Department will also accept electronically-mailed comments, e-mailed to Brenda.Edwards-Jones@ee.doe.gov, but you must supplement such comments with a signed hard copy.

Copies of the agenda and attendees of the public meeting, the public comments received, the list of current rulemakings and possible new products, and this notice may be read at the Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–3142, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Raymond, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE–41, 1000 Independence Avenue, SW, Washington, DC 20585–0121, (202) 586–9611, email: *michael.raymond@ee.doe.gov* pertaining to priority setting for current rulemakings, and Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE–41, 1000 Independence Avenue, SW, Washington, DC 20585–0121, (202) 586–0371, email: *bryan.berringer@ee.doe.gov* pertaining to possible new products, or Francine Pinto, U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, SW, Washington, DC 20585–0103, (202) 586–7432, email: *francine.pinto@hq.doe.gov*

SUPPLEMENTARY INFORMATION: On May 2001, the National Energy Policy Development Group (NEPD Group) reported a National Energy Policy to the President. One of the recommendations called for the President to direct the Secretary of Energy to take steps to improve the energy efficiency of appliances. The recommendation included supporting the existing appliance standards program, setting higher standards where technologically feasible and economically justified, and expanding the scope of the program to include additional consumer products and commercial and industrial equipment where technically feasible and economically justified.

The **Federal Register** notice dated August 28, 2001 (66 FR 45188), announced the September 11, 2001, public meeting and requested written comments be submitted by October 11, 2001. The September 11 public was to discuss the priorities of the existing appliance standards program and any possible expansion of the scope of the program to include additional consumer products and commercial and industrial equipment. However, as a result of the tragic events of September 11, 2001, the public meeting was cut short. At the September 11 public meeting, the interested parties discussed the criteria DOE should consider in deciding whether to expand the scope of the program, including the factors, data and analysis methods that might be used by DOE in its decision making process. Following the September 11 public meeting, DOE received written comments supporting adding a new factor, impact on innovation to the existing priority setting criteria.

DOE developed the list of possible new commercial and residential products from various independent sources which was presented at the September 11 public meeting. DOE has incorporated an additional criterion suggested at the September 11 public meeting, and developed preliminary data sheets for potential new products. This list as well as a listing of current rulemakings and the preliminary data sheets can be found on the following web-site: http://www.eren.doe.gov/buildings/codes_standards/index.htm

The November 6, 2001, public meeting will be to: continue the discussion of the possible expansion of the scope of the program, and review the comments received in response to the August 28, 2001, notice of public meeting; discuss how these comments should be incorporated into the process; review the preliminary data sheets developed; and discuss how these products should be considered for prioritization. The outcome of the meeting would be to screen out products which do not merit further consideration for either a standard and/or voluntary program.

The meeting will be conducted in an informal, conference style. There will not be any discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by the U.S. antitrust laws.

After the meeting and expiration of the period for submitting written statements, the Department will begin consideration of the comments received.

If you would like to participate in the meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information regarding the energy conservation program for consumer products and commercial and industrial equipment, please contact Ms. Brenda Edwards-Jones at (202) 586–2945.

Issued in Washington, DC, on October 17, 2001.

David K. Garman,

Assistant Secretary for Energy Efficiency and Renewable Energy.

[FR Doc. 01–26672 Filed 10–22–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–142499–01]

RIN 1545–BA24

Catch-Up Contributions for Individuals Age 50 or Over

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that would provide guidance concerning the requirements for retirement plans providing catch-up contributions to individuals age 50 or older pursuant to the provisions of section 414(v). These proposed regulations would affect section 401(k) plans, section 408(p) SIMPLE IRA plans, section 408(k) simplified employee pensions, section 403(b) tax-sheltered annuity contracts, and section 457 eligible governmental plans, and would affect participants eligible to make elective deferrals under these plans or contracts. This document also contains a notice of public hearing on these proposed regulations.

DATES: Written and electronic comments and requests to speak (with outlines of oral comments) at a public hearing scheduled for February 21, 2002, must be received by January 31, 2002.

ADDRESSES: Send submissions to: CC:IT&A:RU (REG–142499–01), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:IT&A:RU (REG–142499–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/reglist.html.* The public hearing will be held in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111

Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, R. Lisa Mojiri-Azad or John T. Ricotta at (202) 622–6060 (not a toll-free number); concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, Donna Poindexter, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed regulations under section 414(v) of the Internal Revenue Code of 1986 (Code). Section 414(v) was added by section 631 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (Public Law 107–16), enacted on June 7, 2001. Under section 414(v), an individual age 50 or over is permitted to make additional elective deferrals (up to a dollar limit provided in that section) under a plan that otherwise permits elective deferrals if certain requirements provided under that section are satisfied. Section 414(v) also provides that a plan will not violate any provision of the Code by permitting these additional elective deferrals to be made.

Explanation of Provisions

These proposed regulations would implement new section 414(v) by providing that an employer plan is not treated as violating any provision of the Code solely because the plan permits a catch-up eligible participant (as defined in these proposed regulations) to make catch-up contributions. Catch-up contributions generally 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, even if the plans provide for elective deferrals. If, however, any plan of an employer provides for catch-up contributions, all plans of the employer that provide elective deferrals must comply with the universal availability requirements described below.

A. Eligibility for Catch-up Contributions

Under these 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 is age 50 or older. For purposes of this rule, a participant who is projected to attain age 50 before the end of a calendar year is deemed to be age 50 as of January 1 of that year. The effect of this rule is that all participants who will attain age 50 during a calendar year are treated the same beginning January 1 of that year, without regard to whether the participant survives to his or her 50th birthday or terminates employment during the year and without regard to the employer's choice of plan year.

A catch-up eligible participant can make catch-up contributions under 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 eligible governmental plan, as long as the participant can otherwise make elective deferrals under the plan or contract. For this purpose, elective deferrals include not only elective deferrals defined in section 402(g)(3), but also any contribution to a section 457 eligible governmental plan.

B. Determination of Catch-up Contribution

In describing section 631 of EGTRRA, the Conference report states that ''the otherwise applicable dollar limit on elective deferrals under a section 401(k) plan, section 403(b) annuity, SEP, or SIMPLE, or deferrals under a section 457 plan is increased for individuals who have attained age 50 by the end of the year.'' Conf. Rep. No. 107–84, at 236 (2001). The legislative history to section 631 of EGTRRA indicates that the intent of Congress in enacting section 414(v) was to allow a catch-up eligible participant to make additional elective deferrals over and above any otherwise applicable limit, up to the catch-up contribution limit for the taxable year. The proposed regulations would provide that 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). However, the regulations would not require that a participant have made elective deferrals in excess of an otherwise applicable limit in order to be a catch-up eligible participant. A plan providing for $1,000 of catch-up contributions in 2002 could allow a participant who is over age 50 to make elective deferrals in an amount projected to exceed the otherwise applicable limit by $1,000 at any time during 2002.

