

§ 1.401(k)-1

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

(a) *General rules*—(1) *Certain plans permitted to include cash or deferred arrangements.* A plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement. A cash or deferred arrangement is part of a plan for purposes of this section if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

(2) *Rules applicable to cash or deferred arrangements generally*—(i) *Definition of cash or deferred arrangement.* Except as provided in paragraphs (a)(2)(ii) and (iii) of this section, a cash or deferred arrangement is 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) (including a contract

that is intended to satisfy the requirements of section 403(a)).

(ii) *Treatment of after-tax employee contributions.* A cash or deferred arrangement does not include an arrangement under which amounts contributed under a plan at an employee's election are designated or treated at the time of contribution as after-tax employee contributions (e.g., by treating the contributions as taxable income subject to applicable withholding requirements). See also section 414(h)(1). A designated Roth contribution, however, is not treated as an after-tax contribution for purposes of this section, § 1.401(k)-2 through § 1.401(k)-6 and § 1.401(m)-1 through § 1.401(m)-5. A contribution can be an after-tax employee contribution under the rule of this paragraph (a)(2)(ii) even if the employee's election to make after-tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(iii) *Treatment of ESOP dividend election.* A cash or deferred arrangement does not include an arrangement under an ESOP under which dividends are either distributed or invested pursuant to an election made by participants or their beneficiaries in accordance with section 404(k)(2)(A)(iii).

(iv) *Treatment of elective contributions as plan assets.* The extent to which elective contributions constitute plan assets for purposes of the prohibited transaction provisions of section 4975 and title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93-406, is determined in accordance with regulations and rulings issued by the Department of Labor. See 29 CFR 2510.3-102.

(3) *Rules applicable to cash or deferred elections generally—(i) Definition of cash or deferred election.* A cash or deferred election is any direct or indirect election (or modification of an earlier election) by an employee to have the employer either—

(A) Provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available; or

(B) Contribute an amount to a trust, or provide an accrual or other benefit,

under a plan deferring the receipt of compensation.

(ii) *Automatic enrollment.* For purposes of determining whether an election is a cash or deferred election, it is irrelevant whether the default that applies in the absence of an affirmative election is described in paragraph (a)(3)(i)(A) of this section (i.e., the employee receives an amount in cash or some other taxable benefit) or in paragraph (a)(3)(i)(B) of this section (i.e., the employer contributes an amount to a trust or provides an accrual or other benefit under a plan deferring the receipt of compensation).

(iii) *Rules related to timing—(A) Requirement that amounts not be currently available.* A cash or deferred election can only be made with respect to an amount that is not currently available to the employee on the date of the election. Further, a cash or deferred election can only be made with respect to amounts that would (but for the cash or deferred election) become currently available after the later of the date on which the employer adopts the cash or deferred arrangement or the date on which the arrangement first becomes effective.

(B) *Contribution may not precede election.* A contribution is made pursuant to a cash or deferred election only if the contribution is made after the election is made.

(C) *Contribution may not precede services—(1) General rule.* Contributions are made pursuant to a cash or deferred election only if the contributions are made after the employee's performance of service with respect to which the contributions are made (or when the cash or other taxable benefit would be currently available, if earlier).

(2) *Exception for bona fide administrative considerations.* The timing of contributions will not be treated as failing to satisfy the requirements of this paragraph (a)(3)(iii)(C) merely because contributions for a pay period are occasionally made before the services with respect to that pay period are performed, provided the contributions are made early in order to accommodate bona fide administrative considerations (for example, the temporary absence of the bookkeeper with responsibility to transmit contributions to the

plan) and are not paid early with a principal purpose of accelerating deductions.

(iv) *Current availability defined.* Cash or another taxable benefit is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable benefit at the employee's discretion. An amount is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the amount currently. Similarly, an amount is not currently available as of a date if the employee may under no circumstances receive the amount before a particular time in the future. The determination of whether an amount is currently available to an employee does not depend on whether it has been constructively received by the employee for purposes of section 451.

(v) *Certain one-time elections not treated as cash or deferred elections.* A cash or deferred election does not include a one-time irrevocable election made no later than the employee's first becoming eligible under the plan or any other plan or arrangement of the employer that is described in section 219(g)(5)(A) (whether or not such other plan or arrangement has terminated), to have contributions equal to a specified amount or percentage of the employee's compensation (including no amount of compensation) made by the employer on the employee's behalf to the plan and a specified amount or percentage of the employee's compensation (including no amount of compensation) divided among all other plans or arrangements of the employer (including plans or arrangements not yet established) for the duration of the employee's employment with the employer, or in the case of a defined benefit plan to receive accruals or other benefits (including no benefits) under such plans. Thus, for example, employer contributions made pursuant to a one-time irrevocable election described in this paragraph are not treated as having been made pursuant to a cash or deferred election and are not includible in an employee's gross income by reason of § 1.402(a)-1(d). In the

case of an irrevocable election made on or before December 23, 1994—

(A) The election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because an employee was previously eligible under another plan of the employer (whether or not such other plan has terminated); and

(B) In the case of a plan in which partners may participate, the election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because the election was made after commencement of employment or after the employee's first becoming eligible under any plan of the employer, provided that the election was made before the first day of the first plan year beginning after December 31, 1988, or, if later, March 31, 1989.

(vi) *Tax treatment of employees.* An amount generally is includible in an employee's gross income for the taxable year in which the employee actually or constructively receives the amount. But for section 402(e)(3), an employee is treated as having received an amount that is contributed to an exempt trust or plan described in section 401(a) or 403(a) pursuant to the employee's cash or deferred election. This is the case even if the election to defer is made before the year in which the amount is earned, or before the amount is currently available. See § 1.402(a)-1(d).

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

Example 1. (i) An employer maintains a profit-sharing plan under which each eligible employee has an election to defer an annual bonus payable on January 30 each year. The bonus equals 10% of compensation during the previous calendar year. Deferred amounts are not treated as after-tax employee contributions. The bonus is currently available on January 30.

(ii) An election made prior to January 30 to defer all or part of the bonus is a cash or deferred election, and the bonus deferral arrangement is a cash or deferred arrangement.

Example 2. (i) An employer maintains a profit-sharing plan which provides for discretionary profit sharing contributions and under which each eligible employee may elect to reduce his compensation by up to 10% and to have the employer contribute

such amount to the plan. The employer pays each employee every two weeks for services during the immediately preceding two weeks. The employee's election to defer compensation for a payroll period must be made prior to the date the amount would otherwise be paid. The employer contributes to the plan the amount of compensation that each employee elected to defer, at the time it would otherwise be paid to the employee, and does not treat the contribution as an after-tax employee contribution.

(ii) The election is a cash or deferred election and the contributions are elective contributions.

