■ 4. Removing the language ''partner'' in paragraph (b)(2) and adding the language ''person'' in its place;
■ 5. Removing the language ''80 percent'' in the first and second sentences of paragraph (b)(2) and adding the language ''50 percent'' in its place; and
■ 6. Revising paragraph (b)(3).

The additions and revision read as follows:

§ 1.707–1 Transactions between partner and partnership.

* * * * *

(b) * * *

(1) * * *

(iii) For purposes of matching deductions and income in the case of expenses and interest under section 267(a)(2), two partnerships in which the same persons own, directly or indirectly, more than 50 percent of the capital interests or profits interests in each partnership will be treated as persons specified in section 267(b).

* * * * *

(3) *Ownership of a capital or profits interest.* For the purpose of applying section 707(b), the rules for constructive ownership of stock provided in section 267(c)(1), (2), (4), and (5) apply in determining the extent to which a capital interest or profits interest in a partnership is owned, directly or indirectly, by any person, including a person who does not own a partnership interest prior to application of 267(c). For example, where trust T is a partner in the partnership ABT, and AW, A's wife, is the sole beneficiary of the trust, the ownership of a capital and profits interest in the partnership by T will be attributed to AW both for the purpose of further attributing the ownership of such interest to A and for determining whether AW is a constructive owner of an interest in the partnership. See section 267(c) (1), (2), and (5). Accordingly, if A, B, and T are equal partners in ABT, because AW is treated as constructively owning the one-third capital and profits interest in ABT owned by T and AW's ownership is attributed to A, A will be considered as owning a more than 50 percent capital and profits interest in ABT, and a loss sustained by A on a sale or exchange of property with ABT will be disallowed by section 707(b)(1)(A). Similarly, because AW is treated as constructively owning the one-third capital and profits interest in ABT owned by T and is attributed the ownership of A's capital and profits interest in ABT, AW will be considered as owning a more than 50 percent capital and profits interest in ABT and a loss sustained by AW on a sale or exchange of property with ABT would also be disallowed by section 707(b)(1)(A).

* * * * *

■ **Par. 5.** Section 1.707–9 is amended by:
■ 1. Revising the section heading;
■ 2. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c); and
■ 3. Adding new paragraph (a).

The addition and revision read as follows:

§ 1.707–9. Applicability dates and transitional rules.

(a) *Section 1.707–1.* Paragraphs (b)(1)(i) through (iii), (b)(2), and (b)(3) of § 1.707–1 apply to sales or exchanges of property with respect to controlled partnerships in taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**].

* * * * *

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–25715 Filed 11–24–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–104194–23]

RIN 1545–BQ70

Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document sets forth a proposed regulation that would amend the rules applicable to plans that include cash or deferred arrangements under section 401(k) to provide guidance with respect to long-term, part-time employees. The proposed regulation reflects statutory changes made by the SECURE Act and the SECURE 2.0 Act that relate to long-term, part-time employees. The proposed regulation would affect participants in, beneficiaries of, employers maintaining, and administrators of plans that include cash or deferred arrangements. This document also provides notice of a public hearing.

DATES: Written or electronic comments must be received by January 26, 2024. A public hearing on this proposed regulation has been scheduled for March 15, 2024, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by January 26, 2024. If no outlines are received by January 26, 2024, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on March 13, 2024. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the public hearing must be received by March 12, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–104194–23) by following the online instructions for submitting comments. Requests to speak at or attend the public hearing must be submitted as prescribed in the ''Comments and Public Hearing'' section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket on *www.regulations.gov.* Send paper submissions to: CC:PA:01:PR (REG–104194–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the regulation, call Kara M. Soderstrom at (202) 317–6799 or Jason E. Levine at (202) 317–4148; concerning submission of comments, the hearing, and the access code to attend the hearing by telephone, call Vivian Hayes at (202) 317–6901 (not toll-free numbers) or email *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 401 of the Internal Revenue Code (Code). This proposed regulation would amend § 1.401(k)–5 to set forth rules and definitions applicable to long-term, part-time employees under section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94, 133 Stat. 2534 (2019)), and sections 125 and 401 of the SECURE 2.0 Act of 2022 (SECURE

2.0 Act), enacted on December 29, 2022, as Division T of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328, 136 Stat. 4459 (2022)).

I. Statutory and Regulatory Framework

Section 401(k)(1) of the Code provides that a profit-sharing, stock bonus, pre-ERISA money purchase, or rural cooperative plan will not fail to qualify under section 401(a) merely because it includes a cash or deferred arrangement (CODA) that is a qualified CODA. Under section 401(k)(2), a CODA (generally, an arrangement providing for an election by an employee between contributions to a plan or payments directly in cash) is a qualified CODA only if it satisfies certain requirements. Section 401(k)(2)(B) provides that contributions made pursuant to a qualified CODA (referred to as elective contributions) may not be distributed before the occurrence of certain events, and section 401(k)(2)(C) provides that amounts attributable to the elective contributions must be nonforfeitable at all times. Section 401(k)(2)(D) limits the period of service that a plan may require an employee to complete with the employer or employers maintaining the plan in order to be eligible to participate in the qualified CODA.

Pursuant to section 401(k)(3)(A), a CODA is not treated as a qualified CODA unless: (1) the group of eligible employees under the CODA satisfies the requirements of section 410(b)(1), and (2) elective contributions under the CODA satisfy the actual deferral percentage (ADP) test in section 401(k)(3)(A)(ii). Under section 401(k)(3)(C), the elective contributions (including elective contributions that are designated Roth contributions) under a qualified CODA satisfy the requirements of section 401(a)(4) for a plan year with respect to the amount of those contributions if the contributions satisfy the ADP test for the plan year. As an alternative to satisfying the annual ADP test, a plan may satisfy the provisions of section 401(k)(11) (a SIMPLE 401(k) plan), the ADP safe harbor provisions of section 401(k)(12) (a traditional safe harbor section 401(k) plan), section 401(k)(13) (a qualified automatic contribution arrangement (QACA) safe harbor section 401(k) plan), or section 401(k)(16) (a starter 401(k) deferral-only arrangement).

Under section 401(m)(1), the matching contributions and employee contributions under a defined contribution plan satisfy the requirements of section 401(a)(4) for a plan year with respect to the amount of those contributions only if the actual contribution percentage (ACP) test in section 401(m)(2) is satisfied for the plan year. With respect to matching contributions, as an alternative to satisfying the annual ACP test, a plan may satisfy the provisions of section 401(m)(10) (which parallel the SIMPLE 401(k) provisions of section 401(k)(11)), or the ACP safe harbor provisions of section 401(m)(11) (a traditional safe harbor section 401(m) plan) or section 401(m)(12) (a QACA safe harbor section 401(m) plan).

The Treasury Department and the IRS issued comprehensive regulations under section 401(k) and (m) on December 29, 2004 (TD 9169, 69 FR 78143). Since they were issued, the regulations have been updated a number of times. For example, the regulations were amended to reflect certain statutory changes (*see* TD 9237, 71 FR 6, and TD 9324, 72 FR 21103, providing guidance with respect to designated Roth contributions under section 402A; and TD 9447, 74 FR 8200, providing guidance with respect to section 401(k)(13)) and to address discrete issues unrelated to statutory changes (*see* TD 9319, 72 FR 16878, relating to the definition of compensation; TD 9641, 78 FR 68735, relating to mid-year amendments to safe harbor plan designs; and TD 9835, 83 FR 34469, relating to whether qualified nonelective contributions and qualified matching contributions must be nonforfeitable when contributed to the plan).

The regulations were most recently amended on September 23, 2019 (TD 9875, 84 FR 49651) to reflect statutory changes related to the restriction on distribution of elective contributions under section 401(k)(2)(B).

II. SECURE Act Changes to Section 401(k) Regarding Long-Term, Part-Time Employees

Prior to the enactment of the SECURE Act, section 401(k)(2)(D) provided that a qualified CODA was not permitted to require, as a condition of participation, that an employee complete a period of service that extended beyond the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i) [1]). In general, the period permitted under section 410(a)(1) is the later of attainment of age 21 or completion of a 12-month period during which the employee has at least 1,000 hours of service.

Section 112(a) of the SECURE Act amended section 401(k)(2)(D) of the Code to provide that a qualified CODA must permit certain employees to participate in the CODA even if they do not have at least 1,000 hours of service in a 12-month period. Under section 401(k)(2)(D) (as added by section 112(a)(1) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of: (1) the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i)); or (2) subject to section 401(k)(15), the first period of three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

Section 112(a)(2) of the SECURE Act also amended the Code to add section 401(k)(15), which sets forth additional provisions related to section 401(k)(2)(D)(ii). Section 401(k)(15)(A) provides that section 401(k)(2)(D)(ii) will not apply to an employee unless the employee has attained the age specified in section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in section 401(k)(2)(D)(ii). Section 401(k)(15)(B) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), modified certain nondiscrimination, minimum coverage, top-heavy, and vesting requirements with respect to employees who become eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii).

Section 401(k)(15)(B)(i)(I) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act) provided that, notwithstanding section 401(a)(4), an employer is not required to make nonelective or matching contributions on behalf of employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii), even if those contributions are made on behalf of other employees eligible to participate in the arrangement. Under section 401(k)(15)(B)(i)(II) (as added by section 112(a)(2) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), an employer may elect to exclude employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) from the application of sections 401(a)(4), 401(k)(3), 401(k)(12), 401(k)(13), 401(m)(2), and 410(b).

Section 401(k)(15)(B)(ii) provides that an employer may elect to exclude all employees who are eligible to participate in a plan maintained by the employer solely by reason of section 401(k)(2)(D)(ii) from the application of the top-heavy vesting and benefit

[1] Section 410(a)(1)(B)(i) provides that a plan may require employees to complete 2 years of service (rather than 1) if accrued benefits under the plan are 100 percent nonforfeitable after not more than 2 years of service.

requirements under section 416(b) and (c).

Under section 401(k)(15)(B)(iii) (as added by section 112(a) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), an employee described in section 401(k)(15)(B)(i) must be credited with a year of service for purposes of determining whether the employee has a nonforfeitable right to employer contributions (other than elective contributions) under the arrangement for each 12-month period during which the employee is credited with at least 500 hours of service. In addition, section 401(k)(15)(B)(iii) modifies the break-in-service rules of section 411(a)(6) for the employee by substituting ''at least 500 hours of service'' for ''more than 500 hours of service'' for purposes of applying section 411(a)(6)(A).

Under section 401(k)(15)(B)(iv) (as added by section 112(a) of the SECURE Act, but prior to amendment by the SECURE 2.0 Act), if an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) of the Code subsequently satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 401(k)(2)(D)(ii), then the special provisions of section 401(k)(15)(B)(i) and (ii) cease to apply to the employee as of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 401(k)(2)(D)(ii). However, the cessation does not apply to the special vesting rules of section 401(k)(15)(B)(iii).

Section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3). This includes, among others, employees covered by a collective bargaining agreement with respect to which retirement benefits were the subject of good faith bargaining and nonresident aliens who have no earned income from the employer that constitutes U.S.-source income.

Section 401(k)(15)(D)(i) provides that the entry date rules of section 410(a)(4) apply to an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii). Section 401(k)(15)(D)(ii) provides that 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A).

Prior to amendment by the SECURE 2.0 Act, section 112(b) of the SECURE Act provided that the amendments made by section 112 apply to plan years beginning after December 31, 2020, except that, for purposes of section 401(k)(2)(D)(ii) of the Code, 12-month periods beginning before January 1, 2021, are not taken into account. The effect of disregarding 12-month periods beginning before January 1, 2021, is that employees generally will not become eligible to participate in a CODA pursuant to section 401(k)(2)(D)(ii) until plan years beginning on or after January 1, 2024.

On September 2, 2020, the Treasury Department and the IRS released Notice 2020–68, 2020–38 IRB 567, which includes guidance with respect to section 112 of the SECURE Act. Q&A C–1 of Notice 2020–68 explains that, although section 112(b) of the SECURE Act excludes 12-month periods beginning before January 1, 2021, for purposes of determining an employee's eligibility to participate in a qualified CODA under section 401(k)(2)(D)(ii) of the Code, section 112(b) of the SECURE Act does not exclude 12-month periods beginning before January 1, 2021, for purposes of determining an employee's nonforfeitable right to employer contributions (other than elective contributions) under section 401(k)(15)(B)(iii) of the Code. However, as described in section III.A of this Background, section 125(d) of the SECURE 2.0 Act expands the scope of the disregard of 12-month periods beginning before January 1, 2021, to include the vesting rules of section 401(k)(15)(B)(iii).

The Treasury Department and the IRS received three written comments in response to Notice 2020–68. All written comments responding to Notices 2020–68 are available for public inspection and copying at *http://www.regulations.gov* or upon request. These comments are discussed in section I of the Explanation of Provisions portion of this preamble.

III. SECURE 2.0 Act Changes to Section 401(k) Regarding Long-Term, Part-Time Employees and to Section 112(b) of the SECURE Act

A. Section 125 of the SECURE 2.0 Act

Section 125 of the SECURE 2.0 Act generally expands upon the rules set forth in section 112 of the SECURE Act. Section 125(a)(1) of the SECURE 2.0 Act amends the minimum participation standards of section 202 of the Employee Retirement Income Security Act of 1974 (Pub. L. 93–406, 88 Stat. 829), as amended (ERISA) to add section 202(c) of ERISA. Section 202(c) of ERISA adds rules, which apply to either a qualified CODA or a salary reduction agreement described in section 403(b) of the Code, that are comparable to the rules of section 401(k)(2)(D)(ii) and (k)(15). Section 125(a)(2)(B)(ii) of the SECURE 2.0 Act amends the employer election provisions of section 401(k)(15)(B)(i) of the Code to refer to employees who are eligible to participate in the arrangement solely by reason of section 401(k)(2)(D)(ii) or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA.

