

## Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) under sections 402(g) and 414(v) of the Internal Revenue Code (Code). Section 414(v), added by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (Public Law 107-16; 115 Stat. 38), effective for years beginning after December 31, 2001, permits an individual age 50 or older to make additional elective deferrals each year, up to a dollar limit, if certain requirements provided under that section are satisfied. Under section 414(v)(3), these additional elective deferrals are not subject to certain otherwise applicable limitations on elective deferrals and are excluded from consideration for certain nondiscrimination tests. Under section 414(v)(4), catch-up contributions generally must be made available to all catch-up eligible individuals who participate under any plan maintained by the employer that provides for elective deferrals.

Section 402(g)(1)(C) was added by the Job Creation and Worker Assistance Act of 2002, (JCWAA) (Public Law 107-147; 116 Stat. 21), effective for years beginning after December 31, 2001. This section increases the amount of elective deferrals that a catch-up eligible participant, as defined in section 414(v), may exclude from gross income under section 402(g) by the same dollar limit applicable for the year under section 414(v).

JCWAA also included technical corrections to section 414(v), including clarifications relating to: initial eligibility to make catch-up contributions, coordination of section 414(v) catch-up contributions for individuals who participate in more than one plan, coordination of section 414(v) catch-up contributions with the catch-up contributions provided under section 457(b)(3), and the application of the universal availability requirement of section 414(v)(4) in connection with mergers and acquisitions.

Proposed regulations under section 414(v) were published in the **Federal Register** on October 23, 2001 (66 FR 53555). On February 21, 2002, a public hearing was held on the proposed regulations. Notice 2002-4 (2002-1 C.B. 298) provided transitional rules for complying with the universal availability requirement of section 414(v)(4) and the proposed regulations.

After consideration of the comments and the changes made by JCWAA, these final regulations adopt the provisions of the proposed regulations with certain

modifications, the most significant of which are highlighted below.

## Explanation of Provisions

Under these final regulations, an applicable employer plan is not treated as violating any provision of the Code merely because the plan permits a catch-up eligible participant to make catch-up contributions. For this purpose, an applicable employer plan is a section 401(k) plan, a SIMPLE IRA plan (as defined in section 408(p)), a simplified employee pension (as defined in section 408(k)) (SEP), a plan or contract that satisfies the requirements of section 403(b), or a section 457 plan maintained by an eligible governmental employer (a section 457 eligible governmental plan).

Catch-up contributions are elective deferrals made by a catch-up eligible participant that exceed an otherwise applicable limit and that are treated as catch-up contributions under the plan, but only to the extent they do not exceed the maximum amount of catch-up contributions permitted for the taxable year. An employer is not required to provide for catch-up contributions in any of its plans. However, if any plan of an employer provides for catch-up contributions, all plans of the employer that provide for elective deferrals must comply with the universal availability requirement described below, to the extent applicable.

### A. Eligibility for Catch-up Contributions

As under the proposed regulations, a participant is a catch-up eligible participant, and thus is permitted to make catch-up contributions, if the participant is otherwise eligible to make elective deferrals under the plan and would attain age 50 or older before the end of the participant's taxable year. In the case of a non-calendar year plan, a participant is treated as a catch-up eligible participant beginning on January 1 of the calendar year that includes the participant's 50th birthday, without regard to the plan year.

### B. Determination of Catch-up Contributions

These final regulations retain the same basic structure for determining catch-up contributions as provided in the proposed regulations. Elective deferrals made by a catch-up eligible participant are treated as catch-up contributions if they exceed any otherwise applicable limit, to the extent they do not exceed the maximum dollar amount of catch-up contributions permitted under section 414(v). Catch-up contributions are determined by

reference to three types of otherwise applicable limits: statutory limits, employer-provided limits, and the actual deferral percentage (ADP) limit.

A statutory limit is a limit contained in the Code on elective deferrals or annual additions permitted to be made under the plan or contract (without regard to section 414(v)). Statutory limits include the requirement under section 401(a)(30) that a plan limit all elective deferrals within a calendar year under the plan and other plans (or contracts) maintained by members of a controlled group to the amount permitted under section 402(g).

An employer-provided limit is a limit on the elective deferrals an employee can make under the plan (without regard to section 414(v)) that is contained in the terms of the plan, but is not a statutory limit or the ADP limit. A number of commentators suggested that the regulations specifically provide that a limitation on elective deferrals set by the plan administrator in accordance with plan terms is a limit contained in the terms of the plan. As noted in the preamble to the proposed regulations, the condition that an employer-provided limit be contained in the terms of the plan is intended to correspond with the requirements of § 1.401-1 that a qualified plan be a definite written program and provide for a definite predetermined formula for allocating contributions made to the plan. Accordingly, if a limit is otherwise permissible under a section 401(k) plan, the limit will also satisfy the requirement in section 414(v)(5) that the limit be contained in the terms of the plan.

The ADP limit is the highest dollar amount of elective deferrals that any highly compensated employee (HCE) is permitted under a section 401(k) plan for a plan year by reason of the ADP test under section 401(k)(3) (without regard to section 414(v)). The ADP limit is determined after taking into account all elective deferrals (other than elective deferrals that are catch-up contributions because of an employer-provided limit or statutory limit) and qualified nonelective contributions or qualified matching contributions for the plan year in accordance with section 401(k)(3) and the applicable regulations, and after any necessary correction under section 401(k)(8).

The final regulations retain the rule that the amount of elective deferrals in excess of an applicable limit is generally determined as of the end of a plan year by comparing the total elective deferrals for the plan year with the applicable limit for the plan year. For an applicable limit that is determined on the basis of