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Internal Revenue Service
Washington, DC 20044

RE: Catch-up Contribution Proposed Regulations

To Whom it May Concern:

Ferenczy Benefits Law Center, LLC is a prominent law firm practicing exclusively in the area of employee benefit plans. Our client base ranges from solo plans to employers with 100,000 employees, to third party administrators and large institutions/recordkeepers that support all retirement plan types and sizes. The authors of this letter also provide professional education to other benefits practitioners, with more than 4,000 professionals regularly attending our free webcasts, and we have many subscribers to our books on retirement plan law. This provides us with a unique perspective as to the impact the Catch-up Contribution Rules ("CUC Rules") will have on plan sponsors and their participants, as well as the professional benefits community. We are writing to outline some of the areas that cause us, and our clients, concerns, as well as considerations that we hope can be addressed and clarified in the final CUC regulations.

We appreciate the thoughtful approach the Treasury took in the proposed CUC regulations issued January 13, 2025 (the "Proposed Regs"). They address many of the key questions practitioners have had and provide several areas of valuable insight and flexibility.

We thank the Treasury for providing this comment period in relation to the Proposed Regs. We offer our thoughts with the hope that they will inspire changes to the Proposed Regs that will make it easier for plan sponsors to administer the CUC Rules correctly. We offer our time and availability to the Treasury in the event that it seeks further discussion on any of the points contained herein.

Please note that, for purposes of this letter, we will refer to individuals to whom Code §414(v)(7) applies (i.e., those who have prior year FICA compensation in excess of $145,000, as indexed) as "highly paid individuals" or "HPIs," to distinguish them from highly compensated employees ("HCEs").

Summary of Issues Presented

This comment letter raises the following CUC questions and issues:

In relation to the changes made to Code §414(v)(7) by SECURE 2.0, §603:
Issue #1: Benefits, Rights, and Features Testing in a Non-Roth Plan
Issue #2: Participant Notice Requirement for Roth CUC
Issue #3: Challenges with Roth CUC Corrections
Issue #4: Roth Practices & Procedures

In relation to the changes made to Code §414(v)(2) by SECURE 2.0, §109:
Issue #5: Setting Special Limits for Ages 60-63 CUC

Other:
Issue #6: Issues Impacting Puerto Rican Employees

ISSUES RELATING TO CODE §414(v)(7)

Issue #1
Benefits, Rights, and Features Testing in a Non-Roth Plan

The Proposed Regs provide in Prop. Treas. Reg. §1.414(v)-2(b)(2)(ii) that:

> If an applicable employer plan is described in paragraph (b)(2)(i) of this section [i.e., it does not have a qualified Roth provision], then §1.414(v)-2(b)(2)(ii) does not apply to the plan. As a result, a plan that has one or more highly compensated employees … who are not subject to the Roth catch-up requirement under paragraph (a)(2) may need to preclude one or more of those highly compensated employees from making catch-up contributions to facilitate satisfaction of §1.401(a)(4)-4 with respect to the availability of catch-up contributions.

This section is addressing the fact that the group of HPIs in the plan may embody both HCEs and nonhighly compensated employees ("NHCEs"). If there are NHCEs who are HPIs and are precluded from making CUCs because the plan does not provide for Roth contributions, when HCEs who are not HPIs are not so limited, the specter of a discrimination failure arises.

Treas. Reg. §1.414(v)-1(d)(4) (the "BRF Protection Rule") generally provides that the nondiscrimination in benefits, rights, and features provisions of Treas. Reg. §1.401(a)(4)-4 are not violated because the group of catch-up eligible participants does not satisfy Code §410(b). However, the above quoted language from the Proposed Regs – requiring satisfaction of the nondiscrimination rules when the plan does not offer Roth contributions –would effectively make the BRF Protection Rule inapplicable to a plan that offers CUCs but does not add a Roth feature.

This subparagraph (ii) of Prop. Treas. Reg. §1.414(v)-2(b)(2) seems particularly odd in light of subparagraph (i), which gives relief from the universal availability rule if HPIs are precluded from making CUCs. Subparagraph (i) specifically provides that everyone is still being given an opportunity to make CUCs, but that the limits on the CUCs may vary from participant-to-participant based on their circumstances. Why should this same analysis not apply in the nondiscrimination context?

