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| Form <b>9416</b><br>(Rev. December 1998) | Department of the Treasury – Internal Revenue Service<br><b>Employee Plan Deficiency Checksheet</b><br><b>Attachment #11</b><br><b>Section 401(m) Requirements</b> | Date |
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| <i>For IRS Use</i> | Please furnish the amendment(s) requested in the section(s) checked below. |
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| 1101, 1102,<br>1103 |  | <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 actual 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)-1 of the regulations and Notices 97-2 and 98-1. IRC section 401(m) and Regs. sections 1.401(m)-1(a) and (b) and 1.401(m)-1(f)(6) and (12) and Notices 97-2, 1997-2 I.R.B. 22 and 98-1, 1998-3 I.R.B. 42.</p> |
| II.a.(i), (ii)      |  |   |

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| 1104, 1105 |  | <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 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) or section 415(e) 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 sections 401(m)(3) and (5) and Regs. sections 1.401(m)-1(f)(4) and 1.401(m)-1(f)(1).</p> |
| II.b.(i)   |  |   |

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| 1106, 1107 |  | <p>Section _____ of the plan should be amended to provide that, in calculating the actual contribution percentage (ACP) test of section 401(m) for a plan year, contributions will be taken into account as follows: An employee contribution is to be taken into account if it is paid to the trust during the plan year or paid to an agent of the plan and transmitted to the trust within a reasonable period after the end of the plan year. An excess contribution to a cash or deferred arrangement that is recharacterized is to be taken into account in the plan year in which the contribution would have been received in cash by the employee had the employee not elected to defer the amounts. A matching contribution taken into account for a plan year only if it is (1) made on account of the employee's elective or employee contributions for the plan year, (2) allocated to the employee's account as of a date within that year, and (3) paid to the trust by the end of the 12th month following the close of that year. Qualified matching contributions which are used to meet the requirements of section 401(k)(3)(A) are not to be taken into account for purposes of the ACP test of section 401(m). IRC section 401(m)(3) and Regs. sections 1.401(m)-1(b)(1) and (4).</p> |
| II.b.(ii)  |  |   |

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| 1108       |  | <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 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)(3).</p> |
| II.b.(iii) |  |   |

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| 1109                      |  | 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   |
| II.b.(iv)                 |  | 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)-1(f)(1)(ii)(B).  |
| 1115                      |  | Section _____ of the plan should be amended to provide that the actual contribution percentages (ACPs) of highly compensated employees (HCEs) and non-highly compensated employees (NHCEs) are   |
| II.b.(v)                  |  | 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) and Notice 97-2, 1997-2 I.R.B. 22.  |
| 1112                      |  | 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   |
| II.c.                     |  | section 401(a)(4) and Regs. section 1.401(m)-1(a)(2).  |
| 1136, 1137,<br>1138, 1139 |  | Nonelective employer contributions may be treated as matching contributions for purposes of the actual contribution percentage (ACP) test of section 401(m) only if such contributions are nonforfeitable when   |
| III.a.(i), (ii)           |  | made and distributable only under the following circumstances:<br><br><ol style="list-style-type: none"> <li>1. The employee's retirement, death, disability or separation from service;</li> <li>2. The termination of the plan without establishment or maintenance of another defined contribution plan (other than an ESOP, SEP or SIMPLE IRA Plan);</li> <li>3. In the case of a profit-sharing, stock bonus or rural cooperative plan, the employee's attainment of age 59½ or the employee's hardship;</li> <li>4. The sale or other disposition by a corporation to an unrelated corporation of substantially all of the assets used in a trade or business, but only with respect to employees who continue employment with the acquiring corporation and the acquiring corporation does not maintain the plan after the disposition; and,</li> <li>5. The sale or other disposition by a corporation of its interest in a subsidiary to an unrelated entity, but only with respect to employees who continue employment with the subsidiary and the acquiring entity does not maintain the plan after the disposition.</li> </ol> <p>Paragraphs 2, 4 and 5, above apply only if the distribution is in the form of a lump sum. Nonelective contributions which may be treated as matching contributions must satisfy these requirements without regard to whether they are actually taken into account as matching contributions. Section _____ of the plan should be amended accordingly. IRC section 401(m)(4)(C) and Regs. section 1.401(k)-1(g)(13).</p> |
| 1147                      |  | 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   |
| III.b.                    |  | section 1.401(m)-1(b)(5) of the regulations are satisfied. IRC section 401(m)(3) and Regs. section 1.401(m)-1(b)(5).   |
| 1113, 1114                |  | Section _____ of the plan should be amended to provide that the amount of excess aggregate contributions under a plan subject to the requirements of section 401(m) will be determined in the following  |
| IV.c.(i)                  |  | manner. 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 sections 401(m)(6)(B) and (C), and Regs. sections 1.401(m)-1(e)(2) and (3), and Notice 97-2, 1997-2 I.R.B. 22.   |
| 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  |
| IV.c.(ii)                 |  | are treated as employee contributions due to recharacterization. Regs. section 1.401(m)-1(e)(2)(ii).   |

