Internal Revenue
bulletin

Bulletin No. 2009-12
March 23, 2009

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2009–6, page 694.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the first half of 2009 are set forth for purposes of determining the value of non-commercial flights on employer-provided aircraft under section 1.61–21(g) of the regulations.

EMPLOYEE PLANS

T.D. 9447, page 694.

Final regulations under section 401 and other sections of the Code provide guidance relating to certain automatic contribution arrangements, eligible rollover distributions, forfeitures, and excise tax on certain excess contributions and excess aggregate contributions.

Notice 2009–20, page 711.

Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in March 2009; the 24-month average segment rates; the funding transitional segment rates applicable for March 2009; and the minimum present value transitional rates for February 2009.

EXEMPT ORGANIZATIONS

Announcement 2009–17, page 714.

This announcement is a public notice of the suspension of the federal tax exemption under section 501(p) of the Code of a certain organization that has been designated as supporting or engaging in terrorist activity or supporting terrorism. Contributions made to this organization during the period that the organization's tax-exempt status is suspended are not deductible for federal tax purposes.

ADMINISTRATIVE

Announcement 2009–18, page 714.

This document contains corrections to final and temporary regulations (T.D. 9441, 2009–7 I.R.B. 460) providing further guidance and clarification regarding methods under section 482 of the Code to determine taxable income in connection with a cost-sharing arrangement in order to address issues that have arisen in administering the current regulations.

Announcement 2009–19, page 715.

This document contains corrections to proposed regulations (REG–144615–02, 2009–7 I.R.B. 561) providing further guidance and clarification regarding methods under section 482 of the Code to determine taxable income in connection with a cost-sharing arrangement in order to address issues that have arisen in administering the current regulations.

Announcement 2009–20, page 716.

This document contains corrections to final regulations (T.D. 9442, 2009–6 I.R.B. 434) under section 1502 of the Code providing guidance regarding the treatment of transactions involving obligations between members of a consolidated group.

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 61.—Gross Income Defined

26 CFR 1.61–21: Taxation of fringe benefits.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the first half of 2009 are set forth for purposes of determining the value of non-commercial flights on employer-provided aircraft under section 1.61–21(g) of the regulations.

Rev. Rul. 2009–6

For purposes of the taxation of fringe benefits under section 61 of the Internal Revenue Code, section 1.61–21(g) of the Income Tax Regulations provides a rule for valuing noncommercial flights on employer-provided aircraft. Section 1.61–21(g)(5) provides an aircraft valuation formula to determine the value of such flights. The value of a flight is determined under the base aircraft valuation formula (also known as the Standard Industry Fare Level formula or SIFL) by multiplying the SIFL cents-per-mile rates applicable for the period during which the flight was taken by the appropriate aircraft multiple provided in section 1.61–21(g)(7) and then adding the applicable terminal charge. The SIFL cents-per-mile rates in the formula and the terminal charge are calculated by the Department of Transportation and are reviewed semi-annually.

The following chart sets forth the terminal charge and SIFL mileage rates:

Period During Which the Flight Is Taken	*Terminal Charge*	*SIFL Mileage Rates*
1/1/09 - 6/30/09	$45.41	Up to 500 miles = $.2484 per mile 501-1500 miles = $.1894 per mile Over 1500 miles = $.1821 per mile

DRAFTING INFORMATION

The principal author of this revenue ruling is Kathleen Edmondson of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt/Government Entities). For further information regarding this revenue ruling, contact Ms. Edmondson at (202) 622–0047 (not a toll-free call).

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

26 CFR 1.401(k)–1: Certain cash or deferred arrangements.

T.D. 9447

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 1 and 54

Automatic Contribution Arrangements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to automatic contribution arrangements. These regulations affect administrators of, employers maintaining, participants in, and beneficiaries of section 401(k) plans and other eligible plans that include an automatic contribution arrangement.

DATES: *Effective date:* These regulations are effective on February 24, 2009.

Applicability date: Except as provided in §§1.401(k)–3(j)(1)(i) and 1.401(m)–2(a)(6)(ii), the final regulations relating to qualified automatic contribution arrangements (§§1.401(k)–2, 1.401(k)–3, 1.401(m)–2, and 1.401(m)–3) apply to plan years beginning on or after January 1, 2008. The regulations relating to eligible automatic contribution arrangements (§§1.402(c)–2, 1.411(a)–4, 1.414(w)–1, and 54.4979–1) apply for plan years beginning on or after January 1, 2010.

FOR FURTHER INFORMATION CONTACT: R. Lisa Mojiri-Azad, Dana Barry, or 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 in accordance with the Paperwork Reduction Act of 1995

(44 U.S.C. 3507(d)) under control number 1545–2135 .

The collection of information in these final regulations is in §§1.401(k)–3 and 1.414(w)–1. The information in §1.401(k)–3 is required to comply with the statutory notice requirements in sections 401(k)(13) and 401(m)(12), and is expected to be included in the notices currently provided to employees that inform them of their rights and benefits under the plan. The collection of information under §1.414(w)–1 is required to comply with the statutory notice requirements of section 414(w) and is expected to be included in the notices currently provided to employees that inform them of their rights and benefits under the plan.

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.

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), 401(m), 402(c), 411(a), and 4979 of the Internal Revenue Code (Code) and new regulations under section 414(w) in order to reflect certain of the provisions of section 902 of the Pension Protection Act of 2006, Public Law 109–280 (PPA '06), taking into account certain of the changes made by section 109(b) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110–458 (WRERA).

Section 902 of PPA '06 added sections 401(k)(13), 401(m)(12), and 414(w) to the Code to facilitate automatic contribution arrangements (sometimes referred to as automatic enrollment) in qualified cash or deferred arrangements under section 401(k), as well as in similar arrangements under sections 403(b) and 457(b). An automatic contribution arrangement is a cash or deferred arrangement that provides that, in the absence of an affirmative election by an eligible employee, a default election applies under which the employee is treated as having made an election to have a specified contribution made on his or her behalf under the plan.

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). Section 1.401(k)–1(a)(3)(i) defines a cash or deferred election as any direct or indirect election (or modification of an earlier election) by an employee to have the employer either: (1) provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available; or (2) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation. For purposes of determining whether an election is a cash or deferred election, §1.401(k)–1(a)(3)(ii) provides that it is irrelevant whether the default that applies in the absence of an affirmative election is cash (or some other taxable benefit) or a contribution, an accrual, or other benefit under a plan deferring the receipt of compensation. 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 other requirements. Section 401(k)(2)(A) provides that the amount that each eligible employee under the arrangement may defer as an elective contribution must be available to the employee in cash. Section 1.401(k)–1(e)(2)(ii) provides that, in order for a CODA to satisfy this requirement, the arrangement must provide each eligible employee with an effective opportunity to make (or change) a cash or deferred election at least once during each plan year.

Section 401(k)(2)(B) provides that a qualified CODA must provide that elective contributions may only be distributed after certain events, including hardship and severance from employment. Similar distribution restrictions apply under sections 403(b)(7) and 403(b)(11). Section 457(d)(1)(A) includes distribution restrictions for eligible governmental deferred compensation plans.

Section 401(k)(3)(A)(ii) applies a special nondiscrimination test to the elective contributions of highly compensated employees, within the meaning of section 414(q) (HCEs). Under this test, called the actual deferral percentage (ADP) test, the average percentage of compensation deferred for HCEs is compared annually to the average percentage of compensation deferred for nonhighly compensated employees (NHCEs) eligible under the plan, and if certain limits are exceeded by the HCEs, corrective action must be taken. Pursuant to section 401(k)(8), one method of correction is distribution to HCEs of excess contributions made on their behalf.

Section 401(m) provides a parallel test for matching contributions and employee after-tax contributions under a defined contribution plan, called the actual contribution percentage (ACP) test. Pursuant to section 401(m)(6), one method of correction of the ACP test is distribution to HCEs of excess aggregate contributions made on their behalf.

Sections 401(k)(12) and 401(m)(11) provide a design-based safe harbor under which elective contributions under a CODA and any associated matching contributions are treated as satisfying the ADP and ACP tests if the arrangement meets certain contribution and notice requirements. Sections 1.401(k)–3 and 1.401(m)–3 provide guidance on the requirements for this design-based safe harbor.

Sections 401(k)(13) and 401(m)(12), added by PPA '06 and effective for plan years beginning on or after January 1, 2008, provide an alternative design-based safe harbor for a CODA that provides for automatic contributions at a specified level and meets certain employer contribution, notice, and other requirements. A CODA that satisfies these requirements, referred to as a qualified automatic contribution arrangement (QACA), is treated as satisfying the ADP test and ACP test with respect to matching contributions.

Section 414(w), added to the Code by section 902(d)(1) of PPA '06 and effective for plan years beginning on or after January 1, 2008, further facilitates automatic enrollment by providing limited

relief from the distribution restrictions under section 401(k)(2)(B), 403(b)(7), 403(b)(11), or 457(d)(1)(A) in the case of an eligible automatic contribution arrangement (EACA).

Sections 414(w)(1) and 414(w)(2) provide that an applicable employer plan that contains an EACA is permitted to allow employees to elect to receive a distribution equal to the amount of default elective contributions (and attributable earnings) made with respect to the employee beginning with the first payroll period to which the EACA applies to the employee and ending with the effective date of the election. The election must be made within 90 days after the date of the first default elective contribution with respect to the employee under the arrangement. Sections 414(w)(1)(A) and 414(w)(1)(B) provide that the amount of the distribution is includible in gross income for the taxable year in which the distribution is made, but is not subject to the additional income tax under section 72(t).

Section 414(w)(3) defines an EACA as an arrangement under which: (1) a participant may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash; (2) the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage); and (3) participants are provided a notice that satisfies the requirements of section 414(w)(4). Section 109(b)(4) of WRERA eliminated the provision previously found under section 414(w)(3)(C) that, in the absence of an investment election by the participant, default elective contributions must be invested in accordance with the regulations prescribed by the Secretary of Labor under section 404(c)(5) of the Employee Retirement Income Security Act of 1974 (ERISA).

Section 414(w)(4) requires that, within a reasonable period before each plan year, each employee to whom the arrangement applies for such year receive written notice of the employee's rights and obligations under the arrangement which is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations. Section 414(w)(4)(A)(ii) requires that the notice be written in a manner calculated to be understood by the average employee to whom the arrangement applies. Section 414(w)(4)(B) provides that the notice must explain: (1) the employee's rights under the arrangement to elect not to have elective contributions made on the employee's behalf or to elect to have contributions made at a different percentage; and (2) how contributions made under the automatic contribution arrangement will be invested in the absence of any investment decision by the employee. In addition, the employee must be given a reasonable period of time after receipt of the notice and before the first elective contribution is made to make an election with respect to contributions. In many respects, the notice under section 414(w)(4) is the same as the notice required under section 401(k)(13) for a QACA.

Section 414(w)(5), as amended by section 109(b)(5) of WRERA, defines an applicable employer plan as a trust described in section 401(a) that is exempt from tax under section 501(a), a plan described in section 403(b), a section 457(b) plan that is maintained by a governmental employer described in section 457(e)(1)(A), a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6), or a SIMPLE described in section 408(p).

Section 414(w)(6) provides that a withdrawal described in section 414(w)(1) is not to be taken into account for purposes of the ADP test. Section 109(b)(6) of WRERA amended section 414(w)(6) to provide that a withdrawal described in section 414(w)(1) is not to be taken into account for purposes of applying the limitation under section 402(g)(1).

Section 411(a)(3)(G), as amended by section 902(d)(2) of PPA '06, provides that a matching contribution shall not be treated as forfeitable merely because the matching contribution is forfeitable if it relates to a contribution that is withdrawn under an automatic contribution arrangement that satisfies the requirements of section 414(w).

