Rules and Regulations

Federal Register
Vol. 83, No. 140
Friday, July 20, 2018

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9835]

RIN–1545–BN05

Definitions of Qualified Matching Contributions and Qualified Nonelective Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that amend the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) under regulations regarding certain qualified retirement plans that contain cash or deferred arrangements under section 401(k) or that provide for matching contributions or employee contributions under section 401(m). Under these regulations, an employer contribution to a plan may be a QMAC or QNEC if it satisfies applicable nonforfeitability requirements and distribution limitations at the time it is allocated to a participant's account, but need not meet these requirements or limitations when it is contributed to the plan. These regulations affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified plans that contain cash or deferred arrangements or provide for matching contributions or employee contributions.

DATES: *Effective date.* These regulations are effective July 20, 2018.

Applicability date. These regulations apply to plan years beginning on or after July 20, 2018. However, taxpayers may apply these regulations to earlier periods.

FOR FURTHER INFORMATION CONTACT: Angelique Carrington at (202) 317–4148 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 401(k)(1) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan will not be considered as failing to satisfy the requirements of section 401(a) merely because the plan includes a qualified cash or deferred arrangement (CODA). To be considered a qualified CODA, a plan must satisfy several requirements, including: (i) Under section 401(k)(2)(B), amounts held by the plan's trust that are attributable to employer contributions made pursuant to an employee's election must satisfy certain distribution limitations; (ii) under section 401(k)(2)(C), an employee's right to such employer contributions must be nonforfeitable; and (iii) under section 401(k)(3), such employer contributions must satisfy certain nondiscrimination requirements.

Under section 401(k)(3)(D)(ii), the employer contributions taken into account for purposes of applying the nondiscrimination requirements may, under such rules as the Secretary may provide and at the election of the employer, include matching contributions within the meaning of section 401(m)(4)(A) that meet the distribution limitations and nonforfeitability requirements of section 401(k)(2)(B) and (C) (also referred to as qualified matching contributions or QMACs) and qualified nonelective contributions within the meaning of section 401(m)(4)(C) (QNECs). Under section 401(m)(4)(C), a QNEC is an employer contribution, other than a matching contribution, with respect to which the distribution limitations and nonforfeitability requirements of section 401(k)(2)(B) and (C) are met.

Under § 1.401(k)–1(b)(1)(ii), a CODA satisfies the applicable nondiscrimination requirements if it satisfies the actual deferral percentage (ADP) test of section 401(k)(3), described in § 1.401(k)–2. The ADP test limits the disparity permitted between the percentage of compensation made as employer contributions to the plan for a plan year on behalf of eligible highly compensated employees and the percentage of compensation made as employer contributions on behalf of eligible nonhighly compensated employees. If the ADP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer contributions made on behalf of an eligible employee, employers are allowed to take into account certain QMACs and QNECs made on behalf of the employee by the employer.

In lieu of applying the ADP test, an employer may choose to design its plan to satisfy an ADP safe harbor, including the ADP safe harbor provisions of section 401(k)(12), described in § 1.401(k)–3. Under § 1.401(k)–3, a plan satisfies the ADP safe harbor provisions of section 401(k)(12) if, among other things, it satisfies certain contribution requirements. With respect to the safe harbor under section 401(k)(12), an employer may choose to satisfy the contribution requirement by providing a certain level of QMACs or QNECs to eligible nonhighly compensated employees under the plan.

A defined contribution plan that provides for matching or employee after-tax contributions must satisfy the nondiscrimination requirements under section 401(m) with respect to those contributions for each plan year. Under § 1.401(m)–1(b)(1), the matching contributions and employee contributions under a plan satisfy the nondiscrimination requirements for a plan year if the plan satisfies the actual contribution percentage (ACP) test of section 401(m)(2) described in § 1.401(m)–2.

The ACP test limits the disparity permitted between the percentage of compensation made as matching contributions and after-tax employee contributions for or by eligible highly compensated employees under the plan and the percentage of compensation made as matching contributions and after-tax employee contributions for or by eligible nonhighly compensated employees under the plan. If the ACP test limits are exceeded, the employer must take corrective action to ensure that the limits are met. In determining the amount of employer contributions made on behalf of an eligible employee, employers are allowed to take into account certain QNECs made on behalf of the employee by the employer. Employers must also take into account QMACs made on behalf of the employee by the employer unless an exclusion applies (including an exclusion for

QMACs that are taken into account under the ADP test).

If an employer designs its plan to satisfy the ADP safe harbor of section 401(k)(12), it may avoid performing the ACP test with respect to matching contributions under the plan, as long as the additional requirements of the ACP safe harbor of section 401(m)(11) are met.