In addition, section 125(c) of the SECURE 2.0 Act amends the period of service under section 401(k)(2)(D)(ii) of the Code by replacing ''3'' with ''2''. Thus, as amended by section 125(c) of the SECURE 2.0 Act, section 401(k)(2)(D) of the Code provides that a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of: (1) the period permitted under section 410(a)(1) (disregarding section 410(a)(1)(B)(i)); or (2) subject to section 401(k)(15), the first period of two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

Section 125(d) of the SECURE 2.0 Act amends section 112(b) of the SECURE Act by replacing the reference to section 401(k)(2)(D)(ii) of the Code with references to both section 401(k)(2)(D)(ii) and (k)(15)(B)(iii). Thus, as amended by section 125(d) of the SECURE 2.0 Act, section 112(b) of the SECURE Act provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of either the eligibility rule described in section 401(k)(2)(D)(ii) or the vesting rules of section 401(k)(15)(B)(iii).

Section 125(e) of the SECURE 2.0 Act amends the special rules for cash or deferred arrangements using alternative methods of meeting nondiscrimination requirements under section 416(g)(4)(H) of the Code to provide that the term ''top-heavy plan'' does not include a plan solely because that plan does not provide nonelective or matching contributions to employees described in section 401(k)(15)(B)(i).

The amendments made by section 125(a) and (c) of the SECURE 2.0 Act apply to plan years beginning after December 31, 2024. The amendments made by section 125(d) and (e) of the SECURE 2.0 Act take effect as if included in section 112 of the SECURE Act.

B. Section 401 of the SECURE 2.0 Act

Section 401 of the SECURE 2.0 Act sets forth amendments relating to the SECURE Act. Section 401(a)(2) of the SECURE 2.0 Act includes technical amendments relating to section 112 of the SECURE Act that take effect as if included in section 112 of the SECURE Act.

Section 401(a)(2)(A) of the SECURE 2.0 Act amends the employer election provisions of section 401(k)(15)(B)(i)(II) of the Code to include the ACP safe harbor provisions of section 401(m)(11) and (12). Thus, as amended by section 401(a)(2)(A) of the SECURE 2.0 Act, section 401(k)(15)(B)(i)(II) of the Code permits an employer to elect to exclude employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) (or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA) from the application of those ACP safe harbor provisions, in addition to the other Code provisions listed in section 401(k)(15)(B)(i)(II).

Section 401(a)(2)(B) of the SECURE 2.0 Act amends the vesting rules of section 401(k)(15)(B)(iii) of the Code by replacing ''under the arrangement'' with ''under the plan''. Thus, section 401(a)(2)(B) of the SECURE 2.0 Act clarifies that section 401(k)(15)(B)(iii) of the Code applies for purposes of determining whether an employee described in section 401(k)(15)(B)(i) has a nonforfeitable right to employer contributions (other than elective contributions) under the plan that includes the arrangement.

Section 401(a)(2)(C) of the SECURE 2.0 Act amends the special rules under section 401(k)(15)(B)(iv) of the Code by replacing ''section 410(a)(1)(A)(ii)'' with ''paragraph (2)(D)''. Thus, section 401(a)(2)(C) of the SECURE 2.0 Act clarifies that the special rules of section 401(k)(15)(B)(iv) of the Code apply if an employee who is eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii) (or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA) subsequently satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii).

C. Section 501 of the SECURE 2.0 Act

In general, under section 501(a) and (b) of the SECURE 2.0 Act, for a qualified plan that is not an applicable collectively bargained plan or a governmental plan within the meaning of section 414(d) of the Code, the deadline to adopt a plan amendment that is made pursuant to any amendment made by the SECURE 2.0 Act or pursuant to any regulation issued by the Secretary or the Secretary of Labor (or a delegate of either such Secretary) under the SECURE 2.0 Act is the last day of the first plan year beginning on or after January 1, 2025, or such later date as the Secretary may prescribe. The plan amendment deadline for an applicable collectively bargained plan or a governmental plan, as defined in section 414(d), is the last day of the first plan year beginning on or after January 1, 2027, or such later date as the Secretary may prescribe.

Section 501(c)(1) of the SECURE 2.0 Act amends section 601(b)(1) of the SECURE Act, which provides rules with respect to a plan amendment made pursuant to a provision of the SECURE Act or regulations thereunder, to align the deadline to adopt such a plan amendment with the deadline that applies to a plan amendment that is made pursuant to a provision of the SECURE 2.0 Act.

Whether a plan amendment is made pursuant to section 112 of the SECURE Act, related provisions of the SECURE 2.0 Act, or any regulation relating to those provisions, does not depend on whether any employees could become eligible to participate in the CODA as long-term, part-time employees (as discussed in section I.B of the Explanation of Provisions) under the terms of the amended plan. For example, if a plan that is not an applicable collectively bargained plan or a governmental plan is maintained on a calendar-year basis and provides that, in order to be eligible to make a cash or deferred election under the CODA in the plan, an employee is required to complete a 12-month period during which the employee is credited with at least 1,000 hours of service, but the employer intends to amend the plan to provide that, effective January 1, 2024, each employee is eligible to make a cash or deferred election as soon as administratively practicable after the employee's employment commencement date, then the intended plan amendment would be made pursuant to section 112 of the SECURE Act and related provisions of the SECURE 2.0 Act. Accordingly, if the plan is operated in accordance with the intended plan amendment, then the plan amendment would not be required to be adopted before the deadline that applies to the plan under section 501 of the SECURE 2.0 Act (that is, December 31, 2025, or such later date as the Secretary may prescribe).

Explanation of Provisions

I. Section 1.401(k)–5

A. Overview

This proposed regulation would amend § 1.401(k)–5 (which is reserved for mergers and acquisitions under the existing regulations) to reflect the rules for long-term, part-time employees under section 112 of the SECURE Act and sections 125 and 401 of the SECURE 2.0 Act. Proposed § 1.401(k)–5 defines ''long-term, part-time employee,'' and, with respect to each long-term, part-time employee, requires a qualified CODA to satisfy the participation requirements of proposed § 1.401(k)–5(c) and requires the plan that includes the CODA to satisfy the vesting requirements of proposed § 1.401(k)–5(d). In addition, proposed § 1.401(k)–5(e) provides guidance regarding nonelective and matching contributions made to the plan on behalf of long-term, part-time employees, and proposed § 1.401(k)–5(f) provides guidance regarding certain elections that the employer or employers maintaining the plan may make with respect to long-term, part-time employees.

B. Long-Term, Part-Time Employees

1. Definition

Section 401(k)(15) provides special rules for ''long-term, part-time employees,'' but does not define the term. The rules in section 401(k)(15) apply to employees who are eligible to participate in a qualified CODA solely by reason of section 401(k)(2)(D)(ii), or by reason of section 401(k)(2)(D)(ii) and section 202(c)(1)(B) of ERISA. Under section 112(b) of the SECURE Act, section 401(k)(2)(D)(ii) of the Code generally is effective for plan years beginning after December 31, 2020, but, pursuant to section 125(c) of the SECURE 2.0 Act, section 401(k)(2)(D)(ii) of the Code is amended to replace ''3'' with ''2'' effective for plan years beginning after December 31, 2024. Thus, section 401(k)(15) applies to employees who are eligible to participate in a qualified CODA solely by reason of completing two consecutive 12-month periods or, with respect to a plan year beginning before 2025, three consecutive 12-month periods (referred to as ''the applicable number of consecutive 12-month periods'') during each of which the employee is credited with at least 500 hours of service. However, section 401(k)(15)(A) provides that section 401(k)(2)(D)(ii) does not apply to an employee unless the employee has satisfied the age requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in section 401(k)(2)(D)(ii). In addition, section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3).

Based on the provisions of section 401(k)(15) described in the preceding paragraph, proposed § 1.401(k)–5(b)(1)(i) generally would define a ''long-term, part-time employee'' as an employee who is eligible to participate

in a qualified CODA solely by reason of having: (1) completed two consecutive 12-month periods (under proposed § 1.401(k)–5(b)(1)(iii), ''three consecutive 12-month periods'' would be substituted for ''two consecutive 12-month periods'' with respect to a plan year beginning in 2024) during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)); and (2) attained the age specified in section 410(a)(1)(A)(i) by the close of the last of those 12-month periods. However, under proposed § 1.401(k)–5(b)(1)(ii), long-term, part-time employees would not include: (1) certain employees who are covered by a collective bargaining agreement, (2) employees who are nonresident aliens and who receive no earned income from the employer that constitutes income from sources within the United States, or (3) any other employees described in section 410(b)(3).

Although section 401(k)(15)(C) provides that section 401(k)(2)(D)(ii) does not apply to employees described in section 410(b)(3), section 401(k)(15) does not provide any exceptions from the maximum permissible service requirement of section 401(k)(2)(D)(ii) for a qualified CODA in: (1) a governmental plan (as defined in section 414(d)),[2] or (2) a church plan (as defined in section 414(e)) with respect to which the election provided by section 410(d) has not been made. In addition to the general request for comments on this proposed regulation, comments are specifically requested with respect to the application of section 401(k)(15) to a qualified CODA in such a governmental plan or church plan, including the application of proposed § 1.401(k)–5(d)(1)(ii) (which would clarify that, for purposes of proposed § 1.401(k)–5(d), section 411 will be treated as if it applies to the plan, taking into account the modifications provided in proposed § 1.401(k)–5(d)(1)(i) and (iii)).

[2] Pursuant to section 401(k)(4)(B)(ii) and § 1.401(k)–1(e)(4), a CODA included in a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof, does not satisfy the requirements to be a qualified CODA if the arrangement is adopted after May 6, 1986. However, this adoption deadline for a qualified CODA does not apply to a CODA included in a rural cooperative plan or a plan of an employer that is an Indian Tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian Tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian Tribal government or subdivision thereof, or a corporation chartered under Federal, State or Tribal law that is owned in whole or in part by any of those entities.

2. Eligibility To Participate

As explained in section I.B.1 of this Explanation of Provisions, an employee would be a long-term, part-time employee under the proposed regulation only if the employee became eligible to participate in a qualified CODA solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. The Treasury Department and the IRS received comments in response to Notice 2020–68 requesting clarification that the rules of section 401(k)(15) do not apply to an employee who becomes eligible to participate in a qualified CODA prior to completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (for example, an employee who, upon hire, is immediately eligible to make a cash or deferred election under the arrangement).

Under this proposed regulation, an employee would not be a long-term, part-time employee unless the employee becomes eligible to participate in a qualified CODA solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)). Thus, an employee who becomes eligible to participate in a qualified CODA by reason of having completed any other service requirement (or who is immediately eligible to participate in the CODA) would not be a long-term, part-time employee, and the rules of section 401(k)(15)(B) would not apply to the employee, even if the employee is classified by the employer or employers maintaining the plan as a part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification regarding the application of the rules of section 401(k)(15) to employees who were immediately eligible to participate in a qualified CODA if the plan is later amended to require employees to complete the period of service described in section 401(k)(2)(D) in order to participate in the CODA. Under this proposed regulation, an employee who was immediately eligible to participate in a qualified CODA or who became eligible to participate based on completing another permissible service requirement (for example, completing a 1-year period of service under section 410(a)(1)(A)(ii)) would not become a long-term, part-time employee merely because the plan is amended prospectively to require employees hired on or after the effective date of the amendment to complete the period of service described in section 401(k)(2)(D). This is because the employee was not eligible to participate in the CODA solely by reason of completing the applicable number of consecutive 12-month periods with at least 500 hours of service during each period.

3. Elapsed Time Method of Crediting Service

Under the elapsed time method of crediting service set forth in § 1.410(a)–7, a plan generally is required to take into account the period of time that elapses while an employee is employed with the employer or employers maintaining the plan, regardless of the actual number of hours the employee would have been credited with during that period. For purposes of determining an employee's eligibility to participate, a plan generally may not require an employee to complete more than a 1-year period of service under the elapsed time method (regardless of whether the employee is classified by the employer or employers maintaining the plan as a part-time employee).

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting that a plan be permitted to determine an employee's eligibility to participate as a long-term, part-time employee using the elapsed time method. In general, this proposed regulation would permit a plan to use the elapsed time method to determine an employee's eligibility to participate in a qualified CODA. However, under the elapsed time method, an employee's eligibility to participate is not based upon the actual completion of a specified number of hours of service during a 12-month period. Therefore, an employee who becomes eligible to participate in a qualified CODA under the elapsed time method would not be eligible to participate solely by reason of completing the applicable number of consecutive 12-month periods with at least 500 hours of service during each period and would not be a long-term, part-time employee.

In addition, this proposed regulation does not include an amendment to the elapsed time rules under § 1.410(a)–7. Therefore, a plan may not require an employee, including an employee who is classified as a part-time employee, to complete more than a 1-year period of service under the elapsed time method

in order to be eligible to participate in a qualified CODA.

4. Equivalency Methods of Crediting Service

As an alternative to the general method of crediting service, which is based upon the actual counting of hours of service, a plan may credit hours of service using equivalency methods permitted under 29 CFR 2530.200b–3. Any equivalency method (or methods) used by a plan must be set forth in the plan document. For example, a plan generally may determine the number of hours of service to be credited to employees on the basis of months of employment if an employee is credited with 190 hours of service for each month for which the employee would be required to be credited with at least 1 hour of service. Under this equivalency method, the hours of service credited to an employee for each month are not affected by whether the employee is classified by the employer or employers maintaining the plan as a part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting that a plan be permitted to determine an employee's eligibility to participate as a long-term, part-time employee using an equivalency method to credit hours of service and requesting guidance regarding the application of the equivalency methods for purposes of determining an employee's eligibility to participate as a long-term, part-time employee (for example, whether the minimum number of hours that must be credited under an equivalency method would be reduced). Because an employee is credited with a specified number of hours under both the general method of crediting service and the equivalency methods, this proposed regulation would permit either the general method of crediting service or an otherwise permissible equivalency method to be used to determine whether an employee is credited with at least 500 hours of service during a 12-month period. However, for purposes of determining an employee's eligibility to participate as a long-term, part-time employee, this proposed regulation does not include an amendment reducing the number of hours that otherwise would be credited to the employee under the applicable equivalency method.

