DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210-AB76

Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: In this document, the Department proposes to amend a regulation that describes how states may design and operate payroll deduction savings programs, using automatic enrollment, for private-sector employees without causing the states or private-sector employers to establish employee pension benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). The proposed amendments would expand the current regulation beyond states to cover programs of qualified state political subdivisions that otherwise comply with the current regulation. This rule would affect individuals and employers subject to such programs.

DATES: Written comments should be received on or before [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1210-AB76, by one of the following methods:

☐ Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

☐ Email: e-ORI@dol.gov. Include RIN in the subject line of the message.

☐ Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210, Attention: Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees.

Instructions: All submissions must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. Persons submitting comments electronically are encouraged to submit only by one electronic method and not to submit paper copies. Comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa and at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Suite N-1513, 200 Constitution Avenue N.W., Washington, DC 20210. WARNING: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and are posted on the Internet as received, and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Janet Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Elsewhere in today's Federal Register, the Department issued a final regulation describing conditions that would allow state governments to establish payroll deduction savings programs, with automatic enrollment, for private-sector employees without the state or the employers of those employees being treated as establishing employee pension benefit plans under ERISA. The final regulation is published in response to legislation in some states, and strong interest by others, to encourage retirement savings by giving private-sector employees broader access to savings arrangements through their employers. The final regulation is effective as of [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

As noted in the preamble to the final regulation, concerns that tens of millions of American workers do not have access to workplace retirement savings arrangements have led some states to establish programs that allow private-sector employees to contribute payroll deductions to tax-favored individual retirement accounts described in 26 U.S.C. 408(a) or individual retirement annuities described in 26 U.S.C. 408(b), including Roth IRAs described in 26 U.S.C. 408A (IRAs), offered and administered by the states. California, Connecticut, Illinois, Maryland, and Oregon, for example, have adopted laws along these lines.[1] These initiatives generally require certain employers that do not offer workplace savings arrangements to automatically deduct a specified amount of wages from their employees' paychecks unless the employee affirmatively chooses not to participate in the program. The employers are also required to remit the payroll deductions to state-administered IRAs established for the employees. These programs

[1] California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000-100044 (2012); Connecticut Retirement Security Program Act, P.A. 16-29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, Ch. 324 (H.B. 1378) (2016); Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015).

also allow employees to stop the payroll deductions at any time. None of the initiatives require employers to make matching or other contributions of their own to employee accounts. Some expressly bar such contributions and others do not address this matter. In addition, the state initiatives typically require that employers provide employees with information prepared or assembled by the program, including information on employees' rights and various program features.

As indicated in the preamble to the final rule, some states expressed concern that these payroll deduction savings programs could cause either the state or covered employers to inadvertently establish ERISA-covered plans, despite the express intent of the states to avoid such a result. This concern is based on ERISA's broad definition of "employee pension benefit plan" and "pension plan," which are defined in relevant part as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program provides retirement income to employees."[2] The Department and the courts have broadly interpreted "established or maintained" to require only minimal involvement by an employer or employee organization.[3] An employer could, for example, establish an employee benefit plan simply by purchasing insurance products for individual employees. These expansive definitions are essential to ERISA's purpose of

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[2] 29 U.S.C. 1002(2)(A). ERISA's Title I provisions "shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. 1003(a). Section 4(b) of ERISA includes express exemptions from coverage under Title I for governmental plans, church plans, plans maintained solely to comply with applicable state laws regarding workers compensation, unemployment, or disability, certain foreign plans, and unfunded excess benefit plans. 29 U.S.C. 1003(b).

[3] Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982); Harding v. Provident Life and Accident Ins. Co., 809 F. Supp. 2d 403, 415-419 (W.D. Pa. 2011); DOL Adv. Op. 94-22A (July 1, 1994).

protecting plan participants by ensuring the security of promised benefits. Although ERISA does not govern plans established by states for their own employees, it governs nearly all plans established by private-sector employers for their employees.

With certain exceptions, ERISA preempts state laws that relate to ERISA-covered employee benefit plans.[4] Thus, if a state program were to require employers to take actions that effectively caused them to establish ERISA-covered plans, the state law underlying the program would likely be preempted. Similarly, ERISA would likely preempt a state law mandating private-sector employers to enroll their employees in an ERISA plan established by the state.

A. The Department's Rulemaking Regarding State Payroll Deduction Savings Initiatives

The Department responded to the states' concerns by publishing in today's Federal Register a final safe harbor regulation describing specific circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit plans under ERISA. As a result, the final regulation helps states (but not political subdivisions) establish and operate payroll deduction savings programs so as to reduce the risk of ERISA preemption by avoiding the establishment of ERISA-covered plans.

B. Public Comments on Political Subdivisions

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[4] ERISA § 514(a), 29 U.S.C. 1144(a).

In both the 2015 proposed rule, and the current final rule, the Department defines the term "State" to have the same meaning as given to that term in section 3(10) of ERISA.[5] That section, in relevant part, provides that the term State "includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, [and] Wake Island." The effect of the definition is to limit the scope of the safe harbor to the fifty states and these other jurisdictions.

The Department received multiple comments on the 2015 proposed rule concerning this definition. Several commenters believed this definition is too narrow and supported a broader definition in the final rule. They expressed their support, in general, for a definition that would cover not only state payroll deduction savings programs, but also payroll deduction savings programs of political subdivisions, such as counties and cities.

Set forth below are the commenters' main arguments in favor of expanding the safe harbor to include political subdivisions:

1. Expansion of the safe harbor to political subdivisions will increase retirement savings. Many U.S. workers will continue to be deprived of a workplace savings

[5] On November 18, 2015, the Department published in the Federal Register a proposed regulation providing that for purposes of Title I of ERISA the terms "employee pension benefit plan" and "pension plan" do not include an IRA established and maintained pursuant to a state payroll deduction savings program if that program satisfies all of the conditions set forth in the proposed rule. 80 FR 72006. On the same day that proposal was published, the Department also published an interpretive bulletin explaining the Department's views concerning the application of ERISA section 3(2)(A), 29 U.S.C. 1002(2)(A), section 3(5), 29 U.S.C. 1002(5), and section 514, 29 U.S.C. 1144 to certain state laws designed to expand retirement savings options for private-sector workers through state-sponsored ERISA-covered retirement plans. 80 FR 71936 (codified at 29 CFR § 2509.2015-02). Although discussed in the context of a state as the responsible governmental body, in the Department's view the principles articulated in the Interpretive Bulletin regarding marketplace arrangements and sponsorship of ERISA-covered plans also apply with respect to laws of a political subdivision, provided applicable conditions in the bulletin can be and are satisfied by the political subdivision.