Under the proposed regulations, catch-up contributions would be determined by reference to three types of 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 the 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 that is not a statutory limit. For example, a limit on elective deferrals of highly compensated employees to 10% of pay is an employer-provided limit. The condition that a 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 have a definite written program and provide for a definite predetermined formula for allocating contributions made to the plan.

For a section 401(k) plan that would fail the ADP test of section 401(k)(3) if it did not correct under section 401(k)(8), the ADP limit is the highest dollar amount of elective deferrals that may be retained in the plan by a highly compensated employee after the application of section 401(k)(8)(C) (without regard to section 414(v)). For example, if after ADP testing, elective deferrals by highly compensated employees in excess of $8,000 would be required to be distributed or recharacterized as employee contributions under the statutory correction set forth under section 401(k)(8)(C), then the ADP limit is $8,000. Similar rules apply in the case of a SEP.

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 example, if a plan limits elective deferrals to 10% of compensation, then whether the participant has elective deferrals in excess of 10% of compensation is determined at the end of the plan year. Similarly, elective deferrals in excess of the ADP limit are determined as of the end of the plan year. For a limit that is determined on the basis of a year other

than a plan year (such as the calendar year limit on elective deferrals under section 401(a)(30)), the determination of whether elective deferrals are in excess of the applicable limit is made on the basis of such other year.

If a plan provides for separate employer-provided limits on separate portions of compensation during the plan year, the determination of the amount of elective deferrals in excess of the employer-provided limit is still made on an annual basis, with the applicable limit for the year equal to the sum of the dollar limits that apply to the separate portions of compensation. This situation may occur, for example, when the plan sets a deferral percentage limit for each payroll period.

If the plan limits elective deferrals for separate portions of the plan year, then, solely for purposes of determining the amount that is in excess of an employer-provided limit, the plan may provide, as an alternative rule, that the applicable limit for the plan year is the product of the employee's plan year compensation and the time-weighted average of the deferral percentage limits. For example, if a plan using this time-weighted average limits deferrals to 8 percent of compensation during the first half of the year and 10 percent of compensation for the second half of the year, the applicable limit will be 9 percent of each employee's plan year compensation.

Under the proposed regulations, elective deferrals in excess of an applicable limit would be treated as catch-up contributions only to the extent that such elective deferrals do not exceed the catch-up contribution limit for the taxable year reduced by elective deferrals previously treated as catch-up contributions for the taxable year. The catch-up contribution limit for a taxable year is generally the applicable dollar catch-up limit for such taxable year, except that an elective deferral will not be treated as a catch-up contribution to the extent that the elective deferral, when added to all other elective deferrals for the taxable year under all plans of the employer, exceeds the participant's compensation (determined in accordance with section 415(c)(3)).

These proposed regulations would include a timing rule for purposes of determining when elective deferrals in excess of an applicable limit are treated as catch-up contributions. This rule is necessary because the maximum amount of catch-up contributions is based on a participant's taxable year, but the determination of whether an elective deferral is in excess of an applicable limit is determined on the basis of a taxable year, plan year, or limitation year, depending on the underlying limit. Under the proposed regulations, whether these elective deferrals in excess of an applicable limit can be treated as catch-up contributions would be determined as of the last day of the relevant year, except that if the limit is determined on a taxable or calendar year basis, then whether elective deferrals in excess of the limit can be treated as catch-up contributions would be determined at the time they are deferred. This timing rule is most significant for a plan with a plan year that is not the calendar year. For example, in a plan with a plan year ending on June 30, 2005, elective deferrals in excess of the employer-provided limit or the ADP limit for the plan year ending June 30, 2005, would be treated as catch-up contributions as of the last day of the plan year, up to the catch-up contribution limit for 2005. Any amounts deferred after June 30, 2005, that are in excess of the section 401(a)(30) limit for the 2005 calendar year would also be treated as catch-up contributions at the time they are deferred, up to the catch-up contribution limit for 2005 reduced by elective deferrals treated as catch-up contributions as of June 30, 2005.

C. Treatment of Catch-up Contributions

If an elective deferral is treated as a catch-up contribution, it is not subject to otherwise applicable limits under the plan and the plan will not be treated as failing otherwise applicable nondiscrimination requirements because of the making of catch-up contributions. The proposed regulations would provide guidance on how catch-up contributions under the plan are taken into account for purposes of these various requirements under the Code. Under the proposed regulations, catch-up contributions would not be taken into account in applying the limits of section 401(a)(30), 401(k)(11), 402(h), 402A(c)(2), 403(b), 404(h), 408(k), 408(p), 415, or 457 to other contributions or benefits under the plan offering catch-up contributions or under any other plan of the employer.

For purposes of ADP testing, the proposed regulations would provide that any elective deferral for the plan year that is treated as a catch-up contribution because it is in excess of a statutory limit or an employer-provided limit is disregarded for purposes of calculating the participant's actual deferral ratio (i.e., catch-up contributions are subtracted from the participant's elective deferrals for the plan year prior to determining the participant's actual deferral ratio). This subtraction applies without regard to whether the catch-up eligible participant is a highly compensated employee or a nonhighly compensated employee. If, after running the ADP test, a plan needs to take corrective action under section 401(k)(8), the plan must determine the amount of elective deferrals that are catch-up contributions because they are in excess of the ADP limit. The elective deferrals that are treated as catch-up contributions must be retained by the plan. The plan would not be treated as failing section 401(k)(8) by reason of this retention of catch-up contributions. Excess contributions treated as catch-up contributions would nevertheless be treated as excess contributions for purposes of section 411(a)(3)(G). Therefore, if the plan does not provide for matching contributions on catch-up contributions, any matching contributions related to excess contributions treated as catch-up contributions can be forfeited. The approach under the proposed regulations would exclude those catch-up contributions that can be identified before ADP testing, and allow the plan to treat elective deferrals as catch-up contributions for those participants who would be limited under the plan (because the plan otherwise would be required to distribute some of their elective deferrals), while minimizing changes to current plan administration.

Catch-up contributions with respect to the current plan year are not taken into account for purposes of section 416 or 410(b). However, catch-up contributions made to the plan in 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).

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. 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 matching formula 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.

D. Universal Availability

Under the proposed regulations, a plan that offers catch-up contributions would satisfy the requirements of section 401(a)(4) only if all catch-up eligible participants are provided with the effective opportunity to make the same dollar amount of catch-up contributions. Therefore, if an employer provides for catch-up contributions under a section 401(k) plan, all other 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. This universal availability requirement applies solely with respect to catch-up eligible participants. Because the definition of catch-up eligible participants requires that the participant be eligible to make elective deferrals under a plan without regard to section 414(v), the universal availability requirement will not require plans that do not otherwise provide for elective deferrals to provide for catch-up contributions.