C. Participation

1. Time of Participation

This proposed regulation would set forth rules regarding the date by which a long-term, part-time employee must become eligible to make a cash or deferred election under a qualified CODA (that is, rules regarding the latest permissible entry date for a long-term, part-time employee).

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting confirmation that a plan may use the same entry date rules for long-term, part-time employees as it does for other eligible employees. Under section 401(k)(15)(D)(i), the entry date rules of section 410(a)(4) apply to an employee who is eligible to participate in an arrangement solely by reason of section 401(k)(2)(D)(ii). Accordingly, proposed § 1.401(k)–5(c)(1) reflects the rules of section 410(a)(4), including the rule in § 1.410(a)–4(b) relating to the treatment of an employee who separates from service prior to the employee's scheduled entry date.

2. Determination of 12-Month Periods

Under section 410(a)(5)(A), in general, all years of service with the employer or employers maintaining the plan must be taken into account in computing an employee's period of service for purposes of section 410(a)(1). Similarly, proposed § 1.401(k)–5(c)(2)(i) would clarify that, in general, all 12-month periods during which an employee is credited with at least 500 hours of service with the employer or employers maintaining the plan must be taken into account for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. For example, 12-month periods during which an employee is included in a classification of employees who are ineligible to participate in the qualified CODA generally must be taken into account for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee. However, pursuant to section 112(b) of the SECURE Act, 12-month periods beginning before January 1, 2021, are not taken into account for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee.

With respect to an employee who is not yet eligible to participate in a qualified CODA, the rules of proposed § 1.401(k)–5(c)(2)(i) would not affect the requirement that the employee complete the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service in order to be eligible to participate as a long-term, part-time employee. Thus, if an employee who is not yet eligible to participate in a qualified CODA completes a 12-month period during which the employee is credited with fewer than 500 hours of service, then any prior 12-month periods during which the employee was credited with at least 500 (but less than 1,000) hours of service during each period would not be taken into account for purposes of determining whether the employee is eligible to participate in the CODA as a long-term, part-time employee.

However, this proposed regulation does not include any provisions similar to the break-in-service rules under section 410(a)(5) for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. Thus, if an employee has become eligible to participate as a long-term, part-time employee, then the employee's eligibility to participate as a long-term, part-time employee would not be affected by the employee's completion of one or more 12-month periods during each of which the employee is credited with fewer than 500 hours of service (although, as explained in section I.D.1 of this Explanation of Provisions, a long-term, part-time employee is not required to be credited with a year of vesting service with respect to a 12-month period during which the employee is credited with fewer than 500 hours of service). Similarly, if a former employee who was eligible to participate as a long-term, part-time employee is rehired by an employer maintaining the plan, then the 12-month periods during which the employee previously was credited with at least 500 hours of service with an employer maintaining the plan must be taken into account for purposes of determining whether the rehired employee is eligible to participate as a long-term, part-time employee.[3]

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification that the long-term, part-time employee rules of section 401(k)(15) could apply to an employee even if 12-month periods beginning before January 1,

[3] If a former employee who previously was eligible to participate in a qualified CODA (but who was not eligible to participate as a long-term, part-time employee) is rehired by an employer maintaining the plan, then the employee generally would be immediately eligible to participate again in the CODA based on the employee's prior service with the employer or employers maintaining the plan. Therefore, that former employee would not be eligible to participate in the qualified CODA as a long-term, part-time employee after being rehired. However, if the former employee's eligibility service is disregarded because the plan applies the provisions of section 410(a)(5)(D), then that former employee may become eligible to participate in the qualified CODA as a long-term, part-time employee after being rehired.

2021, are used to determine the employee's eligibility to participate in the qualified CODA. However, because section 112(b) of the SECURE Act provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of section 401(k)(2)(D)(ii), this proposed regulation would exclude any 12-month period beginning before January 1, 2021, for purposes of determining whether an employee is eligible to participate as a long-term, part-time employee. Therefore, an employee would not be a long-term, part-time employee under the proposed regulation if one or more 12-month periods beginning before January 1, 2021, were taken into account for purposes of determining whether the employee completed the applicable number of consecutive 12-month periods during each of which the employee was credited with at least 500 hours of service.

This proposed regulation also includes rules regarding the date on which a 12-month period may begin for purposes of determining an employee's eligibility to participate as a long-term, part-time employee.

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting confirmation that, although an employee's initial 12-month period for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee must be based on the employee's date of hire, subsequent 12-month periods for the employee may be based on the plan year. Under section 401(k)(15)(D)(ii), 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A). Accordingly, under proposed § 1.401(k)–5(c)(2)(ii), an employee's initial 12-month period would begin on the first day for which the employee is entitled to be credited with an hour of service; however, the terms of the plan may provide that, beginning with the plan year that commences within that initial 12-month period, subsequent 12-month periods are determined by reference to the first day of the plan year. Moreover, the subsequent 12-month periods with respect to an employee may be determined by reference to the first day of the plan year regardless of whether the employee is credited with at least 500 hours of service during the employee's initial 12-month period (provided that the employee is not credited with at least 1,000 hours of service during the employee's initial 12-month period).

If the plan provides that 12-month periods (after an employee's initial 12-month period) are determined by reference to the first day of the plan year, an employee's initial 12-month period and second 12-month period are treated as consecutive 12-month periods for purposes of determining the employee's eligibility to participate as a long-term, part-time employee. Therefore, if an employee is credited with at least 500 (but less than 1,000) hours of service during each of those 12-month periods, the employee has completed two consecutive 12-month periods with at least 500 hours of service during each period for purposes of determining the employee's eligibility to participate as a long-term, part-time employee. This is the case even though an employee may be credited with certain hours of service for both the initial 12-month period and the second 12-month period. For an employee hired prior to January 1, 2021, this proposed regulation provides that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee. Thus, if 12-month periods after an employee's initial 12-month period are determined by reference to the first day of the plan year, then, with respect to an employee who was hired prior to January 1, 2021, the first 12-month period for purposes of determining whether the employee is eligible to participate as a long-term, part-time employee generally would be determined by reference to the first day of the first plan year beginning on or after January 1, 2021.

3. Eligibility Conditions Not Based on Age or Service

The Treasury Department and the IRS received comments in response to Notice 2020–68 requesting clarification that an employee who otherwise would be eligible to participate in a qualified CODA as a long-term, part-time employee may be excluded from participating in the CODA if the employee is a member of a job classification that is not based on age or service and whose members are excluded from participating in the CODA under the terms of the plan.

In response to these comments, this proposed regulation would address whether a plan may impose conditions that are not based on age or service in order for an employee to be eligible to participate in a qualified CODA as a long-term, part-time employee. In general, section 401(k)(15) does not preclude a plan that includes a CODA from establishing conditions that must be satisfied in order for an employee to be eligible to participate in the CODA. However, a CODA will fail to satisfy section 401(k)(2)(D) if, as a condition of participation, the plan imposes an age or service requirement (or imposes a condition that has the effect of an age or service requirement) that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).

Accordingly, proposed § 1.401(k)–5(c)(3) would clarify that the long-term, part-time employee rules of § 1.401(k)–5 do not preclude a plan from establishing an eligibility condition that must be satisfied in order for an employee to participate in the CODA, provided that the condition is not a proxy for imposing an age or service requirement (that is, the condition does not have the effect of imposing an age or service requirement with the employer or employers maintaining the plan) that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).[4] However, with respect to an employee who otherwise would be eligible to participate in a qualified CODA as a long-term, part-time employee, but who is excluded from participating as a long-term, part-time employee due to conditions imposed by the plan, the rules of section 401(k)(15)(B)(i) and (ii) (disregarding long-term, part-time employees for purposes of nondiscrimination and coverage testing and top-heavy benefits) do not apply to that excluded employee.

In addition, the maximum period of service that the employer or employers maintaining a plan may require under section 401(k)(2)(D) applies regardless of an employee's job classification. For example, it would not be permissible for an employee classified as a temporary employee to be required to complete a period of service that is described in section 401(k)(2)(D)(ii). This would not be permissible because section 401(k)(2)(D) provides that a qualified CODA may not require, as a condition of participation, that an employee complete a period of service that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii). Thus, if the employee were to complete the period described in section 410(a)(1) (determined without regard to section

[4] The rules of proposed § 1.401(k)–5(c)(3) are intended to align with those of § 1.410(a)–3(d) and (e).

410(a)(1)(B)(i)), then the employee must become eligible to participate in the CODA under section 401(k)(2)(D)(i).

Proposed § 1.401(k)–5(c)(1)(iii) would provide rules addressing the date of participation that apply in the case of an employee who would otherwise be eligible to participate in the arrangement as a long-term, part-time employee but who does not participate solely because the employee does not satisfy the plan's eligibility conditions (other than age or service) as of the date the employee would have participated in the arrangement had the employee satisfied those conditions. If such an employee later satisfies those conditions, then the employee must become eligible to participate in the arrangement immediately upon satisfying those conditions.

4. Elective Contributions

To avoid a circumvention of the requirement that a long-term, part-time employee be eligible to make elective contributions under a qualified CODA, proposed § 1.401(k)–5(c)(4) would provide, in general, that the right to make elective contributions by a long-term, part-time employee who is an eligible non-highly compensated employee (NHCE) may not be restricted in a manner that would not be permitted for an NHCE under a safe harbor section 401(k) plan under § 1.401(k)–3(c)(6). However, a SIMPLE 401(k) plan would be permitted to limit the amount of elective contributions made by a long-term, part-time employee under the plan to the extent needed to satisfy the elective contribution limitation for SIMPLE 401(k) plans under section 401(k)(11)(B)(i)(I) and (m)(10)(A).

D. Vesting

1. Years of Vesting Service Taken Into Account

This proposed regulation would provide vesting rules for purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee, as explained in section I.D.2 of this Explanation of Provisions) has a nonforfeitable right to employer contributions under the plan (other than elective contributions).

In general, the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions) would be determined under the rules of section 411. However, pursuant to section 401(k)(15)(B)(iii), proposed § 1.401(k)–5(d)(1)(i)(A) would provide that each 12-month period during which a long-term, part-time employee (or former long-term, part-time employee) is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)) with the employer or employers maintaining the plan is treated as a year of vesting service.

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification that, for purposes of determining vesting service for a long-term, part-time employee, a plan may use the same vesting computation period that it uses for other employees and is not required to use the long-term, part-time employee's eligibility computation period. Under section 411(a)(5)(A), a vesting computation period generally may be a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary of Labor). Section 401(k)(15)(D)(ii) provides that 12-month periods are determined in the same manner as under the last sentence of section 410(a)(3)(A). However, the introductory language of section 401(k)(15) states that it applies ''for purposes of paragraph (2)(D)(ii)'' (that is, the eligibility rules of section 401(k)(2)(D)(ii)). Based on this language, this proposed regulation would apply the rule under section 401(k)(15)(D)(ii) for purposes of section 401(k)(2)(D)(ii) but would not extend the application of that rule to the vesting rules of section 401(k)(15)(B)(iii). Accordingly, in response to this comment, proposed § 1.401(k)–5(d)(1)(i)(A) would clarify that a plan may designate any 12-consecutive month period that is not prohibited for use under section 411(a) for purposes of determining a long-term, part-time employee's (or former long-term, part-time employee's) vesting service.

In addition, pursuant to section 401(k)(15)(B)(iii), proposed § 1.401(k)–5(d)(1)(iii) would provide that, for purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee) has incurred a 1-year break in service, section 411(a)(6)(A) is applied by substituting ''at least 500 hours of service'' for ''more than 500 hours of service.''

This proposed regulation also would provide guidance regarding 12-month periods that must be taken into account for purposes of determining a long-term, part-time employee's (or former long-term, part-time employee's) years of vesting service. As described in section II of the Background portion of this preamble, Q&A C–1 of Notice 2020–68 provides that, unless a long-term, part-time employee's years of service may be disregarded under section 411(a)(4) (for example, years of service before the employee attains age 18), all years of service with the employer or employers maintaining the plan must be taken into account for purposes of determining the long-term, part-time employee's nonforfeitable right to employer contributions under section 401(k)(15)(B)(iii), including 12-month periods beginning before January 1, 2021.

However, section 125(d) of the SECURE 2.0 Act amended section 112(b) of the SECURE Act (effective as if included in section 112 of the SECURE Act) to provide that 12-month periods beginning before January 1, 2021, are not taken into account for purposes of either the eligibility rule described in section 401(k)(2)(D)(ii) or the vesting rules of section 401(k)(15)(B)(iii). Thus, Q&A C–1 of Notice 2020–68 was effectively rendered obsolete by the enactment of section 125(d) of the SECURE 2.0 Act.

Accordingly, proposed § 1.401(k)–5(d)(1)(i)(B) generally would require that all 12-month periods of service with the employer or employers maintaining the plan must be taken into account for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions (other than elective contributions), unless the period of service of the employee may be disregarded under section 411(a) (which takes into account section 411(a)(4), (a)(6), and (a)(7)(B)). In addition, proposed § 1.401(k)–5(d)(1)(i)(B) would reflect section 125(d) of the SECURE 2.0 Act by permitting any 12-month period beginning before January 1, 2021, to be excluded for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions (other than elective contributions) under the plan.

