

109TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 to increase participation in section 401(k) plans through automatic contribution trusts, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

Mr. BINGAMAN introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To amend the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 to increase participation in section 401(k) plans through automatic contribution trusts, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Save More for Retire-  
5       ment Act of 2005”.

1 **SEC. 2. INCREASING PARTICIPATION IN CASH OR DE-**  
2 **FERRED PLANS THROUGH AUTOMATIC CON-**  
3 **TRIBUTION ARRANGEMENTS.**

4 (a) IN GENERAL.—Section 401(k) of the Internal  
5 Revenue Code of 1986 (relating to cash or deferred ar-  
6 rangement) is amended by adding at the end the following  
7 new paragraph:

8 “(13) NONDISCRIMINATION REQUIREMENTS  
9 FOR AUTOMATIC CONTRIBUTION TRUSTS.—

10 “(A) IN GENERAL.—A cash or deferred ar-  
11 rangement shall be treated as meeting the re-  
12 quirements of paragraph (3)(A)(ii) if such ar-  
13 rangement constitutes an automatic contribu-  
14 tion trust.

15 “(B) AUTOMATIC CONTRIBUTION TRUST.—

16 “(i) IN GENERAL.—For purposes of  
17 this paragraph, the term ‘automatic con-  
18 tribution trust’ means an arrangement—

19 “(I) except as provided in clauses  
20 (ii) and (iii), under which each em-  
21 ployee eligible to participate in the ar-  
22 rangement is treated as having elected  
23 to have the employer make elective  
24 contributions in an amount equal to  
25 the applicable percentage of the em-  
26 ployee’s compensation, and

1                   “(II) which meets the require-  
2                   ments of subparagraphs (C), (D), (E),  
3                   and (F).

4                   “(ii) EXCEPTION FOR EXISTING EM-  
5                   PLOYEES.—In the case of any employee—

6                   “(I) who was eligible to partici-  
7                   pate in the arrangement (or a prede-  
8                   cessor arrangement) immediately be-  
9                   fore the first date on which the ar-  
10                  rangement is an automatic contribu-  
11                  tion trust, and

12                  “(II) whose rate of contribution  
13                  immediately before such first date was  
14                  less than the applicable percentage for  
15                  the employee,

16                  clause (i)(I) shall not apply to such em-  
17                  ployee until the date which is 1 year after  
18                  such first date (or such earlier date as the  
19                  employee may elect).

20                  “(iii) ELECTION OUT.—Each em-  
21                  ployee eligible to participate in the ar-  
22                  rangement may specifically elect not to  
23                  have contributions made under clause (i),  
24                  and such clause shall cease to apply to

1 compensation paid on or after the effective  
2 date of the election.

3 “(iv) APPLICABLE PERCENTAGE.—

4 For purposes of this subparagraph—

5 “(I) IN GENERAL.—The term  
6 ‘applicable percentage’ means, with  
7 respect to any employee, the percent-  
8 age (not less than 3 percent) deter-  
9 mined under the arrangement.

10 “(II) INCREASE IN PERCENT-  
11 AGE.—In the case of the second plan  
12 year beginning after the first date on  
13 which the election under clause (i)(I)  
14 is in effect with respect to the em-  
15 ployee and any succeeding plan year,  
16 the applicable percentage shall be a  
17 percentage (not greater than 10 per-  
18 cent or such higher percentage speci-  
19 fied by the plan) equal to the sum of  
20 the applicable percentage for the em-  
21 ployee as of the close of the preceding  
22 plan year plus 1 percentage point (or  
23 such higher percentage specified by  
24 the plan). A plan may elect to provide  
25 that, in lieu of any increase under the

1 preceding sentence, the increase in the  
2 applicable percentage required under  
3 this subclause shall occur after each  
4 increase in compensation an employee  
5 receives on or after the first day of  
6 such second plan year and that the  
7 applicable percentage after each such  
8 increase in compensation shall be  
9 equal to the applicable percentage for  
10 the employee immediately before such  
11 increase in compensation plus 1 per-  
12 centage point (or such higher percent-  
13 age specified by the plan).