Section 4979 provides for an excise tax on excess contributions (within the meaning of section 401(k)(8)(B)) and excess aggregate contributions (within the meaning of section 401(m)(6)(B)) not distributed within 2½ months after the close of the plan year for which the contributions are made. Section 902 of PPA '06 amended section 4979 to lengthen this 2½ month correction period for excess contributions and excess aggregate contributions under an EACA to 6 months. Thus, in the case of an EACA that is part of a section 401(k) plan, the section 4979 excise tax does not apply to any excess contributions or excess aggregate contributions which, together with income allocable to the contributions, are distributed or forfeited (if forfeitable) within 6 months after the close of the plan year.

Section 902 of PPA '06 amended section 4979(f)(2) to provide that any distributions of excess contributions and excess aggregate contributions (whether or not under an EACA) are includible in the employee's gross income for the taxable year in which distributed. However, pursuant to sections 401(k)(8)(D) and 401(m)(7)(A), the distributions are not subject to the additional income tax under section 72(t). Section 902 of PPA '06 also amended sections 401(k)(8), 401(m)(6), and 4979(f)(1) to eliminate the requirement that distributions of excess contributions or excess aggregate contributions (whether or not under an EACA) include income allocable to the period after the end of the plan year (gap period income).

On November 8, 2007, proposed regulations under sections 401(k), 401(m), 402(c), 411(a), 414(w), and 4979(f) relating to automatic contribution arrangements were issued (REG–133300–07, 2007–2 C.B. 1140 [72 FR 63144]). Written public comments were received on the proposed regulations, and a public hearing was held on May 19, 2008. 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. In addition, these final regulations reflect the amendments to sections 401(k)(13) and 414(w) that were made by WRERA.

Summary of Comments and Explanation of Revisions

I. *Qualified Automatic Contribution Arrangement under Section 401(k)(13)*

A. *Minimum percentage requirement*

Section 401(k)(13)(C)(iii) sets forth a series of minimum default contribution percentages that an automatic contribution arrangement must satisfy in order to be a qualified automatic contribution arrangement (QACA). The final regulations clarify that the minimum percentage for the initial period is based on when the employee first has contributions made pursuant to a default election under the QACA. Thus, if an employee makes an affirmative election before the default contribution would have begun, then the initial period does not begin for the employee. The minimum percentages are increased for plan years after the initial period.

Several commentators requested guidance on the application of the minimum percentage requirement in the case of a rehired employee. The final regulations provide that the minimum percentages are determined without regard to whether an employee has continued to be eligible to make contributions under the plan. Thus, the minimum percentage is generally determined based on the number of years since the date the employee first had default contributions made under the QACA. However, in response to recordkeeping concerns raised by commentators, the final regulations also provide that a plan is permitted to treat an employee who for an entire plan year did not have contributions made pursuant to a default election under the QACA as if the employee had not had such contributions for any prior plan year as well. For example, if an employee terminates in one plan year, remains terminated for a full plan year, and is rehired in a subsequent plan year, the plan is permitted to provide that a new initial period begins after the employee is rehired, regardless of whether the employee had in fact had contributions made pursuant to a default election under the QACA in some earlier plan year.

Other commentators asked whether plans are permitted to limit the duration of an affirmative election or to require employees to make new elections. Under the final regulations, automatic enrollment applies for periods during which the affirmative election is not in effect. Accordingly, a plan could specifically provide that an affirmative election expires and, thus, require an employee to make a new affirmative election if he or she wants the prior rate of elective contribution to continue. In the absence of a second affirmative election, the employee will be automatically enrolled at the plan's default percentage (which must meet the minimum percentage requirement described in the preceding paragraph). For example, if an employer has a QACA beginning in 2009 and the plan provides that all affirmative elections in effect on December 31, 2010 expire on that date, then, if the QACA continues into 2011, all eligible employees who do not make a new affirmative election will be automatically enrolled under the QACA. Similarly, if an employee who made an affirmative election takes a hardship withdrawal under the plan and the plan suspends elective contributions for 6 months after receipt of the hardship distribution in accordance with §1.401(k)–3(c)(6)(v)(B), then, if the plan does not reinstate the affirmative election at the end of the 6 months, the employer must automatically enroll the employee.

The final regulations provide that, for plan years beginning on or after January 1, 2010, compensation for purposes of determining default contributions means safe harbor compensation as defined in §1.401(k)–3(b)(2).

B. *Uniformity requirement*

Section 401(k)(13)(C)(iii) provides that the default percentage must be applied uniformly. The proposed regulations provided that a plan does not fail to satisfy this uniformity requirement merely because: the percentage varies based on the number of years an eligible employee has participated in the automatic contribution arrangement intended to be a QACA; the rate of elective contributions under a cash or deferred election that is in effect immediately prior to the effective date of the default percentage under the QACA is not reduced; the rate of elective contributions is limited so as not to exceed the limits of sections 401(a)(17), 402(g) (determined with or without catch-up contributions described in section 402(g)(1)(C) or 402(g)(7)), and 415; or the default election is not applied during the period an employee is not permitted to make elective contributions in order for the plan to satisfy the requirements of §1.401(k)–3(c)(6)(v)(B).

Some commentators asked whether a QACA may provide for an increase in the default percentage in the middle of the plan year. These commentators suggested that some employers wanted to provide for such an increase to coincide with salary increases or performance evaluations.

To address this issue, the final regulations expand the exception to the uniformity requirement that allows variance based on the number of years since the date the employee first had contributions made pursuant to a default election under an arrangement that is intended to be a QACA. Under the final regulations, the default percentage may also vary based on the portions of years since that date. Thus, the plan may provide for the increase of the default percentage mid-year, as long as the percentage is uniform based on the number of years or portions of years since an employee first had contributions made pursuant to a default election and satisfies the minimum percentage requirement throughout the plan year.

C. *Notice timing requirement*

The proposed regulations provided that a QACA satisfies the notice requirement of section 401(k)(13)(E) only if the notice satisfies the notice requirements under section 401(k)(12) and satisfies the additional requirements found in section 401(k)(13)(E)(ii). Section 401(k)(12)(D) and section 401(k)(13)(E)(i) provide that the notice must be provided within a reasonable period before each plan year to each employee eligible to participate in the QACA.

The final regulations under section 401(k)(12) provide that the determination of whether the notice satisfies the timing requirement is based on all of the relevant facts and circumstances. The timing requirement is deemed satisfied if at least 30 days (and no more than 90 days) before the beginning of each plan year, the notice is provided to each eligible employee. In the case where an eligible employee

is not provided the notice within this 30–90 day period because the employee becomes eligible after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90 days before the employee becomes eligible and no later than the date the employee becomes eligible.

The proposed regulations under section 401(k)(13) applied these same rules to the notice required under section 401(k)(13)(E)(i). In accordance with section 401(k)(13)(E)(ii), the proposed regulations also provided that the notice satisfies the timing requirements only if it is provided sufficiently early so that the employee has a reasonable period of time after receipt of the notice and before the first contribution is made pursuant to a default election under the arrangement to make an affirmative election to defer a different amount or percentage.

Some commentators raised a concern about meeting the notice requirement for employees who are eligible to participate in the plan immediately upon hire. Commentators suggested that employers be given a grace period to provide notice, such as 15 days after hire, as long as the employee has an effective opportunity to elect not to make contributions or make an affirmative election to defer a different amount or percentage of compensation prior to the first contribution made pursuant to a default election.

The final regulations modify the deemed satisfaction of timing requirement set forth in §1.401(k)–3(d)(3)(ii). The regulations provide that if it is not practicable for the notice to be provided on or before the date specified in the plan that an employee becomes eligible, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on that date. Thus, an employer is required to provide the notice to the employee prior to the pay date for the payroll period that includes the date the employee becomes eligible. This change applies to the safe harbor described in section 401(k)(12), as well as section 401(k)(13).

The final regulations provide rules for when the default election must first become effective. In accordance with section 401(k)(13)(E)(ii)(III), the final regulations provide that the default election must be effective no earlier than a reasonable period of time after the receipt of the notice (in order to provide the employee with a reasonable period of time to make an affirmative election). However, the final regulations provide that the default election must be effective no later than the earlier of the pay date for the second payroll period that begins after the date the notice is provided or the first pay date that occurs at least 30 days after the notice is provided. Notwithstanding any delay in when the first default contribution is made, nonelective contributions that are based on a full year's contributions and the rate of matching contributions that varies based on compensation must be based on the safe harbor compensation earned since the participant was first eligible under the plan.

D. *Exclusion of current affirmative elections from automatic enrollment*

The proposed regulations provided that an automatic contribution arrangement does not fail to be a QACA merely because the default election is not applied to an employee who was eligible under the cash or deferred arrangement (or a predecessor arrangement) immediately prior to the effective date of the QACA and on that effective date had an affirmative election in effect (that remains in effect) to have elective contributions made on his or her behalf (in a specified amount or percentage of compensation) or not have elective contributions made on his or her behalf.

Some commentators requested that employers be permitted to treat employees who did not affirmatively elect to make elective contributions under the plan as though they had affirmatively elected zero. These commentators stated that it would be administratively difficult to determine which employees had affirmative elections in effect prior to the effective date of the QACA.

The regulations do not expand the exception for automatically enrolling current employees to employees who have not made an affirmative election. Under section 401(k)(13)(C)(iv)(II), only those employees who had an affirmative election in effect immediately before the QACA became effective are permitted to be excluded from having a default election apply to them.

E. *Other topics*

Commentators requested clarification as to whether the safe harbor nonelective and matching contributions made under a QACA are eligible for hardship withdrawal. The final regulations clarify that these safe harbor contributions are subject to the withdrawal restrictions found in §1.401(k)–1(d) that apply to QNECs and QMACs. Thus, the maximum distributable amount under §1.401(k)–1(d)(3)(ii) does not include earnings, QNECs, QMACs, or these safe harbor contributions.

A commentator asked whether safe harbor matching or nonelective contributions were required for all employees, including those eligible employees with affirmative elections in effect. The final regulations retain the requirement that all eligible employees must receive safe harbor matching contributions or nonelective contributions, whichever is applicable. The special treatment under section 401(k)(13)(C)(iv) for employees who have an affirmative election in effect does not affect whether safe harbor matching contributions or nonelective contributions are required to be made for those employees.

II. *Eligible Automatic Contribution Arrangement under Section 414(w)*

A. *Non-universal eligible automatic contribution arrangements*

The proposed regulations provided that an eligible automatic contribution arrangement (EACA) is an automatic contribution arrangement under an applicable employer plan that applies to each "eligible employee." An eligible employee was defined as an employee who is eligible to make a cash or deferred election under the plan. Therefore, under the proposed regulations, an employer was required to apply automatic enrollment to all current and new employees eligible to make a deferral election under the applicable plan who did not have an affirmative election in effect.

Commentators requested flexibility in the implementation of an EACA by permitting an employer to apply automatic

enrollment only to those employees who are hired on or after the effective date of the EACA.

The final regulations modify the rule in the proposed regulations to provide that the employees who must be subject to the automatic enrollment provisions under an EACA are only those employees who are specified in the plan as being covered employees under the EACA. Thus, automatic enrollment under an EACA need not apply to all employees eligible to make a deferral election under the applicable plan, but only to those employees who are covered by the EACA.

The final regulations provide that the plan document must specify the employees who are covered under the EACA and must state whether an employee who makes an affirmative election remains covered under the EACA. Under section 414(w)(4), the notice regarding an employee's rights and obligations under the arrangement need only be provided to those employees who are covered employees under the EACA as set forth in the plan. Thus, if a plan provides that an employee who makes an affirmative election is no longer a covered employee under the EACA, then the employee is not required to receive the notice after he or she makes an affirmative election.

