CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD

October 26, 2018

The Honorable Governor Edmund G. Brown
Governor
State Capitol, Suite 1173
Sacramento, CA 95814

Re: CalSavers Retirement Savings Program

Honorable Edmund G. Brown,

The California Secure Choice Retirement Savings Investment Board respectfully submits this letter to announce it will implement the CalSavers Retirement Savings Program November 17, 2018. The prerequisites and requirements for the program established under Government Code Section 100043(b) have been met. The facts and analysis affirming satisfaction of the statutory requirements are detailed further in the attached legal analysis.

Members of the public may download the legal analysis online at www.treasurer.ca.gov/scib/implementation.pdf and the public can order hard copies of the analysis by calling (916) 653-1744.

If you have any questions, please contact me by phone (916) 653-1744 or by email at Katie.Selenski@sto.ca.gov.

Sincerely,

K. C. Selenski

Kathleen Selenski
Executive Director
CalSavers Retirement Savings Program

Attachment: Legal memorandum regarding satisfaction of statutory requriements for the CalSavers Retirement Savings Program (October 25, 2018)

Cc: The Honorable Toni G. Atkins, President pro Tempore, California State Senate
The Honorable Anthony Rendon, Speaker, California State Assembly
Daniel Alvarez, Secretary of the California State Senate
E. Dotson Wilson, Chief Clerk of the California State Assembly
Diane F. Boyer-Vine, Legislative Counsel of California

K&L GATES

October 25, 2018

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Privileged and Confidential; Attorney-Client Communication

By E-mail and Overnight Delivery

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

Re: CalSavers Retirement Savings Program

Dear Ms. Selenski:

The California Secure Choice Retirement Savings Trust Act (the "**Act**") established the California Secure Choice Retirement Savings Investment Board ("**Board**") and instructed the Board to design and establish the CalSavers Retirement Savings Program, a retirement savings program for private sector workers (the "**Program**").[1] The Program will enable California employees of employers doing business in California that do not offer a tax-favored retirement plan an opportunity to enroll in a payroll withholding savings program in which they may elect to contribute to traditional individual retirement accounts ("**Traditional IRAs**") or Roth individual retirement accounts ("**Roth IRAs**" and collectively with Traditional IRAs, "**IRAs**") under §§ 408 and 408A of Internal Revenue Code of 1986, as amended ("**Tax Code**"). All Program assets will be held under the California Secure Choice Retirement Savings Trust established under the Act and administered by the Board.[2] The Program is under development and is expected to launch a pilot on or about November 17, 2018, and begin a phased rollout starting in July 2019. To date, the Board has retained Meketa Investment Group as investment consultant, AKF Consulting as program consultant, Ascensus College Savings Recordkeeping Services, LLC ("**Administrator**") as Program recordkeeper and day-to-day administrator and Ascensus Trust Company ("**Trustee**"), an affiliate of the Administrator, to serve as trustee of the IRAs. In addition, the Board has retained State Street Global Advisors Trust Company ("**Investment Manager**") to provide certain mutual funds that are registered under federal securities laws ("**Mutual Funds**") and are advised by its affiliate, SSGA Funds Management, Inc., as the initial underlying investments (each an "**Investment Option**") to be offered under the Program. Finally, the Bank of New York Mellon ("**Custodian**") has been selected by the Board to serve as custodian of the Program assets held in the Mutual Funds.

Act § 100043(b)(1) provides that before opening the Program for enrollment the Board must report to the Governor and Legislature that the following "prerequisites and requirements" have been satisfied:

1. The IRAs offered under the Program qualify for favorable federal income tax treatment under the Tax Code.

2. The Program is structured in a manner to keep it from being classified as an employee benefit plan subject to the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**").

3. The roles and responsibilities of employers, as defined in the regulations implementing the Program, would not cause the Program to be classified as an employee benefit plan subject to ERISA.

4. The Board has adopted a third-party administrator operational model that limits employer interaction and transactions with its employees to the extent feasible.

In preparation for this report, the Board has requested our advice regarding whether these prerequisites and requirements have been satisfied. This letter provides an overview of the Program, a summary of the Tax Code rules applicable to IRAs, a summary of the rules for determining whether the Program is an ERISA-regulated employee benefit plan, an analysis of whether the IRAs offered under the Program would satisfy the applicable Tax Code rules, an analysis of whether the Program would be considered an ERISA employee benefit plan, including with respect to the roles and responsibilities of employers under the Program, and our conclusions on whether the prerequisites and requirements of Act § 100043(b)(1) have been satisfied.

In preparing this letter, we have reviewed the following:

1. The Act;

2. The draft proposed regulations (as of October 19, 2018) under California Code of Regulations Title 10, §§ 10000 through 10011 ("**Draft Regulations**");

3. The draft Program Disclosure Booklet dated November 2018 ("**Program Booklet**");

4. The California Secure Choice Retirement Savings Investment Board Governance Policies adopted February 26, 2018;

5. The CalSavers Program Investment Policy Statement adopted May 21, 2018 ("**Investment Policy**");

6. Agreement Number CSCRSIB07-17A between the Board and the Administrator, approved October 15, 2018 (and the related Guaranty by Ascensus Group, LLC in favor of the Board dated September 24, 2018) ("**Administration and Management Agreement**");

7. Agreement Number CSCRSIB07-17B between the Board and the Investment Manager approved September 10, 2018; and

8. The Roth Individual Retirement Account Application dated April 2017, including the Roth Individual Retirement Custodial Account Agreement (Form 5305-RA, Rev. April 2017) and Disclosure Statement ("**Roth IRA Agreement**").

Assumptions. Our advice is based on the facts and representations described below, which you have agreed to allow us to assume. We also have assumed that the Program documents referred to in items 2 to 8 above that we reviewed are in full force and effect (and that all drafts are adopted in substantially the same form as drafted or proposed) and comply with the Act and other applicable California laws. Because we have made no independent investigation of such facts or assumptions, our advice may not be applicable to the extent they are not accurate or complete. Our advice also is based on our analysis of relevant provisions of applicable laws, regulations and regulatory interpretations currently in effect. Because such laws, regulations and interpretations are subject to change, either prospectively or retroactively, the Board should continue to monitor developments in this area to determine whether future judicial or regulatory developments may affect the analysis or conclusions in this letter.

In addition, we note that on May 31, 2018, a complaint was filed against the Program in the U.S. District Court for the Eastern District of California by the Howard Jarvis Taxpayers Association. The complaint seeks to enjoin the Program alleging that it is an ERISA-regulated pension plan and thus is preempted by ERISA § 514. We understand that the Board intends to vigorously defend against this complaint. The outcome of this litigation could significantly affect our advice in this letter.

