



September 19, 2012

Mr. Mark Iwry  
Senior Advisor to the Secretary and  
Deputy Assistant Secretary (Retirement and Health Policy)  
U.S. Department of Treasury  
Room 3064MT  
1500 Pennsylvania Ave NW  
Washington, DC 20220-0001

**Re: Suggestions for Improvements to EPCRS**

Dear Mr. Iwry,

The American Society of Pension Professionals & Actuaries (“ASPPA”) and the Council of Independent 401(k) Recordkeepers (“CIKR”) are writing to request additional enhancements to the Employee Plans Compliance Resolution System (“EPCRS” or the “Program”) to encourage companies to include automatic enrollment provisions in their plans.<sup>1</sup> As you know, ASPPA has been a supporter of EPCRS for many years and strongly supports the efforts of the Internal Revenue Service (the “Service”) to improve the Program.

ASPPA is a national organization of more than 10,000 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 is particularly focused on the issues faced by small- to medium-sized employers. ASPPA’s membership is diverse but united by a common dedication to the employer-based retirement plan system.

**Summary**

ASPPA and CIKR appreciate the Service’s efforts to continue to increase the standard corrections available under the Program. The Service had requested comments in the latest version of the Program “regarding methods to correct the failure to implement automatic enrollment with respect to elective deferrals in a 401(k) plan that has an automatic enrollment provision .... but where no amounts were withheld from the compensation of an employee who has made no election.”<sup>2</sup> Recognizing the importance of increasing usage of automatic enrollment in qualified retirement plans, we encourage the Service to expand EPCRS to include an

---

<sup>1</sup> The most recent version of EPCRS was published in Revenue Procedure 2008-50. ASPPA previously submitted recommendations to the Internal Revenue Service with respect to ways the Program could be improved and enhanced on February 18, 2010, available at <http://bit.ly/ASPPA-EPCRS>. New information based on the experience of our members has prompted us to contact the Service with additional ideas about this important issue.

<sup>2</sup> Internal Revenue Service, Revenue Procedure 2008-50, Section 2.02, available at [http://www.irs.gov/irb/2008-35\\_IRB/ar10.html#d0e2873](http://www.irs.gov/irb/2008-35_IRB/ar10.html#d0e2873).

alternative corrective option for the failure of a plan to either automatically enroll participants or automatically increase deferral rates.

**ASPPA and CIKR recommend** that the Service modify the “safe harbor” correction methods under EPCRS to provide that, in the case of a plan with automatic enrollment, if an employee is inadvertently excluded from the plan or his or her deferral rate is not automatically increased in accordance with the plan’s provisions, an acceptable correction method would be: (i) to make a corrective qualified nonelective contribution (“QNEC”) with respect to any matching contribution failures occurring during the period of exclusion or non-escalated enrollment rate (adjusted for earnings); and (ii) to provide affected participants who remain employed with the opportunity to contribute, out of future compensation, make-up elective deferrals for the amounts that were not withheld.

## Discussion

### I. Existing Correction Safe Harbors

To encourage employee retirement savings, the Pension Protection Act of 2006 made significant changes to both the Internal Revenue Code (“Code”) and Title I of ERISA to facilitate and enhance plans that automatically enroll employees.<sup>3</sup> As a result, there has been a significant increase in the use of automatic enrollment in retirement plans. According to a recent report, “42 percent of employers automatically enrolled employees into their 401(k) plan, up dramatically from just five percent in 2005....At companies with more than 2,500 employees in the plan, 58 percent used automatic enrollment.”<sup>4</sup>

Although EPCRS is a great resource for employers, the correction method for failure to properly automatically enroll workers has significantly deterred many employers from including this feature in their plans. Our members tell us this is particularly true for smaller plans.

#### A. Elective Deferrals for Excluded Employees

EPCRS includes detailed guidance regarding acceptable “safe harbor” methods of correction for certain operational defects.<sup>5</sup> The “safe harbor” correction for employees who were improperly excluded from the opportunity to make elective deferrals in a non-safe harbor plan is a QNEC equal to 50 percent of the Actual Deferral Percentage (“ADP”) for the excluded employee’s group (i.e., highly or non-highly compensated employees), multiplied by the employee’s compensation for the exclusion period.

