

Form 9416 (March 2010)	Department of Treasury – Internal Revenue Service Employee Plans Deficiency Checksheet Attachment #11 Section 401(m) Requirements	Date
<i>For IRS Use</i>	Please furnish the amendment(s) requested in the section(s) checked	
1011, 1102, 1103 II.a.(i), (ii)	<p>Section _____ of the plan should be amended to provide that the plan will meet the nondiscrimination test set forth in section 401(m)(2)(A) of the Code that applies to employee and matching contributions. Under this test, the actual contribution percentage (ACP) for the group of eligible highly compensated employees for the current plan year may not exceed the greater of (a) 125% of the ACP for all other eligible employees for the prior plan year or (b) the lesser of twice the ACP for all other eligible employees for the prior plan year, or such ACP for all other eligible employees for the prior plan year plus 2%. If the plan is using the current year testing method, then “the current plan year” should be substituted for “the prior plan year” in the previous sentence. The ACP for a group of eligible employees is the average of the ratios (calculated separately for each employee) of the sum of matching and employee contributions and other contributions taken into account paid under the plan on behalf of each employee for the relevant plan year, divided by the employee’s compensation for that plan year. Employee contributions are any employee contributions made on behalf of an employee to an individual account to which attributable earnings and losses are allocated. Matching contributions are any employer contributions (including discretionary contributions) made to a plan on account of an employee contribution or elective contribution to a plan maintained by the employer and any forfeitures allocated on the basis of employee contributions, matching contributions, or elective contributions. For purposes of this requirement, the plan may incorporate by reference the provisions of section 401(m) of the Code and section 1.401(m)-2 of the regulations. IRC section 401(m) and Regs. section 1.401(m)-1(c)(2) and -2(a)(1)(i).</p>	
1104, 1105 II.b. (i)	<p>Section _____ of the plan should be amended to provide that the plan will take into account the actual contribution ratios of all eligible employees for purposes of the actual contribution percentage (ACP) test in IRC section 401(m). For this purpose, an eligible employee is any employee who is directly or indirectly eligible to receive an allocation of matching contributions or to make employee contributions and includes: an employee who would be a plan participant but for the failure to make required contributions; an employee whose right to make employee contributions or receive matching contributions has been suspended because of an election (other than certain one-time elections) not to participate; and an employee who cannot make an employee contribution or receive a matching contribution because section 415(c)(1) prevents the employee from receiving additional annual additions. In the case of an eligible employee who makes no employee contributions and who receives no matching contributions, the contribution ratio that is to be included in determining the ACP is zero. IRC section 401(m)(3) and (5) and Regs. section 1.401(m)-5. If an election has been made to apply section 410(b)(4)(B), the plan may provide that eligible non-highly compensated employees who have not met minimum age and service requirements under section 410(a)(1)(A) are excluded from the ACP test. IRC section 401(m)(5)(C).</p>	
1106, 1107 II.b.(ii)	<p>In running the ACP test for a plan year, an employee contribution will be taken into account if it is paid to the trust during the plan year. An excess contribution to a CODA that is recharacterized as an employee contribution will be taken into account for the ACP test in the plan year in which the contribution would have been received in cash if there had not been an election to defer. A matching contribution will be taken into account for the ACP test for a given plan year only if 1) it is made on account of the employee’s elective or employee contributions for that plan year, 2) it is allocated to the employee’s account as of any date within that plan year, and 3) it is paid to the trust no later than the last day of the 12th month immediately following that plan year. In addition, a nonhighly compensated employee’s (NHCE’s) matching contribution cannot be taken into account for the ACP test to the extent it exceeds the greatest of the following:</p> <ol style="list-style-type: none"> 1) 5 percent of the employee’s compensation; 2) the employee’s matched contributions (elective deferrals, employee contributions or both); and 3) the product of twice the lowest matching rate of at least half the nonhighly compensated employees that made matched contributions for the year and the employee’s matched contributions. An employee’s matching rate is the matching contributions made for such employee divided by that employee’s matched contributions, except that if the matching rate is not the same for all levels of an employee’s matched contributions, the employee is deemed to have made matched contributions equal to 6 percent of compensation. 	

