

How Safe Is Your ADP/ACP Safe Harbor?

Plan sponsors are interested in actual deferral percentage (ADP) and actual contribution percentage (ACP) safe harbor designs primarily because they can eliminate the need for ADP and/or ACP testing and ensure that highly compensated employees can maximize deferrals under the plan. There are many nuances to ADP/ACP safe harbor requirements that present traps for the unwary, which can render them unsafe, but the same complexity that creates these traps also creates planning opportunities.

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Plan sponsors are interested in ADP/ACP safe harbor plan designs because they free the plan from actual deferral percentage (ADP) testing in the case of a 401(k) plan and actual contribution percentage (ACP) testing in the case of a 401(k) or a 403(b) plan that provides matching contributions.¹ Generally, it is not the testing itself that concerns plan sponsors, as the testing is often done by the plan's recordkeeper, but rather the impact on highly compensated employees (HCEs) that results from failing the test—such as reduced limits on deferrals and matching contributions, refunds of elective deferrals, and distributions or forfeitures of matching contributions. These refunds, forfeitures and distributions can come as an unwelcome surprise.

Safe harbor designs have become increasingly prevalent,² and employers increasingly rely on these designs to provide certainty that HCEs will be able to maximize their use of the sponsor's 401(k) or 403(b) plan.

The "core" of the safe harbor designs is a quid pro quo between the plan sponsor and the government. The plan sponsor agrees to make contributions at (or above) a thresh-

old amount (under a relatively fast vesting schedule) and, in exchange, the government grants the employer a "free pass" on ADP and ACP testing. The challenge is that there is a disconnect between the attitude of employers and the Internal Revenue Service (IRS). There are a large number of ancillary rules that are also a part of obtaining safe harbor status, and employers focus heavily on the major components of the safe harbor test—such as minimum contribution levels, vesting and restrictions on in-service withdrawal. However, IRS is focused on the full range of ancillary rules, in effect "guarding" safe harbor status. As a result, employers that do not pay attention to this full set of requirements are exposed to the risk that their "safe harbor" design may not be so safe after all. In fact, IRS has put investigations of safe harbor plans high on its fiscal 2013 work plan.³

Two Different, Basic ADP/ACP Safe Harbor Designs

There are two distinct basic ADP/ACP safe harbor plan designs, and each of the two can have certain variations. The Small Business Job Protection Act of 1996 introduced the first ADP/ACP safe harbor design effective in 1999. The Pen-

TABLE

Safe Harbor Designs

Basic Design Requirements	Traditional Safe Harbor	QACA Safe Harbor
Safe Harbor Matching Contribution	Match each plan year 100% of first 3% of safe harbor compensation deferred by each eligible non-highly compensated employee, plus 50% of next 2% of safe harbor compensation deferred by the non-highly compensated employee	Match each plan year 100% of first 1% of safe harbor compensation deferred by each eligible non-highly compensated employee, plus 50% of next 5% of safe harbor compensation deferred by the non-highly compensated employee
Or	Or	Or
Safe Harbor Nonelective Contribution	Provide each plan year a nonmatching, nonelective contribution of at least 3% of safe harbor compensation to each eligible non-highly compensated employee	Provide each plan year a nonmatching nonelective contribution of at least 3% of safe harbor compensation to each eligible non-highly compensated employee
Vesting of Safe Harbor Employer Contribution	Immediate 100% vesting	100% vesting after two years of service
Limitations on Matching Contributions	Matching contributions cannot be made with respect to elective deferrals (including Roth contributions) or employee non-Roth after-tax contributions that exceed 6% of an employee's safe harbor compensation	Matching contributions cannot be made with respect to elective deferrals (including Roth contributions) or employee non-Roth after-tax contributions that exceed 6% of an employee's safe harbor compensation
	And	And
	Discretionary matching contributions cannot exceed 4% of an employee's safe harbor compensation	Discretionary matching contributions cannot exceed 4% of an employee's safe harbor compensation

sion Protection Act of 2006 introduced a second ADP/ACP safe harbor design, involving automatic enrollment in deferrals (with the ability to opt out) and automatic escalation of deferral rates, known as a *qualified automatic contribution arrangement* or QACA, effective in 2008. For lack of better nomenclature, this article shall refer to the safe harbor design introduced by the Pension Protection Act as the *QACA* safe harbor and the safe harbor design permitted by the Small Business Job Protection Act as the *traditional* safe harbor.

