THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

January 19, 2016

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

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

Attn: Re: Comments on Proposed Safe Harbor Rule (RIN 1210-AB71)

To Whom It May Concern:

As the Comptroller of the City of New York, I appreciate the chance 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 payroll deduction savings by adding a new regulation § 2510.3-2(h) ("Proposed Safe Harbor"). This proposal would clarify the circumstances under which these programs will not be considered "employee benefit plans" subject to ERISA.

New York City's pension system is the 4th largest in the nation and 15th largest in the world, with more than $160 billion dollars under management. As Comptroller, I serve as a member of the Board of Trustees of four of the five City Public Pension Funds and chief investment advisor to, and custodian of assets of, all five Funds. As the investment advisor to the Funds, the Comptroller has the fiduciary responsibility of investing and protecting the Funds for more than 700,000 retirees and beneficiaries. Investing the City's pension funds is one of the Comptroller's most critical tasks.

Moreover, the City of New York has the authority under New York State law to sponsor the type of IRA plan that the proposed rule contemplates. Under the deferred compensation program, City employees are eligible to participate in a 401(k) and 457 plan as well as both traditional and Roth IRAs. The City deferred compensation plans have combined assets in excess of $15 billion. Two City pension funds also sponsor 403(b) plans, with combined assets in excess of $28 billion.

At the same time, 57 percent of New York City workers lack access to a retirement plan at their place of employment. In early 2015, I convened the New York City Retirement Security Study Group, a panel composed of national academic leaders with broad expertise in all aspects of retirement security. Chaired by Scott Evans, my office's Chief Investment Officer, the members include: Dr. Teresa Ghilarducci; Dr. David Laibson; Dr. Olivia S. Mitchell; Dr. Alicia Munnell;

Dr. Joshua Rauh; and Dr. Stephen P. Zeldes. The group has been working diligently to develop innovative and affordable savings options for the growing number of New Yorkers without access to retirement plans at work.

First and foremost, I commend the Department for its support of efforts to establish publicly-enabled retirement savings arrangements for private sector workers. This burgeoning crisis threatens the well-being of retirees and the financial health of local government. The Proposed Safe Harbor and Interpretive Bulletin 2015-02 provide new and valuable tools to help workers prepare for retirement and reduce the burden on taxpayers to provide support for retirees lacking sufficient financial resources.

We largely concur with and support most of the provisions in the Proposed Safe Harbor. To make the final rule as effective as possible in achieving its objectives, we believe that there are a number of provisions that would benefit from further refinement.

The most useful change from the perspective of the City of New York would be to broaden the Department's definition of the governmental entities that can take advantage of this new safe harbor. The Department currently proposes that the safe harbor be limited to "states" as defined in section 3(10) of ERISA: any "State of the United States, the District of Columbia," and certain territories. As now written, this definition would unnecessarily exclude the City of New York from use of the safe harbor and the Interpretive Bulletin 2015-02, which addresses ERISA-covered retirement plans.

In our opinion, our extensive financial management expertise and the existing legal authority to operate retirement plans argue for the inclusion of New York City and comparable municipalities in the Proposed Safe Harbor. We would also maintain that such cities should be free to take advantage of the ability to sponsor ERISA-covered plans as discussed in the Interpretive Bulletin. The more than 1 million workers in the City who would be eligible to take advantage of these types of retirement plans should have access to proposals like those being developed by our New York City Retirement Security Study Group.

Toward that end, the Department could adapt the existing definition of a governmental plan under ERISA Section 3(32): any plan established by "the Government of the United States, the government of any state or political subdivision thereof, or any agency or instrumentality thereof.'' Such plans are exempt from ERISA requirements. Accordingly, this definition could appropriately delineate the sponsors of IRA plans eligible for the safe harbor in a manner that is wholly consistent with current practice on ERISA exemptions for governmental plans.

If the Department is concerned about counties, cities, or smaller entities that may lack the capabilities to operate the contemplated IRA plans, it could add terms to limit the safe harbor to larger jurisdictions that have appropriate experience and infrastructure to operate such a plan. We would support extending the safe harbor to political subdivisions of states that satisfy a criterion such as minimum population (perhaps over 500,000 or 1,000,000 residents), or multiple criteria. These multiple criteria could include restricting access to the safe harbor only to cities or political subdivisions that (a) are in states that have not then created their own state-wide plans and/or (b) currently operate governmental plans that exceed a certain significant size in assets under management and/or employees covered.

The Department has expressed reservations that opening up the safe harbor to political subdivisions of states increases complexity for corporations that operate in multiple states. First, because most large multi-state corporations offer retirement plans, they will be unaffected. Moreover, for any smaller businesses that operate in more than one state, the proposed rule specifically limits the responsibilities of employers to ministerial functions. Given the other requirements of the proposed regulation that shape the design of the IRA plan, it is unlikely that the employer functions can or will differ much, if at all, between plans in different states. This will serve to minimize any burden on the affected companies that operate in more than one state, thus preserving one of ERISA's prime objectives.

Finally, while our study group is still considering issues such as an employer mandate, auto-enrollment, and auto-escalation, we are troubled that the safe harbor only would apply to employers that are mandated by the enabling legislation to participate. Even if employers uncovered by the mandate elect to sign up, the proposed regulation appears to prohibit them from auto-enrolling their employees or implementing the law's default contribution and auto-escalation rates.

We believe that it is important to maximize participation and encourage lower-income employees to save for retirement. For example, if the enabling legislation creating the program mandates participation by employers with five or more employees, an employer with three employees is not eligible to opt-in. Inadvertently doing so could jeopardize the safe harbor. Moreover, states that do not impose an employer mandate would be prevented from establishing a payroll deduction IRA with auto-enrollment, which would inevitably dampen employee participation.

We urge the Department to consider eliminating the employer mandate condition to strengthen the ability of government and the private sector to advance the reach of this important initiative.

Thank you for the opportunity to comment on the proposed regulation. These proposed changes to the provisions, if adopted, will serve to enhance the regulation, especially the ability to open the safe harbor to qualifying cities and/or other political subdivisions of states. We thank the Department for its outstanding efforts to advance retirement security and look forward to working together to increase access to retirement savings vehicles that are currently unavailable to New York City workers.

Respectfully,

Scott M. Stringer
New York City Comptroller