American Federation of Labor and Congress of Industrial Organizations

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Submitted via e-mail to e-ORI@dol.gov.

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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: RIN 1210-AB71; State Savings Arrangements Safe Harbor

Ladies and Gentlemen:

The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the U.S. Department of Labor ("DoL" or "the Department") on the Notice of Proposed Rulemaking published in the Federal Register on November 18, 2015, regarding savings arrangements established by states for non-governmental employees ("Proposed Rule").[1] In addition, we include brief comments on the Interpretive Bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974 ("Interpretive Bulletin").[2]

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. Further, to help

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[1] Employee Pension Benefit Plans; Certain State Savings Programs, 80 Fed. Reg. 72006 (Nov. 18, 2015) (amending 29 C.F.R. § 2510.3-2).

[2] Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974; Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71936 (Nov. 18, 2015) (amending 29 C.F.R. § 2509).

our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

The labor movement has always viewed retirement security as requiring the involvement of government, employers, and workers. That is why we strongly support Social Security and expansion of its benefits and oppose employers' longstanding efforts to retreat from their responsibilities to workers. Working people, through collective bargaining and other forms of advocacy for improved pay and benefits, also have placed a significant emphasis on retirement security through workplace pensions and retirement savings plans. In the private sector, four-in-five union workers participate in a retirement plan at work, compared to fewer than half of non-union workers. Two-thirds of private-sector union workers participate in a defined benefit pension, compared to just one-in-10 non-union workers.[3] In the public sector, union workers are more likely than non-union workers to participate in any kind of retirement plan (88 percent vs. 75 percent) and in a defined benefit plan (85 percent vs. 66 percent).[4] Working people often take an active role in overseeing workplace retirement plans, with thousands of worker representatives serving as trustees for both private and public sector retirement plans.

Overview of the Proposed Rule and Interpretive Bulletin

On July 13, 2015, President Obama directed the Department of Labor "to propose a set of rules . . . to provide a clear path forward for states to create retirement savings programs."[5] The explicit purpose of his directive is to encourage states to adopt and implement new ways for workers to save for retirement given Congress's failure to act on his proposal to enroll automatically certain workers without access to a workplace retirement plan into an Individual Retirement Account ("IRA"). In response, the Department issued the Proposed Rule, which is now open for public comment, and the Interpretive Bulletin, a sub-regulatory explanation of the Department's interpretation of ERISA.

The Proposed Rule creates a safe harbor under which a state can create a payroll deduction retirement savings program for non-governmental employees using an individual retirement plan and including automatic enrollment of employees, without establishing an

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3 U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2015*, Bulletin 2782 (Sept. 2015) t. 2, "Retirement Benefits: Access, Participation, and Take-up Rates, Private Industry Workers, National Compensation Survey, March 2015" *available at* http://www.bls.gov/ncs/ebs/benefits/2015/ebbl0057.pdf.

4 *Id.* at t. 2, "Retirement Benefits: Access, Participation, and Take-up Rates, State and Local Government Workers, National Compensation Survey, March 2015."

5 President Barack Obama, Remarks by the President at White House Conference on Aging (July 13, 2015) *available at* https://www.whitehouse.gov/the-press-office/2015/07/13/remarks-president-white-house-conference-aging.

ERISA “employee pension benefit plan” or “pension plan.” As the Department highlights in the preamble, "Limited employer involvement in the program is the key to a determination that a state savings program is not an employee pension benefit program."[6] To be eligible for the safe harbor, a program must satisfy specific conditions with respect to:

- **Limited employer involvement** (only ministerial acts by the employer necessary to implement the payroll deduction program, such as collecting and remitting employee contributions and providing notices and information; no employer contributions; employer participation required by state law; no employer discretionary authority, control or responsibility; no employer compensation other than reimbursement for actual costs).
- **Role of the state government** (established by the state pursuant to state law; administered by the state; state responsibility for the security of payroll deductions and employee savings; state requirement that employees be notified of their rights and mechanisms to enforce those rights).
- **Employee control and rights** (voluntary participation; no restrictions on withdrawals or costs or penalties on transfers or rollovers; rights enforceable only by the employee, former employee, or beneficiary, an authorized representative, or the state).