Both the traditional and QACA safe harbors require advance notice be given to newly eligible employees and an-

nually to all eligible employees regarding the safe harbor design, as well as certain contingent notices and notices of reduction or suspension of the safe harbor design. Failure to timely provide the proper required notices may affect the safe harbor status of the plan, but this article will not detail those notice requirements and will instead focus on certain design elements of the safe harbors.

Each of the two safe harbor designs requires an employer safe harbor contribution, either in the form of a matching contribution or nonelective (i.e., nonmatching) contribution. The basic design of each of the safe harbors is provided

TABLE continued

Safe Harbor Designs

Basic Design Requirements	Traditional Safe Harbor	QACA Safe Harbor
Automatic Enrollment	No requirement for automatic enrollment, although permitted	Each employee eligible to participate is treated as electing to participate at the “qualified percentage” (described below) unless the employee affirmatively elects (or elected) a deferral level or not to participate
Automatic Deferral Escalation	No requirement for automatic deferral escalation	Automatic deferral must be at least the following “qualified percentages” of compensation, applied uniformly, but not more than 10% of compensation: <ul style="list-style-type: none"> • 3% during first plan year in which the employee begins elective deferrals to the plan* • 4% during second plan year of the employee’s contribution of deferrals into the plan • 5% during third plan year of the employee’s contribution of deferrals into the plan • 6% during the fourth (third and any subsequent plan year) plan year of the employee’s contribution of deferrals into the plan.

* The first period to which the “qualified percentage” applies is actually the period beginning on the date of the employee’s first elective deferrals to the plan and ending on the last day of the first plan year beginning after that date, which will generally be longer than one plan year. This statutory framework accommodates the fact that employees may become eligible for the plan throughout a plan year, either as new hires with immediate eligibility or due to age or service requirements for eligibility. See Code §401(k)(13)(c)(iii)(I).

in the table. Although we will have occasion to refer to the table, the purpose of this article is not to reiterate the basic ADP and ACP safe harbor designs (those basics have been well-documented elsewhere), but rather to point out a number of more subtle and less obvious requirements for the safe harbors. Failure to satisfy these more subtle requirements could mean failure of the safe harbor and, with that, a return to testing and possible noncompliance sanctions. Note that, for purposes of the table, elective deferrals include Roth contributions.

Some ADP/ACP Safe Harbor Guiding Principles

Seven basic principles set forth in the safe harbor regulations that apply to both the traditional and QACA safe harbors can be helpful in understanding various ancillary safe harbor requirements.

1. The basic safe harbor matching designs described in the table can be modified to provide for an enhanced matching formula, provided each non-highly compensated employee (NHCE) receives a matching contribution under the modified safe harbor that is

at least equal to the total matching contribution the NHCE would have received at any rate of contributions elected by the NHCE under the basic safe harbor matching design.⁴

