AMERICAN BENEFITS COUNCIL

September 29, 2016

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: RIN 1210-AB76: Proposed Rule Regarding Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

Dear Sir or Madam:

The American Benefits Council ("Council") appreciates the opportunity to provide comments on the Department of Labor's ("Department") proposed rule[1] that would extend the new safe harbor[2] for state-run mandatory IRA programs for private-sector employees ("state-run arrangements") to similar programs that are established by certain populous cities and counties meeting the proposal's definition of a "qualified political subdivision" ("QPS") ("QPS-run arrangements"). The Council previously submitted comments on January 19, 2016, in response to the Department's initial proposal to create the safe harbor for state-run arrangements.[3]

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either

[1] 81 Fed. Reg. 59,581 (Aug. 30, 2016).

[2] 29 C.F.R. § 2510.3-2(h).

[3] 80 Fed. Reg. 72,006 (Nov. 18, 2015). The Council's comments on the proposed safe harbor are available at https://www.regulations.gov/document?D=EBSA-2015-0018-0033.

1501 M Street NW Suite 600 Washington, DC 20005 202-289-6700 Facsimile 202-289-4582 www.americanbenefitscouncil.org

directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

As discussed further below, the Department's final safe harbor for state-run arrangements left largely unresolved the more serious concerns we expressed in our letter of January 19, 2016, regarding the additional burdens and costs that plan sponsors and the existing retirement system in general will face under the various state programs. Because no safeguards were incorporated in the final safe harbor to prevent those burdens and costs, our members are very concerned that ***the Department's proposed extension of the safe harbor to QPS-run arrangements would only exacerbate the concerns we previously identified***.

As we expressed in our January 19, 2016, comments, the Council and its members support efforts to expand access to retirement savings opportunities for workers. The Department's past efforts to reduce administrative burdens and costs for plan sponsors have been important factors in encouraging the new and continued sponsorship of retirement plans within our voluntary system. However, we are very concerned that the recently finalized safe harbor for state-run arrangements takes a significant step backward by facilitating state laws that undermine the current retirement system by increasing the costs and complexity for employers that maintain retirement plans. Unless adjustments are made to the safe harbor to prevent such results, extending the safe harbor to additional jurisdictions with QPS-run arrangements will only subject existing plan sponsors to even more cost and complexity and further discourage new plan sponsorship.

It is worth emphasizing again that one of the fundamental reasons Congress had for passing ERISA was to ensure that employers choosing to offer a pension plan to employees would be subject only to a single statutory and regulatory regime under federal law. Because the safe harbor, as finalized, did not take steps to prevent employers from being subject to a multitude of regimes under varying state laws, our members – all of whom currently provide plans – are concerned that the very result Congress sought to avoid by enacting ERISA will inevitably occur, as is already apparent in some state-run arrangements that have been proposed or legislated which have not clearly excluded employees of employers with qualified plans. The introduction of QPS-run arrangements under the safe harbor, which would only expand the potential sources of conflict that employers would face, will only make this result worse.

SUMMARY OF THE COUNCIL'S COMMENTS ON THE PROPOSED EXTENSION OF THE SAFE HARBOR TO QPS-RUN ARRANGEMENTS

As explained in more detail below, the Council has the following comments in response to the Department's proposal to extend the safe harbor for state-run arrangements to QPS-run arrangements:

1. The Department should not make the safe harbor available to QPS-run arrangements unless the Department amends the safe harbor conditions to protect plan sponsors from overlapping and inconsistent requirements of different state-run and/or QPS-run arrangements. The minor change the Department made to the final safe harbor was subtle and not sufficient to alleviate the concerns the Council expressed in our January 19, 2016, comment letter, and publicly available documentation from Oregon illustrates why our concerns regarding plan sponsor burdens are not ill-founded. We therefore ask the Department to revisit and reconsider the suggestions we made in our January 19, 2016, letter for additional conditions that could be added to the safe harbor to address our members' concerns about finding themselves subject to multiple and conflicting regimes.