Overview of Board and the Program

Board. The Act created the Board and authorized it to design and implement the Program.[3] The Board is composed of nine members as follows: the California State Treasurer, the California State Director of Finance or his or her designee, the California State Controller, an individual with retirement savings and investment expertise appointed by the California State Senate Committee on Rules, an employee representative appointed by the California State Speaker of the Assembly, a small business representative appointed by the Governor, a public member appointed by the Governor and two other individuals appointed by the Governor.[4] Board members serve without compensation but are entitled to reimbursement of their necessary travel expenses in performing their duties.[5]

The Act authorizes the Board to design, establish and operate the Program in a manner that is consistent with best practices for retirement savings vehicles, encourages participant savings and investing, is simple and portable for participants and offers ease of administration for employers.[6] The Act requires that each Board member and the Administrator and its staff act as fiduciaries "solely in the interest" of participants, for the "exclusive purpose of providing benefits" to participants and defraying reasonable Program expenses and to invest Program assets with the care and skill of a prudent expert.[7] The Board further is authorized to adopt such regulations as it deems necessary to implement the Act.[8]

Covered Employers/Eligible Employees. Under the Act and Draft Regulations, every employer with five or more employees must enroll in the Program if it does not maintain or contribute to a tax-qualified retirement plan (a "**Covered Employer**").[9] A "tax-qualified retirement plan" for this purpose means any retirement plan that qualifies for favorable federal income tax treatment under Tax Code §§ 401(a), 401(k), 403(a), 403(b), 408(k) or 408(p) (such as a tax-qualified retirement plan, multiemployer plan, Simplified Employee Pension or Savings Incentive Match Plan for Employees IRA), other than an employer-provided payroll deduction IRA program that does not provide for automatic enrollment.[10] An eligible employee is any employee who is age 18 or older, has the status of an employee under the California Unemployment Insurance Code and is earning taxable wages in California (an "**Eligible Employee**").[11]

The Draft Regulations also permit individuals in California who are not Eligible Employees (including self-employed individuals) to voluntarily participate in the Program outside of an employment relationship by making contributions directly to the Program or through payroll deductions from an employer that is not a Covered Employer.[12] An employer that agrees to make these payroll deductions does not become a Covered Employer under the Program and is responsible for determining whether remitting payroll deductions to the Program creates an ERISA plan.[13] We understand that individuals who are not Eligible Employees will not be allowed to contribute to the Program until sometime after the Program's launch as determined by the Board. This letter does not address the participation in the Program by individuals who are not Eligible Employees nor the facilitation by non-Covered Employers in such individuals contributing to the Program.

Timing of Initial Registration and Enrollment. The Board intends to launch the Program in three phases. Covered Employers with 100 or more Eligible Employees must register for the Program no later than June 30, 2020, while Covered Employers with more than 50 Eligible Employees (but less than 100 Eligible Employees) must register by June 30, 2021; all other Covered Employers must register by June 30, 2022. The Board is launching a pilot in which certain Covered Employers may register for the Program. Eligible Employees (unless they opt out) of these "pilot" employers will begin contributing to the Program before the officially scheduled rollout.

Before the Program's initial launch, employers that appear to be Covered Employers based on available information will be notified about the requirement to register for the Program by the applicable deadlines, and employers that were erroneously identified as Covered Employers will have the option of certifying their exemption from the Program.[14]

Employer Registration/Employee Enrollment. After the Program's initial launch, Covered Employers will be required to register and make the Program available to Eligible Employees within 24 months after becoming subject to the Act through an internet portal, by telephone or by mail.[15] Once a Covered Employer registers for the Program, it must provide the Administrator with certain basic information about each Eligible Employee (including name, mailing address, date of birth, telephone number, email address and Social Security number) within 30 days of initial registration (or within 30 days of hire for new Eligible Employees).[16] In addition, an employee information packet must be distributed to all Eligible Employees within 30 days of initial registration (or within 30 days of hire for new Eligible Employees).[17] The employee information package will be prepared by the Administrator (under the Board's direction) and will include an opt-out form, other election forms and the Program Booklet, which is intended to provide understandable information regarding the Program, including contribution levels, income tax rules and investment options.[18] While the Draft Regulations provide that Covered Employers will "ensure" that the packet is delivered to Eligible Employees, they further specify that the Administrator is, in fact, responsible for delivering the packet and all other written disclosures and Program information.[19]

The employee information packet also will be delivered by the Administrator to all Eligible Employees who have opted out of contributing to the Program during an annual open enrollment period from October 1 through November 30.[20] Eligible Employees who do not affirmatively opt out of the Program during the open enrollment period will be automatically enrolled in the Program.[21]

Employee Contributions. Each Eligible Employee enrolled in the Program may direct the Covered Employer to withhold a portion of his or her wages and forward it to the Program for deposit into a Roth IRA established by the Administrator in the Eligible Employee's name. The Eligible Employee may contribute from 0% to 100% (in whole percentages) of his or her wages up to the maximum contribution permitted under the Tax Code, or opt out of contributing entirely.[22] (The Board intends to also offer Traditional IRAs sometime after Program launch, at which point the Eligible Employee may choose between contributing to a Roth or Traditional IRA.) However, if the Eligible Employee takes no action, he or she will be deemed to have elected to contribute 5% of wages to a Roth IRA, which will automatically increase by 1% of wages each January 1 (as long as the Eligible Employee has participated in the Program for a least six months) until the Eligible Employee is contributing at a rate of 8% of wages, unless the Eligible Employee opts out of automatic escalation.[23] This automatic escalation feature will also apply to Eligible Employees who affirmatively elect a contribution rate that is less than 8% of compensation unless the Eligible Employee opts out of this feature.[24] Eligible Employees will be allowed to change their contribution rate, opt out of the Program or, if they have opted out, begin contributions at any time by notifying the Administrator.[25] Eligible Employees also may elect to have his or her contribution rate increase at predetermined times and amounts (or opt out of this feature) and may make non-payroll contributions by contacting the Administrator.[26]

Investments. Each Eligible Employee's IRA will be invested in one or more of the Investment Options, which, in turn, will invest in the Mutual Funds selected by the Board with the advice and assistance of the Investment Manager and in accordance with the Act, the Investment Policy and the Draft Regulations. The initial Investment Options are a capital preservation fund, a series of target retirement funds, an aggregate bond fund and a global equity fund. The Board may in the future determine to offer additional Investment Options, terminate an Investment Option or replace an Investment Option and add, replace or terminate an Investment Manager. The default investment option for Eligible Employees who have not made an investment election for the first $1,000 in contributions will be the capital preservation fund and thereafter the target retirement fund corresponding to his or her age in the Program's records.[27] An Eligible Employee may change the investment of his or her future contributions or existing balances by contacting the Administrator.

