

Sample Automatic Enrollment and Default Investment Notice

(Relating to Code Sections 401(k)(13) and 414(w) and ERISA sections 404(c)(5) and 514(e)(3))

On November 8, 2007, the Internal Revenue Service (“IRS”) and the Treasury Department published [proposed regulations](#) on new safe-harbor qualified automatic contribution arrangements (“QACAs”) under section 401(k)(13) of the Internal Revenue Code (“Code”) and on eligible automatic contribution arrangements (“EACAs”) under Code section 414(w). 72 FR 63144. A plan sponsor may implement a QACA and may permit withdrawals of certain amounts contributed under an EACA, as early as January 1, 2008 (for calendar year plans). In addition, on October 24, 2007, the Department of Labor (“DOL”) issued a [final regulation](#), effective December 24, 2007, on assets invested in a qualified default investment alternative (“QDIA”) on behalf of participants and beneficiaries who do not direct the investment of their accounts. DOL Reg. § 2550.404c-5 (72 FR 60452).

Among other things, Code sections 401(k)(13) and 414(w) include notice requirements that plan sponsors must satisfy in order to maintain a QACA or an EACA. The IRS’s proposed regulations set forth these notice requirements. Similarly, sections 404(c)(5) and 514(e)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”) include notice requirements that plan sponsors must satisfy in order to obtain fiduciary relief and preemption of state laws under those sections. The DOL’s regulation sets forth these notice requirements. A plan sponsor’s notice must be sufficiently accurate and comprehensive to apprise employees of their rights and obligations under the plan sponsor’s particular arrangement and must be written in a manner calculated to be understood by the average employee to whom the arrangement applies. Also, the notice must be provided so that employees have a reasonable period of time after receipt of the notice before automatic elective contributions are made to the plan.

To aid plan sponsors in satisfying the requirements of the IRS’s proposed regulations for the 2008 plan year – the first plan year that a plan may include a QACA or EACA – the IRS is posting a sample “Automatic Enrollment Notice” on its website that satisfies notice requirements under Code sections 401(k)(13) and 414(w) for a hypothetical QACA that permits EACA withdrawals and has certain other characteristics. Following coordination with the IRS, the DOL has indicated that use of this sample notice also satisfies the notice requirements under ERISA sections 404(c)(5) and 514(e)(3) and the DOL’s default investment regulation for a hypothetical plan for which a fiduciary may wish to obtain relief under the regulation. A plan sponsor will need to add to, subtract from, or otherwise change the sample notice to the extent a plan’s form and operations differ from the hypothetical QACA described in the sample notice, so that the actual notice accurately reflects the provisions of the plan. For example, a particular plan may satisfy the Code section 401(k)(13) employer contribution requirement through safe-harbor employer nonelective contributions to nonhighly compensated employees, rather than through safe-harbor matching contributions to all eligible participants, or may provide employer nonelective contributions in addition to safe-harbor matching contributions. The plan sponsor will also need to provide details about a plan’s QDIA, as directed in italicized notes to plan sponsors in the sample notice, and will need to fill in any blanks in the sample notice.

The hypothetical QACA described in the sample notice includes the following characteristics:

- The QACA is effective January 1, 2008. It is part of a calendar-year defined contribution plan that, before January 1, 2008, provided only for elective contributions under Code section 401(k) (but not for automatic elective contributions).
- The QACA provides for automatic elective contributions at the minimum level permitted under Code section 401(k)(13), and does not restrict employees' ability to elect other elective contribution levels, except to the extent required under other Code provisions (e.g., Code section 402(g)). The plan does not provide for designated Roth contributions described in Code section 402A.
- The QACA provides for matching contributions for all eligible participants at the minimum level permitted under Code section 401(k)(13), and does not provide for additional employer matching or nonelective contributions. The matching contributions are contributed to the plan on a payroll-by-payroll basis (based on the same definition of eligible compensation used to make elective contributions), and are subject to the minimum vesting schedule described in Code section 401(k)(13)(D)(iii)(I) (that is, full vesting upon completion of 2 years of service).
- Employees are eligible to participate in the plan on their date of hire.
- Participants make elective contribution and investment elections under the plan by returning specified election forms to the plan administrator, and may change their elections at any time without restriction.
- Affirmative contribution elections under the plan, whether made before or after the effective date of the QACA, continue in force until changed by the participant.
- The plan permits participants to withdraw automatic elective contributions during a 90-day window period described in Code section 414(w), and treats a withdrawal request as an election to not make further elective contributions to the plan (absent a contrary affirmative election).
- Plan participants may affirmatively choose among various available investment funds. Automatic elective contributions and related employer matching contributions are, absent contrary affirmative election, invested in a QDIA.
- The plan permits distributions and loans to the extent distributions and loans are permitted under Code sections 401(k)(2)(B) and 72(p)(2). Hardship distributions are permitted to the extent the deemed hardship requirements described in Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B) and (iv)(E) are satisfied.
- The plan administrator has provided summary plan descriptions to participants that accurately describe eligible compensation, contribution limits, service crediting rules, investment election procedures, the investment funds available under the plan, and hardship withdrawal and loan rules.

