

Part III – Administrative, Procedural and Miscellaneous

Adding Automatic Enrollment to Section 401(k) Plans -- Sample Amendments

Notice 2009-65

I. PURPOSE

This notice facilitates automatic enrollment by providing two sample plan amendments for sponsors, practitioners, and employers who want to add certain automatic contribution features to their § 401(k) plans. Sample Amendment 1 can be used to add an automatic contribution arrangement to a § 401(k) plan. Sample Amendment 2 can be used to add an eligible automatic contribution arrangement described in § 414(w) of the Internal Revenue Code (permitting 90-day withdrawals) to a § 401(k) plan.

II. BACKGROUND

Rev. Rul. 2000-8, 2000-1 C.B. 617, provides guidance on automatic contribution arrangements in § 401(k) plans, and under § 1.401(k)-1(a)(3)(ii) of the Income Tax Regulations, the default that applies under a § 401(k) plan in the absence of an employee's affirmative election can be for the employer to make elective contributions to the plan on the employee's behalf.

Under § 1.401(k)-1(e)(2)(ii), a § 401(k) plan must provide an eligible employee an effective opportunity to make (or change) a cash or deferred election at least once during each plan year, and whether an eligible employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

Section 902 of the Pension Protection Act of 2006, Public Law 109-280 (PPA '06), added §§ 401(k)(13), 401(m)(12), and 414(w) to the Code and amended §§ 411(a)(3)(G) and 4979 to facilitate automatic contribution arrangements in qualified cash or deferred arrangements under § 401(k). Final regulations under these Code sections were published in the *Federal Register* on February 24, 2009 (74 F.R. 8200). Section 1107 of PPA '06 provided generally that any plan amendment made pursuant to PPA '06 can be made as late as the last day of the first plan year beginning on or after January 1, 2009 (2011 in the case of a governmental plan).

III. SAMPLE PLAN AMENDMENTS

In General. Two sample plan amendments are provided in the Appendix that sponsors, practitioners, and employers ("plan sponsors") can adopt or use in drafting individualized plan amendments. Because each amendment is a sample amendment,

plan sponsors are not required to adopt either amendment verbatim. In fact, it may be necessary for plan sponsors to modify the chosen amendment to conform to their plan's terms and administrative procedures.

Time and Manner of Adoption. Plan sponsors who want to add one of the sample amendments to their § 401(k) plans must adopt the chosen amendment by the later of (1) the end of the plan year in which the amendment is effective, pursuant to the deadline to adopt a discretionary amendment as provided in § 5.05(2) of Rev. Proc. 2007-44, 2007-2 C.B 54; or (2) if applicable, the deadline under § 1107 of PPA '06 for adopting an amendment made pursuant to PPA '06. Pursuant to § 5.06(1) of Rev. Proc. 2007-44, a later deadline may apply to a governmental plan. The timely adoption of the chosen amendment must be evidenced by a written document that is signed and dated by the employer (including an adopting employer of a pre-approved plan). However, regardless of when the amendment is adopted, the proper notice describing the features of the plan as amended must be provided to employees affected by the amendment within a reasonable period before the amendment is effective.

Effect on Reliance. The adoption of either sample plan amendment (as modified, if necessary to conform to the plan's terms and administrative procedures) will not result in the loss of reliance on a favorable opinion, advisory, or determination letter. Also, the Service will not treat the adoption of one of the amendments as affecting the pre-approved status of a master and prototype ("M&P") or volume submitter plan. That is, such an amendment to an M&P plan that is adopted by an employer will not cause the plan to fail to be an M&P plan. Similarly, such an amendment to a volume submitter plan that is adopted by an employer will not cause the plan to fail to be a volume submitter plan.

Format of the Sample Amendments. The format of the sample plan amendments generally follows the design of pre-approved plans, including all M&P plans, that employ a "basic plan document" and an "adoption agreement." Thus, the sample plan amendments include language designed for inclusion in a basic plan document and language designed for inclusion in an adoption agreement to allow the employer to select among options related to the application of the basic plan document provision. Sponsors of plans that do not use an adoption agreement should modify the format of the chosen amendment to incorporate the appropriate adoption agreement options in the terms of the amendment. In such case, the notes in the adoption agreement portion of the sample amendment should not be included in the amendment that will be signed and dated by the employer.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to RetirementPlanQuestions@irs.gov.