2. Former Long-Term, Part-Time Employees

This proposed regulation would provide rules for an employee who becomes eligible to participate in a qualified CODA as a long-term, part-time employee but who subsequently completes 1 year of service under section 410(a)(1)(A)(ii) or who ceases to satisfy the plan's eligibility conditions (other than age or service conditions).

Under section 401(k)(15)(B)(iv), the rules of section 401(k)(15)(B) (other than the vesting rules of section 401(k)(15)(B)(iii)) cease to apply to any employee as of the first plan year beginning after the plan year in which

the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii) (that is, satisfies the requirements of section 410(a)(1)(A)(ii) without regard to section 410(a)(1)(B)(i)). Thus, the nondiscrimination and coverage testing provisions of section 401(k)(15)(B)(i) and the top-heavy benefit provisions of section 401(k)(15)(B)(ii) cease to apply to any employee as of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii), but the vesting rules of section 401(k)(15)(B)(iii) continue to apply to the employee.

Proposed § 1.401(k)–5(d)(2) would reflect the rules of section 401(k)(15)(B)(iv) by providing that an employee ceases to be a long-term, part-time employee and becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the plan year in which the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii). The nondiscrimination provisions of proposed § 1.401(k)–5(e)(1) (which are explained in section I.E.1 of this Explanation of Provisions) and the employer election provisions of proposed § 1.401(k)–5(f)(1) and (2) (which are explained in section I.F of this Explanation of Provisions) would not apply to a former long-term, part-time employee (regardless of whether the former long-term, part-time employee subsequently completes one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service). However, the vesting rules of proposed § 1.401(k)–5(d)(1) (as explained in section I.D.1 of this Explanation of Provisions) would continue to apply to a former long-term, part-time employee. Thus, a former long-term, part-time employee would continue to be credited with a year of vesting service for any 12-month period during which the former long-term, part-time employee is credited with at least 500 hours of service with the employer or employers maintaining the plan (unless the period of service may be disregarded under section 411(a)).

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification regarding the application of the vesting rules of section 401(k)(15)(B)(iii) and (iv) with respect to an employee who: (1) becomes eligible to participate as a long-term, part-time employee, but who subsequently completes 1 year of service under section 410(a)(1)(A)(ii); or (2) becomes eligible to participate because the employee completed 1 year of service under section 410(a)(1)(A)(ii), but who also completes (before or after becoming eligible to participate) one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service.

Under this proposed regulation, the vesting rules of proposed § 1.401(k)–5(d)(1) would continue to apply to a long-term, part-time employee who completes 1 year of service under section 410(a)(1)(A)(ii). However, an employee who becomes eligible to participate in a qualified CODA because the employee completes 1 year of service under section 410(a)(1)(A)(ii) would not be eligible to participate in the CODA solely by reason of completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Therefore, the employee would not be a long-term, part-time employee, and the vesting rules of proposed § 1.401(k)–5(d)(1) would not apply to the employee (regardless of whether the employee also completes, before or after becoming eligible to participate in the qualified CODA, one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service).

Section 401(k)(15) does not address a long-term, part-time employee who ceases to satisfy a plan's eligibility conditions (other than age or service conditions) for participation in the qualified CODA included in the plan. However, this proposed regulation would provide rules similar to those of section 401(k)(15)(B)(iv) with respect to a long-term, part-time employee who ceases to be eligible to participate in a qualified CODA. Therefore, proposed § 1.401(k)–5(d)(2)(ii) would provide that a long-term, part-time employee becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the earlier of the plan year in which the employee: (1) satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii); or (2) ceases to satisfy the plan's eligibility conditions (other than age or service conditions). Regardless of the reason that a long-term, part-time employee becomes a former long-term, part-time employee, this proposed regulation would provide that the nondiscrimination provisions of proposed § 1.401(k)–5(e)(1) and the employer election provisions of proposed § 1.401(k)–5(f)(1) and (2) do not apply to a former long-term, part-time employee (although the vesting rules of proposed § 1.401(k)–5(d)(1) would continue to apply to a former long-term, part-time employee).

Unlike the rules that would apply to a long-term, part-time employee who becomes a former long-term, part-time employee by reason of satisfying the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii) (that is, by reason of having completed 1 year of service under section 410(a)(1)(A)(ii)), proposed § 1.401(k)–5(d)(2)(iii) would provide that a long-term, part-time employee who ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year generally will return to long-term, part-time employee status as of the first day of the plan year during which the employee again satisfies those conditions. However, that employee would not return to long-term, part-time employee status if the employee also is a former long-term, part-time employee by reason of having completed 1 year of service under section 410(a)(1)(A)(ii). Although proposed § 1.401(k)–5(d)(2)(iii) would permit an employee's status to change from that of a former long-term, part-time employee to a long-term, part-time employee during the plan year, this proposed regulation would not permit an employee to be both a long-term, part-time employee and a former long-term, part-time employee for that plan year. Similarly, under this proposed regulation, if a long-term, part-time employee ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year, but again satisfies those conditions during the same plan year, the employee would remain a long-term, part-time employee for the entire plan year.

Accordingly, proposed § 1.401(k)–5(d)(2)(i) would define a former long-term, part-time employee as an employee who became eligible to participate in the arrangement as a long-term, part-time employee; subsequently ceased to be a long-term, part-time employee because the employee was described in proposed § 1.401(k)–5(d)(2)(ii)(A) or (B); and has not returned to long-term, part-time employee status in accordance with proposed § 1.401(k)–5(d)(2)(iii). Thus, under this proposed definition, an employee first must become eligible to participate in a qualified CODA as a long-term, part-time employee before the employee may become a former long-term, part-time employee.

E. Nonelective and Matching Contributions

1. General Rule

This proposed regulation reflects the nondiscrimination provisions of section 401(k)(15)(B)(i)(I). Proposed § 1.401(k)–5(e)(1) would provide that, notwithstanding section 401(a)(4), neither nonelective nor matching contributions are required to be made on behalf of long-term, part-time employees, even if those contributions are made on behalf of other eligible employees. However, as explained in section I.D.2 of this Explanation of Provisions, proposed § 1.401(k)–5(e)(1) would not apply to former long-term, part-time employees.

2. Coordination With Employer Elections

In addition to section 401(a)(4), other Code sections affect whether contributions must be made on behalf of long-term, part-time employees. Accordingly, proposed § 1.401(k)–5(e)(2) would address the safe harbor section 401(k) plan contribution requirements under section 401(k)(12) and (13), the safe harbor section 401(m) plan contribution requirements under section 401(m)(11) and (12), the top-heavy benefit requirements under section 416, and the SIMPLE 401(k) plan contribution requirements under section 401(k)(11) and (m)(10).

As explained in section I.F.1 of this Explanation of Provisions, this proposed regulation would provide that the employer or employers maintaining a plan are permitted to elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the ADP safe harbor provisions of section 401(k)(12) and (13), the ACP safe harbor provisions of section 401(m)(11) and (12), and certain other nondiscrimination and coverage testing provisions. Similarly, as explained in section I.F.2 of this Explanation of Provisions, this proposed regulation would permit the employer or employers maintaining the plan to elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the top-heavy vesting and benefit requirements of section 416(b) and (c). However, this proposed regulation would not permit an employer to elect to exclude long-term, part-time employees for purposes of determining whether a plan satisfies the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10).

Therefore, proposed § 1.401(k)–5(e)(2)(i) would clarify that if long-term, part-time employees are excluded for purposes of determining whether a plan satisfies the ADP safe harbor provisions of section 401(k)(12) or (13) (and, if applicable, the ACP safe harbor provisions of section 401(m)(11) or (12)), then the plan will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that would not satisfy the safe harbor contribution requirements on behalf of the eligible NHCE). Similarly, proposed § 1.401(k)–5(e)(2)(ii) would clarify that if long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the minimum benefit requirements of section 416(c) for the plan year, then the plan will not fail to satisfy the minimum benefit requirements of section 416(c) merely because the employer contribution (if any) made for the plan year on behalf of a non-key employee who is a long-term, part-time employee does not satisfy those requirements.

However, proposed § 1.401(k)–5(e)(2)(iii) would clarify that, because an employer may not elect under this proposed regulation to exclude long-term, part-time employees from the application of the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10), a plan intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) or (m)(10) must satisfy the matching or nonelective contribution requirements of § 1.401(k)–4(e) with respect to long-term, part-time employees.

F. Employer Elections

1. Nondiscrimination and Coverage

This proposed regulation generally reflects the provisions of section 401(k)(15)(B)(i)(II). Section 401(k)(15)(B)(i)(II) permits an employer to elect to exclude long-term, part-time employees from the application of the nondiscrimination requirements of section 401(a)(4), the ADP test of section 401(k)(3), the ADP safe harbor provisions of section 401(k)(12) and (13), the ACP test of section 401(m)(2), the ACP safe harbor provisions of section 401(m)(11) and (12), and the minimum coverage requirements of section 410(b). Accordingly, proposed § 1.401(k)–5(f)(1) generally would permit an employer to elect to exclude long-term, part-time employees (but not former long-term, part-time employees, as explained in section I.D.2 of this Explanation of Provisions) for purposes of determining whether a plan satisfies those nondiscrimination and minimum coverage requirements.

The nondiscrimination and minimum coverage requirements listed in section 401(k)(15)(B)(i)(II) do not include the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10). Accordingly, an employer election under proposed § 1.401(k)–5(f)(1) would not exclude long-term, part-time employees for purposes of determining whether a plan satisfies the SIMPLE 401(k) requirements of section 401(k)(11) and (m)(10).

For purposes of section 410(b), if long-term, part-time employees are not excluded for purposes of determining whether the plan satisfies section 410(b) pursuant to an employer election under proposed § 1.401(k)–5(f)(1), then those employees generally will be otherwise excludable employees for purposes of section 410(b)(4)(B) and § 1.410(b)–6(b)(3) because those long-term, part-time employees will not have satisfied the service requirements of section 410(a)(1) (without regard to section 410(a)(1)(B)). However, former long-term, part-time employees who have completed 1 year of service under section 410(a)(1)(A)(ii) will not be otherwise excludable employees because those former long-term, part-time employees will have satisfied the minimum age and service requirements of section 410(a)(1) (without regard to section 410(a)(1)(B)).

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification that an employer may elect to exclude long-term, part-time employees for purposes of certain nondiscrimination and coverage testing provisions listed in section 401(k)(15)(B)(i)(II), but include long-term, part-time employees for other of those provisions. This proposed regulation would not provide for such an option because of the interconnection among the nondiscrimination and coverage testing provisions listed in section 401(k)(15)(B)(i)(II) and the risk that disregarding long-term, part-time employees for purposes of some (but not all) of those nondiscrimination and coverage testing provisions could result in discrimination against NHCEs who are not long-term, part-time employees. Accordingly, this proposed regulation would clarify that an employer election under proposed § 1.401(k)–5(f)(1) applies for purposes of every nondiscrimination and coverage testing provision listed in section 401(k)(15)(B)(i)(II) (to the extent the provision otherwise would apply to the plan) and applies with respect to all long-term, part-time employees who are eligible to participate in the qualified CODA.

With respect to a plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), this proposed regulation would clarify that an election under proposed § 1.401(k)–5(f)(1) must be set forth in the plan and satisfy the plan year requirements of § 1.401(k)–3(e). This proposed regulation would set forth a similar requirement for a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12). Therefore, with respect to these plans, in order for an election to satisfy the conditions of proposed § 1.401(k)–5(f)(1), the terms of the plan must provide clearly that long-term, part-time employees are excluded for purposes of the ADP safe harbor provisions of section 401(k)(12) or (13), the ACP safe harbor provisions of section 401(m)(11) or (12), and any other provisions under proposed § 1.401(k)–5(f)(1)(i) that otherwise would apply to the plan.

With respect to a plan that is not intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) for a plan year, this proposed regulation would not require an election under proposed § 1.401(k)–5(f)(1) to be set forth in the plan. However, in order for the employer or employers maintaining the plan to make an election under proposed § 1.401(k)–5(f)(1), the terms of the plan would need to provide enabling language. Thus, in the case of a plan that is not intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) for a plan year, if the plan document does not include enabling language, or an election under proposed § 1.401(k)–5(f)(1) is not made, then long-term, part-time employees would not be excluded for purposes of determining whether the plan satisfies the nondiscrimination requirements of section 401(a)(4), the ADP test of section 401(k)(3), the ACP test of section 401(m)(2), or the minimum coverage requirements of section 410(b) (to the extent those provisions would otherwise apply to the plan).

2. Top-Heavy

Proposed § 1.401(k)–5(f)(2) reflects the provisions of section 401(k)(15)(B)(ii), which permit an employer to elect to exclude all long-term, part-time employees from the application of the top-heavy vesting and benefit requirements under section 416(b) and (c). As explained in section I.D.2 of this Explanation of Provisions, the election under proposed § 1.401(k)–5(f)(2) would not apply to former long-term, part-time employees. In addition, this proposed regulation would clarify that an election under section 401(k)(15)(B)(ii) does not apply for purposes of determining whether a plan is a top-heavy plan (as defined in section 416(g)).