Fees. Each Investment Option imposes an annualized asset-based fee that is deducted pro rata from each IRA invested in the Investment Option. The annualized asset-based fee consists of an underlying fund fee, a Program administration fee and a state fee. The underlying fund fee reflects investment advisory fees, administrative fees and other expenses associated with each Investment Option and can fluctuate over time. The Program administration fee reflects the Administrator's expenses for administering the Program, and the state fee reflects the Board's expenses related to the oversight and administration of the Program. The Program administration fee for all Investment Options will be 0.75% per annum. The underlying fund fee varies by Investment Option, ranging from 0.025% to 0.12%. The state fee will be 0.05% per annum.

Transfers and Withdrawals. An Eligible Employee will have the right to transfer his or her IRA to another IRA outside of the Program or to withdraw funds at any time upon notice to the Administrator. There will not be a charge or other fee for such withdrawals or rollovers.

Wage Withholding Safeguards. Covered Employers are required to remit contributions withheld from Eligible Employees' wages to the Administrator as soon as administratively possible and in all events within seven business days.[28] A Covered Employer's misappropriation of withheld contributions would violate California wage theft laws.[29]

Tax Code Requirements. Program IRAs are intended to satisfy the requirements of Tax Code §§ 408 and 408A. The Roth IRAs will be established by the Administrator using a Roth IRA Agreement based on Internal Revenue Service ("**IRS**") Forms 5305-R and 5305-RA, and a similar agreement based on IRS Form 5305-A is expected to be used when the Traditional IRAs are established. The Administrator is expected to monitor each Eligible Employee's contributions under the Program and return any contributions that exceed the allowable Tax Code maximums (e.g., $5,500 for an individual under age 50 in 2018 or, if less, the individual's annual compensation). However, it will be the responsibility of each Eligible Employee to determine whether he or she is eligible to contribute to a Roth IRA or, because of IRA contributions outside of the Program, has exceeded the Tax Code limit. Program communications will include explanations of these tax requirements. An Eligible Employee who is ineligible to contribute to a Roth IRA or exceeds any Tax Code limit will be able to notify the Administrator and request a refund or corrective distribution.

Employee Communications. The Act directs the Board to develop and distribute written information packets for Eligible Employees. The packet for Eligible Employees is to include disclosures of the benefits and risks of participation, how to make elections and opt out of participation, Program Investment Options and other information about the Program and a statement that the Program is not an employer-established retirement plan and not guaranteed by the State of California.[30] The Board will also cause the Administrator to establish and maintain a Program website and toll-free telephone center staffed by Program-knowledgeable and appropriately licensed representatives. Investment elections and beneficiary designations will be made through the Administrator using the Program's website, toll-free telephone line or paper forms. The Administrator will periodically provide participants with information about their IRAs, including investments, a summary of income tax rules and educational and other materials. The Administrator will distribute quarterly benefit statements to all participants; distribution will be electronic for participants with a valid e-mail address and who so elect, while other participants will be mailed paper statements. Certain explanatory materials will be available in Spanish and other appropriate languages, and translation services are available for all non-English speakers. The Administrator will distribute the required income tax forms electronically or by mail, as appropriate.

Employer Obligations and Limitations. As mentioned above, under the Act and Draft Regulations, Covered Employers will be required to provide the Administrator with certain information regarding their Eligible Employees to process employee contribution elections (including deemed automatic contribution elections and employee opt-outs) and properly deliver the amount withheld to the Trustee. Covered Employers (or their payroll vendor) will be able to access the applicable contribution or opt-out elections of their Eligible Employees through a portal maintained by the Administrator. While the mechanics of this portal are still being developed, it is anticipated that Covered Employers that use a payroll software system will be able directly link their payroll system to the portal. Likewise, Covered Employers using a payroll vendor are expected to be able to have their vendor's system directly linked to the portal. It also is anticipated that a Covered Employer using a manual payroll system will be able to obtain the necessary withholding information by directly accessing the portal before each payroll period.

The Draft Regulations forbid employer contributions.[31] The Draft Regulations provide that a Covered Employer may not endorse or disparage the Program or the IRAs or exercise any authority, control or responsibility with respect to the Program.[32] Covered Employers are expected to direct employee inquiries to the Administrator. Covered Employers also do not have any authority over the Program's investments, selection of the Investment Manager, Administrator, Trustee, Custodian or other vendors, default contribution rates, employee communications about the Program or modification of the Draft Regulations or other Program documents.

Tax Code

The Tax Code provides favorable income tax treatment for IRA contributions and earnings on contributions if the following "**Qualification Requirements**"[33] are satisfied:

1. All contributions must be fully vested at all times.

2. All contributions, other than specified rollover contributions, must be in cash.

3. The IRA must be established by written instrument that includes required Tax Code provisions. The IRS publishes two forms that can be used to satisfy the written instrument requirement with respect to Roth IRAs (Forms 5305-R and 5305-RA).

4. The IRA instrument must, with certain exceptions (e.g., rollover contributions), limit total annual contributions (the "**Tax Code Dollar Limit**") to the applicable limit under Tax Code § 219(b)(5)(A). For 2018, that limit is $5,500 ($6,500 for taxpayers age 50 or older by December 31). These limits are indexed to the cost of living after 2018.

5. The IRA must be created or organized in the United States as a custodial or trust account.

6. The IRA trustee or custodian must be a bank or an institution specifically approved by the IRS to serve as an IRA trustee or custodian. For this purpose, a "bank" is a federal or state bank or trust company that receives deposits and makes loans or that exercises fiduciary powers, an insured credit union, or a corporation that is subject to supervision and examination by state banking regulators.

7. The IRA must be established for the exclusive benefit of the individual and his or her beneficiaries.

8. The IRA is prohibited from investing in life insurance and other insurance contracts.

9. The assets of the IRA may not be commingled with other property, except in a common trust fund or common investment fund.

In addition to these Qualification Requirements, the Tax Code imposes excise taxes and penalties in certain specified circumstances ("**Prohibited Conduct**"), including:

1. Investments in certain "collectibles" are treated as distributions from the IRA.

2. If the IRA owner uses any portion of the IRA as collateral for a loan, the portion so used is treated as a distribution from the IRA.

3. If the IRA owner's beneficiaries fail to receive minimum distributions following the owner's death, an excise tax equal to 50% of the amount that should have been distributed is imposed.

4. If annual IRA contributions exceed the lesser of the Tax Code Dollar Limit or the compensation included in the individual's annual gross income, an excise tax equal to 6% of the excess contribution is imposed each year until the excess contribution is removed from the IRA.

