SPARK INSTITUTE
SHAPING AMERICA'S RETIREMENT

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Internal Revenue Service
CC:PA:01:PR (REG-101268-24)
Room 5203
P.O. Box 7604,
Ben Franklin Station
Washington, DC 20044

Re: Comments on Proposed Regulations on Catch-up Contributions (REG-101268-24) and Request to Testify

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on proposed regulations related to the changes to the catch-up contribution rules made by the SECURE 2.0 Act ("SECURE 2.0").

Our comments follow prior letters to the Department of the Treasury and Internal Revenue Service (collectively, "the Service") on April 10, 2023 (our first request for guidance) and October 23, 2023 (in response to Notice 2023-62). We have been very grateful for the way the Service has responded to our members' concerns—first by providing the administrative delay in Notice 2023-62 and then in how the proposed regulations respond to our questions and concerns. Our comments in this letter are primarily intended to further assist plans and their service providers as they implement the new requirements in Section 603 of SECURE 2.0 (which we refer to as the "Roth catch-up mandate"). The Roth catch-up mandate will be challenging to administer, especially in the early years, and additional simplification and clarification will be of great assistance. As noted near the end of this letter, we are also asking the Service to consider an additional delay, or provide additional good faith or similar relief, given that the final regulations will not be available in time to implement for 2026. Finally, we have one comment related to the interaction of Section 109 of SECURE 2.0 (allowing additional contributions for those age 60-63) or Section 117 of SECURE 2.0 (increased limits for certain SIMPLE plans): whether or not a SIMPLE plan to which Section 117 applies is allowed to apply the increased catch-up contribution limit in Section 109.[1]

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment

[1] Other than this one comment, we do not have any other comments on the portions of the proposed regulations that implement Sections 109 or 117 of SECURE 2.0.

managers. Collectively, our member firms administer the retirement plans for over 110 million American workers.

REQUEST TO TESTIFY

The SPARK Institute **requests to testify** at the public hearing to be held on April 7, 2025. Michael Hadley, Davis & Harman LLP, will testify on behalf of the SPARK Institute. The outline of topics to be covered in our testimony is as follows:

- Comments on the Correction Methods in the Proposed Regulation
- Comments on Wage Threshold
- Comments on Plan Design Issues
- Need for Further Delay

COMMENTS

I. Comments on the Correction Methods

The SPARK Institute greatly appreciates the Service including in the proposed regulations additional correction methods that plan administrators may utilize to correct errors in administering the Roth catch-up mandate. While we believe SPARK members will be fully ready to assist plan sponsors and payroll providers in administering the Roth catch-up mandate, for reasons we have outlined in prior letters, there is still a need for workable correction options. The comments in this section are intended to improve and clarify these correction methods.

Under the proposed regulations, there are two correction methods. The first involves transferring the elective deferral (adjusted for allocable gain or loss) from the participant's pre-tax account to the participant's designated Roth account and reporting the contribution (not adjusted for allocable gain or loss) as a designated Roth contribution on the participant's Form W-2 for the year of the deferral. This option is available only until the Form W-2 is filed or provided to the participant (which generally occurs at the end of January of the following year). We refer to this as the "Form W-2 correction."

The other correction is through an in-plan Roth rollover, under which the plan converts the elective deferral that should have been made on a Roth basis (adjusted for allocable gain or loss) from the participant's pre-tax account to the participant's designated Roth account and reports the amount of the in-plan Roth rollover (adjusted for allocable gain and loss) on Form 1099-R for the year of the rollover. We refer to this as the "in-plan Roth conversion correction."

A. The Service should simplify the in-plan Roth conversion correction method by allowing it to occur at any time until the end of the following calendar year.

Under the proposed regulations, the deadline to utilize the in-plan Roth conversion correction would depend on which limit is the basis for the pre-tax elective deferral being designated a catch-up contribution. Thus, if the limit requiring treatment as a catch-up is the section 402(g) limit, the deadline would be April 15 of the calendar year following the calendar year for which the elective deferral was made. If the applicable limit is the section 415(c) limit, the deadline would be the date under Treas. Reg. § 1.415(c)-1(b)(6) for allocating amounts to the limitation year for which the elective deferral was made. Finally, if the average deferral percentage ("ADP") test is what caused the amounts to need to be treated as catch-up contributions, the deadline would need to be made by March 15 (June 30 for an eligible automatic enrollment plan).[2]

These deadlines are much too complicated, and in our view, unnecessary. First, a plan might have corrections because of multiple reasons in a single year. Second, the deadlines do not provide any additional time, since they are basically the same date as the correction date for that limit, and this correction will involve additional steps to perform the in-plan Roth conversion and communicate with the plan sponsor and participant. Third, the deadlines are based on those intended for excesses being returned to the participant. However, under the in-plan Roth conversion correction, no amounts are actually distributed from the plan.