However, section 125(e) of the SECURE 2.0 Act amends the special rules under section 416(g)(4)(H) of the Code for cash or deferred arrangements using alternative methods of meeting nondiscrimination requirements to provide that the term ''top-heavy plan'' does not include a plan solely because that plan does not provide nonelective or matching contributions to employees described in section 401(k)(15)(B)(i). As explained in section I.E.2 of this Explanation of Provisions, a plan does not fail to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) or the ACP safe harbor provisions of section 401(m)(11) or (12) (including for purposes of applying section 416(g)(4)(H) of the Code) merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee, provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies those provisions pursuant to an election that satisfies the requirements of proposed § 1.401(k)–5(f)(1). Accordingly, proposed § 1.401(k)–5(f)(2) would clarify that, in the case of an employer that makes an election described in proposed § 1.401(k)–5(f)(1) (which has the effect of excluding long-term, part-time employees for purposes of determining whether the plan satisfies the ADP and ACP safe harbor provisions), the plan will not fail to be excluded from the definition of a ''top-heavy plan'' under section 416(g)(4)(H) merely because the employer does not make nonelective or matching contributions on behalf of long-term, part-time employees (or makes nonelective or matching contributions that do not satisfy the requirements for safe harbor contributions).

The employer election regarding nondiscrimination and coverage testing under proposed § 1.401(k)–5(f)(1) and the employer election regarding top-heavy benefits under proposed § 1.401(k)–5(f)(2) would be separate elections. In order for an election to satisfy the conditions of proposed § 1.401(k)–5(f)(2), the terms of the plan would be required to provide that long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c).

3. Additional Employer Contributions

As explained in section I.E of this Explanation of Provisions, this proposed regulation generally would not require an employer to make nonelective or matching contributions on behalf of a long-term, part-time employee. However, the Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting clarification that an employer may elect under section 401(k)(15)(B)(i)(II) to exclude long-term, part-time employees from nondiscrimination and coverage testing, even if the employer makes employer contributions (other than elective contributions) on behalf of long-term, part-time employees under the plan.

Under this proposed regulation, an election to exclude long-term, part-time employees for purposes of nondiscrimination and coverage testing under proposed § 1.401(k)–5(f)(1), and an election to exclude long-term, part-time employees for purposes of top-heavy benefits under proposed § 1.401(k)–5(f)(2), would not be conditioned upon long-term, part-time employees being ineligible to receive employer contributions other than elective contributions under the plan. Accordingly, this proposed regulation generally would permit the employer or employers maintaining the plan to elect to exclude long-term, part-time employees under proposed § 1.401(k)–5(f)(1) and (2), even if the employer or employers maintaining the plan make nonelective or matching contributions on behalf of long-term, part-time employees under the plan. If a plan is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), or the ACP safe harbor provisions of section 401(m)(11) or (12), and the employer elects to exclude long-term, part-time employees under proposed § 1.401(k)–5(f)(1) for purposes of determining whether the plan satisfies those provisions (and any other provisions under proposed § 1.401(k)–5(f)(1)(i) that otherwise would apply to the plan), then any nonelective or matching contributions made on behalf of long-term, part-time employees under the plan would not be safe harbor contributions for purposes of § 1.401(k)–3 or 1.401(m)–3 but, as described in section I.F.2 of this Explanation of Provisions, the plan would continue to be excluded from the definition of a ''top-heavy plan''.

II. Other Issues

A. Catch-Up Contributions and Roth Elective Contributions

Section 112 of the SECURE Act does not address whether a long-term, part-time employee may be a catch-up eligible participant for purposes of making catch-up contributions under section 414(v) and § 1.414(v)–1. However, § 1.414(v)–1(g)(3) provides that an employee is a catch-up eligible participant for a taxable year if: (1) the employee is eligible to make elective deferrals under an applicable employer plan (without regard to section 414(v) or § 1.414(v)–1), and (2) the employee's 50th or higher birthday would occur before the end of the employee's taxable year. An employee who is eligible to participate in a qualified CODA as a long-term, part-time employee would be eligible to make elective deferrals under an applicable employer plan for purposes of § 1.414(v)–1(g)(3). Accordingly, a long-term, part-time employee is a catch-up eligible participant for a taxable year if the employee's 50th or higher birthday would occur before the end of the employee's taxable year.

Under the universal availability requirements of section 414(v)(4) and § 1.414(v)–1(e), a section 401(k) plan (or other applicable employer plan) that offers catch-up contributions and that is otherwise subject to section 401(a)(4) generally will not satisfy the requirements of section 401(a)(4) unless all catch-up eligible participants who participate under any applicable employer plan maintained by the employer are provided an effective opportunity to make the same dollar amount of catch-up contributions. This proposed regulation would not amend the catch-up contribution rules of § 1.414(v)–1. However, as explained in section I.F.1 of this Explanation of Provisions, proposed § 1.401(k)–5(f)(1) would permit an employer to elect to exclude long-term, part-time employees for purposes of certain nondiscrimination and coverage testing provisions, including for purposes of section 401(a)(4). Therefore, long-term, part-time employees would be disregarded for purposes of the universal availability requirements of section 414(v)(4) and § 1.414(v)–1(e), if the employer elects to exclude long-term, part-time employees in accordance with the provisions of proposed § 1.401(k)–5(f)(1).

Similarly, section 401(k)(15) does not address whether a section 401(k) plan may permit a long-term, part-time employee to make designated Roth contributions. However, under § 1.401(k)–1(f)(1), a designated Roth contribution is an elective contribution under a qualified CODA that (to the extent permitted under the plan) satisfies certain conditions. Section 1.401(k)–1(f)(4) further provides that a designated Roth contribution must satisfy the requirements applicable to elective contributions made under a qualified CODA and is treated as an employer contribution for purposes of certain Code sections, including section 401(k). Accordingly, a section 401(k) plan may permit long-term, part-time employees to make designated Roth contributions.

Under § 1.401(k)–1(a)(4)(iv)(B), the right to make designated Roth contributions is a right or feature subject to the requirements of section 401(a)(4). However, if the employer elects to exclude long-term, part-time employees for purposes of determining whether a plan satisfies section 401(a)(4) in accordance with the provisions of proposed § 1.401(k)–5(f)(1), long-term, part-time employees would be disregarded for purposes of determining whether the right to make designated Roth contributions under the plan satisfies section 401(a)(4) and § 1.401(a)(4)–4.

B. Form 5500 and Form 5500–SF—Independent Qualified Public Accountant Audit

The Treasury Department and the IRS received a comment in response to Notice 2020–68 requesting that long-term, part-time employees be excluded for purposes of determining whether a plan is exempt from the requirement to be audited annually by an independent qualified public accountant (IQPA). The Treasury Department and the IRS also received a comment in response to Notice 2020–68 requesting that the determination of whether a plan is exempt from the annual audit requirement be based on the number of plan participants (including long-term, part-time employees) with account balances as of the beginning of the plan year, rather than the total number of participants at the beginning of the plan year. The annual audit requirement of section 103(a)(3) of ERISA falls under the regulatory and interpretive authority of the Department of Labor and is outside the scope of this proposed regulation.[5]

[5] After these comments were received, revisions were made to the forms and instructions for the Form 5500, ''Annual Return/Report of Employee Benefit Plan,'' and Form 5500–SF, ''Short Form Annual Return/Report of Small Employee Benefit Plan,'' for plan years beginning on or after January 1, 2023. The new instructions provide that only participants with an account balance are counted for purposes of the small plan audit waiver of annual examination and report of an IQPA under 29 CFR 2520.104–46. *See* 88 FR 11984 (February 24, 2023).

Proposed Applicability Date

Section 1.401(k)–5 is proposed to apply to plan years that begin on or after January 1, 2024. Prior to the date a Treasury decision revising § 1.401(k)–5 to implement rules for long-term, part-time employees is published in the **Federal Register**, taxpayers may rely on the rules set forth in this notice of proposed rulemaking.

Availability of IRS Documents

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at *www.irs.gov* or contact the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402.

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The information required under this regulation is considered usual and customary records kept by respondents during the normal course of business in administering their retirement plans. These customary business records impose no additional burden on respondents and are not required to be reviewed by the Office of Management and Budget (OMB) per 5 CFR 1320.3(b)(2).

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on several factors. First, the proposed regulation generally is intended to reflect certain statutory changes that affect section 401(k) plans. The proposed regulation primarily would conform the current regulations under section 401(k) with changes made by section 112 of the SECURE Act and sections 125 and 401 of the SECURE 2.0 Act.

Second, although the proposed regulation might affect a substantial

number of small entities, the economic impact of the proposed regulation is not expected to be significant. The changes made by section 112 of the SECURE Act may require certain small entities that sponsor section 401(k) plans to revise the eligibility service requirements under those plans so that long-term, part-time employees are permitted to make cash or deferred elections. However, except with respect to SIMPLE 401(k) plans, those small entities would not be required to make nonelective or matching contributions on behalf of long-term, part-time employees. Any additional recordkeeping or administrative costs resulting from the participation of long-term, part-time employees in section 401(k) plans sponsored by small entities are not expected to be significant.

With respect to small entities that sponsor SIMPLE 401(k) plans, the proposed regulation would require those small entities to make nonelective or matching contributions under those SIMPLE 401(k) plans on behalf of any long-term, part-time employees in order to satisfy section 112 of the SECURE Act. However, if a small entity sponsors a section 401(k) plan, it is expected that the plan typically would be subject to the ADP test or designed to satisfy the requirements for a safe harbor section 401(k) plan, rather than be designed to satisfy the requirements for a SIMPLE 401(k) plan. Accordingly, the number of small entities that sponsor section 401(k) plans that are intended to satisfy the requirements for a SIMPLE 401(k) plan and are affected by the expanded participation requirements of section 112 of the SECURE Act is not expected to be substantial.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of this regulation on small entities. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. The proposed regulation does not propose any rule that would include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. The proposed regulation does not propose any rule that would have federalism implications, impose substantial direct compliance costs on State and local governments, or preempt State law within the meaning of the Executive order.

Comments and Public Hearing

Before a final regulation is adopted with respect to long-term, part-time employee rules for cash or deferred arrangements under § 1.401(k)–5, consideration will be given to comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulation. As described in section I.B.1 of the Explanation of Provisions, comments specifically are requested on the application of section 112 of the SECURE Act to a qualified CODA that is included in either (1) a governmental plan, or (2) a church plan with respect to which the election provided by section 410(d) has not been made.

All comments will be made available at *www.regulations.gov* or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for March 15, 2024, beginning at 10:00 a.m. ET in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit an outline of the topics to be addressed and the time to be devoted to each topic by January 26, 2024 as prescribed in the preamble under the **ADDRESSES** section. A period of 10 minutes will be allocated to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by January 26, 2024, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–104194–23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG–104194–23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–104194–23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG–104194–23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–104194–23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–104194–23. Requests to attend the public hearing must be received by 5:00 p.m. ET on March 13, 2024.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–104194–23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for

REG–104194–23. Requests to attend the public hearing must be received by 5:00 p.m. ET on March 13, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during the hearing, please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–6901 (not a toll-free number) by March 12, 2024.

Drafting Information

The principal authors of this regulation are Kara M. Soderstrom and Jason E. Levine, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes (EEE)). However, other personnel from the IRS and the Treasury Department participated in the development of this regulation.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry for § 1.401(k)–5 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.401(k)–5 is also issued under 26 U.S.C. 401(m)(9).

* * * * *

■ **Par. 2.** Section 1.401(k)–5 is revised to read as follows:

§ 1.401(k)–5 Long-term, part-time employees.

(a) *Overview*—(1) *Rules applicable to long-term, part-time employees*—(i) *In general.* This section provides rules regarding long-term, part-time employees, as defined in paragraph (b)(1) of this section. A cash or deferred arrangement satisfies the requirements of section 401(k)(2)(D) of the Internal Revenue Code only if, with respect to each long-term, part-time employee—

(A) The employee becomes eligible to make a cash or deferred election under the arrangement in accordance with the participation requirements of paragraph (c) of this section; and

(B) The plan that includes the arrangement satisfies the vesting requirements of paragraph (d) of this section.

(ii) *Optional provisions.* A plan that includes a cash or deferred arrangement that satisfies the requirements of paragraphs (c) and (d) of this section may reflect the nonelective and matching contribution provisions of paragraph (e) of this section with respect to long-term, part-time employees (but not former long-term, part-time employees as defined in paragraph (d)(2)(i) of this section). In addition, an employer maintaining the plan may apply the employer election provisions of paragraph (f) of this section with respect to long-term, part-time employees (but not former long-term, part-time employees).

(2) *Rules applicable to former long-term, part-time employees. See* paragraph (d)(2) of this section for rules relating to former long-term, part-time employees.

(b) *Long-term, part-time employees*—(1) *Definition*—(i) *In general.* Except as provided in paragraph (b)(1)(ii) or (iii) of this section, *long-term, part-time employee* means an employee who is eligible to participate in the arrangement solely by reason of having—

(A) Completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)); and

(B) Attained the age specified in section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in paragraph (b)(1)(i)(A) of this section.

(ii) *Exclusion for certain employees.* Long-term, part-time employees do not include—

(A) Employees who are included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between those employee representatives and that employer or employers;

(B) Employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)); or

(C) Any other employees described in section 410(b)(3).

(iii) *Plan years beginning in 2024.* With respect to a plan year beginning in 2024, paragraph (b)(1)(i)(A) of this section is applied by substituting three consecutive 12-month periods for two consecutive 12-month periods.

