



April 5, 2019

Delivered via email

California Secure Choice Retirement Savings Investment Board
915 Capitol Mall, Suite 105
Sacramento, CA 95814
CalSavers@sto.ca.gov

Re: Rulemaking for the CalSavers Retirement Savings Program

Members of the Board:

The American Benefits Council (“Council”) appreciates the opportunity to submit comments on the proposed permanent rules (“proposed rules”) for the CalSavers Retirement Savings Program (“CalSavers”). We also appreciate the continued efforts of the California Secure Choice Retirement Savings Investment Board (“Board”) and CalSavers staff to engage with employers and the plan sponsor community, and to work to minimize the impact of CalSavers on plan sponsors¹ that already offer a retirement savings opportunity to their employees.

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. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans. Many of our members are headquartered in California and they, together with companies headquartered elsewhere, have many employees who work in California.

As noted in our comments submitted November 9, 2018, on the CalSavers emergency rulemaking, the Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers. Due to the voluntary nature of the United States’ employment-based retirement system, we have worked closely with Congress and federal agencies over the years to reduce

¹ We use the term “plan sponsor” herein to refer to employers that offer an ERISA-covered or non-ERISA-covered retirement savings plan or program.

the administrative burdens and costs of sponsoring a pension plan. Reducing those burdens and costs helps to encourage employers to offer (and continue to offer) retirement plans to their employees.

As successful as the employment-based retirement system has been for millions of workers, for many very small businesses, establishing a retirement plan is nevertheless viewed as too burdensome. We therefore understand the concerns that led California to enact a program targeting individuals without access to a retirement plan at work. However, it is critical that state-run programs not disrupt existing employer-provided retirement plans that, in the vast majority of cases, provide for employer contributions and higher contributions limits – features that are not available through programs such as CalSavers. Avoiding the imposition of new requirements and burdens on plan sponsors is also important in recognizing the role of the federal Employee Retirement Income Security Act (“ERISA”) and its broad preemption provision, which promotes and protects the uniform design and operation of employee benefit plans.

In this regard, the Council has the following comments with respect to the proposed rules for CalSavers:

1. We strongly support the process prescribed for identifying Eligible Employers, which includes allowing, but not requiring, Exempt Employers to take any action to communicate their exempt status to CalSavers.
2. We read the proposed rules as confirming that the exemption for employers that maintain or contribute to a Tax-Qualified Retirement Plan is available to all such employers, including an employer whose Tax-Qualified Retirement Plan is not available to every employee of the employer at any given time.
3. Due to conflicting language in the document titled “Initial Statement of Reasons” that accompanied the proposed rulemaking materials, we recommend clarifying that the employer exemption is available to employers that offer an automatic enrollment payroll deduction IRA, as provided for in California Government Code section 100032(g).

1. The Council strongly supports allowing, but not requiring, Exempt Employers to communicate their exempt status to CalSavers.

The Council **strongly supports** the language in proposed rule section 10001(d), which provides that “Exempt Employers may, but need not, inform the Program of their exemption from the Program using one of the methods established under Section 10002(e).”

As stated above, it is very important for the well-being of the existing employment-based retirement system and for the avoidance of ERISA preemption concerns that programs such as CalSavers do not disrupt or impose new burdens on employers that already offer a retirement plan. Requiring Exempt Employers to report or verify their exemption from CalSavers in any manner is one such type of burden that should be avoided.

As noted in our comments of November 9, 2018, we appreciate that a requirement for plan sponsors to report their exempt status to a particular state program such as CalSavers may appear to be a fairly minimal burden. That burden can quickly multiply, however, for employers with employees in every state, as many of our members have, when there are 50 different forms to file or processes to follow, with 50 different requirements, and on 50 different schedules. Even a minimal administrative burden quickly becomes a major burden when multiplied by 50, which is why ERISA's preemption provision is so important. As such, we encourage the Board to finalize the language in proposed rule section 10001(d) that would allow plan sponsors to report their exempt status to CalSavers on a voluntary basis and not require such reporting.

2. The Council reads the proposed rules as exempting all plan sponsors from CalSavers, including sponsors of plans that do not cover every employee at any given time.

