term adjusted ACP with respect to a prior year subgroup means the ACP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year, multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) Example. The following example illustrates the application of this paragraph (c)(4). See also §1.401(k)–2(e)(4) for examples of the parallel rules applicable to the ADP test. The example is as follows:

Example. (i) Employer B maintains two plans, Plan N and Plan P, each of which provides for employee contributions or matching contributions. The plans were not permissively aggregated under §1.410(b)–7(d) for the 2005 testing year. Both plans use the prior year testing method. Plan N had 300 eligible employees who were NHCEs for 2005, and their ACP for that year was 6%. Plan P had 100 eligible employees who were NHCEs for 2005, and the ACP for those NHCEs for that plan was 4%. Plan N and Plan P are permissively aggregated under §1.410(b)–7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan N and Plan P for the 2006 testing year under §1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan NP). Therefore, the prior year ACP for the NHCEs under Plan NP for the 2006 testing year is the weighted average of the ACPs for the prior year subgroups.

(iii) The first step in determining the weighted average of the ACPs for the prior year subgroups is to identify the prior year subgroups. With respect to the 2006 testing year, an employee is a member of a prior year subgroup if the employee was an NHCE of Employer B for the 2005 plan year, was an eligible employee for the 2005 plan year under any section 401(k) plan maintained by Employer B, and would have been an eligible employee in the 2005 plan year under Plan NP if Plan N and Plan P had been permissively aggregated under §1.410(b)–7(d) for that plan year. The NHCEs who were eligible employees under separate plans for the 2005 plan year comprise separate prior year subgroups. Thus, there are two prior year subgroups under Plan NP for the 2006 testing year: the 300 NHCEs who were eligible employees under Plan N for the 2005 plan year and the 100 NHCEs who were eligible employees under Plan P for the 2005 plan year.

(iv) The weighted average of the ACPs for the prior year subgroups is the sum of the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N, and the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan P. The adjusted ACP for the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N is 4.5%, calculated as follows: 6% (the ACP for the NHCEs under Plan N for the prior year) × 300/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 1%. Plan P had 100 eligible employees who were NHCEs for 2005, and their ACP for that year was 4.5%, calculated as follows: 4.5% (the ACP for the NHCEs under Plan P for the prior year) × 100/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 1%. Thus, the prior year ACP for NHCEs under Plan NP for the 2006 testing year is 5.5% (the sum of adjusted ACPs for the prior year subgroups, 4.5% plus 1%).

§1.401(m)–3 Safe harbor requirements.

(a) ACP test safe harbor—(1) Section 401(m)(11) safe harbor. Matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(11) for a plan year if the plan satisfies the safe harbor contribution requirement of paragraph (b) or (c) of this section for the plan year, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this section, and the additional rules of paragraphs (g), (h), and (j) of this section, as applicable.

(2) Section 401(m)(12) safe harbor. For a plan year beginning on or after January 1, 2008, matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(12) for a plan year if the matching contributions are made with respect to an automatic contribution arrangement described in paragraph §1.401(k)–3(j) that satisfies the safe harbor requirements of §1.401(k)–3, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this section,
the plan year requirements of paragraph (f) of this section, and the additional rules of paragraphs (g), (h) and (j) of this section, as applicable.

(3) Requirements applicable to safe harbor contributions. Pursuant to sections 401(k)(12)(E)(ii) and 401(k)(13)(D)(iv), the safe harbor contribution requirement of paragraph (b) or (c) of this section and §1.401(k)–3(k) must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section and §1.401(k)–3(k) are referred to as safe harbor nonelective contributions and safe harbor matching contributions.

(b) Safe harbor nonelective contribution requirement. A plan satisfies the safe harbor nonelective contribution requirement of this paragraph (b) if it satisfies the safe harbor nonelective contribution requirement of §1.401(k)–3(b).

(c) Safe harbor matching contribution requirement. A plan satisfies the safe harbor matching contribution requirement of this paragraph (c) if it satisfies the safe harbor matching contribution requirement of §1.401(k)–3(c).

