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WORKING FOR AMERICA'S RETIREMENT

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Public Hearing on Proposed Regulations Regarding Automatic Contribution Arrangements

May 19, 2008

Department of Treasury
Internal Revenue Service
26 CFR Part 1
[REG-133300-07]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to testify before the Department of the Treasury on the issue of Automatic Contribution Arrangements (ACAs). Encouraging the adoption of Automatic Contribution Arrangements so that an increased number of employees have a vehicle available at the workplace to provide retirement savings is an important goal, and ASPPA supports those legislative and regulatory initiatives that promote such a goal without unduly burdening small employers and without discouraging formation and continued maintenance by employers of qualified retirement plans.

I am Bob Kaplan, Vice President and National Training Consultant for ING and the Chair of ASPPA's Government Affairs 401(k) subcommittee. I was the principal author of the comment letter submitted to Treasury on February 6th by ASPPA regarding Automatic Contribution Arrangements.

ASPPA is a national organization of more than 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, administrators, actuaries, accountants and attorneys. ASPPA's large and broad-based membership gives ASPPA unusual insight into current practical problems with ERISA and qualified retirement plans, with a particular focus on the issues faced by small to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the private retirement plan system.

Issues to be discussed:

I. **Implementation of the Eligible Automatic Contribution Arrangement**

The Proposed Regulations provide that a plan will not be treated as being an EACA for a plan year unless the EACA provisions are in place for the full plan year. This requirement is contrary to the congressional intent to encourage automatic enrollment. Permitting the establishment of an EACA during the plan year would allow plans to implement EACA provisions sooner, thereby increasing participation through automatic enrollment.

The administrator of a plan containing an arrangement described in paragraph (3) shall, within a reasonable period before each plan year, give to each employee to whom an arrangement described in paragraph (3) applies for such plan year notice of the employee's rights and obligations under the arrangement which—

Permitting mid-year implementation of an EACA would not give rise to abusive practices by plan sponsors. ASPPA recognizes, however, that the EACA allows the plan a six-month period for correcting a failed discrimination test, and we would support a requirement that the EACA provisions be in place for at least three months in order for the plan to be able to rely on that particular provision. This approach would be consistent with the first-year implementation rules for safe harbor 401(k) plans and SIMPLE plans.

ASPPA Recommends that the final regulations allow an employer to implement an EACA (1) at any time during a plan year for purposes of permissive withdrawals and, (2) at least 3 months prior to the end of a plan year for purposes of the six-month testing correction period.

II. Good Faith Transition Period for 2008 EACA Implementation

ASPPA has received feedback from its membership that many plan sponsors interested in adding an EACA feature were unable to gain an adequate understanding of the Proposed Regulations to provide timely notices to participants and make the appropriate operational changes in 2007. For plans operating on a calendar year, which are permitted to implement the EACA provisions for the first time effective with the 2008 plan year, failure to implement the EACA in 2007 effectively prevents implementation of the feature until 2009.
The Proposed Regulations were not issued until November 7, 2007, and contained a number of provisions that were unexpected (such as the requirements that notices be provided to all employees and that the EACA be in place for the full plan year). The EACA also requires implementation of a Qualified Default Investment Alternative (QDIA) by the plan. Given the relatively recent release of the QDIA regulations on October 26, 2007, many plan sponsors did not have adequate time to evaluate the QDIA requirements and identify appropriate investments consistent with the QDIA regulations prior to the first day of the 2008 plan year. In addition, many payroll and plan administration software vendors have not yet completed the systems reprogramming necessary to allow for implementation of the automatic enrollment and permissive withdrawal features. ASPPA believes it to be inconsistent with congressional intent that plans be prohibited, due to lack of regulatory lead time, from adopting the EACA provisions in 2008.

ASPPA Recommends that, if the final regulations generally retain the requirement that an EACA be in place for the full plan year, the final regulations provide a special transition rule for 2008 to allow employers until November 1, 2008, to adopt the EACA provisions for 2008. Furthermore, prior to the issuance of the final regulations, the Treasury Department should announce the availability of the transition rule in order to provide sufficient advance notice to employers who wish to use the transitional relief.