For safe harbor plans using the non-elective contribution approach, the corrective contribution for the missed deferral opportunity would generally be equal to 1½ percent of the employee’s

---

<sup>3</sup> See, e.g., Public Law 109–280, Pension Protection Act of 2006 (providing relief from certain testing requirements, preempting state laws that restrict a plan’s ability to use automatic enrollment, adding a safe harbor known as a “qualified automatic contribution arrangement”, allowing plans to return automatic deferrals to participants upon request under certain circumstances, and providing for default investments).

<sup>4</sup> *More Employers Add 401(k) Match, Advice and Automatic Features to Drive Participation and Savings*, Says Schwab Data, Schwab Press Release (Aug. 27, 2012), available at <http://bit.ly/Schwab-2012>.

<sup>5</sup> See generally, Rev. Proc. 2008-50, App. A(.05) and B(\$2.02).

compensation for the exclusion period (i.e., half of the required 3 percent non-elective safe harbor contribution).<sup>6</sup>

For safe harbor plans using the matching contribution approach, the corrective contribution for the missed deferral opportunity would be based on the safe harbor contribution matching rate for the excluded period and would equal 50 percent of the employee's compensation for the exclusion period multiplied by the greater of: (i) the maximum deferral percentage that is matched at 100 percent under the matching formula; or (ii) 3 percent.<sup>7</sup>

EPCRS includes a special exception from these rules for employees who are only briefly excluded during a year. An employer is not required to make a corrective contribution with respect to a missed deferral opportunity if: (i) the employee had been given the opportunity to make elective deferrals for a period of at least the last 9 months in that plan year; and (ii) during that period, the employee had the opportunity to make elective deferrals in an amount not less than the maximum amount that would have been permitted if no failure had occurred (the "Brief Exclusion Exception").<sup>8</sup>

### ***B. Failure to Implement a Deferral Election***

EPCRS also provides a "safe harbor" correction method for an operational defect resulting from failure to implement a valid deferral election. In such cases, the prescribed correction would be to make a QNEC equal to 50 percent of the amount that would have been contributed had the deferral election been implemented.<sup>9</sup>

### ***C. Matching Contributions Corrections***

In addition to the missed deferral opportunity correction, a matching contribution failure may have also occurred and would need to be corrected. The corrective contribution for this purpose is a QNEC equal to the matching contribution that would have been made under the plan's terms if the participant's deferrals had equaled the "missed deferral amount." In the case of a failure to properly implement a participant's deferral election, this equals the full amount of the deferral that should have been withheld.<sup>10</sup>

### ***D. Earnings***

EPCRS also provides that, when corrective contributions are made to a participant's account, the amount must be adjusted for earnings.<sup>11</sup>

## **II. Safe Harbor Correction for Automatic Enrollment**

Many plan sponsors are interested in adding automatic enrollment features to their retirement plans. However, they are concerned that they may be required to make substantial corrective

---

<sup>6</sup> *Id.* at App. B(§2.02(1)(a)(ii)(B)).

<sup>7</sup> *Id.*

<sup>8</sup> Rev. Proc. 2008-50 at App. B(§2.02(1)(a)(ii)(F)).

<sup>9</sup> *Id.* at App. A(.05(5)) and App. B(§2.02(1)(a)(ii)(B)(2)).

<sup>10</sup> Rev. Proc. 2008-50 at App. A(.05) and App. B(§2.02).

<sup>11</sup> Rev. Proc. 2008-50 at App. B(§3.01).

contributions under EPCRS if they inadvertently fail to automatically enroll an employee or fail to automatically increase the deferral amount for an employee. Furthermore, since the employee retains the compensation that would have been withheld had the automatic enrollment feature been properly implemented, the employee is perceived to be receiving a windfall, i.e., receiving the benefits of a deferral without deferring any compensation. Many employers do not believe this to be a fair result.

Unfortunately, it is rare for this type of operational failure to be discovered within the first three months of the plan year, when it could possibly qualify to be corrected under the Brief Exclusion Exception. More often than not, the omission or error is discovered as part of the plan's accounting work done after the year is over. Many plan sponsors do not recognize that there has been a failure until their third party administrator identifies the issue when they are reviewing their files in connection with the preparation of the plan's Form 5500.