As defined in § 1.401(k)–6, QMACs and QNECs must satisfy the nonforfeitability requirements of § 1.401(k)–1(c) and the distribution limitations [1] of § 1.401(k)–1(d) ''when they are contributed to the plan.'' Similarly, under the independent definitions in § 1.401(m)–5, QMACs and QNECs must satisfy the nonforfeitability requirements of § 1.401(k)–1(c) and the distribution limitations of § 1.401(k)–1(d) ''at the time the contribution is made.'' In general, contributions satisfy the nonforfeitability requirements of § 1.401(k)–1(c) if they are immediately nonforfeitable within the meaning of section 411, and contributions satisfy the distribution limitations of § 1.401(k)–1(d) if they may not be distributed before the employee's death, disability, severance from employment, attainment of age 59½, or hardship, or upon the termination of the plan.

Before 2017, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) received comments with respect to the definitions of QMACs and QNECs in §§ 1.401(k)–6 and 1.401(m)–5. In particular, commenters asserted that employer contributions should qualify as QMACs and QNECs as long as they satisfy applicable nonforfeitability requirements at the time they are allocated to participants' accounts, rather than when they are first contributed to the plan. Commenters pointed out that interpreting sections 401(k)(3)(D)(ii) and 401(m)(4)(C) to require satisfaction of applicable nonforfeitability requirements at the time amounts are first contributed to the plan would preclude plan sponsors with plans that permit the use of amounts in plan forfeiture accounts to offset future employer contributions under the plan from applying such amounts to fund QMACs and QNECs. This is because the amounts would have been allocated to the forfeiture accounts only after a participant incurred a forfeiture of benefits and, thus, generally would have been subject to a vesting schedule when they were first contributed to the plan. Commenters requested that QMAC and QNEC requirements not be interpreted to prevent the use of plan forfeitures to fund QMACs and QNECs. The commenters urged that the nonforfeitability requirements under § 1.401(k)–6 should apply when QMACs and QNECs are allocated to participants' accounts and not when the contributions are first made to the plan.

In considering the comments, the Treasury Department and the IRS took into account that the nonforfeitability requirements applicable to QMACs and QNECs are intended to ensure that QMACs and QNECS provide nonforfeitable benefits for the participants who receive them. In accordance with that purpose, the Treasury Department and the IRS concluded that it is sufficient to require that amounts allocated to participants' accounts as QMACs and QNECs be nonforfeitable at the time they are allocated to participants' accounts, rather than when such contributions are made to the plan.

Accordingly, on January 18, 2017, the Treasury Department and the IRS issued a notice of proposed rulemaking (REG–131643–15), which was published in the **Federal Register** (82 FR 5477). Under the notice of proposed rulemaking, the Treasury Department and the IRS proposed to amend § 1.401(k)–6 to provide that amounts used to fund QMACs and QNECs must be nonforfeitable and subject to distribution limitations in accordance with § 1.401(k)–1(c) and (d) when allocated to participants' accounts, and to no longer require that amounts used to fund QMACs and QNECs satisfy the nonforfeitability requirements and distribution limitations when they are first contributed to the plan. As a result, forfeitures would be permitted to be used to fund QMACs and QNECs. No public hearing on the notice of proposed rulemaking was requested or held. Several comments on the proposed rules were submitted, and, after consideration of all the comments, the proposed regulations are adopted without substantive modification.

This document contains amendments to 26 CFR part 1.

Explanation of Provisions

This document contains final regulations that amend the definitions of QMACs and QNECs to provide that employer contributions to a plan are QMACs or QNECs if they satisfy applicable nonforfeitability requirements and distribution limitations at the time they are allocated to participants' accounts. Accordingly, these regulations permit forfeitures of prior contributions to be used to fund QMACs and QNECs.

The Treasury Department and the IRS received five comments in response to the notice of proposed rulemaking that raised issues relating to the modification of the QMAC and QNEC definitions, including issues with respect to plan amendments and the pre-approved plan program, as described in Rev. Proc. 2015–36, 2015–27 I.R.B. 20, Part III of Rev. Proc. 2016–37, 2016–29 I.R.B. 136, and Rev. Proc. 2017–41, 2017–29 I.R.B. 92. The Treasury Department and the IRS determined that the comments relating to the pre-approved plan program are outside the scope of these regulations, which relate solely to the modification of the definitions of QMACs and QNECs. These comments have been shared with IRS Tax Exempt and Government Entities, Employee Plans, which administers the pre-approved plan program.