III. EACA Provisions Only Apply to Employees Hired After the Implementation

The Proposed Regulations provide that a QACA applies to all employees who have not made an affirmative deferral election. In contrast, the proposed regulations are silent on this point for an EACA. Since a plan sponsor implementing an EACA is undertaking increased administrative requirements yet is receiving no advantage for testing under the EACA other than an extended period of time for correction, the EACA should only be required to be applied to those employees hired on or after the adoption of the EACA. Permitting this approach would further the congressional intent of encouraging employers to include EACA provisions in their plans, as this will simplify the administration of plans where records are not retained as to whether an employee has no deferrals due to an affirmative election or due to the failure to make a deferral election.

ASPPA Recommends that the final regulations provide that an EACA only needs to be applied to those employees hired on or after the effective date of the EACA.

IV. QACA Safe Harbor Contributions as a Separate Source

The Proposed Regulations regarding QACA's allows for a vesting schedule of up to two years for the QACA-based employer safe harbor contribution. This QACA safe harbor maximum vesting schedule is different from the immediate vesting required for traditional safe harbor contributions. A plan that previously utilized the traditional safe harbor feature under IRC §401(k)(12) will have employer contributions that are fully vested. Thus, it is possible that a participant in traditional safe harbor plan will have fully vested safe harbor contributions but would not be fully vested if such contributions were made pursuant to a QACA (*i.e.*, if the participant did not have two years of service). The Proposed Regulations do not address the impact on vesting when a traditional safe harbor plan is amended to a QACA safe harbor plan. If all safe harbor contributions are required to be treated as one source for vesting purposes, then the plan would not be able to impose the two-year vesting with respect to those participants in the plan prior to the first plan year as a QACA. This may serve as a deterrent to establishing a QACA, which is contrary to congressional intent. Treating QACA safe harbor contributions as a separate source for vesting purposes would prevent this unnecessary outcome.

ASPPA recommends that the final regulations provide that QACA safe-harbor contributions can be subject to a two-year vesting rule, even for a plan that previously provided a fully vested match under a traditional safe harbor design.

V. Matching Contributions under an EACA

The Proposed Regulations require that, when a participant requests that an elective deferral be returned as a permissive withdrawal within the specified time frame of 90 days, the associated matching contribution must be forfeited. Although many plans deposit matching contributions at the same time as the related deferral contribution (thus, making this guidance necessary), employers are allowed to deposit matching contributions up to the employer's tax filing deadline, including extensions. Employers who use the latter approach may not have deposited the matching contribution as of the date of the permissive withdrawal distribution. ASPPA believes requiring the employer to make the match and then immediately forfeit it is unnecessarily counterproductive and costly for the plan sponsor.

ASPPA recommends that matching contributions not yet contributed to the plan associated with permissive withdrawals do not have to be deposited into the plan. If the employer has already deposited the matching contribution to the plan, then the final regulations should clarify that the forfeiture of such matching contributions would also include any investment gains or losses attributable to such contributions.

VI. Distribution Fees for Permissive Withdrawals

The Proposed Regulations provide that service providers may charge participants distribution fees for processing permissive withdrawals only if the fee is not different from the fee charged by the provider for other distributions. However, most permissive withdrawals will be for small amounts and the standard distribution fees could exceed the amount being distributed. Many service providers will not wish to separately bill plan sponsors for distribution fees that exceed account balances. Moreover, service providers may be willing to charge lower distribution fees for permissive withdrawals given that such withdrawals will be easier to administer since spousal consent, withholding taxes.

ASPPA recommends that the final regulations permit service providers and/or plans to charge participants a distribution fee for processing a permissive withdrawal that is *no more than* the fee charged by the plan for other distributions.

VII. Earnings on Forfeited Matching Amounts in an EACA

The Proposed Regulations provide that elective contributions refunded under the permissive withdrawal rules should be adjusted for investment gains or losses. The regulations further provide that any matching contribution associated with withdrawn deferrals be forfeited; however, the regulations are silent with regard to the treatment of investment gains/losses on the employer match.

ASPPA Recommends that the final regulations clarify that investment gains or losses associated with the employer matching contribution be included with the matching contribution forfeiture resulting from a permissive withdrawal.

VIII. More Restrictive Withdrawal Provisions for Permissive Withdrawal of Erroneous Contributions

Under the Proposed Regulations, a plan including an EACA is permitted, but not required, to allow permissive withdrawals to participants. The request must be made by the participant no later than 90 days from the date on which the initial elective deferral would have been included in wages. Within the same 90-day period, it is possible that an automatically enrolled participant would make an affirmative deferral election. If a participant requests a permissive withdrawal subsequent to making an affirmative deferral election, it might be difficult to determine the correct amount for the permissive withdrawal and a plan may wish to prohibit a permissive withdrawal in this circumstance. The statute does not prohibit more restrictive permissive correction policies, such as limiting permissive withdrawals only to participants who do not have an affirmative election in effect.

