



**Oregon State Treasury
Public Hearing on OregonSaves Amendments to Allow
the Presumptive Exemption of Employers**

**Statement of Michael Hadley, Davis & Harman LLP
On behalf of the American Benefits Council
March 19, 2019**

Good morning. My name is Michael Hadley, and I am the managing partner of the law firm Davis & Harman LLP located in Washington, D.C. It's been my pleasure to visit Salem for the first time in order to provide comments at this hearing on the proposed rulemaking that would allow OregonSaves to continue presumptively exempting employers.

I am speaking today on behalf of the American Benefits Council (the "Council"), a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans. The great majority of the Council's members have operations in multiple states, including Oregon.

The Council, incidentally, recently celebrated 50 years of its work strengthening the employer-sponsored benefits system and helping millions of Americans achieve health and financial security, and on a personal note I am very proud to have worked with the American Benefits Council as long as I have been at Davis & Harman, and before that as a member of the Council.

I am here to express the Council's **strong support** for the OregonSaves proposed rulemaking, and I will speak more on this in a moment. But after that, I would like to take this opportunity to step back and acknowledge the bigger picture. This rulemaking process is just one example of the ongoing stakeholder engagement that has come to exemplify OregonSaves – a very welcomed approach that we hope other states with similar programs will seek to emulate.

BACKGROUND

Before I offer the Council's substantive comments, I'd like to take a minute to talk about the Council's efforts to improve retirement savings opportunities for workers.

The Council and its members have long supported both public and private efforts to expand access to retirement plans for workers. Because the U.S. retirement system is voluntary for employers, we have worked over the years with Congress and the federal agencies to reduce the

administrative burdens and costs of sponsoring a pension plan. However, even though the employment-based retirement system has been successful for millions of workers, many small businesses continue to believe that establishing a retirement plan is too burdensome. We therefore understand the concerns that have led a number of states to create programs such as OregonSaves.

Due to these recent efforts by states to increase retirement savings for private-sector workers, the Council has started working directly with states such as Oregon to provide comments and serve as a resource to the state, such as through our participation on the most recent OregonSaves' Rulemaking Advisory Committee.

The Council's goal in working with the states is twofold. First, we seek to share our experiences in how to achieve savings success. Second, we seek to ensure that a state's IRA program does not adversely affect employers that already offer a retirement plan to their workers.

Now, as an ERISA attorney, I can't testify here and not mention ERISA. But I will limit myself to this one point. ERISA, or the Employee Retirement Income Security Act, was enacted by Congress with a broad preemption provision to ensure that employers who voluntarily sponsor a retirement plan are not subject to a multitude of state law regimes. By providing for a single, nationwide governing regime, ERISA not only makes plan sponsorship less daunting for employers, but it better ensures that participants are protected and treated fairly. When the Council interacts with states on programs such as OregonSaves, we advocate for solutions that minimize the program's impact on plan sponsors. We do this not only because we think it will result in the best outcomes for employees who are already saving through work, but also because it's required in many cases for the program to avoid ERISA preemption concerns.

PROPOSED AMENDMENTS RELATED TO PRESUMPTIVE EMPLOYER EXEMPTIONS

With that background, as I mentioned, the Council strongly supports the proposed rulemaking that would permanently allow OregonSaves to presumptively exempt employers based on Form 5500 data that indicates an employer offers a qualified plan. As you know, prior to the introduction of the presumptive exemption, all employers in Oregon were required to take action either by registering with OregonSaves or, if an employer already offered a qualified plan, by filing a certificate of exemption.

Although we appreciate that the process for obtaining a certificate of exemption was designed to be as simple as possible, this requirement nevertheless consists of a new reporting burden for plan sponsors. The requirement that employers periodically renew their certificate of exemption only increases that burden, as does the prospect that 50 states could impose 50 different means of requiring employers to provide the same information. In previous comments, the Council expressed concern over this reporting requirement for the reasons I mentioned – it creates an additional burden for plan sponsors, and it raises ERISA preemption concerns.

For these reasons, the Council was very pleased when Oregon began taking steps to use Form 5500 data to identify Oregon employers that sponsor a retirement plan in order to

“presumptively” exempt an employer from the program. This process eliminates the need for employers to file a certificate of exemption and periodically renew that certificate. We therefore strongly support the proposed rules, and we anticipate that they will benefit a large portion of plan sponsors in Oregon. We also appreciate that the proposed rules incorporate some modest but helpful clarifications that are not contained in the temporary rules but that were recommended by the Rulemaking Advisory Committee.

Form 5500. There are a few aspects of the Form 5500 that I want to highlight. As you know, the Form 5500 is an annual report that is filed by most private sector employer-sponsored retirement plans and is publicly available on the U.S. Department of Labor’s website. This form contains a wealth of information, including, of course, the EIN of the plan sponsor (which is typically the employer), the type of plan, the number of plan participants, and the plan’s assets. My reason for highlighting this information is that Oregon can glean a lot of data from the Form 5500 well beyond employer EINs, should it have any interest in doing so.

