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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:

These comments are directed towards the recently proposed rule regarding Savings Arrangements Established by States for Non-Governmental Employees ("Proposed Rule"), as well as the accompanying Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974 ("Interpretive Bulletin"). Together, the Proposed Rule and the Interpretive Bulletin were assigned Regulation Identifier Number ("RIN") 1210–AB74.

Collectively, the four labor organizations joining in this letter represent more than 8 million workers. These include low-wage service workers to professionals, including people of all ages and strata of American society. Many of these individuals are currently employed, while others are retired. In addition, the National Conference on Public Employee Retirement Systems is a trade association that represents pension funds that hold assets in trust for more than 20 million public employees and retirees. Individually and collectively, our organizations have a profound interest in working to ensure the retirement security, not only of our members, but for all Americans.

As the Department of Labor ("Department") is well aware, the retirement security of many millions of Americans is at risk. While Social Security, Medicare, and Medicaid provide a significant and necessary base, it is not nearly enough.

It is a tragedy that fewer and fewer workers have access to a defined benefit pension through their workplace, particularly given the fact that defined benefit plans provide superior economic efficiency and retirement security. Thus, far too many are left only with their own savings and the modest Social Security benefits for their retirement income. Worse yet, 68 million workers have no access to any retirement savings plan at work and relatively few of them are saving for retirement on their own. As a result, nearly 40 million working age households (45 percent) do not own any retirement assets, whether a defined benefit pension, a work-sponsored 401(k), or even an IRA. Even among those who are saving for retirement, the amount saved is inadequate to provide for genuine retirement security. The Government Accountability Office concluded earlier this year that "among those with some retirement savings, the median amount of those savings is about $104,000 for households age 55-64," which would yield an inflation protected annuity of just $310 a month.

Furthermore, work-based retirement programs do not cover many millions of workers at the lower end of the economic spectrum who need it the most. It is into this gap that the states have begun to step into the breach and to consider different mechanisms to address what otherwise will become a national crisis. Up until now, the states have been impeded in this effort, largely because of the uncertainty surrounding the issues of federal preemption and various regulatory issues under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").

We commend the Employee Benefits Security Administration and the Department of Labor for taking these important initial steps to provide clarity to the states on these issues, and specifically for providing flexibility for states to build retirement programs that could deliver real retirement security – including the option to establish defined benefit plans.

We also strongly support the two-step approach taken by the Department. The Department has established a new "safe harbor" for state-established Individual Retirement Accounts ("State IRAs"), an important step towards promoting employee retirement savings at the workplace. At the same time, the Department has provided important clarifications as to the effect of ERISA coverage and the scope of ERISA preemption on various state-established retirement programs that would be covered by ERISA. Because of the demonstrated shortcomings associated with both IRAs and defined contribution plans, we agree with the Department that the states need the flexibility to legislate on both non-ERISA IRAs and ERISA-covered plans.

For this reason, our comments are not designed as criticism of the intent or the overall thrust of the two aspects of the Department's guidance, which we strongly support. Instead, our comments are intended to strengthen and clarify both the Proposed Rule and the Interpretive Bulletin.

Comments on the Proposed Rule

1. Multistate Programs—States should have the flexibility to participate in multistate IRA programs. It is likely that states, particularly smaller states, will want to coordinate with other states to establish multistate, regional, or even reciprocal programs. The final regulation should explicitly permit such flexibility.

2. Counties, Cities, Sovereign Nations, and Other Local Governmental Authorities– The Proposed Rule only applies to programs adopted by state governments. The type of experimentation now under consideration by the state governments should also be permitted at the local level. Indeed, one city—New York City with its 8 ½ million people—is more populous than all but eleven states. There is no reason why a program adopted by New York City is beyond the scope of the safe harbor, while one adopted by Wyoming, Vermont, Guam, or the District of Columbia, each of which meets the Proposed Rule's definition of a state and has fewer than 1 million in population, would satisfy its requirements. As a matter of definition, we suggest that the Department could incorporate the definition of "state" set out in ERISA Section 514(c)(2), 29 U.S. C. § 1144(c)(2), which includes political subdivisions, rather than limiting the scope of the safe harbor to the entities specifically identified in ERISA Section 3(10), 29 U.S.C. § 1002(10).

We understand that the Department has concerns with expanding the scope of the safe harbor to include local governments. One issue may be the Department's possible concern over the ability of smaller governmental authorities to appropriately oversee and safeguard government-established savings programs. There may, however, be other, more effective, ways to address this concern.

The safe harbor could be restricted to states and to counties and municipalities that meet certain criteria. For example, the safe harbor could be extended to jurisdictions that meet a minimum population (e.g., 500,000 residents, or a population greater than the least populous state) and sponsorship of defined benefit or defined contribution retirement plans with a certain minimum level of assets (e.g., $500 million). We recognize that the Department may not want to extend the safe harbor to smaller towns, cities or counties without the infrastructure or experience to administer retirement plans for private sector workers. However, 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, should be able to access the safe harbor.