More importantly, regardless of when the in-plan Roth conversion occurs, the participant will have taxable income for the year of the correction and will receive a Form 1099-R after the end of the year. There is simply no reason to impose an earlier deadline. *For this reason, we recommend that a plan be allowed to use the in-plan Roth conversion method up until the end of the calendar year following the calendar year in which the pre-tax elective deferral (which should have been Roth) was made.*

The Service should also provide additional time in the case of a non-calendar year plan and a limit not based on the calendar year, such as a correction based on the plan year (ADP test) or limitation year (section 415 limit). The deadline to use the in-plan Roth conversion method should be extended until at least the later of the deadline in the prior paragraph, or the end of the plan year following the plan year in which the pre-tax elective deferral (which should have been Roth) was made.

We would note that if a plan misses the dates outlined in the proposed regulation, the inadvertent error still needs to be corrected, and will likely be self-corrected under section 305 of SECURE 2.0. The plan might decide that an in-plan Roth conversion is the appropriate correction anyway. For example, if the error occurred because the plan failed to implement the plan's "deemed" Roth election, then the proper correction is to put the plan in the place it would have been had the error not occurred, which is basically an in-plan Roth conversion. It would be inconsistent with the principles of EPCRS to distribute this as an excess contribution.[3]

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[2] Even if we agreed that there should be a different deadline for corrections needed because of the ADP test – which we think is misguided – we would note that this is probably not the correct deadline even for ADP failures. This deadline probably should be the deadline for correcting a failed ADP test – i.e., 12 months following the end of the plan year. Otherwise, the deadline for correcting the ADP test is effectively accelerated by 9 ½ moths (6 months for EACAs).

[3] In addition, we request that the successor to Revenue Procedure 2021-30 explain the correction that should be used in the case of a correction that cannot be made under the regulatory corrections.

B. The Service should confirm that in-plan Roth conversion corrections are not subject to the five-year recapture rule.

The proposed regulations do not directly address the treatment of the in-plan Roth conversion when it is used as a correction, other than to provide that a Form 1099-R will be issued.[4] Voluntary in-plan Roth conversions are subject to what is called the "recapture rule." Unless an exception is available, this recapture rule applies if a participant distributes any part of an in-plan Roth rollover within the 5-taxable-year period that begins January 1 of the year of the in-plan Roth rollover and ends on December 31 of the fifth year. If the recapture rule applies, the 10% additional tax in Code section 72(t) will apply (unless an exception is available).

We believe that the recapture rule should not apply in the case of an in-plan Roth conversion that results from a correction to comply with the Roth catch-up mandate. After all, if the error had not occurred, the participant would have simply made normal designated Roth contributions, which are not subject to the recapture rule.[5] The recapture rule is intended to prevent a participant from avoiding the 10% additional tax by converting pre-tax amounts to Roth and then immediately taking a distribution. In this case, the plan is simply putting the participant in the position they would have been in if the Roth catch-up mandate had been correctly administered.

C. The Service should confirm that a plan may use the in-plan Roth conversion correction even if the plan does not otherwise offer in-plan Roth conversions.

The proposed regulations do not directly address whether or not a plan must otherwise offer in-plan Roth conversions in order to use the in-plan Roth conversion correction. A plan is not required to offer in-plan Roth conversions, and many do not. We do not believe it is necessary to impose this condition. Additionally, the in-plan Roth conversion correction is just a mechanism to change pre-tax catch-up contributions made during the year to Roth for those subject to the Roth catch-up mandate. The right to make Roth catch-up contributions, however, is available to all catch-up eligible participants in this case. There is no additional benefit to any participant subject to the Roth catch-up mandate. We ask that the Service confirm that a plan can avail itself of the in-plan Roth conversion correction even if participants cannot otherwise make an in-plan Roth conversion.[6]

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[4] The proposed regulations simply state that the in-plan Roth conversion correction is made "in accordance with section 402A(c)(4)(E)."

[5] The amounts that were converted to Roth under the in-plan Roth conversion correction would be subject to the normal rules for distributions to the extent that they are not qualified distributions, that is, a pro-rata portion of earnings are taxed as ordinary income and potentially subject to the 10% additional tax.

[6] On a related point, one question we have been asked is whether voluntary in-plan Roth conversions might be used to satisfy the Roth catch-up mandate. We believe the answer to this is no.

D. The Service should not require that a plan use the same correction method for participants impacted by an applicable limit.

Under the proposed regulation, a plan may use either correction method but "must apply the same correction method for all participants with elective deferrals in excess of the same applicable limit." We suggest this requirement be removed. Presumably the Service included this out of vague concern about a plan administrator favoring some participants over others.

