

January 19, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW.
Washington, DC 20210

RE: Proposed Rule for State Savings Arrangements Safe Harbor, RIN 1210-AB71

To whom it may concern,

We are writing concerning the Department of Labor's (Department) proposed rule for savings arrangements established by states for non-governmental employees. As representatives from four states – California, Connecticut, Illinois, and Oregon – seeking to implement retirement savings programs for private-sector workers, we applaud the Department's efforts to ensure that more Americans can easily, safely, and affordably save for retirement.

We are grateful to Secretary Perez and the Department for acknowledging the important role that states can play in addressing the growing retirement savings crisis, and for clarifying the relationship between state-run retirement savings programs and the Employee Retirement Income Security Act (ERISA). The creation of a new safe harbor will enable each of our states to continue with the implementation of programs that will provide access to payroll deduction retirement savings plans for millions of private sector workers while simultaneously ensuring that employers are not burdened with significant administrative duties or financial liability.

While our overall support and appreciation for the proposed rule is strong, we encourage the Department to provide states with as much flexibility as possible to design programs that best meet the needs of our residents. We also offer specific suggestions to clarify administrative, authoritative, and operational provisions of the rule. With these changes, we believe the proposed safe harbor can be an even more effective tool for states seeking to increase access to workplace-based retirement savings programs.

Background

We have a growing retirement savings crisis in this country, with far too many workers at risk of retiring into poverty or being over-reliant on Social Security. Research from the National Institute on Retirement Savings states that the median retirement account balance for all working-age households is a mere \$3,000 with near retirement households saving only slightly more at \$12,000. According to the Social Security Administration, 36 percent of current beneficiaries rely on Social Security for at least 90 percent of their monthly income.

An inadequate system of retirement options – especially for lower-income workers – is one significant cause of the problem. As the Department noted, an estimated 68 million people, or nearly half of the country's entire workforce, lack access to an employer-sponsored plan. At the

same time, we know that access to a workplace-based plan increases the likelihood that someone will save, and save more.

While there has been increased acknowledgement of the need for access to employment-based programs, efforts to address the problem nationally have been slow moving at best. For this reason, state legislatures and policymakers across the country have sought to provide state-based solutions to increase retirement savings options for our workers. In California, Connecticut, Illinois, and Oregon, we have laws on the books creating retirement savings programs for the workers in our states who currently don't have access to workplace-based plans. While the specific features and provisions of the programs differ, ultimately we all hope to enable increased financial security for our residents. In addition, our programs strike an appropriate balance between creating access for employees while limiting employer responsibilities, costs, and liabilities.

We are grateful to the Department for proposing a safe harbor that will effectively enable the creation and implementation of state retirement programs that allow for the automatic enrollment of employees, and required limited participation by certain employers, without triggering ERISA and subjecting employers to more significant administrative responsibilities and financial liabilities.

Suggested Modifications to the Proposed Rule

Clarity on Use of Automatic Enrollment

As currently drafted, an employer's use of automatic enrollment within the safe harbor is contingent upon a state law mandating their participation in the program. While all four signers of this comment letter are working on state-run programs that include some form of a mandate for employer participation, we acknowledge that not all state policymakers might decide to follow that path, and that even with a mandate, not all of the businesses within our own states are covered. We believe that mandates are good public policy, and that belief is reflected within our individual state laws. But, we also envisioned the inclusion of employers and employees who fall outside of the mandates. Unfortunately, this proposal prevents an employer who voluntarily participates from using automatic enrollment. We refer the Department to our individual state letters for suggestions on how to potentially broaden access to employee automatic enrollment.

Under the proposed rule as currently structured, we request clarity on how inclusion within the safe harbor is impacted if certain businesses mandated to participate use automatic enrollment but then fall below the threshold for mandated participation. Would this impact their ability to auto-enroll any new employees going forward? Would it require action on the employer's part for employees who were initially auto-enrolled? We urge the Department to address the uncertainty around how businesses operating on the margins of the threshold can use automatic enrollment.

Additionally, we ask the Department to provide guidance on what would happen to the eligibility of the program for safe harbor if an employer voluntarily chose to participate but inadvertently

used automatic enrollment. These questions relating to the current language in the proposed rule could create technical challenges as we progress with implementation.

Flexibility on Withdrawals:

We urge the Department to provide some level of flexibility in its final rule to enable certain reasonable limitations or restrictions on the timing and frequency of withdrawals for administrative efficiency and costs savings. For example, the Department could consider revising its language in paragraph (h)(1)(iv) to ensure that states can: offer beneficial investment options, where immediate liquidity is not possible, but participants see better performance with lower costs; establish limits to prevent frequent small withdrawals, which can be financially burdensome to the plan and of questionable benefit to the participant; or, establish defaults around retirement withdrawals that could provide the best protection for program participants.

Program Administration and Delegation of Responsibilities:

While we support the requirement that state programs must be established under state law, we believe the Department could provide as much flexibility to states as possible. Language confirming that state law can designate a Board as the primary administrator with rulemaking and decision-making authority would be helpful for those states moving forward with board structures. Additionally, while the proposed rule allows for contracts with one or more service or investment providers, it contains language in paragraph (h)(2)(ii) requiring the state to “retain full responsibility for the operation and administration of the program.” This could be interpreted to mean that the state or Board cannot delegate legal or financial responsibilities. We ask the Department to clarify that contractual allocation of legal or financial responsibilities is allowed as long as the state instrumentality remains responsible for selecting and monitoring outside vendors.

State Responsibility and Enforcement Mechanisms:

Specific language in the proposed rule has caused some concern over the role of the state in protecting program funds and the specific need for newly created enforcement mechanism. The proposed rule in paragraph (h)(1)(iii) “requires the state to assume responsibility for the security of payroll deductions and employee savings,” as one of its conditions for ensuring that responsibilities do not lie with an employer. We understand the aim of the Department to see that withholdings are transmitted appropriately and in a timely fashion. However, all of our states have existing wage theft provisions governing the handling of withholdings, which should be suitable for program funds sent by the employer to the employee’s account directly. We encourage DOL to clarify its intent to avoid misinterpretation of the broad language currently included in the proposed rule.

Additionally, paragraph (h)(1)(iv) requires that a state “adopt measures to ensure that employees are notified of their rights and creates a mechanism for enforcement of those rights.” Given that, as we note, all of our states have existing wage and employment laws, it seems unnecessary to require the creation of new mechanisms. The Department should make clear that existing laws and judicial processes may be suitable for enforcement of the program.

Conclusion

We want to reiterate our thanks to the Department and Secretary Perez for the tireless work and effort that took place over the last year to create a safe harbor for state run programs. The Department has taken a significant step towards ensuring that millions of workers across the country have access to a safe, affordable, and convenient retirement savings option at work. We urge the Department to finalize the rule as quickly as possible.

Thank you for the opportunity to comment. Please feel free to reach out to any of our offices for additional information. We are happy to be of assistance in whatever way possible.

Respectfully submitted,

John Chiang, California State Treasurer
Chair, California Secure Choice Retirement Savings Investment Board

Kevin Lembo
Co-Chair, Connecticut Retirement Security Board

Denise L. Nappier
Co-Chair, Connecticut Retirement Security Board

Michael Frerichs, Illinois State Treasurer
Chair, Illinois Secure Choice Savings Board

Ted Wheeler, Oregon State Treasurer