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DECEMBER 18, 2017

AGENDA ITEM 8  
INFORMATION ITEM

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD

*Report from Regulations Workshops and Summary of Public Comments*

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California Secure Choice Retirement Savings Program (“Secure Choice” or “the Program”) staff hosted public workshops on draft regulations December 5, 2017 in Sacramento, CA and December 7, 2017. The December 7, 2017 workshop had been scheduled to be held in Los Angeles, however the in-person workshop was cancelled due to the wildfires in the region. Instead, the workshop was conducted by phone.

The workshops were designed as a means for the public to provide the opportunity to provide public comments in person on the draft of regulations presented to the Board at the November 27, 2017 Board meeting. In addition to the workshops, members of the public were invited to provide comments on the draft regulations in writing.

Staff received a total of nine formal written comment letters and a number of oral comments from the regulations workshop. All comments submitted in writing are posted on the [regulations](#) page on the Program website. Staff established a deadline of December 7, 2017 for written comments to ensure they had sufficient time to incorporate the comments into this agenda item, however comments received after the date will be posted online.

The public will have additional means of providing comments on the regulations. There will be a formal public comment period that is part of the emergency rulemaking process and again during regular rulemaking. Staff intend to hold a formal public hearing during the regular rulemaking process, estimated to occur in spring of 2018.

A presentation is attached to this item that summarizes the comments received on draft regulations and response to the comments by staff. Also attached are the comment letters received by the December 7, 2017 deadline and a packet of information in response to questions asked by the Board regarding IRA types at the November 27, 2017 Board meeting.

***Attachments***

- Attachment #1 – Summary of Comments on Draft Regulations
- Attachment #2 – Comment Letters
- Attachment #3 – IRA Type Considerations
- Attachment #4 – Enrollment Options

# **California Secure Choice Retirement Savings Investment Board**



## **Summary of Comments on Draft Regulations**

**December 18, 2017**

# Public Comment Opportunities

- Informal workshops on draft regulations December 5 and December 7
- Written public comments on draft regulations  
(<http://www.treasurer.ca.gov/scib/regulations/index.asp>)
- Formal public comment during emergency rulemaking (early-January or early-February 2018 depending on Board approval)
- Formal public comment during regular rulemaking (spring of 2018)

# Notes on this presentation

- This presentation reflects comments received on the draft regulations presented to the Board at the November 27, 2017 Board meeting.
- Comments reflect both written and oral comments.
- Staff responses are included below most comments with an open bullet point: “○”. Comments from the public will be shown with a closed bullet point: “●”
- Any omission or mischaracterization of comments is unintentional.
- Comment letters are posted online and included as attachments to this item.

# Employer Eligibility

10001(j),(k),(m),(o),(r),(y); 10004

- Eligibility: 5+ employees and does not offer a tax-favored retirement plan
- Number of employees: based on employees reported in DE 9C form submitted to EDD for 3<sup>rd</sup> quarter ending September 30.
- Retirement plan coverage: any tax-favored retirement plan defined in 10001(z)
- Government employers: not eligible

# *Comments on Employer Eligibility (1 of 2)*

- Are non-profit charities (i.e. *Goodwill, Salvation Army*, etc.) eligible?
  - Non-profits are included among the eligible population pursuant to Government Code (“GC”) Section 100000(d)(1). Staff is working with EDD to evaluate whether the requirements that employee pay be subject to California state unemployment Insurance (“UI”) taxes could impede eligibility of non-profit employees.
- Concerns regarding use of EDD data. Smaller employers may have more rapid turnover of employees.
  - Use of EDD data only for purposes of employer outreach regarding registration dates. Staff recommend amending regulations to note program will calculate average number of employees for previous year when using EDD data. Use of any employer enrollment method detailed later in this presentation doesn’t require EDD data to determine eligibility.

## *Comments on Employer Eligibility (2 of 2)*

- What happens when an employer drops below 5 employees?
  - Intent was for employers to notify the Program of ineligibility. One option could be for employers to notify the TPA as soon as practicable and no later than twelve/six/etc. following ineligibility.
- Regulations should clarify three-party employment relationship (i.e. Professional Employer Organizations).
  - Use of “common law” definition should provide necessary clarity for three-party employment relationship.

# Employee Eligibility

10001(i),(k)

- Eligibility: Any employee working for an eligible employer
- Minimum age: 18
- No minimum hours worked, no distinction for part-time, seasonal, or temporary employees
- Must have California income reported in W-2 from participating employer and have pay subject to California Unemployment Insurance taxes
- IHSS workers: staff recommendation is to include if possible, but Board can't include without certification by Department of Finance & Department of Social Services and, potentially, legislative amendment



## *Comments on Employee Eligibility*

- Use the same processes as unemployment insurance to determine eligible employees.
  - No changes recommended. Current draft regulations already uses UI to define eligible employees.
- If an employer uses a third-party, “Employer” should mean a client employer. If a client employer is using a Professional Employer Organization (“PEO”), the PEO’s responsibilities should be limited to making deductions from each paycheck, crediting it to the client employer, and then the client employer would transmit to the third-party administrator (“TPA”).
  - No change recommended. Use of “common law” definition should provide necessary clarity for three-party employment relationship.

# Employer Registration

10003(a)-(c), (k)

- Registration date by employer size:
  - 100+ employees: ~January 2020
  - 50+ employees: ~January 2021
  - 5+ employees: ~January 2022
- Employers may register at any time prior to registration date
- Procedure: electronic enrollment through web portal
- Employers can request enrollment via other means (i.e. paper) at least 15 days before the registration date
- Registration will require transmitting certain essential information about the employer and their eligible employees
- New or newly-eligible employers must register within 12 months of eligibility

## *Comments on Employer Registration*

- Allowing employers to enroll voluntarily prior to their mandated time could be deemed as offering an employee benefit subject to ERISA.
  - No ERISA concerns. Employer mandate effective at launch.

# Identifying Exempt Employers

10004(b)

- Option 1: Encourage Optional Self-Certification via web (draft Regs)
  - Consider phasing into a requirement after successful Program launch
- Option 2: Required Self-Certification via web (Oregon model)
  - Require employers to self-certify via web; takes 2 minutes on average
  - Basis of pending litigation in Oregon
- Option 3: Required Self-Certification via State tax form (Illinois model)
  - Cost and time to modify existing form

# *Comments on Identifying Exempt Employers*

- Oppose option 1.
- Support option 1.
- Clarity needed regarding how many employees must have access to employer-sponsored retirement plan for the employer to be deemed exempt.
  - Staff recommendation: one employee.
- Concerns about excluding part-time workers if employer only offers plan to full-time employees.
  - Staff recommend the regulations allow such individuals to participate via personal account outside of employment relationship.
- The program should use the U.S. Department of Labor's Form 5500 database to identify some exempt employers.
  - No change recommended. Staff intend to use the database to identify some exempt employers.
- Subjecting ERISA plan sponsors to reporting requirements would be a violation of ERISA. Options 2 or 3 would violate federal law.

# Employee Enrollment

10003(i)-(j)

- Information packet: provided to eligible employees within 30 days; includes opt-out form and method to acknowledge receipt of disclosures
- Participants can opt out at any time
- Contributions begin as soon as possible, but no later than the first pay period after 30 days
- Employees may choose to enroll at any time
- Employees have the right to full information on the program even if their Employer is ineligible for the program. Employees should have access to program regulations and information including Employer program eligibility.

# *Comments on Enrollment (1 of 3)*

*For all points below, see attachment #4 for enrollment options*

- Program should not require acknowledgement for participation.
- Requiring affirmative selection for participation is not legislative intent.
- Employers should have no role in enrollment.
- Employers should have no obligation to collect the acknowledgement form or the opt-out form. Instead, employees should send the form(s) directly to the TPA.

## *Comments on Enrollment (2 of 3)*

- Program should have annual open enrollment period for employees. Period should be sole opportunity for employees to enroll.
  - Staff recommend allowing enrollment at any time and allow employers to limit enrollment/re-enrollment to no more frequently than 30 days.
- Regulations should specify what information is included in the Employee Information Packet.
  - Staff recommend amending draft regulations to align with statutory requirements.
- Regulations should clarify how the Disclosure Form differs from the Employee Information Packet.
  - No change recommended. The disclosure form is part of the Employee Information Packet.



## *Comments on Enrollment (3 of 3)*

- If enrollment results in a “no match” letter, communication should be between the administrator and the employee and remain confidential. Regulations should provide clear instructions to the employee on how to remedy the situation.
  - Staff recommend adding clarifying language to regulations to affirm policy that the TPA will communicate only with the employee in such a scenario. Communications should not explicitly mention the reason why the employee could not be enrolled, but instead refer them to the website, customer service phone line, or other means to remedy the situation.
- What is the employee opt-out process? What are timeframes?
  - No change recommended. Employers shall provide enrollment material with opt-out form within 30 days of registration. First contribution to occur no later than first compensation period at least 30 days after enrollment.
- How long after an employee requests a refund is their money returned?
  - TPA will establish procedures in accordance with federal laws and regulations.

# Employer Duties

10005

- Provide essential information to the Administrator
- Distribute employee information packet provided by Program within 30 days of employer registration
  - Available electronically and by mail, if requested
- Facilitate collection of opt-out forms and record of employees' acknowledgement of receipt of disclosures, per method to be established by Program in consideration of employer org. feedback
- Remit contributions for each participating employee
- Remain neutral about all aspects of participation
- No fiduciary duty, no liability for participant decisions

## *Comments on Employer Duties (1 of 2)*

- Employer duties should be as limited as possible.
- It is essential that systemic mechanisms are in place to redirect employees to the TPA to handle their questions and concerns—not the employer.
  - No change recommended. Intent is for all questions and concerns be referred to TPA.
- Employers should not have to inform employees of their limited liability and responsibilities under the program, such information shall be in the employee information packet, as required by statute.
  - Agreed, will amend regulations to align with statute.
- If employers are receiving Employee Information Packet electronically, their role should be limited to forwarding to eligible employees.
  - See attachment #4.
- If Program requires copy of employee disclosure, employees should be able to provide directly (not requiring ERs to transmit).
  - See attachment #4.

## *Comments on Employer Duties (2 of 2)*

- Concerns regarding transmission of personal data (SSN/ITIN), potential to “out” undocumented workers. Can participants choose to limit sharing of info with TPA?
  - The information is vital to easy automatic enrollment, minimizes employer duties, and is protected by privacy & confidentiality.
- The Program should consult with *CalChamber*, *CMTA*, et. al. in drafting the sections of the employee information packet related to employer duties.
  - Staff intend to continue consulting with employer representatives in developing and operating the program, as required by GC Section 1000046(d).

# Contributions

10006(a)(2), (b)(1); 10007

- Employees may choose a contribution rate between 0-100% of compensation or a minimum contribution amount of \$1
- Default contribution: 5%
- Non-payroll contributions: permitted
- First contribution: made as soon as possible, but no later than first pay period following 30 days
- IRS contribution limits: program will alert participants
- Employer contributions: prohibited

# *Comments on Contributions (1 of 2)*

- Prefer 3% default rate.
  - No change recommended.
- 5% default rate is reasonable as long as participants can modify contribution rate/amount.
  - No change recommended.
- Auto-escalation at 1% annually up to 8% is reasonable as long as participants can modify contribution rate/amount.
  - No change recommended.
- Participants should be notified of auto-escalation increase no later than 90 days from when the increase will occur via mail and online.
  - Staff concur.
- Data show no differences in support for a 3% or 6% default contribution rate after individuals learn the details of the program.
- Data show broad support for automatic escalation.

## *Comments on Contributions (2 of 2)*

- Clarification is needed on how the program will track and notify participants about annual contribution limits.
  - No change recommended.
- Clarification is necessary on how distributions will be processed.
  - Distribution options to be determined through development of investment policy and selection of investment management, in accordance with existing IRA practices, laws, and regulations.
- Will the program require participants to claim “hardship” for early withdrawal? If so, what are parameters?
  - No changes recommended. For Roth, early withdrawals permissible without penalty. For Traditional, early withdrawals dictated by IRS rules.

# Comparison of IRA Types

## “Roth” (After-tax) and “Traditional” (Pre-tax)

	Age Limit	Max Contributions Per Year	Income Limits	Tax Deduction for Contributions	Taxes on withdrawals after 59.5	Early Withdrawal Penalty	Can money be left in the account
<b>Roth IRA</b>	None	\$5,500 under age 50 \$6,500 over age 50	Contributions can't exceed the maximum or your earned income. Also, your AGI can reduce or eliminate your ability to participate.	None. Contributions are made after tax.	No taxes on any withdrawals after 59.5	Contributions can be withdrawn without taxes or penalties. If earnings are withdrawn it is taxed as income for that year.	Money can be left in with no forced withdrawals for your lifetime
<b>Traditional IRA</b>	No contributions after age of 70.5	\$5,500 under age 50 \$6,500 over age 50	Contributions can't exceed the maximum or your earned income	Depending on AGI some or all of your contributions can be tax deductible	All withdrawals (contributions and earnings) are taxed as income for the year they are taken	Withdrawals will be taxed as income and subject to a 10% IRA penalty	Required Minimum Distributions start at age 70.5



# IRA Type Considerations: Roth v. Traditional

## Section 10006(a)(1)

- Staff and consultants recommend Roth default.
- Benefits of Roth default:
  - Roth offers ability to access contributions tax- and penalty-free
  - Lower-income individuals get minimal, if any, tax benefit from Traditional
  - Participants get to keep more of their earnings upon retirement through tax-free distributions, incentivizing long-term savings
  - Strong stakeholder feedback in support of Roth
  - Drawback: earners above \$133,000 would need to choose Traditional, if available
- Benefits of Traditional default:
  - Penalties for early-withdrawal incentivizes long-term savings
  - Higher-income earners (\$133,000+) not allowed to participate in Roth

## *Comments on IRA type*

*For all points below, see attachment #3 for further background on IRA types*

- Prefer Roth as default due to ability to withdraw funds in a crisis
- Prefer Traditional as default, since some higher-income earners aren't eligible to participate in Roth.
- Roth as default is vital. Because population includes many low- to moderate-income individuals, Roth would allow individuals to withdraw funds without significant penalties in a crisis.
- Prefer Traditional as default – tax penalty incentivizes long-term savings.
- Clarification necessary about how emergency withdrawals could impact eligibility for public benefits.

# Default Settings 10006(a)

If participants make no changes to their enrollment...

- An Individual Retirement Account (IRA) – The Board will decide if it will be Roth or Traditional
- Contribution rate: 5%
- Automatic Escalation: 1% annual increase up to 8% max (can modify rate or opt out)
- Investment option: to be determined at Board's discretion

## Alternate Elections 10006(b)

Participants may choose alternate elections at any time; however, employers may choose to limit changes to no more frequently than once every 30 days

# *Comments on Default Settings and Alternatives (1 of 2)*

- Some concern default auto-escalation rate of 1% is too high.
  - No change recommended.
- Some concern annual escalation is too frequent.
  - No change recommended.
- Requesting clarity that participants can choose alternative contribution rate lower than 5%.
  - Confirmed. Draft regulations allow rate between 0-100%.
- Supports 1% annual auto-escalation rate to 8%; but support dependent on lower default contribution rate.
  - No change recommended.

# *Comments on Default Settings and Alternatives (2 of 2)*

- Board should hold interested persons hearings whenever considering default contribution rate change; include in notice of rate change information noting a participant can choose alternate rate.
  - GC Section 100032(j) requires any changes to default rate be done through regulations. Any change would require public Board meeting and use of formal regulatory process—with public comment and hearings.
- Support recommendation for allowing alternative auto-escalation rate; ensure ease of decision-making.
- Disclose contribution options in variety of languages.
  - Material to be provided in accordance with Dymally-Alatorre Bilingual Services Act.
- Program must provide at least 30 days written notice of any changes to default settings.
  - As above, any change would require regulatory amendments.

# Individual Participation

10006 (c)

- If/when explicitly authorized by the Board, individuals may also participate directly without an employer arrangement
- Minimum age: 18
- Contributions: must be whole dollar amounts
- Minimum contributions: none in regulations, but the Program may establish if necessary
- Auto-escalation: individuals can participate if making automatic contributions through administrator, subject to same limits as employees

## *Comments on Individual Participation*

- Allowing individual participation immediately upon launch is strongly encouraged.
  - Staff recommend individual participation allowed at launch.

# Withdrawals and Rollovers

10008

- Withdrawals from the plan will be subject to any applicable federal laws and regulations
- Pre-retirement age withdrawal: program will prompt participant with educational material on impact of pre-retirement withdrawal
- Rollover procedures: to be established in accordance with federal laws and regulations



# *Comments on Withdrawals and Rollovers*

- How can an individual withdraw account assets?
  - All withdrawals subject to federal laws. For additional info on how IRA types impact withdrawals, see attachment #3.
- Will the program place any barriers to pre-retirement withdrawals? If using hardship withdrawal, how will a “hardship” be defined? How many early withdrawals can an individual take? Will the program limit how much in assets an individual can take out?
  - No changes recommended, no requirement to claim hardship.
- Employees should be able to contribute to their account if they leave a participating employer.
  - Participants will have the ability to continue contributions through individual participation.

# Confidentiality and Disclosures

10010

- All account information is confidential
- Release of any individual account information shall require written authorization from the individual
- The Board may disclose aggregated anonymized data

# Investments

10006(a)(4)

- Board will select a menu of investment options available to all participants
- Board will select a default investment option with an appropriate balance of risk and return opportunities
- Board will decide investment options in the spring of 2018

## *Additional Comments (1 of 5)*

- Strongly oppose vaguely-worded regulations that leaves room for the board or staff to create formal policy that impacts employers.
- Program should provide a contribution calculator to show actual dollar amount of contribution according to contribution rate & income.
  - No change recommended. Such tools will be developed with TPA.
- What in regulations covers portability?
  - Not explicitly included, as IRA laws and regulations, sections in draft regulations on new employee enrollment, and allowing individual participation ensures portability of accounts.
- Specificity regarding pilot program is needed. Are there concerns regarding ERISA for pilot?
  - No ERISA concerns. Employer mandate in effect upon launch.
- Concerns regarding TPA's ability to manage program.
- Now-rescinded DOL rule good foundation for defining program rules.

## *Additional Comments (2 of 5)*

- Regulations should clarify Employee Information Packet more explicitly, including font size, typeface, color, etc.
- Program communications, material, and customer service should be consistent with state foreign language requirement.
  - Communications to be provided in accordance with Dymally-Alatorre Bilingual Services Act.
- Assistance in multiple languages should be available at toll-free customer service phone line.
  - Material to be provided in accordance with Dymally-Alatorre Bilingual Services Act.
- The Board should consider adopting a Language Access Policy Statement similar to Covered California.
  - Staff have recommended program adopt language policies that align with Covered California.
- Communications with participants must be culturally and linguistically appropriate.
  - In addition to following requirements of Dymally-Alatorre Bilingual Services Act, TPA contract will include requirements that communications also be culturally and linguistically appropriate.

## *Additional Comments (3 of 5)*

- Participants should have the ability to access free hard copies of program materials, including account statements.
  - Staff recommend adding clarity in regulations.
- Initial marketing material should be in the name of the program, not the third-party administrator (“TPA”).
- The TPA should form a diverse consumer advisory group to guide them in marketing and messaging.
  - The Program will facilitate TPA connection with stakeholder community.
- A standardized format for file feeds should be developed with recordkeepers to ease the remittance process, and restrictions should be implemented to prevent unilateral file format changes by recordkeepers without adequate notice to implement any changes.

## *Additional Comments (4 of 5)*

- Regardless of who is responsible to remit funds, there should be a specified safe harbor time period to remit funds without penalties after they are withheld. This period should correspond with the Department of Labor Safe Harbor rule for small plans as outlined under 29 CFR § 2510.3-102(a)(2).
  - Staff recommend adding detail to regulations that aligns with existing federal laws and regulations.
- If there is a dispute between employee and employer, between employee and TPA or between employer and TPA, what is the dispute resolution process?
  - No changes recommended. Not typical to define in regulations.

## *Additional Comments (5 of 5)*

- Develop regulations on the work to be performed by state employees.
  - Board shall continue to determine scopes of work to be contracted with third-parties and delineate work to be performed by state employees in accordance with GC Section 100010(a)(5).
- Develop regulations regarding limits to the costs that can be charged to participants.
  - GC Section 100004(d) places some limits on fees. Further discussion on fees to be discussed in TPA RFP discussion later in the agenda.
- Concerns SSN/ITIN requirement could exclude undocumented workers from participation.
  - Either an SSN or ITIN is necessary for participation due to federal laws and regulations, including, but not limited to, “know your customer” laws, and industry practices.



# California Secure Choice Retirement Savings Investment Board



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December 7, 2017

Secure Choice Investment Board  
[securechoice@sto.ca.gov](mailto:securechoice@sto.ca.gov)

SUBJECT: Proposed Regulation:  
 Title 10, California Code of Regulations, Division 1, Chapter 15  
 California Secure Choice Retirement Savings Investment Board  
 Public Comment

Dear Secure Choice Investment Board members and staff,

We first want to recognize and thank you for providing ample opportunity for public input on these regulations, particularly in light of the expedited formal emergency rulemaking process with limited public participation. These written comments reflect our public testimony at your public forum in Sacramento on December 5, 2017.

