February 11, 2007

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

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") and the Profit Sharing/401k Council of America ("PSCA") are pleased to submit the following comments on the proposed regulations under I.R.C. §§ 401(k), 401(m), 402(c), 411(a), 414(w), and 4979(f), relating to automatic contribution arrangements ("automatic enrollment arrangements"). The proposed regulations were published in the Federal Register on November 8, 2007. 72 Fed. Reg. 63,144.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

Established in 1947, PSCA is a national, non-profit association of 1,200 companies and their 6 million plan participants. PSCA represents its members' interests to federal policymakers and offers practical, cost-effective assistance with profit sharing and 401(k) plan design, administration, investment, compliance and communication. PSCA's services are tailored to meet the needs of both large and small companies. Members range in size from Fortune 100 firms to small, entrepreneurial businesses.

ERIC and PSCA members sponsor defined contribution pension plans in order to provide their employees with opportunities for tax-advantaged retirement savings. We supported the enactment of the provisions in the Pension Protection Act of 2006 (Pub. L. No. 109-280) that were designed to facilitate the adoption and implementation of automatic enrollment arrangements in employer-sponsored defined contribution plans that will help employees increase their retirement savings. Our comments on the proposed regulations are intended to advance Congress's objective to facilitating the adoption and implementation of automatic enrollment arrangements.

I. Definition of "Eligible Employee" in Prop. Reg. § 1.414(w)-1(e)(4)

The overly broad definition of "eligible employee" in Prop. Reg. § 1.414(w)-1(e)(4) would have numerous adverse effects on plans and plan participants and would unnecessarily delay implementation of automatic enrollment arrangements.

Prop. Reg. § 1.414(w)-1(e)(4) defines "eligible employee" as an employee who is eligible to make a cash or deferred election under a plan with a cash or deferred arrangement ("CODA"). Because an eligible automatic contribution arrangement ("EACA") is required to provide a notice to each "eligible employee," the proposed definition of "eligible employee" would require each participant in a CODA to be provided with an EACA notice regardless of whether the participant is covered by the EACA. Prop. Reg. § 1.414(w)-1(b)(3). A plan that provides an EACA for only a subset of participants would be required to provide the notice to all employees covered by the CODA. The final regulations should define an eligible employee as employee who is eligible to participate in an EACA.

In addition, Prop. Reg. § 1.414(w)-1(b)(3)(iii) states that "in the year an employee becomes an eligible employee," the EACA notice must be provided within a reasonable period of time before the employee becomes an eligible employee. Unless the definition of "eligible employee" is changed, an employee who is eligible to participate in a CODA prior to the beginning of a plan year in which the EACA becomes effective would not be permitted to participate in an EACA that is adopted after the beginning of the plan year, substantially delaying the adoption of EACAs.

An employer should be permitted to adopt an EACA that becomes effective in the midst of a plan year, and the notice requirement in § 1.414(w)-1(b)(3)(iii) contemplates this possibility. However, the definition of "eligible employee" precludes adoption of an EACA on any date other than the first day of the plan year. We do not envision that adoption of a mid-plan year EACA could result in any discriminatory activity. The final rule should change the definition of "eligible employee" and should state explicitly that an EACA may become effective in mid-year and may cover employees who are already current plan participants.

The proposed definition of "eligible employee" also appears to preclude the addition of a permissible withdrawal provision to a plan that already includes an EACA. The final regulations should change the definition of "eligible employee" as we have recommended and should state explicitly that an employer may add a permissible withdrawal provision that becomes effective after the first day of a plan year and that the withdrawal provision may apply to employees who are plan participants on the effective date of the provision.

II. Time Allowed for Making a § 414(w) Withdrawal Election

The proposed regulations permit a participant to make a § 414(w) withdrawal election at any time up to 90 days after the date of the first default elective contribution under the EACA. Some employers may wish to allow participants to make § 414(w) withdrawal elections during a more limited period. The regulations should allow a plan

to limit withdrawal elections to any period of no less than 30 days and that does not end more than 90 days after the date of the participant's first default elective contribution.

III. Eligibility to Make a § 414(w) Withdrawal

The regulations should make clear that a plan may (or may not) allow a participant to make a § 414(w) withdrawal if the participant made elective contributions to the plan before the EACA became effective. The preamble to the regulation states that an employer may make the withdrawal option available only to employees for whom no elective contributions have been made before the EACA became effective. *See* 72 Fed. Reg. 63,147. The regulations should be revised to reflect the statement in the preamble.

The proposed regulations do not make clear whether a plan may allow a participant to make a § 414(w) withdrawal if the participant has made an affirmative elective deferral election after default elective contributions under the EACA have been made on the participant's behalf. The final regulations should make clear that a plan may provide that a participant who has been automatically enrolled in an EACA may not make a § 414(w) withdrawal after the participant has made an affirmative deferral election.