In order to provide catch-up eligible participants with an effective opportunity to make catch-up contributions, the plan would have to permit 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 effective 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). However, as discussed above, whether these elective deferrals are treated as catch-up contributions would not be determined until the end of the year.

A plan would not fail the universal availability requirement solely because an employer-provided limit did not apply to all employees or different employer-provided limits apply to different groups of employees. As under current law, a plan could provide for different employer-provided limits for 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 highly compensated employees, even though no employer-provided limit applies to nonhighly compensated employees. However, a plan is not permitted to provide lower employer-provided limits for catch-up eligible participants.

The proposed regulations would provide several exceptions to this universal availability requirement. First, the proposed regulations would provide 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). The proposed regulations would also provide transition rules for collectively bargained employees and newly-acquired plans.

E. Participants in Multiple Plans

As discussed in Section B above, the intent of section 414(v) is to permit a catch-up eligible participant to make elective deferrals in an amount equal to the catch-up contribution limit for the year in addition to the amount of elective deferrals that the participant would otherwise have been allowed to defer under the plan or plans in which the catch-up eligible participant participated. Many of the statutory limits that would otherwise limit the participant's elective deferrals are applied on an aggregated basis, for example, across all plans within a controlled group. Accordingly, the proposed regulations would provide that, for purposes of determining whether elective deferrals are in excess of a statutory limit, all elective deferrals in excess of the statutory limit are aggregated in the same manner as the underlying limit and the aggregate amount of elective deferrals treated as catch-up contributions because they exceed the statutory limit must not exceed the applicable dollar catch-up limit.

For example, compliance with section 401(a)(30) is determined based on elective deferrals under all section 401(k) plans and all section 403(b) contracts sponsored by the employer. Therefore, all section 401(k) plans and section 403(b) contracts in the controlled group of the employer would be aggregated for purposes of determining the total amount of elective deferrals in excess of the section 401(a)(30) limit. The amount of elective deferrals treated as catch-up contributions by reason of exceeding the section 401(a)(30) limit under the aggregated plans or contracts must not exceed the dollar amount of the catch-up limit for the taxable year.

In calculating the actual deferral ratio (ADR) (as defined in § 1.401(k)–1(g)) for a highly compensated employee who participates in more than one section 401(k) plan of the employer during the year, all section 401(k) plans are treated as one section 401(k) plan. Consistent with this approach, if a highly compensated employee participates in more than one section 401(k) plan of an employer, in determining the elective deferrals in excess of an employer-provided limit, the proposed regulations would take into account the elective deferrals and employer-provided limits under all section 401(k) plans in which the employee participates. In such a case, the proposed regulations would provide that in determining whether an employee's elective deferrals exceed an employer-provided limit, the applicable limit for the plan year is the sum of the dollar amounts of the limits under the separate plans and the employee's elective deferrals under all these plans are combined to determine if that aggregate employer-provided limit is exceeded.

When the elective deferrals in excess of a statutory or employer-provided limit would be determined based on more than one plan, the aggregate amount of elective deferrals in excess of that limit made under all section 401(k) plans of the employer in which a catch-up eligible participant who is a highly compensated employee participates would be treated as elective deferrals in excess of an applicable limit under each of those section 401(k) plans. In the case of a highly compensated employee, all elective deferrals that exceed a statutory or employer-provided limit and are treated as catch-up contributions under the section 401(k) plans of the employer in which the catch-up eligible participant participates are subtracted from the participant's elective deferrals for purposes of determining the participant's ADR. However, if any of the section 401(k) plans corrects through distribution of excess contributions under section 401(k)(8) in order to comply with section 401(k)(3), only the catch-up contributions made under that plan are permitted to be subtracted from elective deferrals for purposes of this correction.

When the elective deferrals in excess of a statutory or employer-provided limit are determined on an aggregated basis, it must be determined under which plan the elective deferrals in excess of the limit were made. The plan under which the elective deferrals in excess of the limit were made may be determined in any manner that is not

inconsistent with the manner in which such amounts were actually deferred under the plans. For example, if a catch-up eligible participant participates in a section 401(k) plan only during the first 6 months of the year and during the second 6 months of the year, while participating in a section 403(b) contract, the participant's contributions reach and exceed the section 401(a)(30) limit for the year, then all elective deferrals in excess of the section 401(a)(30) limit for the year could be treated as made to the section 403(b) contract.

F. Excludability of Catch-up Contributions

Catch-up contributions are generally not treated as exceeding the applicable dollar amount of section 402(g)(1). The proposed regulations would also provide that a catch-up eligible participant who participates in multiple plans may treat an elective deferral as a catch-up contribution (up to the maximum amount of catch-up contributions permitted for the taxable year) because it exceeds the catch-up eligible participant's section 402(g) limit for the taxable year. This rule would allow a catch-up eligible participant who participates in plans of two or more employers an exclusion from gross income for elective deferrals that exceed the section 402(g) limit, even though the elective deferrals do not exceed an applicable limit for either employer's plan. The treatment by an individual of such elective deferrals as catch-up contributions will not have any impact on either employer's plan. This treatment is parallel to the treatment of excess deferrals for an individual under age 50 who exceeds the section 402(g) limit in the plans of two unrelated employers. Accordingly, the proposed regulations would not provide for the ADP test to be rerun to disregard elective deferrals that an individual treats as catch-up contributions because they exceed the section 402(g) limit. However, the total amount of elective deferrals in excess of the applicable dollar limit in section 402(g)(1)(B) that are not includible in income because they are treated as catch-up contributions cannot exceed that limit by more than the catch-up contribution limit for the taxable year.

Proposed Effective Date

The regulations are proposed to apply to contributions in taxable years beginning on or after January 1, 2002. Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. In addition to the other requests for comments set forth in this document, the IRS and Treasury also request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for February 21, 2002, at 10 a.m. in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th street entrance, located between Constitution and Pennsylvania Avenues, NW. 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 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by January 31, 2002.

A period of 10 minutes will be allotted 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.

Drafting Information

The principal authors of these regulations are R. Lisa Mojiri-Azad and John T. Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Paragraph 2. Section 1.414(v)–1 is added to read as follows:

§ 1.414(v)–1 Catch-up contributions.

(a) *Catch-up contributions*—(1) *General rule.* An applicable employer plan shall not be treated as failing to meet any requirement of the Internal Revenue Code solely because the plan permits a catch-up eligible participant to make catch-up contributions in accordance with section 414(v) and this section. With respect to an applicable employer plan, catch-up contributions are elective deferrals made by a catch-up eligible participant that exceed any of the applicable limits set forth in paragraph (b) of this section and that are treated under the applicable employer plan as catch-up contributions, but only to the extent they do not exceed the catch-up contribution limit described in paragraph (c) of this section (determined in accordance with the special rules for employers that maintain multiple applicable employer plans in paragraph (f) of this section, if applicable). The definitions in paragraphs (a)(2) through (5) of this section apply for purposes of this section.