We, the undersigned organizations have significant concerns over these draft regulations. We also want to remind you that we have submitted written and oral comments outlining some of these same concerns to the board and staff on numerous occasions and before that, to the Legislature throughout the legislative process. We also offered recommendations during the most recent industry stakeholder process regarding employer duties and responsibilities as well as those that should be allocated to the third party administrator (TPA), along with our well thought out reasoning for these recommendations. Through this set of comments, we will reiterate many of those points and introduce new ones pertinent to the language in the draft regulation.

Underground regulations. We strongly oppose any vaguely worded regulation that leaves room for the board or staff to create formal policy that impacts employers outside of the administrative procedures act requirements. Furthermore, regulations are intended to provide guidance and information to the public that must comply with the rules. The regulations as drafted are not clear in a number of provisions, and leave out critical instructions for employers to be able to understand their obligation. The process is intended to create accountability for the agency and transparency to the public. A lack of clear guidance through regulations will only lead to confusion, uncertainty and keep employers from a sense of engagement if they don't understand the rules, or believe they are being tricked.

Regulations adopted by state agencies must comply with the Administrative Procedures Act (APA). As defined by the APA, a regulation is every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

If an agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to, it is an underground regulation. State agencies are prohibited from enforcing underground regulations.

We interpret this rule to require agencies to go through the formal rulemaking process with public input for all substantive policies that implement statute, where the statute has left room for interpretation and implementation of legislative intent.

ERISA and the enrollment process. The employer community has been outspoken about the liability that could be created by this program in terms of employer exposure to ERISA for those that are mandated by the state to participate. It is imperative that the employer have no involvement with the program other than minor administrative functions. Therefore, the success of the program for employers depends on the TPA exercising a strong intermediary role between the employer and employee to ensure extremely limited interaction with the employee and prevent actions that could be construed as or evolve into an employer's endorsement or sponsorship of the program.

This regulation imposes more responsibilities on employers than we are comfortable with. For example, in Section 10004(a)(4) of the draft regulation, employers should not be required to collect the acknowledgement form or the opt-out form. Both can be sent directly to the TPA by the employee, either electronically or through the mail. No employer involvement is necessary here. Further, in Section 10004(a)(6) of the draft regulation, employers should not be mandated to inform employees of their limited liability and responsibilities under this program. The statute requires a disclosure to this fact be contained in the informational packet to eliminate the need for this discussion and instruct employees to direct any questions to the program administrator. Although the 2016 United States Department of Labor safe harbor regulation has been revoked, we encourage the board and staff to consider the limited role envisioned for the employer contained within as a starting point for this regulation.

Further, we encourage the board and staff to be mindful that given the nature of the employment relationship, employees will want to seek out their employers for clarification and instruction regarding their decision to participate in this program. It is essential that systemic mechanisms are in place to redirect employees to the TPA to handle their questions and concerns and not the employer.

Information packet and disclosures. We continue to object to using the acknowledgment of receipt of the employee disclosure as a consent form for enrollment into the plan, which is inconsistent with the legislative intent of the program. As employers advocated for and provided structure to the disclosure, we assert that the purpose of the form is to inform employees from a consumer protection function and to protect employers.

Section 100014(d) of the statute states, *"The disclosure form shall include a method for the employee to acknowledge that the employee has read all of the disclosures and understands their content."* It was never intended to serve as an opt-in or to exclude employees that do not sign the acknowledgement form.

A significant aspect of this rulemaking is the handing of the enrollment process and the operation of the automatic enrollment provision. The process must seek to ensure protection for employers from liability as well as to minimize their administrative burden. Throughout the genesis of the legislation, it was always the intent that this be an automatic enrollment program in order to facilitate maximum participation.

As a separate function, the disclosure is part of the employee information packet that contains an opt-out form should the employee choose not to participate. Providing the disclosure is intended to protect the employer and ensure the employee is fully informed about the program they have been enrolled in so to make an informed decision regarding continued participation. The acknowledgement by the employee that they have received the disclosure documents and information about the program is separate from the automatic enrollment. The acknowledgement is simply part of the administrative function, which we assert would be best performed by the TPA. Again, the acknowledgement by the employee was not envisioned nor contemplated to serve as an opt-in or as making enrollment contingent upon it.

Lastly, regarding the disclosures related to employer liability, responsibility and advice restrictions, we request the board and staff involve and consult with us in the development and design of the document (i.e. font size, color and wording) to ensure employees are properly and adequately noticed that this is a government-run retirement savings program and not one sponsored by their employer.

Missing provisions from the draft. The draft regulations are not specific about some elements of the process, such as how forms are handled, who provides what to whom, and specifically how enrollment occurs. We continue to advocate for a process that limits the employer's function, shifts primary communication and operations with employees to the TPA and is honest with employers and employees.

A number of provisions of the statute are not clarified in the regulations that we believe should be in order to avoid being developed as underground regulations:

- Identification of who tracks contribution limits, who notifies the employee if they have reached it or are close to the limit, and what happens to overpayments beyond the limit.
- Process for employees to take their money out either in its entirety or partial withdrawal of funds. Is a hardship required to make a withdrawal? What are the rules surrounding these functions?
- What constitutes a hardship? The number of times employees will be allowed to invoke a hardship situation; whether there will be a cap and if so, what is the amount?
- What is the employee opt-out process, what are timeframes – how long after an employee provides notification is their money returned?
- If there is a dispute between employee and employer, between employee and TPA or between employer and TPA, what is the dispute resolution process?
- What happens when an employer drops below 5 employees?

Most, if not all, of these functions should be handled by the TPA and should be specified in the RFP and in the regulations. As written, without the specific processes, the development of policy to address these items without formal regulation is likely underground regulation and not enforceable.

Definition of eligible employer. Using the employers report to EDD that merely states how many employees in total they had over the quarter is problematic for those that may generally employ below the threshold but can experience worker increases with a combination of employees over short periods of time throughout the quarter or the year. We don't know what the answer is, but suggest further exploration of alternatives so that employers that don't really have five employees are not subject to the mandate. One suggestion is that employees that are employed less than 30 days would not be counted towards the eligible employer determination, and would not be enrolled into the program.

Open enrollment. The open enrollment period is intended to provide an opportunity for employees that have previously opted-out during the enrollment period, or subsequently after having been enrolled. It was included in the statute in order to minimize employer burdens. It is intended to be the sole opportunity for employees to re-enroll once they have opted-out. Employees should not be allowed to re-enroll at any time after opting-out (Section 10003 (j)), open enrollment is for that purpose so that employers are not handling employee opt-ins at random times throughout the year. The TPA should handle the open enrollment process to minimize disruptions to work flow by taking it out of the hands of the employer, particularly since the information packet and enrollment process must be repeated during this period. The statute clearly requires an open enrollment period yet it is not clarified in the draft regulations.

Voluntary enrollment prior to mandate. If employers are allowed under Section 10003 (d) to enroll voluntarily prior to their mandated time, they could be deemed to be offering an employee benefit and subject to ERISA requirements. Voluntary enrollment must not be an option, although early registration could provide a convenience for employers.

Pilot program. While the concept of a pilot program has merit, the process and requirements need to be specified in the regulations. Will it be voluntary, random selection? If it is voluntary, how do you shield employers from ERISA exposure?

Self-certification by exempt employers. Section 10004 (b) of the draft regulations specifies a method for exempt employers to certify their exemption from the program will be provided to employers. We believe this section should be stricken altogether as we also oppose an employer self-certification process. Furthermore, this section leaves the specifics to be developed by the program, which could result in underground regulations.

Default investments - ROTH versus Traditional IRA. We recommend a Traditional IRA as the default investment. This option eliminates the problem of determining who is eligible based on household income and who will make that determination. For employers that provide higher wages, this creates a situation where the employer must advise the employee regarding contribution limits and eligibility, or some other mechanism must be provided. For employers providing the advice, it puts them in a risky situation for providing advice and becoming a plan sponsor.

Additionally, as we learned during the November Secure Choice Board Meeting, mandating a ROTH IRA as the default could mean imposing a mandate that some employers can never comply with because none of their highly compensated employees will be able to qualify. Such action will defeat the policy purpose of the program.

A Traditional IRA is an investment vehicle that encourages retirement saving by discouraging early withdrawal. Conversely, a ROTH IRA can operate simply as a tax deferred savings account because the money can be taken out without penalty at any time. While we understand the board's market analysis concluded that a ROTH would facilitate higher enrollment, it could also create volatility and higher administrative costs without actually creating dependable retirement savings. Utilization of a Traditional IRA can create long-term financial stability in the Secure Choice fund by discouraging frequent and sizable withdrawals that could negatively impact investment strategies and returns. The state should not simply establish a tax-deferred savings account to address the growing retirement crisis.

Another significant missing piece of the puzzle is the impact on eligibility for safety net services – is there a different impact for ROTH savings as compared to Traditional IRA savings? If we truly wish to encourage and facilitate a retirement savings plan, a Traditional IRA would be a more appropriate option.

For further discussion or information, please contact Marti Fisher, California Chamber of Commerce, [marti.fisher@calchamber.com](mailto:marti.fisher@calchamber.com), or Nicole Rice, California Manufacturers and Technology Association, [nrice@cmta.net](mailto:nrice@cmta.net).

Sincerely,

California Chamber of Commerce  
Association of California Life & Health Insurance Companies  
California Association of Winegrape Growers  
California Business Roundtable  
California Farm Bureau Federation  
California Framing Contractors Association  
California Manufacturers and Technology Association  
California Professional Association of Specialty Contractors  
California Restaurant Association  
California Retailers Association  
Family Business Association of California

MF:ldl

## **Section 10005. Participating Employer Duties**

### **(a) Participating Employers shall:**

#### **(1) For each Eligible Employee provide to the Administrator:**

- (A) Eligible Employee's full legal name;**
- (B) Eligible Employee's Social Security Number or Individual Taxpayer Identification Number;**
- (C) Eligible Employee's date of birth;**
- (D) Eligible Employee's mailing address;**
- (E) Eligible Employee's phone number, if available;**
- (F) Eligible Employee's email address(es), if available; and**
- (G) Any other information requested by the Administrator for the sole purpose of administering the Program;**

Concerns: Requiring an employer to submit employee information to the Administrator is of concern given the immigration status of the employee and his/her family members. Immigrant workers may not feel comfortable having their employer provide this personal information to an outside entity as it may expose the employee to the potential consequences of being an unauthorized worker. Often when an employer becomes aware that the employee is undocumented they use this as a tactic to intimate and exploit the worker.

In addition, immigrant workers are already concerned with the privacy of their information when applying for public benefits. In some cases, immigrants are asking to disenroll from programs as they fear enrollment may facilitate their contact with immigration enforcement or lead to deportation.

### **Outstanding Questions**

- How will the Administrator store the employee data?
- Is the data disposed of if the employee opts out? Or where will it be stored?
- Can the employee opt out before the employer submits their information to the Administrator?
- Does the employer need to provide all seven of these documents? Can some of this information be provided by the employee like the SSN/ITIN?

**Recommendations:** Given the concern around privacy of information and fear of deportation we recommend that the employee be the one to provide his/her employment information to the Administrator if he/she wishes to participate in this program. The employer can submit some information to the administrator to facilitate enrollment such as name and contact information of the employ, but all other sensitive information such as the SSN/ITIN must be provided to the Administrator by the employee.

**Concern:** Under these regulations unauthorized workers can only participate if they have an Individual TaxPayer Identification Number (ITIN). Applying for an ITIN has become more

challenging with recent changes to codify stricter application rules such as providing original copies and limiting the type of documents an immigrant can submit. Therefore, not many unauthorized workers may have an ITIN.

In addition, an unauthorized worker may have provided their employer a social security number not assigned to them but file taxes with an ITIN. When the employer provides the employee information to the Administrator the conflicting data may put the undocumented worker at risk. In addition, the current regulations limit eligibility to immigrant workers who work with an ITIN and file taxes with an ITIN. The number of immigrants working and filing taxes with an ITIN is very small, mostly consisting of contract workers.

#### Outstanding Questions

- What does the disclosure form include? What are the employees attesting to?
- On the back end, can the Administrator link the employee's ITIN to the Social Security he/she is using for employment?

Recommendations: The program should be open to all otherwise eligible workers, regardless of immigration status. We recommend that more research and analysis be done to think through how this program can be available to larger group of immigrants that do not work with an ITIN or do not have an ITIN.

December 8, 2017

Mr. John Chiang  
California State Treasurer and Chair  
California Secure Choice Retirement Savings Investment Board  
915 Capitol Mall, Room 435  
Sacramento, CA 95814

*RE: Secure Choice Draft Regulations*

Dear Treasurer Chiang:

We write as representatives of the 28 million small businesses in America and the more than 3.6 million in California in response to the recently shared draft regulations for California's Secure Choice Retirement Savings Program.

The California Secure Choice Retirement Savings Program will provide an opportunity for small businesses to offer employees access to retirement benefits without incurring the associated burdens of employer-sponsored retirement plans. Scientific polling from AARP and Small Business Majority found two-thirds of small business owners in California support a state retirement savings program that will help them and their employees save for the future. Meanwhile, nearly 80% of small business employees do not have access to a retirement savings option at work. The Secure Choice program will help this underserved population that wants to save for retirement.

We appreciate the considerable effort on the part of the California Secure Choice Retirement Savings Investment Board in crafting these draft regulations and are happy to note that the Board has taken the perspective of California's small business owners into account during this process. We would like to offer the following commentary and suggestions to improve implementation for small business owners.

**Employer Eligibility:** In determining whether an employer is eligible for the Secure Choice Program, we would recommend that the Board use the average number of employees over two quarters as reported on the DE 9C form. Averaging two quarters, such as Quarter 1 and Quarter 3, will avoid potential distortions in employer eligibility calculations due to seasonal fluctuations in employee numbers. We would also recommend clarification that it is the responsibility of the third-party administrator to notify a small business owner that their business has qualified for the program, rather than requiring small businesses to confirm their own eligibility.

**Employee Eligibility:** We agree with the draft regulations regarding employee eligibility that does not impose minimum hours or exceptions for part-time and seasonal workers. **However, our agreement with these regulations is dependent upon the outcome of discussions surrounding the enrollment process.**

**Identifying Exempt Employers:** We support the Secure Choice Board in pursuing Option 1 for identifying exempt employers. We believe that encouraging optional self-certification as the program is established will be a helpful and successful approach.

**Employee Enrollment and Employer Duties:** While we understand that the employer will have some role in distributing materials to employees, we are disappointed that employers are noted as having responsibility for the collection of opt-out forms and employee acknowledgement forms.



From our conversations with small business owners, we know that any further employer responsibilities could create an additional administrative burden. We appreciate that the staff has been receptive to our input from the small business perspective. We know that there are still significant decisions to be made regarding the enrollment process and look forward to offering our full comments on employee enrollment and employer duties at the appropriate time. We will continue to work with the Secure Choice staff to find a path forward that will benefit small employers and establish a robust and successful program.

**Default Settings:** We do not have a preference regarding the type of IRA used as a default for the program. However, we recommend that the program start with one default option. Having multiple options for plans could create employer education issues and complicate employer payroll calculations if they need to track which employee contributions are pre- or post-tax. There may be an appropriate time to introduce more options once the program has been established but we recommend that there not be multiple options upon launch.

**Individual Participations:** We are thrilled to see that self-employed individuals will be able to opt-in to the Secure Choice program, and we appreciate that the Board took our position on this into consideration when crafting the regulations. This provision will benefit the roughly three million non-employer small businesses in California, many of whom likely struggle to access retirement saving programs.<sup>1</sup>

It is estimated that here in California, there are more than 200,000 small employers who are not currently able to offer retirement plans to their employees but would be eligible for this program. Finalizing these regulations is an important step in providing a critical benefit to California's small business owners and employees.

Thank you again for the opportunity to comment as the Board moves forward with implementing the Secure Choice program.

Sincerely,

Mark Herbert  
California Director, Small Business Majority

Heidi Pickman  
Communications and Policy Director, CAMEO

Scott Hauge,  
President, Small Business California

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<sup>1</sup> [https://www.sba.gov/sites/default/files/advocacy/CA\\_1.pdf](https://www.sba.gov/sites/default/files/advocacy/CA_1.pdf)



## The ERISA Industry Committee

*Driven By and For Large Employers*

1400 L Street, NW, Suite 350, Washington, DC 20005

• (202) 789-1400

• [www.eric.org](http://www.eric.org)

*Bryan Hum, Retirement & Compensation Policy Associate*

December 7, 2017

California Secure Choice Retirement Savings Investment Board  
915 Capitol Mall  
Room 435  
Sacramento, CA 95814

Dear Ladies and Gentlemen,

The ERISA Industry Committee (“ERIC”) is pleased to provide comments on the California Secure Choice Retirement Savings Investment Board’s (the “Board”) draft emergency regulations for its Secure Choice Program.

### **I. ERIC’S INTEREST IN THE DRAFT REGULATIONS**

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC therefore has a strong interest in the Board’s draft regulations, which could have an impact on its members’ ability to continue providing competitive and cost-efficient retirement plans.

ERIC supports efforts to enhance and promote retirement savings opportunities, including state-run retirement programs that create safe, simple, and portable savings plans for employees. But, we oppose any regulations that would conflict with the framework and guidelines established under the Employee Retirement Income Security Act of 1974 (“ERISA”). ERISA enables employers to tailor voluntary retirement plans that meet the needs of their workforce and sets forth the rules employers must follow. A major provision of ERISA is the preemption of state laws and regulations of employer-sponsored retirement plans. This preemption provision allows employers with employees in more than one jurisdiction to follow a uniform set of rules that promote predictability and fairness.

ERIC appreciates the opportunity extended by the Board to provide comments before the formal rulemaking process begins. In particular, ERIC values the opportunity to comment on the section pertaining to exempting employers, Section 10004, that already provide employees access to a tax-favored retirement savings plan.

### **II. RECOMMENDATIONS**

Employer plan sponsors of tax-qualified retirement plans currently operate under immense compliance burdens. Any mandates imposed at the state level on employers that sponsor a tax-

**ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels.**

qualified retirement plan could raise ERISA concerns for the state plan, and would only decrease the likelihood of employers offering a quality retirement plan.

ERIC applauds the current version of the draft emergency regulations, which provides for an optional self-certification process for an employer to be exempt from the Secure Choice Program (the “Program”). ERIC encourages the Board to keep this language consistent throughout the rulemaking process, and not add any new compliance mandate that would increase the cost to operate a tax-favored retirement plan.

*a. Identify Exempt Employers Through Optional Self-Certification*

As you know, the Board is considering three options for how employers who provide a tax-qualified retirement plan will be exempt from the Program: (1) encouraging optional self-certification via the web, (2) required self-certification via the web, and (3) required self-certification via State tax form.

A large number of tax-qualified plans file the annual Form 5500 with the Department of Labor (“DOL”), a requirement under ERISA. The Form 5500 data is made available to the public via the DOL website with the ability to easily search and cross-reference the data. Based on the information provided by the Board, the Program would utilize the Form 5500 database to develop a list of ERISA-qualified employers in California, while leaving the option open for employers to self-report. Using the Form 5500 database would be advantageous not only to employers who already sponsor a tax-qualified retirement plan but to the Program’s staff as well. Administratively, the Program would use an existing system and developed infrastructure that has been in place for decades. This would allow the Program to use its resources on more pertinent matters, such as increasing participation from employees who work at a company that does not provide a tax-qualified retirement plan. On the employer side, nothing would need to be completed in addition to the required federal filings. Plan sponsors could continue to operate their retirement plan without any additional compliance burdens.

*b. Subjecting Plan Sponsors to Reporting Requirements Would Be a Violation of ERISA*

Reporting is an essential feature of ERISA. Equally as essential is ERISA’s preemption rules, which supersedes any and all state laws that relate to any employee benefit plan. Here, that would be an employer’s tax-favored retirement plan; thus, any provision or aspect of the Program that relates to or attempts to govern that which ERISA already governs would be superseded. To use a method that mandates reporting not provided for or in addition to the reporting requirements under ERISA would trigger ERISA’s preemption clause and could open the door to possible litigation. We encourage the Board to maintain the first option, optional self-certification, throughout the regulatory process. A movement towards the second or third option, which mandate reporting on an employee benefit plan would be seen as a violation of federal law.

In a presentation made to the Board at its November 27, 2017 meeting, language was included that stated it would take 2-minutes on average for a plan sponsor to self-certify. Based on the information that we have gathered from our members, this is unequivocally false. For large employers, it is likely that the company has a number of legal entities within the state. Depending

on how the Program is setup, a large employer may need to certify all of its legal entities which can be a time-consuming process. Further, if more states implement a state-run mandatory retirement plan that imposes complex reporting requirements on plan sponsors of tax-qualified retirement plans, a drastic increase in compliance tasks would occur on the plan sponsor. This compliance burden would be felt most by employers that are already doing what you want other employers in California to do—provide a quality retirement plan to employees.

