

paragraph (a)(3)(ii) of this section, the default in the absence of an affirmative election is to make a contribution under the cash or deferred arrangement, the plan terms must provide the extent to which the default contributions are pre-tax elective contributions and the extent to which the default contributions are designated Roth contributions.

(B) If the default contributions under the plan are designated Roth contributions, then an employee who has not made an affirmative election is deemed to have irrevocably designated the contributions (in accordance with section 402A(c)(1)(B)) as designated Roth contributions.

(6) *Effective date.* Section 402A and the provisions of this section 1.401(k)-1(f) apply to taxable years beginning after December 31, 2005.

(g) *Effective dates—(1) General rule.* Except as otherwise provided in this paragraph (g), this section and §§ 1.401(k)-2 through 1.401(k)-6 apply to plan years that begin on or after January 1, 2006.

(2) *Early implementation permitted.* A plan is permitted to apply the rules of this section and §§ 1.401(k)-2 through 1.401(k)-6 to any plan year that ends after December 29, 2004, provided the plan applies all the rules of this section and §§ 1.401(k)-2 through 1.401(k)-6 and all the rules of §§ 1.401(m)-1 through 1.401(m)-5, to the extent applicable, for that plan year and all subsequent plan years.

(3) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers in effect on the date described in paragraph (g)(1) of this section, the provisions of this section and §§ 1.401(k)-2 through 1.401(k)-6 apply to the later of the first plan year beginning after the termination of the last such agreement or the first plan year described in paragraph (g)(1) of this section.

(4) *Applicability of prior regulations.* For any plan year before a plan applies this section and §§ 1.401(k)-2 through 1.401(k)-6 (either the first plan year beginning on or after January 1, 2006, or such earlier year, as provided in para-

graph (g)(2) of this section), § 1.401(k)-1 (as it appeared in the April 1, 2004 edition of 26 CFR part 1) applies to the plan to the extent that section, as it so appears, reflects the statutory provisions of section 401(k) as in effect for the relevant year.

[T.D. 9169, 69 FR 78154, Dec. 29, 2004, as amended by T.D. 9237, 71 FR 9 Jan. 3, 2006; T.D. 9319, 72 FR 16894, Apr. 5, 2007; T.D. 9324, 72 FR 21109, Apr. 30, 2007; T.D. 9447, 74 FR 8207, Feb. 24, 2009]

#### § 1.401(k)-2 ADP test.

(a) *Actual deferral percentage (ADP) test—(1) In general—(i) ADP test formula.* A cash or deferred arrangement satisfies the ADP test for a plan year only if—

(A) The ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ADP for the eligible HCEs for the plan year over the ADP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees.* If, for the applicable year for determining the ADP of the NHCEs for a plan year, there are no eligible NHCEs (*i.e.*, all of the eligible employees under the cash or deferred arrangement for the applicable year are HCEs), the arrangement is deemed to satisfy the ADP test for the plan year.

(iii) *Special rule for early participation.* If a cash or deferred arrangement provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the cash or deferred arrangement meets the requirements of section 410(b)(1), then in determining whether the arrangement meets the requirements under paragraph (a)(1) of this section, either—

(A) Pursuant to section 401(k)(3)(F), the ADP test is performed under the plan (determined without regard to disaggregation under § 1.410(b)-7(c)(3)), using the ADP for all eligible HCEs for

the plan year and the ADP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A); or

(B) Pursuant to § 1.401(k)-1(b)(4), the plan is disaggregated into separate plans and the ADP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

(2) *Determination of ADP*—(i) *General rule.* The ADP for a group of eligible employees (either eligible HCEs or eligible NHCEs) for a plan year or applicable year is the average of the ADRs of the eligible employees in that group for that year. The ADP for a group of eligible employees is calculated to the nearest hundredth of a percentage point.

(ii) *Determination of applicable year under current year and prior year testing method.* The ADP test is applied using the prior year testing method or the current year testing method. Under the prior year testing method, the applicable year for determining the ADP for the eligible NHCEs is the plan year immediately preceding the plan year for which the ADP test is being performed. Under the prior year testing method, the ADP for the eligible NHCEs is determined using the ADRs for the eligible employees who were NHCEs in that preceding plan year, regardless of whether those NHCEs are eligible employees or NHCEs in the plan year for which the ADP test is being calculated. Under the current year testing method, the applicable year for determining the ADP for the eligible NHCEs is the same plan year as the plan year for which the ADP test is being performed. Under either method, the ADP for eligible HCEs is the average of the ADRs of the eligible HCEs for the plan year for which the ADP test is being performed. See paragraph (c) of this section for additional rules for the prior year testing method.

(3) *Determination of ADR*—(i) *General rule.* The ADR of an eligible employee for a plan year or applicable year is the sum of the employee's elective con-

tributions taken into account with respect to such employee for the year, determined under the rules of paragraphs (a)(4) and (5) of this section, and the qualified nonelective contributions and qualified matching contributions taken into account with respect to such employee under paragraph (a)(6) of this section for the year, divided by the employee's compensation taken into account for the year. The ADR is calculated to the nearest hundredth of a percentage point. If no elective contributions, qualified nonelective contributions, or qualified matching contributions are taken into account under this section with respect to an eligible employee for the year, the ADR of the employee is zero.

(ii) *ADR of HCEs eligible under more than one arrangement*—(A) *General rule.* Pursuant to section 401(k)(3)(A), the ADR of an HCE who is an eligible employee in more than one cash or deferred arrangement of the same employer is calculated by treating all contributions with respect to such HCE under any such arrangement as being made under the cash or deferred arrangement being tested. Thus, the ADR for such an HCE is calculated by accumulating all contributions under any cash or deferred arrangement (other than a cash or deferred arrangement described in paragraph (a)(3)(ii)(B) of this section) that would be taken into account under this section for the plan year, if the cash or deferred arrangement under which the contribution was made applied this section and had the same plan year. For example, in the case of a plan with a 12-month plan year, the ADR for the plan year of that plan for an HCE who participates in multiple cash or deferred arrangements of the same employer is the sum of all contributions during such 12-month period that would be taken into account with respect to the HCE under all such arrangements in which the HCE is an eligible employee, divided by the HCE's compensation for that 12-month period (determined using the compensation definition for the plan being tested), without regard to the plan year of the other plans and whether those plans are satisfying this section or § 1.401(k)-3.

(B) *Plans not permitted to be aggregated.* Cash or deferred arrangements under plans that are not permitted to be aggregated under § 1.401(k)-1(b)(4) (determined without regard to the prohibition on aggregating plans with inconsistent testing methods set forth in § 1.401(k)-1(b)(4)(iii)(B) and the prohibition on aggregating plans with different plan years set forth in § 1.410(b)-7(d)(5)) are not aggregated under this paragraph (a)(3)(ii).

(iii) *Examples.* The following examples illustrate the application of this paragraph (a)(3):

*Example 1.* (i) Employee A, an HCE with compensation of \$120,000, is eligible to make elective contributions under Plan S and Plan T, two profit-sharing plans maintained by Employer H with calendar year plan years, each of which includes a cash or deferred arrangement. During the current plan year, Employee A makes elective contributions of \$6,000 to Plan S and \$4,000 to Plan T.

(ii) Under each plan, the ADR for Employee A is determined by dividing Employee A's total elective contributions under both arrangements by Employee A's compensation taken into account under the plan for the year. Therefore, Employee A's ADR under each plan is 8.33% (\$10,000/\$120,000).

