



OFFICE OF THE ILLINOIS STATE TREASURER
MICHAEL W. FRERICHS

January 19, 2015

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: Proposed Rule for State Savings Arrangements Safe Harbor, RIN 1210-AB71

To whom it may concern,

I am the Illinois State Treasurer and the Chairman of the Illinois Secure Choice Savings Board, the state board responsible for implementing Illinois' automatic enrollment payroll retirement savings program known as the Illinois Secure Choice Savings Program (Secure Choice). Please accept this letter in support of a rule proposed by the U.S. Department of Labor (Department), published in the Federal Register on November 18, 2015, concerning savings arrangements established by states for non-governmental employees. Secure Choice is tasked with providing access to retirement savings accounts at work for an estimated 1.2 million employees, while simultaneously ensuring that employers are not burdened with administrative duties or financial liability under the Employee Retirement Income Security Act (ERISA). I applaud the Department's efforts to produce a strong rule and ensure that all workers have access to a workplace-based retirement savings plan.

I encourage the Department to provide clarity on key features of the rule, including: (1) the authority of the Board, (2) the responsibility of third party vendors, (3) the state's role in protecting funds, (4) the creation of enforcement mechanisms, and (5) flexibility on withdrawals, to ensure states have the best understanding of the safe harbor. Finally, I ask that the Department consider allowing for auto-enrollment of employees into the program by all participating employers and not just those mandated to do so.

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Background

Retirement insecurity is increasing across the country with far too many workers nationally, and in Illinois, not saving for retirement. Without adequate savings, workers risk retiring into poverty or being over-reliant on Social Security. According to the Social Security Administration, 36 percent of beneficiaries rely on Social Security for at least 90 percent of their monthly income. This lack of adequate retirement savings also places significant burden on state and federal safety net programs.

An inadequate system of retirement options—especially for the most marginalized members of society—is clearly at the root of the problem. As described in the proposed rule, 68 million Americans lack access to an employer-sponsored plan. In Illinois, approximately half of all private sector workers lack access to workplace-based retirement savings options. Further, numerous academic studies—including work conducted at the Schwartz Center for Economic Policy Analysis at the New School and the National Institute on Retirement Security—have revealed a dramatic savings disparity between workers with access to an employer-offered savings plan and those without.

The Illinois Secure Choice Savings Program

In order to address this problem, the Illinois General Assembly passed the Illinois Secure Choice Savings Program Act (the Act) in December, 2014. The legislation was signed into law in January, 2015 and went into effect this past summer. The law requires Illinois businesses with at least 25 employees, that have been in business for two or more years, and who do not currently offer a qualified savings plan to either offer a private market savings option or automatically enroll their employees into Secure Choice. Secure Choice participants will be enrolled into a default target date Roth IRA with a default three percent payroll deduction, but could choose to change their contribution level or fund option at any time, or choose to opt-out of the program altogether. Accounts are owned by individual participants and are portable from job-to-job.

An estimated 1.2 million workers will gain access to employer-based retirement savings plans because of the Illinois Secure Choice Program. Individual accounts will be pooled together and managed by a private investment company selected through a competitive bidding process. Secure Choice is run by a seven-person Board, with the State Treasurer serving as Chair. Implementation is underway, and we estimate the Program will be open for enrollment in the summer of 2017.

Specific language in the Act prevented the program from moving forward if it was deemed to be an employee benefit plan and State or employer liability was established under ERISA. While the Act was intentionally designed to limit the role of employers, certain features of the program, such as automatic enrollment and default options, left some uncertainty about whether Secure Choice would trigger ERISA. We appreciate that the proposed rule from the Department makes clear that Secure Choice is not considered an employee benefit plan and falls under the safe harbor from ERISA.

Essential Features of the Proposed Rule

I am quite pleased that the Department's proposed rule creates a safe harbor for state-based retirement savings plans such as Secure Choice, and includes all the necessary features to enable continued implementation of our program. Further, I agree with the Department's conclusion in its proposed rule that "the 1975 safe harbor was not written with such state laws in mind," and that "where states require employers to offer savings arrangements, undue employer influence or pressure to enroll is far less of a concern." The Department's initiative to allow for a new safe harbor that would provide states with the ability to enact laws requiring workplace-based retirement savings options and allow for state-managed automatic enrollment plans for employees that lack access is the best path forward.