5. The Tax Code Dollar Limit for Roth IRAs is phased out for taxpayers whose adjusted gross income ("**AGI**") exceeds certain amounts specified in the Tax Code. For 2018, the phaseout for Roth IRAs is applied to single taxpayers with AGI between $120,000 and $135,000 and to married taxpayers who file jointly with AGI between $189,000 and $199,000. These limits are indexed to the cost of living after 2018. For married taxpayers filing separately, the Roth IRA contribution limit is phased out based on AGI between $0 and $10,000. Contributions in excess of the Tax Code Dollar Limit (after any phaseout) are subject to a 6% excise tax for each year that the excess contribution remains uncorrected.

6. If any disqualified person engages in a prohibited transaction with respect to the IRA, an initial excise tax equal to 15% of the amount involved in the prohibited transaction is imposed on the disqualified person. If the disqualified person is the IRA owner or his or her beneficiary, the IRA will cease to be treated as an IRA (and will, therefore, lose its tax-qualified status).

The following discussion applies the terms of the Program and the IRAs described above to the Tax Code. The Program and the IRAs established under it are designed to comply with the Qualification Requirements described above. In this regard, the custodial agreement contained in the IRA Agreement in which the Program's Roth IRAs are established is based on IRS Model Form 5305-RA, which the IRS has stated meets the requirements of Tax Code § 408A.[34] Likewise, we understand that when Traditional IRAs are made available under the Program, they will be established using IRS Model Form 5305-A, which the IRS has stated meets the requirements of Tax Code § 408. In addition, the Draft Regulations and administrative procedures are designed to prevent certain Prohibited Conduct. For example, it is not possible to invest in collectibles under the Program or for annual contributions under the Program to exceed the Tax Code Dollar Limit (before phaseout), and there will be disclosure to participating employees of the consequences of Prohibited Conduct and the consequences of excess contributions.

ERISA

Overview. ERISA defines an employee benefit plan as any plan established or maintained by an employer providing employees with retirement or other post-employment income.[35] While IRAs are retirement savings vehicles, they are generally exempt from ERISA because they are established and maintained by individuals and not employers. However, an IRA offered by an employer through the workplace can be an ERISA-regulated plan if there is a certain level of employer involvement or activity. The U.S. Department of Labor ("**DOL**") has regulatory authority over ERISA, subject to judicial review.[36]

The DOL has issued two sets of ERISA "safe harbors" covering payroll deduction IRA programs; programs satisfying a safe harbor are not considered by the DOL as ERISA-regulated employee benefit plans. First, a 1975 DOL regulation established a general ERISA safe harbor for payroll withholding IRAs satisfying certain conditions—most notably that employers refrain from endorsing the program and that employee participation is completely voluntary.[37] (This regulation, together with subsequent DOL interpretative guidance and advisory opinions, will be referred to as the "**1975 Safe Harbor**"). The 1975 Safe Harbor predated the efforts by California and other states to establish a state-run mandated payroll withholding IRA savings program with automatic enrollment ("**auto-IRA**") for private-sector employees. The second DOL regulation was issued in 2016 and provided additional safe-harbor protection specifically for state auto-IRA programs ("**2016 Safe Harbor**").[38] However, the 2016 Safe Harbor was repealed pursuant to the Congressional Review Act ("**CRA**").[39]

1975 Safe Harbor. DOL Regulation § 2510.3-2(d) provides that a payroll deduction IRA program will not be considered a pension plan subject to ERISA if four conditions are satisfied: (1) no contributions are made by the employer; (2) the sole employer involvement is collecting contributions through payroll deductions, remitting them to the IRA sponsor, and publicizing the program to employees without employer endorsement; (3) the employer receives no compensation (other than for certain permitted services actually performed); and (4) employee participation is completely voluntary. In the view of the DOL, conditions 2 and 4 are related because an employer's endorsement and similar involvement in the establishment or maintenance of a program may cause an employee's decision to participate to not be "completely" voluntary.

The DOL expanded the scope of this four-condition regulatory safe harbor by issuing Interpretive Bulletin 99-1 (the "**Bulletin**") as part of its "ongoing efforts to encourage retirement savings" through payroll deduction IRAs.[40] The Bulletin issued in 1999 noted that "over half of the private wage and salary workforce does not have employment-based retirement coverage" and that this lack of coverage was most prevalent among employers with fewer than 100 employees. The Bulletin then observed that small employers do not sponsor retirement plans in part due to the "administrative complexity and burden" and the "risk of commitment to an ongoing expense in the face of financial uncertainties."[41] Although the DOL recognized that employees could always set up their own IRAs, it concluded that employees are more likely to "make use of an individual retirement savings vehicle that is offered in an employer setting and features regular withholding."[42] The Bulletin stressed the DOL's "long-held view that an employer who simply provides employees with the opportunity for making contributions to an IRA through payroll deductions does not thereby establish a 'pension plan'" that is subject to ERISA.

The DOL reiterated in the Bulletin that the nonemployer endorsement and voluntary participation requirements are related. Thus, the Bulletin stated that to be "completely voluntary ... the employer [cannot] endorse or recommend either the [IRA] sponsor or the funding media" and should inform employees that other IRA vehicles are available outside of the program and that an IRA may not be appropriate for the employee. The Bulletin further indicated, on the other hand, that an employee's participation would not be voluntary if he or she was coerced into contributing.

Some employer involvement is allowed in a payroll deduction IRA without jeopardizing the ERISA exemption. Thus, in a payroll IRA program that was invested in a group annuity contract, the DOL permitted the employer, as contract holder, to vote on the annuity provider's upcoming plan of demutualization and elect the method for allocating the demutualization proceeds among IRA participants.[43] The DOL based its ruling on three factors, namely that (1) actions of an independent third party caused the need for the employer to act, (2) the employer would be acting in accordance with New Jersey insurance law and (3) the employer's actions were one-time acts that would not involve the employer retaining any ongoing discretion in administering or operating the IRAs.

An even greater and ongoing level of employer involvement was allowed by the DOL when it ruled that an employer could select three IRA sponsors from a pool of applicants, periodically review each sponsor's performance, replace any underperformers, and negotiate for and receive a written indemnification from each sponsor.[44] The DOL found that these activities "would not result in endorsement or involvement beyond that permitted under [the] regulation"[45] and would not prevent the program from qualifying under the ERISA safe harbor.

CRA and 2016 Safe Harbor

Scope of CRA. The CRA provides Congress with a simplified procedure to issue a "disapproval resolution" revoking certain recent federal regulations and prohibiting federal agencies from issuing a new rule that is "substantially the same" as the revoked regulation.[46] The language of the disapproval resolution is succinct: the 2016 Safe Harbor will have "no force or effect." The 2016 Safe Harbor disapproval resolution also appears to have revoked the related "preambles" (technically referred to as "supplementary information" by the DOL) published by the DOL with the regulation.[47] The disapproval resolution revoking the 2016 Safe Harbor does not reference the 1975 Safe Harbor.