The comments also included questions relating to the application of section 411(d)(6) in cases in which a plan sponsor seeks to amend its plan to apply the rules in this regulation. The application of section 411(d)(6) is generally outside the scope of these regulations. However, if a plan sponsor adopts a plan amendment to define QMACs and QNECs in a manner consistent with these final regulations and applies that amendment prospectively to future plan years, section 411(d)(6) would not be implicated. Moreover, in the common case of a plan that provides that forfeitures will be used to pay plan expenses incurred during a plan year and that any remaining forfeitures in the plan at the end of the plan year will be allocated pursuant to a specified formula among active participants who have completed a specified number of hours of service during the plan year, section 411(d)(6) would not prohibit a plan amendment adopted before the end of the plan year that permits the use of forfeitures to fund QMACs and QNECs (even if, at the time of the amendment, one or more participants had already completed the specified number of hours of service). This is because all conditions for receiving an allocation will not have been satisfied at the time of the amendment, since one of the conditions for receiving an allocation is that plan expenses at the end of the plan year are less than the amount of

[1] The existing definitions of QMACs and QNECs in §§ 1.401(k)–6 and 1.401(m)–5 refer to the distribution requirements of § 1.401(k)–1(d). Section 1.401(k)–1(d) is more appropriately characterized as providing distribution limitations (consistent with the heading of § 1.401(k)–1d)). Accordingly, this preamble refers to distribution limitations rather than distribution requirements, and, as noted in the Explanation of Provisions section of this preamble, the definitions of QMACs and QNECs in §§ 1.401(k)–6 and 1.401(m)–5 are amended in the final regulations to refer to distribution limitations.

forfeitures. See § 1.411(d)–4, Q&A–1(d)(8) (features that are not section 411(d)(6) protected benefits include ''[t]he allocation dates for contributions, forfeitures, and earnings, the time for making contributions (but not the conditions for receiving an allocation of contributions or forfeitures for a plan year after such conditions have been satisfied), and the valuation dates for account balances'').

These regulations are substantively the same as the proposed regulations. However, the Treasury Department and the IRS have determined that the distribution requirements referred to in the existing definitions of QMACs and QNECs in §§ 1.401(k)–6 and 1.401(m)–5 are more appropriately characterized as distribution limitations (consistent with the heading of § 1.401(k)–1(d)), and, accordingly, these definitions have been amended to refer to distribution limitations.

Effective/Applicability Date

These regulations are effective on July 20, 2018.

These regulations apply to plan years beginning on or after July 20, 2018. However, taxpayers may apply these regulations to earlier periods.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov*.

Drafting Information

The principal author of these regulations is Angelique Carrington, Office of Associate Chief Counsel (Tax Exempt and Governmental Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 401(m)(9) and 26 U.S.C. 7805. * * *

■ **Par. 2.** Section 1.401(k)–1 is amended by adding paragraph (g)(5) to read as follows:

§ 1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(g) * * *

(5) *Applicability date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs).* The revisions to the second sentence in the definitions of QMACs and QNECs in § 1.401(k)–6 apply to plan years ending on or after July 20, 2018.

■ **Par. 3.** Section 1.401(k)–6 is amended by revising the second sentence in the definitions of *Qualified matching contributions (QMACs)* and *Qualified nonelective contributions (QNECs)* to read as follows:

§ 1.401(k)–6 Definitions.

* * * * *

Qualified matching contributions (QMACs). * * * Thus, the matching contributions must satisfy the nonforfeitability requirements of § 1.401(k)–1(c) and be subject to the distribution limitations of § 1.401(k)–1(d) when they are allocated to participants' accounts. * * *

Qualified nonelective contributions (QNECs). * * * Thus, the nonelective contributions must satisfy the nonforfeitability requirements of § 1.401(k)–1(c) and be subject to the distribution limitations of § 1.401(k)–1(d) when they are allocated to participants' accounts.

* * * * *

■ **Par. 4.** Section 1.401(m)–1 is amended by adding paragraph (d)(4) to read as follows:

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

* * * * *

(d) * * *

(4) *Effective date for definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs).* The revisions to the definitions of QMACs and QNECs in § 1.401(m)–5 apply to plan years ending on or after July 20, 2018.

■ **Par. 5.** Section 1.401(m)–5 is amended by revising the definitions of *Qualified matching contributions (QMACs)* and *Qualified nonelective contributions (QNECs*) to read as follows:

§ 1.401(m)–5 Definitions.

* * * * *

Qualified matching contributions (QMACs). Qualified matching contributions or QMACs means qualified matching contributions or QMACs as defined in § 1.401(k)–6.

Qualified nonelective contributions (QNECs). Qualified nonelective contributions or QNECs means qualified nonelective contributions or QNECs as defined in § 1.401(k)–6.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

Approved: July 13, 2018.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2018–15495 Filed 7–19–18; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 175

RIN 0790–AJ54

[Docket ID: DOD–2016–OS–0108]

Indemnification or Defense, or Providing Notice to the Department of Defense, Relating to a Third-Party Environmental Claim

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The DoD is identifying the proper address and notification method for an entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim under section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended (hereinafter ''section 330''), or under section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, (hereinafter ''section 1502(e)''). This rule also identifies the documentation