September 29, 2016

Submitted via the Federal eRulemaking Portal: www.regulations.gov
Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210
Attn: Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

RIN: 1210-AB76— Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the Proposed Regulations pertaining to Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees which was published in the Federal Register on August 30, 2016.[1]

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

[1] 81 Fed. Reg. 59581 (August 30, 2016).

Introduction

A number of states are attempting to expand retirement coverage by implementing state legislation for retirement programs for private employers. These programs range from mandatory programs to open exchanges.[2] In addition, there are cities that are also considering similar legislation.[3] There is concern from both states and cities about this legislation being preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). As a result, the Department of Labor ("DOL") has issued guidance to address this issue. Earlier this year, the DOL issued two pieces of guidance—a proposed regulation pertaining to Savings Arrangements Established by States for Non-Governmental Employees creating a safe harbor for these state retirement programs to not be considered "employee benefit plans" for purposes of ERISA[4] and an Interpretive Bulletin relating to State Savings Programs that Sponsor or Facilitate Plans Covered by ERISA ("Interpretive Bulletin") which provides guidance for state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. On August 30 of this year, the DOL finalized the proposed rule pertaining to Savings Arrangements Established by States for Non-Governmental Employees ("Final State Rule").[5] At the same time, the DOL issued a proposed rule pertaining to Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees ("Proposed Rule") which provides guidance for political subdivisions to design and operate payroll deduction savings programs, using automatic enrollment, for private-sector employees without causing the states or private-sector employers to establish employee pension benefit plans under ERISA.

The Chamber has on-going concerns about the Final State Rule as well as additional concerns about the Proposed Rule. We are very disappointed in the DOL's lack of response to concerns raised in our comment letter on the proposal to the Final State Rule.[6] In particular, the

---

[2] While no state has a functional state-run plan at this time, several states have passed legislation that can or will lead to the formation of state-run plans. *The California Secure Choice Retirement Savings Trust Act (S.B. 1234)* - signed into law on September 28, 2012 - requires employers with 5 or more employees that do not already offer a qualified retirement plan to enroll their employees in a new type of savings plan based on IRAs at a contribution rate of 3%, with a guaranteed benefit. *The Illinois Secure Choice Savings Program Act (S.B. 2758)* - signed into law on January 4, 2015 - requires employers with 25 or more employees that do not already offer a qualified retirement plan to enroll their employees in a state-run automatic enrollment payroll deduction Roth IRA with a 3% payroll deduction, but employees are able to change their deduction amount and can affirmatively opt out if they wish. A match or employer contribution is not required. *The Washington Small Business Retirement Marketplace (SB 5826)*—passed in both the Washington Senate and House—provides for a small business retirement marketplace that allows employers with less than 100 employees to voluntarily choose from a range of investment options provided through the marketplace.

[3] State of #OurCity: *Mayor de Blasio Announces Plan for Retirement Security for All New Yorkers*, February 4, 2016. http://www1.nyc.gov/office-of-the-mayor/news/132-16/state-ourcity-mayor-de-blasio-plan-retirement-security-all-new-yorkers. City of Philadelphia, Pennsylvania, Office of the Comptroller, *RETIREMENT SECURITY IN PHILADELPHIA An Analysis of Current Conditions and Paths to Better Outcomes*, May 2016. http://www.philadelphiacontroller.org/publications/RetirementSecurity_Final_May2016_web.pdf.

[4] While the ultimate determination of ERISA preemption is up to the courts, the objective of the guidance is to reduce the risk of the state programs being found preempted. 80 Fed. Reg. at 72006.

[5] 81 Fed. Reg. 59464 (August 30, 2016).