The proposed rule acknowledges the difficulties that employees and employers could face without the correct administrative tools and program features. Given the advantages of increased enrollment, specifically the increased overall savings that would result, I commend the Department for enabling state programs to utilize automatic enrollment, with an option for employees to opt-out. To ensure that the funds of automatically enrolled workers are safely invested, the Department is also right to include provisions within the proposed rule that allow for default investment and contribution options.

One issue, discussed at length in Illinois, is the need to ensure that Secure Choice does not place significant additional burdens on participating employers. For this reason, I fully support the Department for allowing employers to remain simple conduits for the enrollment and payroll deduction portion of a state-run plan, instead of a more involved investment partner with fiduciary responsibility. The proposed rule strikes the correct balance of enabling employers to provide information from the state to employees about the program or fund performance, provide necessary information to the state to facilitate operations of the program, remit payments, and maintain necessary records regarding collection and remittance of payments.

While the core features and intent of the rule are apparent, I believe the Department could provide clarity on certain aspects of the rule to ensure that state programs can be effectively implemented while still remaining within the safe harbor. I also hope the Department will reconsider its limited allowance of automatic enrollment in order to provide even more employers and employees with the opportunity to easily participate in the program and begin saving for retirement.

Proposals for Additional Clarity

Role and Authority of a Board

The proposed rule requires that a state must establish the program pursuant to state law and that "the state must also administer the program directly or through a governmental agency or instrumentality." The rule also contemplates that the state, agency, or instrumentality could contract with commercial service providers to operate its program. I encourage the Department to clarify that a Board, created by state law, could be the primary administrator and have rulemaking authority over the program, including decisions to contract with third party vendors, select investment options, and facilitate program implementation and operations.

Role and Responsibility of Third Party Vendors

While the proposed rule clearly states that a state may contract with one or more service or investment providers, it also includes language in paragraph (h)(2)(ii) requiring the state to “retain full responsibility for the operation and administration of the program.” I certainly agree that the state (or designated Board) must retain ultimate authority over a program, I also believe the proposed rule should allow for the contractual allocation of certain legal or financial responsibilities to vendors as long as the state instrumentality retains responsibility for the selection, monitoring, and oversight of the vendors.

State’s Role in Protecting Funds

The proposed rule includes language in paragraph (h)(1)(iii) that, “requires the state to assume responsibility for the security of payroll deductions and employee savings,” as one of its conditions for ensuring that responsibilities do not lie with an employer. I believe this provision is intended to protect employees by ensuring that withholdings are appropriately transmitted and in a timely fashion. My concern is that the wording could be construed to mean that the state is accountable for security against employer malfeasance, misfeasance, or an overall guarantee against any and all losses. Illinois law does set a maximum amount of time for the transfer of withholdings and the Board is able to reduce that period of time if it so chooses. In addition, the state will continue to enforce its existing laws as they pertain to investment or payroll issues, but it should not be considered a guarantor for retirement investments made through Secure Choice. I urge the Department to provide clarity about the intent of this provision or to remove it entirely.

Need for Enforcement Mechanisms

A somewhat related section of the proposed rule, paragraph (h)(1)(iv) requires that a state “adopt measures to ensure that employees are notified of their rights and creates a mechanism for enforcement of those rights.” I agree that enforcement mechanisms are crucial for the ultimate success of the program and the thorough protection of enrollees, but I have some concern with the notion that new mechanisms must be created. While the Illinois program includes specific language to enforce the mandatory participation of certain employers, I believe that existing wage and employment laws, as well as current regulatory and judicial procedures, could adequately protect employees in the program. I urge the Department to modify the language to make the clear that enforcement mechanisms are essential, but existing laws and regulations may be adequate.

Flexibility on Withdrawals

We urge the Department to provide some level of flexibility in its final rule to enable certain reasonable limitations or restrictions on the timing and frequency of withdrawals for administrative efficiency and costs savings. We encourage the Department to consider revising its language in paragraph (h)(1)(iv) to ensure that states can offer beneficial investment options, where immediate liquidity is not possible, but participants see better performance with lower costs.

