INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2023–51
December 18, 2023

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

ADMINISTRATIVE

Notice 2023-74, page 1484.

Notice 2023-74 provides that calendar year 2023 will be regarded as a further transition period for purposes of IRS enforcement and administration of the minimum reporting threshold for Form 1099-K, Payment Card and Third Party Network Transactions. With respect to calendar years beginning before January 1, 2024, a third party settlement organization is not required to report payments in settlement of third party network transactions with respect to a participating payee unless the amount to be reported exceeds $20,000 and the number of such transactions with that participating payee exceeds 200.

ADMINISTRATIVE, INCOME TAX

Rev. Proc. 2023-40, page 1553.

This proposed revenue procedure specifies when information shown on a return in accordance with the applicable forms and instructions will be an adequate disclosure for purposes of reducing an understatement of income tax under section 6662(d) and for purposes of avoiding the section 6694(a) preparer penalty. This revenue procedure updates Rev. Proc. 2022-41, 2022-50 I.R.B. 527, and applies to any income tax return filed on 2023 tax forms for a taxable year beginning in 2023, and to any income tax return filed in 2024 on 2023 tax forms for short taxable years beginning in 2024.

EMPLOYEE PLANS

REG-104194-23, page 1558.

This document sets forth a proposed regulation that would amend the rules applicable to plans that include cash or deferred arrangements to provide guidance with respect to long-term, part-time employees. The proposed regulation reflects statutory changes made by the SECURE Act and the SECURE 2.0 Act that relate to long-term, part-time employees. The proposed regulation would affect participants in, beneficiaries of, employers maintaining, and administrators of plans that include cash or deferred arrangements. This document also provides notice of a public hearing.

Rev. Proc. 2023-37, page 1491.

This revenue procedure sets forth the rules regarding qualified pre-approved plans and section 403(b) pre-approved plans, and combines, conforms, clarifies, and updates rules for those plans previously set forth in prior revenue procedures.

INCOME TAX

Rev. Proc. 2023-38, page 1544.

This revenue procedure updates the procedures under § 30D(d)(3) of the Internal Revenue Code (Code) for qualified manufacturers to enter into a written agreement with the Secretary of the Treasury or her delegate (Secretary) under which such manufacturer agrees to make periodic written reports to the Secretary providing vehicle identification numbers and other information regarding vehicles eligible for a clean vehicle credit. Vehicles eligible for the clean vehicle credit under § 30D of the Code (§ 30D credit), the qualified commercial clean vehicles credit under § 45W of the Code (§ 45W credit), and the previously-owned clean vehicles credit under § 25E of the Code (§ 25E credit), generally must be manufactured by a qualified manufacturer as described in § 30D(d)(1)(C) and (d)(3). See §§ 45W(c)(1) and 25E(c)(1)(D)(i). This revenue procedure establishes the procedures for qualified manufacturers to submit information regarding vehicles for upfront review by the Department of Energy, to ensure the vehicles are eligible for the § 30D credit for the calendar year at issue in accordance with the excluded entities provision of § 30D(d)(7).

Rev. Rul. 2023-23, page 1472.

2023 Base Period T-Bill Rate. The “base period T-bill rate” for the period ending September 30, 2023 is published as required by section 995(f) of the Internal Revenue Code.

Finding Lists begin on page ii.

INCOME TAX, TAX CONVENTION

Rev. Proc. 2023-36, page 1485.
This revenue procedure updates and supersedes Rev. Proc. 2022-35. Ecuador is added to the list of jurisdictions with which the United States has in effect a relevant information exchange agreement. Argentina and Kazakhstan are added to the list of countries with which Treasury and the IRS have determined it is appropriate to have an automatic exchange relationship with respect to the information collected under Treas. Reg. §§ 1.6049-4(b)(5) and 1.6049-8(a).

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part I

Section 995.—Taxation of DISC Income to Shareholders

2023 Base Period T-Bill Rate. The "base period T-bill rate" for the period ending September 30, 2023, is published as required by section 995(f) of the Internal Revenue Code.

Rev. Rul. 2023-23

Section 995(f)(1) of the Internal Revenue Code provides that a shareholder of a domestic international sales corporation ("DISC") shall pay interest for each taxable year in an amount equal to the product of the "shareholder's DISC-related deferred tax liability" for the year (as defined in section 995(f)(2)) and the "base period T-bill rate." Under section 995(f)(4), the base period T-bill rate is "the annual rate of interest determined by the Secretary to be equivalent to the average of the 1-year constant maturity Treasury yields, as published by the Board of Governors of the Federal Reserve System, for the 1-year period ending on September 30 of the calendar year ending with (or of the most recent calendar year ending before) the close of the taxable year of the shareholder."

The base period T-bill rate for the period ending September 30, 2023, is 4.93 percent.

Pursuant to section 6622 of the Internal Revenue Code, interest must be compounded daily. The table below provides factors for compounding the 2023 base period T-bill rate daily for any number of days in the shareholder's taxable year (including for a 52-53 week taxable year). To compute the amount of the interest charge for the shareholder's taxable year, multiply the amount of the shareholder's DISC-related deferred tax liability for that year by the base period T-bill rate factor corresponding to the number of days in the shareholder's taxable year for which the interest charge is being computed. Generally, one would use the factor for 365 days. One would use a different factor only if the shareholder's taxable year for which the interest charge is being determined is a short taxable year, if the shareholder uses a 52-53 week taxable year, or if the shareholder's taxable year is a leap year.

For the base period T-bill rates for periods ending in prior years, see Rev. Rul. 2022-21, 2022-47 I.R.B. 468; Rev. Rul. 2021-22, 2021-47 I.R.B. 726; Rev. Rul. 2020-25, 2020-48 I.R.B. 1109; Rev. Rul. 2019-27, 2019-51 I.R.B. 1378; Rev. Rul. 2018-31, 2018-50 I.R.B. 848; and Rev. Rul. 2017-23, 2017-49 I.R.B. 546.

DRAFTING INFORMATION

The principal author of this revenue ruling is Kate Kerrigan of the Office of Associate Chief Counsel (International). For further information regarding the revenue ruling, contact Ms. Kerrigan at (202) 317-3800 (not a toll-free number).

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
1	0.000135068
2	0.000270155
3	0.000405260
4	0.000540383
5	0.000675525
6	0.000810685
7	0.000945863
8	0.001081059
9	0.001216273
10	0.001351506
11	0.001486757
12	0.001622027
13	0.001757314
14	0.001892620
15	0.002027944

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
16	0.002163286
17	0.002298647
18	0.002434026
19	0.002569423
20	0.002704839
21	0.002840273
22	0.002975725
23	0.003111195
24	0.003246684
25	0.003382191
26	0.003517716
27	0.003653260
28	0.003788822
29	0.003924402
30	0.004060001
31	0.004195618
32	0.004331253
33	0.004466906
34	0.004602578
35	0.004738268
36	0.004873977
37	0.005009704
38	0.005145449
39	0.005281212
40	0.005416994
41	0.005552794
42	0.005688613
43	0.005824450
44	0.005960305
45	0.006096178
46	0.006232070
47	0.006367980
48	0.006503909
49	0.006639856
50	0.006775821

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
51	0.006911805
52	0.007047807
53	0.007183827
54	0.007319866
55	0.007455923
56	0.007591999
57	0.007728093
58	0.007864205
59	0.008000336
60	0.008136485
61	0.008272653
62	0.008408838
63	0.008545043
64	0.008681265
65	0.008817506
66	0.008953766
67	0.009090044
68	0.009226340
69	0.009362655
70	0.009498988
71	0.009635339
72	0.009771709
73	0.009908098
74	0.010044504
75	0.010180929
76	0.010317373
77	0.010453835
78	0.010590316
79	0.010726815
80	0.010863332
81	0.010999868
82	0.011136422
83	0.011272995
84	0.011409586
85	0.011546195

ANNUAL RATE (4.93%), COMPOUNDED DAILY	
DAYS	FACTOR
86	0.011682823
87	0.011819470
88	0.011956135
89	0.012092818
90	0.012229520
91	0.012366240
92	0.012502979
93	0.012639736
94	0.012776512
95	0.012913306
96	0.013050119
97	0.013186950
98	0.013323800
99	0.013460668
100	0.013597554
101	0.013734459
102	0.013871383
103	0.014008325
104	0.014145286
105	0.014282265
106	0.014419262
107	0.014556278
108	0.014693313
109	0.014830366
110	0.014967438
111	0.015104528
112	0.015241637
113	0.015378764
114	0.015515909
115	0.015653074
116	0.015790256
117	0.015927458
118	0.016064677
119	0.016201916
120	0.016339173

ANNUAL RATE (4.93%), COMPOUNDED DAILY	
DAYS	FACTOR
121	0.016476448
122	0.016613742
123	0.016751054
124	0.016888385
125	0.017025735
126	0.017163103
127	0.017300490
128	0.017437895
129	0.017575319
130	0.017712761
131	0.017850222
132	0.017987702
133	0.018125200
134	0.018262716
135	0.018400252
136	0.018537805
137	0.018675378
138	0.018812969
139	0.018950578
140	0.019088206
141	0.019225853
142	0.019363518
143	0.019501202
144	0.019638905
145	0.019776626
146	0.019914365
147	0.020052124
148	0.020189901
149	0.020327696
150	0.020465510
151	0.020603343
152	0.020741194
153	0.020879064
154	0.021016953
155	0.021154860

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
156	0.021292786
157	0.021430731
158	0.021568694
159	0.021706675
160	0.021844676
161	0.021982695
162	0.022120732
163	0.022258789
164	0.022396864
165	0.022534957
166	0.022673070
167	0.022811200
168	0.022949350
169	0.023087518
170	0.023225705
171	0.023363911
172	0.023502135
173	0.023640378
174	0.023778639
175	0.023916920
176	0.024055219
177	0.024193536
178	0.024331872
179	0.024470227
180	0.024608601
181	0.024746993
182	0.024885404
183	0.025023834
184	0.025162283
185	0.025300750
186	0.025439235
187	0.025577740
188	0.025716263
189	0.025854805
190	0.025993366

ANNUAL RATE (4.93%), COMPOUNDED DAILY	
DAYS	FACTOR
191	0.026131945
192	0.026270543
193	0.026409160
194	0.026547796
195	0.026686450
196	0.026825123
197	0.026963815
198	0.027102525
199	0.027241254
200	0.027380002
201	0.027518769
202	0.027657554
203	0.027796358
204	0.027935181
205	0.028074023
206	0.028212883
207	0.028351763
208	0.028490661
209	0.028629577
210	0.028768513
211	0.028907467
212	0.029046440
213	0.029185432
214	0.029324442
215	0.029463471
216	0.029602520
217	0.029741586
218	0.029880672
219	0.030019776
220	0.030158900
221	0.030298042
222	0.030437203
223	0.030576382
224	0.030715581
225	0.030854798

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
226	0.030994034
227	0.031133289
228	0.031272562
229	0.031411855
230	0.031551166
231	0.031690496
232	0.031829845
233	0.031969212
234	0.032108599
235	0.032248004
236	0.032387429
237	0.032526872
238	0.032666333
239	0.032805814
240	0.032945314
241	0.033084832
242	0.033224369
243	0.033363925
244	0.033503500
245	0.033643094
246	0.033782707
247	0.033922338
248	0.034061988
249	0.034201658
250	0.034341346
251	0.034481053
252	0.034620778
253	0.034760523
254	0.034900287
255	0.035040069
256	0.035179870
257	0.035319690
258	0.035459529
259	0.035599387
260	0.035739264

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
261	0.035879160
262	0.036019075
263	0.036159008
264	0.036298961
265	0.036438932
266	0.036578922
267	0.036718931
268	0.036858959
269	0.036999006
270	0.037139072
271	0.037279157
272	0.037419261
273	0.037559384
274	0.037699525
275	0.037839686
276	0.037979865
277	0.038120063
278	0.038260281
279	0.038400517
280	0.038540772
281	0.038681046
282	0.038821339
283	0.038961651
284	0.039101982
285	0.039242332
286	0.039382701
287	0.039523089
288	0.039663496
289	0.039803922
290	0.039944366
291	0.040084830
292	0.040225313
293	0.040365815
294	0.040506335
295	0.040646875

ANNUAL RATE (4.93%), COMPOUNDED DAILY

DAYS	FACTOR
296	0.040787433
297	0.040928011
298	0.041068608
299	0.041209223
300	0.041349858
301	0.041490511
302	0.041631184
303	0.041771875
304	0.041912586
305	0.042053315
306	0.042194064
307	0.042334832
308	0.042475618
309	0.042616424
310	0.042757248
311	0.042898092
312	0.043038955
313	0.043179837
314	0.043320737
315	0.043461657
316	0.043602596
317	0.043743554
318	0.043884530
319	0.044025526
320	0.044166541
321	0.044307575
322	0.044448628
323	0.044589701
324	0.044730792
325	0.044871902
326	0.045013031
327	0.045154179
328	0.045295347
329	0.045436533
330	0.045577739

ANNUAL RATE (4.93%), COMPOUNDED DAILY	
DAYS	FACTOR
331	0.045718964
332	0.045860207
333	0.046001470
334	0.046142752
335	0.046284053
336	0.046425373
337	0.046566712
338	0.046708070
339	0.046849447
340	0.046990844
341	0.047132259
342	0.047273694
343	0.047415147
344	0.047556620
345	0.047698112
346	0.047839623
347	0.047981153
348	0.048122702
349	0.048264271
350	0.048405858
351	0.048547465
352	0.048689091
353	0.048830735
354	0.048972399
355	0.049114083
356	0.049255785
357	0.049397506
358	0.049539247
359	0.049681006
360	0.049822785
361	0.049964583
362	0.050106400
363	0.050248237
364	0.050390092
365	0.050531967

ANNUAL RATE (4.93%), COMPOUNDED DAILY	
DAYS	FACTOR
366	0.050673861
367	0.050815773
368	0.050957706
369	0.051099657
370	0.051241627
371	0.051383617

Part III

Revised Timeline Regarding Implementation of Amended Section 6050W(e)

Notice 2023-74

SECTION 1. PURPOSE

This notice announces that calendar year 2023 will be regarded as a further transition period for purposes of Internal Revenue Service (IRS) enforcement and administration with respect to the implementation of the amendments made to the minimum threshold for reporting by third party settlement organizations (TPSO) under section 6050W(e) of the Internal Revenue Code (Code)[1] by the American Rescue Plan Act of 2021 (ARP), Public Law 117-2, 135 Stat. 4 (March 11, 2021). The transition period described in this notice is intended to facilitate an orderly transition for TPSO compliance with section 6050W(e) and participating payee compliance with income tax reporting.

SECTION 2. BACKGROUND

.01 Section 6050W, Returns relating to payments made in settlement of payment card and third party network transactions

Section 6050W was added to the Code by section 3091 of the Housing Assistance Tax Act of 2008, Div. C of Public Law 110-289, 122 Stat. 2654, 2908, and requires payment settlement entities to file an information return for each calendar year with respect to payments made in settlement of certain reportable payment transactions. Under section 6050W(a), the annual information return must set forth (1) the name, address, and taxpayer identification number (TIN) of the participating payee to whom payments were made and (2) the gross amount of the reportable payment transactions with respect to that payee in that calendar year. Section 1.6050W-1(a)(6) defines "gross amount" to mean the total dollar amount of the aggregate reportable payment transactions for each participating payee, without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunded amounts, or any other amounts.

Payment settlement entities required to make annual information returns under section 6050W do so by filing Form 1099-K, *Payment Card and Third Party Network Transactions* with the IRS. They are also required to furnish Form 1099-K to the participating payee. Forms 1099-K must be furnished to the participating payees on or before January 31st of the year following the calendar year for which the return was made. Forms 1099-K must be filed with the IRS on or before February 28th (March 31st if filed electronically) of the year following the calendar year for which the return was made. *See* § 6050W(f); § 1.6050W-1(g).

Pursuant to section 6050W(c), section 6050W covers two types of reportable payment transactions: (1) payment card transactions and (2) third party network transactions. Section 6050W(c)(3) states that a third party network transaction is any transaction for the provision of goods or services that is settled through a third party payment network. Under section 6050W(b) and § 1.6050W-1(c)(2), a TPSO is the payment settlement entity that must report third party network transactions – that is, the transactions for goods or services that are settled through the TPSO's third party payment network – on Form 1099-K.

Section 6050W(b)(3) defines a TPSO as the central organization that has the contractual obligation to make payment to the participating payees of third party network transactions. Pursuant to section 6050W(d)(3), a third party payment network is any agreement or arrangement that (i) involves the establishment of accounts with a central organization by a substantial number of providers of goods or services who are unrelated to the central organization and who have agreed to settle transactions for the provision of goods and services with purchasers according to the terms of agreements; (ii) provides standards and mechanisms for settling such transactions; and (iii) guarantees payments to the providers of goods and services in settlement of transactions with the purchasers.

Under section 6050W(d)(1)(A)(ii), a participating payee, in the case of a third party network transaction, is any person who accepts payment from a TPSO in settlement of such transaction.

As originally enacted in 2008, section 6050W(e) provided that a TPSO is not required to report third party network transactions with respect to a participating payee unless the gross amount that would otherwise be reported exceeds $20,000 and the number of such transactions with that participating payee exceeds 200.

.02 Section 3406, Backup withholding

Section 3406(a) requires certain payers to perform backup withholding by deducting and withholding income tax from a reportable payment when, among other circumstances, the payee fails to furnish the payee's TIN to the payer or the IRS has notified the payer that the TIN furnished by the payee is incorrect. Pursuant to section 3406(b)(3)(F), a reportable payment includes payments made by a TPSO that are required to be shown under section 6050W on a Form 1099-K. A payer is required to report the amount of deducted and withheld Federal income tax amounts on Form 945, *Annual Return of Withheld Federal Income Tax,* and on the information return filed with the IRS and furnished to the payee. In the case of the Form 1099-K, withheld income tax is reported in box 4. The payee may then claim credit for the amount of income tax withheld on the payee's Federal income tax return.

.03 Section 6721, Failure to file correct information returns, and section 6722, Failure to furnish correct payee statements

Section 6721 imposes a penalty for any failure to file an information return on or before the required filing date, and for any failure to include all of the information required to be shown on the return or the inclusion of incorrect information.

Section 6722 imposes a penalty for failure to furnish a payee statement on or

[1] Unless otherwise specified, all "section" or "§" references are to sections of the Code or the Income Tax Regulations (26 CFR part 1).

before the required furnishing date to the person to whom such statement is required to be furnished, and for any failure to include all of the information required to be shown on a payee statement or the inclusion of incorrect information.

.04 American Rescue Plan Act of 2021

Section 9674 of the ARP amended section 6050W(e) to provide that, for Forms 1099-K for calendar years beginning after December 31, 2021, a TPSO is required to report payments in settlement of third party network transactions with respect to any participating payee that exceed a minimum threshold of $600 in aggregate payments, regardless of the aggregate number of such transactions.

Notice 2023-10, 2023-3 I.R.B. 403 (January 17, 2023), delayed implementation of the reporting threshold for TPSOs in section 9674(a) of the ARP for Forms 1099-K for calendar years beginning before January 1, 2023. Notice 2023-10 also provided that the IRS would not assert penalties under section 6721 or section 6722 for TPSOs failing to file or failing to furnish Forms 1099-K unless the gross amount of aggregate payments required to be reported exceeded $20,000 and the number of transactions exceeded 200.

SECTION 3. TRANSITION PERIOD FOR ENFORCEMENT AND ADMINISTRATION WITH RESPECT TO CALENDAR YEAR 2023

Calendar year 2023 will be regarded as a further transition period for purposes of IRS enforcement and administration of the information reporting requirements under section 6050W(e), as amended by the ARP. For calendar year 2023, a TPSO is not required to report payments in settlement of third party network transactions with respect to a participating payee unless (1) the gross amount of aggregate payments to be reported exceeds $20,000 and (2) the number of such transactions with that participating payee exceeds 200. The IRS will not assert penalties under section 6721 or section 6722 for a TPSO for failing to file or failing to furnish Forms 1099-K with respect to a payee unless the gross amount of aggregate payments to be reported exceeds $20,000 and the number of such transactions with that participating payee exceed 200.

The IRS will not regard calendar year 2023 as a transition period with respect to the requirements of section 6050W that were not modified by section 9674(a) of the ARP, such as provisions relating to payment card transactions. In addition, TPSOs that have performed backup withholding under section 3406(a) for a payee during calendar year 2023 must file a Form 945 and a Form 1099-K with the IRS and furnish a copy to the payee if total reportable payments to the payee exceeded $600 for the calendar year.

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is the Office of Associate Chief Counsel (Procedure and Administration).

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26 CFR 601.601: Rules and regulations
(Also Part 1, §§ 6049; 1.6049-4, 1.6049-8)

Rev. Proc. 2023-36

SECTION 1. PURPOSE

This revenue procedure provides a list of the jurisdictions with which the United States has in effect a relevant information exchange agreement such that the reporting requirement of §§ 1.6049-4(b)(5) and 1.6049-8(a) of the Income Tax Regulations may apply with respect to certain deposit interest paid to residents of such jurisdictions.

This revenue procedure also provides a list of the jurisdictions with which the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) have determined that it is appropriate to have an automatic exchange relationship with respect to the information collected under §§ 1.6049-4(b)(5) and 1.6049-8(a).

These lists are updated and restated versions of those set forth in Rev. Proc. 2022-35, I.R.B. 2022-40 270. Ecuador has been added in Section 3 of this revenue procedure to the list of jurisdictions with which the United States has in effect a relevant information exchange agreement. Argentina and Kazakhstan have been added in Section 4 of this revenue procedure to the list of jurisdictions with which the Treasury Department and the IRS have determined that it is appropriate to have an automatic exchange relationship.

SECTION 2. BACKGROUND

Sections 1.6049-4(b)(5) and 1.6049-8(a), as revised by TD 9584, 2012-20 I.R.B. 900, require the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013. Section 1.6049-4(b)(5) provides that in the case of interest aggregating $10 or more paid to a nonresident alien individual (as defined in section 7701(b)(1)(B)) that is reportable under § 1.6049-8(a), the payor is required to make an information return on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, for the calendar year in which the interest is paid.

Interest that is reportable under § 1.6049-8(a) is interest described in section 871(i)(2)(A) that relates to a deposit maintained at an office within the United States. The regulations also provide that such deposit interest is reportable only if paid to a resident of a jurisdiction that is identified as a jurisdiction with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information within the meaning of section 6103(k)(4), under which the competent authority is the Secretary of the Treasury or the Secretary's delegate and the United States agrees to provide, as well as receive, information. Finally, the regulations provide that jurisdictions are so identified in an applicable revenue procedure (see § 601.601(d)(2)) as of December 31 before the calendar year in which the interest is paid. The preamble to the regulations (at 2012-20 I.R.B. 901-02) notes that the IRS will not exchange information with another jurisdiction, even if an information exchange agreement is in effect, if there are concerns about confidentiality, safeguarding of data exchanged, the use of the information, or other factors that would make the exchange of information inappropriate.

Rev. Proc. 2012-24, 2012-20 I.R.B. 913, was published contemporaneously with the publication of TD 9584 to provide a list of those jurisdictions with which the United States has in effect an information exchange agreement, such that interest paid to residents of such jurisdictions must be reported by payors to the extent required under §§ 1.6049-4(b)(5) and 1.6049-8(a), and to provide a separate list identifying those jurisdictions with which the automatic exchange of the information collected under the regulations has been determined by the Treasury Department and the IRS to be appropriate. Before issuance of this Rev. Proc. 2023-36, the most current versions of those lists were set forth in Rev. Proc. 2022-35.

SECTION 3. JURISDICTIONS OF RESIDENCE WITH RESPECT TO WHICH THE DEPOSIT INTEREST REPORTING REQUIREMENT APPLIES

The following are the jurisdictions with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information within the meaning of section 6103(k)(4) pursuant to which the United States agrees to provide, as well as receive, information and under which the competent authority is the Secretary of the Treasury or the Secretary's delegate:

Jurisdiction	Rev. Proc. First Identifying Jurisdiction
Antigua & Barbuda	2012-24
Argentina	2018-36
Aruba	2012-24
Australia	2012-24
Austria	2012-24
Azerbaijan	2012-24
Bangladesh	2012-24
Barbados	2012-24
Belgium	2012-24
Bermuda	2012-24
Brazil	2014-64
British Virgin Islands	2012-24
Bulgaria	2012-24
Canada	2012-24
Cayman Islands	2014-64
Chile	2021-32
China	2012-24
Colombia	2014-64
Costa Rica	2012-24
Croatia	2014-64
Curaçao	2014-64
Cyprus	2012-24
Czech Republic	2012-24
Denmark	2012-24
Dominica	2012-24
Dominican Republic	2012-24
Ecuador	2023-36
Egypt	2012-24
Estonia	2012-24
Faroe Islands	2017-46
Finland	2012-24
France	2012-24
Georgia	2019-23

Jurisdiction	Rev. Proc. First Identifying Jurisdiction
Germany	2012-24
Gibraltar	2012-24
Greece	2012-24
Greenland	2017-46
Grenada	2012-24
Guernsey	2012-24
Guyana	2012-24
Honduras	2012-24
Hong Kong	2014-64
Hungary	2012-24
Iceland	2012-24
India	2012-24
Indonesia	2012-24
Ireland	2012-24
Isle of Man	2012-24
Israel	2012-24
Italy	2012-24
Jamaica	2012-24
Japan	2012-24
Jersey	2012-24
Kazakhstan	2012-24
Korea, Republic of	2012-24
Latvia	2012-24
Liechtenstein	2012-24
Lithuania	2012-24
Luxembourg	2012-24
Malta	2012-24
Marshall Islands	2012-24
Mauritius	2014-64
Mexico	2012-64
Moldova	2018-36
Monaco	2012-24
Morocco	2012-24
Netherlands	2012-24
Netherlands special municipalities: Bonaire, Sint Eustatius, and Saba	2012-24
New Zealand	2012-24
Norway	2012-24
Pakistan	2012-24
Panama	2012-24
Peru	2012-24
Philippines	2012-24
Poland	2012-24
Portugal	2012-24

Jurisdiction	Rev. Proc. First Identifying Jurisdiction
Romania	2012-24
Russian Federation	2012-24
Saint Lucia	2016-56
Singapore	2020-15
Sint Maarten	2014-64
Slovak Republic	2012-24
Slovenia	2012-24
South Africa	2012-24
Spain	2012-24
Sri Lanka	2012-24
Sweden	2012-24
Switzerland	2012-24
Thailand	2012-24
Trinidad and Tobago	2012-24
Tunisia	2012-24
Turkey	2012-24
Ukraine	2012-24
United Kingdom	2012-24
Venezuela	2012-24

SECTION 4. JURISDICTIONS WITH WHICH THE TREASURY DEPARTMENT AND THE IRS HAVE DETERMINED THAT AUTOMATIC EXCHANGE OF DEPOSIT INTEREST INFORMATION IS APPROPRIATE

The following list identifies the jurisdictions with which the automatic exchange of the information collected under §§ 1.6049-4(b)(5) and 1.6049-8 has been determined by the Treasury Department and the IRS to be appropriate:

Jurisdiction	Rev. Proc. First Memorializing Determination on Automatic Exchange with Jurisdiction
Argentina	2023-36
Australia	2014-64
Azerbaijan	2016-18
Belgium	2017-31
Brazil	2015-50
Canada	2012-24
Colombia	2017-31
Croatia	2017-46
Curaçao	2019-23
Cyprus	2019-23
Czech Republic	2015-50
Denmark	2014-64
Dominican Republic	2021-32
Estonia	2015-50
Finland	2014-64
France	2014-64
Germany	2014-64

Jurisdiction	Rev. Proc. First Memorializing Determination on Automatic Exchange with Jurisdiction
Gibraltar	2015-50
Greece	2018-36
Guernsey	2014-64
Hungary	2015-50
Iceland	2015-50
India	2015-50
Ireland	2014-64
Isle of Man	2014-64
Israel	2016-56
Italy	2014-64
Jamaica	2016-18
Jersey	2014-64
Kazakhstan	2023-36
Korea, Republic of	2016-56
Latvia	2015-50
Liechtenstein	2015-50
Lithuania	2015-50
Luxembourg	2015-50
Malta	2014-64
Mauritius	2014-64
Mexico	2014-64
Netherlands	2014-64
New Zealand	2015-50
Norway	2014-64
Panama	2017-46
Poland	2015-50
Portugal	2017-31
Saint Lucia	2016-56
Singapore	2021-32
Slovak Republic	2016-18
Slovenia	2015-50
South Africa	2015-50
Spain	2014-64
Sweden	2015-50
Turkey	2022-35
United Kingdom	2014-64

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2022-35 is superseded.

SECTION 6. EFFECTIVE DATES

For purposes of the reporting requirement of § 1.6049-4(b)(5), the list of jurisdictions in Section 3 of this revenue procedure is effective for interest paid on or after January 1 of the calendar year following the issuance of the revenue procedure (as cited in Section 3) first identifying the jurisdiction as having in effect an agreement with the United States as described in § 1.6049-8(a).

The list of jurisdictions in Section 4 of this revenue procedure is effective from the date of issuance of this revenue procedure with respect to information reported to the IRS pursuant to §§ 1.6049-4(b)(5) and 1.6049-8(a) for any tax year for which the jurisdiction was included in the list in Section 3. The revenue procedure citations in the Section 4 list are included for historical reference.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Michelle R. Phillips of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Ms. Phillips at (202) 317-4382 (not a toll-free number).

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PART I. OVERVIEW

SECTION 1. PURPOSE

.01 *In general*. This revenue procedure sets forth the rules regarding Qualified Pre-approved Plans and Section 403(b) Pre-approved Plans, and combines, conforms, clarifies, and updates rules for Qualified Pre-approved Plans and Section 403(b) Pre-approved Plans previously set forth in prior revenue procedures, as described in section 1.01(1) through (3).[1] Combining these prior revenue procedures allows for the rules for the different types of Pre-approved Plans to be more easily conformed to each other, to the extent practicable. These rules for Pre-approved Plans fall into three broad categories:

(1) *Remedial Amendment Periods, the Remedial Amendment Cycle system, and plan amendment deadlines*. This revenue procedure sets forth the rules regarding Remedial Amendment Periods, the Remedial Amendment Cycle system, and plan amendment deadlines for Qualified Pre-approved Plans and for Section 403(b) Pre-approved Plans, which were previously set forth in Rev. Proc. 2016-37, 2016-29 IRB 136, as modified by Rev. Proc. 2017-41, 2017-29 IRB 92, and Rev. Proc. 2020-40, 2020-38 IRB 575 (with respect to Qualified Pre-Approved Plans), and in Rev. Proc. 2019-39, 2019-42 IRB 945, as modified by Notice 2020-35, 2020-25 IRB 948, Rev. Proc. 2020-40, and Rev. Proc. 2021-37, 2021-38 IRB 385 (with respect to Section 403(b) Pre-approved Plans). The rules regarding Remedial Amendment Periods, the Remedial Amendment Cycle system, and plan amendment deadlines are effective on November 21, 2023.

(2) *Provider application for an Opinion Letter*. This revenue procedure also sets forth the procedures for a Provider to apply for an Opinion Letter confirming that the form of the Provider's plan satisfies the Qualification Requirements or Section 403(b) Requirements (procedures that were previously set forth in Rev. Proc. 2017-41, as modified by Rev. Proc. 2018-21, 2018-41 IRB 467 (with respect to Qualified Pre-Approved Plans), and in Rev. Proc. 2021-37 (with respect to Section 403(b) Pre-approved Plans)). The rules regarding the application procedures for an Opinion Letter are effective with respect to:

(a) A Cycle 4 (or later) defined contribution Qualified Pre-approved Plan (Cycle 4 for defined contribution Qualified Pre-approved Plans began on February 1, 2023 (see section 1.02 for the start of the Submission Period for Cycle 4));

(b) A Cycle 4 (or later) defined benefit Qualified Pre-approved Plan (Cycle 4 for defined benefit Qualified Pre-approved Plans begins on April 1, 2025); and

(c) A Cycle 3 (or later) Section 403(b) Pre-approved Plan (the Cycle 2 Submission Period for Section 403(b) Pre-approved Plans ended on May 1, 2023, and Provider applications for Opinion Letters are currently being reviewed for these Pre-approved Plans).

(3) *Adopting Employer application for a determination letter*. This revenue procedure also sets forth the procedures for an Adopting Employer of a Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan to apply for a determination letter regarding the Adopting Employer's plan (procedures that were previously set forth in Rev. Proc. 2016-37 and Rev. Proc. 2017-41 (for an Adopting Employer of a Qualified Pre-approved Plan), and in Rev. Proc. 2021-37 (for an Adopting Employer of a Section 403(b) Pre-approved Plan)). The rules regarding the application procedures for a determination letter apply to:

[1] All references to "section" in this revenue procedure are to sections of this revenue procedure unless otherwise provided (such as with defined terms like Section 403(b) Pre-approved Plans and Section 403(b) Requirements). All references using "§" in this revenue procedure are to sections of the Internal Revenue Code or to Treasury regulations.

(a) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 4 (or later) defined contribution Qualified Pre-approved Plan;

(b) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 4 (or later) defined benefit Qualified Pre-approved Plan; and

(c) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 2 (or later) Section 403(b) Pre-approved Plan.[2]

.02 *Submission Period for Cycle 4 defined contribution Qualified Pre-approved Plans*. Pursuant to this revenue procedure, the Submission Period for a Provider of a defined contribution Qualified Pre-approved Plan to submit an application for a Cycle 4 Opinion Letter begins on February 1, 2024, and ends on January 31, 2025. A Provider may apply for a Cycle 4 Opinion Letter at other times. See section 16 regarding filings made after the Submission Period.

SECTION 2. BACKGROUND

.01 *Rev. Proc. 2016-37*. Rev. Proc. 2016-37 provides that every pre-approved plan has a recurring six-year remedial amendment cycle and that pre-approved plan providers may apply for new opinion letters during a remedial amendment cycle. Rev. Proc. 2016-37 also sets forth an extension of the remedial amendment period and adoption deadline for plan amendments for qualified pre-approved plans.[3]

.02 *Rev. Proc. 2017-41*. Rev. Proc. 2017-41 sets forth the procedures for issuing opinion letters regarding the qualification in form of qualified pre-approved plans.[4]

.03 *Rev. Proc. 2019-39*. Rev. Proc. 2019-39, as modified by Notice 2020-35, sets forth a system of recurring remedial amendment periods for correcting form defects in § 403(b) pre-approved plans first occurring after June 30, 2020. Rev. Proc. 2019-39 also establishes a system of § 403(b) pre-approved plan cycles during which a provider may submit a § 403(b) pre-approved plan for review and approval by the Internal Revenue Service (IRS). Rev. Proc. 2019-39 also sets forth plan amendment deadlines for amendments made to a § 403(b) pre-approved plan.

.04 *Rev. Proc. 2021-37*. Rev. Proc. 2021-37 sets forth the procedures for issuing opinion letters regarding the satisfaction in form of § 403(b) pre-approved plans with respect to the requirements of § 403(b) of the Internal Revenue Code (Code) for remedial amendment cycle 2. Rev. Proc. 2021-37 also sets forth the rules for determining when remedial amendment periods expire for § 403(b) pre-approved plans.

.05 *Rev. Proc. 2022-40*. Rev. Proc. 2022-40, 2022-47 IRB 487, sets forth the rules and procedures for an employer to submit a determination letter application for an individually designed qualified or § 403(b) plan for an initial plan determination, for a determination upon plan termination, and in certain other circumstances identified by the IRS in guidance published in the Internal Revenue Bulletin (IRB). Rev. Proc. 2022-40 also sets forth the remedial amendment period rules and plan amendment deadlines for individually designed qualified or § 403(b) plans.

[2] The rules regarding an Adopting Employer's application for a determination letter apply for Cycle 2 Section 403(b) Pre-approved Plans because, although Cycle 2 has begun, Cycle 2 Opinion Letters have not been issued and the Employer Adoption Window for Cycle 2 (during which an application for a determination letter would generally be submitted) has not begun.
[3] The rules of Rev. Proc. 2016-37 still apply for Cycle 3 Qualified Pre-approved Plans. However, Cycle 4 Qualified Pre-approved Plans (whether defined contribution or defined benefit) will be governed by this revenue procedure and not Rev. Proc. 2016-37.
[4] The rules of Rev. Proc. 2017-41 still apply for Cycle 3 Qualified Pre-approved Plans. However, Cycle 4 Qualified Pre-approved Plans (whether defined contribution or defined benefit) will be governed by this revenue procedure and not Rev. Proc. 2017-41.

.06 *Rev. Proc. 2023-4*. Rev. Proc. 2023-4, 2023-1 IRB 162, (as updated annually) sets forth the general procedures on the issuance of Employee Plans determination letters, including a determination letter for an adopting employer's pre-approved plan.

SECTION 3. ORGANIZATION OF REVENUE PROCEDURE; SIGNIFICANT CHANGES

.01 *Organization of this revenue procedure*.

(1) Sections 1 through 4 set forth the purpose, background, organization, significant changes, and definitions for this revenue procedure.

(2) Sections 5 through 8 set forth the rules regarding Remedial Amendment Periods, the Remedial Amendment Cycle system, and plan amendment deadlines for Qualified Pre-approved Plans and for Section 403(b) Pre-approved Plans.

(3) Sections 9 through 24 set forth the procedures for a Provider to apply for an Opinion Letter confirming that the form of the Provider's plan satisfies the Qualification Requirements or Section 403(b) Requirements.

(4) Section 25 sets forth the procedures for an Adopting Employer of a Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan to apply for a determination letter regarding the Adopting Employer's plan.

(5) Sections 26 through 29 set forth miscellaneous provisions, including provisions regarding the effect on other documents, the effective date, and public comments.

.02 *Examples of significant changes from prior revenue procedures*. In consolidating the prior revenue procedures (which set forth rules for qualified pre-approved plans and § 403(b) pre-approved plans) into this revenue procedure, numerous changes were made to conform, clarify, and update the rules. The following are some examples of those changes.

(1) *For all Pre-approved Plans*.

(a) The Remedial Amendment Period for Disqualifying Provisions or Form Defects is clarified to expire at the same time as the deadline for the adoption of Interim Amendments, as set forth in section 7. See section 6.03(1).

(b) The end of the Remedial Amendment Period for Discretionary Amendments made by an Adopting Employer (not by a Provider) is changed. See section 6.03(2).

(c) The Interim Amendment rules are updated to provide that, if an Adopting Employer does not correct a failure to timely adopt an Interim Amendment within two years after the time period set forth in section 7, then the Adopting Employer's plan will be treated as an individually designed plan at the end of that two-year period. See section 6.04.

(d) The Interim Amendment deadline is changed to match the individually designed plan Remedial Amendment Period deadline. See section 7.01(1)(a) and (2)(a).

(e) The plan amendment deadline for a Governmental Plan is changed to provide additional time beyond the deadline for a plan that is not a Governmental Plan only to the extent any action is required to be taken by the Adopting Employer in order to adopt the amendment. See section 7.01(2).

(f) The eligibility of an employer to adopt a Pre-approved Plan for a Cycle is changed to require that, for a plan that was not in existence in the immediately preceding Cycle, the plan must have been submitted for an Opinion Letter for the Cycle before the employer adopts it. See section 11.01(1).

(g) For a starter 401(k) deferral-only plan described in § 401(k)(16) or a safe harbor deferral-only plan described in § 403(b)(16),[5] an Adopting Employer's reliance is updated to include those sections. See section 12.01(6) and 12.02(6).

(h) The circumstances under which a Pre-approved Plan will be treated as an individually designed plan, and the consequences of such treatment, are updated and clarified. See section 13.05.

(i) The rules for issuing an Opinion Letter are clarified to provide that an Opinion Letter will not be issued for amendments made between Submission Periods. Instead, a Provider must submit a restated plan that incorporates the amendments during the next Submission Period. See section 14.15.

(j) The scope of review for an Opinion Letter is clarified and updated. See section 17.01(1) and (2).

(k) The application filing address is updated. See section 24.

(l) The rules for an Adopting Employer applying for a determination letter are clarified and updated. See section 25.

(2) *For Qualified Pre-approved Plans*.

(a) The number of unaffiliated Providers required to be associated with a Mass Submitter is changed to better match the rules for a Mass Submitter with respect to a Section 403(b) Pre-approved Plan. See section 4.01(10).

(b) The number of employer-clients a Provider must have is changed to better match the rules for a Provider with respect to a Section 403(b) Pre-approved Plan. See section 4.01(15).

(c) The Qualification Requirements are clarified to include § 409 for ESOPs. See section 4.02(3).

(d) The rules relating to a Cycle for a Qualified Pre-approved Plan are changed to match the rules relating to a Cycle for a Section 403(b) Pre-approved Plan. Accordingly, each Cycle is no longer a fixed six years, and each Cycle now ends at the end of the Employer Adoption Window (with the result that the Submission Period may begin after the first day of a Cycle). See section 5.02.

(e) The required provisions for a Qualified Pre-approved Plan that is a pension plan and not a Governmental Plan are changed to require that the plan must have a normal retirement age that is not less than age 55. See section 9.02(13).

(f) The effect of an amendment with respect to which a closing agreement under the Audit Closing Agreement Program or a compliance statement under the Voluntary Correction Program of the Employee Plans Compliance Resolution System (EPCRS) has been issued is clarified to match the rules for a Section 403(b) Pre-approved Plan and provide that reliance on the Opinion Letter will not be lost. See section 13.02(8).

(g) The application procedures for an Opinion Letter are changed to no longer require attachments required in prior Cycles. See section 14.03, which no longer has the requirement.

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[5] Section 121 of Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022), known as the SECURE 2.0 Act of 2022, added §§ 401(k)(16) and 403(b)(16) to the Code, effective for plan years beginning after December 31, 2023.

(h) The consequences of a Provider failure to disclose a material fact are changed to match the rules for a Provider failure to disclose a material fact with respect to a Section 403(b) Pre-approved Plan. See section 14.11.

(i) The consequences of a Mass Submitter's failure to identify a modification are changed to match the rules for a Mass Submitter's failure to identify a modification with respect to a Section 403(b) Pre-approved Plan. See section 15.03(2)(c).

(j) The requirements for a Provider of a discontinued plan are changed to match the rules for a discontinued plan with respect to a Section 403(b) Pre-approved Plan. See section 21.02.

(3) *For Section 403(b) Pre-approved Plans*.

(a) The integral amendment portion of the definition of Form Defect is changed to better match the Qualified Pre-approved Plan rules for a Disqualified Provision. See section 4.03(2).

(b) The requirements for a Standardized Section 403(b) Pre-approved Plan that provides only for elective deferrals are updated to add requirements regarding hardship distributions and § 415 language. See section 9.07(1) and (2).

(c) The requirements for a Standardized Section 403(b) Pre-approved Plan that provides for contributions other than elective deferrals are changed so that the requirements of section 9.07(3)(b) apply only to contributions other than elective deferrals. See section 9.07(3)(b).

(d) The rules for when an Opinion Letter will not be issued with respect to a Section 403(b) Pre-approved Plan are changed to better match the rules for when an Opinion Letter will not be issued with respect to a Qualified Pre-approved Plan and to provide that an Opinion Letter will not be issued for (i) a plan designed to satisfy the provisions of § 105, (ii) a plan that includes § 401(h) accounts, and (iii) a plan that includes purported fail-safe provisions for § 401(a)(4) or the average benefit test under § 410(b). See section 10.02(1).

(e) The rules for an Adopting Employer of a Section 403(b) Pre-approved Plan that applies for a determination letter are updated to better match the Qualified Pre-approved Plan rules for determination letter applications. See section 25.

SECTION 4. DEFINITIONS

.01 *General definitions*. For purposes of this revenue procedure, the following definitions apply to all Pre-approved Plans.

(1) *Adopting Employer*. The term "Adopting Employer" means an Employer that adopts a Pre-approved Plan offered by a Provider.