Example 3. (i) The facts are the same as in *Example 2*, except that the employer makes a \$10,000 contribution on January 31 of the plan year that is in addition to the contributions that satisfy the employer's obligation to make contributions with respect to cash or deferred elections for prior payroll periods. Employee A makes an election on February 15 to defer \$2,000 from compensation that is not currently available and the employer reduces the employee's compensation to reflect the election.

(ii) None of the additional \$10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election, because the contribution was made before the election was made. Accordingly, the employer must make an additional contribution of \$2,000 in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The \$10,000 contribution may be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 4. (i) The facts are the same as in *Example 3*, except that Employee A had an outstanding election to defer \$500 from each payroll period's compensation. The \$10,000 additional payment that is contributed early is not made early in order to accommodate bona fide administrative considerations.

(ii) None of the additional \$10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election for future payroll periods, because the contribution was made before the earlier of Employee A's performance of services to which the contribution is attributable or when the compensation would be currently available. Furthermore, the exception for early contributions in paragraph (a)(3)(iii)(C)(2) of this section does not apply. Accordingly, the employer must make an additional contribution of \$500 per payroll period in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The \$10,000 contribution may be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 5. (i) Employer B establishes a money purchase pension plan in 1986. This is

the first qualified plan established by Employer B. All salaried employees are eligible to participate under the plan. Hourly-paid employees are not eligible to participate under the plan. In 2000, Employer B establishes a profit-sharing plan under which all employees (both salaried and hourly) are eligible. Employer B permits all employees on the effective date of the profit-sharing plan to make a one-time irrevocable election to have Employer B contribute 5% of compensation on their behalf to the plan and make no other contribution to any other plan of Employer B (including plans not yet established) for the duration of the employee's employment with Employer B, and have their salaries reduced by 5%.

(ii) The election provided under the profit-sharing plan is not a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the salaried employees of Employer B who, before becoming eligible to participate under the profit-sharing plan, became eligible to participate under the money purchase pension plan. The election under the profit-sharing plan is a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the hourly employees, because they were not previously eligible to participate under another plan of the employer.

(4) *Rules applicable to qualified cash or deferred arrangements—(i) Definition of qualified cash or deferred arrangement.* A qualified cash or deferred arrangement is a cash or deferred arrangement that satisfies the requirements of paragraphs (b), (c), (d), and (e) of this section.

(ii) *Treatment of elective contributions as employer contributions.* Except as otherwise provided in § 1.401(k)-2(b)(3), elective contributions under a qualified cash or deferred arrangement (including designated Roth contributions) are treated as employer contributions. Thus, for example, elective contributions under such an arrangement are treated as employer contributions for purposes of sections 401(a), 401(k), 402, 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Except as provided in section 402(g), 402A (effective for taxable years beginning after December 31, 2005), or § 1.401(k)-2(b)(3), elective contributions under a qualified cash or deferred arrangement are neither includible in an employee's gross income at the time the cash would have been includible in the employee's gross income (but for the cash

or deferred election), nor at the time the elective contributions are contributed to the plan. See § 1.402(a)-1(d)(2)(i).

(iv) *Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement—(A) Exclusive means of amounts testing.* Elective contributions (including elective contributions that are designated Roth contributions) under a qualified cash or deferred arrangement satisfy the requirements of section 401(a)(4) with respect to amounts if and only if the amount of elective contributions satisfies the nondiscrimination test of section 401(k) under paragraph (b)(1) of this section. See § 1.401(a)(4)-1(b)(2)(ii)(B).

(B) *Testing benefits, rights and features.* A plan that includes a qualified cash or deferred arrangement must satisfy the requirements of section 401(a)(4) with respect to benefits, rights and features in addition to the requirements regarding amounts described in paragraph (a)(4)(iv)(A) of this section. For example, the right to make each level of elective contributions under a cash or deferred arrangement and the right to make designated Roth contributions are rights or features subject to the requirements of section 401(a)(4). See § 1.401(a)(4)-4(e)(3)(i) and (iii)(D). Thus, for example, if all employees are eligible to make a stated level of elective contributions under a cash or deferred arrangement, but that level of contributions can only be made from compensation in excess of a stated amount, such as the Social Security taxable wage base, the arrangement will generally favor HCEs with respect to the availability of elective contributions and thus will generally not satisfy the requirements of section 401(a)(4).

(C) *Minimum coverage requirement.* A qualified cash or deferred arrangement is treated as a separate plan that must satisfy the requirements of section 410(b). See § 1.410(b)-7(c)(1) for special rules. The determination of whether a cash or deferred arrangement satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. See also § 1.401(a)(4)-11(g)(3)(vii)(A), relating to corrective

amendments that may be made to satisfy the minimum coverage requirements of section 410(b).

(5) *Rules applicable to nonqualified cash or deferred arrangements—(i) Definition of nonqualified cash or deferred arrangement.* A nonqualified cash or deferred arrangement is a cash or deferred arrangement that fails to satisfy one or more of the requirements in paragraph (b), (c), (d) or (e) of this section.

(ii) *Treatment of elective contributions as nonelective contributions.* Except as specifically provided otherwise, elective contributions under a nonqualified cash or deferred arrangement are treated as nonelective employer contributions. Thus, for example, the elective contributions under such an arrangement are treated as nonelective employer contributions for purposes of sections 401(a) (including section 401(a)(4)) and 401(k), 404, 409, 411, 412, 415, 416, and 417 and are not subject to the requirements of section 401(m).

(iii) *Tax treatment of employees.* Elective contributions under a nonqualified cash or deferred arrangement are includible in an employee's gross income at the time the cash or other taxable amount that the employee would have received (but for the cash or deferred election) would have been includible in the employee's gross income. See § 1.402(a)-1(d)(1).

(iv) *Qualification of plan that includes a nonqualified cash or deferred arrangement—(A) In general.* A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a nonqualified cash or deferred arrangement. In determining whether the plan satisfies the requirements of section 401(a)(4), the nondiscrimination tests of sections 401(k), paragraph (b)(1) of this section, section 401(m)(2) and § 1.401(m)-1(b) may not be used. See §§ 1.401(a)(4)-1(b)(2)(ii)(B) and 1.410(b)-9 (definition of section 401(k) plan).

(B) *Application of section 401(a)(4) to certain plans.* The amount of employer contributions under a nonqualified cash or deferred arrangement is treated

as satisfying section 401(a)(4) if the arrangement is part of a collectively bargained plan that automatically satisfies the requirements of section 410(b). See §§1.401(a)(4)-(c)(5) and 1.410(b)-2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof). See sections 401(a)(5) and 410(c)(1)(A).

(v) *Example.* The following example illustrates the application of this paragraph (a)(5):

Example. (i) For the 2006 plan year, Employer A maintains a collectively bargained plan that includes a cash or deferred arrangement. Employer contributions under the cash or deferred arrangement do not satisfy the nondiscrimination test of section 401(k) and paragraph (b) of this section.

