# Attachment C: Response to Public Comments

Secure Choice Savings Program (74 Ill. Adm. Code 721; 42 Ill. Reg. 10351)

**Comments from: National Association of Professional Employer Organizations**

**<u>Comment 1:</u>** SB 2758 does not address who the responsible employer is in tri-party employment relationships. As a result, for purposes of Secure Choice, there is a need for the rules to clarify in tri-party employment relationships whether the client business or the individual or entity that contracts with the client business is the "employer" with all the attendant responsibilities of an employer under the program. The client employer – and not the professional employer organization (PEO) – should be treated as the employer for all employer requirements under the program with respect to workers who are performing services for the client employer and who are covered by the contract between the client employer and the PEO.

Section 721.200 Definitions

> *"Employee" means any individual who is 18 years of age or older, who is employed by an employer, and who has wages that are allocable to Illinois during a calendar year under the provisions of Section 304(a)(2)(B) of the Illinois Income Tax Act* [35 ILCS 5]. "Employee" includes both part-time and full-time employees. *<u>Solely for purposes of this Part, in the case of an Employee who is covered by a contract between a Professional Employer Organization and a Client Employer, the Employee shall be treated as employed by the Client Employer (and not by the Professional Employer Organization).</u>*
>
> *<u>"Professional Employer Organization" (PEO) has the meaning provided for such term in 35 ILCS 10/5-5.</u>*
>
> *<u>"Client Employer" means the person or entity that enters into a contract with a Professional Employer Organization.</u>*

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment.

As acknowledged by NAPEO, there are many types of "co-employment" relationships, including both Professional Employer Organizations (PEOs) and temporary staffing agencies. For consistency and equal treatment across all types of employment relationships, we will not alter the statutory definition of employer. Regardless of whether the entity is the sole employer or the co-employer of a worker, the entity that reports the worker for purposes of unemployment insurance to the Illinois Department of Employment Security (IDES), and is responsible for reporting wages on the worker's Form W-2, is considered the employer for purposes of the Program.

The business model behind PEOs is to provide key human resource responsibilities for client employers, including administering employee payroll and benefits, and ensuring compliance with taxation, workers' compensation and unemployment insurance laws. Ensuring client employers comply with Secure Choice would seem to naturally fit within the mission and business model of PEOs, as PEOs generally provide payroll, benefits (including retirement plans), regulatory compliance assistance, and other HR services to their clients (referred to herein as "client employers").

In NAPEO's comment letter, the association notes that there are 54 PEOs currently operating in Illinois. We anticipate that thousands of employers will be subject to Secure Choice. We cannot create a carve out for a subset of co-employers simply because of structure, service or business model variance. It simply would not be feasible to determine the employment relationships between the employees and each separate entity in each Illinois co-employment arrangement and this would likely lead to more uncertainty and confusion. As such, temporary agencies, staffing companies, and PEOs are all considered to be the employer for the employees they report to IDES for unemployment insurance and to IDOR for taxation purposes. We have already begun working with temporary agencies and staffing companies, and in fact, one staffing company is currently enrolled in the Secure Choice pilot program.

**<u>Comment 2:</u>** Any program requirements that are based on the number of employees an employer has should be applied at the client employer level with respect to the workers who are covered by the contract. To the extent that Secure Choice provides more specific instructions with respect to the method that should be used to determine the number of employees that an employer has, we request that such instructions clarify that any workers performing services pursuant to a co-employment relationship involving a PEO and a client employer be counted at the client employer level and not at the PEO level, regardless of which entity reports on such workers for workers' compensation, state tax, or other purposes.

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. Modifying the statutory definition of employer as proposed by NAPEO would create more uncertainty and confusion and potentially lead to workers who might previously have been covered by Secure Choice to lose coverage if they were counted at the "client employer" level rather than at the IDES reporting level. NAPEO notes in its comment letter that "client employers" have on average 10-15 employees. As the Secure Choice mandate only covers employers with 25 or more employers, by NAPEO's own admission, the average "client employer" would not be subject to Secure Choice and thus, the co-employed workers would not gain access to the Program were they to be counted at the "client employer" level.