*Example 2.* (i) The facts are the same as in *Example 1*, except that Plan T defines compensation (for deferral and testing purposes) to exclude all bonuses paid to an employee. Plan S defines compensation (for deferral and testing purposes) to include bonuses paid to an employee. During the current year, Employee A's compensation included a \$10,000 bonus. Therefore, Employee A's compensation under Plan T is \$110,000 and Employee A's compensation under Plan S is \$120,000.

(ii) Employee A's ADR under Plan T is 9.09% (\$10,000/\$110,000) and under Plan S, Employee A's ADR is 8.33% (\$10,000/\$120,000).

*Example 3.* (i) Employer J sponsors two profit-sharing plans, Plan U and Plan V, each of which includes a cash or deferred arrangement. Plan U's plan year begins on July 1 and ends on June 30. Plan V has a calendar year plan year. Compensation under both plans is limited to the participant's compensation during the period of participation. Employee B is an HCE who participates in both plans. Employee B's monthly compensation and elective contributions to each plan for the 2005 and 2006 calendar years are as follows:

Calendar year	Monthly compensation	Monthly elective contribution to Plan U	Monthly elective contribution to Plan V
2005 .....	\$10,000	\$500	\$400
2006 .....	11,500	700	550

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and Plan V for the plan year ending June 30, 2006, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is  $((\$900 \times 6) + (\$1,250 \times 6)) / ((\$10,000 \times 6) + (\$11,500 \times 6))$ , or 10%.

(iii) Under Plan V, Employee B's ADR for the plan year ended December 31, 2005, is equal to total elective contributions under Plan U and V for the plan year ending December 31, 2005, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan V for the plan year ending December 31, 2005, is  $(\$10,800 / \$120,000)$ , or 9%.

*Example 4.* (i) The facts are the same as *Example 3*, except that Employee B first becomes eligible to participate in Plan U on January 1, 2006.

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and V for the plan year ending June 30, 2006, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is  $((\$400 \times 6) + (\$1,250 \times 6)) / ((\$10,000 \times 6) + (\$11,500 \times 6))$ , or 7.67%.

(4) *Elective contributions taken into account under the ADP test—(i) General rule.* An elective contribution is taken into account in determining the ADR for an eligible employee for a plan year or applicable year only if each of the following requirements is satisfied—

(A) The elective contribution is allocated to the eligible employee's account under the plan as of a date within that year. For purposes of this rule, an elective contribution is considered allocated as of a date within a year only if—

(1) The allocation is not contingent on the employee's participation in the plan or performance of services on any date subsequent to that date; and

(2) The elective contribution is actually paid to the trust no later than the end of the 12-month period immediately following the year to which the contribution relates.

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(B) The elective contribution relates to compensation that either—

(1) Would have been received by the employee in the year but for the employee's election to defer under the arrangement; or

(2) Is attributable to services performed by the employee in the year and, but for the employee's election to defer, would have been received by the employee within 2½ months after the close of the year, but only if the plan provides for elective contributions that relate to compensation that would have been received after the close of a year to be allocated to such prior year rather than the year in which the compensation would have been received.

(ii) *Elective contributions for partners and self-employed individuals.* For purposes of this paragraph (a)(4), a partner's distributive share of partnership income is treated as received on the last day of the partnership taxable year and a sole proprietor's compensation is treated as received on the last day of the individual's taxable year. Thus, an elective contribution made on behalf of a partner or sole proprietor is treated as allocated to the partner's account for the plan year that includes the last day of the partnership taxable year, provided the requirements of paragraph (a)(4)(i) of this section are met.

(iii) *Elective contributions for HCEs.* Elective contributions of an HCE must include any excess deferrals, as described in § 1.402(g)-1(a), even if those excess deferrals are distributed, pursuant to § 1.402(g)-1(e).

(5) *Elective contributions not taken into account under the ADP test—(i) General rule.* Elective contributions that do not satisfy the requirements of paragraph (a)(4)(i) of this section may not be taken into account in determining the ADR of an eligible employee for the plan year or applicable year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the elective contributions must satisfy the requirements of section 401(a)(4) (without regard to the ADP test) for the plan year for which they are allocated under the plan as if they were nonelective contributions and were the only nonelective contributions for that year. See

§§ 1.401(a)(4)-1(b)(2)(ii)(B) and 1.410(b)-7(c)(1).

(ii) *Elective contributions for NHCEs.* Elective contributions of an NHCE shall not include any excess deferrals, as described in § 1.402(g)-1(a), to the extent the excess deferrals are prohibited under section 401(a)(30). However, to the extent that the excess deferrals are not prohibited under section 401(a)(30), they are included in elective contributions even if distributed pursuant to § 1.402(g)-1(e).

(iii) *Elective contributions treated as catch-up contributions.* Elective contributions that are treated as catch-up contributions under section 414(v) because they exceed a statutory limit or employer-provided limit (within the meaning of § 1.414(v)-1(b)(1)) are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions were made, or for any other plan year.

(iv) *Elective contributions used to satisfy the ACP test.* Except to the extent necessary to demonstrate satisfaction of the requirement of § 1.401(m)-2(a)(6)(ii), elective contributions taken into account for the ACP test under § 1.401(m)-2(a)(6) are not taken into account under paragraph (a)(4) of this section.

(v) *Additional elective contributions pursuant to section 414(u).* Additional elective contributions made pursuant to section 414(u) by reason of an eligible employee's qualified military service 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.

(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.

(6) *Qualified nonelective contributions and qualified matching contributions that may be taken into account under the ADP*

*test.* Qualified nonelective contributions and qualified matching contributions may be taken into account in determining the ADR for an eligible employee for a plan year or applicable year but only to the extent the contributions satisfy the following requirements—

(i) *Timing of allocation.* The qualified nonelective contribution or qualified matching contribution is allocated to the employee's account as of a date within that year within the meaning of paragraph (a)(4)(i)(A) of this section. Consequently, under the prior year testing method, in order to be taken into account in calculating the ADP for the eligible NHCEs for the applicable year, a qualified nonelective contribution or qualified matching contribution must be contributed no later than the end of the 12-month period immediately following the applicable year even though the applicable year is different than the plan year being tested.

(ii) *Requirement that amount satisfy section 401(a)(4).* The amount of nonelective contributions, including those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)-2(a)(6), satisfies the requirements of section 401(a)(4). See § 1.401(a)(4)-1(b)(2). The amount of nonelective contributions, excluding those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)-2(a)(6), satisfies the requirements of section 401(a)(4). See § 1.401(a)(4)-1(b)(2). In the case of an employer that is applying the special rule for employer-wide plans in § 1.414(r)-1(c)(2)(ii) with respect to the cash or deferred arrangement, the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) must be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on an employer-wide basis. Conversely,

in the case of an employer that is treated as operating qualified separate lines of business, and does not apply the special rule for employer-wide plans in § 1.414(r)-1(c)(2)(ii) with respect to the cash or deferred arrangement, then the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) is not permitted to be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on that basis.

(iii) *Aggregation must be permitted.* The plan that contains the cash or deferred arrangement and the plan or plans to which the qualified nonelective contributions or qualified matching contributions are made, are plans that would be permitted to be aggregated under § 1.401(k)-1(b)(4). If the plan year of the plan that contains the cash or deferred arrangement is changed to satisfy the requirement under § 1.410(b)-7(d)(5) that aggregated plans have the same plan year, qualified nonelective contributions and qualified matching contributions may be taken into account in the resulting short plan year only if such qualified nonelective contributions and qualified matching contributions could have been taken into account under an ADP test for a plan with the same short plan year.

