



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

January 19, 2016

The Honorable Thomas E. Perez
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210-0001

RE: Comments on DOL Employee Benefits Security Administration Proposed Rule under the Employee Retirement Income Security Act concerning Savings Arrangements Established by States for Non-Governmental Employees (RIN: 1210-AB71)

Dear Mr. Secretary:

In general, the City of New York appreciates the U.S. Department of Labor's proposed rule and supports most of its provisions. I commend President Obama, Assistant Secretary Borzi and you for drafting this regulation that will enable states (and, I hope, localities as well) to allow millions of American workers to save for their own retirement through their paychecks. I would like to weigh in on several of these provisions to improve worker access to payroll deduction retirement savings plans without requiring employers or government sponsors to be subject to the Employee Retirement Income Security Act of 1974 (ERISA).

From New York City's perspective, the most important provision to modify is the proposed definition of the governmental entities that can take advantage of this new safe harbor; specifically, paragraph B. "Description of the Proposed Regulation" limits the government entities that may offer a payroll withholding IRA program eligible for the safe harbor to "states" as defined in section 3(10) of ERISA - any "State of the United States, the District of Columbia," and certain territories. This definition would obviously leave out New York City.

Our City has over 8.4 million residents, which would make it the 12th largest state if it were a state. It also has the capacity to administer a large-scale payroll deduction retirement savings plan: New York's five different pension funds with their combined \$160 billion in assets ranks the City as the fifth largest public pension plan sponsor in the United States; New York City also has a deferred compensation plan with over \$15 billion in assets, which includes 401(k)s, IRAs, and a 457 plan. This experience, and the fact that the City has the authority under New York State law to sponsor the type of IRA plan that this proposed rule contemplates, would make the inclusion of New York City and other large cities and governmental subdivisions in the safe harbor strong and well-advised, both legally and as a matter of policy.

My office and the New York City Comptroller, Public Advocate, and City Council have all been working on plans to move forward with this type of retirement plan for the over one million workers in the City who would stand to benefit from it. We believe DOL should expand the government entities that would qualify for the safe harbor to include cities and other political subdivisions.

- One option would be to use ERISA's definition of a governmental plan: the Government of the United States, the government of any state or political subdivision thereof, or any agency or instrumentality thereof. Since this definition applies to governmental plans that are not subject to ERISA, it makes more sense to utilize it in defining IRA plan sponsors that could avail themselves of this safe harbor from ERISA treatment.
- A second option would be to restrict the safe harbor to states, and political subdivisions thereof that meet certain criteria, such as minimum population (e.g., 500,000 residents), sponsorship of defined benefit or defined contribution retirement plans with a certain minimum level of assets (e.g., \$500 million). In other words, DOL may not want to enable smaller towns, cities or counties without the infrastructure or experience to administer retirement plans for private sector workers to have access to the safe harbor, but larger jurisdictions that have such experience, and that are not in states that are creating their own state-wide plans that would have access to the safe harbor, ought to be able to access the safe harbor.

Additionally, there are many factors why the programs sponsored by some cities or other political subdivisions should be eligible for the safe harbor:

- We realize that one of DOL's concerns about opening up the safe harbor to political subdivisions of states is to limit the number of plans that corporations operating in multiple states will have to comply with. We understand this concern as one of the core issues ERISA was created to address. However, the proposed rule limits the variability of the "state" IRA plans, and, in particular with regard to employers, limits their role to ministerial functions, so that the burden on employers will be restricted to certifying employee census information to the program, communicating the "state's" explanatory materials about the program, enrolling employees or processing their "opt-outs," and timely transmitting payroll deductions. These restrictions mean that the burden on companies with operations in multiple places with government-sponsored auto-IRA programs will be minimal.
- We also understand that increased litigation risk is another DOL concern if the safe harbor were to be expanded to include political subdivisions of states. However, we believe that allowing programs sponsored by certain states' political subdivisions would not affect the core qualities of the DOL proposed rule. If a state sponsor of a plan that avails itself of the safe harbor is ultimately sued, the availability of the safe harbor to government entities below the state level would not make the program more or less subject to litigation for states themselves. If the litigation is against the city or political subdivision program, that extra risk, if

any, that such entity has willingly assumed to provide its citizens with an opportunity to participate in a payroll savings program at work.

- Section D (a) Direct Benefits of the proposed rule states, “Thus, while the proposal would reduce uncertainty about state activity within the safe harbor, it would not impair state activity outside it.” While this statement is true for states as the proposal currently defines them, it is not true for cities: New York City has spent much time and money working on proposals for a City-sponsored retirement plan for its private sector workers without access to a workplace plan. The current proposal would certainly impair if not eliminate the City’s ability to create such a plan.

Another concern we have with the draft regulation pertains to the ability of those employers who are not required to participate in the government-sponsored retirement savings plan but who choose to voluntarily participate (for example, employers whose number of employees falls below the state law’s threshold for required participation – in Illinois, for example, employers with fewer than 25 employees). If such employers choose to participate, the proposed regulation appears to prohibit them from auto-enrolling their employees or implementing the law’s default contribution and auto-escalation rates.

Up until now, the DOL has ruled that payroll deduction IRAs in the private sector did not constitute employee benefit plans under ERISA as long as a number of conditions were met, including that they were “completely voluntary.” Under the proposed regulation, government-sponsored IRAs are required to utilize auto-enrollment in order to qualify for the safe harbor, which makes them “voluntary.” We believe extending that treatment to employers that choose to enroll their employees on a “voluntary” basis into the government-sponsored plan, as long as they meet all the other criteria, should affect neither the government nor the employer’s eligibility to qualify for the safe harbor.

Thank you for the opportunity to comment on the proposed regulation. I believe these comments, if adopted, will serve to strengthen the regulation. In particular, our proposal to open the safe harbor to qualifying cities and/or other political subdivisions of states will increase the DOL’s effectiveness in increasing access to retirement savings vehicles that are currently unavailable to millions of U.S. employees.

Sincerely,

A handwritten signature in black ink that reads "Bill de Blasio". The signature is written in a cursive, flowing style.

Bill de Blasio
Mayor

BDB:ka