While it makes sense to offer protections to HPIs subject to the new rules who are not HCEs, the wholesale removal of the BRF Protection Rule leaves a plan open to unintended age-related testing or, even worse, disqualification for discrimination. The practical result of this provision may be that employers will need to choose between providing for a Roth feature they do not want or eliminating CUCs entirely from their plan, which harms any participant over age 50 that would otherwise want to defer additional amounts. The third alternative is to prohibit CUCs by HCEs, thereby disadvantaging those employees in saving for retirement.

We understand the Treasury's concern about a situation in a plan that does not offer Roth contributions in which an NHCE HPI who is otherwise catch-up eligible would be unable to make CUCs, while a sole proprietor or partner, who is an HCE but not an HPI, would be allowed to do so. However, we believe that, if Treasury chooses not to consider CUCs to be currently available to all employees as it would if the BRF Protection Rule applied, nondiscrimination testing in this circumstance should be based on only those who are otherwise able to make CUCs, and not on the entire employee population. This can be effected in one of two ways:

The first option is to apply the current availability rule of Treas. Reg. §1.401(a)(4)-4(b) with reference only to those participants who satisfy the definition of catch-up eligible participant in Treas. Reg. §1.414(v)-1(g)(3).

> Example: Suppose an employer maintains a 401(k) plan that offers CUCs but does not have a Roth feature. All employees of the employer are eligible to participate. Those employees include:

Number of Employees	Classification	HCE	HPI	Age 50+
1	Sole proprietor	Yes	No	Yes
2	Managers	No	Yes	Yes
3	Staff	No	No	Yes
15	Staff	No	No	No

> If nondiscrimination testing was performed using all employees, as is implied by the proposed regulatory language, only 4 of the 20 NHCEs would be able to make CUCs (compared to 100% of the HCEs), and the plan would fail the current availability requirement.

> Under our proposal, the 15 staff members who are not catch-up eligible for the year would be excluded from the test. Thus, 3 of the 5 NHCEs (i.e., 60%) who are age 50+ would be eligible to make catch-up contributions, and the plan would satisfy the current availability requirement.

Under our second possible solution, the age 50 limitation on catch-up contributions can be disregarded, as is permitted under Treas. Reg. §1.401(a)(4)-4(b)(2)(ii) in relation to optional forms of benefit, so that the testing considers all participants, but reflects that CUCs are currently available to anyone who is not an HPI when age is disregarded.

> Example: Using the same facts as in our prior example, but performing the testing using all participants (because we are disregarding the age limitation for CUCs), CUCs are considered to be currently available to 18 of the 20 NHCEs, and the testing is met.

We recommend that *the current availability testing rules in relation to a plan that offers CUCs but not Roth contributions be modified to either exclude from the testing individuals who do not meet the age requirement for CUCs or to disregard the age limitation as permitted for optional forms of benefits in Treas. Reg. §1.401(a)(4)-4(b)(2)(ii).*

Issue #2
Participant Notice Requirement for Roth CUC

The preamble to the Proposed Regs discusses the situation in which a participant has elected to make pre-tax salary deferrals but for whom some amount of the deferrals must be treated as Roth contributions pursuant to Code §414(v)(7). The preamble provides that it is permissible for a plan to contain a deemed Roth provision under which such a participant is automatically treated as if they elected to make Roth contributions to the extent that their deferrals are required to be treated as CUCs. This deemed election provision permits the plan to reclassify the affected pre-tax deferrals to Roth amounts, without further instruction, rather than to refund such amounts to the participant.

The preamble further provides, however, that:

> [I]n accordance with section 414(v)(7)(D), the application of a deemed Roth catch-up election to a participant would be conditioned, under proposed section 1.401(k)-1(f)(5)(iv), on the participant having an effective opportunity (determined on the basis of all relevant facts and circumstances …) to make a new election that is different from the deemed election.

It is unclear from either the Code, Proposed Regs, or the preamble how and when the "effective opportunity" for the new election must be offered. We assume that "effective opportunity" requires some type of notification so that the participant knows that reclassification of the pre-tax deferral may apply to them. There are several possible alternatives under which final regulations or other Treasury guidance may require such an effective opportunity notice be presented:

- <u>Notice to an affected HPI when the need to reclassify arises</u>: The plan administrator may be required, upon discovering that some pre-tax deferrals must be reclassified as CUCs for a participant to whom §414(v)(7) applies, to notify the participant of their right to make a different election and instructions as to how such an election may be made. This notice and election must be made in a timeframe that permits the participant to act before the reclassification occurs.

