



Invested in America

January 28, 2014

Honorable Larry Springer
Washington State House of Representatives
132E Legislative Building
PO Box 40600
Olympia, WA 98504-0600

RE: HB 2474 – An Act Relating to Creating the Save Toward
a Retirement Today State Retirement Savings Plan: **OPPOSE**

Dear Representative Springer,

Thank you very much for the opportunity to submit this statement for the record on behalf of the Securities Industry and Financial Markets Association (SIFMA)¹. SIFMA represents the shared interests of hundreds of securities firms, banks and asset managers, many of whom have a presence in Washington State. Many of our members provide various services to retirement plans, including advisory services, investment opportunities and plan recordkeeping.

We agree there is a savings challenge in this country. Individuals need to save more for retirement and need to better understand the benefits of compounding interest, diversification, and not accessing retirement savings accounts for other purposes. Additional education is part of this process, with age-appropriate programs for children and adults. Enhanced federal and state programs and incentives encouraging more employers to offer these plans and more employees to utilize them would be helpful, and SIFMA would be happy to work with the State on such efforts.

We, however, believe HB 2474 is a step in the wrong direction. It would burden the State with additional costs and liability to develop, establish and administer a new program. Such a program would directly compete with the private market, which today provides a wide variety of individual retirement account options for employees who are ready to contribute a percentage of their annual compensation towards retirement.

Current Provider Market in Washington

One of the underlying premises for this proposal is that Washington businesses and private employers do not currently have access to reasonably priced retirement savings plans. This simply is not true. The market for retirement savings alternatives in Washington is robust and highly competitive, with a wide range of products and services offered by a variety of Washington providers, including brokers, mutual fund complexes, insurance companies, banks and credit unions.

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA has offices in New York and in Washington, D.C. For more information, visit <http://www.sifma.org>.

There are currently 10,934 individuals in Washington working directly in the securities industry, and another 94,517 in the finance and insurance industries. These industries provide numerous fairly priced retirement savings options. These options include 401(k), 403(b), 401(a), and 457(b) plans as well as SIMPLE, SEP and traditional and Roth IRAs.

Moreover, in instances where an employer does not provide a plan, IRAs are readily available at most financial institutions in Washington and around the country, in various formats (including online) and with varied levels of support, from a one-on-one financial advisor relationship to a 'do-it-yourself' account with limited financial advisor support from a call center: indeed, there are plans to meet a wide variety of needs and preferences. There is no reason for the State to enter into direct competition with Washington financial services companies that are employing thousands of workers in the State and who are already providing these services at no direct cost to the State.

The proposal infers that businesses and individuals do not know where to find a quality product and selecting between the complex selections of investment choices contributes to inaction. SIFMA would recommend the State utilize the vast array of free and readily available educational tools through government websites such as the federal Department of Labor, which offers a "Retirement Savings Toolkit"² and other private websites such as www.choosetosave.org. Websites such as these exist to cut through the complexity and help individuals and businesses make informed decisions about their retirement options.

SIFMA would also suggest that, before establishing a new program, the State should review the many different existing product offerings to determine if there is a gap in availability and consider what factors - other than access - may be preventing workers from taking advantage of existing options. The State may also want to consider what the costs would be to the State to try and enter the market on its own.

Two State Studies on Costs

The second premise to offering this program is that the costs to the State will be minimal or non-existent, saying the plan will be "simple and cost-effective." That is also simply not true. A few states have contemplated such legislation and chose to undertake studies instead. We have the benefit today of looking at those studies to see how this might work in Washington.

The State of Washington itself conducted a study on voluntary accounts in 2009 and the Department of Retirement Services found that, once certain service thresholds have been reached, a state-administered 401(k) plan would likely involve an administrative fee of \$200-\$800 per participant; private sector administered payroll deduction or IRA options would result in annual administrative fees of \$20-\$60 and investment fees of .02-.13%. Thus the State could, after a period of time subsidizing the program, end up offering a product to employees that costs the same as or substantially more than that currently being offered by the private sector.

In Maryland, the Maryland Supplemental Retirement Plans (MSRP) study, which was requested in a 2007 law, examined this issue and concluded that a Voluntary Employee Accounts Program would require a subsidy of between \$300,000 and \$500,000 a year for at least 5 to 7 years. Of particular

² <http://www.dol.gov/ebsa/publications/FTTtoolkit.html>

interest is that the study noted the difficulty of achieving economies of scale in the small employer market because the provider must deal with multiple employers with separate payroll systems, record keeping, and plan termination requirements. This situation is quite different than the economies of scale a State can achieve with its own public sector retirement plan or the economies of scale that could be achieved by a large private sector employer.

No Other State Runs a Plan for Non-Public Workers

The third premise is that this is a low risk proposition as there are already similar programs operating in other states. This simply is not true. California did pass legislation in 2012 creating a Secure Choice Retirement Savings Investment Board to explore the issue. The State Treasurer's website makes quite clear that the Board must conduct a privately or federally funded market analysis and feasibility study "to determine whether the legal and practical conditions for implementation can be met." The program cannot proceed unless the Board concludes, based on the analysis, that the program will be self-sustaining. That feasibility analysis has not yet begun.

