February 22, 2017

Delivered via email to kim.olson@ost.state.or.us

Kimberly Olson
Rules Coordinator
Oregon State Treasury
350 Winter St., NE
Suite 100
Salem, OR 97301

Re: Revisions to the Proposed Rules for the Oregon Retirement Savings Plan

Dear Ms. Olson:

The American Benefits Council ("Council") appreciates the opportunity to provide comments on the revisions that were made to the proposed rules for the Oregon Retirement Savings Plan ("Plan" or "ORSP") by the Oregon Retirement Savings Board ("Board"). The Council submitted comments on the rules as they were first proposed last fall in a letter dated December 23, 2016.[1] We especially welcome the additional opportunity to submit comments because the revisions did not address the key concerns that we described in our previous letter. Moreover, although helpful clarification has since been provided by the Oregon State Treasury, the revisions raised very significant concerns for existing retirement plans with waiting periods of more than 90 days.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees across the country, including Oregon. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

It is important to emphasize up front just how concerned the Council and its members were to see that the revised proposed rules would cause the ORSP to

[1] For your reference and convenience, the Council's previous comment letter is attached.

significantly disrupt existing Qualified Plans[2] and their participants by effectively dictating the design of retirement plans that already meet the numerous and stringent requirements imposed by federal law. Although it has since been communicated that this was not the intent of the new language, this situation only highlights the importance of the Board examining how the ORSP could affect our current retirement system and avoiding any adverse effects on employers who currently sponsor a retirement plan. The only way to ensure that correct result is for the ORSP to permanently exempt all current plan sponsors from the Plan's requirements in accordance with Oregon's authorizing legislation.

As we expressed in our December 23 comments, the Council and its members have long supported efforts to expand workers' access to retirement savings opportunities through our nation's existing retirement system and enhancements thereto. Because the current retirement system is voluntary for employers, Congress has very carefully balanced over the years the desire to increase the benefits and protections provided by plans to workers with the resulting burdens on employers. A mandatory state-run IRA program for the private sector ("state-run plan") that imposes additional burdens or expenses on current plan sponsors threatens to upset this balance and would undermine the incentives for employers to maintain (or adopt) a Qualified Plan with employer contributions, higher contribution limits, and far more participant protections as compared to a state-run plan.

It is worth repeating that one of the fundamental goals of the Employee Retirement Income Security Act of 1974 ("ERISA") was to subject employers who sponsor retirement plans to a single federal statutory and regulatory regime. Congress sought to prevent employers who voluntarily sponsor retirement plans from being governed by a patchwork of state law regimes that would inevitably vary from state to state. Although we are supportive of ideas that would increase access to work-based retirement savings opportunities, it is critical that neither Oregon nor other states take action at the expense of the millions of employees benefiting from participation in an ERISA-covered Qualified Plan.

It is with this perspective and background that the Council expressed concerns in our previous comment letter that the rules proposed for the ORSP would undermine Qualified Plan coverage by increasing the costs and complexities faced by employers who currently sponsor a Qualified Plan for their employees. We were therefore disappointed to see that, instead of making changes to better ensure that the ORSP *complements* existing Qualified Plans, the revisions to the rules would have taken a dramatic step in an adverse direction – even if unintended – by interfering with an employer's design of its retirement plan in a manner that goes beyond the plan design parameters already dictated by federal law. As a result, in addition to ensuring that the

[2] Terms not defined herein have the definition assigned to them in the revised proposed rule.

Board appropriately eliminates the problematic revisions to the employer exemption, our initial concerns with the proposed rules remain.

As the Board continues its work to finalize rules for the ORSP, we again urge the Board to rethink its approach to the several issues discussed below. In accordance with our previous comment letter, our suggestions and requests below are intended to ensure that the ORSP works well for all stakeholders, including large and mid-sized employers, Qualified Plan sponsors of all sizes, and employees who participate in Qualified Plans.

SUMMARY OF THE COUNCIL'S NEW AND CONTINUING CRITICAL CONCERNS

As described in more detail below, the Council has the following recommendations for the revised proposed rules, which are intended to address our new and continuing critical concerns with the ORSP. Additional suggestions are also included at the end with respect to other concerns that we previously raised and that were not addressed by the revisions.

- The Council's members are concerned that the ORSP, as well as similar initiatives in other states, will increase the burdens and costs of those employers already offering a Qualified Plan to their employees. It is essential that the ORSP neither burden current plan sponsors with any plan-related rules or participation mandates beyond those that they are already subject to under federal law, nor create confusion or disruption for workers who already participate in a work-based retirement savings opportunity. Any other result would undermine the current retirement system and could cause workers to lose their ERISA-covered plans as employers choose to no longer sponsor a plan.

The rules as they were initially proposed threatened to unduly dictate *to whom* an Employer offers a Qualified Plan by making the permanent Certificate of Exemption only available to an Employer who offers a Qualified Plan to "all of its Employees." Even more concerning, if applied at face value, the revisions to the proposed rules would take a very inappropriate step beyond the initial proposal by also unduly dictating the *plan design* of an Employer's Qualified Plan. Together, these provisions are fraught with very concerning consequences for our retirement system and the millions of workers who benefit from coverage under a Qualified Plan.

