its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

■ 31. The authority citation for part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g, 42 U.S.C. 1437z–2, 42 U.S.C. 1437z–7, and 3535(d).

■ 32. In § 905.312, add paragraph (e) to read as follows:

§ 905.312 Design and construction.

* * * * *

(e) *Broadband infrastructure.* Any new construction or substantial rehabilitation, as substantial rehabilitation is defined in 24 CFR 5.100, of a building with more than 4 rental units and funded by a grant awarded or Capital Funds allocated after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the PHA determines and, in accordance with § 905.326, documents the determination that:

(1) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(2) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(3) The structure of the housing to be rehabilitated makes installation of broadband infrastructure infeasible.

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 33. The authority citation for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 34. Add § 983.157 to subpart D to read as follows:

§ 983.157 Broadband infrastructure.

Any new construction or substantial rehabilitation, as substantial rehabilitation is defined by 24 CFR 5.100, of a building with more than 4 rental units and where the date of the notice of owner proposal selection or the start of the rehabilitation while under a HAP contract is after January 19, 2017 must include installation of broadband infrastructure, as this term is also defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(b) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(c) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

Dated: December 15, 2016.

Nani A. Coloretti,

Deputy Secretary.

[FR Doc. 2016–30708 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB76

Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains an amendment to a final regulation that describes how states may design and operate payroll deduction savings programs for private-sector employees, including programs that use automatic enrollment, without causing the states or private-sector employers to have established employee pension benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). The amendment expands the final regulation beyond states to cover qualified state political subdivisions and their programs that otherwise comply with the regulation. This final rule affects individuals and employers subject to such programs.

DATES: This rule is effective 30 days after the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Janet Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

A. The 2016 Final Safe Harbor Regulation

On August 30, 2016, the Department issued a final regulation establishing a safe harbor pursuant to which state governments can establish payroll deduction savings programs for private-sector employees, including programs with automatic enrollment, without causing either the state or the employers of those employees to have established employee pension benefit plans subject to ERISA. The Department published the safe harbor regulation in response to legislation in some states, and strongly-expressed interest in others, to encourage private-sector employees to save for retirement by giving those employees broader access to retirement savings arrangements through their employers. The safe harbor regulation became effective on October 31, 2016.

As the Department noted in the final regulation's preamble, concerns that tens of millions of America's workers do not have access to workplace retirement savings arrangements led some states to establish state-administered programs that allow private-sector employees to contribute salary withholdings to tax-favored individual retirement accounts described in 26 U.S.C. 408(a), individual retirement annuities described in 26 U.S.C. 408(b), and Roth IRAs described in 26 U.S.C. 408A (collectively, IRAs). California, Connecticut, Illinois, Maryland, and Oregon, for example, have adopted laws along these lines.[1] Those programs generally require certain employers that do not offer workplace savings arrangements to automatically deduct a specified amount of wages from their employees' paychecks, unless an employee affirmatively chooses not to participate in the program, and to remit those payroll deductions to state-administered programs consisting of IRAs established for each participating employee. All of these state initiatives allow employees to stop payroll deductions at any time once they have begun, and they typically require that employers provide employees with program-generated information, including information on employees' rights and various program features. None of the programs, however,

[1] California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000–10044 (2012); Connecticut Retirement Security Program Act, P.A. 16–29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, Ch. 24 (H.B. 1378) (2016); Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015).

currently require employers to make matching or other employer contributions to employee accounts, while some programs expressly prohibit employer contributions and other programs do not address that issue.

The Department also noted in the 2016 final safe harbor regulation's preamble that some stakeholders had expressed concern that their payroll deduction savings programs might cause either the state or the covered employers to inadvertently establish ERISA-covered plans, despite the states' express intent to avoid such a result. The states' concern is based in part on ERISA's broad definition of ''employee pension benefit plan'' and ''pension plan,'' which ERISA defines, in relevant part, as ''any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program . . . provides retirement income to employees . . . .''[2] That definition's broad scope is further evident in the fact that the Department and the courts have broadly interpreted the phrase ''established or maintained'' as requiring only minimal involvement by an employer or employee organization.[3] Thus, for example, it is possible for an employer to establish an ERISA plan simply by purchasing insurance products for an individual employee or employees. Given these expansive definitions, which Congress deemed essential to ERISA's purpose of protecting plan participants by ensuring the security of promised benefits, ERISA applies to nearly all benefit arrangements that private-sector employers establish for their employees.

The states' desire to avoid inadvertently creating ERISA plans through their payroll deduction savings programs stems from the fact that, with certain exceptions, ERISA preempts state laws that relate to ERISA-covered employee benefit plans.[4] Thus, if a state program requires private employers to take actions that effectively cause those employers to establish ERISA-covered plans, the state law underlying the program would likely be preempted. Similarly, if the state-sponsored program itself were deemed to be an ERISA plan, ERISA would likely preempt any state law that mandates private-sector employers to enroll their employees in that program. It is important to note in this regard that although ERISA does exempt from its scope benefit plans that states establish for their own employees, the state payroll deduction savings programs at issue here would not fit that definition.[5]

The Department responded to these concerns by publishing the 2016 final safe harbor regulation, which described specific conditions pursuant to which state payroll deduction savings programs, including those with automatic enrollment, would not result in the state or private-sector employers having established ERISA-covered employee pension benefit plans. The 2016 final safe harbor regulation thus helps states to establish and operate payroll deduction savings programs in a manner that reduces the risk that ERISA would preempt their laws and programs. That final regulation did not, however, include within its scope payroll deduction savings programs established by state political subdivisions.

B. Proposed Amendment to the 2016 Safe Harbor Regulation

1. Expanding the Safe Harbor To Include Political Subdivisions

On August 30, 2016, the Department published in the **Federal Register** a proposed rule amending the 2016 final safe harbor regulation to include within its scope laws and programs established by certain state political subdivisions.[6] The proposed amendment addressed certain public comments the Department received after it first published the safe harbor regulation in 2015 as a proposed rule.[7] In particular, several commenters had expressed the view that the Department's definition of ''State'' in the 2015 proposed safe harbor regulation was too narrow because it did not include political subdivisions. Some of these commenters identified New York City as being interested in offering a program. The 2015 proposal defined the term ''State'' by referencing section 3(10) of ERISA, which provides, in relevant part, that the term State ''includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, [and] Wake Island.'' That definition excludes from the safe harbor any payroll deduction savings program established by state political subdivisions, such as a cities or counties.

Although the Department retained the section 3(10) definition in the 2016 final safe harbor regulation, the Department nevertheless agreed with commenters that there may be good reasons for expanding the safe harbor, subject to certain conditions, to cover political subdivisions and their programs. While it is not clear to the Department how many such political subdivisions eventually will have an interest in establishing programs of the kind described in the final safe harbor regulation, thus far the Department has only received written letters of interest from representatives of Seattle, Philadelphia and New York City.[8] Accordingly, the Department proposed amending the 2016 final safe harbor regulation to add to § 2510.3–2 paragraph (h) the term ''or qualified political subdivision'' wherever the term ''State'' appears. That change would cause the regulation's safe harbor to apply to ''qualified'' political subdivision payroll deduction savings programs in the same manner as it applies to state programs.

The proposed amendment also added a new subparagraph (h)(4) to define the term ''qualified political subdivision'' as any governmental unit of a state, including any city, county, or similar governmental body that met three criteria. First, the political subdivision must have the authority, under state law, whether implicit or explicit, to require employers' participation in the

[2] 29 U.S.C. 1002(2)(A). ERISA's Title I provisions ''shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce . . . .'' 29 U.S.C. 1003(a). Section 4(b) of ERISA includes express exemptions from coverage under Title I for governmental plans, church plans, plans maintained solely to comply with applicable state laws regarding workers compensation, unemployment, or disability, certain foreign plans, and unfunded excess benefit plans. 29 U.S.C. 1003(b).

[3] *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982); *Harding* v. *Provident Life and Accident Ins. Co.,* 809 F. Supp. 2d 403, 415–419 (W.D. Pa. 2011); DOL Adv. Op. 94–22A (July 1, 1994).

[4] ERISA section 514(a), 29 U.S.C. 1144(a).

[5] ERISA section (3)(32), 29 U.S.C. 1002(32).

[6] *See* 81 FR 59581 (August 30, 2016).

[7] *Id. See also* 80 FR 72006 (November 18, 2015). On the same day that the 2015 proposed rule was published, the Department also published an Interpretive Bulletin explaining the Department's views concerning the application of ERISA section 3(2)(A), 29 U.S.C. 1002(2)(A), section 3(5), 29 U.S.C. 1002(5), and section 514, 29 U.S.C. 1144, to certain state laws designed to expand retirement savings options for private-sector workers through state-sponsored ERISA-covered retirement plans. 80 FR 71936 (codified at 29 CFR 2509.2015–02). Although discussed in the context of a state as the responsible governmental body, in the Department's view the principles articulated in the Interpretive Bulletin regarding marketplace arrangements and sponsorship of ERISA-covered plans also apply with respect to laws of a political subdivision, provided applicable conditions in the bulletin can be and are satisfied by the political subdivision. A number of commenters asked the Department to amend the Interpretive Bulletin to reflect this view. Such an amendment is beyond the scope of this rulemaking.

[8] *See, e.g.,* Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment letter #5 (City of Philadelphia Controller); Comment Letter #20 (New York City Mayor).

payroll deduction savings program. Second, the political subdivision must have a population equal to or greater than the population of the least populous state.[9] Third, the political subdivision cannot be within a state that has a statewide retirement savings program for private-sector employees.[10]

The Department's goal in defining ''qualified political subdivision'' in this way was to reduce the number of political subdivisions that can fit within the safe harbor and focus the authority on those subdivisions most likely to have the capacity to implement successful programs. As the Department noted in the proposed rule's preamble, the U.S. Census Bureau reports that there are approximately 90,000 local governmental units in the United States, many of which could be considered ''political subdivisions'' for purposes of the proposed regulation.[11] Given this large number, the Department was concerned that expanding the safe harbor to all political subdivisions would result in overlapping programs within a given state.[12] The Department also had some concerns about expanding the safe harbor to very small political subdivisions, as the U.S. Census Bureau has reported that approximately 83% of state subdivisions have populations of less than 10,000 people.[13] These statistics led the Department to propose to further limit the types of political subdivisions that can fall within the safe harbor to those that are sufficiently large and sophisticated to have the ability to oversee and safeguard payroll deduction savings programs.