A retirement savings program can satisfy these conditions even if it is directed at employees who are not already eligible for some other workplace savings arrangement; uses third-party service or investment providers to operate and administer the program, so long as the state retains full responsibility; or requires automatic enrollment and/or automatic escalation of contribution amounts, so long as each employee receives adequate notice to opt out or change her elections.

While the Department previously issued guidance describing the circumstances under which a payroll deduction IRA will not be considered an ERISA-covered plan[7], none of that guidance evaluates such arrangements with terms required by state law. The Proposed Rule departs significantly from that guidance by requiring a state role in establishing and operating a program, including through a statutory mandate for employers to make payroll deductions, and permitting the program to require automatic enrollment of workers and automatic escalation of worker contributions. Under the existing payroll deduction IRA safe harbor, by contrast, “automatic enrollment of employees is not permitted”[8] and presumably neither is automatic escalation.

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[6] 80 Fed. Reg. 72006, 72010.

[7] *See, e.g.*, Employee Pension Benefit Plan; Individual Retirement Accounts, 29 C.F.R. § 2510.3-2(d); Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974; Interpretive Bulletin Relating to Payroll Deduction IRAs, 29 C.F.R. § 2509.99-1.

[8] 80 Fed. Reg. 72006, 72010 n. 18.

The Interpretive Bulletin provides the Department's views on "certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans."[9] It concludes that "ERISA preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees, provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs."[10] In its analysis, DoL describes three state approaches consistent with ERISA preemption (each of which currently is being implemented or considered by one or more states):

- **Marketplace Approach:** The state establishes a program to connect employers with qualifying plans in the private sector market, without requiring that employers use the marketplace or establish a plan. The state itself would not establish or maintain a savings arrangement.
- **Prototype Plan Approach:** The state creates a tax-qualified prototype plan that employers may choose to adopt, thereby becoming the plan sponsor. The state may draft the prototype plan so that the state (or a designated third-party), not the employer, is responsible for most administrative or asset management functions.
- **Multiple Employer Plan (MEP) Approach:** The state establishes a tax-qualified multiple employer retirement plan. The state, or designated governmental agency or instrumentality, is the plan sponsor, named fiduciary, and plan administrator. The plan design may allow for a participating employer to have only "limited fiduciary responsibilities (the duty to prudently select the arrangement and to monitor its operation would continue to apply)."[11] To satisfy ERISA's requirement that a plan sponsor "must either act directly as the employer of the covered employees or 'indirectly in the interest of an employer' in relation to a plan,"[12] plan participation appears to be limited to "in-state employers."[13]

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[9] 80 Fed. Reg. 71936, 71937.

[10] 80 Fed. Reg. 71936, 71937.

[11] 80 Fed. Reg. 71936, 71938.

[12] 80 Fed. Reg. 71936, 71938 (citation and footnote omitted).

[13] 80 Fed. Reg. 71936, 71939.

<u>Comments on the Proposed Rule</u>

We generally support creating a safe harbor for certain state savings programs under the specific conditions laid out in the Proposed Rule. Federal policy does not ensure individuals will be able to maintain their standard of living once they retire. Social Security, while nearly universal and the most important source of retirement security for Americans, provides only partial income replacement. Although the Internal Revenue Code provides significant tax incentives for the creation of workplace-based pensions and retirement savings plans, just two-thirds of private-sector workers have access and fewer than half participate in retirement plans[14]; many who do participate are not on track to have enough for a secure retirement. Given the limited reach of federal policy and in the absence of federal action to do more, it is important that the Department provide clear guidance to the states on the steps they make take, consistent with federal law, to ensure that their residents are preparing adequately for retirement.

We believe the proposed safe harbor appropriately limits an employer's role to nothing beyond the specified ministerial acts, which are essential to the functioning of a state savings program, and excludes any arrangement in which the employer has any "discretionary authority, control, or responsibility." In our view, expanding this safe harbor in any way that grants discretionary authority, control, or responsibility to an employer, would and should result in the establishment of an ERISA-covered plan—especially when combined with automatic enrollment or automatic escalation of contributions.