As a practical matter, the impact to the participant of using the Form W-2 correction or the in-plan Roth conversion correction is very similar. In either case, the same amount will be moved to the designated Roth account. The correction method chosen has no impact on FICA wages payable in the year of the correction or the year of the deferral. The only difference, it appears, is that with the in-plan Roth conversion correction, any earnings are reported as taxable, but given the amount of time that will pass, this will have a fairly small impact, certainly not enough to encourage a plan administrator to somehow improperly favor one group of employees over another. On the other hand, if the Service retains this requirement, it is essentially forcing all employers to use the in-plan Roth conversion correction, because the deadline for the in-plan Roth conversion correction is later, and a plan administrator will never know for sure that it will not need to make additional corrections after the deadline for the Form W-2 correction.

If the Service remains concerned about abuse, it could substitute for this condition a condition that, based on all the facts and circumstances, the plan administrator may not favor highly compensated employees. To provide certainty, such a condition should be treated as satisfied if the same correction method is used for all similarly situated participants. For this purpose, for example, similarly situated participants might be those whose excess is corrected on the same date and whose elective deferrals exceed the same applicable limit.

E. The Service should remove the requirement that the plan implements the "deemed" election to use the additional correction methods.

One of the conditions of a plan using the Form W-2 correction or the in-plan Roth conversion correction is that the plan has implemented a "deemed" election under which the elective deferrals of a participant who is subject to the Roth catch-up mandate are automatically treated as designated Roth contributions after the participant's pre-tax elective deferrals made during the calendar year equal the Code section 402(g) limit. The preamble does not explain why the Service felt this condition is necessary. Perhaps the Service believes that the "deemed" election is necessary to prove that that the plan had in place policies and procedures designed to result in compliance with the Roth catch-up mandate.

While we very much appreciate and support the "deemed" election option, and think it will be used by a majority of plans, we do not agree that this is a necessary part of reasonable policies and procedures to ensure compliance. In some plans, the plan administrator may believe that it is more efficient to collect an affirmative Roth election rather than deeming participants to have elected it.

Moreover, there may be some circumstances where implementing a "deemed" election is impractical, difficult, or even illegal. For example, it may not be possible for some payroll systems to implement this deemed election easily. In the case of collectively bargained plans, the plan may need the support of the union for this feature.

In the case of state or local governmental plans, a deemed Roth election may not be legal under current law. For example, the Alaska state law authorizing the state and political subdivisions to participate in a deferred compensation plan includes a provision that apparently conflicts with the deemed election rule included in the proposed regulations. Relevantly, that law states: "In the absence of an *affirmative election* to make Roth contributions, an employee's contribution shall be considered to consist entirely of deferred tax contributions." Alaska Stat. Ann. § 39.45.050 (emphasis added). There are also other state laws which might be read to prohibit the deemed election, or may need to be clarified at a minimum.[7] Thus, even if the Service does not accept our recommendation to remove the "deemed" election as a condition of using the additional correction methods, it should at least allow for an exception if the "deemed" election violates applicable law.

F. The Service should confirm the deadline for an in-plan Roth conversion correction in the case of 457(b) plans.

As noted above, we are strongly recommending that the deadline for an in-plan Roth conversion correction be, in all cases, the end of the following year. However, if the Service declines to make this change, we ask for clarification regarding the deadline in the case of a section 457(b) plan. The proposed regulations reference Code sections 401(a)(30) and 415(c) and the ADP test, none of which apply to section 457(b) plans. We ask the Service to explain the deadline in the case of a section 457(b) plan.

G. SPARK supports allowing for no correction in appropriate scenarios.

Footnote 20 of the preamble invites comments on situations in which no correction is needed. We agree that there are likely some situations in which a correction is simply unnecessary. A few such situations have been mentioned by SPARK members:

[7] See, e.g., Ark. Code Ann. § 21-5-508 ("A sum deferred under the deferred compensation program is not subject to income taxation until a distribution is made to the employee or beneficiary unless an employee has by contract directed that his or her contribution is to be deposited into a Roth deferred compensation plan."); Ga. Code Ann. § 45-18-32 ("All such plans shall provide tax deferral benefits for the respective employees in a manner similar to that of the plan for state employees and may provide as an option for eligible employees a qualified Roth contribution program in accordance with Section 402A of the United States Internal Revenue Code."); Tex. Gov't Code Ann. § 609.006 ("A deferred compensation plan must conform to federal law to provide that deferred amounts and investment income are not includable, for federal income tax purposes, in the gross income of a participating employee until distributed to the employee, subject to the employee's option to designate or convert all or a portion of deferred amounts as or to Roth contributions … the federal income tax treatment of which is governed by Section 402A, Internal Revenue Code of 1986.").

- After a significant passage of time, such as when the statute of limitations has run on the participant's tax return for the year in which a contribution should have been made as Roth. After all, the whole point of a Roth contribution is that the contribution is taxable income, and under the Code, the Service generally cannot assess additional taxes for a closed tax year.
- For very small amounts, such as under $250.
- Where the participant has taken a distribution of amounts that would otherwise need to be moved to the plan's Roth account.

