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# PENSION ANALYST COMPLIANCE BULLETIN



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## IRS modifies rules for reduction or suspension of employer contributions to Safe Harbor Plans

On November 15, 2013, the IRS published final rules regarding the reduction or suspension of employer contributions to Safe Harbor Plans, including Qualified Automatic Contribution Arrangements (QACAs). For plan sponsors that make nonelective contributions, these rules are more liberal than originally proposed in May 2009. However, for sponsors that make matching contributions, these rules are somewhat more restrictive because the IRS chose to adopt a uniform set of rules for the two Safe Harbor Plan designs. While the rules for the suspension of nonelective contributions are effective retroactively to May 18, 2009, the more restrictive rules for the suspension of matching contributions are not effective until January 1, 2015.

### Historical perspective

To avoid annual nondiscrimination testing and the potential need to make corrective distributions or contributions in the event of failed tests, many 401(k) and 403(b) plan sponsors have adopted "Safe Harbor Plans." These plan designs require the sponsoring employer to make certain levels of nonelective or matching contributions. In general, plan sponsors must commit to making these contributions for an entire 12-month plan year, and must notify participants of these contributions before the start of the plan year.

The original IRS regulations relating to Safe Harbor Plans provided limited exceptions to the 12-month plan year contribution commitment requirement. Once a plan year began, safe harbor employer contributions could only be discontinued under the following circumstances:

- A plan using the safe harbor matching contribution design could be amended at any time during the plan year to reduce or suspend the matching contributions, as long as: timely advance notice is provided to participants, participants have a reasonable opportunity to change their own contribution elections before the reduction or suspension takes plan, and the plan performs the applicable nondiscrimination tests for the entire plan year.
- A Safe Harbor Plan may be terminated during the plan year, as long as it either (1) satisfies the requirements for reducing or suspending safe harbor matching contributions (other than giving participants an opportunity to change their contribution elections), or (2) is the result of merger or acquisition or the employer's substantial business hardship.

In May 2009, the [IRS proposed rules](#) allowing plans using the safe harbor nonelective contribution design to reduce or suspend those nonelective contributions at any time during the year, but only if the employer incurred a substantial business hardship, as determined by the IRS. While these rules were only proposed, the IRS did allow plan sponsors to follow them in that form until they were finalized, with the promise that any new or more stringent requirements imposed under the final rules would be effective only on a prospective basis.

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## The final rules giveth and taketh away

The [final rules](#) now provide a uniform set of rules for reducing or suspending both types of safe harbor employer contributions. Employers may now suspend or reduce either type of safe harbor contribution (nonelective or matching) if:

1. Either:
  - a. The employer is operating at an economic loss; or
  - b. The safe harbor notice provided to participants before the start of the plan year includes a statement that the employer may reduce or suspend contributions mid-year and that the reduction or suspension will not be applicable until at least 30 days after the employees are provided with a supplemental notice of the action being taken;
2. A supplemental notice is provided to eligible employees when a reduction or suspension occurs;
3. The effective date of the suspension or reduction is not earlier than the later of (a) the date the amendment is adopted, or (b) 30 days after the supplemental notice is provided to employees;
4. Eligible employees have a reasonable opportunity after receipt of the notice and prior to the reduction or suspension of the employer contributions to change their contribution elections; and
5. The plan is amended to provide that the ADP and/or ACP Test, as applicable, will be satisfied for the entire plan year in which the reduction or suspension occurs, using the current year testing method.

The supplemental notice given to each eligible employee must explain:

- The consequences of the amendment suspending or reducing employer contributions;
- The procedures for changing their deferral or employee post-tax contribution elections; and
- The effective date of the amendment.

Since these final rules ease the requirements for suspending or reducing nonelective contributions, any actions taken after May 18, 2009 to suspend or reduce nonelective contributions will have complied with the rules. As a result, the final rules are effective retroactively to May 18, 2009 for nonelective contributions. However, the rules are more stringent for matching contributions, which can no longer be suspended or reduced without a pre-plan year contingent notice. As a result, the revised rules do not apply to safe harbor matching contributions until the first plan year beginning on or after January 1, 2015. The prior rules still apply to matching contributions for the 2014 plan year.

The final rules also give the IRS authority to provide guidance regarding other mid-year amendments to safe harbor provisions via notices, announcements, revenue procedures and revenue rulings, as opposed to having to go through the formal (and often lengthy) regulatory process.

## Plan sponsor options

Sponsors of plans that provide safe harbor nonelective contributions may want to preserve their ability to suspend or reduce these contributions during the 2014 plan year by including a contingent notice in their 2014 pre-plan year participant notices. If those notices have already been distributed, they may be able to revise and reissue them before the start of the plan year.

For 2015 and future plan years, sponsors of all types of Safe Harbor Plans may want to include contingent suspension notices in all pre-plan year participant notices, just to keep their options open.

### Compliance Bulletin by Prudential Retirement

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