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RE: Mandatory Automatic Enrollment Rules Proposed Regulation

To Whom it May Concern:

Ferenczy Benefits Law Center, LLC is a prominent law firm practicing exclusively in the area of employee benefit plans. Our client base ranges from solo plans to employers with 100,000 employees, to third party administrators and large institutions/recordkeepers that support all retirement plan types and sizes. The authors of this letter also provide professional education to other benefits practitioners, with more than 4,000 professionals regularly attending our free webcasts, and we have many subscribers to our books on retirement plan law. This provides us with a unique perspective as to the impact the Mandatory Automatic Enrollment Rules ("MAE Rules") will have on plan sponsors and their participants, as well as the professional benefits community. We are writing to outline some of the areas that concern both our clients and us, as well as considerations that we hope can be addressed and clarified in the final MAE regulations.

We appreciate the thoughtful approach the Treasury took in the proposed MAE regulation issued January 14, 2025 (the "Proposed Reg"). The Proposed Reg addresses many of the key questions practitioners have had and provides several areas of valuable insight and flexibility.

We thank the Treasury for providing this comment period in relation to the Proposed Reg. We offer our thoughts with the hope that they will inspire changes to the Proposed Reg that will make it easier for plan sponsors to administer the MAE Rules correctly. We offer our time and availability to the Treasury in the event that it seeks further discussion on any of the points contained herein.

Summary of Issues Presented

This comment letter raises the following MAE questions and issues:

Issue #1: Small Business Exception
Issue #2: Defining Portions of Years for Automatic Increase
Issue #3: Application of QDIA Requirements for Employer-Directed Plans
Issue #4: Application of MAE in Company Acquisitions
Issue #5: Clarification of Plan Merger Issues

Issue #6: Correction of MAE Failures
Issue #7: Consequences for Union Employees
Issue #8: The Impact of MAE on Deferral Only 403(b) Plans

Issue #1
Clarification of the Small Business Exception

Prop. Treas. Reg. § 1.414A-1(d)(4)(ii) discusses the exception for small businesses, under which plans of employers that "normal employ" 10 or fewer employees do not need to provide for MAE. The Treasury's decision to define the employee count by reference to the COBRA regulations provides clear guidance as to how to determine the number of "normally employed" employees. However, we would welcome additional clarity regarding the application of the related employer rules to the exception and whether a drop in the number of employees enables a plan subject to Code § 414A to later qualify for the exception.

A. Related Employers:

Does the number of employees take into account simply the employees of the organization sponsoring the plan, or does it also consider employees of related employers (i.e., controlled or affiliated service group members pursuant to Code § 414(b), (c), or (m))?

Code § 414 has not been amended to reference Code § 414A as one of the sections to which the related employer rules apply. Furthermore, Code § 414A contains no reference to the related employer rules. We believe that, as a matter of policy and to avoid artificial creation of entities intended to forestall application of the MAE Rules, individuals employed by related employers should be included in determining whether the Small Business Exception applies.

We recommend that *the individuals employed by related entities should be counted in the aggregate for purposes of the Small Business Exemption.*

B. Changes to the Employee Count:

Code § 414A(c)(4) provides in relevant part that MAE does not apply to any 401(k) or 403(b) plan "earlier than the date that is 1 year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees."

The Proposed Reg does not directly address the question of whether an employer can become exempt from the requirements of Code § 414A following a reduction in force that drops the employee count to 10 or fewer.

> Example: Suppose an employer with five employees establishes a calendar year 401(k) plan in January 1, 2026. The small business exception applies. In 2028, the employer grows such that it normally has 11 employees and Code § 414A will apply in 2030. Suppose further that, in 2031, the employee count drops to 9 employees. May the employer remove the automatic enrollment provisions from the plan?