(ii) The arrangement is a nonqualified cash or deferred arrangement. The employer contributions under the cash or deferred arrangement are considered to be nondiscriminatory under section 401(a)(4), and the elective contributions are generally treated as employer contributions under paragraph (a)(5)(ii) of this section. Under paragraph (a)(5)(iii) of this section and under §1.402(a)-1(d)(1), however, the elective contributions are includible in each employee's gross income.

(6) *Rules applicable to cash or deferred arrangements of self-employed individuals—(1) Application of general rules.* Generally, a partnership or sole proprietorship is permitted to maintain a cash or deferred arrangement, and individual partners or owners are permitted to make cash or deferred elections with respect to compensation attributable to services rendered to the entity, under the same rules that apply to other cash or deferred arrangements. For example, any contributions made on behalf of an individual partner or owner pursuant to a cash or deferred arrangement of a partnership or sole proprietorship are elective contributions unless they are designated or treated as after-tax employee contributions. In the case of a partnership, a cash or deferred arrangement includes any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf. Consistent with

§1.402(a)-1(d), the elective contributions under such an arrangement are includible in income and are not deductible under section 404(a) unless the arrangement is a qualified cash or deferred arrangement (*i.e.*, the requirements of section 401(k) and this section are satisfied). Also, even if the arrangement is a qualified cash or deferred arrangement, the elective contributions are includible in gross income and are not deductible under section 404(a) to the extent they exceed the applicable limit under section 402(g). See also §1.401(a)-30.

(ii) *Treatment of matching contributions made on behalf of self-employed individuals.* Under section 402(g)(8), matching contributions made on behalf of a self-employed individual are not treated as elective contributions made pursuant to a cash or deferred election, without regard to whether such matching contributions indirectly permit individual partners to vary the amount of contributions made on their behalf.

(iii) *Timing of self-employed individual's cash or deferred election.* For purposes of paragraph (a)(3)(iv) of this section, a partner's compensation is deemed currently available on the last day of the partnership taxable year and a sole proprietor's compensation is deemed currently available on the last day of the individual's taxable year. Accordingly, a self-employed individual may not make a cash or deferred election with respect to compensation for a partnership or sole proprietorship taxable year after the last day of that year. See §1.401(k)-2(a)(4)(ii) for the rules regarding when these contributions are treated as allocated.

(iv) *Special rule for certain payments to self-employed individuals.* For purposes of sections 401(k) and 401(m), the earned income of a self-employed individual for a taxable year constitutes payment for services during that year. Thus, for example, if a partnership provides for cash advance payments during the taxable year to be made to a partner based on the value of the partner's services prior to the date of payment (and which do not exceed a reasonable estimate of the partner's earned income for the taxable year), a

contribution of a portion of these payments to a profit sharing plan in accordance with an election to defer the portion of the advance payments does not fail to be made pursuant to a cash or deferred election within the meaning of paragraph (a)(3)(iii) of this section merely because the contribution is made before the amount of the partner's earned income is finally determined and reported. However, see § 1.401(k)-2(a)(4)(ii) for rules on when earned income is treated as received.

(b) *Coverage and nondiscrimination requirements*—(1) *In general.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if—

(i) The group of eligible employees under the cash or deferred arrangement (including any employees taken into account for purposes of section 410(b) pursuant to § 1.401(a)(4)-11(g)(3)(vii)(A)) satisfies the requirements of section 410(b) (including the average benefit percentage test, if applicable); and

(ii) The cash or deferred arrangement satisfies—

(A) The ADP test of section 401(k)(3) described in § 1.401(k)-2;

(B) The ADP safe harbor provisions of section 401(k)(12) described in § 1.401(k)-3; or

(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.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) shall be treated as meeting the requirements of this paragraph (b).

(3) *Anti-abuse provisions.* This section and §§ 1.401(k)-2 through 1.401(k)-6 are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ADP for NHCEs (which is used as a benchmark for testing the ADP for HCEs) or to

otherwise manipulate the non-discrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this paragraph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ADP so as to increase significantly the permitted ADP for HCEs, or otherwise manipulate the nondiscrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans and cash or deferred arrangements for purposes of this section, and §§ 1.401(k)-2 through 1.401(k)-6.

(ii) *Aggregation of cash or deferred arrangements within a plan.* Except as otherwise specifically provided in this paragraph (b)(4), all cash or deferred arrangements included in a plan are treated as a single cash or deferred arrangement and a plan must apply a single test under paragraph (b)(1)(ii) of this section with respect to all such arrangements within the plan. Thus, for example, if two groups of employees are eligible for separate cash or deferred arrangements under the same plan, all contributions under both cash or deferred arrangements must be treated as made under a single cash or deferred arrangement subject to a single test, even if they have significantly different features, such as different limits on elective contributions.

(iii) *Aggregation of plans*—(A) *In general.* For purposes of this section and §§ 1.401(k)-2 through 1.401(k)-6, the term *plan* means a plan within the meaning of § 1.410(b)-7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)-7(c), and the permissive aggregation rules of § 1.410(b)-7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)-7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)-7(d) are treated as a

single plan for purposes of sections 401(k) and (m).

(B) *Plans with inconsistent ADP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all cash or deferred arrangements under a plan. Thus, in applying the permissive aggregation rules of §1.410(b)-7(d), an employer may not aggregate plans (within the meaning of §1.410(b)-7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of §1.410(b)-7(b)) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of §1.410(b)-7(b)) using the ADP safe harbor provisions of section 401(k)(12) and another plan that is using the ADP test of section 401(k)(3).

(iv) *Disaggregation of plans and separate testing—(A) In general.* If a cash or deferred arrangement is included in a plan (within the meaning of §1.410(b)-7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the cash or deferred arrangement must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a cash or deferred arrangement are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan complies with the requirements of section 401(k), unless the employer is applying the special rule for employer-wide plans in §1.414(r)-1(c)(2)(ii) with respect to the plan. Similarly, if a cash or deferred arrangement under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the arrangement must be treated as two separate arrangements, one comprising all eligible employees who have met the age and service re-

quirements of section 410(a)(1) and one comprising all eligible employees who have not met the age and service requirements under section 410(a)(1), unless the plan is using the rule in §1.401(k)-2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under §1.401(a)(4)-9(c) may not be used to demonstrate compliance with the requirements of section 401(k). See §1.401(a)(4)-9(c)(3)(ii).

(v) *Modifications to section 410(b) rules—(A) Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in §1.410(b)-7(c)(1) and ESOP and non-ESOP portions of a plan set forth in §1.410(b)-7(c)(2) shall not apply for purposes of this section and §§1.401(k)-2 through 1.401(k)-6. Accordingly, notwithstanding §1.410(b)-7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of section 414(l), as described in §1.410(b)-7(b)) are permitted to be aggregated for these purposes.