2. Criteria Limiting Political Subdivision Eligibility for the Safe Harbor

The first proposed criterion limiting the potential number of political subdivisions eligible for the safe harbor requires that the political subdivision have either explicit or implicit authority under state law to establish and operate a payroll deduction savings program and to require employers within its jurisdiction to participate. In the case of programs with automatic enrollment, that authority must encompass the power to require employers to execute payroll deduction wage withholdings.[14] This criterion will effectively limit the safe harbor's scope to so-called ''general-purpose'' subdivisions, which are political subdivisions that have the authority to exercise traditional sovereign powers, such as the power of taxation, the power of eminent domain, and the police power. It includes county governments, municipal governments, and township governments.[15] According to the U.S. Census Bureau, there are approximately 40,000 ''general-purpose'' political subdivisions in the United States.[16] By contrast, ''special-purpose'' subdivisions, such as utility districts or transit authorities, ordinarily would not have this kind of authority under state law. Thus, the Department expects that this criterion alone will reduce the universe of political subdivisions potentially eligible for the safe harbor from the approximate total of 90,000 U.S. political subdivisions to approximately 40,000.

The second proposed criterion limiting the number of potentially-eligible political subdivisions requires that the political subdivision have a population equal to or greater than the population of the least populous U.S. state (excluding the District of Columbia and the territories listed in section 3(10) of the ERISA). Based on the most recent U.S. Census Bureau statistics available, the least populous U.S. state had approximately 600,000 residents.[17] This criterion will significantly reduce the possibility of overlap by further limiting the universe of potentially-eligible political subdivisions from approximately 40,000 to a subset of approximately 136.[18]

The proposal's third criterion further limited the safe harbor to political subdivisions in states that do not offer their own statewide retirement savings program for private-sector employees.[19] As presented in the proposal, this criterion would have applied to state retirement savings programs described in the safe harbor rule itself, 29 CFR 2510.3–2(h), and also to programs described or referenced in the Department's Interpretive Bulletin found at 29 CFR 2509.2015–02. This criterion excluded from the safe harbor approximately 48 additional political subdivisions that otherwise meet the proposal's population threshold, thereby further limiting the universe of potentially eligible political subdivisions to approximately 88 as of the date of the proposed rule.

3. Solicitation of Comments on the Proposed Amendment

The Department solicited public comments on all aspects of the proposed amendment, including comments on criteria the Department did not specifically address in the proposal, but which might be useful in refining the qualified political subdivision definition. In addition, the Department also requested comments on other facets of the safe harbor more generally. In response to these solicitations, the Department received approximately 27 written comments, many of which are discussed under the topical headings below.

[9] For this purpose, the term ''state'' does not include the non-state authorities listed in section 3(10) of ERISA. Thus, it does not include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and Wake Island.

[10] The proposal's paragraph (h)(4) definition would not, however, apply for other purposes under ERISA, such as for determining whether an entity is a political subdivision for purposes of the definition of a ''governmental plan'' in section 3(32) of ERISA, 29 U.S.C. 1002(32).

[11] This figure represents the U.S. Census Bureau's count for 2012 (the most recent data available). The U.S. Census Bureau produces data every 5 years as a part of the Census of Governments in years ending in ''2'' and ''7.'' *See* U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[12] This could occur in situations where, for example, an employer operates in a state (or states) with multiple political subdivisions.

[13] U.S. Census Bureau, County Governments by Population-Size Group and State: 2012 Census of Governments; U.S. Census Bureau; Subcounty Governments by Population-Size Group and State: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[14] This criterion not only limits the number of political subdivisions that would be eligible for the safe harbor, it also is central to the Department's analysis under section 3(2) of ERISA and the conclusion that employers are not establishing or maintaining ERISA-covered plans. Other criteria in (h)(4) also serve this purpose by reducing the likelihood that an employer might become involved with the arrangement beyond the limits of the safe harbor.

[15] *See* U.S. Census Bureau, Government Organization Summary Report: 2012 Census of Governments (*http://www.census.gov/govs/cog/index.html*).

[16] The U.S. Census Bureau's count of general-purpose political subdivisions for 2012 was 38,910 (3,031 counties, 19,519 municipalities, and 16,360 townships). *Id.*

[17] Wyoming was the least populated state in the U.S., with a population of 586,107. *See* U.S. Census Bureau, Annual Estimates of the Resident Population for States: 2015 Population Estimate (*https://www.census.gov/popest/data/state/totals/2015/index.html*).

[18] As of 2015, there were approximately 136 general-purpose political subdivisions with populations equal to or greater than the population of Wyoming.

[19] Eight states have already adopted laws to implement some form of statewide retirement savings program for private-sector employees. California Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000–100044 (2012); Connecticut Retirement Security Program Act, Pub. Act. 16–29 (2016); Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. 80/1–95 (2015); Maryland Small Business Retirement Savings Program Act, ch. 324 (H.B. 1378) (2016); Mass. Gen. Laws Ch. 29, § 64E (2012); New Jersey Small Business Retirement Marketplace Act, Public Law 2015, Ch. 298; Oregon Retirement Savings Board Act, Ch. 557 (H.B. 2960) (2015); Washington State Small Business Retirement Savings Marketplace Act, Wash. Rev. Code §§ 43.330.730–750 (2015).

II. Final Rule

A. General Overview

The final rule largely adopts the proposal's general structure. Specifically, it amends paragraph (h) of § 2510.3–2 by adding the term ''or qualified political subdivision'' wherever the term ''State'' appears in the regulation. Thus, with these amendments, the final regulation's safe harbor provisions generally apply in the same manner to qualified political subdivision payroll deduction savings programs as they apply to state programs.

The final rule also adopts proposed new subparagraph (h)(4), but with modifications. In the final rule, paragraph (h)(4) defines the term ''qualified political subdivision'' as any governmental unit of a state, including any city, county, or similar governmental body that meets four criteria.[20] First, the political subdivision must have implicit or explicit authority under state law to require employers' participation in the payroll deduction savings program. 29 CFR 2510.3–2(h)(4)(i).[21] Second, the political subdivision must have a population equal to or greater than the population of the least populous state.[22] 29 CFR 2510.3–2(h)(4)(ii)(A). Third, the political subdivision cannot be within a state that has enacted a mandatory statewide payroll deduction savings program for private-sector employees; nor can the political subdivision have geographic overlap with another political subdivision that has enacted such a program. 29 CFR 2510.3–2(h)(4)(ii)(B).[23] Fourth, the political subdivision must implement and administer a retirement plan for its employees. 29 CFR 2510.3–2(h)(4)(ii)(C).[24] Compliance with the latter three conditions is determined as of the date the political subdivision's program is enacted.

B. The Authority Test

The final rule adopts the proposal's requirement that in order to be ''qualified'' a political subdivision must have the ''authority, implicit or explicit, under State law to require employers' participation in the program . . . .'' § 2510.3–2(h)(4)(i). This provision serves two purposes. The main purpose is to ensure that the political subdivision has the authority under state law to require employers within its jurisdiction to participate in the payroll deduction savings program and, in the case of programs with automatic enrollment, to require wage withholding. This is not to say, however, that a state law must explicitly authorize the political subdivision to establish a payroll deduction savings program; rather, it means that the political subdivision must have some measure of legal authority, even if implicit, to establish and operate the program and to compel employers to participate.[25] The provision's second purpose is to limit the qualified political subdivision definition—and by extension to limit the safe harbor's scope—to general-purpose subdivisions, a limitation that greatly reduces the approximate number of potentially-eligible subdivisions from 90,000 to 40,000. For these reasons, and noting that the Department did not receive significant or notable comments on this particular provision, the Department incorporates this provision in the final rule without change.

C. The Population Test

The final rule adopts the proposal's population test for safe harbor qualification, with one modification. As noted above, the final rule states, in relevant part, that a political subdivision must have ''a population equal to or greater than the population of the least populated State,'' and defines the term ''State'' to have the same meaning as in section 3(10) of ERISA (excluding the District of Columbia and territories listed in that section). 29 CFR 2510.3–2(h)(4)(ii)(A).[26] The final rule modifies the proposal by adding to (h)(4)(ii) the phrase ''[a]t the time of the enactment of the political subdivision's payroll deduction savings program,'' and applying this requirement to the population test, as well as the two other conditions that a political subdivision must satisfy to be a qualified political subdivision.

The Department has two primary policy reasons for adopting the population test. First, it is important that the safe harbor not include political subdivisions that may not have the experience, capacity, and resources to establish and oversee payroll deduction savings programs. Second, the Department is interested in reducing the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs. It is the Department's view that the population test is an important measure in achieving both of those purposes. In the preamble to the proposed rule, the Department articulated these policy considerations for public notice and comment.

The Department received a number of comments on this issue that reflected apparently conflicting viewpoints. Some commenters supported the population test because they agree with the Department that population size correlates with a political subdivision having the experience, capacity, and resources to implement the necessary structures to establish and oversee payroll deduction savings programs and meet the safe harbor regulation's various requirements.[27] These commenters state that political subdivisions with larger populations are more likely to share states' concerns about the effect of inadequate retirement savings on social welfare programs. Other commenters disagreed with the population test's underlying premise, as they believe that a population test is arbitrary and does not prove either that the least populated state has sufficient capacity to establish and oversee a payroll deduction savings program or that political subdivisions with lesser populations are *per se* incapable of competently overseeing such a program.

The Department agrees with those commenters who recognize a relationship between population, on the one hand, and resources, experience, and capacity on the other. This is because larger cities and counties (in terms of population) likely have, among other things, a larger tax base and governmental infrastructure, which provides access to greater resources, experience, and capacity than smaller

[20] This new definition does not apply for other purposes under ERISA, such as for determining whether an entity is a political subdivision for purposes of the definition of a ''governmental plan'' in section 3(32) of ERISA, 29 U.S.C. 1002(32).