**<u>Comment 3:</u>** Client employers that offer a PEO-sponsored retirement plan to their employees should be treated as offering or providing an employer-sponsored retirement plan (i.e., a Qualified Retirement Plan) for purposes of Secure Choice and any employer exemption that is based on the employer's offering of a retirement plan.

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. If an employer offers a qualified retirement plan to its workers, the employer is exempt from the Program pursuant to the Act and Section 721.200 of the proposed rules. The list of qualified plans includes: a plan qualified under sections 401(a), 401(k), 403(a), 403(b), 408(k) or 408(p) of the Internal Revenue Code, eligible governmental plans under section 457(b) of the Internal Revenue Code (820 ILCS 80/5), as well as Simplified Employee Pension (SEP) plans, and Savings Incentive Match Plan for Employees (SIMPLE) plans (See Section 721.200).

**<u>Comment 4:</u>** Clarification that PEOs may assist client employers with Secure Choice requirements.

Section 721.410 Registration and Enrollment

…

*<u>(g) Nothing in this Part shall prohibit a Professional Employer Organization and its Client Employer from entering into an agreement under which the Professional Employer Organization agrees to assist the</u>*

*Client Employer with the performance of some or all of the Client Employer's responsibilities under this Part, if applicable.*

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. Participating employers may work with their payroll providers, book keepers, accountants and other professionals and entities to facilitate the registration, auto-enrollment, and payroll deduction process for their employees as necessary. There is no prohibition against an employer working with an outside delegate to help facilitate their role as it relates to the Program. In fact, a number of pilot employers in the Program currently have their payroll providers/processors create the reports necessary to complete payroll deductions and in some cases even submit the employee contributions on behalf of the participating employer. Adding language to indicate that certain entities are not barred from assisting employers with the administration of Secure Choice may lead to additional questions or confusion regarding whether those are the only entities allowed to assist employers.

**Comment 5:** Clarification that a client employer that makes the PEO's retirement plan available to its workers is exempt from Secure Choice.

Section 721.200 Definitions

> *"Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that:*
>
> > *has at no time during the previous calendar year employed fewer than 25 employees in the State;*
> >
> > *has been in business at least 2 years; and*
> >
> > *has not offered a qualified retirement plan, either directly or indirectly, including a plan sponsored by another entity or a group of employers or pursuant to a collective bargaining agreement, in the preceding 2 years.*

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. The definition of employer is statutory language and will not be changed by administrative rule (820 ILCS 80/5). As noted in OST response to Comment 3, if an employer offers a qualified retirement plan to its workers, the employer is exempt from the Program pursuant to the Act and proposed rules.

**Comment 6:** Workers generally receive their wages from a PEO when they perform services for a client employer pursuant to a co-employment relationship between the PEO and client employer. Under this arrangement, the worker's Form W-2 is issued under the PEO's federal employer identification number. Due to this, if a client employer is treated as the employer of those workers in accordance with our recommendations described above, then in many cases a worker would have no wages that are received "from a participating employer" during the calendar year. For this reason, we recommend changing the definition of Wages as follows:

> *"Wages" means W-2 wages, as defined in 26 CFR 1.415(c)-2(d)(4) that are received by an enrollee from a participating employer during the calendar year. [820 ILCS 80/5] For this purpose W-2 wages reported by a PEO shall be treated as received by an enrollee from the Client Employer.*

**<u>OST Response</u>:** The Treasurer's Office is not changing the rule in response to this comment. Because the aforementioned changes are not being made to make the "client employer" the employer for Program purposes, this change is not needed.

