

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9641]

RIN 1545-BI64

Reduction or Suspension of Safe Harbor Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains amendments to regulations relating to certain cash or deferred arrangements under section 401(k) and matching contributions and employee contributions under section 401(m). These regulations provide guidance on permitted mid-year reductions or suspensions of safe harbor nonelective contributions in certain circumstances for amendments adopted after May 18, 2009. These regulations also revise the requirements for permitted mid-year reductions or suspensions of safe harbor matching contributions for plan years beginning on or after January 1, 2015. The regulations affect administrators of, employers maintaining, participants in, and beneficiaries of certain defined contribution plans that satisfy the nondiscrimination tests of section 401(k) and section 401(m) using one of the design-based safe harbors.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN FEDERAL REGISTER]**.

Applicability Date: These regulations generally apply to amendments adopted after May 18, 2009. The amendments to the requirements for permitted mid-year reductions or suspensions of safe harbor matching contributions apply for plan years beginning on or after January 1, 2015.

FOR FURTHER INFORMATION CONTACT: William D. Gibbs at (202) 622-6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2191. The collection of information in these final regulations is in §1.401(k)-3(g)(2) and §1.401(m)-3(h)(2). The collection of information relates to the new supplemental notice requirements in the case of a reduction or suspension of safe harbor nonelective or matching contributions and the requirement to include additional information in the notice required by §§1.401(k)-3(d), 1.401(k)-3(g), and 1.401(m)-3(h) for certain plans that would be permitted to reduce or suspend safe harbor nonelective or matching contributions for a plan year even if the employer had not experienced a business hardship. The likely recordkeepers are businesses and other for-profit institutions, nonprofit institutions, and State and local governments.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to regulations under sections 401(k) and 401(m) of the Internal Revenue Code. Section 401(k)(1) provides that a profit-sharing, stock bonus, pre-ERISA money purchase, or rural cooperative plan will not fail to qualify under section 401(a) merely because it contains a qualified cash or deferred arrangement. Section 1.401(k)-1(a)(2) defines a cash or deferred arrangement (CODA) as an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a). Contributions that are made pursuant to a cash or deferred election under a qualified CODA are commonly referred to as elective contributions.

In order for a CODA to be a qualified CODA, it must satisfy a number of requirements. For example, contributions under the CODA must satisfy either the nondiscrimination test set forth in section 401(k)(3), called the actual deferral percentage (ADP) test, or one of the design-based alternatives in section 401(k)(11), 401(k)(12), or 401(k)(13). Under the ADP test, the average percentage of compensation deferred for eligible highly compensated employees (HCEs) is compared to the average percentage of compensation deferred for eligible nonhighly compensated

employees (NHCEs), and, if certain deferral percentage limits are exceeded with respect to HCEs, corrective action must be taken.

Section 401(k)(12) provides a design-based safe harbor method under which a CODA is treated as satisfying the ADP test if the arrangement meets certain contribution and notice requirements. A plan satisfies this designed-based safe harbor method if the employer makes specified qualified matching contributions (QMACs) for all eligible NHCEs. The employer can make QMACs under a basic matching formula that provides for QMACs on behalf of each eligible NHCE equal to 100% of the employee's elective contributions that do not exceed 3% of compensation, and 50% of the employee's elective contributions that exceed 3% but do not exceed 5% of compensation. Alternatively, the employer can make QMACs under an enhanced matching formula that provides, at each rate of elective contributions, for an aggregate amount of QMACs that is at least as generous as under the basic matching formula, but only if the rate of QMACs under the enhanced matching formula does not increase as the employee's rate of elective contributions increases. In lieu of QMACs, the plan is permitted to provide qualified nonelective contributions (QNECs) equal to 3% of compensation for all eligible NHCEs. In addition, under the design-based safe harbor methods, notice must be provided to each eligible employee, within a reasonable period before the beginning of the plan year, of the employee's rights and obligations under the plan.