[6] U. S. Chamber of Commerce, Comment Letter to the DOL on Proposed Regulations pertaining to Savings Arrangements Established by States for Non-Governmental Employees and the Interpretive Bulletin relating to Stating Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security

DOL still has not addressed our concerns over ERISA preemption, lack of consumer protections, lack of protection for employers against litigation risk, creating an uneven playing field between the public and private sector and an inadequate economic analysis. Given that these concerns have yet to be addressed, we do not understand how the DOL has decided to expand the regulation to allow political subdivisions to create savings programs. Rather than moving forward, we urge the DOL to delay the Proposed Rule until the experience with state-sponsored plans is fully analyzed. If the DOL insists on moving forward, the Chamber urges the DOL to—at a minimum—address basic implementation concerns. Specifically, we urge the DOL to limit the safe harbor to political subdivisions with successful management of public pension assets and to provide guidance for circumstances when a state implements a program after a city. These concerns are further detailed below. We note that these are initial concerns and as these programs start to be implemented, we anticipate that additional concerns and questions will arise that we will want to share with you.

Comments

The Proposed Rule is Premature and Should Be Withdrawn Until the State Experience is Analyzed. As we detail below, there are still numerous questions and concerns about the impact of the safe harbor for state programs that remain unanswered. The context for successful retirement savings programs is extremely important—efficient operating systems, robust financial education and guidance, understandable instructions, and proper investment vehicles are just a few elements necessary to ensure a successful system. There are many questions about the capacity for states to build such an environment for private employees and these concerns are exacerbated at the level of political subdivisions. As such, we recommend that further guidance for political subdivisions be postponed until there is a clear analysis, backed by data and evidence, of this similar safe harbor at the state level.

The DOL Should Not Allow States or Political Entities to Place Restrictions on Withdrawals From Their Programs. The Chamber urges the DOL to re-implement the provisions in the proposal to the Final State Rule that would have prohibited states from imposing any restrictions on withdrawals from the IRAs maintained under the state program. We are concerned that restrictions on withdrawals could prevent workers from rolling savings into more robust employer plans. The purpose of these safe harbors is not just to get people to save but to help create adequate savings for retirement. In the preamble to the Final State Rule, the DOL states,

> For older Americans, inadequate retirement savings can mean sacrificing or skimping on food, housing, health care, transportation, and other necessities. In addition, inadequate retirement savings places greater stress on state and federal social welfare programs as guaranteed sources of income and economic security for older Americans. Accordingly, states have a substantial governmental interest

---

Act of 1974 (ERISA), January 19, 2016 at https://www.uschamber.com/comment/comment-letter-the-dol-state-savings-arrangements-safe-harbor.

> to encourage retirement savings in order to protect the economic security of their residents.[7]

One way to help achieve retirement security is participation in an employer-provided plan with robust investment options. For understandable reasons, many of the state plans being considered are focused on investments with capital preservation. For example, the California Secure Choice Board will use the *my*RA as an investment option for the first three years.[8] While the *my*RA is a better option than no retirement plan at all, it is not as robust as the investment options an employer-provided plan. As written in the final rule, states could prohibit workers from rolling over such assets into an employer-sponsored plan. Such restrictions would prevent workers from consolidating accounts and could prevent workers from achieving a greater accumulation of assets—to the detriment of their retirement security. Consequently, we urge the DOL to return to its original position and not allow restrictions on withdrawals. At the very least, the DOL should not allow restrictions on withdrawals that would prevent a rollover into another tax-qualified retirement plan or account.

The Department Failed to Address Several Issues in the Final State Rule that Continue to be Concerns in the Current Proposed Rule. We are very disappointed in the Department's response to our comments on the proposal for state-sponsored plans. Not only were some of the most important concerns not addressed, but these concerns also pertain equally to the proposal for political subdivisions. As such, we believe it is important to reiterate these concerns and ask that they be addressed both for the current Proposed Rule and for the Final State Rule.

