THE CITY OF NEW YORK

September 29, 2016

The Honorable Thomas E. Perez
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB76 Comments on DOL Employee Benefits Security Administration Proposed Rule under the Employee Retirement Income Security Act concerning Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

Dear Mr. Secretary:

The City of New York (City) welcomes the Department of Labor's proposal to amend 29 C.F.R. § 2510.3-2 in order to facilitate the establishment by qualified political subdivisions (QPS) of payroll deduction savings programs for private-sector employees. Once promulgated, the safe-harbor regulation will permit the City to set up a program that could ultimately help over one million City workers save for their retirement. To that end, the City submits this comment to suggest and justify further amendments to the draft regulation, which are intended to both modify language in the existing draft that could deter states and QPS from establishing programs under the safe harbor and address concerns raised by the Department of Labor (DOL) in its Federal Register notice. This letter begins with a discussion of our concern about the concept of "responsibility" as used in the proposed regulation, an issue that, in our view, is critical to the establishment of successful programs by QPS and concludes with our comments on matters on which the DOL has solicited the City's views.

Section A - Proposed Amendments to §§ 2510.3-2(h)(1)(ii) and (iii) and (h)(2)(ii)

The City's amendments to proposed §§ 2510.3-2(h)(1)(ii) and (iii) and (h)(2)(ii) address the possibility that the existing draft language, if finalized, could require states and QPS to retain broader responsibility and associated liability for their programs than would be required of a fiduciary under ERISA or the common law. The City believes that its amendments will protect program participants and afford needed flexibility to states and to QPS that seek to comply with the regulatory safe harbor.

The existing draft language in the above-noted section suggests that, in order for a program to qualify for the safe harbor, "responsibility" must rest with the state or QPS for plan administration and investment, regardless of the willingness of third parties to undertake some or all these functions and responsibilities. As described further below, the City respectfully proposes that the language be amended to ensure that a program can qualify for the safe harbor if the State or QPS prudently selects and appropriately monitors third party service or investment providers.

Paragraph (h)(1) sets forth the conditions a program must satisfy so that a State or qualified political subdivision can avail itself of the regulatory safe harbor. Subparagraph (ii) requires that the program must be "implemented and administered by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose[.]" See Proposed § 2510.3-2(h)(1)(ii). Similarly, subparagraph (ii) of paragraph (h)(2) states that a program that utilizes one or more service or investment providers will satisfy the regulatory safe harbor "provided that the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains full responsibility for the operation and administration of the program." Proposed §2510.3-2(h)(2)(ii). The statements that a State or qualified political subdivision is "responsible for investing the employee savings or for selecting investment alternatives" and "retains full responsibility for the operation and administration of the program" could be read to require that the state or QPS retain wide-ranging responsibility for all decisions relating to the administration of the savings program, even when such state or QPS has prudently selected a third party to administer and manage the program and has appropriately monitored such party's performance. Under this reading, if the State or qualified political subdivision does not retain such wide-ranging responsibility, its program risks falling outside the parameters of the safe harbor. From the City's perspective, this reading poses significant concerns and raises questions about the City's ability to undertake this savings program while responsibly protecting the public fisc.

After establishing a payroll deduction savings program, the City will likely enter into an agreement with one or more third parties to administer the program and its investments. It is reasonable to anticipate that prudently selected third parties with relevant experience in administering comparable plans may be better equipped than the City to discharge the complex duties associated with administering and managing the program. If the City enters into such agreements, it would be efficient for the City to allocate liability to the third parties to the maximum extent possible, both to ensure that they act responsibly and to prevent the undue organizational complexity and costs that could arise were complete legal "responsibility" (and the associated liability) to remain with the City. In such an arrangement, the City would retain responsibility for the prudent selection and monitoring of the third party. This approach is consistent with that taken by ERISA, under which a plan sponsor can assign all fiduciary duties incident to plan administration to an administrator and retain liability "only with respect to the selection of the [a]dministrator." *Gelardi v Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985). *See also Sommers Drug Stores Co. Empl. Profit Sharing Trust v Corrigan Enters., Inc.*, 793 F.2d 1456, 1460 (5th Cir. 1986); *Schultz v Texaco Inc.*, 127 F.Supp. 2d 443, 452 (S.D.N.Y. 2000); 29 CFR § 2509.75-8 D-4 (providing that the "responsibility, and, consequently,…liability" of a corporate board that selects ERISA plan fiduciaries "is limited to the selection and retention of fiduciaries"). This approach is also consistent with the modern law of trusts, as expressed for example by the Uniform Management of Institutional Funds Act, *see* N.Y. Not-for-Profit Corporation Law §554(a), and the Uniform Management of Public Sector Retirement Systems Act (at §6).

