American Payroll Association

Government Relations • Washington, DC

September 26, 2016

Ms. Janet Song
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

*Electronically via www.regulations.gov*

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

Dear Ms. Song:

Thank you for the opportunity to comment on the Proposed Rule published on August 30, 2016 at 81 *Fed. Reg.* 59581 regarding a safe harbor under the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the role of state political subdivisions.

**About the American Payroll Association**

The American Payroll Association (APA) is a nonprofit professional association serving the interests of more than 21,000 payroll professionals in the United States. The APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws.

The APA's Government Relations Task Force (GRTF) works with legislative and executive branches of government to educate policymakers about the administrative burdens and other impacts of proposed policy changes on government, employers, and individual workers.

APA's GRTF Subcommittee on Retirement Accounts has been engaged in discussions at the federal, state, and local levels concerning retirement savings programs such as those

contemplated by the ERISA safe harbor rules. Initially, we worked with the U.S. Department of the Treasury to develop and implement the My Retirement Accounts (*my*RA) program. Many APA members participated in the pilot program for *my*RA. In addition, we are working with a number of states interested in mandatory retirement savings programs for non-governmental employees.

**General Position**

APA and its members recognize the significance of retirement savings coverage and the ability to save regularly through payroll deductions. We also understand that the U.S. DOL as well as states and state political subdivisions are interested in exploring alternatives that would broaden and facilitate basic retirement savings programs for workers who may not have a qualified employer-sponsored retirement plan available to them. APA's members certainly agree that facilitating retirement savings and improving retirement preparedness for workers are important and laudable goals.

APA's primary concern and interest is in minimizing avoidable administrative burdens on employers. Critically, state political subdivision retirement savings programs must be highly efficient because by design they are self-supporting with minimal costs and without general taxpayer subsidies. Therefore, the criteria for an ERISA safe harbor established by the U.S. DOL are an extremely important cornerstone upon which state political subdivision programs will be built.

A significant portion of the administrative burden for state and political subdivision retirement plans will fall to small and mid-sized employers and those responsible for payroll administration. Despite the best intentions to minimize employers' role, there will be a multitude of necessary communications among plan administrators, employees, and employers, including initial notices and responses, initial set-up of employees' accounts with states or political subdivisions (or their agent), data gathering and resolution of questions that invariably arise when setting up new financial accounts, determining withholding amounts, making adjustments (e.g., when wages are insufficient, or child support and other deductions take priority), and distributing withholding amounts to the retirement account administrator. Protecting employers, states, and state political subdivisions from the complexity of ERISA requirements will help reduce the burden.

APA greatly appreciates the criteria established by the U.S. DOL in the final rule, Savings Arrangements Established by States for Non-Governmental Employees, 81 *Fed. Reg.* 59464 (August 30, 2016; RIN 1210-AB71), that only offers an ERISA safe harbor where employers' role

is minimized. We agree with the U.S. DOL that these same criteria should apply to qualified state political subdivisions.

**Specific Comments on State Political Subdivisions**

The proposed rule defines political subdivision as any governmental unit of a state, including any city, county, or similar governmental body that meets three criteria:

1. The state political subdivision must have authority, implicit or explicit, under state law to require employers to participate in a payroll deduction savings program.

2. The state political subdivision must have a population equal to or greater than the population of the least populous state (includes the 50 states only). According to U.S. Census Bureau statistics, this state is Wyoming with approximately 600,000 residents.

3. The state political subdivision cannot be located within a state that has a statewide retirement savings program for private sector employees.

These criteria seem logical, but also raise some additional questions, including:

***What happens if a state political subdivision creates a retirement savings program for non-governmental employees and later the state creates a statewide program?***

APA recommends that any state that enacts a retirement savings plan mandate should be required to incorporate and supersede any existing state political subdivision programs into the state plan. This will avoid different applications of these retirement savings plans based on when a program was created. Further, because the programs with the greatest number of participants are more likely to operate within the intended cost constraints, state and state political subdivision plans should not compete with each other. For example, in a state in which 12 political subdivisions qualify to enact their own plan, and each does, the per-capita administrative costs will be far higher in aggregate than if the state establishes a single, larger plan. Similarly, the administrative burden on affected employers would be multiplied by the number of different administrators (i.e., city and county mandates) to which they were subject.

The U.S. DOL already recognized this concern in the proposed rule’s third criteria for state political subdivisions. Applying the ERISA safe harbor consistently will ensure uniformity and clarity for purposes of compliance. This also will prevent employers from bearing the burden of

determining which plans apply to which employees. In turn, this will prevent mistakes in withholding and distributing withheld amounts to employee retirement accounts and in administrative management of employee accounts by program administrators and recordkeepers.

Consequently, APA recommends that states, to the extent that they enact similar retirement plan mandates, be required to incorporate any existing political subdivision programs into the state program.

***How will the ERISA safe harbor apply to overlapping state political subdivisions that meet the U.S. DOL's three criteria?***

In some instances, even with the U.S. DOL's proposed criteria, state political subdivisions may maintain overlapping jurisdiction within a state. For example, in Texas, the city of Houston is located in Harris County, and both would meet the U.S. DOL's three criteria. If the U.S. DOL is not proposing to allow the ERISA safe harbor for state political subdivisions when a statewide program is available, logically, the ERISA safe harbor should not be allowed in overlapping state political subdivisions. The likelihood that overlapping political subdivisions will each create a private-sector retirement program may be small, but the proposed rule is an opportunity to prevent this from happening. The U.S. DOL could identify which state political subdivision would have priority over the other. Conversely, criteria could be added to require states to make this determination for their political subdivisions.

One of the concerns APA alluded to earlier is that many plan mandates established by and covering a smaller geographic area could multiply the administrative burden on affected employers. In turn, multiple plan mandates will increase complexity and potential conflicts. For example, the number of employers with operations that cross geographic boundaries between cities and counties is far greater than between states. The same holds true for employees who work in one political subdivision and reside in another (e.g., work in New York City, live in Nassau County on Long Island) or work and reside in overlapping jurisdictions (e.g., Houston and Harris County).

In addition, enactment at the municipal and county levels will increase the potential for program inconsistencies and actual conflicts that result in simultaneous coverage of the same employers and employees by different state political subdivisions. In practice, this may simply require employers to explain that a given employee is already enrolled in a retirement plan, but states, cities, and counties may require varying degrees of responses, i.e., evidence of enrollment, increasing the compliance and administrative burdens.

Finally, APA notes that states can usually rely on one or two agencies that have well-established relationships with employers and a current registry of both employers and their respective employees to initiate state retirement savings programs, i.e., labor and tax/revenue agencies although the specific agency names may vary. State political subdivisions may not have access to this same information, in which case compliance efforts will absorb a significant percentage of available resources and increase administrative costs.

Ultimately, APA recommends that any retirement savings plan mandates occur at the broadest level possible. State-level plans should supersede, adopt, or include any state political subdivision mandates. The U.S. DOL's ERISA safe harbor rules should establish criteria that mandate this approach.

Sincerely,

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