In this regard, we urge the Board to make the following three changes:

1. Eliminate the condition for all Certificates of Exemption that a Qualified Plan be offered "within 90 days of hire," a change that would appear to be in accordance with the February 10th communication from the Oregon State Treasury;

2. Make the Certificate of Exemption permanently available to all Employers who offer a Qualified Plan (whether the Qualified Plan is offered to some or all Employees); and

3. Expand the definition of Qualified Plan to include payroll deduction IRAs.

These changes are necessary to ensure that the ORSP complements existing work-based retirement savings opportunities and does not produce significant adverse effects for plan sponsors and participants. In addition, we believe that such changes will help ensure that the ORSP maximizes its impact in increasing retirement security for Oregon workers by focusing on those employers who offer no retirement plan for their employees.

- We continue to urge the Board to take action, both in its rulemaking (or in other guidance) and through coordination with other states, to reduce the burdens on Employers who find themselves subject to multiple state-run plan regimes. This issue is especially acute for those Employers who offer a Qualified Plan but who may not be eligible for a Certificate of Exemption at some point in the future. To date, we have seen no indication from the Board that the need to minimize such burdens or coordinate with other state-run plans is an issue the Board is currently considering or intends to consider.

NEW AND CONTINUING CRITICAL CONCERNS RELATED TO THE NEED TO AVOID HARM TO QUALIFIED PLAN SPONSORS AND PARTICIPANTS

The Council and its members have significant concerns with the revised proposed rules and the harm they would inflict on Employers who sponsor a Qualified Plan and the participants of those plans, including many thousands of Oregon workers. Although the Oregon State Treasury clarified in a message distributed to interested parties on February 10th that at least some of these effects were not intended, it is not clear at this time how the Board will resolve these concerns (e.g., by removing the "within 90 days of hire" language that would have the unintended effect). In this regard, we cannot overstress the importance of the Board both eliminating the revisions that were made to the employer exemption and making the two changes that we previously recommended to the employer exemption. These three items are further described below.

1. **Conditioning the availability of a Certificate of Exemption on an Employer's offer of a Qualified Plan "within 90 days of hire" is a significant concern and should be eliminated.**

As revised, the Certificates of Exemption available under Division 15 of the proposed rules would only be available to an Employer who offers a Qualified Plan to

its Employees *within 90 days of hire*. Consequently, an Employer who offers a Qualified Plan but does not do so within 90 days of an Employee's hire date would be required to register with the ORSP and enroll every single Employee in the ORSP – *even those Employees already enrolled in the Employer's Qualified Plan* – except for those Employees who proactively opt out of the ORSP. This would be an unfair and burdensome result for both Employers and Employees, and would raise serious preemption concerns under ERISA.

As noted above and reportedly in response to numerous inquiries as to whether the rules would really be applied to Employers with Qualified Plans in this way, the Oregon State Treasury distributed a communication on February 10, 2017, stating that "*[a]s currently structured*, [the ORSP] wouldn't include employers that offer qualified employer plans" (emphasis added). The Treasury further noted that the comments received "show the value of using a public process," and ultimately concluded that "[t]he language in the rules was not intended to require businesses with waiting periods of more than 90 days for their employer plans to facilitate the state's plan."[3]

Although it is very helpful to learn that the Treasury does not intend for the "within 90 days of hire" language to have the effect that it would surely have in applying the rule in its current form, the Treasury did not indicate how it will change the rule prior to its finalization in order to ensure that it operates as intended. In this regard, we believe the correct and necessary action would be to remove the phrase "within 90 days of hire" wherever it occurs in Division 15. Because we are unsure if this is the action the Board will take, we believe it is important here to express what makes the phrase so problematic.

First, it is important to note that federal law has already established minimum design standards that retirement plans must satisfy in order to be considered "qualified" for purposes of the Internal Revenue Code ("Code"). Among these standards is the provision that plan sponsors may impose a waiting period on an employee's eligibility to participate in a qualified plan for up to one year after hire.[4] Although employers are free to impose less restrictive service requirements for eligibility in their qualified plans, federal law does not mandate that they do so. By conditioning the employer exemption on an Employer offering a Qualified Plan within 90 days of hire, Oregon would in effect be setting new, more stringent design standards that Employers must either meet or be subject to the consequences (i.e., mandated participation in the ORSP). Congress sought to prevent this very result through ERISA § 514, which preempts "any and all" state laws that "relate to" an employer-sponsored pension plan.

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[3] We presume for purposes of our comments that the Treasury's reference to "[t]he language in the rules" is referring to the phrase "within 90 days of hire" in all instances in which it was added to Division 15.

[4] Federal law allows employers to increase the requirement to up to two years of service if the plan is not a 401(k) plan and also provides that the employee has a non-forfeitable right to all of his accrued benefits.

There are certainly many Qualified Plans today that are offered to employees within 90 days of hire. But many others have a longer waiting period, and the ability to offer such a longer waiting period under federal law was certainly for some employers a factor in their decision to offer an ERISA-covered plan in the first place. Respectfully, it should not be up to Oregon or any other state to impose their own more stringent plan design requirements on employers whereby the only escape from such requirements is mandated participation in a state-run plan. Our members are further concerned that once the Board dictates one element of plan design, additional requirements could easily follow. What, for example, would prevent the Board in the future from changing the phrase "within 90 days of hire" to "within 60 days of hire," or from further conditioning the employer exemption on a Qualified Plan providing for automatic enrollment or some other feature? Even the prospect of such a slippery slope is highly disconcerting for Qualified Plan sponsors.