14 “(C) MATCHING OR NONELECTIVE CON-  
15 TRIBUTIONS.—

16 “(i) IN GENERAL.—The requirements  
17 of this subparagraph are met if, under the  
18 arrangement, the employer—

19 “(I) makes matching contribu-  
20 tions on behalf of each employee who  
21 is not a highly compensated employee  
22 in an amount equal to 50 percent of  
23 the elective contributions of the em-  
24 ployee to the extent such elective con-

1                   tributions do not exceed 7 percent of  
2                   compensation; or

3                   “**(II)** is required, without regard  
4                   to whether the employee makes an  
5                   elective contribution or employee con-  
6                   tribution, to make a contribution to a  
7                   defined contribution plan on behalf of  
8                   each employee who is not a highly  
9                   compensated employee and who is eli-  
10                  gible to participate in the arrange-  
11                  ment in an amount equal to at least  
12                  3 percent of the employee’s compensa-  
13                  tion,

14                  The rules of clauses (ii) and (iii) of para-  
15                  graph (12)(B) shall apply for purposes of  
16                  subclause (I). The rules of paragraph  
17                  (12)(E)(ii) shall apply for purposes of sub-  
18                  clauses (I) and (II).

19                  “(ii) **OTHER PLANS.**—An arrange-  
20                  ment shall be treated as meeting the re-  
21                  quirements under clause (i) if any other  
22                  plan maintained by the employer meets  
23                  such requirements with respect to employ-  
24                  ees eligible under the arrangement.

25                  “(D) **NOTICE REQUIREMENTS.**—

1           “(i) IN GENERAL.—The requirements  
2 of this subparagraph are met if the re-  
3 quirements of clauses (ii) and (iii) are met.

4           “(ii) REASONABLE PERIOD TO MAKE  
5 ELECTION.—The requirements of this  
6 clause are met if each employee to whom  
7 subparagraph (B)(i) applies—

8                   “(I) receives a notice explaining  
9 the employee’s right under the ar-  
10 rangement to elect not to have elective  
11 contributions made on the employee’s  
12 behalf, and how contributions made  
13 under the arrangement will be in-  
14 vested in the absence of any invest-  
15 ment election by the employee, and

16                   “(II) has a reasonable period of  
17 time after receipt of such notice and  
18 before the first elective contribution is  
19 made to make such election.

20           “(iii) ANNUAL NOTICE OF RIGHTS  
21 AND OBLIGATIONS.—The requirements of  
22 this clause are met if each employee eligi-  
23 ble to participate in the arrangement is,  
24 within a reasonable period before any year  
25 (or if the plan elects to change the applica-

1           ble percentage after any increase in com-  
2           pensation, before the increase), given no-  
3           tice of the employee’s rights and obliga-  
4           tions under the arrangement.

5           The requirements of clauses (i) and (ii) of para-  
6           graph (12)(D) shall be met with respect to the  
7           notices described in clauses (ii) and (iii) of this  
8           subparagraph.

9           “(E) PARTICIPATION, WITHDRAWAL, AND  
10          VESTING REQUIREMENTS.—The requirements  
11          of this subparagraph are met if—

12               “(i) the arrangement requires that  
13               each employee eligible to participate in the  
14               arrangement (determined without regard  
15               to any minimum service requirement other-  
16               wise applicable under section 410(a) or the  
17               plan) commences participation in the ar-  
18               rangement no later than the 1st day of the  
19               1st calendar quarter following the date on  
20               which employee first becomes so eligible,

21               “(ii) the withdrawal requirements of  
22               paragraph (2)(B) are met with respect to  
23               all employer contributions (including  
24               matching and elective contributions) taken  
25               into account in determining whether the



1 arrangement meets the requirements of  
2 subparagraph (C), and

3 “(iii) the arrangement requires that  
4 an employee’s right to the accrued benefit  
5 derived from employer contributions de-  
6 scribed in clause (ii) (other than elective  
7 contributions) is nonforfeitable after the  
8 employee has completed—

9 “(I) at least 1 year of service, or

10 “(II) in the case of an employee  
11 who is eligible to participate in the ar-  
12 rangement as of the first day on  
13 which the employee begins employ-  
14 ment with the employer maintaining  
15 the arrangement, at least 2 years of  
16 service.