(iv) *Disproportionate contributions not taken into account—(A) General rule.* Qualified nonelective contributions cannot be taken into account for a plan year for an NHCE to the extent such contributions exceed the product of that NHCE's compensation and the greater of 5% or two times the plan's representative contribution rate. Any qualified nonelective contribution taken into account under an ACP test under § 1.401(m)-2(a)(6) (including the determination of the representative contribution rate for purposes of § 1.401(m)-2(a)(6)(v)(B)), is not permitted to be taken into account for purposes of this paragraph (a)(6) (including the determination of the representative contribution rate under paragraph (a)(6)(iv)(B) of this section).

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(B) *Definition of representative contribution rate.* For purposes of this paragraph (a)(6)(iv), the plan's representative contribution rate is the lowest applicable contribution rate of any eligible NHCE among a group of eligible NHCEs that consists of half of all eligible NHCEs for the plan year (or, if greater, the lowest applicable contribution rate of any eligible NHCE in the group of all eligible NHCEs for the plan year and who is employed by the employer on the last day of the plan year).

(C) *Definition of applicable contribution rate.* For purposes of this paragraph (a)(6)(iv), the applicable contribution rate for an eligible NHCE is the sum of the qualified matching contributions taken into account under this paragraph (a)(6) for the eligible NHCE for the plan year and the qualified nonelective contributions made for the eligible NHCE for the plan year, divided by the eligible NHCE's compensation for the same period.

(D) *Special rule for prevailing wage contributions.* Notwithstanding paragraph (a)(6)(iv)(A) of this section, qualified nonelective contributions that are made in connection with an employer's obligation to pay prevailing wages under the Davis-Bacon Act (46 Stat. 1494), Public Law 71-798, Service Contract Act of 1965 (79 Stat. 1965), Public Law 89-286, or similar legislation can be taken into account for a plan year for an NHCE to the extent such contributions do not exceed 10 percent of that NHCE's compensation.

(v) *Qualified matching contributions.* Qualified matching contributions satisfy this paragraph (a)(6) only to the extent that such qualified matching contributions are matching contributions that are not precluded from being taken into account under the ACP test for the plan year under the rules of § 1.401(m)-2(a)(5)(ii).

(vi) *Contributions only used once.* Qualified nonelective contributions and qualified matching contributions cannot be taken into account under this paragraph (a)(6) to the extent such contributions are taken into account for purposes of satisfying any other ADP test, any ACP test, or the requirements of § 1.401(k)-3, 1.401(m)-3 or 1.401(k)-4. Thus, for example, matching

contributions that are made pursuant to § 1.401(k)-3(c) cannot be taken into account under the ADP test. Similarly, if a plan switches from the current year testing method to the prior year testing method pursuant to § 1.401(k)-2(c), qualified nonelective contributions that are taken into account under the current year testing method for a year may not be taken into account under the prior year testing method for the next year.

(7) *Examples.* The following examples illustrate the application of this paragraph (a):

*Example 1.* (i) Employer X has three employees, A, B, and C. Employer X sponsors a profit-sharing plan (Plan Z) that includes a cash or deferred arrangement. Each year, Employer X determines a bonus attributable to the prior year. Under the cash or deferred arrangement, each eligible employee may elect to receive none, all or any part of the bonus in cash. X contributes the remainder to Plan Z. The portion of the bonus paid in cash, if any, is paid 2 months after the end of the plan year and thus is included in compensation for the following plan year. Employee A is an HCE, while Employees B and C are NHCEs. The plan uses the current year testing method and defines compensation to include elective contributions and bonuses paid during each plan year. In February of 2005, Employer X determined that no bonuses will be paid for 2004. In February of 2006, Employer X provided a bonus for each employee equal to 10% of regular compensation for 2005. For the 2005 plan year, A, B, and C have the following compensation and make the following elections:

Employee	Compensation	Elective contribution
A .....	\$100,000	\$4,340
B .....	60,000	2,860
C .....	45,000	1,250

(ii) For each employee, the ratio of elective contributions to the employee's compensation for the plan year is:

Employee	Ratio of elective contribution to compensation	ADR (percent)
A .....	\$4,340/\$100,000	4.34
B .....	2,860/60,000	4.77
C .....	1,250/45,000	2.78

(iii) The ADP for the HCEs (Employee A) is 4.34%. The ADP for the NHCEs is 3.78% ((4.77% + 2.78%)/2). Because 4.34% is less than 4.73% (3.78% multiplied by 1.25), the plan satisfies the ADP test under paragraph (a)(1)(i) of this section.

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*Example 2.* (i) The facts are the same as in *Example 1*, except that elective contributions are made pursuant to a salary reduction agreement throughout the plan year, and no bonuses are paid. As provided by section 414(s)(2), Employer X includes elective contributions in compensation. During the year, B and C defer the same amount as in *Example 1*, but A defers \$5,770. Thus, the compensation and elective contributions for A, B, and C are:

Employee	Compensation	Elective contributions	ADR (percent)
A .....	\$100,000	\$5,770	5.77
B .....	60,000	2,860	4.77
C .....	45,000	1,250	2.78

(ii) The ADP for the HCEs (Employee A) is 5.77%. The ADP for the NHCEs is 3.78%  $((4.77\% + 2.78\%) / 2)$ . Because 5.77% exceeds 4.73%  $(3.78\% \times 1.25)$ , the plan does not satisfy the ADP test under paragraph (a)(1)(i) of this section. However, because the ADP for the HCEs does not exceed the ADP for the NHCEs by more than 2 percentage points and the ADP for the HCEs does not exceed the ADP for the NHCEs multiplied by 2  $(3.78\% \times 2 = 7.56\%)$ , the plan satisfies the ADP test under paragraph (a)(1)(ii) of this section.

*Example 3.* (i) Employees D through L are eligible employees in Plan T, a profit-sharing plan that contains a cash or deferred arrangement. The plan is a calendar year plan that uses the prior year testing method. Plan T provides that elective contributions are included in compensation (as provided under section 414(s)(2)). Each eligible employee may elect to defer up to 6% of compensation under the cash or deferred arrangement. Employees D and E are HCEs. The compensation, elective contributions, and ADRs of Employees D and E for the 2006 plan year are shown below:

Employee	Compensation for 2006 plan year	Elective contributions for 2006 plan year	ADR for 2006 plan year (percent)
D .....	\$100,000	\$10,000	10
E .....	95,000	4,750	5

(ii) During the 2005 plan year, Employees F through L were eligible NHCEs. The compensation, elective contributions and ADRs of Employees F through L for the 2005 plan year are shown in the following table:

Employee	Compensation for 2005 plan year	Elective contributions for 2005 plan year	ADR for 2005 plan year (percent)
F .....	\$60,000	\$3,600	6
G .....	40,000	1,600	4
H .....	30,000	1,200	4
I .....	20,000	600	3
J .....	20,000	600	3
K .....	10,000	300	3
L .....	5,000	150	3