Furthermore, we strongly believe that the federal Department of Labor ("DOL") did not intend for states to impose these kinds of narrower parameters on Qualified Plans when it provided for the safe harbor to help facilitate the implementation of state-run plans such as the ORSP. In the preamble to the final safe harbor for state-run plans, the DOL stated that it understood that the state laws enacted to date, including Oregon's, "have been directed toward *those employers that do not offer any workplace savings arrangement*, rather than focusing on employees who are not eligible for such programs."[5] At a minimum, it is clear that the DOL expected state-run plans to have a nominal impact on employers' existing retirement plans. The DOL almost certainly would not want to permit state attempts to increase plan sponsor burdens through heightened plan design requirements such as that imposed by the "within 90 days of hire" language. We would also call the Board's attention to the fact that the ORSP's compliance with the new DOL safe harbor does not necessarily protect Oregon law regarding the ORSP from ERISA preemption, as noted by the DOL itself in the preambles to its regulations. *In that regard, as you know, there are ongoing efforts in Congress to invalidate the new DOL safe harbor, which would raise very serious questions about the permissibility of the ORSP. If the DOL safe harbor is invalidated, we will be back to you with further comments.*

Because the only way to prevent what the Oregon Treasury has described as the unintended consequences of the proposed rules is to eliminate the phrase "within 90 days of hire," this is the action we cautiously assume that the Board will take. But if the Board believes that any other action besides the complete elimination of that phrase in all instances will suffice, then we would urge the Board to publish the subsequent revisions for public comment instead of moving directly to a final rule. We would also note that the Treasury's reference to the intent of the proposed rules "[a]s currently structured" raises the prospect of further concerns. We would further urge the Board

[5] 81 Fed. Reg. 59,468 (Aug. 30, 2016) (emphasis added).

not to restructure the rules in the future so that Employers with Qualified Plans are subject to the ORSP's requirements due to their plan design or for any other reason.

2. All Employers who offer a Qualified Plan should have permanent access to the Employer Exemption.

In our comment letter of December 23, we urged the Board to establish a permanent employer exemption that would be available to all Employers who offer Qualified Plans, regardless of whether the Qualified Plan is available to "all" or to "some but not all" Employees. As originally proposed, the rules provided that an Employer who offers a Qualified Plan to "all of its Employees" could file a Certificate of Exemption with the ORSP that would exempt the Employer from the Plan's requirements. However, an Employer who offers a Qualified Plan to "some but not all" of its Employees may only file a "conditional" Certificate of Exemption, which is good for only three years. Employers with a conditional exemption would then be subject to a recertification process. Instead of making our requested change, the revisions to the proposed rule severely narrowed the availability of the employer exemption as described above.

To reiterate our previous comments, it is essential that the Board make the employer exemption permanently available to all Employers who offer a Qualified Plan. ***Together with our request above to eliminate the "within 90 days of hire" language, these two changes are critical in ensuring that the ORSP does not jeopardize the continued offering of ERISA-covered plans to thousands of Oregonians and impose unnecessary complexity and expense on plan sponsors.***

As we previously explained, employers voluntarily take on numerous administrative fees, fiduciary duties, and various potential liabilities when they decide to offer a Qualified Plan. But an Employer who participates in the ORSP will not have to bear these burdens with respect to Participating Employees, which would discourage Employers from voluntarily offering a Qualified Plan to their Employees in the first place. Moreover, Employers with Employees enrolled in both the ORSP and the Employer's own Qualified Plan would be forced to take on additional administrative responsibilities to monitor and switch Employees between the state-run plan and their own Qualified Plan. These additional costs and encumbrances could have a chilling effect on plan sponsorship to the detriment of employees, who would no longer enjoy the opportunity for employer contributions, higher contribution limits, or increased employee protections associated with qualified plans.

It is further worth repeating that, although it is unusual for a Qualified Plan to be offered to 100% of all employees at all times, it is common that an employee who is not currently eligible for participation will become eligible in the future either due to meeting the plan's waiting period or by moving from an ineligible position to a position

that is eligible for participation.[6] The burden and confusion that would result from subjecting a current plan sponsor to the ORSP because its Qualified Plan is not available to "all" Employees cannot be worth the very minimal incremental coverage gains that may result. As we also mentioned in our previous letter, federal nondiscrimination rules serve to prevent employers from covering only a limited segment of employees under a Qualified Plan such as only executives and/or other highly-compensated employees. Therefore, we would emphasize again that we believe the ORSP will have the greatest positive impact on retirement savings (and the greatest chance for success as a program) by focusing on ensuring the Plan's success for those Oregon workers employed by Employers who do not offer a Qualified Plan.

3. The definition of "Qualified Plan" should include payroll deduction IRAs.

In our comment letter of December 23, we requested that the Board revise the proposed rule's definition of Qualified Plan to include payroll deduction IRAs, regardless of whether a payroll deduction IRA utilizes automatic enrollment or is subject to ERISA. As we previously noted, both the Oregon statute and the proposed rules define, respectively, a qualified retirement plan and a Qualified Plan as "including but not limited to" plans qualified under Code sections 401(a), 401(k), 403(a), 403(b), 408(k), 408(p), or 457(b). Because the revisions to the proposed rules did not modify the definition of Qualified Plan, we would again urge the Board to extend the definition to include payroll deduction IRAs.