For these reasons, we propose that DOL amend subparagraph (ii) of paragraph (h)(1) and subparagraph (ii) of paragraph (h)(2), as these are proposed, to authorize States and QPS to assign responsibility for administering the program and making the program's investment decisions to third parties that have been prudently selected and monitored by the relevant State or QPS. We submit the following amendments for your consideration:

- §2510.3-2(h)(1)(ii): The program is implemented [and administered] by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose, or responsible for prudently (A) selecting service or investment providers to invest the employee savings or select investment alternatives for employees to choose, (B) establishing the scope and terms of the delegation to such service or investment providers, and (C) periodically monitoring the work of such service or investment providers;

- §2510.3-2(h)(2)(ii): Utilizes one or more service or investment providers to operate and administer the program, provided that the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains [full] responsibility for the [operation and administration of] prudent (A) selection of the service or investment providers that operate and administer the program, (B) establishment of the scope and terms of the delegation to such service or investment providers, and (C) periodic monitoring of the work of such service or investment providers;

We think that these amendments would provide States and QPS with critical guidance relating to their responsibility for their programs as well as a means of preventing the potential for excessive liability that otherwise might inhibit QPS from establishing the programs. We believe that, if adopted, these amendments will make this regulation a more effective tool for both States and QPS, by defining customary fiduciary obligations in a manner that recognizes the responsibility of state and local governments to their taxpayers.

In the event the DOL determines that it is appropriate to consider this change for QPS only in the context of the current proposal, the City submits that these amendments are especially critical for QPS. First, unlike states, QPS are not generally protected by sovereign immunity and therefore, may be exposed to liabilities from which states would be able to shield themselves by not consenting to being sued. Second, states have broad powers of taxation, while revenue streams legally available to QPS are often more limited and subject to additional statutory or constitutional restrictions. Third, QPS may be subject to extensive mandates and responsibilities with respect to the provision of local services, including for example public safety services, resulting in great demands upon their resources. These factors cumulatively create a significant need and incentive for QPS to allocate responsibilities and associated liabilities to prudently selected private sector service providers. To accomplish this goal, we propose the following amendments to the present proposal for your consideration if states cannot be included in the scope of the present process:

- §2510.3-2(h)(1)(ii): The program is either implemented and administered by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose or alternatively is implemented by the qualified political subdivision establishing the program (or by a governmental agency or instrumentality thereof), which is responsible for prudently (A) selecting

service or investment providers to invest the employee savings or to select investment alternatives for employees to choose, (B) establishing the scope and terms of the delegation to such service or investment providers, and (C) periodically monitoring the work of such service or investment providers;

- §2510.3-2(h)(2)(ii): Utilizes one or more service or investment providers to operate and administer the program, provided that either the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains full responsibility for the operation and administration of the program, or the qualified political subdivision (or the governmental agency or instrumentality thereof) retains responsibility for the prudent (A) selection of the service or investment providers that operate and administer the program, (B) establishment of the scope and terms of the delegation to such service or investment providers, and (C) periodic monitoring of the work of such service or investment providers; or

