

any employee that do not exceed 4% of compensation.

Proposed Effective Date

The regulations are proposed to apply for plan years beginning no sooner than 12 months after publication of final regulations in the **Federal Register**. However, it is anticipated that the preamble for the final regulations will permit plan sponsors to implement the final regulations for the first plan year beginning after publication of final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the conclusion that few plans containing qualified CODAs will correct excess contributions through the recharacterization of these amounts as employee contributions under § 1.401(k)-2(b)(3) of these proposed regulations. The collections of information contained in §§ 1.401(k)-3(d), (f) and 1.401(m)-3(e) are required by statutory provisions. However, the IRS has considered alternatives that would lessen the impact of these statutory requirements on small entities and has requested comments on the use of electronic media to satisfy these notice requirements. Thus, the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. In addition to the other requests for comments set forth in this document, the IRS and Treasury also request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will

be available for public inspection and copying.

A public hearing has been scheduled for November 12, 2003, at 10 a.m. in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue, NW., entrance, located between 10th and 12th Streets, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by October 22, 2003.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are R. Lisa Mojiri-Azad and John T. Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805
26 U.S.C. 401(m)(9) * * *

Par. 2. Sections 1.401(k)-0 and 1.401(k)-1 are revised, and §§ 1.401(k)-

2 through 1.401(k)-6 are added to read as follows:

§ 1.401(k)-0 Table of contents.

This section contains first a list of section headings and then a list of the paragraphs in each section in §§ 1.401(k)-1 through 1.401(k)-6.

List of Sections

- § 1.401(k)-1 Certain cash or deferred arrangements.
- § 1.401(k)-2 ADP test.
- § 1.401(k)-3 Safe harbor requirements.
- § 1.401(k)-4 SIMPLE 401(k) plan requirements.
- § 1.401(k)-5 Special rules for mergers, acquisitions and similar events. [Reserved].
- § 1.401(k)-6 Definitions.

List of Paragraphs

- § 1.401(k)-1 *Certain cash or deferred arrangements.*
 - (a) General rules.
 - (1) Certain plans permitted to include cash or deferred arrangements.
 - (2) Rules applicable to cash or deferred arrangements generally.
 - (i) Definition of cash or deferred arrangement.
 - (ii) Treatment of after-tax employee contributions.
 - (iii) Treatment of ESOP dividend election.
 - (iv) Treatment of elective contributions as plan assets.
 - (3) Rules applicable to cash or deferred elections generally.
 - (i) Definition of cash or deferred election.
 - (ii) Automatic enrollment.
 - (iii) Rules related to timing.
 - (A) Requirement that amounts not be currently available.
 - (B) Contribution may not precede election.
 - (iv) Current availability defined.
 - (v) Certain one-time elections not treated as cash or deferred elections.
 - (vi) Tax treatment of employees.
 - (vii) Examples.
 - (4) Rules applicable to qualified cash or deferred arrangements.
 - (i) Definition of qualified cash or deferred arrangement.
 - (ii) Treatment of elective contributions as employer contributions.
 - (iii) Tax treatment of employees.
 - (iv) Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement.
 - (A) Exclusive means of amounts testing.
 - (B) Testing benefits, rights and features.
 - (C) Minimum coverage requirement.
 - (5) Rules applicable to nonqualified cash or deferred arrangements.
 - (i) Definition of nonqualified cash or deferred arrangement.
 - (ii) Treatment of elective contributions as nonelective contributions.
 - (iii) Tax treatment of employees.
 - (iv) Qualification of plan that includes a nonqualified cash or deferred arrangement.
 - (A) In general.
 - (B) Application of section 401(a)(4) to certain plans.
 - (v) Example.
 - (6) Rules applicable to cash or deferred arrangements of self-employed individuals.