For example, the safe harbor should not apply in circumstances in which *an employer elects to enroll workers automatically* in a payroll deduction arrangement, regardless of whether the arrangement is established by a state or a private entity. The safe harbor also should not apply in circumstances in which *an employer may elect the savings program* in which to participate *or the investment fund* in which to enroll workers automatically, regardless of whether the employer is subject to a state-law automatic enrollment mandate. Employers that would like to establish a payroll deduction IRA voluntarily, without establishing an ERISA-covered plan, may continue to use the terms of the existing safe harbor.[15]

We urge the Department to elaborate on the necessary steps to satisfy the requirement that the state "assumes responsibility for the security of payroll deductions and employee savings."[16] As the sponsor of the Illinois Secure Choice Savings Program Act has stated,

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[14] U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2015*, Bulletin 2782 (Sept. 2015) t. 2, "Retirement Benefits: Access, Participation, and Take-up Rates, Private Industry Workers, National Compensation Survey, March 2015" *available at* http://www.bls.gov/ncs/ebs/benefits/2015/ebbl0057.pdf.

[15] 29 C.F.R. § 2510.3-2(d).

[16] Proposed 29 C.F.R. § 2510.3-2(h)(iii).

ensuring the money deducted from a worker's wages actually gets deposited into her retirement savings account "is a real potential vulnerability of one of these plans that has to be addressed meticulously."[17] In our view, ensuring the security of payroll deductions will require significant attention and the development of state monitoring and enforcement programs similar to what exists for ERISA plans.

ERISA, in combination with federal bankruptcy law, does address the security of employee payroll deduction contributions to employee benefit plans meticulously. ERISA itself establishes clear responsibilities and rights and includes a comprehensive enforcement regime. The duty to monitor and collect delinquent contributions is a trustee responsibility, and the named fiduciary and/or the fiduciary with authority to hire trustees has a duty to specifically allocate this responsibility.[18] The Department also has promulgated specific standards for how quickly an employer must deposit money into the plan.[19] Further, ERISA plan participants and beneficiaries have a right to sue for fiduciary violations and the Department itself is vested with enforcement authority under ERISA, enabling each to address the failure of an employer to make timely contributions of employee payroll deductions.

Recognizing the magnitude of the problem with delinquent or never-made contributions, the Department has been engaged in extensive enforcement efforts since 1995, when it first began a civil enforcement project focused on this issue. Beginning in 2010, the Department also initiated a "Contributory Plans Criminal Project" to protect workers participating in all types of contributory plans, noting "[t]he participants in contributory plans are vulnerable to various forms of criminal abuse."[20] The Department also conducts an ongoing consumer education program to alert employee benefit plan participants to signs that their contributions are being misused and to complement DoL's enforcement efforts.[21]

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[17] Illinois State Senator Daniel Biss, Remarks at the Brookings Institution Conference "Are New Directions Needed in State Retirement Policy?" (Oct. 7, 2015) *transcript available at* http://www.brookings.edu/~/media/events/2015/10/07-state pensions/20151007_state_pensions_retirement_transcript.pdf.

[18] *See generally* U.S. Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2008-01 (Feb. 1, 2008).

[19] Definition of "Plan Assets"—Participant Contributions, 29 C.F.R. § 2510.3-102.

[20] U.S. Department of Labor, Employee Benefits Security Administration, Fact Sheet, "Contributory Plans Criminal Project" (Apr. 2013), *available at* http://www.dol.gov/ebsa/pdf/fsCPCP.pdf.

[21] *See, e.g.*, U.S. Department of Labor, Employee Benefits Security Administration, "Ten Warning Signs that Your 401(k) Contributions Are Being Misusued," *available at* http://www.dol.gov/ebsa/publications/10warningsigns.html.