In addition to requesting consideration of these amendments, we also ask that DOL consider amending subparagraph (iii) of paragraph (h)(1). The discussion accompanying the Department's Final Rule on Savings Arrangements Established by States for Non-Governmental Employees explained that the condition that a State or QPS must "assume[] responsibility for the security of payroll deductions . . ." does not "make states guarantors or hold them strictly liable for any and all employers' failures to transmit payroll deductions." The discussion further indicated that a State or QPS would satisfy this condition by establishing and following a process that allowed employers to transmit payroll deductions "safely, appropriately and in a timely fashion." 81 Fed. Reg, at 59470. Consistent with the concerns we have described above, we think it would be helpful to clarify that a State or QPS could assign this responsibility to a prudently selected third party, and also to incorporate into the regulation itself the assurances provided in the earlier Federal Register discussion. Accordingly, we propose the following amendment to the language proposed in the Federal Register:

- §2510.3(h)(2)(iii): The State or qualified political subdivision (or governmental agency or instrumentality of either) or a prudently selected service or investment provider assumes responsibility for the security of payroll deductions and employee savings, by establishing a process for the appropriate transmission of payroll deductions and/or establishing or maintaining other appropriate protections for employees;

Section B –Comments relating to Sequential Establishments of Programs by a Qualified Political Subdivision (QPS) and by a State, Proposed § 2510.3-2(h)(4)(iii)

With respect to proposed subparagraph (iii) of paragraph (h)(4), the Department solicited comments on whether the final regulation should address the possibility that the state in which a political subdivision is located establishes a retirement savings program after one of its political subdivisions has established such a program. We recommend that if a qualified political subdivision establishes a program, and subsequently the State establishes a state-wide program that would nullify the political subdivision's qualification, the rule should provide adequate time for an orderly transition and during such time, the political subdivision would continue to be

designated as a qualified political subdivision. We suggest the transition period should be three years from the date of the establishment of the state plan. Three years should be sufficient time to resolve what could be complex transition issues. Those issues can, and likely will include: differences in employer eligibility, as state and city plans may differ on specific features, such as the minimum size of employers whose participation is required; eligibility of employees, such as rules on part-time, seasonal, or minimum age; differences in investment options; and investment transition issues, such as differences in default investment options, how to pay transition costs, and others. The nature of this complexity militates against any precipitous withdrawal of the designation "qualified political subdivision" from a political subdivision if the State in which it is located adopts a state-wide plan subsequent to the establishment of its own plan.

Section C – Comments relating to Definition of "Qualified Political Subdivision" in Proposed §2510.3-2(h)(4)

1. Proposed subparagraph (iii) of §2510.3-2 (h)(4) defines a "qualified political subdivision," in part, as a city, county or similar governmental body that "[i]s not located in a state that pursuant to State law establishes a state-wide retirement savings program for private-sector employees." We have two comments related to this subparagraph:

    a) First, we believe this requirement is overly broad and lacks sufficient specificity regarding the parameters of the state-wide program, which would disqualify a political subdivision from creating a program that could be covered by the safe harbor. We recommend that the language in subparagraph (iii) be clarified to provide that a city, county or similar governmental body is qualified provided it "is not located in a state that, pursuant to State law, establishes a state-wide *payroll deduction* retirement savings program *that mandates employer participation* for private sector employees." This amendment would ensure that if a political subdivision is in a State that establishes a state-wide retirement savings program that does not require employer participation, such as a retirement savings marketplace, a Multiple Employer Plan ("MEP") or "prototype plan," as described in the Department's Interpretive Bulletin at 29 CFR §2509.2015-02, and the political subdivision would otherwise be deemed qualified, such political subdivision would be deemed a "qualified political subdivision."

        The rationale for excluding political subdivisions in States with state-wide retirement savings programs for private-sector employees is to mitigate overlap and duplication. While it is true that overlapping payroll deduction savings programs that require employer participation would cause problems both for employers and for the political jurisdictions at issue, no such problems would ensue if either the State or the political subdivision did not establish a retirement savings program requiring employer participation. Indeed, it is likely that the existence of an ERISA retirement savings program such as a MEP or "prototype" plan in addition to a retirement savings program requiring employer participation would improve outcomes in any jurisdiction that had both, by creating additional options for employers.

    b) A related issue is whether a similar rule should be applied to a smaller political subdivision that exists inside a larger political subdivision, for example: a city inside a county. While we believe that it is unlikely that a city, county or other similarly situated political subdivision would meet the criteria in subparagraphs (i) and (ii) of paragraph

(h)(4), we would encourage the DOL to adopt the same criteria for qualification as we proposed in paragraph (a). More specifically, if the smaller subdivision is in a larger subdivision that has not adopted a *payroll deduction* retirement savings program *that mandates employer participation*, the smaller subdivision should be deemed qualified.