H. The Service should provide for simplification of earnings calculations.

Under the proposed regulations, earnings must be calculated to utilize either the Form W-2 correction or the in-plan Roth conversion correction. Often, the calculation of earnings is a manual process and in certain cases, not administratively feasible. For similar excesses that involve refunds to participants, the regulations provide a safe harbor to calculate earnings that may be utilized to simplify administration, for example, the alternative method under Treas. Reg. §1.401(k)-2(b)(2)(iv)(C). We request that the final regulations provide a rule similar to Treas. Reg. §1.401(k)-2(b)(2)(iv), where a plan may use any reasonable method or instead, use the alternative safe harbor method like that under Treas. Reg. §1.401(k)-2(b)(2)(iv)(C) to calculate applicable earnings for either Form W-2 corrections or in-plan Roth conversion corrections.

II. Comments on Wage Threshold

The proposed regulations provide very helpful guidance on how to determine wages for purposes of the $145,000 threshold. SECURE 2.0 itself is very sparse, simply providing that the threshold is based on wages in the preceding calendar year and based on Code section 3121(a). Our comments in this section address the guidance on the determination of wages.

A. The Service should provide additional guidance or explanation regarding the difference between wages for Social Security and Medicare payroll tax purposes.

The proposed regulations provide that wages are determined by reference to the FICA taxes imposed by Code sections 3101(a) and 3111(a), not sections 3101(b) and 3111(b). In other words, wages are based on those wages that are used to determine Social Security (OASDI) payroll taxes, not Medicare (HI) payroll taxes. The former is generally reported on Box 3 of the Form W-2, and the latter is generally reported on Box 5 of the Form W-2.

The preamble does not explain why the proposed regulations focus on wages for Social Security purposes. We *believe* this may be because there are some state and local government employees whose wages are subject to Medicare taxes, but not Social Security taxes, and thus the Service wanted to provide guidance on whether those employees are subject to the Roth catch-up mandate or not.

But without further explanation or examples, we believe there will be some confusion about the significance of this distinction. For example, it would be helpful if the final regulations, or at least the preamble, explain:

- What significance the distinction between wages as used for purposes of Code sections 3101(a) and 3111(a), versus sections 3101(b) and 3111(b), might have. For example, if certain types of compensation might be captured by one but not the other, that would be helpful for the Service to explain.
- Whether or not a plan administrator can simply rely on Box 3 of Form W-2.
- Whether there are circumstances other than certain state and local government employees where the distinction makes a difference.
- Whether the existence of the wage cap for Social Security taxes (currently $186,000) will have any impact on administration of the wage threshold for the Roth catch-up mandate.[8]

B. The Service should confirm that, until final regulations are effective, a plan may rely on Box 5 of Form W-2 or another reasonable calculation of wages as defined in Code section 3121(a).

Based on the many discussions that SPARK members have had, including with payroll providers, to prepare for the Roth catch-up mandate, we believe most experts were expecting that a plan could refer to either Box 3 of Form W-2 (Social Security wages) or Box 5 of Form W-2 (Medicare wages). After all, both are based on wages as defined in Code section 3121(a), and the most commonly understood difference is the wage cap on Social Security taxes. Notice 2023-62 did not suggest that FICA wages for purposes of Social Security taxes would be the Service's position—it stated that the Service expected to conclude that the Roth catch-up mandate would not apply "in the case of an eligible participant who does not have wages as defined in section 3121(a) (that is, wages for purposes of the Federal Insurance Contributions Act (FICA)) for the preceding calendar year from the employer sponsoring the plan." In short, the position in the proposed regulations was not expected.

Unless and until final regulations are issued, plans should be able to rely on a good faith reasonable interpretation of the statute. Thus, we understand, and ask the Service to confirm in the preamble to the final regulations, that until the final regulations are effective, a plan may rely on Box 5 of Form W-2 or another reasonable calculation of wages as defined in Code section 3121(a).

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[8] We believe that, because the Social Security wage cap is higher than the Roth catch-up mandate, and both are indexed for inflation, the wage cap is unlikely to be relevant unless Congress changes the law. In other words, if an employee is capped at the Social Security wage cap for Box 3 purposes, any wages above the wage cap are irrelevant because the employee is already over the Roth catch-up mandate. But we would appreciate the Service considering this further and either confirming this is the case or explaining when the Social Security wage cap may be relevant.

C. The Service should allow flexibility in the case of affiliated companies with a single paymaster.

The proposed regulations provide that for purposes of the wage threshold, the plan administrator should reference a participant's common law employer without aggregating those wages with the wages from other employers, including employers that participate in the same plan or employers that are treated as a single employer together with the common law employer under Code section 414(b), (c), (m), or (o).