Since 2001, the Department has maintained a separate enforcement project known as the Rapid ERISA Action Team for Bankruptcy ("REACT"), which "focuses [DoL]'s response in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy," including when contributions have not been paid to a plan's trust.[22] In the case of an employer bankruptcy and given the complexities of the law and tight filing deadlines, the Department often plays a critical role assisting in filing proofs of claim for unpaid benefit plan contributions, which can receive priority treatment under federal bankruptcy law's priority for certain unsecured claims for contributions to an employee benefit plan.[23]

We note that many of the programs under development or consideration target smaller employers similar to those 401(k) plans sponsors most likely to be delinquent in depositing worker contributions. We urge the Department, therefore, to require in the final rule that certain minimum requirements be met in order for the state to be determined to have assumed responsibility for the security of payroll deductions. These minimum requirements should include:

- Standards for the timely contribution of payroll deductions into a worker's state-established individual retirement plan.
- Processes and programs to identify delinquent contributions, including but not limited to appropriate audit requirements.
- Comprehensive civil and criminal enforcement programs focused on securing delinquent and missing payroll contributions, including procedures to secure unpaid contributions in the case of a contributing employer's bankruptcy.[24]
- Education programs to inform participants of their rights, how to identify employer misuse of payroll deductions, and how to contact the appropriate state or plan administrative authorities when misuse is suspected.

States may already have wage payment and collection laws, as well as related enforcement programs, that would apply to payroll deductions payable to a newly created, state-established retirement savings program. To the extent such existing laws and programs satisfy the requirements outlined above, a state would not need to establish new laws or programs to meet the proposed safe harbor standard.

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[22] U.S. Department of Labor, Employee Benefits Security Administration, Fact Sheet, "Rapid ERISA Action Team for Bankruptcy" (Apr. 2013), *available at* https://www.dol.gov/ebsa/pdf/fs0102.pdf.

[23] 11 U.S.C. § 507(a)(5).

[24] When an employer that files a bankruptcy petition holds funds deducted from an employee's wages to be paid to a third party that is not an ERISA or governmental employee benefit plan, it can be difficult to establish that these funds do not fall within the property of the bankruptcy estate, making involvement by the state or the savings program critical.

With respect to a state assuming responsibility for the security of employee savings, we urge the Department to provide additional guidance regarding the governance of state-established programs. The Department should require, or at least encourage, state-established retirement savings programs to include one or more representatives of contributing employees in the governance of its program. Worker representation will help ensure the program is operated in the best interests of participants and beneficiaries. And in no instance should a program be permitted to satisfy the requirements of the safe harbor for being a non-ERISA arrangement if it includes one or more employer representatives in its governance but no representatives of contributing employees. We also urge the Department to provide additional guidance regarding the duties of program trustees or custodians with respect to the security and management of program assets, as well as disclosures relating to program assets, including proxy votes. It also is important that the Department emphasize the importance of states establishing plans with low fees and costs and operating them in the best interests of participants and their beneficiaries.[25]

The terms of the Proposed Rule are specific to individual retirement plans established and maintained pursuant to a state payroll deduction savings program. Some states, however, may want to open eligibility to residents who are not employees—for example, a state may enable or even require participation in its retirement savings program by independent contractors—and who will need to access the program individually or through other means outside of an employment relationship. We seek clarification in the final rule that a state retirement savings program will not fail to satisfy the provisions of the safe harbor merely because the program is open to individuals outside the employment relationship, or because the program terms applicable to non-employee participants differ from those applicable to employees or do not satisfy the safe harbor conditions that apply with respect to employees and employers.

The Proposed Rule limits the safe harbor to programs "established by a State pursuant to State law"[26] and requires a program to be "administered by the State establishing the program, or by a governmental agency or instrumentality of the State."[27] The term "State" is defined specifically as including "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone."[28] Therefore, excluded by omission are savings arrangements established and/or administered by any political subdivision of a state, such as a city or county, or potentially jointly by two or more states.

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25 We note that there is an inexplicably large variation in the level of program management fees among state-established Section 529 college savings plans. *See* Savingforcollege.com, "Compare by Features," http://www.savingforcollege.com/compare_529_plans/index.php?page=compare_plan_questions&plan_question_ids[]=215&order_by=plan_question_215 (last accessed 1/15/16).