(2) *Adoption Agreement Plan.* The term "Adoption Agreement Plan" means a plan that consists of a basic plan document and an adoption agreement. The basic plan document includes all the non-elective provisions applicable to all Adopting Employers, and the adoption agreement includes the options that may be selected by each Adopting Employer. No options (including blanks to be completed) may be provided in the basic plan document portion of the Adoption Agreement Plan (except as set forth in section 15.03 regarding Flexible Plans).

(3) *Cycle.* The term "Cycle" means a Remedial Amendment Cycle, as defined in section 4.01(17).

(4) *Discretionary Amendment*. The term "Discretionary Amendment" means an amendment that is not an Interim Amendment.

(5) *Employer*. The term "Employer" means an employer that sponsors a Qualified Pre-approved Plan for its employees or an eligible employer, as described in § 403(b)(1)(A), that sponsors a Section 403(b) Pre-approved Plan for its employees.

(6) *Employer Adoption Window.* The term "Employer Adoption Window" means the period during which an Adopting Employer must adopt a newly approved Pre-approved Plan for a Cycle, and is also generally the period during which an Adopting Employer of a newly approved Pre-approved Plan may submit an application for a determination letter (if otherwise permitted). See section 5.02 regarding the Employer Adoption Window and section 25 regarding determination letters.

(7) *Flexible Plan.* The term "Flexible Plan" means a plan submitted by a Mass Submitter that includes optional provisions (as described in section 15.03(1)(b)).

(8) *Governmental Plan.* The term "Governmental Plan" means a governmental plan within the meaning of § 414(d).

(9) *Interim Amendment*. The term "Interim Amendment" means an amendment to correct a Disqualifying Provision or a Form Defect that results in the failure of a Pre-approved Plan to satisfy a Qualification Requirement or Section 403(b) Requirement, as applicable, by reason of a change in that requirement, or an amendment that is integral to that Disqualifying Provision or Form Defect. See section 6.04.

(10) *Mass Submitter*. The term "Mass Submitter" means any person that (a) has an established place of business in the United States where it is accessible during every business day, and (b) submits Opinion Letter applications on behalf of 15 unaffiliated Providers, each of which is offering, on a word-for-word identical basis, the same plan. A Flexible Plan that is offered by a Provider is considered a plan that is word-for-word identical. For purposes of determining whether 15 unaffiliated Providers offer, on a word-for-word identical basis, the same Pre-approved Plan, a Mass Submitter that is also a Provider is treated as an unaffiliated Provider. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, any law firm, accounting firm, consulting firm, or similar organization is considered to be affiliated with its partners, members, associates, or similar affiliated persons. A Mass Submitter is treated as a Mass Submitter with respect to all of its plans, provided the 15-unaffiliated-Provider requirement is met with respect to at least one plan. See section 15 for rules relating to a Mass Submitter's plans.

(11) *Minor Modification.* The term "Minor Modification" means a minor change to an otherwise word-for-word identical Pre-approved Plan of the Mass Submitter that the IRS determines does not require an in-depth IRS technical review. For example, a change from five-year 100% vesting to three-year 100% vesting is a minor modification for a defined benefit plan. On the other hand, a change in the method of accrual of benefits in a defined benefit plan would not be considered a Minor Modification.

(12) *Nonstandardized Plan*. The term "Nonstandardized Plan" means a Pre-approved Plan that is not a Standardized Plan.

(13) *Opinion Letter*. The term "Opinion Letter" means a written statement issued by the IRS to a Provider or Mass Submitter that the form of a Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan satisfies the Qualification Requirements or the Section 403(b) Requirements, respectively, that are being reviewed by the IRS for the Cycle for which the Opinion Letter is being issued.

(14) *Pre-approved Plan*. The term "Pre-approved Plan" means a plan (including a plan that is word-for-word identical to, or a Minor Modification of, a Mass Submitter's plan) that has received an Opinion Letter under this revenue procedure (or a predecessor of this revenue procedure) and

that is made available by a Provider for adoption by Employers. A Pre-approved Plan includes a plan covering self-employed individuals. A Pre-approved Plan may be either a Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan. A Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan may be either a Standardized Plan or a Nonstandardized Plan. A Qualified Pre-approved Plan or a Section 403(b) Pre-approved Plan may be structured as either an Adoption Agreement Plan or a Single Document Plan.

(15) *Provider*.

(a) The term "Provider" means any person (including, if applicable, a Mass Submitter) that:

(i) Has an established place of business in the United States where it is accessible during every business day, and

(ii) Represents to the IRS in its application for an Opinion Letter that it has at least 15 Employer-clients (except as set forth in section 4.01(15)(a)(ii)(A) regarding a Retirement Income Account), each of which is reasonably expected to adopt one of the Provider's Pre-approved Plans.

(A) A person that is otherwise eligible to be a Provider generally may apply for an Opinion Letter for a Section 403(b) Pre-approved Plan that is intended to be a Retirement Income Account without satisfying the 15-Employer-client requirement with respect to that plan. However, if that person also applies for an Opinion Letter with respect to a Section 403(b) Pre-approved Plan that is not a Retirement Income Account, the person would need to meet the 15-Employer-client requirement for the plan that is not a Retirement Income Account.

(B) The IRS reserves the right to request from the Provider at any time a list of the Employers that have adopted or are expected to adopt the Provider's plans, including the Employers' business addresses and employer identification numbers.

(b) Notwithstanding the preceding provisions of this section 4.01(15), any person that has an established place of business in the United States where it is accessible during every business day may offer a plan that is word-for-word identical to a Mass Submitter's plan as an identical adopter or a plan that includes Minor Modifications to a Mass Submitter's plan as a minor modifier adopter regardless of the number of Employers that are expected to adopt the plan. See section 15 for rules relating to a Mass Submitter's plans, including procedures for identical adopters and minor modifier adopters of a Mass Submitter's plans.

(c) By submitting an application for an Opinion Letter for a Pre-approved Plan under this revenue procedure (or by having an application filed on its behalf by a Mass Submitter as an identical adopter or a minor modifier adopter), a person represents to the IRS that it is a Provider, and that it agrees to comply with any requirements imposed on Providers by this revenue procedure. Failure to comply with these requirements may result in the loss of eligibility to offer Pre-approved Plans and the revocation of Opinion Letters that have been issued to the Provider.

(16) *Related Employers.* For a Pre-approved Plan other than a Section 403(b) Pre-approved Plan that is a Governmental Plan, the term "Related Employer" means an employer that is aggregated with the Adopting Employer under § 414(b), (c), (m), and (o) and the regulations thereunder. For a Section 403(b) Pre-approved Plan that is a Governmental Plan, the term "Related Employer" means an employer that is aggregated with the Adopting Employer in a manner consistent with Notice 89-23, 1989-1 CB 654.

(17) *Remedial Amendment Cycle.* The term "Remedial Amendment Cycle" means the time period designated by the IRS during which (1) a Provider submits a proposed Pre-approved Plan for review and approval by the IRS, (2) the plan, once approved, is adopted by Employers, and (3) an Adopting Employer of a newly approved Pre-approved Plan generally may submit an application for a determination letter (if otherwise permitted). See section 5.

(18) *Remedial Amendment Period.* The term "Remedial Amendment Period" means the period during which an employer maintaining a plan may correct Disqualifying Provisions or Form Defects, as applicable, in its plan retroactive to the beginning of that period. As part of the correction of a Disqualifying Provision or a Form Defect within the applicable Remedial Amendment Period, an Adopting Employer is considered to have satisfied the Qualification Requirements or Section 403(b) Requirements, as applicable, if all provisions of the plan that are necessary to satisfy those requirements have been adopted and made effective in form and operation from the beginning of the Remedial Amendment Period. See section 6.

(19) *Single Document Plan.* The term "Single Document Plan" means a plan offered by a Provider that consists of a single plan document without an adoption agreement. A Single Document Plan may include alternate paragraphs and options that may be selected by an Adopting Employer (including blanks to be completed by the Adopting Employer in accordance with specified parameters).

(20) *Standardized Plan*. The term "Standardized Plan" means a Pre-approved Plan that satisfies the requirements set forth in section 9.03 or 9.07, as applicable. A Qualified Pre-approved Plan that includes an ESOP or that is a Statutory Hybrid Plan may not be a Standardized Plan.

(21) *Submission Period.* The term "Submission Period" means the period during which a Provider (including a Mass Submitter) may apply for an Opinion Letter for a particular Cycle. See section 5.02; also see section 16 regarding filings made after the Submission Period.

.02 *Definitions applicable solely to Qualified Pre-approved Plans*. For purposes of this revenue procedure, the following definitions apply to Qualified Pre-approved Plans and do not apply to Section 403(b) Pre-approved Plans.

(1) *Disqualifying Provision*.

(a) *In general*. For a Qualified Pre-approved Plan, the term "Disqualifying Provision" means:

(i) A provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective;

(ii) A plan provision that, pursuant to § 1.401(b)-1(b)(3), has been designated by the Commissioner, in guidance published in the IRB, as a disqualifying provision by reason of a change in those requirements; or

(iii) The absence from a plan of a provision required by (or, if applicable, integral to) a change in the qualification requirements of the Code.

(b) *Designation of Disqualifying Provisions*. Pursuant to § 1.401(b)-1(b)(3), the IRS designates a plan provision as a Disqualifying Provision if it:

(i) Results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001; or

(ii) Is integral to a Disqualifying Provision described in section 4.02(1)(b)(i).

(2) *Qualified Pre-approved Plan*. The term "Qualified Pre-approved Plan" means a Pre-approved Plan that is intended to meet the Qualification Requirements.

(3) *Qualification Requirements*. The term "Qualification Requirements" means the requirements of §§ 401(a), 403(a), 409, and 4975(e)(7), including requirements provided by statute, or in regulations or other guidance published in the IRB.[6]

(4) *Trust or Custodial Account Document*. The term "Trust or Custodial Account Document" means the separate portion of a Qualified Pre-approved Plan that includes the trust agreement or custodial account agreement and includes provisions covering such matters as the powers and duties of trustees, investment authority, and the kinds of investments that may be made. All provisions of the Trust or Custodial Account Document must be applicable to all Adopting Employers of that trust or custodial account. The trust agreement or custodial account agreement must be in a document separate from the plan document that is submitted for an Opinion Letter.

(5) *Definitions related to ESOPs*.

(a) *ESOP*. The term "ESOP" means an employee stock ownership plan within the meaning of § 4975(e)(7).

(b) *Exempt Loan*. The term "Exempt Loan" means a loan described in § 4975(d)(3) that satisfies the requirements for exemption from the excise tax imposed under § 4975(a) and (b) described in § 54.4975-7(b).

(c) *Readily Tradable Employer Securities*. The term "Readily Tradable Employer Securities" means publicly traded securities as defined in § 1.401(a)(35)-1(f)(5).

(6) *Definitions related to Hybrid Plans*.

(a) *Cash Balance Formula*. The term "Cash Balance Formula" means a statutory hybrid benefit formula, as defined in § 1.411(a)(13)-1(d)(4), that is used to determine all or any part of a participant's accumulated benefit, and under which the accumulated benefit provided under the formula is expressed as the current balance of a hypothetical account maintained for the participant. The hypothetical account balance generally consists of Principal Credits and Interest Credits.

(b) *Cash Balance Plan*. The term "Cash Balance Plan" means a defined benefit plan that includes a Cash Balance Formula.

(c) *Conversion Amendment*. The term "Conversion Amendment" means an amendment defined in § 1.411(b)(5)-1(c)(4). Under this regulation, a conversion amendment is an amendment (i) that reduces or eliminates the benefits that, but for the amendment, a participant would have earned after the effective date of the amendment under a benefit formula that is not a statutory hybrid benefit formula within the meaning of § 1.411(a)(13)-1(d)(4), and (ii) with respect to which, after the effective date of the amendment, all or a portion of the participant's benefit accruals under the plan are determined under a statutory hybrid benefit formula.

(d) *Interest Credit*. The term "Interest Credit" means an interest credit as defined in § 1.411(b)(5)-1(d)(1)(ii)(A). Under this regulation, an interest credit is an adjustment to a participant's hypothetical account balance for a period that is not conditioned on service and that is determined by applying a rate of interest or rate of return to the participant's hypothetical account balance as of the beginning of the period.

(e) *Offset*. The term "Offset" means the reduction of benefits under an Employer's defined benefit plan by an amount attributable to the benefits payable under another plan of the Employer.

[6] Under this definition, a change in Qualification Requirements includes a change provided by statute, or in regulations or other guidance published in the IRB, that affects a requirement of § 401(a), 403(a), 409, or 4975(e)(7), without regard to whether the change results in a Disqualifying Provision or merely permits the adoption of a Discretionary Amendment.

(f) *Principal Credit*. The term "Principal Credit" means a principal credit as defined in § 1.411(b)(5)-1(d)(1)(ii)(D), which includes any increase in a participant's hypothetical account balance that is not an Interest Credit.

(g) *Statutory Hybrid Plan*. The term "Statutory Hybrid Plan" means a defined benefit plan that includes a statutory hybrid benefit formula as defined in § 1.411(a)(13)-1(d)(4).

(h) *Variable Annuity Plan*. The term "Variable Annuity Plan" means any defined benefit plan that includes a variable annuity benefit formula as defined in § 1.411(a)(13)-1(d)(6).

.03 *Definitions applicable solely to Section 403(b) Pre-approved Plans*. For purposes of this revenue procedure, the following definitions apply to Section 403(b) Pre-approved Plans, and do not apply to Qualified Pre-approved Plans:

(1) *Church.* The term "Church" means a church within the meaning of § 3121(w)(3)(A).

(2) *Form Defect.* The term "Form Defect" means:

(a) A provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the form of the § 403(b) plan to fail to satisfy the Section 403(b) Requirements applicable as of the date the plan or amendment is first made effective;

(b) A plan provision that:

(i) Results in the failure of the form of the § 403(b) plan to satisfy the Section 403(b) Requirements by reason of a change in those requirements; or

(ii) Is integral to a Form Defect described in section 4.03(2)(b)(i); or

(c) The absence from a plan of a provision required by (or, if applicable, integral to) a change in the Section 403(b) Requirements.

(3) *Investment Arrangement.* The term "Investment Arrangement" means a funding arrangement under a Section 403(b) Pre-approved Plan. An Investment Arrangement may be an annuity contract under § 1.403(b)-2(b)(2), a custodial account under § 403(b)(7), or a Retirement Income Account.

(4) *Non-qualified Church-Controlled Organization or Non-QCCO.* The term "Non-qualified Church-Controlled Organization" or "Non-QCCO" means a church-controlled tax-exempt organization described in § 501(c)(3) that is not a QCCO.

(5) *Qualified Church-Controlled Organization or QCCO.* The term "Qualified Church-Controlled Organization" or "QCCO" means a church-controlled tax-exempt organization described in § 501(c)(3) that is a qualified church-controlled organization within the meaning of § 3121(w)(3)(B).

(6) *Retirement Income Account.* The term "Retirement Income Account" means a defined contribution program established or maintained by a Church, including an organization described in § 414(e)(3)(A), to provide benefits under § 403(b) for an employee described in § 403(b)(1) (including an employee described in § 414(e)(3)(B)) or his or her beneficiaries, as described in § 403(b)(9).

(7) *Section 403(b) Pre-approved Plan*. The term "Section 403(b) Pre-approved Plan" means a Pre-approved Plan that is intended to meet the Section 403(b) Requirements.

(8) *Section 403(b) Requirements*. The term "Section 403(b) Requirements" means the requirements of § 403(b), including requirements provided in the Code, or in regulations or other guidance published in the IRB.[7]

PART II. REMEDIAL AMENDMENT CYCLES AND REMEDIAL AMENDMENT PERIODS

SECTION 5. REMEDIAL AMENDMENT CYCLE SYSTEM

.01 *Remedial Amendment Cycles*. Under this revenue procedure, every Pre-approved Plan has a recurring Remedial Amendment Cycle. Providers may apply for new Opinion Letters for each Cycle. Adopting Employers of Pre-approved Plans, if otherwise eligible under section 25, may apply for determination letters once each Cycle. Defined contribution Qualified Pre-approved Plans, defined benefit Qualified Pre-approved Plans, and Section 403(b) Pre-approved Plans each have different Cycles. While the same Cycle applies with respect to all defined contribution Qualified Pre-approved Plans, separate Cycles apply with respect to all defined benefit Qualified Pre-approved Plans and with respect to all Section 403(b) Pre-approved Plans.

.02 *Stages of Remedial Amendment Cycle*. For each Cycle, a Provider may apply for an Opinion Letter during the Submission Period, which generally begins at or shortly after the beginning of each Cycle. When the IRS's review of the Pre-approved Plans that are submitted during a Cycle is near completion, the IRS will announce the Employer Adoption Window for that Cycle, during which an Adopting Employer must adopt a newly approved Pre-approved Plan for that Cycle in order to continue to have a Pre-approved Plan. The Employer Adoption Window is also generally the period during which an Adopting Employer of a newly approved Pre-approved Plan may submit for a determination letter, if applicable, pursuant to section 25.[8] The deadline to adopt a newly approved Pre-approved Plan is expected to be a uniform date that will apply to all Adopting Employers. It is expected that the Employer Adoption Window will provide virtually all Employers approximately two years to adopt a newly approved Pre-approved Plan and file for a determination letter, if applicable. A Cycle ends at the end of the last day of the Employer Adoption Window for that Cycle. The next Cycle begins on the following day.

.03 *Cycle 4 Submission Period for defined contribution Qualified Pre-approved Plans*. Pursuant to this revenue procedure, the Submission Period for a Provider of a defined contribution Qualified Pre-approved Plan to apply for a Cycle 4 Opinion Letter begins on February 1, 2024, and ends on January 31, 2025. A Provider of a defined contribution Qualified Pre-approved Plan may still apply for a Cycle 4 Opinion Letter after the Submission Period. See section 16 regarding filings made after the Submission Period.

SECTION 6. REMEDIAL AMENDMENT PERIODS

.01 *In general*. The provisions of this section 6 set forth the Remedial Amendment Periods for Disqualifying Provisions and Form Defects for Pre-approved Plans. A Qualified Pre-approved Plan that does not satisfy a Qualification Requirement or a Section 403(b) Pre-approved Plan that does not satisfy a Section 403(b) Requirement on any day solely as a result of a Disqualifying Provision or Form Defect, as applicable, is considered to have satisfied the Qualification Requirement or

[7] Under this definition, a change in Section 403(b) Requirements includes a statutory, regulatory, or other guidance change that affects a requirement of § 403(b), without regard to whether the change results in a Form Defect or merely permits the adoption of a Discretionary Amendment.

[8] But see, section 25 for when an Adopting Employer may apply for a determination letter outside of the Employer Adoption Window.

Section 403(b) Requirement on that date if, on or before the last day of the Remedial Amendment Period with respect to the Disqualifying Provision or Form Defect, all provisions of the plan that are necessary to satisfy the Qualification Requirement or Section 403(b) Requirement, as applicable, have been adopted and made effective in form and operation for the whole of the period. A Pre-approved Plan for which an Adopting Employer does not correct a Disqualifying Provision or Form Defect within the applicable Remedial Amendment Period is not considered to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable.

.02 *Beginning dates of the Remedial Amendment Period*.

(1) *Disqualifying Provisions*. Pursuant to § 1.401(b)-1(d)(1), unless another time is specified by the Commissioner in guidance published in the IRB, the Remedial Amendment Period for a Disqualifying Provision begins:

(a) In the case of a Disqualifying Provision with respect to a provision of, or absence of a provision from, a new plan, on the date the plan is put into effect;

(b) In the case of a Disqualifying Provision with respect to an amendment to an existing plan (other than a Disqualifying Provision that is related to a change in Qualification Requirements, or that is integral to such a change, as described in section 4.02(1)(b)), on the date the plan amendment is adopted or put into effect, whichever is earlier;

(c) In the case of a Disqualifying Provision with respect to a provision that fails to satisfy the Qualification Requirements by reason of a change in those requirements, on the date on which the change effected by an amendment to the Code or a change in requirements provided in regulations or other guidance published in the IRB became effective with respect to the plan; or

(d) In the case of a Disqualifying Provision with respect to a provision that is integral to a Qualification Requirement that has been changed, on the first day on which the plan was operated in accordance with such provision, as amended.

(2) *Form Defects*. Unless another time is specified by the Commissioner in guidance published in the IRB, the Remedial Amendment Period for a Form Defect begins:

(a) In the case of a Form Defect with respect to a provision of, or absence of a provision from, a new plan, on the date the plan is put into effect;

(b) In the case of a Form Defect with respect to an amendment to an existing plan (other than a Form Defect that is related to a change in Section 403(b) Requirements, or that is integral to such a change, as described in section 4.03(2)(b)), on the date the plan amendment is adopted or put into effect, whichever is earlier;

(c) In the case of a Form Defect with respect to a provision that fails to satisfy the Section 403(b) Requirements by reason of a change in those requirements, on the date on which the change effected by an amendment to the Code or a change in requirements provided in regulations or other guidance published in the IRB became effective with respect to the plan; or

(d) In the case of a Form Defect with respect to a provision that is integral to a Section 403(b) Requirement that has been changed, on the first day on which the plan was operated in accordance with such provision, as amended.

.03 *Expiration of the Remedial Amendment Period*.

(1) *In general*. Provided an Interim Amendment, if applicable, is made timely, and except as otherwise provided in section 6.03(2), by statute, or in regulations or other guidance published in the IRB, the Remedial Amendment Period for a Disqualifying Provision or a Form Defect, as applicable, expires at the later of (a) the end of the Cycle that includes the date on which the

Remedial Amendment Period would have ended if the plan were an individually designed plan,[9] or (b) the end of the first Cycle in which an application for an Opinion Letter that considers the Disqualifying Provision or Form Defect may be submitted. This Remedial Amendment Period applies regardless of whether the Disqualifying Provision or Form Defect relates to a new plan or is due to an amendment to an existing plan (without regard to whether the amendment was required to be adopted), provided that the plan or amendment was adopted timely and in good faith with the intent of complying with the Qualification Requirements or Section 403(b) Requirements, as applicable. The IRS will make the final determination in all cases as to whether a new plan or an amendment to an existing plan was adopted with the good faith intention of complying with the Qualification Requirements or Section 403(b) Requirements, as applicable. If an Interim Amendment is not made timely, then the Remedial Amendment Period for the Disqualifying Provision or the Form Defect, as applicable, expires at the time of the Interim Amendment deadline set forth in section 7.

(2) *Discretionary Amendments made by an Adopting Employer*. For a Discretionary Amendment made by an Adopting Employer (not by the Provider), the Remedial Amendment Period for a Disqualifying Provision or a Form Defect, as applicable, arising from that Discretionary Amendment expires at the end of the Cycle that includes the date on which the Remedial Amendment Period would have ended if the plan were an individually designed plan.

.04 *Interim Amendment requirement*. To promote compliance during a Cycle with a change in Qualification Requirements or Section 403(b) Requirements that affects provisions of a written plan document, a Provider (or Adopting Employer, if applicable) of a Pre-approved Plan must adopt an Interim Amendment with respect to the change within the time period set forth in section 7, unless the Provider (or Adopting Employer, if applicable) reasonably and in good faith determines that no amendment is required.[10] The IRS will make the final determination in all cases as to whether the determination that no Interim Amendment was required is reasonable and in good faith. If an Interim Amendment is not adopted by the end of the time period set forth in section 7, the Provider (or Adopting Employer, if applicable) must correct this failure to timely adopt the Interim Amendment within two years after the end of the time period set forth in section 7; otherwise the Adopting Employer's plan will be treated as an individually designed plan at the end of that two-year period. See section 13.05 for a Pre-approved Plan treated as individually designed.[11]

.05 *Terminating plan*. Notwithstanding any other provision of this section 6, the termination of a Pre-approved Plan ends the Remedial Amendment Period for each Disqualifying Provision or Form Defect of the plan and, thus, generally will shorten the Remedial Amendment Period. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating plan (that is, plan amendments required to be adopted to reflect Qualification Requirements or Section 403(b) Requirements that apply as of the date of termination) must be adopted in connection with the plan termination regardless of whether such requirements are included on a Cumulative List described in section 17, Operational Compliance List described in section 14.09, or Required Amendments List described in Rev. Proc. 2022-40.[12]

.06 *Circumstances in which a Disqualifying Provision or Form Defect may not be corrected retroactively during a Remedial Amendment Period*. If it is not possible to amend a plan retroactively during a Remedial Amendment Period so that all provisions of the plan that are necessary to satisfy Qualification Requirements or Section 403(b) Requirements related to the Disqualifying Provision or Form Defect, as applicable, are made effective in operation for the

[9] For the Remedial Amendment Period rules for individually designed qualified and § 403(b) plans, see Rev. Proc. 2022-40.

[10] See section 14.09 regarding the Operational Compliance List, which identifies changes to Qualification Requirements or Section 403(b) Requirements that are effective during a calendar year.

[11] During the two-year period, the plan will not cease to be a Pre-approved Plan solely because it has failed to adopt the Interim Amendment. Once a plan is treated as an individually designed plan, the plan will be subject to the remedial amendment period rules applicable to individually designed plans and therefore will have a failure to satisfy the Qualification Requirements or Section 403(b) Requirements for failing to have adopted the Interim Amendment (and must use EPCRS to correct that failure in order to adopt a Pre-approved Plan again).

[12] The Required Amendments List establishes the end of the Remedial Amendment Period and the plan amendment deadline for changes in qualification requirements and § 403(b) requirements set forth on the list for qualified individually designed plans and § 403(b) individually designed plans, respectively. The Required Amendments Lists can be found at https://www.irs.gov/retirement-plans/required-amendments-list.

whole Remedial Amendment Period, then the Disqualifying Provision or Form Defect may not be corrected retroactively in order for the form of the plan to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, even if the Adopting Employer adopts a retroactive plan amendment that, in form, appears to satisfy those requirements. An Adopting Employer maintaining a Pre-approved Plan that cannot be corrected by an amendment during the applicable Remedial Amendment Period may be able to correct the Disqualifying Provision or Form Defect under EPCRS. See Rev. Proc. 2021-30, 2021-31 IRB 172 (or its successor).

SECTION 7. PLAN AMENDMENT DEADLINES

.01 *Plan amendment deadline*. Except as otherwise provided in section 7.02, the deadline for the timely adoption of an amendment for a Pre-approved Plan is determined as follows.

(1) *Pre-approved Plan that is not a Governmental Plan*.

(a) *Interim Amendments*. For a Pre-approved Plan that is not a Governmental Plan, a Provider (or the Adopting Employer, if applicable) adopts an Interim Amendment timely if the plan amendment is adopted by the last day of the second calendar year that begins after the issuance of the Required Amendments List (described in Rev. Proc. 2022-40) in which the change in Qualification Requirements or Section 403(b) Requirements appears.

(b) *Discretionary Amendments*. For a Pre-approved Plan that is not a Governmental Plan, in the case of a Discretionary Amendment, an Adopting Employer adopts the amendment timely if the Adopting Employer (or a Provider, if applicable) adopts the plan amendment by the end of the plan year in which the plan amendment is operationally put into effect. An amendment is operationally put into effect when the plan is administered in a manner consistent with the intended plan amendment (rather than existing plan terms). For example, the deadline for adopting a Discretionary Amendment with respect to a calendar year plan that increases participants' accrued benefits and is operationally put into effect during 2023 is December 31, 2023.

(2) *Pre-approved plan that is a Governmental Plan*.

(a) *Interim Amendments*. For a Governmental Plan, in the case of an Interim Amendment, a Provider (or the Adopting Employer, if applicable) adopts the amendment timely if the plan amendment is adopted by the later of:

(i) The last day of the second calendar year that begins after the issuance of the Required Amendments List (described in Rev. Proc. 2022-40) in which the change in Qualification Requirements or Section 403(b) Requirements appears; or

(ii) To the extent any action is required to be taken by the Adopting Employer in order to adopt the Interim Amendment, 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment becomes effective.

(b) *Discretionary Amendments*. For a Governmental Plan, in the case of a Discretionary Amendment, an Adopting Employer (or a Provider, if applicable) adopts the plan amendment timely if the Adopting Employer adopts the plan amendment by the later of:

(i) The end of the plan year in which the plan amendment is operationally put into effect; or

(ii) To the extent any action is required to be taken by the Adopting Employer in order to adopt the Discretionary Amendment, 90 days after the close of the second regular legislative session of the legislative body with authority to amend the plan that begins on or after the date the amendment becomes effective.

.02 *Exceptions to section 7.01 plan amendment deadlines*. Section 7.01 applies unless (1) a statutory provision, or regulations or other guidance published in the IRB, sets forth a deadline to timely adopt a Discretionary Amendment with respect to a plan year that is different from the deadlines under section 7.01, or (2) a statutory provision, or regulations or other guidance published in the IRB, sets forth a deadline to timely adopt a particular type of Interim Amendment that is different from the deadlines under section 7.01.

SECTION 8. SCHEDULES FOR REMEDIAL AMENDMENT CYCLES

The schedules for Pre-approved Plan Cycles are available at https://www.irs.gov/retirement-plans/determination-opinion-and-advisory-letters-6-year-cycle-for-pre-approved-plans-plans. The IRS may revise the schedules to respond to changing circumstances and the needs of Adopting Employers, as necessary. The IRS will announce any such revisions and the timing of the Submission Period for each Cycle, which will be reflected in guidance published in the IRB (either in a revenue procedure, an announcement, or in the applicable Cumulative List (which will be issued prior to a Submission Period)).

PART III. PROCEDURES FOR A PROVIDER APPLYING FOR AN OPINION LETTER

SECTION 9. PROVISIONS REQUIRED IN PRE-APPROVED PLANS

.01 *Provisions required in Pre-approved Plans*.

(1) *Provisions required in Qualified Pre-approved Plans*. Each Qualified Pre-approved Plan must comply with the requirements set forth in section 9.02. Section 9.03 sets forth additional provisions required for a Qualified Pre-approved Plan that is a Standardized Plan. Section 9.04 sets forth additional provisions required for a Qualified Pre-approved Plan that includes an ESOP. Section 9.05 sets forth additional provisions required in a Qualified Pre-approved Plan that includes a Cash Balance Formula.

(2) *Provisions required in Section 403(b) Pre-approved Plans*. Each Section 403(b) Pre-approved Plan must comply with the requirements set forth in section 9.06. Section 9.07 sets forth additional provisions required for a Section 403(b) Pre-approved Plan that is a Standardized Plan. Section 9.08 sets forth additional provisions for a Section 403(b) Pre-approved Plan that is a Retirement Income Account.

.02 *Provisions required in a Qualified Pre-approved Plan.*

(1) *Provider amendments*. Each Qualified Pre-approved Plan must include a procedure for amendments by the Provider, so that a Provider may modify the plan to reflect changes provided by statute, or in regulations or other guidance published in the IRB, and so that any correction of the plan may be applied to all Adopting Employers. The procedure for amendments by the Provider also must state that, for purposes of the Pre-approved Plan program, the Provider will no longer have the authority to amend the plan on behalf of the Adopting Employer as of the date the plan is treated as an individually designed plan pursuant to section 13.05.

(2) *Anti-cutback and vesting schedule change provision*. Each Qualified Pre-approved Plan must specifically provide for the protection required under § 411(a)(10) and (d)(6) in the event that the Adopting Employer amends the plan (including by revising the options selected in the adoption agreement or adopting a new plan). A plan may not be amended in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any Adopting Employer, unless the amendment is permitted under § 1.401(a)-4 and either § 1.411(d)-3 or 1.411(d)-4. See section 9.02(5) for anti-cutback plan provisions that are required in situations in which a plan becomes top-heavy. See § 411(d)(6)(C) and § 1.411(d)-4, Q&A-2(d), for certain exceptions applicable to ESOPs.

(3) *Adopting Employer modification to satisfy §§ 415 and 416*. Each Qualified Pre-approved Plan must provide that plan provisions may be amended by the Adopting Employer to the extent necessary to satisfy § 415 or 416 because of the required aggregation of multiple plans under these sections. Generally, a space should be reserved in the plan with instructions for the Adopting Employer to add such language as necessary to satisfy §§ 415 and 416, if applicable. In addition, a space must be provided in the plan for the Adopting Employer to specify the interest rate and mortality tables used for purposes of establishing the present value of accrued benefits in order to compute the top-heavy ratio under § 416, if applicable. Such a space must be included in both defined contribution plans and defined benefit plans. These provisions must be included in the adoption agreement of an Adoption Agreement Plan.

(4) *Aggregation for § 415 compliance*. Each Qualified Pre-approved Plan must provide for aggregation of all of an Adopting Employer's defined contribution plans and all of an Adopting Employer's defined benefit plans as necessary to satisfy § 415(b) and (c) (each as modified by § 415(h)), and § 415(f).

(5) *Top-heavy requirements*. Each Qualified Pre-approved Plan must either provide that all of the additional requirements applicable to top-heavy plans (described in § 416) apply at all times, or provide that such requirements apply automatically if the plan is top-heavy, regardless of how the options in the plan are completed. In the latter case, all of the requirements for determining whether the plan is top-heavy must be included in the plan. (See Questions T-35 and T-36 of § 1.416-1.) In addition, a plan that is subject to the top-heavy requirements and that does not include vesting rules for all years that are at least as favorable to participants as those set forth in § 416(b) must specifically provide that any vesting that occurs while the plan is top-heavy will not be reduced if the plan ceases to be top-heavy.

(6) *Provision regarding reliance*. Each Qualified Pre-approved Plan must include, in close proximity to the signature line, a statement that describes the limitations on Adopting Employer reliance on an Opinion Letter. See section 12.

(7) *Provision regarding conflicting trust provisions*. Each Qualified Pre-approved Plan must include a statement that the provisions of the single plan document or basic plan document override any conflicting provision included in Trust or Custodial Account Documents used with the plan.[13]

(8) *Dated signatures and adoption agreement provisions*. Each Qualified Pre-approved Plan must include an Adopting Employer signature and date line. The plan also must include a statement that the Provider will inform the Adopting Employer of any amendments made to the plan or of the discontinuance of the plan. The Adopting Employer must sign and date the adoption agreement or signature page of the plan when it first adopts the plan and must complete, sign, and date a new adoption agreement or signature page if the plan has been restated. In addition, the Adopting Employer must complete a new dated adoption agreement or signature page if the Adopting Employer modifies any prior elections or makes new elections. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement or single plan document, or the restatement, amendment, or modification

[13] Accordingly, if a plan is operated in a manner that is inconsistent with a provision of the single plan document or basic plan document, the plan will incur an operational failure even if the plan is operated in a manner consistent with a provision of a Trust or Custodial Account Document that conflicts with the provision of the single plan document or basic plan document.

thereof, by the Adopting Employer. In the case of an Adoption Agreement Plan, the adoption agreement must state that it is to be used with only one basic plan document and must identify that document. In addition, the adoption agreement must include a cautionary statement to the effect that the failure to properly complete the adoption agreement may result in failure of the form of the plan to meet the Qualification Requirements.

(9) *Provider contact information*. Each Qualified Pre-approved Plan must include the Provider's name, address, and telephone number (or a space for the address and telephone number of the Provider's authorized representative) for inquiries by Adopting Employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the Opinion Letter. Each Qualified Pre-approved Plan may provide additional contact information (such as an email address).

(10) *Definition of employee*

(a) *In general*. Each Qualified Pre-approved Plan must define an employee as any employee of the Adopting Employer maintaining the plan or of any Related Employer. The definition of employee also must include any individual treated under § 414(n) or (o) as an employee of any Employer described in the preceding sentence.

(b) *ESOPs*. With respect to a Qualified Pre-approved Plan that includes an ESOP, employees who meet the definition of employee in section 9.02(10)(a) may not participate in the ESOP unless they are employed by the corporation that issues the stock held by the ESOP or by any corporation that is a member of the same controlled group of corporations (within the meaning of § 1563(a), as modified by § 409(l)(4)(B) and (C) and as determined without regard to § 1563(a)(4) and (e)(3)(C)). For all other purposes under the ESOP, including nondiscrimination and coverage, employees who meet the definition of employee in section 9.02(10)(a) are treated as employees.

(11) *Crediting of service taking into account § 414(b), (c), (m), (n), and (o)*. Each Qualified Pre-approved Plan must credit all service with any Related Employer as service with the Adopting Employer maintaining the plan. In addition, in the case of an individual treated under § 414(n) or (o) as an employee of any Employer described in the previous sentence, service with that Employer must be credited to such individual.

(12) *Uniformed Services Employment and Reemployment Rights Act and § 414(u)*. Each Qualified Pre-approved Plan must include a provision reflecting the requirements of § 414(u). See Rev. Proc. 96-49, 1996-2 CB 369.

(13) *Normal retirement age*. Each Qualified Pre-approved Plan that is a pension plan and that is not a Governmental Plan must have a normal retirement age that is not less than age 55.

.03 *Additional provisions required in a Qualified Pre-approved Plan that is intended to be a Standardized Plan*. Each Qualified Pre-approved Plan that is intended to be a Standardized Plan must meet the following requirements:

(1) *Plan benefits all employees*. Under the provisions governing eligibility and participation, the plan by its terms must benefit all employees (regardless of whether any Employer is treated as operating separate lines of business under § 414(r)) except those employees that may be excluded under § 410(a)(1) or (b)(3). The plan may provide options as to whether some or all of the employees described in § 410(a)(1) or (b)(3) are excluded, provided that the criteria for excluding employees described in § 410(a)(1) or (b)(3) apply uniformly to all employees. A Standardized Plan generally may not deny an accrual or allocation to an employee eligible to participate merely because the employee is not an active employee on the last day of the plan year or has failed to complete a specified number of hours of service during the year. However, the plan may deny an allocation or accrual to an employee who is eligible to participate if the employee terminates service during the plan year with not more than 500 hours of service and is not an active employee on the last day of the plan year. A Qualified Pre-approved Plan will not fail to satisfy the requirements of this section 9.03(1) merely because the plan provides, either as the result of an elective provision or

by default in the absence of an election to the contrary, that individuals who become employees, within the meaning of section 9.02(10)(a), as the result of a transaction described in § 410(b)(6)(C) are excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the earlier of the last day of the first plan year beginning after the date of the transaction or the date of a significant change in the plan or in the coverage of the plan. A transaction described in § 410(b)(6)(C) is an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(2) *Eligibility is not more favorable for highly compensated employees*. The eligibility requirements under the plan are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(3) *Allocations and benefits are based on total compensation*. Under the plan, allocations, in the case of a defined contribution plan (other than any cash or deferred arrangement portion), or benefits, in the case of a defined benefit plan, are determined on the basis of total compensation. The plan must provide that, for purposes of allocation, the definition of total compensation is "participant's compensation" within the meaning of § 415(c)(3), or compensation that otherwise satisfies § 414(s) and § 1.414(s)-1(c).

(4) *Section 401(a)(4) safe harbors*. Unless the plan is a target benefit plan or a § 401(k) and/or 401(m) plan, the plan must satisfy, by its terms, one of the design-based safe harbors described in § 1.401(a)(4)-2(b)(2) (taking into account § 1.401(a)(4)-2(b)(4)) or § 1.401(a)(4)-3(b)(3), (4), or (5) (taking into account § 1.401(a)(4)-3(b)(6)).

(5) *Benefits, rights and features are available to all employees*. All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan. (For information regarding benefits, rights, and features and the determination of current availability, see § 1.401(a)(4)-4.)

(6) *Past service credit satisfies safe harbor standard*. Any past service credit under the plan satisfies the safe harbor in § 1.401(a)(4)-5(a)(3).

(7) *Hardship distribution satisfies safe-harbor standards*. Any hardship distribution satisfies the safe harbor standards in § 1.401(k)-1(d)(3).

.04 *Additional provisions required in a Qualified Pre-approved Plan that includes an ESOP*. Each Qualified Pre-approved Plan that includes an ESOP feature must include the following provisions:

(1) *Identification as an ESOP*. A statement that the plan is an employee stock ownership plan within the meaning of § 4975(e)(7) and is designed to invest primarily in employer stock;

(2) *Definition of employer stock*. A provision that defines employer stock in accordance with § 409(l)(1) or (2);

(3) *Diversification*. Provisions that meet the diversification requirements of § 401(a)(28)(B) or, if applicable, § 401(a)(35);

(4) *Valuation, independent appraiser, and allocation of earnings*. Provisions that meet the valuation, independent appraiser, and allocation of earnings requirements set forth in § 401(a)(28)(C), § 54.4975-11(d)(5), and Rev. Rul. 80-155, 1980-1 CB 84;

(5) *Voting*. Provisions that meet the voting requirements of § 409(e);

(6) *Right-to-demand and put-option*. Provisions that meet the right-to-demand and put-option requirements of § 409(h), to the extent applicable;

(7) *Distribution*. Provisions that meet the distribution requirements of § 409(o);

(8) *Exempt loans*. Provisions that set forth the requirements relating to exempt loans as described in § 4975(d)(3), § 54.4975-7, and § 54.4975-11(c);

(9) *Annual addition*. Provisions that meet the ESOP annual addition requirements described in § 1.415(c)-1(f) and, if the ESOP is maintained by an employer that is a C corporation (as defined in § 1361(a)(2)), the requirements described in § 415(c)(6);

(10) *Forfeitures*. If an ESOP provides for forfeitures, provisions that meet the forfeiture requirement of § 54.4975-11(d)(4);

(11) *S corporation employer securities*. If an ESOP holds employer securities consisting of stock in an S corporation (as defined in § 1361(a)(1)), provisions that meet the requirements of § 409(p) and § 1.409(p)-1;

(12) *C corporation employers*. If an ESOP is maintained by employers that are C corporations, provisions that meet the requirements of § 409(n); and

(13) *Identification as C or S corporation*. Provisions (in the plan document or adoption agreement) that identify the Adopting Employer as either a C corporation or an S corporation.

(14) *Definition of employee*. See section 9.02(10)(b).

.05 *Additional provisions required in a Qualified Pre-approved Plan that includes a Cash Balance Plan*

(1) *Prior benefit structures protected*. All Cash Balance Plans must ensure compliance with the anti-cutback provisions of § 411(d)(6). To receive an Opinion Letter under this revenue procedure, a Cash Balance Plan must provide that, at all times, any benefits accrued prior to the Adopting Employer's adoption of the Pre-approved Plan (and other benefits protected under § 411(d)(6)(B)) are protected. A Cash Balance Plan that was the subject of a Conversion Amendment must comply with the provisions of § 411(b)(5)(B)(iii) and § 1.411(b)(5)-1(c). However, an Opinion Letter will not be issued for a plan that uses an opening hypothetical account balance as described in § 1.411(b)(5)-1(c)(3) to meet the requirements of § 1.411(b)(5)-1(c).

(2) *Step-rate structure of Principal Credits*. Cash Balance Plans that include any structure of Principal Credits that increase with age, service, or any other measure during a participant's employment must be definitely determinable, operationally nondiscriminatory, and at all times in compliance with the "133 1/3 percent rule" of § 411(b)(1)(B) and the regulations thereunder. Employers may not rely on the Opinion Letter with respect to the requirements of § 411(b)(1) for increasing Principal Credit schedules that are created by Adopting Employers by completing blanks in the plan formula, but may rely on the Opinion Letter with respect to the requirements of § 411(b)(1) for increasing Principal Credit schedules specified in the Pre-approved Plan document.

.06 *Provisions required in a Section 403(b) Pre-approved Plan.*

(1) *Provider amendments*. Each Section 403(b) Pre-approved Plan must include a procedure for amendments by the Provider, so that changes in the Code, or in regulations or other guidance published in the IRB, and any correction of the plan may be applied to all Adopting Employers. The procedure for amendments by the Provider also must state that, for purposes of the Pre-approved Plan program, the Provider will no longer have the authority to amend the plan on behalf of the Adopting Employer as of the date the plan is treated as an individually designed plan pursuant to section 13.05.

(2) *Adopting Employer modification to satisfy § 415*. Each Section 403(b) Pre-approved Plan must provide that plan provisions may be amended by the Adopting Employer to the extent necessary

to satisfy § 415 because of the required aggregation of multiple plans under these sections. Generally, a space should be reserved in the plan with instructions for the Adopting Employer to add such language as necessary to satisfy § 415. These provisions must be included in the adoption agreement of an Adoption Agreement Plan.