Appendix

Sample Amendment 1

Article [] Automatic Contribution Arrangement

Section 1. Rules of Application

1.1 If the Employer has elected the automatic contribution arrangement option in the adoption agreement, the provisions of this Article shall apply and, to the extent that any other provision of the Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Default Elective Deferrals will be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. The amount of Default Elective Deferrals made for a Covered Employee each pay period is equal to the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's compensation for that pay period. If the Employer has so elected in the adoption agreement, a Covered Employee's Default Percentage will increase by a designated percentage point or points each Plan Year up to the maximum, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the adoption agreement, the first pay period in such Plan Year that begins on or after the date specified in the adoption agreement.

1.3 A Covered Employee will have a reasonable opportunity after receipt of the notice described in Section 3 of this Article to make an affirmative election regarding Elective Deferrals (either to have no Elective Deferrals made or to have a different amount of Elective Deferrals made) before Default Elective Deferrals are made on the Covered Employee's behalf. Default Elective Deferrals being made on behalf of a Covered Employee will cease as soon as administratively feasible after the Covered Employee makes an affirmative election.

Section 2. Definitions

2.1 An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

2.2 A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the automatic contribution arrangement.

2.3 “Default Elective Deferrals” are Elective Deferrals contributed to the Plan under the automatic contribution arrangement on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals.

2.4 The “Default Percentage” is the percentage of a Covered Employee’s compensation contributed to the Plan as a Default Elective Deferral for a Plan Year. The Default Percentage is specified in the adoption agreement.

Section 3. Notice Requirement

3.1 At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Covered Employee a comprehensive notice of the Covered Employee's rights and obligations under the automatic contribution arrangement, written in a manner calculated to be understood by the average Covered Employee. If an employee becomes a Covered Employee after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice will be provided no more than 90 days before the employee becomes a Covered Employee but not later than the date the employee becomes a Covered Employee.

3.2 The notice will accurately describe:

- (a) The amount of Default Elective Deferrals that will be made on the Covered Employee’s behalf in the absence of an affirmative election;
- (b) The Covered Employee’s right to elect to have no Elective Deferrals made on his or her behalf or to have a different amount of Elective Deferrals made; and
- (c) How Default Elective Deferrals will be invested in the absence of the Covered Employee’s investment instructions.

Sample Adoption Agreement Language:

Article [] Automatic Contribution Arrangement

[] If checked, the Automatic Contribution Arrangement provisions of Article [] apply.

Section 1. Covered Employee

Employees covered under the automatic contribution arrangement are: *(check one of the options below)*

- [] All Plan participants.
- [] All Plan participants who do not have an affirmative election in effect regarding Elective Deferrals.

the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's compensation for that pay period. If the Employer has so elected in the adoption agreement, a Covered Employee's Default Percentage will increase by a designated percentage point or points each Plan Year, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the adoption agreement, the first pay period in such Plan Year that begins on or after the date specified in the adoption agreement.

1.3 A Covered Employee will have a reasonable opportunity after receipt of the notice described in Section 4 of this Article to make an affirmative election regarding Elective Deferrals (either to have no Elective Deferrals made or to have a different amount of Elective Deferrals made) before Default Elective Deferrals are made on the Covered Employee's behalf. Default Elective Deferrals being made on behalf of a Covered Employee will cease as soon as administratively feasible after the Covered Employee makes an affirmative election.

Section 2. Definitions

2.1 An "EACA" is an automatic contribution arrangement that satisfies the uniformity requirement in Section 3 of this Article and the notice requirement in Section 4 of this Article.

2.2 An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

2.3 A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the EACA.

2.4 "Default Elective Deferrals" are the Elective Deferrals contributed to the Plan under the EACA on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals.

