



April 20, 2016

The Honorable Kevin de Leon
California State Senate
State Capitol, Room 205
Sacramento, California 95814

**RE: SB 1234 (DE LEON) Retirement Savings Plans
Oppose Unless Amended – As Amended April 5, 2016**

Dear Senate President pro Tempore de Leon:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is a national trade association which brings together the shared interests of hundreds of broker-dealers, banks and asset managers. Many of our members have a strong presence in California, where they provide services to investors and retirement plans, including advisory services, investment opportunities and plan recordkeeping.

We appreciate the opportunity to provide comments on SB 1234, Retirement Savings Plans. We commend you for your longstanding commitment to improving retirement savings. We agree that there is a retirement savings challenge in this country and that action must be taken to address this challenge. While we have great policy concerns with SB 1234, this letter will focus on the potential fiscal impacts.

- **ERISA Applicability.** S.B. 1234, as enacted in 2012, requires under Section 100043 that a Secure Choice Program not be implemented “if it is determined that the program is an employee benefit under the federal Employee Retirement Income Security Act.” The purpose of this provision was to ensure that both the state and private employers not be subject to the cost and liability that would result if ERISA were to apply.

As you know, there has been significant debate across the country as to whether a state run plan for private sector workers is a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA). DOL has issued a proposed rule that, if finalized, would provide states with a limited safe harbor from ERISA. The outcome of the final DOL regulations could have significant risks and costs for California. We would encourage you to wait for DOL’s final rule before moving forward with any program.

Some of the questions that need to be resolved in order to minimize cost and risk include the following:

- Under DOL’s proposed rule, the employer’s participation in the program must be required by State law. The California Secure Choice Retirement Savings Investment Board (CSCIB) has asked

¹ SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. For more information, visit <http://www.sifma.org>.

DOL to change this interpretation, noting that the participation of “non-mandated employers could cause an entire program to fail the safe harbor and become an ERISA plan, with potentially disastrous consequences . . .”

- DOL’s proposed rule permits state savings programs to utilize one or more service or investment providers “provided that the State . . . retains full responsibility for the operation and administration of the program.” CSCIB believes that “the third parties should be responsible for their own actions and contractually assumed duties.”
- Under DOL’s proposed rule, the state has to assume “responsibility for the security of payroll deductions and employee savings.” The CSCIB wants clarification that “the employer and its payroll vendor, and not the state, will be responsible for the actual withholding and delivery of funds.”
- Under DOL’s proposed rule, the State has to “adopt[] measures to ensure that employees are notified of their rights under the program, and creat[e] a mechanism for enforcement of those rights.” The CSCIB would like clarification that the program administrator will do the notification and that the State is not required to add special enforcement mechanisms or create additional regulatory and judicial systems to allow employees to enforce their program rights.
- In addition, under DOL’s proposed rule, the State program cannot “impose any restrictions on [employee] withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code.” The Board would like the option to impose a hardship standard on withdrawals.

The existence of an effective safe harbor is critical to the proposed legislation. We would strongly encourage the legislature to wait for the DOL safe harbor to be finalized before approving any legislation implementing a Secure Choice plan.

Of course, even with a safe harbor, legal challenges are possible. Labor Secretary Perez himself has recognized the shortcomings of any proposal, stating publicly that “The [proposed] safe harbor is not an air-tight guarantee. . . . The federal courts are the ultimate arbiter on the question of whether state retirement plans are legal or not.”

- **Financial Sustainability** – The Overture Financial report commissioned for the CSCIB has estimated the up-front costs of the program somewhere between \$79 million and \$129 million. Moreover, these estimates are just that, and are contingent upon the fact that each of the assumptions required to estimate cost prove correct. Some of these assumptions include:
 - The true opt out rate would have to be roughly 25%;
 - The average income of full-time participants would have to be roughly \$45,000;
 - Roughly 1.6 million workers would have to open accounts within the first year (including participants from roughly 30,000 employers with 100+ employees in the first year);
 - More than 4 million workers would have to sign up within the first few years; and

- 8% of participants could face income restrictions preventing them from participating in a plan (roughly 500,000 workers).

In short, the cost estimate is based on a lot of variables and any miscalculation in a single estimate or assumption could lead to significant cost swings.

We appreciate your willingness to consider our concerns. Please do not hesitate to contact me at 212-313-1311 or SIFMA's lobbyist Joanne Bettencourt at 916-447-8229 with any questions.

Sincerely,



Kim Chamberlain
Managing Director and Associate General Counsel
State Government Affairs

Cc: Members, Senate Appropriations Committee