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| 1119, 1120       |  | Section _____ of the plan should be amended to provide that the distribution (or forfeiture, if applicable) of excess aggregate contributions will include the income allocable thereto. The income   |
| III.c.(iii)      |  | allocable to the excess aggregate contributions includes income for the plan year for which the excess aggregate contributions were made. The plan may also provide that it includes income for the period between the end of the plan year and the date of distribution (or forfeiture). See section 1.401(m)-1(e)(3)(ii) of the regulations for a description of the manner in which income allocable to excess aggregate contributions is to be calculated. IRC section 401(m)(6)(A) and Regs. section 1.401(m)-1(e)(3).   |
| 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  |
| IV.c.(iv)        |  | 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)-1(e)(4).  |
| 1122             |  | Failure to correct excess aggregate contributions by the close of the plan year following 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  |
| IV.c.(v)         |  | 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 2½ months 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)-1(e)(5).  |
| 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  |
| IV.(vi)          |  | attributable to each highly compensated employee. The highly compensated employees subject to actual distribution or forfeiture are determined using the "dollar levelling 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), Regs. section 1.401(m)-1(e)(3) and Notice 97-2, 1997-2 I.R.B. 22.  |
| 1125             |  | Section _____ of the plan should be amended to provide for correction of excess aggregate   |
| IV.d.            |  | contributions. IRC section 401(m)(6) and Regs. section 1.401(m)-1(e).   |
| 1141, 1142       |  | Section _____ of the plan should be amended to define highly compensated employee as an   |
| V.a.             |  | employee who:<br><ol style="list-style-type: none"> <li>1. was a 5 percent owner, as defined in section 416(i)(1)(A)(iii), at any time during the determination year or the look-back year, or</li> <li>2. had compensation from the employer for the look-back year in excess of \$80,000 and , if the employer so elects in the plan, was in the top-paid group for the look-back year.</li> </ol> <p>IRC. section 414(q), Regs. section 1.414(q)-1T, and Notice 97-45, 1997-33 I.R.B. 7.</p>   |
| 1143, 1144, 1145 |  | For purposes of the definition of highly compensated employee, section _____ of the plan should be amended to provide that:   |
| V.b.             |  | <ol style="list-style-type: none"> <li>1. The determination year is the plan year for which the determination of who is highly compensated is being made.</li> <li>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.</li> <li>3. Compensation is compensation within the meaning of section 415(c)(3).</li> <li>4. Employers aggregated under sections 414(b), (c), (m) or (o) are treated as a single employer.</li> <li>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&amp;A 9(b) of section 1.414(q)-1T of the regulations are excluded.</li> </ol> <p>IRC section 414(q), Regs. section 1.414(q)-1T and Notice 97-45, 1997-33 I.R.B. 7.</p> |

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| 1134  |  | 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  |
| V.c.  |  | contributions, in a manner that satisfies section 414(s) and over a period specified in section 1.401(k)-1(g)(2) 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)-1(f)(2) and 1.414(s)-1.  |
| 1148  |  | Because the plan includes both a cash or deferred arrangement subject to section 401(k) and contributions that are subject to section 401(m), the plan should be amended to provide the test for multiple use of the   |
| VI.a. |  | alternative limitation. For this purpose, the plan may incorporate by reference the provisions of section 1.401(m)-2(b) of the regulations. The plan should also be amended to designate the method of correction of multiple use. IRC section 401(m)(9) and Regs. section 1.401(m)-1(b)(2).   |
| 1149  |  | The plan should be amended to provide that it will comply with the limitation on multiple use of the   |
| VI.b. |  | alternative limitation described in section 1.401(m)-2 of the regulations and to designate the method of correction of multiple use. Alternatively, submit information establishing that these requirements are satisfied in another plan of the employer or that no highly compensated employee is eligible or potentially eligible both in a cash or deferred arrangement and in a plan maintained by the same employer that is subject to the requirements of section 401(m) of the Code. IRC section 401(m)(9) and Regs. section 1.401(m)-1(b)(2). |
| 1150  |  | The plan should be amended to provide the test for multiple use of the alternative limitation. For this purpose, the plan may incorporate by reference the provisions of section 1.401(m)-2(b) of the regulations.   |
| VI.c. |  | IRC section 401(m)(9) and Regs. section 1.401(m)-2.  |
| 1151  |  | The plan should be amended to designate the method of correction of multiple use, that is, (1) whether through reduction of the actual deferral percentage or the actual contribution percentage, and (2) whether  |
| VI.d. |  | with respect to all highly compensated employees or only those eligible under both the arrangement subject to section 401(k) and the plan subject to section 401(m). IRC section 401(m)(9) and Regs. section 1.401(m)-2(c).  |