(3) *Aggregation for § 415 compliance*. Each Section 403(b) Pre-approved Plan must provide for aggregation of all of an Adopting Employer's defined contribution plans as necessary to satisfy § 415(c) (as modified by § 415(h)), (f), and (k)(4).

(4) *Provision regarding reliance*. Each Section 403(b) Pre-approved Plan must include, in close proximity to the signature line, a statement that describes the limitations on Adopting Employer reliance on an Opinion Letter. See section 12.

(5) *Provision regarding conflicting provisions in Investment Arrangements or other documents*. Each Section 403(b) Pre-approved Plan must provide that, in the event of any conflict between the terms of the single plan document or the basic plan document and adoption agreement, as applicable, and the terms of Investment Arrangements under the plan (or of any other documents incorporated by reference into the plan), the terms of the single plan document or the basic plan document and adoption agreement, as applicable, will govern. See section 12.03(5) for the effect on reliance in the event of a conflict. An Employer that adopts a Section 403(b) Pre-approved Plan should take this requirement into account in considering Investment Arrangements to be offered under the plan, as well as other documents that may be incorporated by reference. Since the terms of Investment Arrangements under a Section 403(b) Pre-approved Plan must be incorporated by reference into the plan and those arrangements may not have any provisions that are inconsistent with § 403(b), plan terms that are required in a single plan document or the basic plan document and adoption agreement, as applicable, under this section 9 should not create a conflict with the terms of the Investment Arrangements under a properly drafted Section 403(b) Pre-approved Plan. If there nevertheless is a conflict, the terms of the single plan document or the basic plan document and adoption agreement, as applicable, must control.[14]

(6) *Dated signatures and adoption agreement provisions*. Each Section 403(b) Pre-approved Plan must include an Adopting Employer signature and date line. The plan also must include a statement that the Provider will inform the Adopting Employer of any amendments made to the plan or of the discontinuance of the plan. The Adopting Employer must sign and date the adoption agreement or signature page of the plan when it first adopts the plan and must complete, sign, and date a new adoption agreement or signature page if the plan has been restated. In addition, the Adopting Employer must complete a new dated adoption agreement or signature page if it modifies any prior elections or makes new elections. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement or single plan document, or the restatement, amendment, or modification thereof, by the Adopting Employer. In the case of an Adoption Agreement Plan, the adoption agreement must state that it is to be used with only one basic plan document and must identify that document. In addition, the adoption agreement must include a cautionary statement to the effect that the failure to properly complete the adoption agreement may result in failure of the form of the plan to meet the Section 403(b) Requirements.

(7) *Provider contact information*. Each Section 403(b) Pre-approved Plan must include the Provider's name, address, and telephone number (or a space for the address and telephone number of the Provider's authorized representative) for inquiries by Adopting Employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the Opinion Letter. Each Section 403(b) Pre-approved Plan may provide additional contact information (such as an email address).

[14] Accordingly, if a plan is operated in a manner that is inconsistent with a provision of the single plan document or basic plan document, the plan will incur an operational failure even if the plan is operated in a manner consistent with a provision of a Trust or Custodial Account Document that conflicts with the provision of the single plan document or basic plan document.

(8) *Definition of employee*. Each Section 403(b) Pre-approved Plan must define an employee as any employee of the Adopting Employer maintaining the plan or any other Related Employer.

(9) *Crediting of service taking into account § 414(b), (c), (m), and (o)*. Each Section 403(b) Pre-approved Plan must credit all service with any Related Employer as service with the Adopting Employer maintaining the plan.

(10) *Uniformed Services Employment and Reemployment Rights Act and § 414(u)*. Each Section 403(b) Pre-approved Plan must include a provision reflecting the requirements of § 414(u). See Rev. Proc. 96-49.

(11) *Inclusion of Investment Arrangements*. A Section 403(b) Pre-approved Plan includes the Investment Arrangements under the plan in addition to the single plan document or the basic plan document and adoption agreement. Every Section 403(b) Pre-approved Plan must therefore incorporate by reference the terms of the Investment Arrangements under the plan. While the IRS's review of an application for an Opinion Letter is limited to the terms of the single plan document or the basic plan document and adoption agreement, as applicable, the terms of Investment Arrangements and other documents that are incorporated by reference in the plan must satisfy applicable law and may not have any provisions that are inconsistent with the Section 403(b) Requirements. For example, if the forms of annuity benefit available under a plan are described in the Investment Arrangements under the plan, the terms of the Investment Arrangements must satisfy, if applicable to the plan, the joint and survivor annuity requirements of section 205 of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 82954, and any applicable related rules, such as rules relating to transfers of benefits that are subject to the joint and survivor annuity requirement, and may not have any provisions that are inconsistent with the Section 403(b) Requirements.

(12) *Plan must satisfy Section 403(b) Requirements independent of Investment Arrangements*. The IRS's review of a Section 403(b) Pre-approved Plan will consider only the terms of the single plan document or the basic plan document and adoption agreement, as applicable. Accordingly, the provisions described in this section 9.06 (and sections 9.07 and 9.08, if applicable) must be included in the single plan document or the basic plan document or adoption agreement, as appropriate, of every Section 403(b) Pre-approved Plan, regardless of the terms of any Investment Arrangements under the plan or any other documents that may be incorporated by reference. This does not preclude the adoption of a Section 403(b) Pre-approved Plan (including a Standardized Plan) if different Investment Arrangements under a plan have different features or prevent the inclusion of additional provisions in the terms of the Investment Arrangements under the plan or other documents incorporated by reference. It also does not prevent a Section 403(b) Pre-approved Plan from using Investment Arrangements that are more restrictive than required by § 403(b) or the single plan document or the basic plan document and adoption agreement. However, the terms of the single plan document or the basic plan document and adoption agreement, as applicable, must satisfy the requirements of applicable law and this section 9.06 (and sections 9.07 and 9.08, if applicable) independent of any Investment Arrangements under the plan or any other documents incorporated by reference. For example, an Adopting Employer's Adoption Agreement Plan may offer both Investment Arrangements that permit loans and Investment Arrangements that do not permit loans. In this case, (1) the basic plan document must include provisions reflecting the Section 403(b) Requirements, including §§ 1.403(b)-6 and 1.72(p)-1, and (2) the basic plan document and adoption agreement, as completed by the Adopting Employer, must provide that, to the extent permitted by the terms governing the applicable Investment Arrangement, participant loans are available. Similarly, for example, if an Adopting Employer's Single Document Plan offers both Investment Arrangements that permit loans and Investment Arrangements that do not permit loans, then the single plan document must include provisions reflecting the Section 403(b) Requirements, including §§ 1.403(b)-6 and 1.72(p)-1, and must provide that, to the extent permitted by the terms governing the applicable Investment Arrangement, participant loans are available.

(13) *Vesting*. A Section 403(b) Pre-approved Plan may provide a vesting schedule for contributions other than elective deferrals, rather than provide for full and immediate vesting of the contributions. Except in the case of certain Nonstandardized Plans described in this section 9.06(13), contributions other than elective deferrals (and earnings thereon) under a Section 403(b) Pre-approved Plan must vest at least as rapidly as would be required to satisfy the minimum vesting requirements of § 411(a)(2)(B) applicable to a qualified plan under § 401(a), even if the plan is not subject to the parallel minimum vesting requirements under section 203 of ERISA. A Nonstandardized Plan that is designed to be used for a plan that is not subject to the minimum vesting requirements of section 203 of ERISA (for example, a Governmental Plan) is not required to provide that contributions other than elective deferrals will vest at least as rapidly as would be required to satisfy § 411(a)(2)(B). Every Section 403(b) Pre-approved Plan that provides a vesting schedule for contributions other than elective deferrals must also satisfy the following requirements: (1) the portion of a participant's interest in the plan that is not vested must be maintained in a separate account for the participant that is treated as a separate contract to which § 403(c) (or, in case of a custodial account, § 401(a)) applies, (2) as amounts in the participant's separate account become nonforfeitable, they must be removed from the separate account and treated as amounts held under a § 403(b) plan, to the extent permitted under § 1.403(b)-3(d)(2)(ii), and (3) all nonvested amounts remaining in the participant's separate account must become nonforfeitable upon termination of the plan.

(14) *Appendix of administrative responsibilities*. Every Section 403(b) Pre-approved Plan must include an appendix to the plan that will be used to identify the parties responsible for the various administrative functions under the plan that are necessary to comply with the Section 403(b) Requirements and other tax requirements, including the requirements that apply on the basis of the aggregated Investment Arrangements issued to a participant under the plan, and will list all the vendors of Investment Arrangements approved for use under the plan. Changes to the information in the required appendix will not affect the Adopting Employer's ability to rely on an Opinion Letter.

(15) *Identifying category of Employer and plan*. The adoption agreement or single plan document of every Section 403(b) Pre-approved Plan must satisfy the following requirements:

(a) Although a single adoption agreement may be made available to different categories of Employers, the adoption agreement must require the Adopting Employer to show its status as an Employer eligible to maintain a § 403(b) plan by indicating whether the Adopting Employer is:

(i) A government-sponsored educational organization described in § 170(b)(1)(A)(ii) (a public school);

(ii) A tax-exempt organization described in § 501(c)(3) that is exempt from tax under § 501(a);

(iii) An employer of a minister described in § 414(e)(5)(A); or

(iv) A minister described in § 414(e)(5)(A).

(b) The adoption agreement or single plan document must require the Adopting Employer to show its status with respect to the nondiscrimination requirements in § 1.403(b)-5 by indicating whether the plan is:

(i) A Governmental Plan;

(ii) A plan of an Adopting Employer that is a Church or QCCO for employees of the Church or QCCO; or

(iii) A plan not described in (i) or (ii) of this section 9.06(15)(b).

(16) *Separate Section 403(b) Pre-approved Plan for Retirement Income Account*. A single Section 403(b) Pre-approved Plan may not be used for both a Section 403(b) Pre-approved Plan that is a Retirement Income Account and a Section 403(b) Pre-approved Plan that is not a Retirement Income Account. Thus, if a Provider also has a Section 403(b) Pre-approved Plan that is not a Retirement Income Account, a separate Section 403(b) Pre-approved Plan is required for a plan that is intended to constitute a Retirement Income Account.

.07 *Additional provisions required in a Section 403(b) Pre-approved Plan that is intended to be a Standardized Plan*. Each Section 403(b) Pre-approved Plan that is intended to be a Standardized Plan must meet the following requirements:

(1) *Hardship distribution satisfies safe-harbor standards*. Any hardship distribution satisfies the safe harbor standards in the regulations under § 401(k).

(2) *Section 415 treatment of § 403(b) annuity contracts*. Under § 1.415(f)-1(a)(3), all § 403(b) annuity contracts purchased by an Employer for a participant are treated as one § 403(b) annuity contract for purposes of § 415. Section 1.415(f)-1(f)(2) includes a special rule providing that, if a participant on whose behalf a § 403(b) annuity contract is purchased is in control of any employer for a limitation year, then the § 403(b) annuity contract is aggregated with all other defined contribution plans maintained by that employer. For these purposes, a custodial account and a Retirement Income Account are each treated as a § 403(b) annuity contract. Every Section 403(b) Pre-approved Plan that is intended to be a Standardized Plan must include plan language reflecting these rules. In particular, the plan language must coordinate the application of the § 415 limits to all the Standardized Plans of the Adopting Employer and its Related Employers so that, if the only § 403(b) plans maintained by the Adopting Employer and its Related Employers are Standardized Plans, then the plans will satisfy § 415(c) and § 1.415(f)-1(a)(3) without requiring the addition of overriding plan language.

(3) *Elective deferrals only or additional requirements for contributions that are not elective deferrals*. A Section 403(b) Pre-approved Plan that is intended to be a Standardized Plan must provide either:—

(a) That the only contributions that an Adopting Employer may elect to provide under the plan are elective deferrals, or

(b) With respect to any contributions other than elective deferrals, the plan must satisfy all of the following requirements:

(i) *Plan benefits all employees*. Under the provisions governing eligibility and participation, the plan by its terms must benefit all employees except those employees that may be excluded under § 1.410(b)-6 and employees listed in § 1.403(b)-5(b)(4)(ii)(D) or (E). The plan may provide options as to whether some or all of the employees described in § 1.410(b)-6 are excluded, provided that the criteria for excluding employees described in § 1.410(b)-6 apply uniformly to all employees. A Standardized Plan generally may not deny an allocation to an employee eligible to participate merely because the employee is not an active employee on the last day of the plan year or has failed to complete a specified number of hours of service during the year. However, the plan may deny an allocation to an employee who is eligible to participate if the employee terminates service during the plan year with not more than 500 hours of service and is not an active employee on the last day of the plan year. A plan will not fail to satisfy the requirements of this section 9.07(3) with respect to contributions other than elective deferrals merely because the plan provides, either as the result of an elective provision or by default in the absence of an election to the contrary, that individuals who become employees, within the meaning of section 9.06(8), as the result of a transaction described in § 410(b)(6)(C) are excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the earlier of the last day of the first plan year beginning after the date of the transaction or the date of a significant change in the plan or in the coverage of the plan. A transaction described in § 410(b)(6)(C) is an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(ii) *Eligibility is not more favorable for highly compensated employees*. The eligibility requirements under the plan are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(iii) *Allocations are based on total compensation*. Under the plan, allocations (other than any elective deferral portion) are determined on the basis of total compensation. The plan must provide that, for purposes of allocations, the definition of total compensation is "participant's compensation" within the meaning of § 415(c)(3), or compensation that otherwise satisfies § 414(s) and § 1.414(s)-1(c).

(iv) *Section 401(a)(4) safe harbors*. If the plan provides for contributions other than elective deferrals and matching contributions, the plan must satisfy one of the design-based safe harbors described in § 1.401(a)(4)-2(b)(2) with respect to the contributions.

(v) *Benefits, rights and features are available to all employees*. All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan. (For information regarding benefits, rights, and features and the determination of current availability, see § 1.401(a)(4)-4.)

.08 *Additional provisions required in a Section 403(b) Pre-approved Plan intended to be a Retirement Income Account*. Each Section 403(b) Pre-approved Plan that is intended to be a Retirement Income Account must meet the following requirements:

(1) *Identification as Retirement Income Account*. The plan must state the intent to be a Retirement Income Account in accordance with § 1.403(b)-9(a)(2)(ii).

(2) *Separate accounting, investment performance, and exclusive benefit*. The terms of the plan must satisfy the separate accounting, investment performance, and exclusive benefit requirements of § 1.403(b)-9(a)(2)(i).

(3) *Life annuity requirements*. If the plan provides for benefits in the form of a life annuity, the plan must satisfy the present value and benefit guarantee requirements of § 1.403(b)-9(a)(5), and the present value must be based on reasonable actuarial assumptions that are either set forth in the plan or incorporated by reference into the plan.

(4) *Nondiscrimination requirements*. The terms of the plan must set forth the nondiscrimination requirements of § 403(b)(12). The plan also must state that the nondiscrimination requirements are applied to any employee other than an employee of a QCCO or Church.

(5) *Multiple Employers that are not Related Employers*. In the case of multiple Employers that are not Related Employers participating in the plan, each Adopting Employer must identify whether it is a Church, QCCO, non-QCCO, or minister.

SECTION 10. OPINION LETTERS - SCOPE

.01 *General limits on Opinion Letters*. An Opinion Letter constitutes a determination that the form of a Pre-approved Plan satisfies the Qualification Requirements or the Section 403(b) Requirements, as applicable, subject to the requirements and limitations of this revenue procedure. An Opinion Letter is issued only to a Provider or Mass Submitter. The IRS's review of a Provider's or Mass Submitter's application for an Opinion Letter for a Pre-approved Plan will consider only the terms of the single plan document or the basic plan document and adoption agreement, as applicable. The IRS's review will not consider, and an Opinion Letter will not express an opinion with respect to, the terms of any Trust or Custodial Account Document for (or Investment Arrangement under) the plan of any Adopting Employer or any other documents that may be incorporated by reference into an Adopting Employer's plan. An Opinion Letter for a Qualified Pre-approved Plan does not constitute a ruling or a determination as to the exempt status of related trusts or custodial accounts under § 501(a).

.02 *Plans for which an Opinion Letter will not be issued*.

(1) For a Pre-approved Plan, an Opinion Letter will not be issued for:

(a) A plan under which the § 415 limitations are incorporated by reference;

(b) A plan under which the actual contribution percentage (ACP) test under § 401(m)(2) is incorporated by reference;

(c) A Nonstandardized Plan that provides for hardship distributions under circumstances not described in the safe harbor standards in the regulations under § 401(k), unless these distributions are subject to nondiscriminatory and objective criteria included in the plan;

(d) A plan that includes blanks or fill-in provisions for the Adopting Employer to complete, unless the provisions have parameters that preclude the Adopting Employer from completing the provisions in a manner that could violate the Qualification Requirements or Section 403(b) Requirements, as applicable;

(e) A plan designed to satisfy the provisions of § 105;

(f) A plan that includes § 401(h) accounts; or

(g) A plan that includes purported fail-safe provisions for § 401(a)(4) or the average benefit test under § 410(b).

(2) For a Qualified Pre-approved Plan, in addition to the circumstances described in section 10.02(1), an Opinion Letter will not be issued for:

(a) A multiemployer plan;

(b) A single-employer collectively bargained plan (however, this rule does not preclude an employer from covering employees of the employer that are included in a unit covered by a collective bargaining agreement if it is adopting a Pre-approved Plan for its non-bargaining employees or from adopting a Pre-approved Plan pursuant to such agreement as a single-employer plan that covers only bargaining employees of the employer);

(c) A stock bonus plan other than an ESOP;

(d) An ESOP that is a combination of a stock bonus plan and a money purchase plan;

(e) An ESOP that provides for the holding of preferred employer stock, including an ESOP that holds stock described in § 409(l)(3);

(f) A Statutory Hybrid Plan with any of the following features:

(i) A statutory hybrid benefit formula that is not a Cash Balance Formula, such as a formula under which benefits are determined by reference to the current value of an accumulated percentage of the participant's average compensation (a Pension Equity Plan or PEP);

(ii) A provision under which Interest Credits are based on rates of return that are subject to participant choice, or any rate that does not meet the requirements of § 1.411(b)(5)-1(d);

(iii) A provision under which a rate used to determine Interest Credits is based on the actual rate of return on aggregate assets of the plan described in § 1.411(b)(5)-1(d)(5)(ii)(A) or the rate of return on certain regulated investment companies (RICs) described in § 1.411(b)(5)-1(d)(5)(iv) (unless the plan provides that the rate used to determine Interest Credits is equal to the actual rate of return on the aggregate assets of the plan), or is based on or equal to the actual rate of return on a subset of plan assets (as described in § 1.411(b)(5)-1(d)(5)(ii)(B));

(iv) A Conversion Amendment, except for plans providing that, after the effective date of the Conversion Amendment, a participant's accrued benefit is equal to the sum of accruals under the prior formula plus the benefit based on the Cash Balance Formula ("A+B Conversion");

(v) A provision that uses the 3-percent accrual rule or the fractional accrual rule under § 411(b)(1)(A) or (C) to satisfy the accrued benefit requirements under § 411(b)(1);

(vi) A provision for funding exclusively through insurance contracts as described in § 412(e)(3); or

(vii) A provision for Offsets of benefits accrued under another plan (the "offsetting plan"), unless:

(A) The Offset is applied on an accumulated basis at the participant's annuity starting date, rather than offsetting each year's Principal Credit by that year's accruals or contributions under the offsetting plan;

(B) If plan provisions are consistent with treatment of the Cash Balance Formula as a lump sum-based benefit formula under § 1.411(a)(13)-1(d)(3), then the offsetting plan is a defined contribution plan, and the Offset is applied by subtracting the account balance under the defined contribution plan from the hypothetical account balance under the Cash Balance Formula prior to converting the balance to an annuity benefit;

(C) The Offset satisfies the safe-harbor requirements of § 1.401(a)(4)-8(d) (except that the Offset can be computed by subtracting the account balance under the offsetting plan from the hypothetical account balance under the Cash Balance Formula), including the requirement that the offsetting plan may not be a § 401(k) plan or a § 401(m) plan;

(D) For the purpose of determining the amount of the Offset against any defined benefit formula, the Offset reflects the value of any distributions from the offsetting plan made prior to the participant's annuity starting date under the Cash Balance Plan;

(E) The Offset is applied on a uniform basis for all participants;

(F) The plan provides a minimum accrued benefit to participants (expressed as a lifetime annuity commencing at normal retirement age) of no less than 0.5% of compensation for each year of credited service, which is not reduced by the Offset applied to other formulas under the plan;

(G) Accrued benefits, considered in conjunction with defined contribution accounts subject to any Offset, meet nondiscrimination requirements; and

(H) The amount of the Offset, including any procedures and actuarial assumptions for converting a defined contribution account balance (under a specifically named defined contribution plan) to an annuity amount, is definitely determinable;

(g) A plan described in § 414(k) (relating to a defined benefit plan that provides a benefit derived from employer contributions that is based partly on the balance of the separate account of a participant);

(h) A target benefit plan, other than a plan that, by its terms, satisfies each of the safe harbor requirements described in § 1.401(a)(4)-8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)-8(b)(3)(ii) through (vii);

(i) A governmental defined benefit plan that includes a "deferred retirement option plan" (DROP) feature, or similar provisions in which a participant earns additional benefits for continued employment post-normal retirement age in the form of credits to a separate account (including a cash balance account or other arrangement) under the same plan;

(j) A plan under which the actual deferral percentage (ADP) test under § 401(k)(3) is incorporated by reference;

(k) A fully insured § 412(e)(3) plan, other than a non-statutory hybrid plan that by its terms satisfy the safe harbor in § 1.401(a)(4)-3(b)(5);

(l) An eligible combined plan within the meaning of § 414(x)(2); or

(m) A Variable Annuity Plan.

(3) For Section 403(b) Pre-approved Plans, in addition to the circumstances described in section 10.02(1), an Opinion Letter will also not be issued for:

(a) A TEFRA church defined benefit plan (see § 1.403(b)-10(f)(2)); or

(b) A plan grandfathered under Rev. Rul. 82-102, 1982-1 CB 62.

.03 *Issues an Opinion Letter will not consider.*

(1) *Title I issues*. Except as otherwise provided in guidance, an Opinion Letter does not express an opinion, and may not be relied upon, with respect to whether any plan is subject to the requirements of Title I of ERISA or whether a plan satisfies any of those requirements.

(2) *Issues related to a Section 403(b) Pre-approved Plan's coverage of multiple employers that are not Related Employers*. An Opinion Letter does not express an opinion, and may not be relied upon, with respect to whether the plan satisfies § 403(b)(15) or any other requirements that apply related to a plan's coverage of multiple employers that are not Related Employers.

.04 *IRS discretion to decline to issue an Opinion Letter*. The IRS may, in its discretion, decline to issue an Opinion Letter for other types of plans or issues not described in this section 10.

.05 *Nonapplicability of this revenue procedure to IRAs (including traditional IRAs, Roth IRAs, SEPs, and Simple IRAs)*. An Opinion Letter will not be issued under this revenue procedure for prototype plans intended to meet the requirements for individual retirement arrangements under § 408.[15]

SECTION 11. ELIGIBILITY FOR THE CYCLE SYSTEM

.01 *Initial eligibility for the Cycle system*.

[15] See the Form 5305 series, which provides model IRA documents that have been pre-approved by the IRS and for which an opinion letter is not needed. See also Rev. Proc. 87-50, 1987-2 CB 647, as modified by Rev. Proc. 97-29, 1997-1 CB 698; Rev. Proc. 98-59, 1998-2 CB 727; and Rev. Proc. 2010-48, 2010-50 IRB 828, for administrative procedures for seeking opinion letters for individual retirement arrangements under § 408.

(1) *In general*. An Employer that initially adopts a Pre-approved Plan[16] may adopt the plan at any time during a Cycle. Subject to section 11.01(2), upon an Employer's adoption of a Pre-approved Plan, the plan becomes subject to the rules applicable to the Cycle system and the procedures set forth in this revenue procedure. In particular, while a plan is subject to the Cycle system, the plan's Disqualifying Provisions or Form Defects, as applicable, will have the Remedial Amendment Periods described in section 6. After a plan is no longer subject to the Cycle system, the plan's Disqualifying Provisions or Form Defects will be subject to the Remedial Amendment Period rules for an individually designed plan. See Rev. Proc. 2022-40. Accordingly, as of the date that a plan is no longer subject to the Cycle system, if the Remedial Amendment Period for a Disqualifying Provision or Form Defect would be expired under the rules for individually designed plans, then the Remedial Amendment Period will be expired, notwithstanding that the Remedial Amendment Period would not be expired for a Pre-approved Plan. To continue to be eligible for the Cycle system, the Employer must follow the rules in this revenue procedure for continued eligibility. See, in particular, sections 11.02 and 13.

(2) *Prior plan must be a valid plan*. If an Employer that maintains an individually designed plan amends the plan by adopting a Pre-approved Plan, the form of the individually designed plan must satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, at the time the Pre-approved Plan is adopted. Accordingly, prior to adopting the Pre-approved Plan, the Employer must have either timely corrected any Disqualifying Provisions or Form Defects in the individually designed plan before the expiration of the applicable Remedial Amendment Period for such Disqualifying Provision or Form Defect, or have corrected any plan document failure under EPCRS.

.02 *Continuing eligibility for the Cycle system - requirement to adopt newly approved Pre-approved Plan*. For a Pre-approved Plan adopted pursuant to section 11.01 to continue to be eligible for the Cycle system, by the end of the Employer Adoption Window for each Cycle, the Adopting Employer must adopt a newly approved Pre-approved Plan (a newly approved version of the same plan or a newly approved version of a different Pre-approved Plan). If, during the Employer Adoption Window for a Cycle, instead of adopting a newly approved Pre-approved Plan, an Adopting Employer amends its Pre-approved Plan by adopting an individually designed plan, the plan will continue to be subject to the Remedial Amendment Period rules applicable to Pre-approved plans until the end of the Employer Adoption Window for that Cycle; however, for all other purposes, upon adoption of the individually designed plan, the plan will be treated as an individually designed plan. This means, for example, that if the plan is submitted for a determination letter during the Employer Adoption Window, the eligibility conditions applicable to submission of a determination letter set forth in section 9 of Rev. Proc. 2022-40 will apply, and the scope of plan review will be based on the applicable Required Amendments List, as described in section 10 of that revenue procedure. In contrast, if, by the end of any Employer Adoption Window, an Adopting Employer does not amend its Pre-approved Plan by adopting a newly approved Pre-approved Plan or any other plan, the plan will be treated as an individually designed plan at the end of that Employer Adoption Window. Accordingly, the plan will become subject to the rules relating to the Remedial Amendment Period, plan amendment deadlines, and the eligibility requirements applicable to individually designed plan determination letter applications set forth in Rev. Proc. 2022-40 at that time. Once a plan is treated as an individually designed plan, the Adopting Employer is no longer able to rely on an Opinion Letter for that Cycle.

SECTION 12. EMPLOYER RELIANCE ON OPINION LETTER

.01 *Standardized Plans*.

[16] For purposes of this section 11, the term Pre-approved Plan includes a plan that was not in existence in the immediately preceding Cycle and that has been submitted for (but has not yet received) an Opinion Letter for the Cycle.

(1) Except as set forth in section 12.01(2), (3) and (4), an Adopting Employer of a Standardized Plan may rely on the plan's Opinion Letter that the form of the Adopting Employer's plan satisfies, in the case of a Section 403(b) Pre-approved Plan, the Section 403(b) Requirements (including, if applicable, the requirements of §§ 401(a)(4) and 410(b)) or, in the case of a Qualified Pre-approved Plan, the Qualification Requirements, if:

(a) The Standardized Plan has a currently valid Opinion Letter,

(b) The coverage and contributions or benefits under the Adopting Employer's plan are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees,

(c) The Adopting Employer has not amended the Standardized Plan other than to choose options provided under the Standardized Plan or to make amendments as described in section 13.02 relating to employer amendments that will not affect reliance, and

(d) In the case of a Section 403(b) Pre-approved Plan, either (i) the only contributions under the plan are elective deferrals, or (ii) the plan provides for contributions other than elective deferrals and all of the Adopting Employer's Related Employers are employers described in § 403(b)(1)(A). If the plan provides for contributions other than elective deferrals and the Adopting Employer's controlled group includes any employer that is not an employer described in § 403(b)(1)(A), the Adopting Employer may rely on the plan's Opinion Letter, except with respect to whether contributions other than elective deferrals under the plan satisfy the requirements of §§ 401(a)(4) and 410(b).

(2) An Adopting Employer may not rely on an Opinion Letter for a Standardized Plan with respect to the requirements of § 415 (and § 416, in the case of a Qualified Pre-approved Plan) without obtaining a determination letter (see section 25) if the Adopting Employer, or, in the case of a Section 403(b) Pre-approved Plan, any of its Related Employers, maintains or maintained at any time, another plan, including a Standardized Plan, that was qualified or determined to be qualified or a 403(b) plan and that covers or covered some of the same participants. An Employer that adopts a Standardized Plan that is a defined contribution plan is not considered to have maintained another plan merely because the Employer has maintained another defined contribution plan, provided such other plan has been terminated prior to the effective date of the Standardized Plan and no annual additions have been credited to the account of any participant under such other plan as of any date within a limitation year of the Standardized Plan. For this purpose, a plan that has been amended from an individually designed plan to a Standardized Plan is not considered another plan. To be a plan that has been amended from an individually designed plan to a Standardized Plan and thus for the Employer to be able to rely on the Standardized Plan with respect to the requirements of §§ 415 and 416 without obtaining a determination letter, the individually designed plan that has been amended into the Standardized Plan must be of the same type (for example, both defined benefit plans).

(3) An Adopting Employer of a Standardized Plan may not rely on an Opinion Letter for the Standardized Plan with respect to:

(a) Whether the timing of any amendment to the Adopting Employer's plan (or series of amendments) satisfies the nondiscrimination requirements of § 1.401(a)(4)-5(a), except with respect to plan amendments granting past service that meet the safe harbor described in § 1.401(a)(4)-5(a)(3) and are not part of a pattern of amendments that significantly discriminates in favor of highly compensated employees; or

(b) Whether the Adopting Employer's plan satisfies the effective availability requirement of § 1.401(a)(4)-4(c) with respect to any benefit, right, or feature.

An Employer that adopts a Standardized Plan as an amendment to a plan other than a Standardized Plan may not rely on the Opinion Letter with respect to whether a benefit, right, or feature that is prospectively eliminated satisfies the current availability requirements of § 1.401(a)(4)-4, if applicable.

(4) In the case of a Qualified Pre-approved Plan, an Adopting Employer of a Standardized Plan that is a defined benefit plan may rely on the plan's Opinion Letter with respect to the requirements of § 401(a)(26) only if the plan satisfies the requirements of § 401(a)(26) with respect to its prior benefit structure (within the meaning of § 1.401(a)(26)-3) or is deemed to satisfy § 401(a)(26) pursuant to regulations thereunder.

(5) For SIMPLE plans described in § 401(k)(11) and (m)(10), an Adopting Employer may also rely on the plan's Opinion Letter regarding whether the form of the Adopting Employer's plan satisfies the requirements of those sections.

(6) For a starter 401(k) deferral-only plan described in § 401(k)(16) or a safe harbor deferral-only plan described in § 403(b)(16), an Adopting Employer may also rely on the plan's Opinion Letter regarding whether the form of the Adopting Employer's plan satisfies the requirements of those sections.

.02 *Nonstandardized Plans*.

(1) An Adopting Employer of a Nonstandardized Plan may rely on the plan's Opinion Letter that the form of the Adopting Employer's plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable, if:

(a) The Nonstandardized Plan has a currently valid Opinion Letter, and

(b) The Adopting Employer has not amended the plan other than to choose options provided under the plan or to make amendments as described in section 13.02 relating to employer amendments that will not affect reliance.

(2) Except as otherwise provided in this section 12.02, an Adopting Employer of a Nonstandardized Plan may not rely on the plan's Opinion Letter with respect to the requirements of:

(a) In the case of a Qualified Pre-approved Plan, §§ 401(a)(4), 401(a)(26), 401(l) , 410(b), or 414(s) (or, in the case of a Section 403(b) Pre-approved Plan, §§ 401(a)(4), 410(b), or 414(s)); or

(b) Section 415 (or § 416, in the case of a Qualified Pre-approved Plan) if the Adopting Employer, or any of its Related Employers, maintains or has ever maintained another plan covering some of the same participants. For this purpose, whether an employer maintains or has ever maintained another plan is determined using principles consistent with section 12.01(1).

(3) An Adopting Employer of a Nonstandardized Plan may rely on the plan's Opinion Letter with respect to the requirements of § 410(b), if applicable (and, in the case of a Qualified Pre-approved Plan, § 401(a)(26) (other than the § 401(a)(26) requirements that apply to a prior benefit structure)), if all nonexcludable employees benefit under the Adopting Employer's plan.

(4) Nonstandardized Plans may permit an Adopting Employer to select an allocation formula for contributions other than elective deferrals that satisfies one of the design-based safe harbors in § 1.401(a)(4)-2(b)(2) (or, in the case of a Qualified Pre-approved Plan that is a defined benefit plan, a benefit formula that satisfies one of the design-based safe harbors under § 1.401(a)(4)-3(b)(3), (4), or (5)), and to select a safe harbor compensation definition for the formula that satisfies § 1.414(s)-1(c). If the Adopting Employer selects an allocation formula for contributions other than elective deferrals that satisfies one of the design-based safe harbors in § 1.401(a)(4)-2(b)(2) (or, in the case of a Qualified Pre-approved Plan that is a defined benefit plan, § 1.401(a)(4)-3(b)(3), (4), or (5)), and, if the allocation or benefit formula is based on compensation, selects a safe harbor compensation definition that satisfies § 1.414(s)-1(c), then the Adopting Employer of a Nonstandardized Plan may rely on the plan's Opinion Letter with respect to the

nondiscriminatory amounts requirement under § 401(a)(4), if applicable. An Adopting Employer of a Nonstandardized Plan that includes § 401(m) matching contributions (and/or, in the case of a Qualified Pre-approved Plan, § 401(k) contributions) may rely on the plan's Opinion Letter with respect to whether the form of the plan satisfies the actual contribution percentage (ACP) test of § 401(m)(2) (or, in the case of a Qualified Pre-approved Plan, the actual deferral percentage (ADP) test of § 401(k)(3)) if the Adopting Employer elects to use a safe harbor definition of compensation in the test. An Adopting Employer of a Nonstandardized Plan that satisfies the safe harbor requirement described in § 401(m)(11) or 401(m)(12) (or, in the case of a Qualified Pre-approved Plan, that satisfies the safe harbor requirement described in § 401(k)(12) or 401(k)(13)) may rely on the plan's Opinion Letter with respect to whether the form of the Adopting Employer's plan satisfies the requirements of § 401(m) (or § 401(k), if applicable), unless the plan provides for the safe harbor contribution under § 401(m)(11) or 401(m)(12) (or § 401(k)(12) or 401(k)(13), if applicable) to be made under another plan.

(5) For SIMPLE plans described in § 401(k)(11) and (m)(10), an Adopting Employer may also rely on the plan's Opinion Letter regarding whether the form of the Adopting Employer's plan satisfies the requirements of those sections.

(6) For starter 401(k) deferral-only plans described in § 401(k)(16) or a safe harbor deferral-only plan described in § 403(b)(16), an Adopting Employer may also rely on the plan's Opinion Letter regarding whether the form of the Adopting Employer's plan satisfies the requirements of those sections.

(7) Except as set forth in section 9.05(2), an Adopting Employer of a Nonstandardized Plan that is a Qualified Pre-approved Plan that includes a Cash Balance Formula with a structure of Principal Credits that increase with age, service, or any other measure during a participant's employment may not rely on the plan's Opinion Letter with respect to the requirements of § 411(b)(1).

.03 *Other limitations and conditions on reliance*. Notwithstanding any provision in this section 12 to the contrary, the following conditions and limitations regarding reliance by an Adopting Employer on an Opinion Letter apply with respect to all Pre-approved Plans:

(1) An Adopting Employer may rely on an Opinion Letter for a plan that amends a plan of the Employer only if the form of the plan that is being amended satisfied the Qualification Requirements or Section 403(b) Requirements, as applicable. Accordingly, prior to being amended, the plan must either have timely corrected any Disqualifying Provisions or Form Defects for which the Remedial Amendment Period is closed or have corrected any plan document failures under the EPCRS. If this requirement is not met, then the employer (a) is considered to have adopted an individually designed plan, (b) may not rely on the Opinion Letter for the plan, and (c) is not considered be on the Cycle system.[17]

(2) An Adopting Employer may not rely on an Opinion Letter if the Adopting Employer's adoption of a Pre-approved Plan precedes the issuance of an Opinion Letter for the plan.[18]

(3) An Adopting Employer may not rely on an Opinion Letter if the adoption agreement or other elective provisions in the plan are not completed correctly by the Adopting Employer.

(4) An Adopting Employer of any Qualified Pre-approved Plan that is not a Governmental Plan and that is a pension plan in which the normal retirement age selected by the Adopting Employer is less than age 62 may not rely on the Opinion Letter that such age is reasonably representative of the typical retirement age for the employer's industry, as required by § 1.401(a)-1(b)(2). For an Adopting Employer of any Qualified Pre-approved Plan that is a Governmental Plan and that is a pension plan in which the normal retirement age selected by the Adopting Employer does not satisfy any of the safe harbors described in § 1.401(a)-1(b)(2)(v) of the proposed regulations may

[17] The plan may still use EPCRS to correct any failures, and, after correction, then be eligible to adopt a Pre-approved Plan.

[18] In this case, in order to have reliance, the Adopting Employer would need to re-adopt the Pre-approved Plan after the issuance of the Opinion Letter for the plan.

not rely on the Opinion Letter that such age is reasonably representative of the typical retirement age for the employer's industry, as required by § 1.401(a)-1(b)(2).

(5) An Adopting Employer may not rely on an Opinion Letter with respect to any provision of a Trust or Custodial Account Document or Investment Arrangement, as applicable, that conflicts with language in the basic plan document, adoption agreement, or single plan document, as applicable, even if the Trust or Custodial Account Document or Investment Arrangement includes language that states that the provisions of the Trust or Custodial Account Document or Investment Arrangement override the basic plan document, adoption agreement, or single plan document.[19]

(6) For a Qualified Pre-approved Plan, the issuance of an Opinion Letter is not a determination by the IRS that an Adopting Employer's plan is a Governmental Plan or a church plan (as described in § 414(e)). For a Section 403(b) Pre-approved Plan, the issuance of an Opinion Letter is not a determination by the IRS that an Adopting Employer's plan is a Governmental Plan, or that an Adopting Employer is a Church or QCCO.

(7) Pursuant to section 14.11, a Provider's failure to disclose to the IRS a material fact, misrepresentation of a material fact, or failure to accurately provide any of the information called for on any form required by this revenue procedure may result in the inability of Adopting Employers to rely on an Opinion Letter (for example, if there is a failure to disclose to the IRS a material fact, the IRS may revoke the Opinion Letter due to the failure).

(8) Pursuant to section 15.03(2)(c), if a Mass Submitter fails to identify a material modification, the failure is considered a material misrepresentation, and an Adopting Employer may not rely on an Opinion Letter issued with respect to the plan for the modification or any other provision of the plan that may be affected by the modification.

.04 *Reliance equivalent to determination letter*. If an Adopting Employer may rely on an Opinion Letter pursuant to this section 12, the Opinion Letter is equivalent to a determination letter. For example, the Opinion Letter is treated as a determination letter for purposes of section 23 of Rev. Proc. 2023-4 (as updated annually), regarding the effect of a determination letter. As provided in this section 12, the extent of the Adopting Employer's reliance may be limited.

.05 *Obtaining a determination letter*. If an Adopting Employer may not rely on a Pre-approved Plan's Opinion Letter, the Adopting Employer, if eligible as set forth in section 25, may submit an application for a determination letter to obtain reliance that the form of the plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable.

SECTION 13. PLAN AMENDMENTS

.01 *Provider plan amendments generally*. Providers are required to amend their Pre-approved Plans to ensure that the form of their plans continues to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable.[20] Providers must make reasonable and diligent efforts, as soon as practicable following the adoption of plan amendments, to ensure that Adopting Employers of the Provider's plan have actually received and are aware of such plan amendments. Providers must include the date on which each amendment is adopted by the Provider with the amendment provided to Adopting Employers. The Provider must have a procedure to notify an Adopting Employer of amendments and restatements of the plan and to inform the Adopting

[19] Accordingly, if a Pre-approved Plan is operated in a manner that is inconsistent with a provision of the basic plan document or single plan document, the plan will incur an operational failure even if the plan is operated in a manner consistent with a provision of a Trust or Custodial Account Document or Investment Arrangement that conflicts with the provision of the basic plan document or single plan document.

[20] See section 6.04 regarding the requirement to make Interim Amendments.

Employer, when applicable, of the need to timely adopt or amend the plan, including in the case of both initial adoption and restatement of the plan. The Provider must also notify an Adopting Employer that failure to timely adopt the plan or restatement, when required, or failure to take into account plan amendments in the operation of the plan, could result in adverse tax consequences. A Provider's failure to comply with these requirements may result in the loss of eligibility to offer Pre-approved Plans and the revocation of an Opinion Letter that has been issued to the Provider.

.02 *Amendments that will not affect reliance*. An Adopting Employer may continue to rely on an Opinion Letter for a Pre-approved Plan if amendments to the plan are made that are described in paragraphs (1) through (8) of this section 13.02. See section 12.01 and 12.02 for the effect of amendments on reliance on an Opinion Letter by the Adopting Employer. The following types of amendments will not cause an Adopting Employer to lose reliance on an Opinion Letter:

(1) Amendments to the plan to add or change a provision (including choosing among options in the plan) or to specify or change the effective date of a provision, provided the Adopting Employer is permitted to make the modification or amendment under the terms of the Pre-approved Plan as well as under the Qualification Requirements or Section 403(b) Requirements, as applicable, and the provision is identical to a provision in the Pre-approved Plan, except for the effective date;

(2) Sample or model amendments (or an amendment that is substantially similar to a sample or model amendment in all material respects) that are adopted by the Adopting Employer, that are published by the IRS, and that specifically provide that their adoption will not cause a plan to fail to be identical to the Pre-approved Plan;

(3) Amendments that adjust the limitations under §§ 415, 402(g), 401(a)(17), and 414(q)(1)(B) to reflect annual cost-of-living increases, or add automatic cost-of-living adjustment provisions to the plan;

(4) Plan language completed by the Adopting Employer if such overriding language is necessary to satisfy § 415 (or 416, in the case of a Qualified Pre-approved Plan) because of the required aggregation of multiple plans under that section, in accordance with section 9.02(3) or 9.06(2);

(5) Interim Amendments or Discretionary Amendments that are adopted as a result of a change in Qualification Requirements or Section 403(b) Requirements, as applicable, for the form of the plan;

(6) Amendments that reflect a change of a Provider's name, in which case the Provider must notify the IRS, in writing, of the change in name and certify that it still satisfies the conditions to be a Provider described in section 4.01(15) (see also section 19 regarding changes in employer identification numbers);

(7) Amendments to the administrative provisions in the plan (such as provisions relating to investments, plan claims procedures, and Adopting Employer's contact information), provided the amended provisions are not in conflict with any other provision of the plan, still meet the requirements of this revenue procedure, and do not cause the plan to fail to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, (see section 15.03(1)(b)(ii) for additional examples of administrative provisions); and

(8) Amendments with respect to which a closing agreement under the Audit Closing Agreement Program or a compliance statement under the Voluntary Correction Program of EPCRS has been issued (see section 6.05(2)(b) of Rev. Proc. 2021-30 regarding the ability of the Adopting Employer to rely on the Opinion Letter).

.03 *Obtaining reliance after employer amendment*. If an Adopting Employer may not rely on a Pre-approved Plan's Opinion Letter, the Adopting Employer, if eligible in accordance with section 25, may submit an application for a determination letter to obtain reliance that the form of the plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable.

.04 *Effect of employer amendments on a plan's eligibility for the Cycle system*. Except as set forth in section 13.05, employer amendments made to a Pre-approved Plan will not affect the plan's eligibility for the Cycle system.