The language that governs this exception indicates that the MAE Rules apply prospectively one year after the close of the first taxable year in which the employee count exceeds 10. This implies that a "once-in-always-in" rule applies – i.e., once that event occurs, MAE is required to be a permanent provision of the plan. Such a policy has the advantage of making plan administration more consistent and predictable; once an employer has put in place the mechanisms necessary to implement automatic enrollment, there is no reason to take them away later. However, automatic enrollment, and MAE in particular, is an administrative burden that can be costly for smaller plans and can easily result in operational errors. Therefore, we believe that the choice of whether MAE should apply to a company that returns to having fewer than the requisite number of employees should be one made by the plan's sponsor.

This is particularly of concern if the size of the company is reduced by a corporate event, such as a sale of a significant part of the company's business. When the company is downsized in such a manner, it is possible that the infrastructure that made MAE administrable may no longer be available. At that point, it makes sense to permit such a company to forgo the administrative burden of MAE for its now small group of employees. Similarly (and perhaps even more so), if the remaining employees after such a sale are the business owner and his or her spouse, continuing the MAE provision makes even less sense. Therefore, we request that the Treasury consider an exception to the small business "once in, always in" rule for such company modifications.

We recommend that *the final regulations clarify the application of the Small Business Exception when the number of employees decreases to 10 or below, particularly in the context of a downsizing or sale of part of the company.*

Issue #2
Defining Portions of Years for Purposes of the Applicable Automatic Enrollment Percentage

Prop. Treas. Reg. § 1.414A-1(c)(3)(iii)(A) allows for exceptions from automatic enrollment uniform percentage requirement, based on variations of the manner in which number of years (or portions of years) since the beginning of the initial period are determined. In particular, the plan may define days other than the first day of the plan year on which the applicable percentage is increased for participants, so long as the percentage for each participant at all times is at least as high as it would be if the "first day of the plan year" method applied, and such application is uniform throughout the plan.

> Example: Suppose a calendar year plan provided that escalation (from the 3% initial rate and each subsequent rate) was to occur on each April 1 following the one-year anniversary of the participant's initial automatic enrollment, to allow the increase to occur after performance reviews and merit raises. A participant who entered the plan and became subject to automatic enrollment on January 1, 2026, would remain enrolled at the 3% initial rate until April 1, 2027, at which point the deferral rate would increase to 4%. Under any alternate increase date, the escalation of this participant's deferral rate would need to occur no later than December 31, 2027 (i.e., the last day of the plan year

following the year in which the participant's initial period began), which is the latest such date under the statute and the Proposed Reg.

Confirming that this is the way that this provision is intended to be operated would allow plan sponsors to replicate their existing QACA change date provisions into the Code § 414A framework with minimal disruption. We believe the language of the Proposed Reg justifies this interpretation, but we would welcome explanation of this point, perhaps in the preamble. In particular, we have received numerous questions from recordkeepers and third party administrators ("TPAs") regarding the application of the "portions of years" uniformity exception, and believe that additional clarity would help ensure compliance.

We recommend that *the preamble to the final regulations (or the regulations themselves) clarify the application of the "portions of years" rule, perhaps with examples to ensure full understanding.*

Issue #3
Application of QDIA Requirements for Employer-Directed Plans

Code § 414A(b)(1) provides that the MAE scheme must be an "eligible automatic contribution arrangement" or "EACA," as defined in Code § 414(w)(3). Code § 414A(b)(4) further provides that amounts contributed under MAE must be invested pursuant to 29 CFR § 2550.404c-5, i.e., that the plan provide for a qualified default investment alternative ("QDIA") for such funds in absence of an alternate investment election by the participant. This requirement is repeated in the Proposed Reg.

The referenced Labor regulation, 29 CFR § 2550.404c-5, provides fiduciary relief for certain investment alternatives when a plan permits participants to direct the investment of their accounts. The fiduciary relief is predicated on the plan providing for a QDIA in which the participant's account will be invested if they fail to make a specific investment election. The QDIA requirement is not mandated for EACAs in absence of the MAE Rules.

The critical reality is that not all plans with an automatic enrollment provision – and certainly not all plans that are being required to add such a provision due to the MAE Rules – permit participants to direct the investment of their accounts.

