



Plan Sponsor Council of America

Serving retirement plan sponsors for over 60 years

January 19, 2015

VIA EMAIL (e-ORI@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor,
200 Constitution Avenue NW
Washington, D.C. 20210
Attn: State Savings Arrangements Safe Harbor

**Re: Savings Arrangements Established by States for Non-Governmental
Employees and Interpretive Bulletin Relating to State Savings Programs
(RIN 1210-AB71 and RIN 1210-AB74)**

Dear Sir or Madam:

The Plan Sponsor Council of America (“PSCA”) appreciates the opportunity to comment on the Department of Labor’s (“DOL”) proposed regulation under the Employee Retirement Income Security Act of 1974 (“ERISA”) setting forth a safe harbor describing circumstances in which a payroll deduction IRA, including one with automatic enrollment, would not give rise to an employee pension plan under ERISA (the “Proposed Safe Harbor”).¹ The PSCA also is presenting in this letter its concerns about Interpretive Bulletin 2015-02 (“IB 2015-02”),² which was published contemporaneously with the Proposed Safe Harbor and relates to potential state initiatives to create ERISA-compliant retirement plans for adoption by private employers.

The PSCA was established in 1947 and is a leading consumer advocate for employers offering defined contribution and non-qualified deferred compensation plans to their employees. The PSCA is a diverse, collaborative community of employee benefit plan sponsors and related service providers working together on behalf of millions of employees to ensure the success of the voluntary employer-sponsored retirement system. Representing employers of all sizes and

¹ 80 Fed. Reg. 72,006 (Nov. 18, 2015).

² 80 Fed. Reg. 71,936 (Nov. 18, 2015).

confronted by that system. It is from this perspective that PSCA is providing its response to the Proposed Safe Harbor and IB 2015-02, and we very much appreciate the willingness of the DOL to consider our views.

As background, the Proposed Safe Harbor was issued by the DOL in the form of a proposed regulation that would provide a new safe harbor allowing states to mandate a payroll deduction IRA. The DOL states in the Proposed Safe Harbor that any qualifying state-based arrangement would not constitute an employee benefit plan under ERISA, and thus would not be subject to the application of the preemption doctrine under ERISA. Specifically, the proposed regulation would add a new safe harbor requiring that any qualifying state-sponsored payroll deduction IRA programs must be “voluntary”--allowing for automatic enrollment of employees with an opt out feature. Several conditions must be satisfied for the safe harbor to apply, including the requirement that the program must be established pursuant to state law. The relevant state(s) must assume responsibility for the security of the employee savings and must establish a means to notify employees of their rights under the program and a mechanism to enforce those rights. Finally, the rule set limits on the duties and responsibilities that can be imposed on affected employers. Significantly and we believe regrettably, the Proposed Safe Harbor does not include a requirement that the state statutes be expressly limited to employers that do not otherwise offer retirement plans to their employees, and the PSCA believes this omission is quite problematic.

The PSCA recognizes the need within the United States to ensure adequate retirement savings opportunities for all American workers. We further acknowledge that the payroll deduction IRA initiatives that have been enacted by states so far have been undertaken in consideration of that need, and we welcome that concern. Moreover, we recognize and support the continuing efforts of the DOL to do what is possible and advisable within the constructs of existing law to support these retirement savings concerns. As noted by the DOL formally and informally, one of the goals of the Proposed Safe Harbor is to provide clarity to states considering these payroll deduction IRA initiatives so that they can design their programs in a matter that does not run afoul of ERISA and the preemption doctrine in ERISA. It is the view of the PSCA that this clarity not only would assist the states in designing compliant programs, but it would protect plan sponsors from intrusive state arrangements that actually would do damage to the backbone of our country’s retirement system—our system of voluntary, employer based retirement plans. It is within this context that the PSCA submits its comments below.

As noted above, the Proposed Safe Harbor is not on its face limited to state initiatives covering only employers that do not offer retirement plans to their employees—even though that appears to be the approach taken by the states that to date have enacted payroll deduction IRA initiatives. The PSCA’s key concern is whether the state statutes as drafted might be construed to apply to employers that have established retirement plans for their employees (and the Proposed Safe Harbor, as drafted, would not preclude this) or to employees of plan sponsors who have not yet satisfied the eligibility standards set forth in those retirement plans. A state statute so broadly written would impose considerable burdens on plan sponsors, who would be forced to reconsider plan sponsorship and/or the design of those plans in ways that could vary across state lines. One of the core concepts behind the enactment of ERISA, which perhaps has never been more crucial than now in light of these state-based initiatives, is the goal of maintaining a single,

uniform set of retirement rules. These state statutes, no matter how well intended, threaten that core concept if they are not limited to employers that do not offer retirement plans and in the view of the PSCA this threat must be avoided.