2. If matching contributions are used to satisfy either the ADP or ACP of the safe harbor (*safe harbor matching contributions*), the ratio of matching contributions to elective contributions of an HCE for a plan year cannot exceed the ratio of matching contributions to elective contributions for any NHCE for the plan year.⁵ The practical impact of this requirement is that an employer cannot have two different safe harbor formulas covering different employee groups in the same safe harbor plan, even if each safe harbor—if considered alone—would meet all IRS requirements (other than for employees who have not met the statutory minimum age and service requirements, as discussed below). For example, if Acme Company established a safe harbor plan for its two divisions, it could not create a design under which Division A has a basic traditional safe harbor (\$1 for \$1 on the first 3% deferred and \$0.50 per \$1 on the next 2% deferred) and Division B has a modified traditional safe harbor (such as \$1 for \$1 on the first 5% deferred). This is prohibited because an HCE in Division B will (by definition) receive a higher rate of matching contribution than each NHCE in Division A.
3. If safe harbor matching contributions are used to satisfy either the ADP or ACP of the safe harbor, the ratio of matching contributions to elective contributions of any employee for a plan year cannot increase as the amount of the employee's elective contributions increases.⁶ For example, a safe harbor plan cannot match \$1 for \$1 on the first 3% of pay deferred and \$1.50 per \$1 on the next 2% of pay deferred. However, if safe harbor matching contributions are made on the sum of an employee's elective contributions and (non-Roth) after-tax contributions on the same terms as on elective contributions alone, or if safe harbor matching contributions on an employee's elective contributions are not affected by the amount of the employee's (non-Roth) after-tax contributions, then safe harbor matching contributions can be made on both elective contributions and (non-Roth) after-tax contributions.⁷
4. To satisfy the ACP safe harbor, regardless of whether safe harbor matching contributions or safe harbor nonelective contributions are used to satisfy the safe harbor, the ratio of matching contributions to elective deferrals and (non-Roth) after-tax contributions of any employee for a plan year cannot increase as the amount of the employee's elective deferrals and (non-Roth) after-tax contributions increases.⁸
5. To satisfy the ACP safe harbor, regardless of whether safe harbor matching contributions or safe harbor nonelective contributions are used to satisfy the safe harbor, matching contributions cannot be made with respect to elective deferrals (including Roth contributions) or (non-Roth) after-tax contributions of any employee for a plan year that exceed 6% of the employee's safe harbor compensation.⁹ Accordingly, a traditional safe harbor plan cannot match \$1 for \$1 on the first 7% of pay deferred.
6. To satisfy the ACP safe harbor, regardless of whether safe harbor matching contributions or safe harbor nonelective contributions are used to satisfy the safe harbor, discretionary matching contributions cannot exceed 4% of an employee's safe harbor compensation.¹⁰
7. In order to use the safe harbor, a plan must use a specific definition of *compensation*. If a plan uses a definition of compensation outside of this specified "safe harbor" definition of compensation, then the plan loses its safe harbor status.

Potential Traps for the Unwary

As demonstrated by the guiding principles described above, there is much more to safe harbor designs than the amount of employer contribution and vesting. Application of the guiding principles above and the safe harbor regulations more generally presents the following potential traps for the unwary. Please note—This list is not exhaustive; rather, it is illustrative of the many different ways an employer can jeopardize its safe harbor status.

Last Day or Hours Requirement Not Permitted

Every NHCE eligible to make elective contributions must receive the safe harbor contribution under the plan to satisfy the safe harbor.¹¹ A requirement to be employed on the last day of the plan year to receive a safe harbor contribution is not permitted with respect to any eligible NHCE.¹² Similarly, an hours or other service requirement cannot be a condition for an eligible NHCE to receive the safe harbor contribution, except as may be permitted by the permissive disaggregation described in the section “Safe Harbor May Be Limited Only to Employees Satisfying Minimum Age and Service” below. An employer can make safe harbor contributions on the last day of the plan year—But such amounts must be allocated to any employee who participated in the plan throughout the year, including those who terminated employment during the year.