2. In the event that the Department moves forward with its proposal, the Council has the following suggestions for improvement and clarification:

   - The final regulation should provide that a QPS cannot adopt a mandatory program if the state has adopted a voluntary program, which could be accomplished by clarifying the meaning of a "state-wide retirement savings program for private-sector employees" (paragraph (h)(4)(iii));

   - The final regulation *should address* the effect of a state establishing a state-wide retirement savings program after a QPS within that state had already established a payroll deduction savings program; and\

   - Cities that are located in (or in part of) a county with a county-run savings arrangement *should be excluded* from the definition of QPS.

DETAILED COMMENTS

1. The Department should not make the safe harbor for state-run arrangements available to QPS-run arrangements unless the safe harbor is amended to protect plan sponsors and other employers from overlapping and conflicting state regimes.

In our comment letter of January 19, 2016, we expressed our concern that the Department's then-proposed safe harbor did not ensure that state-run arrangements would not interfere with the existing retirement system that is currently providing benefits to millions of Americans. We urged the Department to make safe harbor relief available only to state-run arrangements that do not unnecessarily interfere with and burden existing plan sponsors, plan participants, and employers. In that regard, we conveyed the following specific concerns with the safe harbor as it was initially proposed:

- Current plan sponsors could be subject to a state-run arrangement's employer mandate if the employer's plan does not cover 100% of employees or if the employer does not offer a certain type or plan or level of benefits as determined by the state;

- Employers (including current plan sponsors) with operations and employees in multiple states will be subject to *multiple* state-run arrangement regimes; and

- Employers (including current plan sponsors) will likely be subject to *conflicting* state-run arrangement regimes *with respect to the same employee*, a situation that would occur if an employee lives in one state whose mandatory IRA regime applies to residents of the state, and the employee works in another state whose mandatory IRA regime applies to individuals working in the state. (The current proposal would further complicate this by adding the very likely possibility of conflict between QPS-run and state-run arrangements.)

To address these concerns, we suggested a number of additional conditions that could be added to the safe harbor to ensure that plan sponsors would not be unduly burdened by the state-run arrangements taking advantage of the safe harbor.[4] However, the Department finalized the safe harbor without incorporating our recommendations or taking other steps to ensure that any new burdens placed on employers and the existing retirement system by state-run arrangements are minimized.

The Department acknowledged in the preamble to the final safe harbor regulation that some commenters had expressed concerns that the language in proposed paragraph (h)(2)(i) of the safe harbor, stating that a program would not fail to qualify for the safe harbor merely because the program is "directed toward those employees who are not already eligible for some other workplace savings

[4] See pages 7-8 of the Council's January 19, 2016, comment letter for a description of the conditions that we suggested be added to the safe harbor.

arrangement," could encourage states to focus on whether *particular employees* of an employer are eligible to participate in a workplace savings arrangement, similar to the concerns the Council expressed. In response, the Department noted that it had revised the language in the final safe harbor to provide that a state-run arrangement would not fail to satisfy the conditions of the safe harbor merely because the program is "directed toward those employers that do not offer some other workplace savings arrangement." The Department stated that the revised language would "reduce employer involvement in determining employee eligibility for the state program, and it accurately reflects current state laws."[5]

This change is meaningful only in the context of a state that was unsure whether it would be allowed to avail itself of the safe harbor despite focusing its program on employers that do not offer a workplace retirement savings opportunity. Thus, to the extent that this change makes clear that a state can stay in the safe harbor even if it exempts all employers that already sponsor a plan, we appreciate the clarification. The change does not address, however, our significant concern with states that impose mandates on employers that offer a retirement plan under ERISA.

To illustrate the basis for our continued concern, we would first note the Department's statement that "the relevant laws enacted thus far by the states have been directed toward those employers that do not offer any workplace savings arrangement, rather than focusing on employees who are not eligible for such programs."[6] One of the states listed by the Department as having already enacted a state-run arrangement is Oregon. Under the Oregon statute, an employer is required "to offer its employees the opportunity to contribute to the plan through payroll deductions *unless the employer offers a qualified retirement plan*, including but not limited to a plan qualified under section 401(a), [etc.]" (emphasis added).[7] Although that provision (and similar provisions in most of the other state-run arrangement bills that have passed or been considered) may appear to exclude current plan sponsors from Oregon's mandate, the effect of that provision – and how it is ultimately implemented – is not clear, and as a practical matter could still result in substantial burdens on plan sponsors. For example, a draft Oregon plan design proposal dated June 26, 2016 (v2) that is available on the Oregon Treasurer's website[8] reflects uncertainty with respect to whether an "employer who offers a qualified plan, but [the] plan does not cover

[5] 81 Fed. Reg. 59,468.