IV. Effective Date of § 414(w) Withdrawal Elections

Prop. Reg. § 1.414(w)-1(c)(2) would require the effective date of a § 414(w) withdrawal election to be no "later than the last day of the payroll period that begins after the date the election is made." This extremely tight deadline fails to provide sufficient time for some plan sponsors to communicate to their payroll providers and record keepers the instructions that will be necessary to implement participants' withdrawal elections. This is especially true if an employee makes a withdrawal election on the last day of a payroll period and the payroll period is short, such as one week. The final regulations should provide that the effective date of a § 414(w) withdrawal election must be no later than the earlier of (1) the end of the second payroll period beginning after the election is made or (2) 30 days after the date of the election.

Prop. Reg. § 1.414(w)-1(c)(2) provides that the deadline for making a § 414(w) withdrawal election is 90 days after the date of the first default elective contribution under the EACA. This provision also defines the date of the first elective default elective contribution as "the date that the compensation…would otherwise have been included in gross income." This date may be difficult—if not impossible—for current recordkeeping systems to determine. Contributions are often forwarded to the recordkeeper after the date on which the compensation would have been included in gross income. The final regulations should specify that the date of the first elective contribution is the date on which the plan receives the contribution.

V. Reporting and Withholding Requirements for § 414(w) Withdrawals

The regulations (or other IRS rules) should provide additional guidance on the proper income tax reporting and withholding treatment of § 414(w) withdrawals, including, but not limited, to how they should be reported on Form 1099-Rand whether participants have the right to opt out of income tax withholding on such withdrawals as they can for other non-rollover-eligible distributions. *See* I.R.C. § 3405.

VI. Rehired Employees

The regulations should clarify the treatment of a rehired former employee. In most cases, it will be extremely difficult or impossible for either the employer or the plan's recordkeeper to determine whether a rehired employee who did not make elective deferrals during the employee's prior period of service made an affirmative election not to participate in the plan. The regulations should state that a plan may treat all rehired employees who did not previously participate in the plan as *not* having made an affirmative election not to participate in the plan.

In addition, the regulations should clarify that the plan's automatic contribution schedule is reset when a former employee is rehired. Requiring employers and recordkeepers to search their records to determine the length of each rehired employee's prior periods of service and to carry forward that period for purposes of determining the correct contribution percentage would be very costly and burdensome, and would discourage employers—especially those who rehire significant numbers of former employees—from adopting automatic enrollment arrangements.

The preamble to the proposed regulations implies that an employee who did not participate in the CODA during a prior period of service that occurred before the automatic enrollment arrangement was adopted is subject to the initial-period qualified percentage. *See* 72 Fed. Reg. 63,146. The regulations should make clear that a rehired employee who participated in the automatic contribution arrangement during the employee's prior period of service is also subject to the initial-period qualified percentage upon rehire.

Similarly, the regulations should specify that if an employee becomes ineligible to participate in a CODA (or EACA) due to a change in status or job position, such as a change from a union-represented to a non-represented position, the employee is subject to the initial-period qualified percentage upon resuming eligibility for the plan (or EACA). The qualified percentage contribution schedule should be restarted whenever there is a break in the employee's participation in a plan's automatic enrollment arrangement, other than a break that is attributable to the limits imposed by I.R.C. §§ 401(a)(17), 402(g), or 415 or a hardship withdrawal.

VII. Notice requirements for safe harbor plans under § 401(k)(12)

Prop. Reg. § 1.401(k)-3(k) ("Modifications to contribution requirements and notice requirements for automatic contribution safe harbor") applies only to qualified

automatic contribution arrangements. See Prop. Reg. § 1.401(k)-3(a)(2). The regulations should clarify that Prop. Reg. § 1.401(k)-3(k) does not affect the notice requirements in Treas. Reg. § 1.401(k)-3(d) for plans covered by the safe harbor in § 401(k)(12)..

VIII. Immediate Eligibility for a QACA

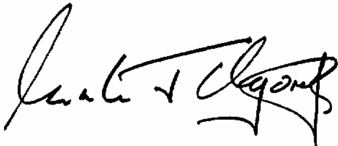
The preamble includes the following statement regarding the notice that a Qualified Automatic Contribution Arrangement (QACA) must provide:

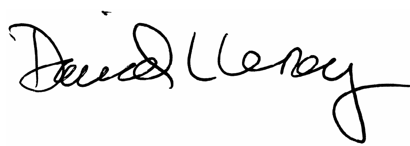
> "In the case of a plan with immediate eligibility when an employee is hired, this deemed timing rule would be satisfied if the employee is provided the notice on the first day of employment." 72 Fed. Reg. 63,147.

It is not uncommon for employers to hold employee benefit orientation meetings once a week, or perhaps less frequently. For example, an individual may be hired on a Monday and receive a benefits orientation, including a QACA notice, on the following Friday. The final rule should state that in the case of a plan with immediate eligibility, a QACA notice may be provided any time after the date of hire provided that the notice is provided within a reasonable period of time before the first elective contribution is made under the arrangement.

ERIC and PSCA appreciate the opportunity to provide their views on this important topic. Increasing the retirement savings of America's workers is essential to ensuring they are adequately prepared for retirement. We strongly urge Treasury and the Internal Revenue Service to adopt the changes recommended in these comments. Doing so will enable employers to adopt automatic contribution arrangements earlier and thereby increase the retirement security of millions of Americans.

Sincerely,





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