ASPPA recommends that the final regulations be clarified to provide that plans are permitted to apply more restrictive requirements for permissive withdrawals than those detailed in the Proposed Regulations.

IX. Simplifying EACA Notice Requirements

The Proposed Regulations include a requirement that the QACA notice contain similar content as the safe harbor notice required under IRC §401(k)(12) for traditional safe harbor

401(k) plans, including details regarding distribution and vesting provisions. However, this comprehensive notice requirement should not extend to the notice requirement of the EACA because an EACA will not constitute a safe harbor plan. Such a lengthy notice requirement may cause many participants to overlook significant and important EACA provisions, such as the QDIA or permissive distributions rules. From both practical and policy points-of-view, allowing the EACA notice to cross-reference the summary plan description (SPD) for the plan's withdrawal and vesting provisions would benefit both plan participants and plan sponsors. They would benefit by having important plan information clearly and concisely communicated while providing participants with details regarding access to other important, but less vital, information.

ASPPA Recommends that the final regulations permit EACA notices to incorporate by reference the distributions and vesting provisions of the SPD.

X. Good-Faith Reliance for Permissive Distributions

The Proposed Regulations allow permissive withdrawals only in plans that satisfy the requirements of an EACA. A concern about the Proposed Regulations is that, if the trustee or other plan fiduciary of an EACA plan is subsequently deemed to have failed to satisfy ERISA §404(c)(5) in the selection of the default investment, the EACA status of the plan will be retroactively revoked to the date of the noncompliance. However, permissive withdrawals may have been made in good-faith, based on the plan administrator's reasonable belief that the plan satisfied the EACA requirements at the time of the distribution. ASPPA is concerned that permissive distributions made subsequent to the date of the violation would be deemed contrary to the terms of the plan document and would result in a qualification issue. This result seems inconsistent with the congressional intent to encourage employers to adopt the EACA provisions and increase plan participation.

ASPPA recommends that the final regulations provide that any permissive withdrawals made prior to the determination that the plan has failed to satisfy the requirements of an EACA (assuming that prior to the determination there was a good-faith belief the plan did, in fact, qualify as an EACA), be regarded as proper distributions under the EACA regulations.

XI. QACA and ACP Testing – Excise Taxes under IRC §4979

Under the Proposed Regulations, plans which contain an EACA can avoid IRC §4979 excise taxes on corrective distributions of excess contributions and excess aggregate contributions that are distributed within six months after the end of the plan year. Under the Proposed Regulations, a QACA generally would meet the requirements under IRC §414(w), except for the requirement to meet ERISA §404(c)(5).

The Proposed Regulations state that the existing rules under Treasury Regulation §§1.401(k)-3 and §1.401(m)-3 apply to a QACA. These plans must satisfy ACP testing with regard to employee contributions (Treas. Reg. §1.401(m)-3(j)(6)) and may need to satisfy ADP testing if permissive disaggregation is utilized. ASPPA believes there may be some confusion regarding the application of excise taxes under IRC §4979 for a QACA that would appear to simultaneously meet the requirements under IRC §414(w).

ASPPA recommends that the final regulations provide that the period for correcting excess contributions and excess aggregate contributions under IRC §4979 should be extended to six months for plans that include an EACA, including any QACA that meets the requirements of ERISA §404(c)(5).

XII. Correcting Failure to Enroll an Eligible Participant in an ACA

Plans occasionally will fail to automatically enroll a participant in an ACA (including a QACA or EACA) in accordance with the requirements of the plan. Plans should be given clear and reasonable methods for correcting this type of operational error. The procedures established under the Employee Plans Compliance Resolution System (EPCRS) detailed in Revenue Procedure 2006-27 provide for corrections of participants who were omitted from participation in a traditional 401(k) plan. In general, the correction requires an employer contribution equal to the average deferral rate of the participants in the group to which the participant belongs (*e.g.*, the non-highly compensated employee group).

ASPPA recommends that the IRS apply EPCRS to ACA enrollment failures by using the plan's default deferral percentage in calculating the amount of the correction.

Thank you for the opportunity to present these remarks. I would be happy to answer any questions about these or other points in our written comments.