### III. CONCLUSION

Ultimately, ERIC shares your goal of increasing retirement access for employees who are employed in the State of California and do not have access to an employer-sponsored plan. For employers that already provide a retirement plan for employees, it is important that they are able to design plans that work effectively, efficiently, and based on the needs of their workforces and industries in which they operate.

ERIC appreciates the opportunity to provide comments on the Board's draft regulations. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400 or [bhum@eric.org](mailto:bhum@eric.org).

Sincerely,

A handwritten signature in blue ink that reads "Bryan Hum". The signature is fluid and cursive, with the first name "Bryan" and last name "Hum" clearly distinguishable.

Bryan Hum  
Associate, Retirement & Compensation Policy

December 7, 2017

TO: California Secure Choice Retirement Savings Investment Board, California Secure Choice Retirement Savings Program, Attention: Katie Selenski, Executive Director

FROM: J. Mark Iwry

Re: Comments on Draft Regulations (Version 11/27/17)

Mr. Chairman, Distinguished Members of the Board, Executive Director Selenski:

I am submitting the following (including the attached) comments on the draft Secure Choice regulations (version 11/27/17) solely on my own behalf, and not on behalf of any other person or any organization. Accordingly, these are my own views and are not intended to represent the views of any other person or any organization.

A number of detailed comments on the draft regulations are attached, and I anticipate providing further such comments shortly.

I also recommend that the regulations provide for a Roth IRA to be the type of IRA that will be used under the Program. In addition, the regulations could provide that the Board has authority to add, at or at any time after the onset of the Program, an additional option permitting participants to select a traditional IRA instead of the default (automatic) option which would be the Roth IRA.

With respect to the decision regarding Roth versus traditional IRA, the following information is submitted with the hope that it might prove helpful to the Board:

1. In 2006, David John, then a senior fellow at the Heritage Foundation, and I, then a nonresident senior fellow at the Brookings Institution, first designed and co-authored the original proposal for automatic IRAs, under the auspices of the nonpartisan Retirement Security Project. This federal proposal to expand retirement coverage through a nationwide program of automatic enrollment in IRAs was endorsed by both Presidential candidates in the 2008 election and was subsequently proposed by President Obama in each of his eight annual budget proposals. It has not been enacted by Congress but has been the model for the State-level automatic IRA legislation enacted thus far in the States of California, Oregon, Illinois, Connecticut, and Maryland.
2. When originally developing the automatic IRA proposal, Mr. John and I gave careful consideration to the pros and cons of using Roth IRAs or traditional IRAs as the automatic IRA vehicle. For a number of reasons, including several of those noted below, we concluded that using the Roth IRA would, on balance, best serve the target population of workers and the overall purposes of the program. We proposed that the Roth be the default type of IRA, giving savers the option of affirmatively electing a traditional IRA instead of the Roth.
3. We gave further consideration to this question on a number of subsequent occasions and reaffirmed this conclusion each time. One such occasion was during the process of drafting our proposal as a bill that was introduced in the U.S. House of Representatives and U.S. Senate with bipartisan cosponsorship among Members of the tax-writing committees in each chamber. When drafting the proposed legislation, we consulted on this and other issues with congressional tax and retirement staff, and each of the bills that was introduced reflected a

decision to designate the Roth IRA as the default, with an option to affirmatively elect a traditional IRA for those who wished to do so.

4. The question of Roth versus traditional IRA was one of the issues that was thoroughly revisited in an interagency process involving the Treasury Department, Labor Department, OMB, Council of Economic Advisors, National Economic Council, and others during the first year of the Obama Administration. The conclusion reached by the Obama Administration was the same – that the Roth would best serve the working households who are the main target of the proposal and would best further the policy goals of the proposal.
5. Since that time, the legislation was repeatedly proposed in the annual Obama budgets and repeatedly introduced in the US Congress, each time using the Roth IRA as the default. The legislation enacted in Oregon, Illinois, and Connecticut has likewise provided for Roth IRAs to be the type (or the default type) of IRA in their automatic IRA programs.<sup>1</sup>
6. In an early paper setting forth the automatic IRA proposal, David John and I explained the Roth default decision as follows:

“... [T]he Roth may be more beneficial for lower-income and moderate-income workers who lack sufficient taxable income to take full advantage of the traditional IRA tax deduction at the time of contribution but who may expect to be in higher tax brackets late in their careers. In addition, the Roth is often thought to be preferable by those who expect high federal budget deficits to eventually drive up future tax rates. All other things being equal, the Roth’s tax advantage for payouts would likely be more valuable than the traditional IRA’s tax deduction for contributions. A number of other factors may militate in favor of defaulting to the Roth. First, for many it comes as an unpleasant surprise that the account balance they have accumulated for decades in a deductible IRA or a traditional deductible 401(k) is worth far less than expected because it cannot be drawn upon without losing a substantial portion to taxation. The Roth generally avoids this unpleasant surprise by permitting the individual to plan for retirement without having to adjust projected or future savings for an uncertain future tax bite.”

“Second, the Roth IRA, by producing less taxable income in retirement years, could avoid exposing some individuals to a higher rate of income tax on Social Security benefits in retirement.” [Roth IRAs, by contrast to deductible IRAs, do not count against the taxpayer in determining the tax on Social Security benefits.]

“Third, while it is hoped that few participants would choose to withdraw funds from their IRAs before they reach or approach retirement age, those who do withdraw from a deductible IRA not long after contributing generally will be subject to both income tax and a 10-percent early withdrawal penalty on the entire amount withdrawn. In contrast, withdrawals from a Roth IRA

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<sup>1</sup> Incidentally, it may be worth recalling, by way of context, that SB 1234 was amended in 2016 to require an interim investment in “United States Treasuries, myRAs, or similar investments” for up to the first three years of the program. Section 100002(e)(1). This language does not require investment in myRAs as opposed to other US Treasury securities or “similar” investments. However, my understanding is that the intent reflected in these amendments, based on discussions among those principally involved at the time, contemplated that the investment would almost certainly be in myRAs. This language provided that the interim investment would be not an option, default or otherwise, but rather the only investment under the program during the interim period of up to three years. MyRAs are exclusively Roth IRAs (not traditional IRAs), offered by the US Department of the Treasury, and invested solely in specially designed US Treasury securities.

In 2017, the Trump Administration decided that myRAs will no longer be made available to California’s program. Later, they decided that myRAs will no longer be offered to the public. However, absent those actions by the Trump Administration, it appears that California’s program probably would have consisted entirely of Roth IRAs for up to the first three years.

within a few years after contributions are made will not be subject to income tax or the 10-percent penalty on the withdrawal except to the extent that it consists of earnings (which are likely to comprise a relatively small portion of the account of those who withdraw relatively soon).”

“Finally, the fact that all but very high income employees are eligible to contribute to a Roth IRA may make the automatic IRA program simpler to administer because virtually all of the target population would be eligible. Individuals saving in a deductible IRA may need to be mindful of their possible eligibility for a qualified plan in another, concurrent job or of their spouse’s eligibility. Some may be ineligible to make deductible contributions but permitted to make nondeductible contributions to a traditional IRA, which could be viewed as an advantage or as a drawback because of the additional layer of complexity it entails.”

The Retirement Security Project, “Pursuing Universal Retirement Security Through Automatic IRAs” (Number 2009-3), page 13.

7. The ideal of a program that is truly a retirement program, with the funds locked up until retirement, is appealing. However, it must be tempered with the recognition that, given the target demographic and their frequent need for liquidity to meet urgent or unexpected shorter-term financial needs, broad participation with some leakage (at least initially) is far better than an airtight program in which few participate because they fear locking up their savings. Moreover, if some of the saving turns out to be shorter-term saving, that is not necessarily a terrible policy outcome, especially if the withdrawals are used mainly to address emergencies or hardship situations.
8. The difference in tax treatment between the Roth IRA and the traditional IRA translates to a significant difference in liquidity. In the 401(k) universe, the relative illiquidity of pretax (as opposed to Roth) accounts can be mitigated to some degree by the availability of plan loans to participants. However, as you know, IRAs are not permitted to make loans to their owners.
9. If the Roth IRA is the default, there is a risk that some individuals will contribute to it even though their income exceeds the dollar ceiling for eligibility. But most who have incomes at that level will be business owners or managers who are also better able to pay attention to the limit and can either opt for a deductible IRA if it is an option under the auto IRA program or can actually opt out of the program and simply adopt their own deductible IRA outside of the employer-sponsored payroll deduction IRA program. If the traditional IRA were the default, there would be a risk that some individuals would have a spouse who participates in an employer-sponsored plan or would themselves participate in a plan in connection with another job and would contribute to the traditional IRA even though their income exceeds the dollar ceiling for eligibility for tax-deductible contributions.
10. At the November Board meeting, there seemed to be an assumption on the part of some that asset and income eligibility tests in public assistance programs (such as TANF, SSI, Medicaid, and the like) would treat Roth IRAs unfavorably and far less favorably than traditional IRAs. The factual basis for this assumption of materially less favorable treatment for Roth IRAs than for traditional IRAs under these eligibility tests was unclear. I would like to suggest that, before further assertions of this kind are made, the staff thoroughly research the issue and obtain the advice of those who have the necessary expertise regarding these aspects of the public assistance programs, including in California, given the considerable state-by-state variation in the application of the programs’ asset and income eligibility tests.

Note: These regulations are new to the CCR.

## California Code of Regulations

### Title 10: Investments

#### Division 1: California Secure Choice Retirement Savings Investment Board

#### Chapter 15: California Secure Choice Retirement Savings Trust

### Section 10000. Existing Definitions

All meanings of the words or terms defined in California Government Code Sections ~~100000-100050~~; California Welfare and Institutions Code Section 12302.2; California Unemployment Insurance Code Sections 1088.9, 601, 606.5, and 621; and Title 26 of the United States Code ("Internal Revenue Code") sections 408(a), 408(b), or 408A shall apply wherever the same words or terms are used throughout this Chapter, except as may be expressly provided otherwise in this Chapter.

NOTE – Authority Cited: Government Code Section 100010; Government Code Section 100048; California Welfare and Institutions Code Section 12302.2; California Unemployment Insurance Code Section 601; California Unemployment Insurance Code Section 606.5; California Unemployment Insurance Code Section 621; California Unemployment Insurance Code Section 1088.9; Internal Revenue Code Section 408(a); Internal Revenue Code Section 408(b); and Internal Revenue Code 408A.

### Section 10001. Additional Definitions

The following definitions shall also apply wherever the terms are used throughout this Chapter:

- a) "Account" means a Participating Employee's or Participating Individual's Individual Retirement Account, including, as applicable, Individual Retirement Annuity ("IRA") within the meaning of Section 408(a), 408(b), or 408A held within the Program.
- b) "Administrator" means the third-party administrator, or administrators, hired by the Board to perform recordkeeping, manage investments, and provide other administrative functions necessary or desirable for operation of the Program.
- c) "Automatic Escalation" means an automatic annual increase in a Participating Employee's or Participating Individual's Contribution Rate that applies unless the Participating Employee or Participating Individual opts out of the increase in favor of a different Contribution Rate or opts out of participation in the Program.
- d) "Board" means the California Secure Choice Retirement Savings Investment Board.
- e) "Compensation" means W-2 wages, as defined in 26 Code of Federal Regulations ("CFR") 1.415(c)-2(d)(4)



- f) "Contribution" means any deposit from a Participating Employee or Participating Individual to an Account.
- g) "Contribution Rate" means the percentage amount of a Participating Employee's Compensation to be withheld and contributed to his or her Account via payroll deduction pursuant to an election made under Section 10006 of these regulations. [question: don't recall whether intent is to allow the alternative of contributions denominated in dollar amounts rather than % of comp, which can be helpful to employees; if so, add that here.]
- h) "Disclosure Form" means the form (or forms) and other information about the Program provided to Employees on behalf of the Program.
- i) "Eligible Employee" means any Employee of an Eligible Employer who is at least eighteen years of age, provided however, that an Eligible Employee does not include: (i) any Employee on whose behalf an Employer makes contributions to a Taft-Hartley pension trust fund; (ii) any Employee covered under the federal Railway Labor Act (45 U.S.C. Sec. 151), or (iii) any Employee engaged in interstate commerce so as not to be subject to the legislative powers of the state, except insofar as application of this title is authorized under the United States Constitution or laws of the United States.
- j) "Eligible Employer" means an Employer, ~~as defined under Section 10001(n) of these regulations,~~ that has five or more Employees and does not provide a Tax-Favored Retirement Plan.
- k) "Employee" means any individual who is a resident of California, or a non-resident with California source income, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee under Unemployment Insurance Code Sections 621 et seq, and ~~who~~ receives an IRS Form W-2 ("W-2") with California wages from an Eligible Employer.
- l) "Employee Information Packet" means the packet of information provided by the Program to be distributed to Eligible Employees by Eligible Employers that includes the Disclosure Form and the Opt-out Form and other information determined to be necessary by the Program.
- m) "Employer" means an individual or non-governmental entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, determined to be an employer under common law rules applicable in determining an employer-employee relationship, except as provided in subdivisions (b)-(d) of in Unemployment Insurance Code Section 606.5.
- n) "Enrollment Date" means the date by which a Participating Employer shall offer Eligible Employees the opportunity to enroll in the Program. The Enrollment Date shall be either:
  - a. The date no later than 30 days following the Registration Date; or

- b. For Eligible Employees hired ~~by~~after an Eligible Employer after it begins participating in the Program, the date no later than 30 days following their hire date.
- o) “Exempt Employer” means an Employer that either (i) has fewer than five Employees as reported on the DE 9C for the quarter ending September 30 of each Program Year; or (ii) that provides or contributes to a Tax-Favored Retirement Plan; or (iii) is the federal government, the state, any county, any municipal corporation, or any of the state’s units or instrumentalities.
- p) “Implementation Date” means the date the Board opens the Program for enrollment to all Eligible Employers.
- q) “Opt-out Form” means the form, paper or electronic, through which an Eligible Employee can note their decision to opt out of participation in the Program.
- r) “Participating Employer” means an Eligible Employer that registers with the Program to provide its Eligible Employees access to the Program.
- s) “Pilot Program” means a period of time during which some Eligible Employers may participate in the Program prior to the opening of the Program for enrollment to all Eligible Employers.
- t) “Program” means the California Secure Choice Retirement Savings Program.
- u) “Program Year” means January 1 through December 31.
- v) “Participating Employee” means an Eligible Employee enrolled in the Program. References herein to a Participating Employee include a Participating Individual as the context requires.
- w) “Participating Individual” means an individual who enrolls in the Program under such terms and conditions as determined by the Program.
- x) “Registration Date” means the date by which each Eligible Employer is required to register with the Program.
- y) “Tax-~~Qualified Favored~~ Retirement Plan” means an ~~e~~Employer-sponsored provided retirement plan that qualifies for favorable federal income tax treatment, including, but not limited to: a defined benefit plan or defined contribution plan which is intended to be tax-qualified under and described in Internal Revenue Code Section 401(a), ~~a Taft-Hartley Plan; a Simple~~ 401(k), ~~Simplified Employee Pension (“SEP-IRA”) plans, Savings Incentive Match Plan for Employees (“SIMPLE”) plans, a plan described by Internal Revenue Code Section 403(a), or 403(b),~~ 408(k), or 408(p). ~~and For purposes of this definition,~~ an employer-provided automatic enrollment payroll deduction IRA will also be

treated as if it were a Tax-Qualified Retirement Plan if it s that qualifies y for favorable federal income tax treatment under the Internal Revenue Code.

- z) "Trust" means the California Secure Choice Retirement Savings Trust.

## **Section 10002. Administration**

The Board intends that, consistent with Government Code Sections 100000-100050, Welfare and Institutions Code Section 12302.2, and Unemployment Insurance Code Section 1088.9, the Program be operated, and these rules be construed, in a manner consistent with applicable regulations and guidance provided by the U.S. Department of Labor relating to payroll deduction IRA programs that are not pension plans under Title I of the Employee Retirement Income Security Act..

## **Section 10003. Employer Registration and Employee Enrollment**

- (a) On or before the Registration Date, each Eligible Employer shall register with the Program.
- (b) The Implementation Date shall be the date reported to the Governor and Legislature required in Government Code Section 100043(b)(1) and shall not be the date of the launch of the Pilot Program.
- (c) Except as provided in Section 10003(d), the Registration Dates are as follows:
  - (1) An Employer employing 100 or more Employees: Implementation Date + 12 months
  - (2) An Employer employing 50 or more Employees: Implementation Date + 24 months
  - (3) An Employer employing 5 or more Employees: Implementation Date + 36 months
- (d) Eligible Employers may determine to accelerate their Registration Date, provided the Program may delay the Enrollment Date applicable to such Employer's Employees if it determines to be in the best interests of Program administration.
- (e) To determine the number of Employees for purposes of this section, Eligible Employers shall use data as submitted on the DE 9C filed for the quarter ending September 30 of each year.
- (f) To register with the Program, an Eligible Employer shall use the internet portal established by the Administrator. Eligible Employers shall provide the following information:
  - (1) Employer name and Doing Business As name, if applicable,
  - (2) Federal Employer Identification Number or California State Employer Payroll Tax Account Number,
  - (3) Employer mailing address,
  - (4) Name, title, telephone number, and email address of an individual designated by the Employer as the primary contact for the Program,
  - (5) Number of Employees as determined pursuant to paragraph (e) of this section, and
  - (6) Any other information reasonably required by the Program for the purposes of administering the Program.

- (g) An Eligible Employer who lacks access to the internet may request to register with the Program by alternate means established by the Administrator. Such Eligible Employers shall make the request to the Administrator no later than 15 days prior to the Registration Date.
- (h) The initial Enrollment Date for each Eligible Employer shall be a date that is not more than 30 days after the Employer's Registration Date.
- (i) The Enrollment Date for new hires will be on or about the date that the Eligible Employee typically completes new hire paperwork, but in no event later than 30 days following the Eligible Employee's start date.
- (j) Eligible Employees who initially choose not to participate in the Program may enroll in the Program at any time.
- (k) An Eligible Employer formed after the Implementation Date or Employers who were previously ineligible for the Program, must register with the Program at a time of their choosing but no later than 12 months after the date it becomes eligible for the Program.

Note – Authority Cited: Government Code Section 100002; Government Code Section 100010; Government Code Section 100012; Government Code Section 100014; Government Code Section 100032; Government Code Section 100043; Government Code Section 100048; Unemployment Insurance Code Section 1088.9.

#### **Section 10004. Employer Exemptions**

- (a) An Employer shall be exempt from the Program if:
  - (1) The Employer employs fewer than five Employees as reported on the DE 9C for the quarter ending September 30 of each Program Year;
  - (2) The Employer provides or contributes to a Tax-Favored Retirement Plan; or
  - (3) The Employer is the federal government; the state; any county; any municipal corporation; or any of the state's units or instrumentalities.
- (b) By the Implementation Date, the Program will notify Employers with a method whereby Exempt Employers may certify their exemption from the Program.

Note – Authority Cited: Government Code Section 100000; Government Code Section 100010; Government Code Section 100012; Government Code Section 100032; Government Code Section 100043; Government Code Section 100048.

#### **Section 10005. Participating Employer Duties**

- (a) Participating Employers shall:
  - (1) For each Eligible Employee provide to the Administrator:
    - (A) Eligible Employee's full legal name;
    - (B) Eligible Employee's Social Security Number or Individual Taxpayer Identification Number;
    - (C) Eligible Employee's date of birth;
    - (D) Eligible Employee's mailing address;
    - (E) Eligible Employee's phone number, if available;
    - (F) Eligible Employee's email address(es), if available; and
    - (G) Any other information requested by the Administrator for the sole purpose of administering the Program;

- (2) Provide the Employee Information Packet to all Eligible Employees within 30 days of the initial Registration Date.
- (3) Provide the Employee Information Packet to all newly-hired or Eligible Employees within 30 days.
  - (A) The Employee Information Packet shall be provided by the Administrator to Participating Employers electronically via email or by supplying Participating Employers the online location where the materials may be downloaded.
  - (B) Upon request by a Participating Employer, the Administrator will provide the Employee Information Packet(s) in hard copy form.
    - i. Participating Employers must request hard copies no later than 45 days prior to the Enrollment Date.
    - ii. Eligible Employees may also request receipt of the Employee Information Packet in hard copy form.
- (4) Facilitate collection of Opt-out Forms and the record of employees' acknowledgement of receipt of the Disclosure Forms.
- (5) Remit Contributions for each Participating Employee each Compensation period to the Administrator at the default Contribution Rate, or at such other Contribution elected by the Participating Employee, or at a rate increased automatically by Automatic Escalation, as directed by the Administrator.
  - (A) Any rate change, or other alternate election impacting Participating Employee's Contributions, shall be made by the next practicable Compensation period and no later than the Compensation period occurring at least 30 days after the election.
- (6) Communicate to Eligible Employees (i) that the Participating Employer's role is limited to remitting Participating Employee Contributions, providing essential Eligible Employee contact information to the Administrator, collecting signed Disclosure Forms from Eligible Employees who request paper enrollment and remitting to the Administrator; and (ii) that the Participating Employer does not provide any additional benefit or promise any particular investment return on the Participating Employee's savings and that Eligible Employees shall refer questions about the Program to the Administrator.
- (7) Participating Employers shall remain neutral about the Program. Participating Employers shall not:
  - (A) Require, endorse, or discourage Eligible Employee participation in the Program.
  - (B) Provide Participating Employees advice or direction on investment choices, Contribution Rates, participation in auto-escalation, or any other Participating Employee decision about the Program.
  - (C) Remit any Contributions for any Participating Employee that completed an Opt-out Form.
  - (D) Exercise any authority, control, or responsibility regarding the Program other than as set forth in paragraph 1 of this section.
- (8) A Participating Employer is not a fiduciary for the Program, is not a sponsor of the Program, and shall not be liable as a plan sponsor.