Before 2017, the CRA only had been used once, in 2003, to repeal a federal regulation, and there is no judicial precedent describing the effect of a CRA disapproval resolution. Taken at face value, the DOL regulatory landscape should be as if the 2016 Safe Harbor never was issued; in other words, the 1975 Safe Harbor remains as the only applicable DOL guidance.

Remaining Precedential Value of the 2016 Safe Harbor. The 2016 Safe Harbor provided 11 conditions, essentially derivative of the 1975 Safe Harbor, but applicable only to state IRA programs. The 2016 Safe Harbor conditions were: (1) the program is established by state law; (2) the program is implemented and administered by the state or its delegate; (3) the state or its delegate is responsible for the security of payroll deductions and employee savings (including through existing state wage and antitheft laws); (4) the state or its delegate provides for employee notices and an enforcement mechanism; (5) employee participation is voluntary; (6) rights of participants and beneficiaries are enforceable only by such individuals, their representatives and the state or its delegate; (7) employer involvement is limited to processing and remitting payroll withholdings, distributing notices and program information to employees and providing information to the state or its delegate; (8) employers do not contribute to the program and do not give employees compensation or other financial incentives to contribute; (9) employer participation is mandated by state law; (10) the employer has no discretionary authority or responsibility under the program; and (11) the employer is not compensated (directly or indirectly) for participating in the program except for certain state provisions of the employer's actual or reasonably estimated program costs.[48]

In deliberating whether, and under what terms, to issue the 2016 Safe Harbor, the DOL argued that a payroll withholding program that nudged employees into savings through automatic enrollment elections would not satisfy the "completely voluntary" condition of the 1975 Safe Harbor. (For purposes of this discussion, we use the term automatic enrollment to include both automatic enrollment and automatic escalation of contribution rates with an employee opt-out.) While this position was enunciated in the disapproved preambles to the proposed and final 2016 Safe Harbor, it would remain relevant to the extent it reflects the DOL's reading of the 1975 Safe Harbor and the nature of negative elections with an opt-out.[49]

The preambles to the now disapproved proposed and final 2016 Safe Harbor explained the DOL's view that a program's auto-enrollment or escalation feature could cause an employer to exercise undue influence over an employee's participation and that contributions made without an affirmative election might not be completely voluntary. For example, the DOL observed in the preamble to the final 2016 Safe Harbor regulation that "**if the employer automatically enrolls employees** in a benefit program, the employees' participation would not be 'completely voluntary' and **the employer's actions** would constitute the 'establishment' of [an ERISA] pension plan."[50] The DOL again emphasized the relationship between employer endorsement

(1975 Safe Harbor condition 2) and the completely voluntary employee participation (1975 Safe Harbor condition 4) in the preamble to the proposed 2016 Safe Harbor, noting that the "completely voluntary" requirement means that the decision to enroll in an IRA program established under the 1975 Safe Harbor must be "self-initiated" and that self-initiated means the decision must be made by the employee, not the employer "**where the employer is acting on [its] own volition** to provide the benefit program, the employer's actions;—e.g., requiring an automatic enrollment arrangement—would constitute its 'establishment' of a plan within the meaning of ERISA."[51] Therefore, according to the preamble, the 2016 Safe Harbor relaxed the requirement for state auto-IRA programs from "completely voluntary" to "voluntary."[52] Thus, according to the preambles, the stricter protection against any employer "coercion" should be unnecessary if the employer's offering of the program was required by state law and the employer had no say in its terms or conditions.

Although there is no semantic or logical difference between "voluntary" and "completely voluntary" participation, the DOL's comments in the preambles to the 2016 Safe Harbor appear to be directed at programs in which there is some employer involvement in the auto-enrollment process. Conversely, the preambles do not argue that a program with automatic employee elections in which an employer had no control over the program's terms, was neutral over whether employees should contribute, did not solicit employee elections, and was required by state law to make the program available to employees, would fail the completely voluntary condition. Thus, for example, if a state program mandates employer participation and limits employer activity to facilitating wage deferrals and transmitting contributions to the program IRAs, there is no "volition" by the employers that would constitute an "establishment" of the IRAs.[53]

Even if the DOL position is that a state program using automatic enrollment cannot satisfy the 1975 Safe Harbor's completely voluntary standard and such position was not disapproved under the CRA, we believe such position is incorrect. There is, to the contrary, a compelling argument that automatic enrollment with clearly communicated and easily implemented opt-out rights is completely voluntary. Legally, an automatic enrollment opt-out feature should be just as much a voluntary election as an opt-in or other "self-initiated" process. While new to IRA-based programs, an opt-out approach is a widely accepted tool to help individuals save; it does not change the dynamic that such saving is voluntary. Automatic enrollment with an opt-out for savings programs was initially developed to encourage employees to make 401(k) contributions. To be tax deferred, an employee's 401(k) contributions must be considered elective (i.e., voluntary). The IRS has ruled that contributions made under a 401(k) plan with an opt-out feature are voluntary.[54] Thus, even in the more regulated realm of 401(k) plans, opt-out features are consistent with the "voluntary" nature of participation in a retirement savings program for regulatory purposes.

Finally, we note that the 1975 Safe Harbor predated the development of automatic enrollment. Indeed, the cases and materials cited by the DOL in the preamble to the proposed 2016 Safe Harbor to support its position that an automatic enrollment feature might not be "completely" voluntary do not involve retirement savings plans.[55] For example, *Doe v. Wood County Board of Education*, the primary case cited by the DOL, ruled that a school district that enrolled grade school children in a single-sex school unless their parents affirmatively elected to place their children in coeducational classes violated the U.S. Department of Education regulations that the choice of single-sex classes must be voluntary.[56] In *Wood County Board of Education*, the week before public school was to begin, parents were given a poorly worded notice of their rights to elect a coeducational school, and by the time notice went out, many children already had selected after-school activities and team sports.[57] Besides the obvious distinctions between a child's education and employee retirement savings programs, it is crucial to note that, in the situation addressed in *Wood County Board of Education*, once the school year begins, it would be emotionally difficult and academically disadvantageous for a child to switch schools. In contrast, in the case of a savings program using automatic enrollment with an opt-out feature, the employee may decline to enroll or stop contributing and obtain a refund at any time through a simple process.[58]