(iii) The ADP for 2006 for the HCEs is 7.5%. Because Plan T is using the prior year testing method, the applicable year for determining the NHCE ADP is the prior plan year (*i.e.*, 2005). The NHCE ADP is determined using the ADRs for NHCEs eligible during the prior plan year (without regard to whether they are eligible under the plan during the plan year). The ADP for the NHCEs is 3.71% (the sum of the individual ADRs, 26%, divided by 7 employees). Because 7.5% exceeds 4.64%  $(3.71\% \times 1.25)$ , Plan T does not satisfy the ADP test under paragraph (a)(1)(i) of this section. In addition, because the ADP for the HCEs exceeds the ADP for the NHCEs by more than 2 percentage points, Plan T does not satisfy the ADP test under paragraph (a)(1)(ii) of this section. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

*Example 4.* (i) Plan U is a calendar year profit-sharing plan that contains a cash or deferred arrangement and uses the current year testing method. Plan U provides that elective contributions are included in compensation (as provided under section 414(s)(2)). The following amounts are contributed under Plan U for the 2006 plan year: QNECs equal to 2% of each employee's compensation; Contributions equal to 6% of each employee's compensation that are not immediately vested under the terms of the plan; 3% of each employee's compensation that the employee may elect to receive as cash or to defer under the plan. Both types of non-elective contributions are made for the HCEs (employees M and N) and the NHCEs (employees O through S) for the plan year and are contributed after the end of the plan year and before the end of the following plan year. In addition, neither type of nonelective contributions is used for any other ADP or ACP test.

(ii) For the 2006 plan year, the compensation, elective contributions, and actual deferral ratios of employees M through S are shown in the following table:

Employee	Compensation	Elective contributions	Actual deferral ratio (percent)
M .....	\$100,000	\$3,000	3
N .....	100,000	2,000	2
O .....	60,000	1,800	3
P .....	40,000	0	0
Q .....	30,000	0	0
R .....	5,000	0	0
S .....	20,000	0	0

(iii) The elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section because the ADP for the HCEs, consisting of employees M and N, is 2.5% and the ADP for the NHCEs is 0.6%.

(iv) The 2% QNECs satisfies the timing requirement of paragraph (a)(6)(i) of this section because it is paid within 12-month after the plan year for which allocated. All non-elective contributions also satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section (because all employees receive an 8% non-elective contribution and the nonelective contributions excluding the QNECs is 6% for all employees). In addition, the QNECs are not disproportionate under paragraph (a)(6)(iv) of this section because no QNEC for an NHCE exceeds the product of the plan's applicable contribution rate (2%) and that NHCE's compensation.

(v) Because the rules of paragraph (a)(6) of this section are satisfied, the 2% QNECs may be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section. The 6% nonelective contributions, however, may not be taken into account because they are not QNECs.

(vi) If the 2% QNECs are taken into account, the ADP for the HCEs is 4.5%, and the actual deferral percentage for the NHCEs is 2.6%. Because 4.5% is not more than two percentage points greater than 2.6 percent, and not more than two times 2.6, the cash or deferred arrangement satisfies the ADP test of section 401(k)(3) under paragraph (a)(1)(ii) of this section.

*Example 5.* (i) The facts are the same as *Example 4*, except the plan uses the prior year testing method. In addition, the NHCE ADP for the 2005 plan year (the prior plan year) is 0.8% and no QNECs are contributed for the 2005 plan year during 2005 or 2006.

(ii) In 2007, it is determined that the elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for 2006 because the 2006 ADP for the eligible HCEs, consisting of employees M and N, is 2.5% and the 2005 ADP for the eligible NHCEs is 0.8%. An additional QNEC of 2% of compensation is made for each eligible NHCE in 2007 and allocated for 2005.

(iii) The 2% QNECs that are made in 2007 and allocated for the 2005 plan year do not satisfy the timing requirement of paragraph (a)(6)(i) of this section for the applicable year for the 2005 plan year because they were not contributed before the last day of the 2006 plan year. Accordingly, the 2% QNECs do not satisfy the rules of paragraph (a)(6) of this section and may not be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for the 2006 plan year. The cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

*Example 6.* (i) The facts are the same as *Example 4*, except that the ADP for the HCEs is 4.6% and there is no 6% nonelective con-

tribution under the plan. The employer would like to take into account the 2% QNEC in determining the ADP for the NHCEs but not in determining the ADP for the HCEs.

(ii) The elective contributions alone fail the requirements of section 401(k) and paragraph (a)(1) of this section because the HCE ADP for the plan year (4.6%) exceeds 0.75% ( $0.6\% \times 1.25$ ) and 1.2% ( $0.6\% \times 2$ ).

(iii) The 2% QNECs may not be taken into account in determining the ADP of the NHCEs because they fail to satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section. This is because the amount of nonelective contributions, excluding those QNECs that would be taken into account under the ADP test, would be 2% of compensation for the HCEs and 0% for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

*Example 7.* (i) The facts are the same as *Example 6*, except that Employee R receives a QNEC in an amount of \$500 and no QNECs are made on behalf of the other employees.

(ii) If the QNEC could be taken into account under paragraph (a)(6) of this section, the ADP for the NHCEs would be 2.6% and the plan would satisfy the ADP test. The QNEC is disproportionate under paragraph (a)(6)(iv) of this section, and cannot be taken into account under paragraph (a)(6) of this section, to the extent it exceeds the greater of 5% and two times the plan's representative contribution rate (0%), multiplied by Employee R's compensation. The plan's representative contribution rate is 0% because it is the lowest applicable contribution rate among a group of NHCEs that is at least half of all NHCEs, or all the NHCEs who are employed on the last day of the plan year. Therefore, the QNEC may be taken into account under the ADP test only to the extent it does not exceed 5% times Employee R's compensation (or \$250) and the cash or deferred arrangement fails to satisfy the ADP test and must correct under paragraph (b) of this section.

*Example 8.* (i) The facts are the same as in *Example 4* except that the plan changes from the current year testing method to the prior year testing method for the following plan year (2007 plan year). The ADP for the HCEs for the 2007 plan year is 3.5%.

(ii) The 2% QNECs may not be taken into account in determining the ADP for the NHCEs for the applicable year (2006 plan year) in satisfying the ADP test for the 2007 plan year because they were taken into account in satisfying the ADP test for the 2006 plan year. Accordingly, the NHCE ADP for the applicable year is 0.6%. The elective contributions for the plan year fail the requirements of section 401(k) and paragraph (a)(1)



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of this section because the HCE ADP for the plan year (3.5%) exceeds the ADP limit of 1.2% (the greater of 0.75% (0.6% × 1.25) and 1.2% (0.6% × 2)), determined using the applicable year ADP for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

*Example 9.* (i)(A) Employer N maintains Plan X, a profit sharing plan that contains a cash or deferred arrangement and that uses the current year testing method. Plan X pro-

vides for employee contributions, elective contributions, and matching contributions. Matching contributions on behalf of NHCEs are qualified matching contributions (QMACs) and are contributed during the 2005 plan year. Matching contributions on behalf of HCEs are not QMACs, because they fail to satisfy the nonforfeitability requirement of §1.401(k)-1(c). The elective contributions and matching contributions with respect to HCEs for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Highly compensated employees .....	15%	5%	5%	0%

(B) The elective contributions and matching contributions with respect to the NHCEs

for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Nonhighly compensated employees .....	11%	4%	0%	4%

(ii) The plan fails to satisfy the ADP test of section 401(k)(3)(A) and paragraph (a)(1) of this section because the ADP for HCEs (15%) is more than 125% of the ADP for NHCEs (11%), and more than 2 percentage points greater than 11%. However, the plan provides that QMACs may be used to meet the requirements of section 401(k)(3)(A)(ii) provided that they are not used for any other ADP or ACP test. QMACs equal to 1% of compensation are taken into account for each NHCE in applying the ADP test. After this adjustment, the applicable ADP and ACP (taking into account the provisions of §1.401(m)-2(a)(5)(ii)) for the plan year are as follows:

	Actual deferral percentage	Actual contribution percentage
HCEs .....	15	5
Nonhighly compensated employees .....	12	3

(iii) The elective contributions and QMACs taken into account for purposes of the ADP test of section 401(k)(3) satisfy the requirements of section 401(k)(3)(A)(ii) under paragraph (a)(1)(ii) of this section because the ADP for HCEs (15%) is not more than the ADP for NHCEs multiplied by 1.25 (12% × 1.25 = 15%).