(d) Limitation on contributions—(1) General rule. A plan that provides for matching contributions meets the requirements of this section only if it satisfies the limitations on contributions set forth in this paragraph (d).

(2) Matching rate must not increase. A plan that provides for matching contributions meets the requirements of this section only if the ratio of matching contributions on behalf of an employee under the plan for a plan year to the employee’s elective deferrals and employee contributions, does not increase as the amount of an employee’s elective deferrals and employee contributions increases.

(3) Limit on matching contributions. A plan that provides for matching contributions satisfies the requirements of this section only if—

(i) Matching contributions are not made with respect to elective deferrals or employee contributions that exceed 6% of the employee’s safe harbor compensation (within the meaning of §1.401(k)–3(b)(2)); and

(ii) Matching contributions that are discretionary do not exceed 4% of the employee’s safe harbor compensation.

(4) Limitation on rate of match. A plan meets the requirements of this section only if the ratio of matching contributions on behalf of an HCE to that HCE’s elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) for that plan year is no greater than the ratio of matching contributions to elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) that would apply with respect to any other HCE for whom the elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) are the same percentage of safe harbor compensation. An employee is taken into account for purposes of this paragraph (d)(4) if the employee is an eligible employee under the cash or deferred arrangement with respect to which the contributions required by paragraph (b) or (c) of this section are being made for a plan year. A plan will not fail to satisfy this paragraph (d)(4) merely because the plan provides that matching contributions will be made separately with respect to each payroll period (or with respect to all payroll periods ending with or within each month or quarter of a plan year) taken into account under the plan for the plan year, provided that matching contributions with respect to any elective deferrals or employee contributions made during a plan year quarter are contributed to the plan by the last day of the immediately following plan year quarter.

(5) HCEs participating in multiple plans. The rules of section 401(m)(2)(B) and §1.401(m)–2(a)(5)(ii) apply for purposes of determining the rate of matching contributions under paragraph (d)(4) of this section. However, a plan will not fail to satisfy the safe harbor matching contribution requirements of this section merely because an HCE participates during the plan year in more than one plan that provides for matching contributions, provided that—

(i) The HCE is not simultaneously an eligible employee under two plans that provide for matching contributions maintained by an employer for a plan year; and
(ii) The period used to determine compensation for purposes of determining matching contributions under each such plan is limited to periods when the HCE participated in the plan.

(6) Permissible restrictions on elective deferrals by NHCEs—(i) General rule. A plan does not satisfy the safe harbor requirements of this section, if elective deferrals or employee contributions by NHCEs are restricted, unless the restrictions are permitted by this paragraph (d)(6).

(ii) Restrictions on election periods. A plan may limit the frequency and duration of periods in which eligible employees may make or change contribution elections under a plan. However, an employee must have a reasonable opportunity (including a reasonable period after receipt of the notice described in paragraph (e) of this section) to make or change a contribution election for the plan year. For purposes of this section, a 30-day period is deemed to be a reasonable period to make or change a contribution election.

(iii) Restrictions on amount of contributions. A plan is permitted to limit the amount of contributions that may be made by an eligible employee under a plan, provided that each NHCE who is an eligible employee is permitted (unless the employee is restricted under paragraph (d)(6)(v) of this section) to make contributions in an amount that is at least sufficient to receive the maximum amount of matching contributions available under the plan for the plan year, and the employee is permitted to elect any lesser amount of contributions. However, a plan may require eligible employees to make contribution elections in whole percentages of compensation or whole dollar amounts.

(iv) Restrictions on types of compensation that may be deferred. A plan may limit the types of compensation that may be deferred or contributed by an eligible employee under a plan, provided that each eligible NHCE is permitted to make contributions under a definition of compensation that would be a reasonable definition of compensation within the meaning of §1.414(s)–1(d)(3). Thus, the definition of compensation from which contributions may be made is not required to satisfy the nondiscrimination requirement of §1.414(s)–1(d)(3).