We think that this is an appropriate rule, and we support retaining it in the final regulations. However, we understand that some large employers with multiple affiliates may consolidate their payroll systems into a single "paymaster" and generally track wages on a consolidated basis regardless of which affiliate an employee may be working for. An employee might technically spend some time working "for" one affiliate, and some time working "for" another, but they are paid, and receive a single Form W-2, from one source. In our view, so long as the employee receives a single Form W-2 from a single payroll, the plan administrator should able to rely on the Form W-2 for determining whether an employee is subject to the Roth catch-up mandate. We think this interpretation is consistent with a related provision in the proposed regulations allowing a plan administrator to rely on a timely-filed Form W-2 with respect to the participant.

D. The Service should address the application of the "separate employer" rule in cases where the ADP test is involved.

Example 4 in the proposed regulations explains how to comply with the Roth catch-up mandate when an employee has wages from more than one employer that had adopted the plan. In that example Participant C has wages from Employers F and G in the prior year, but only had wages from Employer F in the prior year in excess of the wage threshold. In that case, Participant C is not required to designate any catch-up contributions as Roth with respect to compensation paid by Employer G (the only compensation received from Participant C in the current year).

This is an easy example since Employer G does not have any wages for the applicable year that are subject to the Roth catch-up requirement. The Service did not include an example, however, involving an employee with some, but not all, wages in the current year that are subject to the Roth catch-up requirement. For example, assume that Participant C only has wages from Employer F in the prior year, which are in excess of the wage threshold. Participant C transfers to Employer G mid-year in the current year. In the case of an ADP failure, if some of Participant C's contributions must be recharacterized as Roth, it is not clear how the plan administrator would "allocate" that recharacterization. It would be helpful for the Service to include an example in the final regulations explaining how to comply in the case of an ADP failure where a participant is subject to the Roth catch-up mandate for only one participating employer but has contributions attributable to wages from more than one participating employer. Similar issues arise for limits that are based on fiscal years that cross two calendar years – i.e., where the participant may be subject to the Roth mandate for only a portion of the plan year.[9]

A number of SPARK members are very concerned with the complexity presented by this situation, and thus request flexibility in dealing with it.

E. The Service should ensure that increases in the wage threshold are announced in advance of the year for which the wage threshold must be tracked.

The $145,000 wage threshold is indexed for increases in the cost-of-living. However, in administering the Roth catch-up mandate, the plan administrator must refer to wages in the preceding calendar year. Thus, similar to the rule for determining highly compensated employees ("HCEs"), the Service will need to announce the Roth catch-up mandate threshold more than a year in advance.

In Notice 2024-80, which addressed the various retirement plan limits for 2025, the Service stated: "The Roth catch-up wage threshold for 2024, which under section 414(v)(7)(A) is used to determine whether an individual's catch-up contributions to an applicable employer plan (other than a plan described in section 408(k) or (p)) for 2025 must be designated Roth contributions, remains $145,000." This suggests that, going forward, the Service will not announce the wage limit for 2025 until late October or November of this year, and that new wage threshold will apply a few months later. This does not give plans sufficient time to prepare employees who might be over the threshold in the next year. Put another way, it appears that we do not know yet what the wage threshold will be in 2025, so we cannot start preparing informing employees who might be close to $145,000 in wages in 2025 whether they might be subject to the mandate in 2026.

Accordingly, we suggest that the Service modify its procedures for issuing updated wage thresholds, namely issuing updated numbers in late October or early November for the wage threshold that goes into effect for the next year, not in the current year. Thus, for example, when the IRS issues its normal cost-of-living update later in 2025, it should provide the wage threshold that applies in 2026 (and not just in 2025), and going forward provide the limit for the upcoming year. Just like the HCE determination, this will give plans and participants sufficient time to prepare.

[9] A similar issue is presented for an employee who has been making mandatory Roth catch-up contributions and then transfers employment to another participating employer for which the employee is not subject to the mandate. We believe the Roth mandate no longer applies, but it is possible that the deemed election to make Roth contributions will not be automatically turned off. It would be helpful to get relief such that any deemed election to contribute Roth may continue until a new determination is made in the following year regarding whether the employee is subject to the mandate.

III. Comments on Plan Design Issues

A. Plans should be allowed to require that all catch-up contributions are made on a Roth basis.

In our prior comments, we recommended that the Service confirm that a plan may require all catch-up contributions to be made as designated Roth contributions, regardless of a participant's wages. In a footnote in the preamble to the proposed regulations, the Service takes the position that a plan may not require all catch-up contributions to be made on a Roth basis. The Service states that such a plan design would be inconsistent with Code section 402A(b)(1), which provides that designated Roth contributions are elected by an employee "in lieu of all or a portion of elective deferrals the employee is otherwise eligible to make."

This is a fairly thin rationale. Code section 402A(b)(1) is simply a provision that defines what the term "qualified Roth contribution program" means. As we noted in our prior comments, Section 603 of SECURE 2.0 requires that, if a plan offers catch-up contributions and has at least one participant who must make catch-up contributions as Roth, the plan must provide that any eligible participant may make Roth catch-up contributions. In other words, Congress included explicit limits on plan design in the statute. Congress did not explicitly prohibit, however, a plan requiring all catch-up contributions to be made on a Roth basis. We do not believe it is appropriate for the Service to create such a rule.

