**WORKSHOP 58: BEST PRACTICES FOR AUTOENROLLMENT
SUPPLEMENTAL MATERIAL**

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The Pension Protection Act of 2006 ("PPA") added ERISA section 514(e) to clarify the preemption of state garnishment laws so that employers could deduct contributions from employees' pay without written consent. PPA also created the Qualified Default Investment Alternative ("QDIA") to give employers guidance on how to invest a participant's contributions when no affirmative investment election has been made. By establishing the Eligible Automatic Contribution Arrangement ("EACA") design, PPA extended the corrective distribution deadline for a failed ADP/ACP test from 2 ½ months following the close of the plan year to six months. EACA also allows for a 90-day "no foul" distribution option for the more proactive, apathetic participants who are automatically enrolled but do not want to be. PPA also introduced the Qualified Automatic Contribution Arrangement ("QACA") a new safe harbor plan design to avoid ADP/ACP testing. Of course with these new designs and allowance came a litany of new notice requirements.

The QDIA regulations [DOL Reg. 2550-404c-5(a)-(e)] set forth four basic categories of investment vehicles.

- Target-date or lifecycle funds are investment products that provide a selection based on the current age or expected retirement date of the participant.
- Balanced allocation fund, selected in part based on the level of risk appropriate for the plan's demographics.
- Investment management service that actively manages assets for plan participants based on age, expected retirement date or life expectancy.
- Short-term, principal-preservation option for the first 120 days following a participant's initial default investment

Plans seeking to avail themselves of the QDIA advantages must provide notice to participants, explaining the following:

- Circumstance in which the participant's account will be invested in the QDIA,
- The participant's right to direct the investment of his or her account along with instructions for doing so,
- Investment objectives, risk/return and expenses of the QDIA,
- The importance of diversification,
- Any restrictions or expenses related to changing investments, and
- Where to obtain additional information about the investments.

[DOL Regulation 2550.404c-5(c)(3)]

Automatic Contribution Arrangement ("ACA") [DOL Reg. 2550.404c-5(f)(1)] is the basic automatic enrollment design. It requires the plan to adopt QDIA rules and includes another notice requirement. The ACA has no minimum or maximum default deferral percentage; however, the default percentage must be uniform. The plan sponsor may amend the plan by the last day of the plan year to add this feature to an existing plan. The automatic enrollment rules only apply to participants who do not make affirmative deferral elections; however, when the feature is implemented, the plan sponsor may choose to re-enroll any participants with a rate lower than the default rate. Re-enrollments may continue for the life of the plan.

The Eligible Automatic Contribution Arrangement ("EACA") is similar to the ACA, with a couple of key differences. Unlike the ACA, a plan that includes an EACA can select a default investment that does not meet the requirements to be a QDIA. The EACA offers an additional incentive by extending the deadline to refund excess contributions and excess aggregate contributions to six months following the close of the plan year rather than 2 ½ months as with traditional 401(k) plans.

The EACA provides an otherwise impermissible withdrawal [Section 414(w)(2)(B)] in a 401(k) plan. Participants who were automatically enrolled may request a withdrawal of the amounts deferred. The withdrawal must be made within 90 days following the first pay date of deferral. The plan distributes the contributions, adjusted for investment gains or losses, and possibly less a reasonable processing fee. The participant's withdrawal should coincide with an affirmative election to defer zero percent until such time as the participant chooses otherwise. The withdrawal is treated as income in the year distributed without the early withdrawal penalty. The contributions are treated as if they did not happen and match stays in the plan as a forfeiture. The "no foul" distribution is not a requirement rather it is an available provision for the document. Specific notice requirements apply.