- (9) A Participating Employer shall have no civil liability for acting in accordance with these regulations.

Note – Authority Cited: Government Code Section 100000; Government Code Section 100002; Government Code Section 100008; Government Code Section 100010; Government Code Section 100012; Government Code Section 100014; Government Code Section 100032; Government Code Section 100034; Government Code Section 100043; Government Code Section 100048.

**Section 10006. Default program options and alternative elections for Contributions, Automatic Escalation, and investment options**

**(a) Default Elections**

A Participating Employee who has not made an alternative election as specified in this section shall make Contributions to the Program according to the following default elections:

- (1) Contributions shall be made to a Roth IRA Account.
- (2) Contributions shall equal 5% of Compensation for each Compensation period.
  - (A) Before a default election under this section may be changed by the Board, the Board must first hold an interested persons' hearing on the proposed change; and
  - (B) The Program shall provide notice to Participating Employees no later than 90 days before the change is scheduled to take effect.
- (3) The Contribution Rate shall increase by an additional 1% of Compensation on each January 1 following the Participating Employee's initial enrollment up to a maximum Contribution Rate of 8%.
  - (A) If a Participating Employee has not participated in the Program for at least 180 days such Employee shall not participation in Automatic Escalation shall not be a default Account setting until the next Program Year that occurs after they have exceeded 180 days of participation.
- (4) Contributions will be invested in an investment option, or options, selected by the Board that appropriately balances risk and return opportunities for Participating Employees.

**(b) Alternative Elections**

- (1) A Participating Employee may select a Contribution Rate other than the default Contribution Rate between 0% and 100% of Compensation, or represented as whole dollar amounts, through a method established by the Administrator.
  - (A) Participating Employees may select an alternative Contribution Rate, or whole dollar Contribution amount, as frequently as they choose, however Participating Employers may choose to limit such changes to no more than once every 30 days.
- (2) A Participating Employee may opt out of Automatic Escalation at any time by following procedures established by the Administrator.
- (3) A Participating Employee may select an alternative Automatic Escalation amount at least 0.25% of Compensation if their Contributions are represented as a percentage of Compensation or at least \$1 in additional monthly Contributions if

their Contributions are represented by whole dollar amounts by following procedures established by the Administrator.

- (4) Alternate elections shall be implemented as quickly as practicable and no later than the nearest Compensation period 30 days following the election.

(c) Participating Individuals

- (1) The Program shall not allow for participation by individuals until it receives explicit authorization from the Board

- (2) If the Board allows participation by individuals, the Program may establish processes and procedures for Participating Individual transactions with the Program, including without limitation payroll and non-payroll Contributions, including minimum and maximum Contribution amounts, in accordance with annual Contribution limits established by the Internal Revenue Service and any applicable federal laws and regulations.

Note – Authority Cited: Government Code Section 100002; Government Code Section 100010; Government Code Section 100012; Government Code Section 100032; Government Code Section 100034; Government Code Section 100043; Government Code Section 100048; Internal Revenue Code Section 408A.

**Section 10007. Contributions**

(a) Participating Employees

- (1) The initial Participating Employee Contributions shall be facilitated by the Participating Employer no later than the first Compensation period that occurs following 30 days after creation of the Participating Employee's Account.

- (2) A Participating Employee may elect to make non-payroll Contributions to an Account in accordance with procedures developed by the Administrator.

- (3) The Program shall establish procedures for payroll and non-payroll Contributions, including maximum Contribution amounts, in accordance with annual Contribution limits established by the Internal Revenue Service and any applicable federal laws and regulations.

(b) Participating Employers

- (1) Participating Employers are prohibited from contributing to a Participating Employee's Account.

- (A) This provision shall not apply to Participating Employers who are also Eligible Employees participating in the Program.

- (2) Amounts deducted by the Participating Employer pursuant to this Section shall not exceed the amount of the Participating Employee's Compensation remaining after any payroll deductions required by law to have higher precedence, including a court order.

Note – Authority Cited: Government Code Section 100002; Government Code Section 100010; Government Code Section 100012; Government Code Section 100043; Government Code Section 100048; Internal Revenue Code Section 408A.

**Section 10008. Rollovers and Distributions**

- (a) A Participating Employee or Participating Individual may request a rollover, direct transfer, or a distribution of funds by submitting a properly completed ~~distribution~~ request to the Administrator in a manner established by the Program.
- (b) The Program shall establish procedures for rollovers and direct transfers to and from an Account and distributions from an Account, in accordance with applicable law and applicable regulations established by the U.S. Treasury Department and the Internal Revenue Service, and any other federal laws and regulations.

Note – Authority Cited: Government Code Section 100002; Government Code Section 100010; Government Code Section 100012; Government Code Section 100043; Government Code Section 100048; Internal Revenue Code Section 408A.

#### **Section 10010. Confidentiality**

- (a) The Board will treat Account information as confidential, including without limitation, names, addresses, telephone numbers, personal identification information, Contributions, and earnings.
- (b) The Board may disclose Account information to persons or entities other than those described in Section 10006 if the Administrator receives a signed release from the Participating Employee or Participating Individual consenting to disclosure of some or all of the Account information to a specific person or entity. For purposes of this paragraph Account information includes information pertaining to:
  - (1) An Account;
  - (2) Primary and contingent beneficiary designations;
  - (3) Distributions from the Account; or
  - (4) Other information contained in any order from a court of competent jurisdiction.
- (c) A written authorization to release information is valid indefinitely, unless a specific end date is provided in the written statement.

Note – Authority Cited: Government Code Section 100002; Government Code Section 100010; Government Code Section 100014

#### **Section 10011. Subpoena**

A subpoena for information available from the Program must be addressed to the Program. The Program reserves the right to object to any subpoena on the grounds that the subpoena fails to provide a reasonable time for preparation and travel, is otherwise unreasonable or oppressive, or that service was improper, in addition to any other basis legally available. To facilitate prompt processing, copies of subpoenas should be served at the Program. Faxed subpoenas are not acceptable.

Note – Authority Cited: Government Code Section 100010; Government Code Section 100048.

#### **Section 10012. Disclosure**

The Board may disclose aggregated anonymized data that does not include information that is identifiable to an individual Eligible Employee or Participating Employer for purposes of research associated with the Program. The Board may disclose information that it is required to disclose under the California Public Records Act. The Board may disclose Account information



to the Administrator, the providers of investments for the Program, regulatory agencies to the extent disclosure is required by law, and to other persons or entities to the extent the Board determines disclosure is necessary to administer the Program.

Note – Authority Cited: Government Code Section 100010; Government Code Section 100048; Government Code Section 6250 et seq.

DRAFT

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J. Mark Iwry (pronounced “Eevry”) is a Nonresident Senior Fellow at the Brookings Institution and Visiting Scholar at The Wharton School. He served from 2009 to January 2017 as Senior Advisor to the Secretary of the Treasury. He also served concurrently as the U.S. Treasury Department’s Deputy Assistant Secretary for Retirement and Health Policy. As policymaker and regulator, his portfolio included pension, retirement (including 401(k) plans and IRAs), savings, and health policy; related tax policy and tax and legal aspects; legislative and regulatory implementation of health care reform (ACA); other employee benefits and compensation, and related legislative, rulemaking, regulatory, and policymaking responsibilities.

In addition to his current roles at Brookings and Wharton, he is Senior Policy Advisor to AARP and serves on boards of advisors for various organizations, including fintech startup enterprises and academic, research, and other entities, such as the American Benefits Institute, Council of Scholar Advisors of the Georgetown University Center for Retirement Initiatives, Panel of Outside Scholars of the Boston College Center for Retirement Research, Board of Advisors of the Pension Research Council at The Wharton School, and other organizations.

Mr. Iwry was a partner in the law firm of Covington & Burling and Of Counsel to the law firm of Sullivan & Cromwell, providing advice and assistance to major corporations, small businesses, financial institutions, trade associations, and nonprofit entities. He previously served as the Treasury’s Benefits Tax Counsel, Nonresident Senior Fellow at Brookings, Research Professor at Georgetown University, and co-founder and Principal of the Retirement Security Project.

He has been invited to testify before Congress – representing Treasury and the Executive Branch or, while in the private sector, testifying as an independent expert – on approximately 25 occasions and has testified before various State legislatures. He has provided policy advice to numerous Senators, Members of Congress, and congressional staff (Democrats and Republicans) and to five Presidential campaigns. His books and articles include the co-edited volumes (with William Gale and Peter Orszag), *Aging Gracefully: Ideas to Improve Retirement Security in America* and *Automatic: Changing the Way America Saves* (with W. Gale, D. John, L. Walker).

In recent years he has been recognized as one of the world’s “30 top financial players” (*Smart Money* magazine), “Investment News 20” (20 individuals expected to have a major influence on the financial services industry), 100 most influential people in finance (*Treasury and Risk*), 50 most influential people in aging (*Next Avenue*), 40 most influential people in pensions (*Institutional Investor*), number 3 among the “100 most influential people in 401(k)” (*401(k) Wire*), etc.

A principal architect of the Saver’s Credit to expand 401(k) and IRA coverage of middle- and lower-income workers (claimed annually on some 8 million tax returns), the “myRA” (a simple, safe, affordable starter account for new savers), and the “SIMPLE” IRA plan (covering 3 to 4 million workers), he also co-authored President Obama’s legislative proposal to achieve a breakthrough in retirement savings coverage through automatic enrollment in IRAs, and played a central role in initiating and designing the nationwide state-based initiative to adopt the automatic IRA and to enact other retirement savings programs to facilitate private-sector saving at the state level.

He formulated and directed Treasury’s strategy in the 1990s to expand saving by defining, approving and promoting 401(k) automatic enrollment (and automatic rollovers to curtail pension leakage). Between periods of government service, he was instrumental in promoting auto enrollment and

related behavioral 401(k) designs and drafting the Pension Protection Act of 2006 auto enrollment provisions, while advising informally on design of the UK's auto enrollment program.

He also has been centrally involved in developing or orchestrating other expansions, simplifications, and improvements of the nation's pension, health care, and benefits systems, law, and regulatory framework, including the payroll deduction IRA, promoting lifetime income (including "QLAC" longevity annuities, target date fund annuities, and other partial and incremental annuities) in 401(k) and defined benefit plans and in IRAs, expanding saving through direct deposit of income tax refunds into IRAs and US saving bonds, the small business startup tax credit for new retirement plans, faster vesting for participants in pension and 401(k) plans, promoting payroll deduction IRAs and earlier or immediate participation in 401(k) plans, and the rollback of the longstanding "use it or lose it" rule for health FSAs.

Between periods of government service, these efforts also included bringing together the corporate/plan sponsor community, organized labor, pension professionals, and major advocacy groups in a behind-the-scenes process to develop a mutually acceptable legislative solution to the longstanding and divisive cash balance pension controversy. This process, in addition to his ongoing informal advice to key congressional staff at their request, contributed meaningfully to the formulation of the legislative cash balance pension consensus solution embodied in the provisions enacted by Congress in the 2006 Pension Protection Act.

Mr. Iwry has been the subject of profiles in the Wall Street Journal and other major media, which have often reported on his work and views. He has delivered more than 600 talks, keynote addresses, "fireside chats", and other presentations at financial, industry, business, trade association, academic, policy, legal, other professional, nonprofit, advocacy, and other conferences and meetings in the United States and abroad, including lectures at Harvard, Wharton, and other universities, and has conducted numerous "town hall meetings," Q&A sessions, and press, congressional, and stakeholder briefings. In the early and mid-1980s, while practicing law at Covington & Burling, he taught international law as an adjunct member of the law school faculty at George Washington University.

His most recent awards include the American Payroll Association's Government Partner Award, the Pension Rights Center award for outstanding contributions to retirement security, the Retirement Income Industry Association award for innovation in retirement income products, the Small Business Council of America special achievement award for "outstanding contributions, leadership, and dedication to promoting the interests of America's private retirement plan and health care systems and thereby protecting millions of small business employees", and the Insured Retirement Institute's Champion of Retirement award (the only recipient of this award who was not a Senator or Congressman). For his previous service at Treasury, he received a special award from the IRS as well as Treasury's Exceptional Service Award "[i]n recognition of his outstanding leadership and accomplishments .... Widely respected as Treasury's benefits and pension expert, Mr. Iwry excelled at building coalitions of diverse interests...."

He graduated with honors from Harvard College (A.B. in History and Literature) and Harvard Law School (J.D.), and has a Masters degree in Public Policy from Harvard's Kennedy School. He was a Harvard National Scholar, has been listed in *Best Lawyers in America*, *Washington DC Super Lawyers*, *Who's Who*, etc., is a Fellow of the American College of Employee Benefits Counsel, and is a member of the bar of the United States Supreme Court. On a somewhat lighter note, his observations on taxation and our nation's tax system are quoted more frequently than those of nearly any other individual in *As Certain As Death: Quotations About Taxes* (ed., Jeffery L. Yablon, Tax Analysts 2015), where they appear along with (better) quotes from authorities as eminent as Adam Smith, Voltaire, Franklin, Jefferson, de Tocqueville, the Old Testament, and Dave Barry.



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December 7, 2017

*Electronic Delivery*

California Secure Choice Retirement Savings Investment Board  
Attention: Katie Selenski, Executive Director  
915 Capitol Mall, Room 435  
Sacramento, CA 95814  
[SecureChoice@sto.ca.gov](mailto:SecureChoice@sto.ca.gov)

**Re: Need for Additional Clarity in the Secure Choice Regulations for  
Employment Situations Involving Professional Employer Organizations**

Dear Ms. Selenski:

On behalf of the National Association of Professional Employer Organizations (NAPEO), I would like to convey NAPEO's appreciation for the opportunity to provide comments on the draft regulations for California's Secure Choice Program (Program). NAPEO further appreciates the efforts that Program staff have made to involve stakeholders in the regulatory process. We were pleased to see in the draft regulations that staff took seriously the need to clarify at the outset who the "Employer" is for purposes of the Program in certain "tri-party" employment situations in which more than one individual or entity might be viewed as the employer of an employee. However, as discussed below, ***we believe that further clarification is needed for those situations involving a professional employer organization (PEO) in order to more fully and consistently achieve the Program's policy objectives and desired results for California workers and small businesses.***

NAPEO is the largest trade association for professional employer organizations (PEOs), which provide comprehensive HR solutions for small and mid-sized businesses. NAPEO represents approximately 300 PEO member companies that provide services to over 156,000 businesses employing more than 2.7 million workers nationwide. In California, NAPEO has over 60 California member PEOs who provide their services to over 105,000 California workers collectively.

PEOs generally provide payroll, benefits (including retirement plans), regulatory compliance assistance, and other HR services to their clients (referred to herein as "client employers"). Client employers have on average 10-15 workers. They tend to grow faster, have lower employee turnover, and are less likely to go out of business than small businesses that do not use a PEO. As described in our previous letter to California State Treasurer and California Secure

Choice Retirement Savings Investment Board (Board) Chair John Chiang,<sup>1</sup> a PEO's relationship with its client employers differs significantly from temporary agencies and so-called staffing agencies in part because *PEOs generally assume a co-employment relationship with a client's workers for certain limited purposes* such as payroll administration and contractually specified benefits. As a result, it is critical that the Program's regulations specifically address the responsibilities of PEOs and their clients in a manner that best achieves the objectives of the Program. Our recommendations (which are consistent with the approach that has been taken in connection with OregonSaves) are described below.

Our comments address the following:

1. Background on the need for Program regulations to clarify the treatment of tri-party employment relationships.
2. NAPEO's general recommendations for the Program's treatment of PEOs and their client employers in order to better and more consistently achieve the Program's desired outcomes for California workers and small businesses.
3. The challenges associated with applying Unemployment Insurance Code Section 606.5 for purposes of the definition of "Employer" to PEOs and their clients, and why further clarification specific to PEOs is needed in the regulations.
4. Specific recommendations for changes to the draft regulations to address employment situations that involve a PEO.
5. Other technical and procedural recommended changes not specific to PEOs.

## **1. THE NEED FOR PROGRAM REGULATIONS TO CLARIFY THE TREATMENT OF TRI-PARTY EMPLOYMENT RELATIONSHIPS**

As noted in our previous letter to Mr. Chiang, the Secure Choice Program legislation (S.B. 1234) was generally drafted with a traditional "two-party" employment relationship in mind (i.e., one employee and one employer). A two-party employment relationship is the most typical type of relationship that workers have with employers. Even workers who hold multiple jobs would generally be considered as having entered into separate two-party employment relationships with each employer for whom the worker performs services.

Despite the prevalence of two-party employment relationships, there are several forms of "tri-party" employment relationships that exist in certain contexts and that cover a significant number of California workers. A tri-party relationship generally consists of an employee, a client business, and a third individual or entity (e.g., a temporary agency, staffing company, or PEO) that enters into a service contract with the client business. Depending in part on the type of individual or entity involved and the specific arrangement that such individual or entity has with the client business, either party could be treated as the employer of the employee for certain purposes under state and federal law. S.B. 1234, however, does not address who the employer is in tri-party employment relationships.

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<sup>1</sup> See the attached October 21, 2016, letter from NAPEO to The Honorable John Chiang.

Thus, for purposes of the Program, there is a need for the regulations to clarify in tri-party employment relationships whether the client business *or* the individual or entity that contracts with the client business is the “Employer” with all the attendant responsibilities of an Employer under the Program.<sup>2</sup> How the Board and Program staff choose to address this matter for the various forms of tri-party employment relationships will have significant implications with respect to worker coverage under the Program, the employee experience, and administrative complexity for small businesses and PEOs (or temporary agencies or staffing companies).

## **2. GENERAL RECOMMENDATIONS FOR THE TREATMENT OF PEOs UNDER THE PROGRAM**

Unlike other tri-party employment relationships, when a PEO establishes its unique co-employment relationship with a client employer, that relationship is intended to assist the client employer with its compliance issues and the offering of employee benefits to the client’s existing workforce – services that are particularly helpful to small businesses. Yet a PEO’s clients and the employees that work for those client employers would exist and carry on their business regardless of whether the PEO is in the picture. In other words, if a client employer terminates its contract with a PEO, the workers who were covered by the contract remain with the client employer.

As such, the most consistent and lasting employment relationship in this tri-party arrangement is the relationship that exists between the client employer and its own workers – not the PEO and such workers. It is this unique nature of co-employment (i.e., unique to temporary agencies, staffing companies, and even joint employment) that necessitates the inclusion of separate rules for PEO relationships in order to better ensure that (1) the objectives of the Program are met and (2) workers and small businesses are treated consistently and equitably regardless of whether a PEO relationship is present.

*NAPEO has therefore strongly advocated that the following principles be incorporated into any rules developed for state-run retirement programs* such as California’s Secure Choice Program and OregonSaves:

- 1. The client employer – and not the PEO – should be treated as the employer for all employer requirements under the program with respect to workers who are performing services for the client employer and who are covered by the contract between the client employer and the PEO.<sup>3</sup>**
- 2. Any program requirements that are based on the number of employees an employer has should be applied at the client employer level with respect to the workers who are covered by the contract.**

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<sup>2</sup> We would note that a worker who holds multiple jobs could have multiple “Employers” for purposes of the Program, with each Employer potentially being required to enroll the worker in the Program and perform its respective duties as an Employer with respect to the Program. However, a worker who is subject to a tri-party employment relationship should only be treated as having one Employer for purposes of the services performed for the client business. Treating both the client and the individual or entity that contracts with the client as Employers would lead to substantial confusion, overlap, and conflicting actions, and we strongly believe that this result would not have been the intent of the Legislature.

<sup>3</sup> Client employers are generally treated as the employer (rather than the PEO) in several other contexts, including under both federal and state law.