Although the sample notice is designed for use in satisfying the QACA and EACA notice requirements, and the notice requirements under ERISA sections 404(c)(5) and 514(e)(3), plan sponsors may also find the sample notice to be helpful in drafting an employee explanation for an automatic contribution arrangement that is neither a QACA nor an EACA.

[Plan Name] Plan (Plan)
Automatic Enrollment Notice

Beginning in 2008, [] (Company) is making saving for retirement under our 401(k) Plan even easier. We are offering an automatic enrollment feature, and will make new Company matching contributions.

The new automatic enrollment feature won't change your contribution level if you already turned in a [] Form electing the level of your contributions to the Plan or electing not to contribute. Your earlier election will continue to be followed, and matching contributions will be made based on your contribution level. You can change your contribution level by turning in a new [] Form at any time. Matching contributions will then be based on your new contribution level.

If you have not turned in a contribution election form, you will be automatically enrolled in the Plan starting with your first paycheck in 2008. This means that amounts will be taken from your pay and contributed to the Plan. For pay during 2008, these automatic contributions will be 3% of your eligible pay each pay period. But, you can choose a different amount. You can choose to contribute more, less, or even nothing.

Keep in mind that the Company will match one dollar for each dollar you contribute, up to 1% of your eligible pay. The Company will also match 50 cents for each dollar you contribute that is between 1% and 6% of your eligible pay. So, to get the most from these matching contributions, you must contribute at least 6% of your eligible pay each pay period. This is more than the 3% automatic contribution rate. It may also be more than your current contribution rate.

This notice gives you important information about some Plan rules, including the Plan's automatic enrollment feature and Company matching contributions. The notice covers these points:

- Whether the Plan's automatic enrollment feature applies to you;
- What amounts will be automatically taken from your pay and contributed to the Plan;
- What other amounts the Company will contribute to your Plan account;
- How your Plan account will be invested;
- When your Plan account will be vested (that is, not lost when you leave your job), and when you can get your Plan account; and
- How you can change your contributions.

You can find out more about the Plan in another document, the Plan's Summary Plan Description (SPD).

1. Does the Plan's automatic enrollment feature apply to me?

The Plan's automatic enrollment feature will not apply to you if you already elected (by turning in a [] Form to the Plan Administrator) to make contributions to the Plan or to not

contribute. If you made an election, your contribution level will not automatically change. But, you can always change your contribution level by turning in a new contribution form.

If you have not elected a contribution level, you will be enrolled in the Plan starting with your first paycheck in 2008. This means money will be automatically taken from your pay and contributed to your Plan account. If you do not want to be enrolled, you need to turn in the enclosed contribution form to the Plan Administrator by [].

2. If I do nothing, how much will be taken from my pay and contributed to the Plan?

If you do not turn in a completed contribution form by [], 3% of your eligible pay for each pay period will be taken from your pay and contributed to the Plan. This will start with your first paycheck in 2008 and continue through the end of 2009. After 2009, your contribution level will increase by 1% each year (unless you choose a different level), until it reaches 6% of your eligible pay. To learn more about the Plan's definition of eligible pay, you can review the "[]" section of the Plan's SPD.

Your contributions to the Plan are taken out of your pay and are not subject to federal income tax at that time. Instead, they are contributed to your Plan account and can grow over time with earnings. Your account will be subject to federal income tax only when withdrawn. This helpful tax rule is a reason to save for retirement through Plan contributions.

Contributions will be taken out of your pay if you do nothing. But you are in charge of the amount that you contribute. You may decide to do nothing and become automatically enrolled, or you may choose to contribute an amount that better meets your needs. For example, you may want to get the full amount of the Company's matching contributions by contributing at least 6% of your eligible pay. You can change your contributions by turning in a new contribution form to the Plan Administrator at the address listed at the end of this notice.

If you want to contribute more to your account than would be provided automatically, there are limits on the maximum amount. These limits are described in the "[]" section of the Plan's SPD.

3. In addition to the contributions taken out of my pay, what amounts will the Company contribute to my Plan account?

Besides contributing the amounts taken from your pay, the Company will make other contributions to your Plan account. The Company will match, on a dollar-for-dollar basis, the first 1% of eligible pay you contribute each pay period. The Company will also match 50 cents for each dollar you contribute between 1% and 6% of your eligible pay each pay period. These matching contributions will be made if you are automatically enrolled or if you choose your own contribution level.

The Company's matching contributions depend on the amount you contribute out of your pay each pay period.