[6] *Id*.

[7] Oregon Retirement Savings Board Act, Ch. 557 § 3(b) (H.B. 2960) (2015).

[8] *See* http://www.oregon.gov/treasury/ORSP/Documents/Plan%20Design%20proposal%206-26-2016.pdf.

all employees" would qualify for the Oregon state mandate's exemption. The document further proposes an employer phase-in that would include "[e]mployers with [qualified] plan not covering all employees." The Oregon program demonstrates why we believe it cannot be assumed that the states will take the steps necessary to avoid overburdening employers and the current retirement system. We believe it is therefore critical that the Department take steps to ensure that protections for plan sponsors and employers are *requirements* of the safe harbor and not merely permitted provisions.

In the preamble to the proposal to extend the safe harbor to QPS-run arrangements, the Department noted that one of the arguments commenters made in favor of the extension was that most employers in multiple jurisdictions will be unaffected because they already offer retirement plans. As illustrated above with respect to Oregon, our members are very concerned that they will be affected due to either the explicit language of a state statute or the way that a particular program's governing body decides to implement the statute. Plan sponsors would not be merely responsible for ministerial tasks such as distributing program materials, but they would be forced to keep track of every employee's plan status and eligibility for the state program on an ongoing basis. As we cautioned in our January 19, 2016, comment letter, we are beginning to hear from even large companies that the costs and liabilities associated with sponsoring a pension plan are causing them to evaluate other alternatives. If plan sponsors are not assured of an exemption from competing and conflicting state-run (and now potentially QPS-run) arrangements, reducing costs by terminating an existing retirement plan could become a very attractive option, with the altogether unintentional potential effect of lowering the minimum common denominator for retirement plans.

The Department's proposal to extend its safe harbor to QPS-run plans only exacerbates our concerns by adding the possibility of nearly 90 additional jurisdictions creating their own retirement savings regime for private-sector employees. Additional developments that have occurred in the states since the Department first proposed the original safe harbor serve to validate our concerns. As a result, we strongly oppose allowing QPS-run arrangements to qualify for the safe harbor unless the Department takes additional protective action such as adding the conditions we previously proposed to the safe harbor. The Department noted that it is "sensitive to the issue regarding the potential for overlapping programs to apply,"[9] and we would contend that the Department is best positioned to alleviate that issue through amendments to the safe harbor conditions. If this issue is not resolved, then, at a minimum, the safe harbor should not be extended to QPS-run arrangements.

[9] 81 Fed. Reg. 59,584.

2. Suggestions for improvement if DOL moves forward with its proposal to extend the final safe harbor to QPS-run arrangements:

For the reasons explained above, the Council strongly urges the Department not to extend the final safe harbor to QPS-run arrangements unless the Department takes steps to resolve the concerns that are discussed above and contained in our comment letter of January 19, 2016. However, in the event that the Department moves forward with its proposal (regardless of whether our previous concerns are addressed), we have the following requests and suggestions for changes to the proposal.

- **The final regulation should provide that a QPS cannot adopt a mandatory program if the state has adopted a voluntary program. This can be done by clarifying the meaning of a "state-wide retirement savings program for private-sector employees" as used in paragraph (h)(4)(iii) of the proposal.**

  Paragraph (h)(4)(iii) of the proposal provides that the term QPS means "any governmental unit of a State, including a city, county, or similar governmental body, that … Is not located in a State that pursuant to State law establishes a *state-wide retirement savings program for private-sector employees*" (emphasis added). The preamble suggests that a "state-wide retirement savings program for private-sector employees" for purposes of paragraph (h)(4)(iii) is not limited to the state-run arrangements for which the Department has provided a safe harbor, but that it also includes state-run marketplaces, state-sponsored prototype plans, and state-sponsored multiple employer plans.[10] However, this point is not clear and is merely implied in the preamble.