**<u>Comment 7:</u>** For similar reasons, we recommend changing Section 721.380(a) (Reporting Requirements) as follows:

> *The Board shall annually submit an audited financial report to the Governor, Comptroller, Treasurer, and General Assembly. Additionally, the Board shall provide periodic reports at least annually to Participating Employers, reporting the names of each enrollee employed by the Participating Employer and the amounts of contributions made by (<u>or with respect to</u>) the Participating Employer on behalf of each Employee during the reporting period, as well as to enrollees, reporting contributions and investment income allocated to, withdrawals from, and balances in, their Program accounts for the reporting period.*

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. Because the aforementioned changes are not being made to make the "client employer" the employer for Program purposes, this change is not needed.

**<u>Comment 8:</u>** It is critical that all defined terms in the proposed rules be capitalized when it is intended for the definition of such term to apply. There are numerous instances where the terms "employer" is used, when the narrower defined term "Employer" appears to be intended. The same is true of other defined terms and the failure to address these issues changes the literal meaning of the requirements.

Section 721.400(a)-(c) (Eligibility) should be amended and shortened to read as follows:

> *Provided they can meet the eligibility requirements to contribute to an IRA under Section 408A of the Internal Revenue Code, the following ~~employees~~ Employees are eligible to participate in the Program:*
>
> *<u>a)</u> All ~~employees~~ <u>Employees</u> who work for <u>an</u> ~~employers~~ <u>Employer</u> ~~that have 25 or more employees, that have been in business for at least 2 years, and that do not offer qualified retirement plans~~ will be automatically enrolled in the Program;*
>
> *<u>b)</u> All ~~employees~~ <u>Employees</u> who work for a ~~small employer~~ <u>Small Employer</u> ~~that chooses to offer the Program~~;*
>
> *<u>c)</u> All ~~employees~~ <u>Employees</u> who work for a large ~~employer~~ <u>Large Employer</u> ~~that chooses to offer the Program in addition to a qualified retirement plan~~;…*

Without these changes to utilize the defined terms, the meaning of the provision would change, e.g. because the prior calendar year rule for determining the number of Employees would not be incorporated into the Section 721.400(a) rule.

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. The terms "Employee" and "Employer" are defined in Section 721.200 of the rules to alert readers that when those terms are used throughout the rules, they should be read and interpreted as defined rather than in their common parlance.

**Comment 9:** It is unclear from the proposed rules whether a Roth IRA will always be established for an Employee on the same date that the Employee receives a disclosure statement. We therefore recommend the following changes to the definition of Account Revocation Period in Section 721.200:

> *"Account Revocation Period" means the period of time starting from <u>the later of</u> the date an employee's Roth IRA is established and <u>the date</u> the employee receives the disclosure statement and ending on the earlier of (i) 90 days after the date of the employee's first Secure Choice Account contribution or (ii) the Close of Business on the Business Day that the employee makes an Alternate Contribution Election; provided, however, the Account Revocation shall last a minimum of seven days from <u>the later of</u> the date the Roth IRA is established and <u>the date</u> the employee receives the disclosure statement.*

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. Under federal rules on IRA account creation, an account cannot be opened until a participant receives the disclosure statements (26 CFR 1.408-6), so the two dates are one in the same for purposes of the Program.

**Comment 10:** The proposed definition of Participating Employer could imply that 100% of the Employees of a Participating Employer are necessarily enrollees in the Program. Because, as we understand the proposed rules, an Employee could opt out of participation or may not yet have been enrolled in the Program, we suggest changing the definition as follows in Section 721.200:

> *"Participating Employer" means an employer*, large employer *or small employer that provides a payroll deposit retirement savings arrangement as provided for by the Act for its employees ~~who are enrollees in the Program~~.*

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the definition of "Participating Employer" in Section 721.200 to read as follows:

> *"Participating Employer" means an employer,* large employer *or small employer that* ~~provides~~ <u>facilitates</u> *a payroll deposit retirement savings arrangement as provided for by the Act for its employees* ~~who are enrollees in the Program~~.

