September 29, 2016

# DOL's Proposed Rule on Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees
## *RIN 1210-AB76*

***Comments by Hon. Joshua Gotbaum****

Thanks for the opportunity to comment on this potentially very important rule. Since the preamble of the NPRM provides a detailed discussion both of the rationale for the rule and the issues involved in extending the safe harbor to political subdivisions, I'll limit comments primarily to areas where DOL should consider a change.

DOL recognizes that, thus far, only a few states have enacted auto-IRA programs and that most are following the same model[1]. Clearly more experience and a wider range of program options would be useful. DOL recognizes that major cities and counties have the administrative capacity to establish viable programs if they were permitted and chose to do so. However, thus far, only three cities/counties have expressed interest: New York, Philadelphia, and Seattle.

In furtherance of its goal to expand access to retirement savings programs, DOL has proposed to establish criteria for "qualified political subdivisions" enabling them to enjoy the protection of the safe harbor for state plans. It has also used those criteria to limit possible programs. In my view these conditions are too restrictive. DOL may have worried about opening the floodgates; the greater risk is that almost no local programs will even be tried.

I remain concerned, however, about the lack of ERISA's consumer protections in these programs, and so have included a modest suggestion to keep a watchful eye on them.

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The basic requirement proposed by DOL is that a city or county government have the legal ability under state law to require participation in a payroll deduction savings program. This condition seems both appropriate and necessary to fulfill the

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1 Although DOL has attempted to enable both state-created auto-IRA savings programs and state-sponsored ERISA plans, under DOL's interpretation employer participation in ERISA plans cannot be mandated by a state. States that wish to ensure increased coverage can do so only by mandating autoenrollment into an IRA. Thus far only five states have legislated mandatory programs (CA, OR, IL, CT, and MD); not one has been willing to undertake the additional expense of also offering a voluntary state-sponsored ERISA plan. (Massachusetts enacted an optional ERISA plan for non-profits several years ago, but it has yet to be implemented.) One potential benefit of expanding eligibility to cities and counties is that several have expressed some interest in developing an ERISA program.

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conditions of the safe harbor created for state-mandated payroll auto-IRA savings programs.

### *How Much Should DOL Limit City/County Efforts to Expand Retirement Savings?*

DOL also proposed several additional limitations on the political subdivisions that could consider an "auto-IRA" savings program. The Department wanted to avoid experimentation by subdivisions that are unlikely to have the capability to administer a payroll savings program and avoid a multiplicity of payroll savings programs with different requirements. At issue is whether DOL's proposals are too restrictive, not restrictive enough, or about right.

In general, the arguments for extensive entry conditions on city or county auto-IRA programs are not strong. In practice, operational and political limitations will be by far the most important factors.

In the NPRM, DOL discusses three additional possible prerequisites and proposes to adopt the first two:

1. *Having a population equal or greater than the least populous state.*
2. *That the state of which the city or county is a part does not itself already have "a state-wide retirement program for private sector employees".*
3. *That the city or county demonstrate its capacity to design and administer a program by operating a pension plan for its own employees.* (DOL, in my view sensibly, declined to propose this requirement.)

In my view, only requirement 2 is appropriate. (Even then, it's only arguably necessary.) However, as described below, it needs to be more limited in its scope.

#### *Minimum Population Limitations*

DOL notes that there are approximately 90,000 subsidiary governmental units within states and that the vast majority of them are incapable and/or unsuited to design, impose, and operate an auto-enrollment requirement and a sound retirement savings program. For this reason, DOL proposes to limit qualified political subdivision status to governmental entities with a population equal or greater than that of the smallest state, Wyoming, which has an estimated population in 2015 of 586,000. This choice of a cutoff might be based on administrative convenience: Seattle, the smallest of the 3 cities that have expressed interest thus far, had an estimated population in 2015 of 684,000.

It's hard to see why 586,000 is an appropriate cutoff.[2] The particular state, Wyoming, has thus far shown no interest in implementing an auto-IRA, so there's no information on whether that state government is or is not capable of doing so. There are cities whose population is below 586,000 that might ultimately be interested in offering such a program (e.g., Miami, Kansas City, and Minneapolis).

### *Requiring Operation of a Pension Plan*

DOL considered, but did not propose to adopt, a requirement that a city/county government demonstrate their competence at designing and implementing a payroll deduction plan by having in place a pension plan for their own employees.

In practice, the administrative challenges in requiring provision of a private retirement option, monitoring compliance, and then providing a savings channel for the employees of hundreds or thousands of small businesses are far greater than those of providing retirement options to public employees. In terms of operational complexity, they are closer to tax systems than to pension systems.

### *Pre-emption by Statewide Programs*

The Department would like to limit the extent to which employers would be subject to multiple auto-IRA programs. Here, too, the concerns are probably more theoretical than practical: Most small businesses don't operate in multiple jurisdictions; the few that do – and that also lack any kind of employer provided retirement program – would have the option of establishing a voluntary IRA program to avoid any other mandate.

Nonetheless, DOL proposed that no subdivision can operate an auto-IRA program if there is a "statewide retirement program". This requirement, properly specified, could be justified on the basis of avoiding a multiplicity of payroll requirements within a state.

However, the language in the NPRM appears to define "retirement program" so broadly that setting up a website describing currently available commercial options -- without requiring employers to read them, much less arrange for one – would preempt establishment by cities or countries of more effective programs.

This "market exchange" model has been adopted in two states (WA and NJ), after they failed to reach consensus on requiring an auto-IRA. While the "market exchange" approach may permit state elected officials to *claim* that they are doing something about the lack of workplace retirement, in practice it will not do so: There

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[2] DOL has also asked whether it needs to specify that a program, once begun, would not be disqualified in case a city/county's population subsequently falls under the threshold. If DOL retains the population criterion, it should do so.

is no evidence whatsoever that merely re-offering existing private investment options through a state-curated website will lead to adoption of retirement options by businesses that have, for years, declined to provide them.

As currently drafted, however, the NPRM would prevent cities or counties in such states from offering an auto-IRA, thereby denying their residents an easy opportunity to work and save. This is not merely a hypothetical concern: Washington State has legislated an exchange that, under the NPRM as drafted, would prevent the City of Seattle even from considering an automatic IRA savings program. Unless changed, the proposed requirement would reduce the number of currently-interested city/county programs from 3 to just 2.

(If a state, such as Washington State, affirmatively wished to prevent its cities or counties from undertaking an automatic enrollment program, it of course could do so by legislative action. Having cities and counties precluded automatically, just because a statewide consensus was not reached, seems unnecessarily restrictive. It would prevent Seattle and other local governments from helping their own uncovered populations and also providing models that others could use.)

For these reasons, the rule should be modified to provide that *only a statewide program imposing a general mandate* on private businesses precludes subdivisions from being eligible under the safe harbor. Even in that instance, any pre-existing programs should be "grandfathered" so as not automatically to disqualify operating programs. In practice, if a state later implements a statewide program, it will include provisions for conforming the requirements and practices of the two programs.

## *Protecting Consumers When ERISA Can't*

DOL also asked for comments and suggestions on issues it has not raised. I would suggest one for your consideration:

DOL, in creating a safe harbor for state-operated plans *outside ERISA*, is relying on states to provide consumer protections. In my view, this is justified by the opportunity to expand access to retirement savings dramatically.

Nonetheless, it would be better if both states and qualified subdivisions were required publicly to report, at least biennially, on their consumer protection efforts and practices.

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