(B) *Permissive aggregation of collective bargaining units.* Notwithstanding the general rule under section 410(b) and §1.410(b)-7(c) that a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not included in the collective bargaining unit is treated as comprising separate plans, an employer can treat two or more separate collective bargaining units as a single collective bargaining unit for purposes of this section and §§1.401(k)-2 through 1.401(k)-6, provided that the combinations of units are determined on a basis that is reasonable and reasonably consistent from year to year. Thus, for example, if a plan benefits employees in three categories (e.g., employees included in collective bargaining unit A, employees included in collective bargaining unit B, and employees who are not included in any collective bargaining unit), the plan can be treated as comprising three separate plans, each of which benefits only one category of employees. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as comprising only two separate plans, one benefiting all employees

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who are included in a collective bargaining unit and another benefiting all other employees. Similarly, if a plan benefits only employees who are included in collective bargaining unit A and employees who are included in collective bargaining unit B, the plan can be treated as comprising two separate plans. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as a single plan. An employee is treated as included in a unit of employees covered by a collective bargaining agreement if and only if the employee is a collectively bargained employee within the meaning of § 1.410(b)-6(d)(2).

(C) *Multiemployer plans.* Notwithstanding § 1.410(b)-7(c)(4)(ii)(C), the portion of the plan that is maintained pursuant to a collective bargaining agreement (within the meaning of § 1.413-1(a)(2)) is treated as a single plan maintained by a single employer that employs all the employees benefiting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The rules of paragraph (b)(4)(v)(B) of this section (including the permissive aggregation of collective bargaining units) apply to the resulting deemed single plan in the same manner as they would to a single employer plan, except that the plan administrator is substituted for the employer where appropriate and that appropriate fiduciary obligations are taken into account. The noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the noncollectively bargaining unit employees who benefit under the plan are employed by one or more employers.

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

Example 1. (i) Employer A maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. For purposes of applying section 410(b), Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)-1(b). However, Employer A applies the special rule for employer-wide plans in § 1.414(r)-1(c)(2)(ii) to the portion of its profit-sharing

plan that consists of elective contributions under the cash or deferred arrangement (and to no other plans or portions of plans).

(ii) Under these facts, the requirements of this section and §§ 1.401(k)-2 through 1.401(k)-6 must be applied on an employer-wide rather than a qualified separate line of business basis.

Example 2. (i) Employer B maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer B are eligible to participate. For purposes of applying section 410(b), the plan treats the cash or deferred arrangement as two separate plans, one for the employees who have completed the minimum age and service eligibility conditions under section 410(a)(1) and the other for employees who have not completed the conditions. The plan provides that it will satisfy the section 401(k) safe harbor requirement of § 1.401(k)-3 with respect to the employees who have met the minimum age and service conditions and that it will meet the ADP test requirements of § 1.401(k)-2 with respect to the employees who have not met the minimum age and service conditions.

(ii) Under these facts, the cash or deferred arrangement must be disaggregated on a consistent basis with the disaggregation of Plan W. Thus, the requirements of § 1.401(k)-2 must be applied by comparing the ADP for eligible HCEs who have not completed the minimum age and service conditions with the ADP for eligible NHCEs for the applicable year who have not completed the minimum age and service conditions.

Example 3. (i) Employer C maintains Plan X, a stock-bonus plan including an ESOP. The plan also includes a cash or deferred arrangement for participants in the ESOP and non-ESOP portions of the plan.

(ii) Pursuant to paragraph (b)(4)(v)(A) of this section the ESOP and non-ESOP portions of the stock-bonus plan are a single cash or deferred arrangement for purposes of this section and §§ 1.401(k)-2 through 1.401(k)-6. However, as provided in paragraph (a)(4)(iv)(C) of this section, the ESOP and non-ESOP portions of the plan are still treated as separate plans for purposes of satisfying the requirements of section 410(b).

(c) *Nonforfeiture requirements—(1) General rule.* A cash or deferred arrangement satisfies this paragraph (c) only if the amount attributable to an employee's elective contributions are immediately nonforfeitable, within the meaning of paragraph (c)(2) of this section, are disregarded for purposes of applying section 411(a)(2) to other contributions or benefits, and the contributions remain nonforfeitable even if the employee makes no additional

elective contributions under a cash or deferred arrangement.

(2) *Definition of immediately nonforfeitable.* An amount is immediately nonforfeitable if it is immediately nonforfeitable within the meaning of section 411, and would be nonforfeitable under the plan regardless of the age and service of the employee or whether the employee is employed on a specific date. An amount that is subject to forfeitures or suspensions permitted by section 411(a)(3) does not satisfy the requirements of this paragraph (c).

(3) *Example.* The following example illustrates the application of this paragraph (c):

Example. (i) Employees B and C are covered by Employer Y's stock bonus plan, which includes a cash or deferred arrangement. All employees participating in the plan have a nonforfeitable right to a percentage of their account balance derived from all contributions (including elective contributions) as shown in the following table:

Years of service	Nonforfeitable percentage
Less than 1	0
1	20
2	40
3	60
4	80
5 or more	100

(ii) The cash or deferred arrangement does not satisfy paragraph (c) of this section because elective contributions are not immediately nonforfeitable. Thus, the cash or deferred arrangement is a nonqualified cash or deferred arrangement.

(d) *Distribution limitation—(1) General rule.* A cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions may not be distributed before one of the following events, and any distributions so permitted also satisfy the additional requirements of paragraphs (d)(2) through (5) of this section (to the extent applicable)—

(i) The employee's death, disability, or severance from employment;

(ii) In the case of a profit-sharing, stock bonus or rural cooperative plan, the employee's attainment of age 59½, or the employee's hardship; or

(iii) The termination of the plan.

(2) *Rules applicable to distributions upon severance from employment.* An employee has a severance from employ-

ment when the employee ceases to be an employee of the employer maintaining the plan. An employee does not have a severance from employment if, in connection with a change of employment, the employee's new employer maintains such plan with respect to the employee. For example, a new employer maintains a plan with respect to an employee by continuing or assuming sponsorship of the plan or by accepting a transfer of plan assets and liabilities (within the meaning of section 414(1)) with respect to the employee.

(3) *Rules applicable to hardship distributions—(i) Distribution must be on account of hardship.* A distribution is treated as made after an employee's hardship for purposes of paragraph (d)(1)(ii) of this section if and only if it is made on account of the hardship. For purposes of this rule, a distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. The determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan.

(ii) *Limit on maximum distributable amount—(A) General rule.* A distribution on account of hardship must be limited to the maximum distributable amount. The maximum distributable amount is equal to the employee's total elective contributions as of the date of distribution, reduced by the amount of previous distributions of elective contributions. Thus, the maximum distributable amount does not include earnings, QNECs or QMACs, unless grandfathered under paragraph (d)(3)(ii)(B) of this section.