opportunity unless the safe harbor is expanded to cover payroll deduction savings programs of political subdivisions.[6] Where states do not establish state-wide programs, political subdivisions within those states may be willing to do so, but are hesitant to act unless the safe harbor is expanded to clearly cover them.[7] Expanding the safe harbor, therefore, would expand retirement savings coverage, especially in states that do not themselves establish state-level payroll deduction savings programs but do have political subdivisions that would be willing to do so.[8]

2. Expansion of the safe harbor to political subdivisions is supported by section 3(2) of ERISA. The legal basis for the current safe harbor for state programs would not suggest a different result for payroll deduction savings programs established by state political subdivisions that otherwise meet the safe harbor's conditions. Employers that facilitate payroll deduction contributions to an IRA as required by the law of a political subdivision cannot logically be viewed as engaging in more or less involvement than employers that perform the same functions as required by the law of a state. In both cases, employers participate under a legal requirement and are limited to ministerial activity, such as withholding and remitting wages to an IRA custodian. Consequently, the standard for determining whether, under section 3(2) of ERISA, an "employee pension benefit plan" has been "established or maintained" should be the same in both

[6] See, e.g., Comment Letter # 57 (Public Advocate for the City of New York).
[7] See, e.g., Comment Letter # 38 (City of New York Office of Comptroller) and Comment Letter # 42 (City of New York Office of the Mayor). See also Letter from Alan L. Butkovitz, City Controller, Philadelphia to Hon. Thomas E. Perez and Phyllis C. Borzi (April 7, 2016).
[8] See, e.g., Comment Letter #41 (Georgetown University Center for Retirement Initiatives).

cases. There simply is no legal basis for not expanding the safe harbor to political subdivisions.[9]

3. Expansion of the safe harbor to political subdivisions will not unduly burden employers. The safe harbor requires the state to administer the payroll deduction savings program. The safe harbor also forbids employers from involvement other than enrolling employees (or processing their opt-out requests), transmitting payroll deductions, and communicating state-developed explanatory materials. There is no variability in these conditions across political jurisdictions or state lines. Thus, extending the safe harbor to political subdivisions would create only a minimal burden on employers because they are limited to these few ministerial functions, even if the employer operates in multiple jurisdictions and is subject to multiple payroll deduction savings programs.[10] Commenters further argue that most employers in multiple jurisdictions will be unaffected because they already offer retirement plans, the offering of which would exempt the employers from payroll deduction savings programs of state and political subdivisions.[11]

4. Expansion of the safe harbor could be limited to certain political subdivisions. To the extent there are concerns regarding the ability of smaller governmental authorities to appropriately oversee and safeguard payroll deduction savings programs, commenters have suggested that an expanded safe harbor could be restricted to political subdivisions

[9] See, e.g., Comment Letter #65 (Pension Rights Center).
[10] See, e.g., Comment Letter #38 (City of New York Office of the Comptroller), Comment Letter # 42 (City of New York Office of the Mayor), and Comment Letter # 58 (Service Employee International Union and others).
[11] See, e.g., Comment Letter #38 (City of New York Office of the Comptroller) and Comment Letter # 58 (Service Employee International Union and others).

that meet certain criteria.[12] For example, the safe harbor could be extended to political subdivisions that meet a minimum population requirement, such as a population equal to or greater than the least populous state.[13] Another criterion could be sponsorship of a governmental employee pension plan with a certain amount of assets.[14] These criteria could indicate that the political subdivision has appropriate experience and infrastructure to operate a payroll deduction savings program.[15] Another criterion could be that the political subdivision is not in a state that has established its own payroll deduction savings program.[16] Any combination of these criteria could be used to limit the safe harbor. Several commenters also suggested that political subdivisions could be required to petition the Department for approval to establish a payroll deduction savings program.[17]

5. Expansion of the safe harbor will not conflict with state initiatives. Permitting political subdivisions to establish payroll deduction savings programs will not necessarily result in interference with state initiatives in this area. States generally have the authority to determine whether their political subdivisions may and should establish payroll deduction savings programs; determinations such as these are matters to be resolved between the states and their political subdivisions. If a state legislature chooses to create

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[12] Id. See also Letter from Seattle City Councilmember Tim Burgess to Hon. Thomas E. Perez and Phyllis C. Borzi (April 11, 2016).
[13] Id.
[14] See, e.g., Comment Letter #42 (City of New York Office of the Mayor).
[15] See, e.g., Comment Letter #36 (AFL-CIO) and Comment Letter # 38 (City of New York Office of the Comptroller).
[16] See, e.g., Comment Letter #38 (The City of New York Office of the Comptroller), Comment Letter # 56 (Aspen Institute Financial Security Program), and Comment Letter # 63 (Tax Alliance for Economic Mobility).
[17] See, e.g., Comment Letter # 20 (New America), Comment Letter # 56 (Aspen Institute Financial Security Program), and Comment Letter # 63 (Tax Alliance for Economic Mobility).

a program for the entire state, that program could simply preempt or incorporate any existing city-level payroll deduction savings program.[18]

The Department agrees with commenters that there may be good reasons for expanding the safe harbor to cover political subdivisions. It is not clear to the Department, however, how many such political subdivisions would have an interest in establishing programs of the kind described in the final safe harbor regulation.[19] It also is not clear how many political subdivisions would have authority to establish such programs and to require employer participation in such programs. Assuming that at least some political subdivisions could comply with the conditions of the current safe harbor for states, the Department believes that it is important to consider whether these political subdivisions' programs should be included in the safe harbor and that the Department's analysis of the issue would benefit from additional public comments. Accordingly, the Department is publishing this notice of proposed rulemaking soliciting further comments on whether and how the safe harbor should be expanded to state political subdivisions.

II. OVERVIEW OF PROPOSED RULE

The proposal would amend paragraph (h) of §2510.3-2 to add the term "or qualified political subdivision" wherever the term "State" appears in the current regulation. Thus, the regulation's safe harbor provisions would apply in the same manner to payroll deduction savings programs of qualified political subdivisions as they currently apply to state programs. The proposal would add a new paragraph (h)(4) to define the term "qualified political subdivision." Proposed paragraph (h)(4) would define qualified

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[18] See, e.g., Comment Letter # 57 (Public Advocate for the City of New York).

[19] Thus far, the Department has received written letters of interest from representatives of Philadelphia, New York City, and Seattle.

political subdivision as any governmental unit of a state, including any city, county, or similar governmental body that meets three criteria. First, the political subdivision must have the authority, implicit or explicit, under state law to require employers' participation in the payroll deduction savings program. Second, the political subdivision must have a population equal to or greater than the population of the least populous state.[20] Third, the political subdivision cannot be within a state that has a state-wide retirement savings program for private-sector employees. The definition in paragraph (h)(4) of the proposal would not apply for other purposes under ERISA, such as for determining whether an entity is a political subdivision for purposes of the definition of a "governmental plan" in section 3(32) of ERISA, 29 U.S.C. 1002(32).