Both the statute and the Proposed Reg are silent as to how the QDIA requirement applies to a plan subject to MAE that does not provide for participant-directed investments. Will plans that do not permit participant direction of investments be permitted continue to invest any resulting deferrals in a trustee-directed account? The Labor regulation in 29 CFR §2550.404c-5(c)(2) specifically applies when a participant is permitted to direct the investment of their accounts but the investment of their funds in the QDIA occurred because the participant failed to do so. However, in a plan that does not provide for participant-directed investments, such a predicate to the QDIA is not met.

In essence, it is possible that the QDIA requirement of the Code indirectly mandates that all 401(k) plans that are subject to the MAE Rules offer participant-directed investments. This subjects the plan sponsor to additional obligations and notice requirements not otherwise present, and may contradict a sponsor's judgment that trustee-directed investments are preferable to participant-direction. Further, the mechanics of participant-direction are such that it may require the sponsor to change service providers to retain the services of a recordkeeper that can handle participant-direction. All of this may be quite different in terms of responsibilities and costs than what the plan sponsor anticipated when adopting and offering the plan to its employees.

There are two possible solutions, short of mandating full participant direction:

1. The Treasury could permit an exception to the QDIA rules in relation to plans that do not permit participant direction of investments; or

2. The Treasury could provide that the participant is deemed to be able to direct the investment of his or her account by permitting him or her to choose between the QDIA and the employer/trustee-direction of the plan's investments, without requiring a more robust menu of investment options. The QDIA would also be the default investment if the participant made no election.

The provision of general fiduciary relief when a participant directs his or her own investments occurs by virtue of ERISA § 404(c), including the rules for QDIAs in § 404(c)(5). Fiduciary relief under this section is not applicable when the plan does not provide for participant direction. Part of the requirements for the QDIA is that the participant was permitted to direct the investment of his or her account in a broad range of alternatives and chose not to do so. [*See* 29 CFR 2550.404c-5(c)(2), (6)]. Therefore, if the second option is chosen, the fiduciary relief under 29 CFR § 2550.404c-5 would not extend to the trustee-directed investment alternative. Nonetheless, if the participant either chose to invest in the QDIA or defaulted to such an option through inaction, it is important that the fiduciary relief under the Labor regulation apply in relation to the QDIA investment.

Therefore, it would be appreciated if the Treasury would coordinate with the Department of Labor and its retirement plan agency, the Employee Benefit Security Administration, to work together to provide a set of coordinated rules for plan sponsors to follow that would result in fiduciary relief for a plan sponsor, administrator, and trustee in a situation in which the participants elects to direct his or her funds into the QDIA, rather than in the commingled investment account directed by the investment fiduciary.

We recommend *that the final regulations provide either that: (a) plans subject to MAE that do not otherwise provide for participant direction of investments are exempt from the QDIA requirement, or (b) providing participants with the option to choose between the trustee-directed investments and the QDIA suffice to meet the MAE and EACA requirements. We also request that you coordinate with EBSA to ensure that the second option will be deemed to provide the basis for the fiduciary protection under 29 CFR § 2550.404c-5 in relation to the QDIA option.*

Issue #4
Application of MAE Rules in Company Acquisitions

With company acquisitions and mergers so commonplace, it is important that plan sponsors know how MAE applies in such circumstances. While the Proposed Reg is very clear as to the applicability of MAE in general when plans merge (and we were particularly appreciative of the clarification provided in the regulation related to mergers into Pooled Employer Plans and Multiple Employer Plans), the Proposed Reg does not address how MAE applies to participants who enter the Buyer's plan as a result of a business acquisition when a plan merger does not occur.

In particular, at what level must individuals who join a plan sponsored by the Buyer in the wake of and as a result of an acquisition be automatically enrolled? Furthermore, how is that rule affected by the type of business transaction and the manner in which the Seller's former employees become covered by the plan?