**Comment 11:** Because an Employer does not become a Participating Employer under the proposed rules until it provides a Payroll Deposit Retirement Savings Arrangement, it appears that the term "Employer" should be used instead of "Participating Employer" in Section 721.410(a) as follows:

> *The Board shall establish an initial implementation timeline under which ~~participating employers~~ <u>Employers</u> shall register for the Program and facilitate enrollment of their employees into the Program.*

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.410(a) to read as follows:

> a) The Board shall establish an initial implementation timeline under which ~~participating~~ employers shall register for the Program and facilitate enrollment of their employees into

the Program. The Board shall approve the implementation timeline at a public meeting of the Board and make the timeline publicly available by posting it on the Board's or Treasurer's website (see Section 721.720).

**<u>Comment 12:</u>** In some cases, it may be impossible or impractical for an Employer to cease payroll deductions by the next payroll cycle. Thus, we recommend that the phrase "as soon as administratively feasible, not to exceed 30 days following receipt of the notification" be added to the end of Section 721.430(d) (similar to Section 721.510(e)).

**<u>OST Response:</u>** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.430 to read as follows:

**Section 721.430 Opt Out Procedures**

a) Employees who do not wish to participate in the Program will be given an opportunity to opt out before any payroll deduction contribution is made. The Board shall ensure that an employee has a minimum of 30 days from the time he or she is notified that the employer has facilitated the employee's enrollment before an IRA is established and the first payroll deduction is made to opt out of the Program.

b) The account administrator shall provide employees with a number of opt out methods, including electronically and by phone.

c) Any employee who does not opt out of the Program within the 30 day period described in subsection (a) will be automatically enrolled in the Program, and an IRA will be established for that employee pursuant to Section 721.410(f) before the first payroll deduction is made.

<u>d) Any employee who is enrolled in the Program can cease participation and revoke their Roth IRA during the account revocation period.</u>

~~d~~<u>e</u>) Employees can opt out <u>after the account revocation period at any time</u> by giving notice to the account administrator ~~at least 30 days before the effective date of the Program~~, and participants may cease making contributions to their accounts at any time by giving notice to the account administrator. After receiving notice, the account administrator shall ~~instruct~~ <u>notify</u> the employer to cease payroll deductions for the participants. <u>Employers shall cease payroll deductions as soon as administratively feasible, not to exceed 30 days following receipt of the notification from the administrator.</u>

~~e~~<u>f</u>) Employees who opt out of the Program may enroll at any time by following the Program's enrollment procedures.

**<u>Comment 13:</u>** Section 721.430(e) provides that Employees who opt out of the Program may enroll "at any time" by following the Program's enrollment procedures. In the case that those enrollment procedures require any action by the Employer, that action could become burdensome for the Employer, especially if Employees are allowed to re-enroll "at any time." As such, we recommend that the rules limit the opportunity for Employees to re-enroll to a monthly or quarterly basis, or at the very least, allow re-enrollment "as soon as administratively feasible following Employee notification of intent to enroll, not to exceed 30 days following receipt of the notification."

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.430(f) to read as follows:

f) Employees who opt out of the Program may enroll at any time by following the Program's enrollment procedures. Following notification of the employee's intent to enroll, employers shall enroll employees as soon as administratively feasible, not to exceed 30 days following receipt of the notification.

**Comment 14:** There are no provisions in the proposed rules regarding the process and timeframe for facilitating the enrollment of new employees hired after the initial implementation phase.

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by adding subsection (g) to Section 721.410 to read as follows:

g) After initially facilitating enrollment of existing employees into the Program, participating employers shall enroll newly hired employees in the Program as soon as administratively possible, not to exceed 60 days after first payment of employee wages.

**Comment 15:** The proposed Section 721.430(d) Opt Out Procedures allow an employee to opt out "at least 30 days before the effective date of the Program." It would seem, however, that this may not be possible because the Program will be effective independent of any enrollments. We recommend clarifying that opt outs must occur "within the 30-day period described in subsection (a)" similar to Section 721.430(c).

