

January 15, 2016



Via Email: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: Proposed Safe Harbor Rule RIN 1210-AB71

Re: Safe Harbor Rule for State Payroll Deduction IRA Savings Programs

Dear Secretary Perez,

The Illinois Asset Building Group (IABG) appreciates the opportunity to comment on the proposal by the Department of Labor to create a safe harbor exemption from the Employee Retirement Income Security Act (ERISA) for certain state retirement savings programs. The new proposed rule would clarify the circumstances under which these state programs may be established and maintained without creating retirement plans that are subject to ERISA

We greatly appreciate the efforts of Secretary Perez and the Department to provide a pathway towards greater retirement security for workers. These efforts will allow the Illinois Secure Choice Savings Program to provide access to a critical tool low-income workers need to build financially secure retirements.

IABG led advocacy efforts to pass the Illinois Secure Choice Savings Program and is working closely with the Illinois State Treasurer and the Secure Choice Board on implementation of the program. In recent years we have seen states be an important laboratory for innovative change. As we work to implement Secure Choice, it's important that Illinois, and other states, have the flexibility necessary to address the retirement savings needs of a diverse workforce – especially low-income workers and workers of color. We are concerned that the structure of the Proposed Safe Harbor limits their ability to be nimble

We are concerned that the Proposed Safe Harbor only applies to employers that are mandated by state law to participate in the payroll deduction program. This will prevent many Illinois workers, employed at small businesses that are not covered by the employer mandate, from participating. The way the Proposed Safe Harbor is structured also creates very serious compliance challenges. We have a fluid labor market. The number of employees working at a particular business can fluctuate from month to month and year to year. It's very likely that a employee may switch from being covered by the mandate to not being covered and during that time inadvertently auto-enroll an employee.

We ask that the Department remove the mandate condition from the Proposed Safe Harbor and make some clarifying changes to the administrative and operational provisions. This would allow the Proposed Safe Harbor to be a stronger tool for States to partner with the private sector in promoting responsible payroll savings programs that fully protect workers.

Overview of the Illinois Secure Choice Savings Program

More than 2.5 million Illinois workers do not have access to a retirement savings account through their employer, according to a [report](#) from Woodstock Institute and IABG. The report found lack of access is most serious for low-wage workers, of whom 60 percent lack access, but even for workers making \$40,000 or more, 49 percent do not have access to an employment-based retirement savings plan. In response to this retirement savings crisis, IABG advocated for over five years for an automatic retirement savings program in Illinois. Early in 2015, the Illinois Secure Choice Savings Program was signed into law, making Illinois the first state to enact such a program.

Secure Choice mandates the participation of businesses with 25 or more employees year round, that have been in business for at least two years, and do not currently offer a retirement saving program. Those businesses will automatically enroll workers into a Roth IRA. While workers can opt-out of the program, those that do participate will be able to build savings through a payroll deduction. The default contribution will be three percent of the worker's pay with the default investment being a target date fund based on the worker's age. Workers will have the option to choose a different contribution level and select a different investment type from a limited list. The program will be administered by a state board, which oversees the private firm management of the funds. All accounts are pooled together and professionally managed; ensuring that fees are low and investment performance is competitive.

Given the widespread need for access to an employment-based retirement savings program, the Program would be most beneficial for workers if businesses that do not fall under the mandate could voluntarily participate and automatically enroll their employees. This would allow for greater participation and more thoroughly address the retirement savings crisis in that state.

We believe the following recommended changes would create a Safe Harbor that better supports a worker's savings efforts while ensuring the safety of the saver:

- 1. Employer Mandate:** The Proposed Safe Harbor is structured in such a way as to indicate that the Department is concerned that an employer that is not required to participate in the program could improperly influence employees to contribute. IABG believes that as long as an employer cannot be engaged in selecting program investments, default contribution rates, the private investment firm and participate in other administrative decisions an employer voluntarily joining the program will not be able to influence employee choices any more than an employer subject to a mandate. Furthermore, employees will not be at increased risk from their employer's actions if the employer voluntarily decides to participate in the State program with an opt-out investment. For example, the Illinois Secure Choice program will have the same strict limitations on the role of the employer regardless of the employer's size. The employer's only role will be as a facilitator of the payroll deduction.

We believe an opt-out mechanism is as much a completely voluntary as an opt-in. An opt-out approach is simply a tool to help individuals save; it does not change the dynamic that such saving is voluntary. The Illinois Secure Choice Savings Program recognizes the need to address our retirement savings program using proven savings techniques. Thus, the Program adopted auto-enrollment to nudge employees to voluntarily save for retirement. Those wishing not to save will be free to opt-out before enrollment or at any time thereafter – this is true for employees at an employer that falls under the mandate and for those employed at nonmandated businesses.