.05 *Pre-approved plans treated as individually designed*. An Adopting Employer's Pre-approved Plan is treated as individually designed (and, as a result of the plan being treated as individually designed, the Adopting Employer may not rely on the plan's Opinion Letter (see section 12 regarding reliance), will lose eligibility for the Cycle system as described in this section 13.05 (see section 11 regarding eligibility for the Cycle system), and will be subject to different rules for applying for a determination letter (see section 25 regarding determination letters)) under the following circumstances:

(1) An Adopting Employer makes any amendment to a Standardized Plan other than an amendment listed in section 13.02 or as otherwise described in this section 13.05. In this case, the Adopting Employer will lose reliance on the Opinion Letter as of the effective date of the amendment but the plan will remain eligible for the Cycle system (provided that the Adopting Employer adopts timely Interim Amendments) until the end of the Cycle that includes the effective date.[21]

(2) An Adopting Employer amends a Pre-approved Plan (including its adoption agreement, if applicable) within one year of the date the Adopting Employer initially adopted the Pre-approved Plan to incorporate a type of plan not permitted in the Opinion Letter program, as described in section 10.02. In this case, the Adopting Employer is treated as never having had any reliance on the Opinion Letter and is treated as never having been eligible for the Cycle system.

(3) An Adopting Employer amends a Pre-approved Plan (including its adoption agreement, if applicable) more than one year after the date the Adopting Employer initially adopted the Pre-approved Plan to incorporate a type of plan not permitted in the Opinion Letter program, as described in section 10.02. In this case, the Adopting Employer will lose reliance on the Opinion Letter as of the effective date of the amendment but the plan will remain eligible for the Cycle system (provided that the Adopting Employer adopts timely Interim Amendments) until the end of the Cycle that includes the effective date.

(4) An Adopting Employer of a Nonstandardized Plan makes amendments that, due to the nature and extent of the amendments, result in the IRS, in its sole discretion, determining that the plan should be treated as individually designed. In this case, the Adopting Employer generally will lose reliance on the Opinion Letter as of the effective date of the amendments but the plan will remain eligible for the Cycle system (provided that the Adopting Employer adopts timely Interim Amendments) until the end of the Cycle that includes the effective date.

(5) An Adopting Employer chooses to discontinue participation in a Pre-approved Plan that has been amended by the Provider without substituting another Pre-approved Plan. In this case, the Adopting Employer will lose reliance on the Opinion Letter as of the date participation in the Pre-approved Plan ends but the plan will remain eligible for the Cycle system (provided that the Adopting Employer adopts timely Interim Amendments) until the end of the Cycle that includes the date on which participation in the Pre-approved Plan ends.

(6) An Adopting Employer makes an amendment to a Pre-approved Plan that removes any of the required provisions of section 9. In this case, the Adopting Employer will lose reliance on the Opinion Letter as of the effective date of the amendment, but the plan will remain eligible for the Cycle system (provided that the Adopting Employer adopts timely Interim Amendments) until the end of the Cycle that includes the effective date.

(7) As set forth in section 11.02, if, during the Employer Adoption Window for a Cycle, an Adopting Employer adopts a plan other than either a newly approved version of the same plan or a newly

[21] Adopting Employers who are considering making an amendment that is not extensive to a Standardized Plan might consider adopting a Nonstandardized Plan instead, in order to be able to apply for determination letter using Form 5307, *Application for Determination for Adopters of Modified Nonstandardized Pre-approved Plans,* as a Pre-approved Plan. See section 25.

approved version of a different Pre-approved Plan, the plan will continue to be subject to the Remedial Amendment Period rules applicable to Pre-approved plans until the end of the Employer Adoption Window for that Cycle; however, for purposes other than the Remedial Amendment Period, at the time the plan that is not a newly approved Pre-approved Plan is adopted, the plan will be treated as an individually designed plan. In contrast, if, by the end of any Employer Adoption Window, an Adopting Employer fails to adopt a newly approved version of the same plan or a newly approved version of a different Pre-approved Plan, and does not adopt another plan to replace its Pre-approved plan, the plan will be treated as an individually designed plan at the end of that Employer Adoption Window.

(8) As set forth in section 6.04, if an Interim Amendment is not adopted by the time period set forth in section 7 and the Adopting Employer does not correct this failure to timely adopt the Interim Amendment within two years after the time period set forth in section 7, then the Adopting Employer's plan will be treated as an individually designed plan at the end of that two-year period.

SECTION 14. OPINION LETTER APPLICATIONS - INSTRUCTIONS TO PROVIDERS AND OTHER RULES FOR APPLICATIONS AND LETTERS

.01 *Issuance of an Opinion Letter*. The IRS will, upon an application of a Provider, issue an Opinion Letter confirming that the form of the Provider's plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable.

.02 *Cycle 4 Submission Period for defined contribution Qualified Pre-approved Plans*. Pursuant to this revenue procedure, the Submission Period for a Provider of a defined contribution Qualified Pre-approved Plan to submit an application for a Cycle 4 Opinion Letter begins on February 1, 2024, and ends on January 31, 2025. A Provider may still apply for a Cycle 4 Opinion Letter after the Submission Period. See section 16 regarding filing after the Submission Period.

.03 *Procedure for applying for an Opinion Letter*. The Provider must submit an application for an Opinion Letter with respect to its plan on the version of Form 4461, *Application for Approval of Standardized or Nonstandardized Pre-approved Defined Contribution Plans*, Form 4461-A, *Application for Approval of Standardized or Nonstandardized Pre-approved Defined Benefit Plan*, Form 4461-B, *Application for Approval of Standardized or Nonstandardized Pre-approved Plans (Mass Submitter Adopting Provider)*, or Form 4461-C, *Application for Approval of Standardized or Nonstandardized 403(b) Pre-approved Plans*, as appropriate, that is applicable at the time of the request. The request must be accompanied by (1) the applicable required user fee that will be provided for in the successors to Rev. Proc. 2023-4 (as updated annually), and (2) if an Opinion Letter had been issued for the plan for the preceding Cycle, a signed certification that all necessary amendments required by the IRS in order for the form of the plan to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, have been made and communicated to all Adopting Employers. All information on the application form must be typed. The application form must be sent to the address listed in section 24. The application must include a copy of the plan document and any adoption agreement, if applicable. If an Opinion Letter had been issued for the plan for the preceding Cycle, the Provider must submit a restated plan that incorporates any amendments. Copies of Trust or Custodial Account Documents, Investment Arrangements, or other funding media should not be submitted, as the IRS will not review for (and the Opinion Letter will not cover) any provisions included in Trust or Custodial Account Documents, Investment Arrangements, or other funding media. Additionally, the IRS requests that applications be submitted by thumb or flash drive instead of being submitted as paper files, and that the documents be saved in Microsoft Word or Adobe Acrobat PDF format. The IRS strongly encourages Providers to take advantage of this electronic submission format. If a plan received an Opinion Letter for the preceding Cycle, the IRS strongly encourages Providers to submit a redline of the plan highlighting the changes made. To pay a user fee, a Provider must continue to submit a paper check and a paper Form 8717-A, *User Fee for Employee Plan Opinion Letter Request*.

.04 *Additional submission requirements for Interim Amendments*. If the plan has received an Opinion Letter for the preceding Cycle, in addition to the application described in section 14.03, the Provider must submit a certification that all Interim Amendments related to changes in law listed on the applicable Cumulative List have been made and a cover letter summarizing how the provisions of the plan are affected by each amendment. The IRS retains the right to request and secure from the Provider in appropriate circumstances copies of all Interim Amendments related to changes in law listed on the applicable Cumulative List that the Provider has adopted on behalf of its Adopting Employers.

.05 *Expediting review of substantially identical plans*. The IRS reserves the right to review applications in any order that will expedite the processing of Opinion Letter applications, subject to section 16 regarding filings made after the Submission Period. To expedite the review of substantially identical plans that are not a Mass Submitter's plans, the IRS encourages plan drafters and Providers to include with each Opinion Letter application, if appropriate, a cover letter setting forth the following information:

(1) The name and file folder number (if available) of the plan that, for review purposes, the plan drafter designates as the "lead plan" (including the name and EIN of the Provider);

(2) A list of all plans written by the plan drafter that are substantially identical to the lead plan (including the information described in paragraph (1) of this section 14.05 for each plan);

(3) A description of each location in the plan for which the application is being submitted that is not word-for-word identical to the language of the lead plan, including an explanation of the purpose and effect of each such difference; and

(4) A certification made under penalties of perjury by the plan drafter that the information described in paragraph (3) of this section 14.05 is true and complete.

If the Provider or plan drafter is aware that a lead plan or any substantially identical plan has been assigned for review to a specialist, the cover letter also should indicate the name of the specialist, if possible. To the extent feasible, lead plans and substantially identical plans should be submitted together. The IRS will regard the information and certification described in paragraphs (3) and (4) of this section 14.05 as a representation of a material fact for purposes of issuing an Opinion Letter.

.06 *Adoption Agreement Plans - number of basic plan documents, adoption agreements, and applications required*.

(1) *Qualified Pre-approved Plans: use of basic plan document by multiple Adoption Agreement Plans*.

(a) In general, provided that the provisions of a basic plan document are identical for all plans using that document, separate defined contribution Qualified Pre-approved Plan adoption agreements may be associated with the same defined contribution Qualified Pre-approved Plan basic plan document, and separate defined benefit Qualified Pre-approved Plan adoption agreements may be associated with the same defined benefit Qualified Pre-approved Plan basic plan document. Thus, for example, a profit-sharing plan, a money purchase pension plan other than a target benefit plan, a target benefit plan, and an ESOP may all use the same defined contribution basic plan document. Adoption agreements of defined benefit plans, defined contribution plans, and § 403(b) plans may not be associated with the same basic plan document.

(b) Basic plan documents and associated adoption agreements used for Governmental Plans must be separate from the basic plan documents and associated adoption agreements used for plans that are not Governmental Plans. In addition, the basic plan document and the adoption agreements associated with a church plan, as described in § 414(e), that has not made an election set forth in § 410(d) may not be combined with the basic plan document and the adoption agreements of any other type of plan. Thus, for example, a Provider that wishes to obtain Opinion Letters for a Governmental Plan and a non-electing church plan must submit a separate basic plan document and associated adoption agreement for the Governmental Plan and a separate basic plan document and associated adoption agreement for the non-electing church plan.

(2) *Section 403(b) Pre-approved Plans: use of basic plan documents by multiple Adoption Agreement Plans*.

(a) Separate Section 403(b) Pre-approved Plan adoption agreements may be associated with the same Section 403(b) Pre-approved Plan basic plan document. Adoption agreements of defined benefit plans, defined contribution plans, and § 403(b) plans may not be associated with the same basic plan document.

(b) A plan that is intended to be a Retirement Income Account and a plan that is not intended to be a Retirement Income Account may not be combined in in the same basic plan document.

(3) *Number of adoption agreements required*.

(a) A Standardized Plan and a Nonstandardized Plan may not be combined in a single adoption agreement.

(b) The following rules apply for a Qualified Pre-approved Plan:

(i) A profit-sharing plan (with or without a § 401(k) arrangement) that does not include an ESOP feature and a money purchase pension plan that is not a target benefit plan may use the same adoption agreement; however, separate adoption agreements are required for ESOPs and target benefit plans.

(ii) An ESOP is permitted to include both profit-sharing and § 401(k) features in the same adoption agreement; however, an employer that adopts the plan may not adopt the profit-sharing or § 401(k) features without also adopting the ESOP portion of the plan.

(iii) An adoption agreement submitted for a defined benefit plan may include any combination of integrated formulas (that is, formulas that provide for permitted disparity), non-integrated formulas, and cash balance formulas.

(c) For a Section 403(b) Pre-approved Plan, a single adoption agreement may be drafted to cover multiple types of Employers (for example, a single adoption agreement may be drafted to cover a church, a § 501(c)(3) organization, or a public school).

(4) *Number of applications required*. A separate application form must be filed with respect to each adoption agreement submitted. A basic plan document and all associated adoption agreements should be submitted simultaneously. Only one copy of the basic plan document should be provided. However, if additional adoption agreements are later submitted with respect to a basic plan document, the Provider must submit a copy of the basic plan document with each submission and include a cover letter identifying the original submission (including the date submitted). In that case, the plan number given to the basic plan document must remain the same as in the prior submission.

.07 *Separate applications required for Single Document Plans*

(1) With respect to a Standardized Plan and a Nonstandardized Plan, a separate plan and application must be submitted for each plan if it is a Single Document Plan.

(2) For a Qualified Pre-approved Plan, a separate plan and application must be submitted for each of the following types of Single Document Plans: a target benefit plan, an ESOP, and a defined benefit plan. A profit-sharing plan (with or without a § 401(k) arrangement) that does not include an ESOP and a money purchase pension plan that is not a target benefit plan may be combined in a single plan and application. In addition, although an ESOP is permitted to include both profit-sharing and § 401(k) features in the same plan, an Employer that adopts the plan may not select the profit-sharing or § 401(k) features without also selecting the ESOP provisions in the plan.

(3) For a Qualified Pre-approved Plan, with respect to a Governmental Plan or a non-electing church plan, a separate plan and application must be submitted for each plan. Thus, for example, separate plans and application forms must be submitted for a Governmental Plan, a plan that is not a Governmental Plan, and a non-electing church plan.

(4) For a Section 403(b) Pre-approved Plan, a separate plan and application is required for each Single Document Plan. A Single Document Plan may accommodate usage by more than one type of Employer; however, a Retirement Income Account plan must always be filed as a separate Single Document Plan.

.08 *Sample Language*. Before the Submission Period with respect to a Cycle begins, the IRS anticipates providing updated Listings of Required Modifications (LRMs) including sample plan language. Although the sample language is designed for use in plans that use an adoption agreement format, in order to expedite processing, Providers should refer to the sample language as a guide in drafting Single Document Plans. Specifically, to expedite the review of their plans, Providers are encouraged to use LRM language if appropriate. The updated LRMs, when available, may be downloaded at https://www.irs.gov/Retirement-Plans/Listing-of-Required-Modifications-LRMs.

.09 *Operational Compliance List*. The Remedial Amendment Period permits a plan to be amended retroactively to comply with a change in Qualification Requirements or Section 403(b) Requirements, as applicable; however, a plan must be operated in compliance with those requirements beginning on the effective date of the change. To assist Adopting Employers in achieving operational compliance, the IRS provides annually an Operational Compliance List at https://www.irs.gov/retirement-plans/operational-compliance-list to identify changes in those requirements that are effective during a calendar year. To comply with the Qualification Requirements or Section 403(b) Requirements, as applicable, however, a plan must comply operationally with each relevant requirement, even if the requirement is not included on an Operational Compliance List. Providers may wish to consult the Operational Compliance List when drafting Interim Amendments.

.10 *Material furnished to Adopting Employers*. A Provider must furnish each Adopting Employer with a copy of the approved Pre-approved Plan, copies of any subsequent amendments, and the most recently issued Opinion Letter for the plan from the IRS.

.11 *Effect of failure to disclose a material fact, misrepresentation of a material fact, or to accurately provide information*. A Provider's (1) failure to disclose to the IRS a material fact, (2) misrepresentation of a material fact in the application, or (3) failure to accurately provide any of the information called for on any form required by this revenue procedure may result in the inability of Adopting Employers to rely on the Opinion Letter (for example, if the IRS revokes an Opinion Letter due to the Provider's failure to disclose to the IRS a material fact, the Adopting Employer would lose reliance on the Opinion Letter). See section 12.03(7) regarding limitations on reliance. The Provider may be required by the IRS to immediately notify each Adopting Employer of any of its Pre-approved Plans affected by the failure if the Adopting Employer's reliance on the Opinion Letter is affected or if the failure could result in adverse tax consequences for the Adopting Employer.

.12 *Additional information may be requested*. When reviewing the application for an Opinion Letter, the IRS may, in its discretion, require any additional information that it deems necessary, including a demonstration and/or explanation of how the variables (options or alternatives) in the Pre-approved Plan interrelate to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable. If a letter requesting changes to the Pre-approved Plan is sent to the Provider or an authorized representative, changes responsive to the letter must be received no later than 30 days from the date of the letter, and the response must include either a copy of the plan with the changes highlighted or, if the changes are not extensive, replacement pages. If the changes are not received within 30 days, the application may be considered withdrawn. An extension of the 30-day time limit will only be granted for good cause.

.13 *Inadequate submissions*. The IRS will return, without further action or refunding of the user fee, plans that are not in substantial compliance with the Qualification Requirements or Section 403(b) Requirements, as applicable, or plans that are so deficient that they cannot be reviewed in a reasonable period of time. A plan may be considered not to be in substantial compliance if, for example, it omits language needed to comply with a Qualification Requirement or Section 403(b) Requirement, as applicable, or merely incorporates those requirements by reference to the applicable Code section. The IRS will not consider a plan with such an omission or cross-reference until after the plan has been revised and resubmitted, and the modified plan will be treated as a new application for approval as of the date it is resubmitted, and therefore will be treated as filed after the Submission Period, as set forth in section 16, if resubmitted after the Submission Period. No additional user fee will be charged if an inadequate submission is amended to be in substantial compliance and is resubmitted to the IRS within 30 days following the date the Provider is notified of the inadequacy.

.14 *Nonidentification of questionable issues may cause delay*. If a plan submitted as part of an Opinion Letter application includes a provision that gives rise to an issue for which contrary published authorities exist, failure to disclose to the IRS and address any significant contrary authorities may result in requests for additional information, which will delay action on the application. See section 14.12.

.15 *No Opinion Letter for later plan amendments*. The IRS will not issue an Opinion Letter with respect to amendments made between applicable Submission Periods, and the Provider should not submit an application between applicable Submission Periods for an Opinion Letter with respect to plan amendments. Instead, the Provider must submit a restated plan that incorporates the amendments during the next Submission Period.

SECTION 15. ADDITIONAL REQUIREMENTS FOR MASS SUBMITTERS

.01 *Opinion Letters issued to Mass Submitters*.

(1) The IRS will, upon request by a Mass Submitter, issue an Opinion Letter confirming that the form of the Mass Submitter's plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable. See section 14 for the instructions for Opinion Letter applications. In the case of a submission of a Pre-approved Plan under this revenue procedure, the Mass Submitter's application also must be accompanied by applications for an Opinion Letter filed on behalf of 15 unaffiliated Providers, as described in section 4.01(10), that are offering the same plan for that Cycle on a word-for-word identical basis as set forth in section 15.02, unless the Mass Submitter has already satisfied this requirement in connection with a previous application under this revenue procedure involving another Pre-approved Plan pursuant to section 15.01(2). Any plan submitted by a Mass Submitter must include language designating the Mass Submitter as agent for the Provider of the plan for purposes of making plan amendments.

(2) After satisfying the 15-unaffiliated-Providers requirement as to the number of adopting Providers, the Mass Submitter may submit additional applications on behalf of other Providers that wish to adopt a plan that is word-for-word identical to the Mass Submitter's plan (as an

identical adopter) or a plan that includes Minor Modifications to the Mass Submitter's plan (as a minor modifier adopter). In addition, after satisfying the 15-unaffiliated-Provider requirement for one plan of the Mass Submitter, the Mass Submitter may submit applications for an Opinion Letter under this section 15.01 for its other plans, regardless of the number of identical adopters of the other plans.

.02 *Reduced procedural requirements for Providers that use Mass Submitter plans*. A Provider that uses a Mass Submitter's plan must obtain an Opinion Letter. In addition to the applicable requirements in section 14, the Mass Submitter must submit on behalf of each Provider a completed application form that includes a declaration by the Mass Submitter under penalty of perjury that the Provider will offer a plan that is word-for-word identical to a plan of the Mass Submitter or a plan that includes Minor Modifications to the Mass Submitter's plan. If the Provider is offering a plan that is word-for-word identical (including a Flexible Plan), a copy of the plan need not be submitted. If the Mass Submitter submits a plan with Minor Modifications, it must comply with the requirements of section 15.03(2). The application must be accompanied by the required user fee as provided in the successors to Rev. Proc. 2023-4 (as updated annually) and a signed certification that all necessary amendments required by the IRS in order for the form of the Provider's plan to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, have been made and communicated to all Adopting Employers. Upon receipt of the application for an Opinion Letter, the IRS will, as soon as administratively feasible, issue an Opinion Letter with respect to the Provider's plan (provided that an Opinion Letter has been issued with respect to the Mass Submitter's plan).

.03 *Flexible Plans and Minor Modifications*.

(1) *Flexible Plan*.

(a) *In general*. A Provider that adopts a Mass Submitter's Flexible Plan may include or delete any optional provision that is designated as an optional provision in the Mass Submitter's plan, provided the inclusion or deletion of specific optional provisions conforms to the Mass Submitter's written representation to the IRS concerning the choices available to a Provider and the coordination of optional provisions. A Mass Submitter must bracket and identify the optional provisions when submitting the plan to the IRS and provide the IRS a written representation describing the choices available to Providers and the coordination of optional provisions. Thus, the representation must indicate whether a Provider's plan may include only one of a certain group of optional provisions, may include only a specific combination of provisions, or may exclude the provisions entirely. Similarly, if the inclusion (or deletion) of a specific optional provision in a Provider's plan will automatically result in the inclusion (or deletion) of any other optional provision, this relationship must be set forth in the Mass Submitter's representation. A Flexible Plan may include only optional provisions that meet the requirements of section 15.03(1)(b), and must be drafted so that the form of any Provider's plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable, notwithstanding the inclusion or deletion of optional provisions. For example, if a Provider's defined contribution Qualified Pre-approved Plan includes an optional provision that permits a portion of a participant's account to be invested in life insurance, then, under the terms of the Provider's plan, the application of the proceeds of the life insurance must meet the requirements of §§ 401(a)(11) and 417. A Flexible Plan adopted by a Provider that differs from the Mass Submitter's plan only because the Provider has deleted certain optional provisions from its plan in conformance with the Mass Submitter's representation described in this section 15.03(1)(a) is treated as a plan that is word-for-word identical to the Mass Submitter's plan. The IRS encourages Mass Submitters to limit the number of optional provisions described in section 15.03(1)(b)(i) and (ii) that Mass Submitters provide under a Flexible Plan to six investment provisions and six administrative provisions.

(b) *Optional provisions*. A Flexible Plan may include optional provisions that comply with the requirements set forth in this section 15.03(1)(b). The optional provisions may be arranged as separate optional articles or sections within a Pre-approved Plan or as separate optional provisions within a single article or section. A Flexible Plan also may include related optional provisions in the adoption agreement. For example, if a plan document for a Mass Submitter's Flexible Plan includes an optional provision that would permit loans under a Provider's plan, the adoption agreement may also include an optional provision that would enable an Adopting Employer to elect whether loans are available under the plan it adopts. If the Provider does not wish to enable Adopting Employers to make loans available under their plans, the Provider would need to delete from the Provider's plan the optional provision in both the plan document and the adoption agreement. A Provider may include or delete optional provisions of a Mass Submitter's plan, but once the Provider has decided to include an optional provision, it must offer that provision to all Adopting Employers. Any optional provision that the IRS determines does not meet the requirements of this section 15.03(1)(b) must be changed to a non-optional provision or deleted from the Mass Submitter's plan. The following is an exclusive list of the permissible optional provisions that a Flexible Plan may include:

(i) *Investment provisions*. A Mass Submitter may offer a variety of investment provisions in its plan for a Provider to include or delete from the Provider's version of the plan. However, the plan adopted by the Provider must provide some method for investing trust assets. Investment provisions are those provisions that describe the plan's methods of investing assets, including provisions such as the availability of loans and investments in insurance contracts or other funding media, and self-directed investments.

(ii) *Administrative provisions*. A Mass Submitter may offer a variety of administrative provisions in its plan for a Provider to include or delete from the Provider's version of the plan. However, the plan adopted by the Provider must describe how the plan is administered. Administrative provisions are those provisions that describe the administration of the plan, including the powers, duties, and responsibilities of a plan's custodian, trustee, administrator, Adopting Employer, and other fiduciaries, as applicable. Pursuant to section 9.06(14), every Section 403(b) Pre-approved Plan must provide for an appendix to identify the parties responsible for the various administrative functions under the plan. Optional administrative provisions that a Provider may include in or delete from the plan include the allocation of responsibilities among fiduciaries (if applicable), the resignation or replacement of fiduciaries, the claims procedures under the plan, and the record-keeping requirements under the plan. However, procedural provisions that are required for the form of the plan to satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, are not administrative provisions under this section 15. For example, an administrative provision does not include a provision regarding the notice to participants required by § 417 and record-keeping required by regulations under § 401(k) and/or 401(m).

(iii) *Cash or Deferred Arrangement*. A Mass Submitter of a defined contribution qualified plan may include a self-contained cash or deferred arrangement (as defined in § 401(k)) for Providers to include or delete.

(2) *Minor Modifications*.

(a) A plan that includes Minor Modifications to the Mass Submitter's plan must be submitted by the Mass Submitter on behalf of the Provider that will adopt the modified plan. Subject to sections 15.05 and 16 and the provisions of this section 15.03(2)(a), submissions with respect to Minor Modifications will be reviewed on an expedited basis, and Opinion Letters will be issued to the Provider as soon as possible (which might be after the issuance of an Opinion Letter to other Providers (see section 17)).

(b) The IRS reserves the right to determine if the plan's changes are Minor Modifications (that is, if the changes are not numerous and do not require an in-depth technical review). If the IRS determines that the changes are not minor, the plan submitted under section 15.03(2)(c) is not entitled to expedited review and will otherwise be treated as a non-Mass Submitter plan. In the event the plan is treated as a non-Mass Submitter plan, the IRS will notify the Mass Submitter in writing of its determination. Within 30 calendar days following the date that the notification is provided, either the Mass Submitter may revise the plan so that the modifications are minor and resubmit the revised plan, or the Provider may submit Form 4461, 4461-A, or 4461-C, whichever is applicable, and an additional user fee in an amount equal to the difference between a non-Mass Submitter plan application user fee and a minor modifier adopter plan application user fee. If, after the 30-day period, neither action has been taken, the IRS may treat the application as having been withdrawn.

(c) During the Submission Period, the Mass Submitter must initially submit the first page of the application as a placeholder with respect to each Provider that will offer a plan that includes Minor Modifications to the Mass Submitter's plan. After the IRS sends a notification to the applicable Mass Submitter with respect to the lead plan indicating that the IRS has determined that the form of the plan appears to be in full compliance with the applicable Qualification Requirements or Section 403(b) Requirements, as applicable, the Mass Submitter will have 21 days to submit a copy of the Mass Submitter's plan with the Provider's modifications highlighted, as well as a statement indicating the location and effect of each change. The Mass Submitter must certify under penalties of perjury that the plan of the Provider, except for the delineated changes, is word-for-word identical to the plan for which the Mass Submitter will be receiving or has received an Opinion Letter. If a Mass Submitter fails to identify a material modification, the failure is considered a material misrepresentation, and an Adopting Employer may not rely on the Opinion Letter that may be issued with respect to the plan for the modification or any other provision of the plan that may be affected by the modification. See section 12.03(8) regarding limitations on reliance. The Mass Submitter must also immediately notify any affected minor modifier adopter of the failure, and the minor modifier adopter must notify all Adopting Employers of any of its Pre-approved Plans affected by the failure, including an explanation of the effect of the failure on the reliance by Adopting Employers on the Opinion Letter. If a Mass Submitter repeatedly fails to identify the modifications, the IRS may deny permission to that Mass Submitter to submit additional modifications.

.04 *Amendments of Mass Submitter plans*. If a Mass Submitter amends any of its plans, the Mass Submitter must provide copies of the amendment to Providers that have adopted the plan. Any Provider that does not wish to make the amendments made by a Mass Submitter may switch to another Mass Submitter or may submit an application for an Opinion Letter on its own behalf during the next applicable Submission Period. The IRS will not issue an Opinion Letter with respect to amendments made between applicable Submission Periods, and a Mass Submitter should not submit an application between applicable Submission Periods for an Opinion Letter with respect to plan amendments. Instead, the Mass Submitter must submit a restated plan, including the amendments, during the next Cycle.

.05 *Expeditious processing accorded Mass Submitter plans*. Subject to section 16, all Mass Submitters' plans, including approved plans of a Mass Submitter adopted by Providers, will be accorded more expeditious processing than plans submitted by non-Mass Submitters, to the extent administratively feasible.

SECTION 16. FILINGS MADE AFTER THE SUBMISSION PERIOD

.01 *In general*. Except as set forth in section 16.02, for an application for an Opinion Letter (including that of a minor modifier adopter of a Mass's Submitter plan) that is submitted after the applicable Submission Period for a Cycle but before the beginning of the Employer Adoption Window for that Cycle, the IRS generally will not review the application until it has reviewed and processed all applications submitted during that Cycle's Submission Period. However, the IRS may, in its discretion, determine whether the processing of filings made after the Submission Period may be prioritized and accelerated. The IRS will not accept applications for a Cycle that are submitted during or after that Cycle's Employer Adoption Window.

.02 *Exception for identical adopter*. An application for an Opinion Letter for a plan that is word-for-word identical to a Mass Submitter Pre-approved Plan is not treated as made after the Submission Period merely because it is submitted after the end of the applicable Submission Period for a Cycle. Applications for a plan that is word-for-word identical to a Mass Submitter's Pre-approved Plan for a Cycle may be submitted until the IRS informs the Mass Submitter that word-for-word identical applications will no longer be accepted, which is expected to be shortly before the issuance of Opinion Letters for the next Cycle.

SECTION 17. SCOPE OF REVIEW; TIMING OF ISSUANCE OF OPINION LETTERS

.01 *Scope of review*.

(1) *In general*. The IRS will review plans submitted during the Submission Period for a Cycle (as well as later identical adopter applications and applications that are filed after the Submission Period that the IRS will review in accordance with section 16) taking into account the applicable Cumulative List for the Cycle, as described in section 17.01(2). Generally, the IRS will consider only the items on the applicable Cumulative List for the Cycle in determining whether to issue an Opinion Letter for that Cycle. However, if a plan that has not been previously reviewed is submitted for a Cycle or a plan has been amended with respect to previously approved language, the IRS will also review the plan for items on earlier Cumulative Lists, as well as for any other relevant Qualification Requirements or Section 403(b) Requirements, as applicable, that were considered by the IRS in issuing Opinion Letters prior to the implementation of Cumulative Lists.

(2) *Cumulative List*. For each Cycle, the IRS intends to publish a Cumulative List in the IRB shortly before the start of the Cycle's Submission Period. The Cumulative List for a Cycle sets forth specific items the IRS has identified for review in determining whether the form of a Pre-approved Plan that has been submitted to the IRS for an Opinion Letter has been properly updated after the plan was submitted for an Opinion Letter for the preceding Cycle.

.02 *Timing of issuance of Opinion Letters*. The IRS intends to issue Opinion Letters for a Cycle to Mass Submitters and Providers at approximately the same time within the Cycle for applications submitted during the Cycle's Submission Period (other than an application for a plan that includes Minor Modifications to a Mass Submitter plan). Prior to issuing Opinion Letters for a Cycle, the IRS will send a notification to the applicable Mass Submitter or Provider if the IRS determines that the plan appears to be in full compliance with the applicable Qualification Requirements or Section 403(b) Requirements, as applicable, based on the submission and the review as of the date of notification. However, this notification will only indicate that the plan appears to meet the applicable requirements under review as of the date of the notification. This notification is for the convenience of the applicable Mass Submitter or Provider concerning the status of its application and does not constitute an official Opinion Letter on which the Mass Submitter or Provider may rely. In addition, the IRS reserves the right to require changes after the notification is sent.

SECTION 18. WITHDRAWAL OF APPLICATIONS

.01 *Notification and effect*. A Provider may withdraw its application for an Opinion Letter at any time prior to the issuance of an Opinion Letter by notifying the IRS in writing of the withdrawal at the address set forth in section 24. The Provider also must notify each Adopting Employer of the withdrawal of the application and the consequences of the withdrawal to the Adopting Employer. As set forth in section 11, the plan of such an Employer will become an individually designed plan unless the Employer adopts a newly approved Pre-approved Plan during the Employer Adoption Window for the Cycle for which the application was submitted.

.02 *IRS retains information*. Even though an application is withdrawn, the IRS will retain all correspondence and documents associated with that application and will not return them to the Provider. If an application is withdrawn, the case may be referred to IRS Employee Plans Examinations.

SECTION 19. NONTRANSFERABILITY OF OPINION LETTER

An Opinion Letter issued to a Provider is not transferable. In the case of a change in entity with respect to a Provider, an Opinion Letter issued to the Provider may not be utilized by the changed entity. In addition, if a different entity assumes sponsorship of a Pre-approved Plan, it must submit an application for a new Opinion Letter under the name of the different entity and meet all the applicable requirements to be a Provider. The application may be filed at the time of the assumption of plan sponsorship by the new Provider, and the filing is not limited to the applicable Submission Period. The application is subject to a reduced user fee as provided in the successors to Rev. Proc. 2023-4 (as updated annually). The new Opinion Letter will recognize the change in sponsorship and will not modify the scope of or change the reliance on the original Opinion Letter. The IRS may, in appropriate circumstances, request documentation of the assumption of sponsorship prior to issuing an Opinion Letter to the new entity. Examples of a change in entity include, but are not limited to, the acquisition of a Provider by another entity, the sale or transfer of the stock or assets of the Provider to another entity, and any other circumstance that results in a change in a Provider's employer identification number.

SECTION 20. NOTIFICATION OF ADOPTING EMPLOYER REGARDING FAILURE OF THE FORM OF THE PLAN TO SATISFY QUALIFICATION REQUIREMENTS OR SECTION 403(b) REQUIREMENTS

If a Provider has knowledge that the form of an Adopting Employer's plan may no longer satisfy the Qualification Requirements or Section 403(b) Requirements, as applicable, and the Provider does not submit a request to correct the failure to satisfy those requirements under EPCRS, the Provider must notify the Adopting Employer that the plan may no longer satisfy those requirements, advise the Adopting Employer that adverse tax consequences may result from the failure of the form of the plan to satisfy those requirements, and inform the Adopting Employer about the availability of EPCRS. This section 20 does not impose a requirement on a Provider to monitor compliance of an Adopting Employer's plan with the Qualification Requirements or Section 403(b) Requirements, as applicable, but it provides that the Provider has a duty to inform the Adopting Employer if the Provider has knowledge that the Adopting Employer's plan may no longer satisfy those requirements.

SECTION 21. DISCONTINUED PLANS

.01 *Notification to the IRS*. A Provider must notify the IRS in writing if a Pre-approved Plan is no longer in use by any Adopting Employer or the Provider intends to discontinue the plan. The written notification must be sent to the address set forth in section 24 and must refer to the file folder number appearing on the latest Opinion Letter issued.

.02 *Notification to Adopting Employers*. A Provider that intends to discontinue sponsorship of a Pre-approved Plan that has one or more Adopting Employers must inform each Adopting Employer of the date on which the Provider will discontinue sponsorship and that the Adopting Employer's plan will cease to be a Pre-approved Plan and will convert to an individually designed plan on that date. The Provider must also inform each Adopting Employer that, notwithstanding the Provider's discontinuance of its sponsorship, if, by the end of the calendar year following the calendar year in which the Provider discontinues sponsorship of the plan, the Adopting Employer adopts another Pre-approved Plan and the effective date of the adoption is made retroactive to the date of the discontinued sponsorship, then the Adopting Employer's plan will be treated as though it had not ceased to be a Pre-approved Plan.

SECTION 22. REVOCATION OF OPINION LETTER BY THE IRS

An Opinion Letter found to be in error or not in accord with the current procedures of the IRS or the IRS's current interpretation of applicable law may be revoked. See also sections 4.01(15), 13.01, and 23.01 for other circumstances under which an Opinion Letter may be revoked. Revocation may be applied retroactively. For this purpose, an Opinion Letter is given the same effect as a determination letter. See generally section 23 of Rev. Proc. 2023-4 (as updated annually). Revocation may be effected by a notice to the Provider to which the Opinion Letter was originally issued. The Provider must then notify each Adopting Employer of the revocation as soon as possible. The notification to each Adopting Employer must explain how the revocation affects any reliance an Adopting Employer has on the applicable Opinion Letter and on any determination letter issued.

SECTION 23. RECORD KEEPING REQUIREMENTS

.01 *Filing of Opinion Letter application constitutes agreement to comply with record keeping requirements*. By submitting an application for an Opinion Letter under this revenue procedure (or by having an application filed on its behalf by a Mass Submitter), a Provider agrees, as set forth in section 4.01(15), to comply with the requirements imposed on the Provider by this revenue procedure, including the record keeping requirements of this section 23. Failure to comply with the requirements imposed on the Provider by this revenue procedure may result in the loss of eligibility to be a Provider and the revocation of Opinion Letters that have been issued to the Provider.

.02 *Maintenance and availability of records of Adopting Employers*. A Provider must maintain, or have maintained on its behalf, for each of its plans, a record of the names, business addresses, and taxpayer identification numbers of all Adopting Employers. However, a Provider need not maintain records with respect to employers that, to the best of the Provider's knowledge, ceased to maintain its Pre-approved Plan more than three years earlier. Upon written request, a Provider must provide to the IRS a list of Adopting Employers that indicates, to the best of the Provider's knowledge, which of those employers continue to maintain the plan as a Pre-approved Plan and which of those employers have ceased to maintain the plan as a Pre-approved Plan within the preceding three years.

SECTION 24. WHERE TO FILE

.01 *Opinion Letters*. Applications for Opinion Letters, including applications filed by Mass Submitters, should be sent to:

Internal Revenue Service
Attn: Pre-Approved Plans Coordinator
Room 6-403, Group 7521
P.O. Box 2508
Cincinnati, OH 45201-2508

.02 *Delivery Service*. An application shipped by Express Mail or a delivery service should be sent to the attention of the Pre-Approved Plans Coordinator, to:

Internal Revenue Service
550 Main Street
Room 6-403, Group 7521
Cincinnati, OH 45202

PART IV. PROCEDURES FOR AN ADOPTING EMPLOYER APPLYING FOR A DETERMINATION LETTER

SECTION 25. ADOPTING EMPLOYER APPLYING FOR A DETERMINATION LETTER

.01 *In general*. To the extent permitted in this section 25, an Adopting Employer may obtain reliance that the form of the plan satisfies the Qualification Requirements or Section 403(b) Requirements, as applicable, by applying for a determination letter. Section 25.02 provides the rules for applying for a determination letter submitted on Form 5307, *Application for Determination for Adopters of Modified Nonstandardized Pre-Approved Plans*, for review of a Pre-approved Plan using the applicable Cumulative List. Section 25.03 provides the rules for applying for a determination letter submitted on Form 5300, *Application for Determination for Employee Benefit Plan*, for review of a Pre-approved Plan using the applicable Cumulative List. Section 25.04 provides the rules for applying for a determination letter submitted on Form 5300 for review of a plan treated as an individually designed plan using the Required Amendments List. Section 25.05 provides the rules for applying for a determination letter for a partial termination.

.02 *Form 5307 application: eligibility to file, timing, and scope of review*.

(1) *Eligibility to file*.

(a) *In general*. Except as set forth in section 25.02(1)(b), the following Adopting Employers may use a Form 5307 to apply for a determination letter:

(i) An Adopting Employer of a Nonstandardized Plan that makes modifications to the terms of the plan that are not extensive (amendments are considered extensive if the IRS determines, in its sole discretion, that the plan of the Adopting Employer is no longer substantially similar to the Nonstandardized Plan of the Provider (see section 25.03(1)(a)(vi) for treatment of changes that are extensive and section 25.04(1)(a) for treatment of changes that cause a plan to be treated as individually designed)); or

(ii) An Adopting Employer of any Pre-approved Plan that amends its plan solely to add language to satisfy the requirements of § 415 (and § 416, in the case of a Qualified Pre-approved Plan) due to the required aggregation of plans.

(b) *Exceptions*. Notwithstanding the provisions of section 25.02(1)(a), determination letter applications for the following plans must be filed on Form 5300 (if otherwise permitted):

(i) Any determination letter application with respect to a multiple employer Qualified Pre-approved Plan (instead, see section 25.03 and .04);

(ii) A determination letter application for a Nonstandardized Plan that is a Qualified Pre-approved Plan, a pension plan, and not a Governmental Plan in which the normal retirement age is lower than the age 62 safe harbor in § 1.401(a)-1(b)(2), that requests reliance on whether the plan satisfies § 1.401(a)-1(b)(2) (instead, see section 25.03(1)(a)(ii) or (iv));

(iii) A determination letter application for a Nonstandardized Plan that is a Qualified Pre-approved Plan, a pension plan, and a Governmental Plan in which the normal retirement age does not satisfy any of the safe harbors described in § 1.401(a)-1(b)(2)(v) of the proposed regulations, that requests reliance on whether the plan satisfies § 1.401(a)-1(b)(2) of the proposed regulations (instead, see section 25.03(1)(a)(iii) or (v)); or

(iv) A determination letter application for a Nonstandardized Plan regarding a partial termination (instead, see section 25.05).

(c) *Prior favorable determination letter*. An Adopting Employer eligible to file for a determination letter submitted on Form 5307 may file on a Form 5307 regardless of whether a prior favorable determination letter has been issued with respect to the plan.

(d) *Copy of Opinion Letter*. An Adopting Employer must include a copy of the Opinion Letter for the Pre-approved Plan. See section 13 of Rev. Proc. 2023-4 (as updated annually).

(2) *Timing*. An Adopting Employer of a Pre-approved Plan for a Cycle that is eligible to file for a determination letter submitted on Form 5307 generally must file during the Employer Adoption Window for the Cycle. However, if the Adopting Employer had not previously adopted a Pre-approved Plan that had received an Opinion Letter for the preceding Cycle, the Adopting Employer has until the start of the Employer Adoption Window for the next Cycle to apply for a determination letter submitted on Form 5307. For example, if an Employer did not previously adopt a Cycle 2 Pre-approved Plan, adopts a Cycle 3 Nonstandardized Plan, and makes amendments that are not extensive, the Adopting Employer will not be limited to the Cycle 3 Adoption Window to file for a Form 5307 determination letter (for example, the Adopting Employer may have adopted the Cycle 3 Nonstandardized Plan for the first time after the Cycle 3 Adoption Window). Instead, the Adopting Employer has until the start of the Cycle 4 Employer Adoption Window to file for a Form 5307 determination letter for the Cycle 3 plan. If the Adopting Employer then adopts a newly approved Cycle 4 Nonstandardized Plan during the Cycle 4 Employer Adoption Window and makes amendments that are not extensive, the Employer only has until the end of the Cycle 4 Employer Adoption Window to file for a Form 5307 determination letter for the Cycle 4 plan.

(3) *Scope of Review*. For a determination letter submitted on a Form 5307, the Adopting Employer's plan is reviewed using the Cumulative List that was used to review the underlying Pre-approved Plan.

.03 *Form 5300 application filed by an Adopting Employer for a plan treated as a Pre-approved Plan: eligibility to file, timing, and scope of review using Cumulative List*.

(1) *Eligibility to file*.