According to the U.S. Census Bureau, there are approximately 90,000 local governmental units that could be considered "political subdivisions" for purposes of the proposed regulation.[21] Of this number, there are approximately 40,000 "general-purpose" political subdivisions in the United States, which include county governments, municipal governments, and township governments.[22] The remaining approximately 50,000 political subdivisions are so-called "special-purpose" political subdivisions that perform only one function or a very limited number of functions, such as school districts,

[20] For this purpose, the term "state" does not include the non-state authorities listed in section 3(10) of ERISA. Thus, it does not include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and Wake Island.

[21] The U.S. Census Bureau's count for 2012 (the most recent data available). The U.S. Census Bureau produces data every 5 years as a part of the Census of Governments in years ending in "2" and "7." See U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (http://www.census.gov/govs/cog/index.html).

[22] The U.S. Census Bureau's count of general-purpose political subdivisions for 2012 was 38,910 (3,031 counties, 19,519 municipalities, and 16,360 townships). Id.

utility districts, water and sewer districts, and transit authorities.[23] The number of political subdivisions within each state varies widely across the nation, with Illinois, Minnesota, Pennsylvania, and Ohio having over 2,000 general-purpose subdivisions, while Hawaii has only four.[24] In addition, the populations of political subdivisions range greatly in size, for example, from 10,170,292 (Los Angeles County) to 1 (Monowi Village, Nebraska).[25]

Given these statistics, the proposed definition is intended to reduce the number of political subdivisions that would be able to fit within the safe harbor to a small subset of the total number of political subdivisions in the U.S. The Department is sensitive to the issue regarding the potential for overlapping programs to apply, for example, to an employer that might be operating in a state (or states) with multiple political subdivisions. In addition, given that the vast majority of political subdivisions are relatively small in terms of population (approximately 83% have populations of less than 10,000 people), the Department also is sensitive to the issue of whether smaller political subdivisions have the ability to oversee and safeguard payroll deduction savings programs.[26] A narrow expansion of the safe harbor would address these concerns.

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[23] The Census Bureau's count of special-purpose political subdivisions for 2012 was 51,146. Special-purpose political subdivisions include school districts and all other single or limited purpose political subdivisions, known by a variety of titles, including districts, authorities, boards, and commissions. Id.

[24] Illinois has 2,831, Minnesota has 2,724, Pennsylvania has 2,627 and Ohio has 2,333 general-purpose political subdivisions. Note also that the District of Columbia has only one general-purpose political subdivision. See U.S. Census Bureau, Local Governments by Type and State: 2012 Census of Governments (http://www.census.gov/govs/cog/index.html).

[25] U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: 2015 Population Estimate (http://www.census.gov/popest/data/counties/totals/2015/index.html); U.S. Census Bureau, Annual Estimates of the Resident Population for Cities and Towns (Incorporated Places and Minor Civil Divisions): 2015 Population Estimate (https://www.census.gov/popest/data/cities/totals/2015/index.html).

[26] U.S. Census Bureau, County Governments by Population-Size Group and State: 2012 Census of Governments; U.S. Census Bureau; Subcounty Governments by Population-Size Group and State: 2012 Census of Governments (http://www.census.gov/govs/cog/index.html).

The proposal's first limit on the number of political subdivisions is the criterion that, to be within the safe harbor, the political subdivision must have the authority under state law to require employers within its jurisdiction to participate in the payroll deduction savings program, including in particular, the power to require wage withholding in the case of programs with automatic enrollment.[27] See Prop. Reg. § 2510.3-2(h)(4)(i). As proposed, this requirement does not mean that a state law must explicitly authorize the political subdivision to establish the program at issue, but the political subdivision would need to have authority, implicit or explicit, under state law to establish and operate the program and compel employer participation. The Department understands that this criterion (i.e., that the political subdivisions have the ability to compel employer participation) will have the effect of limiting the proposed definition, and therefore the scope of the safe harbor, to so-called "general-purpose" subdivisions, meaning political subdivisions with authority to exercise traditional sovereign powers, such as the power of taxation, the power of eminent domain, and the police power. The Department does not expect that "special-purpose" subdivisions, such as utility districts or transit authorities, ordinarily will have this kind of authority under state law. This limitation is expected to reduce the universe of potential political subdivisions to approximately 40,000 from the approximately 90,000 total.

Commenters suggested three specific additional criteria that could be used to narrow this universe of approximately 40,000 political subdivisions even further. The first suggested criterion is that a political subdivision would have a population equal to or

[27] This criterion not only limits the number of political subdivisions that would be eligible for the safe harbor, it also is central to the Department's analysis under section 3(2) of ERISA and the conclusion that employers are not establishing or maintaining ERISA-covered plans.

greater than the population of the least populous state.[28] The second suggested criterion is that the state in which the political subdivision exists does not have a state-wide retirement savings program for private-sector employees. The third suggested criterion is that a political subdivision would have demonstrated capacity to design and operate a payroll deduction savings program, such as by maintaining a pension plan with substantial assets for employees of the political subdivision.[29]

The proposal adopts only the first two criteria suggested by the commenters. To be within the safe harbor, the proposal would require that the political subdivision have a population equal to or greater than the population of the least populous State (excluding the District of Columbia and territories listed in section 3(10) of the ERISA). See Prop. Reg. § 2510.3-2(h)(4)(ii). Based on the most recently available U.S. Census Bureau statistics, Wyoming is the least populous state, with approximately 600,000 residents. The Department has two primary policy reasons for adopting this criterion. First, it is important to the Department that the proposal not expand the safe harbor to political subdivisions that may not have the experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that is sufficiently protective of employees. The existing public record does not convince the Department that small political subdivisions in general have comparable experience, resources, and capacity to

[28] Wyoming is the least populated state in the U.S., with a population of 586,107. See U.S. Census Bureau, Annual Estimates of the Resident Population for States: 2015 Population Estimate (https://www.census.gov/popest/data/state/totals/2015/index.html).

[29] New York City, for instance, has five different pension funds with their combined $160 billion in assets and a deferred compensation plan with over $15 billion in assets. See Comment Letter # 42 (City of New York Office of Mayor) and Comment Letter #38 (City of New York Office of Comptroller).

those of the least populous state.[30] Second, it is important to the Department that the proposal reduce the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs. This criterion would significantly reduce the possibility of overlap by limiting the universe of potentially eligible political subdivisions from approximately 40,000 to a subset of approximately 136 political subdivisions.[31]

In addition, the proposal would further condition the safe harbor on the political subdivision not being in a state that has a state-wide retirement savings program for private-sector employees. See Prop. Reg. § 2510.3-2(h)(4)(iii). For instance, eight states presently have adopted laws to implement some form of state-wide savings program for private-sector employees.[32] This criterion would exclude from the safe harbor approximately 48 additional political subdivisions with populations equal to or greater than the population of Wyoming, thereby limiting the universe of potentially eligible political subdivisions to approximately 88.[33] The criterion is intended to mitigate overlap and duplication in circumstances where it is most likely to exist, and contemplates, but is not necessarily limited to, those state retirement savings programs described in the safe harbor rule at 29 CFR 2510.3-2(h) and the Department's Interpretive Bulletin at 29 CFR 2509.2015-02.