Safe Harbor Contributions Not Eligible for Hardship Distribution

Safe harbor contributions are not eligible for hardship withdrawal. This is because safe harbor contributions must satisfy the distribution restrictions of Internal Revenue Code Section 401(k), but hardship distributions under that Code section and the corresponding regulations are limited to contributions pursuant to a cash or deferred election to a 401(k) plan or pursuant to a salary reduction agreement to a 403(b) plan. Safe harbor contributions are not elective contributions to a 401(k) or 403(b) plan and so are not eligible for hardship withdrawal.¹³

No Exception From Safe Harbor Matching Contributions for Age-50 Catch-Up Contributions

If a plan uses safe harbor matching contributions to satisfy the ADP safe harbor requirements and the plan permits age-50 catch-up contributions, the safe harbor matching contributions must be applied to the age-50 catch-up contributions to the extent the safe harbor matching contributions would otherwise apply to elective deferrals under the plan. The preamble to the 401(k) regulations issued in 2004 made clear that there is no exception with respect to those catch-up contributions.¹⁴ For example, a participant could contribute the maximum dollar amount (\$17,500 for 2013) before receiving the plan’s maximum match as limited by the

compensation limit (\$255,000 for 2013). If the plan matched elective deferrals dollar for dollar up to 8% of compensation, the compensation limit would cap matching contributions at \$20,400 (8% of \$255,000) and \$2,900 of catch-up contributions would need to be matched.¹⁵

Plan Document Cannot Include Testing Language in the Alternative if Safe Harbor Is Not Satisfied

A safe harbor plan document must specify which safe harbor is used and which safe harbor contributions are used to satisfy the safe harbor requirements, as well as any optional provisions applicable to the selected safe harbor. The plan document cannot provide that ADP or ACP testing will be used if the requirements for the ADP or ACP safe harbor are not satisfied.¹⁶

May Need Second Plan if Not All Employees Are to Receive Safe Harbor Contributions in 403(b) Plan

The “universal availability” requirements of Code Section 403(b) require that all employees be eligible to make elective deferrals under a 403(b) plan with certain limited exceptions. To satisfy the ACP safe harbor requirements, the safe harbor contribution must be provided to all NHCEs eligible to make elective deferrals to the 403(b) plan.¹⁷ One of the exceptions to the universal availability requirement is that employees eligible to make elective deferrals to another 403(b) plan of the employer or a 401(k) plan of the employer can be excluded. Unless the 403(b) plan sponsor intends to provide safe harbor contributions to all employees required to be eligible to make elective deferrals under the universal availability rules, the employer may need to maintain a second plan for those employees to whom the employer does not wish to provide the safe harbor contributions. By allowing those employees to make elective deferrals to the second plan, the exception to universal availability for employees who participate in another plan can be satisfied and those employees can be excluded from receiving the safe harbor contribution.¹⁸

Safe Harbor Contributions Must Be Based on Safe Harbor Compensation

As noted above, there are specific “nondiscriminatory” definitions of compensation that must be used to retain safe harbor status. The basic safe harbor definition of compensa-

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tion used is the same definition of compensation used under Code Section 415: “Wages, salaries, fees for professional services, and other amounts received (without regard to whether or not an amount is paid in cash) 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,” although certain variations are allowed. There are more details—And this issue should be carefully addressed as a part of establishing any safe harbor plan.

Safe Harbor Contributions Must Be Disregarded for Purposes of Permitted Disparity

The safe harbor contribution requirements must be satisfied without regard to Code Section 401(l), i.e., safe harbor contributions cannot be taken into account for purposes of Code Section 401(l).¹⁹ Although safe harbor nonelective

contributions may be taken into account for purposes of determining whether a plan satisfies the nondiscrimination requirements of Code Section 401(a)(4), such as the “general test,” to the extent they are needed to satisfy the safe harbor contribution requirement, safe harbor nonelective contributions may not be taken into account under any plan for purposes of Code Section 401(l), including the imputation of permitted disparity under Treasury Regulation Section 1.401(a)(4)-7.²⁰

Midyear Change to a Less Generous Safe Harbor Formula Not Permitted

Although it is possible to suspend or reduce safe harbor contributions under certain circumstances, the regulations require that the ADP and ACP tests must be satisfied for the entire plan year when safe harbor contributions are suspended or reduced.²¹ The regulations do not permit suspending or reducing safe harbor contributions to move from one safe harbor design to another midyear.

