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§ 1.401(m)–1 Employee and matching contributions.

(a) General Rules—(1) *Nondiscriminatory amount of contributions.* A defined contribution plan does not satisfy section 401(a)(4) for a plan year unless the amount of employee and matching contributions to the plan for the plan year satisfies section 401(a)(4). See § 1.401(a)(4)–1(b)(2)(ii). Except as specifically provided otherwise, for plan years beginning after December 31, 1986 (or such later date provided in paragraph (g) of this section) the amount of employee and matching contributions under a plan satisfies the requirements of section 401(a)(4) only if the employee and matching contributions under the plan satisfy the actual contribution percentage test of section 401(m)(2) and paragraph (b) of this section. See § 1.401(a)(4)–1(b)(2)(ii)(B). Also, except as specifically provided otherwise, for plan years beginning after December 31, 1988 (or such later date provided in § 1.401(m)–2(d)), the amount of employee and matching contributions under a plan satisfies the requirements of sections 401(m) and 401(a)(4) only if any multiple use of the alternative methods of compliance with sections 401 (k) and (m) (contained in sections 401(k)(3)(A)(ii)(II) and 401(m)(2)(A)(ii), respectively) is corrected under § 1.401(m)– 2(c). See section 401(m)(9) and § 1.401(m)–2. For these purposes, the employee and matching contributions are combined with the elective and qualified nonelective contributions, if any, that are treated as matching contributions, and the recharacterized elective contributions, if any, that are treated as employee contributions for purposes of section 401(m).

(2) *Other nondiscrimination rules.* Nondiscrimination requirements in addition to those described in paragraph (a)(1) of this section apply to employee and matching contributions under sections 401(a)(4) and 410(b). For example,

under section 401(a)(4) a plan may not discriminate with respect to the availability of benefits, rights, and features under the plan. See §1.401(a)(4)–1(b)(3). The right to make each level of employee contributions, and the right to each level of matching contributions, are benefits, rights, or features subject to this requirement, and each level must therefore generally be available to a group of employees that satisfies section 410(b). See §1.401(a)(4)–4(e)(3) (i) and (iii) (F) through (G). Thus, for example, a plan does not satisfy section 401(a)(4) if it provides a higher rate of matching contributions for highly compensated employees than for non-highly compensated employees. See paragraph (e)(4) of this section for rules relating to the application of section 401(a)(4) to the correction of excess aggregate contributions. See §1.401(a)(4)–11(g)(3)(vii) for special rules relating to correction of violations of the minimum coverage requirements or discriminatory rates of match in a section 401(m) plan. For special rules governing the application of section 410(b) to employee and matching contributions, see §§1.410(b)–7(c)(1) and 1.410(b)–8(a)(1).

(3) *Rules applicable to collectively bargained plans.* The requirements of this section are treated as satisfied by employee and matching contributions under a collectively bargained plan (or the portion of a plan) that automatically satisfies section 410(b). See §§1.401(a)(4)–1(c)(5) and 1.410(b)–2(b)(7). There are no excess aggregate contributions under a plan (or a portion of a plan) that is treated under this paragraph (a)(3) as satisfying the requirements of this section. Thus, the provisions of section 4979 and §54.4979–1 of this chapter do not apply to contributions described in the first sentence of this paragraph (a)(3).

(b) *Actual contribution percentage test*—(1) *General rule.* (i) For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, the actual contribution percentage test is satisfied if—

(A) The actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage for the group of all other eligible employees multiplied by 1.25; or

(B) The excess of the actual contribution percentage for the group of eligible highly compensated employees over the actual contribution percentage for the group of all other eligible employees is not more than two percentage points, and the actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage for the group of all other eligible employees multiplied by two.

(ii) A plan does not fail to satisfy the requirements of this paragraph (b)(1) merely because all of the eligible employees under the plan for a year are highly compensated employees.

(2) *Plan provision requirement.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, a plan that permits employee or matching contributions does not satisfy the requirements of section 401(a) unless it provides that the actual contribution percentage test of section 401(m)(2) will be met. For purposes of this paragraph (b)(2), the plan may incorporate the provisions of section 401(m)(2), this paragraph (b), and, if applicable, section 401(m)(9) and §1.401(m)–2.

(3) *Aggregation of plans*—(i) *General rule.* See §1.401(m)–1(f)(14) for the definition of a plan used for purposes of this section and §1.401(m)–2. That definition contains the exclusive rules for aggregation and disaggregation of plans for purposes of this section and §1.401(m)–2.

(ii) *Restructuring and Permissive Disaggregation.* Effective for plan years beginning after December 31, 1991, restructuring under §1.401(a)(4)–9(c) may not be used to demonstrate compliance with the requirements of section 401(m). See §1.401(a)(4)– 9(c)(3)(ii). For plan years beginning before January 1, 1992, see §1.401(m)–1(g)(5)(ii). An employer may, however, treat a plan benefiting otherwise excludable employees as two separate plans for purposes of sections 401(m) and 410(b) in accordance with §§1.410(b)–6(b)(3) and 1.410(b)–7(c)(3).

(4) *Employee and matching contributions taken into account under the actual contribution percentage test*—(i) *Employee contributions*—(A) *General rule.* An employee contribution is taken into

account under paragraph (b)(1) of this section for the plan year in which the contribution is made to the trust. For this purpose, a payment by the employee to an agent of the plan is treated as a contribution to the trust at the time of payment to the agent if the funds paid are transmitted to the trust within a reasonable period after the payment to the agent.

(B) *Recharacterized elective contributions.* An excess contribution that is recharacterized under §1.401(k)–1(f)(3) is taken into account as an employee contribution for the plan year that includes the time at which the excess contribution is includible in the gross income of the employee under §1.401(k)–1(f)(3)(ii).

(ii) *Matching contributions*—(A) *General rule.* A matching contribution is taken into account under paragraph (b)(1) of this section for a plan year only if the contribution is allocated to the employee's account under the terms of the plan as of any date within the plan year, is actually paid to the trust no later than 12 months after the close of the plan year, and is made on behalf of an employee on account of the employee's elective contributions or employee contributions for the plan year. Matching contributions that do not satisfy these requirements are not taken into account under paragraph (b)(1) of this section for any plan year. Instead, the amount of these matching contributions must satisfy the requirements of section 401(a)(4) (without regard to the special nondiscrimination rule in paragraph (b)(1) of this section) for the plan year for which they are allocated under the plan, as if they were nonelective contributions and were the only nonelective employer contributions for that year. See §§1.401(a)(4)–1(b)(2)(ii)(B); 1.410(b)–7(c)(1).