17 “(F) CERTAIN WITHDRAWALS MUST BE  
18 ALLOWED.—

19 “(i) IN GENERAL.—Notwithstanding  
20 any other provision of this subsection, the  
21 requirements of this subparagraph are met  
22 if the arrangement allows employees to  
23 elect to withdraw elective contributions de-  
24 scribed in subparagraph (B)(i) (and earn-  
25 ings attributable thereto) from the cash or

1 deferred arrangement in accordance with  
2 the provisions of this subparagraph.

3 “(ii) TIME FOR MAKING ELECTION.—  
4 Clause (i) shall not apply to an election by  
5 an employee unless the election is made no  
6 later than the close of the latest of the fol-  
7 lowing payroll periods occurring after the  
8 first payroll period to which the automatic  
9 enrollment system applies to the employee:

10 “(I) The payroll period in which  
11 the aggregate elective contributions  
12 made under subparagraph (B)(i) first  
13 exceed \$500.

14 “(II) The second payroll period  
15 following such first payroll period.

16 “(III) The first payroll period  
17 which begins at least one month after  
18 the close of the first payroll period to  
19 which the automatic enrollment sys-  
20 tem applies.

21 “(iii) AMOUNT OF DISTRIBUTION.—  
22 Clause (i) shall not apply to any election  
23 by an employee unless the amount of any  
24 distribution by reason of the election is  
25 equal to the amount of elective contribu-

1 tions made with respect to the first payroll  
2 period to which the automatic enrollment  
3 system applies to the employee and any  
4 succeeding payroll period beginning before  
5 the effective date of the election (and earn-  
6 ings attributable thereto).

7 “(iv) TREATMENT OF DISTRIBUTION.—In the case of any distribution to  
8 an employee pursuant to an election under  
9 clause (i)—  
10

11 “(I) the amount of such distribu-  
12 tion shall be includible in the gross in-  
13 come of the employee for the taxable  
14 year of the employee in which the dis-  
15 tribution is made, and

16 “(II) no tax shall be imposed  
17 under section 72(t) with respect to the  
18 distribution.

19 “(v) EMPLOYER MATCHING CON-  
20 TRIBUTIONS.—In the case of any distribu-  
21 tion to an employee by reason of an elec-  
22 tion under clause (i), employer matching  
23 contributions shall be forfeited or subject  
24 to such other treatment as the Secretary  
25 may prescribe.”

1 (b) MATCHING CONTRIBUTIONS.—Section 401(m) of  
2 the Internal Revenue Code of 1986 (relating to non-  
3 discrimination test for matching contributions and em-  
4 ployee contributions) is amended by redesignating para-  
5 graph (12) as paragraph (13) and by inserting after para-  
6 graph (11) the following new paragraph:

7 “(12) ALTERNATE METHOD FOR AUTOMATIC  
8 CONTRIBUTION TRUSTS.—A defined contribution  
9 plan shall be treated as meeting the requirements of  
10 paragraph (2) with respect to matching contribu-  
11 tions if the plan—

12 “(A) meets the contribution requirements  
13 of subparagraphs (B)(i) and (C) of subsection  
14 (k)(13);

15 “(B) meets the notice requirements of sub-  
16 paragraph (D) of subsection (k)(13); and

17 “(C) meets the requirements of paragraph  
18 (11)(B) (ii) and (iii).”.

19 (c) EXCLUSION FROM DEFINITION OF TOP-HEAVY  
20 PLANS.—

21 (1) ELECTIVE CONTRIBUTION RULE.—Clause  
22 (i) of section 416(g)(4)(H) of the Internal Revenue  
23 Code of 1986 is amended by inserting “or  
24 401(k)(13)” after “section 401(k)(12)”.