(2) *Applicable employer plan.* The term applicable employer plan means a section 401(k) plan, a SIMPLE IRA plan

as defined in section 408(p), a simplified employee pension plan as defined in section 408(k) (SEP), a plan or contract that satisfies the requirements of section 403(b), or a section 457 eligible governmental plan.

(3) *Elective deferral.* The term elective deferral means an elective deferral within the meaning of section 402(g)(3) or any contribution to a section 457 eligible governmental plan.

(4) *Catch-up eligible participant*—(i) *General rule.* The term catch-up eligible participant means an employee who—

(A) Is eligible to make elective deferrals during the plan year under an applicable employer plan (without regard to section 414(v) or this section); and

(B) Is age 50 or older.

(ii) *Projection of age 50.* For purposes of paragraph (a)(4)(i)(B) of this section, a participant who is projected to attain age 50 before the end of a calendar year is deemed to be age 50 as of January 1 of such year.

(5) *Other definitions.* (i) The terms employer, employee, section 401(k) plan, and highly compensated employee have the meanings provided in § 1.410(b)–9.

(ii) The term section 457 eligible governmental plan means an eligible deferred compensation plan described in section 457(b) that is established and maintained by an eligible employer described in section 457(e)(1)(A).

(b) *Elective deferrals that exceed an applicable limit*—(1) *Applicable limits.* An applicable limit for purposes of determining catch-up contributions for a catch-up eligible participant is any of the following:

(i) *Statutory limit.* A statutory limit is a limit on elective deferrals or annual additions permitted to be made (without regard to section 414(v) and this section) with respect to an employee for a year provided in section 401(a)(30), 402(h), 403(b)(1)(E), 404(h), 408(k), 408(p), 415, or 457, as applicable.

(ii) *Employer-provided limit.* An employer-provided limit is any limit on the elective deferrals an employee is permitted to make (without regard to section 414(v) and this section) that is contained in the terms of the plan, but which is not required under the Internal Revenue Code. Thus, for example, a plan provision that limits highly compensated employees to a deferral percentage of 10% of compensation is an employer-provided limit that is an applicable limit with respect to the highly compensated employees.

(iii) *Actual deferral percentage (ADP) limit.* In the case of a section 401(k) plan that would fail the ADP test of section 401(k)(3) if it did not correct under section 401(k)(8), the ADP limit is the highest amount of elective deferrals that can be retained in the plan by a highly compensated employee under the rules of section 401(k)(8)(C). In the case of a SEP with a salary reduction arrangement (within the meaning of section 408(k)(6)) that would fail the requirements of section 408(k)(6)(A)(iii) if it did not correct in accordance with section 408(k)(6)(C), the ADP limit is the highest amount of elective deferrals that can be made by a highly compensated employee under the rules of section 408(k)(6).

(2) *Contributions in excess of applicable limit*—(i) *Plan year limits.* Except as provided in paragraph (b)(2)(ii) of this section, the amount of elective deferrals in excess of an applicable limit is determined as of the end of the plan year by comparing the total elective deferrals for the plan year with the applicable limit for the plan year. In the case of a plan that provides for separate employer-provided limits on elective deferrals for separate portions of plan compensation within the plan year, the applicable limit for the plan year is the sum of the dollar amounts of the limits for the separate portions. This plan provision may occur, for example, when the plan sets a deferral percentage limit for each payroll period. If the plan limits elective deferrals for separate portions of the plan year, then, solely for purposes of determining the amount that is in excess of an employer-provided limit, the plan may provide, as an alternative rule, that the applicable limit for the plan year is the product of the employee's plan year compensation and the time-weighted average of the deferral percentage limits. Thus, for example, if a plan that provides for use of a time-weighted average limits deferrals to 8 percent of compensation during the first half of the plan year and 10 percent of compensation for the second half of the plan year, the applicable limit is 9 percent of each employee's plan year compensation.

(ii) *Other year limit.* In the case of an applicable limit which is applied on the basis of a year other than the plan year (e.g., the calendar year limit on elective deferrals under section 401(a)(30)), the determination of whether elective deferrals are in excess of the applicable limit is made on the basis of such other year.

(c) *Catch-up contribution limit*—(1) *General rule.* Elective deferrals with respect to a catch-up eligible participant in excess of an applicable limit under paragraph (b) of this section are treated as catch-up contributions under this section as of a date within a taxable year only to the extent that such elective deferrals do not exceed the catch-up contribution limit described in this paragraph (c), reduced by elective deferrals previously treated as catch-up contributions for the taxable year, determined in accordance with paragraph (c)(3) of this section. The catch-up contribution limit for a taxable year is generally the applicable dollar catch-up limit for such taxable year, as set forth in paragraph (c)(2) of this section. However, an elective deferral is not treated as a catch-up contribution to the extent that the elective deferral, when added to all other elective deferrals for the taxable year under any applicable employer plan of the employer, exceeds the participant's compensation (determined in accordance with section 415(c)(3)) for the taxable year.

(2) *Applicable dollar catch-up limit*—(i) *In general.* The applicable dollar catch-up limit for an applicable employer plan, other than an applicable employer plan described in section 401(k)(11) or a SIMPLE IRA plan as defined in section 408(p), is determined under the following table:

For taxable years beginning in	Applicable dollar catch-up limit
2002	$1,000
2003	2,000
2004	3,000
2005	4,000
2006	5,000

(ii) *SIMPLE plan.* The applicable dollar catch-up limit for an applicable employer plan described in section 401(k)(11) or a SIMPLE IRA plan as defined in section 408(p) is determined under the following table:

For taxable years beginning in	Applicable dollar catch-up limit
2002	$500
2003	1,000
2004	1,500
2005	2,000
2006	2,500

(iii) *Cost of living adjustments.* For taxable years after 2006, the applicable dollar catch-up limit is the applicable dollar catch-up limit for 2006 described in paragraph (c)(2)(i) or (ii) of this section increased at the same time and in the same manner as adjustments under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase that is not a multiple of $500 shall be rounded to the next lower multiple of $500.

(3) *Timing rules.* For purposes of determining the maximum amount of permitted catch-up contributions for a catch-up eligible participant during a taxable year, the determination of whether an elective deferral is a catch-up contribution is made as of the last day of the plan year (or in the case of section 415, as of the last day of the limitation year), except that, with respect to elective deferrals in excess of an applicable limit that is tested on the basis of the taxable year or calendar year (e.g., the section 401(a)(30) limit on elective deferrals), the determination of whether such elective deferrals are treated as catch-up contributions is made at the time they are deferred.

(d) *Treatment of catch-up contributions*—(1) *Contributions not taken into account for certain limits.* Catch-up contributions shall not be taken into account in applying the limits of section 401(a)(30), 401(k)(11), 402(h), 402A(c)(2), 403(b), 404(h), 408(k), 408(p), 415, or 457 to other contributions or benefits under an applicable employer plan or any other plan of the employer.