(b) *Correction of excess contributions—*  
(1) *Permissible correction methods—*(i) *In*

*general.* A cash or deferred arrangement does not fail to satisfy the requirements of section 401(k)(3) and paragraph (a)(1) of this section if the employer, in accordance with the terms of the plan that includes the cash or deferred arrangement, uses any of the following correction methods—

(A) *Qualified nonelective contributions or qualified matching contributions.* The employer makes qualified nonelective contributions or qualified matching contributions that are taken into account under this section and, in combination with other amounts taken into account under paragraph (a) of this section, allow the cash or deferred arrangement to satisfy the requirements of paragraph (a)(1) of this section.

(B) *Excess contributions distributed.* Excess contributions are distributed in accordance with paragraph (b)(2) of this section.

(C) *Excess contributions recharacterized.* Excess contributions are recharacterized in accordance with paragraph (b)(3) of this section.

(ii) *Combination of correction methods.* A plan may provide for the use of any of the correction methods described in

paragraph (b)(1)(i) of this section, may limit elective contributions in a manner designed to prevent excess contributions from being made, or may use a combination of these methods, to avoid or correct excess contributions. A plan may permit an HCE to elect whether any excess contributions are to be recharacterized or distributed. Similarly, a plan may permit an HCE with elective contributions for a year that includes both pre-tax elective contributions and designated Roth contributions to elect whether the excess contributions are to be attributed to pre-tax elective contributions or designated Roth contributions. If the plan uses a combination of correction methods, any contribution made under paragraph (b)(1)(i)(A) of this section must be taken into account before application of the correction methods in paragraph (b)(1)(i)(B) or (C) of this section.

(iii) *Exclusive means of correction.* A failure to satisfy the requirements of paragraph (a)(1) of this section may not be corrected using any method other than the ones described in paragraphs (b)(1)(i) and (ii) of this section. Thus, excess contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess contributions may not be corrected using the retroactive correction rules of § 1.401(a)(4)-11(g). See § 1.401(a)(4)-11(g)(3)(vii) and (5).

(2) *Corrections through distribution—(i) General rule.* This paragraph (b)(2) contains the rules for correction of excess contributions through a distribution from the plan. Correction through a distribution generally involves a 4-step process. First, the plan must determine, in accordance with paragraph (b)(2)(ii) of this section, the total amount of excess contributions that must be distributed under the plan. Second, the plan must apportion the total amount of excess contributions among HCEs in accordance with paragraph (b)(2)(iii) of this section. Third, the plan must determine the income allocable to excess contributions in accordance with paragraph (b)(2)(iv) of this section. Finally, the plan must distribute the apportioned excess contributions and allocable income in ac-

cordance with paragraph (b)(2)(v) of this section. Paragraph (b)(2)(vi) of this section provides rules relating to the tax treatment of these distributions. Paragraph (b)(2)(vii) provides other rules relating to these distributions.

(ii) *Calculation of total amount to be distributed.* The following procedures must be used to determine the total amount of the excess contributions to be distributed—

(A) *Calculate the dollar amount of excess contributions for each HCE.* The amount of excess contributions attributable to a given HCE for a plan year is the amount (if any) by which the HCE's contributions taken into account under this section must be reduced for the HCE's ADR to equal the highest permitted ADR under the plan. To calculate the highest permitted ADR under a plan, the ADR of the HCE with the highest ADR is reduced by the amount required to cause that HCE's ADR to equal the ADR of the HCE with the next highest ADR. If a lesser reduction would enable the arrangement to satisfy the requirements of paragraph (b)(2)(ii)(C) of this section, only this lesser reduction is used in determining the highest permitted ADR.

(B) *Determination of the total amount of excess contributions.* The process described in paragraph (b)(2)(ii)(A) of this section must be repeated until the arrangement would satisfy the requirements of paragraph (b)(2)(ii)(C) of this section. The sum of all reductions for all HCEs determined under paragraph (b)(2)(ii)(A) of this section is the total amount of excess contributions for the plan year.

(C) *Satisfaction of ADP.* A cash or deferred arrangement satisfies this paragraph (b)(2)(ii)(C) if the arrangement would satisfy the requirements of paragraph (a)(1)(ii) of this section if the ADR for each HCE were determined after the reductions described in paragraph (b)(2)(ii)(A) of this section.

(iii) *Apportionment of total amount of excess contributions among the HCEs.* The following procedures must be used in apportioning the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section among the HCEs:

(A) *Calculate the dollar amount of excess contributions for each HCE.* The contributions of the HCE with the highest dollar amount of contributions taken into account under this section are reduced by the amount required to cause that HCE's contributions to equal the dollar amount of the contributions taken into account under this section for the HCE with the next highest dollar amount of contributions taken into account under this section. If a lesser apportionment to the HCE would enable the plan to apportion the total amount of excess contributions, only the lesser apportionment would apply.

(B) *Limit on amount apportioned to any individual.* For purposes of this paragraph (b)(2)(iii), the amount of contributions taken into account under this section with respect to an HCE who is an eligible employee in more than one plan of an employer is determined by taking into account all contributions otherwise taken into account with respect to such HCE under any plan of the employer during the plan year of the plan being tested as being made under the plan being tested. However, the amount of excess contributions apportioned for a plan year with respect to any HCE must not exceed the amount of contributions actually contributed to the plan for the HCE for the plan year. Thus, in the case of an HCE who is an eligible employee in more than one plan of the same employer to which elective contributions are made and whose ADR is calculated in accordance with paragraph (a)(3)(ii) of this section, the amount required to be distributed under this paragraph (b)(2)(iii) shall not exceed the contributions actually contributed to the plan and taken into account under this section for the plan year.

(C) *Apportionment to additional HCEs.* The procedure in paragraph (b)(2)(iii)(A) of this section must be repeated until the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section has been apportioned.

(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.

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participant's accounts. See §1.401(a)(4)-1(c)(8). A plan will not fail to use a reasonable method for computing the income allocable to excess contributions merely because the income allocable to excess contributions is determined on a date that is no more than 7 days before the distribution.

(C) *Alternative method of allocating plan year income.* A plan may allocate income to excess contributions for the plan year by multiplying the income for the plan year allocable to the elective contributions and other amounts taken into account under this section (including contributions made for the plan year), by a fraction, the numerator of which is the excess contributions for the employee for the plan year, and the denominator of which is the sum of the—

(1) Account balance attributable to elective contributions and other contributions taken into account under this section as of the beginning of the plan year, and

(2) Any additional amount of such contributions made for the plan year.