For purposes of the questions below and the examples used to illustrate our questions, please assume that the acquisition is of at least 80 percent of the company stock (in a stock acquisition), or substantially all of the assets of a company (in an asset acquisition) by a "Buyer." The acquired company is the "Seller." Employees who become covered by the Buyer's plan will be referred to as "Acquired Employees." Finally, please assume that there is no merger of any plan previously sponsored by the Seller and the Buyer's plan in connection with these questions.

a) *Situation 1: Acquired Employees cease to participate in the Seller's plan and become eligible to participate in the Buyer's plan in connection with a stock acquisition*

In a situation in which the Buyer acquires the stock of the Seller, the employees experience no termination of employment or new hiring process – they continue to work for the same company, albeit now as employees of a subsidiary of the Buyer. If the employees continue to be covered by the retirement plan sponsored by the now-subsidiary Seller, there should be no effect on the application of MAE in such plan.

However, if the Buyer's plan begins to cover the Acquired Employees in connection with the acquisition, and the Buyer's plan is subject to MAE, at what rate are the Acquired Employees to be automatically enrolled? In particular, is that enrollment based on their years of participation in the Seller's plan prior to the acquisition, or are they considered to be new participants, enrolled at the Buyer's plan's defined initial percentage?

Is the answer to the above question different, depending on whether the Seller's plan was subject to MAE?

> Example: Suppose that an Acquired Employee participated for five prior years in the Seller's plan. The Seller is acquired by the Buyer, participation of the Acquired Employee in the Seller's plan ceases, and the Acquired Employee begins to participate in the Buyer's Plan. Would the Acquired Employee be automatically enrolled in the

Buyer's Plan at the rate that applies to an employee in his or her sixth year of participation? Or, should the employee be enrolled at the initial rate?

Does the automatic enrollment rate in the Buyer's plan depend on whether the Seller sponsored a plan and if such a plan was subject to MAE?

Example: Suppose the Acquired Employee in the above example was automatically enrolled in the Seller's plan prior to the acquisition, and the applicable deferral percentage (as required in the Seller's plan under the MAE Rules) for such Acquired Employee at the time of the acquisition was 8% (i.e., at the rate applicable to the sixth year of participation under the MAE Rules). Would the Acquired Employee need to be automatically enrolled in the Buyer's plan at the MAE rate applicable to the sixth year of participation, the 8% rate previously required in the Seller's plan, or could he or she be enrolled at the initial rate in the Buyer's plan as a new participant?

Would any affirmative election made by the Acquired Employee in the Seller's plan affect automatic enrollment in the Buyer's plan? If such elections would normally not affect the application of MAE in the Buyer's plan, could the Buyer elect to respect affirmative elections previously made in the Seller's plan, even though the Seller's plan was not merged into the Buyer's plan?

We recommend that, *when a company acquires the stock of another and the Acquired Employees begin participating in the Buyer's plan, in absence of a merger of plans, the plan sponsor may elect in the Buyer's Plan to treat the Acquired Employees as new (with automatic enrollment at the initial rate), as continuing their rate of deferral from the Seller's Plan, or may automatically enroll them at the rate applicable in the Buyer's plan, based on their years of participation in the Seller's plan. We believe that there is no reason why the Treasury should not permit maximum flexibility in this area.*

b) Situation 2: Acquired Employees cease to participate in the Seller's plan and become eligible to participate in the Buyer's plan in connection with an asset acquisition.

Contrary to the discussion above, in the case of an asset acquisition, the Acquired Employees are considered to be new employees to the Buyer (although the Buyer can grant credit for prior service in its plan if it chooses to do so).

Our expectation is that all Acquired Employees will be automatically enrolled in the Buyer's plan (assuming it is subject to MAE) at the initial rate. However, does this assumption change based on any other facts, such as the granting of prior service credit in the Buyer's plan for employment with the Seller? Does it matter if prior service credit is granted only for eligibility purposes, only for vesting purposes, or is granted for both? Does the previous application of MAE to Acquired Employees in the Seller's plan affect the answer to this question?

