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Filed Electronically

August 10, 2007

Mr. Martin Pippins
Manager, Employee Plans Technical Guidance
Internal Revenue Service
Washington, DC 20044

Re: **Request for Guidance Regarding Automatic Contribution Arrangements under Section 902 of the Pension Protection Act ("PPA")**

Dear Mr. Pippins:

The SPARK Institute, Inc. ("SPARK")[1] understands that the Internal Revenue Service (the "Service") is developing guidance with respect to the automatic contribution provisions under Section 902 of the PPA. SPARK members include the service providers that will be largely responsible for providing record keeping and administrative services relating to the automatic contribution features for a substantial majority of retirement plans. Additionally, our members have substantial experience working with plans that already include automatic contribution features. Consequently, they understand the potential issues and complexities that must be addressed. Our members have developed the following list of issues, concerns, and recommended solutions and we request that the Service consider developing guidance in accordance with our recommendations.

I. Automatic Contribution Arrangements ("ACA")

A. Initial Notice Timing - Under Section 902(d) of the PPA, employers that implement an ACA must provide a written notice to eligible employees reasonably in advance of their initial enrollment and "a reasonable period before each plan year." Similar provisions under

[1] SPARK represents the interests of a broad-based cross section of retirement plan service providers, including members that are banks, mutual fund companies, insurance companies, third-party administrators and benefits consultants. SPARK members include all of the largest service providers in the retirement plan industry and the combined membership services more than 95% of all defined contribution plan participants.

PPA Section 902(d) apply to Qualified Automatic Contribution Arrangements (“QACAs”). The SPARK Institute is concerned that plan sponsors whose plans provide for immediate enrollment upon employment or enrollment within a short period of time after employment will not be able to satisfy the notice provisions with respect to new employees.

Recommendations - Plan sponsors of such plans that provide for immediate or relatively quick enrollment should be permitted to satisfy the notice requirements by providing new employees with any required notice upon employment or within a reasonable time thereafter. We note that this issue is similar to the one raised by The SPARK Institute in its comment letter to the Department of Labor (“DOL”) regarding the timing of the participant notice requirements under the pending Qualified Default Investment Alternative (“QDIA”) regulations. We urge the Service to coordinate its notice requirements for ACAs and QACAs with the comparable provisions being developed by the DOL.

B. Notice Content – The PPA specifies certain information that must be included in participant notices. However, the PPA does not expressly state whether such notices can include other information that may be required by other rules or information that a plan sponsor wants to provide voluntarily.

Recommendations - Having the flexibility to deliver additional information with the ACA notice could simplify administration for plan sponsors and provide a more understandable communication to the employee. For example, plan sponsors offering an ACA will have to provide both the QDIA notice required by the DOL and the ACA notice. Combining these disclosures into a single communication would be beneficial for plan sponsors and participants. We request that that the Service also issue guidance that provides more detail regarding what disclosures are required, or develop a model notice to help simplify the process of adopting automatic enrollment features.

C. Compliance Testing and Tax Reporting - Section 902 of the PPA allows employees who have made deferrals under an ACA for less than 90 days to terminate their participation, and recover their deferrals amounts from the plan without penalty. We request guidance with respect to how these distributions should be reported. The Technical Explanation prepared by the Joint Committee on Taxation indicates that the amounts distributed will be treated as compensation rather than a contribution to the plan (i.e., not subject to the ten percent early distribution penalty or other plan withdrawal restrictions).

Recommendations - We believe that reporting the amounts returned during the 90-days period on Form 1099R would be the most practical approach for most employers and service providers and would accomplish the objective stated in the Committee Reports of treating the distribution as taxable to the employee. The procedures in place today with respect to handling and reporting excess contributions on Form 1099R could be easily adapted to report amounts returned within the 90-days period.

D. Market Fluctuation and Insufficient Account Balances - We are concerned that the account balances of automatically enrolled participant who request that their deferrals be returned to them as permitted under the rules may have a lower account balance due to market fluctuation, thereby leaving an insufficient amount to repay them the entire amount of their salary deferrals.

Recommendations - The SPARK Institute urges the Service to provide clear guidance that the amount that should be distributed to participants is the amount remaining in the account at the time of the distribution. Plan sponsors should not be put in the position of having to make up account shortfalls caused by market fluctuation.

E. Option to Automatically Enroll Annually – Based on information provided by our members, we understand that service providers are developing various capabilities to accommodate different automatic enrollment periods and opt-out provisions. Consequently, we request that the Service provide guidance regarding whether a plan sponsor may specify that an employee's election to opt out of the plan is effective for specific period of time (e.g., one plan year) or must an employee's election to opt out remain effective until the employee takes affirmative steps to participate in the plan. For example, by allowing a plan sponsor to limit the duration of an employee's opt-out election such plan sponsor can implement an annual automatic enrollment period which would require employees to reconsider their decision on a regular basis and opt out annually. We also request guidance as to whether the limited duration opt-out election can be used in an ACA and QACA.

