WOODSTOCK INSTITUTE

Advancing Economic Security and Community Prosperity

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Via Email to e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave, N.W.
Washington D.C., 20210
Attn: State Savings Arrangements Safe Harbor

RE: RIN 1210-AB71, Savings Arrangements Established by States for Non-Governmental Employees

Dear Secretary Perez:

I am writing on behalf of Woodstock Institute concerning the Department of Labor's (DOL) Notice of Proposed Rulemaking creating the State Savings Arrangements Safe Harbor. Woodstock Institute strongly supports creating a safe harbor for employers that are mandated to participate in state-established and administered automatic enrollment payroll deduction retirement savings programs, and we encourage the DOL to expand the safe harbor to employers that voluntarily participate in those programs. Further, we suggest that the DOL clarify four sections of the proposed rules: (1) Section 2510.3-2(h)(1)(ii), which requires the program to be "administered by the State," (2) Section 2510.3-2(h)(1)(iii), which provides that the State "assumes responsibility for the security of payroll deductions and employee savings," (3) Section 2510.3-2(h)(1)(iv), which requires the State to create "a mechanism for enforcement of [employees'] rights," and (4) Section 2510.3-2(h)(2)(ii), which requires the State to "retain[] full responsibility for the operation and administration of the program."

About Woodstock Institute

Woodstock Institute is a leading nonprofit research and policy organization in the areas of equitable lending and investments; wealth creation and preservation; and safe financial products, services, and systems. Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Our key tools include: applied research; policy development; coalition building; and technical assistance. Woodstock Institute has been a recognized economic justice leader and bridge-builder between communities and policymakers in this field since it was founded in 1973 near Woodstock, Illinois.

Woodstock Institute has been engaged in research and policy efforts to expand access to retirement savings tools and to ensure that more low- and moderate-income workers can easily and safely save for retirement. We published a report in 2012 documenting the lack of access to employment-based retirement savings accounts for private-sector workers in Illinois. To address this problem, we worked with policymakers, businesses, and advocates (including the Illinois Asset Building Group) to create the Illinois Secure Choice Savings Program, which was signed into law in January 2015.[1] Woodstock is assisting the Illinois Treasurer, Governor, and the Secure Choice Board as they implement and launch the program. The program will enable workers to automatically save their own money in a Roth Individual Retirement Account (IRA), which will be invested and managed by a private investment company chosen by the Secure Choice Board. Employers with 25 or more year-round employees will automatically enroll workers (who have the option to opt-out) into the program. Employers with fewer than 25 employees may voluntarily participate in the program. The default contribution is a three percent payroll deduction which will be invested in a target date fund based on the employee's age. Participants in the program will be putting their hard-earned money into a Roth IRA, and their interests will be protected by the Secure Choice Board's selection and oversight of the investment company managing the funds.

The safe harbor is necessary to ensure program implementation.

Without the safe harbor, state savings arrangements are at a substantial risk of being challenged in court. A successful court challenge could preempt state law entirely or require the state-sponsored retirement plans to comply with the Employee Retirement Income Security Act of 1974 (ERISA). The stakes are even higher under Illinois's law, which provides that the program cannot be implemented if it is "determined that the program is an employment benefit plan or employer liability is established under [ERISA]."[2] Thus, for states like Illinois, the safe harbor is absolutely essential to ensuring that the program can be implemented. For states without similar statutory language or for states considering state savings arrangements, the safe harbor is necessary to provide the states with clarity as to the program's viability. Without such clarity, the risk of ERISA preemption would serve as a substantial impediment to the adoption and implementation of these types of laws.

Mandatory retirement savings programs advance an important policy objective: increasing income stability for retired workers.

An increasing number of older Americans are enduring economic hardship due to a lack of retirement income. Nationally in 2013, 9.5 percent of people age 65 or older lived below the poverty line.[3] Moreover, the poverty rate for seniors is increasing; the poverty rate among people 65 and older increased by 5.3 percent between 2010 and 2014.[4] Retirement savings are a source of income that could substantially improve retirees' economic fortunes, yet current trends indicate that retirement savings will fall far short of their potential to supplement retirees' income.

[1] P.A. 98-1150.
[2] *See* Section 95, P.A. 98-1150.
[3] Constantijn W. A. Panis & Michel Bried, August 28, 2015, "Target Populations of State Level Automatic IRA Initiatives." Their analysis is based on data from the Annual Socio-Economic Supplement to the Current Population Survey, March 2014.
[4] Based on analysis of data from the American Community Survey, 1-year estimates for 2010 and 2014.