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	<p>Matching contributions that are forfeited to meet the ACP test or because they relate to excess deferrals, excess contributions, excess aggregate contributions or default elective contributions that are distributed under Code section 414(w) are not counted in the ACP test. Under certain circumstances, an employer may treat elective contributions to a cash or deferred arrangement (i.e., elective deferrals) and certain nonelective contributions (i.e., qualified nonelective contributions, or QNECs) as matching contributions for purposes of the ACP test. Section _____ of the plan should be amended accordingly. IRC section 401(m)(3) and Regs. section 1.401(m)-2(a)(4) and (5).</p>
1108 II.b.(iii)	<p>Section _____ of the plan should be amended to provide that for purposes of determining whether a plan satisfies the actual contribution percentage test of IRC section 401(m), all employee and matching contributions that are made under two or more plans that are aggregated for purposes of section 401(a)(4) and 410(b) (other than section 410(b)(2)(A)(ii)) are to be treated as made under a single plan, and that if two or more plans are permissively aggregated for purposes of section 401(m), the aggregated plans must also satisfy sections 401(a)(4) and 410(b) as though they were a single plan. IRC section 401(m)(2)(B) and Regs. section 1.401(m)-1(b)(4).</p>
1109 II.b.(iv)	<p>Section _____ of the plan should be amended to provide that in calculating the actual contribution percentage for purposes of section 401(m), the actual contribution ratio of a highly compensated employee will be determined by treating all plans subject to section 401(m) under which the highly compensated employee is eligible (other than those that may not be permissively aggregated) as a single plan. IRC section 401(m)(2)(B) and Regs. section 1.401(m)-2(a)(3)(ii).</p>
1115 II.b.(v)	<p>Section _____ of the plan should be amended to provide that the actual contribution percentages (ACPs) of highly compensated employees (HCEs) and nonhighly compensated employees (NHCEs) are determined for the relevant plan years. If the plan is using the prior year testing method, the ACP of HCEs is determined for the current plan year (the "testing year") and the ACP of NHCEs is determined for the prior plan year. If, on the other hand, the plan is using the current year testing method, the ACPs of both HCEs and NHCEs are determined for the current year. IRC section 401(m)(2)(A)</p>
1112 II.c.	<p>Section _____ of the plan should be amended so that the availability of employee contributions (and matching contributions, if applicable) does not discriminate in favor of highly compensated employees. IRC section 401(a)(4) and Regs. section 1.401(m)-1(a)(2).</p>
1136, 1137, 1138, 1139 III.a.(i), (ii)	<p>Section _____ of the plan should be amended to provide that nonelective employer contributions may be treated as matching contributions for purposes of the actual contribution percentage (ACP) test of IRC section 401(m) only if such contributions are nonforfeitable when made to the plan and are subject to the same distribution restrictions (other than hardship) that apply to elective contributions. IRC section 401(m)(4)(C) and Regs. sections 1.401(m)-2(a)(6) and -5.</p>
1147 III.b.	<p>Section _____ of the plan should be amended to provide that elective contributions and/or qualified nonelective contributions may be treated as matching contributions only if the conditions described in section 1.401(m)-2(a)(6) of the regulations are satisfied. IRC section 401(m)(3) and Regs. section 1.401(m)-2(a)(6).</p>
1113, 1114 IV.c.(i)	<p>Section _____ of the plan should be amended to provide that the amount of excess aggregate contributions to be distributed to highly compensated employees (or, if forfeitable, forfeited) is determined under the "ratio leveling method." First, determine how much the actual contribution ratio (ACR) of the highly compensated employee with the highest ACR would have to be reduced to satisfy the actual contribution percentage (ACP) test or cause such ratio to equal the ACR of the highly compensated employee with the next highest ratio. Second, this process is repeated until the ACP test would be satisfied. The amount of excess aggregate contributions is equal to the sum of these hypothetical reductions multiplied, in each case, by the highly compensated employee's compensation. IRC section 401(m)(6)(B) and (C) and Regs. sections 1.401(m)-2(b)(2) and (3).</p>

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1118	Section _____ of the plan should be amended to provide that the amount of excess aggregate contributions for a plan year shall be determined only after first determining the excess contributions that are treated as employee contributions due to recharacterization. Regs. section 1.401(m)-2(a)(4)(ii).
IV.c.(ii)	
1119, 1120	Section _____ of the plan should be amended to provide that the distribution of excess aggregate contributions will include the income or loss allocable thereto. The income or loss allocable to excess aggregate contributions includes income or loss for the plan year for which the excess aggregate contributions were made and, in certain years before 2008, gap-period income or loss. For plan years beginning before 2006, income or loss allocable to the "gap period" (the period between the end of the plan year in which the ADP was exceeded and the date of the distribution of excess aggregate contributions) could be disregarded in determining income or loss on excess aggregate contributions for such years. For plan years beginning after 2005 and before 2008, allocable income or loss included allocable income or loss for the gap period. For plan years beginning on or after January 1, 2008, allocable income or loss does not include allocable income or loss for the gap period. See section 1.401(m)-2(b)(2)(iv) of the regulations for a description of the manner in which income or loss allocable to excess contributions is to be calculated. IRC section 401(m)(6)(A) and Regs. section 1.401(m)-2(b)(2)(iv).