Recommendations - Employers should have the flexibility to designate the duration of employees' opt-out elections provided that employees are notified on the limitation and requirement to opt out at the beginning of each new enrollment period. Based on the information provided to us by our members, this approach is preferred by many employers and is emerging as a common industry practice. We believe that this approach is allowed under the PPA but request specific acknowledgement from the Service.

F. Permissible Deferral Percentages – We request that the Service provide specific guidance regarding whether there is a maximum deferral limit for an ACA. We recognize that the PPA establishes a 10% maximum deferral rate under a QACA but does not create such a limit for ACA.

Recommendations – Plan sponsors should have the plan design flexibility to allow for automatic deferrals to exceed 10%. We urge the Service to confirm that there are no implied maximum deferral limits applicable to an ACA.

G. Plan Amendments - The PPA does not require a plan to be amended until 2009. We request that the Service clarify whether the amendment relief afforded by the PPA applies to all ACA features or just the QACA. While automatic enrollment features were available to plan sponsors prior to the PPA, many plan sponsors elected not to adopt these plan features until the relief afforded by PPA with respect to state law preemption and the 90-day window for returning contributions became available.

Recommendations – The SPARK Institute urges the Service to allow plan sponsors to adopt ACA features without an interim plan amendment for the addition of such provisions. Plan sponsors should be permitted to consolidate their entire PPA plan amendments in the major PPA amendments required in 2009. Additionally, plan sponsors that elect to adopt a good faith amendment prior to the required amendment date should be allowed to do so without jeopardizing the plan's pre-approved plan status (in the case of prototype and volume submitter plans).

II. Qualified Automatic Contribution Arrangements

A. Enrolling Existing Employees - Section 902(a) of the PPA allows an employer to exclude from a QACA any existing employees who "had an election in effect on such date either to participate in the arrangement or to not participate in the arrangement." Our members are concerned that it is not clear whether, under the rule, an employer will be allowed to exclude only those existing employees who affirmatively elected to defer zero percent or will be allowed to also exclude such employees who are deemed to have made a negative election not to participate (i.e., did not return enrollment materials or take action to enroll understanding that their failure to take required action would result in a zero percent deferral rate)?

Recommendations - Plan sponsors should have the flexibility to cover existing employees but should not be required to do so if the employee had the option to participate and either affirmatively or negatively elected not to make a deferral. Many employers, especially those who have changed record keepers, do not know whether an eligible employee who is not participating made an affirmative election to defer zero percent or simply failed to return the enrollment materials. Some employers will be discouraged from establishing a QACA if they have to bear the costs of applying automatic enrollment programs to both existing and newly eligible employees or to bear the expense of obtaining affirmative election again from those who previously chose not to participate.

B. Mid-Year Adoption – We request that the Service provide specific guidance regarding whether a plan that is currently operating as a safe harbor 401(k) (i.e., is not subject to ADP/ACP compliance requirements) can convert to a QACA mid-year? Additionally, we request guidance regarding whether a non-safe harbor 401(k) plan can convert to a QACA mid-year?

Recommendations - The SPARK Institute urges the Service to issue specific guidance that allows plan sponsors the flexibility to change plan design mid-year and retain their prior exemption from compliance testing, provided that the QACA notice requirements are satisfied both with respect to plan participants and other employees who may be automatically enrolled. In addition we would like to see the flexibility of converting an existing 401(k) plan to a QACA mid-year, subject to satisfying the initial notice requirements.

C. No Minimum Participation Requirements – The final version of the QACA provision under the PPA do not include any requirements that a certain percentage of non-highly compensated employees ("NHCEs") must participate in the arrangement in order to obtain the testing relief provided by a QACA. Prior versions of the QACA provisions had included such requirements.

Recommendations - The SPARK Institute requests that the Service provide explicit guidance regarding whether a QACA plan is subject to the minimum participation requirements. The fact that Congress specifically excluded previously included NHCE participation requirements from the final version of the PPA indicates its intent not to impose such requirements. Accordingly, we request that the Service expressly acknowledge that the minimum participation requirements do not apply to a QACA plan.

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The SPARK Institute appreciates the opportunity to provide these comments to the Service. If you have any questions or need additional information regarding this submission, please feel free to contact us at (704) 987-0533.

Respectfully,

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Larry H. Goldbrum
General Counsel