

contributions are elective deferrals and remain subject to the applicable requirements for elective deferrals. For example, catch-up contributions under an applicable employer plan that is a section 401(k) plan are subject to the distribution and vesting restrictions of section 401(k)(2)(B) and (C), although the plan provisions applicable to distributions of elective deferrals treated as catch-up contributions may differ from those applicable to other elective deferrals under the plan (as long as each provision complies with the distribution restrictions of section 401(k)(2)(B)). In addition, excess contributions treated as catch-up contributions nevertheless remain excess contributions for purposes of section 411(a)(3)(G). Therefore, the plan is permitted to provide that matching contributions related to excess contributions treated as catch-up contributions are forfeited. However, as discussed below, it is also permissible for a plan to provide that these matching contributions are not forfeited, without violating section 401(a)(4).

These final regulations retain the rules of the proposed regulations on the treatment of catch-up contributions for purposes of sections 416, 410(b) and 401(a)(4). Catch-up contributions for the current plan year are not taken into account under section 416 or 410(b). However, catch-up contributions for prior years are taken into account in determining whether a plan is top-heavy under section 416, and for purposes of average benefit percentage testing to the extent prior years' contributions are taken into account (*i.e.*, if accrued-to-date calculations are used). In addition, a plan does not fail the requirements of section 401(a)(4) merely because it permits only catch-up eligible participants to make catch-up contributions, without regard to whether the group of catch-up eligible employees would satisfy section 410(b). Similarly, if a plan applies a single matching formula to elective deferrals whether or not they are catch-up contributions, the matching formula as applied to catch-up eligible participants is not treated as a separate benefit, right, or feature under § 1.401(a)(4)–4 from the matching formula as applied to the other participants. However, the matching contributions under the plan must satisfy the actual contribution percentage test under section 401(m)(2) taking into account all matching contributions, including matching contributions on catch-up contributions.

A number of commentators indicated that some employers would not want to provide matching contributions on catch-up contributions and requested

guidance on how they might accomplish that goal in light of the annual determination of whether amounts are in excess of an employer-provided limit. The IRS and Treasury believe that employers can achieve their desired goal by specifying which contributions will be matched, rather than specifying which contributions will not be matched. For example, if an employer-provided limit on elective deferrals is 10% of compensation for each payroll period, the plan can specify that matching contributions will be made based on elective deferrals that do not exceed 10% of compensation for that payroll period (and that do not exceed a statutory limit), and that matching contributions on elective deferrals in excess of the ADP limit will be forfeited, with the assurance that the plan will not be matching catch-up contributions.

#### *D. Universal Availability*

Section 414(v)(4)(A) provides that an applicable employer plan is treated as failing to comply with section 401(a)(4) unless the plan allows all catch-up eligible participants to make the same election with respect to additional elective deferrals. Section 414(v)(4)(B) provides that, for this purpose, all plans maintained by employers treated as a single employer under section 414(b), (c), (m) or (o) are treated as a single plan. The proposed regulations provided that, if an applicable employer plan otherwise subject to section 401(a)(4) provides for catch-up contributions, all other applicable employer plans in the controlled group that provide for elective deferrals (including plans not subject to section 401(a)(4)) must provide catch-up eligible participants with the same effective opportunity to make catch-up contributions. The proposed regulations also included a transition rule for collectively bargained plans and an exception related to mergers and acquisitions.

Several commentators requested that collectively bargained employees described in section 410(b)(3) be disregarded for purposes of the universal availability requirement, just as they are disregarded for purposes of section 401(a)(4) compliance. These commentators explained that it is difficult to coordinate catch-up contributions among non-collectively bargained employees and collectively bargained employees, particularly when more than one collective bargaining unit is involved. For employers participating in multiemployer plans, the difficulties are increased significantly, because of the implications for other, unrelated employers. Some commentators also requested that other groups of

employees be excluded pursuant to provisions of the regulations under section 410(b) allowing employees to be excluded based on plan design, such as participants who have not met the minimum age and service requirements of section 410(a)(1) or employees in different qualified separate lines of business under section 414(r).

In response to comments, these final regulations provide that employees described in section 410(b)(3), most notably collectively bargained employees, are disregarded for purposes of determining whether an applicable employer plan complies with the universal availability requirement. Pursuant to sections 401(a)(4) and 410(b)(3), collectively bargained employees are disregarded for purposes of section 401(a)(4), without regard to plan design or an employer's choice of testing method. The final regulations do not adopt the other suggested exclusions, participants who have not met minimum age and service or participants in different qualified separate lines of business, because these exclusions are based on plan design and testing choices.

These regulations otherwise retain the basic rules of the proposed regulations relating to universal availability and provide that a plan that offers catch-up contributions satisfies the requirements of section 401(a)(4) only if all catch-up eligible participants are provided with an effective opportunity to make the same dollar amount of catch-up contributions. Catch-up eligible participants do not have an effective opportunity to make catch-up contributions unless the applicable employer plan permits each catch-up eligible participant to make sufficient elective deferrals during the year so that the participant has the opportunity to make elective deferrals up to the otherwise applicable limit plus the catch-up contribution limit. An effective opportunity could be provided in several different ways. For example, a plan that limits elective deferrals on a payroll-by-payroll basis might also provide participants with an opportunity to make catch-up contributions that is administered on a payroll-by-payroll basis (*i.e.*, by allowing catch-up eligible participants to increase their deferrals above the otherwise applicable limit by a pro-rata portion of the catch-up limit for the year). The plan would satisfy the effective opportunity requirement even though, as discussed above, whether these elective deferrals are treated as catch-up contributions would not be determined until the end of the year.