

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (“MOU”) is hereby entered into between the Office of the Illinois State Treasurer (the “Treasurer”), for itself and on behalf of the Secure Choice Savings Board (the “Board”) (the Treasurer and the Board are referred to collectively as the “Agencies”), and The ERISA Industry Committee (“ERIC”) (the Agencies and ERIC are referred to collectively as “the Parties”).

RECITALS

WHEREAS, pursuant to 820 ILCS 80/1 et seq., and 74 Ill. Adm. Code 721, in 2018 the Agencies began implementing a retirement program for certain Illinois workers (“Secure Choice”), which requires certain Illinois employers to register and enroll their employees in Secure Choice (“the Participation Requirement”);

WHEREAS, Illinois employers that offer a “Qualified Retirement Plan,” as described in 820 ILCS 80/5 and 74 Ill. Adm. Code 721.200, (“Exempt Employers”) are exempt from the Participation Requirement (“the Exemption”);

WHEREAS, the Agencies and other Illinois state governmental entities not parties to this MOU (“Non-Party Agencies”) have requested and may do so in the future, through various informal and formal means, that Exempt Employers state whether they offer a Qualified Retirement Plan and thus qualify for the Exemption (“the Exemption Requirement”);

WHEREAS, Qualified Retirement Plans include employee pension benefit plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”) (“ERISA Plans”);

WHEREAS, ERIC, a national trade association that represents the interests of large employers that sponsor, *inter alia*, ERISA Plans (collectively, “ERISA Employers”), notified the Agencies of ERIC’s position that ERISA preempts the Exemption Requirement for ERISA Employers;

WHEREAS, the Agencies deny that ERISA preempts the Exemption Requirement for ERISA Employers, but seek to ease any administrative burden on all employers, including Exempt Employers;

WHEREAS, ERIC does not dispute the Participation Requirement for employers not eligible for the Exemption;

WHEREAS, ERIC confirms on behalf of its membership that all members are eligible for the Exemption because they are ERISA Employers; however, if this is not accurate, ERIC will notify the Treasurer on behalf of the Agencies accordingly;

WHEREAS, ERIC seeks to have the Exemption Requirement not apply with respect to its members; and

WHEREAS, to avoid unnecessary and costly litigation regarding their disagreement over the Exemption Requirement for ERISA Employers, the Parties have agreed to the procedures as provided herein that accommodate their respective interests.

WHEREAS, on February 14, 2019, the Board unanimously voted to authorize the Treasurer, on behalf of the Board, to enter into a MOU with ERIC to resolve the disputed claims.

NOW, THEREFORE, the Parties agree to the following:

1. During the pendency of this MOU, the Agencies agree:
 - a. Not to seek any penalties or undertake any other enforcement action against an ERIC member (including an ERIC Member Controlled Group as defined in paragraph (3) below) for failure to comply with the Exemption Requirement, if any, for those ERIC members for which ERIC transmits to Treasurer the employer identification number (“EIN”) of such ERIC member having employees in Illinois along with confirmation of ERIC membership. ERIC shall not have any affirmative obligation to transfer EINs and confirm ERIC membership status under this paragraph, it being understood that ERIC will only transfer EINs and confirm ERIC membership under this clause (a) at the voluntary approval and direction of the ERIC member. Insofar as ERIC provides EINs and confirms ERIC membership for various ERIC members pursuant to this clause (a), such entities are referred to herein as “Prcleared Entities,” and insofar as ERIC does not do so, such ERIC members are referred to herein as “Non-Prcleared Entities.”
 - b. Not to seek any penalties or undertake any other enforcement action against any Non-Prcleared Entity for failure to comply with the Exemption Requirement, if, in response to an enforcement action or any other official inquiry or action by the Agencies against such Non-Prcleared Entity:
 - i. The Non-Prcleared Entity notifies the Treasurer that it is an ERIC member; and
 - ii. Upon any request for confirmation by the Treasurer, ERIC in good faith confirms that the Non-Prcleared Entity is an ERIC member. The Treasurer agrees to only request confirmation from ERIC for entities that have represented to the Treasurer that they are ERIC members. ERIC’s failure to respond within 30 days of its receipt of a written inquiry from the Treasurer shall be deemed ERIC’s denial that the entity in question is an ERIC member.
 - iii. Non-Prcleared Entities for which the requirements of this clause (b) are satisfied are referred to herein as “Designated Entities.” Non-Prcleared Entities for which the requirements of this clause (b) are not satisfied are referred to herein as Non-Designated Entities.

2. The Parties agree that Precleared Entities and Designated Entities shall not have any liability whatsoever to the Agencies for alleged non-compliance with the Exemption Requirement occurring during the pendency of this MOU, and that Precleared Entities and Designated Entities may assert this MOU as an absolute defense in any enforcement action of any kind brought by the Agencies against them at any time for alleged violations of Exemption Requirement occurring during the pendency of this MOU.

