CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Savings Arrangements Established by States for Non-Governmental Employees Proposed Safe Harbor Rule RIN 1210-AB71

We write to submit comments on the proposal by the Department of Labor (DOL) to create a safe harbor exemption from the Employee Retirement Income Security Act (ERISA) that will clarify the parameters under which State payroll deduction savings programs can be established without creating "employee benefit plans" subject to ERISA.

In our state, the California Secure Choice Retirement Savings Trust Act seeks to provide a vital supplement to Social Security income to prevent over 6.3 million private sector low- and middle-income workers from sliding into poverty when they can no longer work, and would serve as a model for other states in helping to address the retirement security crisis (Senate Bill 1234 (De León-Steinberg), Chapter 734, Statutes of 2012). We greatly appreciate the efforts by Secretary Thomas Perez and the Department to clear a pathway for state programs, and will continue to work diligently with the California Secure Choice Retirement Savings Investment Board to implement a program for participants that is reliable, affordable, and completely portable for the millions of Californians that currently lack access to workplace retirement plans.

Towards this end, we would like to take this opportunity to comment on the following specific provisions of the proposed safe harbor rule:

- **<u>§ 2510.3-2(h)(1)(x) Employer Mandate</u>**

  We are concerned that the Department's proposed safe harbor would only extend to employers that are under a state mandate to facilitate worker participation, as this contingency would burden and cause complications for employers if uncovered employees are inadvertently auto-enrolled. Under California's statute, the mandate applies to employers with five or more employees—we worry that employers that initially meet and then fall short of this threshold would find themselves unintentionally in violation of the safe harbor criteria.

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In addition, tying the safe harbor to the employer mandate would unfairly prevent workers not covered by the mandate from being able to participate in the California Secure Choice Retirement Savings Program. It seems that as long as an employer's role is limited to the ministerial duties of passing along program information and facilitating the payroll deduction for employee contributions, this arrangement meets the objective of the safe harbor and the employer mandate condition is not legally necessary.

We therefore respectfully request that the rule be modified to eliminate the employer mandate condition by striking paragraph (h)(1)(x).

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

Paragraph (h)(1)(i) of the proposed safe harbor requires that "the program is established pursuant to State law." Under the California Secure Choice Retirement Savings Trust Act, the Legislature delegated authority for the determination of program design and other features to the California Secure Choice Retirement Savings Investment Board, which is comprised of Governor's appointees, Constitutional Officers, and appointments from the State Senate and Assembly. We are concerned that this paragraph could be interpreted to require statutory changes for each and every program term and administrative decision.

We request that the proposed safe harbor be clarified to provide that if the program is established under state enabling legislation, including the delegation of authority to a governing board or other State-appointed person, that the program would be considered to be established pursuant to state law.

- **§ 2510.3-2(h)(1)(ii) and (2)(ii) Program Administration**

The California Secure Choice Retirement Savings Program will be a public-private partnership modeled after ScholarShare, our state's 529 College Savings Program. In order to ensure that the California Secure Choice Retirement Savings Investment Board has the ability to delegate various duties of program administration to investment managers, recordkeepers and other third parties, we believe that clarification would be helpful.

We request that these paragraphs be revised to explicitly allow the California Secure Choice Retirement Savings Investment Board to utilize service or investment providers and consultants to operate and administer the program, including the investment of program funds.

- **§ 2510.3-2(h)(1)(iii) and (iv) Enforcement of Employee Rights**

Paragraph (h)(1)(iii) states that "[t]he state assumes responsibility for the security of payroll deductions and employee savings." We are concerned that this provision could lead to unwarranted litigation against the state, as it could be interpreted to read that the state assumes responsibility for any employer malfeasance and/or underperforming investments. It appears that the primary objective of this provision is to provide safeguards against employer fraud or error in the

transmission of employee contributions, and we have security mechanisms already in place that will protect workers enrolled in a state payroll deduction savings program.

Therefore, we respectfully request the deletion of paragraph (iii) due to our state's ongoing enforcement of current wage-hour laws, and request that paragraph (iv) be revised to read: "[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."

- **§ 2510.3-2(h)(1)(vi) Withdrawals**

  Paragraph (vi) of the proposed safe harbor would prohibit a program from imposing any restriction, cost, or penalty on the ability of employees to withdraw, transfer, or rollover their IRAs. We are concerned that this constraint would limit the program's investment flexibility and ability to implement cost-saving administrative restrictions (e.g. limiting withdrawals, transfers or rollovers to once per quarter). In addition, to mitigate the problems associated with "leakage," the board may want to consider imposing a hardship standard on withdrawals before a certain age.

  Therefore, we request either the deletion of this paragraph, or a revision that would provide the board with enough flexibility to implement a hardship standard for participant withdrawals.

We appreciate your work on this safe harbor rule. If you have any questions, or would like to discuss our comments further, please do not hesitate to contact us directly.

Respectfully submitted,

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