

MEMO# 23461

May 18, 2009

IRS Proposes Rules to Allow Employers to Suspend Safe-Harbor Nonelective Contributions

[23461]

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TO: PENSION COMMITTEE No. 9-09

PENSION OPERATIONS ADVISORY COMMITTEE No. 10-09 RE: IRS PROPOSES RULES TO ALLOW EMPLOYERS TO SUSPEND SAFE-HARBOR NONELECTIVE CONTRIBUTIONS

IRS proposed regulations allowing 401(k) and 403(b) plans using the design-based safe harbor for nonelective contributions to reduce or suspend the nonelective contribution during a plan year, if the employer incurs a substantial business hardship. [\[1\]](#)

Background

The current regulations describing the design-based safe harbor from ADP and ACP testing for 401(k) and 403(b) plans generally require that a safe harbor design be in place for an entire plan year. However, the regulations allow an employer making qualified matching contributions to reduce or suspend those contributions during a plan year and revert to running the ADP and ACP tests, provided:

- A notice is provided to participants regarding the reduction or suspension;
- The reduction or suspension is effective no earlier than the later of 30 days after the notice is provided or the amendment suspending qualified matching contributions is adopted;
- Participants are given a reasonable opportunity prior to the reduction or suspension to change their contribution election;
- The plan satisfies the ADP and ACP test for the entire plan year; and

- The plan provided the required matching contributions through the effective date of the amendment.

The current regulations do not allow a suspension or reduction of qualified nonelective contributions.

Proposal

IRS proposes to allow employers using the design-based safe harbor for qualified nonelective contributions to suspend or reduce the nonelective contribution during a plan year. The conditions are similar to the conditions for a reduction or suspension of qualified matching contributions, except that only employers that have incurred a “substantial business hardship” may reduce or suspend qualified nonelective contributions. Substantial business hardship is defined as being “comparable” to a substantial business hardship described in Code section 412(c). [\[2\]](#)

IRS is considering requiring that the possibility of a reduced or suspended safe harbor contribution be described in the notice required to be provided before the beginning of each year, and IRS requests comments on whether this should be added to the notice.

IRS proposes to make the regulations effective for amendments adopted after May 18, 2009. Employers may rely on the proposed regulations pending final regulations. Comments on the proposal are due August 17, 2009. The IRS has scheduled a public hearing for September 23, 2009.

The Institute will file a comment letter if there are issues Institute members would like to raise on the proposal. Please contact the undersigned (mhadley@ici.org or 202-326-5810) by July 1, 2009 if you have any issues you would like the Institute to address in a comment letter.

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endnotes

[\[1\]](#) A copy of the proposed regulations is available here:
<http://edocket.access.gpo.gov/2009/pdf/E9-11481.pdf>.

[\[2\]](#) Code section 412(c) allows funding waivers from the defined benefit funding rules for employers who cannot make the required contributions without substantial business hardship.