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Via E-mail: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: Proposed Safe Harbor Rule RIN 1210-AB71)

Re: Safe Harbor Rule for State Payroll Deduction IRA Savings Programs

Ladies and Gentlemen:

I appreciate the opportunity to comment on the proposal by the Department of Labor ("**Department**") to create a safe harbor exemption from the Employee Retirement Income Security Act ("**ERISA**") for certain State payroll deduction savings programs by adding a new regulation § 2510.3-2(h) ("**Proposed Safe Harbor**"), which would clarify the circumstances under which these programs may be established and maintained without creating "employee benefit plans" subject to ERISA.

I would also like to thank Secretary Perez and the Department for their extraordinary efforts to clarify the relationship between State payroll deduction savings programs and ERISA. These efforts will enable the California Secure Choice Retirement Savings Program ("**California Secure Choice Program**") and many other State-initiated employee savings programs to encourage lower-income employees to save for their own retirement.

However, I am concerned that because the Proposed Safe Harbor only would apply to employers that are required by State law to participate in the State payroll deduction program it would unfairly prevent certain workers in California, such as those employed by micro-employers not covered by the employer mandate, from participating. In addition, other States that are not willing to impose an employer mandate would effectively be prevented from

establishing a payroll deduction IRA program with auto-enrollment. The Proposed Safe Harbor's employer mandate requirement also raises serious ERISA compliance issues if uncovered employees are inadvertently auto-enrolled. I believe that if the Department removed the mandate condition from the Proposed Safe Harbor and made certain clarifying changes to the administrative and operational provisions, the Proposed Safe Harbor would become an even stronger tool for States to partner with the private sector in promoting responsible payroll savings programs that fully safeguarded workers' interests.

Overview of the California Secure Choice and Probable Program Features

The California Secure Choice Retirement Savings Investment Board ("**Board**") was created by California Government Code Sections 100000-100044 (the "**Secure Choice Act**") to develop a simple, turn-key savings program that is "convenient, voluntary, low-cost and portable." (For your convenience, the following is a link to the Secure Choice Act: http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=99001-100000&file=100000-100044.) The nine member Board, of which I Chair, consisting of the State Director of Finance (or his designee), the State Controller, and six other individuals appointed by the Governor or Legislature, will be responsible for the overall operation and management of the Program. By statute, the California Secure Choice Program must be established using individual retirement accounts or annuities (generically referred to as "**IRAs**") and may not involve a "plan" for ERISA purposes. Cal. Gov. Code § 100042.

The Secure Choice Act instructs the Board to prepare a feasibility study for the California State Legislature, including recommendations for specific Program terms. Thus, the Board has retained outside counsel and investment, benefit, economic and actuarial consultants in conducting an in-depth analysis of the appropriate design for a payroll-based program to help close the retirement savings "gap" in California. In fact, over 6.3 million primarily lower-income employees in California lack any retirement program at work *and* are not saving on their own. Upon completing its analysis (anticipated February 2016), the Board will report to the State Legislature and propose enabling legislation to implement the California Secure Choice Program.

Although the Board's study is not final and the State Legislature may make changes to the Board's recommendations, I believe the following is a reasonable summary of what the eventual California Secure Choice Program will be.

The Program will allow each covered employee to have amounts withheld from his or her paycheck and contributed to an IRA established by Program in the employee's name.[1] The IRA will satisfy the Internal Revenue Code § 408 rules and will be portable.

[1] I anticipate that employees will be defaulted into a Roth IRA, but employees earning above the Roth limits ($115,000 to $131,000 for single employees and $183,000 to $193,000 for married employees in 2015) or who prefer a tax deduction will be allowed to opt into a traditional IRA.

Generally, all employers in California that do not offer any retirement program (such as a qualified plan, 403(b) plan or SEP) and have at least five employees age twenty or over and who are employed in California will be required to allow their employees to contribute to the Program.[2]

The Board will arrange for the preparation and delivery of a simple, brief and plain English information packet to all eligible employees. Cal. Gov. Code § 100014. The information packet distributed to all employees will clearly and simply communicate that the California Secure Choice Program is voluntary, that there are alternative ways to save and that employees can opt-out by calling a designated number, visiting a website or checking a box and mailing, postage paid, a paper form. Employees who neither make an election nor opt-out will be auto-enrolled at 5% of pay thirty days after the notice/waiting period with the ability to opt-out or elect a different level of payroll savings at any time. The Board will have the authority to change the automatic savings percentage for new enrollees to between 2% and 6%. After one or two years of participation (to be decided by the Board) each contributing employee will have his or her savings rate increased by 1% until the employee attains a 10% saving level, opts-out of the automatic escalation or selects a different percentage.

