

VIA ELECTRONIC MAIL

January 25, 2018

Hon. Kathleen Marchione
Chairs of the Local Government Joint Budget
Committee
Room 917 LOB
Albany, NY 12242

Hon. William Magnarelli
Chairs of the Local Government Joint Budget
Committee
Room 837 LOB
Albany, NY 12242

RE: A.B. 9505/ S.B. 7505 – PPGG Part X – Secure Choice Savings Program

Dear Senator Marchione and Assemblyman Magnarelli:

Thank you for the opportunity to share our concerns regarding A.B. 9505/ S.B. 7505 (PPGG Part X of the New York State Budget), which directs the New York state deferred compensation board to administer a state-run retirement plan for private sector employees. The Financial Services Institute (FSI)¹ and its broker-dealer and financial advisor members are concerned that the inclusion of this provision in the state budget will have serious unintended consequences for the state, employers and retirees. This bill is of strong concern to FSI's New York membership, as FSI currently has a significant presence of 6 broker-dealers and 1,505 financial advisors operating within the state.

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are more than 160,000 independent financial advisors, which account for approximately 52.7% of all producing registered representatives.² These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD). Our financial advisors provide group retirement plans to private employers and individual plans to employees who lack access to an employer provided retirement plan. These advisors work closely with clients to develop individually-tailored retirement plans that are much better suited to achieving the client's retirement goals than a "one size fits all" approach. In contrast, necessity demands that state-run retirement vehicles be managed in the best interest of the group instead of the individual participants.

There has been significant debate across the country as to whether a state or city-run plan for private sector workers is a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA). As you may know, Congress repealed Department of Labor (DOL) rules that provided a loophole for cities and states to create retirement plans for private sector workers by exempting those plans from ERISA. The ERISA exemption strips Americans of federal consumer

¹ The Financial Services Institute (FSI) is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has successfully promoted a more responsible regulatory environment for more than 40,000 independent financial advisors, and more than 100 independent financial services firms who represent upwards of 160,000 affiliated financial advisors. We effect change through involvement in FINRA governance as well as constructive engagement in the regulatory and legislative processes, working to create a healthier regulatory environment for our members so they can provide affordable, objective advice to hard-working Main Street Americans. For more information, please visit www.financialservices.org.

² Cerulli Associates, Advisor Headcount 2016, on file with author.

protections and imposes a new burden on employers by creating a patch work of laws across the country.

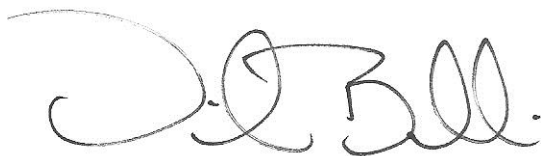
The structure of mandatory city and state-run retirement plans suggest that if the programs are indeed ERISA plans, the state laws are likely to be preempted by federal law, ERISA. One factor that both the court and the DOL will consider is whether the program comply with a regulatory safe harbor for payroll-deduction IRAs. It is unlikely that this plan will qualify. Without the benefit of the safe harbor, a court will likely determine that these plans are subject to or preempted by ERISA. Recently, a lawsuit was filed against the State of Oregon challenging, as preempted by ERISA, the State's requirement that all employers register with the state and certify whether they maintain qualified retirement plans for their employees so as to be exempt from participation in the mandatory state IRA program³ Similar lawsuits can be expected as implementation dates draw nearer. ERISA coverage and preemption would ultimately only be determined through litigation, leaving a great deal of uncertainty as to the viability of state and city-run retirement programs.

Enrolling private employees into a state-run retirement plan will also place a heavy administrative burden on the state, and taxpayers may be forced to shoulder the costs in the event of economic difficulty. Further, employers will be saddled with the additional responsibility of ensuring their employees are enrolled in the plan and processing the necessary payroll contributions. Many small business owners do not have the time or resources for these added administrative tasks.

FSI is committed to constructive engagement in the legislative process. We welcome the opportunity to work with you to help New York's hard-working citizens save for retirement in a way that is both sensible and affordable. In this spirit, we have included a white paper that we've developed which recommends ways state legislators can encourage retirement planning by their constituents. We hope you will find it to be a helpful resource.

Thank you for your consideration of our comments. Should you have any questions, please contact Michelle Carroll Foster at 202-517-6464.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" and a distinct "Bellaire" ending.

David T. Bellaire, Esq.
Executive Vice President & General Counsel

³ The ERISA Industry Committee v. Read, Case No.3:17-cv-01605 (D. Or. Filed October 12, 2017).