Section 401(k)(13), as added by section 902 of the Pension Protection Act of 2006, Public Law 109-280 (PPA '06), provides an alternative design-based safe harbor for a CODA that provides for automatic contributions at a specified level and meets

certain requirements, including employer contribution and notice requirements. Similar to the design-based safe harbor under section 401(k)(12), section 401(k)(13) provides an employer the choice between satisfying a matching contribution requirement or a nonelective contribution requirement. Under the matching contribution requirement, the employer can make matching contributions under a basic matching formula that provides for matching contributions on behalf of each eligible NHCE equal to 100% of the employee's elective contributions that do not exceed 1% of compensation and 50% of the employee's elective contributions that exceed 1% but do not exceed 6% of compensation. Alternatively, the employer can make matching contributions under an enhanced matching formula that provides, at each rate of elective contributions, for an aggregate amount of matching contributions that is at least as generous as under the basic matching formula, but only if the rate of matching contributions under the enhanced matching formula does not increase as the employee's rate of elective contributions increases. In addition, the plan must satisfy a notice requirement under section 401(k)(13) that is similar to the notice requirement under section 401(k)(12).

Section 401(m) sets forth a nondiscrimination requirement that applies to a plan providing for matching contributions or employee contributions. Such a plan must satisfy either the nondiscrimination test set forth in section 401(m)(2), called the actual contribution percentage (ACP) test, or one of the design-based alternatives in section 401(m)(10), 401(m)(11), or 401(m)(12). The ACP test in section 401(m)(2) is comparable to the ADP test in section 401(k)(3).

Under section 401(m)(11), a defined contribution plan is treated as satisfying the ACP test with respect to matching contributions if the plan satisfies the ADP safe harbor

of section 401(k)(12) and certain other requirements are satisfied. Similarly, under section 401(m)(12), as added by section 902 of PPA '06, a defined contribution plan that provides for automatic contributions at a specified level is treated as meeting the ACP test with respect to matching contributions if the plan satisfies the ADP safe harbor of section 401(k)(13) and certain other requirements are satisfied.

Final regulations under sections 401(k) and 401(m) were published on December 29, 2004. Sections 1.401(k)-3 and 1.401(m)-3 set forth the requirements for a safe harbor plan under sections 401(k)(12) and 401(m)(11), respectively. On February 24, 2009, final regulations reflecting sections 401(k)(13) and 401(m)(12) were published in the **Federal Register** (74 FR 8200).

Sections 1.401(k)-3(e)(1) and 1.401(m)-3(f)(1) provide that, subject to certain exceptions, a safe harbor plan must be adopted before the beginning of the plan year and be maintained throughout a full 12-month plan year. Accordingly, if, at the beginning of the plan year, a plan contains an allocation formula that includes safe harbor matching or safe harbor nonelective contributions, then the plan may not be amended to revert to ADP or ACP testing for the same plan year (except to the extent permitted under §§1.401(k)-3 and 1.401(m)-3). Sections 1.401(k)-3(g) and 1.401(m)-3(h) set forth the requirements (including a notice and timing requirement) that must be satisfied in order for a plan that satisfies the ADP and ACP tests using safe harbor matching contributions to be amended during the plan year to reduce or suspend such contributions and to satisfy ADP and ACP tests using the current year testing method. Sections 1.401(k)-3(f) and 1.401(m)-3(g) set forth the requirements that must be satisfied (including a notice requirement) in order for a plan to be amended after the first

day of the plan year to provide that it will satisfy the ADP and ACP tests for that year using safe harbor nonelective contributions, effective as of the first day of that plan year.

Sections 1.401(k)-3(e)(4) and 1.401(m)-3(f)(4) provide that, if a plan terminates during a plan year, the plan will not fail to satisfy the requirements of §§1.401(k)-3(e)(1) and 1.401(m)-3(f)(1) merely because the final plan year is less than 12 months, provided that the plan satisfies the requirements of §§1.401(k)-3 and 1.401(m)-3 through the date of termination and certain other conditions are satisfied (for example, the termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship (comparable to a substantial business hardship described in section 412(d)).¹

On May 18, 2009, proposed regulations under sections 401(k) and 401(m) were published in the **Federal Register** (74 FR 23134), which would permit the mid-year reduction or suspension of safe harbor nonelective contributions in certain circumstances. Written comments were received on the proposed regulations, and a public hearing was held September 23, 2009. After consideration of the comments, these final regulations adopt the provisions of the proposed regulations with certain modifications, the most significant of which are highlighted in the Summary of Comments and Explanation of Revisions.