(2) *Examples.* The following examples illustrate the application of the definition of long-term, part-time employee under paragraph (b)(1) of this section, taking into account the determination of 12-month periods under paragraph (c)(2)(i) of this section. For purposes of the examples, each plan is maintained on a calendar-year basis, includes a cash or deferred arrangement, and each plan's provisions are effective as of January 1, 2024. For purposes of paragraphs (b)(2)(vi) through (xii) of this section (*Examples 6* through *12*), each plan provides that, in order to be eligible to make a cash or deferred election under the arrangement, an employee is required to complete a period of service with the employer maintaining the plan that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or three consecutive 12-month periods (excluding any 12-month period beginning before January 1, 2021) during each of which the employee is credited with at least 500 hours of service (however, effective January 1, 2025, each plan is amended to provide that the applicable number of consecutive 12-month periods during each of which an employee must be credited with at least 500 hours of service in order to participate in the arrangement is reduced from three to two). In addition, for purposes of paragraphs (b)(2)(vi) through (xii) of this section (*Examples 6* through *12*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraph (b)(1)(i) of this section, 12-month periods are determined by reference to the employment commencement date of an employee, and each plan provides monthly entry dates for an eligible employee to commence participation in the arrangement. Except as provided in paragraphs (b)(2)(viii), (ix), and (x) of this section (*Examples 8, 9,* and *10*), each employee has attained age 21. Except as provided in paragraphs (b)(2)(xi) and (xii) of this section (*Examples 11* and *12*), none of the employees are described in section 410(b)(3).

(i) *Example 1.* (A) Employer A maintains Plan I. Plan I includes a cash or deferred arrangement under which each employee of Employer A is eligible to make a cash or deferred election as soon as administratively practicable after the employee's employment commencement date.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan I are long-term, part-time employees

because none of those employees are eligible to participate in the arrangement solely by reason of having completed the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods) during each of which the employee is credited with at least 500 hours of service.

(ii) *Example 2.* (A) Employer B maintains Plan J. Plan J provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer B is required to complete a 12-month period of service with Employer B during which the employee is credited with at least 500 hours of service.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan J are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(iii) *Example 3.* (A) Employer C maintains Plan K. Plan K provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer C is required to complete a period of service with Employer C that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(B) For the plan year beginning January 1, 2024, none of the employees who are eligible to make a cash or deferred election under the arrangement in Plan K are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(C) For plan years beginning on or after January 1, 2025, an employee who becomes eligible to participate in the arrangement in Plan K solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service would be a long-term, part-time employee. However, an employee who became eligible to participate in the arrangement before January 1, 2025, would not be a long-term, part-time employee for plan years beginning on or after January 1, 2025, because that employee did not become eligible to participate in the arrangement solely by reason of completing the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(iv) *Example 4.* (A) Employer D maintains Plan L. Plan L provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee of Employer D is required to complete a 1-year period of service with Employer D using the elapsed time method of crediting service.

(B) None of the employees who are eligible to make a cash or deferred election under the arrangement in Plan L are long-term, part-time employees because none of those employees are eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(v) *Example 5.* (A) The facts are the same as in paragraph (b)(2)(iv)(A) of this section (*Example 4*), except that Plan L requires employees of Employer D who are classified as part-time employees to complete the applicable number of consecutive 1-year periods of service under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section with Employer D using the elapsed time method of crediting service.

(B) Plan L fails to satisfy the requirements of section 401(k)(2)(D)(i) because, under the elapsed time method of crediting service, a 1-year period of service is the maximum period that Plan L may require any employee to complete in order to participate in the arrangement.

(vi) *Example 6.* (A) Employer E maintains Plan M. For purposes of determining the eligibility of an employee to participate in the arrangement under Plan M, Plan M credits an employee with 190 hours of service for each month for which the employee would be required to be credited with at least 1 hour of service. Employees R and S are employees of Employer E who both have an employment commencement date of June 1, 2024. Employees R and S are both classified by Employer E as part-time employees. During the 12-month period beginning on June 1, 2024, Employee R has at least 1 hour of service each month for 6 months and, therefore, is credited with 1,140 hours of service. Employee R commences participation in the arrangement in Plan M on June 1, 2025. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee S is credited with at least 1 hour of service each month for 4 months and, therefore, is credited with 760 hours of service for the period. Employee S commences participation in the arrangement in Plan M on June 1, 2026.

(B) Employee R is not a long-term, part-time employee (or former long-term, part-time employee, as defined in paragraph (d)(2)(i) of this section) because Employee R is credited with 1,140 hours of service during the 12-month period beginning on June 1, 2024. Therefore, Employee R is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. However, Employee S is eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee S is a long-term, part-time employee.

(vii) *Example 7.* (A) Employer G maintains Plan O. Employee U is an employee of Employer G with an employment commencement date of June 1, 2024. Employee U is classified by Employer G as a part-time employee. During the 12-month period beginning on June 1, 2024, Employee U is credited with 900 hours of service. During the 12-month period beginning on June 1, 2025, Employee U is credited with 1,100 hours of service. Employee U commences participation in the arrangement in Plan O on June 1, 2026. During the 12-month period beginning on June 1, 2026, Employee U is credited with 900 hours of service.

(B) Employee U is not a long-term, part-time employee (or former long-term, part-time employee) because Employee U is credited with 1,100 hours of service during the 12-month period beginning on June 1, 2025. Therefore, Employee U is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. The result would be the same even if Employee U also is credited with at least 500 (but less than 1,000) hours of service during the plan year beginning on June 1, 2027 (and therefore completes two consecutive 12-month periods during each of which the

employee is credited with at least 500 hours of service).

(viii) *Example 8.* (A) Employer H maintains Plan P. Plan P excludes any employees who have not yet attained age 21 from participating in the arrangement under Plan P. Employee V is an employee of Employer H with an employment commencement date of June 1, 2024, who attains age 18 on September 2, 2024. During the 12-month period beginning on June 1, 2024, Employee V is credited with 1,100 hours of service. During each of the 12-month periods beginning on June 1, 2025, and June 1, 2026, Employee V is credited with 600 hours of service. On September 2, 2027, Employee V attains age 21 and Employee V commences participation in the arrangement in Plan P on October 1, 2027.

(B) Employee V is not a long-term, part-time employee (or former long-term, part-time employee) because Employee V was credited with 1,100 hours of service during the 12-month period beginning on June 1, 2024, and, therefore, became eligible to participate in the arrangement by reason of completing a 12-month period with at least 1,000 hours of service and attaining age 21. Accordingly, Employee V did not become eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(ix) *Example 9.* (A) Employer I maintains Plan Q. Plan Q excludes any employees who have not yet attained age 21 from participating in the arrangement under Plan Q. Employee W is an employee of Employer I with an employment commencement date of June 1, 2024, who attains age 19 on October 3, 2024. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee W is credited with 600 hours of service for the period. During the 12-month period beginning on June 1, 2026, Employee W attains age 21 (on October 3, 2026), but is credited with only 400 hours of service.

(B) Employee W is not a long-term, part-time employee (or former long-term, part-time employee) because Employee W is credited with only 400 hours of service during the 12-month period in which Employee W attains age 21. Therefore, Employee W did not attain age 21 by the close of the last of the 12-month periods described in paragraph (b)(1)(i)(A) of this section. However, Employee W could become eligible to participate in the arrangement in Plan Q as a long-term, part-time employee as of June 1, 2029, if Employee W is credited with at least 500 (but less than 1,000) hours of service for each 12-month period beginning on June 1, 2027, and June 1, 2028.

(x) *Example 10.* (A) The facts are the same as in paragraph (b)(2)(ix)(A) of this section (*Example 9*), except that, during the 12-month period beginning on June 1, 2026, Employee W is credited with 600 hours of service, and Employee W commences participation in the arrangement in Plan Q on June 1, 2027.

(B) Employee W is credited with 600 hours of service for each 12-month period beginning on June 1, 2025, and June 1, 2026, and attains age 21 on October 3, 2026, which is by the close of the last of those 12-month periods. Accordingly, Employee W is a long-term, part-time employee.

(xi) *Example 11.* (A) Employer J maintains Plan R. Plan R excludes any employees who are included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section from participating in the arrangement under Plan R. Employee X is an employee of Employer J who is included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section, and who has an employment commencement date of June 1, 2024. During each of the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee X is credited with 600 hours of service for the period. During the 12-month period beginning on June 1, 2026, Employee X is credited with 1,100 hours of service. On June 2, 2027, Employee X ceases to be included in a unit of employees covered by a collective bargaining agreement described in paragraph (b)(1)(ii)(A) of this section and becomes eligible to participate in the arrangement.

(B) Employee X is not a long-term, part-time employee (or former long-term, part-time employee) because Employee X is credited with 1,100 hours of service during the 12-month period beginning on June 1, 2026. Therefore, Employee X is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service.

(xii) *Example 12.* (A) The facts are the same as in paragraph (b)(2)(xi)(A) of this section (*Example 11*), except that, during the 12-month period beginning on June 1, 2026, Employee X is credited with only 600 hours of service.

(B) Employee X is eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee X is a long-term, part-time employee.

(c) *Participation*—(1) *Time of participation*—(i) *In general.* Subject to the rules of this paragraph (c)(1) and paragraph (c)(4) of this section, a long-term, part-time employee who satisfies the plan's eligibility conditions (as described in paragraph (c)(3) of this section) must become eligible to make a cash or deferred election under the arrangement no later than the earlier of—

(A) The first day of the first plan year beginning after the date on which the long-term, part-time employee satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section; or

(B) The date 6 months after the date on which the long-term, part-time employee satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section.

(ii) *Employees who separate from service.* The requirements of paragraph (c)(1)(i) of this section do not apply to a long-term, part-time employee who separates from service and does not return to service with the employer or employers maintaining the plan before the date referred to in paragraph (c)(1)(i) of this section. However, if a long-term, part-time employee described in the prior sentence returns to service with the employer or employers maintaining the plan after the date referred to in paragraph (c)(1)(i) of this section and is otherwise eligible to participate in the arrangement, the long-term, part-time employee must be eligible to make a cash or deferred election immediately upon return to service with the employer or employers maintaining the plan.

(iii) *Change in status.* If an employee who would otherwise be eligible to participate in the arrangement as a long-term, part-time employee does not participate solely because the employee does not satisfy the plan's eligibility conditions (as described in paragraph (c)(3) of this section) as of the date referred to in paragraph (c)(1)(i) of this section, and the employee satisfies those conditions after that date, the employee must become eligible to participate in the arrangement immediately upon satisfying those conditions.

(2) *Determination of 12-month periods*—(i) *In general.* Except for any 12-month period beginning before January 1, 2021, all 12-month periods during which an employee is credited

with at least 500 hours of service with the employer or employers maintaining the plan must be taken into account for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section.

(ii) *Initial and subsequent 12-month periods.* (A) The initial 12-month period with respect to an employee begins on the first day for which the employee is entitled to be credited with an hour of service.

(B) Beginning with the plan year that commences within the initial 12-month period described in paragraph (c)(2)(ii)(A) of this section, 12-month periods may be determined by reference to the first day of the plan year. If the preceding sentence applies, that initial 12-month period and the plan year that commences within the initial 12-month period are treated as consecutive 12-month periods.

(iii) *Examples.* The following examples illustrate the determination of 12-month periods under this paragraph (c)(2). For purposes of the examples, each plan includes a cash or deferred arrangement, is maintained on a calendar-year basis, and provides monthly entry dates for an eligible employee to commence participation in the arrangement. Each employee in the following examples has attained age 21, and none of the employees are described in section 410(b)(3). For purposes of paragraphs (c)(2)(iii)(A), (B), and (G) of this section (*Examples 1, 2,* and *7*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section, 12-month periods are determined by reference to the employment commencement date of an employee. For purposes of paragraphs (c)(2)(iii)(C) through (F) of this section (*Examples 3* through *6*), each plan provides that, for purposes of determining whether an employee has satisfied the requirements of paragraphs (b)(1)(i)(A) and (B) of this section, any 12-month period that begins after the first day of the initial 12-month period is determined by reference to the first day of the plan year. For purposes of paragraph (c)(2)(iii)(A) of this section and paragraphs (c)(2)(iii)(C) through (G) of this section (*Example 1* and *Examples 3* through *7*), each plan provides that, effective January 1, 2024, in order to be eligible to make a cash or deferred election under the arrangement, each employee is required to complete a period of service with the employer maintaining the plan that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or three consecutive 12-month periods (excluding any 12-month period beginning before January 1, 2021) during each of which the employee is credited with at least 500 hours of service. However, effective January 1, 2025, each plan is amended to provide that the applicable number of consecutive 12-month periods during each of which an employee must be credited with at least 500 hours of service in order to participate in the arrangement is reduced from three to two.

(A) *Example 1.* (*1*) Employer K maintains Plan S. Pursuant to paragraph (c)(2)(i) of this section, Plan S provides that any 12-month period beginning before January 1, 2021, is not taken into account for purposes of determining whether an employee has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Employee Y is an employee of Employer K with an employment commencement date of June 1, 2021. During each of the 12-month periods beginning on June 1, 2021, June 1, 2022, and June 1, 2023, Employee Y is credited with 600 hours of service for the period. Employee Y commences participation in the arrangement in Plan S on June 1, 2024.

(*2*) Employee Y is eligible to participate in the arrangement solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service, and Employee Y is a long-term, part-time employee. If Employee Y had an employment commencement date of June 1, 2020, and had been credited with 600 hours of service for the 12-month period beginning on June 1, 2020, then the result would be the same because, under the terms of the plan, the 12-month period beginning on June 1, 2020, would not be taken into account for purposes of determining whether Employee Y has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service and, therefore, Employee Y would become eligible to participate in the arrangement on June 1, 2024, as a long-term, part-time employee.

(B) *Example 2.* (*1*) Employer L maintains Plan T. Plan T provides that, in order to be eligible to make a cash or deferred election under the arrangement, each employee is required to complete a period of service with Employer L that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service; or the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods), including 12-month periods beginning before January 1, 2021. Employee Z is an employee of Employer L with an employment commencement date of June 1, 2020. During each of the 12-month periods beginning on June 1, 2020, June 1, 2021, and June 1, 2022, Employee Z is credited with 600 hours of service for the period. Employee Z commences participation in the arrangement in Plan T on June 1, 2023.

