

**SUPPORTING STATEMENT
(EE-175-86 and REG-108639-99)**

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 401 (k) of the Internal Revenue Code permits an employee to receive compensation from his employer in cash or put such compensation into an employer's pension plan. These arrangements are referred to as cash or deferred arrangements (CODA's). Amounts which the employee puts into the cash or deferred arrangement are not taxable to the employee until distributed from such arrangement. For most Code purposes, such amounts are treated as employer contributions.

Section 401(k) contain special discrimination tests relating to coverage and contributions/benefits under CODA's. A plan must meet these requirements in order to maintain its qualified tax-exempt status.

The recordkeeping requirement of §1.401(k)-1(e)(8) simply requires the employer to keep records showing compliance with the discrimination requirements of section 401(k).

The amount that highly compensated employees may defer under a CODA is limited by how much nonhighly compensated employees defer. Amounts which exceed the amount that highly compensated employees can defer are referred to as excess contributions.

Section 401(k)(8) of the Internal Revenue Code of 1986 provides that excess contributions may be recharacterized as employee contributions contributed to a pension plan. Thus, such amounts must be included in the employee's income. The Service has decided to permit use of this rule for plan years which begin before January 1, 1987. Since the employee now has additional income, such income must be reported to appropriate persons and institutions just like any other income. This is the reason for the reporting requirements in §1.401(k)-1(f)(3).

If an employer does not correct the excess contributions, there is a ten percent excise tax imposed on such contributions by section 4979 of the Code. Section 4979 also imposes the same tax on excess aggregate contributions (employee contributions and matching

contributions made on behalf of highly compensated employees that exceed the amount permitted under section 401(m)). The reporting requirement in §54.4979-1(a)(3) relates to filing the form for the payment of this tax.

The tax of section 4979 is also imposed on employers who maintain simplified employee pensions (SEP's) to which excess contributions are made. Section 54.4979-1(a)(4) exempts the employer from the tax of section 4979 if certain information is furnished to the employees who have excess contributions. Section 54.4979-1(a)(4)(ii) sets forth this information.

The recordkeeping requirement contained in §1.401(m)-1(c)(2) concerns section 401(m). Section 401(m) of the Code sets forth a nondiscrimination test for employee contributions and matching contributions (contributions made by an employer based upon amounts deferred by an employee under a CODA or amounts which an employee contributes to a plan) similar to the one for CODA's. In addition, other contributions may be used by the employer to help matching contributions and employee contributions meet the requirements of section 401(m). These amounts are qualified nonelective contributions and amounts deferred under a CODA. The recordkeeping requirement of §1.401(m)-1(c)(2) is needed in order for the employer to show compliance with section 401(m) and the regulations under that section.

2. USE OF DATA

The information reported will be used by employees to file their income tax returns and will be used by the Internal Revenue Service to assess the correct amount of tax.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

IRS Publications, Regulations, Notices and Letters are to be electronically enabled on an as practicable basis in accordance with the IRS Reform and Restructuring Act of 1998.

4. EFFORTS TO IDENTIFY DUPLICATION

We have attempted to eliminate duplication within the agency wherever possible.

5. METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR

OTHER SMALL ENTITIES

We have been unable to reduce the burden for small businesses.

6. CONSEQUENCES OF LESS FREQUENT COLLECTION ON FEDERAL PROGRAMS OR POLICY ACTIVITIES

Not applicable.

7. SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH GUIDELINES IN 5 CFR 1320.5(d)(2)

Not applicable.

8. CONSULTATION WITH INDIVIDUALS OUTSIDE OF THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS

A notice of proposed rulemaking (EE-169-78) was published in the **Federal Register** on November 10, 1981 (46 FR 55544). Final regulation were published in the **Federal Register** (EE-175-86 and EE-160-86) on August 8, 1988 (53 FR 29658). At the same time, additional amendments were proposed and published in the **Federal Register** (53 FR 29719). The proposed regulations were modified and published in the **Federal Register** on May 14, 1990 (55 FR 19947). In another notice of proposed rulemaking under 401(a)(4) was published in the **Federal Register** on September 14, 1990 (55 FR 37888). A public hearing was held on the 1988 proposed regulation on March 14, 1989. A public hearing on the May 14, 1990, proposed regulations was held on September 26-28, 1990. Final regulations (EE-175-86,1545-1069) (all these proposed regulations were finalized) were published in the **Federal Register** on August 15, 1991(56 FR 40507). Another notice of proposed rulemaking (REG-108639-99) was published in the **Federal Register** on July 17, 2003 (68 FR 42476).

In response to the **Federal Register** dated July 21, 2009 (74 Fr 35909), we received no comments during the comment period regarding EE-169-78; REG-108639-99.

9. EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS

Not applicable.

10. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

Generally, tax returns and tax return information are confidential as required by 26 USC 6103.

11. JUSTIFICATION OF SENSITIVE QUESTIONS

Not applicable.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

Under §1.401(k)-1(f)(3), employers may correct excess contributions by recharacterizing such amounts as employee contributions and must file Form 1099-R to indicate such change. The burden for this requirement is being reflected on Form 1099-R.

Under §1.401(k)-1(e)(8), employers must maintain records to demonstrate compliance with the nondiscrimination requirements of section 401(k). We estimate that there are 25,000 employers subject to this requirement and that it will take each of them three hours annually to develop the required records. This will result in a total annual record-keeping burden of 75,000 hours.

Under §1.401(k)-1(f)(3)(ii), employers may correct excess contributions by recharacterizing such amounts as employee contributions and must file certain forms to indicate such change. We estimate that 4,500 employers will be subject to this requirement and that it will take each employer two hours to file such forms. Therefore, we estimate the total reporting burden for recharacterization to be 9,000 hours. The forms which will be filed are a W-2 and a W-2C.

Under §1.401(m)-1(c)(2), employers must keep records to demonstrate compliance with section 401(m) and the applicable regulations. We estimate that 325,000 employers will be subject to this requirement and the annual burden for each will be three hours. Therefore, the total recordkeeping burden will be 975,000 hours annually.

Under section 4979, employers must pay a 10 percent excise tax on excess contributions and excess aggregate contributions if such contributions are not corrected by a certain date. The form used to report this tax is Form 5330. The burden for this requirement has already been accounted for on Form 5330.

The tax of section 4979 will not be imposed on employers who maintain SEP's to which excess contributions are made if certain information is furnished to employees who have made excess contributions. This rule and information required to be furnished to affected employees is in §54.4979-1(a)(4). We estimate that 1,000 employers will want to use these rules and that it will take each employer one hour annually to perform the calculations and notify affected employees. Therefore the total reporting burden is 1,000 hours.

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

As suggested by OMB, our **Federal Register** Notice dated July 21, 2009, requested public comments on estimates of cost burden that are not captured in the estimates of burden hours, i.e., estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. However, we did not receive any responses from taxpayers on this subject. As a result, estimates of these cost burdens are not available at this time.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

Not applicable

15. REASONS FOR CHANGE IN BURDEN

There is no change in the paperwork burden previously approved by OMB. We are making this submission to renew the OMB approval.

16. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

Not applicable.

17. REASONS WHY DISPLAYING THE OMB EXPIRATION DATE IS INAPPROPRIATE

We believe that displaying the OMB expiration date is inappropriate because it could cause confusion by leading taxpayers to believe that the regulation sunsets as of the expiration date. Taxpayers are not likely to be aware that the Service intends to request renewal of the

OMB approval and obtain a new expiration date before the old one expires.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT ON OMB FORM 83-I

Not applicable.

Note: The following paragraph applies to all of the collections of information in this submission:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.