(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).

(v) *Distribution.* Within 12 months after the close of the plan year in which the excess contribution arose, the plan must distribute to each HCE the excess contributions apportioned to such HCE under paragraph (b)(2)(iii) of this section and the allocable income. Except as otherwise provided in this paragraph (b)(2)(v) and paragraph (b)(4)(i) of this section, a distribution

of excess contributions must be in addition to any other distributions made during the year and must be designated as a corrective distribution by the employer. In the event of a complete termination of the plan during the plan year in which an excess contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of an HCE is distributed prior to when the plan makes a distribution of excess contributions in accordance with this paragraph (b)(2), the distribution is deemed to have been a corrective distribution of excess contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(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).

(C) *Corrective distributions attributable to designated Roth contributions.* Notwithstanding paragraphs (b)(2)(vi)(A) and (B) of this section, a distribution of

excess contributions is not includible in gross income to the extent it represents a distribution of designated Roth contributions. However, the income allocable to a corrective distribution of excess contributions that are designated Roth contributions is included in gross income in accordance with paragraph (b)(2)(vi)(A) or (B) of this section (*i.e.*, in the same manner as income allocable to a corrective distribution of excess contributions that are pre-tax elective contributions).

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

(B) *Treatment of corrective distributions as elective contributions.* Excess contributions are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan.

(C) *No reduction of required minimum distribution.* A distribution of excess contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9). See § 1.401(a)(9)-5, A-9(b).

(D) *Partial distributions.* Any distribution of less than the entire amount of excess contributions (and allocable income) with respect to any HCE is treated as a pro rata distribution of excess contributions and allocable income.

(viii) *Examples.* The following examples illustrate the application of this paragraph (b)(2). For purposes of these examples, none of the plans provide for catch-up contributions under section 414(v). The examples are as follows:

*Example 1.* (i) Plan P, a calendar year profit-sharing plan that includes a cash or deferred arrangement, provides for distribution of excess contributions to HCEs to the extent necessary to satisfy the ADP test. For the 2006 plan year, Employee A, an HCE, has elective contributions of \$12,000 and \$200,000 in compensation, for an ADR of 6%, and Employee B, a second HCE, has elective contributions of \$8,960 and compensation of \$128,000, for an ADR of 7%. The ADP for the NHCEs is 3% for the 2006 plan year. Under the ADP test, the ADP of the two HCEs

under the plan may not exceed 5% (*i.e.*, 2 percentage points more than the ADP of the NHCEs under the plan). The ADP for the 2 HCEs under the plan is 6.5%. Therefore, there must be a correction of excess contributions for the 2006 plan year.

(ii) The total amount of excess contributions for the HCEs is determined under paragraph (b)(2)(ii) of this section as follows: the elective contributions of Employee B (the HCE with the highest ADR) are reduced by \$1,280 in order to reduce his ADR to 6% (\$7,680/\$128,000), which is the ADR of Employee A.

(iii) Because the ADP of the HCEs determined after the \$1,280 reduction to Employee B still exceeds 5%, further reductions in elective contributions are necessary in order to reduce the ADP of the HCEs to 5%. The elective contributions of Employee A and Employee B are each reduced by 1% of compensation (\$2,000 and \$1,280 respectively). Because the ADP of the HCEs determined after the reductions equals 5%, the plan would satisfy the requirements of (a)(1)(ii) of this section.

(iv) The total amount of excess contributions (\$4,560 = \$1,280+\$2,000+\$1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. Therefore, Employee A is apportioned \$3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions).

(v) Because the total amount of excess contributions has not been apportioned, further apportionment is necessary. The balance (\$1,520) of the total amount of excess contributions is apportioned equally among Employee A and Employee B (\$760 to each).

(vi) Therefore, the cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to \$3,800 (\$3,040 + \$760) and allocable income and Employee B receives a corrective distribution of \$760 and allocable income.

*Example 2.* (i) The facts are the same as in *Example 1*, except Employee A's ADR is based on \$3,000 of elective contributions to this plan and \$9,000 of elective contributions to another plan of the employer.

(ii) The total amount of excess contributions (\$4,560 = \$1,280+\$2,000+\$1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. The amount of elective contributions for Employee A is \$12,000. Therefore, Employee A is apportioned \$3,040 (the amount required to cause Employee A's elective contributions to equal the next highest

dollar amount of elective contributions). However, pursuant to paragraph (b)(2)(iii)(B) of this section, no more than the amount actually contributed to the plan may be apportioned to an HCE. Accordingly, no more than \$3,000 may be apportioned to Employee A. Therefore, the remaining \$1,560 must be apportioned to Employee B.

(iii) The cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to \$3,000 (total amount of elective contributions actually contributed to the plan for Employee A) and allocable income and Employee B receives a corrective distribution of \$1,560 and allocable income.

(3) *Recharacterization of excess contributions*—(i) *General rule.* Excess contributions are recharacterized in accordance with this paragraph (b)(3) only if the excess contributions that would have to be distributed under (b)(2) of this section if the plan was correcting through distribution of excess contributions are recharacterized as described in paragraph (b)(3)(ii) of this section, and all of the conditions set forth in paragraph (b)(3)(iii) of this section are satisfied.

(ii) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions are includible in the employee's gross income as if such amounts were distributed under paragraph (b)(2) of this section. The recharacterized excess contributions are treated as employee contributions for purposes of section 72, sections 401(a)(4), 401(m), § 1.401(k)-1(d) and § 1.401(k)-2. This requirement is not treated as satisfied unless the payor or plan administrator reports the recharacterized excess contributions as employee contributions to the Internal Revenue Service and the employee by timely providing such Federal tax forms and accompanying instructions and timely taking such other action as is prescribed by the Commissioner in revenue rulings, notices and other guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter) as well as the applicable Federal tax forms and accompanying instructions.

(iii) *Additional rules*—(A) *Time of recharacterization.* Excess contributions may not be recharacterized under this

paragraph (b)(3) after 2½ months after the close of the plan year to which the recharacterization relates. Recharacterization is deemed to have occurred on the date on which the last of those HCEs with excess contributions to be recharacterized is notified in accordance with paragraph (b)(3)(ii) of this section.

(B) *Employee contributions must be permitted under plan.* The amount of recharacterized excess contributions, in combination with the employee contributions actually made by the HCE, may not exceed the maximum amount of employee contributions (determined without regard to the ACP test of section 401(m)(2)) permitted under the provisions of the plan as in effect on the first day of the plan year.

(C) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions continue to be treated as employer contributions for all purposes under the Internal Revenue Code (other than those specified in paragraph (b)(3)(ii) of this section), including section 401(a) and sections 404, 409, 411, 412, 415, 416, and 417. Thus, for example, recharacterized excess contributions remain subject to the requirements of § 1.401(k)-1(c); must be deducted under section 404; and are treated as employer contributions described in section 415(c)(2)(A).

(4) *Rules applicable to all corrections—*

(i) *Coordination with distribution of excess deferrals—(A) Treatment of excess deferrals that reduce excess contributions.* The amount of excess contributions (and allocable income) to be distributed under paragraph (b)(2) of this section or the amount of excess contributions recharacterized under paragraph (b)(3) of this section with respect to an employee for a plan year, is reduced by any amounts previously distributed to the employee from the plan to correct excess deferrals for the employee's taxable year ending with or within the plan year in accordance with section 402(g)(2).