Informally, the DOL has suggested that state statutes that would cover employers that sponsor retirement plans (and that would have to consider changes to those plans in light of these state statutes) likely would be preempted by ERISA. Despite this, no such prohibition is contained within the Proposed Safe Harbor. Given that one of the stated goals for creating this Proposed Safe Harbor is a desire to clearly provide standards to states as to what they can and cannot do in this context, the PSCA believes that the Proposed Safe Harbor should be revised to state explicitly that one of the enumerated conditions is that in order to be covered within the safe harbor the state statutes must not apply to plan sponsors that already offer retirement plans to their employees (without regard to the design features, including eligibility features, in those plans).

On a related matter, and contemporaneous with the release of the Proposed Safe Harbor, the DOL also released IB 2015-02. This interpretive bulletin, which became effective as of November 18, 2015, relates to potential state initiatives to create ERISA-compliant retirement plans. IB 2015-02 allows states to facilitate three types of ERISA-covered programs: (1) an exchange that connects eligible employers with qualifying savings plans available in the relevant market (the State of Washington enacted such a program just this past June); (2) state-sponsored prototype plans; or (3) a state-sponsored multiple employer plan. All the involved plans would be ERISA-compliant. The basis for the position of the DOL in IB 2015-02 is that none of the approaches falling within the scope of the bulletin mandate employee benefit structures or mandate employer involvement (*i.e.*, employer participation in the state programs must be voluntary).

It's very early in this process of state experimenting. It must be noted that other than the exchange program in the State of Washington (which is in a nascent stage), the PSCA is unaware of any program currently enacted by any of the states that would fall within the scope of IB 2015-02. Given this lack of legislative activity, and both the anticipatory nature of this interpretive bulletin and the unclear affect it may have on the voluntary, employer-based retirement system, the PSCA is uncertain why the DOL did not follow a proposed regulation process to establish this new standard. Such a process seemingly would have been timely and would have ensured the opportunity for all stakeholders to consider the implications of this new standard and to submit comments on it. Accordingly, the PSCA respectfully requests that the DOL consider some form of regulatory process, including, if necessary, the withdrawal of IB 2015-02 and the issuance of a proposed regulation, so that stakeholders are given an opportunity to consider and present their views on the topics covered in the interpretive bulletin.

Whether or not the DOL accepts our recommendation above, the PSCA has a significant substantive concern about the standards laid out in IB 2015-02. That concern focuses on the discussion in the interpretative bulletin dealing with multiple employer plans. The PSCA believes that allowing a state to adopt a single multiple employer plan that would be available to employers throughout that state regardless of industry or other connection would extend to that state an unfair competitive advantage in the retirement plan marketplace. The justification for the standards set forth in the interpretive bulletin seems to be to permit states to be competitive

players in the retirement plan industry if they so desire—again subject to the right of employers to choose their retirement plan business partners. In doing so, it seems wholly inappropriate to give the states a competitive advantage over private businesses. Because of a regulatory position taken by the DOL over the years (generally known as the commonality of interest requirement), private businesses generally are prohibited from offering multiple employer plans to employers regardless of industry or other connection. This anomaly creates an unfair and an uneconomic advantage for the states over private businesses but does not further in any way the enumerated goals of IB 2015-02. Accordingly, the PSCA recommends that this unfair competitive advantage be eliminated either by revising the applicable regulatory standards so that private businesses can offer a multiple employer plan to employers regardless of industry or other connection (which we believe is the optimum approach) or by eliminating the rules relating to multiple employer plans from IB 2015-02.

In summary, the PSCA recognizes and supports the efforts of various states and the DOL to enhance retirement savings opportunities, but believes it is vitally important that these efforts not negatively affect the operation of our voluntary, employer-based retirement system. As in other matters affecting the retirement industry, the PSCA wants to be a resource to the DOL as we move toward the issuance of a final rule in this context. We appreciate the opportunity to comment and look forward to working with the DOL as it considers these matters. If you have any questions regarding this comment letter, please feel free to call me at 202-778-3006.

Respectfully submitted,



Richard P. McHugh
Vice President of Washington Affairs