(B) *Grandfathered amounts.* If the plan so provides, the maximum distributable amount may be increased for amounts credited to the employee's account as of a date specified in the plan that is no later than December 31, 1988, or if later, the end of the last plan year ending before July 1, 1989 (or in the case of a collectively bargained plan, the earlier of—

(1) The later of January 1, 1989, or the date on which the last of the collective

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bargaining agreements in effect on March 1, 1986 terminates (determined without regard to any extension thereof after February 28, 1986); or

(2) January 1, 1991 and consisting of—

(i) Income allocable to elective contributions;

(ii) Qualified nonelective contributions and allocable income; and

(iii) Qualified matching contributions and allocable income.

(iii) *Immediate and heavy financial need*—(A) *In general.* Whether an employee has an immediate and heavy financial need is to be determined based on all the relevant facts and circumstances. Generally, for example, the need to pay the funeral expenses of a family member would constitute an immediate and heavy financial need. A distribution made to an employee for the purchase of a boat or television would generally not constitute a distribution made on account of an immediate and heavy financial need. A financial need may be immediate and heavy even if it was reasonably foreseeable or voluntarily incurred by the employee.

(B) *Deemed immediate and heavy financial need.* A distribution is deemed to be on account of an immediate and heavy financial need of the employee if the distribution is for—

(1) Expenses for (or necessary to obtain) medical care that would be deductible under section 213(d) (determined without regard to whether the expenses exceed 7.5% of adjusted gross income);

(2) Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);

(3) Payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, or the employee's spouse, children, or dependents (as defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(b)(1), (b)(2) and (d)(1)(B));

(4) Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence;

(5) Payments for burial or funeral expenses for the employee's deceased parent, spouse, children or dependents (as defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(d)(1)(B)); or

(6) Expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction under section 165 (determined without regard to whether the loss exceeds 10% of adjusted gross income).

(iv) *Distribution necessary to satisfy financial need*—(A) *Distribution may not exceed amount of need.* A distribution is treated as necessary to satisfy an immediate and heavy financial need of an employee only to the extent the amount of the distribution is not in excess of the amount required to satisfy the financial need. For this purpose, the amount required to satisfy the financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

(B) *No alternative means available.* A distribution is not treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the need may be relieved from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all the relevant facts and circumstances. For purposes of this paragraph (d)(3)(iv), the employee's resources are deemed to include those assets of the employee's spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or tenants in common, generally will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act (or comparable State law) is not treated as a resource of the employee.

(C) *Employer reliance on employee representation.* For purposes of paragraph

(d)(3)(iv)(B) of this section, an immediate and heavy financial need generally may be treated as not capable of being relieved from other resources that are reasonably available to the employee, if the employer relies upon the employee's representation (made in writing or such other form as may be prescribed by the Commissioner), unless the employer has actual knowledge to the contrary, that the need cannot reasonably be relieved—

(1) Through reimbursement or compensation by insurance or otherwise;

(2) By liquidation of the employee's assets;

(3) By cessation of elective contributions or employee contributions under the plan;

(4) By other currently available distributions (including distribution of ESOP dividends under section 404(k)) and nontaxable (at the time of the loan) loans, under plans maintained by the employer or by any other employer; or

(5) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(D) *Employee need not take counterproductive actions.* For purposes of this paragraph (d)(3)(iv), a need cannot reasonably be relieved by one of the actions described in paragraph (d)(3)(iv)(C) of this section if the effect would be to increase the amount of the need. For example, the need for funds to purchase a principal residence cannot reasonably be relieved by a plan loan if the loan would disqualify the employee from obtaining other necessary financing.

(E) *Distribution deemed necessary to satisfy immediate and heavy financial need.* A distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if each of the following requirements are satisfied—

(1) The employee has obtained all other currently available distributions (including distribution of ESOP dividends under section 404(k), but not hardship distributions) and nontaxable (at the time of the loan) loans, under the plan and all other plans maintained by the employer; and

(2) The employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 6 months after receipt of the hardship distribution.

(F) *Definition of other plans.* For purposes of paragraph (d)(3)(iv)(C)(4) and (E)(1) of this section, the phrase *plans maintained by the employer* means all qualified and nonqualified plans of deferred compensation maintained by the employer, including a cash or deferred arrangement that is part of a cafeteria plan within the meaning of section 125. However, it does not include the mandatory employee contribution portion of a defined benefit plan or a health or welfare benefit plan (including one that is part of a cafeteria plan). In addition, for purposes of paragraph (d)(3)(iv)(E)(2) of this section, the phrase *plans maintained by the employer* also includes a stock option, stock purchase, or similar plan maintained by the employer. See § 1.401(k)-6 for the continued treatment of suspended employees as eligible employees.

(v) *Commissioner may expand standards.* The Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), expanding the list of deemed immediate and heavy financial needs and prescribing additional methods for distributions to be deemed necessary to satisfy an immediate and heavy financial need.

(4) *Rules applicable to distributions upon plan termination—(i) No alternative defined contribution plan.* A distribution may not be made under paragraph (d)(1)(iii) of this section if the employer establishes or maintains an alternative defined contribution plan. For purposes of the preceding sentence, the definition of the term “employer” contained in § 1.401(k)-6 is applied as of the date of plan termination, and a plan is an alternative defined contribution plan only if it is a defined contribution plan that exists at any time during the period beginning on the date of plan termination and ending 12 months after distribution of all assets from the terminated plan. However, if at all times

during the 24-month period beginning 12 months before the date of plan termination, fewer than 2% of the employees who were eligible under the defined contribution plan that includes the cash or deferred arrangement as of the date of plan termination are eligible under the other defined contribution plan, the other plan is not an alternative defined contribution plan. In addition, a defined contribution plan is not treated as an alternative defined contribution plan if it is an employee stock ownership plan as defined in section 4975(e)(7) or 409(a), a simplified employee pension as defined in section 408(k), a SIMPLE IRA plan as defined in section 408(p), a plan or contract that satisfies the requirements of section 403(b), or a plan that is described in section 457(b) or (f).

(ii) *Lump sum requirement for certain distributions.* A distribution may be made under paragraph (d)(1)(iii) of this section only if it is a lump sum distribution. The term lump sum distribution has the meaning provided in section 402(e)(4)(D) (without regard to section 402(e)(4)(D)(i)(I), (II), (III) and (IV)). In addition, a lump sum distribution includes a distribution of an annuity contract from a trust that is part of a plan described in section 401(a) and which is exempt from tax under section 501(a) or an annuity plan described in 403(a).

(5) *Rules applicable to all distributions—(i) Exclusive distribution rules.* Amounts attributable to elective contributions may not be distributed on account of any event not described in this paragraph (d), such as completion of a stated period of plan participation or the lapse of a fixed number of years. For example, if excess deferrals (and income) for an employee's taxable year are not distributed within the time prescribed in § 1.402(g)-1(e)(2) or (3), the amounts may be distributed only on account of an event described in this paragraph (d). Pursuant to section 401(k)(8), the prohibition on distributions set forth in this section does not apply to a distribution of excess contributions under § 1.401(k)-2(b).