The Final State Rule and the Proposed Rule Contradict the Congressional Intent of ERISA. ERISA has been a key component of our retirement system's legal framework for over forty years, regulating important aspects of employer-provided plans at the federal level. Employers have depended on ERISA to ensure that they can offer plans on a nationwide basis, providing fairness to all employees regardless of where they live or work. Chamber members are extremely concerned that state actions establishing and regulating private employer-provided plans will create complexity in the system. Even a small employer can have operations, employees, or facilities in more than one state and, therefore, would have difficulty complying with differing state requirements. The Proposed Rule adds the possibility—in the near term—of an additional 88 jurisdictions that could create savings programs.[9] The purpose of ERISA's preemption provision was to avoid this very situation.

While there may be debate about the details of what is preempted, it is clear from legislative history that the intent of the statute is to avoid differing state and city laws governing private retirement benefit programs. Representative John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee and floor manager for ERISA in the House at the time of statute's passage stated,

[7] 81 Fed. Reg. at 59464.
[8] California Senate Bill 1234 http://www.treasurer.ca.gov/scib/fact.pdf.
[9] 81 Fed. Reg. at 59585.

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participations by *eliminating the threat of conflicting and inconsistent State and local regulation*…[10]

Senator Jacob Javits, ranking minority member of the Senate Committee on Labor and Public Welfare, and considered one of the primary architects of ERISA echoed the same sentiment,

"… the emergence of a comprehensive and pervasive Federal interest and *the interest of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs*."[11]

Furthermore, the Supreme Court has upheld ERISA preemption to mitigate a myriad of state laws from developing. In the preamble to the proposed state safe harbor rule, the DOL itself acknowledges that "in order to assure nationwide uniformity of treatment, ERISA places the regulation of private-sector employee benefit plans (including employment-based pension plans) under federal jurisdiction."[12] The DOL goes on to recognize that,

> In various decisions, the [Supreme] Court has concluded that ERISA preempts state laws that: (1) mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.[13]

It is hard to see how state or city legislation would not "mandate employee benefit structures" or "bind employers… to particular choices" when the intent of certain legislation is to mandate a retirement program for employers that currently do not offer one. Creating different retirement plans in different states and cities will create significant compliance challenges for employers, particularly smaller businesses. This result clearly runs counter to the statutory intent of ERISA and the purpose of the preemption clause.

The DOL's Response to the Lack of Employee Protections is Contradictory to its Position in the Recently Issued Fiduciary Rule. In response to concerns that the safe harbor in the Final State Rule does not provide adequate protections for participants, the DOL states that

> Such IRAs are subject to applicable provisions of the Code, including Code section 4975. Section 4975 of the Code includes prohibited transaction provisions very similar to those in ERISA, which protect participants and beneficiaries in

---

[10] 120 Cong. Rec. at 29942 (emphasis added).
[11] 120 Cong. Rec. at 29942 (emphasis added).
[12] 80 Fed. Reg. 72006 (November 18, 2015) at 72007.
[13] 80 Fed. Reg. at 72007 *citing* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 14 (1987).

ERISA plans by identifying and disallowing categories of conduct between plans and disqualified persons, as well as conduct involving fiduciary self-dealing.[14]

While the protections under Code section 4975 may be very similar to those in ERISA, they are not the same as evidenced by the DOL's need to include IRAs in its recently issued Conflicts of Interest/Fiduciary rule.[15] Including IRAs in the fiduciary rule indicates that the DOL does not believe the protections under Code section 4975 are the same as the protections under ERISA. It is not clear why the DOL now thinks that these lesser protections are sufficient for private workers who will participate in a state-sponsored savings program.

Moreover, we have seen many examples of states and political subdivisions that have failed to meet the ERISA standard and left their workers without the federal protections that private workers currently enjoy. For example, the city of Jacksonville, Florida recently realized that incompetence and dishonesty had caused a "$1.6 billion debt" in its police and fire pension fund requiring taxpayers "to pay $153 million into it."[16] The city expert hired to evaluate the fund noted that, as a public pension fund, "it was not subject to ERISA's comprehensive, heightened standards—only patchwork, weaker state and local standards."[17] Although the fund told investors that it operated consistent with the highest standards of ERISA, the Introduction to its Statement of Investment Policy posted on its website stated that "the Board of Trustees acknowledges that the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), does not apply to the Fund as a governmental retirement plan."[18] As such, the Fund's executive director, board of trustees, and investment advisors all operated consistent with the understanding that the fund was not subject to the heightened duties of ERISA.[19] Specifically, the Fund Administrator represented in the forms submitted to numerous investment advisors that "the Fund was not subject to ERISA."[20] According to the experts who reviewed the Fund's operation and governance, "the Board not only failed to meet higher ERISA standards, it failed to meet even the lower state and local standards."[21]