(B) *Treatment of excess contributions that reduce excess deferrals.* Under § 1.402(g)-1(e), the amount required to be distributed to correct an excess deferral to an employee for a taxable year is reduced by any excess contributions (and allocable income) previously

distributed or excess contributions recharacterized with respect to the employee for the plan year beginning with or within the taxable year. The amount of excess contributions includible in the gross income of the employee, and the amount of excess contributions reported by the payer or plan administrator as includible in the gross income of the employee, does not include the amount of any reduction under § 1.402(g)-1(e)(6).

(ii) *Forfeiture of match on distributed excess contributions.* A matching contribution is taken into account under section 401(a)(4) even if the match is with respect to an elective contribution that is distributed or recharacterized under this paragraph (b). This requires that, after correction of excess contributions, each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). See § 1.401(a)(4)-4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if elective contributions are distributed under this paragraph (b) to HCEs to the extent needed to meet the requirements of section 401(k)(3), while matching contributions attributable to those elective contributions remain allocated to the HCEs' accounts. Under section 411(a)(3)(G) and § 1.411(a)-4(b)(7), a plan may forfeit matching contributions attributable to excess contributions, excess aggregate contributions or excess deferrals to avoid a violation of section 401(a)(4). See also § 1.401(a)(4)-11(g)(3)(vii)(B) regarding the use of additional allocations to the accounts of NHCEs for the purpose of correcting a discriminatory rate of matching contributions.

(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).

(iv) *No requirement for recalculation.* If excess contributions are distributed or recharacterized in accordance with paragraphs (b)(2) and (3) of this section, the cash or deferred arrangement is

treated as meeting the nondiscrimination test of section 401(k)(3) regardless of whether the ADP for the HCEs, if recalculated after the distributions or recharacterizations, would satisfy section 401(k)(3).

(v) *Treatment of excess contributions that are catch-up contributions.* A cash or deferred arrangement does not fail to meet the requirements of section 401(k)(3) and paragraph (a)(1) of this section merely because excess contributions that are catch-up contributions because they exceed the ADP limit, as described in §1.414(v)-1(b)(1)(iii), are not corrected in accordance with this paragraph (b).

(5) *Failure to timely correct—(i) Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess contributions within 2½ months after the close of the plan year for which the excess contributions are made, the employer will be liable for a 10% excise tax on the amount of the excess contributions. See section 4979 and §54.4979-1 of this chapter. Qualified nonelective contributions and qualified matching contributions properly taken into account under paragraph (a)(6) of this section for a plan year may enable a plan to avoid having excess contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess contributions are not corrected within 12 months after the close of the plan year for which they were made, the cash or deferred arrangement will fail to satisfy the requirements of section 401(k)(3) for the plan year for which the excess contributions are made and all subsequent plan years during which the excess contributions remain in the trust.

(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).

(c) *Additional rules for prior year testing method—(1) Rules for change in testing method—(i) General rule.* A plan is permitted to change from the prior year testing method to the current year testing method for any plan year. A plan is permitted to change from the current year testing method to the prior year testing method only in situations described in paragraph (c)(1)(ii) of this section. For purposes of this paragraph (c)(1), a plan that uses the safe harbor method described in §1.401(k)-3 or a SIMPLE 401(k) plan is treated as using the current year testing method for that plan year.

(ii) *Situations permitting a change to the prior year testing method.* The situations described in this paragraph (c)(1)(ii) are:

(A) The plan is not the result of the aggregation of two or more plans, and the current year testing method was used under the plan for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years the plan has been in existence, including years in which the plan was a portion of another plan).

(B) The plan is the result of the aggregation of two or more plans, and for each of the plans that are being aggregated (the aggregating plans), the current year testing method was used for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years since that aggregating plan has been in existence, including years in which the aggregating plan was a portion of another plan).

(C) A transaction described in section 410(b)(6)(C)(i) and §1.410(b)-2(f) occurs and—

(I) As a result of the transaction, the employer maintains both a plan using the prior year testing method and a plan using the current year testing method; and

(2) The change from the current year testing method to the prior year testing method occurs within the transition period described in section 410(b)(6)(C)(ii).

(2) *Calculation of ADP under the prior year testing method for the first plan year*—(i) *Plans that are not successor plans.* If, for the first plan year of any plan (other than a successor plan), the plan uses the prior year testing method, the plan is permitted to use either that first plan year as the applicable year for determining the ADP for eligible NHCEs, or use 3% as the ADP for eligible NHCEs, for applying the ADP test for that first plan year. A plan (other than a successor plan) that uses the prior year testing method but has elected for its first plan year to use that year as the applicable year is not treated as changing its testing method in the second plan year and is not subject to the limitations on double counting on QNECs under paragraph (a)(6)(vi) of this section for the second plan year.

(ii) *First plan year defined.* For purposes of this paragraph (c)(2), the first plan year of any plan is the first year in which the plan provides for elective contributions. Thus, the rules of this paragraph (c)(2) do not apply to a plan (within the meaning of § 1.410(b)-7(b)) for a plan year if for such plan year the plan is aggregated under § 1.401(k)-1(b)(4) with any other plan that provided for elective contributions in the prior year.

(iii) *Successor plans.* A plan is a successor plan if 50% or more of the eligible employees for the first plan year were eligible employees under a qualified cash or deferred arrangement maintained by the employer in the prior year. If a plan that is a successor plan uses the prior year testing method for its first plan year, the ADP for the group of NHCEs for the applicable year must be determined under paragraph (c)(4) of this section.

(3) *Plans using different testing methods for the ADP and ACP test.* Except as otherwise provided in this paragraph (c)(3), a plan may use the current year testing method or prior year testing method for the ADP test for a plan year without regard to whether the current year testing method or prior

year testing method is used for the ACP test for that year. For example, a plan may use the prior year testing method for the ADP test and the current year testing method for its ACP test for the plan year. However, plans that use different testing methods under this paragraph (c)(3) cannot use—

(i) The recharacterization method of paragraph (b)(3) of this section to correct excess contributions for a plan year;

(ii) The rules of § 1.401(m)-2(a)(6)(ii) to take elective contributions into account under the ACP test (rather than the ADP test); or

(iii) The rules of paragraph (a)(6)(v) of this section to take qualified matching contributions into account under the ADP test (rather than the ACP test).

(4) *Rules for plan coverage changes*—(i) *In general.* A plan that uses the prior year testing method and experiences a plan coverage change during a plan year satisfies the requirements of this section for that year only if the plan provides that the ADP for the NHCEs for the plan year is the weighted average of the ADPs for the prior year subgroups.

(ii) *Optional rule for minor plan coverage changes.* If a plan coverage change occurs and 90% or more of the total number of the NHCEs from all prior year subgroups are from a single prior year subgroup, then, in lieu of using the weighted averages described in paragraph (c)(4)(i) of this section, the plan may provide that the ADP for the group of eligible NHCEs for the prior year under the plan is the ADP of the NHCEs for the prior year of the plan under which that single prior year subgroup was eligible.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (c)(4):

(A) *Plan coverage change.* The term *plan coverage change* means a change in the group or groups of eligible employees under a plan on account of—

(1) The establishment or amendment of a plan;

(2) A plan merger or spinoff under section 414(1);



(3) A change in the way plans (within the meaning of § 1.410(b)-7(b)) are combined or separated for purposes of § 1.401(k)-1(b)(4) (e.g., permissively aggregating plans not previously aggregated under § 1.410(b)-7(d), or ceasing to permissively aggregate plans under § 1.410(b)-7(d));

(4) A reclassification of a substantial group of employees that has the same effect as amending the plan (e.g., a transfer of a substantial group of employees from one division to another division); or

(5) A combination of any of paragraphs (c)(4)(iii)(A)(I) through (4) of this section.

