

HIGHLIGHTS OF THIS ISSUE

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.

INCOME TAX

Rev. Rul. 2009-27, page 404.

Interest rates; underpayments and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning October 1, 2009, will be 4 percent for overpayments (3 percent in the case of a corporation), 4 percent for underpayments, and 6 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding \$10,000 will be 1.5 percent.

Rev. Rul. 2009-28, page 391.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the second half of 2009 are set forth for purposes of determining the value of noncommercial flights on employer-provided aircraft under section 1.61-21(g) of the regulations.

Rev. Proc. 2009-41, page 439.

This procedure provides guidance under section 7701 of the Code for an eligible entity that requests relief for a late classification election filed with the applicable IRS service center within 3 years and 75 days of the requested effective date of the eligible entity's classification. The procedure also provides guidance for those eligible entities that do not qualify for relief under this revenue procedure and that are required to request a letter ruling in order to request relief for a late entity classification election. Rev. Proc. 2002-59 superseded.

EMPLOYEE PLANS

Rev. Rul. 2009-30, page 391.

Automatic contribution increases under automatic contribution arrangements. This ruling provides guidance on how automatic enrollment in a section 401(k) plan can work when there is an escalator feature included. An escalator feature means that the amount of an employee's compensation that is contributed to the plan, without the employee's affirmative election, is increased periodically according to the terms of the plan. Two situations are described. One involves a basic automatic contribution arrangement and the other involves an eligible automatic contribution arrangement described in section 414(w) of the Code. Rev. Rul. 2009-30 is part of the "Savings Initiative" guidance issued by the Service.

Rev. Rul. 2009-31, page 395.

Annual paid time off contributions. This ruling provides guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit annual contributions of an employee's unused paid time off under the employer's paid time off plan. A paid time off plan generally refers to a sick and vacation arrangement that provides for paid leave whether the leave is due to illness or incapacity. The amendment relates to a contribution (including a section 401(k) contribution) or cash out of the unused paid time off, determined as of the end of the plan year (December 31). Rev. Rul. 2009-31 is companion guidance to Rev. Rul. 2009-32 and is part of the "Savings Initiative" guidance issued by the Service.

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Finding Lists begin on page ii.
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Rev. Rul. 2009–32, page 398.

Paid time off contributions at termination of employment. This ruling provides guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit contributions for an employee's accumulated and unused paid time off under the employer's paid time off plan at a participant's termination of employment. A paid time off plan generally refers to a sick and vacation arrangement that provides for paid leave whether the leave is due to illness or incapacity. The amendment relates to a post-severance contribution (including a section 401(k) contribution) or cash out of the accumulated and unused paid time off. Rev. Rul. 2009–32 is companion guidance to Rev. Rul. 2009–31 and is part of the "Savings Initiative" guidance issued by the Service.

Notice 2009–65, page 413.

Adding automatic enrollment to section 401(k) plans – sample amendments. This notice provides two sample amendments that sponsors of section 401(k) plans can use to add automatic enrollment features to their plans. The first sample amendment can be used to add a basic automatic contribution arrangement with, if elected by an adopting employer, an escalation feature. The second sample amendment can be used to add an "eligible automatic contribution arrangement ("EACA") as described in section 414(w) of the Code with, if elected by an adopting employer, as escalation feature. Final regulations (T.D. 9447, 2009–12 I.R.B. 694) under section 414(w) and this notice, by providing sample amendments, facilitate the use of EACAs in section 401(k) plans. This notice is part of the "Savings Initiative" guidance issued by the Service.

Notice 2009–66, page 418.

Automatic enrollment in SIMPLE IRAs. This notice provides guidance to facilitate automatic enrollment in SIMPLE IRA plans, including questions and answers relating to the inclusion in a SIMPLE IRA plan of an automatic contribution arrangement. This notice also requests comments on whether the Department of the Treasury and the Service should issue guidance regarding SIMPLE IRA plans that include eligible automatic contribution arrangements under section 414(w) of the Code. This notice provides guidance, in the form of questions and answers, on automatic contribution arrangements under SIMPLE IRA plans. Notice 2009–66 is companion guidance to Notice 2009–67 and is part of the "Savings Initiative" guidance issued by the Service.

Notice 2009–67, page 420.

Adding automatic enrollment to SIMPLE IRA plans – sample amendment. This notice provides a sample amendment that can be used by a sponsor of a SIMPLE IRA plan described in section 408(p) of the Code to add an automatic contribution arrangement to the plan. Only SIMPLE IRA plans that use a designated financial institution described in section 408(p)(7) can use the sample amendment. Notice 2009–67 is companion guidance to Notice 2009–66 and is part of the "Savings Initiative" guidance issued by the Service.

Notice 2009–68, page 423.

Safe harbor explanations — eligible rollover distributions. This notice contains two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy section 402(f) of the Code. The first safe harbor explanation applies to a distribution not from a designated Roth account, as described in section 402A. The second safe harbor explanation applies to a distribution from a designated Roth account. These safe harbor explanations update the safe harbor explanations that were published in Notice 2002–3, 2002–1 C.B. 289, to reflect changes in the law. This notice is part of the "Savings Initiative" guidance issued by the Service. Notice 2002–3 modified and superseded.

Notice 2009–75, page 436.

Rollovers from employer plans to Roth IRAs. This notice describes the federal income tax consequences of rolling over an eligible rollover distribution from a qualified plan under section 401(a) of the Code, an annuity plan described in section 403(a), a plan described in section 403(b), or an eligible governmental plan under section 457(b) to a Roth IRA described in section 408A. This notice supplements the regulations under section 408A and Notice 2008–30, 2008–12 I.R.B. 638 to provide additional guidance. Notice 2008–30 amplified and clarified.

ADMINISTRATIVE

Rev. Proc. 2009–40, page 438.

This procedure publishes the amount of unused housing credit carryovers allocated to qualified states under section 42(h)(3)(D) of the Code for calendar year 2009.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying

the tax 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 and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

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.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 61.—Gross Income Defined

26 CFR 1.61–21: Taxation of fringe benefits.

Fringe benefits aircraft valuation formula. The Standard Industry Fare Level (SIFL) cents-per-mile rates and terminal charge in effect for the second half of 2009 are set forth for purposes of determining the value of noncommercial flights on employer-provided aircraft under section 1.61–21(g) of the regulations.

Rev. Rul. 2009–28

For purposes of the taxation of fringe benefits under section 61 of the Internal Revenue Code, section 1.61–21(g) of the Income Tax Regulations provides a rule for valuing noncommercial flights on employer-provided aircraft. Section 1.61–21(g)(5) provides an aircraft valuation formula to determine the value of such flights. The value of a flight is determined under the base aircraft valuation formula (also known as the Standard Industry Fare

Level formula or SIFL) by multiplying the SIFL cents-per-mile rates applicable for the period during which the flight was taken by the appropriate aircraft multiple provided in section 1.61–21(g)(7) and then adding the applicable terminal charge. The SIFL cents-per-mile rates in the formula and the terminal charge are calculated by the Department of Transportation and are reviewed semi-annually.

The following chart sets forth the terminal charge and SIFL mileage rates:

<i>Period During Which the Flight Is Taken</i>	<i>Terminal Charge</i>	<i>SIFL Mileage Rates</i>
7/1/09 - 12/31/09	\$45.71	Up to 500 miles = \$.2501 per mile 501–1500 miles = \$.1907 per mile Over 1500 miles = \$.1833 per mile

DRAFTING INFORMATION

The principal author of this revenue ruling is Kathleen Edmondson of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt/Government Entities). For further information regarding this revenue ruling, contact Ms. Edmondson at (202) 622–0047 (not a toll-free call).

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

Automatic contribution increases under automatic contribution arrangements. This ruling provides guidance on how automatic enrollment in a section 401(k) plan can work when there is an escalator feature included. An escalator feature means that the amount of an employee's compensation that is contributed to the plan, without the employee's affirmative election, is increased periodically according to the terms of the plan. Two situations are described. One involves a basic automatic contribution arrangement and the other involves an eligible auto-

matic contribution arrangement described in section 414(w) of the Code. Rev. Rul. 2009–30 is part of the "Savings Initiative" guidance issued by the Service.

Rev. Rul. 2009–30

ISSUES

1. Will default contributions to a profit-sharing plan fail to be considered elective contributions merely because they are made pursuant to an automatic contribution arrangement under which an eligible employee's default contribution percentage automatically increases in plan years after the first plan year of the eligible employee's participation in the automatic contribution arrangement based in part on increases in the eligible employee's plan compensation?

2. Will default contributions under an automatic contribution arrangement fail to satisfy the qualified percentage requirement (including uniformity and minimum percentage requirements) relating to a "qualified automatic contribution arrangement" under section 401(k)(13) of the Internal Revenue Code (providing an automatic enrollment nondiscrimination

safe harbor) or the uniformity requirement relating to an "eligible automatic contribution arrangement" under section 414(w) (permitting 90-day withdrawals) merely because default contributions are made pursuant to an arrangement under which the default contribution percentage for all eligible employees increases on a date other than the first day of a plan year?

FACTS

Situation 1

Employer X maintains Plan A, a profit-sharing plan intended to satisfy the requirements of sections 401(a), 401(k), and 401(m), and maintained on a calendar-year basis. Plan A is not intended to satisfy the requirements to be a qualified automatic contribution arrangement or eligible automatic contribution arrangement.

Under Plan A, any eligible employee of Employer X may affirmatively elect to receive his or her compensation entirely in cash or to have Employer X make specified contributions on the eligible employee's behalf to Plan A in lieu of receiving those amounts as cash compensation. Subject to certain limitations set

forth in Plan A, the eligible employee may designate the amount of these elective contributions as a percentage of the eligible employee's "plan compensation," defined under Plan A as base pay (excluding overtime, bonuses, and other special compensation).

Under Plan A, if any eligible employee of Employer X does not affirmatively elect to receive cash or to have a specified amount contributed to Plan A, default contributions are automatically contributed to Plan A (with a corresponding reduction in the eligible employee's cash compensation) beginning with the first pay period of the first plan year of the eligible employee's participation in the automatic contribution arrangement. For that first plan year, the default contribution percentage is 4 percent of plan compensation. Any eligible employee may elect at any time not to make elective contributions (including not to make default contributions) or to have Employer X contribute to Plan A a different percentage of plan compensation.

Employer X usually provides annual increases in base pay for its employees effective for pay periods beginning on or after the employment anniversary date for each employee. Under Plan A, for plan years after the first plan year of the eligible employee's participation in the automatic contribution arrangement, the default contribution percentage is automatically increased beginning with the first pay period that begins on or after the eligible employee's employment anniversary date. The increase in the default contribution percentage is equal to the greater of (1) 1 percentage point, or (2) a number of percentage points calculated as 30 percent of the percentage increase in the eligible employee's base pay for such first pay period over the eligible employee's base pay for the immediately preceding pay period (rounded to the nearest whole percentage). However, under Plan A, the default contribution percentage may never exceed 11 percent. For example, the default contribution percentage for an employee with default contributions beginning in 2009 would increase by 1 percentage point each plan year for pay periods beginning on or after the employee's employment anniversary date (to 5 percent in 2010, 6 percent in 2011, etc., up to 11 percent in 2016 and later plan years), even if

his or her base pay were not to increase. If the employee's base pay were to increase by at least 5 percent during one or more plan years before 2016, the default contribution percentage would increase to 11 percent even earlier.

Eligible employees are provided notices satisfying the timing and content requirements of section 1.401(k)-1(e)(2)(ii) of the Income Tax Regulations that explain the default contribution percentage, automatic increases in the default contribution percentage in plan years after the first plan year, and the eligible employees' right to elect to have no elective contributions (including no default contributions) made to Plan A or to alter the amount of those contributions.

Plan A provides that elective contributions are immediately nonforfeitable and, if the eligible employee has not attained age 59-1/2, cannot be distributed prior to the eligible employee's death or severance from employment, except in the case of hardship. Plan A also provides that, for each eligible employee, Employer X will make matching contributions to Plan A on account of the eligible employee's elective contributions up to a specified percentage of the eligible employee's plan compensation.

Plan A provides that default contributions and related matching contributions will, absent a contrary election, be invested in a qualified default investment alternative (QDIA), as described in section 2550.404c-5 of Department of Labor regulations.

Situation 2

Employer Y maintains Plan B, a profit-sharing plan intended to satisfy the requirements of sections 401(a), 401(k), and 401(m), and maintained on a calendar-year basis. Plan B is also intended to satisfy the requirements to be a qualified automatic contribution arrangement and an eligible automatic contribution arrangement.

Under Plan B, any eligible employee of Employer Y may affirmatively elect to receive his or her compensation entirely in cash or to have Employer Y make specified contributions on the eligible employee's behalf to Plan B in lieu of receiving those amounts as cash compensation. Subject to certain limitations set forth in Plan B, the eligible employee

may designate the amount of these elective contributions as a percentage of the eligible employee's "plan compensation," defined under Plan B.

Under Plan B, if any eligible employee of Employer Y does not affirmatively elect to receive cash or to have a specified amount contributed to Plan B, default contributions are automatically contributed to Plan B (with a corresponding reduction in the eligible employee's cash compensation) beginning with the first pay period of the first plan year of the eligible employee's participation in the automatic contribution arrangement. For that first plan year, the default contribution percentage is 3 percent of plan compensation. Any eligible employee may elect at any time not to make elective contributions (including not to make default contributions) or to have Employer Y contribute to Plan B a different percentage of plan compensation.

Employer Y usually provides annual increases in compensation for its employees effective for pay periods beginning on or after April 1 each year. Under Plan B, for plan years after the first plan year of the eligible employee's participation in the automatic contribution arrangement, the default contribution percentage is automatically increased beginning with the first pay period that begins on or after April 1. The increase in the default contribution percentage is equal to 1 percentage point. However, under Plan B, the default contribution percentage may never exceed 10 percent.

Eligible employees are provided notices satisfying the timing and content requirements of sections 401(k)(13)(E) and 414(w)(4) that explain the default contribution percentage, automatic increases to the default contribution percentage in plan years after the first plan year, and the eligible employees' right to elect to have no elective contributions (including no default contributions) made to Plan B or to alter the amount of those contributions.

Plan B provides that elective contributions are immediately nonforfeitable and, if the eligible employee has not attained age 59-1/2, cannot be distributed prior to the eligible employee's death or severance from employment, except in the case of hardship or in the case of a distribution that satisfies the requirements of section 414(w)(2). Plan B also pro-

vides that, for each eligible employee, Employer Y will make specified matching contributions to Plan B on account of the eligible employee's elective contributions up to a specified percentage of the eligible employee's plan compensation under a matching formula that satisfies the rules of sections 401(k)(13)(D)(i)(I), (ii), (iii), and (iv) and 401(m)(12).

Plan B provides that default contributions and related matching contributions will, absent a contrary election, be invested in a QDIA.

LAW

Automatic Contribution Arrangements under a Qualified Cash or Deferred Arrangement

Section 401(k) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan can meet the requirements of section 401(a) even if it includes a qualified cash or deferred arrangement. Section 401(k) also sets forth the requirements that a cash or deferred arrangement must satisfy in order to be a qualified cash or deferred arrangement.

Section 1.401(k)-1(a)(2)(i) defines a cash or deferred arrangement as an arrangement under which an employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a).

Section 1.401(k)-1(a)(3)(i) defines a cash or deferred election as any election (or modification of an earlier election) by an employee to have the employer either provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available or contribute an amount to a trust (or provide an accrual or other benefit) under a plan deferring the receipt of compensation.

Section 1.401(k)-1(a)(3)(ii) provides that, for purposes of determining whether an election is a cash or deferred election, it is irrelevant whether the default that applies in the absence of an affirmative election is (1) for the employee to receive an amount in cash or some other taxable benefit or (2) for the employer to contribute an amount to a trust or provide

an accrual or other benefit under a plan deferring the receipt of compensation.

Section 1.401(k)-1(e)(2)(ii) provides that a qualified cash or deferred arrangement must provide an employee with an effective opportunity to make (or change) a cash or deferred election at least once during each plan year, and that whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

Qualified Automatic Contribution Arrangements (Automatic Enrollment Nondiscrimination Safe Harbor)

In general, section 401(k)(3) imposes nondiscrimination standards on qualified cash or deferred arrangements, including an actual deferral percentage (ADP) test. Similarly, in general, section 401(m) imposes nondiscrimination standards on employer matching contributions made to a defined contribution plan on behalf of the employee, including an actual contribution percentage (ACP) test.

Sections 401(k)(13) and 401(m)(12) provide alternative design-based safe harbors for a cash or deferred arrangement that provides for automatic contributions at a specified level and meets certain employer matching contribution (or employer nonelective contribution), uniformity, notice, and other requirements. A cash or deferred arrangement that satisfies these requirements is a qualified automatic contribution arrangement that is treated as satisfying the ADP test and the ACP test.

Sections 1.401(k)-3 and 1.401(m)-3 prescribe rules for qualified automatic contribution arrangements. These rules include, under section 1.401(k)-3(j)(1)(i), a requirement that the default election under a qualified automatic contribution arrangement be a contribution equal to a qualified percentage multiplied by the employee's eligible compensation from which elective contributions are permitted to be made under the cash or deferred arrangement. Under section 1.401(k)-3(j)(2), in general a default contribution percentage is a qualified percentage only if it is uniform for all eligible employees, does not exceed 10 percent, and satisfies certain

minimum percentage requirements. Under section 1.401(k)-3(j)(2)(iii), several exceptions to the uniformity requirement apply, including that a plan does not fail to satisfy the uniformity requirement merely because the default contribution percentage varies based on the number of years (or portions of years) since the beginning of the initial period for an employee. For this purpose, the initial period begins when the employee first has contributions made pursuant to a default election under an arrangement that is intended to be a qualified automatic contribution arrangement for a plan year and ends on the last day of the following plan year. Section 1.401(k)-3(j)(2)(ii) sets out the minimum percentage requirements. In general, the minimum percentage is 3 percent for the initial period. The minimum percentage is 4 percent for the next succeeding plan year, 5 percent for the next succeeding plan year, and 6 percent for all succeeding plan years.

Eligible Automatic Contribution Arrangements (Permitting 90-day Withdrawals)

Section 414(w) provides limited relief from generally-applicable distribution restrictions under sections 401(k)(2)(B), 403(b)(7), 403(b)(11), and 457(d)(1)(A) in the case of an eligible automatic contribution arrangement. In particular, sections 414(w)(1) and 414(w)(2) provide that an applicable employer plan that contains an eligible automatic contribution arrangement is permitted to allow employees, within 90 days after the date of the first default contribution with respect to the employee under the arrangement, to elect to receive a distribution equal to the amount of default contributions (and attributable earnings) made with respect to the employee beginning with the first payroll period to which the eligible automatic contribution arrangement applies to the employee and ending with the effective date of the election. Sections 414(w)(1)(A) and 414(w)(1)(B) provide that the amount of the distribution is includible in gross income for the taxable year in which the distribution is made, but is not subject to the additional income tax under section 72(t). Under section 414(w), an automatic contribution arrangement must satisfy uniformity, notice, and other

requirements in order to be an eligible automatic contribution arrangement.

Section 1.414(w)-1 prescribes rules under section 414(w), including, under section 1.414(w)-1(b)(2)(i), that the default contribution election under an eligible automatic contribution arrangement be a uniform percentage of compensation. Under section 1.414(w)-1(b)(2)(ii), several exceptions to the uniformity requirement apply by cross-reference to section 1.401(k)-3(j)(2)(iii), including a modified version of the exception under which a plan does not fail to satisfy the uniformity requirement merely because the default contribution percentage varies based on the number of years (or portions of years) since the beginning of the initial period for an employee.

ANALYSIS

Situation 1

The default contributions made for an eligible employee in Situation 1 are elective contributions made pursuant to a cash or deferred election and satisfy the requirement in section 1.401(k)-1(a)(3)(i) that the amount that each eligible employee may defer as an elective contribution be available to the eligible employee in cash (or some other taxable benefit). Pursuant to section 1.401(k)-1(a)(3)(ii), the election is a cash or deferred election and the contributions are elective contributions even though the contributions are made pursuant to a default election in the absence of an affirmative election.

Because a default contribution percentage can be increased or otherwise changed over time pursuant to a plan-specified schedule, the default contributions in Situation 1 do not cease to be elective contributions merely because default contribution percentages increase over time and such increases are, in part, determined by reference to the amount of, and are scheduled to take effect at or by reference to the time of, future increases in base pay.

The structure of increases in the default contribution percentage for years after the first plan year of an eligible employee's participation in the automatic contribution arrangement results in default contribution percentages for eligible employees that are not uniform percentages of plan compensation for all eligible employees, and the

percentages do not vary based solely on the number of years (or portions of years) since the beginning of the initial period described in section 1.401(k)-3(j)(2)(iii)(A). However, because the automatic contribution arrangement in Situation 1 is not intended to be an eligible automatic contribution arrangement or a qualified automatic contribution arrangement, this nonuniformity is permissible.

Situation 2

The default contributions described in Situation 2 are elective contributions made pursuant to cash or deferred elections and satisfy the requirement in section 1.401(k)-1(a)(3)(i) that the amount that each eligible employee may defer as an elective contribution be available to the eligible employee in cash (or some other taxable benefit). Pursuant to section 1.401(k)-1(a)(3)(ii), the election is a cash or deferred election and the contributions are elective contributions even though the contributions are made pursuant to a default election in the absence of an affirmative election.

The default contributions described in Situation 2 do not cause the arrangement to fail to satisfy the requirements for a qualified automatic contribution arrangement and an eligible automatic contribution arrangement. In particular, the provisions in Plan B under which, for plan years after the first plan year of an eligible employee's participation in the automatic contribution arrangement, the default contribution percentage is automatically increased beginning with the first pay period that begins on or after April 1, do not cause Plan B to fail the uniformity requirement of sections 1.401(k)-3(j)(2)(i) and 1.414(w)-1(b)(2)(i). The increases are eligible for an exception to the uniformity requirement because they apply in the same manner to all eligible employees for whom the same number of years or portions of years have elapsed since default contributions were first made for them under the automatic contribution arrangement.

Also, the default contribution percentages for each plan year after the first plan year satisfy the minimum default contribution percentage requirements of section 1.401(k)-3(j)(2)(ii) for periods beginning both before and on or after April 1 of such a plan year. This is because, under

section 1.401(k)-3(j)(2)(ii)(B), the minimum default contribution percentage of 4 percent is not required to apply until after the end of the plan year following the first plan year of an eligible employee's participation in the automatic contribution arrangement, whereas, under Plan B, the increased default contribution percentage of 4 percent applies earlier, beginning with the first pay period that begins on or after April 1 of the plan year following the first plan year. Similarly, the minimum default contribution percentages of 5 percent and 6 percent set out in section 1.401(k)-3(j)(2)(ii)(C) and (D) are satisfied under Plan B earlier than required. Alternatively, if under Plan B increased default contribution percentages had not begun to apply until April 1 of the second plan year following the first plan year, the minimum default contribution percentage requirements could have been satisfied by using an initial default contribution percentage of 4 percent (rather than 3 percent).

HOLDINGS

1. Default contributions to a profit-sharing plan will not fail to be considered elective contributions merely because they are made pursuant to an automatic contribution arrangement under which an eligible employee's default contribution percentage automatically increases in plan years after the first plan year of the eligible employee's participation in the automatic contribution arrangement based in part on increases in the eligible employee's plan compensation.

2. Default contributions under an automatic contribution arrangement will not fail to satisfy the qualified percentage requirement (including uniformity and minimum percentage requirements) relating to a qualified automatic contribution arrangement or the uniformity requirement relating to an eligible automatic contribution arrangement merely because default contributions are made pursuant to an arrangement under which the default contribution percentage for all eligible employees increases on a date other than the first day of a plan year.

DRAFTING INFORMATION

The principal author of this revenue ruling is Roger Kuehnle of the Employee

Plans, Tax Exempt and Government Entities Division. Questions regarding this revenue ruling may be sent via e-mail to RetirementPlanQuestions@irs.gov.

Annual paid time off contributions.

This ruling provides guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit annual contributions of an employee's unused paid time off under the employer's paid time off plan. A paid time off plan generally refers to a sick and vacation arrangement that provides for paid leave whether the leave is due to illness or incapacity. The amendment relates to a contribution (including a section 401(k) contribution) or cash out of the unused paid time off, determined as of the end of the plan year (December 31). Rev. Rul. 2009-31 is companion guidance to Rev. Rul. 2009-32 and is part of the "Savings Initiative" guidance issued by the Service.

Rev. Rul. 2009-31

ISSUES

1. Do the amendments described below to an existing qualified profit-sharing plan requiring or permitting certain annual contributions of the dollar equivalent of unused paid time off cause the plan to fail to meet the requirements of § 401(a) and, if applicable, § 401(k) of the Internal Revenue Code (Code)?
2. When is a participant required to recognize gross income with respect to the contributions to the qualified profit-sharing plan and payments to the participant as described below?

FACTS

For purposes of each situation below, it is assumed that the employer is a corporation to which subchapter C of Chapter 1, Subtitle A, of the Code applies; that each participant is an individual who accounts for gross income under the cash receipts and disbursements method of accounting and has a calendar year taxable year; that all employees of the employer are eligible to participate in the paid time off plan (the PTO Plan) on substantially the same terms and conditions; that prior to its amendment, the PTO Plan qualifies as a bona fide

sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5) of the Income Tax Regulations; that all payments for paid time off (whether paid for used or unused time off) are made from the general assets of the employer; and that the employer has two-week pay periods. For this purpose, a paid time off plan refers to a sick and vacation leave plan under which a participant may take paid leave without regard to whether the leave is due to illness or incapacity.

Situation 1

Company Z maintains the Company Z PTO Plan (Z PTO Plan), under which all participants are granted up to 240 hours of paid time off each January 1 (prorated for new hires commencing employment during the calendar year), with the number of hours depending solely on the participant's number of years of service. For this purpose, salaried employees are treated as working 8 hours per work day. Under the Z PTO Plan, no unused paid time off hours remaining as of the close of business on December 31 may be carried over to the following year.

Company Z also maintains the Company Z Profit Sharing Plan (Z Profit Sharing Plan), which is a profit-sharing plan that, without regard to the amendment described in this Situation 1, meets the requirements of § 401(a). The Z Profit Sharing Plan includes a qualified cash or deferred arrangement under § 401(k) that provides for elective contributions and that does not provide for catch-up contributions under § 414(v). The Z Profit Sharing Plan has a calendar year plan year and limitation year.

In December 2008, Company Z amended the Z Profit Sharing Plan and the Z PTO Plan, effective January 1, 2009, to provide that (1) the dollar equivalent of any unused paid time off as of the close of business on December 31 is forfeited under the Z PTO Plan and the dollar equivalent of the amount forfeited is contributed to the Z Profit Sharing Plan and allocated to the participant's account as of December 31, to the extent the contribution (in combination with prior annual additions) does not exceed the applicable limitations under § 415(c), and (2) the dollar equivalent of any remaining paid time off is paid to the employee by February 28 of the

following year. Under the Z Profit Sharing Plan, the amounts attributable to paid time off are in addition to other contributions under the plan and are treated as nonelective contributions. For these purposes, the dollar equivalent of the unused paid time off is determined as the number of hours of unused paid time off multiplied by the participant's hourly rate of compensation as of December 31 of that year (determined for salaried employees by treating the employee as working 8 hours per work day).

A is an employee of Company Z who participates in the Z PTO Plan and the Z Profit Sharing Plan. As of the close of business on December 31, 2009, A has 20x hours of unused paid time off and earns \$25 per hour, and therefore the dollar equivalent of A's unused paid time off is \$500x. Because of the application of the limitations under § 415(c), Company Z may contribute only \$400x of unused paid time off to the Z Profit Sharing Plan for allocation to A's account in the 2009 limitation year (in combination with prior annual additions).

Company Z contributes \$400x to the Z Profit Sharing Plan on behalf of A on February 28, 2010, and allocates this amount to A's account under the Z Profit Sharing Plan as of December 31, 2009. Company Z pays A the remaining \$100x in cash on February 28, 2010.

Situation 2

Company Y maintains the Company Y PTO Plan (Y PTO Plan), under which participants ratably accrue up to 240 hours of paid time off each calendar year on a pay-period basis beginning on January 1 and at the end of the year may carry over to the following year an amount of unused paid time off not to exceed a specified number of hours (the carryover limit). For this purpose, salaried employees are treated as working 8 hours per work day. The dollar equivalent of any unused paid time off for a year in excess of the carryover limit is paid to the participant by February 28 of the following year.

Company Y also maintains the Company Y Section 401(k) Plan (Y 401(k) Plan), which is a profit-sharing plan that, without regard to the amendment described in this Situation 2, meets the requirements of § 401(a). The Y 401(k)

Plan includes a qualified cash or deferred arrangement under § 401(k) that provides for elective contributions and that does not provide for catch-up contributions under § 414(v). The Y 401(k) Plan has a calendar year plan year and limitation year.

In December 2008, Company Y amended the Y 401(k) Plan and the Y PTO Plan, effective January 1, 2009, to provide that a participant may elect to reduce all or part of the dollar equivalent of any unused paid time off that may not be carried over to the following year and have that amount contributed by Company Y to the Y 401(k) Plan and allocated to the participant's account as of the beginning of the third pay period of the following year, to the extent that the contribution (in combination with prior annual additions) does not exceed the applicable limitations under § 415(c) and to the extent that the contributions (in combination with prior elective deferrals) do not exceed the applicable limitation under § 401(a)(30). Under the terms of the Y 401(k) Plan, contributions of the dollar equivalent of paid time off are in addition to other contributions under the Y 401(k) Plan and are treated as elective contributions (for example, the same distribution restrictions apply). The dollar equivalent of any unused paid time off that is not contributed to the Y 401(k) Plan under the terms of the amended Y PTO Plan is paid to the participant by February 28 of the following year. For these purposes, the dollar equivalent of the unused paid time off is determined as the number of hours of unused paid time off multiplied by the participant's hourly rate of compensation as of December 31 of the initial year (determined for salaried employees by treating the employee as working 8 hours per work day).

B is an employee of Company Y who participates in the Y PTO Plan and the Y 401(k) Plan. As of the close of business on December 31, 2009, B has 15x hours of unused paid time off in excess of the carryover limit and earns \$30 per hour, so the dollar equivalent of B's unused paid time off in excess of the carryover limit is \$450x.

Pursuant to a valid and timely election, B elects to have 60% of the dollar equivalent of the unused paid time off in excess of the carryover limit, or \$270x, contributed to the Y 401(k) Plan, the contribution of which would not cause the plan to

exceed the limitations under §§ 401(a)(30) and 415(c) for the applicable year. On February 1, 2010, Company Y contributes \$270x to the Y 401(k) Plan and allocates \$270x to B's account under the plan as of February 1, 2010. Under the terms of the Y 401(k) Plan, this amount is treated as a contribution for the 2010 plan year. Company Y pays B the remaining \$180x on February 1, 2010.

LAW

Section 401(a) provides that a trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries constitutes a qualified trust under that section if a series of conditions is met. Section 401(a)(4) provides as one of those conditions that the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of § 414(q)). A plan maintained pursuant to a collective bargaining agreement is deemed to satisfy the nondiscrimination requirements. In other cases, under the regulations under § 401(a)(4), the amount of nonelective contributions under a profit-sharing plan must satisfy either a design-based safe harbor or a test based on the contributions made for individual participants.

Section 401(a)(30) of the Code provides that in the case of a trust which is part of a plan under which elective deferrals (within the meaning of § 402(g)(3)) may be made with respect to any individual during a calendar year, such trust does not constitute a qualified trust unless the plan provides that the amount of such deferrals under such plan and all other plans, contracts, or arrangements of an employer maintaining such plan may not exceed the amount of the limitation in effect under § 402(g)(1)(A) for taxable years beginning in such calendar year. Under § 402(g)(3), elective contributions under a qualified cash or deferred arrangement are included in the definition of elective deferrals.

Section 401(k)(2)(A) provides, in pertinent part, that a qualified cash or deferred arrangement is any arrangement which is part of a profit sharing plan or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan, which meets the requirements of § 401(a), and under

which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash.

Section 1.401(k)-1(a)(3)(i) provides that a cash or deferred election is any election by an employee to have the employer either: (A) provide an amount to the employee in the form of cash or some other taxable benefit that is not currently available or (B) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

Section 1.401(k)-6 defines nonelective contributions as employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan. Section 1.401(k)-6 defines elective contributions as contributions made pursuant to a cash or deferred election under a cash or deferred arrangement (whether or not qualified).

Under § 401(k)(3)(A)(ii), elective contributions under a qualified cash or deferred arrangement generally must satisfy the actual deferral percentage test. Section 1.401(k)-2(a)(4)(i) provides generally that for purposes of the actual deferral percentage test, elective contributions are taken into account for a year if the elective contribution is allocated to the participant's account under the plan as of a date within that year, and certain other requirements are satisfied.

Section 402(a) provides that any amount actually distributed to any distributee by an employees' trust described in § 401(a) which is exempt from tax under § 501(a) is taxable to the distributee in the taxable year of the distributee in which distributed, under § 72. Section 72(t) provides, in pertinent part, that the income tax applicable to any amount a participant receives from a qualified plan generally is increased by an amount equal to 10 percent of the portion of the amount includible in gross income unless the amounts are distributed on or after the date on which the participant attains age 59½ or after the participant's separation from service after attainment of age 55.

Section 402(e)(3) provides, in pertinent part, that contributions made by an employer on behalf of an employee to a trust

which is part of a qualified cash or deferred arrangement (as defined in § 401(k)(2)) are not treated as distributed or made available to the employee nor as contributions made to the trust by the employee merely because the arrangement includes provisions under which the employee has an election whether the contribution will be made to the trust or received by the employee in cash.

Section 415(a)(1)(B) provides that a trust which is part of a pension, profit-sharing, or stock bonus plan shall not constitute a qualified trust under § 401(a) if in the case of a defined contribution plan, contributions and other additions under the plan with respect to any participant for any taxable year exceed the limitation of § 415(c). Section 415(c)(1) provides that contributions and other additions with respect to a participant exceed the limitation of § 415(c) if, when expressed as an annual addition to the participant's account, the annual addition is greater than the lesser of \$40,000 or 100 percent of the participant's compensation. Section 415(d)(1)(C) provides that the Secretary shall adjust annually the \$40,000 amount for increases in the cost-of-living.

Section 1.415(c)-1(b)(1)(i) generally defines the term "annual addition" as the sum, credited to a participant's account for any limitation year, of (A) employer contributions; (B) employee contributions; and (C) forfeitures. Under § 1.415(c)-1(b)(6), an annual addition generally is treated as credited to the account of a participant for a particular limitation year if it is allocated to the participant's account under the terms of the plan as of any date within that limitation year.

Section 415(c)(3)(A) provides that, in general, the term "participant's compensation" means the compensation of the participant from the employer for the year. Section 1.415(c)-2(b)(1) provides that, for purposes of § 415, compensation includes amounts received for personal services actually rendered in the course of employment with the employer maintaining the plan, to the extent that the amounts are includible in gross income (or to the extent the amounts would have been received and includible in gross income but for certain elections, including an election described in § 402(e)(3)). However, under § 1.415(c)-2(b)(2), contributions by an

employer to a plan of deferred compensation (other than certain elective contributions described in § 402(e)(3)) are not included in compensation for purposes of § 415.

Section 1.415(c)-2(e)(1)(i) states in pertinent part that, in order to be taken into account for a limitation year, compensation within the meaning of section 415(c)(3) must be actually paid or made available to an employee (or, if earlier, includible in the gross income of the employee) within the limitation year. Section 1.415(c)-2(e)(1)(ii) states in pertinent part that, except as otherwise provided in § 1.415(c)-2(e), in order to be taken into account for a limitation year, compensation within the meaning of section 415(c)(3) must be paid or treated as paid to the employee (in accordance with the rules of § 1.415-2(e)(1)(i)) prior to the employee's severance from employment with the employer maintaining the plan.

Section 451(a) and § 1.451-1(a) provide that an item of gross income is includible in gross income in the taxable year in which it is actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under § 1.451-2(a), income is constructively received in the taxable year during which it is credited to a taxpayer's account, set apart or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Section 409A(a)(1)(A)(i) provides, in pertinent part, that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet certain requirements set forth under § 409A(a), or is not operated in accordance with such requirements, all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A(a)(1)(B) provides, in pertinent part, that any compensation required to be included in gross income under § 409A(a)(1)(A) for a taxable year shall be subject to the additional taxes set forth in § 409A(a)(1)(B).

Section 409A(d)(1) provides that the term "nonqualified deferred compensa-

tion plan" means any plan that provides for the deferral of compensation, other than: (A) a qualified employer plan and (B) any *bona fide* vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. Section 409A(d)(2) provides, in pertinent part, that the term "qualified employer plan" means any plan, contract, pension, account or trust described in § 219(g)(5)(A) or (B) (without regard to § 219(g)(5)(A)(iii)). Section 219(g)(5)(A)(i) refers to a plan described in § 401(a), which includes a trust exempt from tax under § 501(a).

ANALYSIS

Situation 1

The amendment of the Z Profit Sharing Plan to require certain contributions of the dollar equivalent of unused paid time off to the Z Profit Sharing Plan does not cause the Z Profit Sharing Plan to fail to meet the requirements of § 401(a), provided that the contributions made pursuant to the arrangement satisfy the nondiscrimination requirements of § 401(a)(4) (in combination with other contributions and forfeitures allocated for the year). Because A is not provided a right to elect a payment of the dollar equivalent of the unused paid time off in lieu of a plan contribution, Company Z's contribution of \$400x to the Z Profit Sharing Plan is not an elective contribution that is made pursuant to a cash or deferred election within the meaning of § 401(k)(2)(A) and § 1.401(k)-(1)(a)(3)(i). Rather, Company Z's contribution to the Z Profit Sharing Plan is a nonelective employer contribution within the meaning of § 1.401(k)-6.

The amount contributed and allocated for each participant will vary based on the amount of the participant's unused paid time off. Thus, contributions for unused paid time off are likely to preclude a plan from satisfying a design-based safe harbor under § 401(a)(4). Therefore, testing based on the contributions made for individual participants generally will be required.

The contributions made pursuant to the arrangement must also not exceed the limitations under § 415(c) (in combination with prior annual additions). Because the contribution of \$400x on behalf of A was allocated to A's account as of December

31, 2009, and made February 28, 2010 (before the end of the 30 day period following the deadline for Company Z to file its income tax return), it is subject to the limitations under § 415(c) applicable for the 2009 limitation year and is taken into account for § 401(a)(4) purposes for the 2009 plan year. Under the facts presented, the contribution of \$400x does not cause the plan to exceed the limitations under § 415(c).

If the requirements of § 401(a)(4) are met, the amount contributed will be includible in A's gross income in accordance with § 402(a) only when distributed to A. Like any other distribution from the Z Profit Sharing Plan, the distribution of amounts attributable to the dollar equivalent of the unused paid time off is subject to an additional 10% income tax under § 72(t) unless the distribution satisfies one of the exceptions described in § 72(t)(2), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

Under the Z PTO Plan as amended, the dollar equivalent of unused paid time off is not paid, set apart, or otherwise made available so that A may draw on it either (i) during the 2009 calendar year or (ii) upon conversion in 2009 to a contribution to a qualified plan or cash payment in 2010. Therefore, under the doctrine of constructive receipt and § 451, such amount is not includible in A's gross income in 2009. In addition, the amendment to the Z PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the Z PTO Plan to fail to qualify as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5). The \$100x payment is includible in A's gross income in 2010, the taxable year in which it is paid to A.

Situation 2

The amendment of the Y 401(k) Plan to permit certain contributions of the dollar equivalent of unused paid time off to the Y 401(k) Plan does not cause the Y 401(k) Plan to fail to meet the requirements of §§ 401(a) and 401(k), provided that the contributions (taking into account other contributions, prior deferrals, and prior annual additions, as applicable) satisfy the nondiscrimination

requirements of § 401(k) and the applicable limitations of §§ 401(a)(30) and 415(c).

Because B is provided a right to elect either a payment of cash or a plan contribution for the dollar equivalent of unused paid time off that may not be carried over to the subsequent year, Company Y's contribution of \$270x to the Y 401(k) Plan and allocation to B's account under the plan is an elective contribution. Because the contribution is made on February 1, 2010 and is not treated as allocated for 2009, it is taken into consideration for the nondiscrimination requirements of § 401(k) and the limitations of §§ 401(a)(30) and 415(c) for 2010.

Under the facts presented, the allocation of \$270x would not cause the Y 401(k) Plan to exceed the limitations of § 415(c) for the 2010 limitation year. Although the dollar equivalent of the unused paid time off was made available to D in 2010, pursuant to § 402(e)(3), the \$270x is not treated as made available to D if the amount was contributed to the plan as part of a qualified cash or deferred arrangement. If the requirements of §§ 401(k) and 401(a)(30) are met, the contribution will have been made pursuant to a qualified cash or deferred arrangement under § 401(k) and will be includible in B's gross income in accordance with § 402(a) only when distributed to B. Like any other distribution from the Y 401(k) Plan, the distribution of amounts attributable to the dollar equivalent of the unused paid time off is subject to an additional 10% income tax under § 72(t) unless the distribution satisfies one of the exceptions described in § 72(t)(2), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

Under the Y PTO Plan, as amended, the dollar equivalent of unused paid time off is not paid, set apart, or otherwise made available so that B may draw on it either (i) during the 2009 calendar year or (ii) upon conversion in 2009 to a contribution to a qualified plan or cash payment in 2010. Therefore, under the doctrine of constructive receipt and § 451, such amount is not includible in B's gross income in 2009. In addition, the amendment to the Y PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the Y PTO Plan to fail to

qualify as a *bona fide* sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5). The \$180x payment is includible in B's gross income in 2010, the taxable year in which it is paid to B.

HOLDING

1. Under the facts presented, the amendments requiring or permitting certain contributions of the dollar equivalent of unused paid time off to a qualified profit-sharing plan do not cause the plan to fail to meet the qualification requirements of § 401(a), provided that the contributions satisfy the applicable requirements of §§ 401(a)(4) and 415(c) and, where applicable, §§ 401(k) and 401(a)(30).
2. Under the facts presented, assuming the applicable qualification requirements are satisfied, a participant does not include in gross income contributions of the dollar equivalent of unused paid time off to the profit-sharing plan in accordance with § 402(a) until distributions are made to the participant from the plan and does not include in gross income an amount paid for the dollar equivalent of unused paid time off that is not contributed to the profit-sharing plan until the taxable year in which the amount is paid to the participant.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Robert Gertner, Roger Kuehnle, and Alice Lynch of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this revenue ruling may be sent via e-mail to retirementplanquestions@irs.gov.

Paid time off contributions at termination of employment. This ruling provides guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit contributions for an employee's accumulated and unused paid time off under the employer's paid time off plan at a participant's termination of employment. A paid time off plan generally refers to a sick and vacation arrangement that provides for paid leave whether the leave is due to illness or incapacity. The amendment relates to a post-severance

contribution (including a section 401(k) contribution) or cash out of the accumulated and unused paid time off. Rev. Rul. 2009–32 is companion guidance to Rev. Rul. 2009–31 and is part of the “Savings Initiative” guidance issued by the Service.

Rev. Rul. 2009–32

ISSUES

1. Do the amendments described below to an existing qualified profit-sharing plan requiring or permitting certain contributions to the plan of the dollar equivalent of unused paid time off at a participant’s termination of employment cause the plan to fail to meet the requirements of § 401(a) and, if applicable, § 401(k) of the Internal Revenue Code (Code)?
2. When is a participant required to recognize gross income with respect to the contributions to the qualified profit-sharing plan and payments to the participant as described below?

FACTS

For purposes of each situation below, it is assumed that the employer is a corporation to which subchapter C of Chapter 1, Subtitle A of the Code applies; that each participant is an individual who accounts for gross income under the cash receipts and disbursements method of accounting and has a calendar year taxable year; that all employees of the employer are eligible to participate in the paid time off plan (the PTO plan) on substantially the same terms and conditions; that prior to its amendment, the PTO plan qualifies as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A–1(a)(5) of the Income Tax Regulations; that payments under the PTO plan for unused paid time off constitute payment for unused accrued bona fide sick, vacation, or other leave for purposes of § 1.415(c)–2(e)(3)(iii)(A); that all payments for paid time off (whether paid for used or unused time off) are made from the general assets of the employer; and that the employer has two-week pay periods. For this purpose, a paid time off plan refers to a sick and vacation pay or leave plan under which a participant may take paid leave without regard to whether the leave is due to illness or incapacity.

Situation 1

Company X maintains the Company X PTO Plan (X PTO Plan), under which all participants are granted up to 240 hours of paid time off each January 1 (prorated for new hires commencing employment during the calendar year), with the number of hours depending solely on the participant’s number of years of service. For this purpose, salaried employees are treated as working 8 hours per work day. Under the X PTO Plan, a participant at the end of the year may carry over to the following year an amount of unused paid time off not to exceed a specified number of hours (the carryover limit), and any hours of unused paid time off in excess of the carryover limit are forfeited. If a participant terminates employment, the dollar equivalent of any hours of unused paid time off remaining at the termination of employment are paid to the terminated participant within 60 days after the termination of employment, with the dollar equivalent determined as the number of hours of unused paid time off multiplied by the terminated participant’s hourly rate of compensation for the pay period during which the participant terminates employment (determined for salaried employees by treating the employee as working 8 hours per work day).

Company X also maintains the Company X Profit Sharing Plan (X Profit Sharing Plan), which is a profit-sharing plan that, without regard to the amendment described in this Situation 1, meets the requirements of § 401(a). The X Profit Sharing Plan includes a qualified cash or deferred arrangement under § 401(k) that provides for elective contributions and that does not provide for catch-up contributions under § 414(v). The X Profit Sharing Plan has a calendar year plan year and limitation year. The X Profit Sharing Plan provides that amounts for unused paid time off paid by the later of 2½ months after termination of employment with Company X or the end of the limitation year that includes the date of the severance from employment are treated as compensation under the plan for purposes of § 415, to the extent permissible under § 415. The X Profit Sharing Plan provides that § 415 compensation is determined using only amounts actually paid during the limitation year.

In December 2008, Company X amended the X Profit Sharing Plan and the

X PTO Plan, effective January 1, 2009, to provide that the dollar equivalent of any unused paid time off at the time of a participant’s termination of employment is forfeited under the X PTO Plan and is contributed to the X Profit Sharing Plan and allocated to the participant’s account as of the first day of the second pay period beginning immediately after the participant’s termination of employment, to the extent the contribution (in combination with prior annual additions) does not exceed the applicable limitations under § 415(c). Under the X Profit Sharing Plan, contributions of the dollar equivalent of paid time off are in addition to other contributions under the plan and are treated as nonelective contributions. Under the terms of the X PTO Plan, the dollar equivalent of any unused paid time off that is not contributed to the X Profit Sharing Plan is paid to the terminated participant within 60 days after the termination of employment. For these purposes, the dollar equivalent of the unused paid time off is determined as the number of hours of unused paid time off multiplied by the terminated participant’s hourly rate of compensation for the pay period during which the participant terminates employment (determined for salaried employees by treating the employee as working 8 hours per work day).

C is an employee of Company X who participates in the X PTO Plan and the X Profit Sharing Plan. C’s employment terminates on October 1, 2009. As of the close of business on October 1, 2009, C has 12x hours of unused paid time off, and earns \$25 per hour, and so has unused paid time off with a dollar equivalent of \$300x. 12x hours does not exceed the sum of the hours in the remaining work days for 2009 plus the carryover limit.

A contribution of \$300x to the X Profit Sharing Plan on behalf of C, in combination with prior annual additions, would not cause C’s total contributions and annual additions to exceed the limitations under § 415(c) for the 2009 limitation year. Company X contributes \$300x to the X Profit Sharing Plan on October 19, 2009, and allocates this amount to C’s account under the X Profit Sharing Plan, effective as of October 19, 2009.

Situation 2

The facts are the same as in *Situation 1*, except that C's employment terminates on December 28, 2009, and any payment for unused paid time off on account of termination will be paid to C in 2010 and will be the only payment of compensation that C will receive from Company X in 2010. C has 12x hours of unused paid time off and earns \$25 per hour, and therefore, has unused paid time off with a dollar equivalent of \$300x. The 12x hours of unused paid time off does not exceed the sum of the hours in the remaining work days for 2009 plus the carryover limit. The \$300x does not exceed the § 415(c) applicable dollar limit for 2010. Company X contributes \$150x to the X Profit Sharing Plan on January 18, 2010, and allocates the amount to C's account under the X Profit Sharing Plan as of January 18, 2010. This contribution is not treated as a contribution to the X Profit Sharing Plan for 2009. Company X pays the remaining \$150x to C on January 18, 2010.

Situation 3

Company W maintains the Company W PTO Plan (W PTO Plan), under which participants ratably accrue up to 240 hours of paid time off each calendar year on a pay-period basis beginning on January 1. For this purpose, salaried employees are treated as working 8 hours per work day. Under the W PTO Plan, a specified number of unused paid time off hours remaining as of the close of business on December 31 may be carried over to the following year, and any hours of unused paid time off in excess of the carryover limit are forfeited. If a participant terminates employment, the dollar equivalent of any hours of unused paid time off remaining at the termination of employment are paid to the terminated participant within 60 days after the termination of employment, with the dollar equivalent determined as the number of hours of unused paid time off multiplied by the terminated participant's hourly rate of compensation for the pay period during which the participant terminates employment (determined for salaried employees by treating the employee as working 8 hours per work day).

Company W also maintains the Company W Section 401(k) Plan (W 401(k)

Plan), which is a profit-sharing plan that, without regard to the amendment described in this Situation 3, meets the requirements of § 401(a). The W 401(k) Plan includes a qualified cash or deferred arrangement under § 401(k) that does not provide for catch-up contributions under § 414(v). The W 401(k) Plan has a calendar year plan year and limitation year. The W 401(k) Plan provides that for purposes of §§ 401(k) and 415(c), amounts contributed to the plan are taken into account for the year in which falls the date the amounts are allocated to the participant's account under the plan. The W 401(k) Plan also provides that amounts for unused paid time off paid by the later of 2½ months after termination of employment with Company W or the end of the limitation year that includes the date of the severance from employment, are treated as compensation under the plan for purposes of § 415, to the extent permissible under § 415(c). The W 401(k) Plan provides that, for purposes of § 415, compensation is determined by including only amounts actually paid during the limitation year.

In December 2008, Company W amended the W 401(k) Plan and the W PTO Plan, effective January 1, 2009, to provide that a participant may elect to reduce all or part of the dollar equivalent of any unused paid time off at the time of a participant's termination of employment and have that amount contributed by Company W and allocated to the participant's account under the W 401(k) Plan as of the first day of the second pay period beginning immediately after the participant's termination of employment, to the extent that the contribution (in combination with prior annual additions) does not exceed the applicable limitations under § 415(c) and to the extent the contributions (in combination with prior elective deferrals) do not exceed the applicable limitation under § 401(a)(30). Under the terms of the W 401(k) Plan, contributions of the dollar equivalent of paid time off are in addition to other contributions and treated as elective contributions. Under the terms of the W PTO Plan, the dollar equivalent of any unused paid time off that is not contributed to the W 401(k) Plan is paid to the employee on the first day of the second pay period beginning immediately after the participant's termination of

employment. For these purposes, the dollar equivalent of the unused paid time off is determined as the number of hours of unused paid time off multiplied by the terminated participant's hourly rate of compensation for the pay period during which the participant terminates employment (determined for salaried employees by treating the employee as working 8 hours per work day).

D is an employee of Company W who participates in the W PTO Plan and the W 401(k) Plan. D terminates employment on October 1, 2009. As of the close of business on October 1, 2009, D has 15x hours of unused paid time off, and earns \$20 per hour, and so has unused paid time off with a dollar equivalent of \$300x. 15x hours does not exceed the sum of the hours in the remaining work days for 2009 plus the carryover limit.

D has a valid and timely election in effect to have 70% of the dollar equivalent of the unused paid time off contributed to the W 401(k) Plan. The contribution of \$210x (70% of \$300x) would not exceed the applicable limitations under §§ 401(a)(30) and 415(c). Company W contributes \$210x to the W 401(k) Plan on October 19, 2009, and allocates that amount to D's account under the W 401(k) Plan as of October 19, 2009. Company W pays the remaining \$90x to D on October 19, 2009.

Situation 4

The facts are the same as in Situation 3, except that D's employment terminates on December 28, 2009, and any payment for unused paid time off on account of termination will be paid to D in 2010 and will be the only payment of compensation that D will receive from Company W in 2010. As of the close of business on December 28, 2009, D has 15x hours of unused paid time off, and earns \$20 per hour, and so has unused paid time off with a dollar equivalent of \$300x. 15x hours does not exceed the sum of the hours in the remaining work days for 2009 plus the carryover limit.

D has a valid and timely election in effect to have 70% of the dollar equivalent of the unused paid time off contributed to the W 401(k) Plan. The contribution of \$210x (70% of \$300x) would not exceed the applicable limitations under §§ 401(a)(30) and 415(c). Company W

contributes \$210x to the W 401(k) Plan on January 18, 2010 and allocates that amount to D's account under the W 401(k) Plan as of January 18, 2010. Company W pays the remaining \$90x to D on January 18, 2010.

LAW

Section 401(a) provides that a trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries constitutes a qualified trust under that section if a series of conditions is met. Section 401(a)(4) provides as one of those conditions that the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of § 414(q)). A plan maintained pursuant to a collective bargaining agreement is deemed to satisfy the nondiscrimination requirements. In other cases, under the regulations under § 401(a)(4), the amount of non-elective contributions under a profit-sharing plan must satisfy either a design-based safe harbor or a test based on the contributions made for individual participants.

Section 401(a)(30) of the Code provides that in the case of a trust which is part of a plan under which elective deferrals (within the meaning of § 402(g)(3)) may be made with respect to any individual during a calendar year, such trust does not constitute a qualified trust unless the plan provides that the amount of such deferrals under such plan and all other plans, contracts, or arrangements of an employer maintaining such plan may not exceed the amount of the limitation in effect under § 402(g)(1)(A) for taxable years beginning in such calendar year. Under § 402(g)(3), elective contributions under a qualified cash or deferred arrangement are included in the definition of elective deferrals.

Section 401(k)(2)(A) provides, in pertinent part, that a qualified cash or deferred arrangement is any arrangement which is part of a profit sharing plan or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan, which meets the requirements of § 401(a), and under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on be-

half of the employee, or to the employee directly in cash.

Section 1.401(k)-1(a)(3)(i) provides that a cash or deferred election is any election by an employee to have the employer either: (A) provide an amount to the employee in the form of cash or some other taxable benefit that is not currently available or (B) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

Section 1.401(k)-6 defines nonelective contributions as employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan. Section 1.401(k)-6 defines elective contributions as contributions made pursuant to a cash or deferred election under a cash or deferred arrangement (whether or not qualified).

Under § 401(k)(3)(A)(ii), elective contributions under a qualified cash or deferred arrangement generally must satisfy the actual deferral percentage test. Section 1.401(k)-2(a)(4)(i) provides generally that for purposes of the actual deferral percentage test, elective contributions are taken into account for a year if the elective contribution is allocated to the participant's account under the plan as of a date within that year, and certain other requirements are satisfied.

Section 402(a) provides that any amount actually distributed to any distributee by an employees' trust described in § 401(a) which is exempt from tax under § 501(a) is taxable to the distributee in the taxable year of the distributee in which distributed, under § 72. Section 72(t) provides, in pertinent part, that the income tax applicable to any amount a participant receives from a qualified plan generally is increased by an amount equal to 10 percent of the portion of the amount includible in gross income unless such amounts are distributed on or after the date on which the participant attains age 59½ or after the participant's separation from service after attainment of age 55.

Section 402(e)(3) provides, in pertinent part, that contributions made by an employer on behalf of an employee to a trust which is part of a qualified cash or deferred arrangement (as defined in § 401(k)(2)) are not treated as distributed or made available

to the employee nor as contributions made to the trust by the employee merely because the arrangement includes provisions under which the employee has an election whether the contribution will be made to the trust or received by the employee in cash.

Section 415(a)(1)(B) provides that a trust which is part of a pension, profit-sharing, or stock bonus plan does not constitute a qualified trust under § 401(a) if in the case of a defined contribution plan, contributions and other additions under the plan with respect to any participant for any taxable year exceed the limitation of § 415(c). Section 415(c)(1) provides that contributions and other additions with respect to a participant exceed the limitation of § 415 if, when expressed as an annual addition to the participant's account, the annual addition is greater than the lesser of \$40,000 or 100 percent of the participant's compensation. Section 415(d)(1)(C) provides that the Secretary shall adjust annually the \$40,000 amount for increases in the cost-of-living in accordance with regulations prescribed by the Secretary.

Section 1.415(c)-1(b)(1)(i) generally defines the term "annual addition" as the sum, credited to a participant's account for any limitation year, of (A) employer contributions; (B) employee contributions; and (C) forfeitures. Under § 1.415(c)-1(b)(6), an annual addition generally is treated as credited to the account of a participant for a particular limitation year if it is allocated to the participant's account under the terms of the plan as of any date within that limitation year.

Section 415(c)(3)(A) provides that in general, the term "participant's compensation" means the compensation of the participant from the employer for the year. Section 1.415(c)-2(b)(1) provides that, for purposes of § 415, compensation includes amounts received for personal services actually rendered in the course of employment with the employer maintaining the plan, to the extent that the amounts are includible in gross income (or to the extent the amounts would have been received and includible in gross income but for certain elections, including an election described in § 402(e)(3)). However, under § 1.415(c)-2(b)(2), contributions by an employer to a plan of deferred compensation (other than certain elective contribu-

tions, including contributions described in § 402(e)(3)) are not included in compensation for purposes of § 415.

Section 1.415(c)-2(e)(1)(i) states in pertinent part that, in order to be taken into account for a limitation year, compensation within the meaning of section 415(c)(3) must be actually paid or made available to an employee (or, if earlier, includible in the gross income of the employee) within the limitation year. Section 1.415(c)-2(e)(1)(ii) states in pertinent part that, except as otherwise provided in § 1.415(c)-2(e), in order to be taken into account for a limitation year, compensation within the meaning of section 415(c)(3) must be paid or treated as paid to the employee (in accordance with the rules of § 1.415(c)-2(e)(1)(i)) prior to the employee's severance from employment with the employer maintaining the plan.

Section 1.415(c)-2(e)(3) provides that a plan may provide that certain amounts are included in the participant's compensation (within the meaning of § 415(c)(3)) if those amounts are paid by the later of 2½ months after severance from employment with the employer maintaining the plan or the end of the limitation year that includes the date of severance from employment with the employer maintaining the plan, and those amounts would have been included in the definition of compensation had they been paid prior to the employee's severance from employment with the employer maintaining the plan. Section 1.415(c)-2(e)(3)(iii)(A) provides that an amount is described in § 1.415(c)-2(e)(3)(iii) (and therefore may be included in § 415(c) compensation subject to certain conditions) if the amount is payment for unused accrued bona fide sick, vacation, or other leave, but only if the employee would have been able to use the leave if employment had continued.

Section 451(a) and § 1.451-1(a) provide that an item of gross income is includible in gross income in the taxable year in which it is actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under § 1.451-2(a), income is constructively received in the taxable year during which it is credited to a taxpayer's account, set apart or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's con-

trol of its receipt is subject to substantial limitations or restrictions.

Section 409A(a)(1)(A)(i) provides, in pertinent part, that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet certain requirements set forth under § 409A(a), or is not operated in accordance with such requirements, all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A(a)(1)(B) provides, in pertinent part, that any compensation required to be included in gross income under § 409A(a)(1)(A) for a taxable year shall be subject to the additional taxes set forth in § 409A(a)(1)(B).

Section 409A(d)(1) provides that the term "nonqualified deferred compensation plan" means any plan that provides for the deferral of compensation, other than: (A) a qualified employer plan and (B) any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. Section 409A(d)(2) provides, in pertinent part, that the term "qualified employer plan" means any plan, contract, pension, account or trust described in § 219(g)(5)(A) or (B) (without regard to § 219(g)(5)(A)(iii)). Section 219(g)(5)(A)(i) refers to a plan described in § 401(a), which includes a trust exempt from tax under § 501(a).

ANALYSIS

Situation 1

The amendment to the X Profit Sharing Plan to require certain contributions of the dollar equivalent of unused paid time off to the X Profit Sharing Plan does not cause the X Profit Sharing Plan to fail to meet the requirements of § 401(a), provided that the contributions satisfy the requirements of § 401(a)(4) (in combination with other contributions and forfeitures allocated for the year). Because C is not provided a right to elect a payment of cash for unused paid time off in lieu of a plan contribution, Company X's contribution of \$300x to the X Profit Sharing Plan is not an elective contribution that is made pursuant to a cash or deferred election within the meaning of § 401(k)(2)(A) and § 1.401(k)-(1)(a)(3)(i).

Rather, Company X's contribution to the X Profit Sharing Plan is a nonelective employer contribution within the meaning of § 1.401(k)-6.

The amount contributed and allocated for each participant will vary based on the amount of the participant's unused paid time off. Thus, the contributions for unused paid time off are likely to preclude a plan from satisfying a design-based safe harbor under § 401(a)(4). Therefore, testing based on the contributions made for individual participants generally will be required.

The contributions made pursuant to the arrangement must also not exceed the limitations under § 415(c) (in combination with prior annual additions). Because the contribution of \$300x was allocated to C's account as of October 12, 2009, and made on that date (before the end of the 30 day period following the deadline for Company X to file its income tax return), the contribution is subject to the limitations under § 415(c) applicable for the 2009 limitation year and is taken into account for § 401(a)(4) purposes for the 2009 plan year. Under the facts presented, the contribution of \$300x (in combination with prior annual additions) does not exceed the limitations of § 415(c) for 2009.

If the requirements of § 401(a)(4) are met, the amount contributed will be included in C's gross income in accordance with § 402(a) only when the amount is distributed to C. Like any other distribution from the X Profit Sharing Plan, the distribution of amounts attributable to the dollar equivalent of unused paid time off is subject to an additional 10% income tax under § 72(t) unless the distribution satisfies one of the exceptions described in § 72(t), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

The amendment to the X PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the X PTO Plan to fail to qualify as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5).

Situation 2

The amendment to the X Profit Sharing Plan to require certain contributions of the dollar equivalent of unused paid

time off to the X Profit Sharing Plan does not cause the X Profit Sharing Plan to fail to meet the requirements of § 401(a) of the Code, provided that the contributions made pursuant to the amendment satisfy the requirements of § 401(a)(4) (in combination with other contributions and forfeitures allocated for the year). Because C is not provided a right to elect a payment of cash for unused paid time off in lieu of a contribution to the X Profit Sharing Plan, Company X's contribution of \$150x to the X Profit Sharing Plan is not an elective contribution that is made pursuant to a cash or deferred election within the meaning of § 401(k)(2)(A) and § 1.401(k)-(1)(a)(3)(i). Rather, Company X's contribution to the X Profit Sharing Plan is a nonelective employer contribution within the meaning of § 1.401(k)-6.

The contributions made pursuant to the arrangement must also not exceed the limitations under § 415(c) (in combination with prior annual additions). Because the contribution is allocated to C's account on January 18, 2010, and made on that date (before the end of the 30 day period following the deadline for Company X to file its income tax return), the contribution is subject to the limitations under § 415 applicable for the 2010 limitation year and is taken into account for § 401(a)(4) purposes for the 2010 plan year. Under the facts, none of the \$300x exceeds the applicable § 415(c)(1)(A) dollar limit for 2010, so the \$150x contribution also would not exceed the applicable § 415(c)(1)(A) dollar limit. However, under § 415(c)(1)(B), the \$150x contribution must also not exceed 100 percent of compensation for the 2010 limitation year. Because the \$150x contribution is a nonelective contribution, it is not taken into account as compensation for purposes of § 415. However, because the paid time off could have been carried over and used in 2010 had C remained employed, the payment of the remaining \$150x to C on January 18 can be included as § 415 compensation for 2010. Accordingly, the allocation of \$150x to C's account will provide an allocation of 100 percent of compensation and will not exceed the § 415(c) limitations for the 2010 limitation year.

If the requirements of § 401(a)(4) are met, the amount contributed will be included in C's gross income in accordance with § 402(a) only when the amount is dis-

tributed to C. Like any other distribution from the X Profit Sharing Plan, the distribution of amounts attributable to the dollar equivalent of unused paid time off is subject to an additional 10% income tax under § 72(t) unless the distribution satisfies one of the exceptions described in § 72(t), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

Under the facts of Situation 2, C terminates employment in 2009, but the contribution to the X Profit Sharing Plan and the cash payment to C occur in 2010. Under the X PTO Plan as amended, the dollar equivalent of unused paid time off is not paid, set apart, or otherwise made available so that C may draw on it either (i) during the 2009 calendar year or (ii) upon conversion in 2009 to a contribution to a qualified plan or cash payment in 2010. Therefore, such amount is not includible in C's gross income in 2009 under the doctrine of constructive receipt and § 451. In addition, the amendment to the X PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the X PTO Plan to fail to qualify as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5). The \$150x payment is includible in C's gross income in 2010, the taxable year in which it is paid to C.

Situation 3

The amendment to the W 401(k) Plan to permit certain contributions of the dollar equivalent of unused paid time off to the W 401(k) Plan does not cause the W 401(k) Plan to fail to meet the requirements of §§ 401(a) and 401(k), provided that the contributions (taking into account other contributions, prior deferrals, and prior annual additions, as applicable) satisfy the nondiscrimination requirements of § 401(k) and the applicable limitations of §§ 401(a)(30) and 415(c).

Because D is provided a right to elect either a payment of cash or a plan contribution for the dollar equivalent of unused paid time off that may not be carried over to the following year, Company W's contribution of \$210x to the W 401(k) Plan is an elective contribution. Because the contribution is allocated to D's account as of October 19, 2009, and is made on

that date (before the end of the 30 day period following the deadline for Company W to file its income tax return), the contribution is subject to the limitations under § 415 applicable for the 2009 limitation year. The contribution is also subject to the limitations on elective deferrals under § 401(a)(30) applied for 2009 and the actual deferral percentage nondiscrimination testing under § 401(k)(3)(A)(ii) and § 1.401(k)-2 for the 2009 plan year.

Under the facts presented, the allocation of \$210x to D's account (in combination with prior annual additions) does not cause the plan to exceed the limitations of § 415(c). Although the dollar equivalent of the unused paid time off was made available to D in 2009, pursuant to § 402(e)(3) the \$210x is not treated as made available to D because the amount was contributed to the plan as part of a qualified cash or deferred arrangement. Accordingly, if the nondiscrimination requirements of § 401(k) and the limitations of § 401(a)(30) are met, the amount contributed will be included in D's gross income in accordance with § 402(a) only when the amount is distributed to D. Like any other distributions from the W 401(k) Plan, the distribution of amounts attributable to the dollar equivalent of unused paid time off is subject to the additional 10% income tax under § 72(t) if the distribution does not meet one of the exceptions of § 72(t), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

In addition, the amendment to the W PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the W PTO Plan to fail to qualify as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5). The \$90x payment is includible in D's gross income in 2009, the taxable year in which it is paid to D.

Situation 4

The amendment to the W 401(k) Plan to permit certain contributions of the dollar equivalent of unused paid time off to the W 401(k) Plan does not cause the W 401(k) Plan to fail to meet the requirements of §§ 401(a) and 401(k), provided that the contributions (taking into account other contributions, prior deferrals, and

prior annual additions, as applicable) satisfy the nondiscrimination requirements of § 401(k) and the applicable limitations of §§ 401(a)(30) and 415(c).

Because D is provided a right to elect either a payment of cash or a plan contribution for the dollar equivalent of unused paid time off that may not be carried over to the following year, Company W's contribution of \$210x to the W 401(k) Plan is an elective contribution. Because the contribution is made on January 18, 2010, and is allocated as of that date (before the end of the 30 day period following the deadline for Company W to file its income tax return), the contribution is subject to the limitations under § 415 applicable for the 2010 limitation year. The contribution is also subject to the limitations on elective deferrals under § 401(a)(30) applied for 2010 and the actual deferral percentage nondiscrimination testing under § 401(k)(3)(A)(ii) and § 1.401(k)-2 for the 2010 plan year.

As an elective contribution, the \$210x may be treated as compensation for purposes of § 415, so that D's total 2010 compensation for purposes of § 415(c) is \$300x (the \$210x elective contribution plus the \$90x payment). Under the facts presented, the allocation of \$210x to D's account (in combination with prior annual additions) will not cause the plan to exceed the limitations of § 415(c). Although the dollar equivalent of the unused paid time off was made available to D in 2010, pursuant to § 402(e)(3) the \$210x will not be treated as made available to D because the amount was contributed to the plan as part of a qualified cash or deferred arrangement. Accordingly, if the nondiscrimination requirements of § 401(k) and the limitations of § 401(a)(30) are met, the amount contributed will be included in D's gross income in accordance with § 402(a) only when the amount is distributed to D. Like any other distributions from the W 401(k) Plan, the distribution of amounts attributable to the dollar equivalent of unused paid time off is subject to the additional 10% income tax under § 72(t) if the distribution does not meet one of the exceptions of § 72(t), such as being made on or after the date on which the participant attains age 59½ or after the participant separates from service after attainment of age 55.

Under the facts of Situation 4, D terminates employment in 2009, but the con-

tribution to the X Profit Sharing Plan and the cash payment to D occur in 2010. Under the X PTO Plan as amended, the dollar equivalent of unused paid time off is not paid, set apart, or otherwise made available so that D may draw on it either (i) during the 2009 calendar year or (ii) upon conversion in 2009 to a contribution to a qualified plan or cash payment in 2010. Therefore, such amount is not includible in D's gross income in 2009 under the doctrine of constructive receipt and § 451. In addition, the amendment to the W PTO Plan and the operation of the plan in accordance with the terms of the amendment do not cause the W PTO Plan to fail to qualify as a bona fide sick and vacation leave plan for purposes of § 409A and § 1.409A-1(a)(5). The \$90x payment is includible in D's gross income in 2010, the taxable year in which it is paid to D.

HOLDING

1. Under the facts presented, the amendments requiring or permitting certain contributions of the dollar equivalent of unused paid time off to a qualified profit-sharing plan do not cause the plan to fail to meet the qualification requirements of § 401(a), provided that the contributions satisfy the applicable requirements of §§ 401(a)(4) and 415(c) and, where applicable, §§ 401(k) and 401(a)(30).
2. Under the facts presented, assuming the applicable qualification requirements are satisfied, a participant does not include in gross income contributions of the dollar equivalent of unused paid time off to the profit-sharing plan in accordance with § 402(a) until distributions are made to the participant from the plan and does not include in gross income an amount paid for the dollar equivalent of unused paid time off that is not contributed to the profit-sharing plan until the taxable year in which the amount is paid to the participant.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Robert Gertner, Roger Kuehnle, and Alice Lynch of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this rev-

enue ruling may be sent via e-mail to retirementplanquestions@irs.gov.

Section 6621.—Determination of Rate of Interest

26 CFR 301.6621-1: Interest rate.

Interest rates; underpayments and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning October 1, 2009, will be 4 percent for overpayments (3 percent in the case of a corporation), 4 percent for underpayments, and 6 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding \$10,000 will be 1.5 percent.

Rev. Rul. 2009-27

Section 6621 of the Internal Revenue Code establishes the rates for interest on tax overpayments and tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding \$10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) is determined by substituting "5 percentage points" for "3 percentage points." See section 6621(c) and section 301.6621-3 of the Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621-3 are generally effective for periods after December 31, 1990.

Section 6621(b)(1) provides that the Secretary will determine the federal short-term rate for the first month in each calendar quarter. Section 6621(b)(2)(A) provides that the federal short-term rate determined under section 6621(b)(1) for any month applies during the first calendar

quarter beginning after that month. Section 6621(b)(3) provides that the federal short-term rate for any month is the federal short-term rate determined during that month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

Notice 88-59, 1988-1 C.B. 546, announced that, in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

The federal short-term rate determined in accordance with section 1274(d) during July 2009 is the rate published in Revenue

Rule 2009-22 to take effect beginning August 1, 2009. The federal short-term rate, rounded to the nearest full percent, based on daily compounding determined during the month of July 2009 is 1 percent. Accordingly, an overpayment rate of 4 percent (3 percent in the case of a corporation) and an underpayment rate of 4 percent are established for the calendar quarter beginning October 1, 2009. The overpayment rate for the portion of a corporate overpayment exceeding \$10,000 for the calendar quarter beginning October 1, 2009, is 1.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning October 1, 2009, is 6 percent. These rates apply to amounts bearing interest during that calendar quarter.

Interest factors for daily compound interest for annual rates of 1.5 percent, 3 percent, 4 percent, and 6 percent are published

in Tables 8, 11, 13, and 17 of Rev. Proc. 95-17, 1995-1 C.B. 556, 562, 565, 567, and 571.

Annual interest rates to be compounded daily pursuant to section 6622 that apply for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is Deborah Colbert-James of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Colbert-James at (202) 622-8143 (not a toll-free call).

TABLE OF INTEREST RATES
PERIODS BEFORE JUL. 1, 1975 — PERIODS ENDING DEC. 31, 1986
OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	In 1995-1 C.B.
		DAILY RATE TABLE
Before Jul. 1, 1975	6%	Table 2, pg. 557
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 559
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 558
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 557
Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 560
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 560
Jan. 1, 1983—Jun. 30, 1983	16%	Table 37, pg. 591
Jul. 1, 1983—Dec. 31, 1983	11%	Table 27, pg. 581
Jan. 1, 1984—Jun. 30, 1984	11%	Table 75, pg. 629
Jul. 1, 1984—Dec. 31, 1984	11%	Table 75, pg. 629
Jan. 1, 1985—Jun. 30, 1985	13%	Table 31, pg. 585
Jul. 1, 1985—Dec. 31, 1985	11%	Table 27, pg. 581
Jan. 1, 1986—Jun. 30, 1986	10%	Table 25, pg. 579
Jul. 1, 1986—Dec. 31, 1986	9%	Table 23, pg. 577

TABLE OF INTEREST RATES
FROM JAN. 1, 1987 — DEC. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987—Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987—Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987—Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987—Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988—Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988—Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988—Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988—Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989—Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989—Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989—Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989—Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990—Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990—Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990—Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990—Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991—Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991—Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991—Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991—Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992—Mar. 31, 1992	8%	69	623	9%	71	625
Apr. 1, 1992—Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992—Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992—Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993—Mar. 31, 1993	6%	17	571	7%	19	573
Apr. 1, 1993—Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993—Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993—Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994—Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994—Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994—Sep. 30, 1994	7%	19	573	8%	21	575

TABLE OF INTEREST RATES
FROM JAN. 1, 1987 — DEC. 31, 1998 – Continued

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Oct. 1, 1994—Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995—Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995—Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995—Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995—Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996—Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996—Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996—Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996—Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997—Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997—Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997—Sep. 30, 1997	8%	21	575	9%	23	577
Oct. 1, 1997—Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998—Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998—Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998—Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998—Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 — PRESENT
NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	RATE	1995-1 C.B.	
		TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	7%	19	573

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 — PRESENT – Continued
NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	RATE	1995-1 C.B. TABLE	PG
Apr. 1, 2006—Jun. 30, 2006	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	4%	13	567

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 — PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	8%	69	623	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	6%	17	571	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	6%	17	571	7%	19	573

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 — PRESENT – Continued
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Apr. 1, 2006—Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	7%	19	573	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	7%	19	573	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	6%	65	619	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	5%	63	617	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	4%	61	615	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	5%	63	617	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	4%	13	567	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	3%	11	565	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	3%	11	565	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	3%	11	565	4%	13	567

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS
FROM JANUARY 1, 1991 — PRESENT

	RATE	1995-1 C.B.	PG
		TABLE	
Jan. 1, 1991—Mar. 31, 1991	13%	31	585
Apr. 1, 1991—Jun. 30, 1991	12%	29	583
Jul. 1, 1991—Sep. 30, 1991	12%	29	583
Oct. 1, 1991—Dec. 31, 1991	12%	29	583
Jan. 1, 1992—Mar. 31, 1992	11%	75	629
Apr. 1, 1992—Jun. 30, 1992	10%	73	627
Jul. 1, 1992—Sep. 30, 1992	10%	73	627
Oct. 1, 1992—Dec. 31, 1992	9%	71	625
Jan. 1, 1993—Mar. 31, 1993	9%	23	577
Apr. 1, 1993—Jun. 30, 1993	9%	23	577
Jul. 1, 1993—Sep. 30, 1993	9%	23	577
Oct. 1, 1993—Dec. 31, 1993	9%	23	577
Jan. 1, 1994—Mar. 31, 1994	9%	23	577
Apr. 1, 1994—Jun. 30, 1994	9%	23	577
Jul. 1, 1994—Sep. 30, 1994	10%	25	579
Oct. 1, 1994—Dec. 31, 1994	11%	27	581
Jan. 1, 1995—Mar. 31, 1995	11%	27	581
Apr. 1, 1995—Jun. 30, 1995	12%	29	583
Jul. 1, 1995—Sep. 30, 1995	11%	27	581
Oct. 1, 1995—Dec. 31, 1995	11%	27	581
Jan. 1, 1996—Mar. 31, 1996	11%	75	629
Apr. 1, 1996—Jun. 30, 1996	10%	73	627
Jul. 1, 1996—Sep. 30, 1996	11%	75	629
Oct. 1, 1996—Dec. 31, 1996	11%	75	629
Jan. 1, 1997—Mar. 31, 1997	11%	27	581
Apr. 1, 1997—Jun. 30, 1997	11%	27	581
Jul. 1, 1997—Sep. 30, 1997	11%	27	581
Oct. 1, 1997—Dec. 31, 1997	11%	27	581
Jan. 1, 1998—Mar. 31, 1998	11%	27	581
Apr. 1, 1998—Jun. 30, 1998	10%	25	579

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS
FROM JANUARY 1, 1991 — PRESENT — Continued

	RATE	1995-1 C.B. TABLE	PG
Jul. 1, 1998—Sep. 30, 1998	10%	25	579
Oct. 1, 1998—Dec. 31, 1998	10%	25	579
Jan. 1, 1999—Mar. 31, 1999	9%	23	577
Apr. 1, 1999—Jun. 30, 1999	10%	25	579
Jul. 1, 1999—Sep. 30, 1999	10%	25	579
Oct. 1, 1999—Dec. 31, 1999	10%	25	579
Jan. 1, 2000—Mar. 31, 2000	10%	73	627
Apr. 1, 2000—Jun. 30, 2000	11%	75	629
Jul. 1, 2000—Sep. 30, 2000	11%	75	629
Oct. 1, 2000—Dec. 31, 2000	11%	75	629
Jan. 1, 2001—Mar. 31, 2001	11%	27	581
Apr. 1, 2001—Jun. 30, 2001	10%	25	579
Jul. 1, 2001—Sep. 30, 2001	9%	23	577
Oct. 1, 2001—Dec. 31, 2001	9%	23	577
Jan. 1, 2002—Mar. 31, 2002	8%	21	575
Apr. 1, 2002—Jun. 30, 2002	8%	21	575
Jul. 1, 2002—Sep. 30, 2002	8%	21	575
Oct. 1, 2002—Dec. 30, 2002	8%	21	575
Jan. 1, 2003—Mar. 31, 2003	7%	19	573
Apr. 1, 2003—Jun. 30, 2003	7%	19	573
Jul. 1, 2003—Sep. 30, 2003	7%	19	573
Oct. 1, 2003—Dec. 31, 2003	6%	17	571
Jan. 1, 2004—Mar. 31, 2004	6%	65	619
Apr. 1, 2004—Jun. 30, 2004	7%	67	621
Jul. 1, 2004—Sep. 30, 2004	6%	65	619
Oct. 1, 2004—Dec. 31, 2004	7%	67	621
Jan. 1, 2005—Mar. 31, 2005	7%	19	573
Apr. 1, 2005—Jun. 30, 2005	8%	21	575
Jul. 1, 2005—Sep. 30, 2005	8%	21	575
Oct. 1, 2005—Dec. 31, 2005	9%	23	577
Jan. 1, 2006—Mar. 31, 2006	9%	23	577
Apr. 1, 2006—Jun. 30, 2006	9%	23	577
Jul. 1, 2006—Sep. 30, 2006	10%	25	579
Oct. 1, 2006—Dec. 31, 2006	10%	25	579
Jan. 1, 2007—Mar. 31, 2007	10%	25	579
Apr. 1, 2007—Jun. 30, 2007	10%	25	579
Jul. 1, 2007—Sep. 30, 2007	10%	25	579
Oct. 1, 2007—Dec. 31, 2007	10%	25	579
Jan. 1, 2008—Mar. 31, 2008	9%	71	625
Apr. 1, 2008—Jun. 30, 2008	8%	69	623
Jul. 1, 2008—Sep. 30, 2008	7%	67	621
Oct. 1, 2008—Dec. 31, 2008	8%	69	623
Jan. 1, 2009—Mar. 31, 2009	7%	19	573
Apr. 1, 2009—Jun. 30, 2009	6%	17	571
Jul. 1, 2009—Sep. 30, 2009	6%	17	571
Oct. 1, 2009—Dec. 31, 2009	6%	17	571

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING \$10,000
FROM JANUARY 1, 1995 — PRESENT

	RATE	1995-1 C.B. TABLE	PG
Jan. 1, 1995—Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995—Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995—Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995—Dec. 31, 1995	6.5%	18	572
Jan. 1, 1996—Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996—Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996—Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996—Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997—Mar. 31, 1997	6.5%	18	572
Apr. 1, 1997—Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997—Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997—Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998—Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998—Jun. 30, 1998	5.5%	16	570
Jul. 1, 1998—Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998—Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999—Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999—Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999—Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999—Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000—Mar. 31, 2000	5.5%	64	618
Apr. 1, 2000—Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000—Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000—Dec. 31, 2000	6.5%	66	620
Jan. 1, 2001—Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001—Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001—Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001—Dec. 31, 2001	4.5%	14	568
Jan. 1, 2002—Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002—Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002—Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002—Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003—Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003—Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003—Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003—Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004—Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004—Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004—Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004—Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005—Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005—Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005—Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005—Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006—Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006—Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006—Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006—Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007—Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007—Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007—Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007—Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008—Mar. 31, 2008	4.5%	62	616
Apr. 1, 2008—Jun. 30, 2008	3.5%	60	614
Jul. 1, 2008—Sep. 30, 2008	2.5%	58	612

TABLE OF INTEREST RATES FOR CORPORATE
OVERPAYMENTS EXCEEDING \$10,000
FROM JANUARY 1, 1995 — PRESENT — Continued

	RATE	1995-1 C.B. TABLE	PG
Oct. 1, 2008—Dec. 31, 2008	3.5%	60	614
Jan. 1, 2009—Mar. 31, 2009	2.5%	10	564
Apr. 1, 2009—Jun. 30, 2009	1.5%	8	562
Jul. 1, 2009—Sep. 30, 2009	1.5%	8	562
Oct. 1, 2009—Dec. 31, 2009	1.5%	8	562

Part III. Administrative, Procedural, and Miscellaneous

Adding Automatic Enrollment to Section 401(k) Plans — Sample Amendments

Notice 2009–65

I. PURPOSE

This notice facilitates automatic enrollment by providing two sample plan amendments for sponsors, practitioners, and employers who want to add certain automatic contribution features to their § 401(k) plans. Sample Amendment 1 can be used to add an automatic contribution arrangement to a § 401(k) plan. Sample Amendment 2 can be used to add an eligible automatic contribution arrangement described in § 414(w) of the Internal Revenue Code (permitting 90-day withdrawals) to a § 401(k) plan.

II. BACKGROUND

Rev. Rul. 2000–8, 2000–1 C.B. 617, provides guidance on automatic contribution arrangements in § 401(k) plans, and under § 1.401(k)–1(a)(3)(ii) of the Income Tax Regulations, the default that applies under a § 401(k) plan in the absence of an employee’s affirmative election can be for the employer to make elective contributions to the plan on the employee’s behalf.

Under § 1.401(k)–1(e)(2)(ii), a § 401(k) plan must provide an eligible employee an effective opportunity to make (or change) a cash or deferred election at least once during each plan year, and whether an eligible employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

Section 902 of the Pension Protection Act of 2006, Public Law 109–280 (PPA ’06), added §§ 401(k)(13), 401(m)(12), and 414(w) to the Code and amended §§ 411(a)(3)(G) and 4979 to facilitate

automatic contribution arrangements in qualified cash or deferred arrangements under § 401(k). Final regulations under these Code sections were published in the *Federal Register* on February 24, 2009 (T.D. 9447, 2009–12 I.R.B. 694 [74 F.R. 8200]). Section 1107 of PPA ’06 provided generally that any plan amendment made pursuant to PPA ’06 can be made as late as the last day of the first plan year beginning on or after January 1, 2009 (2011 in the case of a governmental plan).

III. SAMPLE PLAN AMENDMENTS

In General. Two sample plan amendments are provided in the Appendix that sponsors, practitioners, and employers (“plan sponsors”) can adopt or use in drafting individualized plan amendments. Because each amendment is a sample amendment, plan sponsors are not required to adopt either amendment verbatim. In fact, it may be necessary for plan sponsors to modify the chosen amendment to conform to their plan’s terms and administrative procedures.

Time and Manner of Adoption. Plan sponsors who want to add one of the sample amendments to their § 401(k) plans must adopt the chosen amendment by the later of (1) the end of the plan year in which the amendment is effective, pursuant to the deadline to adopt a discretionary amendment as provided in § 5.05(2) of Rev. Proc. 2007–44, 2007–2 C.B. 54; or (2) if applicable, the deadline under § 1107 of PPA ’06 for adopting an amendment made pursuant to PPA ’06. Pursuant to § 5.06(1) of Rev. Proc. 2007–44, a later deadline may apply to a governmental plan. The timely adoption of the chosen amendment must be evidenced by a written document that is signed and dated by the employer (including an adopting employer of a pre-approved plan). However, regardless of when the amendment is adopted, the proper notice describing the features of the plan as amended must be provided to employees affected by the amendment within

a reasonable period before the amendment is effective.

Effect on Reliance. The adoption of either sample plan amendment (as modified, if necessary to conform to the plan’s terms and administrative procedures) will not result in the loss of reliance on a favorable opinion, advisory, or determination letter. Also, the Service will not treat the adoption of one of the amendments as affecting the pre-approved status of a master and prototype (“M&P”) or volume submitter plan. That is, such an amendment to an M&P plan that is adopted by an employer will not cause the plan to fail to be an M&P plan. Similarly, such an amendment to a volume submitter plan that is adopted by an employer will not cause the plan to fail to be a volume submitter plan.

Format of the Sample Amendments. The format of the sample plan amendments generally follows the design of pre-approved plans, including all M&P plans, that employ a “basic plan document” and an “adoption agreement.” Thus, the sample plan amendments include language designed for inclusion in a basic plan document and language designed for inclusion in an adoption agreement to allow the employer to select among options related to the application of the basic plan document provision. Sponsors of plans that do not use an adoption agreement should modify the format of the chosen amendment to incorporate the appropriate adoption agreement options in the terms of the amendment. In such case, the notes in the adoption agreement portion of the sample amendment should not be included in the amendment that will be signed and dated by the employer.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to RetirementPlanQuestions@irs.gov.

Appendix

Sample Amendment 1

Article [] Automatic Contribution Arrangement

Section 1. Rules of Application

1.1 If the Employer has elected the automatic contribution arrangement option in the adoption agreement, the provisions of this Article shall apply and, to the extent that any other provision of the Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Default Elective Deferrals will be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. The amount of Default Elective Deferrals made for a Covered Employee each pay period is equal to the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's compensation for that pay period. If the Employer has so elected in the adoption agreement, a Covered Employee's Default Percentage will increase by a designated percentage point or points each Plan Year up to the maximum, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the adoption agreement, the first pay period in such Plan Year that begins on or after the date specified in the adoption agreement.

1.3 A Covered Employee will have a reasonable opportunity after receipt of the notice described in Section 3 of this Article to make an affirmative election regarding Elective Deferrals (either to have no Elective Deferrals made or to have a different amount of Elective Deferrals made) before Default Elective Deferrals are made on the Covered Employee's behalf. Default Elective Deferrals being made on behalf of a Covered Employee will cease as soon as administratively feasible after the Covered Employee makes an affirmative election.

Section 2. Definitions

2.1 An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

2.2 A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the automatic contribution arrangement.

2.3 "Default Elective Deferrals" are Elective Deferrals contributed to the Plan under the automatic contribution arrangement on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals.

2.4 The "Default Percentage" is the percentage of a Covered Employee's compensation contributed to the Plan as a Default Elective Deferral for a Plan Year. The Default Percentage is specified in the adoption agreement.

Section 3. Notice Requirement

3.1 At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Covered Employee a comprehensive notice of the Covered Employee's rights and obligations under the automatic contribution arrangement, written in a manner calculated to be understood by the average Covered Employee. If an employee becomes a Covered Employee after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice will be provided no more than 90 days before the employee becomes a Covered Employee but not later than the date the employee becomes a Covered Employee.

3.2 The notice will accurately describe:

- (a) The amount of Default Elective Deferrals that will be made on the Covered Employee's behalf in the absence of an affirmative election;
- (b) The Covered Employee's right to elect to have no Elective Deferrals made on his or her behalf or to have a different amount of Elective Deferrals made; and
- (c) How Default Elective Deferrals will be invested in the absence of the Covered Employee's investment instructions.

Sample Adoption Agreement Language:

Article [] Automatic Contribution Arrangement

[] If checked, the Automatic Contribution Arrangement provisions of Article [] apply.

Section 1. Covered Employee

Employees covered under the automatic contribution arrangement are: *(check one of the options below)*

All Plan participants.

All Plan participants who do not have an affirmative election in effect regarding Elective Deferrals.

All Plan participants who become Plan participants on or after the effective date of the automatic contribution arrangement and who do not have an affirmative election in effect regarding Elective Deferrals.

Section 2. Default Percentage *(Check one of the options below and insert a percentage or percentages and, if applicable, a date.)*

The Default Percentage is []%.

The initial Default Percentage is []% and will increase by [] *(insert a number)* percentage point(s) as described in Section 1.2 of Article [] of the Plan until the Default Percentage is []%. *(Insert the highest Default Percentage that will apply.)* Each increase will be effective at the beginning of the Plan Year unless a different date is inserted here: _____. *(Insert the date of each increase.)*

Section 3. Effective Date

The Automatic Contribution Arrangement under Article [] is effective _____. *(Insert the date the amendment is effective.)*

Name of Employer

By: Signature

Date

Name and title

Sample Amendment 2

Article [] Eligible Automatic Contribution Arrangement (EACA)

Section 1. Rules of Application

1.1 If the Employer has elected the EACA option in the adoption agreement, the provisions of this Article shall apply for the Plan Year and, to the extent that any other provision of the Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Default Elective Deferrals will be made on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals. The amount of Default Elective Deferrals made for a Covered Employee each pay period is equal to the Default Percentage specified in the adoption agreement multiplied by the Covered Employee's compensation for that pay period. If the Employer has so elected in the adoption agreement, a Covered Employee's Default Percentage will increase by a designated percentage point or points each Plan Year, beginning with the second Plan Year that begins after the Default Percentage first applies to the Covered Employee. The increase will be effective beginning with the first pay period that begins in such Plan Year or, if elected by the Employer in the adoption agreement, the first pay period in such Plan Year that begins on or after the date specified in the adoption agreement.

1.3 A Covered Employee will have a reasonable opportunity after receipt of the notice described in Section 4 of this Article to make an affirmative election regarding Elective Deferrals (either to have no Elective Deferrals made or to have a different amount of Elective Deferrals made) before Default Elective Deferrals are made on the Covered Employee's behalf. Default Elective Deferrals being made on behalf of a Covered Employee will cease as soon as administratively feasible after the Covered Employee makes an affirmative election.

Section 2. Definitions

2.1 An "EACA" is an automatic contribution arrangement that satisfies the uniformity requirement in Section 3 of this Article and the notice requirement in Section 4 of this Article.

2.2 An "automatic contribution arrangement" is an arrangement under which, in the absence of an affirmative election by a Covered Employee, a certain percentage of compensation will be withheld from the Covered Employee's pay and contributed to the Plan as an Elective Deferral.

2.3 A "Covered Employee" is a Plan participant identified in the adoption agreement as being covered under the EACA.

2.4 "Default Elective Deferrals" are the Elective Deferrals contributed to the Plan under the EACA on behalf of Covered Employees who do not have an affirmative election in effect regarding Elective Deferrals.

2.5 The "Default Percentage" is the percentage of a Covered Employee's compensation contributed to the Plan as a Default Elective Deferral for the Plan Year. The Default Percentage is specified in the adoption agreement.

Section 3. Uniformity Requirement

3.1 Except as provided in Section 3.2 below or if the Employer has elected an increasing Default Percentage in the adoption agreement, the same percentage of compensation will be withheld as Default Elective Deferrals from all Covered Employees subject to the Default Percentage.

3.2 Default Elective Deferrals will be reduced or stopped to meet the limitations under Code §§ 401(a)(17), 402(g), and 415 and to satisfy any suspension period required after a hardship distribution.

Section 4. Notice Requirement

4.1 At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the Employer will provide each Covered Employee a comprehensive notice of the Covered Employee's rights and obligations under the EACA, written in a manner calculated to be understood by the average Covered Employee. If an employee becomes a Covered Employee after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice will be provided no more than 90 days before the employee becomes a Covered Employee but not later than the date the employee becomes a Covered Employee.

4.2 The notice must accurately describe:

- (a) The amount of Default Elective Deferrals that will be made on the Covered Employee's behalf in the absence of an affirmative election;
- (b) The Covered Employee's right to elect to have no Elective Deferrals made on his or her behalf or to have a different amount of Elective Deferrals made;

(c) How Default Elective Deferrals will be invested in the absence of the Covered Employee's investment instructions; and

(d) The Covered Employee's right to make a withdrawal of Default Elective Deferrals and the procedures for making such a withdrawal.

Section 5. Withdrawal of Default Elective Deferrals

5.1 No later than 90 days after Default Elective Deferrals are first withheld from a Covered Employee's pay, the Covered Employee may request a distribution of his or her Default Elective Deferrals. No spousal consent is required for a withdrawal under this Section 5.

5.2 The amount to be distributed from the Plan upon the Covered Employee's request is equal to the amount of Default Elective Deferrals made through the earlier of (a) the pay date for the second payroll period that begins after the Covered Employee's withdrawal request and (b) the first pay date that occurs after 30 days after the Covered Employee's request, plus attributable earnings through the date of distribution. Any fee charged to the Covered Employee for the withdrawal may not be greater than any other fee charged for a cash distribution.

5.3 Unless the Covered Employee affirmatively elects otherwise, any withdrawal request will be treated as an affirmative election to stop having Elective Deferrals made on the Covered Employee's behalf as of the date specified in Section 5.2 above.

5.4 Default Elective Deferrals distributed pursuant to this Section 5 are not counted towards the dollar limitation on Elective Deferrals contained in Code § 402(g) nor for the ADP test. Matching Contributions that might otherwise be allocated to a Covered Employee's account on behalf of Default Elective Deferrals will not be allocated to the extent the Covered Employee withdraws such Elective Deferrals pursuant to this Section 5 and any Matching Contributions already made on account of Default Elective Deferrals that are later withdrawn pursuant to this Section 5 will be forfeited.

Section 6. Special Rule for Distribution of Excess Contributions and Excess Aggregate Contributions

If the Employer has elected in the adoption agreement that all Plan participants are Covered Employees, then the Plan has until 6 months (rather than 2½ months) after the end of the Plan Year to distribute Excess Contributions and Excess Aggregate Contributions and avoid the Code § 4979 10% excise tax.

Sample Adoption Agreement Language:

Article [] Eligible Automatic Contribution Arrangement (EACA)

[] If checked, the Eligible Automatic Contribution Arrangement (EACA) provisions of Article [] apply.

Section 1. Covered Employee

Employees covered under the EACA are: *(check one of the options below)*

[] All Plan participants.

[] All Plan participants who do not have an affirmative election in effect regarding Elective Deferrals.

[] All Plan participants who become Plan participants on or after the effective date of the EACA and who do not have an affirmative election in effect regarding Elective Deferrals.

Section 2. Default Percentage *(Check one of the options below and insert a percentage or percentages and, if applicable, a date.)*

[] The Default Percentage is []%.

[] The initial Default Percentage is []% and will increase by [] *(insert a number)* percentage point(s) as described in Section 1.2 of Article [] of the Plan until the Default Percentage is []%. *(Insert the highest Default Percentage that will apply.)* Each increase will be effective at the beginning of the Plan Year unless a different date is inserted here: _____ *(Insert the date of each increase.)*

the time and method of making elections under the plan, and the procedures for, and effects of, making withdrawals, including rollovers, from the SIMPLE IRA.

In general, a SIMPLE IRA plan must permit each eligible employee to select the financial institution to which SIMPLE IRA contributions are made on behalf of the employee. Alternatively, an employer is permitted to establish a SIMPLE IRA plan with a designated financial institution, so that all contributions under the plan are made to SIMPLE IRAs at the designated institution. In that case, an employee must be given a reasonable period of time each year in which to transfer his or her SIMPLE IRA balance without cost or penalty from the designated financial institution to a SIMPLE IRA at another financial institution selected by the employee. This requirement is deemed to be met if an employee has until the end of the employee's annual or initial 60-day election period to request to transfer, without cost or penalty, the balance attributable to contributions made for the next year (or for the remainder of the year in the case of an initial election period) and subsequent years to a SIMPLE IRA at another financial institution selected by the employee. The right to make such a transfer must be included in the notice provided to the employee immediately before the election period.

Distributions from a SIMPLE IRA are includible in gross income for the taxable year in which made unless rolled over to another SIMPLE IRA or tax-favored retirement plan. Distributions made during the 2-year period beginning when an employee first participates in any SIMPLE IRA plan of the employer (the employee's "initial two-year participation period") are permitted to be rolled over only to another SIMPLE IRA. Distributions made before age 59½ are subject to the additional 10-percent tax on early withdrawals under § 72(t) unless the distribution is rolled over or an exception applies. However, in the case of a distribution from a SIMPLE IRA made during the employee's initial two-year participation period, the rate of the additional tax is 25 percent rather than 10 percent.

An automatic contribution arrangement is an arrangement under which, in the absence of an affirmative election by an employee, a default election applies whereby

the employee is treated as having elected to have a portion of the employee's compensation contributed to a tax-favored retirement plan as default elective contributions rather than paid to the employee in cash.

III. QUESTIONS AND ANSWERS ON AUTOMATIC ENROLLMENT IN SIMPLE IRA PLANS

Q-1: May a SIMPLE IRA plan include an automatic contribution arrangement?

A-1: Yes. Section 408(p) requires that an employee eligible to participate in a SIMPLE IRA plan have an election between the employer paying cash to the employee or making a contribution to a SIMPLE IRA on behalf of the employee. It does not, however, require that the employee receive an amount in cash in any case in which the employee does not make an affirmative election to have that amount contributed to the SIMPLE IRA. Thus, for purposes of determining whether a contribution is a salary reduction contribution to a SIMPLE IRA, it is irrelevant whether the default that applies in the absence of an affirmative election is (1) for the employee to receive an amount in cash or (2) for the employer to contribute an amount to the SIMPLE IRA.

Q-2: May a SIMPLE IRA plan that includes an automatic contribution arrangement provide that default salary reduction contributions are made only for employees who are first eligible under the SIMPLE IRA plan on or after the effective date of the automatic contribution arrangement and who do not make an affirmative election (including an affirmative election of zero)?

A-2: Yes.

Q-3: May a SIMPLE IRA plan that includes an automatic contribution arrangement provide that the percentage of compensation at which default salary reduction contributions are made for an employee increases based on the number of years or portions of years for which default salary reduction contributions have been made for the employee?

A-3: Yes.

Q-4: What notice requirements apply to a SIMPLE IRA plan that includes an automatic contribution arrangement?

A-4: In addition to the information otherwise required to be included in a SIMPLE IRA notice, the notice must ex-

plain (1) the percentage of compensation at which default salary reduction contributions will be made on the employee's behalf if the employee does not make an affirmative election, (2) the employee's right to elect not to have default salary reduction contributions made to the SIMPLE IRA or to have salary reduction contributions made at a different percentage of compensation or, if permitted under the SIMPLE IRA plan, in a different dollar amount, and (3) how default salary reduction contributions will be invested in the absence of any investment election by the employee. In the case of a SIMPLE IRA plan under which all contributions are made to a designated financial institution, the notice must also explain the additional period (as discussed in Q&A-5 of this notice) during which an employee may elect to transfer his or her balance without cost or penalty to another SIMPLE IRA.

Q-5: In the case of a SIMPLE IRA plan under which all contributions are made to a designated financial institution, how does an employee's right to transfer his or her balance without cost or penalty to another SIMPLE IRA apply if default salary reduction contributions are made for an employee under an automatic contribution arrangement?

A-5: As discussed in Section II of this notice, an employee must be permitted during his or her annual or initial 60-day election period to request to transfer, without cost or penalty, the balance attributable to contributions made for the next year (or for the remainder of the year in the case of an initial election period) and subsequent years to a SIMPLE IRA at another financial institution selected by the employee. If default salary reduction contributions for an employee are made to a designated financial institution, the employee must also be permitted, during the first 60 calendar days of the first year for which default salary reduction contributions are made (or the remainder of the first year in the case of an initial election period), to elect to transfer, without cost or penalty, his or her balance attributable to contributions made for that year and subsequent years to a SIMPLE IRA at another financial institution selected by the employee.

Q-6: In the case of a SIMPLE IRA plan that is covered by the fiduciary duty requirements of § 404 of Title I of the Employee Retirement Income Security Act of

1974 (“ERISA”), does fiduciary relief under § 404(c)(5) of ERISA apply with respect to the investment of SIMPLE IRA contributions, including default salary reduction contributions, in default investments (*i.e.*, investments made in the absence of any investment direction by the employee)?

A–6: The Department of Labor has advised the Internal Revenue Service that the regulations under § 404(c)(5) of ERISA relating to qualified default investment alternatives (29 CFR 2550.404c–5) apply to the investment of contributions, including default salary reduction contributions, under a SIMPLE IRA plan. Therefore, if the requirements of these regulations are met, fiduciary relief under § 404(c)(5) of ERISA applies with respect to the investment of such contributions in default investments.

IV. ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENTS UNDER § 414(w) AND REQUEST FOR COMMENTS

Section 902 of the Pension Protection Act of 2006, Public Law 109–280 (enacted August 17, 2006), added § 414(w) to the Code to facilitate automatic contribution arrangements in § 401(k) plans, § 403(b) plans, and governmental § 457(b) plans. Under § 414(w), an applicable employer plan that contains an eligible automatic contribution arrangement is permitted to allow employees, within 90 days after the date of the first default elective contribution with respect to the employee under the arrangement, to elect to receive a distribution based on the default elective contributions and avoid the additional income tax on early withdrawals under § 72(t). Section 109(b)(5) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110–458 (enacted December 23, 2008), added SIMPLE IRA plans described in § 408(p) of the Code (and salary reduction simplified employee pensions described in § 408(k)(6)) to the list of employer plans that may include an eligible automatic contribution arrangement under § 414(w) of the Code. Final regulations under § 414(w) were published on February 24, 2009 in the *Federal Register* (74 F.R. 8200). The preamble to the regulations provides that they do not reflect guidance on SIMPLE IRA plans that

include an eligible automatic contribution arrangement.

Comments are requested on whether the Department of the Treasury and the Service should issue guidance regarding SIMPLE IRA plans that include eligible automatic contribution arrangements under § 414(w) and, if so, what issues should be addressed in the guidance. For example, such issues might include:

- Application to SIMPLE IRA plans of the last sentence of § 414(w)(1) regarding the forfeiture, or other possible treatment, of employer matching contributions that relate to salary reduction contributions withdrawn in a permissible withdrawal under § 414(w);
- Application to SIMPLE IRA plans of the requirement in § 414(w)(3)(B) that default salary reduction contributions be a uniform percentage of compensation; and
- Administrative issues with respect to permissible withdrawals under § 414(w) and associated matching contributions, such as determining the proper amount of a permissible withdrawal, information sharing with respect to a permissible withdrawal, and reporting of a permissible withdrawal.

Comments are also requested on whether the Department of the Treasury and the Service should issue additional guidance regarding SIMPLE IRA plans that include automatic contribution arrangements that are not eligible automatic contribution arrangements under § 414(w) and, if so, what issues should be addressed in the additional guidance.

Written comments can be sent to CC:PA:LPD:DRU (Notice 2009–66), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, DC 20044. Also, comments may be hand delivered between the hours of 8 a.m. and 4 p.m., Monday through Friday, to CC:PA:LPD:DRU (Notice 2009–66), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the following e-mail address: notice.comments@irs.counsel.treas.gov (Notice 2009–66). All comments will be available for public inspection.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via email to RetirementPlanQuestions@irs.gov.

Adding Automatic Enrollment to SIMPLE IRA Plans — Sample Amendment

Notice 2009–67

I. PURPOSE

This notice facilitates automatic enrollment by providing a sample plan amendment that a prototype sponsor of a SIMPLE IRA plan (using a designated financial institution) can use in drafting an amendment to add an automatic contribution arrangement to the SIMPLE IRA plan.

II. BACKGROUND

Section 408(p) of the Internal Revenue Code provides rules for a SIMPLE IRA plan, which is a simplified tax-favored retirement plan for small employers. Notice 98–4, 1998–1 C.B. 25, provides guidance with respect to SIMPLE IRA plans.

An automatic contribution arrangement is an arrangement under which, in the absence of an affirmative election by an employee, a default election applies under which the employee is treated as having elected to have a portion of the employee’s compensation contributed to a tax-favored retirement plan rather than paid to the employee in cash. A SIMPLE IRA plan may include an automatic contribution arrangement. See Notice 2009–66, I.R.B. 2009–39, 418.

III. SAMPLE PLAN AMENDMENT

Sponsor Adoption. A sample plan amendment is provided in the Appendix that a prototype sponsor of a SIMPLE IRA plan (using a designated financial institution) can use in drafting an amendment to add an automatic contribution arrangement. Because the amendment is a sample amendment, prototype sponsors are not required to adopt the amendment

verbatim. In fact, it may be necessary for prototype sponsors to modify the sample amendment to conform to their SIMPLE IRA plan's terms and administrative procedures. Sponsors that amend their prototype SIMPLE IRA plan documents pursuant to this notice must furnish a copy of the amendment to each adopting employer, regardless of whether the employer will utilize the automatic contribution arrangement.

Employer Adoption. An employer that wants to add an automatic contribution arrangement to its prototype SIMPLE IRA plan (using a designated financial institution) must adopt the amendment, provided by the prototype sponsor, before the effective date of the automatic contribution

arrangement. The timely adoption of the amendment must be evidenced by a written document that is signed and dated by the employer and the designated financial institution.

Effect on Reliance. The adoption of the sample plan amendment (as modified, if necessary to conform to the plan's terms and administrative procedures) in accordance with the procedures described above will not result in the loss of reliance on a favorable opinion letter.

IV. MODEL FORMS

The Service expects to issue a revised Form 5305-SIMPLE, *Savings Incentive Match Plan for Employees of Small Em-*

ployers (SIMPLE) — for Use With a Designated Financial Institution, that includes an automatic contribution arrangement.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via email to RetirementPlanQuestions@irs.gov.

Appendix

Sample SIMPLE IRA Plan Amendment

Article [] Automatic Contribution Arrangement

Section 1. Rules of Application

1.1 If this Article applies, default salary reduction contributions will be made in accordance with this Article. To the extent that any other provision of the SIMPLE IRA Plan is inconsistent with the provisions of this Article, the provisions of this Article shall govern.

1.2 Subject to the limits on salary reduction contributions contained in this SIMPLE IRA Plan, default salary reduction contributions will only be made for an Eligible Employee who: (*select either a or b*)

[] a. does not have an affirmative election regarding salary reduction contributions in effect on the effective date of the Automatic Contribution Arrangement or on the date the employee first becomes eligible to make salary reduction contributions, if later.

[] b. becomes eligible to make salary reduction contributions on or after the effective date of the Automatic Contribution Arrangement and who does not have an affirmative election regarding salary reduction contributions in effect on the date the employee first becomes eligible to make salary reduction contributions.

Default salary reduction contributions being made on behalf of an Eligible Employee will cease as soon as administratively feasible after the Eligible Employee makes an affirmative election.

1.3 The Default Percentage under the SIMPLE IRA Plan for an Eligible Employee described in Section 1.2 above is: (*Select either a or b and fill in the blanks.*)

[] a. *Fixed.* The Default Percentage is []%.

[] b. *Increasing.* The initial Default Percentage is []%, and each calendar year, beginning with the second calendar year that begins after the Default Percentage first applies to the Eligible Employee, the Default Percentage will increase by [] (*insert a number*) percentage point(s) until the Default Percentage is []%. (*Insert the highest Default Percentage that will apply.*) The increase will be effective beginning with the first pay period that begins in such calendar year.

1.4 No default salary reduction contributions will be made on an Eligible Employee's behalf until after the 60-day election period.

Section 2. Definitions

2.1 An "Automatic Contribution Arrangement" is an arrangement under which, in the absence of an affirmative election by an Eligible Employee, a certain percentage of compensation will be withheld from the Eligible Employee's pay and contributed as a salary reduction contribution to the SIMPLE IRA established under this SIMPLE IRA Plan for the Eligible Employee.

2.2 "Default salary reduction contributions" are the salary reduction contributions made to the SIMPLE IRAs of employees described in Section 1.2 above.

2.3 The "Default Percentage" is the percentage of an employee's compensation contributed to the plan as default salary reduction contributions for a calendar year. The Default Percentage is specified in Section 1.3 above.

Section 3. Modified Notice Requirement

3.1 The notice provided to Eligible Employees immediately prior to the 60-day election period must include, for employees described in Section 1.2 above, a comprehensive explanation of the employee's rights and obligations under the Automatic Contribution Arrangement, written in a manner calculated to be understood by the average employee described in Section 1.2 above.

3.2 The notice must accurately describe:

(a) The amount of default salary reduction contributions that will be made on the Eligible Employee's behalf in the absence of an affirmative election and when default salary reduction contributions will start;

(b) The Eligible Employee's right to elect to have no salary reduction contributions made on his or her behalf or to have a different amount of salary reduction contributions made;

(c) How default salary reduction contributions will be invested in the absence of the Eligible Employee's investment instructions; and

(d) If not already permitted under the SIMPLE IRA Plan, the additional period (described in Section 4 below) to make a transfer without cost or penalty from the SIMPLE IRA established for the Eligible Employee at the designated financial institution.

Section 4. Modification of Designated Financial Institution Rules

Notwithstanding any limitation on an Eligible Employee’s right to transfer, without cost or penalty, the balance in his or her SIMPLE IRA maintained at a designated financial institution to another SIMPLE IRA, an employee described in Section 1.2 above may request such a transfer during the 60 days immediately following the employee’s first 60-day election period under the Automatic Contribution Arrangement. This period is in addition to any other periods provided under this SIMPLE IRA Plan, and the transfer request can apply to the entire balance accrued since default salary reduction contributions were first made on the employee’s behalf and to the balance attributable to future contributions, at the employee’s request.

Section 5. Effective Date

This Article [] is effective _____. (Insert January 1 of the first calendar year the Automatic Contribution Arrangement applies or the date the SIMPLE IRA Plan is effective, if later.)

This Article applies only if the effective date is inserted above and the employer and designated financial institution properly execute the amendment.

Name of Employer		

By:	Signature	Date

Name and title		

Name of Financial Institution		

By:	Signature	Date

Name and title		

Safe Harbor Explanation — Eligible Rollover Distributions

Notice 2009-68

I. PURPOSE

This notice contains two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy § 402(f) of the Internal Revenue Code (Code). The first safe harbor explanation applies to a distribution not from a designated Roth account (as described in § 402A). The second safe harbor explanation applies to a distribution from a designated Roth account. These safe harbor explanations update the safe harbor explanations that were published in Notice 2002-3, 2002-1 C.B. 289, to reflect changes in the law. These safe harbor ex-

planations also reorganize and simplify the presentation of the information.

II. BACKGROUND

Section 402(f) requires the plan administrator of a plan qualified under § 401(a) to provide a written explanation to any recipient of an eligible rollover distribution, as defined in § 402(c)(4). In addition, §§ 403(a)(4)(B) and 457(e)(16)(B) require a plan administrator of a § 403(a) plan, or an eligible § 457(b) plan maintained by a governmental employer described in § 457(e)(1)(A) (governmental § 457(b) plan), to provide a written explanation to any recipient of an eligible rollover distribution. Further, § 403(b)(8)(B) requires a payor under a § 403(b) plan to provide a written explanation to the recipient of an eligible rollover distribution.

An eligible rollover distribution is a payment that may be rolled over to an eligible retirement plan, as defined in § 402(c)(8)(B). The term eligible retire-

ment plan means an individual retirement plan or an eligible employer plan. An individual retirement plan (IRA) is defined in § 7701(a)(37) as an individual retirement account described in § 408(a) or an individual retirement annuity described in § 408(b). For purposes of this notice, the term eligible employer plan means: a plan qualified under § 401(a), including a money purchase pension plan, a profit-sharing or stock bonus plan (whether or not the plan includes a qualified cash or deferred arrangement under § 401(k)), and a defined benefit plan; a § 403(a) plan; a § 403(b) plan; or a governmental § 457(b) plan.

The written explanation must describe the direct rollover rules, the mandatory income tax withholding rules for distributions not directly rolled over, the tax treatment of distributions not rolled over, and when distributions may be subject to different restrictions and tax consequences after being rolled over. Section 402(f) provides that this explanation must be given

within a reasonable period of time before the plan makes an eligible rollover distribution. Under § 1.402(f)-1, A-5, of the Income Tax Regulations, the requirements of § 402(f) are satisfied if this explanation (§ 402(f) notice) is provided through the use of an electronic medium that complies with the requirements of § 1.401(a)-21. This explanation should be provided only to participants who are eligible to receive distributions that are eligible rollover distributions.

Section 1.402(f)-1, A-1(b), provides that a plan administrator is deemed to have complied with the requirement that a § 402(f) notice contain certain specified information if the plan administrator provides the applicable model § 402(f) notice published by the IRS. The safe harbor explanations in this notice constitute applicable model § 402(f) notices for this purpose.

This notice provides updated safe harbor explanations that reflect changes made to the Code that affect the information required to be provided in a § 402(f) notice, including sections 617 and 657 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), P.L. 107-16, and sections 824, 827, 828, 829, and 845 of the Pension Protection Act of 2006 (PPA '06), P.L. 109-280. Section 617(a) of EGTRRA added § 402A of the Code, which allows a plan to permit an employee who makes elective contributions under a qualified cash or deferred arrangement to designate some or all of those contributions as designated Roth contributions.¹ Section 402A(c)(3) provides that a rollover contribution of any payment or distribution to an individual from a designated Roth account may be made only if the contribution is to another designated Roth account of the individual or to a Roth IRA of the individual.

Section 657 of EGTRRA amended § 401(a)(31)(B) of the Code to require that a mandatory distribution of more than \$1,000 from a plan qualified under § 401(a) be paid in a direct rollover to an IRA of a designated trustee or issuer if the distributee does not make an affirmative election to have the amount paid in a direct rollover to an eligible retirement plan or to

receive the distribution directly. Section 403(a) plans, § 403(b) plans, and governmental § 457(b) plans are also required to comply with § 401(a)(31)(B).

Section 824 of PPA '06 amended the definition of qualified rollover contribution in § 408A of the Code (relating to rollovers to a Roth IRA) to include rollover contributions from any eligible retirement plan as defined in § 402(c)(8)(B). Prior to this amendment, a Roth IRA could only accept rollover contributions from another Roth IRA, a non-Roth IRA, or a designated Roth account described in § 402A. Section 408A(d)(3)(A) provides that a taxpayer who makes a rollover to a Roth IRA from an eligible employer plan that is not from a designated Roth account must include in gross income the amount of the rollover contribution (other than after-tax contributions). Such a rollover to a Roth IRA is permitted only if the recipient's modified adjusted gross income for the year of the distribution does not exceed \$100,000 and, if married, the recipient files a joint return. Pursuant to section 512 of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA), P.L. 109-222, the \$100,000 income and joint filing requirements do not apply to distributions made after 2009. Section 408A(d)(3)(A), as modified by TIPRA, provides that, in the absence of a contrary election, the amount otherwise required to be included in gross income for any taxable year beginning in 2010 is included in gross income ratably over the 2-year period beginning in 2011. For distributions after 2010, the amount required to be included in income as a result of the distribution being rolled over to a Roth IRA is included in gross income in the year of the distribution.

Under § 72(t)(2)(G) of the Code (as added by section 827 of PPA '06 and modified by section 107 of the Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 110-245), the 10% additional income tax on early distributions described in § 72(t) does not apply to a qualified reservist distribution. A qualified reservist distribution generally means a distribution from an IRA, or from amounts attributable to employer contributions made as elective deferrals described in § 402(g)(3)(A)

or (C) or § 501(c)(18)(D)(iii), made to an individual who was called to active duty for a period in excess of 179 days. Section 72(t)(2)(G) also provides that any individual who receives a qualified reservist distribution may re-contribute the distribution to an IRA without regard to the applicable dollar limitations on contributions.

Under § 72(t)(10) of the Code (as added by section 828 of PPA '06), the 10% additional income tax on early distributions under § 72(t) does not apply to a distribution from a governmental plan, as defined in § 414(d), that is a defined benefit plan if the distribution is made to a qualified public safety employee who separates from service after attainment of age 50. Under § 72(t)(10)(B), a qualified public safety employee is any employee of a State (or political subdivision of a State) who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of the State (or political subdivision of the State).

Under § 402(c)(11) of the Code (as added by section 829 of PPA '06), a direct trustee-to-trustee transfer of a distribution from an eligible employer plan to an inherited IRA (within the meaning of § 408(d)(3)(C)) for a nonspouse designated beneficiary is treated as a direct rollover of an eligible rollover distribution for purposes of § 402(c). For plan years beginning after December 31, 2009, pursuant to section 108(f)(2) of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA '08), P.L. 110-458, the notice requirement of § 402(f) applies to distributions to a nonspouse designated beneficiary.

Section 845 of PPA '06 added § 402(l) of the Code, which generally provides a limited exclusion from gross income for distributions from an eligible employer plan that is a governmental plan (as defined in § 414(d)) that are paid directly to an accident or health plan or a qualified long-term care insurance contract for health or long-term care insurance premiums of an eligible retired public safety officer, his or her spouse, or his or her dependents. Under § 457(a)(3), the § 402(l)

¹ A designated Roth contribution is an elective contribution under a cash or deferred arrangement that is (i) designated by the employee at the time of the cash or deferred election as a designated Roth contribution that is being made in lieu of all or a portion of the pre-tax elective contribution the employee is eligible to make under the plan, (ii) treated by the employer as includible in the employee's gross income at the time the employee would have received the amount in cash if the employee had not made the cash or deferred election, and (iii) maintained by the plan in a separate account.

exclusion also applies to distributions from a governmental § 457(b) plan. An eligible retired public safety officer is a public safety officer who, by reason of disability or attainment of normal retirement age, is separated from service as a public safety officer with the employer that maintains the plan. A public safety officer is defined under section 1204(9)(A) of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351, 42 U.S.C. 3796b(9)(A)) as “an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew.” The total amount excluded from gross income pursuant to § 402(l) cannot exceed \$3,000 annually.

Under § 414(w) (as added by section 902 of PPA '06), an applicable employer plan that contains an eligible automatic contribution arrangement is permitted to allow employees to elect to receive a distribution equal to the amount of the elective contributions under the arrangement (and attributable earnings) made with respect to the employee beginning with the first payroll period to which the arrangement applies to the employee and ending with the effective date of the election. The election must be made within 90 days after the date of the first elective contribution with respect to the employee under the arrangement. The amount of the distribution is not an eligible rollover distribution and is includible in gross income (to the extent not a return of designated Roth contributions) for the taxable year in which the distribution is made, but is not subject to the 10% additional income tax on early distributions under § 72(t).

III. SAFE HARBOR EXPLANATIONS

A principal purpose of the changes in the safe harbor explanations in this notice is to simplify the presentation and description of the participant's options upon receiving an eligible rollover distribution. The new safe harbor explanations also broaden the information to reflect changes in law, such as information on a distribution from a designated Roth account under an employer plan. The information has also been expanded to explain rules that apply in special situations, for example,

when a distribution is made to a nonresident alien.

There are two safe harbor explanations in this notice. The first safe harbor explanation does not include information relevant to distributions from a designated Roth account. Thus, the first safe harbor explanation should only be used for a distribution that is not from a designated Roth account. The second safe harbor explanation reflects the rules relating to distributions from a designated Roth account. Thus, the second safe harbor explanation should only be used for a distribution from a designated Roth account, and the IRS and the Department of the Treasury recommend that it only be provided to a participant with a designated Roth account under the Plan. Both explanations should be provided to a participant if the participant is eligible to receive eligible rollover distributions both from a designated Roth account and from an account other than a designated Roth account.

The safe harbor explanation in this notice for distributions not from a designated Roth account meets the requirements of § 402(f) for an eligible rollover distribution that is not from a designated Roth account if provided to the recipient of the eligible rollover distribution within a reasonable period of time before the distribution is made. Similarly, the safe harbor explanation in this notice for distributions from a designated Roth account meets the requirements of § 402(f) for an eligible rollover distribution from a designated Roth account if provided to the recipient of the eligible rollover distribution within a reasonable period of time before the distribution is made.

Section 1.402(f)-1, A-2, currently provides, in general, that a reasonable period of time for providing an explanation is no less than 30 days (subject to waiver) and no more than 90 days before the date on which a distribution is made. Section 1102 of PPA '06 directs that this regulation be modified to permit a notice required to be provided under § 402(f) to be provided to a participant as much as 180 days before the date on which the distribution is made. Thus, the § 402(f) notice may be provided as much as 180 days before the annuity starting date (or the date on which the distribution is made). See § 1.402(f)-1,

A-2(a), of the Proposed Income Tax Regulations (73 FR 59575).

A plan administrator or payor may customize a safe harbor explanation by omitting any information that does not apply to the plan. For example, if the plan does not hold after-tax employee contributions, it would be appropriate for the section “If your payment includes after-tax contributions” in the explanation for payments not from a designated Roth account to be eliminated. Similarly, if the plan does not provide for distributions of employer stock or other employer securities, it would be appropriate for the section “If your payment includes employer stock that you do not roll over” to be eliminated. Other information that may not be relevant to a particular plan includes, for example, the sections “If your payment is from a governmental section 457(b) plan,” and “If you are an eligible retired public safety officer and your pension payment is used to pay for health coverage or qualified long-term care insurance.” In addition, the plan administrator or payor may provide additional information with a safe harbor explanation if the information is not inconsistent with § 402(f).

Alternatively, a plan administrator or payor can satisfy § 402(f) by providing an explanation that is different from a safe harbor explanation. Any explanation must contain the information required by § 402(f) and must be written in a manner designed to be easily understood.

If the law governing the tax treatment of distributions or other provisions described in a safe harbor explanation in this notice is amended after September 28, 2009, the safe harbor explanation will not satisfy § 402(f) to the extent that the safe harbor explanation no longer accurately describes the relevant law. The safe harbor explanations in Notice 2002-3, appropriately modified to reflect statutory changes since Notice 2002-3 was published, will continue to be safe harbor explanations with respect to notices provided through December 31, 2009.

It is expected that the IRS will publish a Spanish translation of these safe harbor explanations.

EFFECT ON OTHER DOCUMENTS

Notice 2002-3 is modified and superseded.

DRAFTING INFORMATION

The principal authors of this notice are Kathleen Herrmann of the Employee Plans, Tax Exempt and Government En-

tities Division, and Michael P. Brewer of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). Questions regarding this notice may be sent via e-mail

to retirementplanquestions@irs.gov. Mr. Brewer may be reached at 202-622-6090 (not a toll-free call).

* * *

YOUR ROLLOVER OPTIONS

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the “Plan”) is eligible to be rolled over to an IRA or an employer plan. This notice is intended to help you decide whether to do such a rollover.

This notice describes the rollover rules that apply to payments from the Plan that are *not* from a designated Roth account (a type of account with special tax rules in some employer plans). If you also receive a payment from a designated Roth account in the Plan, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.

Rules that apply to most payments from a plan are described in the “General Information About Rollovers” section. Special rules that only apply in certain circumstances are described in the “Special Rules and Options” section.

GENERAL INFORMATION ABOUT ROLLOVERS

How can a rollover affect my taxes?

You will be taxed on a payment from the Plan if you do not roll it over. If you are under age 59½ and do not do a rollover, you will also have to pay a 10% additional income tax on early distributions (unless an exception applies). However, if you do a rollover, you will not have to pay tax until you receive payments later and the 10% additional income tax will not apply if those payments are made after you are age 59½ (or if an exception applies).

Where may I roll over the payment?

You may roll over the payment to either an IRA (an individual retirement account or individual retirement annuity) or an employer plan (a tax-qualified plan, section 403(b) plan, or governmental section 457(b) plan) that will accept the rollover. The rules of the IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the IRA or employer plan (for example, no spousal consent rules apply to IRAs and IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the IRA or employer plan.

How do I do a rollover?

There are two ways to do a rollover. You can do either a direct rollover or a 60-day rollover.

If you do a direct rollover, the Plan will make the payment directly to your IRA or an employer plan. You should contact the IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

If you do not do a direct rollover, you may still do a rollover by making a deposit into an IRA or eligible employer plan that will accept it. You will have 60 days after you receive the payment to make the deposit. If you do not do a direct rollover, the Plan is required to withhold 20% of the payment for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover, you must use other funds to make up for the 20% withheld. If you do not roll over the entire amount of the payment, the portion not rolled over will be taxed and will be subject to the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

How much may I roll over?

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Required minimum distributions after age 70½ (or after death)
- Hardship distributions
- ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends)
- Cost of life insurance paid by the Plan
- Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there will generally be adverse tax consequences if you roll over a distribution of S corporation stock to an IRA).

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?

If you are under age 59½, you will have to pay the 10% additional income tax on early distributions for any payment from the Plan (including amounts withheld for income tax) that you do not roll over, unless one of the exceptions listed below applies. This tax is in addition to the regular income tax on the payment not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Payments from a governmental defined benefit pension plan made after you separate from service if you are a public safety employee and you are at least age 50 in the year of the separation
- Payments made due to disability
- Payments after your death
- Payments of ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Cost of life insurance paid by the Plan
- Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment
- Payments made directly to the government to satisfy a federal tax levy
- Payments made under a qualified domestic relations order (QDRO)
- Payments up to the amount of your deductible medical expenses
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution.

If I do a rollover to an IRA, will the 10% additional income tax apply to early distributions from the IRA?

If you receive a payment from an IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions from the IRA, unless an exception applies. In general, the exceptions to the 10% additional income tax for early distributions from an IRA are the same as the exceptions listed above for early distributions from a plan. However, there are a few differences for payments from an IRA, including:

- There is no exception for payments after separation from service that are made after age 55.
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to an IRA of a spouse or former spouse).
- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.
- There are additional exceptions for (1) payments for qualified higher education expenses, (2) payments up to \$10,000 used in a qualified first-time home purchase, and (3) payments after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

Will I owe State income taxes?

This notice does not describe any State or local income tax rules (including withholding rules).

SPECIAL RULES AND OPTIONS

If your payment includes after-tax contributions

After-tax contributions included in a payment are not taxed. If a payment is only part of your benefit, an allocable portion of your after-tax contributions is generally included in the payment. If you have pre-1987 after-tax contributions maintained in a separate account, a special rule may apply to determine whether the after-tax contributions are included in a payment.

You may roll over to an IRA a payment that includes after-tax contributions through either a direct rollover or a 60-day rollover. You must keep track of the aggregate amount of the after-tax contributions in all of your IRAs (in order to determine your taxable income for later payments from the IRAs). If you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you, each of the payments will include an allocable portion of the after-tax contributions. If you do a 60-day rollover to an IRA of only a portion of the payment made to you, the after-tax contributions are treated as rolled over last. For example, assume you are receiving a complete distribution of your benefit which totals \$12,000, of which \$2,000 is after-tax contributions. In this case, if you roll over \$10,000 to an IRA in a 60-day rollover, no amount is taxable because the \$2,000 amount not rolled over is treated as being after-tax contributions.

You may roll over to an employer plan all of a payment that includes after-tax contributions, but only through a direct rollover (and only if the receiving plan separately accounts for after-tax contributions and is not a governmental section 457(b) plan). You can do a 60-day rollover to an employer plan of part of a payment that includes after-tax contributions, but only up to the amount of the payment that would be taxable if not rolled over.

If you miss the 60-day rollover deadline

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. To apply for a waiver, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590, *Individual Retirement Arrangements (IRAs)*.

If your payment includes employer stock that you do not roll over

If you do not do a rollover, you can apply a special rule to payments of employer stock (or other employer securities) that are either attributable to after-tax contributions or paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock will not be taxed when distributed from the Plan and will be taxed at capital gain rates when you sell the stock. Net unrealized appreciation is generally the increase in the value of employer stock after it was acquired by the Plan. If you do a rollover for a payment that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the payment), the special rule relating to the distributed employer stock will not apply to any subsequent payments from the IRA or employer plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

If you have an outstanding loan that is being offset

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the amount of the loan, typically when your employment ends. The loan offset amount is treated as a distribution to you at the time of the offset and will be taxed (including the 10% additional income tax on early distributions, unless an exception applies) unless you do a 60-day rollover in the amount of the loan offset to an IRA or employer plan.

If you were born on or before January 1, 1936

If you were born on or before January 1, 1936 and receive a lump sum distribution that you do not roll over, special rules for calculating the amount of the tax on the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

If your payment is from a governmental section 457(b) plan

If the Plan is a governmental section 457(b) plan, the same rules described elsewhere in this notice generally apply, allowing you to roll over the payment to an IRA or an employer plan that accepts rollovers. One difference is that, if you do not do a rollover, you will not have to pay the 10% additional income tax on early distributions from the Plan even if you are under age 59½ (unless the payment is from a separate account holding rollover contributions that were made to the Plan from a tax-qualified plan, a section 403(b) plan, or an IRA). However, if you do a rollover to an IRA or to an employer plan that is not a governmental section 457(b) plan, a later distribution made before age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies). Other differences are that you cannot do a rollover if the payment is due to an "unforeseeable emergency" and the special rules under "If your payment includes employer stock that you do not roll over" and "If you were born on or before January 1, 1936" do not apply.

If you are an eligible retired public safety officer and your pension payment is used to pay for health coverage or qualified long-term care insurance

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income plan payments paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your dependents, up to a maximum of \$3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

If you roll over your payment to a Roth IRA

You can roll over a payment from the Plan made before January 1, 2010 to a Roth IRA only if your modified adjusted gross income is not more than \$100,000 for the year the payment is made to you and, if married, you file a joint return. These limitations do not apply to payments made to you from the Plan after 2009. If you wish to roll over the payment to a Roth IRA, but you are not eligible to do a rollover to a Roth IRA until after 2009, you can do a rollover to a traditional IRA and then, after 2009, elect to convert the traditional IRA into a Roth IRA.

If you roll over the payment to a Roth IRA, a special rule applies under which the amount of the payment rolled over (reduced by any after-tax amounts) will be taxed. However, the 10% additional income tax on early distributions will not apply (unless you take the amount rolled over out of the Roth IRA within 5 years, counting from January 1 of the year of the rollover). For payments from the Plan during 2010 that are rolled over to a Roth IRA, the taxable amount can be spread over a 2-year period starting in 2011.

If you roll over the payment to a Roth IRA, later payments from the Roth IRA that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a Roth IRA is a payment made after you are age 59½ (or after your death or disability, or as a qualified first-time homebuyer distribution of up to \$10,000) and after you have had a Roth IRA for at least 5 years. In applying this 5-year rule, you count from January 1 of the year for which your first contribution was made to a Roth IRA. Payments from the Roth IRA that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies). You do not have to take required minimum distributions from a Roth IRA during your lifetime. For more information, see IRS Publication 590, *Individual Retirement Arrangements (IRAs)*.

You cannot roll over a payment from the Plan to a designated Roth account in an employer plan.

If you are not a plan participant

Payments after death of the participant. If you receive a distribution after the participant's death that you do not roll over, the distribution will generally be taxed in the same manner described elsewhere in this notice. However, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you were born on or before January 1, 1936" applies only if the participant was born on or before January 1, 1936.

If you are a surviving spouse. If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to an IRA, you may treat the IRA as your own or as an inherited IRA.

An IRA you treat as your own is treated like any other IRA of yours, so that payments made to you before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies) and required minimum distributions from your IRA do not have to start until after you are age 70½.

If you treat the IRA as an inherited IRA, payments from the IRA will not be subject to the 10% additional income tax on early distributions. However, if the participant had started taking required minimum distributions, you will have to receive required minimum distributions from the inherited IRA. If the participant had not started taking required minimum distributions from the Plan, you will not have to start receiving required minimum distributions from the inherited IRA until the year the participant would have been age 70½.

If you are a surviving beneficiary other than a spouse. If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited IRA. Payments from the inherited IRA will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited IRA.

Payments under a qualified domestic relations order. If you are the spouse or former spouse of the participant who receives a payment from the Plan under a qualified domestic relations order (QDRO), you generally have the same options the participant would have (for example, you may roll over the payment to your own IRA or an eligible employer plan that will accept it). Payments under the QDRO will not be subject to the 10% additional income tax on early distributions.

If you are a nonresident alien

If you are a nonresident alien and you do not do a direct rollover to a U.S. IRA or U.S. employer plan, instead of withholding 20%, the Plan is generally required to withhold 30% of the payment for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042-S. See Form W-8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

Other special rules

If a payment is one in a series of payments for less than 10 years, your choice whether to make a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year are less than \$200 (not including payments from a designated Roth account in the Plan), the Plan is not required to allow you to do a direct rollover and is not required to withhold for federal income taxes. However, you may do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout of more than \$1,000 (not including payments from a designated Roth account in the Plan) will be directly rolled over to an IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed \$5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information, see IRS Publication 3, *Armed Forces' Tax Guide*.

FOR MORE INFORMATION

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590, *Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans (403(b) Plans)*. These publications are available from a local IRS office, on the web at www.irs.gov, or by calling 1-800-TAX-FORM.

* * *

YOUR ROLLOVER OPTIONS

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the “Plan”) is eligible to be rolled over to a Roth IRA or designated Roth account in an employer plan. This notice is intended to help you decide whether to do a rollover.

This notice describes the rollover rules that apply to payments from the Plan that are from a designated Roth account. If you also receive a payment from the Plan that is not from a designated Roth account, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.

Rules that apply to most payments from a designated Roth account are described in the “General Information About Rollovers” section. Special rules that only apply in certain circumstances are described in the “Special Rules and Options” section.

GENERAL INFORMATION ABOUT ROLLOVERS

How can a rollover affect my taxes?

After-tax contributions included in a payment from a designated Roth account are not taxed, but earnings might be taxed. The tax treatment of earnings included in the payment depends on whether the payment is a qualified distribution. If a payment is only part of your designated Roth account, the payment will include an allocable portion of the earnings in your designated Roth account.

If the payment from the Plan is not a qualified distribution and you do not do a rollover to a Roth IRA or a designated Roth account in an employer plan, you will be taxed on the earnings in the payment. If you are under age 59½, a 10% additional income tax on early distributions will also apply to the earnings (unless an exception applies). However, if you do a rollover, you will not have to pay taxes currently on the earnings and you will not have to pay taxes later on payments that are qualified distributions.

If the payment from the Plan is a qualified distribution, you will not be taxed on any part of the payment even if you do not do a rollover. If you do a rollover, you will not be taxed on the amount you roll over and any earnings on the amount you roll over will not be taxed if paid later in a qualified distribution.

A qualified distribution from a designated Roth account in the Plan is a payment made after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying the 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you did a direct rollover to a designated Roth account in the Plan from a designated Roth account in another employer plan, your participation will count from January 1 of the year your first contribution was made to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the other employer plan.

Where may I roll over the payment?

You may roll over the payment to either a Roth IRA (a Roth individual retirement account or Roth individual retirement annuity) or a designated Roth account in an employer plan (a tax-qualified plan or section 403(b) plan) that will accept the rollover. The rules of the Roth IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the Roth IRA or employer plan (for example, no spousal consent rules apply to Roth IRAs and Roth IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the Roth IRA or the designated Roth account in the employer plan. In general, these tax rules are similar to those described elsewhere in this notice, but differences include:

- If you do a rollover to a Roth IRA, all of your Roth IRAs will be considered for purposes of determining whether you have satisfied the 5-year rule (counting from January 1 of the year for which your first contribution was made to any of your Roth IRAs).
- If you do a rollover to a Roth IRA, you will not be required to take a distribution from the Roth IRA during your lifetime and you must keep track of the aggregate amount of the after-tax contributions in all of your Roth IRAs (in order to determine your taxable income for later Roth IRA payments that are not qualified distributions).
- Eligible rollover distributions from a Roth IRA can only be rolled over to another Roth IRA.

How do I do a rollover?

There are two ways to do a rollover. You can either do a direct rollover or a 60-day rollover.

If you do a direct rollover, the Plan will make the payment directly to your Roth IRA or designated Roth account in an employer plan. You should contact the Roth IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

If you do not do a direct rollover, you may still do a rollover by making a deposit within 60 days into a Roth IRA, whether the payment is a qualified or nonqualified distribution. In addition, you can do a rollover by making a deposit within 60 days into a designated Roth account in an employer plan if the payment is a nonqualified distribution and the rollover does not exceed the amount of the earnings in the payment. You cannot do a 60-day rollover to an employer plan of any part of a qualified distribution. If you receive a distribution that is a nonqualified distribution and you do not roll over an amount at least equal to the earnings allocable to the distribution, you will be taxed on the amount of those earnings not rolled over, including the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

If you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you, each of the payments will include an allocable portion of the earnings in your designated Roth account.

If you do not do a direct rollover and the payment is not a qualified distribution, the Plan is required to withhold 20% of the earnings for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover to a Roth IRA, you must use other funds to make up for the 20% withheld.

How much may I roll over?

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Required minimum distributions after age 70½ (or after death)
- Hardship distributions
- ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends)
- Cost of life insurance paid by the Plan
- Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there will generally be adverse tax consequences if S corporation stock is held by an IRA).

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?

If a payment is not a qualified distribution and you are under age 59½, you will have to pay the 10% additional income tax on early distributions with respect to the earnings allocated to the payment that you do not roll over (including amounts withheld for income tax), unless one of the exceptions listed below applies. This tax is in addition to the regular income tax on the earnings not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Payments made due to disability
- Payments after your death
- Payments of ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Cost of life insurance paid by the Plan
- Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment
- Payments made directly to the government to satisfy a federal tax levy
- Payments made under a qualified domestic relations order (QDRO)
- Payments up to the amount of your deductible medical expenses
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution.

If I do a rollover to a Roth IRA, will the 10% additional income tax apply to early distributions from the IRA?

If you receive a payment from a Roth IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions on the earnings paid from the Roth IRA, unless an exception applies or the payment is a qualified distribution. In general, the exceptions to the 10% additional income tax for early distributions from a Roth IRA listed above are the same as the exceptions for early distributions from a plan. However, there are a few differences for payments from a Roth IRA, including:

- There is no special exception for payments after separation from service.
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to a Roth IRA of a spouse or former spouse).
- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.
- There are additional exceptions for (1) payments for qualified higher education expenses, (2) payments up to \$10,000 used in a qualified first-time home purchase, and (3) payments after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

Will I owe State income taxes?

This notice does not describe any State or local income tax rules (including withholding rules).

SPECIAL RULES AND OPTIONS

If you miss the 60-day rollover deadline

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. To apply for a waiver, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590, *Individual Retirement Arrangements (IRAs)*.

If your payment includes employer stock that you do not roll over

If you receive a payment that is not a qualified distribution and you do not roll it over, you can apply a special rule to payments of employer stock (or other employer securities) that are paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock included in the earnings in the payment will not be taxed when distributed to you from the Plan and will be taxed at capital gain rates when you sell the stock. If you do a rollover to a Roth IRA for a nonqualified distribution that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the distribution), you will not have any taxable income and the special rule relating to the distributed employer stock will not apply to any subsequent payments from the Roth IRA or employer plan. Net unrealized appreciation is generally the increase in the value of the employer stock after it was acquired by the Plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

If you receive a payment that is a qualified distribution that includes employer stock and you do not roll it over, your basis in the stock (used to determine gain or loss when you later sell the stock) will equal the fair market value of the stock at the time of the payment from the Plan.

If you have an outstanding loan that is being offset

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the amount of the loan, typically when your employment ends. The loan offset amount is treated as a distribution to you at the time of the offset and, if the distribution is a nonqualified distribution, the earnings in the loan offset will be taxed (including the 10% additional income tax on early distributions, unless an exception applies) unless you do a 60-day rollover in the amount of the earnings in the loan offset to a Roth IRA or designated Roth account in an employer plan.

If you receive a nonqualified distribution and you were born on or before January 1, 1936

If you were born on or before January 1, 1936, and receive a lump sum distribution that is not a qualified distribution and that you do not roll over, special rules for calculating the amount of the tax on the earnings in the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

If you receive a nonqualified distribution, are an eligible retired public safety officer, and your pension payment is used to pay for health coverage or qualified long-term care insurance

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income nonqualified distributions paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your dependents, up to a maximum of \$3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

If you are not a plan participant

Payments after death of the participant. If you receive a distribution after the participant's death that you do not roll over, the distribution will generally be taxed in the same manner described elsewhere in this notice. However, whether the payment is a qualified distribution generally depends on when the participant first made a contribution to the designated Roth account in the Plan. Also, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you receive a nonqualified distribution and you were born on or before January 1, 1936" applies only if the participant was born on or before January 1, 1936.

If you are a surviving spouse. If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to a Roth IRA, you may treat the Roth IRA as your own or as an inherited Roth IRA.

A Roth IRA you treat as your own is treated like any other Roth IRA of yours, so that you will not have to receive any required minimum distributions during your lifetime and earnings paid to you in a nonqualified distribution before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies).

If you treat the Roth IRA as an inherited Roth IRA, payments from the Roth IRA will not be subject to the 10% additional income tax on early distributions. An inherited Roth IRA is subject to required minimum distributions. If the participant had started taking required minimum distributions from the Plan, you will have to receive required minimum distributions from the inherited Roth IRA. If the participant had not started taking required minimum distributions, you will not have to start receiving required minimum distributions from the inherited Roth IRA until the year the participant would have been age 70½.

If you are a surviving beneficiary other than a spouse. If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited Roth IRA. Payments from the inherited Roth IRA, even if made in a nonqualified distribution, will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited Roth IRA.

Payments under a qualified domestic relations order. If you are the spouse or a former spouse of the participant who receives a payment from the Plan under a qualified domestic relations order (QDRO), you generally have the same options the participant would have (for example, you may roll over the payment as described in this notice).

If you are a nonresident alien

If you are a nonresident alien and you do not do a direct rollover to a U.S. IRA or U.S. employer plan, instead of withholding 20%, the Plan is generally required to withhold 30% of the payment for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042-S. See Form W-8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

Other special rules

If a payment is one in a series of payments for less than 10 years, your choice whether to make a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year (only including payments from the designated Roth account in the Plan) are less than \$200, the Plan is not required to allow you to do a direct rollover and is not required to withhold for federal income taxes. However, you can do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout from the designated Roth account in the Plan of more than \$1,000 will be directly rolled over to a Roth IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed \$5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information, see IRS Publication 3, *Armed Forces' Tax Guide*.

FOR MORE INFORMATION

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590, *Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans (403(b) Plans)*. These publications are available from a local IRS office, on the web at www.irs.gov, or by calling 1-800-TAX-FORM.

Rollovers from Employer Plans to Roth IRAs

Notice 2009-75

I. PURPOSE

This notice describes the federal income tax consequences of rolling over an eligible rollover distribution from a qualified plan described in § 401(a) of the Internal Revenue Code (Code), an annuity plan described in § 403(a), a plan described in § 403(b), or an eligible governmental plan under § 457(b) to a Roth IRA described in § 408A.

II. BACKGROUND

Section 401(k) sets forth rules for qualified cash or deferred arrangements under which an employee may make an election between cash and an employer contribution to a plan qualified under § 401(a). Section 403(b) permits a similar salary reduction agreement under which payments are made to a § 403(b) plan. Amounts contributed pursuant to these qualified cash or deferred arrangements and salary reduction agreements are defined in § 402(g)(3) as elective deferrals.

A designated Roth contribution is described in § 402A, which was added to the Code by section 617(a) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107-16 (115 Stat. 103) (EGTRRA), for taxable years beginning after December 31, 2005. A designated Roth contribution is an elective deferral, as described in § 402(g)(3)(A) or (C) of the Code, that has been designated by an employee, pursuant to § 402A, as

not excludable from the employee's gross income. Under § 402A(b)(2), designated Roth contributions made to the plan must be maintained in a separate account (a designated Roth account).

Under § 402(a), a distribution from a plan qualified under § 401(a) generally is taxable under § 72 to the distributee in the taxable year distributed. However, pursuant to § 402A(d)(1), a qualified distribution from a designated Roth account is excludable from gross income. A qualified distribution is defined in § 402A(d)(2) as a distribution that is made after completion of a specified 5-year period and the satisfaction of other specified requirements. If the distribution is not a qualified distribution, then, pursuant to § 72, the distribution is included in the distributee's gross income to the extent allocable to income on the contract and excluded from gross income to the extent allocable to investment in the contract (commonly referred to as basis).

Section 402(c) sets forth rules under which an eligible rollover distribution from a plan qualified under § 401(a) may be rolled over to an eligible retirement plan. In such a case, the distribution generally is not currently includible in the distributee's gross income. An eligible retirement plan means an individual retirement plan or an "eligible employer plan." An individual retirement plan (IRA) is defined in § 7701(a)(37) as an individual retirement account described in § 408(a) or an individual retirement annuity described in § 408(b). For purposes of this notice, an eligible employer plan means a plan qualified under § 401(a), including a profit-sharing or stock bonus plan (whether or not the plan includes a qualified cash or deferred arrangement under

§ 401(k)), a money purchase pension plan, or a defined benefit pension plan; a § 403(a) annuity plan; a § 403(b) plan; and an eligible § 457(b) plan maintained by a governmental employer described in § 457(e)(1)(A) (a "governmental § 457(b) plan").

Under §§ 402(c)(8) and 402A(c)(3), a distribution from a designated Roth account may be rolled over only to another designated Roth account or to a Roth IRA under § 408A. A Roth IRA is a type of IRA under which contributions are not deductible and qualified distributions are excludable from gross income. Under § 408A(d)(2), a qualified distribution from an individual's Roth IRA is a distribution that is made (1) after the 5-taxable-year period beginning with the first taxable year for which the individual had a Roth IRA; and (2) after age 59½, after death, on account of disability, or for a first-time home purchase under certain circumstances. Section 408A(d)(4) sets forth special ordering rules for the return of after-tax contributions in the case of a distribution from a Roth IRA. Under these ordering rules, after-tax contributions are recovered before income.

A taxpayer may convert an amount held in an IRA that is not a Roth IRA (non-Roth IRA) to an amount held in a Roth IRA, pursuant to the rules in § 408A relating to qualified rollover contributions. A conversion may be accomplished by means of a rollover, trustee-to-trustee transfer, or account redesignation. Regardless of the means used to convert, any amount converted from a non-Roth IRA to a Roth IRA is treated as distributed from the non-Roth IRA and rolled over to the Roth IRA.

In the case of such a conversion, the taxpayer must include in gross income

the value of the non-Roth IRA being converted (other than the amount of any after-tax contributions included in the conversion). For taxable years beginning before January 1, 2010, such a conversion is not permitted to be made by a taxpayer whose modified adjusted gross income for the year of the distribution exceeds \$100,000 (or who, if married, does not file jointly). The regulations under § 408A, in particular §§ 1.408A-4 and 1.408A-5, provide guidance relating to conversions from a non-Roth IRA to a Roth IRA (including special rules where a non-Roth IRA annuity is converted into a Roth IRA annuity). These sections of the regulations were issued in 1999 and, thus, do not reflect the statutory revisions described below. Treasury and the Internal Revenue Service expect to incorporate the guidance in this notice into the regulations when those regulations are updated to reflect those statutory revisions.

Under §§ 402A and 408A (as amended by a technical correction in section 108(d) of the Worker, Retiree, and Employer Recovery Act of 2008, Pub. Law No. 110-458, 122 Stat. 5092 (WRERA 2008)), an eligible rollover distribution made from a designated Roth account in an eligible employer plan can be rolled over to a Roth IRA.

Prior to enactment of section 824 of the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06), an eligible rollover distribution from an eligible employer plan not made from a designated Roth account could be rolled over to a non-Roth IRA and then converted to a Roth IRA, but could not be rolled over to a Roth IRA without an intervening rollover to a non-Roth IRA followed by a conversion to a Roth IRA. See Notice 2008-30, 2008-12 I.R.B. 638.

Section 824 of PPA '06 amended the definition of qualified rollover contribution in § 408A of the Code (relating to Roth IRAs) for distributions on or after January 1, 2008, to allow the recipient of an eligible rollover distribution not made from a designated Roth account to roll over the amount of the distribution to a Roth IRA without first contributing that amount to a non-Roth IRA. The Joint Committee on

Taxation Report explains the change made by section 824 of PPA '06 as follows:

The provision allows distributions from tax qualified retirement plans, tax-sheltered annuities, and governmental 457 plans to be rolled over directly from such plan into a Roth IRA, subject to the present law rules that apply to rollovers from a traditional IRA into a Roth IRA. For example, a rollover from a tax-qualified retirement plan into a Roth IRA is includible in gross income (except to the extent it represents a return of after-tax contributions), and the 10-percent early distribution tax does not apply.¹ Thus, under § 402A and § 408A, as amended by section 824 of PPA '06, a rollover from an eligible employer plan (other than from a designated Roth account) to a Roth IRA results in the same federal income tax consequences for a participant as a rollover to a non-Roth IRA immediately followed by a conversion to a Roth IRA (except that the special rule at § 408(d)(2) for aggregating after-tax amounts would not apply).

For taxable years beginning before January 1, 2010, a rollover from an eligible employer plan not made from a designated Roth account is available only to a taxpayer whose modified adjusted gross income for the year of the distribution does not exceed \$100,000 (and who, if married, files jointly). The mandatory withholding requirements provided in § 3405(c) do not apply to a distribution paid from an eligible employer plan to a Roth IRA in a direct rollover, even though the distribution is includible in gross income. Also, the additional income tax on early distributions provided in § 72(t) generally does not apply to a rollover from an eligible retirement plan to a Roth IRA. However, § 408A(d)(3)(F), § 1.408A-6 A-5, and Notice 2008-30, Q&A-3, describe a special rule relating to the additional income tax on early distributions for distributions made from a Roth IRA within a specified 5-year period after a rollover.

This notice supplements the regulations under § 408A and Notice 2008-30 to provide additional guidance on a rollover from an eligible employer plan to a Roth IRA. For additional information, see also

Publication 590, *Individual Retirement Arrangements*.

III. ROLLOVERS FROM AN ELIGIBLE EMPLOYER PLAN TO A ROTH IRA

Q-1: What amount is included in gross income as a consequence of a rollover to a Roth IRA from an eligible employer plan (*i.e.*, a qualified plan described in § 401(a), an annuity plan described in § 403(a), a plan described in § 403(b), or a governmental § 457(b) plan)?

A-1: (a) *Rollovers to a Roth IRA of distributions that are not made from a designated Roth account.* If an eligible rollover distribution from an eligible employer plan is rolled over to a Roth IRA and the distribution is not made from a designated Roth account, then the amount that would be includible in gross income were it not part of a qualified rollover contribution is included in the distributee's gross income for the year of the distribution. For this purpose, the amount included in gross income is equal to the amount rolled over, reduced by the amount of any after-tax contributions that are included in the amount rolled over, in the same manner as if the distribution had been rolled over to a non-Roth IRA that was the participant's only non-Roth IRA and that non-Roth IRA had then been immediately converted to a Roth IRA. Thus, the special rules relating to net unrealized appreciation at § 402(e)(4) and certain optional methods for calculating tax available to participants born on or before January 1, 1936 are not applicable.

(b) *Rollovers to a Roth IRA of distributions made from a designated Roth account.* If an eligible rollover distribution made from a designated Roth account in an eligible employer plan is rolled over to a Roth IRA, the amount rolled over is not includible in the distributee's gross income, whether or not the distribution is a qualified distribution from the designated Roth account.

Q-2: What are the modified adjusted gross income limitations and joint filing requirements for a rollover to a Roth IRA of a distribution from an eligible employer plan made either before January 1, 2010 or on or after January 1, 2010?

¹ Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered in the Senate on August 3, 2006* (JCX-38-06), August 3, 2006, at 174.

A-2: (a) *Distributions not made from a designated Roth account.* Except for a distribution from a designated Roth account, an eligible rollover distribution made before January 1, 2010 from an eligible employer plan may not be rolled over to a Roth IRA unless, for the year of the distribution, the distributee's modified adjusted gross income does not exceed \$100,000 and, in the case of a married distributee, the distributee files a joint federal income tax return with his or her spouse. The \$100,000 limit and the requirement that a married distributee file a joint return do not apply to distributions made on or after January 1, 2010. If an eligible rollover distribution made before 2010 is ineligible to be rolled over to a Roth IRA either because the distributee's modified adjusted gross income exceeds \$100,000 or because a married distributee does not file a joint return, the distribution can be rolled over into a non-Roth IRA and then the non-Roth IRA can be converted, on or after January 1, 2010, into a Roth IRA.

(b) *Distributions made from a designated Roth account.* There are no restrictions based on the modified adjusted gross income limitations and joint filing requirements that apply to a rollover of an eligi-

ble rollover distribution made from a designated Roth account under an eligible employer plan to a Roth IRA.

EFFECT ON OTHER DOCUMENTS

Notice 2008-30, 2008-12 I.R.B. 638, is amplified and clarified.

CONTACT INFORMATION

The principal author of this notice is Kathleen Herrmann of Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to RetirementPlanQuestions@irs.gov.

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

(Also: Part I, § 42; 1.42-14.)

Rev. Proc. 2009-40

SECTION 1. PURPOSE

This revenue procedure publishes the amounts of unused housing credit carryovers allocated to qualified states under

§ 42(h)(3)(D) of the Internal Revenue Code for calendar year 2009.

SECTION 2. BACKGROUND

Rev. Proc. 92-31, 1992-1 C.B. 775, provides guidance to state housing credit agencies of qualified states on the procedure for requesting an allocation of unused housing credit carryovers under § 42(h)(3)(D). Section 4.06 of Rev. Proc. 92-31 provides that the Internal Revenue Service will publish in the Internal Revenue Bulletin the amount of unused housing credit carryovers allocated to qualified states for a calendar year from a national pool of unused credit authority (the National Pool). This revenue procedure publishes these amounts for calendar year 2009.

SECTION 3. PROCEDURE

The unused housing credit carryover amount allocated from the National Pool by the Secretary to each qualified state for calendar year 2009 is as follows:

<i>Qualified State</i>	<i>Amount Allocated</i>
Alabama	\$104,336
California	882,632
Connecticut	78,360
Delaware	19,540
Florida	410,197
Georgia	216,772
Illinois	288,743
Kansas	62,713
Kentucky	95,548
Maine	29,463
Maryland	126,083
Massachusetts	145,428
Michigan	223,881
Minnesota	116,835
New Hampshire	29,448
New Jersey	194,322
New Mexico	44,411
New York	436,202
North Dakota	14,365
Ohio	257,060
Oregon	84,823
Pennsylvania	278,599
Rhode Island	23,517
South Dakota	17,998
Tennessee	139,092
Utah	61,243
Vermont	13,904

Qualified State

Virginia
West Virginia

Amount Allocated

173,876
40,609

EFFECTIVE DATE

This revenue procedure is effective for allocations of housing credit dollar amounts attributable to the National Pool component of a qualified state's housing credit ceiling for calendar year 2009.

DRAFTING INFORMATION

The principal author of this revenue procedure is Christopher J. Wilson of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure contact Mr. Wilson at (202) 622-3040 (not a toll-free call).

26 CFR 601.201: Rulings and determinations letters. (Also: Part 1, §§ 7701; 301.7701-1, 301.7701-2, 301.7701-3, 301.9100-1, 301.9100-3.)

Rev. Proc. 2009-41

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 7701 of the Internal Revenue Code for an eligible entity that requests relief for a late classification election filed with the applicable IRS service center within 3 years and 75 days of the requested effective date of the eligible entity's classification election. The revenue procedure also provides guidance for those eligible entities that do not qualify for relief under this revenue procedure and that are required to request a letter ruling in order to request relief for a late entity classification election.

SECTION 2. BACKGROUND

.01 Section 301.7701-3(a) of the Procedure and Administration Regulations provides in part that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal tax purposes as provided in § 301.7701-3. An eligible entity with at least two members can

elect to be classified as either an association (and thus as a corporation under § 301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner. Section 301.7701-3(b) provides a default classification for an eligible entity that does not file an entity classification election. Thus, an entity classification election is necessary only when an eligible entity chooses to be classified initially as other than its default classification or when an eligible entity chooses to change its classification.

.02 Section 301.7701-3(c)(1)(i) provides the general rules for the time and place for filing an entity classification election. Section 301.7701-3(c)(1)(i) provides that, except as provided in paragraphs (c)(1)(iv) (limitation) or (c)(1)(v) (deemed elections) of § 301.7701-3, an eligible entity may elect to be classified other than as provided under § 301.7701-3(b), or to change its classification, by filing Form 8832, "Entity Classification Election," with the IRS service center designated on Form 8832. An election will not be accepted unless all of the information required by the form and instructions, including the taxpayer identifying number of the entity, is provided on Form 8832. See § 301.6109-1 for rules on applying for and displaying Employer Identification Numbers.

.03 Section 301.7701-3(c)(1)(ii) provides that an eligible entity required to file a federal tax or information return for the taxable year for which an election is made must attach a copy of its Form 8832 to its federal tax or information return for that year. If the entity is not required to file a return for that year, a copy of its Form 8832 must be attached to the federal income tax or information return of any direct or indirect owner of the entity for the taxable year of the owner that includes the date on which the election was effective.

.04 Section 301.7701-3(c)(1)(iii) provides that an election made under § 301.7701-3(c)(1)(i) will be effective on the date specified by the entity on Form 8832 or on the date filed if no such date

is specified on the election form. The effective date specified on Form 8832 cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed. If an election specifies an effective date more than 75 days prior to the date on which the election is filed, it will be effective 75 days prior to the date it was filed. If an election specifies an effective date more than 12 months from the date on which the election is filed, it will be effective 12 months after the date it was filed.

.05 Section 301.7701-3(d)(1) provides in general that a foreign eligible entity's classification is relevant when its classification affects the liability of any person for federal tax or information purposes.

.06 Under § 301.9100-1(c) the Commissioner may grant a reasonable extension of time to make a regulatory election or certain statutory elections under all subtitles of the Code, except subtitles E, G, H, and I.

.07 Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. An entity classification election made pursuant to § 301.7701-3(c) is a regulatory election.

.08 The Commissioner has authority under § 301.9100-1 and § 301.9100-3 to grant an extension of time if a taxpayer fails to file a timely election under § 301.7701-3(c). Section 301.9100-3 provides that the Commissioner will grant an extension of time when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith and the grant of relief will not prejudice the interests of the government.

.09 Rev. Proc. 2002-59, 2002-2 C.B. 615, provides guidance under § 301.7701-3 for entities newly formed under local law to request relief for a late initial classification election filed by the due date for the first federal tax return (excluding extensions) of the entity's desired

classification for the year of the entity's formation.

SECTION 3. SCOPE

.01 This revenue procedure supersedes Rev. Proc. 2002-59 by extending late entity classification relief to both initial classification elections and changes in classification elections along with extending the time for filing late entity classification elections to within 3 years and 75 days of the requested effective date of the eligible entity's classification. Thus, the extended filing period no longer is limited, as it was under Rev. Proc. 2002-59, to entities newly formed under local law requesting relief to file an initial classification election and to the due date for the first federal tax return (excluding extensions) of the entity's desired classification for the year of the entity's formation. For those entities that satisfy the requirements set forth in Section 4.01, this revenue procedure is the exclusive means for obtaining relief for a late entity classification election and is in lieu of the letter ruling procedure that is used to obtain relief for a late entity classification election under § 301.9100-1 and § 301.9100-3. Accordingly, user fees do not apply to action under this revenue procedure.

.02 An eligible entity may qualify for alternative relief under § 301.7701-3(c)(1)(v)(C), which treats an entity as having made a classification election to be treated as an association when it timely elects to be an S corporation under § 1362(a)(1). Also, see Rev. Proc. 2004-48, 2004-2 C.B. 172, and Rev. Proc. 2007-62, 2007-2 C.B. 786, or their successors for special rules applicable to late S corporation elections and late entity classification elections.

.03 An entity that does not satisfy the requirements for relief under this revenue procedure may request relief by applying for a letter ruling. Additionally, eligible entities that do not qualify for relief under this revenue procedure, because they do not satisfy all of the requirements set forth in Section 4.01, and that request a letter ruling for late entity classification relief either must include as part of their letter ruling request the affirmative representation in Section 4.04 or an explanation why the entity cannot make the affirmative representation in Section 4.04. The proce-

dural requirements for requesting a letter ruling are described in Rev. Proc. 2009-1, 2009-1 I.R.B. 1 (or its successor).

SECTION 4. RELIEF FOR LATE CLASSIFICATION ELECTIONS

.01 *Eligibility for relief.* An entity is eligible for relief under Section 4.03 of this revenue procedure for a late classification election if the following requirements are met:

(1)(a) the entity failed to obtain its requested classification as of the date of its formation or upon the entity's classification becoming relevant within the meaning of § 301.7701-3(d) solely because Form 8832 was not filed timely under § 301.7701-3(c)(1)(iii); or

(b) the entity failed to obtain its requested change in classification (subject to the limitations of § 301.7701-3(c)(1)(iv)) solely because Form 8832 was not filed timely under § 301.7701-3(c)(1)(iii); and

(2)(a) the eligible entity seeking an extension of time to make an entity classification election has not filed a federal tax or information return for the first year in which the election was intended because the due date has not passed for that year's federal tax or information return; or

(b) the eligible entity seeking an extension of time to make an entity classification election timely filed all required federal tax returns and information returns consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the taxable years. For changes in an eligible entity's classification election, consistent filing of returns includes filing returns consistent with the deemed treatment of elective changes under § 301.7701-3(g). Under this revenue procedure, if the eligible entity is not required to file a federal tax return or information return, each affected person, who is required to file a federal tax return or information return, must have timely filed all such returns consistent with the entity's requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed during any of the taxable years. Solely for purposes of this section 4.01(2)(b),

an entity and an affected person will be treated as having timely filed a required tax or information return if the return is filed within 6 months after its due date, excluding extensions. An indirect owner of an eligible entity (such as a partner in a partnership that holds an interest in the eligible entity) is not an affected person if an entity in which the indirect owner holds a direct or indirect interest would be required to attach a copy of the eligible entity's Form 8832 to its federal tax or information return in the circumstances described in section 4.01(2)(b)(i) or (ii). An affected person is either:

(i) with respect to the effective date of the eligible entity's classification election, a person who would have been required under § 301.7701-3(c)(1)(ii) to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the taxable year of the person which includes that date; or

(ii) with respect to any subsequent date after the entity's requested effective date of the classification election, a person who would have been required under § 301.7701-3(c)(1)(ii) to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the person's taxable year that includes that subsequent date had the election first become effective on that subsequent date; and

(3) the eligible entity has reasonable cause for its failure to timely make the entity classification election; and

(4) 3 years and 75 days from the requested effective date of the eligible entity's classification election have not passed.

.02 *Procedural requirements for requesting relief.* Within 3 years and 75 days from the requested effective date of the eligible entity's classification election, the eligible entity must file with the applicable IRS service center (determined in accordance with the instructions to Form 8832) a completed Form 8832, signed in accordance with § 301.7701-3(c)(2). The Form 8832 must indicate that it is being filed pursuant to this revenue procedure in accordance with the Form 8832 and accompanying instructions. The Form 8832 must include both a declaration that the elements required for relief in Section 4.01 of this revenue procedure have been satisfied and a statement explaining the

reason for the failure to file a timely entity classification election (referred to as “the reasonable cause statement”). (Until Form 8832 is modified to include the declaration contained in this revenue procedure and space for a reasonable cause statement, the eligible entity should write “Filed Pursuant to Rev. Proc. 2009–41” at the top of Form 8832 and attach both the declaration and the reasonable cause statement to its Form 8832 that is filed with the applicable IRS service center. The declaration and reasonable cause statement must be accompanied by a dated declaration, signed by an authorized representative of the eligible entity and the affected person(s), if any, which states: “Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete.” The individual or individuals who sign must have personal knowledge of the facts and circumstances related to the election. The copy of the Form 8832 that is required under §301.7701–3(c)(1)(ii) to be attached to either the eligible entity’s or the affected person’s return does not need the writing at the top of the Form 8832 or the attachments described in this section 4.02.)

.03 *Relief for late entity classification elections.* Upon receipt of a completed Form 8832 requesting relief under Section 4.01 of this revenue procedure, the IRS service center will determine whether the requirements for granting the late entity classification election have been satisfied and will notify the entity of the result of its determination. An entity receiving relief under this revenue procedure is treated as having made a timely entity classification election as of the requested effective date of the election.

.04 *Eligible entities that do not meet all of the eligibility requirements under Section 4.01 of this revenue procedure.* Eligible entities requesting a letter ruling because they do not meet all of the eligibility requirements of Section 4.01 of this revenue procedure must include either the fol-

lowing representation as part of the entity’s request for a letter ruling or an explanation regarding why they do not qualify to do so: “All required U.S. tax and information returns of the entity (or, if the entity was not required to file any such returns under the desired classification, then all required U.S. tax and information returns of each affected person as defined in Section 4.02 of Rev. Proc. 2009–41) were filed timely or within 6 months of the due date of the respective return (excluding extensions) as if the entity classification election had been in effect on the requested date. No U.S. tax or information returns were filed inconsistently with those described in the prior sentence.”

SECTION 5. EFFECTIVE DATE

.01 *In general.* Except as provided in section 5.02, this revenue procedure is effective September 28, 2009, the date of publication of this revenue procedure in the Internal Revenue Bulletin. This revenue procedure applies to requests pending with the IRS service center pursuant to Rev. Proc. 2002–59 on September 28, 2009, and to requests received thereafter. It also applies to all ruling requests pending in the national office on September 28, 2009, and to requests for relief received thereafter.

.02 *Transition rule for pending letter ruling requests.* If an entity has filed a request for a letter ruling seeking relief for a late entity classification election and that letter ruling request is pending in the national office on September 28, 2009, the entity may rely on this revenue procedure, withdraw that letter ruling request and receive a refund of its user fee. However, the national office will process letter ruling requests pending on September 28, 2009, unless, prior to the earlier of November 12, 2009, or the issuance of the letter ruling, the entity notifies the national office that it will rely on this revenue procedure and withdraw its letter ruling request.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2002–59 is superseded.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1771.

The collection of information in these regulations is in Sections 4.02 and 4.04 of this revenue procedure. The information will help the IRS to determine if an eligible entity meets the requirements of Section 4.01 of this revenue procedure. The collection of information is required to obtain permission to file a late entity classification election. The information will be reported on Form 8832 or submitted as part of a letter ruling request. The time needed to complete and file a letter ruling request or a Form 8832 will vary depending on individual circumstances. The estimated burden for eligible entities filing a letter ruling request or Form 8832 are included in the estimates shown in the Paperwork Reduction Act of the annually published letter ruling revenue procedure and the instructions for Form 8832 respectively.

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 control number.

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 26 U.S.C. 6103.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Richard T. Probst of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Richard T. Probst at (202) 622–3060 (not a toll-free call).

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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Key to Abbreviations:

Ann	Announcement
CD	Court Decision
DO	Delegation Order
EO	Executive Order
PL	Public Law
PTE	Prohibited Transaction Exemption
RP	Revenue Procedure
RR	Revenue Ruling
SPR	Statement of Procedural Rules
TC	Tax Convention
TD	Treasury Decision
TDO	Treasury Department Order

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