We also think that such a rule could encourage employers to adopt a plan design which is not in the best interests of participants. Under the Service's position, the only way that an employer can avoid having to track the $145,000 threshold – which we believe is going to be somewhat challenging for some employers – is to completely eliminate all catch-up contributions, including pre-tax contributions.

We do not think this is a hypothetical exercise. While we think most employers will want to retain catch-up contributions even given the need to track the wage threshold, some might not. For example, in the case of a plan that has both self-employed participants (who are not subject to the mandate) and common law employees, the plan sponsor may find it unsettling that self-employed participants, who may be very well paid, are treated more favorably. Similarly, if a state or local governmental 457(b) plan allows participation of some employees who participate in Social Security and some who do not, there may be a perception of unfairness. In these cases, the plan sponsor may want to require all catch-up contributions to be Roth so that all employees at similar income levels feel that they are treated the same, and if that option is not available, then it may not offer catch-up contributions to anyone.[10]

In short, we urge the Service to reconsider this position, and state in the final regulations that a plan may be drafted to require all catch-up contributions to be made as designated Roth contributions, regardless of a participant's wages.

[10] This option also allows employers that are not yet equipped to track employees who are below or above the wage threshold to continue to offer catch-up contributions to all employees until the payroll system is in place.

B. The Service should remove the requirement for benefits, rights and features testing.

The proposed regulations confirm that an applicable employer plan may, but is not required to, include a qualified Roth contribution program. In that case, an employee who is subject to the Roth catch-up mandate will not be able to make catch-up contributions, but an employee who is not subject to the mandate can continue to make pre-tax catch-up contributions. We support this interpretation.

The preamble then states that such a plan design could cause an issue under Code section 401(a)(4) with respect to benefits, rights, and features. The Service's explanation for this problem is as follows:

> Because the Roth catch-up wage threshold is slightly lower than the wage threshold used in the definition of highly compensated employee (HCE) under section 414(q)(1)(B), some non-HCEs may be subject to the Roth catch-up requirement. Thus, if a plan that does not include a qualified Roth contribution program prohibits catch-up eligible participants who are subject to the Roth catch-up requirement from making catch-up contributions, while permitting other catch-up eligible participants to make catch-up contributions, then the outcome of the nondiscrimination test with respect to the availability of catch-up contributions performed under § 1.401(a)(4)-4 may be affected.

The solution in the proposed regulations for this problem is to allow a plan to preclude one or more catch-up eligible participants who are HCEs and who are not subject to the Roth catch-up requirement (for example, because they did not receive FICA wages for the preceding year) from making catch-up contributions, if this allows the plan to pass benefits, rights and features testing.

To our mind, this is an unnecessarily complicated solution. The fact that a small number of non-HCEs might be restricted from making catch-up contributions by operation of the wage threshold does not indicate that the plan is inherently discriminating in favor of HCEs. Most if not all HCEs will also be restricted from making catch-up contributions if a plan does not offer designated Roth contributions. The benefits, rights, and features test is a creation of Treasury regulations, and the regulations provide for various other conditions that need not be tested even though they may sometimes benefit HCEs, such as vested percentage, age and service conditions, and loan defaults.[11] This is an example of another such situation that should not require application of a complex test, nor a complex solution, especially because there will be a very small number of individuals whose wages are high enough to put them over the Roth catch-up mandate threshold but who are not HCEs (and vice versa).

Accordingly, we recommend that the final regulations provide that the availability of catch-up contributions may be disregarded for purposes of availability of a benefit, right or feature if the

[11] Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii).

sole reason a participant may not make catch-up contributions is because the plan does not offer Roth contributions and the employee is subject to the Roth catch-up mandate.[12]

C. The Service should confirm that PLESA contributions can be counted towards the Roth catch-up mandate.

If a plan adopts a pension-linked emergency savings account ("PLESA") feature under Code section 402A(e), contributions to a PLESA will generally be made on a Roth basis. Such contributions are treated as designated Roth contributions for most purposes, although they are subject to a few special rules that do not apply to other designated Roth contributions. We believe that PLESA contributions would be counted towards the Roth catch-up contribution mandate, but it would be helpful to have explicit confirmation.

We recognize that highly compensated employees are generally not allowed to contribute to a PLESA, but as the Service notes in the preamble, there are circumstances where a non-highly compensated employee might nonetheless be subject to the Roth catch-up mandate.

IV. Comments on Special Situations

The comments in this section relate to special situations, in particular 457(b) and 403(b) plans and plans qualified under both U.S. and Puerto Rico law ("dual qualified").

A. The Services should include in the final regulations examples illustrating the interaction with the special 457(b) and 403(b) catch-up contribution rules.