**OST Response:** The Treasurer's Office is changing the rule in response to this comment. See the revised language to Section 721.430(e) in response to Comment 12.

**Comment 16:** In Section 721.440(c), the cross reference should be to "Section 721.420(e)," not to "Section 721.420(d)".

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.440(c) to read as follows:

c) Accounts will remain in the Program and participants may continue to make contributions pursuant to Section 721.420(~~d~~e), unless they elect to transfer or close their accounts, in accordance with Section 721.540 and Subpart F.

**Comment 17:** In Section 721.520, it would be helpful to clarify that the Account Administrator will send the account statements.

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.520 to read as follows:

Account statements shall be provided to participants by the account administrator on a quarterly basis. The account statements may be sent by U.S. mail and/or provided electronically in accordance with 26 CFR 1.401(a)-21 or in any other form permitted by the IRS.

**Comments from: American Benefits Council**

**<u>Comment 18:</u>** The rules should clarify that employers are exempt if they offer a Qualified Retirement Plan to some or all employees. In order to clarify what we believe was likely intended under the proposal, and to avoid severe disruption to Plan Sponsors that would result if a Plan Sponsor were required to enroll its employees who are not currently eligible for the employer's plan in Secure Choice, we ask that the Board revise the definition of "Employer" in Section 721.200 as follows:

> *"Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that:*
>
> > *has at no time during the previous calendar year employed fewer than 25 employees in the State;*
> >
> > *has been in business at least 2 years; and*
> >
> > *has not offered a qualified retirement plan <u>to some or all of its employees</u> in the preceding 2 years.*

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. The definition of employer is statutory language and will not be changed (820 ILCS 80/5). Furthermore, the Act and the proposed rules define qualified retirement plans, which are regulated by federal law, including nondiscrimination and minimum coverage requirements.

**<u>Comment 19:</u>** An employer should be exempt if it offers a payroll deduction IRA program. We request that the Board revise the definition of "Qualified Retirement Plan" in Section 721.200 as follows:

> "Qualified Retirement Plan" includes a plan qualified under sections 401(a), 401(k), 403(a), 403(b), 408(k) or 408(p) of the Internal Revenue Code. The term also includes an eligible governmental plan under section 457(b) of the Internal Revenue Code, as well as Simplified Employee Pension (SEP) plans, and Savings Incentive Match Plan for Employees (SIMPLE) plans<u>, and payroll deduction IRA programs</u>. ~~Payroll deduction IRA programs are not qualified retirement plans.~~

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. To maintain consistency with federal guidelines, payroll deduction IRA programs are not qualified retirement plans and do not count as an employer sponsored plan. The proposed rules include SEP plans and SIMPLE plans under the definition of "Qualified Retirement Plans", but this definition does not extend to payroll deduction IRAs broadly because they do not have the same requirements and benefits for employee coverage and employer contributions.

**<u>Comment 20:</u>** The process that Illinois uses to identify which employers are required to participate in Secure Choice should require self-identification only by those employers that are subject to the participation requirement. The process should not require Plan Sponsors to report their exempt status to the state. Instead of requiring Plan Sponsors to report their offer of a retirement plan on Form IL-941, we urge the Board to consider reversing the current reporting requirement so that (1) only those employers that are required to participate in Secure Choice would self-identify by checking the box on

Form IL-941, and (2) employers that are exempt, including Plan Sponsors, would not be required to take any reporting action.

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. Plan sponsors are not required to take any additional reporting action. Currently, all Illinois employers already complete Form IL-941 on a quarterly basis. The checkbox asking an employer if it is exempt from Secure Choice has been a part of that form since January 2017. The checkbox is not meant to segregate plan sponsors, but rather is intended to capture Illinois employers who could be exempt from Secure Choice for any number of reasons, including employing fewer than 25 workers or being in business fewer than two years. In addition to relying on the IL-941 form, plan sponsors that can be matched on EIN with a qualified plan reported on the most recently published federal 5550 form data have already been removed from the invitation pool.