Our members tell us that the complexities of administering automatic enrollment mean that plans with these features are very prone to errors in both getting employees initially enrolled, as well as in implementing automatic escalator provisions. Sponsors of 401(k) and similar elective savings plans would be substantially more willing to include automatic enrollment features if the costs for correcting inadvertent failures could be reduced and made more equitable. Many of our members tell us that they discourage their plan sponsor clients from including automatic enrollment because of this concern.

To encourage and facilitate the adoption of automatic enrollment provisions, a "safe harbor" correction method should be provided that is available only to plans that contain automatic enrollment provisions. The correction would be similar to the Brief Exclusion Exception. Under our proposal:

1. No corrective contribution would be required by the employer in relation to the missed deferral opportunity if an employee is inadvertently excluded from the plan or his or her deferral rate is not automatically increased in accordance with the plan's provisions. Instead, affected employees who have not terminated employment with the employer would be offered the opportunity to increase their deferrals prospectively out of compensation paid in the future to "make up" for the missed deferrals.
2. The plan sponsor would be required to make a QNEC under the normal EPCRS rules to correct a matching or nonelective contribution failure, properly adjusted for earnings.
3. This special correction method would only be available if the operational error was corrected on a prospective basis, no later than the due date, including extensions, for the Form 5500 for the plan year in which the error first occurred, although corrective contributions could be made after this date in accordance with normal EPCRS procedures.

4. The make-up deferrals and corrective employer contributions, if any, would be treated as allocated in the year in which the error occurred for purposes of Code sections 402(g) and 415.

This approach would encourage greater use of automatic enrollment and remains fair to participants. Ultimately, employees inadvertently omitted (or whose deferral rates were not increased) get to choose between simply retaining the pay that would have been withheld and making up the contribution out of future compensation. Additionally, the current EPCRS rules regarding correction for missed employer contributions and earnings in circumstances such as these would continue to apply. This would ensure that the omitted participant receives the corrective contributions to which he or she would otherwise be entitled to under normal EPCRS correction methodologies.

**ASPPA and CIKR recommend** that the Service modify EPCRS to add a new “safe harbor” correction method that would be limited to plans with automatic enrollment. It would apply to operational failures in which a participant inadvertently was not automatically enrolled or whose deferral rate was not automatically increased in accordance with the plan’s terms. This new correction method would require: (i) any non-terminated participant be provided with an opportunity to defer out of future compensation the amounts that should have been withheld under the plan’s automatic enrollment provisions; (ii) that the participant be provided a reasonable period of time after being enrolled to contribute the deferral amounts that were not withheld; and (iii) the employer to contribute a corrective QNEC, plus earnings, as provided for under existing EPCRS correction methods, with respect to any matching or nonelective contribution failures occurring during the period of exclusion or non-increased deferral rate. This new correction method would be only be available if the omitted employee or incorrect deferral rate is prospectively corrected no later than the due date, including extensions, of Form 5500 for the plan year in which the defect first occurred, although the normal EPCRS procedures would apply to the timing of corrective contributions.



These comments were prepared by Craig P. Hoffman, General Counsel, and Debra A. Davis, Assistant General Counsel and Director of Government Affairs. We welcome the opportunity to discuss these issues with the Service. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/  
Brian H. Graff, Esq., APM  
Executive Director/CEO

/s/  
Judy A. Miller, MSPA  
Chief of Actuarial Issues

/s/  
Craig P. Hoffman, Esq., APM  
General Counsel

/s/  
Mark Dunbar, MSPA, Co-Chair  
Gov't Affairs Committee

/s/  
Ilene H. Ferenczy, Esq., APM, Co-Chair  
Gov't Affairs Committee

/s/  
James Paul, Esq., APM, Co-Chair  
Gov't Affairs Committee

cc: Robert Choi  
Director, Employee Plans  
Internal Revenue Service  
1750 Pennsylvania Avenue, NW  
Washington, DC 20006

Joyce Kahn  
Manager, EP Voluntary Compliance  
Internal Revenue Service  
1111 Constitution Ave NW  
PE-4G7  
Washington, DC 20224-0001

Andrew Zuckerman  
Director, EP Rulings & Agreements  
Internal Revenue Service  
1111 Constitution Ave NW SE:T:EP:RA  
Washington, DC 20224-0001

Victoria A Judson  
Division Counsel/ Associate Chief Counsel  
Tax Exempt & Governmental Entities  
Internal Revenue Service  
1111 Constitution Avenue, NW  
4306 IR  
Washington, DC 20224