There continues to be a significant amount of confusion regarding the interaction between the Roth catch-up mandate and the special catch-up contribution rules that apply to 457(b) and 403(b) plans.

By way of background, certain employees of a qualified organization may contribute an increased dollar amount to a 403(b) plan if they have completed at least 15 years of service with the organization. This special catch-up is the lowest of three amounts:

- $3,000;
- $15,000, reduced by the sum of (a) amounts not included in gross income for prior taxable years by reason of this special 403(b) catch-up and (b) the aggregate amount of designated Roth contributions permitted for prior taxable years by reason of this special 403(b) catch-up; and

[12] However, if the Service does not reconsider its position, we request clarification on how the solution in the proposed regulations is effectuated. For example, it is unclear what a plan should do if it finds that it fails the benefits rights or features test. We request confirmation that a plan could in that case simply refund contributions to HCEs. It is not 100% clear that this could be done, at least via retroactive amendment, because it results in a reduction of benefits.

- \$5,000 multiplied by the employee's years of service with the qualified employer, less all elective deferrals the employee made in prior years to the organization's plans.

In the case of a 457(b) plan, the special catch-up generally works as follows. In the three years ending before the participant's normal retirement age ("NRA") under the plan, the participant can make catch-up contributions each year up to the normal contribution limit, that is, essentially contribute double the regular contribution limit. However, the amount of these catch-up contributions in total cannot exceed any "unused" contributions from prior years. For example, if the participant under-contributed the limit in prior years by \$200,000, then the participant has plenty of "unused" contributions and could contribute double the limit each year (i.e. double the normal \$23,500 limit in 2025). Alternatively, if the participant contributed the maximum contribution in all prior years, except for one year in which the participant contributed \$5,000 less than the maximum for that year, then in the three years before NRA, the participant can only make a total \$5,000 special catch-up.

Prior to enactment of SECURE 2.0, the interaction of these special catch-up rules and the section 414(v) catch-up contribution was fairly straightforward, and addressed in the applicable 403(b) and 457(b) regulations.[13] Congress did not impose the Roth catch-up mandate on these special catch-up contribution rules, so it has been understood that a participant eligible for a special catch-up may always continue to do so on a pre-tax basis.

In the preamble the proposed regulations, the Service addresses this interaction in case of a 457(b) plan:

> Section 603(b)(2) of the SECURE 2.0 Act amends section 457(e)(18)(A)(ii) of the Code and, pursuant to this amendment, a portion of the catch-up contributions made to an eligible governmental 457(b) plan in accordance with section 457(b)(3) and (e)(18) by a catch-up eligible individual for the last three taxable years ending before the individual attains normal retirement age must be designated Roth contributions. The portion that is subject to this Roth requirement is the amount by which the applicable dollar catch-up limit under section 414(v)(2)(B)(i) exceeds the maximum permitted contribution set forth in section 457(b)(3) (determined without regard to section 457(e)(18)).

This explanation is very helpful, although because of the somewhat dense language it has led to some confusion. We understand the Service to be saying that a participant can always make any special 457 catch-up available to that participant (available in the three years prior to normal retirement age) on a pre-tax basis. If, in one of those three years, the section 414(v) catch-up contribution is higher, then the participant can still make any special 457 catch-up contribution left over on a pre-tax basis, but the remainder attributable to the section 414(v) catch-up must be Roth. For example, if in a particular year, a participant (who is subject to the Roth catch-up mandate) is entitled to an extra \$5,000 in special 457 catch-up, and the section 414(v) catch-up

[13] Treas. Reg. §1.403(b)-4(c)(3)(iv); 1.457-4(c)(2).

that year is $7,500, then at least $2,500 of that participant's catch-up must be contributed as Roth, and the rest can be pre-tax or Roth.

We think it would be helpful if the final regulations include some examples illustrating the interaction of the Roth catch-up mandate in the case of a participant who is also eligible for either the special 457(b) catch-up contribution or the special 403(b) catch-up contribution.

B. The Service should confirm that the deemed election and other rules for 401(k) plans apply to 457(b) plans.

The proposed regulations modify the 401(k) and 403(b) regulations to reflect the "deemed" election rule. In contrast, no changes are proposed to the text of the 457(b) regulations. In footnote 5 of the preamble, the Service notes that this is because the regulations that implement the availability of Roth features in 457(b) plans were never themselves finalized. We understand the issue, but it would be helpful for the Service to confirm that, until final regulations under section 457(b) to reflect the inclusion of a qualified Roth contribution program are finalized, section 457(b) plans may nonetheless rely on the "deemed" election rule that is available for 401(k) and 403(b) plans. After all the Roth catch-up mandate is going into effect, whether or not the Service finalizes the 457(b) regulations.

C. The Service should confirm that there is no requirement for Puerto Rico employees in dual-qualified plans to make after-tax contributions.