For example:

If you earn \$2,000 in eligible pay during a pay period and you elect to contribute 6% of your pay, the Company will deduct \$120 from your pay for the pay period (that is, 6% x \$2,000). The \$120 will be put in your Plan account. The Company will also make matching contributions to your Plan account of \$70 for the pay period. In other words, the Company will make a dollar-for-dollar matching contribution on your contributions up to 1% of eligible pay (100% of 1% x \$2,000, or \$20) plus a 50¢-per-dollar matching contribution on your contributions between 1% and 6% of eligible pay (50% of 5% x \$2,000, or \$50). Or, if you contribute 3% of your eligible pay for the pay period, the Company will take \$60 out of your pay and put it in your Plan account, and will also make \$40 in matching contributions for the pay period. Or, if you choose not to contribute to the Plan for a pay period, you will get no matching contributions for the pay period.

Remember, you can always change the amount you contribute to the Plan by turning in a new contribution form.

4. How will my Plan account be invested?

The Plan lets you invest your account in a number of different investment funds. Unless you choose a different investment fund or funds, your Plan account will be invested in the [] Fund.

[Note to plan sponsors: In order for the Plan's default investment to satisfy section 404(c)(5) of ERISA, the default investment fund must be a qualified default investment alternative ("QDIA") under DOL Reg. § 2550.404c-5. You must describe the Plan's QDIA, including its investment objectives, risk and return characteristics, and fees and expenses, and must describe other circumstances, if any, under which assets may be invested in the QDIA.]

You can change how your Plan account is invested, among the Plan's offered investment funds, by turning in the enclosed [] Form to the Plan Administrator at the address listed at the end of this notice.

[Note to plan sponsors: In order for the Plan's default investment to satisfy section 404(c)(5) of ERISA, you must describe any restrictions, fees, or expenses that apply when participants or beneficiaries transfer assets from the QDIA to other investment funds.]

To learn more about the Plan's investment funds and procedures for changing how your Plan account is invested you can review the "[]" section of the Plan's SPD. Also, you can contact the Plan Administrator using the contact information at the end of this notice.

5. When will my Plan account be vested and available to me?

You will always be fully vested in your contributions to the Plan. You will also be fully vested in matching contributions when you complete two years of service. To be fully vested in Plan contributions means that the contributions (together with any investment gain or loss) will always belong to you, and you will not lose them when you leave your job. For more information about years of service, you can review the "[]" section of the Plan's SPD.

Even if you are vested in your Plan account, there are limits on when you may withdraw your funds. These limits may be important to you in deciding how much, if any, to contribute to the

Plan. Generally you may only withdraw vested money after you leave your job, reach age 59-1/2, or become disabled. Also, there is generally an extra 10% tax on distributions before age 59-1/2. Your beneficiary can get any vested amount remaining in your account when you die.

You also can borrow certain amounts from your vested Plan account, and may be able to take out certain vested money if you have a hardship. Hardship distributions are limited to the dollar amount of your contributions. They may not be taken from earnings or matching contributions. Hardship distributions must be for a specified reason – for qualifying medical expenses, costs of purchasing your principal residence (or preventing eviction from or foreclosure on your principal residence, or repairing qualifying damages to your principal residence), qualifying post-secondary education expenses, or qualifying burial or funeral expenses. Before you can take a hardship distribution, you must have taken other permitted withdrawals and loans from qualifying Company plans. If you take a hardship distribution, you may not contribute to the Plan or other qualifying Company plans for 6 months.

You can learn more about the Plan’s hardship withdrawal and loan rules in the “[]” and “[]” sections of the Plan’s SPD. You can also learn more about the extra 10% tax in IRS Publication 575, Pension and Annuity Income.

6. Can I change the amount of my contributions?

You can always change the amount you contribute to the Plan. If you know now that you do not want to contribute to the Plan (and you haven’t already elected not to contribute), you will want to turn in a contribution form electing zero contributions by []. That way, you avoid any automatic contributions.

But, if you do not turn in the form in time to prevent automatic contributions, you can withdraw the automatic contributions for a short time, despite the general limits on Plan withdrawals. During the 90 days after automatic contributions are first taken from your pay, you can withdraw the prior automatic contributions by turning in a [] Form to the Plan Administrator. The amount you withdraw will be adjusted for any gain or loss. If you take out your automatic contributions, you lose Company contributions that matched the automatic contributions. Also, your withdrawal will be subject to federal income tax (but not the extra 10% tax that normally applies to early distributions). If you take out automatic contributions, the Company will treat you as having chosen to make no further contributions. However, you can always choose to continue or restart your contributions by turning in a contribution form.

If you have any questions about how the Plan works or your rights and obligations under the Plan, or if you would like a copy of the Plan’s SPD or other Plan documents, please contact the Plan Administrator at:

[Plan administrator name]
[Address]
[Telephone number]
[Email address]