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[30] The regulation does not preclude these smaller political subdivisions from establishing their own programs, but for policy reasons the Department chooses not to extend safe harbor status to such programs.
[31] As of 2015, there were approximately 136 general-purpose political subdivisions with populations equal to or greater than the population of Wyoming.
[32] California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000-100044 (2012); Connecticut Retirement Security Program Act, Pub. Act. 16-29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, ch. 324 (H.B. 1378) (2016); Mass. Gen. Laws ch. 29, §64E (2012); New Jersey Small Business Retirement Marketplace Act, Pub. L. 2015, ch. 298; Oregon Retirement Savings Board Act, ch. 557 (H.B. 2960) (2015); Washington State Small Business Retirement Savings Marketplace Act, Wash. Rev. Code §§ 43.330.730-750 (2015).
[33] Supra at footnote 25.

The Department also is considering the possibility of further limiting the universe of potentially eligible political subdivisions. The Department is considering whether to add the third criterion suggested by the commenters that would require that political subdivisions have a demonstrated capacity to design and operate a payroll deduction savings program, such as by maintaining a pension plan with substantial assets for employees of the political subdivision. Whereas the "smallest state" criterion in paragraph (h)(4)(ii) of the proposal would assume that political subdivisions have sufficient experience, capacity, and resources to safely establish and oversee a payroll deduction savings program by using population as a proxy for evidence of these characteristics, this criterion would require direct and objectively verifiable evidence of this ability. For example, a political subdivision that establishes and maintains a large defined benefit plan for its governmental employees would be more likely to have sufficient experience, capacity, and resources to design and operate a payroll deduction savings program.

III. SOLICITATION OF COMMENTS

The Department seeks comments on all aspects of this proposal. Although general comments and views on whether or not the safe harbor should be expanded to cover political subdivisions are solicited, the Department is especially interested in comments on the proposed definition of "qualified political subdivision" in paragraph (h)(4). Specifically, commenters are encouraged to focus on the three specific limiting criteria in paragraphs (i), (ii), and (iii) of (h)(4) of the proposal, and to address the following operational questions.

With respect to paragraph (h)(4)(ii) of the proposal (requiring the political subdivision to have a population equal to or greater than the population of the least populous state), comments are solicited on whether the final regulation should contain a provision to address the possibility of fluctuating populations of states and political subdivisions and the consequences of a qualified political subdivision falling below the required population threshold after it has already established and is administering a payroll deduction savings program. For instance, determinations under paragraph (h)(4)(ii) could be made at a fixed point in time and preserved, such that future changes in populations of the state, political subdivision, or both would not affect the program's status under the safe harbor. The phrase "at the time it establishes its payroll deduction savings program," for example, could be added to the end of paragraph (h)(4)(ii) of the proposal to accomplish this result.

With respect to paragraph (h)(4)(iii) of the proposal (relating to situations in which a state has a preexisting state-wide retirement savings program), comments are solicited on whether the final regulation should address the effect on the status of a payroll deduction savings program of a qualified political subdivision if the state in which the subdivision is located establishes a state-wide retirement savings program after the subdivision has established and operates a payroll deduction savings program. If a state were to establish a state-wide program after one of its subdivisions previously had done so, presumably the state would take into account the nature and existence of the subdivision's program and act in a measured and calculated way so as to avoid or mitigate any undesirable overlap, in which case the final regulation need not address the issue. For example, the state could act by displacing the subdivision's program after a transition period or coordinating the state and subdivision programs. Either approach would mitigate overlap. In addition, for an employer that had employees in two adjoining states, overlap could be avoided or mitigated by coordination among the states (including their political subdivisions) to, for example, exempt any employer that complied with any state (or political subdivision) program or sponsored a workplace savings arrangement. The intent of such approaches could be to ensure that employers would never be subject to more than one state (or political subdivision) program.

Also with respect to paragraph (h)(4)(iii) of the proposal, comments are solicited on whether the final regulation should expand this provision to cover, for example, those situations in which a political subdivision, encompassed within the jurisdictional boundaries of a larger political subdivision that already maintains a retirement savings program, seeks to establish a payroll deduction savings program. For instance, if a county in a state without a state-wide retirement savings program were to establish a county-wide retirement savings program, the question is whether paragraph (h)(4)(iii) of the proposal should be expanded to preclude a city in (or in part of) that county from thereafter being considered a qualified political subdivision. Thus, in much the same way that paragraph (h)(4)(iii) of the proposal would mitigate overlap across the entire state, the expansion discussed in this paragraph could mitigate overlap across political subdivisions, in circumstances in which there is no state-wide retirement savings program.

In addition, commenters are encouraged to focus on the criterion relating to a demonstrated capacity to design and operate a payroll deduction savings program. As mentioned above, this criterion is being considered by the Department, but is not included in paragraph (h)(4) of the proposal. Comments on what objective evidence could be used by political subdivisions to establish that they have sufficient experience, capacity, and resources to design and operate a payroll deduction savings program would be particularly useful.

Some commenters, by contrast, suggested fewer limitations than what is included in paragraph (h)(4) of the proposal. These commenters believe that the only limitation needed is the one in paragraph (h)(4)(i) of the proposal (i.e., the political subdivision must have the requisite authority, implicit or explicit, under state law to require the employer's participation in the program). The Department requests that commenters also address this approach and whether, and to what extent, overlap would be a problem under this approach and if not, why. Further, if the safe harbor is expanded to qualified political subdivisions, commenters are encouraged to address whether the conditions of the existing safe harbor should differ in any way as applied to the qualified political subdivisions. In addition, the Department is interested in additional comments on other criteria, not discussed in this proposal, which might be used to refine the definition of qualified political subdivision in the proposed regulation or other facets of the safe harbor more generally.

IV. REGULATORY IMPACT ANALYSIS

A. Executive Order 12866 Statement

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is ‘‘significant’’ and therefore subject to the requirements of the Executive Order and review by OMB. Section 3(f) of the Executive Order defines a ‘‘significant regulatory action’’ as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as an ‘‘economically significant’’ action); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

OMB has tentatively determined that this regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, it has determined that the action is significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the proposed rule and the Department provides the following assessment of its benefits and costs.

