

# Rev. Proc. 97-9

## SECTION 1. PURPOSE

.01 This revenue procedure provides a model amendment that may be used to assist employers in adopting a plan that contains 401(k) SIMPLE provisions.

The model amendment gives plan sponsors a way to incorporate 401(k) SIMPLE provisions in plans containing cash or deferred arrangements (“CODAs”) and matching contributions. The model amendment incorporates the alternative method of satisfying the nondiscrimination tests applicable to these plans as contained in §§ 401(k)(11) and 401(m)(10) of the Internal Revenue Code. Sections 401(k)(11) and 401(m)(10) were added to the Code by § 1422 of the Small Business Job Protection Act of 1996, Pub. L. No. 104–188 (“SBJPA”). This revenue procedure does not apply to § 408(p) SIMPLE plans, as described in § 1421 of the SBJPA, under which contributions are made to employees’ SIMPLE IRAs.

.02 The model amendment may be used by organizations or practitioners with approved master and prototype (“M&P”) plans, regional prototype plans, or volume submitter specimen plans to modify the existing plans they sponsor so that employers can establish new plans containing 401(k) SIMPLE provisions. Employers that currently maintain an M&P plan, a regional prototype plan or a volume submitter specimen plan may modify existing 401(k) plans to incorporate 401(k) SIMPLE provisions. The model amendment may also be used by sponsors of individually designed plans to modify existing 401(k) plans to incorporate 401(k) SIMPLE provisions. The model amendment is available only for sponsors of plans containing provisions required to satisfy §§ 401(k), 401(m) and 401(a)(30) that have received favorable opinion, notification, advisory, or determination letters that take into account the requirements of the Tax Reform Act of 1986, Pub. L. No. 99–514 (“TRA ’86”).

## **SECTION 2. BACKGROUND AND GENERAL INFORMATION**

.01 New sections 401(k)(11) and 401(m)(10) of the Code (“401(k) SIMPLE provisions”), provide an alternative method of satisfying the nondiscrimination tests contained in §§ 401(k)(3)(A)(ii) and 401(m)(2), applicable to CODAs. These 401(k) SIMPLE provisions may only be adopted by employers that employed 100 or fewer employees earning at least \$5,000 in compensation for the preceding year. The 401(k) SIMPLE provisions may not be adopted by an employer who maintains another employer-spon-

sored plan covering employees who are eligible to participate in the cash or deferred arrangement using the 401(k) SIMPLE provisions. Generally, no contributions may be made during a year to a plan using the 401(k) SIMPLE provisions, other than those contributions described in section 2.03 below.

.02 A 401(k) plan that includes 401(k) SIMPLE provisions does not have to satisfy the actual deferral percentage and actual contribution percentage tests otherwise applicable to plans containing CODAs and matching contributions and is not treated as top-heavy under § 416 of the Code.

.03 Under a plan containing the 401(k) SIMPLE provisions, each employee may elect to make salary reduction contributions for a year of up to \$6,000. The employer must make either a matching contribution equal to the employee’s salary reduction contributions, limited to 3% of the employee’s compensation for the year, or a nonelective contribution for all eligible employees equal to 2% of the employee’s compensation for the year. All amounts contributed under 401(k) SIMPLE provisions must be nonforfeitable at all times.

.04 The plan year of a plan containing the 401(k) SIMPLE provisions must be the calendar year. An employer maintaining a 401(k) plan on a fiscal year basis must convert the plan to a calendar year in order to adopt the 401(k) SIMPLE provisions.

.05 Several additional requirements apply to plans adopting the model amendment and include the following:

- (1) a special definition of compensation for purposes of the 3% matching and 2% nonelective contributions described in section 2.03;
- (2) notification and election period requirements; and
- (3) transitional rules for growing employers.