1           (2) MATCHING CONTRIBUTION RULE.—Clause  
2           (ii) of section 416(g)(4)(H) of such Code is amended  
3           by inserting “or 401(m)(12)” after “section  
4           401(m)(11)”.

5           (d) DEFINITION OF COMPENSATION.—

6           (1) BASE PAY OR RATE OF PAY.—The Sec-  
7           retary of the Treasury shall, no later than December  
8           31, 2006, modify Treasury Regulation section  
9           1.414(s)–1(d)(3) to facilitate the use of the safe har-  
10          bors in sections 401(k)(12), 401(k)(13),  
11          401(m)(11), and 401(m)(12) of the Internal Rev-  
12          enue Code of 1986, and in Treasury Regulation sec-  
13          tion 1.401(a)(4)–3(b), by plans that use base pay or  
14          rate of pay in determining contributions or benefits.  
15          Such modifications shall include increased flexibility  
16          in satisfying section 414(s) of such Code in any case  
17          where the amount of overtime compensation payable  
18          in a year can vary significantly.

19          (2) APPLICATION OF REQUIREMENTS TO SEPA-  
20          RATE PAYROLL PERIODS.—Not later than December  
21          31, 2006, the Secretary of the Treasury shall issue  
22          rules under subparagraphs (B)(i) and (C)(i) of sec-  
23          tion 401(k)(13) of such Code and under clause (i)  
24          of section 401(m)(12)(A) of such Code that, effec-  
25          tive for plan years beginning after December 31,

1 2006, permit such requirements to be applied sepa-  
2 rately to separate payroll periods based on rules  
3 similar to the rules described in Treasury Regulation  
4 sections 1.401(k)-3(c)(5)(ii) and 1.401(m)-3(d)(4).

5 (e) SECTION 403(b) CONTRACTS.—Paragraph (11) of  
6 section 401(m) of the Internal Revenue Code of 1986 is  
7 amended by adding at the end the following:

8 “(C) SECTION 403(b) CONTRACTS.—An  
9 annuity contract under section 403(b) shall be  
10 treated as meeting the requirements of para-  
11 graph (2) with respect to matching contribu-  
12 tions if such contract meets requirements simi-  
13 lar to the requirements under subparagraph  
14 (A).”.

15 (f) PREEMPTION OF CONFLICTING STATE REGULA-  
16 TION.—Section 514 of the Employee Retirement Income  
17 Security of 1974 (29 U.S.C. 1144) is amended by insert-  
18 ing at the end the following new subsection:

19 “(e) AUTOMATIC CONTRIBUTION ARRANGEMENTS.—  
20 “(1) IN GENERAL.—Notwithstanding any other  
21 provision of this section, any law of a State shall be  
22 superseded if it would directly or indirectly prohibit  
23 or restrict the inclusion in any plan of an eligible  
24 automatic contribution arrangement.

1           “(2) ELIGIBLE AUTOMATIC CONTRIBUTION AR-  
2           RANGEMENT.—For purposes of this subsection, the  
3           term ‘eligible automatic contribution arrangement’  
4           means an arrangement—

5                   “(A) under which a participant may elect  
6                   to have the employer make payments as con-  
7                   tributions under the plan on behalf of the par-  
8                   ticipant, or to the participant directly in cash,

9                   “(B) under which the participant is treated  
10                  as having elected to have the employer make  
11                  such contributions in an amount equal to a uni-  
12                  form percentage of compensation provided  
13                  under the plan until the participant specifically  
14                  elects not to have such contributions made (or  
15                  specifically elects to have such contributions  
16                  made at a different percentage),

17                  “(C) under which contributions described  
18                  in subparagraph (B) are invested in accordance  
19                  with regulations prescribed by the Secretary  
20                  under section 404(c)(4), and

21                  “(D) which meets the requirements of  
22                  paragraph (3).