2. Proposed subparagraph (ii) of paragraph (h)(4) should be amended to restrict automatic qualification under the safe harbor to QPS with experience sponsoring a retirement plan, with the option for political subdivisions that only meet one of the proposed criteria to petition the Department for inclusion in the safe harbor. Subparagraph (ii) provides that, in order to be deemed "qualified," cities, counties or similar governmental bodies must have a population equal to or greater than the population of the least populated State. We would argue for a more rigorous standard. We believe that population alone is not an indicator of the ability of a political subdivision to effectively run a retirement savings program. In addition to having a substantially-sized population, we believe that experience sponsoring one or more retirement plans for its own employees is an important indicator of a political subdivision's capacity to run a retirement savings plan for private sector employees. However, not all political subdivisions, even those larger than the smallest State, have such experience, since many states have one or more State-wide retirement plans that cover all or virtually all political subdivisions in the State, such as Ohio, Utah, and Wisconsin. In addition, we believe there are circumstances where the DOL should consider applications from political subdivisions that may not qualify based on population but have experience sponsoring a retirement plan. We believe that DOL should give consideration to additional particularized criteria, and/or a new application process accompanied by a more generalized standard if DOL is willing to establish such a process, for political subdivisions that would refine the proposed criteria in circumstances where a political subdivision meets the population threshold or has experience sponsoring one or more retirement plans for its employees, but does not meet both of these benchmarks. Lastly, in response to the query in the proposed rulemaking, we believe that the determination regarding population size should be made one time only, so future variations in population would not affect a political subdivision's qualification under the regulations. We would, therefore, suggest the following approach to qualifying political subdivisions that meet the criteria in paragraph (h)(4)(i) and (h)(4)(iii).

We would propose the following amendment to subparagraph (ii) of paragraph (h)(4). We have not specified the new application process or criteria for those political subdivisions that do not satisfy clauses (A) and (B), and defer to DOL's expertise in establishing such process or criteria:

- (ii) <u>At the time it establishes a payroll deduction retirement savings program that mandates employer participation for private sector employees:</u>
  <u>A.</u> Has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and territories listed in section 3(10) of the Act)<u>; and</u>
  <u>B. Sponsors a retirement plan (defined benefit, or plans under Sections 457, 403(a), 401(k) of the Internal Revenue Code) for all or some of its own employees.</u>

C. If a political subdivision satisfies clause (A) or (B) of this subparagraph, but does not satisfy clauses (A) and (B) of this subparagraph, and such political subdivision satisfies subparagraphs (i) and (iii) of paragraph (h)(4) of this section, then it may petition the Secretary pursuant to this clause to be deemed qualified by demonstrating that it has the necessary combination of experience, capability and/or resources [procedure to be set forth here] OR it shall be a 'qualified political subdivision" if Y [additional particularized criteria demonstrating capability to be set forth here].

We believe that amending subparagraph (ii) consistent with this approach provides greater assurance that the political subdivisions that seek to establish retirement savings programs pursuant to the regulatory safe harbor will have the capacity both in size and experience to effectively operate and administer them and clarifies that the population of a political subdivision is determined at the time of the establishment of a program.

Thank you for the opportunity to comment on the proposed regulation. The City believes that these comments, if adopted, will go a long way toward ensuring that the safe harbor can be fully utilized by qualified political subdivisions to establish these important retirement savings programs for millions of U.S. employees.

Sincerely,

Bill de Blasio
Mayor

Letitia James
Public Advocate