The situation in Jacksonville is just one of many examples that prompted the expert who reviewed the city's depleted fund to issue a warning to participants in state and municipal retirement plans. He cautions that "[p]ublic pensions, in my experience, often do reference ERISA in their organizational documents but rarely give compliance with the comprehensive federal statute much attention."[22] In these plans that are not regulated by ERISA, participants and taxpayers are left to their own devices. The Department should not knowingly expose private sector workers to such insecurity and uncertainty. Consequently, we reiterate our

---

[14] 81 Fed. Reg. at 59469.
[15] 29 CFR Parts 2509, 2510, and 2550; 81 Fed. Reg. 20946 Federal Register (April 8, 2016).
[16] Ron Littlepage, *The Anger Over the Pension Scandal Will Only Continue to Rise*, FLA. TIMES-UNION (Oct. 29, 2015), www.jacksonville.com/opinion/ron-littlepage/2015-10-29/story/ron-littlepage-anger-over-pension-scandal-will-only-continue
[17] Edward Siedle, *Jacksonville Pension's Failed Adoption of the Highest Federal (ERISA) Safety Standards*, FORBES (Oct. 30, 2015), www.forbes.com/sites/edwardsiedle/2015/10/30/jacksonville-pensions-failed-adoption-of-highest-federal-erisa-safety-standards/#fe216adfb0d4.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Siedle, *supra* note 33.

concern that participants will not receive adequate protections under the Final State Rule or the Proposed Regulation and urge the DOL to rectify this omission by holding states and political subdivisions to the same fiduciary obligations as private plan sponsors under ERISA.

Both Safe Harbors Create an Unfair Playing Field Between Government-Sponsored Programs and Private Programs. The Chamber has serious concerns that the DOL gives state plans a free pass from ERISA liability for automatically enrolling private sector employees, yet does not extend the same safe harbor for automatic enrollment to private sector plans. Currently, the non-ERISA safe harbor for private sector payroll deduction IRA plans does not allow the employer to automatically enroll participants.[23] This inconsistent application of the safe harbor not only discriminates—without merit—against private sector plans, but it also suggests that pleasing government entities is more important than encouraging employee retirement savings for all. We strongly encourage the DOL to amend the safe harbor and even the playing field by disallowing automatic enrollment by states or political subdivisions that use the safe harbor or extending to private sector plans the ability to use automatic enrollment.

The Chamber Again Urges the Department to Provide Protections to Employers Against Litigation Risks. In our comments on the proposal for the Final State Rule, the Chamber specifically asked the DOL to address the increased liability that could be placed on employers. The intended purpose of the Final State Rule and the Proposed Rule is to reduce the risk of their savings programs being preempted; however, the DOL admits that the ultimate determination rests with the courts.[24] As such, there is a risk of increased legal liability for employers—an employee or class action suit could challenge the safe harbor definition under this proposal and claim that the employers are subject to ERISA. If a violation of ERISA is found, the employers will have been unwittingly subjected to this increased liability without any recourse against the state or political subdivision using the safe harbor or the DOL.

The DOL's only response to this concern is a footnote in the Final State Rule inviting "states and other interested persons to ask the Department to consider whether some additional guidance or relief would be appropriate."[25] We reiterate that such guidance and relief is not only appropriate but necessary to protect employers who are being mandated to participate in these programs. In addition, relief must be provided at both the state and political subdivision level to include protections for employers if courts disavow the safe harbor rule. Furthermore, this relief should be provided before any of these programs are implemented.