(a) *In general*. The following Adopting Employers must use a Form 5300 to apply for a determination letter under this section 25.03:

(i) An Adopting Employer that is the controlling member of a multiple employer Nonstandardized Plan that is a Qualified Pre-approved Plan and that has made modifications to the terms of the plan that are not extensive (see section 13.05(4));

(ii) For a Qualified Pre-approved Plan that is a pension plan and not a Governmental Plan with a normal retirement age that is lower than the age 62 safe harbor in § 1.401(a)-1(b)(2), an Adopting Employer (or, if the plan is a multiple employer qualified plan, the controlling member) that files a determination letter request that is limited to a determination as to whether a plan's normal retirement age satisfies the requirements of § 1.401(a)-1(b)(2);

(iii) For a Qualified Pre-approved Plan that is a pension plan and a Governmental Plan with a normal retirement age that does not satisfy any of the safe harbors described in § 1.401(a)-1(b)(2)(v) of the proposed regulations, an Adopting Employer (or, if the plan is a multiple employer qualified plan, the controlling member) that files a determination letter request that is limited to a determination as to whether a plan's normal retirement age satisfies the requirements of § 1.401(a)-1(b)(2) of the proposed regulations;

(iv) For a Nonstandardized Plan that is a Qualified Pre-approved Plan, a pension plan, and not a Governmental Plan in which the normal retirement age under the plan is lower than the age 62 safe harbor, an Adopting Employer (or, if the plan is a multiple employer qualified plan, the controlling member) that files a determination letter request that includes, but is not limited to, whether the plan satisfies § 1.401(a)-1(b)(2), and that has made additional modifications to the terms of the plan that are not extensive; or

(v) For a Nonstandardized Plan that is a Qualified Pre-approved Plan, a pension plan, and a Governmental Plan in which the normal retirement age does not satisfy any of the safe harbors described in § 1.401(a)-1(b)(2)(v) of the proposed regulations, an Adopting Employer (or, if the plan is a multiple employer qualified plan, the controlling member) that files a determination letter request that includes, but is not limited to, whether the plan satisfies § 1.401(a)-1(b)(2) of the proposed regulations, and that has made additional modifications to the terms of the plan that are not extensive.

(vi) An Adopting Employer of a Nonstandardized Plan that makes modifications to the terms of the plan that are extensive (see section 25.02(1)(a)(i) for what changes will be determined to be extensive and section 13.05(4) for changes that cause a plan to be treated as individually designed and thus subject to section 25.04(1)(a)).

(b) *Prior favorable determination letter*. An Adopting Employer eligible to file for a determination letter submitted on Form 5300 under this section 25.03 may file on a Form 5300 under this section 25.03 regardless of whether a prior favorable determination letter has been issued with respect to the plan.

(c) An Adopting Employer that applies for a determination letter for a Pre-approved Plan for one or more of the reasons described in section 25.03(1)(a) must identify the applicable reason(s) in a cover letter to the application and include a copy of the Opinion Letter for the Pre-approved Plan.

(2) *Timing*. For each Cycle, an Adopting Employer that is eligible to file for a determination letter submitted on Form 5300 under this section 25.03 generally must file the determination letter application during the Employer Adoption Window for the Cycle. However, if the Adopting Employer had not previously adopted a Pre-approved Plan that had received an Opinion Letter for the preceding Cycle, the Adopting Employer has until the start of the Employer Adoption Window for the next Cycle to apply for a determination letter submitted on Form 5300 under this section 25.03. For example, if a controlling member of a multiple employer plan did not previously adopt a Cycle 2 Pre-approved Plan, adopts a Cycle 3 Nonstandardized Plan, and makes amendments that are not extensive, the Adopting Employer will not be limited to the Cycle 3 Adoption Window to

file for a Form 5300 determination letter (for example, the Employer may have adopted the Cycle 3 Nonstandardized Plan for the first time after the Cycle 3 Adoption Window). Instead, the Adopting Employer has until the start of the Cycle 4 Employer Adoption Window to file for a Form 5300 determination letter under this section 25.03 for the Cycle 3 plan. If the Adopting Employer then adopts a newly approved Cycle 4 Nonstandardized Plan during the Cycle 4 Employer Adoption Window and makes amendments that are not extensive, the Employer only has until the end of the Cycle 4 Employer Adoption Window to file for a Form 5300 determination letter under this section 25.03 for the Cycle 4 plan.

(3) *Scope of Review*. For a determination letter submitted on Form 5300 under this section 25.03, the Adopting Employer's plan is reviewed using the Cumulative List that was used to review the underlying Pre-approved Plan.

.04 *Form 5300 application filed by an Adopting Employer for a plan treated as individually designed: eligibility to file, timing, and scope of review using the Required Amendments List*.

(1) *Eligibility to file*.

(a) *In general*. An Adopting Employer whose plan is treated as individually designed pursuant to section 13.05 (for example, if the Adopting Employer makes amendments that, due to the nature and extent of the amendments, result in the IRS determining that the plan should be treated as individually designed, as described in section 13.05(4)) must use a Form 5300 to apply for a determination letter under this section 25.04:

(b) If eligible under Rev. Proc. 2022-40, including the criteria that the plan previously had not been filed for a determination letter submitted on a Form 5300 and had not been issued a determination letter as an individually designed plan.

(2) *Timing*. At any time, to the extent permitted under Rev. Proc. 2022-40.

(3) *Scope of Review*. In accordance with Rev. Proc. 2022-40, the plan is reviewed based on the Required Amendments List that was issued during the second calendar year preceding the submission of the determination letter application.

.05 *Form 5300 application for a partial termination*. An Adopting Employer of a Qualified Pre-approved Plan (or, if the plan is a multiple employer plan, the controlling member) that requests a determination regarding partial termination must file using Form 5300. Applicants may not request a determination letter with respect to the entire plan unless the plan is otherwise eligible to be submitted for a determination letter. If the request is limited to whether a partial termination has occurred, the Employer may file on Form 5300 at any time, regardless of whether the Employer is otherwise eligible to submit a determination letter application. If the request is not limited to whether a partial termination has occurred, the Employer must be otherwise eligible to submit a determination letter application pursuant to Rev. Proc. 2022-40.

.06 *Procedures provided in annual revenue procedure*. Determination letter filing procedures are set forth in Rev. Proc. 2023-4, which is updated annually.

PART V. MISCELLANEOUS

SECTION 26. EFFECT ON OTHER DOCUMENTS

.01 Part I and III of Rev. Proc. 2016-37 are clarified, modified, and superseded with respect to a Cycle 4 (or later) Qualified Pre-approved Plan.

.02 Rev. Proc. 2017-41 is clarified, modified, and superseded with respect to a Cycle 4 (or later) Qualified Pre-approved Plan.

.03 Sections 4, and 10 through 12 of Rev. Proc. 2019-39 are clarified, modified, and superseded with respect to a Cycle 3 (or later) Section 403(b) Pre-approved Plan.

.04 Sections 4 through 22 and 25 of Rev. Proc. 2021-37 are clarified, modified, and superseded with respect to a Cycle 3 (or later) Section 403(b) Pre-approved Plan.

SECTION 27. EFFECTIVE DATE

.01 *In general*. Except as provided in section 27.02 through .03, this revenue procedure is effective on November 21, 2023.

.02 Sections 9 through 24 (regarding procedures for applications for Opinion Letters) are effective with respect to:

(1) A Cycle 4 (or later) defined contribution Qualified Pre-approved Plan;

(2) A Cycle 4 (or later) defined benefit Qualified Pre-approved Plan; and

(3) A Cycle 3 (or later) Section 403(b) Pre-approved Plan.

.03 Section 25 (regarding procedures for applications for a determination letter) is effective with respect to:

(1) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 4 (or later) defined contribution Qualified Pre-approved Plan;

(2) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 4 (or later) defined benefit Qualified Pre-approved Plan; and

(3) An application for a determination letter submitted by an Adopting Employer with respect to a Cycle 2 (or later) Section 403(b) Pre-approved Plan.[22]

SECTION 28. PUBLIC COMMENTS

The Department of the Treasury (Treasury Department) and the IRS invite comments on this revenue procedure. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type "Revenue Procedure 2023-37" in the search field on the Regulations.gov home page to find this revenue procedure and submit comments). Alternatively, comments may be submitted by mail to:

[22] The rules regarding an Adopting Employer's application for a determination letter apply for Cycle 2 Section 403(b) Pre-approved Plans because, although Cycle 2 has begun, Cycle 2 Opinion Letters have not been issued and the Employer Adoption Window for Cycle 2 (during which an application for a determination letter would generally be submitted) has not begun.

Internal Revenue Service
Attn: CC:PA:LPD:PR (Revenue Procedure 2023-37), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044.

The Treasury Department and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket.

SECTION 29. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in this revenue procedure are third-party disclosures, recordkeeping, and reporting requirements listed in sections 6.04, 9.02(8), 9.06(6), 13.01, 14.03, 14.04, 14.05, 15, 23.01 and 23.02. This information is required to enable the Commissioner, Tax Exempt and Government Entities Division of the IRS, to make determinations in connection with compliance with the Qualification Requirements or Section 403(b) Requirements. This information will be used to determine whether a plan is entitled to favorable tax treatment. The likely respondents are banks, insurance companies, other financial institutions, law, actuarial, and consulting firms, employee benefit practitioners and employers. Any collection burden associated with this revenue procedure is accounted for and approved by OMB under OMB control numbers 1545-1674 and 1545-0169.

The reporting requirements mentioned within this revenue procedure are related to the application process for an opinion letter as detailed in section 14.03. Additional application information is needed related to: Interim Amendments as detailed in section 14.04; substantially identical plans as detailed in section 14.05; and Mass Submitter applications as detailed in section 15. These collection requirements are included within the OMB approval for 1545-0169. This revenue procedure does not alter these previously approved information collection requirements and does not create new collection requirements not already approved by OMB.

The third-party disclosure requirements mentioned within this revenue procedure are related to the notification requirements for Providers to inform the Adopting Employers of plan amendments (including Interim Amendments) or the discontinuance of the plan as detailed in sections 9.02(8), 9.06(6), and 13.01 (and section 6.04 regarding Interim Amendments). These collection requirements are included within the OMB approval for 1545-1674. This revenue procedure does not alter these previously approved information collection requirements and does not create new collection requirements not already approved by OMB.

The recordkeeping requirements mentioned within this revenue procedure are related to keeping records of the of the Opinion Letter application as detailed in section 23.01; and amendment notifications as detailed in sections 9.02(8), 9.06(6), and 13.01. Additionally, Providers must keep records of the Adopting Employers as detailed in section 23.02. These collection requirements are included within the OMB approval for 1545-1674. This revenue procedure does not alter these previously approved information collection requirements and does not create new collection requirements not already approved by OMB.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by § 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is Patrick Gutierrez of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this revenue procedure, contact Employee Plans at (513) 975-6319 (not a toll-free number).

Submission of Information to IRS by Qualified Manufacturers of Clean Vehicles, Previously-Owned Clean Vehicles, and Commercial Clean Vehicles

Rev. Proc. 2023-38

SECTION 1. PURPOSE

This revenue procedure updates the procedures under § 30D(d)(3) of the Internal Revenue Code (Code)[1] for qualified manufacturers to enter into a written agreement with the Internal Revenue Service (IRS) under which such manufacturer agrees to make periodic written reports to the Secretary providing vehicle identification numbers (VINs) and other information regarding vehicles eligible for a clean vehicle credit. Vehicles eligible for the clean vehicle credit under § 30D (§ 30D credit), the qualified commercial clean vehicles credit under § 45W (§ 45W credit), and the previously-owned clean vehicles credit under § 25E (§ 25E credit), generally must be manufactured by a qualified manufacturer as described in § 30D(d)(1)(C) and (d)(3).[2] *See* §§ 45W(c)(1) and 25E(c)(1)(D)(i). This revenue procedure consolidates all the procedural requirements for qualified manufacturers in one document for ease of reference, and establishes the procedures for qualified manufacturers to submit information regarding vehicles for upfront review by the Department of Energy (DOE), to ensure the vehicles are eligible for the § 30D credit for the calendar year at issue in accordance with the excluded entities provision of § 30D(d)(7). As provided in section 8 of this revenue procedure, this revenue procedure supersedes section 4 of Revenue Procedure 2022-42, 2022-52 I.R.B. 565, as well as sections 4.02(1), 7.01, and 7.02 of Revenue Procedure 2023-33, 2023-43 I.R.B. 1135.

SECTION 2. BACKGROUND

.01 *Section 30D, Clean Vehicle Credit*

(1) Section 30D was enacted by § 205(a) of the Energy Improvement and Extension Act of 2008, Division B of Public Law 110-343, 122 Stat. 3765, 3835 (October 3, 2008), to provide a credit for purchasing and placing in service new qualified plug-in electric drive motor vehicles. Section 30D has been amended several times since its enactment, most recently by § 13401 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA). In general, the amendments made by § 13401 of the IRA to § 30D apply to vehicles placed in service after December 31, 2022, except as provided in § 13401(k)(2) through (5) of the IRA.

(2) Section 30D(a) allows a credit for the taxable year with respect to each new clean vehicle placed in service by a taxpayer during the taxable year. Section 30D(b) provides a maximum credit of $7,500 per vehicle, consisting of $3,750 if certain critical minerals requirements are met and $3,750 if certain battery components requirements are met. These requirements are described in § 30D(e)(1) and (2), respectively.

(3) Section 30D(d)(1) defines a "new clean vehicle" as a motor vehicle that satisfies the following eight requirements set forth in § 30D(d)(1)(A) through (H):

(a) The original use of the motor vehicle must commence with the taxpayer.

(b) The motor vehicle must be acquired for use or lease by the taxpayer and not for resale.

(c) The motor vehicle must be made by a qualified manufacturer.

(d) The motor vehicle must be treated as a motor vehicle for purposes of title II of the Clean Air Act.

(e) The motor vehicle must have a gross vehicle weight rating of less than 14,000 pounds.

(f) The motor vehicle must be propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 7 kilowatt hours and is capable of being recharged from an external source of electricity.

(g) The final assembly of the motor vehicle must occur within North America (effective August 17, 2022).

(h) The person who sells any vehicle to the taxpayer must furnish a report to the taxpayer and to the Secretary, at such time and in such manner as the Secretary provides, containing the following items:

(i) The name and taxpayer identification number of the taxpayer;

(ii) The VIN, unless, in accordance with any applicable rules promulgated by the Secretary of Transportation, the vehicle is not assigned such a number;

(iii) The battery capacity of the vehicle;

(iv) Verification that original use of the vehicle commences with the taxpayer;

(v) The maximum credit under § 30D allowable to a taxpayer with respect to the vehicle (the amount reported is without regard to the § 30D(f)(10) or § 25E(b) limitations based on modified adjusted gross income); and

(vi) In the case of a taxpayer who makes an election to transfer the credit to an eligible entity under § 30D(g)(1),[3] any amount described in § 30D(g)(2)(C) that has been provided to such taxpayer.

(4) Section 30D(d)(3) defines a "qualified manufacturer" as any manufacturer (within the meaning of the regulations prescribed by the Administrator of the Environmental Protection Agency (EPA) for purposes of the administration of title II of the Clean Air Act (as defined in 42 U.S.C. 7521, *et seq*)) that enters into a written agreement with the Secretary

[1] Unless otherwise specified, all "Section" or "§" references are to sections of the Code.

[2] Section 30D(d)(6) defines a new clean vehicle to include any new qualified fuel cell motor vehicle (as defined in § 30B(b)(3)) that meets the requirements of § 30D(1)(G) and (H). Section 25E(c) defines a previously-owned clean vehicle to include, in part, a motor vehicle that either (1) meets the requirements of § 30D(d)(1)(C) (regarding qualified manufacturer), or (2) satisfies the requirements of § 30B(b)(3)(A) and (B) (regarding fuel cell motor vehicles) and has a gross vehicle weight rating of less than 14,000 pounds. Therefore, if a new clean vehicle is a new qualified fuel cell motor vehicle described in § 30D(d)(6), it does not need to be made by a qualified manufacturer, as otherwise required under § 30D(d)(1)(C). Similarly, if a previously-owned clean vehicle is a fuel cell motor vehicle described in § 25E(c)(1)(D)(ii), it does not need to be made by a qualified manufacturer, as otherwise required under § 25E(c)(1)(D)(i). However, any qualified manufacturer that makes fuel cell vehicles must report on such vehicles as described in sections 4.05 and 6 of this revenue procedure. In addition, any manufacturer of fuel cell vehicles that is not subject to the requirement to be a qualified manufacturer is encouraged to become a qualified manufacturer for purposes of providing the IRS with information to facilitate tax administration.

[3] Amendments to § 30D to allow an election to transfer the credit to an eligible entity are effective for vehicles placed in service after December 31, 2023. The transfer election provisions are incorporated by reference in § 25E(f) and apply to previously-owned clean vehicles.

under which such manufacturer agrees to make periodic written reports to the Secretary (at such times and in such manner as the Secretary may provide) providing vehicle identification numbers and such other information related to each vehicle manufactured by such manufacturer as the Secretary may require.

(5) Section 30D(d)(5) defines "final assembly" as the process by which a manufacturer produces a new clean vehicle at, or through the use of, a plant, factory, or other place from which the vehicle is delivered to a dealer or importer with all component parts necessary for the mechanical operation of the vehicle included with the vehicle, whether or not the component parts are permanently installed in or on the vehicle.

(6) Section 30D(d)(6) provides that "new clean vehicle" includes any new qualified fuel cell motor vehicle (as defined in § 30B(b)(3)) that meets the requirements under § 30D(d)(1)(G) and (H).

(7) Section 30D(d)(7) provides that "new clean vehicle" does not include: any vehicle placed in service after December 31, 2024, with respect to which any of the applicable critical minerals contained in the battery of such vehicle (as described in § 30D(e)(1)(A)) were extracted, processed, or recycled by a foreign entity of concern (as defined in 42 U.S.C. 18741(a)(5)), or any vehicle placed in service after December 31, 2023, with respect to which any of the components contained in the battery of such vehicle (as described in § 30D(e)(2)(A)) were manufactured or assembled by a foreign entity of concern.

(8) Section 13401(k)(3) of the IRA provides that the critical minerals and the battery components requirements described in § 30D(e)(1) and (2) apply to vehicles placed in service after the date on which proposed guidance with respect to the critical minerals and the battery components requirements is issued by the Secretary. On April 17, 2023, the Department of the Treasury (Treasury Department) and the IRS issued a Notice of Proposed Rulemaking, 88 F.R. 23370, which constitutes that proposed guidance. Thus, the critical minerals and battery components requirements apply to vehicles placed in service on or after April 18, 2023.

(9) Section 30D(e)(1)(A) provides that the critical minerals requirement with respect to the battery from which the electric motor of a vehicle draws electricity is satisfied if the percentage of the value of the applicable critical minerals (as defined in § 45X(c)(6)) contained in such battery that were (i) extracted or processed in the United States, or in any country with which the United States has a free trade agreement in effect, or (ii) recycled in North America, is equal to or greater than the applicable percentage (as certified by the qualified manufacturer, in such form or manner as prescribed by the Secretary) (critical minerals requirement). The applicable percentage for the critical minerals requirement is set forth in § 30D(e)(1)(B)(i) through (v) and varies based on when the vehicle is placed in service. In the case of a vehicle placed in service after April 18, 2023, and before January 1, 2024, the applicable percentage is 40 percent. In the case of a vehicle placed in service during calendar year 2024, 2025, and 2026, the applicable percentage is 50 percent, 60 percent, and 70 percent, respectively. In the case of a vehicle placed in service after December 31, 2026, the applicable percentage is 80 percent.

(10) Section 30D(e)(2)(A) provides that the battery components requirement with respect to the battery from which the electric motor of a vehicle draws electricity is satisfied if the percentage of the value of the components contained in such battery that were manufactured or assembled in North America is equal to or greater than the applicable percentage (as certified by the qualified manufacturer, in such form or manner as prescribed by the Secretary) (battery components requirement). The applicable percentage for the battery components requirement is set forth in § 30D(e)(2)(B)(i) through (vi) and varies based on when the vehicle is placed in service. In the case of a vehicle placed in service after April 18, 2023, and before January 1, 2024, the applicable percentage is 50 percent. In the case of a vehicle placed in service during calendar year 2024 or 2025, the applicable percentage is 60 percent. In the case of a vehicle placed in service during calendar year 2026, 2027, and 2028, the applicable percentage is 70 percent, 80 percent, and 90 percent, respectively. In the case of a vehicle placed in service after December 31, 2028, the applicable percentage is 100 percent.

(11) Section 30D(f)(11)(A) provides that no credit is allowed for a vehicle with a manufacturer's suggested retail price in excess of the applicable limitation. Section 30D(f)(11)(B) provides that the applicable limitation for each vehicle classification is as follows: in the case of a van, a sport utility vehicle, or a pickup truck, $80,000; and in the case of any other vehicle, $55,000.

.02 *Section 25E, Previously-Owned Clean Vehicles Credit*

(1) Section 13402 of the IRA added § 25E to the Code, which is generally effective for vehicles acquired after December 31, 2022, and before January 1, 2033. Section 25E(a) provides that in the case of a qualified buyer who, during a taxable year, places in service a previously-owned clean vehicle, an income tax credit (that is, the § 25E credit) is allowed for the taxable year equal to the lesser of (1) $4,000, or (2) the amount equal to 30 percent of the sale price with respect to such vehicle.

(2) Section 25E(c) defines certain terms for purposes of the § 25E credit. Section 25E(c)(1) defines "previously-owned clean vehicle" as, with respect to a taxpayer, a motor vehicle that satisfies the following four requirements set forth in § 25E(c)(1)(A) through (D):

(a) The model year of the motor vehicle is at least 2 years earlier than the calendar year in which the taxpayer acquires such vehicle.

(b) The original use of the motor vehicle commences with a person other than the taxpayer.

(c) The motor vehicle is acquired by the taxpayer in a qualified sale.

(d) The motor vehicle:

(i) meets the requirements of § 30D(d)(1)(C), (D), (E), (F), and (H) (except for § 30D(d)(1)(H)(iv)), or

(ii) is a motor vehicle that:

(A) satisfies the requirements under § 30B(b)(3)(A) and (B), and

(B) has a gross vehicle weight rating of less than 14,000 pounds.

(3) Section 25E(c)(2) defines a "qualified sale" as a sale of a motor vehicle (A) by a dealer (as defined in § 30D(g)

(8)), (B) for a sale price that does not exceed $25,000, and (C) that is the first transfer since August 16, 2022, to a qualified buyer other than the person with whom the original use of such vehicle commenced.

(4) Section 25E(c)(3) defines "qualified buyer" as, with respect to a sale of a motor vehicle, a taxpayer (A) who is an individual, (B) who purchases such vehicle for use and not for resale, (C) with respect to whom no deduction is allowable with respect to another taxpayer under § 151, and (D) who has not been allowed a § 25E credit for any sale during the 3-year period ending on the date of the sale of such vehicle.

(5) Section 25E(c)(4) defines "motor vehicle" and "capacity" to have the meaning given such terms in § 30D(d)(2) and (4), respectively.

(6) Section 25E(d) provides that no credit is allowed under § 25E(a) with respect to any vehicle unless the taxpayer includes the vehicle identification number of such vehicle on the return of tax for the taxable year.

03. *Section 45W, Credit for Qualified Commercial Clean Vehicles*

(1) Section 13403(a) of the IRA added new § 45W to the Code, which is effective for vehicles acquired after December 31, 2022, and before January 1, 2033. A taxpayer can claim a § 45W credit for purchasing and placing in service a qualified commercial clean vehicle, as defined in § 45W(c), during the taxable year. The amount of the § 45W credit is the lesser of (1) 15 percent of the taxpayer's basis in the vehicle (30 percent in the case of a vehicle not powered by a gasoline or diesel internal combustion engine), or (2) the incremental cost of the vehicle. Under § 45W(b)(4), the credit is limited to $7,500 in the case of a vehicle that has a gross vehicle weight rating of less than 14,000 pounds, and $40,000 for all other vehicles.

(2) Under § 45W(c), a "qualified commercial clean vehicle" is defined as any vehicle that is of a character subject to the allowance for depreciation that:

(a) meets the requirement under § 30D(d)(1)(C) of being made by a qualified manufacturer and is acquired for use or lease by the taxpayer and not for resale,

(b) either:

(i) meets the requirement under § 30D(d)(1)(D) of being treated as a motor vehicle for purposes of title II of the Clean Air Act and is manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails), or

(ii) is mobile machinery, as defined in § 4053(8) (including vehicles that are not designed to perform a function of transporting a load over the public highways), and

(c) either:

(i) is propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 15 kilowatt hours (or, in the case of a vehicle that has a gross vehicle weight rating of less than 14,000 pounds, 7 kilowatt hours) and is capable of being recharged from an external source of electricity, or

(ii) is a motor vehicle that satisfies the requirements under § 30B(b)(3)(A) and (B) of being a new qualified fuel cell motor vehicle.

.04 *Revenue Procedure 2022-42*

(1) Rev. Proc. 2022-42, in relevant part, established procedures for qualified manufacturers to enter into written agreements with the IRS in accordance with §§ 30D(d)(1)(C) and 30D(d)(3).

(2) Sections 4.01 and 4.02 of Rev. Proc. 2022-42 provided, respectively, information regarding the contents of the written agreement that a manufacturer must enter into with the IRS to become a qualified manufacturer and the contents of the written reports submitted by the qualified manufacturer to the IRS.

(3) Section 6.01 of Rev. Proc. 2022-42 provided that manufacturers must send their signed written agreements to *IRS.Clean.Vehicle.Manufacturers@irs.gov*. Section 6.02 of Rev. Proc. 2022-42 provided, in relevant part, that qualified manufacturers must file written monthly reports with the IRS by the fifteenth of the month and may file more frequently. It further provided that qualified manufacturers must send an email to *IRS.Clean.Vehicles.QM.Reporting@irs.gov* indicating their intent to submit monthly reports and the IRS will respond with instructions on how to submit their reporting information.

.05 *Revenue Procedure 2023-33*

(1) Rev. Proc. 2023-33, in relevant part, superseded sections 6.01 and 6.02 of Rev. Proc. 2022-42, and provided updated information on written agreements to be submitted by manufacturers to the IRS to be considered qualified manufacturers, as well as the method for qualified manufacturers to submit monthly reports, beginning January 1, 2024.

(2) Section 7.01 of Rev. Proc. 2023-33 updated the information for entering into a written agreement and provided that beginning January 1, 2024, to be a qualified manufacturer, manufacturers must have entered into a written agreement pursuant to section 4.01 of Rev. Proc. 2022-42 through the IRS Energy Credits Online Portal. It also clarified that manufacturers who previously registered and filed written agreements under the procedures in section 6.01 of Rev. Proc. 2022-42 must enter into new written agreements through the IRS Energy Credits Online Portal, and that the procedures for manufacturers to enter into written agreements prior to January 1, 2024, will remain as described in section 6.01 of Rev. Proc. 2022-42.

(3) Section 7.02 of Rev. Proc. 2023-33 updated the information for filing written reports by qualified manufacturers and provided that beginning January 1, 2024, qualified manufacturers must file the monthly written reports described in section 4.02 of Rev. Proc. 2022-42 through the IRS Energy Credits Online Portal by the fifteenth of the month following the month to which each monthly written report relates. It further stated that qualified manufacturers may file reports more frequently than once a month. Beginning January 1, 2024, manufacturers who previously registered as qualified manufacturers under the procedures in section 6.01 of Rev. Proc. 2022-42 must file their written reports through the IRS Energy Credits Online Portal. It further clarified that the procedures for manufacturers to file written reports prior to January 1, 2024, will remain as described in section 6.02 of Rev. Proc. 2022-42.

.06 *IRS Proposed Regulations*

(1) On April 17, 2023, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-120080-22) in the *Federal Register* (88

F.R. 23370) (April 2023 proposed regulations). The April 2023 proposed regulations provided proposed definitions for certain terms related to § 30D, proposed rules regarding personal and business use and other special rules, and additional proposed rules related to the critical mineral and battery component requirements.

(2) On October 10, 2023, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-113064-23) in the *Federal Register* (88 F.R. 70310) (October 2023 proposed regulations), that contains initial and additional proposed regulations under §§ 25E, 30D, and 6213.

(3) Concurrently with this revenue procedure, the Treasury Department and the IRS are releasing a notice of proposed rulemaking (REG-118492-23) in the *Federal Register*, regarding the excluded entity provisions under § 30D(d)(7) with respect to the § 30D credit (December 2023 proposed regulations). The December 2023 proposed regulations would provide additional clarity on definitions with respect to new clean vehicles eligible for the clean vehicle credit.

(4) References in this revenue procedure to "clean vehicle regulations" are to the provisions of the April 2023 proposed regulations, October 2023 proposed regulations, and December 2023 proposed regulations described in this section 2.06 of this revenue procedure, once they are issued in final form.

.07 *Department of Energy Guidance*

Concurrently with this revenue procedure, the DOE is releasing proposed guidance in the *Federal Register* (DOE guidance), which proposes interpretations of certain terms used in the definition of "foreign entity of concern" (FEOC) provided in section 40207(a)(5) of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)) and as cross-referenced in § 30D(d)(7).

SECTION 3. DEFINITIONS

.01 *In General*. Terms used in this revenue procedure and not defined in section 3 of this revenue procedure have the same meaning as in §§ 30D, 45W and 25E, and the clean vehicle regulations.

.02 *IRS Energy Credits Online Portal.* For purposes of this revenue procedure, the "IRS Energy Credits Online Portal" refers to the registration portal that manufacturers and sellers must use to register as a qualified manufacturer, seller, or registered dealer. A link to the site is available on irs.gov. Any successor portal or successor site address will be announced and made available on irs.gov.

.03 *Model Year.* The term "model year" means the model year determined under the EPA's Clean Air Act regulations (*see* 40 CFR 86.082-2).

SECTION 4. QUALIFIED MANUFACTURER WRITTEN AGREEMENTS AND PERIODIC REPORTING REQUIREMENTS

.01 *Qualified Manufacturer Written Agreements, In General.* To meet certain statutory requirements of §§ 30D, 25E, and 45W, any manufacturer that currently produces or previously produced a vehicle eligible for a credit may enter into a written agreement with the IRS to become a qualified manufacturer as defined in § 30D(d)(3). Manufacturers are not qualified manufacturers until they have entered into written agreements with the IRS. In addition, any manufacturer of fuel cell vehicles that is not required to be a qualified manufacturer under § 30D(d) is encouraged to become a qualified manufacturer for purposes of providing the IRS with information to facilitate tax administration.

.02 *Qualified Manufacturer Written Agreements Through The IRS Energy Credits Online Portal.* Qualified manufacturers may enter into a written agreement through the IRS Energy Credits Online Portal after the IRS announces the availability of the Portal on irs.gov. Beginning January 1, 2024, to be a qualified manufacturer, manufacturers must have entered into a written agreement through the IRS Energy Credits Online Portal. Manufacturers who previously registered and filed written agreements under the procedures in section 6.01 of Rev. Proc. 2022-42, section 7.01 of Rev. Proc. 2023-33, or section 4.03 of this revenue procedure must enter into new written agreements through the IRS Energy Credits Online Portal to be considered qualified manufacturers on or after January 1, 2024. An individual representative of the manufacturer must register through the IRS Energy Credits Online Portal and provide the required information to request to become a qualified manufacturer. The manufacturer's representative will need to sign in or create an account on irs.gov in order to verify the manufacturer's business tax information and register. Help related to the IRS identity verification process can be found on the sign-in page or at www.irs.gov/registerhelp. This individual representative of the manufacturer must be currently authorized to legally bind the manufacturer in these matters. Before the end of December 2023, the IRS will update its systems to allow a manufacturer to authorize more than one employee to make representations on its behalf through the IRS Energy Credits Online Portal.

.03 *Qualified Manufacturer Written Agreements Prior to January 1, 2024*. Prior to January 1, 2024, manufacturers may send their signed written agreements to *IRS.Clean.Vehicle.Manufacturers@irs.gov* to be a qualified manufacturer. An electronic signature is acceptable. For written agreements submitted under this section 4.03, the manufacturer must provide the IRS a statement signed by a person currently authorized to bind the taxpayer in these matters, consistent with section 4.02 of Rev. Proc. 2022-42.

.04 *Updates to Procedures for Qualified Manufacturer Written Agreements.* Any changes to the content and format of the written agreement will be provided on irs.gov or through the IRS Energy Credits Online Portal, and qualified manufacturers will be notified to enter a revised written agreement.

.05 *Periodic Reporting Requirements.* The IRS will not consider a vehicle to meet the requirements of § 30D(d)(1)(C) unless a qualified manufacturer submits a written report containing the information required by section 6 of this revenue procedure with respect to such vehicle. For the purposes of § 25E, a qualified manufacturer must submit a written report or reports containing the information required by section 6 of this revenue procedure with respect to a prior model year vehicle for such vehicle to be considered a previously-owned clean vehicle, to the extent such information has not already been provided for purposes of § 30D and/or § 45W.

SECTION 5: COMPLIANT-BATTERY LEDGER FOR PURPOSES OF SECTION 30D

.01 *Introduction.*

(1) For calendar years beginning January 1, 2025, for vehicles to qualify for the clean vehicle credit under § 30D, the qualified manufacturer must provide information to the IRS to establish a compliant-battery ledger for each calendar year. The compliant-battery ledger (as defined in the clean vehicle regulations) for a calendar year tracks a qualified manufacturer's anticipated supply of batteries that are FEOC-compliant (as defined in clean vehicle regulations) for such calendar year. One compliant-battery ledger may be established for all vehicles for a calendar year, or there may be separate ledgers for specific models or classes of vehicles. For calendar year 2024, the qualified manufacturer is not required to provide information to establish a compliant-battery ledger, but the qualified manufacturer must submit information as provided in section 5.06 of this revenue procedure.

(2) To establish a compliant-battery ledger for a calendar year, the qualified manufacturer must do the following: (i) determine a projected number of FEOC-compliant batteries in accordance with section 5.02 of this revenue procedure; (ii) submit an attestation with respect to the projected number, including supporting certifications and documentation, in accordance with section 5.03 of this revenue procedure; and (iii) receive approval of the projected number (in whole or in part) from the IRS, as provided in section 5.04 of this revenue procedure. Additionally, the qualified manufacturer must later submit a year-end attestation with respect to the calendar year, as provide in section 5.10 of this revenue procedure. These submissions and attestations must be accurate to the best of the qualified manufacturer's knowledge and belief and provided under penalties of perjury, and are subject to review by the IRS and the DOE for errors, intentional disregard, or fraud.

.02 *Determination of projected number of FEOC-compliant batteries.* The qualified manufacturer must determine the projected number of batteries that it knows, or reasonably anticipates based on its contracts with suppliers, will be FEOC-compliant, with respect to new clean vehicles (as described in § 30D(d)) for which the qualified manufacturer anticipates providing a periodic written report prior to or during the calendar year and which are expected to be placed in service by consumers during such calendar year. With respect to the determination:

(1) The determination is based on quantity and mass of the battery components and applicable critical minerals, as well as associated constituent materials, that are procured or contracted for the calendar year and that are known or reasonably anticipated to be FEOC-compliant battery components or FEOC-compliant applicable critical minerals, as applicable.

(2) The qualified manufacturer must conduct due diligence (as provided in the clean vehicle regulations) with respect to all battery components and applicable critical minerals, as well as associated constituent materials, that are relevant to determining whether such battery components or applicable critical minerals are FEOC-compliant.

(3) The qualified manufacturer must determine whether all battery components, including all battery cells, non-battery cell battery components, batteries, and applicable critical minerals, as well as associated constituent materials, are FEOC-compliant.

(4) The qualified manufacturer may rely upon attestations, documentation and certifications of a third-party manufacturer or supplier that operates a battery cell production facility provided that the third-party manufacturer or supplier performs due diligence and provides the qualified manufacturer information sufficient to make the determinations described in section 5.02 of this revenue procedure. In the case of multiple third party manufacturers or suppliers (such as a case in which a manufacturer contracts with a battery manufacturer, who, in turn, contracts with a manufacturer or supplier who operates a battery cell production facility), this requirement must be satisfied by each such manufacturer or supplier either directly to the qualified manufacturer or indirectly through contractual relationships.

.03 *Attestations, certifications, and documentation to be provided to the DOE.* The qualified manufacturer must submit to the DOE the information described in section 5.03(1) of this revenue procedure, and make attestations, under penalty of perjury, as described in sections 5.03(2) through 5.03(5) of this revenue procedure. The qualified manufacturer may make a separate submission for a specific model or class of vehicles provided that it specifies in its submission the model or class of vehicles to which such submission relates.

(1) A compliance report, including supporting documentation in relation to battery components and applicable critical minerals, as well as associated constituent materials, contained in the battery from which the electric motor of the vehicle draws electricity. The compliance report must contain the following information:

(a) A description of measures taken to exercise due diligence and the approach taken to determine compliance with the requirements of § 30D(d)(7).

(b) A list of all battery component manufacturers or assemblers, including manufacturers or assemblers of battery cells, and documentation appropriately reliable and sufficient to determine whether the battery component manufacturers or assemblers are foreign entities of concern pursuant to DOE guidance under 42 U.S.C. 18741(a)(5), including:

(i) Ownership and control, as represented by equity interests, board seats, and voting rights, based on public and non-public (if applicable) information.

(ii) Place of incorporation, principal place of business, individual operating facilities for relevant materials and components production, and relevant activities, based on permits and facility information.

(iii) Excerpts from licenses and contracts with FEOCs, if applicable, to demonstrate lack of effective control.

(iv) Additional information as may be required by the DOE.

(c) A list of the battery cells used by the qualified manufacturer, including a serial number or other system used to track FEOC-compliant battery cells to the batteries they are contained within, as well as the tracking of battery components used in the production of battery cells.

(d) A list of applicable critical mineral extractors, processors, or recyclers (including any applicable critical mineral extraction, processing, or recycling steps subject to the transition rule for non-traceable battery materials), and documentation appropriately reliable and sufficient to determine whether the applicable critical mineral extractors, processors, or recyclers (including any processors or recyclers of associated constituent materials) are foreign entities of concern pursuant to DOE guidance under 42 U.S.C. 18741(a)(5), including:

(i) Ownership and control, as represented by equity interests, board seats, and voting rights, based on public and non-public (if applicable) information.

(ii) Place of incorporation, principal place of business, individual operating facilities for relevant materials and components production, and relevant activities, based on permits and facility information.

(iii) The dates of purchase of each applicable critical mineral from each entity that conducts extraction, processing, or recycling.

(iv) Excerpts from licenses and contracts with FEOCs, if applicable, to demonstrate lack of effective control.

(v) Additional information as may be required by the DOE.

(e) A description of the specific steps that the qualified manufacturer will take or reasonably anticipates taking to determine that battery cells and batteries are FEOC-compliant.

(f) The following quantity and mass information:

(i) Quantity and/or mass of FEOC-compliant battery components and FEOC-compliant applicable critical minerals, as well as associated constituent materials, from each manufacturer, assembler, extractor, processor, or recycler (excluding any applicable critical minerals subject to the transition rule for non-traceable battery materials).

(ii) Quantity of FEOC-compliant battery components divided by the quantity of each battery component per battery.

(iii) Total mass of each of FEOC-compliant applicable critical mineral divided by the quantity of each applicable critical mineral per battery.

(iv) Quantity of anticipated vehicles by type, make and model, that are FEOC-compliant and not FEOC-compliant, based on battery cell product lines and the content of associated batteries.

(v) Calculations regarding temporary allocation-based determinations for applicable critical materials contained in constituent materials of a battery cell.

(vi) Date of each of the calculations regarding temporary allocation-based determinations for applicable critical materials contained in constituent materials of a battery cell.

(g) Proof of mass or quantity for each FEOC-compliant supplier, specifically identifying where information is contained regarding the relevant ownership of each supplier or quantity information, which includes but is not limited to:

(i) Invoices (timing of delivery/anticipated delivery date) related to battery components and applicable critical materials contained in the batteries of new clean vehicles that are included in the allocation calculations.

(ii) Contractual excerpts, as supporting documentation of supply contracts, including any contractual agreements by third-party battery cell manufacturers or suppliers or battery manufacturers to conduct due diligence.

(iii) Documentation of additional sources of supply if there is not yet a contractual agreement but such sources are deemed highly likely to factor into the temporary allocation-based determination calculations.

(iv) Documentation with information regarding battery components and applicable critical minerals, as well as associated constituent materials, in each vehicle.

(h) If the qualified manufacturer is relying on the transition rule for non-traceable battery materials (as provided in the clean vehicle regulations), a report demonstrating how the qualified manufacturer will comply with the excluded entity restrictions once the transition rule is no longer in effect.

(i) If available, independent analysis or audit of FEOC compliance factors prior to submission of the FEOC compliance information to the DOE, including identification of the auditor or analyst and the auditor or analyst's expertise for performing such analysis.

(2) An attestation of the projected number of FEOC-compliant batteries that the qualified manufacturer has determined under section 5.02 of this revenue procedure and an explanation of the basis of such determination.

(3) An attestation that the qualified manufacturer has exercised due diligence to determine that the batteries, battery cells, battery components, and applicable critical minerals, as well as associated constituent materials, relating to the vehicles are FEOC-compliant.

(4) An attestation that if any material changes occur with respect to any information provided in this section 5.03(1) of this revenue procedure, the qualified manufacturer will report this information to the DOE as provided in section 5.07 of this revenue procedure.

(5) An attestation that the information submitted is true and correct to the best of the knowledge of the qualified manufacturer's representative.

.04 *Upfront Review of Projected Number of FEOC-Compliant Batteries*.

(1) To establish a compliant-battery ledger, the qualified manufacturer must submit the attestation of the projected number of FEOC-compliant batteries and other information described section 5.03 of this revenue procedure for upfront review to the DOE through a method provided by the DOE. The IRS will make a determination with respect to the submission, with analytical assistance from the DOE, and notify the qualified manufacturer of its determination.

(2) If a qualified manufacturer submits the information to the DOE by July 1 of the year prior to the calendar year for which the compliant-battery ledger is being established, the DOE will review the submission and provide its analysis, and the IRS, in consultation with the DOE, will determine the projected number of FEOC-compliant batteries for the qualified manufacturer prior to the beginning of the calendar year. Specifically, the DOE will review the information submitted by the qualified manufacturer within 45 days of the submission, unless a longer period is agreed to by the qualified manufacturer and the DOE. The DOE may request additional information from the qualified manufacturer. The qualified manufacturer must respond to the request for additional information within 21 days of such request, unless a longer period is agreed to by the qualified manufacturer and the DOE. The DOE will notify the

qualified manufacturer and the IRS of its analysis either agreeing with the projected number of FEOC-compliant batteries determined and attested to by the qualified manufacturer, disagreeing with such number, or agreeing with such number in part, no later than October 1 of the calendar year prior to the calendar year for which the qualified manufacturer is seeking determination regarding the projected number of FEOC-compliant batteries. The IRS will then make a final determination concerning the projected number of FEOC-compliant batteries no later than October 31.

(3) If a qualified manufacturer makes its submission regarding the projected number of FEOC-compliant batteries after July 1 of the year prior to the calendar year for which the compliant-battery ledger is being established, the DOE will review and provide its analysis, and the IRS, in consultation with the DOE, will make determinations on a rolling basis.

.05 *Right to Administrative Review if the Projected Number of FEOC-compliant Batteries is Rejected.* If, on the basis of the DOE's analysis or otherwise, the IRS rejects (in whole or in part) the projected number of FEOC-compliant batteries, the qualified manufacturer will have 21 days from the date of the IRS's determination to request administrative review of the DOE's analysis and IRS's determination. If the qualified manufacturer requests administrative review, it may submit additional information to the DOE regarding its projected number of FEOC-compliant batteries. Once the DOE determines such additional information is complete, the DOE will provide the IRS with an updated analysis within 21 days. The IRS will make a final determination concerning the number of FEOC-compliant batteries within 21 days of receipt of the DOE's analysis of the qualified manufacturer's request for administrative review and any additional information submitted during the administrative review.

.06 *Submission of 2024 information*. When the qualified manufacturer submits the information described in sections 5.02 and 5.03 of this revenue procedure to the DOE with respect to vehicles it intends to make available to be placed in service during calendar year 2025, it must also submit the information and attestations described in sections 5.03(1) and 5.03(3) through 5.03(5) of this revenue procedure with respect to vehicles that have been placed in service or are expected to be placed in service during calendar year 2024. However, the submission of the information related to vehicles that have been or are expected to be placed in service in calendar year 2024 is not required to include information related to applicable critical minerals, and associated constituent materials.

