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§ 1.401(m)-3 Safe harbor requirements.

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- (1) General rule.
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- (1) Contributions taken into account.
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- (3) Early participation rules.
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- (5) Contributions used only once.
- (6) Plan must satisfy ACP with respect to employee contributions.

§ 1.401(m)- Special rules for mergers, acquisitions and similar events. [Reserved].

§ 1.401(m)-5 Definitions.

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

(a) *General nondiscrimination rules*—

(1) *Nondiscriminatory amount of contributions*—(i) *Exclusive means of amounts testing*. A defined contribution plan does not satisfy section 401(a) for a plan year unless the amount of employee contributions and matching contributions to the plan for the plan year satisfies section 401(a)(4). The amount of employee contributions and matching contributions under a plan satisfies the requirements of section 401(a)(4) with respect to amounts if and only if the amount of employee contributions and matching contributions satisfies the nondiscrimination test of section 401(m) under paragraph (b) of this section and the plan satisfies the additional requirements of paragraph (c) of this section. See § 1.401(a)(4)-1(b)(2)(ii)(B).

(ii) *Testing benefits, rights and features*. A plan that provides for employee contributions or matching contributions must satisfy the requirements of section 401(a)(4) relating to benefits, rights and features in addition to the requirement regarding amounts described in paragraph (a)(1)(i) of this section. For example, the right to make each level of employee contributions and the right to each level of matching contributions under the plan are benefits, rights or features subject to the requirements of section 401(a)(4). See § 1.401(a)(4)-4(e)(3)(i) and (iii)(F) through (G).

(2) *Matching contributions*—(i) *In general*. For purposes of section 401(m), this section and §§ 1.401(m)-2 through 1.401(m)-5, matching contributions are—

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral; and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective deferrals.

(ii) *Employer contributions made on account of an employee contribution or elective deferral*. Whether an employer contribution is made on account of an employee contribution or an elective deferral is determined on the basis of all the relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. An employer contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan or a plan described in § 1.402(g)-1(b) is not a matching contribution.

(iii) *Employer contributions not on account of an employee contribution or elective deferral*. An employer contribution is not a matching contribution made on account of an elective deferral if it is contributed before the cash or deferred election is made or before the employee's performance of services with respect to which the elective deferral is made (or when the cash that is subject to the cash or deferred election would be currently available, if earlier). In addition, an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution.

(3) *Employee contributions*—(i) *In general*. For purposes of section 401(m), this section and §§ 1.401(m)-2 through 1.401(m)-5, employee contributions are contributions to a plan that 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) and are allocated to an individual account for each eligible employee to which attributable earnings and losses are allocated. See § 1.401(k)-1(a)(2)(ii). The term *employee contributions* includes—

(A) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(B) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;