**3. Client employers that offer a PEO-sponsored retirement plan to their employees should be treated as offering or providing an employer-sponsored retirement plan (i.e., a Tax-Favored Retirement Plan) for purposes of the program and any employer exemption that is based on the employer's offering of a retirement plan.**

By incorporating the above principles into the Program's regulations (or ensuring that the regulations would not produce a contrary result), the Program would achieve the following, which we believe are strongly in the interests of the Program and those impacted by it:

- Critically, a client employer could not avoid the Program's mandate (and thus prevent workplace access to the Program to its workers, including the opportunity for payroll deduction) by entering into a contract with a PEO that offers a retirement plan in situations where either (1) the client employer chooses not to make the PEO's retirement plan available to its workers or (2) the PEO only makes its retirement plan available to its own internal employees. Either situation would leave the workers covered by the PEO service contract without a work-based retirement savings option.
- A small business would not be subject to the Program's mandate at a date earlier than what the legislation intended for simply because it uses a PEO, which would often be the case if the "number of Employees" was determined at the PEO level.
- Employees of a small business that begins or terminates a relationship with a PEO would avoid being needlessly un-enrolled or re-enrolled in the Program if the "Employer" switched from the small business to the PEO or vice versa.
- A PEO that does not sponsor a retirement plan would avoid the myriad administrative complexities that would arise if it were a Participating Employer under the Program with respect to workers performing services for client employers in instances where the client employers have control over certain functions that the PEO would nevertheless be responsible for under Section 10005 of the draft regulations (e.g., setting up payroll deductions for the client's workers).
- A PEO that does not sponsor a retirement plan would not be required to automatically enroll a worker in the Program in cases where that worker already participates in a retirement plan sponsored by the client employer.
- In the case of a small business that does not co-employ 100% of its workforce, workers would avoid the confusion and fundamental unfairness that would result from finding themselves enrolled in the Program at different dates, as would often be the case if (1) the PEO is considered the Employer of the co-employed workers and is subject to one Registration Date, and (2) the client employer is the Employer of the non-co-employed workers and is subject to a different Registration Date (assuming neither the PEO nor the client employer is exempt from the Program). In addition, such small businesses would avoid the confusion of keeping track of which workers they would have responsibility for as the "Employer" under the program.

Ultimately, by ensuring the above principles and results are achieved, the Program will help provide workers and small businesses throughout California with a consistent experience and

uniform access to the Program regardless of whether the small business has entered into a contract with a PEO.

### **3. THE NEED FOR FURTHER CLARIFICATION OF WHO THE “EMPLOYER” IS WHEN A PEO RELATIONSHIP IS PRESENT**

Under the draft regulations, the “Employer” of an employee would generally be the individual or non-governmental entity that is determined to be an employer by applying the common law rules for determining employer/employee status. However, in the case that “an individual or entity contracts to supply an employee to perform services for a customer or client,” then subdivisions (b)-(d) in Unemployment Insurance (UI) Code Section 606.5 would be used to determine whether the individual/entity *or* the customer/client is the employer of a particular employee (rather than the common law test).

We read the cross reference to UI Code Section 606.5 as being intended to clarify for purposes of the Program which party is the employer of an employee in a tri-party employment situation. As noted above, we very much appreciate that Program staff understand the importance of the regulations providing clarity in this regard, and we agree that addressing tri-party employment relationships within the definition of “Employer” is an effective way to achieve this goal. However, we request that further clarification specifically addressing PEO relationships be added to the definition. This addition (language for which is suggested in part four below) is necessary to ensure (1) consistent treatment of PEO clients under the Program and (2) consistent and equitable treatment by the Program of the variety of types of employment relationship – traditional two-party relationships, temporary and staffing agency relationships, and co-employment (i.e., PEO) relationships.

The additional clarification we seek stems from the fact that UI Code Section 606.5 was not drafted with PEOs in mind, and there is otherwise no clear PEO-specific provision in the California statutes. Section 606.5 was drafted years ago to address the UI responsibilities of temporary agencies and more traditional employee “leasing” companies,<sup>4</sup> neither of which specifically address co-employment relationships. In the PEO context, it is not always clear under Section 606.5 whether the PEO would be the employer, and the answer may vary by PEO or even by client based on the services that a client contracts with the PEO to receive. Further confusing the matter, for purposes of the draft regulations, in the case that a PEO is determined *not* to be the employer under Section 606.5, then Section 606.5(c) provides that the PEO pays the employee’s wages as the agent of the employer. For a variety of reasons, PEOs are not agents of their client employers.

For the policy reasons and Program objectives discussed in part two above, *it seems to us that the intent of the draft regulations and the reference to UI Code 606.5 was for the client employer to be the employer for purposes of the Program instead of the PEO.* This result would be consistent with the treatment of PEOs and their clients under the final rules for OregonSaves. However, for the reasons noted above, the draft regulations would not consistently produce this result in employment situations involving a PEO. We have therefore suggested below some language that we believe would preserve the draft regulation’s treatment

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<sup>4</sup> Although PEOs have historically been known as employee leasing companies, that term is outdated and generally no longer adequately represents the modern PEO business model.



of traditional two-party employment relationships, temporary agencies, and staffing companies, while also ensuring that a PEO and its client employers are treated consistently vis-à-vis other PEOs and their clients.

#### 4. RECOMMENDED CHANGES TO THE DRAFT REGULATIONS

Pursuant to the discussion above, NAEPO respectfully recommends that staff amend the draft regulations as follows in order to provide for the consistent treatment of PEOs and their client employers under the Program and to better achieve the Program's policy objectives in terms of coverage goals and administrative simplicity.

- a. *Recommended changes related to the definition of Employer to clarify that the client employer, and not the PEO, is the Employer under the Program.*

##### **Section 10001. Additional Definitions**

(n) "Employer" means an individual or non-governmental entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, determined to be an employer under common law rules applicable in determining an employer-employee relationship, except as provided in subdivisions (b)-(d) in Unemployment Insurance Code Section 606.5. Notwithstanding the preceding sentence, solely for purposes of the Program, in the case of an Employee who is covered by a contract described in Section 10001(u) of these regulations between a Professional Employer Organization and a client or customer, the client or customer (and not the PEO) is the Employer of such Employee.

...

(u) "Professional Employer Organization" or "PEO" means an individual or non-governmental entity that enters into a contract substantially meeting the requirements of Internal Revenue Code Section 7705(e)(2)(A)-(E) (without regard to the word "certified" in subparagraph (C)) with a client or customer under which the PEO takes on certain mutually agreed-upon employer responsibilities with respect to the workers performing services for the client or customer who are covered by the contract.<sup>5</sup>

(v)(u) "Program" means...

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<sup>5</sup> Unlike a number of states, California's statutes do not contain a definition of PEO for any purpose. We have therefore recommended a definition of "Professional Employer Organization" that incorporates certain contract requirements that are standard for and generally unique to PEOs, and that are enumerated as part of the Internal Revenue Service's voluntary certification program for PEOs as provided for in the Internal Revenue Code (although IRS certification would not be required to be considered a PEO for purposes of our suggested definition).

*b. Recommended changes to the definition of Employee to accommodate PEO relationships.*

The draft regulations would define “Employee” in part as an individual who “receives an IRS Form W-2 (“W-2”) with California wages *from an Eligible Employer*” (emphasis added). In most types of employment relationships, the individual or entity who is the “Eligible Employer” for purposes of the Program will be the same person who provides the W-2 to the Employee. However, because PEOs generally issue W-2s to workers as part of the tax reporting services they perform for client employers, that would not be the case if a PEO’s client is the “Eligible Employer.” We therefore recommend the following changes to the definition of “Employee” to ensure that the definition is workable with respect to individuals who are covered by a contract between a PEO and client employer.

**Section 10001. Additional Definitions**

(k) “Employee” means any individual who (1) is a resident of California, or a non-resident with California source income, (2) under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee under

Unemployment Insurance Code Sections 621 et seq., and (3) who receives an IRS Form W-2 (“W-2”) with California wages from an Eligible Employer or from a Professional Employer Organization with respect to services the individual performed for an Eligible Employer.

*c. Recommended changes to accommodate the ways in which Form DE 9C is filed in employment relationships involving a PEO.*

The draft regulations would rely on data as reported on the DE 9C for purposes of determining the “number of Employees” that an Employer has, which is in turn relevant for determining (1) whether an Employer is exempt from the Program and (2) the Registration Date of an Eligible Employer. In this regard, we recommend that the changes shown below be made to ensure that the number of Employees an Employer has is appropriately determined when a PEO relationship is present.

As noted above, PEOs utilize a variety of business models and approaches to how they execute the services they provide to client employers. As a result, in some cases a PEO may submit the Form DE 9C on behalf of a client using the client employer’s account number, whereas other PEOs may submit the form in aggregate for all clients with workers in California using the PEO’s own account number. California’s Employment Development Department (EDD) has generally accepted a PEO’s use of either method. Moreover, a client employer that does not co-employ 100% of its workforce would report its non-co-employed workers on one DE 9C while the PEO would generally be responsible for reporting the co-employed workers on a separate DE 9C (whether under the client employer’s account number or the PEO’s).

Regardless, we believe that the intent of the draft regulations is to determine the number of Employees that an Employer has based on a count of all Employees reported on the Form DE 9C who have wages attributable to services performed for a client employer, regardless of whether

that Employee was reported under the client employer's account number or the PEO's account number.<sup>6</sup> We therefore suggest the following changes:

#### **Section 10001. Additional Definitions**

(o) "Exempt Employer" means an Employer that either (i) has fewer than five Employees as reported on the DE 9C for the quarter ending September 30 of each Program Year; or (ii) that provides or contributes to a Tax-Favored Retirement Plan (including a Tax-Favored Retirement Plan offered through a PEO); or (iii) is the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities. If an Employer has entered into a contract with a PEO as described in Section 10001(u) of these regulations, the reference to the DE 9C reporting in the preceding sentence shall include: (A) any DE 9C filed under the Employer's account number; and (B) any DE 9C filed under the applicable PEO's account number, but only to the extent that an Employee reported on the PEO's DE 9C performed services for the Employer.

#### **Section 10003. Employer Registration and Employee Enrollment**

(e) For purposes of subsection (c), the number of Employees an Eligible Employer employs shall be the number of Employees as reported on a DE 9C for the quarter ending September 30 in the calendar year preceding the calendar year in which the Registration Date occurs.<sup>7</sup> If an Employer has entered into a contract with a PEO as described in Section 10001(u) of these regulations, the reference to the DE 9C reporting in the preceding sentence shall include: (A) any DE 9C filed under the Employer's account number; and (B) any DE 9C filed under the applicable PEO's account number, but only to the extent that an Employee reported on the PEO's DE 9C performed services for the Employer.

#### **Section 10004. Employer Exemptions**

(a) An Employer shall be exempt from the Program if:

(1) The Employer employs fewer than five Employees as reported on the DE 9C for the quarter ending September 30 of each Program Year;

(2) The Employer provides or contributes to a Tax-Favored Retirement Plan (including a Tax-Favored Retirement Plan offered through a PEO); or

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<sup>6</sup> This necessary change further demonstrates the need for a specific PEO rule to best achieve the Program's objectives. For example, assume there is a PEO client with 14 employees, 10 of whom are covered under a PEO co-employment relationship. Without the changes we are recommending, 10 employees would receive a W-2 from the PEO (as required by federal law) and the 4 who are not in the tri-party relationship (and who receive a W-2 from the client employer) would be excluded from potential participation in the Program because the client employer could claim an exemption for having fewer than 5 employees as reported on the DE 9C.

<sup>7</sup> This suggested change is intended to clarify which DE 9C applies with respect to a particular Registration Date. Thus, if one Registration Date is July 1, 2019, the number of Employers would be determined by reference to the DE 9C filed for the quarter ending September 30, 2018.

(3) The Employer is the federal government; the state; any county; any municipal corporation; or any of the state's units or instrumentalities.

For purposes of this subsection, if an Employer has entered into a contract with a PEO as described in Section 10001(u) of these regulations, the reference to the DE 9C shall include: (A) any DE 9C filed under the Employer's account number; and (B) any DE 9C filed under the applicable PEO's account number, but only to the extent that an Employee reported on the PEO's DE 9C performed services for the Employer.

*d. Recommended change to clarify that PEOs may assist clients with Program compliance.*

For the reasons stated above, we strongly believe that a PEO's client (and not the PEO) should be the Employer for purposes of the Program with respect to the covered workers performing services for the client employer. If this is the outcome that the regulations adopt, then for those client employers that become Participating Employers under the Program, we expect that PEOs would generally offer their services to assist those clients with any duties they would have as Participating Employers (just as PEOs provide their small business clients with assistance with respect to similar such tasks and responsibilities in other contexts). Thus, in order to provide clarification and avoid any questions with respect to whether such assistance from a PEO would be allowed, we recommend the following addition to Section 10005.

#### **Section 10005. Participating Employer Duties**

(10) Nothing in these regulations shall prohibit a Professional Employer Organization from entering into a contract as described in Section 10001(u) with a client or customer that is a Participating Employer under which the PEO is to assist the client or customer in the performance of some or all of a Participating Employer's duties under these regulations.

### **5. OTHER TECHNICAL AND PROCEDURAL RECOMMENDED CHANGES NOT SPECIFIC TO PEOs**

Although not unique to PEO relationships, NAPEO has the following additional comments on the draft regulations at this time:

- ***Need to Further Limit the Responsibilities of Participating Employers:*** To the extent practicable, we would urge the staff to explicitly limit Participating Employers' responsibilities with respect to Program-related tasks throughout the draft regulations. Many of the tasks enumerated in the draft regulations can and should be performed by the Administrator in order to minimize Participating Employers' administrative burdens and to better ensure that the Program is operated in a manner consistent with the U.S. Department of Labor's guidance relating to non-ERISA payroll deduction IRAs. However, the draft regulations are silent in many instances with respect to whether the Administrator or the Participating Employer (or another party) would be responsible for a particular task, or they otherwise leave open the possibility that a process could subsequently be developed that places additional administrative duties on Participating Employers.

For example, Section 10006(b)(2) states that a Participating Employee may opt out of Automatic Escalation at any time by following procedures established by the Administrator, but that language leaves open the possibility that the Participating Employer could be made responsible for collecting and tracking those opt-out requests under the procedures developed by the Administrator. Section 10006(b)(3) presents a similar concern with respect to a Participating Employee's ability to change his or her Automatic Escalation amount (seemingly also at any time).

- ***Definition of “Tax-Favored Retirement Plan”:*** We suggest that the definition of “Tax-Favored Retirement Plan” in Section 10001(z) be amended by adding a specific reference to 401(k) plans. Although we assume that the draft definition's inclusion of plans that are “intended to be tax qualified under Internal Revenue Code Section 401(a)” would include 401(k) plans, people are generally more familiar with the term “401(k) plan” and we believe it could help avoid potential confusion by specifically including the term.
- ***Need to Clarify Employer Requirements with respect to Participating Individuals:*** Section 10006(c)(2) of the draft regulations states that the Program may establish processes and procedures for Participating Individuals' transactions with the Program, including payroll Contributions. In this regard, we request clarification that no employer of a Participating Individual is required to offer or facilitate payroll Contributions to the Program on behalf of the Participating Individual unless (1) the employer is a Participating Employer for purposes of the Program and (2) the Participating Individual is also a Participating Employee with respect to that employer/Participating Employer.

In addition, we request clarification that, in the event that an employer chooses to allow a Participating Individual to make Contributions to the Program via payroll deduction, such employer does not become responsible for any of the Participating Employer duties such as those listed in Section 10004, except for withholding and remitting such Contributions to the Administrator.

\* \* \* \* \*

Once more, we appreciate your consideration of our comments on the draft regulations for the Program. Should you have any questions with respect to the issues discussed herein or NAPEO's position on such matters, please contact me at (503) 345-2486 or Daniel Harris of NAPEO at (703) 739-8173.

Sincerely,

Craig Ahlswede  
Chair, NAPEO CA Leadership Council  
President, Allevity HR & Payroll



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December 7, 2017

California Secure Choice  
Retirement Savings Investment Board  
Transmitted via email: SecureChoice@sto.ca.gov

**Re: Comment on Draft Emergency Regulations**

Dear Members of the Retirement Savings Investment Board,

The Pew Charitable Trusts' (Pew) retirement savings team studies the challenges that American workers are facing in saving for retirement, the barriers that employers experience in offering retirement savings plans for their workers, and the public policy initiatives that would address these difficulties and barriers. Since 2014, we have published several reports and released other material on a range of topics related to retirement security, including "Who's In, Who's Out: A look at access to employer-based retirement plans and participation in the states," "Worker Reactions to State-Sponsored Auto-IRA Programs," which is based on a survey of 927 private sector workers without a retirement plan at their workplace, and "Employer Reactions to Leading Retirement Policy Ideas," which is based on a nationally representative survey of 1,639 private sector small and midsize businesses.<sup>1</sup>

On November 27, 2017, draft emergency regulations for California Secure Choice were issued for public comment. We are pleased to provide a summary of our research findings that may relate to issues raised in the draft emergency regulations.

Please note that the purpose of Pew's work at the current time is to release research that is relevant to ongoing policy discussions about retirement savings throughout the country, but not to propose or endorse specific policy options. As a result, this submission should not be construed as support for or opposition to any provision in the draft emergency regulations.

In this letter, we will discuss retirement security issues broadly as they may relate to retirement savings in California and also address specific topics of relevance to the draft regulations.

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<sup>1</sup> The Pew Charitable Trusts, "Who's In, Who's Out," [http://www.pewtrusts.org/~media/assets/2016/01/retirement\\_savings\\_report\\_jan16.pdf?la=en](http://www.pewtrusts.org/~media/assets/2016/01/retirement_savings_report_jan16.pdf?la=en); The Pew Charitable Trusts, "Worker Reactions to State-Sponsored Auto-IRA Programs," 2017, [http://www.pewtrusts.org/~media/assets/2017/10/retirement\\_savings\\_worker\\_reactions\\_v5.pdf](http://www.pewtrusts.org/~media/assets/2017/10/retirement_savings_worker_reactions_v5.pdf); The Pew Charitable Trusts, "Employer Reactions to Leading Retirement Policy Ideas," 2017, <http://www.pewtrusts.org/~media/assets/2017/07/employer-reactions-to-leading-retirement-policy-ideas-071117.pdf>.

Retirement Security in California: Workers in the United States accumulate the vast majority of their retirement savings through employer-based plans, but large gaps in coverage exist. Our data show significant differences in access and participation across the states. In California, more than 4 million full-time, full-year, private-sector wage and salary workers lack access to a retirement savings plan or a pension through their employer. Fifty-one percent of full-time private sector California workers have access to a workplace retirement plan, which places California 46<sup>th</sup> out of the 50 states. In addition, 44 percent of all workers are participating in a workplace retirement plan, which places California 44<sup>th</sup> out of 50 states. Access to and participation in a private sector workplace retirement plan increases with the size of the employer, as workers get older and as wages and salaries increase – specific details can be found on the Pew website.<sup>2</sup>

Default Contribution Rate: In section 10006(a)(2), the draft emergency regulations state that contributions “shall equal 5 percent of Compensation for each Compensation period.” A study published by Pew earlier this year found employees would be almost equally as likely to participate in a savings plan under a 3 percent or 6 percent default contribution rate. In the survey of workers, participants were initially divided such that half were told that they would be enrolled into a retirement savings program that would automatically deduct 3 percent of pay to contribute into the plan, and the other half were told that their default contribution would be 6 percent of pay. Ten percent of employees surveyed initially said they would opt out under a 6 percent default contribution rate, whereas 9 percent said they would opt out under a 3 percent default rate.

Under a 3 percent rate, 60 percent of those surveyed said they would stay in a savings plan without making changes, 1 percent stated they would lower their contribution rate, 13 percent would increase their contribution rate, and 16 percent reported that they didn’t know what they would do.

Under a 6 percent default rate, 53 percent of employees said they would stay in the savings plan as is, 6 percent indicated that they would lower their default rate, 11 percent would increase their contribution rate, and 20 percent said they didn’t know what they would do. After hearing more details about the program, there was no significant difference in participation rates between respondents who were told they would have 3 percent or 6 percent default rates.

Pew’s separate survey of owners of small to midsized business without retirement plans found majority support for both contribution rates. When asked about individual features of auto-IRA plans, 81 percent supported a 3 percent rate of contribution and 69 percent supported a 6 percent contribution default. After hearing more details about the program, there were no differences in overall support between those who were told about a 3 percent versus a 6 percent default rate.

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<sup>2</sup> California Fact Sheet, <http://www.pewtrusts.org/~media/data-visualizations/interactives/2015/retirementsavings/pdf/pewemployerbasedretirementplanaccessandparticipationcalifornia.pdf>.

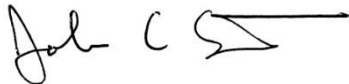


Automatic Escalation of Contributions: In addition, at section 10006(a)(3) the draft regulations state that “the Contribution Rate shall increase by an additional 1 percent of Compensation on each January 1 following the Participating Employee’s initial enrollment up to a maximum Contribution Rate of 8 percent.” Pew’s survey of workers found broad support (68 percent) for the automatic escalation of contributions. This result differed by both age cohort and experience with retirement planning. One-fifth of those 18-35 answered “don’t know” when asked about automatic escalation. That drops to 7 percent among those 36-51. Those with no retirement planning experience were also twice as likely as those with experience to say they don’t know (14 percent compared with 6 percent). They also expressed less support for automatic escalation (67 percent compared with 77 percent). Those with planning experience may more easily recognize the benefits of pro-savings features like the automatic escalation of contributions or may be more familiar with them. That experience also may be related to having access to an employer-sponsored plan previously.

