

**SUPPORTING STATEMENT**  
**Notice 98-52 and REG-108639-99**

**1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION**

This notice and subsequent regulations are needed to provide guidance to plan administrators, plan sponsors, etc., to implement changes to section 401(k) and section 401(m) of the Internal Revenue Code (the "Code") that were made by section 1433 of the Small Business Job Protection Act of 1996 ("SBJPA"), Pub. L. No. 104-188.

The changes pertain to the safe harbor provisions in the instance of the actual deferral percentage (ADP) and actual contribution percentage (ACP) tests of section 401(k)(3) and section 401(m)(2) of the Code.

To implement the changes, plan sponsors must amend their plans to reflect the new law and must provide plan participants with an annual notice describing the benefits available under the plan.

**2. USE OF DATA**

The data will be used by the Service to determine whether a determination letter should be issued with respect to the acceptability of the proposed plan amendment.

The notification requirement is required by the statute to ensure that employees are apprised of their rights under the plan.

**3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN**

We have no plans to offer electronic filing. 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 ENTITIES**

This notice was the result of changes in the law enacted by SBJPA. In its guidance, the notice states that an adopting employer, such as, a small business, may use the safe harbors to satisfy the ADP and ACP tests without incurring the time and expense of actually performing these tests. Current law requires that employers maintaining section 401(k) plans must annually compare the average deferrals by nonhighly compensated employees with the average deferrals by highly compensated employees. If the averages do not satisfy certain mathematical criteria, the employer must make corrections to bring the averages in line. A similar test must be performed annually for plans that provide for employer matching contributions. Under the safe harbor provisions, these ADP and ACP tests do not have to be performed, provided the employer meets certain contribution and notification requirements.

**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 THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS**

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

A notice of proposed rulemaking was published in the Federal Register on July 17, 2003 (68 FR 42476). On November 12, 2003, a public hearing was held on the proposed regulations. After consideration of the comments, these final regulations adopt the provisions of the proposed regulations with certain modifications. The final regulations were published in the Federal Register on December 29, 2004 (69 FR 78144). These final regulations will be effective for plan years that begin on

or after January 1, 2006.

We received no comments during the comment period in response to the Federal Register Notice (72 FR 59594), dated October 22, 2007.

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

Not applicable.

10. **ASSURANCE OF CONFIDENTIALITY OF RESPONSES**

Submissions for determination letters, etc., under this notice may be considered tax returns and tax return information that are confidential as required by 26 U.S.C. § 6103. In general, certain matters relating to taxability and deductibility are disclosable under 26 U.S.C. § 6110.

11. **JUSTIFICATION OF SENSITIVE QUESTIONS**

Not applicable.

12. **ESTIMATED BURDEN OF INFORMATION COLLECTION**

The notice involves two types of information collection.

**Section V.C**

Under the statute, section 401(k)(12)(D), an employer maintaining a section 401(k) plan that uses the safe harbor provisions to satisfy the ADP or ACP test must annually provide eligible employees a notice apprising them of their benefits and obligations under the plan.

We estimate that 60,000 employers will provide the notice required under the statute. The estimated annual burden per respondent is 1 hour, for a total estimated burden of 60,000 hours.

**Section XI**

An employer wishing to take advantage of the safe harbor provisions must either amend an existing plan or draft a new plan containing the safe harbor provisions.

**We estimate that 60,000 employers will use the safe harbor provisions. The estimated one-time burden per recordkeeper is 20 minutes, for a total estimated burden of 20,000 hours.**

**The guidance provided in this notice should lessen the amount of time that would otherwise be needed to provide notice to employees and to draft and submit plan amendments.**

**Estimates of the annualized cost to respondents for the hour burdens shown above are not available at this time.**

**13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS**

**As suggested by OMB, our Federal Register Notice dated October 22, 2007, 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**

**There is no change in the paperwork burden previously approved by OMB. We are making this submission to renew the OMB approval.**

**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 would cause confusion by leading taxpayers to believe that the notice sunsets as of the expiration date. Taxpayers may not be aware that, if needed, 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 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.**