- Notice to any HPI at the beginning of or during the plan year: The plan administrator may be required to provide all participants to whom §414(v)(7) potentially applies (i.e., those who earned in excess of the applicable dollar amount in the prior taxable year, or those who so earned who have also elected to make pre-tax salary deferrals) with a notice during the applicable plan year, advising them of the deemed election provision and its potential application. Such notice would also provide the means by which an alternate election may be made by the affected participant. Under this option, the notice is generic and will potentially be provided to participants for whom no reclassification will be required or attempted.

- Notice to all HPIs or employees as part of the SPD, deferral election, or other 401(k)-related annual notice: The plan administrator may be permitted to provide a more general notice to all participants, either as part of the normal plan disclosure requirements (e.g., the Summary Plan Description ("SPD") or deferral election form), or perhaps on an annual basis as part of the annual notice requirements, as to the potential for reclassification of pre-tax deferrals for participants to whom §414(v)(7) applies, and of the ability and means for an affected participant to make an alternate election. Again, this generalized notice would be provided to participants who may not be subject to §414(v)(7) or who will not be subject to any special limitation on pre-tax deferrals for the year.

We believe that it is to the benefit of both the affected plan and the participants if the rules favor the retention by the plan of funds contributed to it during the year. We further favor a procedure that provides the least disruption to the plan administration process. We are sensitive to the fact that reclassification of CUCs results in taxable income to the affected participant, but that will occur whether the CUCs are reclassified or distributed. So, participant taxation in such a situation is unavoidable.

However, if the funds are retained in the plan, the participant is better off than if the money was distributed. First, the participant's ultimate retirement income is enhanced because the funds will remain segregated for that purpose and grow on a tax-sheltered basis. Second, if the plan matches deferrals, distribution of the deferrals generally requires either forfeiture or distribution of the related matching contribution. If the deferral is reclassified, the matching contribution is retained. Finally, if the excess amount stays in the plan as a Roth contribution, there is potential for additional tax benefits for the participant if a qualified distribution of the Roth amount is ultimately made.

Permitting the notice to be provided in a generalized fashion in the SPD or the annual notice provides the affected participants with the required information, but in a manner that encourages the reclassification of the excess amount to a CUC. Further, both the provision of the notice and the reclassification are accomplished with minimal disruption to the orderly administration of the plan.

We recommend that *the Treasury adopt the third of the above notice procedures for the provision of "effective opportunity" to the affected participants, i.e., requiring notification through provisions in the SPD, deferral election, and/or annual notice. In this manner, affected* *individuals will be provided with the information they need to elect to obtain a distribution of their excess pre-tax deferrals if they so choose, without creating a new, time-limited administrative procedure. Further, as discussed above, this encourages the result that is in the best interests of the plan and affected participants.*

Issue #3
Challenges with Roth CUC Corrections

1. The Timing of Correction of Failures to Reclassify CUCs as Roth for HPIs

Because reclassification of pre-tax deferrals as Roth will commonly occur after the deferrals are deposited to the plan, corrections typically will be required. It is also likely, if not highly probable, that plan administrators and payroll service providers will inadvertently code CUCs of HPIs incorrectly as pre-tax amounts. The Treasury clearly acknowledges this by including correction options in the Proposed Regs. However, the timing restrictions discussed in the Proposed Regs appear to be very rigid and require action within a very narrow window. It is impractical to believe that all plan sponsors will be able to identify the catch-up failures and/or complete the annual testing no later than January 31 (the deadline for the Form W-2 correction option under the Proposed Regs), 2½ months after the end of the plan year (if triggered by an ADP testing failure), or April 15 (the deadline for in-plan Roth conversions if triggered by the Code §402(g) and/or §401(a)(30) limit being reached). It is likely that many of these CUC failures will not be identified until later, such as during the plan's independent audit for the Form 5500, which normally will not occur until several months later.

