

recipient under a plan for any plan year is less than \$100 (excluding income), a corrective distribution of excess contributions (and income) is includible in the gross income of the recipient in the taxable year of the recipient in which the corrective distribution is made.

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

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

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

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

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

*Example 1.* (i) Plan P, a calendar year profit-sharing plan that includes a cash or deferred arrangement, provides for distribution of excess contributions to HCEs to the extent necessary to satisfy the ADP test. Employee A, an HCE, has elective contributions of \$12,000 and \$200,000 in compensation, for an ADR of 6%, and Employee B, a second HCE, has elective contributions of \$8,960 and compensation of \$128,000, for an ADR of 7%. The ADP for the NHCEs is 3%. Under the ADP test, the ADP of the two HCEs under the plan may not exceed 5% (i.e., 2 percentage points more than the ADP of the NHCEs under the plan). The ADP for the 2 HCEs under the plan is 6.5%. Therefore, there must be a correction of excess contributions.

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

(iii) Because the ADP of the HCEs determined after the \$1,280 reduction to

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

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

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

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

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

(ii) The total amount of excess contributions (\$4,560 = \$1,280 + \$2,000 + \$1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. The amount of elective contributions for Employee A is \$12,000. Therefore, Employee A is apportioned \$3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions). However, pursuant to paragraph (b)(2)(iii)(B) of this section, no more than the amount actually contributed to the plan may be apportioned to an HCE. Accordingly, no more than \$3,000 may be apportioned to Employee A. Therefore, the remaining \$1,560 must be apportioned to Employee B.

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

*Example 3.* (i) The facts are the same as in *Example 1*. The plan allocates income on a daily basis. The corrective distributions are made in February 2007. The excess contribution that must be distributed to

Employee A as a corrective distribution is \$3,800. This amount must be increased (or decreased) to reflect gains (or losses) allocable to that amount during the 2006 plan year. The plan uses a reasonable method that satisfies paragraph (b)(2)(iv)(B) of this section to determine the gain during the 2006 plan year allocable to the \$3,800 as \$145. Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required would be \$3,945.

(ii) Because the plan allocates income on a daily basis, excess contributions are credited with gain or loss during the gap period. Therefore, the corrective distribution must include income allocable to \$3,945 through the date of distribution. For the period from January 1 through the date of distribution, the income allocable to \$3,945 is \$105. Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of \$4,050.

*Example 4.* (i) The facts are the same as in *Example 1*. The plan determines plan year income using the alternative method for calculating income provided in paragraph (b)(2)(iv)(C) of this section and using the portion of the participant's account attributable to elective contributions, including elective contributions made for the plan year. The plan uses the safe harbor method provided in paragraph (b)(2)(iv)(D) of this section for allocating gap period income. The corrective distribution is made during the last week of February 2007. At the beginning of the 2006 plan year, \$100,000 of Employee A's plan account was attributable to elective contributions. During the 2006 plan year, \$10,000 in elective contributions were contributed to the plan for Employee A. The income allocable to Employee A's account attributable to elective contributions for the 2006 plan year is \$8,000.

(ii) Therefore, the plan year income allocable to the \$3,800 corrective distribution for Employee A is \$266.65 (\$8,000 multiplied by \$3,800 divided by \$110,000). Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required is \$4,066.65. This amount must be increased by the gap period income of \$53.32 (10% multiplied by \$266.65 (2006 plan year income attributable to the excess contribution) multiplied by 2 (number of calendar months since end of 2006 plan year). Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of \$4,119.97.

*Example 5.* (i) The facts are the same as in *Example 4*, except that the plan provides for quarterly valuations based on the account balance at the end of the quarter.

(ii) Because the plan's method for allocating income does not allocate any income to amounts distributed during the quarter, Employee A will not be credited with an allocation of income with respect to the amount distributed. Accordingly, Plan P need not plan adjust the distribution of excess contribution for income during the gap period and thus satisfies paragraph (a)(1) of this section if Employee A receives a corrective distribution of \$4,066.65.