With respect to the correction of excess contributions for a plan year beginning on or after January 1, 2010, the final regulations provide that a plan that contains an EACA is entitled to the extended 6-month period for correcting excess contributions and excess aggregate contributions without incurring an excise tax under section 4979, only if all eligible NHCEs and eligible HCEs are covered employees under the EACA for the entire plan year (or the portion of the plan year that the employees are eligible employees). Thus, if an EACA covers fewer than all the eligible employees under the plan, the employer will be unable to take advantage of the extension under section 4979.

B. *Uniformity requirement*

The proposed regulations provided that an EACA must provide that the default elective contribution is a uniform percentage of compensation. The exceptions to the uniformity requirement for a QACA set forth in §1.401(k)–3(j)(2)(iii) also applied to an EACA (without regard to whether the arrangement was intended to be a QACA).

Some commentators requested that the uniformity requirement be eased if the plan is a multiemployer plan or a multiple employer plan, or if the sponsor wants to have different default contributions for collectively bargained and non-collectively bargained employees. The final regulations do not specifically permit this. However, these plan sponsors can accomplish a similar goal by establishing separate EACAs for each of these separate groups. To address the possibility that a plan may contain more than one EACA, the final regulations provide that the requirement that the default elective contributions under an EACA be a uniform percentage of compensation is applied by aggregating all automatic contribution arrangements within the plan that are intended to be EACAs. For this purpose, in the case of a plan subject to section 410(b), the definition of plan is determined after applying the disaggregation rules of §1.401(k)–1(b)(4). Thus, a plan that is subject to the rules of section 410(b) is permitted to provide for separate EACAs for different groups of collectively bargained employees or different employers in a multiple employer plan with a different default percentage for each EACA, but such a plan could not have different default percentages apply to different groups of employees that are in the same plan after application of the disaggregation rules of §1.401(k)–1(b)(4).

C. *Mid-year implementation of an eligible automatic contribution arrangement*

Section 401(k)(12)(D) contains the notice requirement applicable to a plan that is relying on the safe harbor for nondiscrimination testing in section 401(k)(12). It requires that the notice be provided "within a reasonable period before any year." The final regulations under section 401(k)(12) provide that the notice must be provided within a reasonable period of time before the plan year (or, in the first year that the employee becomes eligible, within a reasonable period of time before the employee becomes eligible). The final regulations further provide that whether this timing requirement is satisfied is based upon all of the relevant facts and circumstances and that the timing requirement is deemed to be satisfied if the notice is given at least 30 days (and no more than 90 days) before the beginning of each plan year. In the case of an employee who becomes eligible after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90 days before the employee becomes eligible for the cash or deferred arrangement (and no later than the date the employee becomes eligible).

Section 401(k)(13)(E), which contains the notice requirements applicable to a QACA, and section 414(w)(4), which contains the notice requirements applicable to an EACA, each require that the notice be provided "within a reasonable period before each plan year." The proposed regulations interpreted these provisions in a manner consistent with the interpretation in the final regulations under section 401(k)(12) of the almost identical language in that section, including the requirement that the notice be provided within a reasonable period of time before each plan year, except that, for individuals who become eligible employees during the plan year, the notice need only be provided within a reasonable period before the employee becomes an eligible employee.

Some commentators noted that the notice timing requirement could be interpreted to preclude the establishment of an EACA in the middle of the plan year, in situations where the notice was not provided before the beginning of the plan year. They suggested that the statutory requirement to provide notice before the start of each plan year should not preclude starting an EACA in the middle of the plan year of an existing cash or deferred arrangement that is not an EACA, if notice is provided to each eligible employee within a reasonable period of time before the employee becomes eligible for the arrangement.

The final regulations do not adopt this suggestion. Instead, the final regulations generally retain the rule in the proposed regulations, which is consistent with the statutory requirements of section 414(w)(4) and with the interpretation of the identical language in section 401(k)(13) and the almost identical language in section 401(k)(12). The final regulations do, however, treat individuals

who first become covered under an automatic contribution arrangement as a result of a change in employment status the same as individuals who first become eligible to make a cash or deferred election for purposes of the notice timing requirements.

Consistent with the revisions to the deemed timing rule for purposes of sections 401(k)(12) and 401(k)(13) described in this preamble, the final regulations provide that if it is not practicable for the notice to be provided on or before the date specified in the plan that an employee becomes eligible, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on that date. Thus, an employer is required to provide the notice to the employee prior to the pay date for the payroll period that includes the date the employee becomes eligible.

D. *Permissible withdrawal*

Section 414(w)(2) limits the period for the special election to withdraw default elective contributions to the first 90 days after the date of the first default contribution under the EACA. The proposed regulations provided that the date of the first default elective contribution is the date that the compensation that is subject to the cash or deferred election would otherwise have been included in gross income.

Some commentators suggested that the 90-day period start from the date the first contribution is received by the plan for the participant. The final regulations retain the rule in the proposed regulations that the 90-day period starts after the date the compensation would otherwise have been included in gross income. This date is used for other relevant Code provisions, such as the application of the section 402(g) limitation.

If an employer is concerned about inadvertently permitting withdrawal elections outside the 90-day period due to misidentifying the date of the first default elective contribution as defined under the regulations, the plan is permitted to limit the period during which the election can be made to less than 90 days. Under the final regulations, a plan is permitted to set an earlier deadline for the election to withdraw default elective contributions. However, if a plan offers a permissible withdrawal for covered employees, the election period for the covered employees must be at least 30 days.

The final regulations also provide that the date of the first default elective contribution must take into account any default elective contributions made under any EACA under the plan. For this purpose, all EACAs under the plan must be aggregated. However, if the plan provides for multiple EACAs to cover different employees in different portions of the plan and these portions of the plan are mandatorily disaggregated under section 410(b), then there is no requirement to aggregate those different EACAs. Thus, in the case where a plan that is subject to the rules of section 410(b) has separate EACAs for different groups of collectively bargained employees or different employers in a multiple employer plan, the date for determining the first default elective contribution is determined with respect to each EACA within the separate disaggregated plan. In addition, in response to comments, the final regulations provide that for purposes of determining the date of the first default elective contribution, a plan is permitted to treat an employee who for an entire plan year did not have default elective contributions made under the EACA as if the employee had not had such contributions for any prior plan year as well.

Commentators asked whether employers can restrict the permissible withdrawals based on subsequent affirmative elections made by employees. For example, one commentator requested that an employer be permitted to limit the permissible withdrawal election to those employees who are automatically enrolled and who do not make a subsequent affirmative election of an amount (other than zero) within the 90-day election period. Under a section 401(a) plan or a section 403(b) plan, an employer is not permitted to condition an employee's right to take a permissible withdrawal on the level of the employee's deferral election under the plan. Thus, an employee's permissible withdrawal rights may not be restricted based upon the employee's subsequent affirmative election.

The proposed regulations provided that the effective date of the permissible withdrawal election must be no later than the last day of the payroll period that begins after the date the election is made. This rule was included in the proposed regulations to limit section 414(w) withdrawals to default elective contributions made for short periods of time. In response to comments, the final regulations modify this rule to provide that the latest effective date of the permissible withdrawal election cannot be after the earlier of: (1) the pay date for the second payroll period beginning after the election is made, or (2) the first pay date that occurs at least 30 days after the election is made. Of course, a plan may permit an earlier effective date.

Commentators also requested that the IRS clarify when the permissible withdrawal amount must be distributed. The final regulations clarify that the permissible withdrawal distribution must be made in accordance with the plan's ordinary timing procedures for processing distributions and making distributions. Thus, the permissible withdrawal distribution should be processed and distributed no differently than any other distribution permitted under the plan.

The proposed regulations provided that a permissible withdrawal distribution may be reduced by any generally applicable fees, but specified that the plan may not charge a different fee for a distribution under section 414(w) than would apply to other distributions. In response to comments, the final regulations clarify that the plan cannot charge a higher fee for a distribution under section 414(w) than would apply to any other distributions of cash.

One commentator requested guidance with respect to the withholding treatment of permissible withdrawal amounts. These amounts are subject to section 3405(b).

E. *Forfeiture of employer matching contributions*

The proposed regulations provided that matching contributions with respect to default elective contributions that had been distributed pursuant to a permissible withdrawal election must be forfeited. In response to comments, the final regulations clarify that the forfeiture applies to any matching contributions that have been allocated to the participant's account, ad-

justed for allocable gain or loss. The final regulations provide that the plan is permitted to provide that matching contributions will not be made with respect to any withdrawal made under §1.414(w)–1(c) if the withdrawal has been made prior to the date as of which the matching contributions would otherwise be allocated.

III. *Other Issues*

A. *Other automatic contribution arrangements*

Many employers have previously adopted automatic contribution arrangements as originally described in prior guidance, such as Rev. Rul. 2000–8, 2000–1 C.B. 617. This prior guidance, which was reflected in regulations under section 401(k) issued in 2004, permitted employers to automatically enroll employees in a section 401(k) plan. These final regulations do not affect any automatic contribution arrangement that is not intended to be a QACA or an EACA.

B. *Other issues under section 902 of PPA '06 and WRERA*

These regulations also reflect the modification to the correction rules for excess contributions and excess aggregate contributions provided in section 902(e) of PPA '06. These provisions include: (1) the change in the year of inclusion in income for distributed excess contributions to the year of distribution; and (2) the elimination of the requirement to include gap period income for a distribution that is made to correct an ADP or ACP failure. However, these regulations do not reflect: (1) the change made by section 109(b)(3) of WRERA that eliminates the requirement to include gap period income for a distribution of an excess deferral under section 402(g); (2) the additional time to correct excess contributions under a SARSEP that includes an EACA; (3) the tax treatment of excess contributions and earnings thereon under a SARSEP; and (4) guidance on SIMPLE IRA plans that include an EACA.

Effective Date

Except as provided in §§1.401(k)–3(j)(1)(i) and 1.401(m)–2(a)(6)(ii), the final regulations relating to qualified automatic contribution arrangements (§§1.401(k)–2, 1.401(k)–3, 1.401(m)–2, and 1.401(m)–3) apply to plan years beginning on or after January 1, 2008. The regulations relating to eligible automatic contribution arrangements (§§1.402(c)–2, 1.411(a)–4, 1.414(w)–1, and 54.4979–1) apply for plan years beginning on or after January 1, 2010. For plan years that begin in 2008, a plan must operate in accordance with a good faith interpretation of section 414(w). For this purpose, a plan that operates in accordance with the proposed regulations under §1.414(w)–1 or these final regulations will be treated as operating in accordance with a good faith interpretation of section 414(w).

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 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 on the fact that most small entities that maintain plans that will be eligible for the safe harbor provisions of sections 401(k) and 401(m) or the distribution relief provisions of section 414(w) currently provide a similar notice with which this notice can be combined. 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 this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Drafting Information

The principal authors of these regulations are Dana Barry, William D. Gibbs, and R. Lisa Mojiri-Azad, 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.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are amended as follows:

Part 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended to read as follows:

Authority: 26 U.S.C. 401(m)(9) and 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 in:

1. The entry for §1.401(k)–2 is amended by—

a. Adding the entry for §1.401(k)–2(a)(5)(vi) and revising the entry for §1.401(k)–2(b)(2)(iv)(D).

b. Revising entries for §1.401(k)–2(b)(2)(vi)(A) and (b)(2)(vi)(B).

c. Adding an entry for §1.401(k)–2(b)(5)(iii).

2. The entry for §1.401(k)–3 is amended by—

a. Adding entries for §§1.401(k)–3(a)(1), 1.401(k)–3(a)(2) and 1.401(k)–3(a)(3).

b. Adding an entry for §1.401(k)–3(i).

c. Adding entries for §§1.401(k)–3(j)(1) and 1.401(k)–3(j)(2).

d. Adding entries for §§1.401(k)–3(k)(1), 1.401(k)–3(k)(2), 1.401(k)–3 (k)(3) and 1.401(k)–3(k)(4).