2.5 The "Default Percentage" is the percentage of a Covered Employee's compensation contributed to the Plan as a Default Elective Deferral for the Plan Year. The Default Percentage is specified in the adoption agreement.

Section 3. Uniformity Requirement

3.1 Except as provided in Section 3.2 below or if the Employer has elected an increasing Default Percentage in the adoption agreement, the same percentage of

compensation will be withheld as Default Elective Deferrals from all Covered Employees subject to the Default Percentage.

3.2 Default Elective Deferrals will be reduced or stopped to meet the limitations under Code §§ 401(a)(17), 402(g), and 415 and to satisfy any suspension period required after a hardship distribution.

Section 4. Notice Requirement

4.1 At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Covered Employee a comprehensive notice of the Covered Employee's rights and obligations under the EACA, written in a manner calculated to be understood by the average Covered Employee. If an employee becomes a Covered Employee after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice will be provided no more than 90 days before the employee becomes a Covered Employee but not later than the date the employee becomes a Covered Employee.

4.2 The notice must accurately describe:

- (a) The amount of Default Elective Deferrals that will be made on the Covered Employee's behalf in the absence of an affirmative election;
- (b) The Covered Employee's right to elect to have no Elective Deferrals made on his or her behalf or to have a different amount of Elective Deferrals made;
- (c) How Default Elective Deferrals will be invested in the absence of the Covered Employee's investment instructions; and
- (d) The Covered Employee's right to make a withdrawal of Default Elective Deferrals and the procedures for making such a withdrawal.

Section 5. Withdrawal of Default Elective Deferrals

5.1 No later than 90 days after Default Elective Deferrals are first withheld from a Covered Employee's pay, the Covered Employee may request a distribution of his or her Default Elective Deferrals. No spousal consent is required for a withdrawal under this Section 5.

5.2 The amount to be distributed from the Plan upon the Covered Employee's request is equal to the amount of Default Elective Deferrals made through the earlier of (a) the pay date for the second payroll period that begins after the Covered Employee's withdrawal request and (b) the first pay date that occurs after 30 days after the Covered Employee's request, plus attributable earnings through the date of distribution. Any fee charged to the Covered Employee for the withdrawal may not be greater than any other fee charged for a cash distribution.

5.3 Unless the Covered Employee affirmatively elects otherwise, any withdrawal request will be treated as an affirmative election to stop having Elective Deferrals made on the Covered Employee's behalf as of the date specified in Section 5.2 above.

5.4 Default Elective Deferrals distributed pursuant to this Section 5 are not counted towards the dollar limitation on Elective Deferrals contained in Code § 402(g) nor for the ADP test. Matching Contributions that might otherwise be allocated to a Covered Employee's account on behalf of Default Elective Deferrals will not be allocated to the extent the Covered Employee withdraws such Elective Deferrals pursuant to this Section 5 and any Matching Contributions already made on account of Default Elective Deferrals that are later withdrawn pursuant to this Section 5 will be forfeited.

Section 6. Special Rule for Distribution of Excess Contributions and Excess Aggregate Contributions

If the Employer has elected in the adoption agreement that all Plan participants are Covered Employees, then the Plan has until 6 months (rather than 2½ months) after the end of the Plan Year to distribute Excess Contributions and Excess Aggregate Contributions and avoid the Code § 4979 10% excise tax.

Sample Adoption Agreement Language:

Article [] Eligible Automatic Contribution Arrangement (EACA)

[] If checked, the Eligible Automatic Contribution Arrangement (EACA) provisions of Article [] apply.

Section 1. Covered Employee

Employees covered under the EACA are: *(check one of the options below)*

[] All Plan participants.

[] All Plan participants who do not have an affirmative election in effect regarding Elective Deferrals.

[] All Plan participants who become Plan participants on or after the effective date of the EACA and who do not have an affirmative election in effect regarding Elective Deferrals.

Section 2. Default Percentage *(Check one of the options below and insert a percentage or percentages and, if applicable, a date.)*

[] The Default Percentage is []%.

[] The initial Default Percentage is []% and will increase by [] *(insert a number)* percentage point(s) as described in Section 1.2 of Article [] of the Plan