The Department Failed to Address Chamber Concerns with the Economic Analysis in the Previous Proposal. In our comment on the proposal to the Final State Rule, the Chamber raised numerous questions that the economic analysis failed to address. These questions are still unanswered in the Final State Rule and the many of the same questions apply to the Proposed Rule.

- In the proposal to the Final State Rule, the DOL concludes that the costs imposed on employers will be "minimal." There is no evidence in the analysis on how the DOL arrived at this conclusion—there was no investigation into the costs associated with

[23] 29 CFR 2510-2(d).
[24] 80 Fed. Reg. 72006.
[25] 81 Fed. Reg. at 59471, FN 36.

modifying payroll systems or other administrative costs that employers may incur. Consequently, the DOL's claim of minimal cost impact is at best an arbitrary guess, not founded on credible research.

- In the proposal to the Final State Rule, the DOL admits that the employers most likely impacted by the rule will be small businesses,[26] but the agency has did not pursue the regulatory flexibility analysis far enough and still has not done so. DOL needs to do more research to characterize the small businesses most likely to be impacted.
- In addition, we provided the following list of some of the questions that agency should have investigated and answered before moving forward with this proposal. We reiterate the need to address the questions for both the Final State Rule and the Proposed Rule.
    - What are companies saying about the cost and other implications of these proposals?
    - Will the proposed savings programs adversely affect plans currently offered by employers?
    - Besides the administrative cost of handling payroll deductions for participants, what are the other possible cost burdens that these plans may impose on employers?
    - Would the Proposed Regulation expose employers to liabilities that would not be applicable in the absence of the rule?
    - Will employers need to exercise diligence to ensure that state or political subdivision programs qualify for the proposed safe harbor?
    - Are there alternative safe harbor definitions that the DOL could have considered and that would have less burdensome impacts on employers?
    - How many new employees will participate in these programs and how does that benefit measure against the financial and administrative costs imposed on employers?
    - What are the risks to employees who participate in these savings programs? Are they safer or riskier than traditional employer sponsored plans?

If the Department Moves Forward with the Proposal, the Following Issues Must be Addressed. Again, we urge the DOL to delay finalizing the Proposed Rule until the experience of the state safe harbor can be fully analyzed. However, if the DOL insist on moving forward, we believe the issues detailed below must be addressed.

The Department Should Provide Guidance if a State Implements a Program after a Political Subdivision. The DOL asks for comments on this issue but does not provide any guidance.[27] The Chamber believes that such guidance is necessary if this proposal is to move forward. To create fewer burdens for employers, the Chamber recommends that for purposes of the ERISA safe harbor, the employer can choose whether to remain under the original program of the political subdivision or switch to the state program.

The Safe Harbor Must be Limited to Political Subdivisions with Successful Management of Public Pension Assets. The Chamber believes that this is a critical requirement that must be included in the safe harbor to ensure that retirement assets of private workers are not jeopardized by cities that have not managed their own finances well. In addition, we recommend

[26] *Id*.
[27] 81 Fed. Reg. at 59585.

that this requirement also be included in the Final State Rule as there are several states that also have mismanaged pension assets.

The corruption scandals involving public employee pension plans in California and other states illustrate the absurdity of the DOL's contention that state administration ensures the plans will be operated in accordance with the interests of the citizen-participants. The governance and operational issues that made such scandals possible at state-administered pension plans cannot be consigned to history. Many aspects of the operating environment that allowed the illicit activity at the California Public Employees' Retirement System (CalPERS) and other public pension funds as well as the underfunding crisis facing most state-run pension plans still have yet to be addressed. It is good that CalPERS has forbidden the payment of agent fees and instructed outside management firms handling its investments not to use placement agents. But there are still enormous shortcomings in the operational, governance, regulatory structures associated with public plans. Many of the most glaring shortcomings are issues the DOL would not tolerate in ERISA-governed plans.