(ii) *Deemed distributions.* The cost of life insurance (determined under section 72) is not treated as a distribution for purposes of section 401(k)(2) and

this paragraph (d). The making of a loan is not treated as a distribution, even if the loan is secured by the employee's accrued benefit attributable to elective contributions or is includible in the employee's income under section 72(p). However, the reduction, by reason of default on a loan, of an employee's accrued benefit derived from elective contributions is treated as a distribution.

(iii) *ESOP dividend distributions.* A plan does not fail to satisfy the requirements of this paragraph (d) merely by reason of a dividend distribution described in section 404(k)(2).

(iv) *Limitations apply after transfer.* The limitations of this paragraph (d) generally continue to apply to amounts attributable to elective contributions (including QNECs and qualified matching contributions taken into account for the ADP test under § 1.401(k)-2(a)(6)) that are transferred to another qualified plan of the same or another employer. Thus, the transferee plan will generally fail to satisfy the requirements of section 401(a) and this section if transferred amounts may be distributed before the times specified in this paragraph (d). In addition, a cash or deferred arrangement fails to satisfy the limitations of this paragraph (d) if it transfers amounts to a plan that does not provide that the transferred amounts may not be distributed before the times specified in this paragraph (d). The transferor plan does not fail to comply with the preceding sentence if it reasonably concludes that the transferee plan provides that the transferred amounts may not be distributed before the times specified in this paragraph (d). What constitutes a basis for a reasonable conclusion is determined under standards comparable to those under the rules related to acceptance of rollover distributions. See § 1.401(a)(31)-1, A-14. The limitations of this paragraph (d) cease to apply after the transfer, however, if the amounts could have been distributed at the time of the transfer (other than on account of hardship), and the transfer is an elective transfer described in § 1.411(d)-4, Q&A-3(b)(1). The limitations of this paragraph (d) also do not apply to

amounts that have been paid in a direct rollover to the plan after being distributed by another plan.

(6) *Examples.* The following examples illustrate the application of this paragraph (d):

Example 1. Employer M maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be withdrawn for any reason after two years following the end of the plan year in which the contributions were made. Because the plan permits distributions of elective contributions before the occurrence of one of the events specified in section 401(k)(2)(B) and this paragraph (d), the cash or deferred arrangement is a nonqualified cash or deferred arrangement and the elective contributions are currently includible in income under section 402.

Example 2. (i) Employer N maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement. Plan W provides for distributions upon a participant's severance from employment, death or disability. All employees of Employer N and its wholly owned subsidiary, Employer O, are eligible to participate in Plan W. Employer N agrees to sell all issued and outstanding shares of Employer O to an unrelated entity, Employer T, effective on December 31, 2006. Following the transaction, Employer O will be a wholly owned subsidiary of Employer T. Additionally, individuals who are employed by Employer O on the effective date of the sale continue to be employed by Employer O following the sale. Following the transaction, all employees of Employer O will cease to participate in Plan W and will become eligible to participate in the cash or deferred arrangement maintained by Employer T, Plan X. No assets will be transferred from Plan W to Plan X, except in the case of a direct rollover within the meaning of section 401(a)(31).

(ii) Employer O ceases to be a member of Employer N's controlled group as a result of the sale. Therefore, employees of Employer O who participated in Plan W will have a severance from employment and are eligible to receive a distribution from Plan W.

Example 3. (i) Employer Q maintains Plan Y, a profit-sharing plan that includes a cash or deferred arrangement. Plan Y, the only plan maintained by Employer Q, does not provide for loans. However, Plan Y provides that elective contributions under the arrangement may be distributed to an eligible employee on account of hardship using the deemed immediate and heavy financial need provisions of paragraph (d)(3)(iii)(B) of this section and provisions regarding distributions necessary to satisfy financial need of paragraphs (d)(3)(iv)(A) through (D) of this section. Employee A is an eligible employee

in Plan Y with an account balance of \$50,000 attributable to elective contributions made by Employee A. The total amount of elective contributions made by Employee A, who has not previously received a distribution from Plan Y, is \$20,000. Employee A requests a \$15,000 hardship distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his dependent. At the time of the distribution request, the sole asset of Employee A (that is reasonably available to Employee A within the meaning of paragraph (d)(3)(iv)(B) of this section) is a savings account with an available balance of \$10,000.

(i) A distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependent is deemed to be on account of an immediate and heavy financial need of Employee A.

(iii) A distribution is treated as necessary to satisfy Employee A's immediate and heavy financial need to the extent the need may not be relieved from other resources reasonably available to Employee A. Under paragraph (d)(3)(iv)(B) of this section, Employee A's \$10,000 savings account is a resource that is reasonably available to the employee and must be taken into account in determining the amount necessary to satisfy Employee A's immediate and heavy financial need. Thus, Employee A may receive a distribution of only \$5,000 of his elective contributions on account of this hardship, plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 4. (i) The facts are the same as in *Example 3.* Employee B, another employee of Employer Q has an account balance of \$25,000, attributable to Employee B's elective contributions. The total amount of elective contributions made by Employee B, who has not previously received a distribution from Plan Y, is \$15,000. Employee B requests a \$10,000 distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his child. Employee B makes a written representation (with respect to which Employer Q has no actual knowledge to the contrary) that the need cannot reasonably be relieved:

- (A) Through reimbursement or compensation by insurance or otherwise;
- (B) By liquidation of the employee's assets;
- (C) By cessation of elective contributions or employee contributions under the plan;
- (D) By other distributions or nontaxable (at the time of the loan) loans from plans

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maintained by the employer or by any other employer; or

(E) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(i) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee B's child is deemed to be on account of an Employee B's immediate and heavy financial need. In addition, because Employer Q can rely on Employee B's written representation, the distribution is considered necessary to satisfy Employee B's immediate and heavy financial need. Therefore, Employee B may receive a \$10,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 5. (i) The facts are the same as in *Example 3*, except Plan Y provides for hardship distributions using the safe harbor rule of paragraph (d)(3)(iv)(E) of this section. Accordingly, Plan Y provides for a 6 month suspension of an eligible employee's elective contributions and employee contributions to the plan after the receipt of a hardship distribution by such eligible employee.

(ii) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependent is deemed to be on account of an Employee A's immediate and heavy financial need. In addition, because Employee A is not eligible for any other distribution or loan from Plan Y and Plan Y suspends Employee A's elective contributions and employee contributions following receipt of the hardship distribution, the distribution will be deemed necessary to satisfy Employee A's immediate and heavy financial need (and Employee A is not required to first liquidate his savings account). Therefore, Employee A may receive a \$15,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 6. Employer R maintains a pre-ERISA money purchase pension plan that includes a cash or deferred arrangement that is not a rural cooperative plan. Elective contributions under the arrangement may be distributed to an employee on account of hardship. Under paragraph (d)(1) of this section, hardship is a permissible distribution event only in a profit-sharing, stock bonus or rural cooperative plan. Since elective contributions under the arrangement may be distributed before a permissible distribution event occurs, the cash or deferred arrangement does not satisfy this paragraph (d), and

is not a qualified cash or deferred arrangement. Moreover, the plan is not a qualified plan because a money purchase pension plan may not provide for payment of benefits upon hardship. See § 1.401-1(b)(1)(i).