(B) *Prior year subgroup.* The term *prior year subgroup* means all NHCEs for the prior plan year who, in the prior year, were eligible employees under a specific plan maintained by the employer that included a qualified cash or deferred arrangement and who would have been eligible employees in the prior year under the plan being tested if the plan coverage change had first been effective as of the first day of the prior plan year instead of first being effective during the plan year. The determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether the NHCE terminated employment during the prior year.

(C) *Weighted average of the ADPs for the prior year subgroups.* The term *weighted average of the ADPs for the prior year subgroups* means the sum, for all prior year subgroups, of the adjusted ADPs for the plan year. The term *adjusted ADP with respect to a prior year subgroup* means the ADP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year, multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) *Examples.* The following examples illustrate the application of this paragraph (c)(4):

*Example 1.* (i) Employer B maintains two calendar year plans, Plan O and Plan P, each of which includes a cash or deferred arrangement. The plans were not permissively aggregated under § 1.410(b)-7(d) for the 2005 plan

year. Both plans use the prior year testing method. Plan O had 300 eligible employees who were NHCEs for the 2005 plan year, and their ADP for that year was 6%. Sixty of the eligible employees who were NHCEs for the 2005 plan year under Plan O, terminated their employment during that year. Plan P had 100 eligible employees who were NHCEs for 2005, and the ADP for those NHCEs for that plan was 4%. Plan O and Plan P are permissively aggregated under § 1.410(b)-7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)-7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)-1(b)(4). Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) The Plan O prior year subgroup consists of the 300 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.5%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year)  $\times$  300/400 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year)  $\times$  100/400 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.5% (the sum of adjusted ADPs for the prior year subgroups, 4.5% plus 1%).

(v) As provided in paragraph (c)(4)(iii)(B) of this section, the determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether that NHCE terminated employment during the prior year. Thus, the prior ADP for the NHCEs under Plan OP for the 2006 plan year is unaffected by the termination of the 60 NHCEs covered by Plan O during the 2005 plan year.

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*Example 2.* (i) The facts are the same as *Example 1*, except that the 60 employees who terminated employment during the 2005 plan year are instead spun-off to another plan.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)-7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)-1(b)(4) and the spin-off of the 60 employees is a plan coverage change. Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) For purposes of determining the prior year subgroups, the employees who would have been eligible employees in the prior year under the plan being tested are determined as if both plan coverage changes had first been effective as of the first day of the prior plan year. The Plan O prior year subgroup consists of the 240 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and would have been eligible under Plan OP for the 2005 plan year if the spin-off had occurred at the beginning of the 2005 plan year and Plan O and Plan P had been permissively aggregated under § 1.410(b)-7(d) for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated under § 1.410(b)-7(d) for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan O and the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan P. The adjusted ADP for the prior year subgroup consisting of eligible NHCEs under Plan O is 4.23%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year)  $\times$  240/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the prior year subgroup consisting of the eligible NHCEs from Plan P is 1.18%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year)  $\times$  100/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.41% (the sum of adjusted ADPs for the prior year subgroups, 4.23% plus 1.18%).

*Example 3.* (i) The facts are the same as in *Example 1*, except that instead of Plan O and Plan P being permissively aggregated for the 2006 plan year, 200 of the employees eligible

under Plan O were spun-off from Plan O and merged into Plan P.

(ii) The spin-off from Plan O and merger to Plan P for the 2006 plan year are plan coverage changes for Plan P. Therefore, the prior year ADP for the NHCEs under Plan P for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan P. There are 2 subgroups under Plan P for the 2006 plan year. The Plan O prior year subgroup consists of the 200 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan P for the 2005 plan year if the spin-off and merger had occurred on the first day of the 2005 plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P for the 2005 plan year.

(iii) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.0%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year)  $\times$  200/300 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1.33%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year)  $\times$  100/300 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan P for the 2006 plan year is 5.33% (the sum of adjusted ADPs for the 2 prior year subgroups, 4.0% plus 1.33%).

(iv) The spin-off from Plan O for the 2006 plan year is a plan coverage change for Plan O. Therefore, the prior year ADP for the NHCEs under Plan O for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan O. In this case, there is only one prior year subgroup under Plan O, the employees who were NHCEs of Employer B for the 2005 plan year and who were eligible for the 2005 plan year under Plan O. Because there is only one prior year subgroup under Plan O, the weighted average of the ADPs for the prior year subgroup under Plan O is equal to the NHCE ADP for the prior year (2005 plan year) under Plan O, or 6%.

*Example 4.* (i) Employer C maintains a calendar year plan, Plan Q, which includes a cash or deferred arrangement that uses the prior year testing method. Plan Q covers employees of Division A and Division B. In 2005, Plan Q had 500 eligible employees who were NHCEs, and the ADP for those NHCEs for 2005 was 2%. Effective January 1, 2006, Employer C amends the eligibility provisions

under Plan Q to exclude employees of Division B effective January 1, 2006. In addition, effective on that same date, Employer C establishes a new calendar year plan, Plan R, which includes a cash or deferred arrangement that uses the prior year testing method. The only eligible employees under Plan R are the 100 employees of Division B who were eligible employees under Plan Q.

(ii) Plan R is a successor plan, within the meaning of paragraph (c)(2)(iii) of this section (because all of the employees were eligible employees under Plan Q in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The amendment to the eligibility provisions of Plan Q and the establishment of Plan R are plan coverage changes within the meaning of paragraph (c)(4)(iii)(A) of this section for Plan Q and Plan R. Accordingly, each plan must determine the NHCE ADP for the 2006 plan year under the rules set forth in paragraph (c)(4) of this section.

(iv) The prior year ADP for NHCEs under Plan Q is the weighted average of the ADPs for the prior year subgroups. Plan Q has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan Q for the 2005 plan year if the amendment to the Plan Q eligibility provisions had occurred as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 plan year under Plan Q, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as if the plan amendment had not occurred.

(v) Similarly, Plan R has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan R for the 2005 plan year if the plan were established as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

*Example 5.* (i) The facts are the same as in *Example 4*, except that the provisions of Plan R extend eligibility to 50 hourly employees who previously were not eligible employees under any qualified cash or deferred arrangement maintained by Employer C.

(ii) Plan R is a successor plan (because 100 of Plan R's 150 eligible employees were eligible employees under another qualified cash or deferred arrangement maintained by Employer C in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The establishment of Plan R is a plan coverage change that affects Plan R. Because the 50 hourly employees were not eligible employees under any qualified cash or de-

ferred arrangement of Employer C for the prior plan year, they do not comprise a prior year subgroup. Accordingly, Plan R still has only one prior year subgroup. Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

[T.D. 9169, 69 FR 78154, Dec. 29, 2004, as amended by T.D. 9237, 71 FR 10, Jan. 3, 2006; T.D. 9447, 74 FR 8207, Feb. 24, 2009]

#### § 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