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Congress of Industrial
Organizations**

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AFL-CIO

AMERICA'S UNIONS

Submitted via e-mail to e-ORI@dol.gov.

September 29, 2016

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-AB76; Savings Arrangements Established by State Political
Subdivisions for Non-Governmental Employees

Ladies and Gentlemen:

The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the U.S. Department of Labor ("DOL" or "the Department") on the Notice of Proposed Rulemaking published in the Federal Register on August 30, 2016, regarding savings arrangements established by state political subdivisions for non-governmental employees ("Proposed Rule").¹

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

The labor movement has always viewed retirement security as requiring the involvement of government, employers, and workers. That is

¹ Employee Pension Benefit Plans; Certain Governmental Payroll Deduction Savings Programs, 81 Fed. Reg. 59581 (Aug. 30, 2016) (amending 29 C.F.R. § 2510.3-2) available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-30/pdf/2016-20638.pdf>.

why we strongly support Social Security and expansion of its benefits and oppose employers' efforts to retreat from their responsibilities to their workers. Working people, through collective bargaining and other forms of advocacy for improved pay and benefits, have placed a significant emphasis on retirement security through workplace pensions and retirement savings plans. Four-in-five union workers in the private sector participate in a retirement plan at work, compared to fewer than half of non-union workers. Two-thirds of private-sector union workers participate in a defined benefit pension, compared to just one-in-10 non-union workers.² Similarly, in the public sector union workers are more likely than non-union workers to participate in any kind of retirement plan (87 percent vs. 76 percent) and in a defined benefit plan (84 percent vs. 67 percent).³

Background

On July 13, 2015, President Obama directed the Department of Labor “to propose a set of rules . . . to provide a clear path forward for states to create retirement savings programs.”⁴ The explicit purpose of his directive was to encourage states to adopt and implement new ways for workers to save for retirement given Congress’s failure to act on his proposal to enroll automatically certain workers without access to a workplace retirement plan into Individual Retirement Accounts (“IRAs”). In response, the Department, after issuing a notice of proposed rulemaking, which was followed by a public comment period, promulgated a safe harbor under which a state can create a payroll deduction retirement savings program for non-governmental employees using individual retirement plans and including automatic enrollment of employees, without establishing an ERISA “employee pension benefit plan” or “pension plan.”⁵

To be eligible for this safe harbor, a program must satisfy specific conditions with respect to:

- **Limited employer involvement** (only ministerial acts by the employer necessary to implement the payroll deduction program, such as collecting and remitting employee contributions and providing notices and information; no employer contributions; employer participation required by state law; no employer discretionary authority,

² U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016*, Bulletin 2785 (Sept. 2016) t. 2, “Retirement Benefits: Access, Participation, and Take-up Rates, Private Industry Workers, National Compensation Survey, March 2016” available at <http://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.htm>, (last visited Sept. 26, 2016).

³ *Id.* at t. 2, “Retirement Benefits: Access, Participation, and Take-up Rates, State and Local Government Workers, National Compensation Survey, March 2016” available at <http://www.bls.gov/ncs/ebs/benefits/2016/ownership/govt/table02a.htm>, (last visited Sept. 26, 2016).

⁴ President Barack Obama, Remarks by the President at White House Conference on Aging (July 13, 2015) available at <https://www.whitehouse.gov/the-press-office/2015/07/13/remarks-president-white-house-conference-aging>.

⁵ Employee Pension Benefit Plans; Certain State Payroll Savings Programs, 81 Fed. Reg. 59464 (Aug. 30, 2016) (amending 29 C.F.R. § 2510.3-2) available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-30/pdf/2016-20639.pdf>.

control or responsibility; no employer compensation other than consideration (including tax incentives and credits) received directly from the state not in excess of an amount that reasonably approximates the employer's costs).

- **Role of the state government** (established by the state pursuant to state law; administered by the state; state responsibility for the security of payroll deductions and employee savings; state requirement that employees be notified of their rights and for mechanisms to enforce those rights).
- **Employee control and rights** (voluntary participation; rights enforceable only by the employee, former employee, or beneficiary, an authorized representative, or the state).

A retirement savings program can satisfy these conditions even if it is directed at employers that do not already offer some other workplace savings arrangement; uses third-party service or investment providers to operate and administer the program, so long as the state retains full responsibility; or requires automatic enrollment and/or automatic escalation of contribution amounts, so long as each employee receives adequate notice to opt out or change her elections.

The Proposed Rule would amend this safe harbor by permitting a qualified political subdivision of a state also to establish and maintain a payroll deduction savings program. The Proposed Rule defines qualified political subdivision as “any governmental unit of a State, including a city, county, or similar governmental body, that—

- (i) Has the authority, implicit or explicit, under State law to require employers' participation in the program...;
- (ii) Has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and [specified U.S.] territories...); and
- (iii) Is not located in a State that pursuant to State law establishes a statewide retirement savings program for private-sector employees.”⁶

Comments on the Proposed Rule

We generally support creating a safe harbor for certain savings programs established by a state's political subdivisions so long as the safe harbor is limited in scope and includes additional conditions designed to protect the best interests of participating workers. Specifically, we support the proposed amendment to the current safe harbor with the modifications discussed below.