.07 *Increase to compliant-battery ledger*. Once the compliant-battery ledger is established for a calendar year, the qualified manufacturer may determine an additional projected number of batteries that it knows or reasonably anticipates are FEOC-compliant due to the procurement of additional FEOC-compliant battery components, or FEOC-compliant applicable critical minerals, as well as associated constituent materials. The qualified manufacturer may then request an increase to the number in the compliant-battery ledger by submitting the attestations and other information described in section 5.03 of this revenue procedure for review by the DOE through the method described in section 5.04 of this revenue procedure. The qualified manufacturer may make such requests periodically, but may make no more than one submission per calendar month. The DOE will review requests no less frequently than quarterly and provide its analysis to the IRS. The IRS will make a final determination concerning the number of FEOC-compliant batteries within 21 days of receipt of the DOE's analysis. The additional projected number, once approved by the IRS, will result in an increase to the number of batteries in the qualified manufacturer's compliant-battery ledger. If, on the basis of the DOE's analysis or otherwise, the IRS rejects (in whole or in part) the additional projected number of FEOC-compliant batteries, the qualified manufacturer will have 21 days from the date of IRS's determination to request administrative review of the DOE's analysis and IRS's determination, as described in section 5.05 of this revenue procedure.

.08 *Reduction in FEOC-compliant batteries for errors or changes.*

(1) If the qualified manufacturer discovers an error in or change to the information provided in the attestations, certifications, and documentation described in section 5.03 of this revenue procedure for a calendar year that results in a reduction in the number of FEOC-compliant batteries, the qualified manufacturer must determine the amount of the reduction and report to the DOE through the method described in section 5.04 of this revenue procedure, within 30 days of such discovery. This determination and reporting obligation applies to information with respect to the current year and any of the prior three calendar years for which the qualified manufacturer had a compliant-battery ledger. If the IRS finds, based on DOE analysis or otherwise, that the reduction in the number of FEOC-compliant batteries should be greater than that determined by the qualified manufacturer, the qualified manufacturer may request administrative review from the IRS as described in 5.05 of this revenue procedure.

(2) If any error or change described in section 5.08(1) of this revenue procedure is discovered in the same calendar year to which the error or change relates, there will be a decrease to the compliant-battery ledger for the same calendar year. The decrease described in the previous paragraph may decrease the compliant-battery ledger below zero, creating a negative balance in the compliant-battery ledger. If the error or change described in section 5.08(1) is discovered after the end of the calendar year to which such error or change relates or in any of the subsequent three calendar years, the error or change will decrease the compliant-battery ledger for the calendar year for which it is discovered.

(3) If the IRS or the DOE independently become aware of any material change to the information provided in the attestations, certifications, and documentation described in section 5.03 of this revenue procedure, the DOE may request information to support or rebut such presumed material change. This review may result in updates to the compliant-battery ledger.

.09 *Tracking of FEOC-compliant batteries.*

(1) Once the projected number of batteries for a calendar year is approved, the IRS will enter the compliant-battery ledger into the IRS Energy Credits Online Portal.

(2) At the time the qualified manufacturer submits a written report pursuant to section 6.02 of this revenue procedure with the IRS, reporting the VIN of a new clean vehicle as eligible for a § 30D credit, the total approved number of batteries will be reduced by the number of batteries contained in such vehicle in the IRS Energy Credits Online Portal. The VIN of a new clean vehicle must be associated with the serial number or serial numbers of the battery or batteries contained in such vehicle pursuant to the qualified manufacturer written reports, described in section 6 of this revenue procedure.

(3) Once the number of approved batteries in the IRS Energy Credits Online Portal reaches zero or less than zero, the qualifying manufacturer will not be able to submit additional written reports for new clean vehicles into the IRS Energy Credits Online Portal.

(4) Any remaining balance in the compliant-battery ledger at the end of the calendar year, whether positive or negative, will be included in the compliant-battery ledger for the subsequent calendar year. If a qualified manufacturer has multiple compliant-battery accounts with a negative balance, any negative balance will first be included in the compliant-battery ledger for the same model or class of vehicles for the subsequent calendar year. However, if there is no ledger for the same model or class of vehicles in the subsequent calendar year, the IRS can account for such negative balance in the ledger of a different model or class of vehicles of the qualified manufacturer.

.10 *Year End Attestation*. No later than January 30 of the year after the calendar year for which a compliant-battery ledger is established, the qualified manufacturer, under penalty of perjury, must submit an attestation to the DOE as to the accuracy of the calendar year's projected number of FEOC-compliant batteries, as established in sections 5.03 and 5.04 of this revenue procedure, and as adjusted under sections 5.05, 5.07, and 5.08 of this revenue procedure. The IRS will make a determination regarding the year end attestation and may make appropriate adjustments to the compliant-battery ledger as described in sections 5.07 and 5.08 of this revenue procedure, as a result of such determination.

SECTION 6: WRITTEN REPORTS BY QUALIFIED MANUFACTURERS

.01 *Contents of Written Reports by Qualified Manufacturers*. The written report providing information for vehicles that may be eligible for the credit under § 30D, § 25E, and/ or § 45W must contain the name, address, and taxpayer identification number of the qualified manufacturer. This written report must be provided by the qualified manufacturer to the IRS in the time and manner described in section 6.02 of this revenue procedure. In addition, the written report must contain all of the following information for any vehicle that the qualified manufacturer asserts is eligible for the credit under § 30D, § 25E, and/ or § 45W:

(1) General Information.

(a) The make, model, model year, and any other appropriate identifiers of the motor vehicle;

(b) Certification that the motor vehicle is made by a qualified manufacturer, within the meaning of § 30D(d)(3);

(c) Certification that the motor vehicle is treated as a motor vehicle for purposes of title II of the Clean Air Act;

(d) The gross vehicle weight rating of the motor vehicle;

(e) The battery capacity of the motor vehicle;

(f) The motor vehicle's VIN; and

(g) Such other information as the Secretary may provide on irs.gov.

(2) Specifically, for § 30D:

(a) Certification that the motor vehicle is propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 7 kilowatt hours and the battery is capable of being recharged from an external source of electricity, or is a new qualified fuel cell motor vehicle (as defined in § 30B(b)(3)).

(b) Certification that the motor vehicle is manufactured primarily for use on public streets, roads and highways (not including a vehicle operated exclusively on a rail or rails) and has at least four wheels.

(c) Certification that the final assembly of the motor vehicle occurred within North America.

(d) Certification of the percentage of the value of the applicable critical minerals (as defined in § 45X(c)(6)) contained in the battery from which the electric motor of the vehicle draws electricity that were (i) extracted or processed in the United States, or in any country with which the United States has a free trade agreement in effect, or (ii) recycled in North America.

(e) Certification of the percentage of the value of the components contained in the battery from which the electric motor of the vehicle draws electricity that were manufactured or assembled in North America.

(f) Whether the motor vehicle is a van, sport utility vehicle, pickup truck, or other vehicle.

(g) The motor vehicle's manufacturer's suggested retail price.

(h) For vehicles anticipated to be placed in service after December 31, 2024:

(i)The number of batteries from which the electric motor of the motor vehicle draws electricity.

(ii) The serial number of each battery in the vehicle.

(iii) A certification that the vehicle contains FEOC-compliant batteries that are tracked on a compliant-battery ledger.

(i) For vehicles anticipated to be placed in service after December 31, 2023, certification that the new clean vehicle meets the excluded entity requirements in section 30D(d)(7) and the clean vehicle regulations.

(3) Specifically, for § 25E:[4]

(a) Certification that the motor vehicle is either: propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 7 kilowatt hours and the battery is capable of being recharged from an external source of electricity, or is a qualified fuel cell motor vehicle that satisfies the requirements under § 30B(b)(3)(A) and (B) and has a gross vehicle weight rating of less than 14,000 pounds.

(b) Certification that the motor vehicle is manufactured primarily for use on public streets, roads and highways (not

[4] For motor vehicles for which such certification has not already been provided for purposes of § 30D and/ or § 45W.

including a vehicle operated exclusively on a rail or rails) and has at least four wheels.

(4) Specifically, for § 45W:

(a) For motor vehicles, certification that the vehicle is manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails), and is either: a motor vehicle that is propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 15 kilowatt hours (or, in the case of a vehicle that has a gross vehicle weight rating of less than 14,000 pounds, 7 kilowatt hours) and is capable of being recharged from an external source of electricity, or is a new qualified fuel cell motor vehicle that satisfies the requirements under § 30B(b)(3)(A) and (B); or

(b) For mobile machinery, certification that the machinery meets the definition in § 4053(8) (including vehicles that are not designed to perform a function of transporting a load over the public highways), and that the machinery is either: propelled to a significant extent by an electric motor that draws electricity from a battery that has a capacity of not less than 15 kilowatt hours (or, in the case of a vehicle that has a gross vehicle weight rating of less than 14,000 pounds, 7 kilowatt hours) and is capable of being recharged from an external source of electricity, or is a new qualified fuel cell motor vehicle that satisfies the requirements under § 30B(b)(3)(A) and (B).

(c) With respect to a motor vehicle with a gross vehicle weight rating of less than 14,000 pounds, the manufacturer's suggested retail price.

(5) Attestation Required. Each written report must include: a declaration, applicable to the certification, statements, and any accompanying documents, signed by a person currently authorized to bind the qualified manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) in these matters, in the following form: "Under penalties of perjury, I declare that I have examined this certification, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this certification are true, correct, and complete."

.02 *Filing of Written Reports by Qualified Manufacturers*. Qualified manufacturers must file the reports pursuant to section 6.01 of this revenue procedure with the IRS on a monthly basis, by the fifteenth of the month. Qualified manufacturers may file reports more frequently than once a month. Until the IRS provides otherwise, qualified manufacturers must send an email to *IRS.Clean.Vehicles.QM.Reporting@irs.gov* indicating their intent to submit monthly reports and the IRS will respond with instructions on how to submit their reporting information. In addition, for any new clean vehicle under § 30D for which a written report was previously submitted as described in section 6.02 of Rev. Proc. 2022-42 or section 7.02 of Rev. Proc. 2023-33 but is not placed in service prior to January 1, 2024, qualified manufacturers must update the written report to include information on the vehicle's compliance with § 30D(d)(7). Qualified manufacturers must send an email to *IRS.Clean.Vehicles.QM.Reporting@irs.gov* indicating their intent to submit updated reports, and the IRS will respond with instructions on how to submit their updated reporting information. Beginning in 2024, on a date determined by the IRS, qualified manufacturers will be required to file the written reports described in section 6.01 of this revenue procedure through the IRS Energy Credits Online Portal monthly by the fifteenth of the month following the month to which each monthly written report relates. Qualified manufacturers may file reports more frequently than once a month. The availability of the IRS Energy Credits Online Portal for submission of written reports by qualified manufacturers, as well as any changes to the content and format of the written reports will be provided on irs.gov, and qualified manufacturers will be notified of the update.

.03 *Taxpayer's Reliance*. A taxpayer who acquires a "new clean vehicle," a "previously-owned clean vehicle" for which the seller provides a clean vehicle seller report, or a "qualified commercial clean vehicle" and places such vehicle in service may rely on the manufacturer's certification concerning the manufacturer's status as a qualified manufacturer. A taxpayer also may rely on the information and certifications contained in the qualified manufacturer's written reports for the tax credits allowed under §§ 30D, 25E, and 45W.

.04 Erroneous Written Reports. Any acknowledgment that the IRS provides for a written report, including a qualified manufacturer's certifications under §§ 30D, 45W, and 25E, is not a determination that a motor vehicle or mobile machinery qualifies for the credit under the respective Code sections.

SECTION 7. EFFECT OF ERRORS AND FRAUD WITH RESPECT TO SECTION 30D

.01 *In General.* If the IRS determines, after consultation with the DOE and after review of the attestation, certification, and documentation requirements in section 5 of this revenue procedure relating to the section 30D credit, that a qualified manufacturer has provided attestations, certifications, or documentation that contain inaccurate information, it may take appropriate action as described in sections 7.02 and 7.03 of this revenue procedure. Such action would affect vehicles and qualified manufacturers on a prospective basis.

.02 *Inadvertent errors.* If the IRS determines that the attestations, certifications, or documentation for a specific new clean vehicle contain inadvertent errors, the IRS will notify the qualified manufacturer in writing, and the qualified manufacturer will have 21 days from the date of the notification to cure the error or rebut the IRS' determination. If the error or errors are not cured:

(1) In the case of a new clean vehicle that has not been placed in service for which the qualified manufacturer has submitted a periodic written report certifying compliance with the requirements of § 30D(d), such vehicle will no longer be considered a new clean vehicle eligible for the § 30D credit.

(2) In the case of a new clean vehicle that has not been placed in service for which the qualified manufacturer has not submitted a periodic written report certifying compliance with the requirement of § 30D(d), the qualified manufacturer may not submit such periodic written report.

(3) In the case of a new clean vehicle that has been placed in service, the IRS may require a decrease in the

compliant-battery ledger. If the qualified manufacturer has multiple compliant-battery ledgers, the IRS may determine which of the ledgers will be decreased.

.03 *Intentional disregard or fraud.* If the IRS determines that a qualified manufacturer intentionally disregarded attestation, certification, or documentation requirements or reported information fraudulently or with intentional disregard, all vehicles of the qualified manufacturer that have not been placed in service will no longer be considered new clean vehicles eligible for the section 30D credit. As an additional consequence, the IRS may terminate the written agreement between the IRS and the manufacturer, thereby terminating the manufacturer's status as a qualified manufacturer. The IRS will notify the qualified manufacturer in writing of the determination. If a qualified manufacturer is notified of the termination of its written agreement, it will have the opportunity for administrative review of the IRS's determination. During the period that the issue is pending, the qualified manufacturer will not be able to certify any vehicles as eligible for the §§ 30D, 45W, and 25E credits. Once the IRS makes a final determination, a qualified manufacturer's written agreement will either be confirmed as revoked, fully reinstated, or reinstated under conditions as determined by the IRS. The qualified manufacturer may submit a new written agreement to reestablish qualified manufacturer status only as provided by the IRS.

SECTION 8. EFFECT ON OTHER DOCUMENTS

.01 The requirements of sections 4.03 and 4.04 of this revenue procedure regarding filing a written agreement to be a qualified manufacturer before January 1, 2024, supersede the requirements of section 4.01 of Rev. Proc. 2022-42. Sections 4.02 and 4.04 of this revenue procedure supersede section 4.02(1) and 7.01 of Rev. Proc. 2023-33, providing information for qualified manufacturers to register and submit qualified manufacturer written agreements through the IRS Energy Credits Online Portal after January 1, 2024.

.02 Section 6.01 of this revenue procedure supersedes section 4.02 of Rev. Proc. 2022-42, regarding the periodic reports submitted by qualified manufacturers. Section 6.02 of this revenue procedure supersedes the requirements of section 7.02 of Rev. Proc. 2023-33, in providing procedures for qualified manufacturer filing of monthly written reports through the IRS Energy Credits Online Portal. Sections 6.03 and 6.04 of this revenue procedure supersede sections 4.03 and 4.04 of Rev. Proc. 2022-42, respectively, providing information for taxpayer reliance and the effect of erroneous reports.

SECTION 9. PAPERWORK REDUCTION ACT

.01 The collection of information contained in this revenue procedure has been submitted, and will be submitted, to the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2311. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

.02 The collection requirements in sections 4 and 6 of this revenue procedure were previously approved by OMB under control number 1545-2137. This revenue procedure does not change these collection requirements. The new collections of information in this revenue procedure are in section 5. This information is collected and retained to ensure that vehicles meet the requirements for the new clean vehicle credit under § 30D. This information will be used to determine whether the vehicle for which the credit is claimed by a taxpayer is property that qualifies for the credit. The collection of information is voluntary to obtain a benefit. The likely respondents are corporations and partnerships. The IRS will submit the collection requirements under section 5 of this revenue procedure to OMB under 5 CFR 1320.10. The estimated total annual reporting burden is 4,450 hours.

.03 The estimated annual burden for the submission of information to the DOE before July 1 per respondent is 100 hours. The estimated annual burden for additional supplemental submissions of information to the DOE is 25 hours per respondent. The estimated annual burden per respondent is 0.25 hours to complete the qualified manufacturer written reports. The estimated number of respondents is 25. The estimated annual frequency of responses is 16.

.04 Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by § 6103.

SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is the Office of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this revenue procedure, call the energy security guidance contact number at (202) 317-5254 (not a toll-free number).

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26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also: Part 1, §§ 6662, 6694, 1.6662-4, 1.6694-2)

Rev. Proc. 2023-40

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2022-41, 2022-50 I.R.B. 527, and identifies circumstances under which the disclosure on a taxpayer's income tax return with respect to an item or position is adequate for the purpose of reducing the understatement of income tax under section 6662(d) of the Internal Revenue Code (relating to the substantial understatement aspect of the accuracy-related penalty), and for the purpose of avoiding the tax return preparer penalty under section 6694(a) (relating to understatements due to unreasonable positions) with respect to income tax returns. This revenue procedure does not apply with respect to any other penalty provisions (including but not limited to the disregard provisions of the section 6662(b)(1) accuracy-related penalty, the section 6662(i) increased accuracy-related penalty in the case of nondisclosed noneconomic substance transactions, and the section 6662(b)(7) and (j) increased accuracy-related penalty in the case of undisclosed foreign financial asset understatements). If this revenue procedure does not include an item or position, disclosure is adequate with respect to that item or position only if made on a properly completed Form 8275 or 8275-R, as appropriate, attached to the return for the year or to a qualified amended return. *See* Treas. Reg. § 1.6664-2(c) for information about qualified amended returns.

This revenue procedure applies to any income tax return filed on 2023 tax forms for a taxable year beginning in 2023, and to any income tax return filed in 2024 on 2023 tax forms for short taxable years beginning in 2024.

SECTION 2. CHANGES FROM REV. PROC. 2022-41

Changes have been made in order to update the taxable years to which this revenue procedure applies. No substantive changes have been made.

SECTION 3. BACKGROUND

.01 If section 6662 applies to any portion of an underpayment of tax required to be shown on a return, an amount generally equal to 20 percent of the portion of the underpayment is added to the tax. Under section 6662(b)(2), the penalty applies to the portion of any underpayment of tax that is attributable to a substantial understatement of income tax. The penalty rate increases to 40 percent in the case of gross valuation misstatements under section 6662(h), nondisclosed noneconomic substance transactions under section 6662(i), or undisclosed foreign financial asset understatements under section 6662(j).

.02 Generally, there is a substantial understatement of income tax if the amount of the understatement exceeds the greater of (i) 10 percent of the amount of tax required to be shown on the return for the taxable year or (ii) $5,000. Section 6662(d)(1). Section 6662(d)(1)(C) provides a special rule for taxpayers claiming a section 199A deduction. In the case of any taxpayer who claims any deduction allowed under section 199A for the taxable year, there is a substantial understatement of income tax if the amount of the understatement exceeds the greater of (i) 5 percent of the amount of tax required to be shown on the return for the taxable year or (ii) $5,000. Section 6662(d)(1)(B) provides a special rule for corporations. A corporation (other than an S corporation or a personal holding company) has a substantial understatement of income tax if the amount of the understatement exceeds the lesser of (i) 10 percent of the tax required to be shown on the return for a taxable year (or, if greater, $10,000) or (ii) $10,000,000. Generally, an understatement is the excess of the amount of tax required to be shown on the return for the taxable year over the amount of the tax that is shown on the return reduced by any rebate, where the excess is determined without regard to items to which the reportable transaction understatement penalty under section 6662A applies. Section 6662(d)(2)(A). For purposes of determining whether an understatement is substantial, the understatement determined under the general rule is increased by the aggregate amount of any reportable transaction understatements relating to the return. Section 6662A(e)(1)(A).

.03 In the case of an item not attributable to a tax shelter, if the taxpayer has a reasonable basis for the tax treatment of the item, the amount of the understatement is reduced by the portion of the understatement attributable to the item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. Section 6662(d)(2)(B)(ii).

.04 Section 6694(a) imposes a penalty on a tax return preparer who prepares a return or claim for refund reflecting an understatement of liability due to an "unreasonable position" if the tax return preparer knew (or reasonably should have known) of the position. A position (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) is generally treated as unreasonable unless (i) there is or was substantial authority for the position, or (ii) the position was properly disclosed in accordance with section 6662(d)(2)(B)(ii)(I) and had a reasonable basis. If the position is with respect to a tax shelter (as defined in section 6662(d)(2)(C)(ii)) or a reportable transaction to which section 6662A applies, the position is treated as unreasonable unless it is reasonable to believe that the position would more likely than not be sustained on the merits. *See* Notice 2009-5, 2009-3 I.R.B. 309, for interim penalty compliance rules for tax shelter transactions.

.05 In general, this revenue procedure provides guidance for determining when disclosure by return is adequate for purposes of section 6662(d)(2)(B)(ii) and section 6694(a)(2)(B). For purposes of this revenue procedure, the taxpayer must furnish all required information in accordance with the applicable forms and instructions, and the money amounts entered on these forms must be verifiable.

.06 This revenue procedure may apply to a return for a fiscal tax year that begins in 2023 and ends in 2024. This revenue procedure may also apply to a short year return for a period beginning in 2024 if the return is to be filed before the 2024 forms are available. (Note that individuals are generally not put in this position.) The most frequent situation in which a short year arises is when filing a decedent's final return for a fractional part of a year. In that situation, the 2024 form will be available because the final return is due the fifteenth day of the fourth month following the close of the 12-month period that began with the first day of such fractional part of the year (meaning the due date is not accelerated). *See* Treas. Reg. § 1.6072-1(b). In the case of fiscal year and short year returns, the taxpayer must take into account any tax law changes that are effective for tax years beginning after December 31, 2023, even though these changes are not reflected on the form or instructions.

.07 This document does not take into account the effect of tax law changes effective for tax years beginning after December 31, 2023. If a line referenced in this revenue procedure is affected by such a change and requires additional reporting, a taxpayer may have to file Form 8275, *Disclosure Statement*, or Form 8275-R, *Regulation Disclosure Statement*, until the Service prescribes criteria for complying with the requirement.

.08 A complete and accurate disclosure of a tax position on the appropriate year's

Schedule UTP, *Uncertain Tax Position Statement*, will be treated as if the corporation filed a Form 8275 or Form 8275-R regarding the tax position. The filing of a Form 8275 or Form 8275-R, however, will not be treated as if the corporation filed a Schedule UTP.

SECTION 4. PROCEDURE

.01 General

(1) Additional disclosure of facts relevant to, or positions taken with respect to, issues involving any of the items set forth below is unnecessary for purposes of reducing any understatement of income tax under section 6662(d) (except as otherwise provided in section 4.02(3) concerning Schedules M-1 and M-3), provided that the forms and attachments are completed in a clear manner and in accordance with their instructions.

(2) The money amounts entered on the forms must be verifiable, and the information on the return must be disclosed in the manner described below. For purposes of this revenue procedure, a number is verifiable if, on audit, the taxpayer can prove the origin of the amount (even if that number is not ultimately accepted by the Service) and the taxpayer can show good faith in entering that number on the applicable form.

(3) The disclosure of an amount as provided in section 4.02 below is not adequate when the understatement arises from a transaction between parties who are related within the meaning of section 267(b). If an entry may present a legal issue or controversy because of a related-party transaction, then that transaction and the relationship must be disclosed on a Form 8275 or Form 8275-R.

(4) When the amount of an item is shown on a line that does not have a preprinted description identifying that item (such as on an unnamed line under an "Other Expense" category), the taxpayer must clearly identify the item by including the description on that line. For example, to disclose a bad debt for a sole proprietorship, the words "bad debt" must be written or typed on the line of Schedule C (Form 1040 or 1040-SR) that shows the amount of the bad debt. Also, for Schedule M-3 (Form 1120), Part II, line 25, Other income (loss) items with differences, or Part III, line 38, Other expense/deduction items with differences, the entry must provide descriptive language; for example, "Cost of non-compete agreement deductible not capitalizable," and the description must be provided on an attachment. Similarly, for other forms, if space limitations on a form do not allow for an adequate description, the description must be continued on an attachment.

(5) Although a taxpayer may literally meet the disclosure requirements of this revenue procedure, the disclosure will have no effect for purposes of the section 6662 accuracy-related penalty if the item or position on the return (1) does not have a reasonable basis as defined in Treas. Reg. § 1.6662-3(b)(3); (2) is attributable to a tax shelter item as defined in section 6662(d)(2)(C)(ii); or (3) is not properly substantiated or the taxpayer failed to keep adequate books and records with respect to the item or position.

(6) Disclosure also will have no effect for purposes of the section 6694(a) penalty as applicable to tax return preparers if the position is with respect to a tax shelter (as defined in section 6662(d)(2)(C)(ii)) or a reportable transaction to which section 6662A applies.

.02 Items

(1) Form 1040, Schedule A, *Itemized Deductions*:

(a) Medical and Dental Expenses: Complete lines 1 through 4, supplying all required information.

(b) Taxes: Complete lines 5 through 7, supplying all required information. Line 6 must list each type of tax and the amount paid.

(c) Interest Expenses: Complete lines 8 through 10, supplying all required information. This section 4.02(1)(c) does not apply to (i) amounts disallowed under section 163(d) unless Form 4952, *Investment Interest Expense Deduction*, is completed, or (ii) amounts disallowed under section 265.

(d) Charitable Contributions: Complete lines 11 through 14, supplying all required information and attaching all related forms required pursuant to statute or regulation.

(e) Casualty and Theft Losses: Complete Form 4684, *Casualties and Thefts*, and attach to the return. Each item or article for which a casualty or theft loss is claimed must be listed on Form 4684.

(2) Certain Trade or Business Expenses (including, for purposes of this section, the following six expenses as they relate to the rental of property):

(a) Casualty and Theft Losses: The procedure outlined in section 4.02(1)(e) must be followed.

(b) Legal Expenses: The amount claimed must be stated. This section does not apply, however, to amounts properly characterized as capital expenditures, personal expenses, or non-deductible lobbying or political expenditures, including amounts that are required to be (or that are) amortized over a period of years.

(c) Specific Bad Debt Charge-off: The amount written off must be stated.

(d) Officers' Compensation: Complete Form 1125-E, *Compensation of Officers*, when its instructions require completion. You must express the "percent of time devoted to business" as a numerical percentage, rather than as a non-numerical description such as "part" or "as needed." This section does not apply to "excess parachute payments," as defined in section 280G. This section does not apply to the extent that remuneration paid or incurred exceeds an applicable employee-remuneration deduction limitation under section 162(m).

(e) Repair Expenses: The amount claimed must be stated. This section does not apply, however, to any amount properly characterized as capital expenditures or personal expenses.

(f) Taxes (other than foreign taxes): The amount claimed must be stated.

(3) Differences in book and income tax reporting:

For Schedule M-1 and all Schedules M-3, including those listed in (a)-(f) below, the information provided must reasonably apprise the Service of the potential controversy concerning the tax treatment of the item. If the information provided does not so apprise the Service, a Form 8275 or Form 8275-R must be used to adequately disclose the item (*see* Part II of the instructions for those forms).

> Note: An item reported on a line with a pre-printed description, shown on an attached schedule or "itemized" on Schedule M-1, may represent the aggregate amount of several transactions producing that item (*i.e.*, a group of similar items, such as

amounts paid or incurred for supplies by a taxpayer engaged in business). In some instances, a potentially controversial item may involve a portion of the aggregate amount disclosed on the schedule. The Service will not be reasonably apprised of a potential controversy by the aggregate amount disclosed. In these instances, the taxpayer must use Form 8275 or Form 8275-R regarding that portion of the item.

Combining unlike items, whether on Schedule M-1 or Schedule M-3 (or on an attachment when directed by the instructions), will not constitute an adequate disclosure.

Additionally, taxpayers that file the Schedule M-3 (Form 1120), *Net Income (Loss) Reconciliation for Corporations With Total Assets of $10 Million or More*, may be required to complete Schedule B (Form 1120), *Additional Information for Schedule M-3 Filers*. For further information, see Who Must File in the General Instructions for Schedule B (Form 1120). Taxpayers that file the Schedule M-3 (Form 1065), *Net Income (Loss) Reconciliation for Certain Partnerships*, may be required to complete Schedule C (Form 1065), *Additional Information for Schedule M-3 Filers*. For further information, see Who Must File in the General Instructions for Schedule C (Form 1065). When required, these schedules are necessary to constitute adequate disclosure:

(a) Form 1065. Schedule M-3 (Form 1065), *Net Income (Loss) Reconciliation for Certain Partnerships*:

Part II (reconciliation of income (loss) items)	Column (a), *Income (Loss) per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference*; and Column (d), *Income (Loss) per Tax Return*
Part III (reconciliation of expense/deduction items)	Column (a), *Expense per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference;* and Column (d), *Deduction per Tax Return*

(b) Form 1120. (i) Schedule M-1, *Reconciliation of Income (Loss) per Books With Income per Return*.
(ii) Schedule M-3 (Form 1120), *Net Income (Loss) Reconciliation for Corporations With Total Assets of $10 Million or More*:

Part II (reconciliation of income (loss) items)	Column (a), *Income (Loss) per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference*; and Column (d), *Income (Loss) per Tax Return*
Part III (reconciliation of expense/deduction items)	Column (a), *Expense per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference;* and Column (d), *Deduction per Tax Return*

(c) Form 1120-L. Schedule M-3 (Form 1120-L), *Net Income (Loss) Reconciliation for U.S. Life Insurance Companies With Total Assets of $10 Million or More*:

Part II (reconciliation of income (loss) items)	Column (a), *Income (Loss) per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference*; and Column (d), *Income (Loss) per Tax Return*
Part III (reconciliation of expense/deduction items)	Column (a), *Expense per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference;* and Column (d), *Deduction per Tax Return*

(d) Form 1120-PC. Schedule M-3 (Form 1120-PC), *Net Income (Loss) Reconciliation for U.S. Property and Casualty Insurance Companies With Total Assets of $10 Million or More*:

Part II (reconciliation of income (loss) items)	Column (a), *Income (Loss) per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference*; and Column (d), *Income (Loss) per Tax Return*
Part III (reconciliation of expense/deduction items)	Column (a), *Expense per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference;* and Column (d), *Deduction per Tax Return*

(e) Form 1120-S. Schedule M-3 (Form 1120-S), *Net Income (Loss) Reconciliation for S Corporations With Total Assets of $10 Million or More*:

Part II (reconciliation of income (loss) items)	Column (a), *Income (Loss) per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference*; and Column (d), *Income (Loss) per Tax Return*
Part III (reconciliation of expense/deduction items)	Column (a), *Expense per Income Statement*; Column (b), *Temporary Difference*; Column (c), *Permanent Difference;* and Column (d), *Deduction per Tax Return*

(f) Form 1120-F. Schedule M-3 (Form 1120-F), *Net Income (Loss) Reconciliation for Foreign Corporations With Reportable Assets of $10 Million or More*:

Part II (reconciliation of income (loss) items)	Column (b), *Temporary Differences*; Column (c), *Permanent Differences*; and Column (d), *Other Permanent Differences for Allocations to Non-ECI and ECI*
Part III (reconciliation of expense/deduction items)	Column (b), *Temporary Differences*; Column (c), *Permanent Differences*; and Column (d), *Other Permanent Differences for Allocations to Non-ECI and ECI*

(4) Foreign Tax Items:

(a) International Boycott Transactions: Transactions disclosed on Form 5713, *International Boycott Report*; Schedule A, *International Boycott Factor (Section 999(c)(1))*; Schedule B, *Specifically Attributable Taxes and Income (Section 999(c)(2))*; and Schedule C, *Tax Effect of the International Boycott Provisions*, must be completed when required by their instructions.

(b) Treaty-Based Return Position: Transactions and amounts under section 6114 or section 7701(b) as disclosed on Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*, must be completed when required by its instructions.

(5) Other:

(a) Moving Expenses: Complete Form 3903, *Moving Expenses*, and attach to the return.

(b) Employee Business Expenses: Complete Form 2106, *Employee Business Expenses (for use only by Armed Forces reservists, qualified performing artists, fee-basis state or local government officials, and employees with impairment-related work expenses)*, and attach to the return. This section does not apply to club dues or to travel expenses for any non-employee accompanying the taxpayer on the trip.

(c) Fuels Credit: Complete Form 4136, *Credit for Federal Tax Paid on Fuels*, and attach to the return.

(d) Investment Credit: Complete Form 3468, *Investment Credit*, and attach to the return.

SECTION 5. EFFECTIVE DATE

This revenue procedure applies to any income tax return filed on a 2023 tax form for a taxable year beginning in 2023 and to any income tax return filed on a 2023 tax form in 2024 for a short taxable year beginning in 2024.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Vincent Liu of the Office of the Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue procedure, contact Branch 2 of Procedure and Administration at (202) 317-6844 (not a toll free number).

Part IV

Notice of Proposed Rulemaking

Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)

REG-104194-23

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document sets forth a proposed regulation that would amend the rules applicable to plans that include cash or deferred arrangements under section 401(k) to provide guidance with respect to long-term, part-time employees. The proposed regulation reflects statutory changes made by the SECURE Act and the SECURE 2.0 Act that relate to long-term, part-time employees. The proposed regulation would affect participants in, beneficiaries of, employers maintaining, and administrators of plans that include cash or deferred arrangements. This document also provides notice of a public hearing.

DATES: Written or electronic comments must be received by January 26, 2024**.** A public hearing on this proposed regulation has been scheduled for March 15, 2024, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by January 26, 2024. If no outlines are received by January 26, 2024, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on March 13, 2024. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the public hearing must be received by March 12, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG-104194-23) by following the online instructions for submitting comments. Requests to speak at or attend the public hearing must be submitted as prescribed in the "Comments and Public Hearing" section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket on *www.regulations.gov*. Send paper submissions to: CC:PA:01:PR (REG-104194-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the regulation, call Kara M. Soderstrom at (202) 317-6799 or Jason E. Levine at (202) 317-4148; concerning submission of comments, the hearing, and the access code to attend the hearing by telephone, call Vivian Hayes at (202) 317-6901 (not toll-free numbers) or email *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 401 of the Internal Revenue Code (Code). This proposed regulation would amend § 1.401(k)-5 to set forth rules and definitions applicable to long-term, part-time employees under section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act, 2020 (Public Law 116-94, 133 Stat. 2534 (2019)), and sections 125 and 401 of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act), enacted on December 29, 2022, as Division T of the Consolidated Appropriations Act, 2023 (Public Law 117-328, 136 Stat. 4459 (2022)).

I. *Statutory and Regulatory Framework*

Section 401(k)(1) of the Code provides that a profit-sharing, stock bonus, pre-ERISA money purchase, or rural cooperative plan will not fail to qualify under section 401(a) merely because it includes a cash or deferred arrangement (CODA) that is a qualified CODA. Under section 401(k)(2), a CODA (generally, an arrangement providing for an election by an employee between contributions to a plan or payments directly in cash) is a qualified CODA only if it satisfies certain requirements. Section 401(k)(2)(B) provides that contributions made pursuant to a qualified CODA (referred to as elective contributions) may not be distributed before the occurrence of certain events, and section 401(k)(2)(C) provides that amounts attributable to the elective contributions must be nonforfeitable at all times. Section 401(k)(2)(D) limits the period of service that a plan may require an employee to complete with the employer or employers maintaining the plan in order to be eligible to participate in the qualified CODA.

Pursuant to section 401(k)(3)(A), a CODA is not treated as a qualified CODA unless: (1) the group of eligible employees under the CODA satisfies the requirements of section 410(b)(1), and (2) elective contributions under the CODA satisfy the actual deferral percentage (ADP) test in section 401(k)(3)(A)(ii). Under section 401(k)(3)(C), the elective contributions (including elective contributions that are designated Roth contributions) under a qualified CODA satisfy the requirements of section 401(a)(4) for a plan year with respect to the amount of those contributions if the contributions satisfy the ADP test for the plan year. As an alternative to satisfying the annual ADP test, a plan may satisfy the provisions of section 401(k)(11) (a SIMPLE 401(k) plan), the ADP safe harbor provisions of section 401(k)(12) (a traditional safe harbor section 401(k) plan), section 401(k)(13) (a qualified automatic contribution arrangement (QACA) safe harbor section 401(k) plan), or section 401(k)(16) (a starter 401(k) deferral-only arrangement).

Under section 401(m)(1), the matching contributions and employee contributions under a defined contribution plan satisfy the requirements of section 401(a)(4) for a plan year with respect to the amount of those contributions only if the actual contribution percentage (ACP) test in section 401(m)(2) is satisfied for the plan year. With respect to matching contributions, as an alternative to satisfying the annual ACP test, a plan may satisfy the provisions of section 401(m)(10) (which parallel the SIMPLE 401(k) provisions of section 401(k)(11)), or the ACP safe harbor provisions of section 401(m)(11) (a traditional safe harbor section 401(m) plan) or section 401(m)(12) (a QACA safe harbor section 401(m) plan).

The Treasury Department and the IRS issued comprehensive regulations under section 401(k) and (m) on December 29, 2004 (TD 9169, 69 FR 78143). Since they were issued, the regulations have been updated a number of times. For example, the regulations were amended to reflect certain statutory changes (*see* TD 9237, 71 FR 6, and TD 9324, 72 FR 21103, providing guidance with respect to designated Roth contributions under section 402A; and TD 9447, 74 FR 8200, providing guidance with respect to section 401(k)(13)) and to address discrete issues unrelated to statutory changes (*see* TD 9319, 72 FR 16878, relating to the definition of compensation; TD 9641, 78 FR 68735, relating to mid-year amendments to safe harbor plan designs; and TD 9835, 83 FR 34469, relating to whether qualified nonelective contributions and qualified matching contributions must be nonforfeitable when contributed to the plan).

The regulations were most recently amended on September 23, 2019 (TD 9875, 84 FR 49651) to reflect statutory changes related to the restriction on distribution of elective contributions under section 401(k)(2)(B).

II. *SECURE Act Changes to Section 401(k) Regarding Long-Term, Part-Time Employees*

Prior to the enactment of the SECURE Act, section 401(k)(2)(D) provided that a qualified CODA was not permitted to require, as a condition of participation, that an employee complete a period of service that extended beyond the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i)[1]). In general, the period permitted under section 410(a)(1) is the later of attainment of age 21 or completion of a 12-month period during which the employee has at least 1,000 hours of service.

Section 112(a) of the SECURE Act amended section 401(k)(2)(D) of the Code to provide that a qualified CODA must permit certain employees to participate in the CODA even if they do not have at least 1,000 hours of service in a 12-month period. Under section 401(k)(2)(D) (as added by section 112(a)(1) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of: (1) the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i)); or (2) subject to section 401(k)(15), the first period of three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

Section 112(a)(2) of the SECURE Act also amended the Code to add section 401(k)(15), which sets forth additional provisions related to section 401(k)(2)(D)(ii). Section 401(k)(15)(A) provides that section 401(k)(2)(D)(ii) will not apply to an employee unless the employee has attained the age specified in section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in section 401(k)(2)(D)(ii). Section 401(k)(15)(B) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), modified certain nondiscrimination, minimum coverage, top-heavy, and vesting requirements with respect to employees who become eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii).

Section 401(k)(15)(B)(i)(I) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act) provided that, notwithstanding section 401(a)(4), an employer is not required to make nonelective or matching contributions on behalf of employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii), even if those contributions are made on behalf of other employees eligible to participate in the arrangement. Under section 401(k)(15)(B)(i)(II) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), an employer may elect to exclude employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) from the application of sections 401(a)(4), 401(k)(3), 401(k)(12), 401(k)(13), 401(m)(2), and 410(b).

Section 401(k)(15)(B)(ii) provides that an employer may elect to exclude all employees who are eligible to participate in a plan maintained by the employer solely by reason of section 401(k)(2)(D)(ii) from the application of the top-heavy vesting and benefit requirements under section 416(b) and (c).

Under section 401(k)(15)(B)(iii) (as added by section 112(a) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), an employee described in section 401(k)(15)(B)(i) must be credited with a year of service for purposes of determining whether the employee has a nonforfeitable right to employer contributions (other than elective contributions) under the arrangement for each 12-month period during which the employee is credited with at least 500 hours of service. In addition, section 401(k)(15)(B)(iii) modifies the break-in-service rules of section 411(a)(6) for the employee by substituting "at least 500 hours of service" for "more than 500 hours of service" for purposes of applying section 411(a)(6)(A).

Under section 401(k)(15)(B)(iv) (as added by section 112(a) of the SECURE

[1] Section 410(a)(1)(B)(i) provides that a plan may require employees to complete 2 years of service (rather than 1) if accrued benefits under the plan are 100 percent nonforfeitable after not more than 2 years of service.

Act, but prior to amendment by the SECURE 2.0 Act), if an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) of the Code subsequently satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 401(k)(2)(D)(ii), then the special provisions of section 401(k)(15)(B)(i) and (ii) cease to apply to the employee as of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 401(k)(2)(D)(ii). However, the cessation does not apply to the special vesting rules of section 401(k)(15)(B)(iii).

Section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3). This includes, among others, employees covered by a collective bargaining agreement with respect to which retirement benefits were the subject of good faith bargaining and nonresident aliens who have no earned income from the employer that constitutes U.S.-source income.

Section 401(k)(15)(D)(i) provides that the entry date rules of section 410(a)(4) apply to an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii). Section 401(k)(15)(D)(ii) provides that 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A).

Prior to amendment by the SECURE 2.0 Act, section 112(b) of the SECURE Act provided that the amendments made by section 112 apply to plan years beginning after December 31, 2020, except that, for purposes of section 401(k)(2)(D)(ii) of the Code, 12-month periods beginning before January 1, 2021, are not taken into account. The effect of disregarding 12-month periods beginning before January 1, 2021, is that employees generally will not become eligible to participate in a CODA pursuant to section 401(k)(2)(D)(ii) until plan years beginning on or after January 1, 2024.

On September 2, 2020, the Treasury Department and the IRS released Notice 2020-68, 2020-38 IRB 567, which includes guidance with respect to section 112 of the SECURE Act. Q&A C-1 of Notice 2020-68 explains that, although section 112(b) of the SECURE Act excludes 12-month periods beginning before January 1, 2021, for purposes of determining an employee's eligibility to participate in a qualified CODA under section 401(k)(2)(D)(ii) of the Code, section 112(b) of the SECURE Act does not exclude 12-month periods beginning before January 1, 2021, for purposes of determining an employee's nonforfeitable right to employer contributions (other than elective contributions) under section 401(k)(15)(B)(iii) of the Code. However, as described in section III.A of this Background, section 125(d) of the SECURE 2.0 Act expands the scope of the disregard of 12-month periods beginning before January 1, 2021, to include the vesting rules of section 401(k)(15)(B)(iii).

The Treasury Department and the IRS received three written comments in response to Notice 2020-68. All written comments responding to Notices 2020-68 are available for public inspection and copying at *http://www.regulations.gov* or upon request. These comments are discussed in section I of the Explanation of Provisions portion of this preamble.

III. *SECURE 2.0 Act Changes to Section 401(k) Regarding Long-Term, Part-Time Employees and to Section 112(b) of the SECURE Act*

A. *Section 125 of the SECURE 2.0 Act*

Section 125 of the SECURE 2.0 Act generally expands upon the rules set forth in section 112 of the SECURE Act. Section 125(a)(1) of the SECURE 2.0 Act amends the minimum participation standards of section 202 of the Employee Retirement Income Security Act of 1974 (Public Law 93-406, 88 Stat. 829), as amended (ERISA) to add section 202(c) of ERISA. Section 202(c) of ERISA adds rules, which apply to either a qualified CODA or a salary reduction agreement described in section 403(b) of the Code, that are comparable to the rules of section 401(k)(2)(D)(ii) and (k)(15). Section 125(a)(2)(B)(ii) of the SECURE 2.0 Act amends the employer election provisions of section 401(k)(15)(B)(i) of the Code to refer to employees who are eligible to participate in the arrangement solely by reason of section 401(k)(2)(D)(ii) or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA.

In addition, section 125(c) of the SECURE 2.0 Act amends the period of service under section 401(k)(2)(D)(ii) of the Code by replacing "3" with "2". Thus, as amended by section 125(c) of the SECURE 2.0 Act, section 401(k)(2)(D) of the Code provides that a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of: (1) the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i)); or (2) subject to section 401(k)(15), the first period of two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

Section 125(d) of the SECURE 2.0 Act amends section 112(b) of the SECURE Act by replacing the reference to section 401(k)(2)(D)(ii) of the Code with references to both section 401(k)(2)(D)(ii) and (k)(15)(B)(iii). Thus, as amended by section 125(d) of the SECURE 2.0 Act, section 112(b) of the SECURE Act provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of either the eligibility rule described in section 401(k)(2)(D)(ii) or the vesting rules of section 401(k)(15)(B)(iii).

