

March 2008

**Department of Labor Issues Proposed Regulations Regarding Civil Penalties
for Failure to Provide Automatic Contribution Arrangements Notice**

Increasingly, sponsors of Code Section 401(k) plans are moving to automatic enrollment arrangements, in part to satisfy the special nondiscrimination requirements for 401(k) plans. That movement was enhanced by the Pension Protection Act of 2006 which provided for an automatic enrollment safe harbor for testing purposes and the preemption of state laws that prohibit or restrict automatic enrollment arrangements. In connection with these changes, Congress modified ERISA to require the plan administrator of a plan with an automatic contribution arrangement (“ACA”) to provide to each participant a notice on the participant’s rights and obligations under an ACA. In accordance with the DOL regulations issued in connection with qualified default investment alternatives (“QDIAs”), the notice must be provided at least 30 days in advance of a participant’s eligibility to participate in the ACA and at least 30 days prior to the beginning of each plan year. By providing the notice the plan sponsor avoids the possible application of state laws and may reduce fiduciary liability for QDIAs. Failure to provide the notice could result in a civil penalty of not more than \$1,000 per day for each violation.

The DOL’s recently issued proposed regulations have a few points of note. First, the amount of the penalty can increase rapidly, because each failure or refusal to furnish the notice with respect to any person entitled to receive the notice is treated as a separate violation. Second, if more than one person is responsible as administrator for the failure to provide the notice, all such persons are jointly and severally liable for the failure. Third, the liability is a personal liability of the person against whom the penalty is assessed; not a liability of the plan. The payment of the penalties from plan assets would be a violation of ERISA.

If you have any questions regarding this or other ERISA or Internal Revenue Code required notices or the penalties that may be assessed for a failure or refusal to provide such notices, please contact the undersigned.

Manes M. Merrit	212-451-2330
Nina Krauthamer	212-451-2242
Barry L. Salkin	212-451-2212
Annette Messano	212-451-2370

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