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We thank you for the opportunity to comment on these important topics. More information from these reports can be found on our website, [www.pewtrusts.org/retirementsavings](http://www.pewtrusts.org/retirementsavings). We look forward to your continued engagement and are available to share our work and discuss these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Scott", followed by a horizontal line and a stylized flourish.

John C. Scott  
Director  
Retirement Savings Project



December 7, 2017

Katie Selenski  
Executive Director  
California Secure Choice Retirement Savings Investment Board  
915 Capitol Mall, Room 110  
Sacramento, CA 95814  
*Transmitted via Email*

RE: Public Comment on Draft of Emergency Regulations of the California Secure Choice Program

Dear Ms. Selenski:

UnidosUS (formerly The National Council of La Raza), the largest national Hispanic civil rights organization in the United States, strongly supports the California Secure Choice Retirement Savings Program, and welcomes the opportunity to provide feedback on the draft emergency regulations. UnidosUS conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, we provide capacity-building assistance to our Affiliates who work at the state and local level to advance opportunities for individuals and families.

One of our core areas of work is economic security and retirement readiness, detailed in our 2015 report, “Enhancing Latino Retirement Readiness in California.” An estimated 3.5 million Latino employees stand to benefit from the Secure Choice program and gain access to retirement accounts.

The recommendations outlined below echo previous UnidosUS comments, particularly with respect to maximizing accessibility and protecting the privacy of enrollee information. These comments are largely drawn from the 2015 “Retirement Readiness” report and related Secure Choice work in the years that have followed, as well as from conversations with stakeholders and members of the UnidosUS Affiliate Network, which includes 60 organizations serving more than 3.1 million Latinos throughout California. By taking into account how Latino workers would be impacted by specific aspects of Secure Choice design, we have a unique opportunity to enhance the retirement security of nearly 4 million Latinos who will have access to a retirement savings program for the first time.

a. **Employer exemptions**

An employer is exempt from Secure Choice if it already offers a retirement program for its employees. This exemption may leave out many part-time and seasonal employees who work for employers that offer retirement savings programs, but only for full-time workers. Latinos and other minorities in California are more likely to be part-time and seasonal workers;

approximately 32% of Latino workers are employed in part-time or seasonal employment.<sup>i</sup> Part-time and seasonal workers should have equal access to a retirement program either through their employer or Secure Choice. In order to ensure that these workers are offered retirement savings options, we recommend the following amendment to Section 1004:

Section 10004(a) An Employer shall be exempt from the Program if: (2) The Employer provides or contributes to a Tax-Favored Retirement Plan *available to all employees, including Part-Time and Seasonal Employees*;

Title 22 of the California Code of Regulations, Section 1326-1(a) similarly requires an employer to record and account for its part-time and seasonal workforce for purposes of Unemployment Insurance benefits.

**b. Default program options and alternative elections for contributions, automatic escalation, and early withdrawal**

UnidosUS recognizes the need for a default contribution rate that will allow program participants to accumulate savings that will strengthen their long-term economic stability. However, this must be balanced against a requirement of contributing funds that would lower take-home pay to an unsustainable level and dissuade some low-wage earners from participating in the program. For many eligible program participants, this may be the first experience they have in regularly contributing to a dedicated retirement savings account, and they may benefit from gradually building up to a higher contribution amount over time rather than starting with a higher required contribution. It is for these reasons that UnidosUS strongly recommends a default contribution rate of 3% of wages.

In UnidosUS focus groups,<sup>ii</sup> Latino participants were sensitive to small differences in how much they could set aside each month for retirement savings. When asked about what specific amount they would feel comfortable seeing deducted from their paycheck, most focus group participants agreed that 3% was a reasonable default rate. While some stakeholders have argued that a 3% default would not result in adequate savings for retirement, we are concerned that people will elect not to save if the deductions are too high. As an alternative to a higher initial default contribution, UnidosUS supports a robust escalation rate. Once employees are enrolled in the program, UnidosUS supports the recommended 1% automatic escalation, to take place each January 1 following the participating employee's initial enrollment, up to a maximum contribution rate of 8%.

UnidosUS also supports the draft recommendation that participating employees should be allowed to elect an alternative contribution rate and escalation rate other than the defaults, without penalty. Communication of these options to program participants will be critical. The process by which employees elect an alternative rate, or to opt-out of automatic escalation, should be as easy as possible for the employee.

The program administrator must provide written documentation of these options, and make it available in all of the non-English languages used by the populations that will participate in Secure Choice. Information must be clear and easy to understand, with support services such as a toll-free assistance phone line easily accessible for participants, that is also available in the same non-English language options. Participating employees must also receive at least 30 days written notice of any changes to their account contributions. To address this, Section 10006(a)(3) of the draft regulations should be amended to include a notification requirement and process for opting-out.

In an effort to preserve the adequacy of savings in Secure Choice accounts, several stakeholders have recommended prohibiting workers from accessing their accounts for any reason other than retirement. However, UnidosUS research shows that restricting access to retirement accounts may have a negative effect on participation. In UnidosUS focus groups, Latinos in California expressed a preference for allowing penalty-free access to Secure Choice accounts under certain conditions.<sup>iii</sup> The Internal Revenue Service (IRS) allows for tax-free early distributions from Individual Retirement Accounts (IRA) to pay for health care, higher education, and the purchase of a first home. Secure Choice accounts should not carry harsher penalties than what is currently standard practice in IRAs for participants who choose to access their funds prior to retirement.

### **c. Individual eligibility**

UnidosUS strongly encourages the board to authorize individuals to participate in the program and to immediately establish processes and procedures for participating individual transactions with the Secure Choice Program on the same timeline as the implementation of other categories of eligible participants.

Latinos and other minorities in California are more likely to belong to the contingent workforce, which includes the self-employed, part-time workers, and those employed by temporary staffing agencies, contractors, and other labor market intermediaries. The majority of the temporary workforce in California is Latino or another racial/ethnic minority.<sup>iv</sup> These workers are not directly employed by the companies for which they work, and they are usually ineligible for workplace benefits, including retirement plans. Trends show that contingent arrangements are becoming more prevalent in the U.S. economy, leaving millions of workers in precarious employment arrangements and without access to a workplace retirement plan.

Part-time and seasonal employment is more prevalent in certain industries such as agriculture, mining, and construction—industries that employ nearly one-quarter (23.2%) of California's Latino immigrant workforce<sup>v</sup> and are less likely to offer retirement plans. To ensure retirement access for part-time workers, the state of Illinois' Secure Choice program counts employees in the same manner that the Illinois Department of Employment Security (IDES), equivalent to the California Employment Development Department, counts employees for purposes of unemployment insurance. California Secure Choice can use this as a model for part-time worker access.

**d. Confidentiality of employee information/immigration status**

As UnidosUS has previously recommended to Secure Choice staff, enrollment should not include questions that are intrusive or that create potential legal liability for undocumented worker-beneficiaries.

Section 1005 of the draft regulations states that the employer shall “Facilitate collection of Opt-out Forms and the record of employees’ acknowledgement of receipt of the Disclosure Forms.” The regulations should specify what information is included in the Disclosure Forms and how it is different from the “Information Packet.” The Board should consider adopting language from the proposed RFP for Program Administration and Investment Management Services, which states that “The Program Disclosure Statement must be included in all employee information packets and shall contain all of the Program rules and material information necessary for participants to make informed decisions regarding their participation in the Program.”

The regulations should make clear that “the record of employees’ acknowledgment of receipt of the Disclosure Forms” will not create potential legal liability for undocumented worker-beneficiaries. For example, the “record of employees’ acknowledgment” should not require the employee to verify the employee’s Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN).

In the event that a “no-match” situation occurs in which the program administrator is unable to verify the participating employee’s identity using the SSN or ITIN provided by the employee, the regulations should make clear that communication between the administrator and employee regarding the details of the situation remains confidential. The employer should only receive notice of a halt of contributions to the employee’s account without specifying details. Further, the regulations should state that the program administrator must provide clear instruction to the employee regarding how to contact the administrator to discuss and/or correct their paperwork.

**e. Language access**

Currently as drafted, regulations do not address the need for communication about the program to participants in languages other than English. The regulations should specify that, in accordance with The Dymally-Alatorre Bilingual Services Act (California Government Code Section 7290 et. Seq.), the Secure Choice Program will furnish information and render services in the languages of the non-English speaking people it will serve. As further mandated under the Act, the regulations should specify that the Program will provide written materials explaining services in any non-English language spoken by a substantial number of the public served by the Program.

The Board may also want to consider adopting a Language-Access Program Policy Statement, like the Covered California Program, which states:

Covered California is responsible for ensuring that all persons, including those who are non-English speaking, are provided equal access to the available services and information of the Department. All programs shall deliver services in ways that recognize individual differences and are sensitive to cultural differences. Effective communication with customers who are non-English speaking shall be achieved through bilingual staff, translated written materials, and contracted interpreter/translation services.

**f. Other considerations**

Public perception of Secure Choice may be a determining factor in eligible employees' participation in the program. It is therefore critical that targeted efforts and robust investments go into producing culturally and linguistically appropriate education materials about program participation. All materials that relay program information from the program administrator should be clear and easy to understand, and the administrator should establish clear information channels to field questions from eligible employees and program participants.

Secure Choice stakeholder meetings have identified the desire to encourage participants to interact with the program through online or mobile phone access. While this will likely be adopted by many program participants, some low-income workers may not have regular access to these platforms. We encourage the program administrator to include the option for employees to access free hard copy documentation about program details and to have the ability to access account information at no cost to the employee via hard copy written materials.

Thank you for your consideration of these comments. If you have any questions, or would like clarification of our requests, please contact Marisabel Torres, Senior Policy Analyst, at (213) 787-9602 or [mtorres@unidosus.org](mailto:mtorres@unidosus.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Lindsay Daniels".

Lindsay Daniels  
Associate Director, Economic Policy  
UnidosUS

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<sup>i</sup> UnidosUS tabulation of Census Bureau's Current Population Survey, Annual Social and Economic Supplement, 2017.

<sup>ii</sup> Catherine Singley Harvey, *Enhancing Latino Retirement Readiness in California* (Washington, DC: UnidosUS, 2015), <http://publications.unidosus.org/handle/123456789/1148>

<sup>iii</sup> Ibid

<sup>iv</sup> Miranda Dietz, *Temporary Workers in California Are Twice as Likely as Non-Temps to Live in Poverty* (Berkeley, CA: University of California, Berkeley, 2012), [http://laborcenter.berkeley.edu/pdf/2012/temp\\_workers.pdf](http://laborcenter.berkeley.edu/pdf/2012/temp_workers.pdf).

<sup>v</sup> UnidosUS analysis of Current Population Survey, *Annual Social and Economic Supplement*, March 2014.

December 7, 2017

Via Email [SecureChoice@sto.ca.gov](mailto:SecureChoice@sto.ca.gov)

Katie Selenski  
Executive Director  
California Secure Choice  
915 Capitol Mall, Room 110  
Sacramento, CA 95814

Re: Comments on Secure Choice Program Draft Regulations

Dear Ms. Selenski,

United Ways of California fights for the health, education and financial stability of every person, in every community. We work to expand opportunities for low-income children and families to be healthy, to gain an education, and to be financially stable.

Secure Choice will assist Californians, especially low and middle-income workers, in saving for a more secure retirement. As a key stakeholder and facilitator in the Secure Choice Outreach Plan planning process, we want to ensure the program is designed and administered with the needs of low and middle-income employees at the forefront. We are pleased to be able to provide some comments in very transparent process.

#### **Name Recommendation**

- **CalSavers:** 'CalSavers' has been suggested as a potential program name. We feel that 'CalSavers' aligns with similar state programs such as CalWORKs, CalEITC, CalFresh and Medi-Cal. Employees may see familiarity in the name and a sense of trust in the program which has the potential to encourage employee participation. We strongly recommend not retaining the Secure Choice name.

#### **Section 10001. Additional Definitions**

- **No comment**

#### **Section 10002. Administration**

- **No comment**

#### **Section 10003. Employer Registration and Employee Enrollment**

- **No comment**

#### **Section 10004. Employer Exemptions**

- **Employees have the right to full information on the program** even if their Employer is ineligible for the program. Employees should have access to program regulations and information including Employer program eligibility.

#### **Section 10005. Participating Employer Duties**

- **Program materials and information should be linguistically accessible to all employees.** Program materials and information must abide by Federal and State Language access laws. Such materials and information should be available in the top 12 languages spoken in California along with access to translation assistance. This should be a requirement for any plan administrator as well.

#### **Section 10006. Default program options and alternative elections for Contributions, Automatic Escalation, and investment options**

- **It is vital for the program to remain a ROTH IRA:** Employee participation rate will be the driver in the success of this program. It is important that the program works for population it is intended to target; low to moderate income people.
  - Employees in the target population could easily face greater financial hardships from time to time and would need the flexibility of a program that allows them to withdraw funds to help alleviate any financial crises without heavy penalties. We want to make sure the program works for and with low to moderate income people.
- **Contribution rate:** The default 5% contribution rate with the automatic annual escalation rate of 1% increase up to 8% max are reasonable as long as employee can modify rate or opt out at any time.
- **Notification of Auto Escalation:** Employees should be notified no later than 90 days via mail and online portal when their contribution will increase. An adequate amount of time will allow for employees to stay informed on their contributions and adjust their financial planning accordingly.
- **Concern for Income and Asset Limits for Public Benefits:** While we understand that an IRA would not be counted as an asset or resource when being deemed eligible for benefits, we would like clarification about how any withdrawals for emergencies would be handled. Would the amount withdrawn count towards income for the year and as a result potentially cause them to lose other benefits if above income threshold?

#### **Section 10007. Contributions**

- **No Comment**

#### **Section 10008. Rollovers and Distributions**

- Employees should remain eligible and able to contribute to their account if they switch to an ineligible employer or if they have periods of unemployment. This will be important to make clear during the outreach and marketing of the program.

#### **Section 10010. Confidentiality**

- **No comment**

#### **Section 10011. Subpoena**

- **No comment**

#### **Section 10012. Disclosure**

- **No comment**



In addition to regulations, we would like to comment on a few items that we feel should be included in the RFP for the third-party administrator:

**Language Requirement**

- They should be able to provide services in the twelve threshold languages spoken in California.

**Logo Placement**

- Initial program marketing materials should not include the third-party administrator's logo. The program should be marketed with the program logo (CalSavers).

**Consumer Advisory Group**

- We recommend that the third-party administrator form a diverse consumer advisory group to guide them in the marketing and messaging efforts and that they reflect the Secure Choice developed and tested external messaging for various target populations.

**Paper Statements**

- It is critical for employees to be able to request paper statements if they desire rather than only web based access to their accounts.

We thank you for the opportunity to comment on the regulations and RFP and applaud Secure Choice on the robust and transparent stakeholder process. We look forward to working with Secure Choice moving forward.

Thank you,



Judy Darnell  
Vice President of Public Policy  
United Ways of California

December 11, 2017

Katie Selenski  
Executive Director  
Secure Choice Retirement Savings Program  
915 Capitol Mall, Room 110  
Sacramento, CA 95814

Dear Ms. Selenski:

AARP is pleased to submit comments in response to the draft regulations for the Secure Choice Retirement Savings program as it relates to investments, the California Secure Choice Retirement Savings Investment Board, and the California Secure Choice Retirement Savings Trust. AARP has been working in support of the Secure Choice program from 2012 when the original study legislation was introduced, with the purpose of studying the feasibility of a work-and-save program managed by the state. In addition to supporting passage of that legislation, AARP contributed financially to the feasibility and market research. In 2016 we mobilized and activated 200,000 AARP advocates, and led a diverse coalition to help pass a bipartisan bill, which was signed by Governor Brown.

Throughout 2017, AARP has been actively involved with the employee and employer stakeholder workgroups brought together by the Secure Choice Executive Director. During the discussions in these workgroups we tackled a number of topics, including default rate, default options, privacy and security, definition of employers and employees, and accessibility. As a result of those discussions, one of the key elements of the Secure Choice program that we believe the Board should adopt is to offer a Roth IRA as the default option for the nearly seven million Californian workers who may potentially enroll in the program.

Although Roth IRAs function similarly to traditional IRAs, Roth accounts use post-tax dollars. This means that taxes are not owed upon retirement and investments can grow tax-free. Paying taxes on the front end may allow savers to accumulate more money over time. Roth IRAs also eliminate potential problems with deferred tax revenue for the state. Additionally, low-income savers have tax- and penalty-free access to their own contributions made to a Roth IRA in the case of an emergency. Many of the people who will participate in the Secure Choice program are low- to moderate-income workers, and this will be an important element to encourage them to participate in the program.

I am also enclosing the comments from AARP's consultant, Keller and Rohrbach, in response to the draft regulations. You may contact me at 626-585-2622 if you have questions.

I commend the Secure Choice Retirement Savings Investment Board and the Secure Choice staff for their hard work in producing the draft regulations. AARP stands ready to help the Board and the Secure Choice team in any way we can.

Sincerely,

A handwritten signature in black ink, reading "Nancy C. McPherson". The signature is fluid and cursive, with a large loop at the end of the last name.

Nancy McPherson  
State Director

Enclosed: AARP Consultant, Keller and Rohrbach, Comments

# KELLER ROHRBACK L.L.P.

December 6, 2017

Re: Draft Regulations for California Secure Choice Program

Dear Ms. Gill,

AARP has asked us to analyze the draft regulations for the California Secure Choice Program (the “Program”). The purpose of this letter is to apprise the California Secure Choice Retirement Savings Investment Board (“Board”) of issues it should be aware of when developing the Program’s regulations and ways it can address these issues.

Below, we describe in detail four features of the Program that will help facilitate the Board’s implementation of the Program: treatment of employers with ERISA plans; method of enrollment for employees; employer obligations under the Program; and references to ERISA or other language that suggest arrangements under the Program are ERISA plans. Within each section we have cited the relevant regulations and identified areas in need of further clarification or amendment.

## **I. IF EMPLOYERS WITH ERISA PLANS ARE EXEMPT FROM THE PROGRAM, ARE THEY REQUIRED TO CERTIFY THIS “EXEMPT STATUS,” AND IF YES, HOW?**

The Supreme Court has found that ERISA will preempt a state law if it has an impermissible “connection with” or “reference to” ERISA plans. The “connection with” analysis is concerned with whether a state law “governs . . . a central matter of plan administration,” or “interferes with nationally uniform plan administration.”<sup>1</sup>

The draft regulations suggest that California will adopt a method similar to OregonSaves whereby exempt employers are required to certify that they provide or contribute to an ERISA plan. *See* Section 10001(e) (use a “Certificate of Exemption,” a truthful statement by an authorized representative of an Employer that it is exempt); Section 10004(b) (“By the Implementation Date, the Program will notify Employers with a method whereby Exempt Employers may certify their exemption from the Program.”).

Although the OregonSaves program is currently facing a narrow challenge on their reporting requirement, we do not believe that this challenge will be successful. The challenge relies on the Supreme Court’s recent decision in *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016), where ERISA was held to preempt a Vermont law. That law “require[d] health insurers, health care providers, health care facilities, and governmental agencies to report any ‘information relating to health care costs, prices, quality, utilization, or resources required’ [as indicated] by

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<sup>1</sup> See Note 2.

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[a] state agency, including data relating to health insurance claims and enrollment.” Health insurers were required to submit claims data on members, subscribers, and policyholders. Furthermore, the law defined health insurer as a self-insured health care benefit plan, any third-party administrator, and any similar entity with claims data, eligibility data, provider files, and other information related to health care provided to a Vermont resident. *Id.* at 941. All this information was entered into an “all-payer claims database.” Entities covered by the state law were required to register with Vermont and submit data monthly, quarterly, or annually, depending on the number of individuals that the entity served; i.e. the more people served, the more frequently reports had to be filed.

The Court found that ERISA preempted the state law because it intruded upon a “central matter of plan administration.” ERISA extensively regulates plan reporting, disclosure, and recordkeeping; therefore, the additional reporting mandated by Vermont created parallel or additional regulations to ERISA’s already extensive reporting obligations, in the Court’s view. Thus, the state law had an impermissible “connection with” ERISA because it addressed “fundamental components of ERISA’s regulation of plan administration”. *Id.* at 945. The Court described Vermont’s reporting requirement as a direct and invasive regulation of plans.

In contrast, Oregon’s exemption reporting requirements do not seek to regulate plans directly and the information they seek is very limited: does the employer offer an ERISA plan. Moreover, courts have considered how burdensome a state law is on plan administrators as part of their ERISA preemption analysis. In *Louisiana Health Services & Indem. Co. v. Rapides Healthcare System*, 461 F.3d 529, 530-31 (5th Cir. 2006), the U.S. Court of Appeals for the Fifth Circuit considered whether ERISA preempted a Louisiana assignment statute. The court noted, “a statute’s impact on nationally uniform plan-administration must be evaluated in light of *the particular burden* the statute imposes on plan administration. *The greater the impact, the greater the burden.* As the [Supreme] Court recognized in *Egelhoff*, ‘all state laws create some potential for lack of uniformity.’ *Id.* at 539 (emphasis added; citing to *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)).