Summary of Comments and Explanation of Revisions

The proposed regulations would have required, as a condition of the permitted reduction or suspension of safe harbor nonelective contributions, that the employer incur a substantial business hardship (comparable to a substantial business hardship

¹ The definition of substantial business hardship in section 412(d) was relocated to become part of section 412(c) by section 111 of PPA '06.

described in section 412(c)). Several commentators requested that the substantial business hardship requirement be eliminated as a condition of the reduction or suspension. The commentators argued that there were insufficient policy reasons for the rules permitting the reduction or suspension of safe harbor nonelective contributions to be stricter than the rules permitting the reduction or suspension of safe harbor matching contributions, that the determination of whether the employer satisfies each of the elements of the section 412(c) definition of substantial business hardship is unnecessarily burdensome, and that employers will not have certainty that they satisfy the substantial business hardship requirements.

The final regulations make two changes in response to these concerns about demonstrating compliance with the requirement that the employer incur a substantial business hardship (comparable to a substantial business hardship described in section 412(c)). First, the requirement has been modified by replacing the standard in the proposed regulations that the employer have a substantial business hardship (as described in section 412(c)) with a standard that the employer be operating at an economic loss as described in section 412(c)(2)(A). This new standard eliminates the requirement to determine the health of the industry (as described in section 412(c)(2)(B) and (C)) or whether the reduction or suspension of safe harbor nonelective contributions is needed so that the plan will continue (as described in section 412(c)(2)(D)). Second, the final regulations permit an employer to reduce or suspend safe harbor nonelective contributions without regard to the financial condition of the employer if notice is provided to participants before the beginning of the plan year which discloses the possibility that the contributions might be reduced or suspended mid-year. The notice

must also provide that a supplemental notice will be provided to plan participants if a reduction or suspension does occur and that the reduction or suspension will not apply until at least 30 days after the supplemental notice is provided. These regulations do not alter the existing ability of a safe harbor plan to use a contingent notice (as described in §1.401(k)-3(f)(2)) before the beginning of the plan year where the contingent notice indicates that the plan may be amended during the plan year to include safe harbor nonelective contributions and that, if the plan is amended, a follow-up notice will be provided.

In order to achieve uniformity between the rules that apply to a mid-year reduction or suspension of safe harbor matching contributions and the rules that apply to a mid-year reduction or suspension of safe harbor nonelective contributions, the final regulations modify the rules that apply to mid-year amendments reducing or suspending safe harbor matching contributions so that the requirements that apply to a mid-year reduction or suspension of safe harbor nonelective contributions are not stricter than those that apply to a mid-year reduction or suspension of safe harbor matching contributions. Thus, safe harbor matching contributions may be reduced or suspended under a mid-year amendment only if either (i) the employer is operating at an economic loss as described in section 412(c)(2)(A), or (ii) the notice provided to participants before the beginning of the plan year discloses that the contributions might be reduced or suspended mid-year, that participants will receive a supplemental notice if that occurs, and that the reduction or suspension will not apply until at least 30 days after the supplemental notice is provided. Because this requirement is a new limitation on the ability of an employer to amend its plan to reduce or suspend safe harbor matching

contributions, the change is first effective for plan years beginning on or after January 1, 2015.²

The final regulations also provide that guidance of general applicability published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b)) may set forth additional situations in which a plan that includes provisions satisfying the requirements of §1.401(k)-3 will not fail to satisfy the requirements of section 401(k) for a plan year even if the plan is amended during the plan year to implement a mid-year change to those provisions. This will provide the IRS with greater flexibility to develop rules to address special circumstances under which a mid-year change to a section 401(k) safe harbor plan is appropriate, such as an amendment to the plan in connection with a mid-year corporate transaction. This flexibility also extends to mid-year changes to a safe harbor plan under section 401(m) of the Code.

Under the proposed regulations, the reduction or suspension of safe harbor nonelective or matching contributions could not be effective “earlier than the later of 30 days after eligible employees are provided the supplemental notice . . . and the date the amendment is adopted.” The final regulations clarify the intention that the reduction or suspension cannot be effective earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the supplemental notice. Thus, the minimum 30-day waiting period applies solely with respect to the date the supplemental notice is provided and not the date the amendment is adopted.

The preamble to the proposed regulations stated that a plan that is amended during the plan year to reduce or suspend safe harbor contributions (whether

² The preamble to the proposed regulations indicated that the IRS and Treasury were considering adding a requirement that employers provide advance notice regarding the possibility of reduced or suspended safe harbor contributions.

nonelective contributions or matching contributions) must prorate the otherwise applicable compensation limit under section 401(a)(17) in accordance with the requirements of §1.401(a)(17)-1(b)(3)(iii)(A). Some commentators asked for clarification as to how these rules apply. Such an explanation of the application of the rules of section 401(a)(17) is beyond the scope of these section 401(k) and (m) regulations.

