

A plan will not fail the universal availability requirement solely because an employer-provided limit does not apply to all employees or different employer-provided limits apply to different groups of employees, as long as each limit satisfies the nondiscriminatory availability requirements of § 1.401(a)(4)–4 for benefits, rights, and features. Thus, for example, a plan could provide for an employer-provided limit that applies to HCEs, even though no employer-provided limit applies to NHCEs. However, as under the proposed regulations, these final regulations retain the rule that an applicable employer plan is not permitted to provide lower employer-provided limits for catch-up eligible participants. Furthermore, a plan fails to provide an effective opportunity to make catch-up contributions if it has an applicable limit (e.g., an employer-provided limit) and does not permit all catch-up eligible participants to make elective deferrals in excess of that limit.

In addition to the exclusion for collectively bargained employees discussed above, these final regulations include several other exceptions to the universal availability requirement. Under these regulations, a plan does not fail the universal availability requirement because it restricts elective deferrals, including elective deferrals for catch-up eligible participants, under a cash availability limit. A cash availability limit is a limit that restricts elective deferrals to amounts available after withholding from the employee's pay (e.g., after deduction of all applicable income and employment taxes). For this purpose, a limit of 75% of compensation or higher will be treated as limiting employees to amounts available after other withholdings.

These final regulations also include a broader exception to the universal availability requirement during the transition period provided under section 410(b)(6)(C) than was included in the proposed regulations, consistent with the amendments made by JCWAA. Under these final regulations, an applicable employer plan that satisfies the universal availability requirement before an acquisition or disposition described in § 1.410(b)–2(f) continues to be treated as satisfying the universal availability requirement of section 414(v)(4) through the end of the period described in section 410(b)(6)(C). These final regulations also retain a rule providing for coordination between catch-up contributions under section 414(v) and the provisions of section

457(b)(3), in accordance with section 414(v)(6)(C).

A number of comments were received on the application of the universal availability requirement to an applicable employer plan that is qualified under Puerto Rico tax law as well as under the Code. These final regulations do not affect the transitional relief granted in Notice 2002–4 that provides that an applicable employer plan will not fail to satisfy the universal availability requirement solely because another applicable employer plan of the employer that is qualified under Puerto Rico law does not provide for catch-up contributions.

#### *E. Participants in Multiple Plans*

The technical corrections in JCWAA amended section 414(v) to provide that all applicable employer plans of an employer, other than section 457 eligible governmental plans, are treated as one plan for purposes of determining the amount of catch-up contributions and all section 457 eligible governmental plans of the same employer are treated as one plan for this purpose. Statutory limits, such as the limits under section 401(a)(30) or 415, already provide for coordination among plans in the same controlled group, and elective deferrals in addition to the amounts permitted under these limits are similarly coordinated. Employer-provided limits, however, apply only to the plan that provides for the limit, and the ADP limit applies only to section 401(k) plans. Accordingly, these final regulations provide guidance on coordination of the amount in excess of these limits on a controlled-group basis.

With respect to employer-provided limits, these regulations allow a plan to permit a catch-up eligible participant to defer an amount in addition to the amount allowed under the employer-provided limit, without regard to whether the employee has already utilized his or her catch-up opportunity under another plan of the same employer. However, to the extent elective deferrals under another plan maintained by the employer have already been treated as catch-up contributions during the taxable year, the elective deferrals under the plan may be treated as catch-up contributions only up to the amount remaining under the catch-up limit for the year. Any other elective deferrals that exceed the employer-provided limit may not be treated as catch-up contributions and must satisfy the otherwise applicable nondiscrimination rules. For example, the right to make contributions in excess of the employer-provided limit is an other right or feature which must satisfy

§ 1.401(a)(4)–4 to the extent that the contributions are not catch-up contributions. Also, contributions in excess of the employer provided limit are taken into account under the ADP test to the extent they are not catch-up contributions.

Finally, these regulations retain the allocation rule included in the proposed regulations. When a participant is eligible under more than one applicable employer plan maintained by the same employer, the specific plan under which amounts in excess of an applicable limit are treated as catch-up contributions is permitted to be determined in any manner that is not inconsistent with the manner in which such amounts were actually deferred under the plans.

#### *F. Excludability of Catch-up Contributions*

JCWAA amended section 402(g) to increase the elective deferral limit for a catch-up eligible participant by the amount of the allowable catch-up contributions for the taxable year. The provisions of these final regulations related to these provisions are under new § 1.402(g)–2, rather than under § 1.414(v)–1, as in the proposed regulations. Under § 1.402(g)–2, the amount of elective deferrals that a catch-up eligible participant is permitted to exclude from income under section 402(g) for the taxable year is increased by the maximum amount of catch-up contributions permitted for the taxable year under section 414(v). This treatment by the catch-up eligible participant is not affected by whether the applicable employer plans treat the elective deferrals as catch-up contributions. Thus, a catch-up eligible participant who participates in plans of two or more employers is permitted to exclude from gross income elective deferrals that exceed the section 402(g) limit, even though neither plan treats those elective deferrals as catch-up contributions. In addition, the treatment by an individual of such elective deferrals as catch-up contributions will not have any effect on either employer's plan.

#### **Effective Date**

These final regulations are applicable to contributions in taxable years beginning on or after January 1, 2004. Taxpayers are permitted to rely on these final regulations and the proposed regulations for taxable years beginning prior to January 1, 2004.

#### **Special Analyses**

It has been determined that these final regulations are not a significant regulatory action as defined in