[21] This provision reduces the approximate number of potentially eligible political subdivisions from 90,000 to 40,000.

[22] This provision reduces the approximate number of potentially eligible political subdivisions from 40,000 to 128. For purposes of this provision, the term ''state'' does not include the non-state authorities listed in section 3(10) of ERISA. Thus, it does not include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and Wake Island.

[23] This provision reduces the approximate number of potentially eligible political subdivisions from 128 to 80.

[24] This provision reduces the approximate number of potentially eligible political subdivisions from 80 to 51.

[25] This particular purpose is central to the Department's analysis under section 3(2) of ERISA and to its conclusion that employers are not establishing or maintaining ERISA-covered plans. 81 FR 59464, 70–71 (Aug. 30, 2016).

[26] The U.S. Census Bureau currently identifies Wyoming as the least populous state, with approximately 600,000 residents.

[27] *See* Comment Letter #11 (Corporation for Enterprise Development); Comment Letter #14 (AARP); Comment Letter #17 (AFSCME).

cities and counties.[28] In this regard, population can serve as one indicator of whether a city or county is likely to have sufficient resources, experience, and capacity to safely and competently establish and oversee a payroll deduction savings program. By keying off the least populated state, the final regulation's population test effectively establishes a federal floor, such that no political subdivision could qualify for the safe harbor unless the subdivision has a level of capacity and resources equal to or greater than the capacity and resources of the least populated state, using population as a proxy for capacity and resources.

The provisions of the Department's safe harbor pertaining to state payroll deduction savings programs assume that even the least populated states have the capacity and resources to manage a payroll deduction savings program. In the Department's view, political subdivisions that are the population size of small states could, in the right circumstances, have similar capacity and resources as their state counterparts of the same size. For that reason, the Department has decided not to flatly exclude such entities from coverage under the safe harbor. At the same time, however, the Department notes that states necessarily have a breadth of responsibilities, administrative systems, and experience that may not be matched by political subdivisions of equal size. Accordingly, the final regulation also adopts the demonstrated capacity test for these subdivisions, as discussed below. Together these tests ensure a high likelihood that qualified political subdivisions will have sufficient resources, experience, and capacity to safely and competently establish and oversee a payroll deduction savings programs. The application of both the size restriction and the demonstrated capacity test reduce the possibility that employers would be subject to a multiplicity of overlapping political subdivision programs. The population test directly advances this important policy interest by limiting the universe of political subdivisions potentially eligible for the safe harbor from approximately 40,000 general purpose political subdivisions to a far smaller number. As of 2015, there were approximately 136 general-purpose political subdivisions with populations equal to or greater than the population of Wyoming.

Even though the final regulation excludes smaller political subdivisions from the safe harbor, the Department acknowledges that cities and counties are not *per se* incapable of competently overseeing a payroll deduction savings program solely because they fail the final rule's population test. Indeed, many localities that fall below the population threshold may have sufficient experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that sufficiently protects employees. Nevertheless, based on the public record, the Department's view continues to be that smaller political subdivisions do not, in general, have experience, resources, and capacity comparable to that of the least populous state, and therefore the Department chooses not to extend safe harbor status to such localities and their programs. It is also important to note that the final regulation does not—and the Department could not—bar smaller localities from establishing and maintaining payroll deduction savings programs for private-sector employees that fall outside the Department's safe harbor regulation.

As noted above, the Department did make one technical improvement to the proposed population test. Public comments raised concerns about the possibility that fluctuating populations could cause a qualified political subdivision to fall below the required population threshold—and therefore drop outside the safe harbor—after it had already enacted a payroll deduction savings program. To eliminate this possibility and its attendant uncertainty, the final rule contains new language to clarify that such cities and counties would not lose their qualified status merely because of population fluctuations. In that regard, the final regulation adds to paragraph (h)(4)(ii) the phrase ''[a]t the time of the enactment of the political subdivision's payroll deduction savings program.''

Finally, some commenters suggested that, because population size is only a rough indicator of a political subdivision's capacity and ability to safely operate a payroll deduction savings program, the Department should consider pairing the population test with some other more refined test or indicator. As mentioned above, the Department agrees that the population test could be improved by being paired with an additional criterion to gauge whether a sufficiently-large political subdivision should nonetheless fail to qualify under the safe harbor for lack of experience. The section below discusses the changes made to accomplish this result.

D. Demonstrated Capacity Test

The final regulation adopts a ''demonstrated capacity'' test in addition to the population test. As noted in the preceding sections, the population test removed from the safe harbor a significant number of smaller political subdivisions based solely on their size. The demonstrated capacity test, on the other hand, focuses on a political subdivision's ability to operate a payroll deduction savings program by requiring direct and objectively verifiable evidence of a political subdivision's experience, capacity, and resources to operate or administer such programs. The two tests (population test and demonstrated capacity test) combine to ensure a strong likelihood that political subdivisions that meet the safe harbor have sufficient experience, capacity, and resources to safely establish and oversee payroll deduction savings programs in a manner that sufficiently protects private-sector employees and that would not require employer involvement beyond the limits of the safe harbor regulation.

The Department adopted this new test in response to a significant number of commenters that strongly support this idea. These commenters encouraged the Department to consider two different approaches for developing a demonstrated capacity test. The first suggested approach focuses on whether the political subdivision has implemented and administers a retirement plan for its own employees.[29] The second suggested approach focuses on whether the political subdivision has an existing infrastructure for assessing and collecting income, sales, use or other similar taxes.[30] The apparent rationale behind these suggested approaches is that political subdivisions that are sophisticated enough to operate a retirement plan or levy and collect their own taxes should possess sufficient experience, capacity, and resources to safely establish and oversee a payroll deduction savings program. In addition, retirement plan administration and tax administration entail administrative activities that are highly comparable to the type of administrative activity that would be necessary to establish and oversee a successful

[28] For similar reasons, the population test also would reduce the likelihood of employer involvement beyond the limits of the safe harbor regulation. For instance, larger cities and counties with greater resources, experience and capacity likely will be better able to assert and maintain complete control over their programs such that there will be few or no occasions for participating employers to exercise their own discretion or control with respect to the program.

[29] *See, e.g.,* Comment Letter #16 (Investment Company Institute).

[30] *See, e.g.,* Comment Letter #19 (Georgetown University Center for Retirement Initiatives).

payroll deduction savings program for private-sector employees.

The final regulation adopts the suggested plan sponsorship approach as the sole basis for a demonstrated capacity test. Thus, in order to be qualified for the safe harbor under the final regulation, a political subdivision must implement and administer its own retirement plan. The Department agrees with the commenters that administering a public retirement plan for the political subdivision's own employees is sufficiently similar to establishing and overseeing a payroll deduction savings program for employees of other entities that successfully performing the former is strong evidence of an ability to successfully perform the latter. Both endeavors require, for example, receiving contributions, custodianship, investing assets or selecting investment options, deciding claims, furnishing account statements, meeting reporting requirements, distributing benefit payments, or selecting and overseeing others to perform some or all of these tasks. A political subdivision that does not implement and administer a retirement plan for its own employees, on the other hand, will fail to qualify under the safe harbor even if it passes the population test and all the other safe harbor conditions set forth in the qualified political subdivision definition.

The Department declined to adopt as part of the demonstrated capacity test the second of the commenters' suggested approaches, *i.e.,* the existence of a tax infrastructure. In support of that approach, the commenters suggested that a political subdivision's levying and collecting its own income, wage, or similar taxes may provide evidence that the political subdivision has the capacity to establish and oversee payroll deduction savings programs. The commenters noted that effective tax and program administration require political subdivisions to safely and efficiently exchange data and money with employers in a timely and ongoing fashion, usually by way of electronic payroll and other systems. In the Department's view, however, plan sponsorship is a better and more directly relevant indicator of a subdivision's ability to sponsor and administer a retirement savings program. Additionally, the Department is unable to verify the precise number of political subdivisions that both levy and collect their own income, wage, or similar taxes. Without such information, the Department is unable to assess the effect of this suggested approach on the safe harbor's scope. For these reasons, the Department declined to include this approach in the final rule's demonstrated capacity test.

Finally, the new test does not prescribe the type or size of plan a political subdivision must implement and administer in order to meet the safe harbor's new ''plan administration'' criterion. Thus, a political subdivision can satisfy this criterion by administering a defined benefit plan, an individual account plan, or both. Although a number of commenters suggested that the Department consider a plan size requirement, such as a minimum level of assets under management or number of participants covered, the Department declines to adopt these suggestions in the final rule.[31] As long as the plan provides retirement benefits for some or all of the political subdivision's employees, and provided that the political subdivision administers the plan directly or is responsible for selecting and overseeing others performing plan administration, the retirement plan is a ''plan, fund, or program'' within the meaning of paragraph (h)(4)(ii)(C) of the final regulation.

E. Consumer Protections

The final rule eliminates lingering ambiguity regarding the requirement in proposed paragraph (h)(1)(iii) that the state or political subdivision must assume responsibility for the security of payroll deductions. The Department previously attempted to clarify this requirement in the preamble to the final regulation dealing with state payroll deduction savings programs.[32] Despite those earlier efforts, commenters on the proposal continued to ask the Department to further clarify the meaning of this requirement. A number of commenters specifically focused on the need to clarify and strengthen proposed paragraph (h)(1)(iii), with some specifically stressing the importance of clear and strong standards protecting payroll deductions.[33] Many commenters also raised a generic concern that the proposal does not contain sufficient consumer protections as compared to the protections ERISA would offer.[34] The Department received similar comments on the 2015 proposed rule for state payroll deduction savings programs. Many of those commenters specifically referenced and supported a rule similar to the Department's regulation at 29 CFR 2510.3–102 (defining when participant contributions become ''plan assets'' for the purpose of triggering ERISA's protections).