I anticipate the Board will outsource the day-to-day administration, investment and custody/trustee duties to qualified third parties selected from the private sector after competitive bidding.

I currently envision having only one investment option, an age-based life cycle asset allocation series. At each age band, employees would be allowed to choose between a "conservative," "moderate" or "aggressive" asset allocation, with the default investment being the moderate asset allocation corresponding to the employee's age. However, in each employee's initial period of participation (to be decided by the Board, but likely to be the first two or three years of participation) and regardless of age, all moneys will be invested in a stable value or similar low-risk portfolio. While the Board may choose an "off-the-shelf" life cycle fund, I anticipate the Board will hire money managers or fund companies to run a customized product. Of course, I anticipate the Board will retain one or more qualified investment consultants to advise it in the entire process.

I believe that auto-enrollment with an opt-out is one of the cornerstones of the Secure Choice Program. Academic research by behavioral economists, numerous participant surveys and anecdotal evidence all attest to the incredible success that automatic enrollment has had in getting non-savers to save.[3] Without this feature, I believe that the California Secure Choice

[2] The Board may determine to set the minimum age at 19 or 21. The employer mandate only would apply to employees who are employed in California.

[3] Charcalla, Veronica and Crawford, Gary, "Overcoming Participant Inertia," Prudential 2013; Butrica, Barbara A. and Karamcheva, Nadia S., "Automatic Enrollment, Employee Compensations, and Retirement Security," Center for Retirement Research, Boston College, CRR WP 2012-25, November 2012 at http://crr.bc.edu/wp-content/uploads/2012/11/wp_2012-25-508.pdf; Thaler, Richard H. and Sunstein, Cass R.,

Program will have significantly less impact on the growing retirement insecurity problem. While each employee will receive easy-to-follow instructions on opting out, and I hope relatively few participants will take "advantage" of the opt-out and will instead begin saving for their future.

An employer's only involvement with the California Secure Choice Program will be to provide census information (e.g., name, address) of its employees to the record keeper and to properly withhold and transmit employee contributions to the IRA custodian. Employers will not have any say in determining investment policy, choosing the investments or selecting vendors. Employers will be instructed to direct all employee questions to the record keeper. The information packet and election forms will clearly state that the Program is "not an employer sponsored plan" or covered by ERISA. Cal. Gov. Code § 100014(c)(2).

What follows is my reasoning why the Proposed Safe Harbor's employer mandate condition should be eliminated and then several recommended simplifications and clarifications to other provisions of the Proposed Safe Harbor that I believe would benefit employees' efforts to save.

1. §2510.3-2(h)(1)(x) Employer Mandate

Paragraph (h)(1)(X) of the Proposed Safe Harbor links a program's ability to nudge employees into saving via auto-enrollment with a requirement that their employers must join the program; without an employer mandate, only employees who affirmatively elect to contribute may save. The Supplementary Information to the Proposed Safe Harbor explains the Department's view that if an *employer's* participation is voluntary, the *employee's* auto-enrollment would not be completely voluntary. Specifically, the Department appears to be concerned that an employer that is not required to participate in the program will be in a position to improperly influence employees to contribute.

I strongly believe that so long as an employer has no discretion in choosing program investments, default contribution rates, the IRA custodian, record keeper, advisors, communications and the like, an employer voluntarily joining the program will not be in a position to influence employee choices any more than an employer subject to a mandate. Indeed, there is no reason why an employer that chooses to join a State program would even want to unduly influence its employees to participate in the program.

Crucially, employees will not be exposed to greater risk from employer activities if the employer voluntarily decided to join a State program with automatic savings. For example, the California Secure Choice program would have the same strict limitations that employers may

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Nudge, Yale University Press (2008); Beshears, John, Choice, James. J., Laibson, David, and Madrian, Brigitte C, "The Importance of Default Options for Retirement Savings Outcomes: Evidence from the United States," pp. 59-87 in Kay, Stephen J. and Sinha, Tapen, eds, Lessons from Pension Reform in the Americas, ed. Stephen. J. Kay and Tapen Sinha, New York: Oxford University Press, 2008; Benartzi, Schlomo and Thaler, Richard, "Heuristic Biases in Retirement Savings Behavior," Journal of Economic Perspectives 21(3):81-104, 2007.

only engage in certain ministerial activities regardless of whether the employer has five employees or fewer than five. Similarly, the employee notices, recordkeeping system, investments, distribution rules, etc. will be identical. Basically, once an employer joins, it will be a mere facilitator without discretion, other than to pull out. And, even employers covered by California's mandate may terminate participation in the California Program by adopting their own employee savings plan.