23           “(3) NOTICE REQUIREMENTS.—

24                   “(A) IN GENERAL.—The administrator of  
25                   an individual account plan shall, within a rea-

1           sonable period before each plan year, give to  
2           each employee to whom an arrangement de-  
3           scribed in paragraph (2) applies for such plan  
4           year notice of the employee's rights and obliga-  
5           tions under the arrangement which—

6                   “(i) is sufficiently accurate and com-  
7                   prehensive to apprise the employee of such  
8                   rights and obligations, and

9                   “(ii) is written in a manner calculated  
10                  to be understood by the average employee  
11                  to whom the arrangement applies.

12                 “(B) TIME AND FORM OF NOTICE.—A no-  
13                 tice shall not be treated as meeting the require-  
14                 ments of subparagraph (A) with respect to an  
15                 employee unless—

16                   “(i) the notice includes a notice ex-  
17                   plaining the employee's right under the ar-  
18                   rangement to elect not to have elective con-  
19                   tributions made on the employee's behalf  
20                   (or to elect to have such contributions  
21                   made at a different percentage),

22                   “(ii) the employee has a reasonable  
23                   period of time after receipt of the notice  
24                   described in clause (i) and before the first



1 elective contribution is made to make such  
2 election, and

3 “(iii) the notice explains how contribu-  
4 tions made under the arrangement will be  
5 invested in the absence of any investment  
6 election by the employee.”.

7 (g) EFFECTIVE DATE.—

8 (1) IN GENERAL.—Except as provided by para-  
9 graph (2), the amendments made by this section  
10 shall apply to plan years beginning after December  
11 31, 2005.

12 (2) SECTION 403(b) CONTRACTS.—The amend-  
13 ments made by subsection (e) shall apply to years  
14 ending after the date of the enactment of this Act.

15 **SEC. 3. TREATMENT OF INVESTMENT OF ASSETS BY PLAN**  
16 **WHERE PARTICIPANT FAILS TO EXERCISE IN-**  
17 **VESTMENT ELECTION.**

18 (a) IN GENERAL.—Section 404(c) of the Employee  
19 Retirement Income Security Act of 1974 (29 U.S.C.  
20 1104(c)) is amended by adding at the end the following  
21 new paragraph:

22 “(4) DEFAULT INVESTMENT ARRANGE-  
23 MENTS.—

24 “(A) IN GENERAL.—For purposes of para-  
25 graph (1), a participant in an individual ac-

1 count plan meeting the notice requirements of  
2 subparagraph (B) shall be treated as exercising  
3 control over the assets in the account with re-  
4 spect to the amount of contributions and earn-  
5 ings which, in the absence of an investment  
6 election by the participant, are invested by the  
7 plan in accordance with regulations prescribed  
8 by the Secretary. The regulations under this  
9 subparagraph shall provide guidance on the ap-  
10 propriateness of designating default investments  
11 that include a mix of asset classes consistent  
12 with long-term capital appreciation.

13 “(B) NOTICE REQUIREMENTS.—

14 “(i) IN GENERAL.—The requirements  
15 of this subparagraph are met if each par-  
16 ticipant—

17 “(I) receives, within a reasonable  
18 period of time before each plan year,  
19 a notice explaining the employee’s  
20 right under the plan to designate how  
21 contributions and earnings will be in-  
22 vested and explaining how, in the ab-  
23 sence of any investment election by  
24 the participant, such contributions  
25 and earnings will be invested, and

1                   “(II) has a reasonable period of  
2                   time after receipt of such notice and  
3                   before the beginning of the plan year  
4                   to make such designation.

5                   “(ii) FORM OF NOTICE.—The require-  
6                   ments of clauses (i) and (ii) of section  
7                   401(k)(12)(D) of the Internal Revenue  
8                   Code of 1986 shall be met with respect to  
9                   the notices described in this subpara-  
10                  graph.”

11                  (b) EFFECTIVE DATE.—

12                   (1) IN GENERAL.—The amendments made by  
13                   this section shall apply to plan years beginning after  
14                   December 31, 2005.

15                   (2) REGULATIONS.—Final regulations under  
16                   section 404(c)(4)(A) of the Employee Retirement In-  
17                   come Security Act of 1974 (as added by this section)  
18                   shall be issued no later than 6 months after the date  
19                   of the enactment of this Act.