Safe Harbor Status: Some Overlooked Design Opportunities

The traps described above occur, in part, because of the complexity of the statutory language behind the “simple” idea of a safe harbor design. This complexity also creates hidden opportunities for employers. A few of these opportunities are described below.

Safe Harbor May Be Limited Only to Employees Satisfying Minimum Age and Service

A plan can be treated as two separate plans under Code Section 410(b)(4)(B)—one for the group of employees who have satisfied the minimum age and service requirements of Code Section 410(a)(1)(A) and the other plan for the group of employees who have not. The ADP (or ACP) safe harbor can apply to one of these two separate plans and the ADP (or ACP) test can apply to the other.²² This ability to treat the group of employees who have not satisfied the minimum age and service requirements of Code Section 410(a)(1)(A) as covered under a separate plan provides a limited exception to the general requirement that every eligible NHCE must receive the safe harbor contribution to satisfy the safe harbor.

Some plan sponsors use this permissive disaggregation of “otherwise excludable employees” to provide the safe harbor contribution only to the group of employees who have satisfied the minimum age and service requirements of Code Section 410(a)(1)(A). For example, it would be possible to permit all employees covered by a plan to make elective contributions, but provide the safe harbor contribution only to those employees who have satisfied age and service conditions permitted by Code Section 410(a)(1)(A) and the corresponding regulations, including the use of two entry dates, such as January 1 and July 1 for a calendar-year plan, when permitted.²³ The group of employees who have not satisfied the minimum age and service requirements of Code Section 410(a)(1)(A) would be subject to ADP and ACP testing, as applicable.²⁴

Possible to Layer Discretionary Match Atop Safe Harbor Matching Contributions

Although safe harbor contributions must be nondiscretionary, a safe harbor plan can provide for discretionary matching contributions in addition to required safe harbor contributions. These discretionary contributions can benefit from the protection of the safe harbor and need not be subject to ACP testing. The discretionary matching contributions must not exceed 4% of an employee’s safe harbor compensation (described above), and the total of matching contributions under the plan cannot be made with respect to elective deferrals (or non-Roth after-tax contributions, if applicable) that exceed 6% of the employee’s safe harbor compensation. For example, a plan could have an enhanced safe harbor matching design that provides a 100% match on the first 6% of safe harbor compensation deferred by an employee and also provide a discretionary match of 50% on the first 6% of safe harbor compensation deferred by an employee. Neither the safe harbor matching contribution nor the discretionary matching contribution is made with respect to elective deferrals that exceed 6% of the employee’s safe harbor compensation, so the total of matching contributions under the plan is not made with respect to elective deferrals that exceed 6% of the employee’s safe harbor compensation. The discretionary matching contributions of the example cannot exceed 3% of the employee’s safe harbor compensation and so do not exceed 4% of the employee’s safe harbor compensation.

Permissive Aggregation of Safe Harbor Plans for Nondiscrimination Testing May Be Possible

For purposes of testing whether plan coverage or benefits significantly discriminate in favor of HCEs, a plan sponsor may find it advantageous to treat more than one plan as a single plan (i.e., permissively aggregate plans) for purposes of testing. Plans using inconsistent ADP testing methods (including an ADP safe harbor) or inconsistent ACP testing methods (including an ACP safe harbor) cannot be permissively aggregated.²⁵ A plan, including permissively aggregated plans treated as a single plan, must apply a single ADP method, namely, the ADP test, the traditional safe harbor or the QACA safe harbor. Parallel rules apply for purposes of the ACP testing methods.²⁶ Thus, it should be possible to permissively aggregate plans using the same safe harbor (i.e., either the traditional or QACA safe harbor). While not expressly stated in the applicable regulations, it would seem that a uniform safe harbor contribution design would need to be present across the permissively aggregated safe harbor plans to satisfy the safe harbor requirements.