A district court decision in *AARP v. EEOC* issued after the 2016 Safe Harbor indicates that courts may require a rather high level of outside influence before an individual's choice in an opt-out election would not be voluntary.[59] In *EEOC*, the district court considered a rule in the Americans with Disabilities Act ("**ADA**") that an employee may "voluntarily" consent to his or her employer's collection of certain medical history and conduct medical exams. At issue was an Equal Employment Opportunity Commission ("**EEOC**") regulation allowing employers to provide employees with a 30% health premium reduction by participating in a wellness program that collected information and provided services protected under the ADA. Applying a *Chevron* analysis (discussed in the following section), the district court overturned and remanded the EEOC regulation as arbitrary because 30% is too high an incentive to give employees a "meaningful choice."[60]

Judicial Deference to DOL. Assuming *arguendo* that the DOL will take the position that a payroll withholding program with automatic enrollment, opt-out and minimal employer involvement does not satisfy the 1975 Safe Harbor, we must consider the degree of deference that a court may give such interpretation. Judicial deference to agency interpretations depends on many factors and generally encompasses three tiers ranging from complete deference, commonly known as "*Chevron* deference"[61] (which is applied to an agency's interpretation of a statute through a regulation or similar notice-and-comment rulemaking); nearly complete deference, commonly known as "*Auer* deference"[62] (when applied to an agency's interpretation of its own ambiguous regulation); and *de novo* review, commonly known as "*Skidmore* deference."[63] While this issue is quite complex, in general the level of judicial deference depends on whether the regulator has been delegated rulemaking authority by Congress on the matter carrying the force of law (*Chevron*), is interpreting its own ambiguous regulation (*Auer*) or involves an agency interpretation that is not a formal adjudication, a notice-and-comment rulemaking or an interpretation of the agency's own regulation (*Skidmore*). When applying the *Chevron* deference standard, a court must determine whether an agency's interpretation of a silent or ambiguous term in a statute is a permissible construction of the statute. For example, the Fifth Circuit recently vacated the DOL's fiduciary rule regulations *in toto* after finding that the DOL's interpretation of the phrase "renders investment advice" was unreasonable for numerous reasons and thus exceeded the DOL's authority to construe ERISA.[64]

Since the CRA disapproval has presumably wiped away the 2016 Safe Harbor and the 1975 Safe Harbor did not consider the possibility of automatic enrollment, there is a sound argument that the nondeferential *Skidmore* standard would apply to any DOL position on whether a program that uses auto-enrollment can be completely voluntary within the meaning of the 1975 Safe Harbor. However, we note that assuming that the DOL had the legal authority to, and in fact did, issue post-CRA guidance or took a particular position in litigation concerning the completely voluntary condition, such guidance or position would be an interpretation of the DOL's own regulation; therefore, a court could determine to apply the more deferential *Auer* standard.

The Program and the 1975 Safe Harbor. The following discussion applies the Program terms as described in the Overview above to the four conditions of the 1975 Safe Harbor:

1. Condition 1 should be satisfied because the Draft Regulations forbid Covered Employers from contributing to the Program.

2. Condition 2 should be satisfied because employer involvement in the Program essentially will be limited to registering with the Administrator by providing certain basic employee information, and processing and withholding employee contributions and remitting them to the Program. Employee information and materials will be prepared by the Board (or its delegate) and will highlight the Covered Employers' limited role. The Draft Regulations prohibit Covered Employers from endorsing the Program, encouraging employee contributions or providing any financial or investment advice. Instead, Covered Employers will be required to remain neutral concerning the Program and direct employee questions to the Administrator.[65]

3. Condition 3 should be satisfied because Covered Employers will not receive any direct or indirect compensation in connection with the Program, including for registering or making the Program available to Eligible Employees.

4. Condition 4 (the requirement that employee participation be "completely voluntary") should be satisfied because employees will at all times have the ability to opt out of participation in the Program or change their contribution rate and investment choices available under the Program. As described above, the Program will automatically enroll Eligible Employees with the right to opt out of contributing or to elect a different rate. The Board, with the Administrator's assistance, intends to provide Eligible Employees with advance notice of this automatic contribution feature in clear, simple communication materials and will make it easy for Eligible Employees to opt out or make their own elections. Covered Employers will have no control or influence over the automatic enrollment process, thus prohibiting employers from directly or indirectly endorsing the Program or encouraging Eligible Employees to contribute.

Importantly, the Program requires that Covered Employers make the Program available to Eligible Employees and does not allow Covered Employers to decline to participate in the Program or to have any discretion over the Program's terms. We do not believe that the DOL intended to assert that an otherwise exempt program becomes an ERISA plan simply by using automatic enrollment if coupled with robust employee communication and election procedures and strict limitations on employer activity. Further, even if the DOL asserted the position that the Program does not satisfy the completely voluntary condition, the Board could raise significant arguments that such position represents an incorrect application of the 1975 Safe Harbor. Finally, even without satisfying the 1975 Safe Harbor, the Board may assert under the case law discussed below that the Program is established and maintained by the Board, acting in the state's interest, and is neither established nor maintained by an employer. Under these precedents, a program that is shown to be neither established nor maintained by an employer cannot be an employee benefit plan under ERISA.

Beyond Safe Harbors. The 1975 Safe Harbor, like any other regulatory safe harbor, is just that: it provides a bright-line standard for identifying IRA payroll deduction programs that, in the DOL's view, are not covered by ERISA but does not set the outer boundaries for what is or is not an ERISA plan. Accordingly, a program that falls outside the 1975 Safe Harbor may still be a non-ERISA program.

Federal Case Law. To be an ERISA plan, a program must be "established or maintained by an employer."[66] ERISA's regulation of employee benefit plans presumes a level of administrative and operational activity, as it is the employer's activities with respect to a plan that are vulnerable to abuse.[67] The purpose of the "established or maintained" requirement is to "ascertain whether the plan is part of an employment relationship by looking at the degree of participation by the employer in the establishment or maintenance of the plan."[68] A plan is established when the employer has taken affirmative steps to extend benefits, for example, by financing or arranging financing to fund benefits, establishing a procedure for disbursing benefits or representing to employees that the employer has established a plan.[69] Even an employer's alleged promise to provide benefits, without documentary evidence, does not establish an ERISA plan.[70]

The Supreme Court has found that a plan does not exist when an employer assumes no responsibility to pay benefits on a regular basis such that there is no need for ongoing administrative practices associated with the provision of benefits.[71] The question of whether a plan is "established or maintained by an employer" is one of fact "to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person."[72] In applying this test, the crucial factor is whether the employer intends to provide benefits on a regular and long-term basis.[73] To ascertain whether an employer has established an ERISA benefits plan, courts will look to (1) internal or distributed documents, (2) oral representations, (3) the existence of a fund or account to pay benefits, (4) actual payment of benefits, (5) a deliberate failure to correct known perceptions of a plan's existence, (6) the reasonable understanding of employees and (7) the intentions of the putative sponsor.[74]

A Covered Employer's only responsibilities with respect to the Program will be limited to registering with the Administrator, providing the Administrator with certain employee census and related information, obtaining the Eligible Employee contribution or opt out elections through the Administrator's portal, and properly withholding Eligible Employees' contributions from their wages and timely and accurately transmitting them to the Trustee. All of these activities are mandated by the Act—there is no "volition" exercised by the Covered Employer. Moreover, such minimal activities do not include any administrative decision-making, employer contributions or other involvement that the courts have focused on in determining that an employer has established or maintained an ERISA plan.