We recommend that *a Buyer in an asset acquisition generally apply MAE to the acquired employees as if they were newly entered, although the final regulation should permit the Buyer to elect to automatically enroll them at the rate based on their years of participation in the Seller's* *plan, or at their applicable rate of deferral in the Seller's plan. In this situation, we also believe that it would benefit all parties for the Treasury to permit maximum flexibility.*

Issue #5
Clarifications Needed in Relation to Plan Mergers

The Proposed Reg clarifies the applicability of MAE to plan mergers and spinoffs under myriad circumstances. However, while it answers all questions about what plans are required to comply with the MAE Rules, it is not clear exactly how MAE applies to the employees in the merged plan.

For the purposes of our questions below, assume that two plans are merging, and that the surviving plan is subject to MAE.

a) *Situation #1: Both merging plans were previously subject to MAE, although the schedules for automatic enrollment under the two plans were different.*

The MAE Rules define a minimum rate of automatic enrollment for participants based on years of participation in the plan. Plans may be drafted to apply MAE based on those minimum percentages, with automatic increases applied annually based on service after plan entry. Alternatively, plans may use different automatic enrollment schedules, so long as each participant is automatically enrolled at a deferral rate that is at least equal to the MAE minimum rate for any given year of participation. A plan may also automatically enroll participants at an initial and ongoing rate of 10 percent, which avoids automatic increases.

When two plans merge and MAE is applied to the employees who first participate in the surviving plan due to the merger, is their rate of deferral at their enrollment based on their date of participation in the plan in which they previously participated, or are they automatically enrolled in the merged plan based on the initial percentage under that plan's automatic enrollment schedule?

> Example: Suppose that the automatic enrollment of Plan A was based on the minimum percentages in Code § 414A, with a maximum percentage of 10%. Plan A merged with Plan B, which was also covered by MAE, but automatically enrolled all employees at a level rate of 10%. Plan A is the surviving plan.
>
> Mary, who has four years of participation in Plan B, was automatically enrolled at a deferral rate of 10%. Under Plan A, her automatic enrollment percentage would be 6% (i.e., the rate for someone in his or her fourth year of participation). What is the appropriate percentage for her ongoing automatic enrollment in the merged Plan A, 6% (based on the Plan A applicable percentages) or 10% (based on her previous automatic enrollment)?

We recommend that *the surviving plan be permitted to elect for automatic enrollment of new participants – including those who join the plan in connection with a merger of plans – at the rate under the surviving plan or at the previously applicable rate under the disappearing plan.*

This is preferable over application of the initial rate, because it encourages participants to continue deferring both at their historic level and in the manner intended by Congress that is appropriate for their years of participation.

b) *Situation #2: A plan without MAE is merged into a plan with MAE and the resulting plan is subject to MAE*

When MAE is applied to participants in a merger situation who were previously not subject to MAE, what automatic enrollment percentage applies? In particular, will the participants first covered by the surviving plan by virtue of the merger be subject to automatic enrollment based on their participation in the disappearing plan (even though that plan was not subject to MAE), or will they begin MAE in the merged plan under the initial percentage of the MAE schedule?

> Example: Suppose that Plan A, which was not subject to MAE, merged into Plan B, which is subject to MAE. The surviving plan is subject to MAE.
>
> Joe had four years of participation in Plan A and has never elected to have salary deferrals made on his behalf to the Plan (nor did that Plan automatically enroll him). Upon merger, is Joe automatically enrolled in the merged plan at the rate applicable to participant with four years of participation, or is he automatically enrolled at the initial rate?

If a participant in the disappearing plan, which previously had no automatic enrollment, made an affirmative election to defer in that plan, does such an affirmative election apply in the surviving plan? Or, is that participant subject to MAE in the surviving plan?

> Example: Continuing the facts from the prior Example, suppose that Graham (who had five years of participation in Plan A) made an affirmative election to defer 4% to that plan prior to the merger. After the merger of the plans, is Graham subject to MAE at the rate of 7% (appropriate for a participant with five years of participation) in Plan B, or does the prior affirmative election of 4% continue to apply?