The additions and revisions read as follows:

§1.401(k)–0 Table of Contents.

* * * * *

§1.401(k)–2 ADP test.

(a) * * *

(5) * * *

(vi) Default elective contributions pursuant to section 414(w).

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(A) * * *

* * * * *

(D) Plan years before 2008.

* * * * *

(vi) * * *

(A) Corrective distributions for plan years beginning on or after January 1, 2008.

(B) Corrective distributions for plan years beginning before January 1, 2008.

* * * * *

(5) * * *

(iii) Special rule for eligible automatic contribution arrangements.

* * * * *

§1.401(k)–3 Safe harbor requirements.

(a) * * *

(1) Section 401(k)(12) safe harbor.

(2) Section 401(k)(13) safe harbor.

(3) Requirements applicable to safe harbor contributions.

* * * * *

(i) [Reserved].

(j) Qualified automatic contribution arrangement.

(1) Automatic contribution requirement.

(i) In general.

(ii) Automatic contribution arrangement.

(iii) Exception to automatic enrollment for certain current employees.

(2) Qualified percentage.

(i) In general.

(ii) Minimum percentage requirements.

(A) Initial-period requirement.

(B) Second-year requirement.

(C) Third-year requirement.

(D) Later years requirement.

(iii) Exception to uniform percentage requirement.

(iv) Treatment of periods without default contributions.

(k) Modifications to contribution requirements and notice requirements for automatic contribution safe harbor.

(1) In general.

(2) Lower matching requirement.

(3) Modified nonforfeiture requirement.

(4) Additional notice requirements.

(i) In general.

(ii) Additional information.

(iii) Timing requirements.

Par. 3. Section 1.401(k)–1 is amended by:

1. Revising paragraph (b)(1)(ii)(C) and adding new paragraph (b)(1)(ii)(D).

2. Adding a new sentence after the fifth sentence in paragraph (e)(7).

The additions and revisions to read as follows:

§1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(C) The ADP safe harbor provisions of section 401(k)(13) described in §1.401(k)–3; or

(D) The SIMPLE 401(k) provisions of section 401(k)(11) described in §1.401(k)–4.

* * * * *

(e) * * *

(7) *Plan provision requirement.* * * * In addition, a plan that uses the safe harbor method of section 401(k)(13), as described in paragraph (b)(1)(ii)(C) of this section, must specify the default percentages that apply for the plan year and whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution, and is not permitted to provide that ADP testing will be used if the requirements for the safe harbor are not satisfied. * * *

* * * * *

Par. 4. Section 1.401(k)–2 is amended by:

1. Adding paragraph (a)(5)(vi).

2. Revising paragraphs (b)(2)(iv)(A) and (b)(2)(iv)(D).

3. Removing paragraph (b)(2)(iv)(E).

4. Revising paragraph (b)(2)(vi)(A).

5. Revising the heading and adding a new first sentence to paragraph (b)(2)(vi)(B).

6. Removing *Examples 3, 4,* and *5* of paragraph (b)(2)(viii).

7. Revising paragraph (b)(4)(iii) and adding paragraph (b)(5)(iii).

The additions and revisions to read as follows:

§1.401(k)–2 ADP test.

(a) * * *

(5) * * *

(vi) *Default elective contributions pursuant to section 414(w).* Default elective contributions made under an eligible automatic contribution arrangement (within the meaning of §1.414(w)–1(b)) that are distributed pursuant to §1.414(w)–1(c) for plan years beginning on or after January 1, 2008, are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions are made, or for any other plan year.

* * * * *

(b) * * *

(2) * * *

(iv) *Income allocable to excess contributions*—(A) *General rule.* For plan years beginning on or after January 1, 2008, the income allocable to excess contributions is equal to the allocable gain or loss through the end of the plan year. See paragraph (b)(2)(iv)(D) of this section for rules that apply to plan years beginning before January 1, 2008.

* * * * *

(D) *Plan years before 2008.* For plan years beginning before January 1, 2008, the income allocable to excess contributions is determined under §1.401(k)–2(b)(2)(iv) (as it appeared in the April 1, 2007, edition of 26 CFR part 1).

* * * * *

(vi) *Tax treatment of corrective distributions*—(A) *Corrective distributions for plan years beginning on or after January 1, 2008.* Except as provided in this paragraph (b)(2)(vi), for plan years beginning on or after January 1, 2008, a corrective distribution of excess contributions (and allocable income) is includible in the employee's gross income for the employee's taxable year in which distributed. In addition, the corrective distribution is not subject to the early distribution tax of section 72(t). See paragraph (b)(5) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months (6 months in the case of certain plans that include an eligible automatic contribution arrangement within the meaning of section 414(w)) after the end of the plan year. See also §1.402(c)–2, A–4 for restrictions on rolling over distributions that are excess contributions.

(B) *Corrective distributions for plan years beginning before January 1, 2008.* The tax treatment of corrective distributions for plan years beginning before January 1, 2008, is determined under

§1.401(k)–2(b)(2)(vi) (as it appeared in the April 1, 2007, edition of 26 CFR Part 1). * * *

* * * * *

(4) * * *

(iii) *Permitted forfeiture of QMAC*. Pursuant to section 401(k)(8)(E), a qualified matching contribution is not treated as forfeitable under §1.401(k)–1(c) merely because under the plan it is forfeited in accordance with paragraph (b)(4)(ii) of this section or §1.414(w)–1(d)(2).

* * * * *

(5) * * *

(iii) *Special rule for eligible automatic contribution arrangements*. In the case of excess contributions under a plan that includes an eligible automatic contribution arrangement within the meaning of section 414(w), 6 months is substituted for 2½ months in paragraph (b)(5)(i) of this section. The additional time described in this paragraph (b)(5)(iii) applies to a distribution of excess contributions for a plan year beginning on or after January 1, 2010 only where all the eligible NHCEs and eligible HCEs are covered employees under the eligible automatic contribution arrangement (within the meaning of §1.414(w)–1(e)(3)) for the entire plan year (or for the portion of the plan year that the eligible NHCEs and eligible HCEs are eligible employees).

* * * * *

Par. 5. Section 1.401(k)–3 is amended by:

1. Revising paragraph (a).

2. Adding a new sentence at the end of paragraph (d)(3)(ii).

3. Revising the first sentence of paragraph (e)(1).

4. Revising the last sentence of paragraph (h)(2).

5. Revising the first sentence of paragraph (h)(3).

6. Adding paragraphs (i), (j), and (k).

The additions and revisions to read as follows:

§1.401(k)–3 Safe harbor requirements.

(a) *ADP test safe harbor*—(1) *Section 401(k)(12) safe harbor*. A cash or deferred arrangement satisfies the ADP safe harbor provision of section 401(k)(12) for a plan year if the arrangement satisfies the safe harbor contribution requirement of paragraph (b) or (c) of this section for the plan year, the notice requirement of paragraph (d) of this section, the plan year requirements of paragraph (e) of this section, and the additional rules of paragraphs (f), (g), and (h) of this section, as applicable.

(2) *Section 401(k)(13) safe harbor*. For plan years beginning on or after January 1, 2008, a cash or deferred arrangement satisfies the ADP safe harbor provision of section 401(k)(13) for a plan year if the arrangement is described in paragraph (j) of this section and satisfies the safe harbor contribution requirement of paragraph (k) of this section for the plan year, the notice requirement of paragraph (d) of this section (modified to include the information set forth in paragraph (k)(4) of this section), the plan year requirements of paragraph (e) of this section, and the additional rules of paragraphs (f), (g), and (h) of this section, as applicable. A cash or deferred arrangement that satisfies the requirements of this paragraph (a)(2) is referred to as a qualified automatic contribution arrangement.

(3) *Requirements applicable to safe harbor contributions*. Pursuant to section 401(k)(12)(E)(ii) and section 401(k)(13)(D)(iv), the safe harbor contribution requirement of paragraph (b), (c), or (k) of this section must be satisfied without regard to section 401(l). The contributions made under paragraph (b) or (c) of this section (and the corresponding contributions under paragraph (k) of this section) are referred to as safe harbor nonelective contributions and safe harbor matching contributions.

* * * * *

(d) * * *

(3) * * *

(ii) *Deemed satisfaction of timing requirement*. * * * If it is not practicable for the notice to be provided on or before the date specified in the plan that an employee becomes eligible, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on the date the employee becomes eligible.

(e) *Plan year requirement*—(1) *General rule*. Except as provided in this paragraph (e) or in paragraph (f) of this section, a plan will fail to satisfy the requirements of sections 401(k)(12), 401(k)(13), and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. * * *

* * * * *

(h) * * *

(2) *Use of safe harbor nonelective contributions to satisfy other discrimination tests*. * * * However, pursuant to section 401(k)(12)(E)(ii) and section 401(k)(13)(D)(iv), to the extent they are needed to satisfy the safe harbor contribution requirement of paragraph (b) of this section, safe harbor nonelective contributions may not be taken into account under any plan for purposes of section 401(l) (including the imputation of permitted disparity under §1.401(a)(4)–7).

(3) *Early participation rules*. Section 401(k)(3)(F) and §1.401(k)–2(a)(1)(iii)(A), which provide an alternative nondiscrimination rule for certain plans that provide for early participation, do not apply for purposes of section 401(k)(12), section 401(k)(13), and this section. * * *

* * * * *

(i) [Reserved].

(j) *Qualified automatic contribution arrangement*—(1) *Automatic contribution requirement*—(i) *In general*. A cash or deferred arrangement is described in this paragraph (j) if it is an automatic contribution arrangement described in paragraph (j)(1)(ii) of this section where the default election under that arrangement is a contribution equal to the qualified percentage described in paragraph (j)(2) of this section multiplied by the eligible employee's compensation from which elective contributions are permitted to be made under the cash or deferred arrangement. For plan years beginning on or after January 1, 2010, the compensation used for this purpose must be safe harbor compensation as defined under paragraph (b)(2) of this section.

(ii) *Automatic contribution arrangement*. An automatic contribution arrangement is a cash or deferred arrangement within the meaning of §1.401(k)–1(a)(2) that provides that, in the absence of an eligible employee's affirmative election, a default election applies under which the employee is treated as having made an

election to have a specified contribution made on his or her behalf under the plan. The default election begins to apply with respect to an eligible employee no earlier than a reasonable period of time after receipt of the notice describing the automatic contribution arrangement. The default election ceases to apply with respect to an eligible employee for periods of time with respect to which the employee has an affirmative election that is currently in effect to—

(A) Have elective contributions made in a different amount on his or her behalf (in a specified amount or percentage of compensation); or

(B) Not have any elective contributions made on his or her behalf.

(iii) *Exception to automatic enrollment for certain current employees*. An automatic contribution arrangement will not fail to be a qualified automatic contribution arrangement merely because the default election provided under paragraph (j)(1)(i) of this section is not applied to an employee who was an eligible employee under the cash or deferred arrangement (or a predecessor arrangement) immediately prior to the effective date of the qualified automatic contribution arrangement and on that effective date had an affirmative election in effect (that remains in effect) to—

(A) Have elective contributions made on his or her behalf (in a specified amount or percentage of compensation); or

(B) Not have elective contributions made on his or her behalf.

(2) *Qualified percentage*—(i) *In general*. A percentage is a qualified percentage only if it—

(A) Is uniform for all employees (except to the extent provided in paragraph (j)(2)(iii) of this section);

(B) Does not exceed 10 percent; and

(C) Satisfies the minimum percentage requirements of paragraph (j)(2)(ii) of this section.

(ii) *Minimum percentage requirements*—(A) *Initial-period requirement*. The minimum percentage requirement of this paragraph (j)(2)(ii)(A) is satisfied only if the percentage that applies for the initial period is at least 3 percent. For this purpose, the initial period begins when the employee first has contributions made pursuant to a default election under an arrangement that is intended to be a qualified automatic contribution arrangement for a plan year and ends on the last day of the following plan year.