The QACA safe harbor [Treas. Reg. 1.401(k)-3(j)] is potentially more attractive than their traditional predecessor. A two year vesting schedule could be very attractive to employers with high turnover for new hires. This creates the potential for forfeitures to reduce future contribution costs. Some practitioners have argued that the cost savings is offset by higher participation in a match plan resulting in higher employer contributions. Employers should first have a desire to see an increase in plan participation before looking at any ACA design. QACA plan may also adopt the 90-day "no foul" withdrawal option. QACA prescribes a minimum default rate of three percent; however, to start that low requires at least annual escalation (the first two years may remain at three percent before escalating) of one percent per year to at least six percent not to exceed 10 percent. To avoid escalation, design the plan to default to six percent from the beginning.

Like its predecessor QACA can either provide nonelective or match. The nonelective contribution is a minimum of three percent like the traditional. The match formula is a little different beginning with 100 percent of the first one percent of pay deferred plus 50 percent of the next five percent deferred (a six percent deferral culminates in 3.50 percent match). [IRC Sec. 401(k)(13)(D)(i)(I). Again, both may allow for a two-year vesting schedule. We recommend a cliff schedule. Like traditional safe harbor designs ADP/ACP are satisfied and, if the only contributions to the plan are deferrals and safe harbor contributions, the plan satisfies the top heavy requirements as well.

- Service providers must collaborate with the plan sponsor to administer automatic enrollment plans.
- Monitor eligibility to provide appropriate notices, forms and instructions
- Proper tracking of affirmative elections to ensure that the correct deferral or default deferral amounts are deducted at the apportioned time
- Recordkeepers gathering only actively contributing and third party administrators that engage plan sponsors at year end are in an ideal position to assist in the mechanics of autoenrollment
- Good consultants are in a position to point plan sponsors to the appropriate service providers and help design the program from start to finish

Available April 2, 2015 with a sunset provision January 1, 2021 are new correction procedures under the IRS Employee Plans Compliance Resolution System ("EPCRS"). Revenue Procedure 2015-28 provides corrective measures when automatic deferrals do not follow the plan's operation. The previous correction method treated missed enrollment in the same manner as a missed affirmative election serving as a roadblock to adding automatic contribution arrangements. This most recent iteration of EPCRS meets the plan sponsor more fairly in the middle provided certain requirements are met.

1. The employee deferral must begin by
    a. Employee notifies sponsor – first paycheck on or after the last day of the month following the month sponsor is notified
    b. Other than employee – first paycheck on or after 9 ½ months following the end of the plan year in which the error occurred
2. Sponsor provides a notice to the affected participants within 45 days after correct deferrals begin
    a. Name of the plan and point of contact
    b. Describes the error
    c. Explains the correction in progress including the match to be made if applicable
    d. Participant may increase deferral to make up for missed opportunity
3. Sponsor deposits missed matching contributions with applicable earnings by the last day of the second plan year following the year in which the error occurred
    a. Earnings may be calculated using the plan's QDIA return, assuming the participant has not chosen investments
    b. Losses may not reduce the principal amount of the match

The new approach more appropriately reflects a correction for the apathetic participant who chose nothing.

Plan sponsors must answer a number of questions to arrive at the right design.

- Should I try to enroll all participants who are not actively participating, everyone with a rate lower than the default or only new hires?
- How can the new implementation integrate into corporate culture?
- How do we properly launch this new feature?
- Will employees like and understand it?
- Do we need an employer contribution?
- Can we afford an employer contribution?
- Can payroll handle these changes and how much more time will staff spend keeping up with this change?
- Can our current service providers handle all of the logistics?
- When should we adopt the new design?
- How do we select default investments?
- What is the best way to deliver notices?
- Who do I hire to help me with these decisions?

You as the Pension/ERISA Consultant help the plan sponsor navigate the decision-making process by either offering to help or partnering with other service providers who can shoulder the administrative complexities and give the plan sponsor peace of mind that all facets of automatic enrollment will be handled through documented processes, procedures and systems.

Autoenrollment designs almost more than any other designs require the full cooperation of a willing plan sponsor, a technologically astute recordkeeper, engaged investment consultant and you the, expert on deck, ERISA consultant.