**<u>Comment 21:</u>** The rules should clarify that exempt employers, including Plan Sponsors, are not required to allow employees who enroll in the Program on an individual basis to make contributions to their Account through payroll deduction. Section 721.420(e) of the proposed rules provides that the Board may allow individuals who do not work for a participating employer to enroll in Secure Choice, and that the Account Administrator would be responsible for developing a process that allows those individuals to "make contributions separate from an employer payroll system." We read this language as saying that exempt employers, including Plan Sponsors, would not be *required* to allow an employee who participates in the Program on an individual basis to make Account contributions through payroll deduction. If that is correct, we support that approach. However, we recommend that, to the extent necessary, this point be clarified in Section 721.400(d).

**<u>OST Response:</u>** The Treasurer's Office is not changing the rule in response to this comment. American Benefits Council's reading of the language is correct. Section 721.400(d) states that while an employee of a non-participating employer can open an account, the employee may be required to make contributions through methods other than a payroll deduction if the non-participating employer chooses not to facilitate payroll deductions for the Program.

**Comments from: Heartland Alliance for Human Needs & Human Rights and Woodstock Institute**

**<u>Comment 22:</u>** We support the principle behind Section 721.400, allowing individuals who do not work for employers who offer Secure Choice to participate in the Program. However, Section 721.400(d) states that "any employee who works for an employer that does not offer the Program may set up his or her own account," while Section 721,420(e) states that "the Board may allow individuals who do not work for a participating employer to enroll in the Program." We encourage the Treasurer's Office to clarify these sections and to allow any individual, regardless of their employment status, to open a Secure Choice account, as long as they are not employed at a participating employer.

**<u>OST Response:</u>** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.400 to read as follows:

> **Section 721.400 Eligibility**
>
> Provided they meet the requirements of section 408(A) of the Internal Revenue Code, the following ~~employees~~ <u>individuals</u> are eligible to participate in the Program:

a) All employees who work for employers that have 25 or more employees, that have been in business for at least 2 years, and that do not offer qualified retirement plans will be automatically enrolled in the Program;

b) All employees who work for a small employer that chooses to offer the Program;

c) All employees who work for a large employer that chooses to offer the Program in addition to a qualified retirement plan; ~~and~~

d) Any employee who works for an employer that does not offer the Program may set up his or her own account but may be required to make contributions through methods other than a payroll deduction~~.~~; and

e) Any individual with earned income in the calendar year regardless of whether they work for an employer.

**Comment 23:** The proposed rules should indicate that communications to participants about the Program, including the employee information packet and account statements outlined in Section 721.520, should be written as clearly and simply as possible, within the limits of what is legally required.

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.395 to read as follows:

**Section 721.395 Information Packets**

*Prior to the opening of the Program for enrollment, the Board shall design and disseminate to all employers an employer information packet and an employee information packet, which shall include background information on the Program.* [820 ILCS 80/55(a)] The Board should strive to use plain language, whenever and wherever possible. The employee information packet shall include a disclosure form, as well as a document with information on how to opt out of the Program or select a contribution rate other than the default contribution rate. Participating employers shall provide the employee information packets to employees upon launch of the Program and to new employees at the time of hiring. Alternatively, participating employers shall provide the account administrator with the employee contact information necessary for the account administrator to send employees the employee information packet. Informational packets may be updated as necessary. Delivery of information packets may also be accomplished electronically in accordance with 26 CFR 1.401(a)-21 or in any other form permitted by the IRS.

**Comment 24:** We urge the proposed rules to allow the Board and the account administrator to create program materials in additional languages. At a minimum, the account administrator should be required to provide a hotline for Secure Choice participants who speak languages other than English.

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. Nothing in the rules or the Act prohibits the Board from allowing for creation of materials in languages other than English. The account administrator is currently providing fact sheets and posters in Spanish and the client services call center provides customer service in Spanish and translation service in a number of other languages.