As we explained previously, absent this clarification, it would be burdensome and inefficient to require Employers who currently offer a payroll deduction IRA to choose between administering both the payroll deduction IRA and the ORSP, or terminating their payroll deduction IRA and replacing it with the ORSP. ***The ORSP should be focused on those Employees who work for Employers who do not offer any form of work-place retirement savings opportunity and not positioned to compete with existing retirement savings opportunities, including payroll deduction IRAs, in this manner.*** The ORSP's accounts will offer nearly identical savings opportunities to Employees as payroll deduction IRAs. The automatic enrollment and escalation features of the ORSP accounts are not sufficient to warrant excluding Employers who offer payroll deduction IRAs from the employer exemption. Indeed, Employers offering other Qualified Plans without these features are nonetheless eligible for the exemption.

Consequently, the Council continues to recommend that the Board modify its rule to include payroll deduction IRAs within the definition of Qualified Plans.

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[6] In addition, we would note that independent contractors and interns are typically excluded from an employer's Qualified Plan, and that the exclusion of such positions should not impact the availability of a Certificate of Exemption. As with other ineligible positions, such individuals may become eligible to participate in the retirement plan in the future if they are hired into a position that is eligible for participation.

CRITICAL CONCERNS WITH RESPECT TO EMPLOYERS WHO COULD BE SUBJECT TO MULTIPLE STATE-RUN PLANS

In our December 23 letter, we expressed our members' significant concern that employers with operations and employees in multiple states are very likely to be subject to multiple and potentially conflicting state-run plan regimes as more states implement a state-run plan. We requested that the Board take action, both through proactive rulemaking (or other guidance) and through coordination with other states, to minimize such burdens and potential conflicts for these employers. ***We remain very concerned that, to date, we have seen no evidence that the Board has attempted any such coordination with other states or even acknowledged the need to do so in the future.***

Once more, we would urge Oregon to take the lead on establishing guidelines and processes to protect both employers and workers from the unnecessary burden of being subject to multiple and/or conflicting state-run plan regimes. This risk is particularly acute for any current plan sponsor who, absent a workable exemption, could be forced to administer multiple state-run plan regimes in addition to their Qualified Plan, and whose only option to ease their burden would be to terminate their Qualified Plan. ***It will be imperative that the states take reasonable steps to mitigate the consequences of implementing a patchwork of state-run plans. As the state that has made the most progress toward implementation, we urge Oregon to provide assurances to employers that the state will attempt to coordinate with other states.***

To briefly recap, the three primary sources of conflict and burden that we asked the Board to consider in our letter of December 23 are as follows:

1. **Multi-state employer subject to multiple regimes:** A common scenario that our members anticipate involves employers with workers in multiple states, where more than one of those states requires that workers within that state be enrolled in the respective state's state-run plan. As a result, such employers would be responsible for following the rules of multiple jurisdictions' plans, which could become unimaginably complex and resource-intensive.

2. **Single employee subject to multiple regimes:** Situations may also arise where, due to states' different approaches in determining who will be subject to enrollment in their respective state-run plans, an employer could be required to enroll a single individual in multiple state-run plans, which could lead to much confusion, excess contributions by individuals, and tax penalties on individuals for such excess contributions.
3. **Employers' administrative requirements:** For each state-run plan that is implemented, employers will inevitably be responsible for tasks such as distributing materials to employees and remitting contributions that are withheld from employees' pay, among other duties. If an employer becomes subject to multiple state-run plans, that employer will likely face different

procedural requirements from state to state. Employers would be forced to either keep track of and comply with multiple sets of procedures or choose to follow the more stringent (and often more expensive) procedures for all plans.[7]

Each of the above points is explained in more detail in our previous comment letter. In addition, that letter offered potential options to reduce the employer burden in each instance, such as expanding the definition of Qualified Plan to include state-run plans of other states.[8]

OTHER CONCERNS PREVIOUSLY RAISED BY THE COUNCIL THAT WERE NOT ADDRESSED IN THE REVISIONS TO THE PROPOSED RULES

We appreciate that the Board incorporated some of the Council's previous suggestions into the revised proposed rules for the ORSP, such as modifying the proposed rules to allow Participating Employers seven (7) business days to transmit amounts deducted from Participating Employees' Wages. However, we continue to have concerns with respect to the following issues that the Council raised in its previous comments but that were not addressed in the revised proposed rules:

- ***Participating Employees' compliance with Internal Revenue Code requirements:*** In our comment letter of December 23, the Council cautioned that many Employees who participate in the ORSP will inadvertently violate the Code's IRA rules at some point, and that addressing such violations can be an expensive process for individual employees. We recommended that the Board implement procedures or safeguards that would minimize the likelihood of Participating Employees running afoul of the IRA rules, including income limits and contribution limits.

  In a change made by the revisions to the proposed rules, the informational materials that Participating Employers must distribute to Employees would be required to state that Employees with income in excess of the Roth IRA limits should opt out of the Plan. This lone change, although helpful, will not do enough to prevent Participating Employees from unintentionally violating the Roth IRA income limits, and it does not even address potential violations of other rules such as the Roth IRA contribution limits. We recommend that the Board consider additional safeguards, perhaps in coordination with the Plan

[7] For example, as described in our previous comments, an employer could be required to maintain records under one state-run plan for six years, whereas another state-run plan that the employer is also subject to could require that records be maintained for eight years. The employer could keep track of which records must be maintained for six years and which for eight, or the employer could choose the simpler (but more expensive) approach of maintaining all records for eight years.

[8] Please see pages 7-8 of our letter of December 23 for more details and a description of our proposed options to reduce the burden on employers subject to multiple state-run plan regimes.