(B) *Second-year requirement*. The minimum percentage requirement of this paragraph (j)(2)(ii)(B) is satisfied only if the percentage that applies for the plan year immediately following the last day described in paragraph (j)(2)(ii)(A) of this section is at least 4 percent.

(C) *Third-year requirement*. The minimum percentage requirement of this paragraph (j)(2)(ii)(C) is satisfied only if the percentage that applies for the plan year immediately following the plan year described in paragraph (j)(2)(ii)(B) of this section is at least 5 percent.

(D) *Later years requirement*. A percentage satisfies the minimum percentage requirement of this paragraph (j)(2)(ii)(D) only if the percentage that applies for all plan years following the plan year described in paragraph (j)(2)(ii)(C) of this section is at least 6 percent.

(iii) *Exception to uniform percentage requirement*. A plan does not fail to satisfy the uniform percentage requirement of paragraph (j)(2)(i)(A) of this section merely because—

(A) The percentage varies based on the number of years (or portions of years) since the beginning of the initial period for an eligible employee;

(B) The rate of elective contributions under a cash or deferred election that is in effect for an employee immediately prior to the effective date of the default percentage under the qualified automatic contribution arrangement is not reduced;

(C) The rate of elective contributions is limited so as not to exceed the limits of sections 401(a)(17), 402(g) (determined with or without catch-up contributions described in section 402(g)(1)(C) or 402(g)(7)), and 415; or

(D) The default election provided under paragraph (j)(1)(i) of this section is not applied during the period an employee is not permitted to make elective contributions in order for the plan to satisfy the requirements of §1.401(k)–3(c)(6)(v)(B).

(iv) *Treatment of periods without default contributions*. The minimum percentages described in paragraph (j)(2)(ii) of this section are based on the date the initial period begins, regardless of whether the employee is eligible to make elective contributions under the plan after that date. Thus, for example, if an employee is ineligible to make contributions under the plan for 6 months because the employee had a hardship withdrawal and the 6-month period includes a date as of which the default minimum percentage is increased, then the default percentage must reflect that increase when the employee is permitted to resume contributions. However, for purposes of determining the date the initial period described in paragraph (j)(2)(ii)(A) of this section begins, a plan is permitted to treat an employee who for an entire plan year did not have contributions made pursuant to a default election under the qualified automatic contribution arrangement as if the employee had not had such contributions made for any prior plan year as well.

(k) *Modifications to contribution requirements and notice requirements for automatic contribution safe harbor*—(1) *In general*. A cash or deferred arrangement satisfies the contribution requirements of this paragraph (k) only if it satisfies the contribution requirements of either paragraph (b) or (c) of this section, as modified by the rules of paragraphs (k)(2) and (k)(3) of this section. In addition, a cash or deferred arrangement satisfies the notice requirement of section 401(k)(13)(E) only if the notice satisfies the additional requirements of paragraph (k)(4) of this section.

(2) *Lower matching requirement*. In applying the requirement of paragraph (c) of this section in the case of a cash or deferred arrangement, the basic matching formula is modified so that each eligible NHCE must receive the sum of—

(i) 100 percent of the employee's elective contributions that do not exceed 1 percent of the employee's safe harbor compensation; and

(ii) 50 percent of the employee's elective contributions that exceed 1 percent of the employee's safe harbor compensation but that do not exceed 6 percent of the employee's safe harbor compensation.

(3) *Modified nonforfeiture requirement*. A cash or deferred arrangement described in paragraph (j) of this section will not fail to satisfy the requirements of paragraph (b) or (c) of this section, as applicable, merely because the safe harbor contributions are not qualified nonelective contributions or qualified matching contributions provided that—

(i) The contributions are subject to the withdrawal restrictions that apply to QNECs and QMACs, as set forth in §1.401(k)–1(d); and

(ii) Any employee who has completed 2 years of service (within the meaning of section 411(a)) has a nonforfeitable right to the account balance attributable to the safe harbor contributions.

(4) *Additional notice requirements*—(i) *In general*. A notice satisfies the requirements of this paragraph (k)(4) only if it includes the additional information described in paragraph (k)(4)(ii) of this section and satisfies the timing requirements of paragraph (k)(4)(iii) of this section.

(ii) *Additional information*. A notice satisfies the additional information requirement of this paragraph (k)(4)(ii) only if it explains—

(A) The level of elective contributions which will be made on the employee's behalf if the employee does not make an affirmative election;

(B) The employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made in a different amount or percentage of compensation); and

(C) How contributions under the arrangement will be invested (including, in the case of an arrangement under which the employee may elect among 2 or more investment options, how contributions will be invested in the absence of an investment election by the employee).

(iii) *Timing requirements*. A notice satisfies the timing requirements of this paragraph (k)(4)(iii) only if it is provided sufficiently early so that the employee has a reasonable period of time after receipt of the notice to make the elections described under paragraph (k)(4)(ii)(B) and (C) of this section. However, the requirement in the preceding sentence that an employee have a reasonable period of time after receipt of the notice to make an alternative election does not permit a plan to make the default election effective any later than the earlier of—

(A) The pay date for the second payroll period that begins after the date the notice is provided; and

(B) The first pay date that occurs at least 30 days after the notice is provided.

Par. 6. Section 1.401(k)–6 is amended by revising the last sentence in the definition of "qualified matching contributions (QMACs)" to read as follows:

§1.401(k)–6 Definitions.

* * * * *

Qualified matching contributions (QMACs). * * * See also §1.401(k)–2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under section 411(a)(3)(G) as a result of being a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution, or it is forfeitable under §1.414(w)–1(d)(2).

* * * * *

Par. 7. Section 1.401(m)–0 is amended in:

1. The entry for §1.401(m)–2 by—

a. Revising §1.401(m)–2(b)(2)(iv)(D).

b. Adding an entry for §1.401(m)–2 (b)(4)(iii).

c. Revising the entries for §1.401(m)–2(b)(2)(vi)(A) and (b)(2) (vi)(B).

d. Adding an entry for §1.401(m)–2 (b)(4)(iii).

2. The entry for §1.401(m)–3 by revising the entries for §§1.401(m)–3(a)(1), 1.401(m)–3(a)(2) and 1.401(m)–3(a)(3).

The additions and revisions read as follows:

§1.401(m)–0 Table of Contents.

* * * * *

§1.401(m)–2 ACP Test.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(A) * * *

* * * * *

(D) Plan years before 2008.

(E) Allocable income for recharacterized elective contributions.

* * * * *

(vi) * * *

(A) Corrective distributions for plan years beginning on or after January 1, 2008.

(B) Corrective distributions for plan years beginning before January 1, 2008.

* * * * *

(4) * * *

(iii) Special rule for eligible automatic contribution arrangements.

* * * * *

§1.401(m)–3 Safe Harbor Requirements.

(a) * * *

(1) Section 401(m)(11) safe harbor.

(2) Section 401(m)(12) safe harbor.

(3) Requirements applicable to safe harbor contributions.

* * * * *

Par. 8. Section 1.401(m)–1 is amended by:

1. Revising paragraph (b)(1)(iii) and adding paragraph (b)(1)(iv).

2. Revising the last sentence of paragraph (b)(4)(iii)(B).

3. Revising the fifth sentence of paragraph (c)(2).

The additions and revisions read as follows:

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

* * * * *

(b) * * *

(1) * * *

(iii) The ACP safe harbor provisions of section 401(m)(12) described in §1.401(m)–3; or

(iv) The SIMPLE 401(k) provisions of sections 401(k)(11) and 401(m)(10) described in §1.401(k)–4.

* * * * *

(4) * * *

(iii) * * *

(B) *Arrangements with inconsistent ACP testing methods.* * * * Similarly, an employer may not aggregate a plan (within the meaning of §1.410(b)–7) that is using the ACP safe harbor provisions of section 401(m)(11) or 401(m)(12) and another plan that is using the ACP test of section 401(m)(2).

* * * * *

(c) * * *

(2) *Plan provision requirement.* * * * Similarly, a plan that uses the safe harbor method of section 401(m)(11) or 401(m)(12), as described in paragraphs (b)(1)(ii) and (b)(1)(iii) of this section, must specify the default percentages that apply for the plan year and whether the safe harbor contribution will be the

nonelective safe harbor contribution or the matching safe harbor contribution, and is not permitted to provide that ACP testing will be used if the requirements for the safe harbor are not satisfied. * * *

* * * * *

Par. 9. Section 1.401(m)–2 is amended by:

1. Revising the first and second sentences of paragraph (a)(5)(iv).

2. Revising paragraph (a)(5)(v).

3. Adding a new sentence at the end of paragraph (a)(6)(ii).

4. Revising paragraphs (b)(2)(iv)(A) and (b)(2)(iv)(D).

5. Removing paragraph (b)(2)(iv)(E).

6. Redesignating paragraph (b)(2)(iv)(F) as paragraph (b)(2)(iv)(E).

7. Revising paragraph (b)(2)(vi)(A).

8. Adding a new sentence to the beginning of paragraph (b)(2)(vi)(B).

9. Adding paragraph (b)(4)(iii).

The additions and revisions to read as follows:

§1.401(m)–2 ACP test.

(a) * * * * *

(5) * * * * *

(iv) *Matching contributions taken into account*. A plan that satisfies the ACP safe harbor requirements of section 401(m)(11) or 401(m)(12) for a plan year but nonetheless must satisfy the requirements of this section because it provides for employee contributions for such plan year is permitted to apply this section disregarding all matching contributions with respect to all eligible employees. In addition, a plan that satisfies the ADP safe harbor requirements of §1.401(k)–3 for a plan year using qualified matching contributions but does not satisfy the ACP safe harbor requirements of section 401(m)(11) or 401(m)(12) for such plan year is permitted to apply this section by excluding matching contributions with respect to all eligible employees that do not exceed 4 percent (3½ percent in the case of a plan that satisfies the ADP safe harbor under section 401(k)(13)) of each employee's compensation. * * *

(v) *Treatment of forfeited matching contributions*. A matching contribution that is forfeited because the contribution to which it relates is treated as an excess contribution, excess deferral, excess aggregate contribution, or default elective contribution that is distributed under section 414(w), is not taken into account for purposes of this section.

* * * * *

(6) * * * * *

(ii) *Elective contributions taken into account under the ACP test*. * * * In addition, for plan years ending on or after November 8, 2007, elective contributions which are not permitted to be taken into account for the ADP test for the plan year under §1.401(k)–2(a)(5)(ii), (iii), (v), or (vi) are not permitted to be taken into account for the ACP test.

* * * * *

(b) * * * * *

(2) * * * * *

(iv) *Income allocable to excess aggregate contributions*—(A) *General rule*. For plan years beginning on or after January 1, 2008, the income allocable to excess aggregate contributions is equal to the allocable gain or loss through the end of the plan year. See paragraph (b)(2)(iv)(D) of this section for rules that apply to plan years beginning before January 1, 2008.

* * * * *

(D) *Plan years before 2008*. For plan years beginning before January 1, 2008, the income allocable to excess aggregate contributions is determined under §1.401(m)–2(b)(2)(iv) (as it appeared in the April 1, 2007, edition of 26 CFR part 1).

* * * * *

(vi) *Tax treatment of corrective distributions*—(A) *Corrective distributions for plan years beginning on or after January 1, 2008*. Except as otherwise provided in this paragraph (b)(2)(vi), for plan years beginning on or after January 1, 2008, a corrective distribution of excess aggregate contributions (and allocable income) 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 and is therefore not subject to tax 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). See paragraph (b)(4) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months (6 months in the case of certain plans that include an eligible automatic contribution arrangement within the meaning of section 414(w)) after the end of the plan year. See also §1.402(c)–2, A–4, prohibiting rollover of distributions that are excess aggregate contributions.