B. Background and Need for Regulatory Action

As discussed in detail above in Section I of this preamble, several commenters on the 2015 proposal urged the Department to expand the safe harbor to include payroll deduction savings programs established by political subdivisions of states. In particular, the commenters argued that the proposal would be of little or no use for employees of employers in political subdivisions in states that choose not to have a state-wide program, even though there is strong interest in a payroll deduction savings program at a political subdivision level, such as New York City, for example. Certain commenters asked the

Department to consider extending the safe harbor to large political subdivisions (in terms of population) with authority and capacity to maintain such programs.

The Department stated in the final rule that it agrees with these commenters but believes that its analysis of the issue would benefit from additional public comments. Accordingly, the Department is publishing this notice of proposed rulemaking, which would amend paragraph (h) of §2510.3-2 to cover payroll deduction savings programs of qualified political subdivisions, defined in paragraph (h)(4) as "any governmental unit of a State, including a city, county, or similar governmental body, that (i) has the authority, implicit or explicit, under State law to require employers' participation in the program as described in paragraph (h)(1)(ix) of this section; (ii) has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and territories listed in section 3(10) of the Act); and (iii) is not located in a State that pursuant to State law establishes a state-wide retirement savings program for private-sector employees."

C. Benefits and Costs

In analyzing benefits and costs associated with this proposed rule, the Department focuses on the direct effects, which include both benefits and costs directly attributable to the rule. These benefits and costs are limited, because as stated above, the proposed rule would merely establish a safe harbor describing the circumstances under which a qualified political subdivision with authority under state law could establish payroll deduction savings programs that would not give rise to ERISA-covered employee pension benefit plans. It does not require qualified political subdivisions to take any actions nor employers to provide any retirement savings programs to their employees.

The Department also addresses indirect effects associated with the proposed rule, which include (1) potential benefits and costs directly associated with the requirements of qualified political subdivision payroll deduction savings programs, and (2) the potential increase in retirement savings and potential cost burden imposed on covered employers to comply with the requirements of such programs. Indirect effects vary by qualified political subdivisions depending on their program requirements and the degree to which the proposed rule might influence political subdivisions to design their payroll deduction savings programs.

1. Direct Benefits

The Department believes that political subdivisions and other stakeholders would directly benefit from the proposal to expand the scope of the safe harbor to include payroll deduction savings programs established by qualified political subdivisions eligible for the safe harbor rule. Similar to the states, this will provide political subdivisions with clear guidelines to determine the circumstances under which programs they create for private-sector workers would not give rise to the establishment of ERISA-covered plans. The Department expects that the proposed rule would reduce legal costs, including litigation costs political subdivisions would incur, by (1) removing uncertainty about whether such political subdivision payroll deduction savings programs give rise to the establishment of plans that are covered by Title I of ERISA, and (2) creating efficiencies by eliminating the need for multiple political subdivisions to incur the same costs to determine that their programs would not give rise to the establishment of ERISA-covered plans. However, these benefits would be limited to qualified political subdivisions meeting all criteria set forth in this proposed rule. Those governmental units of a state, including any city, county, or similar governmental body that are not eligible to use the safe harbor may incur legal costs if they elect to establish their own payroll deduction savings programs. Furthermore, the population size criterion inherently induces uncertainty about eligibility status because population sizes of both states and political subdivisions change over time due to births, deaths, and migrations. Some political subdivisions currently meeting the safe harbor criteria may face uncertainty and incur legal costs later if they fail the population test after they establish their own payroll deduction savings programs.[34] This uncertainty about the eligibility status may deter some political subdivisions that barely meet the population size requirement from establishing their own payroll deduction savings programs, especially if their populations are projected to decline or to remain steady compared to the population growth of the least populous state in near future. For example, a currently qualified political subdivision interested in establishing its own payroll deduction savings program may not do so if it is unsure whether it can continuously meet the population criterion set forth in this proposed rule. Similarly, some qualified political subdivisions may face uncertainty if their states establish a state-wide retirement savings programs later. Thus, although the Department estimates approximately 88 political subdivisions could become qualified under this proposed rule, some qualified political subdivisions may not consider themselves as qualified in a practical sense based on the uncertainty regarding their population growth and their states' decisions in near future. Even beyond that, some

[34] According to 1980 Census, Alaska was the least populated state but in 2010, it followed Wyoming and Vermont as the third smallest state. Wyoming was the least populated state in 2000 and 2010. A number of counties and cities that were more populated than Wyoming in 2000 became less populated than Wyoming in 2010. For example, to name a few, Delaware County in Pennsylvania, New Castle County in Delaware, Summit County in Ohio, Union County in New Jersey were larger than Wyoming by population in 2000 yet became smaller by 2010. Another example would be Las Vegas city in Nevada. Las Vegas city was smaller than Wyoming in 2000 but it surpassed Wyoming in population size by 2010.

political subdivisions may have no interest in establishing payroll deduction savings programs without regard to the safe harbor in the proposal.

The Department notes that the proposed rule would not prevent political subdivisions from identifying and pursuing alternative policies, outside of the safe harbor, that also would not require employers to establish or maintain ERISA-covered plans. Thus, while the proposed rule would reduce uncertainty about political subdivision activity within the safe harbor, it would not impair political subdivision activity outside of it. This proposed regulation is a safe harbor and as such, does not require employers to participate in qualified political subdivision payroll deduction savings programs; nor does it purport to define every possible program that does not give rise to the establishment of ERISA-covered plans.

2. Direct Costs

The proposed rule does not require any new action by employers or the political subdivisions. It merely establishes a safe harbor describing certain circumstances under which qualified political subdivision-required payroll deduction savings programs would not give rise to an ERISA-covered employee pension benefit plan and, therefore, should not be preempted by ERISA. Political subdivisions may incur legal costs to analyze the rule and determine whether their programs fall within the safe harbor. However, the Department expects that these costs will be less than the costs that would be incurred in the absence of the proposed rule. Some political subdivisions currently developing payroll deduction savings programs would need to monitor their current population to assess their eligibility for the safe harbor, projected population sizes as well as the least populous state's size. However, the Department expects these monitoring costs to be small, because such monitoring activity generally would be confined to political subdivisions with a population size similar to the least populous state. Similarly, some political subdivisions interested in developing their own payroll deduction savings programs would also need to monitor states' activities regarding state-wide retirement savings programs and communicate with states to mitigate any undesirable overlap.

Qualified political subdivisions may incur administrative and operating costs including mailing and form production costs. These potential costs are not directly attributable to the proposed rule; however, they are attributable to the political subdivision's creation of the payroll deduction savings program pursuant to its authority under state law. Some commenters on the 2015 proposed rule expressed the concern that smaller political subdivisions without the experience or capabilities to administer a payroll deduction savings program may contemplate creating and operating their own programs if the safe harbor rule is extended to all political subdivisions without any restrictions. This proposed rule addresses this concern by limiting eligibility for the safe harbor rule based on a political subdivision's population size, assuming larger political subdivisions are more likely than smaller ones to have sufficient existing resources, experience, and infrastructure to create and implement payroll deduction savings programs.