Incorporating Form 5500 Data for Multiple Employer Plans. Late last year, the Council discussed with OregonSaves staff the use of Form 5500 data for all plan sponsors, including in particular whether Oregon’s Form 5500 database could incorporate the EINs of employers that participate in a multiple employer plan, or “MEP.” The EINs of employers that participate in a MEP are listed in an attachment to the MEP’s Form 5500. Oregon’s ability to presumptively exempt employers that participate in a MEP would be especially helpful for small and mid-sized businesses because they are more likely to use a MEP than a large employer that typically sponsors its own plan.

We understand from recent comments made by Joel Metlen that staff are exploring how to incorporate employer EINs from a MEP’s Form 5500 attachment. We appreciate this effort and encourage you to continue this work if a resolution has not yet been found.

Oregon S.B. 165. As much as the Council looks forward to OregonSaves’ increasing use of presumptive exemptions, there is one thing that we are concerned could negate much of the very positive work that staff have invested in developing the presumptive exemption process – and that is Senate Bill 165.

S.B. 165 would require all employers to indicate on their annual tax return whether they offer a qualified retirement plan that would allow the employer to obtain an exemption from OregonSaves. We are concerned that this process would take a significant step backwards by introducing a new reporting burden on plan sponsors and risking a new ERISA preemption challenge for OregonSaves. Furthermore, S.B. 165 would nullify the benefits of the presumptive exemption process for plan sponsors because all employers would be subject to the new tax form reporting requirement, not just those that did not receive a notice of presumptive exemption.

We encourage Oregon not to introduce a new reporting requirement for plan sponsors. One way to accomplish this is to amend S.B. 165 so that it only requires reporting by non-exempt employers. In other words, an employer that does not offer a qualified plan would, for example, check a box on the tax form to indicate that it is required to participate in OregonSaves. Employers that do offer a plan would not take any action related to OregonSaves on the tax form.

The Council has the same concerns and has provided similar feedback to Illinois on its similar reporting requirement.

Effect of Rules on Small Employers. The last comment I have on the proposed rulemaking is that the Council anticipates that the proposed amendments would reduce the cost of compliance for all employers, including small employers. Providing a notice of presumed exemption will reduce the compliance burden for each recipient employer that would otherwise be required to file a certificate of exemption (and periodically renew that certificate).

In addition, several of the other amendments that would be made under the proposed rulemaking, such as directing participants to notify the program administrator instead of the employer for certain purposes, will reduce compliance costs for all facilitating employers. This reduction will be especially meaningful for the smallest of facilitating employers that typically do not have a dedicated human resources or benefits professional.

OREGONSAVES AS A LEADER AND MODEL FOR STATE-RUN IRA PROGRAMS

Beyond expressing the Council's support for the proposed rulemaking, the more important message that I wish to convey is that the Council and its members have greatly appreciated the outreach that the OregonSaves board and staff have conducted with employers and plan sponsors since the very early days of the program's development. The opportunities we've had to provide comments, serve on a rulemaking advisory committee, and remain informed through the open and transparent process with which you have developed this program have been vital in minimizing the impact of OregonSaves on plan sponsors and current savers. OregonSaves has truly been a model for engagement, and we hope other states that look to Oregon for its leadership in state-run IRA programs will follow your example.

In addition to stakeholder engagement, there are some key features of OregonSaves that have been important in helping to ensure that OregonSaves complements the existing retirement system instead of harming it. For example:

- **Exempting all plan sponsors.** It was critical that OregonSaves not require employers to participate if they already offer a retirement plan and follow federal law regarding employee eligibility rules. The OregonSaves board accomplished this by providing in the rules that an employer is exempt if it offers a qualified plan to "some or all" of its employees.
- **Minimizing burdens on exempt employers.** While we understand that a state will need to ensure that it can determine which employers are subject to the state mandate, it is critical that the state minimize the burdens on employers that are exempt. And the subject of this hearing, which in part is designed to minimize employer reporting requirements by using Form 5500 data, is a great example of that effort.
- **Leveraging existing providers.** A third aspect of OregonSaves that the Council believes has been important for its success has been the board's decision to hire professional service providers, such as a third party recordkeeper and investment provider. These providers offer a wealth of experience and expertise. Professional service providers are also familiar entities to many employers who are often

accustomed to working with a private provider – and not the state – in the delivery of services and benefits to employees.

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In closing, as OregonSaves continues to grow and develop, there are two things that we encourage you to do. The first is to continue working and coordinating with other states that have similar programs, as we understand you have been doing with California and Illinois in particular. We have already seen some of the benefits of this coordination, and it is very helpful for employers that operate in more than one state when the rules and processes of various state programs are similar.

Second, we encourage you to continue to engage with national trade organizations, including the American Benefits Council, that work with employers and plan sponsors. We have a great deal of experience with and understanding of the various stakeholders in the retirement industry, and we are happy to work with you toward the goal of increasing retirement savings for all workers in a manner that does not disrupt current savers and plan sponsors. In fact, we would request that as other states reach out to OregonSaves, you encourage them to engage early with national organizations, like the Council, which represent plan sponsors and/or service providers and have experience on the issues I've discussed here.

Thank you again for the opportunity to testify, and I welcome any questions you may have.