Some commentators requested that the regulations permitting a mid-year amendment reducing or suspending safe harbor nonelective contributions apply with respect to amendments adopted before the proposed regulations were published in the Federal Register. Because the regulations in effect before the proposed regulations were published clearly prohibited such a plan amendment, any employer that adopted such a plan amendment violated the rules applicable under section 401(k) and, if applicable, section 401(m). The Employee Plans Compliance Resolution System (EPCRS) provides a method to correct such a violation. See Appendix A.05(2)(d)(iii) of Rev. Proc. 2013-12 (2013-4 IRB 313, 367), see §601.601(d)(2).

Applicability Dates

These regulations generally apply to amendments adopted after May 18, 2009, the effective date previously provided in the proposed regulations. The amendments to the requirements for permitted mid-year reductions or suspensions of safe harbor matching contributions apply for plan years beginning on or after January 1, 2015.

Special Analyses

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not

required. It has also been determined that 5 U.S.C. 533(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that small employers that take advantage of the provisions in these regulations will likely see a modest reduction in the cost of providing pensions to their employees. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are William D. Gibbs and Pamela R. Kinard, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

Part 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the sectional authority for § 1.401(k)-3 to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.401(k)-3 is also issued under 26 U.S.C. 401(m)(9).

Par. 2. Section 1.401(k)-0 is amended by revising the entries for §1.401(k)-3(g), (g)(1) and (g)(2) to read as follows:

§1.401(k)-0. Table of contents.

* * * * *

§1.401(k)-3 Safe harbor requirements.

* * * * *

(g) Permissible reduction or suspension of safe harbor contributions.

(1) General rule.

(i) Matching contributions.

(ii) Nonelective contributions.

(2) Supplemental notice.

* * * * *

Par. 3. Section 1.401(k)-3 is amended by:

1. Revising the second sentence in paragraph (e)(1).

2. Revising paragraphs (e)(4)(i) and (e)(4)(ii).

3. Revising paragraph (g).

The revisions read as follows:

§1.401(k)-3 Safe harbor requirements.

* * * * *

(e) * * * (1) * * * In addition, except as provided in paragraph (g) of this section or in guidance of general applicability published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), a plan which includes provisions that satisfy the

rules of this section will not satisfy the requirements of §1.401(k)-1(b) if it is amended to change such provisions for that plan year. * * *

* * * * *

(4) * * *

(i) The plan would satisfy the requirements of paragraph (g) of this section, treating the termination of the plan as a reduction or suspension of safe harbor contributions, other than the requirements of paragraph (g)(1)(i)(A) or (g)(1)(ii)(A) of this section (relating to the employer's financial condition and information included in the initial notice for the plan year) and paragraph (g)(1)(i)(D) or (g)(1)(ii)(D) of this section (requiring that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections); or

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship comparable to a substantial business hardship described in section 412(c).

* * * * *

(g) Permissible reduction or suspension of safe harbor contributions--(1)

General rule--(i) Matching contributions. A plan that provides for safe harbor matching contributions intended to satisfy the requirements of paragraph (c) of this section for a plan year will not fail to satisfy the requirements of section 401(k)(3) merely because the plan is amended during the plan year to reduce or suspend safe harbor matching contributions on future elective contributions (and, if applicable, employee contributions) provided that--

(A) In the case of plan years beginning on or after January 1, 2015, the employer either--

(1) Is operating at an economic loss as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (d) of this section a statement that the plan may be amended during the plan year to reduce or suspend safe harbor matching contributions and that the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (g)(2) of this section;

(C) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the supplemental notice described in paragraph (g)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(k)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (g)) with respect to amounts deferred through the effective date of the amendment.

(ii) Nonelective contributions. For amendments adopted after May 18, 2009, a plan that provides for safe harbor nonelective contributions intended to satisfy the requirements of paragraph (b) of this section for the plan year will not fail to satisfy the requirements of section 401(k)(3) merely because the plan is amended during the plan year to reduce or suspend safe harbor nonelective contributions provided that--

(A) The employer either--

(1) Is operating at an economic loss, as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (d) of this section a statement that the plan may be amended during the plan year to reduce or suspend safe harbor nonelective contributions and that the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (g)(2) of this section;

(C) The reduction or suspension of safe harbor nonelective contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the supplemental notice described in paragraph (g)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of nonelective contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(k)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (g)) with respect to safe harbor compensation paid through the effective date of the amendment.