**Comment 25:** We encourage the Treasurer's Office to allow the Board and account administrator to refer participants to vetted institutions who can provide financial coaching and financial capability services.

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. The Treasurer's Office, the Board, and the account administrator are not in a position to recommend specific institutions for financial coaching and financial capability services, but do encourage individuals to seek financial and tax advice as necessary in various documents and descriptions provided to participants.

**Comment 26:** The proposed rules should require the account administrator to notify participants at the time of enrollment about the potential for penalties, and again at the point when a participant submits a withdrawal request to the account administrator, as outlined in Section 721.610.

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. Program materials already include specific information related to the potential for penalties and taxes on early withdrawals.

**Comment 27:** With more and more people, including older adults, turning to the gig economy and entrepreneurship to make a living, it is important to be clear about where they fit in the eligibility criteria for Secure Choice. Many of these jobs do not include benefits or retirement savings options, and so we encourage the Treasurer's Office to clarify that self-employed individuals are included in the "small employers" definition so they can participate in the Program.

**OST Response:** The Treasurer's Office is changing the rule in response to this comment. See OST Response to Comment 22.

**Comments from: AARP Illinois**

**Comment 28:** It is unclear from the draft regulations whether employers will be required to report whether or not they have an ERISA plan. An affirmative reporting requirement would not seek to regulate plans directly and the information it would seek is very limited: does the employer offer an ERISA plan? Moreover, courts have considered how burdensome a state law is on plan administrators as part of their ERISA preemption analysis. While the Board could insulate the Program from challenge on this basis by not requiring reporting, no matter how minimal, by employers with ERISA plans, we think that given the strong argument against preemption and the problems with identifying such employers absent the requirement, this is not advisable.

**OST Response:** The Treasurer's Office is not changing the rule in response to this comment. We are utilizing a number of information sharing channels, including data from the IL-941 form and the most recently published federal 5500 qualified retirement plan reporting data to remove employers that can be matched on EIN with a qualified retirement plan. Employers that cannot be matched with a qualified retirement plan will receive an invitation to register and auto-enroll their employees in the Program.

**Comment 29:** Section 721.380(a) may inadvertently bring the prohibition on employer contributions into question:

> …Additionally, the Board shall provide periodic reports at least annually to participating employers, reporting the names of each enrollee employed by the participating employer and *the amounts of contributions made by the participating employer on behalf of each employee* during the reporting period, as well as to enrollees, reporting contributions…
> (emphasis added).

Although other parts of the regulations, as provided, indicate that employer contributions are prohibited under the Program, this emphasized language above seems to suggest that employer contributions are permitted. Thus, we recommend amending the provided language to simply state "the amounts of each employee's contributions."

**<u>OST Response:</u>** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.380(a) to read as follows:

> a) *The Board shall annually submit an audited financial report to the Governor, Comptroller, Treasurer, and General Assembly. Additionally, the Board shall provide periodic reports at least annually to participating employers, reporting the names of each enrollee employed by the participating employer and the amounts of contributions made by ~~the participating employer on behalf of~~ each employee during the reporting period, as well as to enrollees, reporting contributions and investment income allocated to, withdrawals from, and balances in, their Program accounts for the reporting period.*

**<u>Comment 30:</u>** We recommend providing additional guidance instructing employers *not* to do the following:

- Provide their own employer-specific materials to employees.
- Place their letterheads or logos on any of the Program's materials.
- Distribute materials recommending the Program to their employees or otherwise suggest that employees participate.