For example, the 2011 report CalPERS commissioned on its pay-to-play scandal discussed changes necessary to prevent future abuses of the plan. One recommendation was that "[t]here must be increased vigilance on the part of CalPERS as to those portions of its investment portfolio-like private equity, real estate, and hedge funds-that have not traditionally been subject to as great a degree of public scrutiny as other types of investments."[28] Despite this warning in 2011, earlier this year the CalPERS Board of Trustees rejected a proposal to require private equity firms dealing with the fund to disclose "all types of fees, carry, discounts, and rebates" charged to the funds participants.[29] This rejection of greater transparency came after CalPERS publicly acknowledged that "the state does not know the total amount in fees pensioners are now paying to firms in its $28 billion private equity portfolio."[30] Apparently, the laws governing public pension plans in California do not mirror ERISA's requirement that plan trustees must assess the reasonableness of fees.[31] After all, the reasonableness of fees can only be evaluated if the amount of the fees is actually tracked and known.

Earlier this month, CalPERS' management practices once again raised red flags about the integrity and stability of public pension funds in America with the revelation that it kept "two sets of books" with remarkably divergent numbers on the plans it administered, but only made one set showing higher funding levels publicly available.[32] This practice came to light when a tiny pension fund for the six-employee California Citrus Pest Control District Number 2, which

---

[28] Andrew S. Ross, *CalPERS scandal detailed in report*, SFGATE.COM (March 20, 2011), www.sfgate.com/business/bottomline/article/CalPERS-scandal-detailed-in-report-2388431.php (quoting the 75-page report of attorney, Philip Khinda, who CalPERS retained to undertake a 17-month investigation of the pay-to-play scandal and to make recommendations of changes to prevent a recurrence).

[29] David Sirota and Andrew Perez, *California Pension Won't Force Wall Street to Disclose All Fees Charged to Retirees*, INT'L BUSINESS TIMES (Dec. 21, 2015), www.ibtimes.com/political-capital/california-pension-wont-force-wall-street-disclose-all-fees-charged-retirees.

[30] *Id.*

[31] ERISA section 404(a)(1)(A).

[32] Mary Williams Walsh, *A Sour Surprise for Public Pensions: Two Sets of Books*, NEW YORK TIMES (Sept. 27, 2016) at: http://www.nytimes.com/2016/09/18/business/dealbook/a-sour-surprise-for-public-pensions-two-sets-of-books.html?_r=0.

is administered by CalPERS, decided to convert to a 401(k) plan. CalPERS had consistently informed the plan that it was fully-funded under "officially-stated numbers."[33] Remarkably, however, after the plan elected to convert to a defined contribution model, CalPERS produced numbers showing that the plan faced a $48 million shortage and sent a letter demanding full payment of this underfunding. The public pension giant explained that the underfunding was based on non-public "market-value" figures of the plan's assets rather than the rosier published "actuarial" valuation.[34]

While the dilemma of this small plan has yet to be resolved, this latest revelation has raised serious alarm over public pension funds' assertions about their funding status. It has also revived a long-running debate among actuaries about whether the actuarial standards used by public pension plans are "fundamentally flawed, causing systemic under-funding and setting up a slow-moving train wreck when baby boomers retired."[35] These scandals should certainly make the Department rethink placing private-sector workers into plans managed by entities like CalPERS.

Other common practices at many public pension funds also do not bode well for the retirement security of workers DOL is directing to government-run programs through the safe harbor. These include forgoing required investments, "[i]mprudent benefit enhancements . . . after consecutive years of unusually high returns on a pension plan's investments," and allowing state and local governments to redirect "contributions for other uses."[36] Such practices at state-administered defined benefit plans that are not subject to ERISA illustrate the prescience of the warning in the report on the CalPERS "pay-to-play" scandal that the "fundamental problem" with state-administered public pension plans remains and "events similar to what transpired at CalPERS could just as easily appear elsewhere."[37]