(2) Supplemental notice. The supplemental notice requirement of this paragraph (g)(2) is satisfied if each eligible employee is given a notice (in writing or such other form as prescribed by the Commissioner) that explains--

(i) The consequences of the amendment that reduces or suspends future safe harbor contributions;

(ii) The procedures for changing their cash or deferred elections and, if applicable, their employee contribution elections; and

(iii) The effective date of the amendment.

* * * * *

Par. 4. Section 1.401(m)-0 is amended by revising the entries for §1.401(m)-3(h), (h)(1) and (h)(2), and adding entries for §1.401(m)-3(h)(1)(i) and (h)(1)(ii), to read as follows:

§1.401(m)-0 Table of contents.

* * * * *

§1.401(m)-3 Safe harbor requirements.

* * * * *

(h) Permissible reduction or suspension of safe harbor contributions.

(1) General rule.

(i) Matching contributions.

(ii) Nonelective contributions.

(2) Supplemental notice.

* * * * *

Par. 5. Section 1.401(m)-3 is amended by:

1. Revising the second sentence in paragraph (f)(1).
2. Revising paragraphs (f)(4)(i) and (f)(4)(ii).
3. Revising paragraph (h).

The revisions read as follows:

§1.401(m)-3 Safe harbor requirements.

* * * * *

(f) * * * (1) * * * In addition, except as provided in paragraph (h) of this section or in guidance of general applicability published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), a plan which includes provisions that satisfy the rules of this section will not satisfy the requirements of §1.401(m)-1(b) if it is amended to change such provisions for that plan year. * * *

* * * * *

(4) * * *

(i) The plan would satisfy the requirements of paragraph (h) of this section, treating the termination of the plan as a reduction or suspension of safe harbor contributions, other than the requirements of paragraph (h)(1)(i)(A) or (h)(1)(ii)(A) of this section (relating to the employer's financial condition and information included in the initial notice for the plan year) and paragraph (h)(1)(i)(D) or (h)(1)(ii)(D) of this section (requiring that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections); or

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship, comparable to a substantial business hardship described in section 412(c).

* * * * *

(h) Permissible reduction or suspension of safe harbor contributions--(1)

General rule--(i) Matching contributions. A plan that provides for safe harbor matching contributions intended to satisfy the requirements of paragraph (c) of this section for a plan year will not fail to satisfy the requirements of section 401(m)(2) merely because the plan is amended during the plan year to reduce or suspend safe harbor matching contributions on future elective deferrals (and, if applicable, employee contributions) provided that--

(A) In the case of plan years beginning on or after January 1, 2015, the employer either--

(1) Is operating at an economic loss as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (e) of this section, a statement that the plan may be amended during the plan year to reduce or suspend safe harbor matching contributions and that the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (h)(2) of this section;

(C) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after

eligible employees are provided the supplemental notice described in paragraph (h)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(m)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to amounts deferred through the effective date of the amendment.

(ii) Nonelective contributions. For plan amendments adopted after May 18, 2009, a plan that provides for safe harbor nonelective contributions intended to satisfy the requirements of paragraph (b) of this section will not fail to satisfy the requirements of section 401(m)(2) for the plan year merely because the plan is amended during the plan year to reduce or suspend safe harbor nonelective contributions provided that—

(A) The employer either--

(1) Is operating at an economic loss as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (e) of this section a statement that the plan may be amended during the plan year to reduce or suspend safe harbor nonelective contributions and that the reduction or suspension will not apply until at

least 30 days after all eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (h)(2) of this section;

(C) The reduction or suspension of safe harbor nonelective contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the supplemental notice described in paragraph (h)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of nonelective contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(m)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to safe harbor compensation paid through the effective date of the amendment.

(2) Supplemental notice. The supplemental notice requirement of this paragraph

(h)(2) is satisfied if each eligible employee is given a notice that satisfies the requirements of §1.401(k)-3(g)(2).

* * * * *

Beth Tucker
Deputy Commissioner for Operations Support.

Approved: June 17, 2013

Mark J. Mazur
Assistant Secretary of the Treasury (Tax Policy).

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