(B) *Matching contributions and qualified nonelective contributions used to satisfy actual deferral percentage test.* A matching contribution that is treated as an elective contribution is subject to the actual deferral percentage test of section 401(k)(3) and is not taken into account under paragraph (b)(1) of this section. See §1.401(k)–1(b)(5)(iii) for the rule relating to years before January 1, 1987. A qualified nonelective contribution that is treated as an elective contribution is subject to the actual deferral percentage test of section 401(k)(3) and is not taken into account as a matching contribution under paragraph (b)(1) or (5) of this section.

(C) *Treatment of forfeited matching contributions.* A matching contribution that is forfeited to correct excess aggregate contributions, or because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution, is not taken into account under paragraph (b)(1) of this section.

(5) *Qualified nonelective contributions and elective contributions that may be taken into account under the actual contribution percentage test.* Except as specifically provided otherwise, for purposes of paragraph (b)(1) of this section, all or part of the qualified nonelective contributions and elective contributions made with respect to any or all employees who are eligible employees under the plan of the employer being tested may be treated as matching contributions provided that each of the following requirements (to the extent applicable) is satisfied:

(i) The amount of nonelective contributions, including those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test, satisfies the requirements of section 401(a)(4). See §1.401(a)(4)–1(b)(2).

(ii) The amount of nonelective contributions, excluding those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test and those qualified nonelective contributions treated as elective contributions under §1.401(k)–1(b)(5) for purposes of the actual deferral percentage test, satisfies the requirements of section 401(a)(4). See §1.401(a)(4)–1(b)(2).

(iii) The elective contributions, including those treated as matching contributions for purposes of the actual contribution percentage test, satisfy the requirements of section 401(k)(3).

(iv) The qualified nonelective contributions are allocated to the employee under the plan as of a date within the plan year (within the meaning of §1.401(k)–1(b)(4)(i)(A)), and the elective contributions satisfy §1.401(k)–1(b)(4)(i) for the plan year.

(v) For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, the plan that takes qualified nonelective contributions and elective contributions into account in determining whether employee and matching contributions satisfy the requirements of section 401(m)(2)(A), and the plans to which the qualified nonelective contributions and elective contributions are made, could be aggregated under §1.410(b)–7(d) after application of the mandatory disaggregation rules of §1.410(b)–7(c), as modified in §1.401(k)–1(g)(11). If the plan year of the section 401(m) plan is changed to satisfy the requirement under §1.410(b)–7(d)(5) that the aggregated plans have the same plan year, the elective contributions may be taken into account in the resulting short plan year only if these contributions satisfy the requirements of §1.401(k)–1(b)(4) with respect to the short year, and the qualified nonelective contributions may be taken into account in the resulting short plan year only if these contributions satisfy the requirements of §1.401(k)–1(b)(4)(i)(A) with respect to the short year as if they were elective contributions.

(c) *Additional requirements*—(1) *Coordination with other plans.* Except as expressly permitted under section 401(k) or 401(m), for plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, employee or matching contributions (or elective contributions treated as matching contributions under paragraph (b)(5) of this section) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the employee or matching contributions are made) satisfy the requirements of section 401(a). Indeed, the portion of a plan that consists of employee and matching contributions is treated as a separate plan for purposes of sections 401(a)(4) and 410(b). See §1.410(b)–7(c)(1). Similarly, although matching contributions and qualified nonelective contributions may be used to enable a plan to satisfy the minimum contribution or benefit requirements under section 416, matching contributions that are used in this way are not treated as matching contributions, and must therefore satisfy the nondiscrimination requirements of section 401(a)(4) without regard to section 401(k) or 401(m). See §1.416–1, M–18 & M–19 and paragraph (f)(12)(iii) of this section. See also §1.401(k)–1(b)(5) for circumstances under which matching contributions may be used to determine whether a plan satisfies the requirements of section 401(k). This paragraph does not apply for purposes of determining whether a plan satisfies the average benefit percentage test of section 410(b)(2)(A)(ii).

(2) *Recordkeeping requirement.* A plan satisfies this section only if the employer maintains the records necessary to demonstrate compliance with the applicable nondiscrimination requirements of paragraph (b) of this section, including records showing the extent to which qualified nonelective contributions and elective contributions are taken into account.

(3) *Consistent application of separate line of business rules.* If an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with §1.414(r)–1(b) for purposes of applying section 410(b), and applies the special rule for employer-wide plans in §1.414(r)–1(c)(2)(ii) to the portion of the plan that consists of matching contributions or to the portion of the plan that consists of employee contributions (the "matching and employee contribution portions"), then the requirements of this section, section 401(m), and §1.401(m)–2 must be applied on an employer-wide rather than a qualified-separate-line-of-business basis to all of the plans or portions of plans taken into account in determining whether those requirements are satisfied by the matching and employee contribution portions of the plan (regardless of whether the other plans or portions of plans also satisfy the requirements necessary to apply the special rule in §1.414(r)–1(c)(2)(ii)). Conversely, if an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with §1.414(r)–1(b) for purposes of applying section 410(b), and does not apply the special rule for employer-

wide plans in §1.414(r)1–(c)(2)(ii) to either the matching or employee contribution portions of the plan, then the requirements of this section, section 401(m) and §1.401(m)–2 must be applied on a qualified-separate-line-of-business rather than an employer-wide basis to all of the plans or portions of plans taken into account in determining whether those requirements are satisfied by the matching and employee contribution portions of the plan (regardless of whether one or more of the other plans or portions of plans is tested under the special rule §1.414(r)–1(c)(2)(ii)). This requirement applies solely for purposes of determining whether the requirements of this section, section 401(m), and §1.401(m)–2 are satisfied by the matching and employee contribution portions of the plan. The rules of this paragraph are illustrated by the following example.

Example. (i) Employer A maintains a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. Under the profit-sharing plan, each $1.00 of elective contributions under the cash or deferred arrangement is matched by $0.50 of employer contributions. Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with §1.414(r)–1(b) for purposes of applying section 410(b). However, Employer A applies the special rule for employer-wide plans in §1.414(r)–1(c)(2)(ii) to the portion of its profitsharing plan that consists of matching contributions. Employer A makes qualified nonelective contributions to the profit-sharing plan for the 1995 plan year.

(ii) Under these facts, the requirements of sections 401(a)(4) and 410(b) must be applied on an employer-wide rather than a qualified-separate-line-of-business basis in determining whether these qualified nonelective contributions (and any elective contributions under the cash or deferred arrangement) satisfy the requirements of §1.401(m)–1(b)(5), and thus whether they may be taken into account under the actual contribution percentage test. Thus, in order for the nonelective contributions to be used to satisfy the actual contribution percentage test, both (1) the total amount of nonelective contributions under the profit-sharing plan, including the qualified nonelective contributions to be used to satisfy the actual contribution percentage test, and (2) the total amount of nonelective contributions under the profit-sharing plan, excluding the qualified nonelective contributions to be used to satisfy the actual contribution percentage test, must satisfy the requirements of section 401(a)(4) on an employer-wide basis. Further, in order for any elective contributions under the cash or deferred arrangement to be used to satisfy the actual contribution percentage test, the total amount of elective contributions, including any treated as matching contributions under the actual contribution percentage test, must satisfy the requirements of section 401(k)(3) on an employer-wide basis. Of course, in order for the profit-sharing plan to satisfy section 401(a), it must still satisfy sections 410(b) and 401(a)(4) on a qualified-separate-line-of-business basis.