Woodstock Institute's 2012 report is called "Coming Up Short: The Scope of Retirement Insecurity Among Illinois Workers."[5] The Woodstock Report notes that retirement income is derived from four main sources: earnings, assets, Social Security, and employment-based retirement plans. Considering the relative contribution each source makes to retirement income and the trends that indicate how those sources may change in the future suggest that most households will not have adequate income in retirement unless policies are implemented to increase retirement savings.

The Woodstock Report analyzes each source of retirement income. With respect to earnings, the Woodstock Report cites data from the Employee Benefit Research Institute, which shows that income from earnings represents only a small fraction of retirement income: 6.2 percent or less for households in the bottom 60 percent of incomes as of 2008.[6] As for assets, in 2008, they provided only 6.2 percent or less of retirement income for households in the bottom 60 percent of incomes.[7]

Social Security constitutes a significant portion of retirement income for many retirees but, increasingly, is replacing less of a retiree's pre-retirement income. The Woodstock Report also cites data that show that Social Security provided an average of 42.4 percent of pre-retirement income in 1981 and only 39.8 percent of pre-retirement income in 2008.[8] As part of the changes made to extend the solvency of the Social Security Trust Fund in 1983, the replacement rate for benefits was reduced over a period of time. As a result, the replacement rate is scheduled to decrease about five percent between 2010 and 2020 and remain at that reduced level going forward, so it appears unlikely that Social Security will be able to provide additional support for retirees' retirement income.

The inability of earnings, assets, and Social Security to provide adequate retirement income requires retirees to rely increasingly on retirement savings, yet approximately 2.5 million private-sector workers in Illinois[9] and 68 million workers across the country[10] do not have access to an employment-based retirement plan. Nationally, only 49.1 percent of private-sector wage and salary workers between the ages of 21 and 64 work for a company with an employment-based retirement plan, and only 39.2 percent of these workers participated in the plan.[11] Even for full-time, full-year wage and salary workers, who are most likely to be covered by an employment-based plan, the percentage who worked for an employer with a retirement plan declined from 69.1 percent in 1999 to 62.5 percent in 2008.[12] The participation rate for this population declined during this period from 60.4 percent in 1999 to 54.8 percent in 2008.[13]

Many retirees face the prospect of outliving their retirement savings, assuming they have any. A lack of income poses obvious problems to such retirees. As the commentary to the proposed rule notes, "inadequate retirement savings can mean sacrificing or skimping on food, housing, health care,

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[5] Cowan, Spencer. Coming Up Short: The Scope of Retirement Insecurity Among Illinois Workers, Woodstock Institute. September 2012, downloaded December 15, 2005 (hereinafter referred to as the "Woodstock Report").
[6] Woodstock Report, at 1 (citing Employee Benefit Research Institute (EBRI), October 2009. EBRI Databook on Employee Benefits, Chapter 7, Table 7.5).
[7] Woodstock Report, at 3 (citing EBRI Databook on Employee Benefits, Chapter 7, updated October 2009).
[8] Woodstock Report, at 3 (citing EBRI Databook on Employee Benefits, Chapter 7, updated October 2009).
[9] Woodstock Institute Policy Brief: Access to Employment-Based Retirement Savings in Illinois, April 2012.
[10] Copeland, Craig, Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013, Employee Benefit Research Institute, Issue Brief No. 405 (October 2014) (available at www.ebri.org).
[11] Woodstock Report, at 4 (citing EBRI Issue Brief No. 348, October 2010, Figure 1).
[12] EBRI Issue Brief No. 405, Figure 19.
[13] Id.

transportation, and other necessities."[14] Retirees may be pushed into poverty, which not only harms the retiree, but also, as also noted in the commentary to the proposed rule, creates fiscal pressure on publicly financed retirement programs and on other public assistance programs.[15] Retirees who struggle financially may also be forced to rely on their children or extended family, which could drain the family's resources and force them to make various sacrifices, including a reduction in retirement savings. In this way, the lack of adequate retirement savings becomes a self-perpetuating problem.

The Illinois Secure Choice Savings Program could extend retirement savings opportunities to 1.7 million workers in Illinois who do not currently have access to an employment-based retirement savings plan.[16] We also hope that the automatic enrollment component of the law will result in a relatively high participation rate among this population. For these workers, access to retirement savings can substantially lower the risk of economic hardship in retirement. Therefore, states can and should implement these types of programs, and the proposed rule enables them to do that without having employers that are mandated to participate in the program be subject to ERISA requirements.

Allowing states to create savings arrangements could inform and inspire action at the federal level.