The proposed regulations address the application of the Roth catch-up mandate with respect to plans that are intended be qualified under both U.S. and Puerto Rico tax codes. Puerto Rico's tax code does not allow for designated Roth contributions, although it does allow catch-up contributions at a different level than U.S. law. The proposed regulations suggest that if a plan does not offer Roth catch-up contributions to participants in Puerto Rico, the plan might violate Code section 414(v)(7)(B).[14] The solution, it appears, offered by the proposed regulations is that a dual qualified plan will be treated as meeting Code section 414(v)(7)(B) if it allows participants who are in such a plan to make after-tax contributions.

A number of SPARK members have expressed some confusion over the implication of this part of the proposed regulations. Some have expressed concern that participants taxed under Puerto Rico law in dual-qualified plan may be effectively forced to make after-tax contributions if they wish to make catch-up contributions allowed by Puerto Rico. Other members believe that the reference to after-tax contributions in the proposed regulations is only there to confirm that a plan subject to U.S. law will not lose its U.S. qualified status because of a violation of Code section 414(v)(7)(B), provided participants taxed under Puerto Rico law are at least offered the right to make after-tax contributions.

[14] Code section 414(v)(7)(B), which was added by SECURE 2.0, states: "In the case of an applicable employer plan with respect to which subparagraph (A) applies to any participant for a plan year, paragraph (1) shall not apply to the plan unless the plan provides that any eligible participant may make the participant's additional elective deferrals as designated Roth contributions."

Put another way, it would be helpful for the Service to confirm that a participant taxed under Puerto Rico law can continue to make catch-up contributions that are pre-tax for Puerto Rico purposes. In short, we think there should be no application of the Roth catch-up mandate in Puerto Rico, as there are already numerous differences in tax treatment and contribution limits between U.S. and Puerto Rico tax codes. Forcing employees taxed in Puerto Rico to make catch-up contributions as after-tax contributions would not be a desirable outcome.

IV. Need for Further Delay and/or Additional Good Faith Relief

We thank the Service for providing for a delay in the Roth catch-up mandate until 2026. The SPARK Institute and its members have been working hard towards implementation. For example, we have held a series of implementation workshops, including most recently a workshop in July 2024, co-hosted by Vanguard, focused solely on the Roth catch-up mandate. This workshop brought together key stakeholders, including retirement plan recordkeepers and payroll providers, and addressed both technical implementation and practical considerations. We addressed the differing responsibilities of payroll versus recordkeeping. We are also working to reconvene recordkeepers and payroll providers to discuss these proposed regulations.

In other words, we want to be very clear that SPARK members have used the additional time wisely to prepare for implementation.

Unfortunately, we must ask the Service to consider a further delay. The main reason for this is how long it took for the Service to release these proposed regulations, and the likelihood that the final regulations will not be released with sufficient time to prepare for 2026, if they are released in 2025 at all. This tight timeframe presents two choices: either implementing the finalized Roth catch-up regulations on a rushed basis, or having to implement the rules twice, once based on the proposed regulations and/or a good faith interpretation of the rules and then again when the final regulations are released.

If the Service is unwilling to grant a further delay, then we recommend the following. First, since we are concerned that some parts of the retirement community are unsure if a further extension will be forthcoming, we recommend the Service make a public statement of its intentions that reflects the position of the new administration.

Second, we ask the Service to consider additional relief for good faith attempts to implement the Roth catch-up mandate in 2026. Third, we recommend that the Service provide additional time for implementation of the final regulations when they are released. For example, the Service has currently proposed to make them effective for taxable years beginning six months after the final regulations are published. This could mean plans, payroll companies, and service providers would implement in 2026 and then, depending on the timing of the final regulations, might be compelled to immediately begin making adjustments to address the final regulations in 2027. Additional time, in that case, would be appropriate and most welcome.

V. Interaction of Sections 117 and 109 of SECURE 2.0 for SIMPLE Plans

Section 109 of SECURE 2.0 provides for an increased contribution limit in the case of a SIMPLE plan for participants age 60 to 63. This limit is $5,250 in 2025.[15]

Section 117 of the SECURE 2.0 Act amends section 414(v)(2) of the Code to increase the applicable dollar catch-up limit under section 414(v)(2)(B)(ii) for SIMPLE plans sponsored by certain eligible employers who are described in section 408(p)(2)(E)(iv). The increased applicable dollar catch-up limit is available automatically to certain employers and applies by election to other employers (who must make additional matching or nonelective contributions).

The proposed regulations do not address, at least not directly, whether an employer with a SIMPLE plan to which section 117 of SECURE 2.0 applies (either automatically or by election) is precluded from choosing to apply the higher limit for those age 60 to 63. We would ask the Service to clarify.

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The SPARK Institute appreciates the opportunity to provide these comments to the Treasury Department and IRS. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley (mlhadley@davis-harman.com), Davis & Harman LLP.

Sincerely,

Tim Rouse
Executive Director

[15] See Notice 2024-80.