(d) *Examples.* The provisions of paragraphs (a) through (c) of this section are illustrated by the following examples. Assume in each case that the employer is a corporation, and that the employer's taxable year and plan year are the calendar year. Also assume that the employee contributions, elective contributions, matching contributions and qualified nonelective contributions meet the applicable requirements of sections 401(a)(4) and 410. For methods to be used to correct excess aggregate contributions, see paragraph (e) of this section.

Example 1. (i) Employer L maintains a profit-sharing plan providing for voluntary employee contributions. L does not maintain a plan that includes a cash or deferred arrangement. For the 1988 plan year, the actual contribution percentages (ACPs) for the highly compensated employees and nonhighly compensated employees are shown in the following chart:

	Actual contribution percentage
Highly compensated	10
Nonhighly compensated	5

(ii) This plan fails to qualify under either of the tests of section 401(m)(2)(A) because the ACP for highly compensated employees is more than 125 percent of the ACP for nonhighly compensated employees, and exceeds the ACP for the nonhighly compensated employees by more than two percentage points. L must either reduce the ACP for the highly compensated employees to seven percent (to satisfy the 200 percent/two percentage point test) or increase the ACP of the nonhighly compensated employees to eight percent (to satisfy the 125 percent test).

Example 2. (i) Employer M maintains a plan under which each dollar of employee contributions is matched with $.50 of employer contributions. M maintains no other plan. For the 1988 plan year, the average percentage of compensation contributed to the plan

for the employees is shown in the following chart:

	Employee contributions (percent)	Matching contributions (percent)	Actual contribution percentage
Highly compensated	10	5	15
Nonhighly compensated	5	2.5	7.5

(ii) This plan fails to satisfy either of the tests of section 401(m)(2)(A). Employer M must either reduce the actual contribution percentage of the highly compensated employees to 9.5 percent (to satisfy the 200 percent/two percentage point test) or increase the actual contribution percentage of the nonhighly compensated employees to 12 percent (to satisfy the 125 percent test).

Example 3. (i) Employer N maintains a plan that contains a cash or deferred arrangement and permits employee contributions. Employer N includes elective contributions in compensation as permitted under §1.414(s)–1(c)(4)(i). See §1.401(k)–1(g)(2)(i). For the 1988 plan year, the average percentages of compensation contributed to the plan by the highly compensated and nonhighly compensated employees as elective contributions and employee contributions are shown in the chart below. Elective contributions meet the requirements of paragraph (b)(5) of this section.

	Elective Contributions (percent)	Employee Contributions (percent)
Highly compensated	10	10
Nonhighly compensated	10	6

(ii) The plan fails to meet the requirements of section 401(m) because the actual contribution percentage (ACP) of highly compensated employees is more than 125 percent of the ACP of the other employees, and exceeds the ACP of the other employees by more than two percentage points.

(iii) The plan provides that elective contributions made by nonhighly compensated employees may be used to meet the requirements of section 401(m) to the extent needed under that section. Under this provision, the plan uses elective contributions equal to two percent of the compensation of the nonhighly compensated employees in the ACP test. After this adjustment, the actual deferral percentages (ADPs) and ACPs are as follows:

	ADP (percent)	ACP (percent)
Highly compensated	10	10
Nonhighly compensated	8	8

(iv) The ACP of the highly compensated employees meets the requirements of section 401(m)(2)(A)(i) because it is 125 percent of that for nonhighly compensated employees. The ADP of the highly compensated employees similarly satisfies the 125 percent test. The plan would also meet the requirements of section 401(m) if all elective contributions were used in the ACP test. This is because the ACP for the highly compensated employees (20 percent) would be 125 percent of the ACP for the nonhighly compensated employees (16 percent).

Example 4. (i) Employer P maintains a plan that includes a cash or deferred arrangement. Elective contributions, qualified nonelective contributions (QNCs), employee contributions, and matching contributions are made to the plan. Employer P includes elective contributions in compensation as permitted under §1.414(s)–1(c)(4)(i). The elective contributions and QNCs meet the requirements of paragraph (b)(5) of this section. For the 1989 plan year, the QNCs, elective contributions, and employee and matching contributions, expressed as a percentage of compensation, are shown in the following table:

	QNCs (percent)	Elective Contributions (percent)	Employee/ Matching Contributions (percent)
Highly compensated	3	5	6
Nonhighly compensated	3	4	2

(ii) The elective contributions meet the test of section 401(k)(3)(A)(ii). The employee and matching contributions, however, do not meet the actual contribution percentage (ACP) test. P may not use any QNCs of the nonhighly compensated employees to meet the ACP test because the remaining QNCs would discriminate in favor of the highly compensated employees. However, P could make additional QNCs or matching contributions of two percent of compensation on behalf of the nonhighly compensated employees. Alternatively, P could treat all QNCs for all employees and elective contributions equal to one percent of compensation for nonhighly compensated employees as matching contributions and make additional QNCs of 1.2 percent of compensation on behalf of nonhighly compensated employees. The ACPs for highly and nonhighly compensated employees would then be nine percent and 7.2 percent, respectively, thus satisfying the 125 percent test. The actual deferral percentages would be five and three percent, respectively, which would satisfy the 200 percent/two percentage point test.

Example 5. (i) Employer P maintains a cash or deferred arrangement. Elective contributions, qualified nonelective contributions (QNCs), employee contributions, and matching contributions are made to the plan. The elective contributions and the QNCs meet the requirements of paragraph (b)(5) of this section. For the 1989 plan year, the contributions are shown in the following table:

	QNCs (percent)	Elective contributions (percent)	Employee/ matching contributions (percent)
Highly compensated	0	6	6
Nonhighly compensated	3	3	3

(ii) The QNCs may be used in the actual deferral percentage (ADP) test, the actual contribution percentage (ACP) test, or a combination of the two. If P treats one-third of the QNCs as elective contributions and two-thirds as matching contributions, the ADPs for the highly compensated and nonhighly compensated employees are six and four percent, respectively, and satisfy the 200 percent/two percentage point test. Similarly, the ACPs for the two groups are six and five percent, respectively, and satisfy the 125 percent test.