Would the answer to this question be different if the disappearing plan was not subject to MAE but nonetheless had an automatic enrollment provision, and the affected participant was previously automatically enrolled at 4%?

We recommend that *the surviving plan to which MAE applies be permitted to elect to automatically enroll individuals who become participants due to the plan merger either (a) at the rate under the surviving plan based on plan participation in the disappearing plan; (b) at the initial rate. We believe that this flexibility is desirable to accommodate differences in plans and administrative abilities.*

We further recommend that *the surviving plan be permitted to elect to continue the affirmative elections previously made by participants in the disappearing plan. This is preferable over application of the initial rate, because it permits participants to continue deferring at the rate to which they are accustomed*

Issue #6
Correction of MAE Failures

It is anticipated that the new MAE requirements will be the subject of numerous Operational Failures, as defined in Revenue Procedure 2021-30 ("EPCRS") § 5.01(2)(b), particularly in the year or two immediately following the MAE initial effective date of January 1, 2025.

Based on our previous correction experience, coupled with communications we have had with both plan sponsor and TPA clients, we believe that several factors have led to an unusually large number of noncompliant plans. In particular, we understand that the following issues have contributed to the plan sponsor confusion:

- The applicability of the MAE Rules to plans that were adopted between late 2022 and the January 1, 2025, MAE effective date means that there are many sponsors of these newer plans who were unaware of the need to modify plan administration to embody automatic enrollment. As the MAE Rules had a delayed effective date and an extended remedial amendment period, most practitioners chose not to include prospective language regarding MAE in the plan documents produced during this period. As a result, the documents do not reflect the MAE requirement, nor do participant notices (typically generated by the same software systems that produce the plan documents) automatically provide the annual EACA notice for distribution to participants.

- Notwithstanding the fact that plan sponsors are responsible for knowing everything that impacts a plan that they adopted, the details of retirement plan law and changes are outside the ken of most business owners (particularly in small companies). As a result, many, if not most, plan sponsors rely on their service providers to keep them abreast of and in compliance with plan-related legal changes. It is also true that some providers – particularly low-touch bundled recordkeepers that are computer-based – fall short of providing this guidance. Late information or a lack of information shared with plan sponsors has led to many, many plans failing to be compliant with the MAE Rules as of the beginning of 2025. Many other plan sponsors and practitioners chose to wait to implement MAE-related procedures until guidance was issued about the MAE Rules. The Proposed Reg was not issued until after the beginning of 2025, which meant that some service providers and plan sponsors were ill-prepared to initiate MAE in early January.

These Operational Failures will require correction.

Issue #1: Effect of the EPCRS rules on the correction method needed for the plan sponsor to repair an operational failure on a timely basis

EPCRS Appendix A § .05(8) allows a plan sponsor with an automatic enrollment failure to correct this failure without having to make a Qualified Nonelective Contribution ("QNEC") in relation to missed deferrals, if the failure is corrected not later than 9½ months following the year in which the automatic enrollment failure occurred with respect to a participant. However, there is no specific language within EPCRS for resolving the plan sponsor's failure to timely implement the MAE provision by its applicability date. We believe that plan compliance and the correction of Operational Failures of this sort will be enhanced if there is a definitive, reasonable correction for the failure to institute MAE on a timely basis.

Although EPCRS Appendix A § .05(8) provides the 9½ month window for correction of automatic enrollment failures without a QNEC, EPCRS also requires that the plan sponsor fund any matching contribution in relation to the missed deferrals, adjusted for earnings. To calculate the missed matching contribution, one must determine the missed deferrals on which the corrective match is to be based. EPCRS Appendix A § .05(2) requires that the missed deferrals for a given participant be equal to the average deferral percentage ("ADP") of the relevant group (i.e., HCE vs. NHCE), times the affected participant's compensation.