In response to these concerns, the final rule clarifies and strengthens the requirement that states and political subdivisions must assume responsibility for the security of payroll deductions. Specifically, paragraph (h)(1)(iii) contains a new sub-clause clarifying that this requirement—to assume responsibility for the security of payroll deductions—includes two subsidiary requirements. The first subsidiary requirement is that states and political subdivisions must require that employers promptly transmit wage withholdings to the payroll deduction savings program. The second subsidiary requirement is that states and political subdivisions must provide an enforcement mechanism to ensure employer compliance with the first subsidiary requirement. These new requirements protect employees by ensuring that their payroll deductions are transmitted to their IRAs as quickly as possible, where they become subject to applicable Internal Revenue Code provisions, including the protective prohibited transaction provisions found in section 4975 of the Code.[35] States and political subdivisions may meet the new requirements in a variety of ways, including, for example, through legislation, ordinance, or administrative rulemaking.

The final regulation does not prescribe what is meant for wage withholdings to be transmitted ''promptly.'' Instead, each state and qualified political subdivision is best positioned to calibrate the appropriate timeframe for its own program. Nevertheless, in the interest of providing certainty to states and political subdivisions, the final regulation contains a special safe harbor for promptness. Paragraph (h)(5) provides that, for purposes of paragraph (h)(1)(iii), employer wage withholdings are ''deemed to be transmitted promptly'' if such amounts are

[31] *See, e.g.,* Comment Letter #9 (New York City Comptroller).

[32] 81 FR 59470 (August 30, 2016).

[33] *See, e.g.,* Comment Letter #12 (AFL–CIO); Comment Letter #16 (ICI) (incorporating comments from January 19, 2016 letter pertaining to state payroll deduction savings programs); Comment Letter #22 (American Council of Life Insurers) (''The inclusion of a payroll deduction transmission timing requirement in a safe harbor—especially one that provides for auto-enrollment—will provide a powerful incentive for those seeking to use the safe harbor protection to ensure that employee payroll deductions are transmitted safely, appropriately, and in a timely manner as non-compliance will subject the plan to ERISA's Title I requirements.'').

[34] *See, e.g.,* Comment Letter #12 (AFL–CIO); Comment Letter #16 (ICI); Comment Letter #17 (AFSCME); Comment Letter #18 (U.S. Chamber of Commerce); Comment Letter #22 (American Council of Life Insurers); Comment Letter #26 (Economic Studies at Brookings).

[35] *See* 81 FR 59469 (August 30, 2016).

transmitted to the program as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the last day of the month following the month in which such amounts would otherwise have been payable to the employee in cash. This standard is closely aligned with the rules in 29 CFR 2510.3–102 for plans involving SIMPLE IRAs, as described in section 408(p) of the Internal Revenue Code.[36] Paragraph (h)(5) is not, however, the only method of complying with the promptness requirement in paragraph (h)(1)(iii) of the final regulation.

F. Overlap

The proposed rule limited the safe harbor to political subdivisions that are not located in a state that establishes a statewide retirement savings program for private-sector employees.[37] The purpose behind this criterion was to reduce the number of political subdivisions that could potentially meet the safe harbor, thereby mitigating the potential for overlap or duplication between political subdivision programs and state programs. In the proposal's preamble, the Department interpreted the term ''state-wide retirement savings program'' to include retirement savings programs described in the Department's Interpretive Bulletin found at 29 CFR 2509.2015–02, such as the voluntary marketplace and exchange models adopted by Washington State and New Jersey.[38]

A number of commenters expressed concern that including non-mandatory state programs within this limiting criterion is overly broad.[39] The commenters noted that where a state establishes the types of voluntary programs described in the Interpretive Bulletin, such as voluntary marketplaces and exchanges, there is little risk that employers would be subject to overlapping requirements or duplication because statewide information marketplaces and exchanges are merely vehicles for providing employees access to information about retirement savings options.[40] Thus, such programs would not impose upon employers any obligations that might conflict or overlap with a political subdivision's mandatory payroll deduction savings program. These commenters urged the Department to clarify in the final rule that a political subdivision is precluded from meeting this safe harbor condition only when the political subdivision is in a state that establishes a mandatory statewide payroll deduction savings program that requires employers to participate.

Commenters also expressed concern that the proposed rule's provision excluding a political subdivision from the safe harbor if the state subsequently enacts its own payroll deduction savings program could, in certain circumstances, result in legitimate political subdivision programs automatically dropping out of the safe harbor.[41] Specifically, the commenters pointed out that under the proposed rule, a political subdivision could be ''qualified'' at the time it enacts a payroll deduction savings program, but then suffer automatic disqualification if its state subsequently enacts a statewide program.[42] This is because the proposed rule excludes from the safe harbor any political subdivision that is in a state that ''enacts'' its own program, without regard to whether the political subdivision had enacted its own program before the state acted.

1. Clarifying ''Statewide Retirement Savings Program''

The Department agrees with the commenters that this criterion was overly broad. Accordingly, the final rule modifies the proposed rule to clarify that in order to be eligible for the safe harbor a political subdivision must not be located in a state that has enacted a *mandatory* statewide payroll deduction savings program for private sector employees. *See* § 2510.3(h)(4)(ii)(B). This modified language will continue to exclude from the safe harbor political subdivisions located in states (such as California, Connecticut, Illinois, Maryland, and Oregon) that have enacted a mandatory state payroll deduction savings program, as well as other political subdivisions that seek to enact a safe harbor program after the state in which they are located has already done so. Revised paragraph (h)(4)(ii)(B) does not, however, exclude from the safe harbor political subdivisions located in states that have enacted only *voluntary* programs such as those Massachusetts, New Jersey, and Washington State had enacted as of the date this final rule was published.[43]

2. Timing—Political Subdivisions Enacting Programs Before the State

The Department agrees with commenters that an otherwise-qualified political subdivision that has relied on the safe harbor to enact a payroll deduction savings program should not automatically lose its qualified status when its state subsequently enacts its own program. To allow an otherwise-qualified, pre-existing program to precipitously drop outside the safe harbor due to actions outside of its control would impose upon affected employers and participants undesirable uncertainty and complexities.[44] The final rule therefore revises paragraph (h)(4) to exclude from the safe harbor political subdivisions that are located in a state that already has enacted a *mandatory* statewide payroll deduction savings program *before the political subdivision enacts its own program.* Thus, if a state enacts such a program after the political subdivision has done so, the political subdivision does not automatically fall outside the safe harbor. Rather, in such instances it is incumbent upon the state and the political subdivision to determine how to coordinate the potentially overlapping programs in a way that does not require employer involvement beyond the limits of the safe harbor regulation, whether that means carving out the political subdivision from the state program, incorporating the political subdivision's program into the state program, or employing some other alternative.

3. Elimination of Overlapping Political Subdivision Programs

Some commenters asked the Department to clarify how the safe harbor would apply to political subdivisions that each enact a mandatory payroll deduction savings program for employees within their potentially overlapping jurisdictions. Some of those commenters further suggested that the Department should

[36] 29 CFR 2510.3–102(b)(2). *See, e.g.,* DOL Advisory Opinion 83–25A (May 24, 1983).

[37] *See* paragraph (h)(4)(iii) of the proposed rule; 81 FR 59581, 92 (Aug. 30, 2016).

[38] 81 FR 59581, 85 (Aug. 30, 2016).

[39] *See, e.g.,* Comment Letter #3 (Washington State Department of Commerce); Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment Letter #7 (Economic Opportunity Institute); Comment Letter #9 (New York City Comptroller); Comment Letter #14 (AARP); Comment Letter #17 (AFSCME); Comment Letter #19 (Georgetown University Center for Retirement Initiatives); Comment Letter #20 (New York City Mayor); Comment Letter #26 (Economic Studies at Brookings).

[40] *See* Comment Letter #9 (New York City Comptroller).

[41] *See, e.g.,* Comment Letter #4 (Seattle City Councilmember Tim Burgess); Comment Letter #8 (American Retirement Association).

[42] *See* Comment Letter #8 (American Retirement Association); Comment Letter #20 (New York City Mayor).

[43] Mass. Gen. Laws ch. 29, § 64E (2012); New Jersey Small Business Retirement Marketplace Act, Public Law 2015, ch. 298; Washington State Small Business Retirement Savings Marketplace Act, Wash. Rev. Code §§ 43.330.730–750 (2015).

[44] *See, e.g.,* Comment Letter #8 (American Retirement Association); Comment Letter #20 (New York City Mayor).

establish a rule that the larger political subdivision's program (*e.g.,* a county program) should take priority over any political subdivision program within its jurisdiction (*e.g.,* a city program), regardless of which program was first enacted.[45]

As a practical matter, and in view of the fact that only three political subdivisions have expressed a potential interest in establishing payroll deduction savings programs, the Department does not anticipate that there will be overlapping programs among political subdivisions. After careful deliberation, however, the Department decided to address concerns regarding the potential for conflicting requirements by modifying the proposed rule to preclude potentially overlapping political subdivision programs. As explained in the proposed rule's preamble, the Department has taken substantial measures to mitigate the potential that overlapping programs could simultaneously meet the safe harbor,[46] but there remains some potential for overlap. To eliminate any remaining potential for overlap, the Department has decided to extend the first-in-time coordination rule (the provisions of paragraph (h)(4)(ii)(B) of the rule that exclude from the safe harbor an otherwise qualified political subdivision when the state in which it is located has already enacted a mandatory payroll deduction savings program) to apply in situations where a mandatory payroll deduction savings program has already been enacted in another political subdivision. Thus, to the extent that a political subdivision meets the other conditions to be qualified but has a geographic overlap with another political subdivision that has already enacted a mandatory payroll deduction saving program for private-sector employees, the former political subdivision would be precluded from enacting a mandatory payroll deduction saving program that would satisfy the safe harbor. The Department has determined that this first-in-time rule will eliminate the few remaining situations in which the possibility of overlap among political subdivisions might otherwise exist.