(e) *Correction of excess aggregate contributions*—(1) *General rule*—(i) *Permissible correction methods.* A plan satisfies the requirements of section 401(m)(2) and paragraph (b)(1) of this section with respect to the amount of employee and matching contributions under the plan if the employer, in accordance with the terms of the plan and paragraph (b)(5) of this section, makes qualified nonelective contributions or elective contributions that, in combination with employee and matching contributions, satisfy the actual contribution percentage test. In addition, a plan subject to the requirements of section 401(m) satisfies section 401(m)(2) and paragraph (b)(1) of this section if, in accordance with the terms of the plan, excess aggregate contributions on behalf of highly compensated employees (and the income allocable to these contributions) are distributed in accordance with paragraph (e)(3) of this section. Matching contributions (and the income allocable to matching contributions) that are not vested (determined without regard to any increase in vesting that may occur after the date of the forfeiture) may also be forfeited to correct excess aggregate contributions. Finally, a plan may limit employee or matching contributions in a manner that prevents excess aggregate contributions from being made.

(ii) *Combination of correction methods.* The plan may permit a combination of the methods listed in paragraph (e)(1)(i) of this section to avoid or correct excess aggregate contributions.

(iii) *Impermissible correction methods.* Excess aggregate contributions may not be corrected by forfeiting vested matching contributions, recharacterizing matching contributions, or not making matching contributions required under the terms of the plan. Excess aggregate contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess aggregate contributions may not be corrected using the retroactive correction rules of §1.401(a)(4)–11(g). See §1.401(a)(4)–11(g)(3)(vii) and (5). See paragraph (e)(5) of this section for the effects of a failure to correct excess aggregate contributions. See §1.411(a)–4(b)(7) regarding permissible forfeitures of matching contributions.

(iv) *Partial correction.* Any distribution of less than the entire amount of excess aggregate contributions (and income) is treated as a pro rata distribution of excess aggregate contributions and income.

(2) *Amount of excess aggregate contributions*—(i) *General rule.* The amount of excess aggregate contributions for a highly compensated employee for a plan year is the amount (if any) by which the employee's employee and matching contributions must be reduced for the employee's actual contribution ratio to equal the highest permitted actual contribution ratio under the plan. To calculate the highest permitted actual contribution ratio under a plan, the actual contribution ratio of the highly compensated employee with the highest actual contribution ratio is reduced by the amount required to cause the employee's actual contribution ratio to equal the ratio of the highly compensated employee with the next highest actual contribution ratio. If a lesser reduction would enable the arrangement to satisfy the actual contribution percentage test, only this lesser reduction may be made. This process must be repeated until the plan satisfies the actual contribution percentage test. The highest actual contribution ratio remaining under the plan after leveling is the highest permitted actual contribution

ratio. For each highly compensated employee, the amount of excess aggregate contributions for a plan year is equal to the total employee and matching contributions, plus qualified nonelective contributions and elective contributions taken into account in determining the employee's actual contribution ratio under paragraph (f)(1) of this section, minus the amount determined by multiplying the employee's actual contribution ratio (determined after application of this paragraph (e)(2)) by the compensation used in determining the ratio. In no case may the amount of excess aggregate contributions with respect to any highly compensated employee exceed the amount of employee and matching contributions made on behalf of the highly compensated employee for the plan year.

(ii) *Coordination with correction of excess contributions.* The amount of excess aggregate contributions with respect to an employee for a plan year is calculated after determining the excess contributions to be recharacterized as employee contributions for the plan year.

(iii) *Correction of family members.* The determination and correction of excess aggregate contributions of a highly compensated employee whose actual contribution ratio is determined under the family aggregation rules of paragraph (f)(1)(ii)(C) of this section, is accomplished by reducing the actual contribution ratio as required under this paragraph (e)(2) and allocating the excess aggregate contributions for the family group among the family members in proportion to the employee and matching contributions of each family member that are combined to determine the actual contribution ratio.

(3) *Corrective distribution of excess aggregate contributions (and income)*—(i) *Genera1 rule.* Excess aggregate contributions (and income allocable thereto) are distributed in accordance with this paragraph (e)(3) only if the excess aggregate contributions and allocable income are designated by the employer as a distribution of excess aggregate contributions (and income), and are distributed to the appropriate highly compensated employees after the close of the plan year in which the excess aggregate contributions arose and within 12 months after the close of that plan year. In the event of a complete termination of the plan during the plan year in which an excess aggregate contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of a highly compensated employee is distributed during the plan year in which the excess aggregate contribution arose, the distribution is deemed to have been a corrective distribution of excess aggregate contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(ii) *Income allocable to excess aggregate contributions*—(A) *General rule.* The income allocable to excess aggregate contributions is equal to the sum of the allocable gain or loss for the plan year and, if the plan so provides, the allocable gain or loss for the period between the end of the plan year and the date of distribution (the "gap period").

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess aggregate contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participants' accounts. See §1.401(a)(4)–1(c)(8).

(C) *Alternative method of allocating income.* A plan may allocate income to excess aggregate contributions by multiplying the income for the plan year (and the gap period, if the plan so provides) allocable to employee contributions, matching contributions, and amounts treated as matching contributions by a fraction. The numerator of the fraction is the excess aggregate contributions for the employee for the plan year. The denominator of the fraction is equal to the sum of:

(*1*) The total account balance of the employee attributable to employee and matching contributions, and amounts treated as matching contributions as of the beginning of the plan year; plus

(*2*) The employee and matching contributions, and amounts treated as

matching contributions for the plan year and for the gap period if gap period income is allocated.

(D) *Safe harbor method of allocating gap period income.* Under the safe harbor method, income on excess aggregate contributions for the gap period is equal to 10 percent of the income allocable to excess aggregate contributions for the plan year (calculated under the method described in paragraph (e)(3)(ii)(C) of this section), multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of the month is treated as made on the last day of the preceding month. A distribution made after the fifteenth day of the month is treated as made on the first day of the next month.

(E) *Allocable income for recharacterized elective contributions.* If recharacterized elective contributions are distributed as excess aggregate contributions, the income allocable to the excess aggregate contributions is determined as if recharacterized elective contributions had been distributed as excess contributions. Thus, income must be allocated to the recharacterized amounts distributed using the methods in §1.401(k)–1(f)(4)(ii).

(iii) *No employee or spousal consent required.* A distribution of excess aggregate contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(iv) *Treatment of corrective distributions and forfeited contributions as employer contributions.* Excess aggregate contributions, including forfeited matching contributions, are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan. Forfeited matching contributions that are reallocated to the accounts of other participants for the plan year in which the forfeiture occurs are treated under section 415 as annual additions for the participants to whose accounts they are reallocated and for the participants from whose accounts they are forfeited.