3. Uncertainty

The Department is confident that the proposed safe harbor rule, by clarifying that qualified political subdivision programs do not require employers to establish ERISA-covered plans, will benefit political subdivisions and many other stakeholders otherwise beset by greater uncertainty. However, the Department is unsure as to the magnitude of the benefits, costs and transfer impacts of these programs, because they will depend on the qualified political subdivisions' independent decisions on whether and how best to take advantage of the safe harbor and on the cost that otherwise would have been attached to uncertainty about the legal status of the qualified political subdivisions' actions. The Department is also unsure of (1) the proposed rule's effects on political subdivisions that do not meet the safe harbor criteria, (2) whether any of these ineligible political subdivisions are currently developing their own payroll deduction savings programs, and (3) the extent to which ineligible political subdivisions would be discouraged from designing and implementing payroll deduction savings programs. The Department cannot predict what actions political subdivisions will take, stakeholders' propensity to challenge such actions' legal status, either absent or pursuant to the proposed rule, or courts' resultant decisions.

4. Indirect Effects: Impact of Qualified Political Subdivision Payroll Deduction Savings Programs

As discussed above, the impact of qualified political subdivision payroll deduction savings programs is directly attributable to the qualified political subdivision legislation that creates such programs. As discussed below, however, under certain circumstances, these effects could be indirectly attributable to the proposed rule. For example, it is conceivable that more qualified political subdivisions could create payroll deduction savings programs due to the clear guidelines provided in the proposed rule and the reduced risk of an ERISA preemption challenge, and therefore, the increased prevalence of such programs would be indirectly attributable to the proposed rule. However, such an increase would be bounded by the eligibility restrictions for political subdivisions. If this issue were ultimately resolved in the courts, the courts could make a different preemption decision in the rule's presence than in its absence. Furthermore, even if a potential court decision would be the same with or without the rulemaking, the potential reduction in political subdivisions' uncertainty-related costs could induce more political subdivisions to pursue these workplace savings initiatives. An additional possibility is that the rule would not change the prevalence of political subdivision payroll deduction savings programs, but would accelerate the implementation of programs that would exist anyway. With any of these possibilities, there would be benefits, costs and transfer impacts that are indirectly attributable to this rule, via the increased or accelerated creation of political subdivision-level payroll deduction savings programs.

The possibility exists that the proposed rule could result in an acceleration or deceleration of payroll deduction programs at the state level depending on the circumstances. For example, if multiple cities in a state set up robust, successful payroll deduction savings programs, a state that might otherwise create its own program could conclude a state-wide program no longer is necessary. On the other hand, states could feel pressure to create a state-wide program if a city in the state does so in order to provide retirement income security for all of its citizens. However, problems could arise if the state and city programs overlap. Therefore, in Section III above, the Department solicits comments regarding whether the final regulation should clarify the status of a payroll deduction savings program of a qualified political subdivision when the state in which the subdivision is located establishes a state-wide retirement savings program after the qualified political subdivision establishes and operates its program. As discussed in the comment solicitation, the Department expects that in this circumstance, states would take into account the nature and existence of the qualified political subdivision's program and act in a measured and calculated way to ensure undesirable overlaps are eliminated.

Qualified political subdivisions that elect to establish payroll deduction savings programs pursuant to the safe harbor would incur administrative and operating costs, which can be substantial especially in the beginning years until the payroll deduction savings programs become self-sustaining. In addition, in order to avoid conflicts and confusion, qualified political subdivisions may incur costs to coordinate with other subdivisions, particularly those with overlapping boundaries.[35] However, these costs should offset compliance costs affected employers in the political subdivision would otherwise incur in the absence of communication and coordination.

The Department acknowledges the possibility that conflicting programs could be created in overlapping qualified political subdivisions when their programs are not coordinated in states without state-wide retirement savings program. Therefore, in order to obtain information that may help evaluate approaches to mitigate overlap across political subdivision, the Department solicits comments in Section III above regarding whether paragraph (h)(4)(iii) of the proposed rule should be expanded to, for example, preclude a city that is located within a county from being considered a qualified political subdivision if the county has established a county-wide payroll deduction savings program.

[35] For example, Harris County and City of Houston in Texas both would be eligible for the safe harbor and could create and operate their own savings programs. In this scenario, it would be ideal for the political subdivisions to coordinate and communicate with each other in developing and implementing savings programs to avoid conflicting rules and confusion for employers.

Employers may incur costs to update their payroll systems to transmit payroll deductions to the political subdivision or its agent, develop recordkeeping systems to document their collection and remittance of payments under the payroll deduction savings program, and provide information to employees regarding the political subdivision programs. As with political subdivisions' operational and administrative costs, some portion of these employer costs would be indirectly attributable to the rule if more political subdivision payroll deduction savings programs are implemented in the rule's presence than would be in its absence. Because the proposed rule narrows the number of political subdivisions that are eligible for the safe harbor rule, the aggregate costs imposed on employers would be limited. Moreover, in order to satisfy the safe harbor, most associated costs for employers would be nominal because the roles of employers are limited to ministerial functions such as withholding the required contribution from employees' wages, remitting contributions to the political subdivision program and providing information about the program to employees. However, these costs would be incurred disproportionately by small employers and start-up companies, which tend to be least likely to offer pensions. According to one survey, about 60% of small employers do not use a payroll service.[36] These small employers may incur additional costs to use external payroll companies to comply with their political subdivisions' programs. However, some small employers may decide to use a payroll service to withhold and remit payroll taxes independent of their political subdivisions'

[36] National Small Business Association, April 11, 2013, "2013 Small Business Taxation Survey." This survey says 23% of small employers who handle payroll taxes internally have no employees. Therefore, only about 46%, not 60%, of small employers would be in fact affected by political subdivisions' payroll deduction savings programs, based on this survey. The survey does not include small employers that use payroll software or on-line payroll programs, which provide a cost effective means for such employers to comply with payroll deduction savings programs.

program requirement. Therefore, the extent to which these costs can be attributable to political subdivisions' programs could be smaller than what some might estimate. Moreover such costs could be mitigated if political subdivisions exempt the smallest companies from their payroll deduction savings programs as some states do. The Department welcomes comments regarding this assessment.