Safe Harbor Matching Contributions Can Be Included in ACP Test of After-Tax Contributions


The ACP safe harbors do not apply to (non-Roth) after-tax contributions, which must be ACP-tested. However, safe harbor matching contributions may be optionally included or excluded from the ACP test of the after-tax contributions.²⁷

Annual Reset to Minimum Automatic Enrollment Deferral Is Possible

Automatic enrollment applies for periods during which an employee’s affirmative contribution election is not in effect. A plan can specifically provide that an affirmative election expires and, thereby, require an employee to make a new affirmative election to continue the employee’s prior affirmatively elected rate of contribution. In the absence of a second affirmative election, the employee would automatically be enrolled at the plan’s default percentage, which must meet the QACA safe harbor minimum percentage requirement (*qualified percentages*) described in the design requirements table. Note, however, that a plan is permitted to treat an employee who for an entire plan year did not have

contributions made pursuant to a default election under the QACA as if the employee did not have default contributions under the QACA in any prior plan year for purposes of determining the applicable qualified percentage for the employee.²⁸

Conclusion

Safe harbor designs hold out the promise of simplified administration (no ADP or ACP testing) and employee communication (no need to communicate refunds or ADP/ACP-based limits). However, in order to achieve this simplicity, employers must work through additional layers of complexity. These layers can be successfully navigated, but only with guidance from a resource that understands the full scope of these safe harbors. 

Endnotes

1. It should be noted that ADP testing is not required for 403(b) plans. Elective deferrals to a 403(b) plan are instead subject to a separate “universal availability” requirement. Nevertheless, ACP testing does apply to matching contributions to nongovernmental 403(b) plans and the ACP safe harbor offers relief from this ACP testing. Accordingly, this article will also be of interest to nongovernmental 403(b) plan sponsors that provide matching contributions.

2. For example, among publicly traded employers, 42% use a safe harbor design in their matched savings plans (Aon Hewitt 2013 Benefit SpecSelect™).

3. According to comments of IRS officials at an October 16, 2012 meeting of the Mid-Atlantic Pension Liaison Group. See October 17, 2012 *BNA Daily Tax Report*.

4. See Treas. Reg. §§1.401(k)-3(c)(3) and 1.401(k)-3(k)(1).

5. See Treas. Reg. §§1.401(k)-3(c)(4) and 1.401(m)-3(c). The 401(k) ADP safe harbor regulations use the term *elective contributions* while the 401(m) ACP safe harbor regulations use the term *elective deferrals*. Treas. Reg. §1.401(m)-5 defines *elective deferrals* as defined in Code §402(g)(3), which includes employer contributions made pursuant to a qualified cash or deferred arrangement under Code §401(k)(2) or pursuant to a salary reduction agreement under Code §403(b). Treas. Reg. §1.401(k)-6 defines *elective contributions* as employer contributions made to a plan pursuant to a cash or deferred election under a cash or deferred arrangement, whether or not the arrangement is a qualified cash or deferred arrangement under Treas. Reg. §1.401(k)-1(a)(4). For purposes of this article, the terms *elective deferral* and *elective contribution* shall be used interchangeably, as the article is only concerned with qualified cash or deferred arrangements for purposes of the ADP safe harbor. See also Treas. Reg. §§1.402(g)(3)-1, 1.401(k)-3(a)(3), and 1.403(b)-3(a).

6. See Treas. Reg. §§1.401(k)-3(c)(3) and 1.401(m)-3(c).

7. See Treas. Reg. §§1.401(k)-3(c)(5) and 1.401(m)-3(c).

8. See Treas. Reg. §1.401(m)-3(d)(2). After-tax contributions (i.e., employee contributions) do not include designated Roth contributions. See Treas. Reg. §1.401(m)-1(a)(3).