(v) *Tax treatment of corrective distributions*—(A) *Genera1 rule.* Except as otherwise provided in this paragraph (e)(3)(v), a corrective distribution of excess aggregate contributions (and income) that is made within 2½ months after the end of the plan year for which the excess aggregate contributions were made is includible in the employee's gross income for the taxable year of the employee ending with or within the plan year for which the excess aggregate contributions were made. A corrective distribution of excess aggregate contributions (and income) that is made more than 2½ months after the plan year for which the excess aggregate contributions were made is includible in the employee's gross income in the taxable year of the employee in which distributed. The portion of the distribution that is treated as an investment in the contract under section 72 is determined without regard to any plan contributions other than those distributed as excess aggregate contributions. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4980A. See paragraph (e)(5) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year.

(B) *Rule for de minimis distributions.* If the total excess contributions and excess aggregate contributions distributed to a recipient under a plan for any plan year are less than $100 (excluding income), a corrective distribution of excess aggregate contributions (and income) is includible in gross income in the recipient's taxable year in which the corrective distribution is made.

(C) *Rule for certain 1987 and 1988 excess aggregate contributions.* Distributions for plan years beginning in 1987 and 1988 to which the de minimis rule of this paragraph (e)(3)(v) of this section would otherwise apply may be reported by the recipient, at the recipient's option, either in the year described in paragraph (e)(3)(v)(A) of this section, or in the year described in paragraph (e)(3)(v)(B) of this section. This special rule may be used only for distributions

made within 2½ months after the close of the plan year, but not later than April 17, 1989.

(vi) *No reduction of required minimum distribution.* A distribution of excess aggregate contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9).

(vii) *No corrective distribution of matching contributions other than excess aggregate contributions.* A matching contribution that is an excess aggregate contribution may be distributed as provided in section 401(m)(6) and §1.401(m)–1(e)(3). A matching contribution may not be distributed merely because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution. See §§1.401(k)–1(f)(5)(iii) and 1.411(a)–4(b)(7) regarding permissible forfeitures of matching contributions that relate to excess contributions, excess deferrals, or excess aggregate contributions.

(4) *Coordination with section 401(a)(4).* A matching contribution is taken into account under section 401(a)(4) even if it is distributed, unless the distributed contribution is an excess aggregate contribution. However, the method of distributing excess aggregate contributions provided in the plan must satisfy the requirements of section 401(a)(4). This requires that after correction each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). See §1.401(a)(4)–4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if employee contributions are distributed under this paragraph (e) to highly compensated employees to the extent needed to meet the requirements of section 401(m)(2), while matching contributions attributable to employee contributions remain allocated to the highly compensated employees' accounts. See §1.411(a)–4(b)(7) for a rule that allows forfeiture of these matching contributions to avoid a violation of section 401(a)(4). See also §1.401(a)(4)–11(g)(3)(vii)(B) regarding the use of additional allocations to the accounts of nonhighly compensated employees for the purpose of correcting a discriminatory rate of matching contributions. A method of distributing excess aggregate contributions will not be considered discriminatory solely because, in accordance with the terms of the plan, unmatched employee contributions that exceed the highest rate at which employee contributions are matched are distributed before matched employee contributions, or matching contributions are distributed (or forfeited) prior to employee contributions. See *Example 6* in paragraph (e)(6) of this section.

(5) *Failure to correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess aggregate contributions within 2½ months after the close of the plan year for which the excess aggregate contributions are made, the employer will be liable for a 10 percent excise tax on the amount of the excess aggregate contributions. See section 4979 and §54.4979–1. Qualified nonelective contributions properly taken into account under paragraph (b)(5) of this section for a plan year may enable a plan to avoid having excess aggregate contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess aggregate contributions are not corrected within 12 months after the close of the plan year for which they were made, the plan will fail to meet the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and all subsequent plan years in which the excess aggregate contributions remain in the plan.

(6) *Examples.* The principles of this paragraph (e) are illustrated by the following examples. Assume in each example that no income or loss is allocable to elective, employee, or matching contributions.

Example 1. (i) Employer A maintains a thrift plan that does not include a cash or deferred arrangement. In 1990, the actual contribution percentage (ACP) for nonhighly compensated employees is four percent.

Thus, the ACP for the group of highly compensated employees may not exceed six percent. The three highly compensated employees who participate have the following compensation, contributions, and actual contribution ratios (ACRs):

Employee	Compensation	Employee and matching contributions	Actual contribution ratio (percent)
A	100,000	10,000	10
B	90,000	6,300	7
C	75,000	3,750	5
Average			7.33

(ii) The maximum amount of employee and matching contributions permitted on behalf of A, B, and C is determined by reducing contributions in order of their ACRs, beginning with the highest ACR. Thus, A's contribution is first reduced to $7,000 or 7.0 percent. Since the resulting ACP of 6.33 percent still exceeds the permitted highly compensated ACP of six percent, the contributions allocated to A and B must be further reduced to 6.5 percent. This results in an ACP of six percent, which meets the 200 percent/two percentage point test. The excess aggregate contributions for A and B are $3,500 and $450, respectively.

Example 2. (i) Employee A is the sole highly compensated participant in a cash or deferred arrangement maintained by Employer X. The plan that includes the arrangement, Plan X, provides a fully vested matching contribution equal to 50 percent of elective contributions. Plan X is a calendar year plan. Employer X includes elective contributions in compensation as permitted under §1.414(s)–1(c)(4)(i). See §1.401(k)–1(g)(2)(i). Plan X corrects excess contributions by recharacterization. For the 1988 plan year, A's compensation is $58,333, and A's elective contributions are $7,000. The actual deferral percentages and actual contribution percentages of A and other employees under Plan X are shown below:

	Actual deferral percentage	Actual contribution percentage
Employee A	12	6
Nonhighly compensated	8	4

(ii) In February 1989, Employer X determines that A's actual deferral ratio must be reduced to 10 percent, or $5,833, which requires a recharacterization of $1,167 as an employee contribution. This increases A's actual contribution ratio to eight percent ($3,500 in matching contributions plus $1,167 recharacterized as employee contributions, divided by $58,333 in compensation). Since A's actual contribution ratio must be limited to six percent for Plan X to satisfy the actual contribution percentage test, Plan X must distribute $1,167 of A's employee and matching contributions. If $1,167 in matching contributions is distributed, this will correct the excess aggregate contributions and will not result in a discriminatory rate of matching contributions. See *Example 8.*

Example 3. Same as *Example 2,* except that in 1988 A also had elective contributions of $1,313 under Plan Y, maintained by an employer unrelated to X. In January 1989, A requests and receives a distribution of $1,000 in excess deferrals from Plan X. Pursuant to the terms of Plan X, A forfeits the $500 match on the excess deferrals to correct a discriminatory rate of match (see *Example 8*). The $1,167 that would otherwise have been recharacterized for Plan X to satisfy the actual deferral percentage test is reduced by the $1,000 already distributed as an excess deferral, leaving $167 to be recharacterized. See §1.401(k)–1(f)(5)(i). Pursuant to the terms of Plan X, A forfeits the $83.50 match on the recharacterized $167 to correct a discriminatory rate of match. A's actual contribution ratio is now 5.29 percent ($2,916.50 ($3,500–$500–$83.50)) in matching contributions plus $167 in employee contributions, divided by $58,333 in compensation. Since Plan X satisfies the actual contribution percentage test, no further distribution is required or permitted.