(e) *Additional requirements for qualified cash or deferred arrangements—(1) Qualified plan requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if the plan of which it is a part is a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan that otherwise satisfies the requirements of section 401(a) (taking into account the cash or deferred arrangement). A plan that includes a cash or deferred arrangement may provide for other contributions, including employer contributions (other than elective contributions), employee contributions, or both. However, except as expressly permitted under section 401(m), 410(b)(2)(A)(ii) or 416(c)(2)(A), elective contributions and matching contributions taken into account under § 1.401(k)-2(a) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the contributions are made) satisfy the requirements of section 401(a).

(2) *Election requirements—(i) Cash must be available.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. Thus, for example, if an eligible employee is provided the option to receive a taxable benefit (other than cash) or to have the employer contribute on the employee's behalf to a profit-sharing plan an amount equal to the value of the taxable benefit, the arrangement is not a qualified cash or deferred arrangement. Similarly, if an employee has the option to receive a specified amount in cash or to have the employer contribute an amount in excess of the specified cash amount to a profit-sharing plan on the employee's behalf, any contribution made by the employer on the employee's behalf in excess of the specified cash amount is not treated as made pursuant to a qualified cash or deferred arrangement, but

would be treated as a matching contribution. This cash availability requirement applies even if the cash or deferred arrangement is part of a cafeteria plan within the meaning of section 125.

(ii) *Frequency of elections.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides an employee with an effective opportunity to make (or change) a cash or deferred election at least once during each plan year. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

(3) *Separate accounting requirement—*
(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if the portion of an employee's benefit subject to the requirements of paragraphs (c) and (d) of this section is determined by an acceptable separate accounting between that portion and any other benefits. Separate accounting is not acceptable unless contributions and withdrawals are attributed to the separate accounts and gains, losses, and other credits or charges are separately allocated on a reasonable and consistent basis to the accounts subject to the requirements of paragraphs (c) and (d) of this section and to other accounts. Subject to section 401(a)(4), forfeitures are not required to be allocated to the accounts in which benefits are subject to paragraphs (c) and (d) of this section. The separate accounting requirement of this paragraph (e)(3)(i) applies at the time the elective contribution is contributed to the plan and continues to apply until the contribution is distributed under the plan.

(ii) *Satisfaction of separate accounting requirement.* The requirements of paragraph (e)(3)(i) of this section are treated as satisfied if all amounts held under a plan that includes a qualified cash or deferred arrangement (and, if applicable, under another plan to which QNECs and QMACs are made) are subject to the requirements of paragraphs (c) and (d) of this section.

(4) *Limitations on cash or deferred arrangements of state and local govern-*

ments—(i) *General rule.* A cash or deferred arrangement does not satisfy the requirements of this paragraph (e) if the arrangement is adopted after May 6, 1986, by a State or local government or political subdivision thereof, or any agency or instrumentality thereof (a governmental unit). For purposes of this paragraph (e)(4), an employer that has made a legally binding commitment to adopt a cash or deferred arrangement is treated as having adopted the arrangement on that date.

(ii) *Rural cooperative plans and Indian tribal governments.* This paragraph (e)(4) does not apply to a rural cooperative plan or to a plan of an employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State or tribal law which is owned in whole or in part by any of the entities in this paragraph (e)(4)(ii).

(iii) *Adoption after May 6, 1986.* A cash or deferred arrangement is treated as adopted after May 6, 1986, with respect to all employees of any employer that adopts the arrangement after such date.

(iv) *Adoption before May 7, 1986.* If a governmental unit adopted a cash or deferred arrangement before May 7, 1986, then any cash or deferred arrangement adopted by the unit at any time is treated as adopted before that date. If an employer adopted an arrangement prior to such date, all employees of the employer may participate in the arrangement.

(5) *One-year eligibility requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if no employee is required to complete a period of service with the employer maintaining the plan extending beyond the period permitted under section 410(a)(1) (determined without regard to section 410(a)(1)(B)(i)) to be eligible to make a cash or deferred election under the arrangement.

(6) *Other benefits not contingent upon elective contributions—*(i) *General rule.* A cash or deferred arrangement satisfies

this paragraph (e) only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement. The preceding sentence does not apply to—

(A) Any matching contribution (as defined in § 1.401(m)-1(a)(2)) made by reason of such an election;

(B) Any benefit, right or feature (such as a plan loan) that requires, or results in, an amount to be withheld from an employee's pay (*e.g.* to pay for the benefit or to repay the loan), to the extent the cash or deferred arrangement restricts elective contributions to amounts available after such withholding from the employee's pay (after deduction of all applicable income and employment taxes);

(C) Any reduction in the employer's top-heavy contributions under section 416(c)(2) because of matching contributions that resulted from the elective contributions; or

(D) Any benefit that is provided at the employee's election under a plan described in section 125(d) in lieu of an elective contribution under a qualified cash or deferred arrangement.

(ii) *Definition of other benefits.* For purposes of this paragraph (e)(6), other benefits include, but are not limited to, benefits under a defined benefit plan; nonelective contributions under a defined contribution plan; the availability, cost, or amount of health benefits; vacations or vacation pay; life insurance; dental plans; legal services plans; loans (including plan loans); financial planning services; subsidized retirement benefits; stock options; property subject to section 83; and dependent care assistance. Also, increases in salary, bonuses or other cash remuneration (other than the amount that would be contributed under the cash or deferred election) are benefits for purposes of this paragraph (e)(6). The ability to make after-tax employee contributions is a benefit, but that benefit is not contingent upon an employee's electing to make or not make elective contributions under the arrangement merely because the amount of elective contributions reduces dollar-for-dollar the amount of after-tax employee contributions that may be made. Additionally, benefits under any

other plan or arrangement (whether or not qualified) are not contingent upon an employee's electing to make or not to make elective contributions under a cash or deferred arrangement merely because the elective contributions are or are not taken into account as compensation under the other plan or arrangement for purposes of determining benefits.

(iii) *Effect of certain statutory limits.* Any benefit under an excess benefit plan described in section 3(36) of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93-406, that is dependent on the employee's electing to make or not to make elective contributions is not treated as contingent. Deferred compensation under a nonqualified plan of deferred compensation that is dependent on an employee's having made the maximum elective deferrals under section 402(g) or the maximum elective contributions permitted under the terms of the plan also is not treated as contingent.