*Golden Gate Restaurant Ass’n v. City and County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), is also relevant here. In that case, the U.S. Court of Appeals for the Ninth Circuit rejected an ERISA preemption challenge to a city ordinance, which created a public health care program for all San Francisco residents who lacked health insurance and met age and income requirements. The Ninth Circuit rejected several different preemption arguments. In addressing one of them, it stated the following:

Finally, the Ordinance does not impose on plan administrators any “administrative [or] financial burden of complying with conflicting directives” relating to benefits law. *Ingersoll-Rand Co.*, 498 U.S. at 142, 111 S.Ct. 478. The Ordinance does impose an administrative burden on covered employers, for they must keep track of their obligations

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to make expenditures on behalf of covered employees and must maintain records to show that they have complied with the Ordinance. But these burdens exist whether or not a covered employer has an ERISA plan. Thus, they are burdens on the employer rather than on an ERISA plan. *See WSB Elec., Inc.*, 88 F.3d at 795 (rejecting the argument that a law “is preempted because it imposes additional administrative burdens regarding benefits contributions on *the employer*,” where it did “not impose any additional burden on ERISA plans or require the employer to take any action with regard to those plans”) (emphasis in original).

546 F.3d 639 at 657. Although the situation was somewhat different, exemption reporting requirements benefit from the same distinction; i.e., the administrative burden is on the employer, not the plan. The reporting requirements in Oregon are narrow and have been crafted to avoid employer burden.

Nevertheless, we have two recommendations:

1. The Board could adopt regulations whereby the Program contacts exempt employers to certify their exemptions rather than having employers complete this process. In its recommendations (provided to the Board before it issued the draft regulations), the Board’s staff noted that if an employer does not certify an exemption with the Program the third-party administrator of the Program (“TPA”) would follow up with the employer to enroll in the Program. That process could be used to determine whether those employers provide ERISA plans; i.e., if the employer indicates that it did not enroll in the program because it offered an ERISA plan, then the TPA could make note of the employer’s exempt status without requiring the employer to affirmatively certify its exempt status. This will shift the burden of certifying exemptions from the employers to the Program. Of course, this will require additional resources and could increase the costs of operating the Program.

2. Alternatively, if the Board maintains the employer reporting requirement, then subsequent regulations could choose a method that imposes minimum burdens on employers. For example, the OregonSaves program requires exempt employers to certify their exemptions by accessing the Program site and providing the following: Federal Employer Identification or Tax Identification Number (EIN/TIN), zip code, and an access code provided by the Program. This process is said to take about 5 minutes. If the Board adopts a similar requirement it should seek to impose the least amount of burden on employers as possible.

## **II. HOW DO EMPLOYEES ENROLL IN THE PROGRAM? DO THEIR EMPLOYERS AUTOMATICALLY ENROLL THEM OR DO THEY OPT IN?**

Since ERISA’s enactment, the U.S. Department of Labor (“the Department”) has issued several “safe harbors” which allow employers to offer certain benefits without “establishing or maintaining” ERISA plans. In 1975, the Department issued a Safe Harbor for payroll deduction IRA programs (“1975 Safe Harbor”). As you are no doubt aware, in 2016, the Department

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issued a Safe Harbor to encourage states to create state IRA arrangements without the risk that by doing so, employers would be deemed to “establish or maintain” ERISA plans; i.e., the arrangements would not be preempted by ERISA. Although Congress revoked the 2016 Safe Harbor through the Congressional Review Act, that safe harbor closely tracked the 1975 Safe Harbor. Thus, even without the 2016 Safe Harbor, California can still rely on the 1975 Safe Harbor to avoid the preemption of the Program.

The 1975 Safe Harbor, DOL Regulation, 29 C.F.R. [Code of Federal Regulations] Section 2510.3-2(d), provides that a payroll deduction IRA program will not be considered a pension plan covered by ERISA if it meets all the following conditions:

- (i) No contributions are made by the employer or employee association;
- (ii) Participation is completely voluntary for employees or members;
- (iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
- (iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

The first and fourth prongs of the 1975 Safe Harbor are simple determinations in the context of state IRA arrangements; i.e., the arrangements meet those exemption requirements. However, the second and third prongs -- employer endorsement and “completely voluntary” participation -- require further analysis.

The “completely voluntary” prong is largely a matter of how employees are enrolled in the Program. If employers are required to enroll their employees and employees do not have the option to opt out of the Program, then it will be more difficult for the Program to argue that participation is voluntary. However, if employees enroll themselves in the Program and there is no circumstance under which they are automatically enrolled, this would lean in favor of a court finding that voluntary participation is a feature of the Program.

While decisions on this issue are mixed, *Byard v. QualMed Plans for Health, Inc.*, 966 F. Supp. 354, 358 (E.D. Pa. 1997) may be instructive for the Board, wherein the court found that an “opt-in” program was completely voluntary. Although the company had signed a contract with an HMO enrolling all employees in the program, the plan was completely voluntary because employees could discontinue membership in the plan simply by stopping their monthly payments. *Id.* at 358.

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It is not clear from the draft regulations how employees will enroll or be enrolled in the Program. However, based on information from the State Treasurer's website, we assume that California will adopt an opt in program:

**How do employees participate?**

Enrollment in Secure Choice is voluntary for employees. If an employee enrolls, but decides they no longer want to participate, they may opt-out of the program at any time. Employees will be given an opportunity to re-enter the program during an open enrollment period at least once every two years.

Nevertheless, we recommend clarifying this point.

Note, however, that "Participating Employers" are required to provide the Program Administrator with information about each Eligible Employee (name, SSN, DOB, mailing address, etc.). Section 10005(a)(1)(A)-(G). It is not clear whether this will have the effect of enrolling employees in the Program. We recommend clarifying this section.

### **III. WHAT ARE ELIGIBLE EMPLOYERS REQUIRED TO DO UNDER THE PROGRAM?**

In addition to requiring participation to be voluntary, the 1975 Safe Harbor prohibits an employer from "endorsing" the Program. Thus, employer obligations in the enrollment and facilitation of the Program are central to whether a program will be exempt under the 1975 Safe Harbor. If an employer's involvement would lead an employee to believe that the employer had *endorsed* the Program then the Program would not be exempt under the Safe Harbor.

The regulations require employers to distribute an "Employee Information Packet" to their employees. The packet is provided by the Program and includes the "Disclosure Form" (the form (or forms) and other information about the Program provided to the Employees on behalf of the Program) and "Opt-out Form." Employers must distribute this within 30 days of the initial Registration Date.

This obligation to provide an information packet to Eligible Employees is consistent with case law finding this does not constitute employer endorsement. For example, one appeals court held that an employer did not endorse a group insurance program when it distributed a sales brochure, waiver-of-insurance cards, and enrollment cards, as "those efforts were undertaken to help [the insurer] publicize the program; the documents themselves were prepared and printed by [the insurer], and delivered by it to [the company] for distribution." *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135-36 (1st Cir. 1995). The company had no role in drafting the plan; working out its structural components; determining eligibility for coverage; interpreting policy language; investigating, allowing and disallowing claims; handling litigation; or negotiating settlements. *Id.* at 1136. Even though the company had provided a cover letter recommending enrollment, the appeals court held that an opinion, without more, did not amount to endorsement, where the letter did not "expressly state" that the employer endorsed the program. *Id.*



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In addition to requiring employers to provide information to employees, Section 10005(a)(4) requires “Participating Employers” to facilitate the collection of opt-out forms and maintain the record of employees’ acknowledgement of receipt of the Disclosure Forms. These obligations are also consistent with case law *not* finding employer endorsement as courts have permitted employers to facilitate enrollment and maintain records regarding enrollees under the 1975 Safe Harbor without establishing or maintaining ERISA plans. To illustrate, an employer did not endorse a program where it confirmed plan enrollment, maintained an employee enrollment list for its own record, completed the employer portion of the claim, maintained statistical data of plan enrollees, kept track of employee eligibility, and answered the occasional claim question. *Johnson*, 63 F.3d at 1136; *see also Byard*, 996 F. Supp. at 359-60 (holding that the safe harbor’s provisions were not defeated where the employer engaged in recordkeeping, documentation of eligibility, notification of cancellation, and discussed eligibility with employees).

**IV. DOES THE PROGRAM’S STATUTORY TEXT, REGULATIONS, OR MATERIALS SUGGEST THAT (1) ELIGIBLE EMPLOYERS ARE REQUIRED TO ESTABLISH ERISA PLANS UNDER THE PROGRAM OR (2) THAT THE ARRANGEMENTS CREATED UNDER THE PLAN ARE EMPLOYER-SPONSORED BENEFIT PLANS?**

A state arrangement that does not satisfy the criteria of the 1975 Safe Harbor is not necessarily an ERISA plan. Rather, in such instances, courts will still need to determine whether the arrangement is “established or maintained by an employer.” Indeed, an employer’s decision to extend benefits to its employees does not alone indicate that it has “established or maintained” a plan. Notwithstanding, Section 10001(s) defines “Participating Employers” as “an Eligible Employer that registers with the Program to provide its Eligible Employees access to the Program.” We recommend amending Section 10001(s) to read:

“Participating Employer” means an Eligible Employer that *is required to and does* registers with the Program. ~~to provide its Eligible Employees access to the Program.~~

The draft regulations also contain several disclaimers; i.e. the employer must remain neutral, the employer is not a fiduciary, etc. Disclaimers are not dispositive in determining whether an ERISA plan exists, however, it may help a court reach that conclusion. Nevertheless, we recommend providing additional guidance instructing employers *not* to do the following:

- Provide their own employer-specific materials to employees
- Place their letterheads or logos on any of the Program’s materials
- Distribute materials recommending the Program to their employees or otherwise suggest that employees participate

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The remaining issues concern challenges under the “reference to” framework. As noted previously, the Supreme Court has stated that ERISA preempts a state law if it has a “connection with” or “reference to” an ERISA plan. A state law has a “reference to” ERISA plans “[w]here a State’s law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law’s operation.” *California Division of Labor Standards Enforcement v. Dillingham*, 519 U.S. 316, 325 (1997)).

The draft regulations broadly refer to “Tax-Favored Retirement Plans,” as “an Employer-provided retirement plan,” which includes, but is not limited to, “a defined benefit plan or defined contribution plan which is intended to be tax qualified under Internal Revenue Code Section 401(a) . . .” This definition includes ERISA plans. *See* Section 10001(z) (defining “Tax-Favored Retirement Plan”); Section 10001(k) (defining “Eligible Employers,” in part, as those not providing a Tax-Favored Retirement Plan). Section 10002 also provides that the Program must be operated in a manner consistent with the 1975 Safe Harbor. Again, it is unlikely that a court would find these mere references to ERISA sufficient to find the Program preempted.

## **V. CONCLUSION**

The Program should continue to use disclaimers stating that the Program’s arrangements are not ERISA plans and that employers simply enable their employees to make payroll contributions. These disclaimers should also be included in any materials that are disseminated to employees and employers about the Program.

Moreover, in designing the Program’s enrollment process, the Board should be sure to outline the type of information needed from exempt employers. If the Board adopts an exemption reporting requirement similar to OregonSaves, then it should impose the same or less of a burden on employers than OregonSaves does.

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We look forward to discussing this letter with you and/or answering any questions that you may have about it.

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Best Regards,

Keller Rohrbach L.L.P.

David S. Preminger  
dpreminger@kellerrohrback.com

Erin Riley  
eriley@kellerrohrback.com

Rachel Morowitz  
rmorowitz@kellerrohrback.com

# YOUNG INVINCIBLES

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December 7, 2017

Secure Choice Retirement Savings Program  
C/O: California Secure Choice Retirement Savings Investment Board  
915 Capitol Mall – Room 435  
Sacramento, CA 95814

Honorable California Secure Choice Retirement Savings Investment Board:

On behalf of Young Invincibles (YI) and our constituents, I am writing today to advocate strongly on behalf of a Roth IRA account default for the Secure Choice Retirement Program. We support this type of IRA account default because we want to ensure the Secure Choice Board, staff and coalition members launch a statewide retirement program that is (1) accessible to young adults, (2) flexible to the needs of the generation, and (3) resonates in both the message and approach which will drive more active participation.

YI is a national nonpartisan, research, policy and advocacy organization that spends a majority of our time on the-ground with young adults both sharing consumer information, conducting research and advocating alongside of young adults for young adults aged 18-34. We do so with the mission to build the economic opportunity and political participation of our generation.

It is important to acknowledge that this generation came of age during one of the greatest economic downturns in the history of this country and amid macroeconomic trends of depressed wages, globalization, and technological change of the past three decades. It is this economic backdrop that sets this generation's caution and risk aversion. Members of this generation saw their parents lose their homes and jobs due to real failures in both the financial and government systems. Many of us are still living harsh economic realities, including: a generation that is burdened with historically high student debt, young adult workers today earn \$10,000 less than young adults in 1989 (a decline of 20 percent), and disturbing racial inequality persists and grows. Young African Americans' median wealth declined by a third since 1989.

It is with this understanding that we support the account defaulting to a Roth IRA. Flexibility of funds is going to be key if the Secure Choice Board wants to successfully engage this young adult generation in participating in this program. YI strongly supports providing a financial safety net for young adults and making building wealth easier. We believe this program design needs to account for the economic fragility of our lowest-income young adults.

We thank you in advance for your consideration. Please feel free to contact Gustavo Herrera at 323.332.7641 or [Gustavo.herrera@younginvincibles.org](mailto:Gustavo.herrera@younginvincibles.org) should you have any questions or concerns.

Sincerely,

Gustavo Herrera, MBA  
Western Regional Director, Young Invincibles

DC | CA | CO | IL | NY | TX

[younginvincibles.org](http://younginvincibles.org)



/together.invincible



@younginvincible



December 13, 2017

Secure Choice Board  
c/o California State Treasurer  
Sacramento, California

**Compelling Argument in Favor of Roth IRA only**

Dear Board:

I have followed the progress of the Secure Choice from 2016 proposed legislation to its existing planning and implementation. I recently served on the Secure Choice Planning for Outreach Workgroup with many other stakeholders.

The opinion that I express is mine only and contains no representation of the entity for whom I was participating in the Outreach workgroup. It is my opinion as a practicing Certified Public Accounting (CPA) and Certified Financial Planner (CFP) with 38 years of experience serving every income level.

It is my opinion that the Roth IRA should be the only option available in the Secure Choice program.

I cannot think of one rational reason that the State of California would consider a Traditional IRA. In fact, a Traditional IRA would be disastrous for many participants. I list some of the reasons (certainly not exhaustive) below:

1. For 95% of the participants, the Roth is the right solution.
2. For the 5% or less of the participants where a Traditional might be appropriate, they can "opt out". They are generally at an income and education level that they can determine the pros and cons of Roth vs. Traditional and choose investment choices in the retail market place. The State should not be concerned about inconveniencing high wage earners.
3. The above percentages (my opinion based on common sense) indicate that Roth should be the only choice. Including a Traditional IRA would demonstrate poor judgment on the part of the State of California, adding complexity, cost, and financial harm to its citizens.
4. Of the demographic that will participate in Secure Choice, how many of them will need to withdraw funds before they are 59 ½? Under a Traditional, they will face (at a minimum) penalties of 10% federal and 2.5% California. At best, they will receive 87.5% of their money back when they are in a position of hardship. We would be putting our citizens at risk rather than protecting them.

5. Participants will likely get no tax benefit for a Traditional. The majority will be in a “zero tax bracket”. Remember Romney’s phrase that 47% of the population pays no taxes (politically unpopular, but true)? Many participants will read that it’s “pre-tax dollars”, “a tax deduction”, and “it will save you taxes” when in fact, there will be no tax savings.
6. In a Traditional IRA, it’s possible that they would receive no tax savings when contributing, but have to pay taxes on withdrawals during retirement. That is a bad tax planning.
7. The only negative is that someone might fail to “opt out” and their income levels were above \$90,000 (single) or \$190,000 (married). That very narrow demographic might make Roth contributions when they are barred from doing so. If they make that mistake, there is a remedy: They have the opportunity to withdraw “excess contributions” up to the following April 15<sup>th</sup> with no penalty.

Look at the demographics. They scream “Roth IRA”.

Look at the potential harm. It screams “Don’t let them use a Traditional IRA.”

I conclude by saying don’t expose California citizens to harm when they might need those funds most. We are selling them on the concept “it’s your money, not the government’s”. A 12.5% penalty makes that statement false, and puts the State in the same category as “payday lenders”. Please don’t do that.

The State should have a fiduciary duty to do right by its citizens. Including a Traditional IRA option violates that concept.

Respectfully submitted,



Mark L. Prendergast, CPA, CFP®  
Director of Tax Strategies



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December 18, 2017

Agenda Item 8, attachment #3

### IRA Type Considerations

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In response to questions raised by Board members and the public at the November 27, 2017 Board meeting, staff and the consultants have prepared some background material on IRA types.

This attachment contains the following items:

1. Comparison of Roth and Traditional IRA Features (1 page)
2. Summary of Feasibility Study Finding on Assets Accessibility & Opt-out Rate (2 pages)
3. Impact of Secure Choice Participation on Eligibility for Public Benefit Programs (4 pages)
4. Copy of Staff's October Memorandum re: IRA Type (4 pages)

## Comparison of Roth and Traditional IRA Features

	Roth IRA	Traditional IRA
Is there an age limit?	Contributions can be made to a Roth IRA at any age	No contributions are allowed after the age of 70 ½
How much can I contribute?	<ul style="list-style-type: none"> <li>\$5,500 for those under age 50</li> <li>\$6,500 for those age 50 and older</li> </ul>	<ul style="list-style-type: none"> <li>\$5,500 for those under age 50</li> <li>\$6,500 for those age 50 and older</li> </ul>
Does my income affect my contribution limits?	<p>Contributions can't exceed the lower of the IRS limits listed above, or your earned income for the year.</p> <p>In addition, your ability to participate in a Roth account could be reduced or eliminated based on your modified adjusted gross income (see table in October staff report)</p>	Contributions can't exceed the lower of the IRS limits listed above, or your earned income for the year.
Can I claim a tax deduction?	No. Contributions to a Roth account are after-tax dollars.	Depending on your modified adjusted gross income, some or all of your contributions may be tax deductible
Retirement Savings Contributions Credit (Saver's Credit)	<p>You're eligible for the credit if you're:</p> <ol style="list-style-type: none"> <li>Age 18 or older;</li> <li>Not a full-time student; and</li> <li>Not claimed as a dependent on another person's return</li> </ol> <p>The amount of the credit is 50%, 20% or 10% of your retirement plan or IRA contributions up to \$2,000 (\$4,000 if married filing jointly), depending on your adjusted gross income (reported on your Form 1040 or 1040A).</p>	
Will I pay taxes on withdrawals made after 59½?	No. Since contributions are made with after-tax dollars, you won't have any tax liability on your contributed amount when withdrawn. In addition, there will be no taxes due on any of the earnings, provided you are over 59 ½ when the withdrawal takes place.	Any money (both contributions and any interest) withdrawn after 59 ½ will be taxed as ordinary income.
Can I take a loan from my account?	Loans cannot be taken from IRA accounts	
What if I want to withdraw money before I'm 59 ½?	Withdrawals of your contributions are always tax and penalty free. Any earnings are subject to taxes and penalties if withdrawn before 59 ½.	<p>Withdrawals will be subject to taxes as described above. In addition, there will be a 10% penalty on any money taken from the account before age 59 ½.</p> <p>Certain penalty free withdrawals are allowed including college costs, a first home purchase, or certain medical expenses or military service.</p>
What if I want to leave the money in the account?	Money can be left in the account with no forced withdrawals during your lifetime.	You must start making withdrawals (called Required Minimum Distributions) from the account once you reach 70 ½.
Impact on other benefits (Medicaid, SSI, SNAP, etc.)	See AKF memorandum.	



## Summary of Feasibility Study Finding on Assets Accessibility & Opt-out Rate

In the market analysis, program design, and financial feasibility study conducted for the Board in 2016, consultants Overture Financial recommended the default IRA type to be a Roth IRA with the option to select a Traditional IRA.