Employers, particularly those operating in multiple political subdivisions, may face potentially increased costs to comply with several political subdivision payroll deduction savings programs. This can be more challenging for employers if they operate in political subdivisions where not all subdivisions have their own payroll deduction savings programs and/or where some subdivisions' programs conflict with others. The Department acknowledges the heightened complexity caused by political subdivisions' payroll deduction savings programs and challenges faced by employers. However, the employers operating across several political subdivision borders may have ERISA-covered plans in place for their employees. Thus, there may be no cost burden associated with complying with multiple political subdivision payroll deduction savings programs because employers that sponsor plans might be exempt from those programs. Furthermore, in order to satisfy the proposed safe harbor rule, the role of employers would be limited to ministerial functions such as timely transmitting payroll deductions, which implies that the increase in cost burden is further likely to be restricted. By limiting the eligibility to political subdivisions in states without state-wide retirement savings programs, this proposed rule addresses the concerns raised by several commenters about the possibility that a political subdivision's program may conflict with its state's retirement savings program.

The Department believes that well-designed political subdivision-level payroll deduction savings programs have the potential to effectively reduce gaps in retirement security. Relevant variables such as pension coverage, labor market conditions,[37] population demographics, and elderly poverty, vary widely across the political subdivisions, suggesting a potential opportunity for progress at the political subdivision level. Many workers throughout these political subdivisions currently may save less than would be optimal due to (1) behavioral biases (such as myopia or inertia), (2) labor market conditions that prevent them from accessing plans at work, or (3) their employers failure to offer retirement plans.[38] Some research suggests that automatic contribution policies are effective in increasing retirement savings and wealth in general by overcoming behavioral biases or inertia.[39] Well-designed political subdivisions' payroll deduction savings programs could help many savers who otherwise might not be saving enough or at all to begin to save earlier than they might have otherwise. Such workers will have traded some consumption today for more in retirement, potentially reaping net gains in overall lifetime well-being. Their additional savings may also reduce fiscal pressure on publicly financed retirement programs and other public assistance programs, such as the Supplemental Nutritional Assistance Program, that support low-income Americans, including older Americans.

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[37] See, e.g., U.S. Bureau of Labor Statistics, ''Metropolitan Area Employment and Unemployment—May 2016,'' USDL–16–1291 (June 29, 2016).

[38] According to the National Compensation Survey, March 2016, only 66% of private-sector workers have access to retirement benefits – including Defined Benefit and Defined Contribution plans - at work. According to the comment letter submitted by the Public Advocate for the City of New York, only 41 percent of individuals working in the private sector within the five boroughs of New York City have access to retirement savings plans at work.

[39] See Chetty, Friedman, Leth-Petresen, Nielsen & Olsen, "Active vs. Passive Decisions and Crowd-out in Retirement Savings Accounts: Evidence from Denmark," 129 Quarterly Journal of Economics 1141-1219 (2014). See also Madrian and Shea, "The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior," 116 Quarterly Journal of Economics 1149-1187 (2001).

The Department believes that well-designed political subdivision payroll deduction savings programs can achieve their intended, positive effects of fostering retirement security. However, the potential benefits – primarily increases in retirement savings – might be somewhat limited, because the proposed safe harbor does not allow employer contributions to political subdivisions' payroll deduction savings programs. Additionally, the initiatives might have some unintended consequences. Those workers least equipped to make good retirement savings decisions arguably stand to benefit most from these programs, but also arguably could be at greater risk of suffering adverse unintended effects. Workers who would not benefit from increased retirement savings could opt out, but some might fail to do so. Such workers might increase their savings too much, unduly sacrificing current economic needs. Consequently, they might be more likely to cash out early and suffer tax losses (unless they receive a non-taxable Roth IRA distribution), and/or to take on more expensive debt to pay necessary bills. Similarly, political subdivisions' payroll deduction savings programs directed at workers who do not currently participate in workplace savings arrangements may be imperfectly targeted to address gaps in retirement security. For example, some college students might be better advised to take less in student loans rather than open an IRA and some young families might do well to save more first for their children's education and later for their own retirement. In general, workers without retirement plan coverage tend to be younger, lower-income or less attached to the workforce, thus these workers may be financially stressed or have other savings goals. Because only large political subdivisions can create and implement programs under the proposed rule, these demographic characteristics can be more pronounced assuming large political subdivisions tend to have more diverse workforces.[40] If so, then the benefits of political subdivisions' payroll deduction savings programs could be further limited and in some cases potentially harmful for certain workers. Although these might be valid concerns, political subdivisions are responsible for designing effective programs that minimize these types of harm and maximize benefits to participants.

There is another concern that political subdivision initiatives may "crowd-out" ERISA-covered plans. The proposed rule may inadvertently encourage employers operating in multiple political subdivisions to switch from ERISA-covered plans to political subdivision payroll deduction savings programs in order to reduce costs especially if they are required to cover employees currently ineligible to participate in ERISA-covered plans under political subdivision programs. This proposed rule makes clear that political subdivision programs directed toward employers that do not offer other retirement plans fall within this proposed safe harbor rule. However, employers that wish to provide retirement benefits are likely to find that ERISA-covered programs, such as 401(k) plans, have advantages for them and their employees over participation in political subdivision programs. Potential advantages include significantly higher limits on tax-favored contributions, greater flexibility in plan selection and design, opportunity for employers to contribute, ERISA protections, and larger positive recruitment and retention effects. Therefore it seems unlikely that political subdivision initiatives will ''crowd-out'' many ERISA-covered plans, although, if they do, some workers might lose ERISA-protected benefits that could have been more generous and more secure than

[40] See e.g., Comment Letter # 57 (Public Advocate for the City of New York).

political subdivision-based (IRA) benefits if political subdivisions do not adopt consumer protections similar to those Congress provided under ERISA.

There is also the possibility that some workers who would otherwise have saved more might reduce their savings to the low, default levels associated with some political subdivision programs. Political subdivisions can address this concern by incorporating into their programs participant education or ‘‘auto-escalation’’ features that increase default contribution rates over time and/or as pay increases. There also is a concern that political subdivisions’ programs would in general provide participants with less consumer protection than ERISA-covered plans. However, this concern can be addressed by political subdivisions designing their programs with sufficient participant protections.

D. Regulatory Alternatives

As discussed in Section II of this preamble, the Department was presented with and considered two divergent alternatives in determining which political subdivisions would be qualified to use the safe harbor.