.06 Except as provided in section 2.02, all other qualification requirements of the Code continue to apply to a plan that contains 401(k) SIMPLE provisions including the contribution limitations of § 415; the compensation limitations of § 401(a)(17); and the requirement that the plan as amended continue to be operated in accordance with its terms. In addition, all other requirements applicable to 401(k) plans continue to apply, including, the distribution restrictions of § 401(k)(2)(B) and the general prohibition set forth in § 401(k)(4)(B) on State and local governments maintaining a

401(k) plan. Contributions under a plan containing 401(k) SIMPLE provisions are deductible subject to the limits of § 404(a).

.07 The model amendment supersedes any plan provision that is inconsistent with the provisions of the model amendment. For example, if the plan contains a provision that limits any employee’s salary reduction contributions for a year to a percentage that results in an amount less than \$6,000, the salary reduction contribution provision of the model amendment permitting yearly contributions of up to \$6,000 will govern.

.08 Employers adopting a new 401(k) plan containing the model amendment may make it effective as of any date on or after January 1, 1997, but in no event later than October 1 of the year in which adopted. Employers amending an existing 401(k) plan to incorporate the model amendment must make the model amendment effective as of the following January 1 unless they are using the 1997 Transition Rule described in section 3.

## **SECTION 3. 1997 TRANSITION RULE**

.01 Employers that have maintained a 401(k) plan in 1997 may adopt the model amendment for 1997 if the following conditions are satisfied:

- (1) the employer adopts the 401(k) SIMPLE provisions by July 1, 1997, effective as of January 1, 1997;
- (2) the salary reduction contributions for the year made prior to adoption of the model amendment do not total more than \$6,000 for each employee;
- (3) the matching or nonelective contributions described in section 2.03 are of inherently equal or greater value than the contributions required under the plan prior to the amendment; and
- (4) all eligible employees are provided with an election period described in section 3.3(b)(iv) of the model amendment.

.02 If an employer adopts 401(k) SIMPLE provisions under this transition rule, the model amendment applies to the plan for the 1997 year. For example, the cumulative salary reduction contributions for the year, including those made prior to and those made following the adoption of the model amendment, must not total more than \$6,000 for any employee.

## **SECTION 4. USE OF THE MODEL AMENDMENT**

.01 Sponsors described in section 4.02 may amend their plans by adopting, word-for-word, the model amendment in the appendix in accordance with the instructions in this revenue procedure. If a sponsor to whom the model amendment is available pursuant to section 4.02 adopts the model amendment, neither application to the Service nor a user fee is required. The Service will not issue new opinion, notification, advisory, or determination letters for plans that are amended solely to add the model amendment.

.02 The only sponsors to whom the model amendment is available are sponsors of M&P, regional prototype, volume submitter specimen, and individually designed plans that contain CODA provisions and that have received favorable opinion, notification, advisory, or determination letters that take into account the requirements of TRA '86 under Rev. Proc. 89-9, 1989-1 C.B. 780, as modified; Rev. Proc. 89-13,

1989-1 C.B. 801, as modified; Rev. Proc. 90-20, 1990-1 C.B. 495; Rev. Proc. 91-41, 1991-2 C.B. 697; Rev. Proc. 91-66, 1991-2 C.B. 870; Rev. Proc. 93-39, 1993-2 C.B. 513; or Rev. Proc. 96-6, 1996-1 I.R.B. 151.

.03 Organizations and practitioners that have approved M&P and regional prototype plans and volume submitter specimen plan sponsors that use the model language must file Form 8837, Notice of Adoption of Revenue Procedure Model Amendments.

## **SECTION 5. REVOCATION OF MODEL AMENDMENT**

The model amendment contains a model revocation clause which permits employers to revoke the 401(k) SIMPLE provisions without terminating the plan. The revocation clause should be executed only if the employer wants to revert to the plan provisions that apply in the absence of 401(k) SIMPLE provisions. The revocation may be adopted on any date, but may only become effective on the first day of the calendar

year following the date of adoption.