Example 4. Same as *Example 3,* except that A does not request a distribution of excess deferrals until March 1989. Employer X has already recharacterized $1,167 as employee contributions. Under §1.402(g)–1(e)(6), the amount of excess deferrals is reduced by the amount of excess contributions that are recharacterized. Because the amount recharacterized is greater than the excess deferrals, Plan X is neither required nor permitted to make a distribution of excess deferrals, and the recharacterization has corrected the excess deferrals.

Example 5. For the 1987 plan year, Employee B defers $7,000 under Plan C and $1,000 under plan D. Plans C and D are maintained by unrelated Employers C and D; both Plans C and D have calendar plan years. Plan C provides a fully vested, 100 percent matching contribution and does not take elective contributions into account under section 401(m) or take matching contributions into account

under section 401(k). Employer C determines that B has excess contributions of $600 and excess aggregate contributions of $1,600. B timely requests and receives a distribution of the $1,000 excess deferral from Plan C, and pursuant to the terms of Plan C, forfeits the corresponding $1,000 matching contribution to correct a discriminatory rate of match (see *Example 8*). Plan C provides that excess contributions and excess aggregate contributions are corrected by distribution. No distribution is required or permitted to correct the excess contributions because $1,000 has been distributed from this plan as excess deferrals. The distribution required to correct the excess aggregate contributions (after forfeiting the matching contribution) is $600 ($1,600 in excess aggregate contributions minus $1,000 in forfeited matching contributions). If B had corrected the excess deferrals of $1,000 by withdrawing $1,000 from Plan D, Plan C would have had to correct the $600 excess contributions in Plan C by distributing $600. Since B then would have forfeited $600 (instead of $1,000) in matching contributions, B would have had $1,000 ($1,600 in excess aggregate contributions minus $600 in forfeited matching contributions) remaining of excess aggregate contributions in Plan C. These would have been corrected by distributing an additional $1,000 from Plan C.

Example 6. Employee B is the sole highly compensated employee in a thrift plan under which the employer matches 100 percent of employee contributions up to two percent of compensation, and 50 percent of employee contributions up to the next four percent of compensation. For the 1988 plan year, B has compensation of $100,000. B makes an employee contribution of $7,000, or seven percent, and receives a four percent matching contribution of $4,000. Thus, B's actual contribution ratio (ACR) is 11 percent. The actual contribution percentage for the nonhighly compensated employees is five percent, and the employer determines that B's ACR must be reduced to seven percent to comply with the rules of section 401(m). In this case, the plan satisfies the requirements of this paragraph if it distributes the unmatched employee contributions of $1,000, and $2,000 of matched employee contributions with their related matches of $1,000. This would leave B with four percent employee contributions, and three percent matching contributions, for an ACR of seven percent. The plan could instead distribute all matching contributions. The plan would fail to meet the requirements of this paragraph if it distributed $4,000 (four percent) of B's employee contributions and none of B's matching contributions because this would result in a discriminatory rate of matching contributions. See §1.401(m)–1(e)(2) and (4). See also *Example 8*.

Example 7. (i) Employee C is a highly compensated employee in Employer X's thrift plan, which matches 100 percent of employee contributions up to five percent of compensation. The matching contribution is vested at the rate of 20 percent per year. In 1991, C makes $5,000 in employee contributions and receives $5,000 of matching contributions. C is 60 percent vested in the matching contributions at the end of the 1991 plan year.

(ii) In February 1992, X determines that C has excess aggregate contributions of $1,000. The plan provides that only matching contributions will be distributed as excess aggregate contributions.

(iii) X has two options available in distributing C's excess contributions. The first option is to distribute $600 of vested matching contributions and forfeit $400 of nonvested matching contributions. These amounts are in proportion to C's vested and nonvested interests in all matching contributions. The second option is to distribute $1,000 of vested matching contributions, leaving the nonvested matching contributions in the plan.

(iv) If the second option is chosen, the plan must also provide a separate vesting schedule for vesting these nonvested matching contributions. This is necessary because the nonvested matching contributions must vest as rapidly as they would have had no distribution been made. Thus, 50 percent must vest in each of the next two years.

(v) The plan will not satisfy the nondiscriminatory availability requirement of section 401(a)(4) if only nonvested matching contributions are distributed because the effect is that matching contributions for highly compensated employees vest more rapidly than those for nonhighly compensated employees. See §1.401(m)–1(e)(4).

Example 8. (i) Employer B maintains a calendar year profit sharing plan that includes a cash or deferred arrangement. Elective contributions are matched at the rate of 100 percent. After-tax employee contributions are permitted under the plan only for nonhighly compensated employees and are matched at the same rate. No employees make excess deferrals. Employee A, a highly compensated employee, makes an $8,000 elective contribution and receives an $8,000 matching contribution.

(ii) Employer B performs the actual deferral percentage (ADP), the actual contribution percentage (ACP), and the multiple use tests. To correct failures of the ADP and ACP tests, the plan distributes to A $1,000 of excess contributions and $500 of excess aggregate contributions. After the distributions, A's contributions for the year are $7,000 of elective contributions and $7,500 of matching contributions. As a result, A has received a higher effective rate of matching contributions than nonhighly compensated employees ($7,000 of elective contributions matched by $7,500 is an effective matching rate of 107

percent). If this amount remains in A's account without correction, it will cause the plan to fail to satisfy section 401(a)(4), because only a highly compensated employee receives the higher matching contribution rate. The remaining $500 matching contribution may be forfeited (but not distributed) under section 411(a)(3)(G), if the plan so provides. The plan could instead correct the discriminatory rate of matching contributions by making additional allocations to the accounts of nonhighly compensated employees. See §1.401(a)(4)–11(g)(3)(vii)(B) and (6), *Example 7.*

(f) *Definitions.* The following definitions apply for purposes of this section and §1.401(m)–2 except as otherwise specifically provided:

(1) *Actual contribution percentage*—(i) *General rule.* The actual contribution percentage for a group of employees for a plan year is the average of the actual contribution ratios of the employees in the group. For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, actual contribution ratios and the actual contribution percentage for a group are calculated to the nearest one-hundredth of a percentage point.