(*2*) Plan T does not fail to satisfy the requirements of section 401(k)(2)(D) merely because, under the terms of Plan T, Employee Z commences participation in the arrangement on June 1, 2023. However, paragraph (c)(2)(i) of this section does not permit any 12-month period beginning before January 1, 2021 (including the 12-month period beginning on June 1, 2020), to be taken into account for purposes of determining whether an employee has completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee Z is not a long-term, part-time employee because Employee Z is not eligible to participate in the arrangement solely by reason of having completed the applicable number of consecutive 12-month periods (beginning on or after January 1, 2021) during each of which the employee is credited with at least 500 hours of service.

(C) *Example 3.* (*1*) Employer M maintains Plan U. Employee A is an employee of Employer M with an employment commencement date of March 1, 2023. During the 12-month period beginning on March 1, 2023, Employee A is credited with 400 hours of service. During each of the 12-month periods beginning on January 1, 2024, and January 1, 2025, Employee A is credited with 600 hours of service for the period. Employee A commences participation in the arrangement under Plan U on January 1, 2026.

(*2*) Plan U satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee A. The fact that the 12-month period beginning March 1, 2023, is not a 12-month period for which Employee A is credited with at least 500 hours of service, does not prevent Employee A from being a long-term, part-time employee. Accordingly, Employee A is eligible to participate in the arrangement on January 1, 2026, solely by reason of having completed

two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2024, and January 1, 2025), and Employee A is a long-term, part-time employee.

(D) *Example 4.* (*1*) Employer N maintains Plan V. Employee B is an employee of Employer N with an employment commencement date of December 1, 2023. During the 12-month period beginning on December 1, 2023, Employee B is credited with 600 hours of service. During the 12-month period beginning on January 1, 2024, Employee B is credited with 600 hours of service. Employee B commences participation in the arrangement under Plan V on January 1, 2025.

(*2*) Plan V satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee B because the 12-month periods beginning on December 1, 2023, and January 1, 2024, are considered two consecutive 12-month periods. Accordingly, Employee B is eligible to participate in the arrangement on January 1, 2025, solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service, and Employee B is a long-term, part-time employee.

(E) *Example 5.* (*1*) Employer O maintains Plan W. Employee C is an employee of Employer O with an employment commencement date of August 1, 2020. During the 12-month period beginning on August 1, 2020, Employee C is credited with 600 hours of service. During each of the 12-month periods beginning on January 1, 2021, January 1, 2022, and January 1, 2023, Employee C is credited with 600 hours of service for the period. Employee C commences participation in the arrangement in Plan W on January 1, 2024.

(*2*) Plan W satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee C. Pursuant to paragraph (c)(2)(i) of this section, Plan W does not take into account the 12-month beginning on August 1, 2020, for purposes of determining whether Employee C has completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. Accordingly, Employee C is eligible to participate in the arrangement on January 1, 2024, solely by reason of having completed three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2021, January 1, 2022, and January 1, 2023), and Employee C is a long-term, part-time employee.

(F) *Example 6.* (*1*) Employer P maintains Plan X. Employee D is an employee of Employer P with an employment commencement date of March 1, 2023. During the 12-month period beginning on March 1, 2023, Employee D is credited with 600 hours of service. During the 12-month period beginning on January 1, 2024, Employee D is credited with 400 hours of service. During each of the 12-month periods beginning on January 1, 2025, and January 1, 2026, Employee D is credited with 600 hours of service for the period. Employee D commences participation in the arrangement under Plan X on January 1, 2027.

(*2*) Plan X satisfies the requirements of paragraph (c)(2)(ii)(B) of this section with respect to Employee D. The 12-month period beginning on March 1, 2023 (for which Employee D is credited with 600 hours of service) is not taken into account for purposes of determining whether Employee D has completed the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service because Employee D is not credited with at least 500 hours of service during the 12-month period beginning on January 1, 2024. Accordingly, Employee D is eligible to participate in the arrangement on January 1, 2027, solely by reason of having completed two consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (that is, the 12-month periods beginning on January 1, 2025, and January 1, 2026), and Employee D is a long-term, part-time employee.

(G) *Example 7.* (*1*) Employer Q maintains Plan Y. Employee E is an employee of Employer Q with an employment commencement date of June 1, 2023. During each of the 12-month periods beginning on June 1, 2023, and June 1, 2024, Employee E is credited with 600 hours of service for the period. Employee E commences participation in the arrangement in Plan Y on June 1, 2025. During the 12-month period beginning on June 1, 2025, Employee E is credited with 300 hours of service.

(*2*) Pursuant to paragraph (c)(2)(i) of this section, the 12-month periods beginning on June 1, 2023, and June 1, 2024, must be taken into account for purposes of determining whether Employee E is a long-term, part-time employee. This requirement is not changed merely because Employee E is not credited with at least 500 hours of service during the 12-month period beginning on June 1, 2025. Accordingly, Employee E does not cease to be a long-term, part-time employee merely because Employee E completes a 12-month period during which Employee E is credited with less than 500 hours of service.

(3) *Eligibility conditions not based on age or service*—(i) *In general.* Subject to paragraph (c)(3)(ii) of this section, the rules of this section do not preclude a plan from establishing an eligibility condition that must be satisfied in order for an employee to participate in the arrangement (for example, requiring as a condition of participation that an employee be employed within a specified job classification), provided that the condition is not a proxy for imposing an age or service requirement that requires an employee to complete a period of service with the employer or employers maintaining the plan that extends beyond the close of the earlier of the periods described in section 401(k)(2)(D)(i) and (ii).

(ii) *Eligibility conditions that are proxies for age or service.* For purposes of applying the rules of this section, a plan provision will be treated as a proxy for imposing an age or service requirement if the provision has the effect of imposing an age or service requirement with the employer or employers maintaining the plan.

(iii) *Examples.* The following examples illustrate the rules of this paragraph (c)(3). For purposes of the examples, each plan includes a cash or deferred arrangement and is maintained on a calendar-year basis.

(A) *Example 1.* (*1*) Employer R maintains Plans Z and A. Effective January 1, 2024, Plan Z provides that, as a condition to participate in the arrangement, an employee must complete the number of consecutive 12-month periods that applies under paragraph (b)(1)(i)(A) or (b)(1)(iii) of this section (referred to as the applicable number of consecutive 12-month periods) during each of which the employee is credited with at least 500 hours of service. Effective January 1, 2024, Plan A provides that, as a condition to participate in the arrangement, an employee must complete a 12-month period during which the employee is credited with at least 1,000 hours of service.

(*2*) Because the provision of Plan Z that requires an employee to complete the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service in order to participate in the arrangement requires an employee to complete the period of

service described in section 401(k)(2)(D)(ii), that provision requires an employee to complete a period of service with Employer R that extends beyond the close of the earlier of the period described in section 401(k)(2)(D)(i), or the period described in section 401(k)(2)(D)(ii). Accordingly, as of January 1, 2024, the arrangement under Plan Z fails to satisfy the requirements of section 401(k)(2)(D). Similarly, because Plan A requires an employee to complete a 12-month period during which the employee is credited with at least 1,000 hours of service in order to participate in the arrangement, as of January 1, 2024, the arrangement under Plan A fails to satisfy the requirements of section 401(k)(2)(D).

(B) *Example 2.* (*1*) Employer S maintains Plan B. Employer S is comprised of Divisions T and U. In order to be employed in Division T, an employee is required to be classified as a full-time employee, which Employer S defines as an employee who completes a 12-month period during which the employee is credited with at least 1,000 hours of service. All other employees of Employer S are employed in Division U. Effective January 1, 2024, Plan B provides that, as a condition to participate in the arrangement, an employee is required to be employed in Division T.

(*2*) Because the provision of Plan B that requires an employee to be employed in Division T in order to participate in the arrangement has the effect of requiring an employee to complete the period of service described in section 401(k)(2)(D)(i), that provision is treated as a service requirement under paragraph (c)(3)(ii) of this section. Accordingly, as of January 1, 2024, the arrangement under Plan B fails to satisfy the requirements of section 401(k)(2)(D) because the arrangement requires an employee to complete a period of service with Employer S that extends beyond the close of the earlier of: the period described in section 401(k)(2)(D)(i), or the period described in section 401(k)(2)(D)(ii).

(C) *Example 3.* (*1*) Employer V maintains Plan C. Prior to January 1, 2024, Plan C provided that an employee classified by Employer V as a part-time employee was ineligible to make a cash or deferred election under the arrangement unless the part-time employee completed a 12-month period during which the employee was credited with at least 1,000 hours of service with Employer V. Effective January 1, 2024, Plan C provides that an employee classified by Employer V as a part-time employee is ineligible to make a cash or deferred election under the arrangement unless the employee completes a period of service with Employer V that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (excluding any 12-month period beginning before January 1, 2021).

(*2*) Plan C does not fail to satisfy the requirements of section 401(k)(2)(D) merely because, effective January 1, 2024, Plan C provides that an employee classified as a part-time employee is ineligible to make a cash or deferred election under the arrangement unless the employee completes a period of service with Employer V that extends until the close of the earlier of: a 12-month period during which the employee is credited with at least 1,000 hours of service, or the applicable number of consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service (excluding any 12-month period beginning before January 1, 2021).

(4) *Elective contributions.* A cash or deferred arrangement satisfies the requirements of this paragraph (c)(4) only if the right to make elective contributions by a long-term, part-time employee who is an eligible NHCE is not restricted in a manner that would not be permitted for an NHCE under § 1.401(k)–3(c)(6). However, a SIMPLE 401(k) plan may limit the amount of elective contributions made by long-term, part-time employees under the plan to the extent needed to satisfy the elective contribution limitation for SIMPLE 401(k) plans under section 401(k)(11)(B)(i)(I) and (m)(10)(A).

(d) *Vesting*—(1) *Years of vesting service taken into account*—(i) *General rule.* For purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions)—

(A) Each 12-month period (which may be any 12-consecutive month period that is not prohibited for use under section 411(a)) during which the employee is credited with at least 500 hours of service (as defined in section 410(a)(3)(C)) with the employer or employers maintaining the plan is treated as a year of vesting service; and

(B) Except for any 12-month period beginning before January 1, 2021, all 12-month periods of service with the employer or employers maintaining the plan must be taken into account unless the period of service of the employee may be disregarded under section 411(a).

(ii) *Application of vesting rules.* For purposes of this paragraph (d), section 411 will be treated as if it applies to the plan, taking into account the modifications provided in paragraphs (d)(1)(i) and (iii) of this section.

(iii) *Break in service.* For purposes of determining whether a long-term, part-time employee (or former long-term, part-time employee) has incurred a 1-year break in service, section 411(a)(6)(A) is applied by substituting at least 500 hours of service for more than 500 hours of service.

(2) *Former long-term, part-time employees*—(i) *Definition.* A *former long-term, part-time employee* means an employee who—

(A) Became eligible to participate in the arrangement as a long-term, part-time employee;

(B) Subsequently ceased to be a long-term, part-time employee because the employee was described in paragraph (d)(2)(ii)(A) or (B) of this section; and

(C) Has not returned to long-term, part-time employee status in accordance with paragraph (d)(2)(iii) of this section.

(ii) *Timing.* A long-term, part-time employee becomes a former long-term, part-time employee as of the first day of the first plan year beginning after the earlier of the plan year in which the employee:

(A) Satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii); or

(B) Ceases to satisfy the plan's eligibility conditions (other than age or service conditions).

(iii) *Return to long-term, part-time employee status.* If a long-term, part-time employee who ceases to satisfy the plan's eligibility conditions (other than age or service conditions) during a plan year subsequently satisfies those conditions, then the employee will return to long-term, part-time employee status as of the first day of the plan year during which the employee again satisfies those conditions. However, the preceding sentence does not apply if the employee is a former long-term, part-time employee because the employee satisfies the requirements of section 401(k)(2)(D) without regard to section 401(k)(2)(D)(ii).

(3) *Examples.* The following examples illustrate the vesting requirements of this paragraph (d). For purposes of the examples, each plan includes a cash or deferred arrangement; is maintained on a calendar-year basis; provides that, for purposes of determining whether an employee has satisfied the requirements

of paragraph (b)(1)(i) of this section and for purposes of determining the nonforfeitable right of a long-term, part-time employee (or former long-term, part-time employee) to employer contributions under the plan (other than elective contributions), all 12-month periods are determined by reference to the employment commencement date of an employee; and provides that, for purposes of determining the nonforfeitable right of an employee to any nonelective contribution made on behalf of the employee, the plan uses a 6-year graded vesting schedule.

(i) *Example 1.* (A) Employer X maintains Plan G. Employees of Employer X are employed at either Plant Y or Plant Z. Plan G requires that an employee be employed at Plant Y as a condition to participate in the arrangement. This condition is not a proxy for age or service under paragraph (c)(3)(ii) of this section. Employee N is an employee of Employer X who is employed at Plant Z, and who has an employment commencement date of June 1, 2021. During the 12-month periods beginning on June 1, 2021, June 1, 2022, June 1, 2023, June 1, 2024, June 1, 2025, and June 1, 2026, Employee N is credited with 600 hours of service for each period. On June 2, 2027, Employee N is transferred to Plant Y, becomes eligible to participate in the arrangement in Plan G, and thereafter commences participation in the arrangement as a long-term, part-time employee.

(B) Unless Plan G is permitted to disregard years of vesting service for Employee N under section 411(a), paragraph (d)(1)(i) of this section requires Plan G to credit Employee N with 6 years of vesting service for the 12-month periods beginning on June 1, 2021, June 1, 2022, June 1, 2023, June 1, 2024, June 1, 2025, and June 1, 2026, because Employee N is credited with at least 500 hours of service during each of those periods. Accordingly, Employee N has a 100-percent nonforfeitable right to any nonelective contribution under Plan G that is made on behalf of Employee N.