Since the original payroll deduction safe harbor was promulgated by the Department in 1975, the Department always has allowed some employer activity in non-ERISA payroll deduction IRAs.[4] First, of course, the employer has to select the IRA provider[s] and allow the provider[s] to solicit its employees. The Department has gone further, allowing an employer to periodically review each sponsor's performance, replace any underperformers and negotiate for and receive a written indemnification from each sponsor.[5] Similarly, in a payroll IRA program that was invested in an group annuity contract issued by an insurer undergoing demutualization, the Department permitted the employer, as contract holder, to vote on the plan of demutualization and elect the method for allocating the demutualization proceeds among IRA participants.[6]

The Supplementary Information, in footnote 12, cites several cases and other materials outside of the savings plan arena for the proposition that opt-in elections are more voluntary than opt-out. I respectfully submit that these cases and materials are not completely relevant to the issue here. For example, *Doe v. Wood,* the primary cased cited in the Supplementary Information, ruled that a school district which enrolled grade school children in a single-sex school unless their parents affirmatively elected to place their children in coeducational classes violated the U.S. Department of Education regulations that the choice of single sex classes must completely voluntary. However, in *Wood* the week before public school was to begin parents were given a poorly worded notice of their rights to elect coeducational school, and by the time notice went out many children already had selected after school activities and team sports. Besides the many obvious distinctions between a child's education and an employee's retirement savings, it is crucial to note that, in the situation addressed in *Wood*, once the school year begins, it would be emotionally difficult for a child to switch schools. With automatic enrollment in California Secure Choice and similar State programs, the employee may stop contributing at any time simply by calling toll-free, visiting a website or mailing paper form to the recordkeeper. Indeed, if the employee wishes a complete "do-over," he or she could easily withdraw the funds from the IRA, generally without penalty or tax consequences.

Similarly, in another case cited by the Department, *Davis v. Liberty Mut. Ins. Co.*, the court determined that an employee's enrollment in a health insurance program was not completely voluntary because an employee could either elect to participate or forfeit the benefit without any

[4] 29 CFR § 2510.3-2(d).
[5] AO 82-27A (June 16, 1982).
[6] AO 2001-03A (Feb. 15, 2001).

additional compensation. This feature essentially made it impossible for an employee to opt-out of coverage. However, whether or not the employer is subject to a mandate, employees covered by an auto-enrollment feature always have the choice of not saving. I believe that the other cases and materials cited by the Department are similarly distinguishable.

Legally, an opt-out mechanism is as much a completely voluntary election as an opt-in. While new to IRA-based programs, an opt-out approach is simply a tool to help individuals save; it does not change the dynamic that such saving is voluntary. A contributory savings program must either be opt-in or opt-out. In Bulletin 99-1, the Department noted the large number of workers, especially at smaller employers, without access to any retirement plan and America's low savings rate. Sadly, the problem has gotten significantly worse over the ensuing fifteen plus years and is reaching crisis proportions.[7] The Secure Choice Act has adopted the proven technique of auto-enrollment to nudge employees to voluntarily save for retirement. Those wishing not to save will be free to opt-out before enrollment or at any time thereafter.

Automatic enrollment with an opt-out for savings programs was initially developed to encourage employees to make 401(k) contributions. To be tax deferred an employee's 401(k) contributions must be considered elective (i.e., voluntary). The Internal Revenue Service has ruled that contributions made under an opt-out are voluntary. *See* Rev. Rul. 2000-8, 2000-1 C.B. 149. Thus, even in the more regulated realm of 401(k) plans, opt-out contributions are voluntary.