The normal correction availability for violations of Code §402(g) ends on April 15 of the year following the year of the failure, so the April 15 deadline for Roth conversion of the CUC is consistent with that deadline. However, the ADP/ACP corrections are permitted to be made under Treas. Reg. §1.401(k)-2 through the end of the following plan year. Pretax deferrals are commonly reclassified as CUCs at such time, once testing is completed. The Proposed Regs, on the other hand, would require HPIs to receive distributions of these reclassified amounts unless they were determined within 2½ months following the affected plan year end. This is inconsistent with common administrative practice and disadvantages HPIs unnecessarily.

Reading the Proposed Regs on their face, if these strict deadlines are missed, then the only resolution is to distribute the CUCs to the participants. This is contrary to one of the general principles of the Employee Plans Compliance Resolution System ("EPCRS"), currently embodied in Revenue Procedure 2021-30, which requires that, where possible, assets should remain in the plan and also provides an extended time (beyond normal deadlines) to correct failures. It is also inconsistent with the language of SECURE 2.0, §305, under which Congress mandated that the Treasury make self-correction more available to plan sponsors. The Proposed Regs restrict the normal broadly available error correction methods and timing, making fixing mistakes and keeping funds in the plan much more difficult, increasing the potential that the relevant amounts will need to be distributed from the plan.

EPCRS also provides correction methods that apply when a plan fails its annual ADP/ACP testing and is not timely corrected. Because of these correction opportunities, the end result of failing to correct an ADP/ACP testing failure by the last day of the following plan year is not the automatic disqualification of the plan. EPCRS permits later correction of eligible inadvertent failures, including an ADP/ACP testing failure, within a reasonable time so that the qualified status of the plan is retained.

The failure to reclassify CUCs as Roth in violation of Code §414(v)(7) should be considered to be an eligible inadvertent failure under EPCRS, particularly in light of the requirement in Prop. Treas. Reg. §1.414(v)-2(c)(3)(i) that the plan have practices and procedures in place at the time of the correction to be able to use the reclassification correction method. All self-correction procedures permitted by EPCRS require as a prerequisite that the employer have practices and procedures designed to facilitate compliance. Furthermore, Treasury should not disregard these EPCRS correction rules in the context of CUC reclassification as Roth. Plan sponsors should be permitted to self-correct this type of failure without any unwarranted time restriction on the use of the in-plan Roth conversion for such a correction. Whether the funds convert to Roth by April 15, or later in the year following the year of failure, the Form 1099-R will be issued in the following January and the IRS will be able to collect the applicable taxes.

We recommend that *the final regulations provide, and EPCRS be modified to permit, the correction of a failure to reclassify CUCs as Roth for HPIs as an eligible inadvertent failure, using the in-plan Roth rollover option, without the time limitations currently present in the Proposed Regs.*

2. <u>The Limitation on a Plan's Correction Methods</u>

Prop. Treas. Reg. §1.414(v)-2(c)(2) provides two different correction methods for a failure to properly classify a CUC as a Roth amount. Section 1.414(v)-2(c)(2)(i) provides in relevant part that "the plan must apply the same correction method for all participants with elective deferrals in excess of the same applicable limit." It is possible that plan sponsors and administrators will have significant problems complying with this provision, particularly with regard to the Form W-2 correction option.

First, it is possible that certain participant-owners of an unincorporated business not currently receiving a Form W-2 will nonetheless be HPIs for a given plan year. This could occur either because they were nonowners and received Form W-2 income in the prior year, or because the form of the business changed from an entity that issues Forms W-2 to owners (such as S-corporations) to a type of entity that does not (such as an LLC taxed as a partnership). Such an individual would not receive a Form W-2 for the year in which they are an HPI. Therefore, a failure to classify their CUC as Roth cannot be corrected via the Form W-2 modification option. If such option must be applied to all participants for whom the failure is discovered before the end of January, the inability to use that method for one participant means that all participants must be corrected using the in-plan Roth rollover method. So, the plan would be precluded from using the Form W-2 modification option for the nonowner HPIs in the same year, requiring the in-plan Roth rollover option to be used for everyone.

Further difficulties occur because the plan administrator may not discover (and then desire to correct) all CUC-related failures at the same time.