Expansion of Automatic Enrollment to all Participating Employers

As currently written, an employer's ability to use automatic enrollment and fall within the safe harbor is contingent upon a state law mandating their participation in the program. An employer who voluntarily chose to participate could not use automatic enrollment without triggering ERISA. The Department notes that voluntary participation by an employer effectively changes the voluntary nature of an employee who is automatically enrolled. I would urge the Department to consider allowing for automatic enrollment into state-run plans regardless of whether an employer is mandated to participate or not.

I would argue that the vast majority of stakeholders in Illinois understand the importance of a mandate to ensure broad participation by employers, and in turn, broad coverage of employees in the program. We believe that programs with mandates are good public policy, and because of this the Illinois Secure Choice Program requires certain businesses with 25 or more employees to either enroll their employees in the Program or secure a private market plan. Despite this requirement, hundreds of thousands of private sector workers are employed by businesses that don't offer a retirement plan but also fall below the employee threshold. It was hoped that additional businesses might choose to participate, thus allowing for broader coverage. As previously noted, automatic enrollment would likely lead to more employee participation and in turn, greater savings.

I urge the Department to consider a path in which any employer participating in a state-run program – given the distinction made between state programs and privately-managed plans – could utilize automatic enrollment. Employee participation with an easily accessible opt-out method should be considered just as “completely voluntary” as an opt-in method. With Secure Choice, participants will have multiple methods for opting-out or terminating participation at any time. In addition, the nature of a Roth IRA (the legislatively-mandated investment vehicle) would mean that a participant could remove any of the principle without incurring any penalty or fees.

If the Department maintains the current language including a state mandate for automatic enrollment, then I urge the Department to provide additional language clarifying whether and how inclusion within the safe harbor is impacted if certain businesses utilize automatic enrollment but then fall below the threshold for mandated participation. Would this impact their ability to auto-enroll any new employees going forward? Would it require action on the employer's part for employees who were initially auto-enrolled? This uncertainty around how businesses should operate on the margins of the threshold could lead to undue administrative burdens, costs, and potential mistakes for those employers.

In addition, I would ask for clarity on whether the program would lose its safe harbor exemption if any employer voluntarily participating were to inadvertently use auto-enrollment. The proposed rule could be interpreted to imply that such action could cause the entire Program to fail the safe harbor and trigger ERISA, which could be devastating for the Program, thousands of participating businesses, and over a million participating employees. Guidance from the Department for how to address these concerns within the requirement for a mandate would be incredibly helpful.

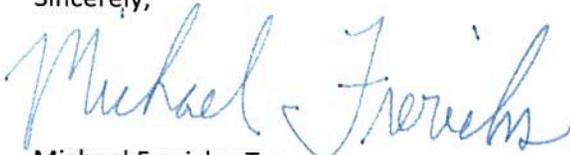
These modifications will allow my staff and the Secure Choice Board to continue implementation knowing that the Illinois program falls securely within the framework of the safe harbor. Without these changes, concerns remain about the authority of the Board, the role third party providers can play, the existence of sufficient enforcement mechanisms, the potential requirements for fund protections, and the inability to enact limited, reasonable withdrawal protections. This could hinder our ability to ensure an effective implementation and rollout of the program.

Conclusion

The Department has taken a significant step towards ensuring millions of Americans have access to an easy, safe, and affordable retirement savings option at work. For Illinois, this proposed rule clears the way for the Secure Choice Board to continue implementation of the Illinois Secure Choice Savings Program, benefiting over a million private sector workers. We appreciate the Department's tireless work on drafting these rules, its transparent process in eliciting feedback and information, and the opportunity to provide comments. We urge the Department to finalize the rule as quickly as possible.

Please feel free to reach out to the Office of the State Treasurer or the Illinois Secure Choice Savings Board for additional information or any assistance we can provide during this process.

Sincerely,

A handwritten signature in blue ink that reads "Michael Frerichs". The signature is written in a cursive style with a large, stylized initial "M".

Michael Frerichs, Treasurer
State of Illinois