The yet to be constructed California plan also cannot be implemented "if it is determined that the program is an employee benefit plan under the federal Employee Retirement Income Security Act." The Board must obtain from the federal Department of Labor an Advisory Opinion that ERISA does not apply. ERISA applicability would result in substantial additional costs and liability for both the state and participating employers, something the legislature was not interested in pursuing. We believe, as further described below, that DOL will determine that ERISA applies.

The California plan also cannot be implemented unless and until the IRS finds that the program qualifies for the same "favorable federal income tax treatment ordinarily accorded to IRAs under the Internal Revenue Code." The Board must get this Determination Letter ruling before moving forward.

Even after these hurdles are cleared, the Board must still go back to the legislature for approval before implementing any plan. All of this suggests a fairly lengthy and expensive process. States considering following California's lead may want to await the outcome in California before moving forward.

With respect to other jurisdictions, six states had similar legislation introduced in 2013 but none was enacted or passed their house of origin. Oregon decided to conduct a retirement savings study, for which the state has created a task force. Massachusetts passed a much narrower voluntary bill in 2012 targeted at small not-for-profits; this has not yet been implemented.

ERISA Applicability and Liability

We are also concerned about the conflicts that would undoubtedly arise between federal regulations governing retirement plans and laws enacted by individual states – in effect, what the Employee Retirement Income Security Act (ERISA) was designed to address in 1974. Different states would most likely have different rules governing operation, accumulation and distributions, which we feel could result in employee and employer confusion on how the state versus federal or another state's plans and programs operate. We are concerned that employees who save for retirement in a state plan will not have the same rights and protections that are provided under the federal regime. For

example, a state based retirement plan may not provide spousal protections (which are provided under ERISA). Another example is that the state benefit may not be portable to a different state should the employee relocate outside the state sponsoring the program.

It is for these good reasons, among others, that ERISA was created. While ERISA does mean additional costs for anyone operating an ERISA plan, it also means additional protections for participants and a uniform set of rules and requirements governing them.

Part of the costs relate, in our view, to the federal regulations vendors already face in the retirement space, which we believe the state will also become subject to. We believe ERISA would appropriately apply in the case of a state sponsored plan run for private employees and would create substantial ERISA compliance costs and financial liability for the state. The Department of Labor issued an Advisory Opinion last year to Connecticut Governor Malloy which addressed this issue as well. Advisory Opinion 2012-01A was issued in response to the Connecticut State legislature's attempt to provide health insurance coverage for private sector workers. In it the DOL advised that private sector employers are not governmental agencies or instrumentalities. Section 4 of ERISA, discussing applicability of ERISA Title I, does not differentiate between welfare benefit plans and pension benefit plans and the analysis is identical for coverage of private sector workers in a pension benefit plan. It is clear from this Advisory Opinion that ERISA would apply to this type of plan, and all of the requirements and costs associated with ERISA plans would therefore apply.

There is additional guidance from the Department of Labor that would be applicable as well, since it is only the Department of Labor or a court of law that can determine whether or not ERISA would apply. There is a safe harbor for certain payroll deduction arrangements; however, there are several requirements that must be met. These requirements include limited involvement from the employer. HB 2474 includes a provision calling for employer contributions; however, once an employer contributes then it is clearly employer involvement, and therefore, an ERISA covered plan.

The proposed legislation acknowledges the need for approval from the Internal Revenue Service, but it would also be necessary to obtain a federal Department of Labor advisory opinion to ensure the applicability of ERISA to the plan. HB 2474 is drafted as a multiple employer plan, which would be subject to ERISA. Allowing for an employer contribution, as HB 2474 would, also subjects the plan to ERISA.

Once ERISA application is clear, then the State would be liable for complying with it. These liability concerns include liability for a breach of fiduciary duty under ERISA, which entails:

- Liability for failure to file the necessary IRS forms and accounting mistakes;
- Liability for any complications of complying with annual non-discrimination testing;
- Liability for a breach of fiduciary duty under ERISA, which includes liability for paying unreasonable plan expenses and monitoring all the investment options offered or utilized within the plan and making timely adjustments as determined necessary; and
- Liability for ensuring that no prohibited transactions are occurring, including monitoring for conflicts between a plan and a party in interest.

Lastly, we note that the bill would require the director overseeing this new plan to select vendors and contractors based on their willingness to limit their liability; however, it is a basic tenet of

ERISA that the director of the 401(k) plan to look out for the employee's best interest, not the State's best interest. It would be a disservice to the private sector employees for them to be in a plan that is more focused on limiting the State's liability than looking out for their best interests.

Positive Steps Moving Forward

SIFMA would like to work with state policymakers to expand retirement plan coverage. We believe that education about the options that currently exist for small and non-profit employers would help increase coverage. For example, many small employers are not aware that the federal government provides for a \$500 per year tax credit for three years if a business starts a new plan. Some small employers may still be unfamiliar with the ability to offer a low cost IRA based retirement program. In addition, there are educational programs at the federal level about the benefits to any employer offering a retirement plan to employees that could be replicated on the state level at what we think would be a minimal cost in time and money. This could entail partnerships between small employer groups, various providers and the State, such as by holding meetings at schools or civic organizations at a local level. SIFMA would be happy to work with the State on such efforts.

We appreciate your willingness to consider our concerns. Please do not hesitate to contact me at (212) 313-1317 should you have any questions or if you would like any additional information.

Sincerely,

/s/

Marin E. Gibson
Managing Director and Associate General Counsel
State Government Affairs