

**SUPPORTING STATEMENT  
(REG-108639-99)**

**1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION**

The final regulations provide new comprehensive requirements for cash or deferred arrangements under section 401(k) and matching and employee contributions under section 401(m). The final regulations update the existing final regulations published in 1991 for statutory changes and incorporate guidance issued since 1991. Accordingly, the reporting and recordkeeping requirements for the following projects, previously approved by OMB, are being combined under this supporting statement: Notices 98-1, 98-52, 2000-3 and existing final regulations under sections 401(k) and (m).

Section 401(k) of the Internal Revenue Code (Code) permits certain qualified plans to contain a cash or deferred arrangement (CODA) under which an employee can elect to receive an amount in cash or have the employer make a contribution of such amount to the qualified plan maintaining the CODA. Amounts which the employee puts into the cash or deferred arrangement are not taxable to the employee until distributed from the qualified plan. For most purposes under the Code, such amounts are treated as employer contributions.

Section 401(k)(3) contains special discrimination tests relating to coverage and contributions under CODAs. A plan containing a CODA must meet these requirements in order to maintain its qualified tax-exempt status.

In general, the amount that highly compensated employees may defer under a CODA in a given plan year is limited by how much non-highly compensated employees defer in the prior plan year (prior year testing). Plans may also test for nondiscrimination by using amounts non-highly compensated employees defer in the current year (current year testing). Amounts which exceed the amount that highly compensated employees can defer are referred to as excess contributions.

Section 401(k)(12) and section 401(m)(11) provide alternate safe harbor methods of satisfying the nondiscrimination tests of section 401(k)(3) and 401(m)(2). In order to take advantage of these methods, plan sponsors must amend their plans and must provide plan participants with written notices describing the benefits available under the plan.

Section 401(k)(8) of the Code 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. 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)-2(b)(3).

Under sections 401(k)(12) and 401(m)(11), plans containing a CODA or providing for matching or employee contributions may use the design-based safe harbors contained in these sections to satisfy the nondiscrimination requirements of the ADP or ACP tests. The safe harbor rules permit plans to satisfy the nondiscrimination requirements by meeting the contribution and notice requirements of sections 401(k)(12) or 401(m)(11) without being required to perform the complex mathematical comparisons required by the ADP and ACP tests. This safe harbor method of compliance is particularly attractive to small businesses as a way to avoid the expense of ADP/ACP testing.

Sections 401(k)(12)(D) and 401(m)(11)(A)(ii) require that certain notices be provided to eligible participants in safe harbor plans to apprise them of their rights and obligations under the plans.

Section 401(k)(2)(B)(IV) permits withdrawals from a 401(k) plan on account of hardship of the employee in certain cases. Section 1.401(k)-1(d)(iv) of the proposed regulations permits an employer to rely on an employee's written representation that an immediate and heavy financial need cannot reasonably be relieved from certain sources listed in the regulation.

## **2. USE OF DATA**

The collections of information contained in "1.401(k)-3(d), 1.401(k)-3(f), 1.401(k)-3(g), 1.401(k)-4(d)(3), 1.401(m)-3(e), 1.401(m)-3(g), 1.401(m)-3(h) and 1.401(k)-4 are required by the IRS to comply with requirements of sections 401(k)(12)(D) and 401(m)(11)(A)(ii) regarding notices that must be provided to eligible participants to apprise them of their rights and obligations under certain plans. This information will be used by participants to determine whether to participate in the plan, and by the IRS to confirm that the plan complies with applicable qualification requirements to avoid adverse tax consequences. The information required by '1.401(k)-2(b)(3) will be used by employees to file their income tax returns and by the Internal Revenue Service to assess the correct amount of tax. The information provided under '1.401(k)-1(d)(3)(iii)(C) will be used by employers in determining whether to make hardship distributions to participants.

## **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

### REG-108639-99

The notice of proposed rulemaking was published in the **Federal Register** on July 17, 2003, and a public hearing was held on November 12, 2003, in response to written comments and requests for a hearing.

In response to the **Federal Register Notice** dated March 29, 2010 (75 FR 15492), we received no comments during the comment period regarding REG-108639-99.

### EE-175-86

A notice of proposed rulemaking was published in the **Federal Register** on November 10, 1981 (46 FR 55544). Final regulation was published in the **Federal Register** 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 on May 14, 1990 (55 FR 19947). Another notice of proposed rulemaking under 401(a)(4) was published in the **Federal Register** on September 14, 1990 (55 FR 37888). Additional guidance was needed and another set of proposed regulations was published in the **Federal Register** on September 14, 1990 (55 FR 37888). A public hearing was held on the 1988 proposed regulations on March 14, 1989. A public hearing on the May 14, 1990, proposed regulations was held on September 26-28, 1990. Final regulations (encompassing all of these proposed regulations) were published in the **Federal Register** on August 15, 1991 (56 FR 40507).