9. See Treas. Reg. §1.401(m)-3(d)(3)(i).

10. See Treas. Reg. §1.401(m)-3(d)(3)(ii).

11. For this purpose, *eligible* means an employee who is directly or indirectly eligible to make a cash or deferred election under the plan for all or a portion of the plan year. Certain conditions on eligibility are permitted and certain one-time irrevocable elections are not considered to be cash or deferred elections. See Treas. Reg. §1.401(k)-6 for the definition of *eligible employee*.

12. See Example 4 of Treas. Reg. §1.401(k)-3(c)(7).

13. See Code §§401(k)(12)(E)(i), 401(k)(13)(D)(iii)(II), 401(k)(2)(B)(i)(IV), and 402(e)(3) and Treas. Reg. §§1.401(k)-3(b)(1), 1.401(k)-3(c)(1) and 1.401(k)-1(d)(3)(ii)(A), and the definitions of *qualified nonelective contribution* and *qualified matching contribution* in Treas. Reg. §1.401(k)-6.

14. See 69 *Fed. Reg.* 78151 (Dec. 29, 2004).

15. However, to be an ACP safe harbor plan, matching contributions cannot be made with respect to elective deferrals of any employee for a plan year that exceed 6% of the employee’s safe harbor compensation, so the plan in the example cannot be an ACP safe harbor plan even though it is an ADP safe harbor plan.

16. See Treas. Reg. §§1.401(k)-1(e)(7) and 1.401(m)-1(c)(2).

17. See Treas. Reg. §1.401(m)-3(b), which cross-references Treas. Reg. §1.401(k)-3(b), and Treas. Reg. §1.401(m)-3(c), which cross-references Treas. Reg. §1.401(k)-3(c).

18. The second plan could be another 403(b) plan, a 401(k) plan, or a 457(b) eligible governmental plan, whichever is applicable to the employer and permitted under the circumstances.

19. See Code §§401(k)(12)(E)(ii), 401(k)(13)(D)(iv), 401(m)(11)(A)(i), and 401(m)(12)(B).

20. See Treas. Reg. §1.401(k)-3(h)(2).

21. See Treas. Reg. §§1.401(k)-3(g) and 1.401(m)-3(h) and proposed Treas. Reg. §§1.401(k)-3(g) and 1.401(m)-3(h), 74 *Fed. Reg.* 23134 (May 18, 2009).

22. See Treas. Reg. §§1.401(k)-3(g)(3), 1.401(k)-1(b)(1), 1.401(k)-1(b)(4)(iv)(A), 1.401(k)-1(b)(4)(vi) Example 2, 1.401(m)-1(b)(1), and 1.401(m)-1(b)(4)(iv)(A). Note that under the cited regulations, it also seems possible to apply one safe harbor design to the group of employees who have satisfied the minimum age and service requirements of Code Section 410(a)(1)(A) and another safe harbor design to the group of employees who have not.

23. See Treas. Reg. §1.410(a)-4(b)(1), but see Treas. Reg. §1.410(a)-7(c)(3) in the case of an elapsed time service plan.

24. For instance, a plan without either matching contributions or after-tax contributions would not be subject to ACP testing, and there is no ADP test requirement for 403(b) plans.

25. See Treas. Reg. §§1.401(k)-1(b)(4)(iii) and 1.401(m)-1(b)(4)(iii). Permissive aggregation rules are set forth in Treas. Reg. §1.410(b)-7(d) but are modified by Treas. Reg. §§1.401(k)-1(b)(4)(v), 1.401(m)-1(b)(4)(v), and, with respect to 403(b) plans, 1.410(b)-7(f).

26. See Treas. Reg. §1.401(m)-1(b)(4).

27. See Treas. Reg. §§1.401(m)-2(a)(5)(iv) and 1.401(m)-3(j)(6).

28. See the preamble to the final Treasury regulations on automatic contribution arrangements, 74 *Fed. Reg.* 8202-8203 (Feb. 24, 2009).

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