The Department asks whether the conditions of the current safe harbor should differ in any way as applied to qualified political subdivisions. Although the Department declined to include in the current safe harbor certain minimum requirements necessary to establish that a state has assumed responsibility for the security of payroll deductions, we urge the Department to reconsider including such requirements with respect to qualified political subdivisions. While states are likely to have wage payment and collection laws, as well as related enforcement programs, political subdivisions are unlikely to have experience with similar laws or

⁶ Proposed Section 2510.3-2(h)(4).

enforcement programs. Therefore, minimum requirements for political subdivisions should include:

- Standards for the timely transmittal of payroll deductions into a worker's individual retirement plan.
- Processes and programs to identify delinquent contributions, including but not limited to appropriate audit requirements.
- Comprehensive civil and criminal enforcement programs focused on securing delinquent and missing payroll contributions, including procedures to secure unpaid contributions in the case of a contributing employer's bankruptcy.
- Education programs to inform participants of their rights, how to identify employer misuse of payroll deductions, and how to contact the appropriate qualified political subdivision or plan administrative authorities when misuse is suspected.

We also urge the Department to reconsider including additional requirements with respect to a qualified political subdivision assuming responsibility for the security of employee savings. The Department should require, or at least encourage, retirement savings programs established by qualified political subdivisions to include one or more representatives of contributing employees in the governance of its program. Worker representation will help ensure the program is operated in the best interests of participants and beneficiaries. We also urge the Department to provide additional guidance regarding the duties of program trustees or custodians with respect to the security and management of program assets, as well as disclosures relating to program assets, including proxy votes. It also is important that the Department emphasize the importance of qualified political subdivisions establishing plans with low fees and costs and operating them in the best interests of participants and their beneficiaries.

In the Preamble to the Proposed Rule, the Department indicates that it is considering including in the amended safe harbor an additional criterion that a political subdivision demonstrate that it has the capacity to design and operate a payroll deduction savings program. The Department solicits comments on what objective evidence could be used by political subdivisions to establish that they have sufficient experience, capacity, and resources to design and operate a payroll deduction savings program.⁷

We believe requiring objective evidence of a political subdivision's capacity to design and operate a payroll deduction savings program, in addition to the three criteria already contained in the Proposed Rule, is appropriate. This evidence would be especially important if the Department again declines to include additional minimum requirements regarding the security of payroll deductions and savings. The Department should consider including several alternative criteria for establishing that a state has the experience performing functions similar to those required to operate a retirement savings program. Maintenance of a retirement plan or plans for employees of the political subdivision with assets greater than or equal to the total assets in retirement plans maintained by the state with the lowest asset amount would be

⁷ 81 Fed. Reg. 59581, 59586.

appropriate objective evidence. Additional alternative criteria could include self-administration by the political subdivision of payroll taxes, income taxes withheld from employees, and sales or use taxes. Any of these would demonstrate that a political subdivision has experience exercising administrative, collection, and enforcement functions similar to those required in running a payroll deduction savings program that depends on the compliance of hundreds, or even thousands, of employers.

If the Department adopts a retirement plan maintenance criterion, the Department should clarify what it means for a political subdivision to maintain a retirement plan for its employees. A political subdivision should be required to have a meaningful or substantial role in the administration of a plan. The assets of a plan should not be counted if the political subdivision merely contributes or forwards employee contributions to a plan maintained by another governmental entity, such as a statewide plan.

The Department asks whether the final rule should address the possibility of changed circumstances with regard to the minimum population threshold and the requirement that a political subdivision not be located in a state that establishes a statewide retirement savings program.⁸ In our view, the final rule should specify that satisfaction of the minimum population criterion will be determined when a savings program is established, without regard to subsequent population changes in the political subdivision or the states. Similarly, if the Department adopts a requirement that a political subdivision maintain a retirement plan or plans that meet a specific asset threshold, the Department should specify that satisfaction of the minimum asset requirement will be determined when a savings program is established. If a state establishes a statewide retirement savings program after a political subdivision has done so, the Department should leave to the state the determination of the relationship between the two programs and whether the political subdivision's program will continue independent of the statewide program.

The Department notes that some commenters suggested that the only requirement to be a qualified political subdivision be that a political subdivision has the implicit or explicit authority under state law to require employers to participate in the program.⁹ We object to this approach. This could create significant problems due to overlapping requirements. Further, opening the safe harbor to governmental entities without the requisite capacity and sophistication to establish a payroll deduction savings program would not be in the best interests of working people.

Aligning Interpretive Bulletin 2015-02 with the Amended Safe Harbor

In November 2015, the Department issued Interpretive Bulletin 2015-02 relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974 ("Interpretive Bulletin").¹⁰ The Interpretive Bulletin provides the

⁸ 81 Fed. Reg. 59581, 59585.

⁹ 82 Fed. Reg. 59581, 59586.

¹⁰ Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974; Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement

Department's views on "certain state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans."¹¹ It concludes that "ERISA preemption principles leave room for states to sponsor or facilitate ERISA-based retirement savings options for private sector employees, provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs."¹² Given the Department has proposed amending the current safe harbor to make it available to certain political subdivisions, we suggest the Department also update the Interpretive Bulletin to clarify that (and the conditions under which) a political subdivision may also sponsor or facilitate ERISA-based retirement plans.

We greatly appreciate the opportunity to submit these comments. Please do not hesitate to contact us with any questions you may have.

Very truly yours,

/s/ Shaun C. O'Brien

Shaun C. O'Brien
Assistant Policy Director for Health & Retirement

Income Security Act of 1974, 80 Fed. Reg. 71936 (Nov. 18, 2015) (amending 29 C.F.R. § 2509) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-11-18/pdf/2015-29427.pdf>.

¹¹ 80 Fed. Reg. 71936, 71937.

¹² 80 Fed. Reg. 71936, 71937.