(2) *Contributions not taken into account for certain nondiscrimination tests*—(i) *Application of ADP test.* Elective deferrals that are treated as catch-up contributions with respect to a section 401(k) plan because they exceed a statutory or employer-provided limit described in paragraph (b)(1)(i) or (ii) of this section, respectively, are subtracted from the catch-up eligible participant's elective deferrals for the plan year for purposes of determining the actual deferral ratio (ADR) (as defined in § 1.401(k)–1(g)) of a catch-up eligible participant. Similarly, elective deferrals that are treated as catch-up contributions with respect to a SEP because they exceed a statutory or employer-provided limit described in paragraph (b)(1)(i) or (ii) of this section, respectively, are subtracted from the catch-up eligible participant's elective deferrals for the plan year for purposes of determining the deferral percentage under section 408(k)(6)(D) of a catch-up eligible participant.

(ii) *Adjustment of elective deferrals for correction purposes.* For purposes of the correction of excess contributions in accordance with section 401(k)(8)(C), elective deferrals under the plan treated as catch-up contributions for the plan year are subtracted from the catch-up eligible participant's elective deferrals under the plan for the plan year.

(iii) *Excess contributions treated as catch-up contributions.* A section 401(k) plan that satisfies the ADP test of section 401(k)(3) through correction under section 401(k)(8) must retain any elective deferrals that are treated as catch-up contributions pursuant to paragraph (c) of this section because they exceed the ADP limit in paragraph (b)(1)(iii) of this section. In addition, a section 401(k) plan is not treated as failing to satisfy section 401(k)(8) merely because elective deferrals described in the preceding sentence are not distributed or recharacterized as employee contributions. Similarly, a SEP is not treated as failing to satisfy section 408(k)(6)(A)(iii) merely because catch-up contributions are not treated as excess contributions with respect to a catch-up eligible participant under the rules of section 408(k)(6)(C). Notwithstanding the fact that elective deferrals described in this paragraph (d)(2)(iii) are not distributed, such elective deferrals are still considered to be excess contributions under section 401(k)(8), and accordingly, matching contributions with respect to such elective deferrals may be forfeited under the rules of section 411(a)(3)(G).

(iv) *Application for top-heavy.* Catch-up contributions with respect to the current plan year are not taken into account for purposes of section 416. Thus, if the only contributions made for a plan year for key employees are catch-up contributions, the applicable percentage under section 416(c)(2) is 0%, and no top-heavy minimum contribution under section 416 is required for the year. However, catch-up contributions for prior years are taken into account for purposes of section 416. Thus, catch-up contributions for prior years are included in the account balances that are used in determining whether the plan is top-heavy under section 416(g).

(v) *Application for section 410(b).* Catch-up contributions with respect to the current plan year are not taken into account for purposes of section 410(b). Thus, catch-up contributions are not taken into account in determining the average benefit percentage under § 1.410(b)–5 for the year if benefit percentages are determined based on current year contributions. However, catch-up contributions for prior years are taken into account for purposes of section 410(b). Thus, catch-up contributions for prior years would be included in the account balances that are used in determining the average benefit percentage if allocations for prior years are taken into account.

(3) *Availability of catch-up contributions.* An applicable employer plan does not violate § 1.401(a)(4)–4 merely because the group of employees for whom catch-up contributions are currently available (i.e., the catch-up eligible participants) is not a group of employees that would satisfy section 410(b) (without regard to § 1.410(b)–5). In addition, a catch-up eligible participant is not treated as having a right to a different rate of allocation of matching contributions merely because an otherwise nondiscriminatory schedule of matching rates is applied to elective deferrals that include catch-up contributions. The rules in this paragraph (d)(3) also apply for purposes of satisfying the requirements of section 403(b)(12).

(e) *Universal availability requirement*—(1) *General rule.* An applicable employer plan that offers catch-up contributions and that is otherwise subject to section 401(a)(4) (including a plan that is subject to section 401(a)(4) pursuant to section 403(b)(12)) 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 with the effective opportunity to make the same dollar amount of catch-up contributions. A plan does not fail to satisfy this effective opportunity requirement merely because the plan allows participants to defer an amount equal to a specified percentage of compensation for each payroll period and for each payroll period permits each catch-up eligible participant to defer a pro-rata share of the applicable dollar catch-up limit in addition to that amount. A plan does not fail the universal availability requirement of this paragraph (e) solely because an employer-provided limit does not apply to all employees or different limits apply to different groups of employees under paragraph (b)(2)(i) of this section. However, a plan may not provide lower employer-provided limits for catch-up eligible participants.

(2) *Exception for section 457 eligible governmental plans.* An applicable employer plan does not fail to comply with the universal availability requirement of this paragraph (e) merely because another applicable employer plan that is a section 457 eligible governmental plan does not provide for catch-up contributions to the extent set forth in section 414(v)(6)(C).

(3) *Exception for newly acquired plans.* An applicable employer plan does not fail to comply with the universal availability requirement of this paragraph (e) merely because another applicable employer plan does not provide for catch-up contributions, if—

(i) The other applicable employer plan becomes maintained by the employer by reason of a merger,

acquisition or similar transaction described in § 1.410(b)–2(f); and

(ii) The other applicable employer plan is amended to provide for catch-up contributions as soon as practicable, but no later than by the end of the period described in section 410(b)(6)(C).

(f) *Special rules for an employer that sponsors multiple plans*—(1) *General rule.* If elective deferrals under more than one applicable employer plan of an employer are aggregated for purposes of applying a statutory limit under paragraph (b)(1)(i) of this section, then the aggregate elective deferrals treated as catch-up contributions by reason of exceeding that statutory limit under all such applicable employer plans must not exceed the applicable dollar catch-up limit for the taxable year. For example, since compliance with section 401(a)(30) is determined based on elective deferrals under section 401(k) plans and section 403(b) contracts sponsored by the employer, the total amount of elective deferrals under all section 401(k) plans and section 403(b) contracts of the employer treated as catch-up contributions by reason of exceeding the section 401(a)(30) limit for a calendar year under the aggregated plans must not exceed the applicable dollar catch-up limit for such taxable year.

(2) *Highly compensated employee in more that one section 401(k) plan.* If a highly compensated employee is a participant in more than one section 401(k) plan of an employer, in determining whether the employee's elective deferrals exceed an employer-provided limit under paragraph (b)(1)(ii) of this section, the employer-provided limit for the plan year is the sum of the dollar amounts of the limits under the separate plans for that employee and the employee's elective deferrals under all section 401(k) plans of the employer are combined to determine if the employer-provided limit is exceeded.