> Example: Suppose that a plan administrator believes that it has identified all HPIs whose CUCs must be reclassified in January, and uses the Form W-2 modification option for this reclassification. Suppose further that, when the plan is undergoing its independent audit later in the year, the auditor discovers a missed HPI, and that previously unidentified HPI has CUCs that require reclassification to Roth. The timing of this discovery means it is now too late for the Form W-2 modification option to be used. Would the fact that there is one participant who did not get corrected at the same time and using the same method as the others create a noncompliance problem that could negate the correction for everyone under the Proposed Regs? If so, what would be the effect of that result, and how could the plan administrator resolve that?
>
> If the newly found affected HPI would be required to take distribution of the excess, rather than have the in-plan Roth rollover method used, such HPI is being unfairly disadvantaged due to an error that may not have been theirs, but the plan administrator's. That is a harsh result.

This provision also discourages early correction of a §414(v)(7) failure.

> Example: Suppose an HPI has a pre-tax amount contributed to the plan in August, and the Plan Administrator quickly discovers that the payment exceeds a limit, is a CUC, and should have been funded as a Roth amount. If the Plan Administrator immediately fixes the error by moving the deferral amount from the pre-tax account to the participant's Roth account (making a note to remember to have the Form W-2 properly reflect the Roth contribution), that Plan Administrator has now committed that all later errors related to the same limit must be corrected using the Form W-2 modification method. The plan administrator at that time has no way to know whether this will be possible prior to the January 31 deadline. The likely and unhelpful result is that the plan administrator will purposely wait to make any corrections until after January 31, so that all CUC errors will be corrected using the in-plan Roth rollover method, as is required.

Trying to comply with the consistency requirement will make correction of §414(v)(7) failures difficult, with no real advantage.

We recommend that the consistency requirement of Prop. Treas. Reg. §1.414(v)-2(c)(2)(i) be eliminated from the final regulations, and that the plan administrator be permitted to correct the §414(v)(7) failures in a manner consistent with the timing of their discovery, regardless of the correction method used for other participants with similar issues.

Issue #4
Roth Practices and Procedures

Even the most compliant plan sponsor may experience a need to make corrections under the Proposed Regs, because excess contributions or testing failures that lead to CUCs often cannot be determined until after the plan year end. Therefore, we expect that the corrections outlined in the Proposed Regs will be commonly employed. It is in everyone's best interest to make them widely available to otherwise compliant plans.

The Proposed Regs, however, contain prerequisites to be able to correct such failures that may put their use out of the reach of many plan administrators. In particular, Prop. Treas. Reg. §1.414(v)-2(c)(3) requires that, to be eligible to correct a §414(v)(7) failure by any method other than distribution of the excess deferrals, the plan sponsor or plan administrator must have practices and procedures "designed to result in compliance with section 414(v)(7) at the time the elective deferral is made." This simple phrase presents two problems we hope the final regulations will resolve.

First, what practices and procedures must be adopted to be considered sufficient to meet the "designed to result in compliance with section 414(v)(7)" requirement?

Second, this requirement is more stringent than that needed for correction of other operational failures. The practices and procedures requirement is familiar to practitioners and plan sponsors who have historically taken advantage of the correction options in EPCRS. EPCRS §4.04 permits the self-correction of failures only if the plan sponsor or plan administrator has "established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements." However, this requirement is general in nature. Nothing in EPCRS requires that the policies and procedures established by the plan sponsor or administrator specifically address the area of failure. If such a requirement existed for every qualification requirement, every plan administrator would be required to have procedures that rival the Code and the related regulations and guidance in quantity and quality for every aspect of plan qualification.

Other regulations discuss correction methods without requiring the procedural specificity outlined in the Proposed Regs. In reality, even the well-prepared plan sponsor or plan administrator cannot predict, document, and pre-resolve every potential roadblock to compliance.

The practices and procedures contemplated by the Proposed Regs have stricter requirements. The Proposed Regs first note that these practices and procedures must be designed for compliance explicitly with §414(v)(7). This is far more specific than just overall compliance with the Code. The Proposed Regs further stipulate that the practices and procedures must provide that any elective deferrals by a HPI exceeding the limits of Code §§401(a)(30) or 415(c) be automatically treated as a designated Roth contribution.

We appreciate the Treasury's desire to ensure that plan sponsors and administrators understand their responsibilities vis-à-vis their 401(k) and 403(b) plans. However, the liberal correction structure of EPCRS, particularly since the enactment of §305 of SECURE 2.0, goes a long way in helping employers ensure that their plans are in compliance. We believe that interpreting the requirements for practices and procedures too tightly would contradict the purpose of EPCRS and its current efficiency.

As Treasury is aware, retirement plans are voluntarily provided by employers for nonunionized employees. In addition, a majority of employers in the U.S. are small in size, making the cost of providing retirement benefits high per participant. Provisions like the detailed policies and procedure requirement make administration expensive and difficult for these employers, and are contrary to the intent to encourage employers to make these benefits available to their workers.

We recommend that *Treasury remove the language in Prop. Treas. Reg. §1.414(v)-2(c)(3) requiring explicit CUC policies and procedures from the final regulations. If that is not acceptable, we recommend that the final regulations be detailed as to what features need to be in the practices and procedures, so that compliance obligations are clearly outlined.*

ISSUES RELATING TO CODE §414(v)(2)

Issue #5
Setting Special Limits for Ages 60-63 CUC

Unlike Code §414(v)(7), the Code provisions added by §109 of SECURE 2.0 provide increased benefits to plan participants. In addition, the issues are less complex than those previously discussed in this letter.

The language of Prop. Treas. Reg. §1.414(v)-1(c)(2)(i) (for qualified plans and 403(b) plans) and §1.414(v)-1(c)(2)(ii) (for SIMPLE plans) implies that the increased catch-up limits apply automatically to all applicable plans. Therefore, any plan sponsor that does not want to integrate this position into its plan must affirmatively elect not to do so and reflect that election in writing as a plan provision. In contrast, the basic CUC provision, as per Code §414(v), must be affirmatively elected by the employer in the plan document. We are hoping that the Treasury can confirm that this is the intent of the Proposed Regs language as it appears to be conflicting.

We recommend that *the final regulations clarify that no specific plan language is required to implement the increased catch-up limits for ages 60-63 and that a plan sponsor that does not want to make these increased amounts available must so provide explicitly in the plan.*

We are also interested to know whether a plan sponsor is permitted to modify the terms of the increased CUCs to be more restrictive than the law permits. For example, could a plan be amended to provide that a more restrictive group of ages will have the increased CUCs available to them, such as limiting the provision to individual between ages 60-61? Similarly, could the plan sponsor limit the cap on CUCs to an amount lower than that provided in §414(v)(2)(E), such as 125% of the current CUC limit (as opposed to the available 150%) or to a given dollar amount, such as $10,000 more than the normal CUC limit? (We assume that any such reduced limits must be applied in a nondiscriminatory fashion.)

We recommend that *the final regulations explicitly clarify whether flexibility is available in relation to the increased CUC limit that would enable a plan to provide for fewer participants to be eligible for the increased amounts, or limits on the increase below that permitted by the law. We further recommend that any relief on this issue be incorporated into the universal availability rules of Prop. Treas. Reg. §1.414(v)-1(e)(1)(iii).*

OTHER ISSUE

Issue #6
Issues Impacting Puerto Rican Employees

We appreciate that the Treasury identified certain accommodations for plans that cover Puerto Rican employees, commonly known as dual-qualified plans. In particular, you acknowledge that CUCs under §414(v)(7) must be Roth contributions for HPIs in the U.S., but after-tax contributions for Puerto Rican employees.

It would be helpful, however, if the Treasury would further clarify the application of these rules to employees who move between the mainland and Puerto Rico during the year, thereby being paid part of the year under the U.S. Internal Revenue Code ("USIRC") rules and for part of the year under the Puerto Rico Internal Revenue Code rules. In such instances, how should the plan sponsor handle the increased CUC for individuals ages 60-63? Or, how should the plan sponsor apply the Roth/after-tax requirements to such individuals?

We recommend that *the final regulations outline the applicability of the USIRC rules to the income earned that is treated as U.S. Form W-2 income, and how any limit on CUCs is apportioned between mainland and PR income, so that the limitations can be appropriately applied.*

* * * * *

We thank you again for requesting input from the benefits community on these issues. We look forward to augmented guidance in the future.

Very truly yours,

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