The California Secure Choice Program has an employer mandate satisfying the Proposed Safe Harbor. However, I expect that employers with fewer than five employees may wish to join the Program, but under the Proposed Safe Harbor would be prevented from using its most powerful savings tool--auto-enrollment. Similarly, a small employer with at least five workers might be forced to shut down auto-enrollment if headcount dipped below the threshold, compelling the affected employees to re-enroll by making affirmative elections. Unfortunately, the behavioral studies conducted for the Board demonstrate that if switched to opt-out many employees will, instead, simply stop contributing. This problem will be compounded for workers employed by small businesses with a variable headcount--in some years meeting the five employee threshold and in others having fewer than five. The resulting roller coaster of opt-in in one year, opt-out in another will cause unnecessary confusion, increased administrative costs and likely lead to mistakes.

Importantly, no State, California included, would be able to fully vet all participating employers. Some ineligible employers may inadvertently or intentionally "sneak" into the Program and auto-enroll their employees. The Proposed Safe Harbor suggests that such non-mandated employers could cause an entire program to fail the safe harbor and become an ERISA plan, with potentially disastrous consequences for the thousands of participating employers and millions of employees.

[7] Interpretive Bulletin 99-1 (29 CFR 2509.99-1

I strongly believe that an employer mandate is not a legally necessary condition for the Safe Harbor for a State program using auto enrollment and/or escalation, would unfairly exclude certain employees in California from the Secure Choice Program's benefits and could possibly cause compliance difficulties. And, although not affecting the California Program, the I feel the Department's proposed mandate requirement would unfairly harm lower income employees in States choosing to establish payroll deduction IRA savings programs without a mandate by preventing such programs from adopting an opt-out approach. While I believe that California Secure Choice is the best path to help uncovered employees save for retirement, I recognize that other paths should be open without unfairly preventing lower income employees from the proven benefits of automatic savings.

Therefore, I urge the Department to eliminate the employer mandate condition and strike paragraph (h)(1)(x).

2. **§2510.3-2(h)(1)(x) Established pursuant to State Law.**

Paragraph (h)(1)(i) of the proposed Safe Harbor requires that "the program is established pursuant to State law." I believe other State legislatures, will delegate to a State-appointed board or similar body the authority to determine a number of program features. Such features might include the default contribution rate, when auto-escalation will kick in, investment of program funds (including whether participants will be allowed to choose between a menu of board-selected funds), and withdrawal and distribution rules. For example, California is expected to delegate the authority to set and modify many program terms as well numerous administrative decisions to the Board. It would be extremely disruptive and costly if these decisions also had to be approved by the State Legislature. *Thus, the Proposed Safe Harbor should be clarified to provide that if the program is established under State legislation, even if it delegates authority to a board or other State-appointed person, the program would be considered to be established pursuant to state law. (I suggest language to accomplish this at the end of comment 3 below.)*

Paragraph, Section (h)(2)(iii) suggests that a program's auto-contribution and escalation features should be "specified under state law." As discussed in the preceding paragraph, a State legislature should be able to delegate authority to set or change the contribution/escalation rates to an appointed board or other person. *Therefore, this paragraph should be changed to delete the word "specified."*

3. **§2510.3-2(h)(1)(ii) & (2)(ii) Program Administration.**

The Proposed Safe Harbor could be read to limit a State's ability to delegate various duties to money managers, record keepers and other third parties. Thus, paragraph (ii) provides "[t]he program is administered by the State ...or by a governmental agency or instrumentality of the State, which is responsible for investing employee savings or for selecting investment alternatives for employees to choose." Similarly, paragraph (h)(2)(ii) permits a program to use service providers, if the State or designated governmental agency or instrumentality "retains full

responsibility for the operation and administration of the program."

It is quite probable other state programs will be operated by third parties. Besides typical recordkeeping, reporting, communication and distribution functions, Program moneys will be invested by professional managers (either directly or through designated investment vehicles) selected by the Board with the advice of expert consultants. The appointing State entity will have a duty to select, monitor and replace vendors in accordance with State law, but these third parties should be responsible for their own actions and contractually assumed duties. The Safe Harbor should clearly reflect this outsourcing approach. Also, the singling out of investments in Section (h)(1)(ii) is confusing.

Thus, I recommend that these two paragraphs be revised as follows:

(h)(1)(ii) "The program is administered by the State establishing the program, or by a governmental agency or instrumentality of such State or by a committee, board or other person selected pursuant to State law."

(h)(2)(ii) "A program that utilizes one or more service or investment providers and consultants to operate and administer the program, including the investment of program funds, will not fail to meet the requirements of this section, provided that the State or other person described in paragraph (h)(1)(ii) of this section, is responsible for selecting, monitoring and, as such person deems appropriate, replacement of the providers or consultants."