Under the first and broadest alternative, the safe harbor could be made available to any political subdivision in the U.S. with the authority to require employers to participate in payroll deduction programs. According to U.S. Census Bureau data, tens of thousands of political subdivisions would qualify under this approach.[41] While this alternative potentially could result in providing access to payroll deduction savings programs to the most workers in a state, the Department did not adopt this alternative

[41] The U.S. Census Bureau’s count for 2012 (the most recent data available). The U.S. Census Bureau produces data every 5 years as a part of the Census of Governments in years ending in “2” and “7.” See U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (http://www.census.gov/govs/cog/index.html).

because it could cause administrative complexity for employers operating in a state (or states) with multiple political subdivisions due to overlapping programs of political subdivisions. Moreover, the vast majority of political subdivisions are relatively small in terms of population (83% have populations of less than 10,000 people), and the Department is sensitive to the issue of whether smaller political subdivisions have the ability, experience, and resources to oversee payroll deduction savings programs and safeguard employee contributions to such programs.[42]

By contrast, the narrower approach the Department considered and adopted in the proposal would reduce the number of potentially qualified political subdivisions by applying the criteria set forth in paragraphs (h)(4)(i)-(iii) of the proposal. This approach should reduce administrative burden and complexity on employers and protect workers by ensuring that payroll deduction savings programs would be established and operated by larger political subdivisions. The consequence of this approach may be that fewer employees will be automatically enrolled in payroll deduction savings programs of political subdivisions, but the Department found this to be the preferred alternative, because it balances two very important policy goals of advancing secure coverage and savings opportunities for workers whose employers do not offer workplace savings programs while reducing burdens on employers. Comments are solicited on this analysis.

E. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the

[42] U.S. Census Bureau, County Governments by Population-Size Group and State: 2012 Census of Governments; U.S. Census Bureau; Subcounty Governments by Population-Size Group and State: 2012 Census of Governments (http://www.census.gov/govs/cog/index.html).

general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department has determined this proposed rule is not subject to the requirements of the PRA, because it does not contain a "collection of information" as defined in 44 U.S.C. 3502(3). The rule does not require any action by or impose any requirements on employers or the states. It merely clarifies that certain political subdivision payroll deduction savings programs that encourage retirement savings would not result in the creation of employee benefit plans covered by Title I of ERISA.

Moreover, the PRA definition of "burden" excludes time, effort, and financial resources necessary to comply with a collection of information that would be incurred by respondents in the normal course of their activities. See 5 CFR 1320.3(b)(2). The definition of "burden" also excludes burdens imposed by a state, local, or tribal government independent of a Federal requirement. See 5 CFR 1320.3(b)(3). The proposed rule imposes no burden on employers, because political subdivisions customarily include notice and recordkeeping requirements when enacting their payroll deduction savings programs. Thus, employers participating in such programs are responding to political subdivision, not Federal, requirements.

Although the Department has determined that the proposed rule does not contain a collection of information, when rules contain information collections the Department invites comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the burden of the collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

In addition to having an opportunity to file comments with the Department, comments may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the proposed rule to ensure their consideration.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

The proposed rule merely establishes a new safe harbor describing circumstances in which payroll deduction savings programs established and maintained by political subdivisions would not give rise to ERISA-covered employee pension benefit plans. Therefore, the proposed rule imposes no requirements or costs on small employers, and the Department believes that it will not have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million as adjusted for inflation.

H. Congressional Review Act

The proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The proposed rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign- based enterprises in domestic and export markets.

I. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires adherence to specific criteria by federal agencies in formulating and implementing policies that have ‘‘substantial direct effects’’ on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final regulation.

In the Department’s view, the proposed regulations, by clarifying that certain workplace savings arrangements under consideration or adopted by certain political subdivisions will not result in creation of employee benefit plans under ERISA, would provide more latitude and certainty to political subdivisions and employers regarding the treatment of such arrangements under ERISA. The Department will affirmatively engage in outreach with officials of states, political subdivisions, and with employers and other stakeholders, regarding the proposed rule and seek their input on the proposed rule and any federalism implications that they believe may be presented by it.

List of Subjects in 29 CFR Part 2510

Accounting, Employee benefit plans, Employee Retirement Income Security Act, Pensions, Reporting, Coverage.

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR 2510 as set forth below:

PART 2510--DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1-2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3-101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3-38 is also issued under sec. 1, Pub. L. 105-72, 111 Stat. 1457 (1997).

2. Revise § 2510.3-2 (h) to read as follows:

(h) <u>Certain governmental payroll deduction savings programs</u>. (1) For purposes of title I of the Act and this chapter, the terms “employee pension benefit plan” and “pension plan” shall not include an individual retirement plan (as defined in 26 U.S.C.

7701(a)(37)) established and maintained pursuant to a payroll deduction savings program of a State or qualified political subdivision of a State, provided that:

(i) The program is specifically established pursuant to State or qualified political subdivision law;

(ii) The program is implemented and administered by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;

(iii) The State or qualified political subdivision (or governmental agency or instrumentality of either) assumes responsibility for the security of payroll deductions and employee savings;

(iv) The State or qualified political subdivision (or governmental agency or instrumentality of either) adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;

(v) Participation in the program is voluntary for employees;

(vi) All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the State or qualified political subdivision (or governmental agency or instrumentality of either);

(vii) The involvement of the employer is limited to the following:

(A) Collecting employee contributions through payroll deductions and remitting them to the program;

(B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;

(C) Providing information to the State or qualified political subdivision (or governmental agency or instrumentality of either) necessary to facilitate the operation of the program; and

(D) Distributing program information to employees from the State or qualified political subdivision (or governmental agency or instrumentality of either) and permitting the State or qualified political subdivision (or governmental agency or instrumentality of either) to publicize the program to employees;

(viii) The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;

(ix) The employer's participation in the program is required by State or qualified political subdivision law;

(x) The employer has no discretionary authority, control, or responsibility under the program; and

(xi) The employer receives no direct or indirect consideration in the form of cash or otherwise, other than consideration (including tax incentives and credits) received directly from the State or qualified political subdivision (or governmental agency or instrumentality of either) that does not exceed an amount that reasonably approximates the employer's (or a typical employer's) costs under the program.

(2) A payroll deduction savings program will not fail to satisfy the provisions of paragraph (h)(1) of this section merely because the program—

(i) Is directed toward those employers that do not offer some other workplace savings arrangement;

(ii) Utilizes one or more service or investment providers to operate and administer the program, provided that the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains full responsibility for the operation and administration of the program; or

(iii) Treats employees as having automatically elected payroll deductions in an amount or percentage of compensation, including any automatic increases in such amount or percentage, unless the employee specifically elects not to have such deductions made (or specifically elects to have the deductions made in a different amount or percentage of compensation allowed by the program), provided that the employee is given adequate advance notice of the right to make such elections, and provided, further, that a program may also satisfy this paragraph (h) without requiring or otherwise providing for automatic elections such as those described in this paragraph (h)(2)(iii).

(3) For purposes of this section, the term "State" shall have the same meaning as defined in section 3(10) of the Act.

(4) For purposes of this section, the term "qualified political subdivision" means any governmental unit of a State, including a city, county, or similar governmental body, that–

(i) Has the authority, implicit or explicit, under State law to require employers' participation in the program as described in paragraph (h)(1)(ix) of this section;

(ii) Has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and territories listed in section 3(10) of the Act); and

(iii) Is not located in a State that pursuant to State law establishes a state-wide retirement savings program for private-sector employees.

Signed at Washington, DC, this 24th day of August, 2016.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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