We recognize that one of the Department's concerns about opening up the safe harbor to political subdivisions of states is that it would expand the number of mandates with which multi-state corporations would have to comply. We understand this concern as one of the core issues ERISA was created to address. The Proposed Rule, however, limits the variability of these state mandates, and in particular, limits their role of employers 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, typically through their payroll providers. These restrictions mean that the burden on companies with operations in multiple places with government-sponsored IRA programs will be minimal. Furthermore, many of these larger corporations already have retirement savings plans in place, and therefore would have already satisfied the applicable state and local mandates. In these cases, the affected employers would have no additional burden.

We also understand that the Department is concerned that extending the safe harbor to include political subdivisions would increase the possibility that the rule would be subject to court challenge. We believe, however, that such a challenge, even if successful, would not likely affect the efficacy of the Rule as applied to the states. Furthermore, it is the political subdivisions themselves that would carry the burden of any such litigation risk. Alternatively, the Department may partially address this issue without expanding the possibility of a successful challenge to the Proposed Rule by expanding the safe harbor to encompass local governmental mandates that are authorized even if not required, by state legislation.

3. Delegation to Board or Commission—The language of the Proposed Rule may be read to suggest that the safe harbor is limited to programs where the rates of automatic employee contributions, as well as any automatic escalators of those rates, are specified in state legislation. Laws enacted in Illinois and Oregon, and bills under consideration in several other states, however, have delegated to boards or commissions the responsibility for making these types of determinations. This is consistent with standard practice in enabling legislation, where a legislative body enacts laws addressing a public policy concern and delegates the details of implementation to an executive agency or a board or commission. We also note that Section 514(c)(1) of ERISA, 29 U.S.C. § 1144(c)(1), includes an expansive definition of state law that covers such delegated authority. We therefore request that the language of the Proposed Rule be clarified to encompass such delegation of authority.

4. Small Employers—As a matter of policy and law, we support the Department's determination that state automatic enrollment IRA programs that are entirely or predominantly voluntary would not fall within the proposed safe harbor. We believe that extending the safe harbor to voluntary auto-enrollment is a significant encroachment on the protective policies of ERISA and must be rejected. We are concerned, however, with the exclusion from the safe harbor of employers that are not subject to a state mandate but that nevertheless elect to participate in a predominately mandatory state program. As you know, the State IRA programs under consideration typically exclude from their mandate employers below specified size thresholds. Employees of these small employers that elect to participate in a State IRA should nevertheless have the demonstrated benefit of such features as auto-enrollment and auto-escalation. Furthermore, as a legal matter, we believe there is a clear distinction between an employer that elects to participate in a voluntary program and one that participates in an otherwise mandatory program provided the mandatory program covers employers who employ the vast majority of employees in the state. In the former, the employer's choice is likely to entail the selection of a full range of features, while in the latter, an exempt employer's sole choice will be whether to make the program available to its employees on the same basis as the program is available to similarly situated employees of larger employers. We, therefore, request that the safe harbor be expanded to authorize states to apply the same features in its mandatory IRA to exempt employers that participate voluntarily.

5. Safe Harbor—Although the preamble to the Proposed Rule clearly states that it is providing an additional "safe harbor" that defines an arrangement that is not subject to ERISA coverage, that statement does not appear within the body of the regulation itself. It would be helpful to those states that may wish to experiment by adopting programs that are not specifically

and clearly covered by the safe harbor but that are consistent with its meaning and intent if the Proposed Rule itself were to include such a statement.

Comments on the Interpretive Bulletin

1. Employers as Fiduciaries—As a matter of public policy, ERISA-covered plans have greater participant protections than IRAs, permit greater employee contributions, allow for employer contributions, and are far more flexible in terms of their structure, all of which are important to helping ensure the retirement security of the covered participants and beneficiaries. For this reason, it is important to not create a regulatory bias in favor of State IRAs and against State MEPs by imposing unnecessary additional burdens on employers. The Interpretive Bulletin includes very constructive language to support that goal. For example, the Interpretive Bulletin states that reporting and disclosure functions could be handled centrally rather than having that burden fall to each individual employer.

The Interpretive Bulletin's language regarding the potential for imposing fiduciary duties on individual employers, however, is less helpful. The language states that, even if an employer has no other duties, it would nevertheless have "limited fiduciary responsibilities . . . to prudently select the arrangement and to monitor its operation . . . ." In our view, however, these duties would not necessarily apply to an employer whose only role is to opt into the state MEP and to remit required contributions.[1]

Under the terms of the Interpretive Bulletin, the state, or a designated governmental agency or instrumentality, would be the named fiduciary, which has the ultimate authority to control and manage the operation and administration of the plan. In practice, a state or other public plan sponsor is likely to invest a board or agency with fiduciary responsibility for establishing the arrangement and monitoring its operations. In this role, the state or its designated governmental agency or instrumentality will be most similar to the trustees of a multiemployer plan also acting as the named fiduciary, with a comparable or even superior level of independence and alignment of its interests with the best interests of plan participants and beneficiaries. It is settled law that an employer whose only role with respect to a multiemployer plan is to bargain its participation in the plan, bargain its contribution rates, and to remit contributions as they come due, is not a fiduciary to the plan. We believe this principle is equally applicable to state MEPs.