Municipal pension plans have also engaged in similar practices that hurt beneficiaries and indicate they would not be trustworthy administrators of private pension assets. For example, the bankruptcy of Detroit revealed that the city's municipal pension funds had "questionable interest rates applied to annuities."[38] Investigators also found that "Detroit's municipal pensions exceeded their legal limits in real-estate investments," and awarded retirees in some years more than a 20% return on their annuities even as the funds lost value."[39] A report concluded that the "abuse of discretion was most egregious" when the general retirement fund lost 24% of the value of its assets, but the trustees nevertheless credited annuity savings-plan accounts for current employees with an investment return of 7.5% by utilizing assets that were supposed to be going to fund retiree pensions.[40] These decisions are evidence of poor management and the assets of private workers should not be entrusted to such entities.

---

[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] RAEGEN T. MILLER, REDEFINING TEACHER PENSIONS, CENTER FOR AMERICAN PROGRESS 1 (Sept. 2011), www.americanprogress.org/issues/education/report/2011/09/30/10232/redefining-teacher-pensions.
[37] Ross, *supra* note 8.
[38] Matthew Dolan, Report Faults Detroit Pension Funds Payouts, WALL ST. J. (Sept. 26, 2013), www.wsj.com/articles/SB10001424052702303796404579099524149455810.
[39] *Id.*
[40] *Id.*

As noted earlier in this comment, Jacksonville, FL has a $1.6 billion debt due to incompetence and dishonesty. The report of the city's expert concluded that the Board's "failure to scrutinize investment management fees—as required under ERISA fiduciary standards—. . . has resulted in $6 million in excessive fees paid each year or $36 million over the past six years."[41] Far more costly, however, was the "Board's failure to conduct or commission any review of the damage to the Fund caused by its former investment consultant over two decades" and its decision to choose "to accept a settlement of a mere $273,696, for an estimated $300-$500 million in underperformance losses."[42] Furthermore, conflicts of interest in the operation and management of the Jacksonville fund were rampant. The Board allowed the fund's executive director to create a special, extra retirement fund for himself and the Fund's senior staff.[43] This special fund received priority funding such that it was overfunded "even as the pension fund for police officers and firefighters was precariously underfunded" to the point that there are currently only about 46 cents available for every dollar promised to rank and file officers and firefighters.[44] Even more shocking, the mishandling of the Jacksonville police and fire fund continued for years after watchdogs raised concerns in 2008 over the plans' approximately $798 million in underfunding.[45]

The dubious practices that occur with alarming frequency at both state and municipal public pension plans that operate free from the strict and enforceable standards of ERISA explain the Pew Charitable Trusts' findings that state pension plans as a group fell approximately 20% short of making even their actuarially required contributions in 2013.[46] They explain the Brookings Institution's discovery that "even by their own misleading calculations, many states have set aside less than two thirds of what they need to meet their pension obligations."[47] And as the Congressional Budget Office has noted, "[b]y any measure, nearly all state and local pension plans are underfunded."[48] Researches have estimated the size of the unfunded liabilities in state and local government pension funds to be as high as $3 trillion.[49]

---

[41] Siedle, *supra* note 33.
[42] *Id.*
[43] Eileen Kelly, *City sues Keane and pension fund board over special pension, seeks repayments,* FLA. TIMES-UNION (Nov. 23, 2015), www.jacksonville.com/news/metro/2015-11-23/story/city-sues-keane-and-pension-fund-board-over-special-pension-seeks
[44] *Id.*
[45] Edward Siedle, *Long-Awaited Forensic Investigation of City of Jacksonville Police and Fire Pension Fund*, FORBES.COM (October 27, 2015),
[46] THE PEW CHARITABLE TRUSTS, THE STATE PENSIONS FUNDING GAP: CHALLENGES PERSIST 2 (July 2015), www.pewtrusts.org/~/media/assets/2015/07/pewstates_statepensiondebtbrief_final.pdf?la=en (noting that "in 2013, state pension contributions totaled $74 billion—$18 billion short of what was needed to meet the [actuarially required contributions]").
[47] RICHARD M. JOHNSON ET. AL., ARE PUBLIC PENSIONS KEEPING UP WITH THE TIMES?, THE BROOKINGS INSTITUTION 2 (June 2013), www.brookings.edu/research/reports/2013/06/12-public-pensions-johnson-chingos-whitehurst.
[48] CONGRESSIONAL BUDGET OFFICE, THE UNDERFUNDING OF STATE AND LOCAL PENSION PLANS 1 (May 2011), www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12084/05-04-pensions.pdf.
[49] *Role of Public Employee Pensions in Contributing to State Insolvency and the Possibility of State Bankruptcy Chapter, Hearing before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 112th Cong. 47 (2011) (Statement of Joshua Rauh, Ph.D., Associate Professor of Finance, Kellogg School of Mgmt., Northwestern University).