(3) *Allocation rules.* When the amount of elective deferrals in excess of an applicable limit under paragraph (b)(1) of this section is determined under the aggregation rules of paragraph (f)(1) or (f)(2) of this section, the aggregate amount of the elective deferrals in excess of that applicable limit made under all section 401(k) plans that are aggregated for purposes of determining a highly compensated employee's ADR are treated as elective deferrals in excess of an applicable limit for purposes of applying the catch-up contribution limit under paragraph (c)(1) of this section with respect to each of these section 401(k) plans. However, the catch-up contributions are subtracted from elective deferrals for purposes of paragraph (d)(2)(ii) of this section only under the applicable employer plan under which the catch-up contributions are made. The applicable employer plan under which the elective deferrals in excess of an applicable limit are made for purposes of this paragraph (f)(3) may be determined in any manner that is not inconsistent with the manner in which such amounts were actually deferred under the plans.

(g) *Application of section 402(g)*—(1) *Exclusion of catch-up contributions.* In determining the amount of elective deferrals that are includable in gross income under section 402(g), except as provided in paragraph (g)(2) of this section, catch-up contributions are not treated as exceeding the applicable dollar amount of section 402(g)(1). For purposes of this paragraph (g), a catch-up eligible participant who makes elective deferrals under applicable employer plans of two or more employers that exceed the applicable dollar amount under section 402(g)(1) may treat the elective deferrals in excess of that applicable dollar amount as a catch-up contribution to the extent permitted in paragraph (g)(2) of this section, even though the elective deferrals do not exceed an applicable limit under either plan. Therefore, for a catch-up eligible participant who makes elective deferrals under applicable employer plans of two or more employers that exceed the applicable dollar amount under section 402(g)(1), the elective deferrals in excess of that applicable dollar amount are excludable from gross income as catch-up contributions to the extent permitted in paragraph (g)(2) of this section. Whether an elective deferral is treated as a catch-up contribution by an applicable employer plan is determined under paragraph (c) of this section and without regard to whether the employee treats an elective deferral as a catch-up contribution under this paragraph (g).

(2) *Maximum excludable amount.* If a catch-up eligible participant participates in two or more applicable employer plans during a taxable year, the total amount of elective deferrals under all plans that are not includable in gross income under this paragraph (g) because they are catch-up contributions shall not exceed the applicable dollar catch-up limit under paragraph (c)(2)(i) of this section for the taxable year.

(h) *Coordination with other catch-up provisions*—(1) *Coordination with section 457(b)(3).* In the case of an applicable employer plan that is a section 457 eligible governmental plan, the catch-up contributions permitted under this section shall not apply to a catch-up eligible participant for any taxable year for which the additional contributions permitted under section 457(b)(3) applies to such participant. For additional guidance, see regulations under section 457.

(2) *Coordination with section 402(g)(7).* [Reserved].

(i) *Examples.* The following examples illustrate the application of this section. For purposes of these examples, the limit under section 401(a)(30) is $15,000 and the applicable dollar catch-up limit is $5,000 and, except as specifically provided, the plan year is the calendar year. In addition, it is assumed that the participant's elective deferrals under all plans of the employer do not exceed the participant's section 415(c)(3) compensation and that any correction pursuant to section 401(k)(8) is made through distribution of excess contributions. The examples are as follows:

Example 1. (i) Participant A is eligible to make elective deferrals under a section 401(k) plan, Plan P. Plan P does not limit elective deferrals except as necessary to comply with sections 401(a)(30) and 415. In 2006, Participant A is 55 years old. Plan P also provides that a catch-up eligible participant is permitted to defer amounts in excess of the section 401(a)(30) limit up to the applicable dollar catch-up limit for the year. Participant A defers $18,000 during 2006.

(ii) Participant A's elective deferrals in excess of the section 401(a)(30) limit ($3,000) do not exceed the applicable dollar catch-up limit for 2006 ($5,000). Under paragraph (a)(1) of this section, the $3,000 is a catch-up contribution and, pursuant to paragraph (d)(2)(i) of this section, it is not taken into account in determining Participant A's ADR for purposes of section 401(k)(3).

Example 2. (i) Participants B and C, who are highly compensated employees earning $120,000, are eligible to make elective deferrals under a section 401(k) plan, Plan Q. Plan Q limits elective deferrals as necessary to comply with section 401(a)(30) and 415, and also provides that no highly compensated employee may make an elective deferral at a rate that exceeds 10% of compensation. However, Plan Q also provides that a catch-up eligible participant is permitted to defer amounts in excess of 10% during the plan year up to the applicable dollar catch-up limit for the year. In 2006, Participants B and C are both 55 years old and, pursuant to the catch-up provision in Plan Q, both elect to defer 10% of compensation plus a pro-rata portion of the $5,000 applicable dollar catch-up limit for 2006. Participant B continues this election in effect for the entire year, for a total elective contribution for the year of $17,000. However, in July 2006, after deferring $8,500, Participant C discontinues making elective deferrals.

(ii) Once Participant B's elective deferrals for the year exceed the section 401(a)(30) limit ($15,000), subsequent elective deferrals are treated as catch-up contributions as they

are deferred, provided that such elective deferrals do not exceed the catch-up contribution limit for the taxable year. Since the $2,000 in elective deferrals made after Participant B reaches the section 402(g) limit for the calendar year does not exceed the applicable dollar catch-up limit for 2006, the entire $2,000 is treated as a catch-up contribution.

(iii) As of the last day of the plan year, Participant B has exceeded the employer-provided limit of 10% (10% of $120,000 or $12,000 for Participant B) by an additional $3,000. Since the additional $3,000 in elective deferrals does not exceed the $5,000 applicable dollar catch-up limit for 2006, reduced by the $2,000 in elective deferrals previously treated as catch-up contributions, the entire $3,000 of elective deferrals is treated as a catch-up contribution.

(iv) In determining Participant B's ADR, the $5,000 of catch-up contributions are subtracted from Participant B's elective deferrals for the plan year under paragraph (d)(2)(i) of this section. Accordingly, Participant B's ADR is 10% ($12,000 / $120,000). In addition, for purposes of applying the rules of section 401(k)(8), Participant B is treated as having elective deferrals of $12,000.

(v) Participant C's elective deferrals for the year do not exceed an applicable limit for the plan year. Accordingly, Participant C's $8,500 of elective deferrals must be taken into account in determining Participant C's ADR for purposes of section 401(k)(3).

Example 3. (i) The facts are the same as in *Example 2,* except that Plan Q is amended to change the maximum permitted deferral percentage for highly compensated employees to 7%, effective for deferrals after April 1, 2006. Participant B, who has earned $ 40,000 in the first 3 months of the year and has been deferring at a rate of 10% of compensation plus a pro-rata portion of the $5,000 applicable dollar catch-up limit for 2006, reduces the 10% of pay deferral rate to 7% for the remaining 9 months of the year (while continuing to defer a pro-rata portion of the $5,000 applicable dollar catch-up limit for 2006). During those 9 months, Participant B earns $80,000. Thus, Participant B's total elective deferrals for the year are $14,600 ($4,000 for the first 3 months of the year plus $5,600 for the last 9 months of the year plus an additional $5,000 throughout the year).