(v) Restrictions due to limitations under the Internal Revenue Code. A plan may limit the amount of contributions made by an eligible employee under a plan—

(A) Because of the limitations of section 402(g) or section 415; or

(B) Because, on account of a hardship distribution, an employee's ability to make contributions has been suspended for 6 months in accordance with §1.401(k)–1(d)(3)(v)(E).

(e) Notice requirement. A plan satisfies the notice requirement of this paragraph (e) if it satisfies the notice requirement of §1.401(k)–3(d).

(f) Plan year requirement—(1) General rule. Except as provided in this paragraph (f) or in paragraph (g) of this section, a plan will fail to satisfy the requirements of section 401(m)(11), section 401(m)(12), and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of that plan year and remain in effect for an entire 12-month plan year. In addition, except as provided in paragraph (h) of this section or in guidance of general applicability published in the Internal Revenue Bulletin (see §601.601(d)(2)(i)(B) of this chapter), a plan which includes provisions that satisfy the rules of this section will not satisfy the requirements of §1.401(m)–1(b) if it is amended to change such provisions for that plan year. Moreover, if, as described in paragraph (j)(4) of this section, safe harbor matching or nonelective contributions will be made to another plan for a plan year, provisions under that other plan specifying that the contributions will be made and that the contributions will be QNECs or QMACs must also be adopted before the first day of that plan year.

(2) Initial plan year. A newly established plan (other than a successor plan within the meaning of §1.401(m)–2(c)(2)(iii)) will not be treated as violating the requirements of this paragraph (f) merely because the plan year is less than 12 months, provided that the plan year is at least 3 months long (or, in the case of a newly established employer that establishes the plan as soon as administratively feasible after
the employer comes into existence, a shorter period). Similarly, a plan will not fail to satisfy the requirements of this paragraph (f) for the first plan year in which matching contributions are provided under the plan provided that—

(i) The plan is not a successor plan; and

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship, comparable to a substantial business hardship described in section 412(c).

(g) Plan amendments adopting nonelective safe harbor contributions. Notwithstanding paragraph (f)(1) of this section, a plan that provides for the use of the current year testing method may be amended after the first day of the plan year and no later than 30 days before the last day of the plan year to adopt the safe harbor method of this section, effective as of the first day of the plan year, using nonelective contributions under paragraph (b) of this section if the plan satisfies the requirements of §1.401(k)–3.

(h) Permissible reduction or suspension of safe harbor contributions—(1) General rule—(i) Matching contributions. A plan that provides for safe harbor matching contributions intended to satisfy the requirements of paragraph (c) of this section for a plan year will not fail to satisfy the requirements of section 401(m)(2) merely because the plan is amended during the plan year to reduce or suspend safe harbor matching contributions on future elective deferrals (and, if applicable, employee contributions) provided that—

(A) In the case of plan years beginning on or after January 1, 2015, the employer either—

(1) Is operating at an economic loss as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (e) of this section, a statement that the plan may be amended during the plan year to reduce or suspend safe harbor matching contributions and that the reduction or suspension will not apply until at least 30 days after eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (h)(2) of this section;

(C) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are
provided the supplemental notice described in paragraph (h)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(m)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to amounts deferred through the effective date of the amendment.

(ii) Nonelective contributions. For plan amendments adopted after May 18, 2009, a plan that provides for safe harbor nonelective contributions intended to satisfy the requirements of paragraph (b) of this section will not fail to satisfy the requirements of section 401(m)(2) for the plan year merely because the plan is amended during the plan year to reduce or suspend safe harbor nonelective contributions provided that—

(A) The employer either—

(1) Is operating at an economic loss as described in section 412(c)(2)(A) for the plan year; or

(2) Includes in the notice described in paragraph (e) of this section a statement that the plan may be amended during the plan year to reduce or suspend safe harbor nonelective contributions and that the reduction or suspension will not apply until at least 30 days after eligible employees are provided notice of the reduction or suspension;

(B) All eligible employees are provided a supplemental notice that satisfies the requirements of paragraph (h)(2) of this section;

(C) The reduction or suspension of safe harbor nonelective contributions is effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the supplemental notice described in paragraph (h)(2) of this section;

(D) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of nonelective contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(E) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in §1.401(m)-2(a)(2)(ii); and

(F) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to safe harbor compensation paid through the effective date of the amendment.