Section 125(e) of the SECURE 2.0 Act amends the special rules for cash or deferred arrangements using alternative methods of meeting nondiscrimination requirements under section 416(g)(4)(H) of the Code to provide that the term "top-heavy plan" does not include a plan solely because that plan does not provide nonelective or matching contributions to employees described in section 401(k)(15)(B)(i).

The amendments made by section 125(a) and (c) of the SECURE 2.0 Act apply to plan years beginning after December 31, 2024. The amendments made by section 125(d) and (e) of the SECURE 2.0 Act take effect as if included in section 112 of the SECURE Act.

B. *Section 401 of the SECURE 2.0 Act*

Section 401 of the SECURE 2.0 Act sets forth amendments relating to the SECURE Act. Section 401(a)(2) of the

SECURE 2.0 Act includes technical amendments relating to section 112 of the SECURE Act that take effect as if included in section 112 of the SECURE Act.

Section 401(a)(2)(A) of the SECURE 2.0 Act amends the employer election provisions of section 401(k)(15)(B)(i)(II) of the Code to include the ACP safe harbor provisions of section 401(m)(11) and (12). Thus, as amended by section 401(a)(2)(A) of the SECURE 2.0 Act, section 401(k)(15)(B)(i)(II) of the Code permits an employer to elect to exclude employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) (or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA) from the application of those ACP safe harbor provisions, in addition to the other Code provisions listed in section 401(k)(15)(B)(i)(II).

Section 401(a)(2)(B) of the SECURE 2.0 Act amends the vesting rules of section 401(k)(15)(B)(iii) of the Code by replacing "under the arrangement" with "under the plan". Thus, section 401(a)(2)(B) of the SECURE 2.0 Act clarifies that section 401(k)(15)(B)(iii) of the Code applies for purposes of determining whether an employee described in section 401(k)(15)(B)(i) has a nonforfeitable right to employer contributions (other than elective contributions) under the plan that includes the arrangement.

Section 401(a)(2)(C) of the SECURE 2.0 Act amends the special rules under section 401(k)(15)(B)(iv) of the Code by replacing "section 410(a)(1)(A)(ii)" with "paragraph (2)(D)". Thus, section 401(a)(2)(C) of the SECURE 2.0 Act clarifies that the special rules of section 401(k)(15)(B)(iv) of the Code apply if an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) (or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA) subsequently satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii).

C. *Section 501 of the SECURE 2.0 Act*

In general, under section 501(a) and (b) of the SECURE 2.0 Act, for a qualified plan that is not an applicable collectively bargained plan or a governmental plan within the meaning of section 414(d) of the Code, the deadline to adopt a plan amendment that is made pursuant to any amendment made by the SECURE 2.0 Act or pursuant to any regulation issued by the Secretary or the Secretary of Labor (or a delegate of either such Secretary) under the SECURE 2.0 Act is the last day of the first plan year beginning on or after January 1, 2025, or such later date as the Secretary may prescribe. The plan amendment deadline for an applicable collectively bargained plan or a governmental plan, as defined in section 414(d), is the last day of the first plan year beginning on or after January 1, 2027, or such later date as the Secretary may prescribe.

Section 501(c)(1) of the SECURE 2.0 Act amends section 601(b)(1) of the SECURE Act, which provides rules with respect to a plan amendment made pursuant to a provision of the SECURE Act or regulations thereunder, to align the deadline to adopt such a plan amendment with the deadline that applies to a plan amendment that is made pursuant to a provision of the SECURE 2.0 Act.

Whether a plan amendment is made pursuant to section 112 of the SECURE Act, related provisions of the SECURE 2.0 Act, or any regulation relating to those provisions, does not depend on whether any employees could become eligible to participate in the CODA as long-term, part-time employees (as discussed in section I.B of the Explanation of Provisions) under the terms of the amended plan. For example, if a plan that is not an applicable collectively bargained plan or a governmental plan is maintained on a calendar-year basis and provides that, in order to be eligible to make a cash or deferred election under the CODA in the plan, an employee is required to complete a 12-month period during which the employee is credited with at least 1,000 hours of service, but the employer intends to amend the plan to provide that, effective January 1, 2024, each employee is eligible to make a cash or deferred election as soon as administratively practicable after the employee's employment commencement date, then the intended plan amendment would be made pursuant to section 112 of the SECURE Act and related provisions of the SECURE 2.0 Act. Accordingly, if the plan is operated in accordance with the intended plan amendment, then the plan amendment would not be required to be adopted before the deadline that applies to the plan under section 501 of the SECURE 2.0 Act (that is, December 31, 2025, or such later date as the Secretary may prescribe).

Explanation of Provisions

I. *Section 1.401(k)-5*

A. *Overview*

This proposed regulation would amend § 1.401(k)-5 (which is reserved for mergers and acquisitions under the existing regulations) to reflect the rules for long-term, part-time employees under section 112 of the SECURE Act and sections 125 and 401 of the SECURE 2.0 Act. Proposed § 1.401(k)-5 defines "long-term, part-time employee," and, with respect to each long-term, part-time employee, requires a qualified CODA to satisfy the participation requirements of proposed § 1.401(k)-5(c) and requires the plan that includes the CODA to satisfy the vesting requirements of proposed § 1.401(k)-5(d). In addition, proposed § 1.401(k)-5(e) provides guidance regarding nonelective and matching contributions made to the plan on behalf of long-term, part-time employees, and proposed § 1.401(k)-5(f) provides guidance regarding certain elections that the employer or employers maintaining the plan may make with respect to long-term, part-time employees.

B. *Long-term, part-time employees*

1. Definition

Section 401(k)(15) provides special rules for "long-term, part-time employees," but does not define the term. The rules in section 401(k)(15) apply to employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii), or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA. Under section 112(b) of the SECURE Act, section 401(k)(2)(D)(ii) of the Code generally is effective for plan years beginning after December 31, 2020, but, pursuant to section 125(c) of the SECURE 2.0 Act, section 401(k)(2)(D)(ii) of the Code is amended to replace "3" with "2" effective for plan years beginning after December 31, 2024. Thus, section 401(k)(15) applies to employees who are eligible to participate in a qualified CODA solely by reason of completing two consecutive 12-month periods or, with respect to a plan year beginning before 2025, three consecutive 12-month periods (referred to as "the applicable number of consecutive 12-month periods") during each of which the employee is credited with at least 500 hours of service. However, section 401(k)(15)(A) provides that section 401(k)(2)(D)(ii) does not apply to an employee unless the employee has satisfied the age requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in section 401(k)(2)(D)(ii). In addition, section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3).

Based on the provisions of section 401(k)(15) described in the preceding paragraph, proposed § 1.401(k)-5(b)(1)(i) generally would define a "long-term, part-time employee" as an employee who is eligible to participate in a qualified CODA solely by reason of having: (1) completed two consecutive 12-month periods (under proposed § 1.401(k)-5(b)(1)(iii), "three consecutive 12-month periods" would be substituted for "two consecutive 12-month periods" with respect to a plan year beginning in 2024) during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)); and (2) attained the age specified in section 410(a)(1)(A)(i) by the close of the last of those 12-month periods. However, under proposed § 1.401(k)-5(b)(1)(ii), long-term, part-time employees would not include: (1) certain employees who are covered by a collective bargaining agreement, (2) employees who are nonresident aliens and who receive no earned income from the employer that constitutes income from sources within the United States, or (3) any other employees described in section 410(b)(3).

Although section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3), section 401(k)(15) does not provide any exceptions from the maximum permissible service requirement of section 401(k)(2)(D)(ii) for a qualified CODA in: (1) a governmental plan (as defined in section 414(d)),[2] or (2) a church plan (as defined in section 414(e)) with respect to which the election provided by section 410(d) has not been made. In addition to the general request for comments on this proposed regulation, comments are specifically requested with respect to the application of section 401(k)(15) to a qualified CODA in such a governmental plan or church plan, including the application of proposed § 1.401(k)-5(d)(1)(ii) (which would clarify that, for purposes of proposed § 1.401(k)-5(d), section 411 will be treated as if it applies to the plan, taking into account the modifications provided in proposed § 1.401(k)-5(d)(1)(i) and (iii)).

2. Eligibility to Participate

As explained in section I.B.1 of this Explanation of Provisions, an employee would be a long-term, part-time employee under the proposed regulation only if the employee became eligible to participate in a qualified CODA solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. The Treasury Department and the IRS received comments in response to Notice 2020-68 requesting clarification that the rules of section 401(k)(15) do not apply to an employee who becomes eligible to participate in a qualified CODA prior to completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (for example, an employee who, upon hire, is immediately eligible to make a cash or deferred election under the arrangement).

Under this proposed regulation, an employee would not be a long-term, part-time employee unless the employee becomes eligible to participate in a qualified CODA solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)). Thus, an employee who becomes eligible to participate in a qualified CODA by reason of having completed any other service requirement (or who is immediately eligible to participate in the CODA) would not be a long-term, part-time employee, and the rules of section 401(k)(15)(B) would not apply to the employee, even if the employee is classified by the employer or employers maintaining the plan as a part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification regarding the application of the rules of section 401(k)(15) to employees who were immediately eligible to participate in a qualified CODA if the plan is later amended to require employees to complete the period of service described in section 401(k)(2)(D) in order to participate in the CODA. Under this proposed regulation, an employee who was immediately eligible to participate in a qualified CODA or who became eligible to participate based on completing another permissible service requirement (for example, completing a 1-year period of service under section 410(a)(1)(A)(ii)) would not become a long-term, part-time employee merely because the plan is amended prospectively to require employees hired on or after the effective date of the amendment to complete the period of service described in section 401(k)(2)(D). This is because the employee was not eligible to participate in the CODA solely by reason of completing the applicable number of consecutive 12-month periods with at least 500 hours of service during each period.

3. Elapsed Time Method of Crediting Service

Under the elapsed time method of crediting service set forth in § 1.410(a)-7,

[2] Pursuant to section 401(k)(4)(B)(ii) and § 1.401(k)-1(e)(4), a CODA included in a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof, does not satisfy the requirements to be a qualified CODA if the arrangement is adopted after May 6, 1986. However, this adoption deadline for a qualified CODA does not apply to a CODA included in a rural cooperative plan or a plan of an employer that 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 that is owned in whole or in part by any of those entities.

a plan generally is required to take into account the period of time that elapses while an employee is employed with the employer or employers maintaining the plan, regardless of the actual number of hours the employee would have been credited with during that period. For purposes of determining an employee's eligibility to participate, a plan generally may not require an employee to complete more than a 1-year period of service under the elapsed time method (regardless of whether the employee is classified by the employer or employers maintaining the plan as a part-time employee).

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting that a plan be permitted to determine an employee's eligibility to participate as a long-term, part-time employee using the elapsed time method. In general, this proposed regulation would permit a plan to use the elapsed time method to determine an employee's eligibility to participate in a qualified CODA. However, under the elapsed time method, an employee's eligibility to participate is not based upon the actual completion of a specified number of hours of service during a 12-month period. Therefore, an employee who becomes eligible to participate in a qualified CODA under the elapsed time method would not be eligible to participate solely by reason of completing the applicable number of consecutive 12-month periods with at least 500 hours of service during each period and would not be a long-term, part-time employee.

In addition, this proposed regulation does not include an amendment to the elapsed time rules under § 1.410(a)-7. Therefore, a plan may not require an employee, including an employee who is classified as a part-time employee, to complete more than a 1-year period of service under the elapsed time method in order to be eligible to participate in a qualified CODA.

4. Equivalency Methods of Crediting Service

As an alternative to the general method of crediting service, which is based upon the actual counting of hours of service, a plan may credit hours of service using equivalency methods permitted under 29 CFR 2530.200b-3. Any equivalency method (or methods) used by a plan must be set forth in the plan document. For example, a plan generally may determine the number of hours of service to be credited to employees on the basis of months of employment if an employee is credited with 190 hours of service for each month for which the employee would be required to be credited with at least 1 hour of service. Under this equivalency method, the hours of service credited to an employee for each month are not affected by whether the employee is classified by the employer or employers maintaining the plan as a part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting that a plan be permitted to determine an employee's eligibility to participate as a long-term, part-time employee using an equivalency method to credit hours of service and requesting guidance regarding the application of the equivalency methods for purposes of determining an employee's eligibility to participate as a long-term, part-time employee (for example, whether the minimum number of hours that must be credited under an equivalency method would be reduced). Because an employee is credited with a specified number of hours under both the general method of crediting service and the equivalency methods, this proposed regulation would permit either the general method of crediting service or an otherwise permissible equivalency method to be used to determine whether an employee is credited with at least 500 hours of service during a 12-month period. However, for purposes of determining an employee's eligibility to participate as a long-term, part-time employee, this proposed regulation does not include an amendment reducing the number of hours that otherwise would be credited to the employee under the applicable equivalency method.

C. *Participation*

1. Time of Participation

This proposed regulation would set forth rules regarding the date by which a long-term, part-time employee must become eligible to make a cash or deferred election under a qualified CODA (that is, rules regarding the latest permissible entry date for a long-term, part-time employee).

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting confirmation that a plan may use the same entry date rules for long-term, part-time employees as it does for other eligible employees. Under section 401(k)(15)(D)(i), the entry date rules of section 410(a)(4) apply to an employee who is eligible to participate in an arrangement solely by reason of section 401(k)(2)(D)(ii). Accordingly, proposed § 1.401(k)-5(c)(1) reflects the rules of section 410(a)(4), including the rule in § 1.410(a)-4(b) relating to the treatment of an employee who separates from service prior to the employee's scheduled entry date.

2. Determination of 12-Month Periods

Under section 410(a)(5)(A), in general, all years of service with the employer or employers maintaining the plan must be taken into account in computing an employee's period of service for purposes of section 410(a)(1). Similarly, proposed § 1.401(k)-5(c)(2)(i) would clarify that, in general, all 12-month periods during which an employee is credited with at least 500 hours of service with the employer or employers maintaining the plan must be taken into account for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. For example, 12-month periods during which an employee is included in a classification of employees who are ineligible to participate in the qualified CODA generally must be taken into account for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee. However, pursuant to section 112(b) of the SECURE Act, 12-month periods beginning before January 1, 2021, are not taken into account for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee.

With respect to an employee who is not yet eligible to participate in a qualified CODA, the rules of proposed § 1.401(k)-5(c)(2)(i) would not affect the requirement that the employee complete the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service in order to be eligible to participate as a long-term, part-time employee. Thus, if an employee who is not yet eligible to participate in a qualified CODA completes a 12-month period during which the employee is credited with fewer than 500 hours of service, then any prior 12-month periods during which the employee was credited with at least 500 (but less than 1,000) hours of service during each period would not be taken into account for purposes of determining whether the employee is eligible to participate in the CODA as a long-term, part-time employee.

However, this proposed regulation does not include any provisions similar to the break-in-service rules under section 410(a)(5) for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. Thus, if an employee has become eligible to participate as a long-term, part-time employee, then the employee's eligibility to participate as a long-term, part-time employee would not be affected by the employee's completion of one or more 12-month periods during each of which the employee is credited with fewer than 500 hours of service (although, as explained in section I.D.1 of this Explanation of Provisions, a long-term, part-time employee is not required to be credited with a year of vesting service with respect to a 12-month period during which the employee is credited with fewer than 500 hours of service). Similarly, if a former employee who was eligible to participate as a long-term, part-time employee is rehired by an employer maintaining the plan, then the 12-month periods during which the employee previously was credited with at least 500 hours of service with an employer maintaining the plan must be taken into account for purposes of determining whether the rehired employee is eligible to participate as a long-term, part-time employee.[3]

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification that the long-term, part-time employee rules of section 401(k)(15) could apply to an employee even if 12-month periods beginning before January 1, 2021, are used to determine the employee's eligibility to participate in the qualified CODA. However, because section 112(b) of the SECURE Act provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of section 401(k)(2)(D)(ii), this proposed regulation would exclude any 12-month period beginning before January 1, 2021, for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. Therefore, an employee would not be a long-term, part-time employee under the proposed regulation if one or more 12-month periods beginning before January 1, 2021, were taken into account for purposes of determining whether the employee completed the applicable number of consecutive 12-month periods during each of which the employee was credited with at least 500 hours of service.

This proposed regulation also includes rules regarding the date on which a 12-month period may begin for purposes of determining an employee's eligibility to participate as a long-term, part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting confirmation that, although an employee's initial 12-month period for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee must be based on the employee's date of hire, subsequent 12-month periods for the employee may be based on the plan year. Under section 401(k)(15)(D)(ii), 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A). Accordingly, under proposed § 1.401(k)-5(c)(2)(ii), an employee's initial 12-month period would begin on the first day for which the employee is entitled to be credited with an hour of service; however, the terms of the plan may provide that, beginning with the plan year that commences within that initial 12-month period, subsequent 12-month periods are determined by reference to the first day of the plan year. Moreover, the subsequent 12-month periods with respect to an employee may be determined by reference to the first day of the plan year regardless of whether the employee is credited with at least 500 hours of service during the employee's initial 12-month period (provided that the employee is not credited with at least 1,000 hours of service during the employee's initial 12-month period).

If the plan provides that 12-month periods (after an employee's initial 12-month period) are determined by reference to the first day of the plan year, an employee's initial 12-month period and second 12-month period are treated as consecutive 12-month periods for purposes of determining the employee's eligibility to participate as a long-term, part-time employee. Therefore, if an employee is credited with at least 500 (but less than 1,000) hours of service during each of those 12-month periods, the employee has completed two consecutive 12-month periods with at least 500 hours of service during each period for purposes of determining the employee's eligibility to participate as a long-term, part-time employee. This is the case even though an employee may be credited with certain hours of service for both the initial 12-month period and the second 12-month period. For an employee hired prior to January 1, 2021, this proposed regulation provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee. Thus, if 12-month periods after an employee's initial 12-month period are determined by reference to the first day of the plan year, then, with respect to an employee who was hired prior to January 1, 2021, the first 12-month period for purposes of determining whether the

[3] If a former employee who previously was eligible to participate in a qualified CODA (but who was not eligible to participate as a long-term, part-time employee) is rehired by an employer maintaining the plan, then the employee generally would be immediately eligible to participate again in the CODA based on the employee's prior service with the employer or employers maintaining the plan. Therefore, that former employee would not be eligible to participate in the qualified CODA as a long-term, part-time employee after being rehired. However, if the former employee's eligibility service is disregarded because the plan applies the provisions of section 410(a)(5)(D), then that former employee may become eligible to participate in the qualified CODA as a long-term, part-time employee after being rehired.

employee is eligible to participate as a long-term, part-time employee generally would be determined by reference to the first day of the first plan year beginning on or after January 1, 2021.

3. Eligibility Conditions Not Based on Age or Service

The Treasury Department and the IRS received comments in response to Notice 2020-68 requesting clarification that an employee who otherwise would be eligible to participate in a qualified CODA as a long-term, part-time employee may be excluded from participating in the CODA if the employee is a member of a job classification that is not based on age or service and whose members are excluded from participating in the CODA under the terms of the plan.

In response to these comments, this proposed regulation would address whether a plan may impose conditions that are not based on age or service in order for an employee to be eligible to participate in a qualified CODA as a long-term, part-time employee. In general, section 401(k)(15) does not preclude a plan that includes a CODA from establishing conditions that must be satisfied in order for an employee to be eligible to participate in the CODA. However, a CODA will fail to satisfy section 401(k)(2)(D) if, as a condition of participation, the plan imposes an age or service requirement (or imposes a condition that has the effect of an age or service requirement) that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).

Accordingly, proposed § 1.401(k)-5(c)(3) would clarify that the long-term, part-time employee rules of § 1.401(k)-5 do not preclude a plan from establishing an eligibility condition that must be satisfied in order for an employee to participate in the CODA, provided that the condition is not a proxy for imposing an age or service requirement (that is, the condition does not have the effect of imposing an age or service requirement with the employer or employers maintaining the plan) that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).[4] However, with respect to an employee who otherwise would be eligible to participate in a qualified CODA as a long-term, part-time employee, but who is excluded from participating as a long-term, part-time employee due to conditions imposed by the plan, the rules of section 401(k)(15)(B)(i) and (ii) (disregarding long-term, part-time employees for purposes of nondiscrimination and coverage testing and top-heavy benefits) do not apply to that excluded employee.

In addition, the maximum period of service that the employer or employers maintaining a plan may require under section 401(k)(2)(D) applies regardless of an employee's job classification. For example, it would not be permissible for an employee classified as a temporary employee to be required to complete a period of service that is described in section 401(k)(2)(D)(ii). This would not be permissible because section 401(k)(2)(D) provides that a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii). Thus, if the employee were to complete the period described in section 410(a)(1) (determined without regard to section 410(a)(1)(B)(i)), then the employee must become eligible to participate in the CODA under section 401(k)(2)(D)(i).

Proposed § 1.401(k)-5(c)(1)(iii) would provide rules addressing the date of participation that apply in the case of an employee who would otherwise be eligible to participate in the arrangement as a long-term, part-time employee but who does not participate solely because the employee does not satisfy the plan's eligibility conditions (other than age or service) as of the date the employee would have participated in the arrangement had the employee satisfied those conditions. If such an employee later satisfies those conditions, then the employee must become eligible to participate in the arrangement immediately upon satisfying those conditions.

4. Elective Contributions

To avoid a circumvention of the requirement that a long-term, part-time employee be eligible to make elective contributions under a qualified CODA, proposed § 1.401(k)-5(c)(4) would provide, in general, that the right to make elective contributions by a long-term, part-time employee who is an eligible non-highly compensated employee (NHCE) may not be restricted in a manner that would not be permitted for an NHCE under a safe harbor section 401(k) plan under § 1.401(k)-3(c)(6). However, a SIMPLE 401(k) plan would be permitted to limit the amount of elective contributions made by a long-term, part-time employee under the plan to the extent needed to satisfy the elective contribution limitation for SIMPLE 401(k) plans under section 401(k)(11)(B)(i)(I) and (m)(10)(A).

D. *Vesting*

1. Years of Vesting Service Taken into Account

This proposed regulation would provide vesting rules for purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee, as explained in section I.D.2 of this Explanation of Provisions) has a nonforfeitable right to employer contributions under the plan (other than elective contributions).

In general, the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions) would be determined under the rules of section 411. However, pursuant to section 401(k)(15)(B)(iii), proposed § 1.401(k)-5(d)(1)(i)(A) would provide that each 12-month period during which a long-term, part-time employee (or

[4] The rules of proposed § 1.401(k)-5(c)(3) are intended to align with those of § 1.410(a)-3(d) and (e).

former long-term, part-time employee) is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)) with the employer or employers maintaining the plan is treated as a year of vesting service.

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification that, for purposes of determining vesting service for a long-term, part-time employee, a plan may use the same vesting computation period that it uses for other employees and is not required to use the long-term, part-time employee's eligibility computation period. Under section 411(a)(5)(A), a vesting computation period generally may be a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary of Labor). Section 401(k)(15)(D)(ii) provides that 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A). However, the introductory language of section 401(k)(15) states that it applies "for purposes of paragraph (2)(D)(ii)" (that is, the eligibility rules of section 401(k)(2)(D)(ii)). Based on this language, this proposed regulation would apply the rule under section 401(k)(15)(D)(ii) for purposes of section 401(k)(2)(D)(ii) but would not extend the application of that rule to the vesting rules of section 401(k)(15)(B)(iii). Accordingly, in response to this comment, proposed § 1.401(k)-5(d)(1)(i)(A) would clarify that a plan may designate any 12-consecutive month period that is not prohibited for use under section 411(a) for purposes of determining a long-term, part-time employee's (or former long-term, part-time employee's) vesting service.

In addition, pursuant to section 401(k)(15)(B)(iii), proposed § 1.401(k)-5(d)(1)(iii) would provide that, for purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee) has incurred a 1-year break in service, section 411(a)(6)(A) is applied by substituting "at least 500 hours of service" for "more than 500 hours of service."

This proposed regulation also would provide guidance regarding 12-month periods that must be taken into account for purposes of determining a long-term, part-time employee's (or former long-term, part-time employee's) years of vesting service. As described in section II of the Background portion of this preamble, Q&A C-1 of Notice 2020-68 provides that, unless a long-term, part-time employee's years of service may be disregarded under section 411(a)(4) (for example, years of service before the employee attains age 18), all years of service with the employer or employers maintaining the plan must be taken into account for purposes of determining the long-term, part-time employee's nonforfeitable right to employer contributions under section 401(k)(15)(B)(iii), including 12-month periods beginning before January 1, 2021.

However, section 125(d) of the SECURE 2.0 Act amended section 112(b) of the SECURE Act (effective as if included in section 112 of the SECURE Act) to provide that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of either the eligibility rule described in section 401(k)(2)(D)(ii) or the vesting rules of section 401(k)(15)(B)(iii). Thus, Q&A C-1 of Notice 2020-68 was effectively rendered obsolete by the enactment of section 125(d) of the SECURE 2.0 Act.

Accordingly, proposed § 1.401(k)-5(d)(1)(i)(B) generally would require that all 12-month periods of service with the employer or employers maintaining the plan must be taken into account for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions (other than elective contributions), unless the period of service of the employee may be disregarded under section 411(a) (which takes into account section 411(a)(4), (a)(6), and (a)(7)(B)). In addition, proposed § 1.401(k)-5(d)(1)(i)(B) would reflect section 125(d) of the SECURE 2.0 Act by permitting any 12-month period beginning before January 1, 2021, to be excluded for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions (other than elective contributions) under the plan.

2. Former Long-Term, Part-Time Employees

This proposed regulation would provide rules for an employee who becomes eligible to participate in a qualified CODA as a long-term, part-time employee but who subsequently completes 1 year of service under section 410(a)(1)(A)(ii) or who ceases to satisfy the plan's eligibility conditions (other than age or service conditions).

Under section 401(k)(15)(B)(iv), the rules of section 401(k)(15)(B) (other than the vesting rules of section 401(k)(15)(B)(iii)) cease to apply to any employee as of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii) (that is, satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 410(a)(1)(B)(i)). Thus, the nondiscrimination and coverage testing provisions of section 401(k)(15)(B)(i) and the top-heavy benefit provisions of section 401(k)(15)(B)(ii) cease to apply to any employee as of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii), but the vesting rules of section 401(k)(15)(B)(iii) continue to apply to the employee.

Proposed § 1.401(k)-5(d)(2) would reflect the rules of section 401(k)(15)(B)(iv) by providing that an employee ceases to be a long-term, part-time employee and becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii). The nondiscrimination provisions of proposed § 1.401(k)-5(e)(1) (which are explained in section I.E.1 of this Explanation of Provisions) and the employer election provisions of proposed § 1.401(k)-5(f)(1) and (2) (which are explained in section I.F of this Explanation of Provisions) would not apply to a former long-term, part-time employee (regardless of whether the former long-term, part-time employee subsequently completes one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service). However, the vesting rules of proposed § 1.401(k)-5(d)(1) (as explained in section I.D.1 of this Explanation of Provisions) would continue to apply to a former long-term, part-time employee. Thus, a former long-term, part-time employee would continue to be credited with a year of vesting service for any 12-month period during which the former long-term, part-time employee is credited with at least 500 hours of service with the employer or employers maintaining the plan (unless the period of service may be disregarded under section 411(a)).

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification regarding the application of the vesting rules of section 401(k)(15)(B)(iii) and (iv) with respect to an employee who: (1) becomes eligible to participate as a long-term, part-time employee, but who subsequently completes 1 year of service under section 410(a)(1)(A)(ii); or (2) becomes eligible to participate because the employee completed 1 year of service under section 410(a)(1)(A)(ii), but who also completes (before or after becoming eligible to participate) one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service.

Under this proposed regulation, the vesting rules of proposed § 1.401(k)-5(d)(1) would continue to apply to a long-term, part-time employee who completes 1 year of service under section 410(a)(1)(A)(ii). However, an employee who becomes eligible to participate in a qualified CODA because the employee completes 1 year of service under section 410(a)(1)(A)(ii) would not be eligible to participate in the CODA solely by reason of completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Therefore, the employee would not be a long-term, part-time employee, and the vesting rules of proposed § 1.401(k)-5(d)(1) would not apply to the employee (regardless of whether the employee also completes, before or after becoming eligible to participate in the qualified CODA, one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service).

Section 401(k)(15) does not address a long-term, part-time employee who ceases to satisfy a plan's eligibility conditions (other than age or service conditions) for participation in the qualified CODA included in the plan. However, this proposed regulation would provide rules similar to those of section 401(k)(15)(B)(iv) with respect to a long-term, part-time employee who ceases to be eligible to participate in a qualified CODA. Therefore, proposed § 1.401(k)-5(d)(2)(ii) would provide that a long-term, part-time employee becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the earlier of the plan year in which the employee: (1) satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii); or (2) ceases to satisfy the plan's eligibility conditions (other than age or service conditions). Regardless of the reason that a long-term, part-time employee becomes a former long-term, part-time employee, this proposed regulation would provide that the nondiscrimination provisions of proposed § 1.401(k)-5(e)(1) and the employer election provisions of proposed § 1.401(k)-5(f)(1) and (2) do not apply to a former long-term, part-time employee (although the vesting rules of proposed § 1.401(k)-5(d)(1) would continue to apply to a former long-term, part-time employee).

Unlike the rules that would apply to a long-term, part-time employee who becomes a former long-term, part-time employee by reason of satisfying the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii) (that is, by reason of having completed 1 year of service under section 410(a)(1)(A)(ii)), proposed § 1.401(k)-5(d)(2)(iii) would provide that a long-term, part-time employee who ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year generally will return to long-term, part-time employee status as of the first day of the plan year during which the employee again satisfies those conditions. However, that employee would not return to long-term, part-time employee status if the employee also is a former long-term, part-time employee by reason of having completed 1 year of service under section 410(a)(1)(A)(ii). Although proposed § 1.401(k)-5(d)(2)(iii) would permit an employee's status to change from that of a former long-term, part-time employee to a long-term, part-time employee during the plan year, this proposed regulation would not permit an employee to be both a long-term, part-time employee and a former long-term, part-time employee for that plan year. Similarly, under this proposed regulation, if a long-term, part-time employee ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year, but again satisfies those conditions during the same plan year, the employee would remain a long-term, part-time employee for the entire plan year.

Accordingly, proposed § 1.401(k)-5(d)(2)(i) would define a former long-term, part-time employee as an employee who became eligible to participate in the arrangement as a long-term, part-time employee; subsequently ceased to be a long-term, part-time employee because the employee was described in proposed § 1.401(k)-5(d)(2)(ii)(A) or (B); and has not returned to long-term, part-time employee status in accordance with proposed § 1.401(k)-5(d)(2)(iii). Thus, under this proposed definition, an employee first must become eligible to participate in a qualified CODA as a long-term, part-time employee before the employee may become a former long-term, part-time employee.

E. *Nonelective and matching contributions*

1. General Rule

This proposed regulation reflects the nondiscrimination provisions of section 401(k)(15)(B)(i)(I). Proposed § 1.401(k)-5(e)(1) would provide that, notwithstanding section 401(a)(4), neither nonelective nor matching contributions are required to be made on behalf of long-term, part-time employees, even if those contributions are made on behalf of other eligible employees. However, as explained in section I.D.2 of this Explanation of Provisions, proposed § 1.401(k)-5(e)(1) would not apply to former long-term, part-time employees.

2. Coordination with Employer Elections

In addition to section 401(a)(4), other Code sections affect whether contributions must be made on behalf of long-term, part-time employees. Accordingly, proposed § 1.401(k)-5(e)(2) would address the safe harbor section 401(k) plan contribution requirements under section 401(k)(12) and (13), the safe harbor section 401(m) plan contribution requirements under section 401(m)(11) and (12), the top-heavy benefit requirements under section 416, and the SIMPLE 401(k) plan contribution requirements under section 401(k)(11) and (m)(10).

As explained in section I.F.1 of this Explanation of Provisions, this proposed regulation would provide that the employer or employers maintaining a plan are permitted to elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the ADP safe harbor provisions of section 401(k)(12) and (13), the ACP safe harbor provisions of section 401(m)(11) and (12), and certain other nondiscrimination and coverage testing provisions. Similarly, as explained in section I.F.2 of this Explanation of Provisions, this proposed regulation would permit the employer or employers maintaining the plan to elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the top-heavy vesting and benefit requirements of section 416(b) and (c). However, this proposed regulation would not permit an employer to elect to exclude long-term, part-time employees for purposes of determining whether a plan satisfies the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10).

Therefore, proposed § 1.401(k)-5(e)(2)(i) would clarify that if long-term, part-time employees are excluded for purposes of determining whether a plan satisfies the ADP safe harbor provisions of section 401(k)(12) or (13) (and, if applicable, the ACP safe harbor provisions of section 401(m)(11) or (12)), then the plan will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that would not satisfy the safe harbor contribution requirements on behalf of the eligible NHCE). Similarly, proposed § 1.401(k)-5(e)(2)(ii) would clarify that if long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the minimum benefit requirements of section 416(c) for the plan year, then the plan will not fail to satisfy the minimum benefit requirements of section 416(c) merely because the employer contribution (if any) made for the plan year on behalf of a non-key employee who is a long-term, part-time employee does not satisfy those requirements.

However, proposed § 1.401(k)-5(e)(2)(iii) would clarify that, because an employer may not elect under this proposed regulation to exclude long-term, part-time employees from the application of the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10), a plan intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) or (m)(10) must satisfy the matching or nonelective contribution requirements of § 1.401(k)-4(e) with respect to long-term, part-time employees.

F. *Employer elections*

1. Nondiscrimination and Coverage

This proposed regulation generally reflects the provisions of section 401(k)(15)(B)(i)(II). Section 401(k)(15)(B)(i)(II) permits an employer to elect to exclude long-term, part-time employees from the application of the nondiscrimination requirements of section 401(a)(4), the ADP test of section 401(k)(3), the ADP safe harbor provisions of section 401(k)(12) and (13), the ACP test of section 401(m)(2), the ACP safe harbor provisions of section 401(m)(11) and (12), and the minimum coverage requirements of section 410(b). Accordingly, proposed § 1.401(k)-5(f)(1) generally would permit an employer to elect to exclude long-term, part-time employees (but not former long-term, part-time employees, as explained in section I.D.2 of this Explanation of Provisions) for purposes of determining whether a plan satisfies those nondiscrimination and minimum coverage requirements.

The nondiscrimination and minimum coverage requirements listed in section 401(k)(15)(B)(i)(II) do not include the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10). Accordingly, an employer election under proposed § 1.401(k)-5(f)(1) would not exclude long-term, part-time employees for purposes of determining whether a plan satisfies the SIMPLE 401(k) requirements of section 401(k)(11) and (m)(10).

For purposes of section 410(b), if long-term, part-time employees are not excluded for purposes of determining whether the plan satisfies section 410(b) pursuant to an employer election under proposed § 1.401(k)-5(f)(1), then those employees generally will be otherwise excludable employees for purposes of section 410(b)(4)(B) and § 1.410(b)-6(b)(3) because those long-term, part-time employees will not have satisfied the service requirements of section 410(a)(1) (without regard to section 410(a)(1)(B)). However, former long-term, part-time employees who have completed 1 year of service under section 410(a)(1)(A)(ii) will not be otherwise excludable employees because those former long-term, part-time employees will have satisfied the minimum age and service requirements of section 410(a)(1) (without regard to section 410(a)(1)(B)).

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification that an employer may elect to exclude long-term, part-time employees for purposes of certain nondiscrimination and coverage testing provisions listed in section 401(k)(15)(B)(i)(II), but include long-term, part-time employees for other of those provisions. This proposed regulation would not provide for such an option because of the interconnection among the nondiscrimination and coverage testing provisions listed in section 401(k)(15)(B)(i)(II) and the risk that disregarding long-term, part-time employees for purposes of some (but not all) of those nondiscrimination and coverage testing provisions could result in discrimination against NHCEs who are not long-term, part-time employees. Accordingly, this proposed regulation would clarify that an employer election under proposed § 1.401(k)-5(f)(1) applies for purposes of every nondiscrimination and coverage testing provision listed in section 401(k)(15)(B)(i)(II) (to the extent the provision otherwise would apply to the plan) and applies with respect to all long-term, part-time employees who are eligible to participate in the qualified CODA.

With respect to a plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), this proposed regulation would clarify that an election under proposed § 1.401(k)-5(f)(1) must be set forth in the plan and satisfy the plan year requirements of § 1.401(k)-3(e). This proposed regulation would set forth a similar requirement for a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12). Therefore, with respect to these plans, in order for an election to satisfy the conditions of proposed § 1.401(k)-5(f)(1), the terms of the plan must provide clearly that long-term, part-time employees are excluded for purposes of the ADP safe harbor provisions of section 401(k)(12) or (13), the ACP safe harbor provisions of section 401(m)(11) or (12), and any other provisions under proposed § 1.401(k)-5(f)(1)(i) that otherwise would apply to the plan.

With respect to a plan that is not intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) for a plan year, this proposed regulation would not require an election under proposed § 1.401(k)-5(f)(1) to be set forth in the plan. However, in order for the employer or employers maintaining the plan to make an election under proposed § 1.401(k)-5(f)(1), the terms of the plan would need to provide enabling language. Thus, in the case of a plan that is not intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) for a plan year, if the plan document does not include enabling language, or an election under proposed § 1.401(k)-5(f)(1) is not made, then long-term, part-time employees would not be excluded for purposes of determining whether the plan satisfies the nondiscrimination requirements of section 401(a)(4), the ADP test of section 401(k)(3), the ACP test of section 401(m)(2), or the minimum coverage requirements of section 410(b) (to the extent those provisions would otherwise apply to the plan).

2. Top-Heavy

Proposed § 1.401(k)-5(f)(2) reflects the provisions of section 401(k)(15)(B)(ii), which permit an employer to elect to exclude all long-term, part-time employees from the application of the top-heavy vesting and benefit requirements under section 416(b) and (c). As explained in section I.D.2 of this Explanation of Provisions, the election under proposed § 1.401(k)-5(f)(2) would not apply to former long-term, part-time employees. In addition, this proposed regulation would clarify that an election under section 401(k)(15)(B)(ii) does not apply for purposes of determining whether a plan is a top-heavy plan (as defined in section 416(g)).

However, section 125(e) of the SECURE 2.0 Act amends the special rules under section 416(g)(4)(H) of the Code for cash or deferred arrangements using alternative methods of meeting nondiscrimination requirements to provide that the term “top-heavy plan” does not include a plan solely because that plan does not provide nonelective or matching contributions to employees described in section 401(k)(15)(B)(i). As explained in section I.E.2 of this Explanation of Provisions, a plan does not fail to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) (including for purposes of applying section 416(g)(4)(H) of the Code) merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee, provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies those provisions pursuant to an election that satisfies the requirements of proposed § 1.401(k)-5(f)(1). Accordingly, proposed § 1.401(k)-5(f)(2) would clarify that, in the case of an employer that makes an election described in proposed § 1.401(k)-5(f)(1) (which has the effect of excluding long-term, part-time employees for purposes of determining whether the plan satisfies the ADP and ACP safe harbor provisions), the plan will not fail to be excluded from the definition of a “top-heavy plan” under section 416(g)(4)(H) merely because the employer does not make nonelective or matching contributions on behalf of long-term, part-time employees (or makes nonelective or matching contributions that do not satisfy the requirements for safe harbor contributions).

The employer election regarding nondiscrimination and coverage testing under proposed § 1.401(k)-5(f)(1) and the employer election regarding top-heavy benefits under proposed § 1.401(k)-5(f)(2) would be separate elections. In order for an election to satisfy the conditions of proposed § 1.401(k)-5(f)(2), the terms of the plan would be required to provide that long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c).

3. Additional Employer Contributions

As explained in section I.E of this Explanation of Provisions, this proposed regulation generally would not require an employer to make nonelective or matching contributions on behalf of a long-term, part-time employee. However, the Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting clarification that an employer may elect under section 401(k)(15)(B)(i)(II) to exclude long-term, part-time employees from nondiscrimination and coverage testing, even if the employer makes employer contributions (other than elective contributions) on behalf of long-term, part-time employees under the plan.

Under this proposed regulation, an election to exclude long-term, part-time employees for purposes of nondiscrimination and coverage testing under proposed § 1.401(k)-5(f)(1), and an election to exclude long-term, part-time employees for purposes of top-heavy benefits under proposed § 1.401(k)-5(f)(2), would not be conditioned upon long-term, part-time employees being ineligible to receive employer contributions other than elective contributions under the plan. Accordingly, this proposed regulation generally would permit the employer or employers maintaining the plan to elect to exclude long-term, part-time employees under proposed § 1.401(k)-5(f)(1) and (2), even if the employer or employers maintaining the plan make nonelective or matching contributions on behalf of long-term, part-time employees under the plan. If a plan is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), or the ACP safe harbor provisions of section 401(m)(11) or (12), and the employer elects to exclude long-term, part-time employees under proposed § 1.401(k)-5(f)(1) for purposes of determining whether the plan satisfies those provisions (and any other provisions under proposed § 1.401(k)-5(f)(1)(i) that otherwise would apply to the plan), then any nonelective or matching contributions made on behalf of long-term, part-time employees under the plan would not be safe harbor contributions for purposes of § 1.401(k)-3 or 1.401(m)-3 but, as described in section I.F.2 of this Explanation of Provisions, the plan would continue to be excluded from the definition of a "top-heavy plan".

II. *Other Issues*

A. *Catch-up contributions and Roth elective contributions*

Section 112 of the SECURE Act does not address whether a long-term, part-time employee may be a catch-up eligible participant for purposes of making catch-up contributions under section 414(v) and § 1.414(v)-1. However, § 1.414(v)-1(g)(3) provides that an employee is a catch-up eligible participant for a taxable year if: (1) the employee is eligible to make elective deferrals under an applicable employer plan (without regard to section 414(v) or § 1.414(v)-1), and (2) the employee's 50th or higher birthday would occur before the end of the employee's taxable year. An employee who is eligible to participate in a qualified CODA as a long-term, part-time employee would be eligible to make elective deferrals under an applicable employer plan for purposes of § 1.414(v)-1(g)(3). Accordingly, a long-term, part-time employee is a catch-up eligible participant for a taxable year if the employee's 50th or higher birthday would occur before the end of the employee's taxable year.

Under the universal availability requirements of section 414(v)(4) and § 1.414(v)-1(e), a section 401(k) plan (or other applicable employer plan) that offers catch-up contributions and that is otherwise subject to section 401(a)(4) generally will not satisfy the requirements of section 401(a)(4) unless all catch-up eligible participants who participate under any applicable employer plan maintained by the employer are provided an effective opportunity to make the same dollar amount of catch-up contributions. This proposed regulation would not amend the catch-up contribution rules of § 1.414(v)-1. However, as explained in section I.F.1 of this Explanation of Provisions, proposed § 1.401(k)-5(f)(1) would permit an employer to elect to exclude long-term, part-time employees for purposes of certain nondiscrimination and coverage testing provisions, including for purposes of section 401(a)(4). Therefore, long-term, part-time employees would be disregarded for purposes of the universal availability requirements of section 414(v)(4) and § 1.414(v)-1(e), if the employer elects to exclude long-term, part-time employees in accordance with the provisions of proposed § 1.401(k)-5(f)(1).

Similarly, section 401(k)(15) does not address whether a section 401(k) plan may permit a long-term, part-time employee to make designated Roth contributions. However, under § 1.401(k)-1(f)(1), a designated Roth contribution is an elective contribution under a qualified CODA that (to the extent permitted under the plan) satisfies certain conditions. Section 1.401(k)-1(f)(4) further provides that a designated Roth contribution must satisfy the requirements applicable to elective contributions made under a qualified CODA and is treated as an employer contribution for purposes of certain Code sections, including section 401(k). Accordingly, a section 401(k) plan may permit long-term, part-time employees to make designated Roth contributions.