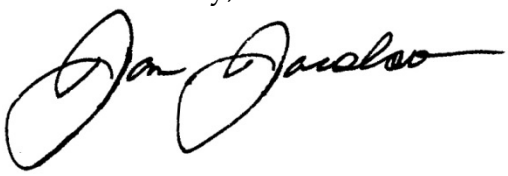
Administrator, that would better protect Participating Employees from errors such as these. We would reiterate our concerns, however, that Employers not be given responsibility for preventing or resolving Participating Employees' violations of the IRA rules.

- ***More detailed guidance and information continues to be necessary:*** As discussed in more detail in our December 23 letter, additional guidance with respect to many aspects of the Plan would be useful to provide Participating Employers with the information necessary to carry out their duties under the Plan and to give Employees more information about whether to participate in the ORSP or opt out. In addition, it is also worth restating that, if the Board intends for the ORSP to satisfy the conditions of the DOL's new safe harbor for state-run plans, it would be helpful for the Board to provide more information on how the safe harbor conditions will be met. Although we understand that the additional information requested in this regard may be beyond the scope of the proposed rules, it would be helpful to have some indication from the Board as to whether and when such guidance and answers may be provided (in any form).

* * * * *

Once more, we appreciate the opportunity to provide comments on the Board's revisions to the proposed rules for the ORSP. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700 or by email to jjacobson@abcstaff.org.

Sincerely,



Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

December 23, 2016

Delivered via email to dan.mcnally@ost.state.or.us

Dan McNally
Rules Coordinator
Oregon State Treasury
350 Winter Street, NE
Suite 100
Salem, OR 97301

Re: Proposed Rules for the Oregon Retirement Savings Plan

Dear Mr. McNally:

The American Benefits Council ("Council") appreciates the opportunity to provide comments on the rules proposed for the Oregon Retirement Savings Plan ("Plan" or "ORSP") by the Oregon Retirement Savings Board ("Board"). As the first state to issue proposed rules for the operation of a mandatory state-run IRA program for the private sector ("state-run plan"), Oregon is in a unique position to influence the development of state-run plans in other states and be looked to for best practices. We accordingly believe that the Board's work on the rules for the ORSP could ultimately affect workers and employers well beyond Oregon's borders.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees across the country, including Oregon. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

The Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers. In this regard, due to the voluntary nature of the United States' employment-based retirement system, we have worked closely with Congress and the federal agencies over the years to reduce the

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administrative burdens and costs of sponsoring a pension plan in order to encourage employers to offer (and to continue to offer) retirement plans to their employees.

Although we understand the concerns that have led several states to explore and/or pass statutes creating a state-run plan, we are nevertheless concerned that the implementation of these plans could undermine the incentive to adopt (or maintain) a retirement plan with employer contributions, higher contribution limits, and far more participant protections. For this and other reasons, we do not support mandates for employers to participate in state-run plans. We strongly believe that retirement plan coverage can be broadened in a much more effective way through the elimination of regulatory burdens, increased education of employees and employers, and greater incentives to sponsor, or participate in, plans that provide greater retirement security. However, we recognize that the Oregon law has been enacted, and we are not writing today to address that decision.

We are writing today primarily to express the great concern that we and our members have about the proposed means of implementing the Oregon law that would undermine Qualified Plan[1] coverage by increasing the costs and complexities faced by employers who currently sponsor a Qualified Plan for their employees.

For more than 40 years, employers who sponsor a retirement plan have been subject to a single federal statutory and regulatory regime under the Employee Retirement Income Security Act of 1974 ("ERISA"). One of the fundamental reasons that Congress had for passing ERISA was to ensure that employers who voluntarily sponsor a retirement plan are not subject to a multitude of regimes under state laws that would inevitably vary from state to state. This framework has enabled the current retirement system to successfully reach millions of employees across the country. And while we are very supportive of ideas that would increase access to a work-based retirement savings opportunity for those workers who do not currently have access to an employer-sponsored plan, it is critical that states do not take action at the expense of employees who are already participants in an ERISA-covered plan. ERISA-covered plans offer several important advantages over state-run plans, including, as noted, the opportunity for employer contributions, higher contribution limits, and more participant protections.

As the Board works to finalize the rules for the ORSP, we respectfully request that the Board take into careful consideration what steps it can take to minimize the Plan's burdens on current plan sponsors and the retirement system in general. We appreciate that the proposed rule's Statement of Need and Fiscal Impact indicates that the Plan is being designed to minimize its economic impact on small businesses with fewer than 50

[1] Terms not defined herein have the definition assigned to them in the proposed rule.

employees.[2] However, we ask that the Board also strive for a goal of minimizing the Plan's economic impact on (1) all employers who currently sponsor a retirement plan (regardless of size), and (2) large and mid-sized businesses, which are more likely to operate in multiple states and be subject to multiple state-run plans in the future. As proposed, the rules create a program that we expect would work well for and minimize the burdens on small employers who do not offer a Qualified Plan and whose employees only work in Oregon. Our recommendations for changes to the proposed rule, as described below, are intended to ensure that the Plan *also* works well for plan sponsors and businesses that operate in multiple states.

SUMMARY OF THE COUNCIL'S MAIN COMMENTS

As described in more detail below, the Council has the following key recommendations regarding the proposed rules, which are aimed at addressing our members' most critical concerns with respect to the ORSP. Additional suggestions are also included at the end.