The ADP, however, cannot be known until after the end of the plan year, when the needed testing data can be collected (including the plan year's compensation and deferrals) and the testing may be completed. Assuming that the MAE failure is caught soon after the beginning of the year, this is a long time to wait to make a correction. In addition, the correction is more expensive each day, as the plan sponsor is also required to provide a corrective deposit equal to the lost earnings for the participants for the period between when the missed match should have been deposited and when it was, in fact, corrected.

This extensive process and time delay is completely eliminated if the plan is a 401(k) safe harbor plan. In comparison, a safe harbor 401(k) plan is permitted to presume that the missed deferral is equal to 3% of compensation. While this presumption does not negatively impact the amount of employer contributions in a safe harbor nonelective plan, the application of this 3% standard assumption in a plan with the basic match formula is permitted even though a presumed deferral between 3% and 5% would produce additional matching contributions for the affected participants.

We believe that the need to wait for the ADP testing to be completed makes correction more difficult and costly for a plan sponsor that may or may not have known that it was out of compliance as of January 1, 2025. Further, such a delay in correction decreases participant confidence in the plan's compliance and may have a negative effect on deferrals, notwithstanding the automatic enrollment.

As a result, we believe it is appropriate that the missed deferrals in a plan conforming to MAE be presumed to be 3%, such that plan sponsors may confidently and timely correct MAE failures during the year.

We recommend that EPCRS be modified to allow the plan sponsor with an MAE failure to correct such failure in the same manner as if the plan were a safe harbor nonelective plan and apply the calculation rules of EPCRS Appendix A § .05(5)(2)(d)(i). This would allow plan sponsors to make corrections promptly, to the benefit of the participants.

Issue #2: Need for special correction rules and timing for 2025 Operational Failures

As discussed above, many plan sponsors (particularly those for smaller plans) were commonly unaware that MAE would need to be implemented as of January 1, 2025. When Treasury issued the Proposed Reg. in January 2025, it was already too late to meet the January 1, 2025, automatic enrollment deadline. And, of course, service providers cannot consult with all their plan sponsor clients at the same time; it takes time for them to advise each client and implement the decisions made.

For example, one of our plan sponsor clients implemented a new plan with a 401(k) feature that was effective as of January 1, 2023. At that time, the plan did not include an automatic enrollment provision, because the law did not require it to. The TPA/document provider notified the plan sponsor in October 2024 of its obligation to include MAE as of January 1, 2025. Due to the time constraints of making the necessary plan design decisions and the processes required to implement automatic enrollment for a plan that did not have such a provision before, the plan sponsor failed to implement MAE in operation in early 2025.

EPCRS Appendix A § .05 provides the correction methods for the failure to enroll a participant in a 401(k) feature, including the "safe harbor" correction of Appendix A § .05(8), which eliminates the need to make a QNEC correction for missed deferrals if the plan contains an automatic enrollment feature. However, for many plans subject to MAE, there was no automatic enrollment feature in the plan as of January 1, 2025. Does this prevent the use of the safe harbor correction method, or is such an employer required to make a 25% or 50% QNEC, depending on additional facts, for the unenrolled participants? Can the plan qualify as having automatic enrollment for the purposes of Appendix A §.05(8) if the plan sponsor amends the plan as permitted by SECURE 2.0, §501 and IRS Notice 2024-02, §J, prior to December 31, 2026, to add such a provision?

With the lack of guidance on proper correction, it is possible – if not likely – that the timing requirements for the 0% QNEC safe harbor under EPCRS Appendix A §.05(8) will not be met by many plan sponsors. This would be very expensive for many employers, particularly smaller companies.

It is crucial that the final regulation clarify the means by which MAE failures can be corrected, particularly in relation to failures to initially qualify in January 2025. The SECURE 2.0 interim amendments will apply MAE retroactively to January 1, 2025. This should be sufficient to enable the plans to qualify for the automatic enrollment safe harbor under EPCRS. Nonetheless, it would be helpful and reasonable if the Treasury would (a) affirm that plans subject to MAE that are amended within the SECURE 2.0 remedial amendment period are considered to contain an automatic enrollment provision as of January 1, 2025, notwithstanding the presence or absence of formal documentation at that time as to this provision; and (b) permit employers that failed to implement MAE in 2025 to use the "safe harbor" 0% QNEC method available to plans even if the 9½ month rule cannot be met.