26 Proposed 29 C.F.R. § 2510.3-2(h)(i).

27 Proposed 29 C.F.R. § 2510.3-2(h)(ii).

28 29 U.S.C. § 1002(10).

Consistent with the policy objectives underlying the Proposed Rule, we suggest the Department consider expanding the safe harbor to include retirement savings arrangements established and/or administered by a political subdivision of a state[29] and jointly by two or more states.

With respect to political subdivisions of a state, we suggest the Department establish minimum eligibility requirements to ensure that the political entity has the administrative capacity and sophistication necessary to administer a retirement savings arrangement, protect the rights of participating workers, and ensure the security of workers' payroll deductions and retirement savings. The Department could use easily measured proxies for administrative capacity and sophistication. For example, total population of a political subdivision as measured by the most recent decennial census or an interim population estimate published by the U.S. Census Bureau would be an appropriate proxy. The eligibility threshold could be set at or near the total population of the smallest of the 50 states, such as 500,000.

Another approach could be to require a minimum value of assets under management in public employee retirement plans governed by a trustee or trustees appointed and/or overseen by the political subdivision. Similar to the approach described for population, the eligibility threshold could be set at or near the total assets in such plans for the state with the smallest asset total.[30]

A state may want to establish a payroll deduction savings program using the proposed safe harbor and also sponsor or facilitate one or more of the ERISA-based retirement savings options for private sector employees described in the Interpretive Bulletin. A state also may want to establish, in combination with any of these programs, a non-ERISA, IRA-based savings program that employers can elect to offer under the terms of the existing safe harbor for completely voluntary payroll deduction IRAs (i.e., programs without automatic enrollment and/or automatic escalation). We suggest the Department provide additional guidance clarifying that states may choose to adopt two or more of these approaches.

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29 The Department should also consider permitting retirement savings arrangements established and/or administered jointly by two or more political subdivisions, such as an arrangement established by two adjoining counties.

30 Based on 2014 Census figures for state-administered defined benefit plans, that threshold would be approximately $4 billion, which is comparable to total assets in Vermont's public employee defined benefit plans. U.S. Census Bureau, *2014 Annual Survey of Public Pensions: State Administered Defined Benefit Data*, t. FIN008ALL "State and Locally-Administered Defined Benefit Pension Systems—All Data by State and Level of Government: 2014" *available at* https://www.census.gov/govs/retire/index.html.

Comments on the Interpretive Bulletin

We appreciate the Department's Interpretive Bulletin guidance describing its views on the types of ERISA-covered retirement plans a state may establish and the role a state may play in facilitating employer adoption of such plans, without running afoul of ERISA's broad preemption provision. Although, as a legal matter, a state's role with respect to ERISA-covered plans is necessarily more limited than with non-ERISA plans, workers, retirees and their beneficiaries gain meaningful advantages when employers adopt ERISA plans because of the statute's detailed participant protections.[31] Further, unlike under state retirement savings programs established pursuant to the Proposed Rule, an employer adopting or participating in an ERISA plan may make contributions to the plan for their employees. Employer contributions can be a decisive factor in whether a worker elects to participate in a plan and whether non-highly-compensated workers are able to build adequate retirement savings.

The MEP, in our view, is the most significant of the three approaches outlined in the Interpretive Bulletin because it has the greatest potential for the development of retirement plans that will deliver adequate retirement income to workers. State sponsorship, pooling of assets, and centralized administration, when combined, are likely to produce improved outcomes for workers through more efficient and effective plan design and administration, lower money management, administrative and other costs, and better alignment of interests between those responsible for running a MEP and the workers participating in it.

We greatly appreciate the opportunity to submit these comments. Please do not hesitate to contact us with any questions you may have.

Very truly yours,

/s/ Shaun C. O'Brien

Shaun C. O'Brien
Assistant Policy Director for Health & Retirement

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[31] ERISA is designed, in part, "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).