- The proposed rule should be modified so that the employer exemption is available to all Employers who offer a Qualified Plan to some or all Employees. In addition, the definition of Qualified Plan should be expanded to include payroll deduction IRAs. These two changes (the most critical of which is the former) are necessary to ensure that the ORSP complements the existing retirement system rather than undermines it by imposing unnecessary burdens and expense on current plan sponsors, which would ultimately harm the thousands of Oregon workers who are already saving for retirement in an employer-sponsored plan.

- Employers with operations and employees in multiple states are very likely to be subject to multiple and potentially conflicting state-run plan regimes as more states implement their state-run plans. We urge the Board to take action, both in its rulemaking and through coordination with other states, to reduce employer burdens in situations including (1) employers who are subject to multiple state-run plan regimes; (2) employees who are subject to enrollment in more than one state-run plan; and (3) the employer's performance of administrative tasks where the employer is required to comply with multiple sets of rules in multiple states.

NEED FOR APPROPRIATE EXPANSIONS TO THE PROPOSED EMPLOYER EXEMPTION

1. All Employers Who Offer a Qualified Plan Should Have Permanent Access to the Employer Exemption

[2] The Statement of Need and Fiscal Impact estimates that 53,000 small businesses and 64,000 firms of all sizes will be affected by the Plan.

Under the proposed rule, Employers who file a Certificate of Exemption with the Plan would be exempt from the Plan's requirements. A Certificate of Exemption is only available to Employers who offer a Qualified Plan to "all of its Employees." However, an Employer who offers a Qualified Plan to "some but not all of its Employees" may file a "conditional" Certificate of Exemption. Although the conditional Certificate of Exemption would also serve to exempt an Employer from the Plan, the proposed rules state that such Employers "may be required to register with the Plan at a later time." That is, the proposed rule would reserve for the Board the right to determine in the future that such Employers would be required to participate in the Plan.

The statutory basis for the proposed rule's employer exemption is located in section 3(1)(b) of H.B. 2960. That section provides that the Board must develop and establish a plan that "Require[s] an employer to offer its employees the opportunity to contribute to the plan through payroll deductions *unless the employer offers a qualified retirement plan*…" (emphasis added).

Although we appreciate that the proposed rule provides for a conditional exemption for Employers who offer a Qualified Plan to "some but not all" Employees, ***we urge the Board to establish in its rulemaking a permanent employer exemption that is available to all Employers who offer a Qualified Plan, regardless of whether that plan is offered to some or all of the Employer's Employees***. The statute requires that an exemption be made available for an Employer who "offers a qualified retirement plan." It does not limit the exemption to Employers who offer a plan to "all" Employees.

Making the employer exemption permanently available to all plan sponsors is the ***single most critical thing*** that the Board can do to ensure that the ORSP complements the current retirement system instead of jeopardizing the continued offering of ERISA-covered plans to thousands of Oregonians and imposing unnecessary complexity and expense on plan sponsors. Many proponents of the state-run plans assume that medium and large employers will continue to maintain 401(k) plans regardless of the regulatory environment. This is not accurate in our view or in the view of the Council's members, just as the exact same assumption regarding defined benefit plans from many years ago has proved to be incorrect.

An employer who sponsors a Qualified Plan has administrative fees, fiduciary duties, and numerous potential liabilities. An employer participating in the ORSP has none of that, thus strongly pushing the employer away from its Qualified Plan and toward the ORSP, to the detriment of the employer's employees who benefit far more under a Qualified Plan. In this context, it is critical that the Board not do anything further to cause employers to drop their savings plan. If the ORSP applies to employers with a plan, that would certainly cause many employers to drop their plan, as discussed below. Workers in a state will not be benefitted if employers would forego their offering of an ERISA-covered plan with greater benefits and employee protections in favor of

the reduced employer costs and liabilities associated with the state-run plans. However, under the proposed rules, and for very real and legitimate business reasons, employers would be placed in the unfortunate position of having to consider such a move.

It goes without saying that an employer who offers a 401(k) plan to, for example, 95% of its employees (but excludes, for example, the 5% of its employees who are temporary or contract employees or are not yet eligible for participation) would be burdened by an additional requirement that the employer enroll the remaining 5% of its employee population in a state-run plan. For example, not only would the employer be responsible for understanding and carrying out its responsibilities under the state-run plan (on top of its many duties with respect to the 401(k) plan), but the employer would also be forced to constantly monitor and switch employees between the state-run plan and 401(k) plan as employee eligibility for the 401(k) plan changes. At some point, those additional burdens will inevitably discourage many employers from continuing to offer an ERISA-covered plan, especially since the ORSP would not subject employers to fees or liabilities.

As proposed, the non-conditional Certificate of Exemption would only be available to a very narrow segment of current plan sponsors in Oregon. It is unusual for a Qualified Plan to be offered to 100% of all employees at all times, from the date of hire.[3] Oftentimes, an employee who is not currently eligible for participation in the plan will become eligible in the future, either due to meeting the plan's service requirement or due to moving from an ineligible position to a position eligible for participation. Although we understand the desire to have a goal of ensuring that every single Oregon worker has access to a retirement savings opportunity at all times, even the proposed rule seemingly acknowledges that administrative impracticalities and constraints are inevitable (e.g., the proposal would allow a Participating Employer a minimum of 60 days between its Registration Date and the date upon which the Participating Employer must enroll its Employees).

In light of the risks and consequences of the proposal to current plan sponsors and the many employees who are benefiting from participation in a Qualified Plan, and given the administrative challenges associated with ensuring that 100% of a work force has access to a Qualified Plan, we urge the Board to permanently expand the employer exemption to all Employers who offer a Qualified Plan. We believe that the ORSP will have the greatest positive impact on retirement savings by focusing on ensuring that the Plan is successful for Employees of Employers who do not offer a Qualified Plan.