We recommend that *Treasury affirm that plan sponsors to subject to MAE are considered as having an automatic enrollment provision as of January 1, 2025, even if the plan did not yet* *provide for this, and even if the implementation of the MAE provisions followed thereafter. This will enable those sponsors to take advantage of the "safe harbor" correction for automatic enrollment plans.*

We further recommend that *Treasury extend the time for compliance with the safe harbor provision from the current 9½ month rule until the end of the plan year following the first plan year to which MAE applies, to provide time for the plan sponsor to learn about the requirements, make administrative decisions about how the requirements will be applied to their plans, and correct the operational failure of not applying these provisions sooner. This would align the compliance with the MAE Rules with the end of the interim amendment deadline for SECURE 2.0 pursuant to Notice 2024-2, § J.*

Issue #7
Consequences on Union Employees

Unlike the proposed Treasury regulations for the changes in Catch-up Contribution, the Proposed Reg did not provide for any delayed implementation of the MAE related to union employees covered under a collective bargaining agreement ("CBA") where the CBA has expressly prohibited forcing the union employees to be covered by automatic enrollment provisions. For plans that cover both union employees of an employer, this places the plan sponsor in a terrible position. Either they are forced to commit an Operational Failure by not instituting MAE or to commit an unfair labor action by violating the CBA.

We recommend that the Treasury issue intermediate guidance, pending the release of the final regulations, providing immediate relief to plan sponsors with union employees covered by a CBA that prohibits automatic enrollment to permit the delay of MAE for such employees until the expiration of the current CBA.

Issue #8
Effect of MAE on Deferral-Only 403(b) Plans

Our final recommendation is not strictly related to the Proposed Reg itself but does address an important issue for which we recommend coordination and comment with the EBSA.

29 CFR §2510.3-2(f) provides a regulatory safe harbor that allows a deferral-only 403(b) plan that is sponsored by a nongovernmental, nonchurch organization, to be exempt from ERISA if the deferrals are "completely voluntary" and the employer has limited involvement with the plan ("ERISA Safe Harbor Exemption"). Many 403(b) plans avail themselves of this exemption.

EBSA addressed the definition of "completely voluntary" in connection with a different ERISA exemption, i.e., for employer-sponsored payroll withholding IRA savings arrangements. [29 CFR §2510.3-2(d)] This exemption uses the same terminology as the 403(b) exemption and is found in another section of the same regulation. The DOL commented in the preamble to the IRA-related regulation:

> One of the 1975 IRA Payroll Deduction Safe Harbor's conditions is that an employee's participation be ''completely voluntary.'' The Department intended this term to mean considerably more than that the employees are free to opt out of participation in the program. In other words, under the safe harbor, the decision to enroll in the program must be made by the employee, not the employer. If the employer automatically enrolls employees in a benefit program, the employees' participation would not be ''completely voluntary'' and the employer's actions would constitute the ''establishment'' of a pension plan, within the meaning of ERISA section 3(2).

Plan sponsors are concerned that the new MAE mandate may cause plans which would otherwise qualify for the ERISA Safe Harbor Exemption to lose that exemption because deferrals may not be self-initiated. The loss of the exemption would have wide-ranging effects on these plans and their nonprofit sponsors, from requiring Form 5500 filing and independent audits to fiduciary obligations and a different enforcement structure. This is surely an unintended consequence of Code §414A.

We recommend that the Treasury coordinate with EBSA to produce guidance that clarifies that compliance with the MAE Rules does not, in and of itself, constitute a violation of the "completely voluntary" requirement and subject the plan to ERISA.

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We thank you again for requesting input from the benefits community on these issues. We look forward to augmented guidance in the future.

Very truly yours,

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