The Illinois Secure Choice Program has an employer mandate that falls under the Proposed Safe Harbor. However, employers with fewer than 25 employees may wish to join the Program, but under the Proposed Safe Harbor would be prevented from using its most powerful savings tool-- auto-enrollment. Similarly, a small employer with at least 25 employees might be forced to shut down auto-enrollment if headcount dipped below the threshold, compelling the affected employees to re-enroll by making affirmative elections. The unnecessary confusion caused by an opt-in in one year, opt-out in another will increase administrative costs and will be difficult to enforce.

IABG strongly believes that an employer mandate is not a necessary condition for the Safe Harbor for a State program using auto enrollment, would unfairly exclude certain employees in Illinois from the Secure Choice Program's benefits and could possibly cause compliance difficulties

2. **Established pursuant to State Law:** We recommend that the Department clarify language in paragraph (h)(1)(i) of the proposed Safe Harbor, which requires that "the program is established pursuant to State law." Under the Illinois Secure Choice Savings Act, the law allows a State-appointed board to determine a number of program features. It would be impractical and costly if all these decisions had to be approved by the State Legislature. We ask that you clarify the Proposed Safe Harbor to provide that if the program is established under State legislation, even if it delegates authority to a board or other State-appointed person, the program would be considered to be established pursuant to state law.
3. **Program Administration:** We recommend that the Department clarify language related to the administration of the program. The Proposed Safe Harbor could be read to limit a State's ability to delegate various duties third party entities. Paragraph (ii) provides "[t]he program is administered by the State ...or by a governmental agency or instrumentality of the State, which is responsible for investing employee savings or for selecting investment alternatives for employees to choose." Similarly, paragraph (h)(2)(ii) permits a program to use service providers, if the State or designated governmental agency or instrumentality "retains full responsibility for the operation and administration of the program."

Much of the Illinois Secure Choice Program will be operated by third parties but overseen by the Board. Besides typical recordkeeping, reporting, communication and distribution functions, program funds will be invested by professional managers (either directly or through designated investment vehicles) selected by the Board. These third parties should be responsible for their own actions and duties outlined in their contracts. The Safe Harbor should clearly reflect this approach.

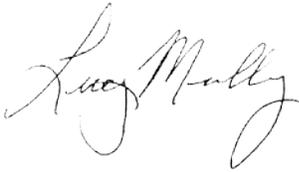
4. **Enforcement of Employee Rights** Two requirements in the Proposed Safe Harbor are confusing and duplicative of existing State regulation. First, paragraph (h)(1)(iii) requires that "the state assumes responsibility for the security of payroll deductions and employee savings." We believe this language simply is intended to protect employees from employer fraud or error in timely transmission of withholdings to the program custodian and investment in the proper vehicle. However, the employer and its payroll vendor, and not the state, will be responsible for the actual withholding and delivery of funds. As with all payroll and investment issues, if the employer/vendor acts improperly, the state will use its enforcement powers to address improper actions. We urge the Department to eliminate (iii) in its entirety from the Proposed Safe Harbor.

In a similar vein, paragraph (h)(1)(iv) requires that "the state adopt measures to ensure that employees are notified of their rights and creates a mechanism for the enforcement of those

rights.” The word “ensure” is misplaced; we believe that the Department simply intends that the State’s rules require that the appropriate party (most likely the program administrator) provide employees with the notice. Furthermore, Illinois and the other states each have wage collection laws and an enforcement system to protect employees against employer’s failure to properly withhold from their paychecks and apply those withholdings as required by law. Thus, the Safe Harbor should not require that a State add special enforcement mechanisms or additional security mechanism to protect workers enrolled in its payroll deduction savings program, to the extent that the State determines that laws and regulations already on the books are available.

We greatly support the Department’s efforts to allow states to establish payroll deduction IRA savings programs that are exempt from ERISA. This exemption will allow Illinois, and other states, to expand access to retirement savings tools and address the retirement savings crisis so more of workers can retire with dignity. Thank you for your review of our comments to the proposed rules. We are happy to answer any questions. You can contact Lucy Mullany, Senior Policy Manager of Financial Empowerment Policy at Heartland Alliance and IABG, at 312-498-8614 or lmullany@heartlandalliance.org.

Sincerely,



Lucy Mullany
Senior Policy Manager, Financial Empowerment Policy
Heartland Alliance
Coordinator of Illinois Asset Building Group (IABG)
Email: lmullany@heartlandalliance.org
Phone: 312-498-8614

John Bouman
President
Sargent Shriver National Center on Poverty Law
Steering Committee Member of Illinois Asset-Building Group (IABG)