IV.c.(iii)	
1121	A method of correcting excess aggregate contributions must meet the nondiscrimination requirements of section 401(a)(4). A method under which employee contributions are distributed to highly compensated employees to the extent necessary to meet the requirements of section 401(m)(2), while matching contributions attributable to such employee contributions remain allocated to the employee's account, will not meet the requirements of section 401(a)(4). Section _____ of the plan should be amended accordingly. Regs. section 1.401(m)-2(b)(3)(v)(B)
IV.c.(iv)	
1122	Failure to correct excess aggregate contributions by the end of the 12-month period immediately following the end of the plan year for which they were made will cause the plan to fail to satisfy the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and for all subsequent years they remain uncorrected. Also, the employer will be liable for a 10% excise tax on the amount of excess aggregate contributions unless they are corrected within 2 1/2 months (6 months in the case of certain plans that include an eligible automatic contribution arrangement within the meaning of section 414(w)) after the close of the plan year for which they were made. Section _____ of the plan should be amended accordingly. IRC sections 401(m)(6)(A) and 4979 and Regs. section 1.401(m)-2(b)(4).
IV.c.(v)	
1123	Section _____ of the plan should be amended to provide that the distribution (or forfeiture, if applicable) of excess aggregate contributions shall be made on the basis of the respective amounts attributable to each highly compensated employee. The highly compensated employees subject to actual distribution or forfeiture are determined using the "dollar leveling method" starting with the highly compensated employee with the greatest dollar amount of employee, matching and other contributions treated as matching contributions for the plan year and continuing until the amount of the excess aggregate contributions has been accounted for. IRC section 401(m)(6)(C) and Regs. section 1.401(m)-2(b)(2)(iii).
IV.c.(vi)	
1125	Section _____ of the plan should be amended to provide for correction of excess aggregate contributions. IRC section 401(m)(6) and Regs. section 1.401(m)-2(b).
IV.d.	
1141, 1142	Section _____ of the plan should be amended to define highly compensated employee as an employee who:
V.a.	<ol style="list-style-type: none"> 1. was a 5 percent owner, as defined in section 416(i)(1)(A)(ii), at any time during the determination year or the look-back year; or 2. had compensation from the employer for the look-back year in excess of \$80,000 (as adjusted), and, if the employer so elects in the plan, was in the top-paid group for the look-back year.
	IRC section 414(q), Regs. section 1.414(q)-1T and Notice 97-45, 1997-2 C.B. 296.

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<p>1143, 1144 V.b.</p>	<p>For purposes of the definition of highly compensated employee, section _____ of the plan should be amended to provide that:</p> <ol style="list-style-type: none"> 1. The determination year is the plan year for which the determination of who is highly compensated is being made. 2. The look-back year is the 12-month period immediately preceding the determination year, or if the employer so elects in the plan, the calendar year beginning with or within such 12-month period. 3. Compensation is compensation within the meaning of section 415(c)(3). 4. Employers aggregated under sections 414(b), (c), (m) or (o) are treated as a single employer. 5. If the employer has made a top-paid group election, the top-paid group consists of the top 20% of employees ranked on the basis of compensation received during the look-back year. For purposes of determining the number of employees in the top-paid group, employees described in section 414(q)(5) and Q&A 9(b) of section 1.414(q)-1T of the regulations are excluded. <p>IRC section 414(q), Regs. section 1.414(q)-1T and Notice 97-45, 1997-2 C.B. 296.</p>
<p>1134 V.c.</p>	<p>Section _____ of the plan should be amended to define compensation, for purposes of the actual contribution percentage (ACP) test of section 401(m) and the determination of excess aggregate contributions, in a manner that satisfies section 414(s) and over a period specified in section 1.401(m)-5 of the regulations. A definition will satisfy section 414(s) if it conforms to one of the definitions described in sections 1.414(s)-1(c)(2) and 1.414(s)-1(c)(3) of the regulations. Alternatively, submit a demonstration that the definition is nondiscriminatory. IRC sections 401(m)(3)(B) and 414(s) and Regs. sections 1.401(m)-5 and 1.414(s)-1.</p>
<p>VI.</p>	<p>RESERVED.</p>
<p>1152 VII.a.</p>	<p>Section _____ of the plan should be amended to provide the matching formula or nonelective contribution formula it is using to automatically satisfy section 401(k).</p>
<p>1153 VII.b.(i).</p>	<p>Section _____ of the plan should be amended to specify the applicable vesting schedule for matching contributions, if not immediately nonforfeitable.</p>
<p>1154, 1155 VII.b.(ii)</p>	<p>Section _____ of the plan should be amended to specify that (1) matching contributions may not be made with respect to employee contributions or elective contributions that in the aggregate exceed 6% of the employee's compensation, (2) the rate of matching contributions may not increase as the rate of employee contributions or elective contributions increases, (3) at any rate of employee contributions or elective contributions the rate of matching contributions that would apply with respect to any HCE who is an eligible employee is no greater than the rate of matching contributions that would apply with respect to an NHCE who is an eligible employee and who has the same rate of employee contributions or elective contributions and (4) only permissible restrictions are applied to an employee's ability to make elective or employee contributions as described in Regs. section 1.401(m)-3(d)(6).</p>
<p>1156 VII.c.</p>	<p>Section _____ of the plan should be amended to provide that matching contributions made at the employer's discretion may not be made on behalf of any employee that, in the aggregate, could exceed a dollar amount equal to 4% of the employee's compensation. If this condition is not satisfied, the regular actual contribution percentage (ACP) test applies. Regs. section 1.401(m)-3(d)(3)(ii).</p>

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1157 VII.d.	Section _____ of the plan should be amended to provide that the regular actual contribution percentage (ACP) test applies (i) with respect to after-tax employee contributions and (ii) with respect to matching contributions under the plan that fail to satisfy the ACP test safe harbor. IRC section 401(m)(11) and Regs. section 1.401(m)-3.