Under § 1.401(k)-1(a)(4)(iv)(B), the right to make designated Roth contributions is a right or feature subject to the requirements of section 401(a)(4). However, if the employer elects to exclude long-term, part-time employees for purposes of determining whether a plan satisfies section 401(a)(4) in accordance with the provisions of proposed § 1.401(k)-5(f)(1), long-term, part-time employees would be disregarded for purposes of determining whether the right to make designated Roth contributions under the plan satisfies section 401(a)(4) and § 1.401(a)(4)-4.

B. *Form 5500 and Form 5500-SF – Independent qualified public accountant audit*

The Treasury Department and the IRS received a comment in response to Notice 2020-68 requesting that long-term, part-time employees be excluded for purposes of determining whether a plan is exempt from the requirement to be audited annually by an independent qualified public accountant (IQPA). The Treasury Department and the IRS also received a comment in response to Notice 2020-68 requesting that the determination of whether a plan is exempt from the annual audit requirement be based on the number of plan participants (including long-term, part-time employees) with account balances as of the beginning of the plan year, rather than the total number of participants at the beginning of the plan year. The annual audit requirement of section 103(a)(3) of ERISA falls under the regulatory and interpretive authority of the Department of Labor and is outside the scope of this proposed regulation.[5]

Proposed Applicability Date

Section 1.401(k)-5 is proposed to apply to plan years that begin on or after January 1, 2024. Prior to the date a Treasury decision revising § 1.401(k)-5 to

[5] After these comments were received, revisions were made to the forms and instructions for the Form 5500, "Annual Return/Report of Employee Benefit Plan," and Form 5500-SF, "Short Form Annual Return/Report of Small Employee Benefit Plan," for plan years beginning on or after January 1, 2023. The new instructions provide that only participants with an account balance are counted for purposes of the small plan audit waiver of annual examination and report of an IQPA under 29 CFR 2520.104-46. See 88 FR 11984 (February 24, 2023).

implement rules for long-term, part-time employees is published in the **Federal Register,** taxpayers may rely on the rules set forth in this notice of proposed rulemaking.

Availability of IRS Documents

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at *www.irs.gov* or contact the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402.

Special Analyses

I. *Regulatory Planning and Review*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. *Paperwork Reduction Act*

The information required under this regulation is considered usual and customary records kept by respondents during the normal course of business in administering their retirement plans. These customary business records impose no additional burden on respondents and are not required to be reviewed by the Office of Management and Budget (OMB) per 5 CFR 1320.3(b)(2).

III. *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act, it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on several factors. First, the proposed regulation generally is intended to reflect certain statutory changes that affect section 401(k) plans. The proposed regulation primarily would conform the current regulations under section 401(k) with changes made by section 112 of the SECURE Act and sections 125 and 401 of the SECURE 2.0 Act.

Second, although the proposed regulation might affect a substantial number of small entities, the economic impact of the proposed regulation is not expected to be significant. The changes made by section 112 of the SECURE Act may require certain small entities that sponsor section 401(k) plans to revise the eligibility service requirements under those plans so that long-term, part-time employees are permitted to make cash or deferred elections. However, except with respect to SIMPLE 401(k) plans, those small entities would not be required to make nonelective or matching contributions on behalf of long-term, part-time employees. Any additional recordkeeping or administrative costs resulting from the participation of long-term, part-time employees in section 401(k) plans sponsored by small entities are not expected to be significant.

With respect to small entities that sponsor SIMPLE 401(k) plans, the proposed regulation would require those small entities to make nonelective or matching contributions under those SIMPLE 401(k) plans on behalf of any long-term, part-time employees in order to satisfy section 112 of the SECURE Act. However, if a small entity sponsors a section 401(k) plan, it is expected that the plan typically would be subject to the ADP test or designed to satisfy the requirements for a safe harbor section 401(k) plan, rather than be designed to satisfy the requirements for a SIMPLE 401(k) plan. Accordingly, the number of small entities that sponsor section 401(k) plans that are intended to satisfy the requirements for a SIMPLE 401(k) plan and are affected by the expanded participation requirements of section 112 of the SECURE Act is not expected to be substantial.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of this regulation on small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. The proposed regulation does not propose any rule that would include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. The proposed regulation does not propose any rule that would have federalism implications, impose substantial direct compliance costs on State and local governments, or preempt State law within the meaning of the Executive order.

Comments and Public Hearing

Before a final regulation is adopted with respect to long-term, part-time employee rules for cash or deferred arrangements under § 1.401(k)-5, consideration will be given to comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulation. As described in section I.B.1 of the Explanation of Provisions, comments specifically are requested on the application of section 112 of the SECURE Act to a qualified CODA that is included in either (1) a governmental plan, or (2) a church plan with respect to which the election provided by section 410(d) has not been made.

All comments will be made available at *www.regulations.gov* or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for March 15, 2024, beginning at 10:00 a.m. ET in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit an outline of the topics to be addressed and the time to be devoted to each topic by January 26, 2024 as prescribed in the preamble under the **ADDRESSES** section. A period of 10 minutes will be allocated to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by January 26, 2024, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG-104194-23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-104194-23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-104194-23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-104194-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG-104194-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-104194-23. Requests to attend the public hearing must be received by 5:00 p.m. ET on March 13, 2024.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-104194-23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-104194-23. Requests to attend the public hearing must be received by 5:00 p.m. ET on March 13, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during the hearing, please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by March 12, 2024.

Drafting Information

The principal authors of this regulation are Kara M. Soderstrom and Jason E. Levine, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes (EEE)). However, other personnel from the IRS and the Treasury Department participated in the development of this regulation.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry for § 1.401(k)-5 in numerical order to read in part as follows:

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

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Section 1.401(k)-5 is also issued under 26 U.S.C. 401(m)(9).

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Par. 2. Section 1.401(k)-5 is revised to read as follows:

§ 1.401(k)-5 Long-term, part-time employees.

(a) *Overview*—(1) *Rules applicable to long-term, part-time employees*—(i) *In general*. This section provides rules regarding long-term, part-time employees, as defined in paragraph (b)(1) of this section. A cash or deferred arrangement satisfies the requirements of section 401(k)(2)(D) of the Internal Revenue Code only if, with respect to each long-term, part-time employee—

(A) The employee becomes eligible to make a cash or deferred election under the arrangement in accordance with the participation requirements of paragraph (c) of this section; and

(B) The plan that includes the arrangement satisfies the vesting requirements of paragraph (d) of this section.

(ii) *Optional provisions*. A plan that includes a cash or deferred arrangement that satisfies the requirements of paragraphs (c) and (d) of this section may reflect the nonelective and matching contribution provisions of paragraph (e) of this section with respect to long-term, part-time employees (but not former long-term, part-time employees as defined in paragraph (d)(2)(i) of this section). In addition, an employer maintaining the plan may apply the employer election provisions of paragraph (f) of this section with respect to long-term, part-time employees (but not former long-term, part-time employees).

(2) *Rules applicable to former long-term, part-time employees*. *See* paragraph (d)(2) of this section for rules relating to former long-term, part-time employees.

(b) *Long-term, part-time employees*—(1) *Definition*—(i) *In general*. Except as provided in paragraph (b)(1)(ii) or (iii) of this section, *long-term, part-time employee* means an employee who is eligible to participate in the arrangement solely by reason of having—

(A) Completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)); and

(B) Attained the age specified in section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in paragraph (b)(1)(i)(A) of this section.

(ii) *Exclusion for certain employees*. Long-term, part-time employees do not include—

(A) Employees who are included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between those employee representatives and that employer or employers;

(B) Employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)); or

(C) Any other employees described in section 410(b)(3).

(iii) *Plan years beginning in 2024*. With respect to a plan year beginning in 2024, paragraph (b)(1)(i)(A) of this section is applied by substituting three consecutive 12-month periods for two consecutive 12-month periods.

(2) *Examples*. The following examples illustrate the application of the definition of long-term, part-time employee under paragraph (b)(1) of this section, taking into account the determination of 12-month periods under paragraph (c)(2)(i) of this section. For purposes of the examples, each plan is maintained on a calendar-year basis, includes a cash or deferred arrangement, and each plan's provisions are effective as of January 1, 2024. For purposes of paragraphs (b)(2)(vi) through (xii) of this section (*Examples 6* through *12*), each plan provides that, in order to be eligible to make a cash or deferred election under the arrangement, an employee is required to complete a period of service with the employer maintaining the plan that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or three consecutive 12-month periods (excluding any 12-month period beginning before January 1, 2021) during each of which the employee is credited with at least 500 hours of service (however, effective January 1, 2025, each plan is amended to provide that the applicable number of consecutive 12-month periods during each of which an employee must be credited with at least 500 hours of service in order to participate in the arrangement is reduced from three to two). In addition, for purposes of paragraphs (b)(2)(vi) through (xii) of this section (*Examples 6* through *12*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraph (b)(1)(i) of this section, 12-month periods are determined by reference to the employment commencement date of an employee, and each plan provides monthly entry dates for an eligible employee to commence participation in the arrangement. Except as provided in paragraphs (b)(2)(viii), (ix), and (x) of this section (*Examples 8, 9,* and *10*), each employee has attained age 21. Except as provided in paragraphs (b)(2)(xi) and (xii) of this section (*Examples 11* and *12*), none of the employees are described in section 410(b)(3).

(i) *Example 1*. (A) Employer A maintains Plan I. Plan I includes a cash or deferred arrangement under which each employee of Employer A is eligible to make a cash or deferred election as soon as administratively practicable after the employee's employment commencement date.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan I are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods) during each of which the employee is credited with at least 500 hours of service.

(ii) *Example 2*. (A) Employer B maintains Plan J. Plan J provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer B is required to complete a 12-month period of service with Employer B during which the employee is credited with at least 500 hours of service.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan J are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(iii) *Example 3*. (A) Employer C maintains Plan K. Plan K provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer C is required to complete a period of service with Employer C that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(B) For the plan year beginning January 1, 2024, none of the employees who are eligible to make a cash or deferred election under the arrangement in Plan K are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(C) For plan years beginning on or after January 1, 2025, an employee who becomes eligible to participate in the arrangement in Plan K solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service would be a long-term, part-time employee. However, an employee who became eligible to participate in the arrangement before January 1, 2025, would not be a long-term, part-time employee for plan years beginning on or after January 1, 2025, because that employee did not become eligible to participate in the arrangement solely by reason of completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(iv) *Example 4*. (A) Employer D maintains Plan L. Plan L provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer D is required to complete a 1-year period of service with Employer D using the elapsed time method of crediting service.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan L are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(v) *Example 5*. (A) The facts are the same as in paragraph (b)(2)(iv)(A) of this section (*Example 4*), except that Plan L requires employees of Employer D who are classified as part-time employees to complete the applicable number of consecutive 1-year periods of service under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section with Employer D using the elapsed time method of crediting service.

(B) Plan L fails to satisfy the requirements of section 401(k)(2)(D)(i) because, under the elapsed time method of crediting service, a 1-year period of service is the maximum period that Plan L may require any employee to complete in order to participate in the arrangement.

(vi) *Example 6*. (A) Employer E maintains Plan M. For purposes of determining the eligibility of an employee to participate in the arrangement under Plan M, Plan M credits an employee with 190 hours of service for each month for which the employee would be required to be credited with at least 1 hour of service. Employees R and S are employees of Employer E who both have an employment commencement date of June 1, 2024. Employees R and S are both classified by Employer E as part-time employees. During the 12-month period beginning on June 1, 2024, Employee R has at least 1 hour of service each month for 6 months and, therefore, is credited with 1,140 hours of service. Employee R commences participation in the arrangement in Plan M on June 1, 2025. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee S is credited with at least 1 hour of service each month for 4 months and, therefore, is credited with 760 hours of service for the period. Employee S commences participation in the arrangement in Plan M on June 1, 2026.

(B) Employee R is not a long-term, part-time employee (or former long-term, part-time employee, as defined in paragraph (d)(2)(i) of this section) because Employee R is credited with 1,140 hours of service during the 12-month period beginning on June 1, 2024. Therefore, Employee R is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. However, Employee S is eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee S is a long-term, part-time employee.

(vii) *Example 7*. (A) Employer G maintains Plan O. Employee U is an employee of Employer G with an employment commencement date of June 1, 2024. Employee U is classified by Employer G as a part-time employee. During the 12-month period beginning on June 1, 2024, Employee U is credited with 900 hours of service. During the 12-month period beginning on June 1, 2025, Employee U is credited with 1,100 hours of service. Employee U commences participation in the arrangement in Plan O on June 1, 2026. During the 12-month period beginning on June 1, 2026, Employee U is credited with 900 hours of service.

(B) Employee U is not a long-term, part-time employee (or former long-term, part-time employee) because Employee U is credited with 1,100 hours of service during the 12-month period beginning on June 1, 2025. Therefore, Employee U is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. The result would be the same even if Employee U also is credited with at least 500 (but less than 1,000) hours of service during the plan year beginning on June 1, 2027 (and therefore completes two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service).

(viii) *Example 8*. (A) Employer H maintains Plan P. Plan P excludes any employees who have not yet attained age 21 from participating in the arrangement under Plan P. Employee V is an employee of Employer H with an employment commencement date of June 1, 2024, who attains age 18 on September 2, 2024. During the 12-month period beginning on June 1, 2024, Employee V is credited with 1,100 hours of service. During each of the 12-month periods beginning on June 1, 2025, and June 1, 2026, Employee V is credited with 600 hours of service. On September 2, 2027, Employee V attains age 21 and Employee V commences participation in the arrangement in Plan P on October 1, 2027.

(B) Employee V is not a long-term, part-time employee (or former long-term, part-time employee) because Employee V was credited with 1,100 hours of service during the 12-month period beginning on June 1, 2024, and, therefore, became eligible to participate in the arrangement by reason of completing a 12-month period with at least 1,000 hours of service and attaining age 21. Accordingly, Employee V did not become eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(ix) *Example 9*. (A) Employer I maintains Plan Q. Plan Q excludes any employees who have not yet attained age 21 from participating in the arrangement under Plan Q. Employee W is an employee of Employer I with an employment commencement date of June 1, 2024, who attains age 19 on October 3, 2024. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee W is credited with 600 hours of service for the period. During the 12-month period beginning on June 1, 2026, Employee W attains age 21 (on October 3, 2026), but is credited with only 400 hours of service.

(B) Employee W is not a long-term, part-time employee (or former long-term, part-time employee) because Employee W is credited with only 400 hours of service during the 12-month period in which Employee W attains age 21. Therefore, Employee W did not attain age 21 by the close of the last of the 12-month periods described in paragraph (b)(1)(i)(A) of this section. However, Employee W could become eligible to participate in the arrangement in Plan Q as a long-term, part-time employee as of June 1, 2029, if Employee W is credited with at least 500 (but less than 1,000) hours of service for each 12-month period beginning on June 1, 2027, and June 1, 2028.

(x) *Example 10*. (A) The facts are the same as in paragraph (b)(2)(ix)(A) of this section (*Example 9*), except that, during the 12-month period beginning on June 1, 2026, Employee W is credited with 600 hours of service, and Employee W commences participation in the arrangement in Plan Q on June 1, 2027.

(B) Employee W is credited with 600 hours of service for each 12-month period beginning on June 1, 2025, and June 1, 2026, and attains age 21 on October 3, 2026, which is by the close of the last of those 12-month periods. Accordingly, Employee W is a long-term, part-time employee.

(xi) *Example 11*. (A) Employer J maintains Plan R. Plan R excludes any employees who are included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section from participating in the arrangement under Plan R. Employee X is an employee of Employer J who is included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section, and who has an employment commencement date of June 1, 2024. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee X is credited with 600 hours of service for the period. During the 12-month period beginning on June 1, 2026, Employee X is credited with 1,100 hours of service. On June 2, 2027, Employee X ceases to be included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section and becomes eligible to participate in the arrangement.

(B) Employee X is not a long-term, part-time employee (or former long-term, part-time employee) because Employee X is credited with 1,100 hours of service during the 12-month period beginning on June 1, 2026. Therefore, Employee X is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(xii) *Example 12*. (A) The facts are the same as in paragraph (b)(2)(xi)(A) of this section (*Example 11*), except that, during the 12-month period beginning on June 1, 2026, Employee X is credited with only 600 hours of service.

(B) Employee X is eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee X is a long-term, part-time employee.

(c) *Participation*—(1) *Time of participation*—(i) *In general*. Subject to the rules of this paragraph (c)(1) and paragraph (c)(4) of this section, a long-term, part-time employee who satisfies the plan's eligibility conditions (as described in paragraph (c)(3) of this section) must become eligible to make a cash or deferred election under the arrangement no later than the earlier of—

(A) The first day of the first plan year beginning after the date on which the long-term, part-time employee satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section; or

(B) The date 6 months after the date on which the long-term, part-time employee satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section.

(ii) *Employees who separate from service*. The requirements of paragraph (c)(1)(i) of this section do not apply to a long-term, part-time employee who separates from service and does not return to service with the employer or employers maintaining the plan before the date referred to in paragraph (c)(1)(i) of this section. However, if a long-term, part-time employee described in the prior sentence returns to service with the employer or employers maintaining the plan after the date referred to in paragraph (c)(1)(i) of this section and is otherwise eligible to participate in the arrangement, the long-term, part-time employee must be eligible to make a cash or deferred election immediately upon return to service with the employer or employers maintaining the plan.

(iii) *Change in status*. If an employee who would otherwise be eligible to participate in the arrangement as a long-term, part-time employee does not participate solely because the employee does not satisfy the plan's eligibility conditions (as described in paragraph (c)(3) of this section) as of the date referred to in paragraph (c)(1)(i) of this section, and the employee satisfies those conditions after that date, the employee must become eligible to participate in the arrangement immediately upon satisfying those conditions.

(2) *Determination of 12-month periods*—(i) *In general*. Except for any 12-month period beginning before January 1, 2021, all 12-month periods during which an employee is credited with at least 500 hours of service with the employer or employers maintaining the plan must be taken into account for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section.

(ii) *Initial and subsequent 12-month periods*. (A) The initial 12-month period with respect to an employee begins on the first day for which the employee is entitled to be credited with an hour of service.

(B) Beginning with the plan year that commences within the initial 12-month period described in paragraph (c)(2)(ii)(A) of this section, 12-month periods may be determined by reference to the first day of the plan year. If the preceding sentence applies, that initial 12-month period and the plan year that commences within the initial 12-month period are treated as consecutive 12-month periods.

(iii) *Examples*. The following examples illustrate the determination of 12-month periods under this paragraph (c)(2). For purposes of the examples, each plan includes a cash or deferred arrangement, is maintained on a calendar-year basis, and provides monthly entry dates for an eligible employee to commence participation in the arrangement. Each employee in the following examples has attained age 21, and none of the employees are described in section 410(b)(3). For purposes of paragraphs (c)(2)(iii)(A), (B), and (G) of this section (*Examples 1*, *2*, and *7*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section, 12-month periods are determined by reference to the employment commencement date of an employee. For purposes of paragraphs (c)(2)(iii)(C) through (F) of this section (*Examples 3* through *6*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section, any 12-month period that begins after the first day of the initial 12-month period is determined by reference to the first day of the plan year. For purposes of paragraph (c)(2)(iii)(A) of this section and paragraphs (c)(2)(iii)(C) through (G) of this section (*Example 1* and *Examples 3* through *7*), each plan provides that, effective January 1, 2024, in order to be eligible to make a cash or deferred election under the arrangement, each employee is required to complete a period of service with the employer maintaining the plan that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or three consecutive 12-month periods (excluding any 12-month period beginning before January 1, 2021) during each of which the employee is credited with at least 500 hours of service. However, effective January 1, 2025, each plan is amended to provide that the applicable number of consecutive 12-month periods during each of which an employee must be credited with at least 500 hours of service in order to participate in the arrangement is reduced from three to two.

(A) *Example 1*. (*1*) Employer K maintains Plan S. Pursuant to paragraph (c)(2)(i) of this section, Plan S provides that any 12-month period beginning before January 1, 2021, is not taken into account for purposes of determining whether an employee has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Employee Y is an employee of Employer K with an employment commencement date of June 1, 2021. During each of the 12-month periods beginning on June 1, 2021, June 1, 2022, and June 1, 2023, Employee Y is credited with 600 hours of service for the period. Employee Y commences participation in the arrangement in Plan S on June 1, 2024.

(*2*) Employee Y is eligible to participate in the arrangement solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service, and Employee Y is a long-term, part-time employee. If Employee Y had an employment commencement date of June 1, 2020, and had been credited with 600 hours of service for the 12-month period beginning on June 1, 2020, then the result would be the same because, under the terms of the plan, the 12-month period beginning on June 1, 2020, would not be taken into account for purposes of determining whether Employee Y has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service and, therefore, Employee Y would become eligible to participate in the arrangement on June 1, 2024, as a long-term, part-time employee.

(B) *Example 2*. (*1*) Employer L maintains Plan T. Plan T provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee is required to complete a period of service with Employer L that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service; or the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods), including 12-month periods beginning before January 1, 2021. Employee Z is an employee of Employer L with an employment commencement date of June 1, 2020. During each of the 12-month periods beginning on June 1, 2020, June 1, 2021, and June 1, 2022, Employee Z is credited with 600 hours of service for the period. Employee Z commences participation in the arrangement in Plan T on June 1, 2023.

(*2*) Plan T does not fail to satisfy the requirements of section 401(k)(2)(D) merely because, under the terms of Plan T, Employee Z commences participation in the arrangement on June 1, 2023. However, paragraph (c)(2)(i) of this section does not permit any 12-month period beginning before January 1, 2021 (including the 12-month period beginning on

June 1, 2020), to be taken into account for purposes of determining whether an employee has completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee Z is not a long-term, part-time employee because Employee Z is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods (beginning on or after January 1, 2021) during each of which the employee is credited with at least 500 hours of service.

(C) *Example 3*. (*1*) Employer M maintains Plan U. Employee A is an employee of Employer M with an employment commencement date of March 1, 2023. During the 12-month period beginning on March 1, 2023, Employee A is credited with 400 hours of service. During each of the 12-month periods beginning on January 1, 2024, and January 1, 2025, Employee A is credited with 600 hours of service for the period. Employee A commences participation in the arrangement under Plan U on January 1, 2026.

(*2*) Plan U satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee A. The fact that the 12-month period beginning March 1, 2023, is not a 12-month period for which Employee A is credited with at least 500 hours of service, does not prevent Employee A from being a long-term, part-time employee. Accordingly, Employee A is eligible to participate in the arrangement on January 1, 2026, solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2024, and January 1, 2025), and Employee A is a long-term, part-time employee.

(D) *Example 4*. (*1*) Employer N maintains Plan V. Employee B is an employee of Employer N with an employment commencement date of December 1, 2023. During the 12-month period beginning on December 1, 2023, Employee B is credited with 600 hours of service. During the 12-month period beginning on January 1, 2024, Employee B is credited with 600 hours of service. Employee B commences participation in the arrangement under Plan V on January 1, 2025.

(*2*) Plan V satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee B because the 12-month periods beginning on December 1, 2023, and January 1, 2024, are considered two consecutive 12-month periods. Accordingly, Employee B is eligible to participate in the arrangement on January 1, 2025, solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service, and Employee B is a long-term, part-time employee.

(E) *Example 5*. (*1*) Employer O maintains Plan W. Employee C is an employee of Employer O with an employment commencement date of August 1, 2020. During the 12-month period beginning on August 1, 2020, Employee C is credited with 600 hours of service. During each of the 12-month periods beginning on January 1, 2021, January 1, 2022, and January 1, 2023, Employee C is credited with 600 hours of service for the period. Employee C commences participation in the arrangement in Plan W on January 1, 2024.

(*2*) Plan W satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee C. Pursuant to paragraph (c)(2)(i) of this section, Plan W does not take into account the 12-month beginning on August 1, 2020, for purposes of determining whether Employee C has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee C is eligible to participate in the arrangement on January 1, 2024, solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2021, January 1, 2022, and January 1, 2023), and Employee C is a long-term, part-time employee.

(F) *Example 6*. (*1*) Employer P maintains Plan X. Employee D is an employee of Employer P with an employment commencement date of March 1, 2023. During the 12-month period beginning on March 1, 2023, Employee D is credited with 600 hours of service. During the 12-month period beginning on January 1, 2024, Employee D is credited with 400 hours of service. During each of the 12-month periods beginning on January 1, 2025, and January 1, 2026, Employee D is credited with 600 hours of service for the period. Employee D commences participation in the arrangement under Plan X on January 1, 2027.

(*2*) Plan X satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee D. The 12-month period beginning on March 1, 2023 (for which Employee D is credited with 600 hours of service) is not taken into account for purposes of determining whether Employee D has completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service because Employee D is not credited with at least 500 hours of service during the 12-month period beginning on January 1, 2024. Accordingly, Employee D is eligible to participate in the arrangement on January 1, 2027, solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2025, and January 1, 2026), and Employee D is a long-term, part-time employee.

(G) *Example 7*. (*1*) Employer Q maintains Plan Y. Employee E is an employee of Employer Q with an employment commencement date of June 1, 2023. During each of the 12-month periods beginning on June 1, 2023, and June 1, 2024, Employee E is credited with 600 hours of service for the period. Employee E commences participation in the arrangement in Plan Y on June 1, 2025. During the 12-month period beginning on June 1, 2025, Employee E is credited with 300 hours of service.

(*2*) Pursuant to paragraph (c)(2)(i) of this section, the 12-month periods beginning on June 1, 2023, and June 1, 2024, must be taken into account for purposes of determining whether Employee E is a long-term, part-time employee. This requirement is not changed merely because Employee E is not credited with at least 500 hours of service during the 12-month period beginning on June 1, 2025. Accordingly, Employee E does not cease to be a long-term, part-time employee merely because Employee E completes a 12-month period during which Employee E is credited with less than 500 hours of service.

(3) *Eligibility conditions not based on age or service*—(i) *In general*. Subject to paragraph (c)(3)(ii) of this section, the rules of this section do not preclude a plan from establishing an eligibility condition that must be satisfied in order for an employee to participate in the arrangement (for example, requiring as a condition of participation that an employee be employed within a specified job classification), provided that the condition is not a proxy for imposing an age or service requirement that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).

(ii) *Eligibility conditions that are proxies for age or service*. For purposes of applying the rules of this section, a plan provision will be treated as a proxy for imposing an age or service requirement if the provision has the effect of imposing an age or service requirement with the employer or employers maintaining the plan.

(iii) *Examples*. The following examples illustrate the rules of this paragraph (c)(3). For purposes of the examples, each plan includes a cash or deferred arrangement and is maintained on a calendar-year basis.

(A) *Example 1*. (*1*) Employer R maintains Plans Z and A. Effective January 1, 2024, Plan Z provides that, as a condition to participate in the arrangement, an employee must complete the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods) during each of which the employee is credited with at least 500 hours of service. Effective January 1, 2024, Plan A provides that, as a condition to participate in the arrangement, an employee must complete a 12-month period during which the employee is credited with at least 1,000 hours of service.

(*2*) Because the provision of Plan Z that requires an employee to complete the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service in order to participate in the arrangement requires an employee to complete the period of service described in section 401(k)(2)(D)(ii), that provision requires an employee to complete a period of service with Employer R that extends beyond the close of the earlier of the period described in section 401(k)(2)(D)(i), or the period described in section 401(k)(2)(D)(ii). Accordingly, as of January 1, 2024, the arrangement under Plan Z fails to satisfy the requirements of section 401(k)(2)(D). Similarly, because Plan A requires an employee to complete a 12-month period during which the employee is credited with at least 1,000 hours of service in order to participate in the arrangement, as of January 1, 2024, the arrangement under Plan A fails to satisfy the requirements of section 401(k)(2)(D).

(B) *Example 2*. (*1*) Employer S maintains Plan B. Employer S is comprised of Divisions T and U. In order to be employed in Division T, an employee is required to be classified as a full-time employee, which Employer S defines as an employee who completes a 12-month period during which the employee is credited with at least 1,000 hours of service. All other employees of Employer S are employed in Division U. Effective January 1, 2024, Plan B provides that, as a condition to participate in the arrangement, an employee is required to be employed in Division T.

(*2*) Because the provision of Plan B that requires an employee to be employed in Division T in order to participate in the arrangement has the effect of requiring an employee to complete the period of service described in section 401(k)(2)(D)(i), that provision is treated as a service requirement under paragraph (c)(3)(ii) of this section. Accordingly, as of January 1, 2024, the arrangement under Plan B fails to satisfy the requirements of section 401(k)(2)(D) because the arrangement requires an employee to complete a period of service with Employer S that extends beyond the close of the earlier of: the period described in section 401(k)(2)(D)(i), or the period described in section 401(k)(2)(D)(ii).

(C) *Example 3*. (*1*) Employer V maintains Plan C. Prior to January 1, 2024, Plan C provided that an employee classified by Employer V as a part-time employee was ineligible to make a cash or deferred election under the arrangement unless the part-time employee completed a 12-month period during which the employee was credited with at least 1,000 hours of service with Employer V. Effective January 1, 2024, Plan C provides that an employee classified by Employer V as a part-time employee is ineligible to make a cash or deferred election under the arrangement unless the employee completes a period of service with Employer V that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (excluding any 12-month period beginning before January 1, 2021).

(*2*) Plan C does not fail to satisfy the requirements of section 401(k)(2)(D) merely because, effective January 1, 2024, Plan C provides that an employee classified as a part-time employee is ineligible to make a cash or deferred election under the arrangement unless the employee completes a period of service with Employer V that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (excluding any 12-month period beginning before January 1, 2021).

(4) *Elective contributions*. A cash or deferred arrangement satisfies the requirements of this paragraph (c)(4) only if the right to make elective contributions by a long-term, part-time employee who is an eligible NHCE is not restricted in a manner that would not be permitted for an NHCE under § 1.401(k)-3(c)(6). However, a SIMPLE 401(k) plan may limit the amount of elective contributions made by long-term, part-time employees under the plan to the extent needed to satisfy the elective contribution limitation for SIMPLE 401(k) plans under section 401(k)(11)(B)(i)(I) and (m)(10)(A).

(d) *Vesting*—(1) *Years of vesting service taken into account*—(i) *General rule*. For purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions)—

(A) Each 12-month period (which may be any 12-consecutive month period that is not prohibited for use under section 411(a)) during which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)) with the employer or employers maintaining the plan is treated as a year of vesting service; and

(B) Except for any 12-month period beginning before January 1, 2021, all 12-month periods of service with the employer or employers maintaining the plan must be taken into account unless the period of service of the employee may be disregarded under section 411(a).

(ii) *Application of vesting rules*. For purposes of this paragraph (d), section 411 will be treated as if it applies to the plan, taking into account the modifications provided in paragraphs (d)(1)(i) and (iii) of this section.

(iii) *Break in service*. For purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee) has incurred a 1-year break in service, section 411(a)(6)(A) is applied by substituting at least 500 hours of service for more than 500 hours of service.

(2) *Former long-term, part-time employees*—(i) *Definition*. A *former long-term, part-time employee* means an employee who—

(A) Became eligible to participate in the arrangement as a long-term, part-time employee;

(B) Subsequently ceased to be a long-term, part-time employee because the employee was described in paragraph (d)(2)(ii)(A) or (B) of this section; and

(C) Has not returned to long-term, part-time employee status in accordance with paragraph (d)(2)(iii) of this section.

(ii) *Timing*. A long-term, part-time employee becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the earlier of the plan year in which the employee:

(A) Satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii); or

(B) Ceases to satisfy the plan's eligibility conditions (other than age or service conditions).

(iii) *Return to long-term, part-time employee status*. If a long-term, part-time employee who ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year subsequently satisfies those conditions, then the employee will return to long-term, part-time employee status as of the first day of the plan year during which the employee again satisfies those conditions. However, the preceding sentence does not apply if the employee is a former long-term, part-time employee because the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii).

(3) *Examples*. The following examples illustrate the vesting requirements of this paragraph (d). For purposes of the examples, each plan includes a cash or deferred arrangement; is maintained on a calendar-year basis; provides that, for purposes of determining whether an employee has satisfied the requirements of paragraph (b)(1)(i) of this section and for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions), all 12-month periods are determined by reference to the employment commencement date of an employee; and provides that, for purposes of determining the

nonforfeitable right of an employee to any nonelective contribution made on behalf of the employee, the plan uses a 6-year graded vesting schedule.

(i) *Example 1*. (A) Employer X maintains Plan G. Employees of Employer X are employed at either Plant Y or Plant Z. Plan G requires that an employee be employed at Plant Y as a condition to participate in the arrangement. This condition is not a proxy for age or service under paragraph (c)(3)(ii) of this section. Employee N is an employee of Employer X who is employed at Plant Z, and who has an employment commencement date of June 1, 2021. During the 12-month periods beginning on June 1, 2021, June 1, 2022, June 1, 2023, June 1, 2024, June 1, 2025, and June 1, 2026, Employee N is credited with 600 hours of service for each period. On June 2, 2027, Employee N is transferred to Plant Y, becomes eligible to participate in the arrangement in Plan G, and thereafter commences participation in the arrangement as a long-term, part-time employee.

(B) Unless Plan G is permitted to disregard years of vesting service for Employee N under section 411(a), paragraph (d)(1)(i) of this section requires Plan G to credit Employee N with 6 years of vesting service for the 12-month periods beginning on June 1, 2021, June 1, 2022, June 1, 2023, June 1, 2024, June 1, 2025, and June 1, 2026, because Employee N is credited with at least 500 hours of service during each of those periods. Accordingly, Employee N has a 100-percent nonforfeitable right to any nonelective contribution under Plan G that is made on behalf of Employee N.

(ii) *Example 2*. (A) Employer A maintains Plan H. Employee O commences participation in the arrangement in Plan H as a long-term, part-time employee on June 1, 2024. During the 12-month period beginning on June 1, 2024, Employee O is credited with 1,200 hours of service. During each of the 12-month periods beginning on June 1, 2025, and June 1, 2026, Employee O is credited with 600 hours of service for the period.

(B) Based on these facts, Employee O remains a long-term, part-time employee for the plan year beginning January 1, 2025. Pursuant to paragraph (d)(2)(ii) of this section, Employee O becomes a former long-term, part-time employee beginning with the next plan year. However, this paragraph (d) continues to apply to Employee O (although paragraphs (e) and (f) of this section no longer apply to Employee O beginning with the 2026 plan year). Employee O will not cease to be a former long-term, part-time employee merely because Employee O completes one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service. Thus, Employee O is credited with a year of vesting service for each of the 12-month periods in which Employee O is credited with at least 500 hours of service (including the 12-month periods beginning on June 1, 2025, and June 1, 2026).

(iii) *Example 3*. (A) Employer B maintains Plan J. Employees of Employer B are employed at either Plant C or Plant D. Plan J requires, as a condition to participate in the arrangement, that an employee be employed at Plant C. This condition is not a proxy for age or service under paragraph (c)(3)(ii) of this section. Employee P is an NHCE who is employed at Plant C, and who has an employment commencement date of June 1, 2021. On June 1, 2024, Employee P commences participation in the arrangement in Plan J as a long-term, part-time employee. During the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee P continues to be credited with at least 500 (but less than 1,000) hours of service for each period. However, on March 1, 2025, Employee P is transferred to Plant D and becomes ineligible to participate in the arrangement. On March 1, 2026, Employee P is transferred back to Plant C and again becomes eligible to participate in the arrangement. Employee P remains employed at Plant C through the 2026 plan year.

(B) Based on these facts, Employee P remains a long-term, part-time employee for the 2025 plan year (although Employee P may not make a cash or deferred election under the arrangement as of March 1, 2025). Pursuant to paragraph (d)(2)(iii) of this section, Employee P remains a long-term, part-time employee for the 2026 plan year (although Employee P is not eligible to make a cash or deferred election under the arrangement again until March 1, 2026). As a result, Employee P never becomes a former long-term, part-time employee, and this paragraph (d) continues to apply to Employee P.

(e) *Nonelective and matching contributions*—(1) *General rule*. Notwithstanding section 401(a)(4), neither nonelective nor matching contributions are required to be made on behalf of long-term, part-time employees, even if those contributions are made on behalf of other eligible employees.

(2) *Coordination with employer elections*—(i) *Safe harbor contributions*. A plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that does not satisfy the safe harbor contribution requirements of § 1.401(k)-3 on behalf of the eligible NHCE), provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the ADP safe harbor provisions of section 401(k)(12) or (13) pursuant to the election under paragraph (f)(1) of this section. Similarly, a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12) will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that does not satisfy the safe harbor contribution requirements of § 1.401(m)-3 on behalf of the eligible NHCE), provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the ACP safe harbor provisions of section 401(m)(11) or (12) pursuant to the election under paragraph (f)(1) of this section.

(ii) *Top-heavy minimum benefits*. A plan that is a top-heavy plan for the plan year will not fail to satisfy the minimum benefit requirements of section 416(c) merely because the employer contribution (if any) made for the plan year on behalf of a non-key employee who is a long-term, part-time employee does not satisfy those requirements, provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the minimum benefit requirements of section 416(c) for the plan year pursuant to an election under paragraph (f)(2) of this section.

(iii) *SIMPLE 401(k) contributions*. An employer may not elect under paragraph (f) of this section to exclude long-term, part-time employees from the application of the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10). Accordingly, a plan intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) or (m)(10) must satisfy the matching or nonelective contribution requirements of § 1.401(k)-4(e) with respect to long-term, part-time employees.

(3) *Examples*. The following examples illustrate the employer contribution rules of this paragraph (e). For purposes of the examples, each plan includes a cash or deferred arrangement and is maintained on a calendar-year basis.

(i) *Example 1*. (A) Employer E maintains Plan K, which is intended to satisfy the ADP safe harbor provisions of section 401(k)(12). Plan K provides that Employer E elects to exclude all long-term, part-time employees for purposes of determining whether Plan K satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section, and the employer election satisfies the requirements of paragraph (f)(1)(ii) of this section. Plan K requires Employer E to make a QNEC on behalf of each eligible NHCE who is not a long-term, part-time employee equal to 3 percent of the NHCE's safe harbor compensation, and the NHCEs who receive this contribution include any former long-term, part-time employees who are eligible NHCEs. Plan K provides that Employer E is required to make a nonelective contribution on behalf of each long-term, part-time employee equal to 2 percent of the long-term, part-time employee's compensation for the plan year.

(B) Based on these facts, long-term, part-time employees are excluded for purposes of determining whether Plan K satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to Plan K), including the ADP safe harbor provisions of section 401(k)(12). Accordingly, Plan K does not fail to satisfy the safe harbor nonelective contribution requirement of § 1.401(k)-3(b) merely because a safe harbor nonelective contribution is not made on behalf of each eligible NHCE who is a long-term, part-time employee. In addition, because long-term, part-time employees are also excluded for purposes of determining whether Plan K satisfies the nondiscrimination requirements of section 401(a)(4), any nonelective contribution made on behalf of a long-term, part-time employee is disregarded for purposes of determining whether nonelective contributions satisfy the nondiscrimination requirements of section 401(a)(4).

(ii) *Example 2*. (A) Employer F maintains Plan L, which is intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10). Plan L provides that Employer F may elect to exclude all long-term, part-time employees for purposes of determining whether Plan L satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section. Employer F elects to exclude all long-term, part-time employees for the plan year in accordance with the requirements of paragraph (f)(1) of this section. Plan L requires Employer F to make a matching contribution on behalf of each eligible employee, excluding long-term, part-time employees (but including any former long-term, part-time employees who are eligible employees), equal to 100 percent of the elective contributions of the employee for the plan year, up to 3 percent of the SIMPLE compensation of the employee for the entire plan year. Plan L does not provide for any employer contributions (other than elective contributions) to be made on behalf of long-term, part-time employees.

(B) Plan L fails to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10) for the plan year because Plan L does not require Employer F to make the matching contribution on behalf of each eligible employee on whose behalf elective contributions were made for the plan year.

(f) *Employer elections*—(1) *Nondiscrimination and coverage*—(i) *General rule*. Subject to paragraph (f)(1)(ii) of this section, an employer may elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the following provisions:

(A) The nondiscrimination requirements of section 401(a)(4);

(B) The ADP test of section 401(k)(3);

(C) The ADP safe harbor provisions of section 401(k)(12) and (13);

(D) The ACP test of section 401(m)(2);

(E) The ACP safe harbor provisions of section 401(m)(11) and (12); and

(F) The minimum coverage requirements of section 410(b).

(ii) *Additional requirements*. An employer election satisfies the requirements of this paragraph (f)(1)(ii) if—

(A) The election applies for purposes of every provision under paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to the plan);

(B) The election applies with respect to all long-term, part-time employees who are eligible to participate in the arrangement;

(C) With respect to a plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), the election is set forth in the plan and satisfies the plan year requirements of § 1.401(k)-3(e); and

(D) With respect to a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12), the election is set forth in the plan and satisfies the plan year requirements of § 1.401(m)-3(f).

(2) *Top-heavy*—(i) *General rule*. Subject to paragraph (f)(2)(ii) of this section, an employer may elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the vesting and benefit requirements of section 416(b) and (c). This election does not apply for purposes of determining whether the plan is a top-heavy plan as defined in section 416(g). However, in the case of an employer that makes an election described in paragraph (f)(1) of this section (which has the effect of excluding long-term, part-time employees for purposes of determining whether the plan satisfies the ADP and ACP safe harbor provisions), the plan will not fail to be excluded from the definition of a top-heavy plan under section 416(g)(4)(H) merely because the employer does not make nonelective or matching contributions on behalf of long-term, part-time employees (or makes nonelective or matching contributions that do not satisfy the requirements for safe harbor contributions).

(ii) *Additional requirements*. An employer election satisfies the requirements of this paragraph (f)(2)(ii) if—

(A) The election applies with respect to all long-term, part-time employees who are eligible to participate in the arrangement; and

(B) The terms of the plan provide that long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c).

(3) *Examples*. The following examples illustrate the employer election provisions of this paragraph (f). For purposes of the examples, each plan is maintained on a calendar-year basis and includes a cash or deferred arrangement, which is intended to satisfy the ADP test of section 401(k)(3).

(i) *Example 1*. (A) Employer G maintains Plan M. Plan M provides that Employer G may elect to exclude all long-term, part-time employees for purposes of determining whether Plan M satisfies every provision under paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to Plan M). Employer G elects to exclude all long-term, part-time employees for the plan year in accordance with the requirements of paragraph (f)(1) of this section. Plan M requires Employer G to make a nonelective contribution on behalf of each eligible employee equal to 2 percent of the compensation of the employee for the plan year.

(B) Based on these facts, long-term, part-time employees are excluded for purposes of determining whether Plan M satisfies every provision under paragraph (f)(1)(i) of this section for the plan year (to the extent the provision would otherwise apply to Plan M), including the nondiscrimination requirements of section 401(a)(4). Accordingly, any nonelective contribution made on behalf of a long-term, part-time employee for the plan year is disregarded for purposes of determining whether nonelective contributions made for the plan year satisfy the nondiscrimination requirements of section 401(a)(4).

(ii) *Example 2*. (A) Employer H maintains Plan N. Plan N provides that all long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c). Plan N requires Employer H to make a nonelective contribution on behalf of each eligible employee who is credited with at least 1,000 hours of service during the plan year equal to 3 percent of the compensation of the employee for the plan year. Plan N provides that each employee has a 100-percent nonforfeitable right to any nonelective contribution Employer H makes on behalf of the employee. Plan N is a top-heavy plan with respect to the plan year.

(B) Based on these facts, long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c) for the plan year. Accordingly, although Plan N is a top-heavy plan with respect to the plan year, Plan N is not required to satisfy the top-heavy benefit provisions of section 416(c) for the plan year with respect to any non-key employee who is a long-term, part-time employee.

(g) *Applicability date*. This section applies to plan years that begin on or after January 1, 2024.

Douglas W. O'Donnell,
Deputy Commissioner for Services and Enforcement.

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Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2023–27 through 2023–52 is in Internal Revenue Bulletin 2023–52, dated December 27, 2023.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2023–27 through 2023–52 is in Internal Revenue Bulletin 2023–52, dated December 27, 2023.

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