## **SECTION 6. RELIANCE**

Plans that are amended in accordance with sections 4 and 5 will not lose their otherwise applicable extended reliance period under Rev. Procs. 89-9 and 89-13, as modified by Rev. Proc. 93-9, 1993-1 C.B. 474, or section 13 of Rev. Proc. 93-39. Employers entitled to rely on an opinion, notification, advisory, or determination letter will not lose reliance on the letter merely because of these amendments.

## **DRAFTING INFORMATION**

The principal authors of this revenue procedure are Maxine Terry and Roger Kuehnle of the Employee Plans Division. For further information regarding this revenue procedure, contact the Employee Plans Division's taxpayer assistance telephone service between 1:30 and 4:00 p.m., Eastern Time, Monday through Thursday at (202) 622-6074/6075. (These telephone numbers are not toll-free numbers.)

## **APPENDIX**

### **MODEL AMENDMENT UNDER SECTIONS 401(k)(11) AND 401(m)(10)**

#### **MODEL AMENDMENT TO ADOPT SIMPLE 401(k) PROVISIONS**

##### **SECTION I. SIMPLE 401(K) PROVISIONS**

1.1 This amendment adds to the plan SIMPLE 401(k) provisions that are intended to satisfy the requirements of §§ 401(k)(11) and 401(m)(10) of the Internal Revenue Code.

1.2 The provisions of sections 3.3, IV, VI, and VII of this amendment apply for a year only if the following conditions are met:

(a) The employer adopting this amendment is an eligible employer. An eligible employer means, with respect to any year, an employer that had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding year. In applying the preceding sentence, all employees of controlled groups of corporations under § 414(b), all employees of trades or businesses (whether incorporated or not) under common control under § 414(c), all employees of affiliated service groups under § 414(m), and leased employees required to be treated as the employer's employees under § 414(n), are taken into account.

An eligible employer that adopts this amendment and that fails to be an eligible employer for any subsequent year, is treated as an eligible employer for the 2 years following the last year the employer was an eligible employer. If the failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence applies only if the provisions of § 410(b)(6)(C)(i) are satisfied.

(b) No contributions are made, or benefits accrued for services during the year, on behalf of any eligible employee under any other plan, contract, pension, or trust described in § 219(g)(5)(A) or (B), maintained by the employer.

1.3 To the extent that any other provision of the plan is inconsistent with the provisions of this amendment, the provisions of this amendment govern.

##### **SECTION II. DEFINITIONS**

2.1 "Compensation" means, for purposes of sections 1.2(a), 3.1 and 3.2, the sum of the wages, tips, and other compensation from the employer subject to federal income tax withholding (as described in § 6051(a)(3)) and the employee's salary reduction contributions made under this or any other 401(k) plan, and, if applicable, elective deferrals under a § 408(p) SIMPLE plan, a SARSEP, or a § 403(b) annuity contract and compensation deferred under a § 457 plan, required to be reported by the employer on Form W-2 (as described in § 6051(a)(8)). For self-employed individuals, compensation means net earnings from

self-employment determined under § 1402(a) prior to subtracting any contributions made under this plan on behalf of the individual. The provisions of the plan implementing the limit on compensation under § 401(a)(17) apply to the compensation under Section III.

2.2 “Eligible employee” means, for purposes of this amendment, any employee who is entitled to make elective deferrals described in § 402(g) under the terms of the plan.

2.3 “Year” means the calendar year.

## **SECTION III. CONTRIBUTIONS**

### **3.1 Salary Reduction Contributions**

(a) Each eligible employee may make a salary reduction election to have his or her compensation reduced for the year in any amount selected by the employee subject to the limitation in section 3.1(b). The employer will make a salary reduction contribution to the plan, as an elective deferral, in the amount by which the employee’s compensation has been reduced.

(b) The total salary reduction contribution for the year cannot exceed \$6,000 for any employee. To the extent permitted by law, this amount will be adjusted to reflect any annual cost-of-living increases announced by the IRS.