[3] On a related point, it is not entirely clear to us what is meant by the provision stating that a Certificate of Exemption is available to an Employer who offers a Qualified Plan to "all" of its Employees. An Employer with a stable workforce and no recent hires might offer a Qualified Plan to 100% of its Employees at one particular moment, but a new Employee who is hired the following week might not be eligible due to not having met a service requirement.

The question could be raised as to whether there needs to be a special rule denying the exemption to employers who only cover a small percentage of their employees under their Qualified Plan. The answer is no. Covering only a small percentage of employees is rare today, because there is no good business reason to do this.[4] And escaping the state mandate is not enough of a business justification to do this. So while this is a theoretical possibility, Oregon should not construct elaborate rules to prevent an evasion that is very unlikely to occur.

2. The Definition of "Qualified Plan" Should Include Payroll Deduction IRAs

Section 3(1)(b) of H.B. 2960 describes a qualified retirement plan as "*including but not limited to* a plan qualified under section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p) or section 457(b) of the Internal Revenue Code" (emphasis added). The proposed rule would similarly define Qualified Plan as "a retirement plan qualified under the Internal Revenue Code, *including but not limited to* section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p) or section 457(b)" (emphasis added).

We ask that the proposed rule's definition of Qualified Plan be modified to include payroll deduction IRAs, whether or not the payroll deduction IRA utilizes automatic enrollment, and whether or not the arrangement is subject to ERISA. Employers who currently offer a payroll deduction IRA should not be forced to choose between administering both the payroll deduction IRA and the ORSP (especially with respect to the same Employee) or terminating their payroll deduction IRA and replacing it with the ORSP. Assuming that the accounts utilized by the ORSP will be IRA accounts, both the payroll deduction IRA and ORSP would present nearly identical savings opportunities for Employees. The fact that the ORSP requires automatic enrollment and automatic escalation does not justify excluding Employers with a payroll deduction IRA from the employer exemption because Employers who offer a Qualified Plan (as currently defined) without those features are nevertheless eligible for the exemption.

For the above reasons, and because both the statute and the proposed rule clearly allow for consideration of other types of savings arrangements under the definition of a Qualified Plan, we believe that the inclusion of payroll deduction IRAs is appropriate. This modification to the proposed rule would, in combination with our recommendation to permanently exempt all plan sponsors, help ensure that the ORSP does not disrupt workers who are currently saving for retirement in a work-based plan.

NEED TO MINIMIZE CONFLICTS FOR PARTICIPATING EMPLOYERS

[4] The only exception is that in some cases, a business might want to only cover executives, who value pre-tax deferred benefits more than lower-paid employees. But that approach is prohibited by federal nondiscrimination rules.

In addition to ensuring that the employer exemption is permanently available to all Employers who offer a Qualified Plan (whether to all or to some Employees), our members' other critical concern is the very real likelihood that employers with operations and employees in multiple states will inevitably be subject to multiple state-run plan regimes. This concern is especially acute in the event that Employers who offer a Qualified Plan to some (but not all) Employees are required to register with the ORSP and become Participating Employers.

Large and mid-sized businesses, which are much more likely to operate in multiple states than small businesses, will be disparately impacted as more states implement state-run plans. At worst – though certainly not inconceivable – a large employer with locations and employees in every state could eventually be subject to 50 state-run plan regimes (or more if cities and counties implement plans). This would be an extraordinary burden for even large employers to face. Still worse than our concern that employers will be required to participate in multiple state-run plans is the very conceivable scenario in which employers could be subject to *conflicting* state-run plan regimes *with respect to the same employee*.

In developing the new ERISA safe harbor for state-run plans and city- or county-run plans, the Department of Labor ("DOL") acknowledged the potential for overlapping programs, but implied that the states and local governments are in a better position to address or alleviate this issue. Because DOL has not, to date, provided any guidance or assistance to states or the many employers who will face multiple and/or conflicting state-run plans, ***we urge Oregon to take the lead on establishing guidelines and processes to protect both employers and workers from the unnecessary burden of being subject to multiple and/or conflicting state-run plan regimes***.

As the Board continues its work to implement the ORSP, we ask that the Board consider its opportunities to establish best practices for rules and other guidance that, if adopted in similar form by other states that implement a state-run plan, would help prevent the confusion and burdens that will surely result for many employers in the absence of coordination between the states.

There are three primary sources of conflict and/or burden that we especially request the Board to consider:

- **Multi-state employer subject to multiple regimes:** We anticipate many situations in which an employer has employees in multiple states, and more than one of those states requires that workers within the state be enrolled in the respective state's state-run plan. As a result, the employer has the burden and expense of complying with multiple state-run plans. For example, assume that Oregon, California, and Illinois have each implemented their state-run plans. An employer with 10 employees in Oregon, 3 employees in California, and 2

employees in Illinois would be responsible for following the rules of all three state-run plans, even as a small employer with only 15 employees.

Potential option to reduce burden: Expand the definition of Qualified Plan to include state-run plans of other states. For example, a California employer with a single employee in Oregon could file a Certificate of Exemption with the ORSP if the California employer offered the California state-run plan to all of its employees, including the Oregon employee. (This would require that state-run plans be willing to accept enrollees who are subject to another state's enrollment requirement.)