1158 VII.e.	RESERVED.
1158, 1160 VII.f.	Section _____ of the plan should be amended to provide that matching contributions are taken into account for a plan year under the actual contribution percentage (ACP) test safe harbor in accordance with the allocation and timing rules of section 1.401(m)-2(a) of the regulations, which provides that a matching contribution is only taken into account for a plan year if the contribution is allocated to the employee's account under the terms of the plan as of any date within the plan year, is actually paid to the trust no later than 12 months after the close of the plan year, and is made on behalf of an employee on account of the employee's elective contributions or employee contributions for the plan year. Regs. section 1.401(m)-3(j).
1161 VII.g.	Section _____ of the plan should be amended to limit suspension of additional contributions to 6 months. Regs. section 1.401(m)-3(d)(6)(v).
1162 VII.h.(i)	Section _____ of the plan should be amended for the aggregation and disaggregation rules described in Regs. section 1.401(m)-3(d)(5).
1165 VIII.a.	Section _____ of the plan should be amended to provide the matching formula or nonelective contribution formula it is using to automatically satisfy section 401(k). IRC section 401(m)(12) and Regs. section 1.401(m)-3.
1166 VIII.b.(i).	Section _____ of the plan should be amended to specify the applicable vesting schedule for matching contributions, if not immediately nonforfeitable.
1167 VIII.b.(ii)	Section _____ of the plan should be amended to specify that (1) matching contributions may not be made with respect to employee contributions or elective contributions that in the aggregate exceed 6% of the employee's compensation, (2) the rate of matching contributions may not increase as the rate of employee contributions or elective contributions increases, (3) at any rate of employee contributions or elective contributions the rate of matching contributions that would apply with respect to any HCE who is an eligible employee is no greater than the rate of matching contributions that would apply with respect to an NHCE who is an eligible employee and who has the same rate of employee contributions or elective contributions and (4) only permissible restrictions are applied to an employee's ability to make elective or employee contributions as described in Regs. section 1.401(m)-3(d)(6). IRC section 401(m)(12)(B) and Regs. section 1.401(m)-3(d)(3).
1168 VIII.c.	Section _____ of the plan should be amended to provide that matching contributions made at the employer's discretion may not be made on behalf of any employee that, in the aggregate, could exceed a dollar amount equal to 4% of the employee's compensation. If this condition is not satisfied, the regular actual contribution percentage (ACP) test applies. Regs. section 1.401(m)-3(d)(3)(ii).

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1169 VIII.d.	Section _____ of the plan should be amended to provide that the regular actual contribution percentage (ACP) test applies (i) with respect to after-tax employee contributions and (ii) with respect to matching contributions under the plan that fail to satisfy the QACA ACP test safe harbor. IRC section 401(m)(11) and Regs. section 1.401(m)-3.
1170 VII.e.	Section _____ of the plan should be amended to provide that matching contributions are taken into account for a plan year under the actual contribution percentage (ACP) test safe harbor in accordance with the allocation and timing rules of section 1.401(m)-2(a) of the regulations, which provides that a matching contribution is only taken into account for a plan year if the contribution is allocated to the employee's account under the terms of the plan as of any date within the plan year, is actually paid to the trust no later than 12 months after the close of the plan year, and is made on behalf of an employee on account of the employee's elective contributions or employee contributions for the plan year. Regs. section 1.401(m)-3(j).
1171 VIII.f.	Section _____ of the plan should be amended to limit suspension of additional contributions to 6 months. Regs. section 1.401(m)-3(d)(6)(v).
1162 VIII.g.	Section _____ of the plan should be amended for the aggregation and disaggregation rules described in Regs. section 1.401(m)-3(d)(5).