

SUPPORTING STATEMENT NOTICE 2008-113

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 409A generally provides that unless certain requirements are met, amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A(a)(1)(A)(i) provides that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet the requirements of § 409A(a)(2), (3) or (4), all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A(a)(1)(B)(i)(I) provides that if compensation is required to be included in gross income under § 409A(a)(1)(A), the tax imposed on such income is increased by the sum of two additional taxes equal to the amount of interest determined under § 409A(a)(1)(B)(ii) plus an amount equal to 20% of the compensation which is required to be included in gross income. Similar tax consequences apply under § 409A(b)(5) if the requirements of § 409A(b) are not met.

The Treasury Department and the Service recognize that in certain cases, unintentional operational errors in complying with § 409A may occur which would result in income inclusion and additional tax for the service provider. This Notice provides guidance on correcting certain unintentional operational errors. This Notice sets forth the information needed by the Service to ensure that the affected service providers and service recipients have complied with the terms of the Notice.

This notice expands upon, and supersedes, the guidance provided in Notice 2007-100, generally by expanding the types of unintentional operational errors that may be corrected and are eligible for relief. The notice continues the relief provided in Notice 2007-100 allowing corrections during the service provider's same taxable year in which the failure occurred. The notice also makes permanent the relief provided in Notice 2007-100 providing limited relief for failures that involve only limited amounts. The notice expands upon Notice 2007-100 by permitting taxpayers that are not insiders with respect to the service recipient (as defined in the notice) to correct a failure during the year immediately following the year of the failure. The notice also expands upon Notice 2007-100 by providing limited relief for failures that are not corrected by the applicable deadline and involve amounts greater than the prescribed limited amounts, but are corrected before the end of the second taxable year following the year of the failure.

2. USE OF DATA

The information will be used by the Service to determine whether the taxpayers claiming the relief set forth in the Notice were eligible for the relief and that the relevant requirements were met.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

Taxpayers will be able to file the required information electronically if they file their federal income tax returns electronically. Service recipients may use electronic means (such as email) to provide required information to service providers.

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

Not applicable.

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

Not applicable.

7. SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH THE 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

On December 3, 2007, the Treasury Department and the IRS issued Notice 2007–100, 2007–52 I.R.B. 1243, setting forth guidance permitting the correction of certain operational failures, and providing transition relief limiting the amount includible in income under § 409A(a) for certain operational failures involving limited amounts. Notice 2007–100 also described potential guidance that would limit the amount includible in income under § 409A(a) for certain operational failures involving amounts that exceeded the limit. Comments were requested with respect to all aspects of the notice. The Treasury Department and the IRS have reviewed all of the comments submitted, and are issuing this notice as a successor to Notice 2007–100. This notice incorporates, clarifies and expands upon the guidance provided in Notice 2007–100, and accordingly Notice 2007–100 is obsolete. For further information, see § X of this notice.

In response to the **Federal Register notice dated March 7, 2011 (76 FR 12415)**, we received no comments during the comment period regarding this notice.

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

Not applicable.

10. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

Submissions under this revenue procedure notice are considered tax returns and tax return information, which are confidential as required by 26 U.S.C. § 6103.

11. JUSTIFICATION OF SENSITIVE QUESTIONS

Not applicable.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

Section IX of the notice requires the service recipient to attach a statement to its timely-filed federal income tax return providing certain information regarding the operational failure of the nonqualified deferred compensation plan to comply with § 409A(a). In addition, the service recipient must furnish certain information to the affected service providers. In the case of operation failures described in §§ V, VI, VII or VIII of the notice, the service provider must also attach a statement to his or her timely filed return.

The total estimated average annual burden is .5 hours on 10,000 respondents for a total of 5,000 hours annually.

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 7, 2011 (76 FR 12415)**, 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

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 leading taxpayers to believe that the notice will sunset as of the expiration date. Taxpayers are not likely to be aware that the Service may 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 FOPM 83-I

Not applicable.

Note: The following paragraph applies to all 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 the 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.