(B) *Corrective distributions for plan years beginning before January 1, 2008*. The tax treatment of corrective distributions for plan years beginning before January 1, 2008, is determined under §1.401(m)–2(b)(2)(vi) (as it appeared in the April 1, 2007, edition of 26 CFR Part 1). * * *

(4) * * *

(iii) *Special rule for eligible automatic contribution arrangements*. In the case of excess aggregate contributions under a plan that includes an eligible automatic contribution arrangement (within the meaning of section 414(w)), 6 months is substituted for 2½ months in paragraph (b)(4)(i) of this section. The additional time described in this paragraph (b)(4)(iii) applies to a distribution of excess aggregate contributions for a plan year beginning on or after January 1, 2010 only where all the eligible NHCEs and eligible HCEs are covered employees under the eligible automatic contribution arrangement (within the meaning of §1.414(w)–1(e)(3)) for the entire plan year (or for the portion of the plan year that the eligible NHCEs and eligible HCEs are eligible employees).

* * * * *

Par. 10. Section 1.401(m)–3 is amended by:

1. Revising paragraph (a).

2. Revising the first sentences of paragraphs (f)(1) and (j)(3).

The revisions read as follows:

§1.401(m)–3 Safe harbor requirements.

(a) *ACP test safe harbor*—(1) *Section 401(m)(11) safe harbor*. Matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(11) for a plan year if the plan satisfies the safe harbor contribution requirement of paragraph (b) or (c) of this section for the plan year, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this

section, the plan year requirements of paragraph (f) of this section, and the additional rules of paragraphs (g), (h) and (j) of this section, as applicable.

(2) *Section 401(m)(12) safe harbor.* For a plan year beginning on or after January 1, 2008, matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(12) for a plan year if the matching contributions are made with respect to an automatic contribution arrangement described in paragraph §1.401(k)–3(j) that satisfies the safe harbor requirements of §1.401(k)–3, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this section, the plan year requirements of paragraph (f) of this section, and the additional rules of paragraphs (g), (h) and (j) of this section, as applicable.

(3) *Requirements applicable to safe harbor contributions.* Pursuant to sections 401(k)(12)(E)(ii) and 401(k)(13)(D)(iv), the safe harbor contribution requirement of paragraph (b) or (c) of this section and §1.401(k)–3(k) must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section and §1.401(k)–3(k) are referred to as safe harbor nonelective contributions and safe harbor matching contributions.

* * * * *

(f) *Plan year requirement*—(1) *General rule.* Except as provided in this paragraph (f) or in paragraph (g) of this section, a plan will fail to satisfy the requirements of section 401(m)(11), section 401(m)(12), and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of that plan year and remain in effect for an entire 12-month plan year. * * *

* * * * *

(j) * * *

(3) *Early participation rules.* Section 401(m)(5)(C) and §1.401(m)–2(a)(1)(iii)(A), which provide an alternative nondiscrimination rule for certain plans that provide for early participation, do not apply for purposes of section 401(m)(11), section 401(m)(12), and this section. * * *

* * * * *

Par. 11. Section 1.402(c)–2, A–4, is amended by redesignating paragraph (h) as (j), adding a new paragraph (h), and adding and reserving paragraph (i) to read as follows:

§1.402(c)–2 Eligible rollover distributions, questions and answers.

* * * * *

A–4 * * *

(h) A distribution that is a permissible withdrawal from an eligible automatic contribution arrangement within the meaning of section 414(w).

(i) [Reserved].

* * * * *

Par. 12. Section 1.411(a)–4 is amended by revising paragraph (b)(7) to read as follows:

§1.411(a)–4 Forfeitures, suspensions, etc.

* * * * *

(b) * * *

(7) *Certain matching contributions.* A matching contribution (within the meaning of section 401(m)(4)(A) and §1.401(m)–1(a)(2)) is not treated as forfeitable even if under the plan it may be forfeited under §1.401(m)–2(b)(1) because the contribution to which it relates is treated as an excess contribution (within the meaning of §§1.401(k)–2(b)(2)(ii) and 1.401(k)–6), excess deferral (within the meaning of §1.402(g)–1(e)(1)(iii)), excess aggregate contribution (within the meaning of §1.401(m)–5), or a default elective contribution (within the meaning of §1.414(w)–1(e)) that is withdrawn in accordance with the requirements of §1.414(w)–1(c).

* * * * *

Par. 13. Section 1.414(w)–1 is added to read as follows:

§1.414(w)–1 Permissible Withdrawals from Eligible Automatic Contribution Arrangements.

(a) *Overview.* Section 414(w) provides rules under which certain employees are permitted to elect to make a withdrawal of default elective contributions from an eligible automatic contribution arrangement. This section sets forth the rules applicable to permissible withdrawals from an eligible automatic contribution arrangement within the meaning of section 414(w). Paragraph (b) of this section defines an eligible automatic contribution arrangement. Paragraph (c) of this section describes a permissible withdrawal and addresses which employees are eligible to elect a withdrawal, the timing of the withdrawal election, and the amount of the withdrawal. Paragraph (d) of this section describes the tax and other consequences of the withdrawal. Paragraph (e) of this section includes the definitions applicable to this section.

(b) *Eligible automatic contribution arrangement*—(1) *In general.* An eligible automatic contribution arrangement is an automatic contribution arrangement under an applicable employer plan that is intended to be an eligible automatic contribution arrangement for the plan year and that satisfies the uniformity requirement under paragraph (b)(2) of this section, and the notice requirement under paragraph (b)(3) of this section. An eligible automatic contribution arrangement need not cover all employees who are eligible to elect to have contributions made on their behalf under the applicable employer plan.

(2) *Uniformity requirement*—(i) *In general.* An eligible automatic contribution arrangement must provide that the default elective contribution is a uniform percentage of compensation.

(ii) *Exception to uniform percentage requirement.* An arrangement does not violate the uniformity requirement of paragraph (b)(2)(i) of this section merely because the percentage varies in a manner that is permitted under §1.401(k)–3(j)(2)(iii), except that the rule of §1.401(k)–3(j)(2)(iii)(B) is applied without regard to whether the arrangement is intended to be a qualified automatic contribution arrangement.

(iii) *Rules of application.* For purposes of this paragraph (b)(2), all automatic contribution arrangements that are intended to be eligible automatic contribution arrangements within a plan (or within the disaggregated plan under §1.410(b)–7, in the case of a plan subject to section 410(b)) are aggregated. Thus, for example, if a single plan within the meaning of section 414(l) covering employees in two separate divisions has two different automatic contribution arrangements that are intended to be eligible automatic contributions arrangements, the two automatic contribution arrangements can constitute eligible automatic contribution arrangements only if the default elective contributions under

the arrangements are the same percentage of compensation. However, if the different automatic contribution arrangements cover employees in portions of the plan that are mandatorily disaggregated under the rules of section 410(b), then there is no requirement to aggregate those automatic contribution arrangements under the uniformity requirements of this paragraph (b)(2).

(3) *Notice requirement*—(i) *General rule*. The notice requirement of this paragraph (b)(3) is satisfied for a plan year if each covered employee is given notice of the employee's rights and obligations under the arrangement. The notice must be sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and be written in a manner calculated to be understood by the average employee to whom the arrangement applies. The notice must be in writing; however, see §1.401(a)–21 for rules permitting the use of electronic media to provide applicable notices.

(ii) *Content requirement*. The notice must include the provisions found in §1.401(k)–3(d)(2)(ii) to the extent those provisions apply to the arrangement. A notice is not considered sufficiently accurate and comprehensive unless the notice accurately describes—

(A) The level of the default elective contributions which will be made on the employee's behalf if the employee does not make an affirmative election;

(B) The employee's rights to elect not to have default elective contributions made to the plan on his or her behalf or to have a different percentage of compensation or different amount of contribution made to the plan on his or her behalf;

(C) How contributions made under the arrangement will be invested in the absence of any investment election by the employee; and

(D) The employee's rights to make a permissible withdrawal, if applicable, and the procedures to elect such a withdrawal.

(iii) *Timing*—(A) *General rule*. The timing requirement of this paragraph (b)(3)(iii) is satisfied if the notice is provided within a reasonable period before the beginning of each plan year or, in the plan year the employee is first eligible to make a cash or deferred election (or first becomes covered under the automatic contribution arrangement as a result of a change in employment status), within a reasonable period before the employee becomes a covered employee. In addition, a notice satisfies the timing requirements of paragraph (b)(3) of this section only if it is provided sufficiently early so that the employee has a reasonable period of time after receipt of the notice in order to make the election described under paragraph (e)(2)(i) or (e)(2)(ii) of this section.

(B) *Deemed satisfaction of timing requirement*. The timing requirement of this paragraph (b)(3)(iii) is satisfied if at least 30 days (and no more than 90 days) before the beginning of each plan year, the notice is given to each employee covered under the automatic contribution arrangement for the plan year. In the case of an employee who does not receive the notice within the period described in the previous sentence because the employee becomes eligible to make a cash or deferred election (or becomes covered under the automatic contribution arrangement as a result of a change in employment status) after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90 days before the employee becomes eligible to make a cash or deferred election (or becomes covered under the automatic contribution arrangement as a result of a change in employment status), and no later than the date that affords the employee a reasonable period of time after receipt of the notice to make the election described under paragraph (e)(2)(i) or (e)(2)(ii) of this section. If it is not practicable for the notice to be provided on or before the date specified in the plan that an employee becomes eligible to make a cash or deferred election, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on that date.

(c) *Permissible withdrawal*—(1) *In general*. If the plan so provides, any employee who has default elective contributions made under the eligible automatic contribution arrangement may elect to make a withdrawal of such contributions (and earnings attributable thereto) in accordance with the requirements of this paragraph (c). An applicable employer plan that includes an eligible automatic contribution arrangement will not fail to satisfy the prohibition on in-service withdrawals under section 401(k)(2)(B), 403(b)(7), 403(b)(11), or 457(d)(1) merely because it permits withdrawals that satisfy the timing requirement of paragraph (c)(2) of this section and the amount requirement of paragraph (c)(3) of this section.

(2) *Timing*—(i) *Last date to make election*. A covered employee's election to withdraw default elective contributions must be made no later than 90 days after the date of the first default elective contribution under the eligible automatic contribution arrangement and must be effective no later than the date set forth in paragraph (c)(2)(iii) of this section. A plan is permitted to set an earlier deadline for making this election, but if a plan provides that a covered employee may withdraw default elective contributions, then the election period for the covered employee must be at least 30 days.

(ii) *Determination of date of first default elective contribution*. For purposes of this paragraph (c)(2), the date of the first default elective contribution is the date that the compensation that is subject to the cash or deferred election would otherwise have been included in gross income.

(iii) *Latest effective date of the election*. The effective date of an election described in this paragraph (c)(2) cannot be after the earlier of—

(A) The pay date for the second payroll period that begins after the date the election is made; and

(B) The first pay date that occurs at least 30 days after the election is made.

(iv) *Special rules*—(A) *Treatment of periods without default elective contributions*. For purposes of determining the date of the first default elective contribution under the eligible automatic contribution arrangement, a plan is permitted to treat an employee who for an entire plan year did not have default elective contributions made under the eligible automatic contribution arrangement as if the employee had not had such contributions for any prior plan year as well.

(B) *Treatment relating to aggregation of arrangements*.The determination of whether an election is made no later than 90 days after the date of the first default elective contribution under the eligible automatic contribution arrangement must take into account any other eligible au-

tomatic contribution arrangement that is required to be aggregated with the eligible automatic contribution arrangement under the rules of paragraph (b)(2)(iii) of this section.