G. Petition Process

Some commenters suggested that political subdivisions could petition or apply to the Department for an individual opinion or decision regarding whether or not the political subdivisions qualify for the safe harbor. These commenters propose that such a process could be available for political subdivisions that meet at least some of the four conditions in paragraph (h)(4) of the final regulation, but fail to meet all of the conditions. For example, the process could be available for a city or county that satisfies the demonstrated capacity test but not the population test, or vice-versa. These commenters envision a process in which the petitioner or applicant would present to the Department its best case for safe harbor status using a list of factors or criteria to be developed by the Department. This approach would give ''close-call'' cities and counties an avenue to obtain qualified status, while reserving to the Department the ability to deny potentially unsafe or improper applicants.

The Department declines to adopt this suggestion. The qualified political subdivision definition in paragraph (h)(4) of the final rule consists of four criteria, each of which is a bright-line measure that is either met or not. These objective criteria enable interested parties to readily determine whether or not they meet the definition. The commenters' suggested petition or application process, by contrast, is inherently subjective, and thus runs entirely counter to the Department's objective approach. Moreover, under the commenters' proposed model, the outcome in any particular case would depend on, among other things, the Department's view of the relevant facts and its weighing and balancing of a given list of factors or criteria. The present public record provides little, if any, direction on the type of criteria or factors the Department could or should adopt under such an approach, or whether each individual criterion or factor should be given equal weight. Apart from these significant shortcomings, the commenters' suggested proposal also raises Departmental budgetary and resource issues that are beyond the scope of this rulemaking.

H. Responsibility and Liability for Program Operations

The proposal required that states and political subdivisions assume and retain full responsibility for the payroll deduction savings programs they implement and administer. More specifically, the proposal provided that states and political subdivisions must assume responsibility (i) for investing employee savings or for selecting investment alternatives; (ii) for the security of payroll deductions and employee savings; and (iii) for operating and administering their programs, even if they delegate those functions to service or investment providers.[47] The proposal thus made it clear that in order for a program to qualify for the safe harbor, states and political subdivisions must assume and retain responsibility for operating and administering their programs.

At least one commenter requested that the Department clarify what it means for a state or political subdivision to assume and retain full responsibility for program operations, especially where the state or political subdivision chooses to delegate some of its responsibilities to third-party experts.[48] In the commenter's view, this requirement effectively prevents states and political subdivisions from delegating responsibilities and liabilities to third-party experts who are willing to assume such duties and liabilities. This commenter argues that this provision exposes states and political subdivisions to broader responsibility—and greater liability for third-party management—than they would have under ERISA's fiduciary standards, or possibly even under state statutes or common law. The commenter therefore asked the Department to modify the proposal to clarify that states and political subdivisions can delegate some of their management responsibility and attendant liability to third-party service or investment providers, on the condition that the state or political subdivision prudently selects and appropriately monitors those service providers.

The final regulation contains no such modification. The essence of the regulation's requirement that states and political subdivisions assume and retain full responsibility for operating and administering their payroll deduction savings programs is simply that states and political subdivisions must retain ultimate authority over those programs. Such authority includes, for example, determining whether or not to hire and fire qualified third-party service providers, and determining the scope of those service providers' duties. In drafting this rule, the Department fully anticipated that states and political subdivisions might choose to delegate program administration to qualified service providers that the states or political subdivisions oversee.[49] In that

[45] *See, e.g.,* Comment Letter #6 (American Payroll Association); Comment Letter #15 (American Benefits Council); Comment Letter #20 (New York City Mayor); Comment Letter #23 (Financial Services Institute).

[46] *See* 81 FR 59581, 59585–86.

[47] *See* §§ 2510.3–2(h)(1)(ii), (h)(1)(iii), and (h)(2)(ii), respectively.

[48] *See* Comment Letter #20 (New York City Mayor).

[49] *See* § 2510.3–2(h)(2)(ii) (states and political subdivisions may, without falling outside the safe harbor, utilize service or investment providers to

regard, the Department recognizes that prudently-selected third parties with relevant program administration and investment experience and expertise may, in many circumstances, be better equipped than a state or political subdivision to discharge the specialized duties associated with operating and managing payroll deduction savings programs. Thus, given that this requirement does not preclude sponsoring states and political subdivisions from delegating or assigning some or all of their administrative responsibilities to third-party service providers, states and political subdivisions would not lose their safe harbor status by doing so. It is important to note, however, that this requirement does not in any way govern the assignment of liability between states and political subdivisions and those to whom they delegate such responsibilities. Rather, issues of liability, such as whether and how states or political subdivisions and their service providers allocate liabilities among themselves, are matters for state and local law, and for applicable provisions of the Internal Revenue Code.

I. Timing

A few commenters asked the Department to delay extending the safe harbor to qualified political subdivisions until after the Department has had a chance to accumulate and fully analyze experience data on state-sponsored payroll deduction savings programs.[50] Among the concerns these commenters raised are the potential for overlapping programs; the uncertainty that a political subdivision could establish a program and then drop out of the safe harbor due to fluctuating populations; political subdivisions' assumed inferior level of financial sophistication, expertise and resources to properly manage payroll deduction savings programs; the inherently subjective nature of attempting to differentiate between sophisticated and unsophisticated political subdivisions; and a perceived lack of consumer protections. The commenters also suggested that a delay in implementing the final rule would allow more time for states to establish statewide programs, thereby alleviating the need for potentially overlapping political subdivisions to establish separate programs.

Although the Department declines the commenters' requests to delay implementing this final rule, the final rule reflects that the Department did take the commenters' concerns into account. As noted above in this preamble, the final rule addresses the commenters' concerns about potentially overlapping programs by adopting a new condition that further reduces the number of political subdivisions that can meet the safe harbor. That condition requires that in order to be eligible for the safe harbor a political subdivision must already administer a public-employee retirement program. The Department believes that this condition—which a number of commenters supported—measures, in objective terms, a political subdivision's ability to operate and administer a payroll deduction savings program for private-sector employees. The final rule also clarifies that an otherwise-qualified political subdivision will not automatically drop outside the safe harbor due to a drop in population, and it adds important consumer protections by requiring that employers remit employee wage withholdings to state and political subdivision programs in a timely manner. Moreover, the final rule does not preclude a state from moving forward with establishing its own payroll deduction savings program simply because a political subdivision within its borders has already done so.

The Department also notes that one very large political subdivision has already taken steps to establish a payroll deduction savings program for its private-sector employee residents, and, based on the comments the Department has received, it seems two others have expressed a potential interest in doing so.[51] As noted throughout this preamble, facilitating political subdivisions' ability to encourage their residents to save for retirement by enrolling them in payroll deduction savings programs furthers important state, federal, and Departmental goals and policies. For these reasons, and considering the modifications the Department already made to the final rule, the Department judges it appropriate to implement the final rule at this time.

III. Regulatory Impact Analysis

A. Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and review by the OMB. Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as an ''economically significant'' action); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal requirements, the President's priorities, or the principles set forth in the Executive Order.

OMB has determined that this regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, it has determined that the action is significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the final rule and the Department provides the following assessment of its benefits and costs.

B. Background

As discussed in detail above in Section I of this preamble, several

operate and administer their payroll deduction savings programs as long as the state or political subdivision retains full responsibility for operating and administering the program).

[50] Comment Letter #8 (American Retirement Association); Comment Letter #15 (American Benefits Council); Comment Letter #18 (U.S. Chamber of Commerce).

[51] *See, e.g., The New York City Nest Egg: A Plan for Addressing Retirement Security in New York City, Office of the New York City Comptroller (October 2016).*

commenters on the 2015 proposal [52] urged the Department to expand the safe harbor for state payroll deduction savings programs to include payroll deduction savings programs established by state political subdivisions. In particular, the commenters argued that an expansion of the safe harbor is necessary, because otherwise the safe harbor would not benefit employees of employers in political subdivisions that are located in states that have not adopted a statewide program and expressed a strong interest in establishing such programs.

In response, on August 30, 2016, the Department published a proposed rule [53] that would amend the 2016 final safe harbor regulation for state programs to include within its scope laws and programs established by certain state political subdivisions. The Department received and carefully reviewed the public comments submitted in response to the proposal. The Department now is publishing a final rule that amends paragraph (h) of § 2510.3–2 to cover payroll deduction savings programs of qualified political subdivisions defined in paragraph (h)(4) of the final rule. The Department discusses the benefits and costs attributable to the final rule below.

C. Benefits and Costs

In analyzing benefits and costs associated with this final rule, the Department focuses on the direct effects, which include both benefits and costs directly attributable to the rule. These benefits and costs are limited, because as stated above, the final rule would merely establish a safe harbor describing the circumstances under which qualified political subdivisions with authority under state law could establish payroll deduction savings programs that would not give rise to ERISA-covered employee pension benefit plans. It does not require qualified political subdivisions to take any actions nor employers to provide a retirement savings programs to their employees.

The Department also addresses indirect effects associated with the final rule, which include (1) potential benefits and costs directly associated with the requirements of qualified political subdivision payroll deduction savings programs, and (2) the potential increase in retirement savings and potential cost burden imposed on covered employers to comply with the requirements of such programs. Indirect effects vary by qualified political subdivisions depending on their program requirements and the degree to which the final rule might influence how political subdivisions design their payroll deduction savings programs.

Although the Department estimates that approximately 51 political subdivisions are potentially eligible to use this final rule,[54] the Department understands that many qualified political subdivisions may not be interested in establishing payroll deduction savings programs. As noted above, commenters have identified only three cities—New York City, Philadelphia, and Seattle—as having any potential interest to date. Therefore, the direct benefits and direct costs attributable to this final rule could be quite limited.

1. Direct Benefits

The Department believes that political subdivisions and other stakeholders would directly benefit from expanding the scope of the Department's final safe harbor regulation to include payroll deduction savings programs established by qualified political subdivisions. As with the states, this action will provide political subdivisions with clear guidelines to determine the circumstances under which programs they create for private-sector workers would not give rise to the establishment of ERISA-covered plans. The Department expects that the final rule will reduce legal costs, including litigation costs political subdivisions might otherwise incur, by (1) removing uncertainty about whether such political subdivision payroll deduction savings programs give rise to the establishment of plans that are covered by Title I of ERISA, and (2) creating efficiencies by eliminating the need for multiple political subdivisions to incur the same costs to determine that their programs would not give rise to the establishment of ERISA-covered plans. However, these benefits will be limited to qualified political subdivisions meeting all criteria set forth in this final rule. Those governmental units of a state, including any city, county, or similar governmental body that are not eligible to use the safe harbor may incur legal costs if they elect to establish their own payroll deduction savings programs.