(ii) *Example 2.* (A) Employer A maintains Plan H. Employee O commences participation in the arrangement in Plan H as a long-term, part-time employee on June 1, 2024. During the 12-month period beginning on June 1, 2024, Employee O is credited with 1,200 hours of service. During each of the 12-month periods beginning on June 1, 2025, and June 1, 2026, Employee O is credited with 600 hours of service for the period.

(B) Based on these facts, Employee O remains a long-term, part-time employee for the plan year beginning January 1, 2025. Pursuant to paragraph (d)(2)(ii) of this section, Employee O becomes a former long-term, part-time employee beginning with the next plan year. However, this paragraph (d) continues to apply to Employee O (although paragraphs (e) and (f) of this section no longer apply to Employee O beginning with the 2026 plan year). Employee O will not cease to be a former long-term, part-time employee merely because Employee O completes one or more 12-month periods during each of which the employee is credited with at least 500 (but less than 1,000) hours of service. Thus, Employee O is credited with a year of vesting service for each of the 12-month periods in which Employee O is credited with at least 500 hours of service (including the 12-month periods beginning on June 1, 2025, and June 1, 2026).

(iii) *Example 3.* (A) Employer B maintains Plan J. Employees of Employer B are employed at either Plant C or Plant D. Plan J requires, as a condition to participate in the arrangement, that an employee be employed at Plant C. This condition is not a proxy for age or service under paragraph (c)(3)(ii) of this section. Employee P is an NHCE who is employed at Plant C, and who has an employment commencement date of June 1, 2021. On June 1, 2024, Employee P commences participation in the arrangement in Plan J as a long-term, part-time employee. During the 12-month periods beginning on June 1, 2024, and June 1, 2025, Employee P continues to be credited with at least 500 (but less than 1,000) hours of service for each period. However, on March 1, 2025, Employee P is transferred to Plant D and becomes ineligible to participate in the arrangement. On March 1, 2026, Employee P is transferred back to Plant C and again becomes eligible to participate in the arrangement. Employee P remains employed at Plant C through the 2026 plan year.

(B) Based on these facts, Employee P remains a long-term, part-time employee for the 2025 plan year (although Employee P may not make a cash or deferred election under the arrangement as of March 1, 2025). Pursuant to paragraph (d)(2)(iii) of this section, Employee P remains a long-term, part-time employee for the 2026 plan year (although Employee P is not eligible to make a cash or deferred election under the arrangement again until March 1, 2026). As a result, Employee P never becomes a former long-term, part-time employee, and this paragraph (d) continues to apply to Employee P.

(e) *Nonelective and matching contributions*—(1) *General rule.* Notwithstanding section 401(a)(4), neither nonelective nor matching contributions are required to be made on behalf of long-term, part-time employees, even if those contributions are made on behalf of other eligible employees.

(2) *Coordination with employer elections*—(i) *Safe harbor contributions.* A plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13) will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that does not satisfy the safe harbor contribution requirements of § 1.401(k)–3 on behalf of the eligible NHCE), provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the ADP safe harbor provisions of section 401(k)(12) or (13) pursuant to the election under paragraph (f)(1) of this section. Similarly, a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12) will not fail to satisfy those provisions merely because the employer does not make a nonelective or matching contribution on behalf of an eligible NHCE who is a long-term, part-time employee (or makes a nonelective or matching contribution that does not satisfy the safe harbor contribution requirements of § 1.401(m)–3 on behalf of the eligible NHCE), provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the ACP safe harbor provisions of section 401(m)(11) or (12) pursuant to the election under paragraph (f)(1) of this section.

(ii) *Top-heavy minimum benefits.* A plan that is a top-heavy plan for the plan year will not fail to satisfy the minimum benefit requirements of section 416(c) merely because the employer contribution (if any) made for the plan year on behalf of a non-key employee who is a long-term, part-time employee does not satisfy those requirements, provided that long-term, part-time employees are excluded for purposes of determining whether the plan satisfies the minimum benefit requirements of section 416(c) for the plan year pursuant to an election under paragraph (f)(2) of this section.

(iii) *SIMPLE 401(k) contributions.* An employer may not elect under paragraph (f) of this section to exclude long-term, part-time employees from the application of the SIMPLE 401(k)

provisions of section 401(k)(11) and (m)(10). Accordingly, a plan intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) or (m)(10) must satisfy the matching or nonelective contribution requirements of § 1.401(k)–4(e) with respect to long-term, part-time employees.

(3) *Examples.* The following examples illustrate the employer contribution rules of this paragraph (e). For purposes of the examples, each plan includes a cash or deferred arrangement and is maintained on a calendar-year basis.

(i) *Example 1.* (A) Employer E maintains Plan K, which is intended to satisfy the ADP safe harbor provisions of section 401(k)(12). Plan K provides that Employer E elects to exclude all long-term, part-time employees for purposes of determining whether Plan K satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section, and the employer election satisfies the requirements of paragraph (f)(1)(ii) of this section. Plan K requires Employer E to make a QNEC on behalf of each eligible NHCE who is not a long-term, part-time employee equal to 3 percent of the NHCE's safe harbor compensation, and the NHCEs who receive this contribution include any former long-term, part-time employees who are eligible NHCEs. Plan K provides that Employer E is required to make a nonelective contribution on behalf of each long-term, part-time employee equal to 2 percent of the long-term, part-time employee's compensation for the plan year.

(B) Based on these facts, long-term, part-time employees are excluded for purposes of determining whether Plan K satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to Plan K), including the ADP safe harbor provisions of section 401(k)(12). Accordingly, Plan K does not fail to satisfy the safe harbor nonelective contribution requirement of § 1.401(k)–3(b) merely because a safe harbor nonelective contribution is not made on behalf of each eligible NHCE who is a long-term, part-time employee. In addition, because long-term, part-time employees are also excluded for purposes of determining whether Plan K satisfies the nondiscrimination requirements of section 401(a)(4), any nonelective contribution made on behalf of a long-term, part-time employee is disregarded for purposes of determining whether nonelective contributions satisfy the nondiscrimination requirements of section 401(a)(4).

(ii) *Example 2.* (A) Employer F maintains Plan L, which is intended to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10). Plan L provides that Employer F may elect to exclude all long-term, part-time employees for purposes of determining whether Plan L satisfies the statutory requirements listed in paragraph (f)(1)(i) of this section. Employer F elects to exclude all long-term, part-time employees for the plan year in accordance with the requirements of paragraph (f)(1) of this section. Plan L requires Employer F to make a matching contribution on behalf of each eligible employee, excluding long-term, part-time employees (but including any former long-term, part-time employees who are eligible employees), equal to 100 percent of the elective contributions of the employee for the plan year, up to 3 percent of the SIMPLE compensation of the employee for the entire plan year. Plan L does not provide for any employer contributions (other than elective contributions) to be made on behalf of long-term, part-time employees.

(B) Plan L fails to satisfy the SIMPLE 401(k) provisions of section 401(k)(11) and (m)(10) for the plan year because Plan L does not require Employer F to make the matching contribution on behalf of each eligible employee on whose behalf elective contributions were made for the plan year.

(f) *Employer elections*—(1) *Nondiscrimination and coverage*—(i) *General rule.* Subject to paragraph (f)(1)(ii) of this section, an employer may elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the following provisions:

(A) The nondiscrimination requirements of section 401(a)(4);

(B) The ADP test of section 401(k)(3);

(C) The ADP safe harbor provisions of section 401(k)(12) and (13);

(D) The ACP test of section 401(m)(2);

(E) The ACP safe harbor provisions of section 401(m)(11) and (12); and

(F) The minimum coverage requirements of section 410(b).

(ii) *Additional requirements.* An employer election satisfies the requirements of this paragraph (f)(1)(ii) if—

(A) The election applies for purposes of every provision under paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to the plan);

(B) The election applies with respect to all long-term, part-time employees who are eligible to participate in the arrangement;

(C) With respect to a plan that is intended to satisfy the ADP safe harbor provisions of section 401(k)(12) or (13), the election is set forth in the plan and satisfies the plan year requirements of § 1.401(k)–3(e); and

(D) With respect to a plan that is intended to satisfy the ACP safe harbor provisions of section 401(m)(11) or (12), the election is set forth in the plan and satisfies the plan year requirements of § 1.401(m)–3(f).

(2) *Top-heavy*—(i) *General rule.* Subject to paragraph (f)(2)(ii) of this section, an employer may elect to exclude long-term, part-time employees for purposes of determining whether the plan satisfies the vesting and benefit requirements of section 416(b) and (c). This election does not apply for purposes of determining whether the plan is a top-heavy plan as defined in section 416(g). However, in the case of an employer that makes an election described in paragraph (f)(1) of this section (which has the effect of excluding long-term, part-time employees for purposes of determining whether the plan satisfies the ADP and ACP safe harbor provisions), the plan will not fail to be excluded from the definition of a top-heavy plan under section 416(g)(4)(H) merely because the employer does not make nonelective or matching contributions on behalf of long-term, part-time employees (or makes nonelective or matching contributions that do not satisfy the requirements for safe harbor contributions).

(ii) *Additional requirements.* An employer election satisfies the requirements of this paragraph (f)(2)(ii) if—

(A) The election applies with respect to all long-term, part-time employees who are eligible to participate in the arrangement; and

(B) The terms of the plan provide that long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c).

(3) *Examples.* The following examples illustrate the employer election provisions of this paragraph (f). For purposes of the examples, each plan is maintained on a calendar-year basis and includes a cash or deferred arrangement, which is intended to satisfy the ADP test of section 401(k)(3).

(i) *Example 1.* (A) Employer G maintains Plan M. Plan M provides that Employer G may elect to exclude all long-term, part-time employees for purposes of determining whether Plan M satisfies every provision under paragraph (f)(1)(i) of this section (to the extent the provision would otherwise apply to Plan M). Employer G elects to exclude all long-term, part-time employees for the plan year in

accordance with the requirements of paragraph (f)(1) of this section. Plan M requires Employer G to make a nonelective contribution on behalf of each eligible employee equal to 2 percent of the compensation of the employee for the plan year.

(B) Based on these facts, long-term, part-time employees are excluded for purposes of determining whether Plan M satisfies every provision under paragraph (f)(1)(i) of this section for the plan year (to the extent the provision would otherwise apply to Plan M), including the nondiscrimination requirements of section 401(a)(4). Accordingly, any nonelective contribution made on behalf of a long-term, part-time employee for the plan year is disregarded for purposes of determining whether nonelective contributions made for the plan year satisfy the nondiscrimination requirements of section 401(a)(4).

(ii) *Example 2.* (A) Employer H maintains Plan N. Plan N provides that all long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c). Plan N requires Employer H to make a nonelective contribution on behalf of each eligible employee who is credited with at least 1,000 hours of service during the plan year equal to 3 percent of the compensation of the employee for the plan year. Plan N provides that each employee has a 100-percent nonforfeitable right to any nonelective contribution Employer H makes on behalf of the employee. Plan N is a top-heavy plan with respect to the plan year.

(B) Based on these facts, long-term, part-time employees are excluded from the application of the vesting and benefit requirements of section 416(b) and (c) for the plan year. Accordingly, although Plan N is a top-heavy plan with respect to the plan year, Plan N is not required to satisfy the top-heavy benefit provisions of section 416(c) for the plan year with respect to any non-key employee who is a long-term, part-time employee.

(g) *Applicability date.* This section applies to plan years that begin on or after January 1, 2024.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–25987 Filed 11–24–23; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90, 14–58, 09–197, and 16–271; RM–11868; Report No. 3203; FR ID 183017]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Petitions for Reconsideration (Petitions) have been filed in the Commission's proceeding Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support, ETC Annual Reports and Certifications, Telecommunications Carriers Eligible to Receive Universal Service Support, Connect America Fund—Alaska Plan, and Expanding Broadband Service Through the ACAM Program.

DATES: Oppositions to the Petitions must be filed on or before December 12, 2023. Replies to oppositions must be filed on or before December 22, 2023.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Stephen Wang of the Wireline Competition Bureau, Telecommunications Access Policy Division, at (202) 418–7400 or *Stephen.Wang@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3203, released October 31, 2023. The full text of the Petitions can be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/.* The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. 801(a)(1)(A), because no rules are being adopted by the Commission.

Subject: Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support (WC Docket Nos. 10–90, 14–58, 09–197, and 16–271; RM–11868).

Number of Petitions Filed: 5.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–25858 Filed 11–24–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2023–0023; FF09E21000 FXES1111090FEDR 245]

RIN 1018–BH13

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Sacramento Mountains Checkerspot Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period and announcement of public hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are reopening the public comment period on our August 10, 2023, proposed rule to designate critical habitat for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*), a butterfly from New Mexico, under the Endangered Species Act of 1973, as amended (Act). We are taking this action to conduct a public hearing and to allow all interested parties additional time to comment on the proposal to designate critical habitat for the Sacramento Mountains checkerspot butterfly. Comments previously submitted need not be resubmitted and will be fully considered in preparation of the final rule.

DATES:

Comment submission: The comment period on the proposed rule that published August 10, 2023 (88 FR 54263), is reopened. We will accept comments received or postmarked on or before December 27, 2023. Please note that comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date to ensure consideration.

Public hearing: On December 12, 2023, we will hold a public hearing on the proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly from 5 to 8 p.m., Mountain time, using the Zoom online platform (for more information, see Public Hearing, below).

ADDRESSES:

Availability of documents: You may obtain copies of the August 10, 2023, proposed rule and associated documents on the internet at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2023–0023.