(ii) *Actual contribution ratio*—(A) *General rule.* An employee's actual contribution ratio is the sum of the employee and matching contributions allocated to the employee's account for the plan year, and the qualified nonelective and elective contributions treated as matching contributions for the plan year, divided by the employee's compensation for the plan year. If an eligible employee makes no employee contributions and no matching, qualified nonelective contributions, or elective contributions are taken into account with respect to the employee, the actual contribution ratio of the employee is zero. See paragraphs (b)(4), (b)(5), and (f)(2) of this section for rules regarding the employee and matching contributions, qualified nonelective and elective contributions, and compensation that are taken into account in calculating this fraction.

(B) *Highly compensated employee eligible under more than one plan.* The actual contribution ratio of a highly compensated employee who is eligible to participate in more than one plan of an employer to which employee or matching contributions are made is calculated by treating all the plans in which the employee is eligible to participate as one plan. However, plans that are not permitted to be aggregated under §1.410(b)–7(c), as modified in §1.401(k)–1(g)(11), are not aggregated for this purpose. For example, if a highly compensated employee with compensation of $80,000 may receive matching contributions under two plans of an employer, the employee's actual contribution ratio under each plan is calculated by dividing the employee's total matching contributions under both plans by $80,000, unless the plans are required to be disaggregated. In that case, the actual contribution ratio of the employee under each plan is to be calculated by dividing the employee's matching contributions under that plan by $80,000. See paragraph (b)(3) of this section for the treatment of certain multiple plans. For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, if a highly compensated employee participates in two or more plans that have different plan years, this paragraph (f)(1)(ii) is applied by treating all plans whose plan years end with or within the same calendar year as a single plan.

(C) *Employees subject to family aggregation rules—(1)* Aggregation of employee contributions and other amounts. For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, if a highly compensated employee is subject to the family aggregation rules of section 414(q)(6) because that employee is either a five-percent owner or one of the 10 most highly compensated employees, the combined actual contribution ratio for the family group (treated as one highly compensated employee) must be determined by combining the employee contributions, matching contributions, amounts treated as matching contributions, and compensation of all family members.

(*2*) *Effect on actual contribution percentage of nonhighly compensated employees.* The employee and matching contributions, amounts treated as

matching contributions, and compensation of all family members are disregarded for purposes of determining the actual contribution percentage for the group of highly compensated employees, and the group of nonhighly compensated employees.

(3) *Multiple family groups.* If an employee is required to be aggregated as a member of more than one family group in a plan, all eligible employees who are members of those family groups that include that employee are aggregated as one family group.

(2) *Compensation.* The term *compensation* means compensation as defined in §1.401(k)–1(g)(2)(i).

(3) *Elective contributions.* The term "elective contribution" means elective contribution as defined in §1.401(k)–1(g)(3).

(4) *Eligible employee*—(i) *General rule.* The term "eligible employee" means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for a plan year. For example, if an employee must perform ministerial or mechanical acts (e.g., formal application for participation or consent to payroll withholding) in order to be eligible to make an employee contribution for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs these acts. An employee who is unable to make an employee contribution or to receive an allocation of matching contributions because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (e.g., satisfy a minimum period of service requirement) in order to be eligible to make an employee contribution or to receive an allocation of matching contributions for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is an eligible employee for purposes of section 401(m) for a plan year even though the employee may not make an employee contribution or receive an allocation of matching contributions by reason of the suspension. Finally, an employee does not fail to be an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1) or 415(e).

(ii) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, upon commencing employment with the employer or upon the employee's first becoming eligible under any plan of the employer providing for employee or matching contributions, is given a one-time opportunity to elect, and the employee does in fact elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under the plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. In no event is an election made after December 23, 1994 treated as a one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan (whether or not terminated) of the employer.

(5) *Employee.* The term "employee" means an employee as defined in §1.401(k)–1(g)(5).

(6) *Employee contributions.* The term "employee contribution" means any mandatory or voluntary contribution to the plan that is treated at the time of contribution as an after-tax employee contribution (e.g., by reporting the contribution as taxable income subject to applicable withholding requirements) and is allocated to a separate account to which the attributable earnings and losses are allocated. See §1.401(k)–1(a)(2)(ii). The term includes:

(i) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(ii) Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B);

(iii) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;

(iv) Amounts attributable to excess contributions within the meaning of

section 401(k)(8)(B) that are recharacterized as employee contributions; and

(v) Employee contributions to an annuity contract described in section 403(b).

The term does not include repayment of loans, repayment of distributions described in section 411(a)(7)(C), or employee contributions that are transferred to a plan from another plan. For purposes of this paragraph (f)(6), employee contributions described in paragraph (f)(6)(ii) of this section are deemed contributed to a defined contribution plan.

(7) *Employer.* The term "employer" means the employer as defined in §1.401(k)–1(g)(6).

(8) *Excess aggregate contributions.* The term "excess aggregate contribution" means, with respect to any plan year, the excess of the aggregate amount of the employee and matching contributions (and any qualified nonelective contribution or elective deferral taken into account in computing the contribution percentage) actually made on behalf of highly compensated employees for the plan year, over the maximum amount of contributions permitted under the limitations of section 401(m)(2)(A). The amount of excess aggregate contributions for each highly compensated employee is determined by using the method described in paragraph (e)(2) of this section. For purposes of this paragraph, qualified matching contributions treated as elective contributions in accordance with §1.401(k)–1(b)(5) are disregarded.

(9) *Excess contributions.* The term "excess contribution" means an excess contribution as defined in §1.401(k)–1(g)(7)(i).

(10) *Excess deferrals.* The term "excess deferrals" means excess deferral as defined in §1.402(g)–1(e)(1)(iii).

(11) *Highly compensated employee.* The term "highly compensated employee" means a highly compensated employee as defined in section 414(q).

(12) *Matching contributions*—(i) *In general.* The term "matching contribution" means:

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral (as defined in §1.402(g)–1(b)); and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective contributions.

(ii) *Employer contributions made on account of employee or elective contributions.* For purposes of paragraph (f)(12)(i) of this section, whether an employer contribution is made on account of an employee contribution or an elective contribution is determined on the basis of all relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. Thus, for example, an employer contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan or a plan described in §1.402(g)–1(b) is not a matching contribution. Notwithstanding the foregoing, for plan years beginning before January 1, 1992, an employer may elect to take into account as matching contributions, contributions made to a plan pursuant to an arrangement under which the employer makes contributions to the plan on account of either employee contributions to the plan or contributions made by an employee to an employer-sponsored savings arrangement that are not held in the plan, provided that the arrangement was in effect prior to August 8, 1988.

