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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-131643-15]

RIN-1545-BN05

Definitions of Qualified Matching Contributions and Qualified Nonelective Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) under regulations relating to certain qualified retirement plans that contain cash or deferred arrangements under section 401(k) or that provide for matching contributions or employee contributions under section 401(m). Under these regulations, employer contributions to a plan would be able to qualify as QMACs or QNECs if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. These regulations would affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified plans that contain cash or deferred arrangements or provide for matching contributions or employee contributions.

DATES: Comments and requests for a public hearing must be received by

[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-131643-15) Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-131643-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue N.W., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-131643-15).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Rosemary Y. Oluwo at (202) 317-6060; concerning submissions of comments or to request a hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 401(k)(1) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as failing to satisfy the requirements of section 401(a) merely because the plan includes a qualified cash or deferred arrangement (CODA). To be considered a qualified CODA, a plan must satisfy several requirements, including: (i) under section 401(k)(2)(B), amounts held by the plan's trust that are attributable to employer contributions made pursuant to an employee's election

must satisfy certain distribution requirements; (ii) under section 401(k)(2)(C), an employees' right to such employer contributions must be nonforfeitable; and (iii) under section 401(k)(3), such employer contributions must satisfy certain nondiscrimination requirements.

Under section 401(k)(3)(D)(ii), the employer contributions taken into account for purposes of applying the nondiscrimination requirements may, under such rules as the Secretary may provide and at the election of the employer, include, in addition to contributions made pursuant to an employee's election, matching contributions that meet the distribution and nonforfeitability requirements of section 401(k)(2)(B) and (C) and qualified nonelective contributions within the meaning of section 401(m)(4)(C). Under section 401(m)(4)(C), a qualified nonelective contribution is an employer contribution, other than a matching contribution, with respect to which the distribution and nonforfeitability requirements of section 401(k)(2)(B) and (C) are met.

Under §1.401(k)-1(b)(1)(ii), a CODA satisfies the applicable nondiscrimination requirements if it satisfies the actual deferral percentage (ADP) test of section 401(k)(3), described in §1.401(k)-2. The ADP test limits the degree of disparity permitted between the percentage of compensation made as employer contributions to the plan for a plan year on behalf of eligible highly compensated employees and the percentage of compensation made as employer contributions on behalf of eligible nonhighly compensated employees. If the ADP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer

contributions made on behalf of an eligible employee, employers are allowed to take into account certain qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) made on behalf of the employee by the employer.

In lieu of applying the ADP test, an employer may choose to design its plan to satisfy an ADP safe harbor, including the ADP safe harbor provisions of section 401(k)(12), described in §1.401(k)-3. Under §1.401(k)-3, a plan satisfies the ADP safe harbor provisions of section 401(k)(12) if, among other things, it satisfies certain contribution requirements. With respect to the safe harbor under section 401(k)(12), an employer may choose to satisfy the contribution requirement by providing a certain level of QMACs or QNECs to eligible nonhighly compensated employees under the plan.

A defined contribution plan that provides for matching or employee after-tax contributions must satisfy the nondiscrimination requirements under section 401(m) with respect to those contributions for any plan year. Under §1.401(m)-1(b)(1), the matching contributions and employee contributions under a plan satisfy the nondiscrimination requirements for a plan year if the plan satisfies the actual contribution percentage (ACP) test of section 401(m)(2) described in §1.401(m)-2.

The ACP test limits the degree of disparity permitted between the percentage of compensation made as matching contributions and after-tax employee contributions for or by eligible highly compensated employees under the plan and the percentage of compensation made as matching contributions

and after-tax employee contributions for or by eligible nonhighly compensated employees under the plan. If the ACP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer contributions made on behalf of an eligible employee, employers are allowed to take into account certain QNECs made on behalf of the employee by the employer. Employers must also take into account QMACs made on behalf of the employee by the employer unless an exclusion applies (including an exclusion for QMACs that are taken into account under the ADP test).

If an employer designs its plan to satisfy the ADP safe harbor of section 401(k)(12), it may avoid performing the ACP test with respect to matching contributions under the plan, as long as the additional requirements of the ACP safe harbor of section 401(m)(11) are met.

Under §1.401(k)-6, QMACs and QNECs are matching contributions and employer contributions (other than elective or matching contributions) that satisfy the nonforfeitability requirements of §1.401(k)-1(c) and the distribution requirements of §1.401(k)-1(d) “when they are contributed to the plan.”

Similarly, §1.401(m)-5 includes independent definitions of QMACs and QNECs, which are matching contributions and employer contributions (other than elective or matching contributions) that satisfy the nonforfeitability and distribution requirements of §1.401(k)-1(c) and (d) “at the time the contribution is made.”

The Treasury Department and the IRS have received comments with respect to the definitions of QMACs and QNECs in §§1.401(k)-6 and 1.401(m)-5.