- **Single employee subject to multiple regimes:** There may be situations where, due to different state approaches in determining who is subject to enrollment in a state-run plan, an employer could be required to enroll a single individual in multiple state-run plans. For example, assume that an employer with operations in both Oregon and Idaho has an employee who works at a location in Oregon but lives in Idaho. Assume further that Idaho has implemented a state-run plan that applies to all Idaho residents working for Idaho employers. The Oregon employer could be required to enroll the employee in both the Oregon and Idaho state-run plans.

  Potential option to reduce burden: Same as above, i.e., expand the definition of Qualified Plan to include state-run plans of other states.

- **Employer's administrative requirements:** Employers will have certain responsibilities with respect to each state-run plan that is implemented, including, for example, the distribution of materials to employees and the remittance of contributions that are withheld from employees' pay. Employers who are subject to multiple state-run plans will likely face different procedural requirements among the programs. For example, one state-run plan may require that employers distribute hard copies of program materials to employees, whereas another state-run plan allows for electronic distribution. Employers will be forced to keep track of and comply with multiple sets of procedures or may choose, where feasible, to simply follow the more stringent (and generally more expensive) process for all plans.[5]

  Potential option to reduce burden: Wherever possible, the Board should provide Participating Employers with flexibility in how required tasks are performed. For example (and as is currently proposed for the ORSP), Participating Employers should have the option of delivering required program materials in hard copy or

[5] As another example, if an employer is subject to two state-run plans that require the employer to maintain records for six years, and one state-run plan that requires records to be maintained for eight years, the employer could keep track of which records must be maintained for six years and which for eight, or the employer could simply maintain all records for eight years, a more expensive, yet simple, approach.

electronically. In addition, for tasks in which the submission of a form is required, it would be helpful if a Participating Employer was allowed to use either the specific form provided by the Plan or a substantially similar form that contains the necessary information (i.e., one that may be used with respect to multiple state-run plans).

The options we described above are just a few possibilities of ways that the Board could help minimize the additional burden and conflicts that will arise for employers who are subject to multiple state-run plans. In addition to considering these and other alternatives, we urge the Board to reach out to other states as they move forward with the implementation of a state-run plan and work to establish similar rules and procedures. We also encourage states to consider joining their programs together, such as through the development of a plan administered jointly by multiple states.

OTHER COMMENTS

In addition to our primary concerns described above, we have the following additional comments on the proposed rules:

- **Timing of the transmission of contributions:** The proposed rules would require that amounts deducted by a Participating Employer be transmitted to the Plan Administrator "as swiftly as possible, not to exceed five (5) calendar days from the date of deduction." We suggest that the proposed rule be modified to allow seven (7) business days for the transmission, which would provide the same standard that many employers are familiar with in the DOL safe harbor rule for small plans.[6]

- **Compliance with Internal Revenue Code requirements:** Although we are not aware that a final decision has been made, due to the availability of the new DOL safe harbor for state-run IRA arrangements, we assume that the employee accounts in the ORSP will be IRA accounts (likely Roth IRAs, but potentially traditional IRAs). As the Board is aware, the Internal Revenue Code and the federal regulations thereunder contain numerous rules with respect to IRAs, including income limits and contribution limits. Although it is our understanding that Participating Employers will not be responsible for ensuring Participating Employees' compliance with the various IRA rules – and it is critical that employers not be given this responsibility – we want to emphasize that many Participating Employees will unknowingly violate the IRA rules at some point, and that addressing any such violations could be a frustrating and expensive process for individuals.

[6] 29 C.F.R. § 2510.3-102(a)(2).

We recommend that the Board consider procedures and safeguards that either the Board or the Plan Administrator could implement in order to minimize the occurrence of Participating Employees running afoul of the IRA rules.

- **Need for more detailed guidance:** Although the proposed rules establish several basic parameters for the ORSP, additional guidance with respect to many aspects of the Plan will be necessary to (1) provide Participating Employers with the information they need to carry out their duties with respect to the Plan, and (2) enable Employees to make a more informed decision as to whether to remain a participant in the ORSP or opt out.

  For example, with respect to the Plan's auto-escalation feature, Participating Employers would need additional information on whether contributions are to be escalated on the same day for all Participating Employees or be based, for example, on the anniversary of an individual's participation in the Plan. If the same date is used for all Participating Employees, Participating Employers would then need guidance on whether to auto escalate the contributions of an employee who has been a Participating Employee for less than a year (or wait until the following year to first escalate his or her contribution percentage).

  As another example, the proposed rules state that the Board will charge each account a fee to defray the ORSP's operating expenses, but no additional information about the fee, including the amount or the range that could be charged, is provided. Employees should have access to more detailed information on the account fees prior to their Enrollment Date.

- **Compliance with DOL's safe harbor:** Assuming that the Board intends for the ORSP to meet the conditions of DOL's new safe harbor for state-run plans, it would be helpful to have more information on how the safe harbor conditions will be met, including how employee, former employee, and beneficiary rights under the ORSP will be enforced.[7] In addition, because DOL's final safe harbor did not include a prohibition on states imposing withdrawal restrictions on IRA accounts, the ORSP should provide clear disclosure up front with respect to what, if any, withdrawal restrictions will exist, as any such restrictions could affect opt out rates and the sustainability of the Plan.

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Again, we appreciate the opportunity to provide comments on the Board's proposed rules for the ORSP. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700 or ldudley@abcstaff.org.

[7] 29 C.F.R. § 2510.3-2(h)(1)(vi).

Sincerely,

Lynn D. Dudley,
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