(iii) *Contributions used to meet the requirements of section 416.* For plan years beginning after December 31, 1988, a contribution or allocation that is used to meet the minimum contribution or benefit requirement of section 416 is not treated as made on account of an employee or elective contribution and therefore is not a matching contribution.

(13) *Nonelective contributions.* The term "nonelective contribution" means

nonelective contributions as defined in §1.401(k)–1(g)(10).

(14) *Plan.* The term "plan" means a plan as defined in §1.401(k)–1(g)(11).

(15) *Qualified nonelective contributions.* The term "qualified nonelective contribution" means qualified nonelective contributions as defined in §1.401(k)–1(g)(13)(ii).

(16) *Section 401(k) plan.* The term *section 401(k) plan* means a section 401(k) plan within the meaning of §1.410(b)–9.

(17) *Section 401(m) plan.* The term *section 401(m) plan* means a section 401(m) plan within the meaning of §1.410(b)–9.

(g) *Effective dates*—(1) *General rule.* Except as provided in paragraphs (g)(2), (g)(3), (g)(4), and (g)(5) of this section, or as specifically provided otherwise in this section, this section is effective for plan years beginning after December 31, 1986.

(2) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, this section does not apply to years beginning before the earlier of—

(i) January 1, 1989, or

(ii) The date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986).

(3) *Certain annuity contracts*—(i) In the case of an annuity contract under section 403(b), not maintained pursuant to a collective bargaining agreement, except as otherwise provided in paragraph (g)(5) of this section, this section applies to plan years beginning after December 31, 1988.

(ii) In the case of an annuity contract described in section 403(b) maintained pursuant to a collective bargaining agreement described in paragraph (g)(2)(i) of this section, this section does not apply to years beginning before the earlier of

(A) The later of—

(*1*) January 1, 1989, or

(*2*) The date determined under paragraph (g)(2)(ii) of this section; or

(B) January 1, 1991.

(4) *State and local government plans.* A governmental plan described in section 414(d), including a plan subject to section 403(b)(12)(A)(i) (nonelective plan) is treated as satisfying section 401(m) for plan years beginning before the later of January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously. For purposes of this paragraph (g)(4), the term *governing body with authority to amend the plan* means the legislature, board, commission, council, or other governing body with authority to amend the plan.

(5) *Transition rule for plan years beginning before 1992*—(i) *General rule.* For plan years beginning before January 1, 1992, a reasonable interpretation of the rules set forth in section 401 (k) and (m) of the Internal Revenue Code (as in effect during those years) may be relied upon to determine whether a plan was qualified during those years.

(ii) *Restructuring*—(A) *General rule.* In determining whether the requirements of section 401(m) are satisfied for plan years beginning before January 1, 1992, a plan may be treated as consisting of two or more component plans, each consisting of all of the allocations and other benefits, rights, and features provided to a group of employees under the plan. See §1.401(a)(4)–9(c). An employee may not be included in more than one component plan of the same plan for a plan year under this method. If this method is used for a plan year, the requirements of section 401(m) are applied separately with respect to each component plan for the plan year. Thus, for example, the actual contribution ratio and the amount of excess aggregate contributions, if any, of each eligible employee under each component plan must be determined as if the component plan were a separate plan. This method applies solely for purposes of section 401(m). Thus, for example, the requirements of section 410(b) must still be satisfied by the entire plan.

(B) *Identification of component plans*—(*1*) *Minimum coverage requirement.* The group of eligible employees described in §1.401(m)–1(f)(4) under each component plan must separately satisfy the requirements of section 410(b) as if the component plan were a separate plan. Component plans may not be aggregated to satisfy this requirement.

(*2*) *Commonality requirement.* The group of employees used to identify a component plan must share some common attribute or attributes, other than similar actual contribution ratios. Permissible common attributes include, for example, employment at the same work site, in the same job category, for the same division or subsidiary, or for a unit acquired in a specific merger or acquisition, employment for the same number of years, compensation under the same method (e.g., salaried or hourly), coverage under the same contribution formula, and attributes that could be used as the basis of a classification that would be treated as reasonable under §1.410(b)–4(b). Employees whose only common attribute is the same or similar actual contribution ratios, or another attribute having substantially the same effect as the same or similar actual contribution ratios, are not considered as sharing a common attribute for this purpose. This rule applies regardless of whether the component plan or the plan of which it is a part satisfies the ratio or percentage test of section 410(b).

[T.D. 8357, 56 FR 40534, Aug. 15, 1991, as amended by T.D. 8376, 56 FR 63432, Dec. 4, 1991; T.D. 8357, 57 FR 10290, Mar. 25, 1992; T.D. 8581, 59 FR 66175, Dec. 23, 1994; TD 8581, 60 FR 12416, Mar. 7, 1995]

§1.401(m)–2 Multiple use of alternative limitation.

(a) *In general.* The rules in this section prevent the multiple use of the alternative methods of compliance with sections 401 (k) and (m) contained in section 401(k)(3)(A)(ii)(II) and 401(m)(2)(A)(ii) respectively. Paragraph (b) of this section discusses the scope of this section and contains the general rule for determination of a multiple use of the alternative limitation. Paragraph (c) of this section contains rules for the correction of multiple use. The consequences of multiple use of the alternative methods of compliance are described in §1.401(m)–1(a)(1).

(b) *General rule for determination of multiple use*—(1) *In general.* (i) Multiple use of the alternative limitation occurs if all of the conditions of this paragraph (b)(1) are satisfied:

(A) One or more highly compensated employees of the employer are eligible employees in both a cash or deferred arrangement subject to section 401(k) and a plan maintained by the employer subject to section 401(m).

(B) The sum of the actual deferral percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(k) and the actual contribution percentage of the entire group of eligible highly compensated employees under the plan subject to section 401(m) exceeds the aggregate limit of paragraph (b)(3) of this section.

(C) The actual deferral percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(k) exceeds the amount described in section 401(k)(3)(A)(ii)(I).

(D) The actual contribution percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(m) exceeds the amount described in section 401(m)(2)(A)(i).

(ii) The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees are determined after use of qualified nonelective contributions and qualified matching contributions to meet the requirements of section 401(k)(3)(A)(ii) and after use of qualified nonelective contributions and elective contributions to meet the requirements of section 401(m)(2)(A). The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees are determined after any corrective distribution or forfeiture of excess deferrals, excess contributions, or excess aggregate contributions and after any recharacterization of excess contributions required without regard to this section. Only plans and arrangements maintained by the same employer are taken into account under this paragraph (b)(1). If the employer maintains two or more plans after application of the rules under §1.401(k)– 1(g)(11), multiple use is tested separately with respect to each plan. Thus, for example, if an employer maintains a cash or deferred arrangement with matching contributions, under which elective contributions may be made under either an ESOP or a non-ESOP, multiple use