(ii) The employer-provided limit for Participant B for the plan year is $9,600 ($4,000 for the first 3 months of the year, plus $5,600 for the last 9 months of the year). Accordingly, Participant B's elective deferrals for the year that are in excess of the employer-provided limit are $5,000 (the excess of $14,600 over $9,600), which does not exceed the applicable dollar catch-up limit of $5,000.

(iii) Alternatively, Plan Q may provide that the employer-provided limit is determined as the time-weighted average of the different deferral percentage limits over the course of the year. In this case, the time-weighted average limit is 7.75% for all participants, and the applicable limit for Participant B is 7.75% of $120,000, or $9,300. Accordingly, Participant B's elective deferrals for the year that are in excess of the employer-provided limit are $5,300 (the excess of $14,600 over $9,300). Since the amount of Participant B's elective deferrals in excess of the employer-provided limit ($5,300) exceeds the applicable dollar catch-up limit for the taxable year, only $5,000 of Participant B's elective deferrals may be treated as catch-up contributions. In determining Participant B's actual deferral ratio, the $5,000 of catch-up contributions are subtracted from Participant B's elective deferrals for the plan year under paragraph (d)(2)(i) of this section. Accordingly, Participant B's actual deferral ratio is 8% ($9,600 / $120,000). In addition, for purposes of applying the rules of section 401(k)(8), Participant B is treated as having elective deferrals of $9,600.

Example 4. (i) The facts are the same as in *Example 1.* In addition to Participant A, Participant D is a highly compensated employee who is eligible to make elective deferrals under Plan P. During 2006, Participant D, who is 60 years old, elects to defer $14,000.

(ii) The ADP test is run for Plan P (after excluding the $3,000 in catch-up contributions from Participant A's elective deferrals), but Plan P needs to take corrective action in order to pass the ADP test. After applying the rules of section 401(k)(8)(C) to allocate the total excess contributions determined under section 401(k)(8)(B), the maximum deferrals which may be retained by any highly compensated employee in Plan P is $12,500.

(iii) Pursuant to paragraph (b)(1)(iii) of this section, the ADP limit under Plan P of $12,500 is an applicable limit. Accordingly, $1,500 of Participant D's elective deferrals exceed the applicable limit. Similarly, $2,500 of Participant A's elective deferrals (other than the $3,000 of elective deferrals treated as catch-up contributions because they exceed the section 401(a)(30) limit) exceed the applicable limit.

(iv) The $1,500 of Participant D's elective deferrals that exceed the applicable limit are less than the applicable dollar catch-up limit and are treated as catch-up contributions. Pursuant to paragraph (d)(2)(iii) of this section, Plan P must retain Participant D's $1,500 in elective deferrals and Plan P is not treated as failing to satisfy section 401(k)(8) merely because the elective deferrals are not distributed to Participant D.

(v) The $2,500 of Participant A's elective deferrals that exceed the applicable limit are greater than the portion of the applicable dollar catch-up limit ($2,000) that remains after treating the $3,000 of elective deferrals in excess of the section 401(a)(30) limit as catch-up contributions. Accordingly, $2000 of Participant A's elective deferrals are treated as catch-up contributions. Pursuant to paragraph (d)(2)(iii) of this section, Plan P must retain Participant A's $2,000 in elective deferrals and Plan P is not treated as failing to satisfy section 401(k)(8) merely because the elective deferrals are not distributed to Participant A. However, $500 of Participant A's elective deferrals can not be treated as catch-up contributions and must be distributed to Participant A in order to satisfy section 401(k)(8).

Example 5. (i) Participant E is a catch-up eligible employee under a section 401(k) plan, Plan R, with a plan year ending October 31, 2006. Plan R does not limit elective deferrals except as necessary to comply with section 401(a)(30) and section 415. Plan R permits all catch-up eligible participants to defer an additional amount equal to the applicable dollar catch-up limit for the year ($5,000) in excess of the section 401(a)(30) limit. Participant E did not exceed the section 401(a)(30) limit in 2005. Participant E made $3,200 of deferrals in the period November 1, 2005 through December 31, 2005 and an additional $16,000 of deferrals in the first 10 months of 2006, for a total of $19,200 in elective deferrals for the plan year.

(ii) Once Participant E's elective deferrals for the calendar year 2006 exceed $15,000, subsequent elective deferrals are treated as catch-up contributions at the time they are deferred, provided that such elective deferrals do not exceed the applicable dollar catch-up limit for the taxable year. Since the $1,000 in elective deferrals made after Participant E reaches the section 402(g) limit for the calendar year does not exceed the applicable dollar catch-up limit for 2006, the entire $1,000 is a catch-up contribution. Pursuant to paragraph (d)(2)(i) of this section, $1,000 is subtracted from Participant E's $19,200 in elective deferrals for the plan year ending October 31, 2006 in determining Participant E's ADR for that plan year.

(iii) The ADP test is run for Plan R (after excluding the $1,000 in elective deferrals in excess of the section 401(a)(30) limit), but Plan R needs to take corrective action in order to pass the ADP test. After applying the rules of section 401(k)(8)(C) to allocate the total excess contributions determined under section 401(k)(8)(C), the maximum deferrals that may be retained by any highly compensated employee under Plan R for the plan year ending October 31, 2006 (the ADP limit) is $14,800.

(iv) Under paragraph (d)(2)(ii) of this section, elective deferrals that exceed the section 401(a)(30) limit under Plan R are also subtracted from Participant E's elective deferrals under Plan R for purposes of applying the rules of 401(k)(8). Accordingly, for purposes of correcting the failed ADP test, Participant E is treated as having contributed $18,200 of elective deferrals in Plan R. The amount of elective deferrals that would have to be distributed to Participant E in order to satisfy section 401(k)(8)(C) is $3,400 ($18,200 minus $14,800), which is less than the excess of the applicable dollar catch-up limit ($5,000) over the elective deferrals previously treated as catch-up contributions under Plan R for the taxable year ($1,000). Under paragraph (d)(2)(iii) of this section, Plan R must retain Participant E's $3,400 in elective deferrals and is not treated as failing to satisfy section 401(k)(8) merely because the elective deferrals are not distributed to Participant E.

(v) Even though Participant E's elective deferrals for the calendar year 2006 have exceeded the section 401(a)(30) limit, Participant E can continue to make elective deferrals during the last two months of the calendar year, since Participant E's catch-up contributions for the taxable year have not exceeded the applicable dollar catch-up limit

for the taxable year. However, the maximum amount of elective deferrals Participant E may make for the balance of the calendar year is $600 (the $5,000 applicable dollar catch-up limit for 2006, reduced by the $4,400 ($1,000 plus $3,400) of elective deferrals previously treated as catch-up contributions during the taxable year).