In the upcoming years, we will learn whether state savings arrangements meaningfully address the problem of inadequate retirement savings. Positive results could inspire this country to establish a national retirement savings program. Mandatory savings programs already exist in Australia, Britain, and New Zealand. In Australia, for example, research shows that its retirement income system, which includes a mandatory retirement savings program, has "achieved high individual savings rates and broad coverage at reasonable low cost to the government."[17] The *New York Times*, in a recent article, summarized these countries' programs and their achievements.[18] Hopefully, the experience in Illinois and in other states with mandated retirement savings programs will provide the data necessary to inspire a similar program at the national level.

State savings arrangements that permit employers to participate voluntarily should also be included in the safe harbor.

State retirement savings arrangements, like the Illinois Secure Choice Program, aim to increase both access to a retirement plan and actual participation in a plan. The employer mandate increases access and the automatic employee enrollment is designed to increase participation. Footnote 18 of the commentary to the proposed rules notes that if the state savings arrangement permits employees who are not subject to the automatic enrollment requirement to voluntarily participate, such participation would not trigger ERISA preemption.[19] In this way, allowing voluntary employee participation in the program would further the goal of increasing program participation.

[14] 80 FR 72006-7.
[15] 80 FR 72007.
[16] Constantijn W. A. Panis & Michel Bried, August 28, 2015, "Target Populations of State Level Automatic IRA Initiatives."
[17] Agnew, Julie. Australia's Retirement System: Strengths, Weaknesses, and Reforms, Center for Retirement Research at Boston College. April 2013, downloaded December 15, 2015.
[18] *New York Times*, December 11, 2015..
[19] 80 FR 72010.

Both access and participation could be further increased by allowing employers to opt in to the program. The proposed safe harbor excludes voluntary employer participants, but the Illinois law contains a provision for voluntary employer participation.[20] If an employer volunteers to participate, the employer would still serve as a mere facilitator of the program, just as employers who are covered by the law's mandate. The state would still set the terms for and administer the payroll deduction savings program. By volunteering to be a "participating employer" in the program, the employer would submit itself to the various terms that dictate and limit employer involvement. A voluntary participating employer, as compared to a mandated participating employer, does not give rise to a greater risk of undue pressure or influence to enroll.

The difference between allowing a safe harbor for mandated employer participants but not for voluntary employer participants appears to rest on the distinction between "completely voluntary" and "voluntary" participation by the employee. Under the 1975 safe harbor regulation,[21] an opt-in program would be considered "completely voluntary" and not trigger ERISA requirements, while an opt-out program would only be "voluntary" and would trigger ERISA requirements. The difference between the two in the level of participation is significant; opt-out programs are likely to have about twice the participation rate of opt-in programs. In terms of imposing a burden on the employee, the difference is minimal. All the employee has to do to opt-out is check a single box on a single piece of paper.

Given the minimal level of imposition on the employee to opt-out and the significant difference in likely participation, and with the safeguards designed into the Illinois Secure Choice Program in mind, allowing employers to voluntarily participate would further the policy objectives behind retirement state savings programs with no significant burden on employees who did not want to participate. Workers would enjoy increased access to and participation in a retirement savings plan, greater retirement security, and gain those benefits with minimal risk of any of the potential harms that ERISA was intended to prevent. Therefore, we recommend that Section 2510.3-2(h)(1)(x) of the proposed rules be stricken.

Not only would allowing employers that voluntarily participate in the Secure Choice Program with an opt-out feature to receive the protection of the safe harbor maximize the benefit to employees with virtually no downside risk of harm because of the protections built into the Secure Choice Program by design, it would greatly reduce the burden on businesses and administrators running the program. If mandated employers receive a safe harbor and employers participating voluntarily do not, then employers mandated into the program might have to determine annually whether they were still subject to the mandate because that determination would affect how their employees had to be treated. For example, employees who were automatically enrolled under the opt-out provisions while the employer was mandated, having 26 employees, might have to opt-in the next year when the participation became voluntary because two employees had left the company and it had not yet hired their replacements, an unnecessary burden and potential source of confusion for employer and employee alike.

The burden would not be just on employers, however. Administrators would have to recertify every participating employer every year to determine whether employees or new hires have to opt-out or opt-in. Whether an employer is over the threshold for the mandate is determined by the level of employment for the previous year, with new employees enrolled when they are hired. That means that administrators would have to certify employers early in the year to avoid having new hires improperly

[20] *See* definition of "small employer," Section 5. P.A. 98-1150.

[21] 29 CFR 2510.3-2(d)

treated and possibly being automatically enrolled with an opt out choice when they should have had to opt in.