There is simply no reason to believe that states and cities that have mismanaged the assets of their own employees will be any more prudent in handling the retirement assets of private sector workers. This is especially true of the states with the largest underfunded pension liabilities to which the DOL is specifically extending the NPRM's safe harbor—California (with $154.2 billion in underfunding) and Illinois (with $85.4 billion in underfunding).[50] Indeed, while many have reached the reasonable conclusion that the state pension systems have become structures "with which state lawmakers cannot be trusted,"[51] the DOL's proposed safe harbor would extend the reach of the very same officials and lawmakers that have become the symbol of misleading accounting standards, unrealistic promises, and opaque investment strategies.

The Economic Analysis of the Proposed Rule is Inadequate and Incomplete. In addition to the concerns raised in the proposal to the Final State Rule, the Proposed Rule raises two important adverse impact concerns that are directly tied to the local government options that the Proposed Rule would provide:

1. By encouraging development of a patchwork of potentially different and conflicting local and state plans, the proposal may increase administrative costs of employers who will need to be aware of and to comply with different rules across the various state and local jurisdictions in which their businesses operate.
2. Local savings program may crowd out existing private defined contribution plans by either encouraging employers to drop their existing plans or by discouraging employers not currently offering plans from consideration of starting their own plans. In the case of employers who operate across jurisdictions that offer local savings plans and those that do not, the crowding out effect may result in employees in areas where there is not local saving plan available having no access to any savings plan, because employers may find it infeasible to offer private plans in areas not served by governmental plans when they choose not to offer plans in areas that are served by governmental plans.

Before finalizing the Proposed Rule, the Chamber urges the DOL to address these questions to determine if this ruling will provide sufficient benefits to private workers or undue burdens on private employers.

---

[50] Thomas J. Healy et. al., *Underfunded Public Pensions in the United States: The Size of the Problem, the Obstacles to Reform and the Path Forward* 139 (Harvard Kennedy School, Mossavar-Rahmani Center for Business & Government, Working Paper, April 2012), www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/publications/fwp/MRCBG_FWP_2012_08-Healey_Underfunded.pdf. Notably, some studies estimate the amount of unfunded liabilities to be larger. *See* ANDREW BIGGS, THE MARKET VALUE OF PUBLIC-SECTOR PENSION DEFICITS, AMERICAN ENTERPRISE INSTITUTE 5 (April 2010), www.aei.org/files/2010/04/06/2010RPOno1g.pdf ("As the state with the largest population, California has the largest absolute public-pension funding shortfall at $454 billion.").

[51] Ted Nesi, *Lawmakers Cannot Be Trusted with Today's Pension System*, WPRI.COM (May 25, 2011), wpri.com/blog/2011/05/27/lawmakers-cannot-be-trusted-with-todays-pension-system (quoting *New York Times* columnist Josh Barro).

Conclusion

Thank you for your consideration of these comments. We look forward to working with you to provide retirement security within the Congressional intent and framework of the ERISA statute.

Randel Johnson
Senior Vice President
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce

Aliya Wong
Executive Director, Retirement Policy
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce