ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

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

Re: RIN 1545-BR11: Notice of Proposed Rulemaking on "Catch-Up Contributions"

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the Notice of Proposed Rulemaking entitled "Catch-Up Contributions" (Proposed Rule or Proposal), issued by the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) on January 13, 2025.[1] ERIC appreciates the guidance the IRS, the Department of the Treasury, and other regulators have provided in connection with the *SECURE 2.0 Act of 2022* (SECURE 2.0), including this Proposal.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

ERIC supported SECURE 2.0, but we recognize that technical implementation of many provisions may be challenging. Section 603, requiring that certain "catch-up" retirement plan contributions be made on a Roth basis, has proven to be one of the most complicated provisions that plans will be asked to implement.

Under Section 603 of the SECURE 2.0 Act, individuals with FICA wages of more than $145,000 in the preceding year from the plan sponsor may only make catch-up contributions on a Roth

[1] 90 Fed. Reg. 2645 (Jan. 13, 2025).

basis. This requirement was set to be effective for taxable years starting on and after December 31, 2023.[2] This provision, while appearing to be straightforward, introduced a lot of administrative complexity, particularly in relation to the determination of the wage requirement. To their credit, Treasury and the IRS recognized this complexity, and issued interim guidance in the form of Notice 2023-62.

Under the Notice, Treasury and IRS provided a two year "administrative transition period" under which catch-up contributions made by a participant subject to the new Roth requirement will be treated as satisfying the law even if the contributions are not designated Roth contributions. That relief is set to expire on December 31, 2025. The Notice also previewed anticipated guidance that IRS and Treasury intended to issue.

In particular, the Notice foreshadowed: (1) the Roth catch-up requirement would not apply for an eligible participant who did not have FICA wages for the preceding calendar year from the employer sponsoring the plan; (2) a plan administrator and an employer would be permitted to treat an election by an eligible participant to make catch-up contributions on a pre-tax basis as an election to make catch-up contributions on a Roth basis (the "deeming" flexibility); and (3) a catch-up eligible participant's FICA wages for the preceding calendar year from one participating employer in an applicable plan maintained by more than one employer would not be aggregated with the participant's FICA wages for the preceding calendar year from another participating employer in the plan for purposes of determining whether the participant's FICA wages exceeded the threshold for the Roth mandate. The Notice also asked for stakeholder input on a number of other questions; ERIC provided comments on this Notice on October 24, 2023.[3]

In general, the guidance in both Notice 2023-62 and the Proposal is helpful and practical. We have identified a few improvements that could be made as the Treasury and IRS consider finalizing these rules.

- **Aggregation Requirements.** Under the statute, whether the Roth catch-up requirement applies to a catch-up eligible participant is based on the amount of the participant's FICA wages for the preceding year from the employer sponsoring the plan.[4] Under the Proposal, the "employer sponsoring the plan" is defined in reference to the employee's common law employer, as under FICA wage determination. [5] The Proposal clarifies that "if there are multiple employers participating in a plan that are treated as a single employer under the controlled group rules, each of the participating employers that is a common law employer would be a separate employer sponsoring the plan."[6] We understand that different employers (and controlled groups) may have complicated payroll systems that do not allow easy disaggregation for these purposes. If finalized, this Proposal could create serious challenges for large companies and plans where employees might work for several different "employers" within the same controlled group. We

[2] Section 603 of SECURE 2.0.
[3] https://www.eric.org/wp-content/uploads/2023/10/ERIC-Comments-SECURE-2-Roth-Catch-up.pdf.
[4] IRC 414(v)(7).
[5] Proposal at 2651.
[6] *Id.* at 2652.

request that the final regulation provide additional flexibility to plans in this situation. For example, the final regulation could provide that the plan may, but is not required to, disaggregate wages by employer for purposes of applying the Roth catch-up requirements.

- **Design Flexibility.** ERIC asked for flexibility for plan sponsors to design their plans in such a way as to minimize plan administration burdens. As part of this, ERIC requested clarification that a plan could require that all catch-up contributions be made on a Roth basis.

> *ERIC supports this proposal and providing plan sponsors with the flexibility to design appropriate programs, including permitting plans with Roth features and those without to limit catch-up contributions to participants who do not trigger the $145,000 earnings threshold, including requiring these employees to make catch-up contributions on a pre-tax basis. Furthermore, IRS should clarify that a plan may require all catch-up contributions be made on a Roth basis. A plan should be permitted to require this even for participants who do not trigger the mandatory threshold of $145,000. Some ERIC members have expressed interest in this option in order to simplify and standardize plan administration. Absent this, it's possible some plans (especially smaller plans) would consider wholly eliminating catch-up contributions, which seems contrary to Congress' manifest intent to encourage retirement savings.*[7]

In the Proposed Rule, the IRS stated that it considered this proposal and *"concluded that, for a participant who is not subject to the Roth catch-up requirement, allowing a plan design that requires all participants' catch-up contributions to be designated Roth contributions would be inconsistent with the language of section 402A(b)(1), which provides that a designated Roth contribution must be elected by an employee "in lieu of all or a portion of elective deferrals the employee is otherwise eligible to make."*[8] We do not agree that the statute commands this result, and we also remain concerned that this creates a disincentive to including catch-up contributions in the first place. Accordingly, IRS should reconsider this position and allow plans to require all participants to make catch-up contributions on a Roth basis in the final rule.

- **Corrections**. Because administration of this provision is likely to be very complex, the importance of the corrections process is magnified. We requested flexibility for our plans in this process, and the Proposed Regulation generally does provide relief. However, the regime of deadlines by which corrections must be made is also unnecessarily complex, depending on the reason why the particular contribution cannot be held on a pre-tax basis.[9] The Treasury and IRS should consider creating a single, lenient deadline for plans to correct errors related to implementation of this new requirement, at least for some additional transition period.

[7] https://www.eric.org/wp-content/uploads/2023/10/ERIC-Comments-SECURE-2-Roth-Catch-up.pdf.
[8] Proposal at 2653 n. 16.
[9] *See id.* at 2654.

Moreover, the requirement for a consistent application of a correction method could be read to preclude the use of both methods for a plan year. If that reading is correct, employers generally would be compelled to use the Form 1099-R method exclusively for fear of missing the deadline for Forms W-2.

Furthermore, under the Proposal, the correction method using the participant's Form W-2 is not available if the participant has already been furnished with the form for a given year. This should be changed to permit amended W-2 forms to be used for corrections.

Finally, IRS/Treasury should confirm that no correction is required where a participant was initially deemed subject to the Roth mandate based on the Form W-2, but the participant's FICA wages are later adjusted to be below the threshold. Absent this clarification, plans might be forced into recharacterizations, which would create needless complexity and costs for plans and participants.

- **Dual-qualified plans**. As the preamble notes, plans subject to the qualification requirements of both Internal Revenue Code section 401(a) and section 1081.01 of the Puerto Rico Code are subject to different rules. Because there are no designated Roth contributions under the Puerto Rico Code, the application of section 603 to employees in of a dual-qualified plan in Puerto Rico is unclear.[10] Under the Proposed Rule, participants who would be otherwise subject to the Roth mandate are instead to make after-tax contributions. Earnings on these contributions do not receive the same favorable tax treatment as earnings on designated Roth contributions. It also does not appear that the statute compels this mandate to apply in this context. Instead, the Proposed Rule should be amended not to require these dual-qualified plans to offer after-tax catch-up contributions for the participants subject to the Puerto Rico Code.

- **Applicability dates.** The final rule generally would apply to contributions in taxable years beginning more than six months after issuance. Plans maintained pursuant to one or more collective bargaining agreements could delay compliance with the final rule until the first taxable year that begins after the date on which the last collective bargaining agreement in effect on December 31, 2025, terminates. However, plans will need to comply with Section 603 beginning in 2026, even if final regulations are not yet issued and effective. Plans are permitted to apply the Proposal for catch-up contributions in tax years beginning after December 31, 2023. Given the complexity of the Proposed Rule, we would ask IRS to release guidance in advance of 2026 expressly allowing plans to comply with a reasonable, good faith interpretation of Section 603 until final rules are effective.

[10] *Id.* at 2650.

Thank you again for the opportunity to comment on this Proposal. This section is highly complex, and rules are not yet finalized, so additional relief is warranted. We look forward to continuing to work with the Treasury Department and the IRS as they implement the provisions of SECURE 2.0.

Sincerely,

Andrew Banducci