Conclusions

Based on and subject to the foregoing assumptions, qualifications and analysis, it is our view that:

1. The Program's Roth IRAs should satisfy Tax Code §§ 408 and 408A requirements for establishing and maintaining a Roth IRA. Of course, the actual federal income tax benefits of the Roth IRAs will depend on the operation of the Program and compliance with Qualification Requirements and avoidance of Prohibited Conduct in operation. Please note that because the documents necessary to establish the Program's Traditional IRAs have not yet been drafted, we do not express any view on application of the Tax Code to the Traditional IRAs; once these documents have been prepared, we would be pleased to review them and would expect to be able to extend our views as to their satisfaction of the Tax Code requirements.

2. The Program should not be considered an employee benefit plan subject to ERISA. However, as discussed above, the final determination of whether the Program is subject to ERISA rests with the courts, and it is possible that a court could disagree with our analysis and rule that the Program involves the establishment of an ERISA plan. Also, it is possible that the DOL would consider a modification to the 1975 Safe Harbor through an amendment of the regulation or issuance of new guidance (which is subject to the restrictions imposed by the CRA on substantially the same regulations, as discussed above). While we believe it is unlikely at present, it also is conceivable that the DOL may take an enforcement position against state auto-IRA programs, such as the Program.

3. The roles and responsibilities of Covered Employers under the Draft Regulations should not cause the Program to be classified as an employee benefit plan subject to ERISA. However, as noted under item 2 above, the final determination of whether the Covered Employers' roles and responsibilities under the Program would create an employee benefit plan subject to ERISA rests with the courts and could be affected by any regulatory action taken by the DOL.

4. The Program's operations, as set forth in the Draft Regulations, the Program Booklet and the Administration and Management Agreement, will be managed by third parties selected by the Board, including the Administrator, Investment Manager and Trustee, under the supervision of the Board and its staff. Covered Employers' obligations under the Program will be limited to registering with the Program and providing certain employee census and related information to the Administrator, obtaining the Eligible Employee contribution or opt-out elections through the Administrator's portal, and properly withholding Eligible Employees' contributions from their wages and timely and accurately transmitting them to the Trustee. Beyond these duties, which are intended to be ministerial, the Program neither provides for nor permits interactions between Covered Employers and Eligible Employees regarding the Program. Thus, it appears that the Program's operational model limits the interactions and transactions between Covered Employers and their Eligible Employees to the extent feasible.

Accordingly, the Program should satisfy the prerequisites and requirements set forth in Act § 100043(b)(1).

Sincerely yours,

David E. Morse

cc: Robert Hedrick
Rikki Sapolich-Krol – K&L Gates LLP
Michael Hart - K&L Gates LLP

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[1] California legislation enacted in 2012 established the Board and authorized the Board to conduct a detailed market analysis and make recommendations for an IRA-based program. Based on the Board's recommendations, the California legislature in 2016 enacted SB 1234, which officially established the Program. Cal. Gov't Code §§ 100000-44 (West 2016 Supp.).

[2] Act § 100004(a).

[3] Act § 100002.

[4] Act § 100002(a)(1).

[5] Act § 100002(b).

[6] Act § 100012(a).

[7] Act § 100002(d).

[8] Act § 100002(d).

[9] Act § 100000(d); Draft Regulations §§ 10001(i), 10003.

[10] Draft Regulations § 10001(z).

[11] Act § 100000(c); Draft Regulations § 10001(k).

[12] Draft Regulations § 10008.

[13] Draft Regulations § 10008(e).

[14] Draft Regulations § 10003(d).

[15] Draft Regulations §§ 10004(d), 10004(e).

[16] Draft Regulations § 10005.

[17] *Id.*

[18] Act § 100014.

[19] Draft Regulations § 10005(c).

[20] Draft Regulations § 10006(h).

[21] Draft Regulations § 10006(h)(2).

[22] Draft Regulations §§ 10007(b), 10007(c)(4). The ability to contribute to a Traditional IRA will not be available during the initial launch of the Program, but is expected to become available at a later time.

[23] Draft Regulations § 10007(a).

[24] Draft Regulations § 10007(a)(2)(A).

[25] Draft Regulations § 10007(b).

[26] *Id*.

[27] Draft Regulations § 10007(a)(4).

[28] Draft Regulations § 10005(d).

[29] The California Labor Code governs all private employers in California. In addition to possible civil penalties and criminal sanctions, the employee may bring a wage claim filed with the California Division of Labor Standards Enforcement or in a civil action. Cal. Lab. Code §§ 1193.5, 2699.

[30] Act § 100014.

[31] Draft Regulations § 10007(c)(1). The Act permits Covered Employers to make employer contributions to the Program only to the extent that the contributions would be permitted under the Tax Code and would not cause the program to be treated as an employee benefit plan under ERISA. Act § 100012(j).

[32] Draft Regulations § 10005(e).

[33] Contributions to a Roth IRA are made on an after-tax basis and are not deductible. Distributions of contributions from a Roth IRA are tax-free. Generally, "qualified distributions" of earnings from a Roth IRA are tax-free. Roth IRA distributions are qualified distributions if (1) made after the five-taxable-year period beginning with the first taxable year for which the employee (or the employee's spouse) made a contribution to a Roth IRA of the employee, and (2) either is made on or after the employee attains age 59½, is made to a beneficiary or estate of the employee on or after the employee's death, is made on account of the employee's disability or is a qualified first-time homebuyer distribution. Distributions of earnings that are not qualified distributions are generally taxable if not rolled over to another tax-advantaged retirement arrangement such as another IRA or an employer's tax-qualified retirement plan. Tax Code §§ 408, 408A.

[34] IRS Notice 98-49. The IRS sponsors a program under which it will review and approve a "prototype" IRA and furnish an opinion letter that the prototype IRA satisfies Tax Code § 408A. However, the IRS will not issue an opinion letter for an IRA that is based on the model Form 5305-RA. (*See* Rev. Proc. 98-59.)

[35] ERISA § 3(2). ERISA exempts governmental plans, but the Program would not be considered a governmental plan because it covers private sector and not state employees. ERISA § 3(32).

[36] White House Reorganization Plan No. 4 of 1978 (Executive Order 12108).