In our comments of November 9, 2018, we expressed the importance of ensuring that all plan sponsors are exempt from CalSavers, including plan sponsors whose Tax-Qualified Retirement Plan does not cover every employee at all times. When an employer creates a retirement plan, the plan is generally available to most employees. The various nondiscrimination rules in the Internal Revenue Code require that the plan's eligibility and benefit rules do not favor highly compensated employees, and such rules impose restrictions on eligibility conditions in the plan. But, consistent with these restrictions, it is unusual for a qualified retirement plan to be offered to 100% of all employees at all times, starting from the date of hire. 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.

In this regard, proposed rule section 10000(p) defines "Exempt Employer" in part as an employer that "maintains or contributes to a Tax-Qualified Retirement Plan." Correspondingly, proposed rule section 10000(l) defines "Eligible Employer" in part as an employer that "does not maintain or contribute to a Tax-Qualified Retirement Plan." We believe that this language is best interpreted as exempting from CalSavers all plan sponsors that maintain or contribute to a Tax-Qualified Retirement Plan, even if such plan is not offered to every employee. This reading of the proposed rule is consistent with the views we have heard expressed by CalSavers staff, and we encourage the

Board and staff to continue to clarify, as appropriate, in any conversations and program-related material that the intended effect of the rules is indeed to exempt all plan sponsors.

3. Due to conflicting language, clarification should be provided that the employer exemption is available to employers that offer an automatic enrollment payroll deduction IRA.

Section 100032(g) of the California Government Code provides that an employer that (1) provides an employer-sponsored retirement plan or (2) offers an automatic enrollment payroll deduction IRA shall be exempt from the requirements of CalSavers if the plan or IRA qualifies for favorable federal income tax treatment under the federal Internal Revenue Code.

Section 10000(y) of the proposed rules defines “Tax-Qualified Retirement Plan” as a retirement plan that qualifies for favorable federal income tax treatment under Internal Revenue Code sections 401(a), 401(k), 403(a), 403(b), 408(k), or 408(p). The definition further specifies that “[a]n employer-provided payroll deduction IRA program that does not provide for automatic enrollment is not a Tax-Qualified Retirement Plan.” The definition in the proposed rules is silent, however, with respect to an employer’s offer of an automatic enrollment payroll deduction IRA.

In conversations with CalSavers staff, we understand that, because the Government Code clearly provides an exemption for employers that offer an automatic enrollment payroll deduction IRA, it was viewed as unnecessary to repeat that statutory provision in the rules. However, we note that the document accompanying the proposed rules titled “Initial Statement of Reasons” implies that section 10000(y) provides an exhaustive list of savings arrangements that would qualify as a “Tax-Qualified Retirement Plan” for purposes of the employer exemption. In other words, the Initial Statement of Reasons suggests that automatic enrollment payroll deduction IRAs are not included within the definition of Tax-Qualified Retirement Plan. For example, see the following language on page 17 of the document:

- “The ‘Tax-Qualified Retirement Plan’ definition clearly defines the types of retirement plans that, if offered by an employer, would result in the employer deemed to be exempt.... *By exclusion, the definition establishes the types of savings arrangements or other employer benefits that would not result in an employer deemed to be an Exempt Employer*” (emphasis added).
- “The ‘Tax-Qualified Retirement Plan’ definition in the proposed regulations includes the list of *all* retirement plans that, if offered by an employer, would result in them being exempt from the requirements of statute. *By exclusion, the list*

also establishes programs that would not render an employer exempt from the requirements of [the statute]" (emphasis added).

Due to the potential for confusion as a result of this language in the Initial Statement of Reasons, we recommend clarifying that, in accordance with the CalSavers statute, the employer exemption is available to employers that offer an automatic enrollment payroll deduction IRA. We suggest that this could be accomplished by adding automatic enrollment payroll deduction IRAs to the definition of Tax-Qualified Retirement Plan in section 10000(y) of the proposed rules and/or clarifying this point in any other information regarding the employer exemption that is developed for employers.

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Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700 or by email at ldudley@abcstaff.org.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is fluid and cursive, with "Lynn" on the first line and "D. Dudley" on the second line.

Lynn D. Dudley
Senior Vice President, Global Retirement & Compensation Policy