**<u>OST Response:</u>** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.410 to add a new subsection (h) as follows:

> <u>h) Participating employers shall not contribute to or endorse the Program, or execute any discretionary authority, control, or responsibility with respect to the Program.</u>

**<u>Comment 31:</u>** Although we believe that Illinois' program will be considered to fall under DOL's 1975 Safe Harbor, a state arrangement that does not satisfy the criteria of the safe harbor is not necessarily an ERISA plan. Rather, in such instances, courts will still need to determine whether the arrangement is "established or maintained by an employer." Indeed, an employer's decision to extend benefits to its employees does not alone indicate that it has "established or maintained" a plan. Notwithstanding, below we have identified preferred alternative language in the regulations:

We suggest using terms other than "offer" and "voluntarily elect", such as "make available" in the following sections:

- 721.200. “Large Employer” means a person or entity engaged in a…offers a qualified retirement plan, but notifies the Board that it is interested in offering the Program in addition to its qualified retirement plan.

- 721.200. “Small Employer” means a person or entity engaged in a…but notifies the Board that it is interested in being a participating employer.

- 721.400(b). All employees who work for a small employer that chooses to offer the Program.

- 721.400(c). All employees who work for a large employer that chooses to offer the Program in addition to a qualified retirement plan.

- 721.420(a). Small employers and large employers may choose to offer the Program to their employees.

- 721.420(b). Small employers or large employers who voluntarily elect to participate in the Program shall notify the account administrator and shall register for the Program using the online portal.

- 721.420(c). The account administrator will develop a process that allows for the enrollment of employees from small employers or large employers who elect to participate in the Program.

**<u>OST Response:</u>** The Treasurer’s Office is changing the rule in response to this comment by:

1. Changing the definition of “Large Employer” to read as follows:

**Section 721.200 Definitions**

"Large Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Illinois, whether for profit or not for profit, that:

has at no time during the previous calendar year employed fewer than 25 employees in the State;

has been in business at least 2 years; and

offers a qualified retirement plan, but notifies the Board that it is interested in ~~offering~~ <u>making</u> the Program <u>available to its employees</u> in addition to its <u>own</u> qualified retirement plan.

2. Revising subsections (b), (c), and (d) of Section 721.400 to read as follows:

**Section 721.400 Eligibility**

b) All employees who work for a small employer that chooses to ~~offer~~ make the Program available to its employees;

c) All employees who work for a large employer that chooses to ~~offer~~ make the Program available to its employees in addition to its own ~~a~~ qualified retirement plan; and

d) Any employee who does not work~~s~~ for ~~an~~ a participating employer ~~that does not offer the Program~~ may set up his or her own account but may be required to make contributions through methods other than a payroll deduction.

3. Revising subsections (a), (b), and (c) of Section 721.420 to read as follows:

**Section 721.420 Voluntary Participation**

a) Small employers and large employers may choose to ~~offer~~ make the Program available to their employees.

b) Small employers or large employers who ~~voluntarily elect to participate in~~ choose to make the Program available to their employees shall notify the account administrator and shall register for the Program using the online portal.

c) The account administrator will develop a process that allows for the enrollment of employees from small employers and ~~or~~ large employers that ~~who elect to participate~~ choose to make ~~in~~ the Program available to their employees.

**Comment 32:** Although the regulations repeatedly state that the Board is responsible for establishing the Program, we suggest using the word "facilitate" instead of "provides" in the following section:

> 721.200. *"Participating Employer" means an employer, large employer, or small employer that* facilitates *a payroll deduction retirement savings arrangement as provided for by the Act for its employees who are enrollees in the Program.*

**OST Response:** The Treasurer's Office is changing the rule in response to this comment. See OST Response to Comment 10.

**Comment 33:** We also suggest using "facilitate" instead of "allows" in the following section:

> 721.200. "Payroll Deposit Retirement Savings Arrangement" means an arrangement by which a participating employer facilitates payroll deduction contributions from enrollees to the Program.

**OST Response:** The Treasurer's Office is changing the rule in response to this comment by changing the language in Section 721.200 to read as follows:

> *"Payroll Deposit Retirement Savings Arrangement" means an arrangement by which a participating employer ~~allows enrollees to remit~~* facilitates *payroll deduction contributions* from enrollees *to the Program.*