[37] DOL Reg. § 2510.3-2(d).

[38] DOL Reg. § 2510.3-2(h).

[39] H.J. Res 66, 115th Cong. (2017).

[40] DOL Reg. § 2509.99-1; 64 Fed. Reg. 33000, 33001 (Jun. 18, 1999).

[41] *Id*.

[42] *Id*.

[43] DOL Advisory Opinion 2001-03A (Feb. 15, 2001).

[44] DOL Advisory Opinion 82-27A (Jun. 16, 1982).

[45] *Id*.

[46] CRA § 801(b)(2).

[47] The CRA resolution cites to the first page of the Federal Register entry as opposed to the page where the actual regulation begins, and the CRA defines (by cross-referencing the definition from the Administrative Procedures Act) "rule" as including "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

[48] DOL Reg. § 2510.3-2(h).

[49] We are assuming (without expressing our view) for this portion of our advice that the CRA's proscription on the DOL's issuing of new rules similar to the 2016 Safe Harbor would not affect the DOL's ability to issue regulatory guidance concerning whether a payroll withholding IRA program would fall within the 1975 Safe Harbor or otherwise be subject to ERISA.

[50] Final Safe Harbor, 81 Fed. Reg. 59464, 59465 (Aug. 30, 2016) (emphasis added).

[51] Proposed Safe Harbor, 80 Fed. Reg. 72006, 72008 (Nov. 18, 2015) (emphasis added).

[52] Final Safe Harbor, 81 Fed. Reg. at 59466.

[53] *See Byard v. QualMed Plans for Health, Inc.*, 966 F. Supp. 354, 358 (E. D. Pa. 1997) (holding that employee participation in an employer health insurance program was "completely voluntary" when "employees could discontinue their membership in the plan simply by stopping their monthly payments").

[54] *See* Rev. Rul. 2000-8, 2000-1 C.B. 149.

[55] 80 Fed. Reg. 72006, 72008 (Nov. 18, 2015).

[56] 888 F. Supp. 2d 771, 775–77 (S.D. W. Va. 2012).

[57] *Id.* at 777.

[58] We note that certain business trade groups seeking to stymie auto-IRAs have obtained and distributed legal analysis arguing that auto-IRAs, including the Program, fail the completely voluntary test of the 1975 Safe Harbor. The outside analysis of which we are aware relies on a combination of inapposite ERISA and irrelevant non-ERISA precedent. One cited case is *Meadows v. Emp'rs Health Ins.*, 826 F. Supp. 1225 (D. Ariz. 1993), which held that an employer's "voluntary" disability and accidental death plan was covered by ERISA. However, in *Meadows* the court stressed that the plan required 100% or 75% employee participation (depending on the type of coverage), thus essentially making employee participation mandatory. The Program, of course, has no such participation requirement. Another example is *Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114 (S.D.N.Y. 2014), which held that an employer-initiated tip pooling arrangement violated New York State wage hour laws because of the employer's heavy hand in imposing the arrangement. Besides having nothing to do with ERISA, the identity of employees opting not to share tips would be known to their co-workers, leading to peer pressure and possible scorn for not sharing. Indeed, we have found no case law holding that an individual's enrollment in a payroll withholding savings program, with ample advance notice of the program's terms and the ability to opt-out of contributing either before or any time after withholding begins is not completely voluntary. As one court has succinctly noted, the purpose of the completely voluntary condition "is to identify programs sponsored by the employer and meant to be a benefit of employment." *Ames v. Jefferson Pilot Fin. Co.*, F. Supp. 2d 1050, 1055-56 (D. Ariz. 2007) (quoting *Meadows*). Here, the Program is sponsored by the State, not the employer, the employer's minimal involvement is mandated, not voluntary, and therefore the Program has neither the appearance nor characteristics of a benefit of employment provided by the employer.

[59] 226 F Supp. 3d 7 (Aug. 22, 2017).

[60] *Id*. at 23−24.

[61] *Chevron* deference is the most deferential standard and applies to an agency's interpretation of a statute that is silent or ambiguous regarding the issue in question. *Chevron USA, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842−43 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218, 226−27 (2001). *Chevron* deference applies

only if Congress delegated authority to the agency to make rules carrying the force of law and the interpretation is made pursuant to that authority. *Mead Corp.*, 533 U.S. at 226–27. If Congress has expressly delegated authority and *Chevron* deference otherwise applies, an agency interpretation is considered controlling and *binding* in judicial proceedings "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227 (citing *Chevron USA, Inc.*, 467 U.S. at 844).

[62] The existence of other regulations, rulings, or administrative practices that are consistent with the interpretation can weigh in favor of *Auer* deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

[63] *Skidmore* deference generally addresses how much weight to give to an agency interpretation that is not a formal adjudication, a notice-and-comment rulemaking, or an interpretation of the agency's own regulation. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference is typically considered in connection with policy statements, agency manuals and enforcement guidelines, and other interpretations that "lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (refusing to apply *Chevron* deference to "an interpretation contained in an opinion letter" from the DOL). *Skidmore* deference applies only to the extent that the agency's interpretation has the "power to persuade." *Skidmore*, 323 U.S. at 140.

[64] *Chamber of Commerce of the U.S. v. Acosta*, No. 17-10238 (5th Cir. Mar. 15, 2018).

[65] If an employer were to violate any of the Program's requirements, such as by contributing to an IRA established under the Program, that IRA may, under the authorities described in this letter, be treated as being subject to ERISA.

[66] ERISA §§ 3(2)(A), 3(3), 4(a).

[67] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 16 (1987).

[68] *Peckham v. GEM State Mut. of Utah*, 964 F.2d 1043, 1049 (10th Cir. 1992) (holding that an employer's subscription to a multi-employer group insurance trust that provides employers with insurance for their employees, the purchase of insurance for its employees, and the listing of insurance in the company manual as an employee benefit created an employment relationship in satisfaction of the "established or maintained" requirement).

[69] *Ed Miniat, Inc. v. Globe Life Ins. Grp, Inc.*, 805 F.2d 732, 739 (7th Cir. 1986).

[70] *See, e.g.*, *Harris v. Ark. Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986) (holding that an employer's alleged promise to provide retirement benefits did not constitute the establishment of an employee pension plan despite making payments to another employee following that employee's retirement).

[71] *Fort Halifax Packing Co.*, 482 U.S. at 12.

[72] *Deibler v. United Food & Commercial Workers' Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992).

[73] *See id.*, 973 F.2d at 209 (citing *Wickman v. Nw. Nat'l Ins. Co.*, 908 F.2d 1077, 1083 (1st Cir. 1990)).

[74] *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Emps.*, 974 F.2d 391, 400 (3d Cir. 1992).