(2) Supplemental notice. The supplemental notice requirement of this paragraph (h)(2) is satisfied if each eligible employee is given a notice that satisfies the requirements of §1.401(k)-3(g)(2).

(i) [Reserved]

(j) Other rules—(1) Contributions taken into account. A contribution is taken into account for purposes of this section for a plan year under the same rules as §1.401(k)-3(h)(1).

(2) Use of safe harbor nonelective contributions to satisfy other nondiscrimination tests. A safe harbor nonelective contribution used to satisfy the nonelective contribution requirement under paragraph (b) of this section may also be taken into account for purposes of determining whether a plan satisfies section 401(a)(4) under the same rules as §1.401(k)-3(h)(2).

(3) Early participation rules. Section 401(m)(5)(C) and §1.401(m)-2(a)(1)(iii)(A), which provide an alternative nondiscrimination rule for certain plans that provide for early participation, do not apply for purposes of determining whether a plan satisfies section 401(a)(4) under the same rules as §1.401(k)-3(h)(2).

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(4) Satisfying safe harbor contribution requirement under another defined contribution plan. Safe harbor matching or nonelective contributions may be made to another defined contribution plan under the same rules as § 1.401(k)–3(h)(4). Consequently, each NHCE under the plan providing for matching contributions must be eligible under the same conditions under the other defined contribution plan and the plan to which the contributions are made must have the same plan year as the plan providing for matching contributions.

(5) Contributions used only once. Safe harbor matching or nonelective contributions cannot be used to satisfy the requirements of this section with respect to more than one plan.

(6) Plan must satisfy ACP with respect to employee contributions. If the plan provides for employee contributions, in addition to satisfying the requirements of this section, it must also satisfy the ACP test of § 1.401(m)–2(a)(1). See § 1.401(m)–2(a)(5)(iv) for special rules under which the ACP test is permitted to be performed disregarding some or all matching when this section is satisfied with respect to the matching contributions.


§ 1.401(m)–4 Special rules for mergers, acquisitions and similar events. [Reserved]

§ 1.401(m)–5 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(m) and the regulations thereunder.

Actual contribution percentage (ACP). Actual contribution percentage or ACP means the ACP of the group of eligible employees as defined in § 1.401(m)–2(a)(3)(i).

Actual contribution percentage (ACP) test. Actual contribution percentage test or ACP test means the test described in § 1.401(m)–2(a)(1).

Actual contribution ratio (ACR). Actual contribution ratio or ACR means the ACR of an eligible employee as defined in § 1.401(m)–2(a)(3).

Actual deferral percentage (ADP) test. Actual deferral percentage test or ADP test means the test described in § 1.401(k)–2(a)(1).

Compensation. Compensation means compensation as defined in section 414(s) and § 1.414(s)–1. The period used to determine an employee’s compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. See also section 401(a)(17) and § 1.401(a)(17)–1(c)(1). For this purpose, in case of an HCE whose ACR is determined under § 1.401(m)–2(a)(3)(ii), period of participation includes periods under another plan for which matching contributions or employee contributions are aggregated under § 1.401(m)–2(a)(3)(ii).

Current year testing method. Current year testing method means the testing method under which the applicable year is the current plan year, as described in § 1.401(k)–2(a)(2)(i) or § 1.401(m)–2(a)(2)(ii).

Designated Roth contributions. Designated Roth contributions means designated Roth contributions as defined in § 1.401(k)–1(f)(1).

Elective contributions. Elective contributions means elective contributions as defined in § 1.401(k)–6.

Elective deferrals. Elective deferrals means elective deferrals described in section 402(g)(3).

Eligible employee—(1) General rule. Eligible employee means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (e.g., formal application for participation or consent to