(3) *Amount and timing of distributions*—(i) *In general*. A distribution satisfies the requirement of this paragraph (c)(3) if the distribution is equal to the amount of default elective contributions made under the eligible automatic contribution arrangement through the effective date of the election described in paragraph (c)(2) of this section (adjusted for allocable gains and losses to the date of distribution). If default elective contributions are separately accounted for in the participant's account, the amount of the distribution will be the total amount in that account. However, if default elective contributions are not separately accounted for under the plan, the amount of the allocable gains and losses will be determined under rules similar to those provided under §1.401(k)–2(b)(2)(iv) for the distribution of excess contributions.

(ii) *Fees*. The distribution amount as determined under this paragraph (c)(3) may be reduced by any generally applicable fees. However, the plan may not charge a higher fee for a distribution under section 414(w) than would apply to any other distributions of cash.

(iii) *Date of distribution*. The distribution must be made in accordance with the plan's ordinary timing procedures for processing distributions and making distributions.

(d) *Consequences of the withdrawal*—(1) *Income tax consequences*—(i) *Year of inclusion*. The amount of the withdrawal is includible in the eligible employee's gross income for the taxable year in which the distribution is made. However, any portion of the distribution consisting of designated Roth contributions is not included in an employee's gross income a second time. The portion of the withdrawal that is treated as an investment in the contract is determined without regard to any plan contributions other than those distributed as a withdrawal of default elective contributions.

(ii) *No additional tax on early distributions from qualified retirement plans*. The withdrawal is not subject to the additional tax under section 72(t).

(iii) *Reporting*. The amount of the withdrawal is reported on Form 1099–R, *"Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.,"* as described in the applicable instructions.

(iv) *Disregarded for purposes of section 402(g)*. The amount of the withdrawal is not taken into account in determining the limitation on elective deferrals under section 402(g).

(2) *Forfeiture of matching contributions*. In the case of any withdrawal made under paragraph (c) of this section, employer matching contributions with respect to the amount withdrawn that have been allocated to the participant's account (adjusted for allocable gains and losses) must be forfeited. A plan is permitted to provide that employer matching contributions will not be made with respect to any withdrawal made under paragraph (c) of this section if the withdrawal has been made prior to the date as of which the match would otherwise be allocated.

(3) *Consent rules*. A withdrawal made under paragraph (c) of this section may be made without regard to any notice or consent otherwise required under section 401(a)(11) or 417.

(e) *Definitions*. Unless indicated otherwise, the following definitions apply for purposes of section 414(w) and this section.

(1) *Applicable employer plan*. An applicable employer plan means a plan that—

(i) Is qualified under section 401(a);

(ii) Satisfies the requirements of section 403(b);

(iii) Is a section 457(b) eligible governmental plan described in §1.457–2(f);

(iv) Is a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6); or

(v) Is a SIMPLE described in section 408(p).

(2) *Automatic contribution arrangement*. An automatic contribution arrangement means an arrangement that provides for a cash or deferred election and which specifies that, in the absence of a covered employee's affirmative election, a default election applies under which the employee is treated as having elected to have default elective contributions made on his or her behalf under the plan. The default election begins to apply with respect to an eligible employee no earlier than a reasonable period of time after receipt of the notice describing the automatic contribution arrangement. This default election ceases to apply with respect to an eligible employee for periods of time with respect to which the employee has an affirmative election that is currently in effect to—

(i) Not have any default elective contributions made on his or her behalf; or

(ii) Have contributions made in a different amount or percentage of compensation.

(3) *Covered employee*. Covered employee means an employee who is covered under the automatic contribution arrangement, determined under the terms of the plan. A plan must provide whether an employee who makes an affirmative election remains a covered employee. If a plan provides that an employee who makes an affirmative election described in paragraph (e)(2)(i) or (e)(2)(ii) of this section remains a covered employee, then the employee must continue to receive the notice described in paragraph (b)(3) of this section and the plan may be eligible for the excise tax relief with respect to excess amounts distributed within 6 months after the end of the plan year under section 4979(f)(1). Such an employee will also have the default election reapply if the plan provides that the employee's prior affirmative election no longer remains in effect and the employee does not make a new affirmative election.

(4) *Default elective contributions*. Default elective contributions means the contributions that are made at a specified level or amount under an automatic contribution arrangement in the absence of a covered employee's affirmative election that are—

(i) Contributions described in section 402(g)(3); or

(ii) Contributions made to an eligible governmental plan within the meaning of §1.457–2(f) that would be elective contributions if they were made under a qualified plan.

(f) *Effective/applicability date*—(1) *Statutory effective date*. Section 414(w) applies to plan years beginning on or after January 1, 2008.

(2) *Regulatory effective date*. This section applies to plan years beginning on or after January 1, 2010. For plan years that begin in 2008, a plan must operate in accordance with a good faith interpretation

of section 414(w). For this purpose, a plan that operates in accordance with this section will be treated as operating in accordance with a good faith interpretation of section 414(w).

PART 54—PENSION EXCISE TAXES.

Par. 14. The authority citation for part 54 continues to read in part as follows:

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

Par. 15. Section 54.4979–1, paragraph (c)(1) is revised to read as follows:

§54.4979–1 Excise tax on certain excess contributions and excess aggregate contributions.

* * * * *

(c) *No tax when excess distributed within 2½ months after close of year or additional employer contributions made*—(1) *General rule*. No tax is imposed under this section on any excess contribution or excess aggregate contribution, as the case may be, to the extent the contribution (together with any income allocable thereto) is corrected before the close of the first 2½ months of the following plan year (6 months in the case of a plan that includes an eligible automatic contribution arrangement within the meaning of section 414(w)). The extension to 6 months applies to a distribution of excess contributions or excess aggregate contributions for a plan year beginning on or after January 1, 2010, only where all the eligible NHCEs and eligible HCEs (both as defined in §1.401(k)–6 of this Chapter) are covered employees under an eligible automatic contribution arrangement within the meaning of section 414(w) for the entire plan year (or the portion of the plan year that the eligible NHCEs and eligible HCEs are eligible employees under the plan)). Qualified nonelective contributions and qualified matching contributions taken into account under §1.401(k)–2(a)(6) of this Chapter or qualified nonelective contributions or elective contributions taken into account under §1.401(m)–2(a)(6) of this Chapter for a plan year may permit a plan to avoid excess contributions or excess aggregate contributions, respectively, even if made after the close of the 2½ month (or 6 month) period for distributing excess contributions or excess aggregate contributions without the excise tax. See §1.401(k)–2(b)(1)(i) and (5)(i) of this Chapter for methods to avoid excess contributions, and §1.401(m)–2(b)(1)(i) of the Chapter for methods to avoid excess aggregate contributions.

* * * * *

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved January 16, 2009.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

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Part III. Administrative, Procedural, and Miscellaneous

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2009–20

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code as in effect for plan years beginning before 2008. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I), and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–2 C.B. 366.

The composite corporate bond rate for February 2009 is 6.83 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

For Plan Years Beginning in		Corporate Bond Weighted Average	Permissible Range		
Month	*Year*		90%	to	100%
March	2009	6.35	5.72		6.35

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. For plan years beginning in 2008 and 2009, a transitional rule under § 430(h)(2)(G) provides that the segment rates are blended with the corporate bond weighted average as specified above. An election may be made under § 430(h)(2)(G)(iv) to use the segment rates without applying the transitional rule.

Notice 2007–81, 2007–44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, the 24-month average corporate bond segment rates, and the funding transitional segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from February 2009 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of February 2009 are, respectively, 5.24, 7.07, and 7.08. The three 24-month average corporate bond segment rates applicable for March 2009 under the election of § 430(h)(2)(G)(iv) are as follows:

First Segment	Second Segment	Third Segment
5.31	6.54	6.73

The transitional segment rates under § 430(h)(2)(G) applicable for March 2009, taking into account the corporate bond weighted average of 6.35 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	6.00	6.41	6.48
2009	5.66	6.48	6.60

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 417(e)(3)(A)(ii)(II) (prior to amendment by PPA) defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual rate of interest on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury securities for February 2009 is 3.59 percent. The Service has determined this rate as the average of the yield on the 30-year Treasury bond maturing in May 2038 determined each day through February 11, 2008, and the yield on the 30-year Treasury bond maturing in February 2039 determined each day for the balance of the month.

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	*Year*		90%	to	105%
March	2009	4.51	4.06		4.74

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rate is the monthly spot segment rate blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for February 2009, taking into account the February 2009 30-year Treasury rate of 3.59 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2008	3.92	4.29	4.29
2009	4.25	4.98	4.99

DRAFTING INFORMATION

The principal author of this notice is Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at *RetirementPlanQuestions@irs.gov*.

Table I

Monthly Yield Curve for January 2009

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	4.10	20.5	7.18	40.5	7.07	60.5	7.04	80.5	7.03
1.0	4.37	21.0	7.17	41.0	7.07	61.0	7.04	81.0	7.03
1.5	4.63	21.5	7.17	41.5	7.07	61.5	7.04	81.5	7.03
2.0	4.89	22.0	7.16	42.0	7.07	62.0	7.04	82.0	7.03
2.5	5.16	22.5	7.16	42.5	7.07	62.5	7.04	82.5	7.02
3.0	5.41	23.0	7.15	43.0	7.07	63.0	7.04	83.0	7.02
3.5	5.64	23.5	7.15	43.5	7.07	63.5	7.04	83.5	7.02
4.0	5.86	24.0	7.14	44.0	7.06	64.0	7.04	84.0	7.02
4.5	6.06	24.5	7.14	44.5	7.06	64.5	7.04	84.5	7.02
5.0	6.23	25.0	7.13	45.0	7.06	65.0	7.04	85.0	7.02
5.5	6.38	25.5	7.13	45.5	7.06	65.5	7.04	85.5	7.02
6.0	6.51	26.0	7.13	46.0	7.06	66.0	7.04	86.0	7.02
6.5	6.63	26.5	7.12	46.5	7.06	66.5	7.04	86.5	7.02
7.0	6.73	27.0	7.12	47.0	7.06	67.0	7.04	87.0	7.02
7.5	6.81	27.5	7.12	47.5	7.06	67.5	7.03	87.5	7.02
8.0	6.88	28.0	7.11	48.0	7.06	68.0	7.03	88.0	7.02
8.5	6.95	28.5	7.11	48.5	7.06	68.5	7.03	88.5	7.02
9.0	7.00	29.0	7.11	49.0	7.06	69.0	7.03	89.0	7.02
9.5	7.05	29.5	7.11	49.5	7.06	69.5	7.03	89.5	7.02
10.0	7.09	30.0	7.10	50.0	7.05	70.0	7.03	90.0	7.02
10.5	7.12	30.5	7.10	50.5	7.05	70.5	7.03	90.5	7.02
11.0	7.15	31.0	7.10	51.0	7.05	71.0	7.03	91.0	7.02
11.5	7.17	31.5	7.10	51.5	7.05	71.5	7.03	91.5	7.02
12.0	7.19	32.0	7.10	52.0	7.05	72.0	7.03	92.0	7.02
12.5	7.20	32.5	7.09	52.5	7.05	72.5	7.03	92.5	7.02
13.0	7.21	33.0	7.09	53.0	7.05	73.0	7.03	93.0	7.02
13.5	7.22	33.5	7.09	53.5	7.05	73.5	7.03	93.5	7.02
14.0	7.23	34.0	7.09	54.0	7.05	74.0	7.03	94.0	7.02
14.5	7.23	34.5	7.09	54.5	7.05	74.5	7.03	94.5	7.02
15.0	7.23	35.0	7.09	55.0	7.05	75.0	7.03	95.0	7.02
15.5	7.23	35.5	7.08	55.5	7.05	75.5	7.03	95.5	7.02
16.0	7.23	36.0	7.08	56.0	7.05	76.0	7.03	96.0	7.02
16.5	7.22	36.5	7.08	56.5	7.05	76.5	7.03	96.5	7.02
17.0	7.22	37.0	7.08	57.0	7.05	77.0	7.03	97.0	7.02
17.5	7.21	37.5	7.08	57.5	7.04	77.5	7.03	97.5	7.02
18.0	7.21	38.0	7.08	58.0	7.04	78.0	7.03	98.0	7.02
18.5	7.20	38.5	7.08	58.5	7.04	78.5	7.03	98.5	7.02
19.0	7.20	39.0	7.08	59.0	7.04	79.0	7.03	99.0	7.02
19.5	7.19	39.5	7.07	59.5	7.04	79.5	7.03	99.5	7.02
20.0	7.19	40.0	7.07	60.0	7.04	80.0	7.03	100.0	7.02

Part IV. Items of General Interest

Suspension of Tax-Exempt Status of an Organization Identified With Terrorism

Announcement 2009–17

I. Purpose

This announcement is a public notice of the suspension under section 501(p) of the Internal Revenue Code of the federal tax exemption of a certain organization that has been designated as supporting or engaging in terrorist activity or supporting terrorism. Contributions made to an organization during the period that the organization's tax-exempt status is suspended are not deductible for federal tax purposes.