4. §2510.3-2(h)(1)(iii) & (iv) Enforcement of employee rights.

Two requirements in the Proposed Safe Harbor are confusing and duplicative of existing State regulation. First, paragraph (h)(1)(iii) requires that "[t]he state assumes responsibility for the security of payroll deductions and employee savings." I believe this language simply is intended to protect employees from employer fraud or error in timely transmission of withholdings to the program custodian and investment in the proper vehicle. However, the employer and its payroll vendor, and not the state, will be *responsible* for the actual withholding and delivery of funds. Of course, as with all payroll and investment issues, if the employer/vendor acts improperly, the state will use its police powers to enforce its laws, correct such improper activity and punish wrongdoers. *Thus, the I urge the Department to eliminate (iii) in its entirety from the Proposed Safe Harbor.*

In a similar vein, paragraph (h)(1)(iv) requires that that "[t]he state adopt measures to ensure that employees are notified of their rights and creates a mechanism for the enforcement of those rights." The word "ensure" is misplaced; I believe that the Department simply intends that the State's rules require that the appropriate party (most likely the program administrator) provide employees with the notice. Furthermore, California and the other states each have "wage-hour" laws and an enforcement system to protect employees against employer's failure to properly withhold from their paychecks and apply those withholdings as required by law. Thus,

the Safe Harbor should not require that a State add special enforcement mechanisms or additional security mechanism to protect workers enrolled in its payroll deduction savings program, to the extent that the State determines that laws and regulations already on the books are available. Finally, California and, I believe most, if not all, other States, already have regulatory and judicial systems in place to allow employees to enforce their program rights and should not be required to create a new and duplicative enforcement regime. While California and many other States will develop an ERISA-like internal program claim system, I do believe that the Proposed Safe Harbor should not require a State to adopt such a system, but rather leave it to the individual States to decide the best approach.

I recommend that the Department rewrite the requirement as: "[t]he State shall adopt measures to cause employees to be notified of their rights under the program. Such rights may include an internal claims and dispute resolution process."

5. §2510.3-2(h)(1)(vi) Withdrawals

Paragraph (vi) of the Proposed Safe Harbor would not permit a program to impose any "restriction," "cost" or "penalty" on an employee's ability to withdraw, transfer or rollover his or her IRA. However, such limitations could limit a program's investment flexibility (e.g., a stable value funds with an "equity wash" or an insurance company annuity payable only on death, disability or a stated age) and ability to impose cost-saving administrative restrictions (e.g., withdrawals, transfers or rollovers limited to once a quarter). Further, I am deeply concerned about "leakage"--employees using their IRAs for discretionary purchases, vacations, etc. Thus, I anticipate the Board would consider imposing a hardship standard on withdrawals before a certain age under a loose version of the standards applicable to Section 457 and 401(k) plans.[8] Of course, the participating employers would have no involvement in hardship withdrawals. *Thus, I recommend that the section (vi) be deleted. If the Department determines that a hardship withdrawal limit is not appropriate, then I recommend that Section (vi) be revised as follows:*

(vi) The program does not require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and does not otherwise impose any restrictions on withdrawals, other than limitations on the timing and frequency of withdrawals for administrative convenience or cost savings or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code, provided that a program may impose investment-based restrictions, costs or penalties (e.g., an equity wash; market value adjustment or distribution rules imposed in an insurance company annuity contract).

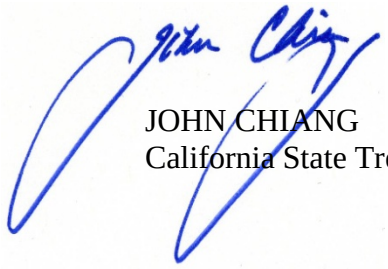
Conclusion

I am deeply grateful that the Department is pursuing the goal of allowing States to establish payroll deduction IRA savings programs that are exempt from ERISA regulations. The

[8] The Internal Revenue Code IRA rules allow the use of a hardship restriction.

exemption will enable States to partner with private sector investment managers, record keepers, custodians and other third parties to create simple, low-cost programs and enable lower income workers to save for retirement. For the reasons discussed above, I believe that eliminating the mandate condition and making certain other simplifications and clarifications to the Proposed Safe Harbor will extend the benefits of these IRA savings programs to more lower-income employees and reduce program administrative costs without sacrificing any worker safeguards.

Respectfully submitted,



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