Example 6. (i) The facts are the same as in *Example 5,* except that Participant E exceeded the section 401(a)(30) limit for 2005 by $1,300 prior to October 31, 2005, and made $600 of elective deferrals in the period November 1, 2005, through December 31, 2005 (which were catch-up contributions for 2005). Thus, Participant E made $16,600 of elective deferrals for the plan year ending October 31, 2006.

(ii) Once Participant E's elective deferrals for the calendar year 2006 exceed $15,000, subsequent elective deferrals are treated as catch-up contributions as they are deferred, provided that such elective deferrals do not exceed the applicable dollar catch-up limit for the taxable year. Since the $1,000 in elective deferrals made after Participant E reaches the section 402(g) limit for calendar year 2006 does not exceed the applicable dollar catch-up limit for 2006, the entire $1,000 is a catch-up contribution. Pursuant to paragraph (d)(2)(i) of this section, $1,000 is subtracted from Participant E's elective deferrals in determining Participant E's actual deferral ratio for the plan year ending October 31, 2006. In addition, the $600 of catch-up contributions from the period November 1, 2005 to December 31, 2005 are subtracted from Participant E's elective deferrals in determining Participant E's ADR. Thus, the total elective deferrals taken into account in determining Participant E's ADR for the plan year ending October 31, 2006, is $15,000 ($16,600 in elective deferrals for the current plan year, less $1,600 in catch-up contributions).

(iii) The ADP test is run for Plan R (after excluding the $1,600 in elective deferrals in excess of the section 401(a)(30) limit), but Plan R needs to take corrective action in order to pass the ADP test. After applying the rules of section 401(k)(8)(C) to allocate the total excess contributions determined under section 401(k)(8)(C), the maximum deferrals that may be retained by any highly compensated employee under Plan R (the ADP limit) is $14,800.

(iv) Under paragraph (d)(2)(ii) of this section, elective deferrals that exceed the section 401(a)(30) limit under Plan R are also subtracted from Participant E's elective deferrals under Plan R for purposes of applying the rules of 401(k)(8). Accordingly, for purposes of correcting the failed ADP test, Participant E is treated as having contributed $15,000 of elective deferrals in Plan R. The amount of elective deferrals that would have to be distributed to Participant E in order to satisfy section 401(k)(8)(C) is $200 ($15,000 minus $14,800), which is less than the excess of the applicable dollar catch-up limit ($5,000) over the elective deferrals previously treated as catch-up contributions under Plan R for the taxable year ($1,000). Under paragraph (d)(2)(iii) of this section, Plan R must retain Participant E's $200 in elective deferrals and is not treated as failing to satisfy section 401(k)(8) merely because the elective deferrals are not distributed to Participant E.

(v) Even though Participant E's elective deferrals for calendar year 2006 have exceeded the section 401(a)(30) limit, Participant E can continue to make elective deferrals during the last two months of the calendar year, since Participant E's catch-up contributions for the taxable year 2006 have not exceeded the applicable dollar catch-up limit for the taxable year. However, the maximum amount of elective deferrals Participant E may make for the balance of the calendar year is $3,800 (the $5,000 applicable dollar catch-up limit for 2006, reduced by $1,200 ($1,000 plus $200) in elective deferrals previously treated as catch-up contributions during taxable year 2006).

Example 7. (i) Participant F, who is 58 years old, is a highly compensated employee who earns $100,000. Participant F participates in a section 401(k) plan, Plan S, for the first six months of the year and then transfers to another section 401(k) plan, Plan T, sponsored by the same employer, for the second six months of the year. Plan S limits highly compensated employees' elective deferrals to 6% of compensation for the period of participation, but permits catch-up eligible participants to defer amounts in excess of 6% during the plan year, up to the applicable dollar catch-up limit for the year. Plan T limits highly compensated employee's elective deferrals to 8% of compensation for the period of participation, but permits catch-up eligible participants to defer amounts in excess of 8% during the plan year, up to the applicable dollar catch-up limit for the year. Participant F, who earned $50,000 in the first six months of the year, defers $5,000 under Plan S. Participant F also deferred $5,000 under Plan T.

(ii) Under paragraph (f)(2) of this section, the employer-provided limit for Participant F is $7,000, the sum of the employer-provided limit for Plan S ($3,000) and the employer-provided limit for Plan T ($4,000). Participant F's elective deferrals for the year are $10,000. Therefore, the amount of Participant F's elective deferrals in excess of the employer-provided limit is $3,000. Under paragraph (f)(3) of this section, the $3,000 in excess of the employer-provided limit is treated as an elective deferral in excess of that limit under both Plans S and T for purposes of applying the catch-up contribution limit under paragraph (c)(1) of this section.

(iii) Since the amount of Participant F's elective deferrals in excess of the employer-provided limit ($3,000) does not exceed the applicable dollar catch-up limit for the taxable year, the entire $3,000 of Participant F's elective deferrals are treated as catch-up contributions. In determining Participant F's actual deferral ratio, the entire $3,000 of catch-up contributions is subtracted from Participant F's elective deferrals for the plan year under paragraph (d)(2)(i) of this section. Accordingly, Participant F's actual deferral ratio is 7% ($7,000/$100,000) for both Plans S and T.

(iv) In accordance with paragraph (f)(3) of this section, it is determined that $2,000 of the excess over the employer-provided limit was made under Plan S and $1,000 of the excess over the employer-provided limit was made under Plan T. This determination is not inconsistent with the manner in which the elective deferrals were actually made. Therefore, under paragraph (d)(2)(ii) of this section, for purposes of applying the rules of section 401(k)(8), Participant F is treated as having elective deferrals of $3,000 ($5,000–$2,000) in Plan S and $4,000 ($5,000–$1,000) in Plan T.

(v) If, after applying the ADP test of section 401(k)(3), Plan S or Plan T were to require correction under section 401(k)(8), the maximum amount of elective deferrals in excess of the ADP limit that could be treated as catch-up contributions for Participant F under the Plan could not exceed $2,000, the applicable dollar catch-up limit of $5,000, reduced by the $3,000 in excess of the employer-provided limit previously treated as catch-up contributions for the taxable year.

(j) *Effective date and transition rule*— (1) *Effective date.* Section 414(v) and this section apply to contributions in taxable years beginning on or after January 1, 2002.

(2) *Transition rule for collectively bargained employees.* An applicable employer plan will not fail to satisfy the requirements of paragraph (e) of this section merely because employees eligible to make elective deferrals who are included in a unit of employees covered by a collective bargaining agreement in effect on January 1, 2002, are not permitted to make catch-up contributions until the first plan year beginning after the termination of such agreement.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 48

[REG–143219–01]

RIN 1545–BA27

Gasoline Tax Claims Under Section 6416(a)(4)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This document invites comments from the public on issues that the IRS may address in proposed regulations relating to claims for credits or refunds of the gasoline tax. All materials submitted will be available for public inspection and copying.

DATES: Written and electronic comments must be received by January 22, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG–143219–01), room