In particular, commenters assert that employer contributions should be able to qualify as QMACs and QNECs as long as they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, rather than when they are first contributed to the plan. Commenters contend that interpreting sections 401(k)(3)(D)(ii) and 401(m)(4)(C) to require satisfaction of applicable nonforfeitability and distribution requirements at the time amounts are first contributed to the plan would preclude plan sponsors with plans that permit the use of amounts in plan forfeiture accounts to offset future employer contributions under the plan from applying such amounts to fund QMACs and QNECs. This is because the amounts would have been allocated to the forfeiture accounts only after a participant incurred a forfeiture of benefits and, thus, generally would have been subject to a vesting schedule when they were first contributed to the plan. Commenters have requested that QMAC and QNEC requirements not be interpreted to prevent the use of plan forfeitures to fund QMACs and QNECs. The commenters urge that the nonforfeitability and distribution requirements under §1.401(k)-6 should apply when QMACs and QNECs are allocated to participants' accounts and not when the contributions are first made to the plan.

Explanation of Provisions

After consideration of the comments described in this preamble in the “**Background**” section, the Treasury Department and the IRS are proposing to amend §1.401(k)-6 to provide that amounts used to fund QMACs and QNECs must be nonforfeitable and subject to distribution restrictions in accordance with

§1.401(k)-1(c) and (d) when allocated to participants' accounts, and to no longer require that amounts used to fund QMACs and QNECs satisfy the nonforfeitability and distribution requirements when they are first contributed to the plan. Treasury and IRS note that while the second sentence of each of the current definitions of QMACs and QNECs refers to the "vesting" requirements of §1.401(k)-1(c), those requirements are more appropriately characterized as "nonforfeitability" requirements consistent with section 401(k)(2)(C) and the title of §1.401(k)-1(c). Accordingly, these proposed regulations would amend these definitions to clarify those references by replacing the word "vesting" with "nonforfeitability" in each definition; these changes are not otherwise intended to have any substantive impact on this or any other section of the regulations. These proposed regulations would also amend the definitions of QMACs and QNECs in §1.401(m)-5 to provide cross-references to the definitions of QMACs and QNECs under §1.401(k)-6. These amendments to §1.401(m)-5 are being made to ensure a consistent definition of QMACs and QNECs in §1.401(k)-6 and §1.401(m)-5 (including the requirement that amounts used to fund QMACs and QNECs be made subject to nonforfeitability and distribution requirements when they are allocated to participants' accounts as QMACs or QNECs) and are not otherwise intended to have any substantive impact on this or any other section of the regulations.

Proposed Effective/Applicability Date

These regulations are proposed to apply to taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as final

regulations in the **Federal Register**. Taxpayers, however, may rely on these proposed regulations for periods preceding the proposed applicability date. If, and to the extent, the final regulations are more restrictive than the rules in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "**Addresses**" heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Rosemary Y. Oluwo, Office of Associate Chief Counsel (Tax Exempt and Governmental Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

List of subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

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

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

Par. 2. Section 1.401(k)-1 is amended by adding paragraph (g)(5) to read as follows:

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

* * * * *

(g) * * *

(5) Effective date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs). The revisions to the second sentence in the definitions of QMACs and QNECs in § 1.401(k)-6 apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register.

Par. 3. Section 1.401(k)-6 is amended by revising the second sentence in the definitions of Qualified matching contributions (QMACs) and Qualified nonelective contributions (QNECs) to read as follows:

§1.401(k)-6 Definitions.

* * * * *

Qualified matching contributions (QMACs). * * * Thus, the matching contributions must satisfy the nonforfeitability requirements of §1.401(k)-1(c) and be subject to the distribution requirements of §1.401(k)-1(d) when they are allocated to participants' accounts. * * *

Qualified nonelective contributions (QNECs). * * * Thus, the nonelective contributions must satisfy the nonforfeitability requirements of §1.401(k)-1(c) and be subject to the distribution requirements of §1.401(k)-1(d) when they are allocated to participants' accounts. * * *

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Par. 4. Section 1.401(m)-1 is amended by adding paragraph (d)(4) to read as follows:

§1.401(m)-1 Employee contributions and matching contributions. * * * * *

(d) * * *

(4) Effective date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs). The revisions to the definitions of QMACs and QNECs in § 1.401(m)-5 apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 5. Section 1.401(m)-5 is amended by revising the definitions of Qualified matching contributions (QMACs) and Qualified nonelective contributions (QNECs) to read as follows:

§1.401(m)-5 Definitions.

* * * * *

Qualified matching contributions (QMACs). Qualified matching contributions or QMACs means qualified matching contributions or QMACs as defined in §1.401(k)-6.

Qualified nonelective contributions (QNECs). Qualified nonelective contributions or QNECs means qualified nonelective contributions or QNECs as defined in §1.401(k)-6.

John Dalrymple

Deputy Commissioner for Services and Enforcement.

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