  Because the scope of what constitutes a state-wide retirement savings program for private-sector employees, as that term is used in paragraph (h)(4)(iii), is unclear and could be interpreted as including only state-run arrangements (i.e., mandated IRA programs), we request that the Department clarify in the final rule that such term includes the following:

  (1) state retirement savings programs described in 29 C.F.R. § 2510.3-2(h);

  (2) completely voluntary state retirement savings programs that meet the conditions of the 1975 safe harbor (29 C.F.R. § 2510.3-2(d));

[10] 81 Fed. Reg. 59,585. See also 81 Fed. Reg. 59,585 n.32.

(3) state retirement savings programs described in the Interpretive Bulletin at 29 C.F.R. § 2509.2015-02 (i.e., state programs that utilize the marketplace, prototype, or multiple employer plan approach); and

(4) any other state retirement savings program for private-sector employees similar to those described in (1)-(3) above.

- **The final regulation *should address* the effect of a state establishing a state-wide retirement savings program after a QPS within that state had already established a payroll deduction savings program.**

  The Department requested comments on whether the final regulation should address the effect on the status of a QPS's payroll deduction savings program if the state in which the QPS is located establishes a state-wide retirement savings program after the QPS has already established and begun operating its program.[11] The Department stated that if such a situation occurred, then "*presumably* the state would take into account the nature and existence of the [QPS's] program and act in a measured and calculated way so as to avoid or mitigate any undesirable overlap…"[12] (emphasis added). In noting that states would presumably act on their own without the need for the Department to address the issue of overlapping programs, the Department suggested that states could work to coordinate state-run arrangements with QPS-run arrangements, and further that states could coordinate among themselves "to ensure that employers would never be subject to more than one state (or [QPS]) program."[13]

  We have seen no evidence to date that states have, on their own accord, taken steps to minimize overlapping state mandates on employers and individual employees. As a result, we are not confident that states would adequately and consistently minimize any overlapping or even conflicting requirements in the case that a QPS-run arrangement is operative within that state. As discussed above, we therefore urge the Department to address the potential overlap between programs – both among states and within states – in the final regulation. As also discussed above and in our comment letter of January 19, 2016, one way for the Department to achieve that goal would be to condition the availability of the safe harbor on provisions in the state-run arrangement statutes that are designed to "mitigate any undesirable overlap" between state programs. The same conditions could also be applied with respect to QPS-run arrangements.

[11] 81 Fed. Reg. 59,585.

[12] 81 Fed. Reg. 59,585-86.

[13] 81 Fed. Reg. 59,586.

- **Cities that are located in (or in part of) a county with a county-run savings arrangement *should be excluded* from the definition of QPS.**

  The Department also asked for comments on whether cities that are located in (or in part of) a county with a county-run retirement savings program should be excluded from the definition of QPS.[14] As proposed, the definition of QPS would already exclude from its definition counties and cities that are located within a state that has established a state-wide retirement savings program. Thus, we believe it logically follows that the same reasons that led the Department to propose the current restriction on the definition of QPS in paragraph (h)(4)(iii), which we strongly favor, would also support the exclusion of cities that are located in (or in part of) a county with a county-run retirement savings arrangement from the definition of QPS.

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As a final comment, we urge the Department to ***slow down and fully consider*** the long-term implications of undermining ERISA and the tremendous value of uniformity and consistency in the law that it provides to participants and plan sponsors. The final regulation was under review at the Office of Management and Budget for 33 days, and this proposal received only **19 days** of review despite never even appearing on the Department's regulatory agenda. With a mere 30-day comment period, we fear there has been insufficient time to consider and resolve the problems created by the approaches it supports and will result in eroding retirement security.

Again, we appreciate the opportunity to provide comments on the Department's proposed rule. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700.

Sincerely,

Jan Jacobson

Jan Jacobson
Senior Counsel, Retirement Policy

[14] *Id.*