(iv) *Nonqualified deferred compensation.* Except as otherwise provided in paragraph (e)(6)(iii) of this section, participation in a nonqualified deferred compensation plan is treated as contingent for purposes of this paragraph (e)(6) to the extent that an employee may receive additional deferred compensation under the nonqualified plan to the extent the employee makes or does not make elective contributions.

(v) *Plan loans and distributions.* A loan or distribution of elective contributions is not a benefit conditioned on an employee's electing to make or not make elective contributions under the arrangement merely because the amount of the loan or distribution is based on the amount of the employee's account balance.

(vi) *Examples.* The following examples illustrate the application of this paragraph (e)(6):

Example 1. Employer T maintains a cash or deferred arrangement for all of its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the nonqualified deferred compensation plan, R and C are eligible to participate only if they do not make elective contributions under the cash or deferred arrangement. Participation in the nonqualified plan is a contingent benefit for purposes of

this paragraph (e)(6), because R's and C's participation is conditioned on their electing not to make elective contributions under the cash or deferred arrangement.

Example 2. Employer T maintains a cash or deferred arrangement for all its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the arrangements, Employees R and C may defer a maximum of 10% of their compensation, and may allocate their deferral between the cash or deferred arrangement and the nonqualified deferred compensation plan in any way they choose (subject to the overall 10% maximum). Because the maximum deferral available under the nonqualified deferred compensation plan depends on the elective deferrals made under the cash or deferred arrangement, the right to participate in the nonqualified plan is a contingent benefit for purposes of this paragraph (e)(6).

(7) *Plan provision requirement.* A plan that includes a cash or deferred arrangement satisfies this paragraph (e) only if it provides that the nondiscrimination requirements of section 401(k) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1)(ii) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ADP test of section 401(k)(3), as described in paragraph (b)(1)(ii)(A) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ADP for eligible NHCEs for the first plan year is 3% or the ADP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(k)(12), as described in paragraph (b)(1)(ii)(B) of this section, must specify 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. 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 wheth-

er 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. For purposes of this paragraph (e)(7), a plan may incorporate by reference the provisions of section 401(k)(3) and § 1.401(k)-2 if that is the nondiscrimination test being applied. The Commissioner may, in guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), specify the options that will apply under the plan if the nondiscrimination test is incorporated by reference in accordance with the preceding sentence.

(8) *Section 415 compensation required.* With respect to compensation that is paid (or would have been paid but for a cash or deferred election) in plan years beginning on or after July 1, 2007, a cash or deferred arrangement satisfies this paragraph (e) only if cash or deferred elections can only be made with respect to amounts that are compensation within the meaning of section 415(c)(3) and § 1.415(c)-2. Thus, for example, the arrangement is not a qualified cash or deferred arrangement if an eligible employee who is not in qualified military service (as that term is defined in section 414(u)) and who is not permanently and totally disabled (as defined in section 22(e)(3)) can make a cash or deferred election with respect to an amount paid after severance from employment, unless the amount is paid by the later of 2½ months after severance from employment or the end of the year that includes the date of severance from employment and is described in § 1.415(c)-2(e)(3)(ii) or (iii).

(f) *Special rules for designated Roth contributions—(1) In general.* The term designated Roth contribution means an elective contribution under a qualified cash or deferred arrangement that, to the extent permitted under the plan, is—

(i) Designated irrevocably by the employee at the time of the cash or deferred election as a designated Roth contribution that is being made in lieu of all or a portion of the pre-tax elective contributions the employee is otherwise eligible to make under the plan;

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(ii) Treated by the employer as not excludible from the employee's gross income (in accordance with paragraph (f)(2) of this section);

(iii) Maintained by the plan in a separate account (in accordance with paragraph (f)(3) of this section).

(2) *Inclusion treatment.* An elective contribution is generally treated as not excludible from gross income if it is treated as includible in gross income by the employer (e.g., by treating the contribution as wages subject to applicable income tax withholding). However, in the case of a self-employed individual, an elective contribution is treated as not excludible from gross income only if the individual does not claim a deduction for such amount. If an elective contribution would not have been includible in gross income if the amount had been paid directly to the employee (rather than being subject to a cash or deferral election), the elective contribution is nevertheless permitted to be a designated Roth contribution, provided the employee is entitled to treat the amount as an investment in the contract pursuant to section 72(f)(2).

(3) *Separate accounting required.* Under the separate accounting requirement of this paragraph (f)(3), contributions and withdrawals of designated Roth contributions must be credited and debited to a designated Roth account maintained for the employee and the plan must maintain a record of the employee's investment in the contract (that is, designated Roth contributions that have not been distributed) with respect to the employee's designated Roth account. In addition, gains, losses, and other credits or charges must be separately allocated on a reasonable and consistent basis to the designated Roth account and other accounts under the plan. However, forfeitures may not be allocated to the designated Roth account and no contributions other than designated Roth contributions and rollover contributions described in section 402A(c)(3)(B) may be allocated to such account. The separate accounting requirement applies at the time the designated Roth contribution is contributed to the plan and must continue to apply until the designated Roth account is completely distributed. A-13 of

§1.402A-1 for additional requirements for separate accounting.

(4) *Designated Roth contributions must satisfy rules applicable to elective contributions—(i) In general.* A designated Roth contribution must satisfy the requirements applicable to elective contributions made under a qualified cash or deferred arrangement. Thus, for example, a designated Roth contribution must satisfy the requirements of paragraphs (c) and (d) of this section and is treated as an employer contribution for purposes of sections 401(a), 401(k), 402, 404, 409, 411, 412, 415, 416 and 417. In addition, the designated Roth contributions are treated as elective contributions for purposes of the ADP test. Similarly, the designated Roth account under the plan is subject to the rules of section 401(a)(9)(A) and (B) in the same manner as an account that contains pre-tax elective contributions.

(ii) *Special rules for direct rollovers.* A direct rollover from a designated Roth account under a qualified cash or deferred arrangement may only be made to another designated Roth account under an applicable retirement plan described in section 402A(e)(1) or to a Roth IRA described in section 408A, and only to the extent the rollover is permitted under the rules of section 402(c). Moreover, a participant's designated Roth account and the participant's other accounts under a plan are treated as accounts held under two separate plans (within the meaning of section 414(1)) for purposes of applying the automatic rollover rules for mandatory distributions under section 401(a)(31)(B)(i)(I) and the special rules in A-9 through A-11 of §1.401(a)(31)-1.

(5) *Rules regarding designated Roth contribution elections—(i) Frequency of elections.* The rules under paragraph (e)(2)(ii) of this section regarding frequency of elections apply in the same manner to both pre-tax elective contributions and designated Roth contributions. Thus, an employee must have an effective opportunity to make (or change) an election to make designated Roth contributions at least once during each plan year.

(ii) *Default elections—(A)* In the case of a plan that provides for both pre-tax elective contributions and designated Roth contributions and in which, under

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