### **3.2 Other Contributions**

(a) Matching Contributions—Each year, the employer will contribute a matching contribution to the plan on behalf of each employee who makes a salary reduction election under section 3.1. The amount of the matching contribution will be equal to the employee’s salary reduction contribution up to a limit of 3% of the employee’s compensation for the full calendar year.

(b) Nonelective Contribution—For any year, instead of a matching contribution, the employer may elect to contribute a nonelective contribution of 2% of compensation for the full calendar year for each eligible employee who received at least \$5,000 of compensation from the employer for the year. By inserting a number less than \$5,000 here \_\_\_\_\_, the employer agrees to substitute this lesser amount for the \$5,000 amount in the preceding sentence.

### **3.3 Limitation on Other Contributions**

(a) General rule—No employer or employee contributions may be made to this plan for the year other than salary reduction contributions described in section 3.1, matching or nonelective contributions described in section 3.2 and rollover contributions described in § 1.402(c)-2, Q&A-1(a) of the Income Tax Regulations.

(b) 1997 Transition Rule—If the employer has maintained this plan during 1997 prior to adopting this amendment, then contributions made prior to the amendment are treated as made under sections 3.1 and 3.2 provided that: (i) the employer adopts the 401(k) SIMPLE provisions by July 1, 1997, effective as of January 1, 1997; (ii) the salary reduction contributions for the year made prior to adoption of the amendment do not total more than \$6,000 for any employee; (iii) the other contributions set forth in section 3.2 are of inherently equal or greater value than the contributions required under the plan prior to the amendment; and (iv) for 1997, the 60-day election period requirement described in sections 4.1(a) and (b) is deemed satisfied if the employee may make or modify a salary reduction election during a 60-day election period that begins no later than 30 days after the amendment is adopted but in no event later than July 1, 1997.

3.4 The provisions of the plan implementing the limitations of § 415 apply to contributions made pursuant to sections 3.1 and 3.2.

## **SECTION IV. ELECTION AND NOTICE REQUIREMENTS**

### **4.1 Election Period**

(a) In addition to any other election periods provided under the plan, each eligible employee may make or modify a salary reduction election during the 60-day period immediately preceding each January 1.

(b) For the year an employee becomes eligible to make salary reduction contributions under this amendment, the 60-day election period requirement of section 4.1(a) is deemed satisfied if the employee may make or modify a salary reduction election during a 60-day period that includes either the date the employee becomes eligible or the day before.

(c) Each employee may terminate a salary reduction election at any time during the year.

### **4.2 Notice Requirements**

(a) The employer will notify each eligible employee prior to the 60-day election period described in section 4.1 or 3.3(b)(iv) that he or she can make a salary reduction election or to modify a prior election during that period.

(b) The notification described in section 4.2(a) will indicate whether the employer will provide a 3% matching contribution described in section 3.2(a) or a 2% nonelective contribution described in section 3.2(b).

## **SECTION V. VESTING REQUIREMENTS**

All benefits attributable to contributions made pursuant to this amendment are nonforfeitable at all times.

## **SECTION VI. TOP-HEAVY RULES**

The plan is not treated as a top-heavy plan under § 416 for any year for which the provisions of this amendment are effective and satisfied.

## **SECTION VII. NONDISCRIMINATION TESTS**

The plan is treated as meeting the requirements of §§ 401(k)(3)(A)(ii) and 401(m)(2) for any year for which the provisions of this amendment are effective and satisfied.

## SECTION VIII. EFFECTIVE DATE

This amendment is effective on \_\_\_\_\_.

\_\_\_\_\_  
Employer Name

\_\_\_\_\_  
By: Signature

\_\_\_\_\_  
Name and Title

\_\_\_\_\_  
Date

## MODEL REVOCATION CLAUSE

This amendment is revoked effective as of the first day of the calendar year following \_\_\_\_\_  
(enter the date the revocation is adopted).

\_\_\_\_\_  
Employer Name

\_\_\_\_\_  
By: Signature

\_\_\_\_\_  
Name and Title

\_\_\_\_\_  
Date