In order to constitute a ''qualified political subdivision,'' the proposed rule required the political subdivision to have a population equal to or greater than the population of the least populous state. Several commenters asserted that based on this provision, it is possible that fluctuating populations could cause a previously qualified political subdivision to fall below the required population threshold and fall outside the safe harbor after it has established its program. To eliminate this possibility and reduce uncertainty, the Department clarified in the final rule that political subdivisions satisfying the population threshold when they enact a payroll deduction savings program would not lose their qualified status solely due to subsequent population fluctuations. This change will especially benefit political subdivisions close to the population threshold and encourage them to establish payroll deduction savings programs, because they will not have to continuously monitor their population if their population is equal to or greater than the population of the least populous state when their program is enacted.

In response to comments, the final rule clarifies that a qualified political subdivision would not automatically lose its qualified political subdivision status if the state establishes a payroll deduction savings program after the political subdivision has done so. Political subdivisions will benefit from this provision, because they will not have to be concerned that their programs will fall outside the safe harbor if the state subsequently establishes a program. The Department notes that in such situations, it expects that the state and qualified political subdivision will coordinate potentially overlapping programs to ensure a smooth transition. Although they may incur some costs associated with communication and coordination, these costs would be smaller compared to the costs that employers and participants may face if the qualified political subdivision's program experiences any disruptions or unexpected changes due to the lack of communication and coordination between the state and qualified political subdivision.

The Department estimates that there are approximately eight combinations where political subdivisions could potentially establish conflicting payroll deduction savings programs due to overlapping boundaries. In the final rule, the Department mitigated the possibility that political subdivisions with overlapping geographic boundaries could each become qualified political subdivisions by providing that a

[52] *See* 80 FR 72006 (November 18, 2015).

[53] *See* 81 FR 59581 (August 30, 2016).

[54] This estimate is based on the population estimates from the U.S. Census Bureau, the Census of Government data from the U.S. Census Bureau about defined benefit (DB) plans for local government employees, and BrightScope data about defined contribution (DC) plans for local government employees. For qualified political subdivision with overlapping boundaries, it counts only one per combination as the final rule precludes overlapping programs.

political subdivision that geographically overlaps with another political subdivision cannot be qualified if the overlapping subdivision already has enacted a mandatory payroll deduction savings program for private sector employees. Thus, the final rule benefits employers by providing certainty that they will not be subject to a multiplicity of overlapping political subdivision programs. It also benefits qualified political subdivisions by providing clarity regarding the circumstances under which political subdivisions with overlapping boundaries can enact payroll deduction savings programs that qualify for the safe harbor.

The final rule also clarifies the requirement that states and political subdivisions assume responsibility for the security of payroll deduction contributions in paragraph (h)(1)(iii). A number of commenters specifically focused on the need to clarify and strengthen this provision and some specifically stressed the importance of clear and strong standards protecting payroll deductions. The Department received similar comments on the 2015 proposed rule for state payroll deduction savings programs. In response to these comments, the Department buttressed paragraph (h)(1)(iii) in the final rule by including a new sub-clause clarifying that states and political subdivisions must (1) require that employers promptly transmit wage withholdings to the payroll deduction savings program, and (2) provide an enforcement mechanism to ensure that withheld wages are promptly transmitted.

These new requirements will benefit employees by ensuring that their payroll deductions are transmitted as quickly as possible to their IRAs, where they become subject to applicable Internal Revenue Code provisions, including the protective prohibited transaction provisions found in section 4975 of the Code. States and political subdivisions may adopt the new required protections in a variety of ways, including, for example, through legislation, ordinance, or administrative rulemaking. The provision also benefits states and political subdivisions that create payroll deduction savings programs and employers by providing clarity regarding the specific actions that are necessary to comply with the requirement for states and political subdivisions to assume responsibility for the security of payroll deductions.[55]

The Department notes that the final rule would not prevent political subdivisions from identifying and pursuing alternative policies, outside of the safe harbor, that also would not require employers to establish or maintain ERISA-covered plans. Thus, while the final rule would reduce uncertainty about political subdivision activity within the safe harbor, it would not impair political subdivision activity outside of it. This final regulation is a safe harbor and as such, it does not require employers to participate in qualified political subdivision payroll deduction savings programs; nor does it purport to define every possible program that does not give rise to the establishment of ERISA-covered plans.

2. Direct Costs

The final rule does not require any new action by employers or the political subdivisions. It merely establishes a safe harbor describing certain circumstances under which qualified political subdivision-required payroll deduction savings programs would not give rise to an ERISA-covered employee pension benefit plan and, therefore, would reduce the risks of being preempted by ERISA. Political subdivisions may incur legal costs to analyze the rule and determine whether their programs fall within the safe harbor. However, the Department expects that these costs will be less than the costs that would be incurred in the absence of the final rule. If a qualified political subdivision interested in developing its own payroll deduction savings program overlaps with another qualified political subdivision, it would also need to monitor the activities by the qualified political subdivision with an overlapping boundary and communicate with it to avoid any potential complications in relying on this safe harbor rule as the final rule precludes overlapping payroll deduction savings programs. Only one qualified political subdivision, out of approximately eight possible combinations, with a potentially overlapping boundary expressed interest in establishing its own payroll deduction savings program to the Department. Thus, the Department expects the monitoring and communication costs to be relatively small.

Qualified political subdivisions may incur administrative and operating costs including mailing and form production costs. These potential costs, however, are not directly attributable to the final rule; they are attributable to the political subdivision's creation of the payroll deduction savings program pursuant to its authority under state law.

Some commenters expressed the concern that smaller political subdivisions without the experience or capabilities to administer a payroll deduction savings program may contemplate creating and operating their own programs if the safe harbor rule is extended to all political subdivisions without any restrictions. This final rule addresses this concern by requiring political subdivisions to have a population equal to or greater than the least populous state and have a demonstrated capacity to operate a payroll deduction savings program in order to be qualified. The premise underlying these requirements is that political subdivisions that meet them are likely to have sufficient existing resources, experience, and infrastructure to create and implement payroll deduction savings programs.

3. Uncertainty

The Department is confident that the final rule will benefit political subdivisions and many other stakeholders otherwise beset by uncertainty by clarifying the circumstances under which qualified political subdivisions can create payroll deduction savings programs, including programs with automatic enrollment, without causing the political subdivision or employer to create an ERISA-covered employee benefit pension plan. However, the Department is unsure of the magnitude of the benefits, costs and transfer impacts of these programs, because they will depend on the qualified political subdivisions' independent decisions on whether and how best to take advantage of the safe harbor and on the cost that otherwise would have been attached to uncertainty about the legal status of the qualified political subdivisions' actions. The Department is also unsure of (1) the final rule's effects on political subdivisions that do not meet the safe harbor criteria, (2) whether any of these ineligible political subdivisions are currently developing their own payroll deduction savings programs, and (3) the extent to which ineligible political subdivisions would be discouraged from designing and implementing payroll deduction savings programs. The Department cannot predict what actions political subdivisions will take,

[55] The final regulation does not specifically define what is meant for wage withholdings to be transmitted "promptly." Instead, each state and qualified political subdivision is best positioned to calibrate the appropriate timeframe for its own program. Nevertheless, in the interest of providing certainty to states and political subdivisions, the final regulation added paragraph (h)(5) to the rule, which contains a special safe harbor for promptness. For more detailed information, see the discussion about consumer protection in the preamble.

stakeholders' propensity to challenge such actions' legal status, either absent or pursuant to the final rule, or courts' resultant decisions.

4. Indirect Effects: Impact of Qualified Political Subdivision Payroll Deduction Savings Programs

As discussed above, the impact of qualified political subdivision payroll deduction savings programs is directly attributable to the qualified political subdivision legislation that creates such programs. As discussed below, however, under certain circumstances, these effects could be indirectly attributable to the final rule. For example, it is conceivable that more qualified political subdivisions could create payroll deduction savings programs due to the clear guidelines provided in the final rule and the reduced risk of an ERISA preemption challenge, and therefore, the increased prevalence of such programs would be indirectly attributable to the final rule. However, such an increase would be bounded by the eligibility restrictions for political subdivisions. With the authority, population and demonstrated capacity tests, and the preclusion of overlapping programs, the number of political subdivisions that are potentially eligible to use the safe harbor is very small (51). Moreover, as stated above, the Department is aware of only three political subdivisions that have expressed an interest in creating such programs. An additional possibility is that the rule would not change the prevalence of political subdivision payroll deduction savings programs, but would accelerate the implementation of programs that would exist anyway. With any of these possibilities, there would be benefits, costs and transfer impacts that are indirectly attributable to this rule, via the increased or accelerated creation of political subdivision-level payroll deduction savings programs.

The possibility exists that the final rule could result in an acceleration or deceleration of payroll deduction savings programs at the state level depending on the circumstances. For example, if multiple cities in a state set up robust, successful payroll deduction savings programs, a state that might otherwise create its own program could conclude that a statewide program no longer is necessary. On the other hand, states could feel pressure to create a statewide program if a city in the state does so in order to provide retirement income security for all of its citizens. However, problems could arise if the state and city programs overlap. Therefore, the Department solicited comments regarding whether the final regulation should clarify the status of a payroll deduction savings program of a qualified political subdivision when the state in which the subdivision is located establishes a statewide retirement savings program after the qualified political subdivision establishes and operates its program. Many commenters suggested that the Department should leave to the state to determine the appropriate relationship between the political subdivision's and the state's programs. Although this may appear to add another layer of complexity, the appropriate resolution would depend on the circumstances of each state and political subdivision. In some circumstances, it might be most cost effective to scale a political subdivision's payroll deduction program up to the entire state, whereas it might economically make more sense to maintain a political subdivision's program independent of the state's under different circumstances. As a commenter pointed out, it would be generally more cost effective if payroll deduction savings programs are able to take advantage of economies of scale.[56] To do so, a state may decide to discontinue the program established by a political subdivision and implement its own statewide program. In this case, the Department expects the state and the political subdivision will coordinate the potentially overlapping programs.