If the risk of harm to, or burden on, the employee were more than *de minimis*, the distinction between mandated employers receiving the benefit of a safe harbor and voluntarily participating employers not might be defensible. The safeguards built into the Secure Choice Program and limited role that the employer plays, however, eliminate the risk that the employer is influencing the choice of investment, and the effort needed for the employee to opt out is minimal. The insignificant potential for harm and burden on the employee are insufficient to justify the much larger burdens placed on employers and administrators in having to distinguish between mandated employers and those participating voluntarily.

The sections of the rule pertaining to program administration should be clarified.

Two sections of the rule appear aimed at ensuring that the State retain “full responsibility” for the administration of the program. *See* Sections 2510.3-2(h)(1)(ii), 2510.3-2(h)(2)(ii). These sections could be construed to limit a state’s ability to delegate various responsibilities to third parties, including, for example, investment managers and private financial institutions. In Illinois, the State has the duty to make and enter into contracts with third-parties for the administration of the program, and we believe the third-parties should be responsible, under such contracts, for performing their contractual duties. The rule should make clear that delegation to third-parties is permissible. Thus, we suggest that these sections be revised.

Section 2510.3-2(h)(1)(ii) should be revised as follows: “The program is administered by the State establishing the program, or by a governmental agency or instrumentality of the State or by a committee, board, or other person selected pursuant to State law.”

Section 2510.3-2(h)(2)(ii) should be revised as follows: “Utilizes one or more third-parties, selected pursuant to State law, to administer the program, provided that the State or other person or entity described in paragraph (h)(1)(ii) of this section is responsible for selecting, monitoring, and, as necessary, replacing such third-parties.”

The section of the rule pertaining to the “security” of payroll deductions should be clarified or stricken.

Section 2510.3-2(h)(1)(iii) of the proposed rule provides that, to qualify for the safe harbor, the state must assume “responsibility for the security of payroll deductions and employee savings.” The term “security” is ambiguous. Security could mean a guarantee against losses, which would effectively require the state to indemnify program participants. The Illinois law creates an Illinois Secure Choice Savings Board, onto which is imposed a fiduciary duty and other duties to ensure that participant funds are handled appropriately.[22] In this sense, the funds are “secure,” but we invite clarification as to the type of security contemplated by this section to ensure that the rule cannot be interpreted as imposing an obligation for the state to indemnify program participants or guarantee against losses. We would also support striking paragraph (h)(1)(iii).

[22] *See* Sections 25-30, P.A. 98-1150.

The section of the rule pertaining to "mechanism for enforcement" of employees' rights should be clarified.

Section 2510.3-2(h)(1)(iv) of the proposed rule provides that, to qualify for the safe harbor, the state must *create* a mechanism for the enforcement of employees' rights. The Illinois law creates an enforcement mechanism to ensure that employers who are covered by the law comply with the state mandate by enrolling their employees in the program.[23] The law does not, however, create a new mechanism to ensure that employers properly remit employee contributions to the program fund. Payments to the program fund that are made on behalf of an employee would be considered "wages" under the Illinois Wage Payment and Collection Act.[24] That Act contains its own enforcement mechanisms.[25] Thus, the Illinois law establishing the state savings arrangement did not itself create an enforcement mechanism relative to the employer's duty to properly remit employee contributions to the program fund. Woodstock Institute believes that the proposed rule does not mean to disqualify Illinois' program from the safe harbor on the basis of this fact, but we invite clarification on this portion of the proposed rule. Perhaps substituting "have" for "create" in that line of the proposed rule would solve this issue.

Conclusion

Woodstock Institute appreciates the opportunity to comment on the DOL's proposed rule. State savings arrangements that include mandatory employer participation and automatic employee enrollment are likely to substantially increase worker participation in a retirement savings program and may inspire similar action at the federal level. Retirement savings have great potential to increase income security for older Americans, particularly considering the relative stagnation or decline in the other primary sources of retirement income: earnings, assets, and Social Security. Improved income security for older Americans is a win on all fronts. It benefits older Americans, their families, and the overall economy. For these reasons, we also support extending the safe harbor to employers who voluntarily participate in a state savings program. Finally, we suggest clarifying the proposed rule with respect to the concepts of program administration, the "security" of payroll deductions, and the "enforcement mechanism" required under the proposed rule. We urge the DOL to finalize and implement this rule as quickly as possible.

Very truly yours,

Dory Rand

Dory Rand
President
Woodstock Institute

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[23] *See* Section 85, P.A. 98-1150.
[24] 820 ILCS 115/8.
[25] 820 ILCS 115/11-14.