

## SUPPORTING STATEMENT

Internal Revenue Service

T. D. 8537 (final)

Carryover of Passive Activity Losses and Credits and At Risk Losses to Bankruptcy Estates of  
Individuals

OMB Control No. 1545-1375

### 1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

The regulations provide rules relating to the application of carryover of passive activity losses and “at risk” losses to the bankruptcy estates of individuals. The regulations were amended to designate additional attributes that pass from the debtor to the bankruptcy estate under section 1398(g) of the Internal Revenue Code and that, upon termination of the estate, pass from the bankruptcy estate to the debtor under section 1398(i). Section 1398 was added to the Code by the Bankruptcy Tax Act of 1980 (Pub. L. 96-589), and was amended by the Tax Reform Act of 1986 (Pub. L. 99-514).

These regulations affect individual taxpayers who file bankruptcy petitions under chapter 7 or chapter 11 of title 11 of the United States Code and have passive activity losses and credits under section 469 or losses under section 465.

### 2. USE OF DATA

The provisions of §§1.1398-1 and 1.1398-2 are effective for bankruptcy cases commencing on or after November 9, 1992. For cases commenced before November 9, 1992, the regulations apply only if a joint election is made by the debtor and the estate. In cases under chapter 7, the election shall be valid only with the written consent of the bankruptcy trustee. In cases under chapter 11, the election is valid only if it is made as part of a bankruptcy plan that is confirmed by the court or into an order of the court.

On any returns affected by the election, the debtor and the estate must place the words “ELECTION PURSUANT TO SECTION §1.1398-1” or “ELECTION PURSUANT TO §1.1398-2” on the first page of the return. These requirements are necessary to ensure that the debtor and the estate are treating the debtor's passive activity loss and credit and any “at risk” losses under section 465 in a consistent manner and provides the Internal Revenue Service adequate notice that an election has been made.

### 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. The proposed regulations permit public notice to be published on a website. Electronic filing of the election is not currently available due to the low number of filers. IRS has determined that the relatively low volume does not justify the cost of electronic enabling.

4. EFFORTS TO IDENTIFY DUPLICATION

The information obtained through this collection is unique and is not already available for use or adaptation from another source.

5. METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR OTHER SMALL ENTITIES

There is no burden on small businesses or entities by this collection due to the inapplicability of the authorizing statute to this type of entity.

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

Consequences of less frequent collection of recordkeeping on federal programs or policy activities would delay the necessary requirements to validate an election provided under section 1398 of the code; thereby endangering the IRS the inability to meet its mission.

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).

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

Periodic meetings are held between IRS personnel and representatives of the American Bar Association, the National Society of Public Accountants, the American Institute of Certified Public Accountants, and other professional groups to discuss tax law and tax forms. During these meetings, there is an opportunity for those attending to make comments regarding TD 8537.

We received no comments during the comment period in response to the *Federal Register* notice dated October 02, 2017, (82 FR 45949).

9. 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.

11. JUSTIFICATION OF SENSITIVE QUESTIONS

No personally identifiable information (PII) is collected.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

Sections 1.1398-1(f) and -2(f) of the regulations provide for a joint election to have these regulations apply to cases commenced prior to the date of publication and that remain open within the meaning of section 350 of title 11 of the United States Code if, in a chapter 7 case, the trustee consents to the election in writing, or in a chapter 11 case, the election is made a part of the plan or reorganization or pursuant to an order of the court.

Additionally, the words “ELECTION PURSUANT TO SECTION §1.1398-1” or “ELECTION PURSUANT TO SECTION §1.1398-2” must be placed prominently on the first page of any return of the debtor and the estate to which the election applies.

Burden estimate as follows:

| Authority              | Document | # Respondents | # Responses Per Respondent | Annual Responses | Hours Per Response | Total Burden |
|------------------------|----------|---------------|----------------------------|------------------|--------------------|--------------|
| §1.1398-1 and 1.3198-2 | TD 8537  | 500           | 1                          | 500              | 12min. (.20 hrs.)  | 100          |

13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

To ensure more accuracy and consistency across its information collections, IRS is currently in the process of revising the methodology it uses to estimate burden and costs. Once this methodology is complete, IRS will update this information collection to reflect a more precise estimate of burden and costs.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

To ensure more accuracy and consistency across its information collections, IRS is currently in the process of revising the methodology it uses to estimate burden and costs. Once this methodology is complete, IRS will update this information collection to reflect

a more precise estimate of burden and costs.

15. REASONS FOR CHANGE IN BURDEN

There is no change in the paperwork burden previously approved by OMB. We are making this submission for renewal purposes only.

This regulation is submitted for renewal purposes.

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

IRS believes 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 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.