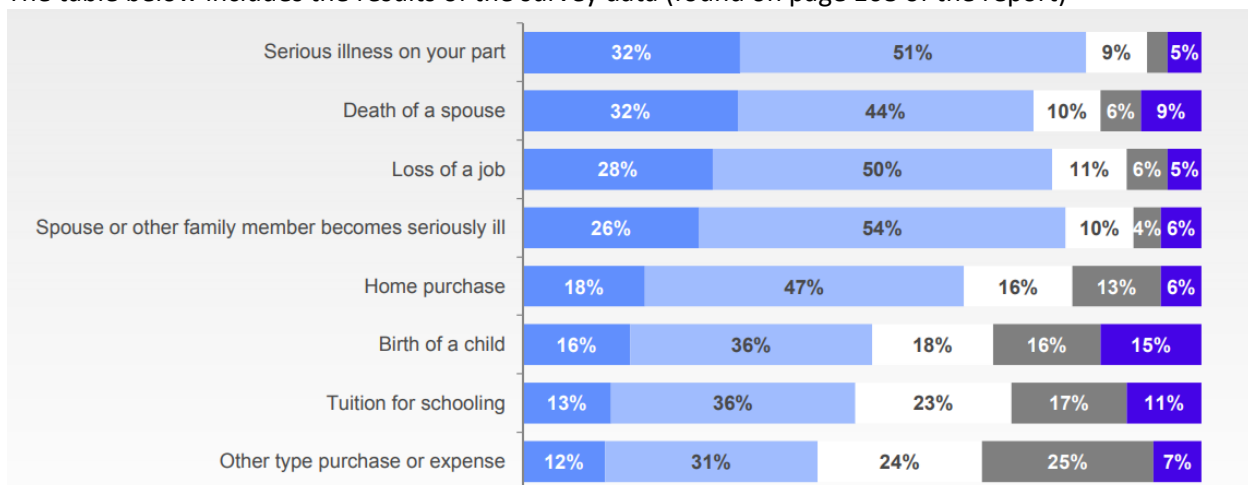
The consultants based their recommendation on a market analysis of the population eligible for the Program to determine which of the two IRA types would provide the most benefit for the eligible population. The consultants noted a strong point in favor of a Roth IRA default is due to the relatively low income of the target population (median income is \$23,000; mean income is \$35,000). The consultants estimate over half (58%) of the eligible population are in the 10% income tax bracket or below and would receive little to no benefit due to the annual tax deductions resulting from saving in a Traditional IRA.

As part of their study, the consultants also conducted a survey and focus groups to determine the preferences of the eligible population. While the consultants did not ask individuals to express a preference for Roth or Traditional explicitly, they did ask survey respondents about the importance of accessing their retirement savings in the event of certain situations.

### Market Analysis Findings

Among those surveyed, about a third (32%) reported they would not participate in the Program if they cannot access their money if they become seriously ill or if their spouse dies. About a quarter would not participate if they could not access their money in the event of a job loss (28%) or if a family member becomes seriously ill (26%).

The table below includes the results of the survey data (found on page 168 of the report)



Base: Total, n=1,000

Q8. How important is it that you have access, before retirement, to your money in your California Secure Choice program account for each of the following situations?

Prepared by Greenwald & Associates 2015



The actual question asked of participants and the breakdown of their responses (found on page 168 of the report) is also included below:

8. How important is it that you have access, before retirement, to your money in your California Secure Choice program account for each of the following situations?  
Keep in mind that taking money out early means that less will be available for your retirement.

	<b>Total</b> (n=1,000)	<b><u>Must have</u> or won't participate</b>	<b>Would be nice to have access</b>	<b>Don't care either way</b>	<b>Do not need access</b>	<b>NA</b>
a.	Loss of a job	28%	50	11	6	5
b.	Serious illness on your part	32%	51	9	3	5
c.	Spouse or other family member becomes seriously ill	26%	54	10	4	6
d.	Death of a spouse	32%	44	10	6	9
e.	Birth of a child	16%	36	18	16	15
f.	Home purchase	18%	47	16	13	6
g.	Other large purchase or expense, such as buying a car or taking a vacation	12%	31	24	25	7
h.	Tuition for schooling	13%	36	23	17	11



## MEMORANDUM

**TO: CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD**  
**FROM: AKF CONSULTING GROUP**  
**DATE: DECEMBER 8, 2017**  
**RE: IMPACT OF SECURE CHOICE PARTICIPATION ON ELIGIBILITY FOR PUBLIC BENEFIT PROGRAMS**

### I INTRODUCTION

At the request of Staff to the Secure Choice Retirement Savings Investment Board, AKF Consulting has researched the potential impact of Secure Choice participation on eligibility for certain public benefit programs. In particular, our research has sought to identify whether public benefit programs:

- (i) View Roth and Traditional IRAs differently as assets, and
- (ii) Characterize distributions from Roth and Traditional IRAs differently as income.

With that in mind, we have conducted a brief study of what we understand to be the most widely used public benefit programs in California. Please see the summary chart included in the Appendix for full details. Our general conclusions are described in more detail below:

- (i) For the most part, public benefit programs do not consider Roth or Traditional IRAs assets differently when determining eligibility based on asset levels. In fact, most of the public benefit programs identified in our research do not consider Roth or Traditional IRAs at all when determining asset-based eligibility. Based upon the public benefit programs we have identified, in only two instances are Roth and Traditional IRAs viewed differently in asset tests.
- (ii) Based upon our research, distributions of contributions and earnings from a deductible Traditional IRA would be treated as income and thus would affect qualification for public benefit programs with income tests. In contrast, the distribution of contributions from a Roth IRA would not be treated as income and thus would have no impact on qualification for these programs. Based on this, it appears that a Roth IRA would make the most sense as a default structure for a low-income worker participating in Secure Choice.

We note that our research is not necessarily inclusive of all available public benefit programs, nor does it constitute legal, financial or tax advice with respect to participation in those programs.

### II IRA ASSET AND DISTRIBUTION INFORMATION

As indicated above, for the majority of identified public benefit programs, there is no distinction between Roth and Traditional IRAs for purposes of accumulating retirement savings and calculating assets. The rows shaded in **blue** in the summary chart in the Appendix show that neither Traditional nor Roth IRAs are considered as assets when determining eligibility for participation. The rows shaded in **yellow** show the instances where the existence of a Traditional or a Roth IRAs would be considered as assets but in these cases there is no distinction between a Roth or a Traditional IRAs. Only in the rows shaded in **red** is there a difference in the treatment of a Roth or a Traditional IRA for purposes of an asset test.



California Secure Choice Board, December 8, 2017

As a related point we note that participation in some of the identified public benefit programs automatically qualifies the individual for participation in other programs (e.g., an individual with Medi-Cal automatically qualifies for IHSS). Thus, the fact that assets within IRAs are not considered for eligibility for many of the programs will benefit individuals who participate in multiple programs.

Whether a distribution is deemed to be income depends on many factors, but the fundamental considerations are: (i) the source of the distribution (e.g., is it a withdrawal of a contribution or earnings) and (ii) whether the withdrawals are taxable. To that end, contributions withdrawn from a Roth IRA reflect after-tax dollars so there is no impact on income qualification for the public benefit programs. Contributions withdrawn from a Traditional IRA, however, are considered income and thus would count towards income for most programs. We also note that pre-retirement withdrawals of earnings from a Roth IRA are taxable and thus would be treated as income.

We do note that Medi-Cal treats distributions from Roth and Traditional IRAs differently for income purposes. Any form of monthly taxable benefit from a Traditional IRA is considered as income, whereas only monthly distributions of income earned from a Roth IRA prior to age 59 ½ or within five years of the account opening, whichever is longer, are considered income.



California Secure Choice Board, December 8, 2017

## APPENDIX

### IRAS AND PUBLIC BENEFIT PROGRAMS

*Note:*

- *Blue rows represent public benefit programs where only taxable distributions are deemed to be income and thus would impact eligibility for the public benefit program.*
- *Yellow rows represent public health care benefit programs where income and IRA assets impact eligibility.*
- *Red rows represent retirement and disability income programs where assets could affect the paid benefit.*

Program	Traditional IRA	Roth IRA	Source
<b>CalFresh</b>	Not considered an asset for CalFresh  Distributions will impact income eligibility requirements	Not considered an asset for CalFresh  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.mybenefitscalwin.org">www.mybenefitscalwin.org</a> county <a href="http://cdss.ca.gov/letter_notices">cdss.ca.gov/letter notices</a> <a href="http://cdss.ca.gov/CalFresh">cdss.ca.gov/CalFresh</a>  Office of Assistance: 916 874 3100 (Lori)
<b>CalWORKs</b>	Not considered an asset for CalWORKs  Distributions will impact income eligibility requirements	Not considered an asset for CalWORKs  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.mybenefitscalwin.org">www.mybenefitscalwin.org</a> <a href="http://cdss.ca.gov/letter_notices">cdss.ca.gov/letter notices</a> <a href="http://cdss.ca.gov/CalWORKs">cdss.ca.gov/CalWORKs</a>  County Office of Assistance: 916 874 3100 (Dara)  CalWORKs: 916 874 3100 (Camilla)
<b>Free and Reduced Priced Meals (FRPM)</b>	Not considered an asset for FRPM  Distributions will impact income eligibility requirements	Not considered an asset for FRPM  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.benefits.gov">www.benefits.gov</a> <a href="http://www.ca.gov">www.ca.gov</a>
<b>In Home Supportive Services (IHSS)</b>	Not considered an asset for IHSS  Distributions will impact income eligibility requirements	Not considered an asset for IHSS  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.cdss.ca.gov/in-home-supportive-services">www.cdss.ca.gov/in-home-supportive-services</a>
<b>Section 8 Housing</b>	Not considered an asset for Section 8  Distributions will impact income eligibility requirements	Not considered an asset for Section 8  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="https://section-8-housing.org/California">https://section-8-housing.org/California</a>  Sacramento County: 916 440 1319 (Lira)
<b>State and Federal Earned Income Tax Credit (EITC)</b>	Not considered an asset for EITC  Distributions will impact income eligibility requirements	Not considered an asset for EITC  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.IRS.gov">www.IRS.gov</a> Publication 596 <a href="http://www.ftb.ca.gov/individuals">www.ftb.ca.gov/individuals</a>

Program	Traditional IRA	Roth IRA	Source
<b>Women, Infants Children (WIC)</b>	Not considered an asset for WIC  Distributions will impact income eligibility requirements	Not considered an asset for WIC  Pre-retirement distributions of interest earned will impact income eligibility requirements	<a href="http://www.wicworks.ca.gov">www.wicworks.ca.gov</a>  Community Resource Project WIC
<b>Medi-Cal</b>	Not considered an asset under age 65  Monthly distributions from own or beneficiary account are considered income  Single annual distributions are NOT considered income for Medi-Cal qualification	Not considered an asset under age 65  Monthly distributions of income earned before five years or age 59 ½ whichever is longer are considered income  Single annual distributions of income earned are NOT considered income for Medi-Cal qualification	<a href="http://www.coveredca.com">www.coveredca.com</a>  County Office of Human Assistance: 916 874 3100 (Jamie)
<b>Medicare</b>	Considered an asset for Medicare	Considered an asset for Medicare	<a href="http://www.medicare.gov">www.medicare.gov</a>  800 633 4227 (Jasmine)
<b>Dual Eligibles</b>	Considered an asset for Medi-Cal and Medicare	Considered an asset for Medi-Cal and Medicare	<a href="http://www.coveredca.com">www.coveredca.com</a>  County Office of Assistance: 916 874 3100 (Lori)
<b>Social Security (SS) and Supplemental Security Income (SSI)</b>	May be considered an asset when SS and SSI is paid	Not considered an asset for SS and SSI	<a href="http://www.ssa.gov/planners/retire">www.ssa.gov/planners/retire</a> <a href="http://www.ssa.gov/redbook/eng/overview-disability">www.ssa.gov/redbook/eng/overview-disability</a> <a href="http://www.ssa.gov/planners/taxes">www.ssa.gov/planners/taxes</a> <a href="http://www.cdss.ca.gov/SSDI-SSI">www.cdss.ca.gov/SSDI-SSI</a>
<b>Social Security Disability Income (SSDI)</b>	Not considered an asset for SSDI	Not considered an asset for SSDI	<a href="http://www.ssa.gov/redbook/eng/overview-disability">www.ssa.gov/redbook/eng/overview-disability</a> <a href="http://www.heritage.org">www.heritage.org</a> <a href="http://www.cdss.ca.gov/SSDI-SSI">www.cdss.ca.gov/SSDI-SSI</a>

### **PROGRAM DESIGN ELEMENT DECISION POINT**

The Board may include one or more payroll deduction IRA arrangements. The program may offer a Traditional IRA (pre-tax contributions), Roth IRA (post-tax contributions), or both at launch. If both are offered at launch, an additional decision needs to be made as to which type will be utilized as the default.

### **BACKGROUND**

**Relevant Code:** Government Code §100008 notes the Program shall include one or more payroll deduction IRA arrangements.

**Oregon & Illinois Reference Point:** The OregonSaves and Illinois Secure Choice programs currently offer only a Roth IRA. Staff at both programs are currently researching the possible inclusion of a Traditional IRA at a later date.

**Feasibility Study:** The feasibility study recommended using a Roth IRA as the default option<sup>1</sup>.

### **STAFF ANALYSIS**

#### **Traditional IRA:**

- Allows individuals to contribute pretax income towards investments that can grow tax-deferred; no capital gains or dividend income is taxed until it is withdrawn.
- Individual taxpayers are allowed to contribute 100% of any compensation earned up to a specified maximum dollar amount determined annually by the IRS. For 2015, 2016, and 2017, the contribution limit is \$5,500 with an additional \$1,000 of contributions available to those participants aged 55 or older.
- Contributions may be tax-deductible depending on the taxpayer's income, tax-filing status and other factors.
- When taking distributions from a traditional IRA, the funds are treated as ordinary income and are subject to income tax. Distributions can be taken as early as age 59 ½ with required minimum distributions ("RMD's") at age 70 ½. Funds removed prior to full retirement eligibility incur a 10% penalty in addition to the applicable income tax rate.

#### **Roth IRA:**

- Allows individuals to contribute after-tax dollars.
- Same contribution limits as a Traditional IRA.
- Contributions are not tax deductible since they are made with after-tax dollars (although the Saver's Credit provides an additional tax credit of 10% to 50% of the contribution, depending on income and life situation).
- Distributions equal to the amount contributed to the account can be withdrawn at any time without penalty, however withdrawals of any investment interest earned on

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<sup>1</sup> *Supra* note 2

contributions prior to 59 ½ will be taxed as income and subject to a 10% early withdrawal penalty.

- Contributions can be made after the participant reaches the age of 70 ½ provided they have earned income.
- No RMD's within Roth IRAs.
- There are eligibility restrictions on Roth IRA participation depending on tax filing status and income level.

This table from [the IRS](#) shows the eligibility and contribution limits for participation in a **Roth IRA**:

If you're filing status is....	And your modified AGI is...	Then you can contribute...
<b>married filing jointly or qualifying widow(er)</b>	< \$186,000	up to the limit
	≥ \$186,000 but < \$196,000	a reduced amount
	≥ \$196,000	zero
<b>married filing separately</b> and you lived with your spouse at any time during the year	< \$10,000	a reduced amount
	≥ \$10,000	zero
<b>single, head of household, or married filing separately</b> and you did not live with your spouse at any time during the year	< \$118,000	up to the limit
	≥ \$118,000 but < \$133,000	a reduced amount
	≥ \$133,000	zero

Whether a Roth or Traditional IRA is more beneficial to the participant depends on a multitude of factors, including:

- Tax bracket and current income of the participant.
- Expected tax rate at retirement.
- Need or desire for penalty-free access to savings pre-retirement.
- Personal preference.

In general, lower participant current income and a longer investment horizon suggests an advantage to participating in a Roth IRA, since there is no (or a reduced) benefit to the reduction in taxable income provided by a Traditional IRA. Additionally, since Roth contributions are made with after-tax dollars, both the contributions and earnings can be withdrawn tax free in retirement.

If a participant decides they do not want to participate in the Program after being automatically enrolled, or otherwise withdraw their contributions, the contributions are treated as if they were never made as long as the distribution occurs by the due date of their tax return for the year in which they made the contribution(s). The withdrawal of contributions is tax free, but any earnings on the contributions must be reported as income for the year in which they were earned.



An argument in favor of the Traditional IRA approach is the inherent incentive for participants to leave retirement savings invested in the account and not access the funds for shorter term needs. This structure strongly encourages participants to commit to treating the IRA as the long-term investment account that it is intended to be. However, as strongly suggested by several employee and consumer stakeholders groups, access to funds for emergency or other high priority needs may be paramount for many lower income families that the Program seeks to serve. As referenced in the introduction to this document, the Program must be sensitive to the diverse financial lives of its participants and be vigilant in identifying means to accommodate a complex hierarchy of financial needs<sup>2</sup>.

Proponents of a Traditional IRA option also argue that it would allow individuals earning above the Roth income cap (\$133,000 per year) to participate in the Program, where those individuals could not participate via a Roth IRA account structure. While data on this sub-group is not available, staff assumes that there would be only a small number of such individuals among the employers subject to the law's mandate and that many of them would be likely to have savings arrangements established on their own.

There is no clear administrative delineation to the Program or cost advantage to the participant of offering either a Roth or Traditional IRA, though offering both at launch would add complexity to program participation at both the employer and employee level. It would add operational complexity for the participating employers by requiring them to track both pre- and post-tax contributions for various employees, and would require an additional level of outreach and education to the participants and potential participants so that the advantages and disadvantage of both account types are clearly understood.

## **STAKEHOLDER AND PUBLIC INPUT**

There is general consensus among the stakeholder working groups that the Program should start by offering a Roth IRA as the default option, and explore the feasibility of offering a Traditional IRA as a separate option either at launch or in the future.

The employee stakeholder group expressed a strong preference for participants to have penalty-free access to their retirement savings before reaching retirement age, if financially necessary, which was the primary driver of their support for a Roth IRA account type. EARN, a leading asset-building organization and member of the employee working group, surveyed its members on a number of topics including the importance of having penalty-free access to savings for cases of emergency. EARN's survey found a clear majority (74%) of members and saver respondents would prefer to be able to withdraw their retirement savings before age 59 ½.

Representatives of a large number of payroll services companies and their industry associations expressed a strong preference for the Program to offer a Roth account only. They reported that offering both account types would significantly increase processing complexity for employers and their payroll service providers.

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<sup>2</sup> *Supra* note 1.

## **PROGRAM CONSULTANT INPUT**

AKF agrees with staff's assessment and recommendation on the use of Roth IRAs as the default retirement savings vehicle in the Secure Choice program. We believe this is the appropriate default account structure for employers and employees given the following:

- Employees can make after-tax payroll deduction contributions to Roth IRAs (parenthetically we note that the contribution levels are the same for Roth and Traditional IRAs).
- All earnings grow tax deferred and are tax-free if contributions are withdrawn at or after age 59-1/2, or for another qualified distribution.
- There are no required mandatory distributions from Roth IRAs.
- Individuals can access their own contributions if necessary, prior to age 59 ½.
- There are special provisions available in Roth IRAs for withdrawing contributions and earnings to purchase a first home or to fund higher education.

We acknowledge there is a small population of employees who may not be eligible for a Roth IRA and thus would benefit from a Traditional IRA. For this reason, we believe it would be prudent to offer the choice of both a Roth IRA and a Traditional IRA, if feasible, in the Secure Choice launch. We understand that adding a Traditional IRA could impact the complexity and potentially the timing of the program launch. Beyond the administrative challenges, we further understand, there could be a significant increase in the level of education required for employees to understand the differences between Roth and Traditional IRAs. In order to validate or eliminate these concerns, we suggest that the Program Administrator RFP ask potential TPAs to include a work plan and feasibility assessment for implementing a Traditional IRA in addition to a Roth IRA.

## **STAFF RECOMMENDATION**

Offer a Roth IRA as the sole option at program launch and, if at any time the Program offers a Traditional IRA, make the Roth IRA the default option.

Explore the feasibility of offering a Traditional IRA at a later date.

Enrollment Process Options (“Form” means Record of Acknowledgement)				
	Option 1	Option 2	Option 3	Option 4
Summary of Employer Responsibility	Employer collects and submits Form to TPA	Employer collects and retains Form	No Employer role in collecting Form	Auto-enroll everyone at outset; no Employer role in collecting Form
Distribution of Information Packet	Employer distributes packet to employees either electronically or via paper.	Employer distributes packet to employees either electronically or via paper.	Employer distributes packet to employees either electronically or via paper.	Employer distributes packet to employees either electronically or via paper.
Options for Collection & Retention of Record of Acknowledgement	a) Transmit electronic record of Form to TPA (Email, Upload, Fax, etc.)  b) Payroll or other HR portal could facilitate direct link to TPA.  c) Submit paper Form to TPA.	a) Employer receives and retains Form.  b) Transmission of contributions by employer considered indication of employee acknowledgement.	Employee responsible for transmission of Form to TPA either electronically (direct access to Program website, email, Fax, etc.) or by submitting paper form (may include self-addressed stamp envelope).  The employer could provide an option for employee to transmit via a payroll or other HR portal.  TPA could also directly reach out to employees if email address is on file.	Employers could use any methods in Option 3 to distribute packet.  <u>If employees fail to submit Form or claim account online within 90 days of enrollment, contributions received would be refunded to the employer for transmission to employee.</u>
Holder of Record of Acknowledgement	TPA	Employer	TPA	TPA, but may receive within 90 days after enrollment