Qualified political subdivisions that elect to establish payroll deduction savings programs pursuant to the safe harbor would incur administrative and operating costs, which can be substantial especially in the beginning years until the payroll deduction savings programs become self-sustaining.

Employers may incur costs to update their payroll systems to transmit payroll deductions to the political subdivision or its agent, develop recordkeeping systems to document their collection and remittance of payments under the payroll deduction savings program, and provide information to employees regarding the political subdivision programs. As with political subdivisions' operational and administrative costs, some portion of these employer costs would be indirectly attributable to the rule if more political subdivision payroll deduction savings programs are implemented in the rule's presence than would be in its absence. Because the final rule narrows the number of political subdivisions that are eligible for the safe harbor by the population and demonstrated capacity tests, the aggregate costs imposed on employers would be limited. Moreover, in order to satisfy the safe harbor, most associated costs for employers would be nominal because the roles of employers are limited to ministerial functions, such as withholding the required contribution from employees' wages, remitting contributions to the political subdivision program and providing information about the program to employees. These costs would be incurred disproportionately by small employers and start-up companies, which tend to be least likely to offer pensions. These small employers may incur additional costs to acquire payroll software, use on-line payroll programs, or use external payroll companies to comply with their political subdivisions' programs.[57] However, some small employers may decide to use payroll software, an on-line payroll program, or a payroll service to withhold and remit payroll taxes independent of their political subdivisions' program requirement. Furthermore, compared to manually processing payroll taxes, utilizing payroll software or an on-line payroll program may be more cost effective for small employers in the long run. Therefore, the extent to which these costs can be attributable to political subdivisions' programs could be smaller than what some might estimate. Moreover such costs could be mitigated if political subdivisions exempt the smallest companies from their payroll deduction savings programs as some states do. Supporting this view, a commenter stated that complexity and administrative costs are often cited by small employers as barriers to offer retirement plans for their employees and argued that savings arrangements established by political subdivisions could in fact alleviate small employers' burdens.[58]

Employers, particularly those operating in multiple political subdivisions, may face potentially increased costs to comply with several political subdivision payroll deduction

[56] Comment Letter #6 (American Payroll Association).

[57] According to one survey, about 60 percent of small employers do not use a payroll service. National Small Business Association, April 11, 2013, ''2013 Small Business Taxation Survey.'' This survey says 23% of small employers who handle payroll taxes internally have no employees. Therefore, only about 46%, not 60%, of small employers would be in fact affected by political subdivisions' payroll deduction savings programs, based on this survey. The survey does not include small employers that use payroll software or on-line payroll programs, which provide a cost effective means for such employers to comply with payroll deduction savings programs.

[58] *See* Comment letter #5 (City of Philadelphia Controller).

savings programs, depending on whether and, if so, how, the requirements of those programs differ. This can be more challenging for employers if they operate in states where not all political subdivisions have their own payroll deduction savings programs and/or where some political subdivisions' programs differ in certain ways from others. However, several states have only one qualified political subdivision. Even if states have multiple qualified political subdivisions, the final rule precludes overlapping programs. Thus, the potential burden faced by employers operating in multiple political subdivisions is limited. Moreover, employers operating across several political subdivision borders are likely to have ERISA-covered plans in place for their employees. Thus, there may be no cost burden associated with complying with multiple political subdivision payroll deduction savings programs because employers that sponsor plans typically are exempt from the law enacting such programs. Furthermore, in order to satisfy the final safe harbor rule, the role of employers would be limited to ministerial functions such as timely transmitting payroll deductions, which implies that the increase in cost burden is further likely to be restricted. By limiting eligibility to political subdivisions based on the population, authority, and demonstrated capacity conditions and precluding overlapping political subdivision programs, this final rule further addresses the concerns raised by several commenters by substantially limiting the possibility of conflicting programs among multiple political subdivisions.

The Department believes that well-designed political subdivision-level payroll deduction savings programs have the potential to effectively reduce gaps in retirement security. The political subdivisions that expressed interest in establishing their own payroll deduction savings programs for private-sector workers in the political subdivision seem to be motivated by those workers' significantly lower access rates to employment-based retirement plans compared to the rates for workers nationwide.[59] In order to successfully reduce these significant gaps in retirement savings as intended, there are several factors to consider. Relevant variables such as pension coverage, labor market conditions,[60] population demographics, and elderly poverty, vary widely across the political subdivisions, suggesting a potential opportunity for progress at the political subdivision level. Many workers throughout these political subdivisions currently may save less than would be optimal due to (1) behavioral biases (such as myopia or inertia), (2) labor market conditions that prevent them from accessing plans at work, or (3) their employers' failure to offer retirement plans.[61] Some research suggests that automatic contribution policies are effective in increasing retirement savings and wealth in general by overcoming behavioral biases or inertia.[62] Well-designed political subdivisions' payroll deduction savings programs could help many savers who otherwise might not be saving enough or at all to begin to save earlier than they might have otherwise. Such workers will have traded some consumption today for more in retirement, potentially reaping net gains in overall lifetime well-being. Their additional savings may also reduce fiscal pressure on publicly financed retirement programs and other public assistance programs, such as Supplemental Security Income (SSI), which support low-income Americans, including older Americans.

The Department believes that well-designed political subdivision payroll deduction savings programs can achieve their intended, positive effects of fostering retirement security. However, the potential benefits—primarily increases in retirement savings—might be somewhat limited, because the final safe harbor does not allow employer contributions to political subdivisions' payroll deduction savings programs. Additionally, the initiatives potentially might have some unintended consequences. Those workers least equipped to make good retirement savings decisions arguably stand to benefit most from these programs, but also arguably could be at greater risk of suffering adverse unintended effects. Workers who would not benefit from increased retirement savings could opt out, but some might fail to do so. Such workers might increase their savings too much, unduly sacrificing current economic needs. Consequently, they might be more likely to cash out early and suffer tax losses (unless they receive a non-taxable Roth IRA distribution), and/or to take on more expensive debt to pay necessary bills. Similarly, political subdivisions' payroll deduction savings programs directed at workers who do not currently participate in workplace savings arrangements may be imperfectly targeted to address gaps in retirement security. For example, some college students might be better advised to take less in student loans rather than open an IRA and some young families might do well to save more first for their children's education and later for their own retirement. In general, workers without retirement plan coverage tend to be younger, lower-income or less attached to the workforce, thus these workers may be financially stressed or have other savings goals. Because only large political subdivisions can create and implement programs under the final rule, these demographic characteristics can be more pronounced, assuming large political subdivisions tend to have more diverse workforces. If so, then the benefits of political subdivisions' payroll deduction savings programs could be further limited and in some cases potentially harmful for certain workers. Although these might be valid concerns, political subdivisions are responsible for designing effective programs that minimize these types of harm and maximize benefits to participants.

Commenters have stated another concern—that political subdivision initiatives may ''crowd-out'' ERISA-covered plans. The final rule may inadvertently encourage employers operating in multiple political subdivisions to switch from ERISA-covered plans to political subdivision payroll deduction savings programs in order to reduce costs, especially if they are required to cover employees currently ineligible to participate in ERISA-covered plans under political subdivision programs. This final rule makes clear that political subdivision programs directed toward employers that do not offer other retirement plans fall within this final safe harbor rule.

[59] According to the comment letter submitted by the city of Philadelphia, in May 2016, 54% of employees in Philadelphia do not have access to workplace retirement plans. Similarly, 57% of New York City private-sector workers lack access to a retirement plan at their employment place according to the comment letter submitted by the office of Comptroller of the City of New York. These statistics are significantly higher than the nation-wide average of 34% lacking access to a retirement plan through employment for private-sector workers, according to the National Compensation Study in June of 2016.

[60] *See, e.g.,* U.S. Bureau of Labor Statistics, ''Metropolitan Area Employment and Unemployment—May 2016,'' USDL–16–1291 (June 29, 2016).

[61] According to the National Compensation Survey, March 2016, only 66% of private-sector workers have access to retirement benefits—including defined benefit and defined contribution plans—at work.

[62] *See* Chetty, Friedman, Leth-Petresen, Nielsen & Olsen, ''Active vs. Passive Decisions and Crowd-out in Retirement Savings Accounts: Evidence from Denmark,'' 129 Quarterly Journal of Economics 1141–1219 (2014). *See also* Madrian and Shea, ''The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,'' 116 Quarterly Journal of Economics 1149–1187 (2001).

However, employers that wish to provide retirement benefits are likely to find that ERISA-covered programs, such as 401(k) plans, have important advantages for them and their employees over participation in political subdivision programs. Potential advantages include significantly higher limits on tax-favored contributions that may be elected by employees ($18,000 in 401(k) plans and $24,000 for those age 50 or older) versus $5,500 in IRAs ($6,500 for those age 50 or older), the opportunity for employers to make tax-favored matching or nonmatching contributions on behalf of employees (allowing a total of up to $54,000 ($60,000 for those age 50 or older) of employee plus employer contributions for an employee in a 401(k) plan versus $5,500 or $6,500 in IRAs), greater flexibility in plan selection and design, ERISA protections, and larger positive recruitment and retention effects.[63] Therefore it seems unlikely that political subdivision initiatives will ''crowd-out'' many ERISA-covered plans, although, if they do, some workers might lose ERISA-covered plans that could have been more generous than political subdivision-based (IRA) benefits.

There is also the possibility that some workers who would otherwise have saved more might reduce their savings to the low, default levels associated with some political subdivision programs. Political subdivisions can address this concern by incorporating into their programs participant education or ''auto-escalation'' features that increase default contribution rates over time and/or as pay increases.

D. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on final and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

In accordance with the requirements of the PRA, the Department solicited comments regarding its determination that the proposed rule is not subject to the requirements of the PRA, because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3). The Department's conclusion was based on the premise that the proposed rule does not require any action by or impose any requirements on employers or the political subdivisions. It merely clarifies that certain political subdivision payroll deduction savings programs that encourage retirement savings would not result in the creation of employee benefit plans covered by Title I of ERISA.

The Department did not receive any comments regarding this assessment. Therefore, the Department has determined that the final rule is not subject to the PRA, because it does not contain a collection of information. The PRA definition of ''burden'' excludes time, effort, and financial resources necessary to comply with a collection of information that would be incurred by respondents in the normal course of their activities. *See* 5 CFR 1320.3(b)(2). The definition of ''burden'' also excludes burdens imposed by a state, local, or tribal government independent of a Federal requirement. *See* 5 CFR 1320.3(b)(3). The final rule imposes no burden on employers, because political subdivisions will customarily include notice and recordkeeping requirements when enacting their payroll deduction savings programs. Thus, employers participating in such programs are responding to political subdivision, not Federal, requirements.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

Although several commenters maintained that the proposed rule would impose significant costs on small employers, similar to the proposal, the final rule merely establishes a new safe harbor describing circumstances in which payroll deduction savings programs established and maintained by political subdivisions would not give rise to ERISA-covered employee pension benefit plans. Therefore, the final rule imposes no requirements or costs on small employers, and the Department believes that it will not have a significant economic impact on a substantial number of small employers. Similarly, because the final rule does not impose any requirements or costs on small governments, the Department believes that it will not have a significant economic impact on a substantial number of small government entities, either. Accordingly, pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million as adjusted for inflation.

G. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

H. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It

[63] These contribution limits are for year 2017. For more details, *see: https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions.*

also requires adherence to specific criteria by federal agencies in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final regulation.

In the Department's view, the final rule, by clarifying that payroll deduction savings programs by certain political subdivisions will not result in creation of employee benefit plans under ERISA, would provide more latitude and certainty to political subdivisions and employers regarding the treatment of such arrangements under ERISA. Therefore, the final rule does not contain policies with federalism implications within the meaning of the Order.

Nonetheless, in respect for the fundamental federalism principles set forth in the Order, the Department affirmatively engaged in outreach, including meetings, conference calls, and outreach events, with officials of political subdivisions and other stakeholders regarding the final rule and sought their input on the safe harbor. The Department also received comment letters from local governments and their representatives. Many of the changes in the final rule stem from suggestions contained in the comment letters.

List of Subjects in 29 CFR Part 2510

Accounting, Employee benefit plans, Employee Retirement Income Security Act, Coverage, Pensions, Reporting.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as set forth below:

PART 2510—DEFINITION OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

■ 2. In § 2510.3–2, revise paragraph (h) to read as follows:

§ 2510.3–2 Employee pension benefit plan.

* * * * *

(h) *Certain governmental payroll deduction savings programs.* (1) For purposes of title I of the Act and this chapter, the terms ''employee pension benefit plan'' and ''pension plan'' shall not include an individual retirement plan (as defined in 26 U.S.C. 7701(a)(37)) established and maintained pursuant to a payroll deduction savings program of a State or qualified political subdivision of a State, provided that:

(i) The program is specifically established pursuant to State or qualified political subdivision law;

(ii) The program is implemented and administered by the State or qualified political subdivision establishing the program (or by a governmental agency or instrumentality of either), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;

(iii) The State or qualified political subdivision (or governmental agency or instrumentality of either) assumes responsibility for the security of payroll deductions and employee savings, including by requiring that amounts withheld from wages by the employer be transmitted to the program promptly and by providing an enforcement mechanism to assure compliance with this requirement;

(iv) The State or qualified political subdivision (or governmental agency or instrumentality of either) adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;

(v) Participation in the program is voluntary for employees;

(vi) All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the State or qualified political subdivision (or governmental agency or instrumentality of either);

(vii) The involvement of the employer is limited to the following:

(A) Collecting employee contributions through payroll deductions and remitting them to the program;

(B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;

(C) Providing information to the State or qualified political subdivision (or governmental agency or instrumentality of either) necessary to facilitate the operation of the program; and

(D) Distributing program information to employees from the State or qualified political subdivision (or governmental agency or instrumentality of either) and permitting the State or qualified political subdivision (or governmental agency or instrumentality of either) to publicize the program to employees;

(viii) The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;

(ix) The employer's participation in the program is required by State or qualified political subdivision law;

(x) The employer has no discretionary authority, control, or responsibility under the program; and

(xi) The employer receives no direct or indirect consideration in the form of cash or otherwise, other than consideration (including tax incentives and credits) received directly from the State or qualified political subdivision (or governmental agency or instrumentality of either) that does not exceed an amount that reasonably approximates the employer's (or a typical employer's) costs under the program.

(2) A payroll deduction savings program will not fail to satisfy the provisions of paragraph (h)(1) of this section merely because the program—

(i) Is directed toward those employers that do not offer some other workplace savings arrangement;

(ii) Utilizes one or more service or investment providers to operate and administer the program, provided that the State or qualified political subdivision (or the governmental agency or instrumentality of either) retains full responsibility for the operation and administration of the program; or

(iii) Treats employees as having automatically elected payroll deductions in an amount or percentage of compensation, including any automatic increases in such amount or percentage, unless the employee specifically elects not to have such deductions made (or specifically elects to have the deductions made in a different amount or percentage of compensation allowed by the program), provided that the employee is given adequate advance notice of the right to make such elections, and provided, further, that a program may also satisfy this paragraph (h) without requiring or otherwise providing for automatic elections such as those described in this paragraph (h)(2)(iii).

(3) For purposes of this paragraph (h), the term ''State'' shall have the same

meaning as defined in section 3(10) of the Act.

(4) For purposes of this paragraph (h), the term ''qualified political subdivision'' means any governmental unit of a State, including a city, county, or similar governmental body, that—

(i) Has the authority, implicit or explicit, under State law to require employers' participation in the program as described in paragraph (h)(1)(ix) of this section; and

(ii) At the time of the enactment of the political subdivision's payroll deduction savings program:

(A) Has a population equal to or greater than the population of the least populated State (excluding the District of Columbia and territories listed in section 3(10) of the Act);

(B) Has no geographic overlap with any other political subdivision that has enacted a mandatory payroll deduction savings program for private-sector employees and is not located in a State that has enacted such a program statewide; and

(C) Has implemented and administers a plan, fund, or program that provides retirement income to its employees, or results in a deferral of income by its employees for periods extending to the termination of covered employment or beyond.

(5) For purposes of paragraph (h)(1)(iii) of this section, amounts withheld from an employee's wages by the employer are deemed to be transmitted promptly if such amounts are transmitted to the program as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the last day of the month following the month in which such amounts would otherwise have been payable to the employee in cash.

Signed at Washington, DC, this 9th day of December, 2016.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2016–30069 Filed 12–19–16; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 89

[Docket ID: DOD–2015–OS–0020]

RIN 0790–AJ33

Interstate Compact on Educational Opportunity for Military Children

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: DoD is establishing policies to implement the Interstate Compact on Educational Opportunity for Military Children (referred to as the ''Compact'') within the DoD, informed by the sense of Congress, and in furtherance of the operation of DoD schools. The final rule provides components with policies to support the intent of the Compact, which is to aid the transition of school-age children in military families between school districts (to include between Department of Defense Educational Activity (DoDEA) schools and state school districts). Each state joining the Compact agrees to address specific school transition issues in a consistent way and minimize school disruptions for military children transferring from one state school system to another. The Compact consists of general policies in four key areas: Eligibility, enrollment, placement, and graduation. Children of active duty members of the uniformed services, National Guard and Reserve on active duty orders, and members or veterans who are medically discharged or retired for one year are eligible for assistance under the Compact.

DATES: This rule is effective on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Marcus Beauregard, 571–372–5357.

SUPPLEMENTARY INFORMATION: On March 7, 2016 (81 FR 11698–11706), the Department of Defense published a proposed rule titled Interstate Compact on Educational Opportunity for Military Children for a 60-day public comment period. The public comment period closed on May 6, 2016. Ten public comments were received. The preamble to this final rule addresses the comments. Due to one of the public comments received, the Department has revised the final rule to reflect that the Military Departments will nominate military representatives by position to act as liaisons to State Councils and the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) will designate them in this manner.

Edits were made to adjust the process established to designate DoD liaisons to State Councils, so that liaisons are designated by position rather than by individual.

As the result of further internal coordination, administrative edits were made to the regulatory text.

Comment: ''This regulation is very beneficial for the States and as the DoD is to handle the majority of the cost, it has the promise of doing a great deal of good for the children of active duty military without being overly burdensome to the States participating. However, as the participation in the Compact is voluntary, it is possible that the degree of implementation will vary from state to state, perhaps by a large degree. This potential for variation would run against the purpose of the regulation. It is not always desirable to have penalties as part of a regulation, especially one that is voluntary, but without a clear idea of how the regulation would be enforced, the goals of the Compact may not be successful.''

Response: All fifty states and the District of Columbia (DC) have accepted the Compact into their state statutes. Consequently, complying with the provisions of the Compact is based on compliance with state law. Additionally, the Compact (approved by all fifty states and DC) includes the oversight of the Compact by a Commission composed of member states, with rules governing non-compliance and dispute resolution. Also, support for the administration of the Compact and the Commission is funded entirely by the member states without support from the federal government.

Comment: ''This new policy will not only bring awareness to schools, but will open up a need for additional staff to require training and employment in the schools to assist these [military] families. This rule will also open doors for additional policy to be made and other services not being addressed to have priority in legislation in the upcoming years so that the military families can have less strain than they already do with having a parent serve our country.''

Response: The fifty states and DC enacted laws approving the Compact with the understanding that implementation of the Compact would not require additional staffing in schools. Additionally, since enactment of the Compact in the 50 states and DC between 2008 and 2014, there have not been additional policies or services to address educational needs of children in