II. Background

The federal government has designated a number of organizations as supporting or engaging in terrorist activity or supporting terrorism under the Immigration and Nationality Act, the International Emergency Economic Powers Act, and the United Nations Participation Act of 1945. Federal law prohibits most contributions to organizations that have been so designated.

Section 501(p) of the Code was enacted as part of the Military Family Tax Relief Act of 2003 (P. L. 108–121), effective November 11, 2003. Section 501(p)(1) suspends the exemption from tax under section 501(a) of any organization described in section 501(p)(2). An organization is described in section 501(p)(2) if the organization is designated or otherwise individually identified (1) under certain provisions of the Immigration and Nationality Act as a terrorist organization or foreign terrorist organization; (2) in or pursuant to an Executive Order which is related to terrorism and issued under the authority of the International Emergency Economic Powers Act or section 5 of the United Nations Participation Act of 1945 for the purpose of imposing on such organization an economic or other sanction; or (3) in or pursuant to an Executive Order issued under the authority of any federal law, if the organization is designated or otherwise individually identified in or pursuant to the Executive Order as supporting or engaging in terrorist activity (as defined in the Immigration and Nationality Act) or supporting terrorism (as defined in the Foreign Relations Authorization Act) and the Executive Order refers to section 501(p)(2).

Under section 501(p)(3) of the Code, suspension of an organization's tax exemption begins on the date of the first publication of a designation or identification with respect to the organization, as described above, or the date on which section 501(p) was enacted, whichever is later. This suspension continues until all designations and identifications of the organization are rescinded under the law or Executive Order under which such designation or identification was made.

Under section 501(p)(4) of the Code, no deduction is allowed under any provision of the Internal Revenue Code for any contribution to an organization during any period in which the organization's tax exemption is suspended under section 501(p). Thus, for example, no charitable contribution deduction is allowed under section 170 (relating to the income tax), section 545(b)(2) (relating to undistributed personal holding company income), section 556(b)(2) (relating to undistributed foreign personal holding company income), section 642(c) (relating to charitable set asides), section 2055 (relating to the estate tax), section 2106(a)(2) (relating to the estate tax for nonresident aliens) and section 2522 (relating to the gift tax) for contributions made to the organization during the suspension period.

On February 11, 2009, the organization listed below was designated under Executive Order 13224, entitled "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism."

III. Notice of Suspension and Non-deductibility of Contributions

The organization whose tax exemption has been suspended under section 501(p) and the effective date of such suspension are listed below. Contributions made to this organization during the period of suspension are not deductible for federal tax purposes.

Tamil Foundation, Inc.
Cumberland, MD
Effective date: 2–11–09

IV. Federal Tax Filings

An organization whose exempt status has been suspended under section 501(p) does not file Form 990 and is required to file the appropriate Federal income tax returns for the taxable periods beginning on the date of the suspension. The organization must continue to file all other appropriate federal tax returns, including employment tax returns, and may also have to file federal unemployment tax returns.

V. Contact Information

For additional information regarding the designation or identification of an organization described in section 501(p)(2), contact the Compliance Division at the Office of Foreign Assets Control of the U.S. Treasury Department at 202–622–2490. Additional information is also available for download from the Office's Internet Home Page at *http://www.treas.gov/offices/enforcement/ofac/*

For additional information regarding the suspension of the federal tax exemption of an organization under section 501(p), contact Ward L. Thomas at (202) 283–8913 at the Internal Revenue Service.

Section 482: Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement; Correction

Announcement 2009–18

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains corrections to final and temporary regulations (T.D. 9441, 2009–7 I.R.B. 460) that were published in the **Federal Register** on Monday, January 5, 2009 (74 FR 340)

providing further guidance and clarification regarding methods under section 482 to determine taxable income in connection with a cost sharing arrangement in order to address issues that have arisen in administering the current regulations. The temporary regulations affect domestic and foreign entities that enter into cost sharing arrangements described in the temporary regulations.

DATES: This correction is effective March 5, 2009, and is applicable on January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Kenneth P. Christman, (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of this document are under sections 367 and 482 of the Internal Revenue Code.

Need for Correction

As published, final and temporary regulations (T.D. 9441) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final and temporary regulations (T.D. 9441), which was the subject of FR Doc. E8–30715, is corrected as follows:

1. On page 346, column 2, in the preamble, under the paragraph heading "4. Acquisition Price and Market Capitalization Methods—Temp. Treas. Reg. §1.482–7T(g)(5) and (6), third paragraph of the column, line 17, the language "PCT Payor's, nonroutine contributions" is corrected to read "PCT Payee's, nonroutine contributions".

2. On page 347, column 1, in the preamble, the language of the paragraph heading "2. Contingent Payments—Temp. Treas. Reg. §1.482–7T(h)(2)(iv) and (v)" is corrected to read "2. Contingent Payments—Temp. Treas. Reg. §1.482–7T(h)(2)(iii) and (iv)".

3. On page 348, column 2, in the preamble, under the paragraph heading "Special Analyses", last paragraph of the column, line 13, the language "preamble to the cross-reference notice of" is corrected to read "preamble to the cross-referenced notice of".

4. On page 348, column 3, in the preamble, under the paragraph heading "Drafting Information", second paragraph of the column, line 2, the language "proposed regulations is Kenneth P." is corrected to read "temporary regulations is Kenneth P.".

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on March 4, 2009, 8:45 a.m., and published in the issue of the Federal Register for March 5, 2009, 74 F.R. 9570)

Section 482: Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement; Correction

Announcement 2009–19

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains corrections to a notice of proposed rulemaking by cross-reference to temporary regulations (REG–144615–02, 2009–7 I.R.B. 561) that was published in the **Federal Register** on Monday, January 5, 2009 (74 FR 236) providing further guidance and clarification regarding methods under section 482 to determine taxable income in connection with a cost sharing arrangement in order to address issues that have arisen in administering the current regulations. These temporary regulations potentially affect controlled taxpayers within the meaning of section 482 that enter into cost sharing arrangements as defined therein.

FOR FURTHER INFORMATION CONTACT: Kenneth P. Christman, (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 482 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG–144615–02) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking by cross-reference to temporary regulations (REG–144615–02), which was the subject of FR Doc. E8–30712, is corrected as follows:

1. On page 236, in the document headings, under the caption "ACTION:", the language "Notice of proposed rulemaking by cross-reference to temporary regulations, notice of proposed rulemaking, and notice of public hearing." is corrected to read "Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.".

2. On page 236, column 3, in the preamble, under the paragraph heading "Special Analyses", last line of the column, the language "sharing agreements. Few small entities" is corrected to read "sharing arrangements. Few small entities".

3. On page 237, column 1, in the preamble, under the paragraph heading "Special Analyses", first paragraph of the column, line 2, the language "agreements, as defined by these" is corrected to read "arrangements, as defined by these".

4. On page 237, column 1, in the preamble, under the paragraph heading "Comments and Public Hearing", third paragraph, line 1, the language "The rules of 26 CFR 601.601(a)(93)" is corrected to read "The rules of 26 CFR 601.601(a)(3)".

§1.482–2 [Corrected]

5. On page 237, column 3, §1.482–2(f)(2), the language "Election

to apply paragraph (b) of this section to earlier taxable years." is corrected to read "Election to apply paragraph (b) to earlier taxable years.".

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on March 4, 2009, 8:45 a.m., and published in the issue of the Federal Register for March 5, 2009, 74 F.R. 9577)

Consolidated Returns; Intercompany Obligations; Correction

Announcement 2009–20

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final regulations (T.D. 9442, 2009–6 I.R.B. 434) that were published in the **Federal Register** on Monday, December 29, 2008 (73 FR 79324) under section 1502 of the Internal Revenue Code providing guidance regarding the treatment of transactions involving obligations between members of a consolidated group.

DATES: This correction is effective February 11, 2009, and is applicable on December 29, 2008.

FOR FURTHER INFORMATION CONTACT: Frances Kelly, (202) 622–7770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this document are under section 1502 of the Internal Revenue Code.

Need for Correction

As published, final regulations (T.D. 9442) contains errors that may prove to be misleading and are in need of clarification.

* * * * *

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.1502–13 is amended as follows:

1. The second sentence of paragraph (g)(3)(i)(B) is revised.

2. Paragraph (g)(3)(i)(B)(*1*)(*vi*) is revised.

3. Paragraph (g)(7)(ii) *Example 4*. (ii) is revised.

4. The paragraph title for paragraph (g)(7)(ii) *Example 4*. (iv) is added.

5. The sixth sentence of paragraph (g)(7)(ii) *Example 5*. (i) is revised.

§1.1502–13 Intercompany transactions.

* * * * *

(g) * * *

(3) * * *

(i) * * *

(B) * * * In making this determination, if a creditor or debtor realizes an amount in a transaction in which a creditor assigns all or part of its rights under an intercompany obligation to the debtor, or a debtor assigns all or part of its obligations under an intercompany obligation to the creditor, the transaction will be treated as an extinguishment and will be excepted from the definition of "triggering transaction" only if either of the exceptions in paragraphs (g)(3)(i)(B)(*5*) or (*6*) of this section apply. * * *

(*1*) * * *

(*vi*) The stock of the transferee member (or a higher-tier member other than a higher-tier member of an 80-percent chain that includes the transferor and transferee) is disposed of within 12 months from the assignment of the intercompany obligation, unless at the time of the assignment, the transferor member, transferee member (or in the case of successive section 351 exchanges, each transferor and transferee member) and the debtor member are all in the same 80-percent chain; and all of the stock of the transferee (or in the case of successive section 351 exchanges, the lowest-tier transferee) held by members of the group is disposed of as part of the same plan or arrangement, either directly or indirectly, to persons that are not members of the group.

* * * * *

(7) * * *

(ii) * * *

Example 4. * * *

(ii) *No deemed satisfaction and reissuance*. Because the assignment of the B note is an exchange to which section 351 applies and neither S nor B recognize gain or loss, the transaction is not a triggering transaction under paragraph (g)(3)(i)(B)(*1*) of this section, and the note is not treated as satisfied and reissued under paragraph (g)(3)(ii) of this section.

* * * * *

(iv) *Transferee loss subject to limitation*. * * *

* * * * *

Example 5. * * *

(i) * * * The terms and conditions of the note are not modified in connection with the sales transaction, the transaction does not result in a change in payment expectations, and no amount of income, gain, deduction, or loss is recognized by S, B, or T with respect to the note.

* * * * *

Guy Traynor,
Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on March 4, 2009, 8:45 a.m., and published in the issue of the Federal Register for March 5, 2009, 74 F.R. 6828)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
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