

SUPPORTING STATEMENT

OMB No. 1545-1669

(REG-108639-99), (TD 9169-Final) Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m)

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 these proposed regulations are contained in §§1.401(k)-1(d)(3)(iii)(C), 1.401(k)-2(b)(3), 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) and 1.401(m)-3(h).

The information required by §§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

Consequences of less frequent collection on federal programs or policy activities could result in an increase in taxpayers filing inaccurate tax returns and IRS not confirming qualified plan that complies with applicable qualification requirements to avoid adverse tax consequences.

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

There are no special circumstances requiring data collection to be inconsistent with Guidelines in 5 CFR 1320.5(d)(2).

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

We received no comments during the comment period in response to the *Federal Register* notice dated September 26, 2016 (81 FR 66127).

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

No payment or gift has been provided to any respondents.

10. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

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

1. JUSTIFICATION OF SENSITIVE QUESTIONS

No personally identifiable information (PII) is collected .

2. ESTIMATED BURDEN OF INFORMATION COLLECTION

The collections of information contained in these proposed regulations are contained in §§1.401(k)-1(d)(3)(iii)(C), 1.401(k)-2(b)(3), 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) and 1.401(m)-3(h) .

The information required by §§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.

The burden estimates are as follows:

Documents	Estimated number of Respondents	Estimated burden/per/respondents	Estimated Annual Burden Hours	
REG-108639-99 and	22,500	1hour 10 minutes.	26,500	
Notice 98-52	60,000	1 hour 20 minutes	80,000	
TD 9169	82,500	Varies 0.33 to 2.5 hours	106,500	

*** Notice 98-52 was previously consolidated with this collection under the final regulations and OMB No. 1545-1624 was discontinued; however the burden estimates were omitted.

3. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

There are no capital/start-up or ongoing operation/ maintenance cost associated with this information collection.

4. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

There is no estimated annualized cost to the federal government.

15. REASONS FOR CHANGE IN BURDEN

The burden estimates from Notice 98-52 were not included in the consolidated ICR previously approved by OMB, which caused an increase in responses by 60,000 and an increase in burden by 80,000 hours.

16. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

There are no plans for tabulation, statistical analysis and publication.

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

There are no exceptions to the certification statement.

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.