In these regulations, we inadvertently neglected to include all of the paperwork requirements. We are adding new existing requirements under sections 1.401(k)-1(d)(3)(iii)(C), 1.401(k)-2(b)(3), 1.401(k)-4, and 1.401(k)-4(d)(3).

### Notice 2000-3

Notice 2000-3 was published in the **Internal Revenue Bulletin** on January 6, 2000 (2000-4 IRB 413).

**Notice 98-52**

Notice 98-52 was published in the **Internal Revenue Bulletin** on November 16, 1998 (1998-46 IRB 16).

**Notice 98-1**

Notice 98-1 was published in the **Internal Revenue Bulletin** on January 20, 1998 (1998-3 IRB 42).

**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**

In determining whether to make a hardship distribution, section 1.401(k)-1(d)(3)(iii)(C) of the final regulations permits an employer to rely on an employee's written representation that an immediate and heavy financial need cannot reasonably be relieved from certain sources listed in the regulation. We estimate that 5,000 employees will make these written representations and that it will take each employee 30 minutes to complete. Therefore, we estimate the total reporting burden for this provision to be 2,500 hours. This is a new existing requirement.

Under '1.401(k)-2(b)(3), employers may correct excess contributions by recharacterizing such amounts as employee contributions and must file certain forms to indicate this 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. This is a new existing requirement.

Sections 1.401(k)-1(e)(8) and 1.401(m)-1(c)(2) of the existing final regulations

require an employer to keep records showing compliance with the nondiscrimination requirements of section 401(k)(3). We estimate that there are 175,000 employers subject to each of these requirements and that it will take each employer 3 hours annually to develop the required records for each requirement. This will result in a total annual record keeping burden of 1,050,000 hours. The burden for this requirement is covered under EE-175-86, which is approved by OMB 1545-1069.

The final regulations eliminate this separate record keeping requirement. However, employers must still maintain records to establish compliance with the requirements of section 401(k) and 401(m) and the accompanying regulations under the general record keeping requirements of section 6001. When the regulations are finalized, the burden for this requirement is covered under 26 CFR 31.6001-1, which is approved OMB number 1545-0798.

An employer wishing to take advantage of the guidance concerning safe harbor section 401(k) or 401(m) plans provided in sections 1.401(k)-3 or 401(m)-3 must amend an existing plan or draft a new retirement plan containing applicable language. We estimate that 6,000 employers will make such amendments annually. The estimated burden per respondent for this requirement is 20 minutes, for a total estimated burden of 2,000 hours annually. The burden for this requirement is covered under Notice 2000-3, which is approved by OMB 1545-1669.

An employer maintaining a section 401(k) or 401(m) plan that uses the safe harbor provisions to satisfy the ADP/ACP tests must annually provide eligible employees a notice apprising them of their rights and obligations under the plan. Guidance on these statutory requirements is contained in "1.401(k)-3(d) and 1.401(m)-3(e) of the proposed regulations. We estimate that 60,000 employers will provide the notices required under the statute. The estimated annual burden per respondent is 1 hour, for a total estimated burden of 60,000 hours. This burden for this requirement is covered under Notice 98-52, which is approved by OMB 1545-1624.

The guidance provided at sections 1.401(k)-3(f) and 1.401(m)-3(g) can be used by an employer greater flexibility in adopting safe harbor plan after the first day of a plan year but no later than 30 days before the end of the plan year. One condition is that the plan provide contingent and follow-up notices to plan participants as provided in section 1.401(k)-3(f)(2) and (3). We estimate that 6,000 employers will take these actions annually. The estimated burden per respondent is 1 hour, for a total estimated burden of 6,000 hours. The burden for this requirement is covered under Notice 2000-3, which is approved by OMB 1545-1669.

The guidance provided at sections 1.401(k)-3(g) and 1.401(m)-3(h) can be used by an employer amending a safe harbor plan to reduce or suspend the safe harbor

matching contributions on future elective contributions by providing a supplemental written notice in accordance with section 1.401(k)-3(g)(2). We estimate that 6,000 employers will provide these notices annually. The estimated burden per respondent is 1 hour, for a total estimated burden of 6,000 hours. This is a new requirement.

An employer adopting a SIMPLE 401(k) plan under the guidance provided in section 1.401(k)-4 must amend an existing plan or draft a new retirement plan to contain applicable language satisfying the requirements of section 1.401(k)-4. We estimate that 500 employers will make such amendments annually. The estimated burden per respondent for this requirement is 1 hour, for a total estimated burden of 500 hours annually. This is a new existing requirement.

An employer maintaining a SIMPLE 401(k) plan must satisfy the annual notice to employees' requirement of section 1.401(k)-4(d)(3). We estimate that 500 employers will provide the annual notice required under this provision. The estimated annual burden per respondent is 1 hour, for a total estimated burden of 500 hours. This is a new existing requirement.

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 March 29, 2010, 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 response from taxpayers on this subject. As a result, estimates of the cost burdens are not available at this time.

**14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT**

Not applicable.

**15. REASONS FOR CHANGE IN BURDEN**

Not applicable.

**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 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.