In this circumstance, in which a state government is stepping into the shoes of an employer to perform the essential duties related to the selection and monitoring of other plan fiduciaries and service providers, an employer should reasonably be able to rely upon the state's selection of appropriate vendors, investment vehicles, and pricing. In this regard it is important to note that a state or instrumentality of the state is distinguishable from private actors in terms of accountability, transparency and operation. Therefore, unlike MEPs sponsored by private

[1] We do not dispute, however, that pursuant to 29 C.F.R. § 2510.3-102, an employer that withholds employee contributions from an employee's pay and fails to remit those contributions to an employee benefit plan becomes a fiduciary with respect to those wrongfully-retained contributions. We note that this is a very limited duty.

entities, fiduciary duties related to selection and monitoring are appropriately placed on the state or its designated governmental agencies or instrumentalities, instead of a participating employer.

As an alternative approach, we suggest that the Department clearly state that, as a matter of fiduciary prudence, it is the Department's view that an employer may reasonably rely upon the actions of the fiduciaries of a State MEP in designing and administering the plan and will therefore be considered to have satisfied any fiduciary duties related to selection and continued monitoring of the State MEP. We believe that such a statement would go a long way towards relieving the concerns of employers contemplating participation in a State MEP.

2. States and Sovereign Immunity. —As you know, while the states that are considering the establishment of state pension programs are very concerned with protecting the retirement security of their residents, many of them are also very concerned with avoiding substantial additional financial burdens on their treasuries and taxpayers. For this reason, it is of paramount interest to these states that they be permitted to determine the identity of the plan fiduciaries so that any potential fiduciary liability is limited to those fiduciaries. Most troubling is a footnote suggesting that a state's exercise of sovereign immunity may conflict with ERISA's remedial provisions. We therefore request that the Interpretive Bulletin be clarified to provide that a state that assigns fiduciary responsibilities to designated boards, commissions, or officials, is not itself a fiduciary and that its exercise of sovereign immunity with respect to state offices and officials not so designated and who do not perform fiduciary functions with regard to the plan does not conflict with ERISA's remedial provisions.

3. Multistate MEPs.—As noted above in our discussion of the Proposed Rule it is possible that states and other governmental entities may choose to enter into multistate, or reciprocal, programs with other governments. The Interpretive Bulletin should permit them the flexibility to do so.

4. Counties, Cities, Sovereign Nations, and Other Local Governmental Authorities. – For the reasons noted above with regard to the Proposed Rule, the Interpretive Bulletin should be clarified to state that the guidance is not limited to state-sponsored programs by that it also applies to MEPs and other programs adopted by local governments.

5. Financial Incentives—Because of the substantial advantages of ERISA-covered retirement plans, states may wish to offer incentives to employers to either join a state MEP or to establish its own plan. We believe it would be helpful if the Department would expand the Interpretive Bulletin to state the Department's view that such incentives would not be subject to preemption.

6. State MEPs as a Default Option—One of the alternative approaches under consideration is that a state may adopt legislation mandating that covered employers provide retirement savings vehicles to their employees, with the options for satisfying such a mandate to include both participation in an ERISA-covered plan (such as a State MEP) and non-ERISA options (such as a State IRA program). As drafted, however, the Interpretive Bulletin does not appear to cover an instance where an employer that fails to make an affirmative election will be considered to have elected to join a State MEP. Because such a structure includes options that do not require the establishment or maintenance of, or participation in, an ERISA-covered plan, including the opportunity to join a State or private sector wage deduction IRA (albeit without

such features as auto-enrollment), participation in the State MEP would be considered voluntary and, therefore, the law would not be pre-empted by ERISA. *See Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F.3d 639 (9th Cir, 2008). We therefore request that the Department clarify its position that a mandate structured in this manner, where participation in the State MEP is treated as the default choice of an employer that otherwise fails to elect a different alternative, would not be preempted. In addition or in the alternative, we ask the Department to clarify that a mandate requiring that an employer offer its employees a wage deduction IRA (without auto-enrollment) or an ERISA plan, is not pre-empted by ERISA in accordance with *Golden Gate*.

Thank you for the opportunity to comment on the Proposed Rule and the Interpretive Bulletin. We share the Department's view that this is an historic opportunity to help strengthen the retirement security of the many millions of Americans who might otherwise be reduced to poverty and deprivation in their later years, rather than living in the comfort and security that they have earned through their labor. We look forward to further discussion of these matters with you.

Sincerely,

Peter Colavito
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Service Employees International Union

Lily Eskelen Garcia
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