3. The Parties expressly agree that during the pendency of this MOU, the Agencies may seek penalties and otherwise undertake full enforcement action against Non-Designated Entities for failure to comply with the Exemption Requirement.

4. All notices and communications under this MOU shall be in writing and shall be deemed effective upon receipt when delivered personally, sent by e-mail, or seven (7) business days after being sent by registered or certified mail, postage prepaid, return receipt requested at the address listed below, or at such other address or to such other parties as may be specified in writing by the Parties hereto:

If to the Treasurer:
Director of Secure Choice
Office of the Illinois State Treasurer
100 West Randolph St., Suite 15-600
Chicago, IL 60601
312-814-8955
securechoice@illinoistreasurer.gov

If to ERIC:
President and Chief Executive Office
The ERISA Industry Committee
701 8th Street, N.W.
Suite 610
Washington, DC 20001

The Parties agree to promptly inform each other of any relevant changes in address.

5. The Parties agree that any entity that is a member of a “controlled group of corporations,” as defined in 26 C.F.R. § 1.1563-1(a)(1), that includes at least one entity that is an ERIC member (“ERIC Member Controlled Group”) shall be deemed an ERIC member, provided that the entity is otherwise eligible for the Exemption because it is an ERISA Employer as to some or all of its Illinois employees. Entities within an ERIC Member Controlled Group that are ineligible for the Exemption shall not be deemed ERIC members. The Parties acknowledge that the Treasurer may rely on representations made by ERIC related to this paragraph and the Treasurer retains all rights related to such reliance.

6. During the pendency of this MOU, the Parties mutually reserve their rights regarding the rights and obligations of entities within ERIC Member Controlled Groups that are ineligible for the Exemption and therefore subject to the Participation Requirement.

7. This MOU shall be a public document.

8. ERIC agrees that it will not commence litigation in state or federal court against the Agencies during the pendency of this Agreement which challenges the Participation Requirement or the Exemption Requirement.

9. ERIC agrees to work with the appropriate federal regulatory agencies to seek changes to existing reporting forms required under ERISA that can provide the Agencies the information needed to verify that employers are ERISA Employers.

10. ERIC may represent to the Illinois Department of Revenue (the "Department of Revenue") and other Non-Party Agencies that the Agencies believe that Non-Party Agencies should not assess penalties against any Precleared Entity or Designated Entity for failure to satisfy the Exemption Requirement imposed by such Non-Party Agencies, including, without limitation, "Box C" on the Department of Revenue's Form-IL 941. The Agencies further agree that they will support ERIC's effort to remove "Box C" from Form IL-941 or from any other equivalent form of any Non-Party Agency that requires an employer to certify whether it is eligible for the Exemption.

11. The Parties acknowledge that the Agencies have no control over and do not bind any Non-Party Agencies, including Non-Party Agency enforcement of the Exemption Requirement. The Parties further acknowledge that ERIC reserves all rights to bring litigation in federal court during the pendency of this Agreement against any Non-Party Agency that threatens or seeks to enforce the Exemption Requirement against any ERIC member.

12. The Agencies agree to continue to use and to consider in good faith whether current, publicly available data sources may obviate the need for any Exemption Requirement by ERISA Employers. The Agencies welcomes ERIC's assistance in that effort.

13. If the United States Department of Labor ("DOL") (i) modifies the Form 5500 to require a sponsor of an ERISA Plan to annually list each entity (including each entity's federal employer identification number) within its controlled group with employees covered by an ERISA Plan and (ii) provides data that is readily accessible in a usable electronic form that allows for a determination as to which Illinois employers offer an ERISA Plan, the Agencies will, within a reasonable time (not to exceed six months), evaluate whether the modified Form 5500 enables the Agencies to amend their administrative process to remove the Exemption Requirement for ERISA Employers. Should the Agencies make any changes from the current Exemption Requirement as a result of the events described in the immediately foregoing sentence occurring, the Agencies will publicly communicate such changes.

14. ERIC may represent to DOL and others that the Agencies (i) support modifications to Form 5500 as described in the preceding paragraph (13), and (ii) will consider in good faith using information derived from any modification to Form 5500. To the extent permitted by law, the Agencies will reasonably cooperate with information requests from ERIC in connection with ERIC's discussions with federal regulators regarding changes to Form 5500.

15. This MOU is limited to the existing Exemption Requirement imposed by the Agencies. The Parties mutually reserve their rights with respect to any other existing or future regulatory obligation imposed by the Agencies. The Parties further mutually reserve their rights with respect to any existing or future regulatory obligation imposed by Non-Party Agencies.

16. This MOU is being executed solely for the purpose of creating a binding framework with respect to the Exemption Requirement during the pendency of this MOU. This MOU shall not be construed as an admission by the Agencies of any liability on their part. The Agencies expressly

deny all liability for any encroachment upon ERISA preemption. This MOU shall not be deemed as any interpretation of ERISA by ERIC or any admission by ERIC concerning ERISA.

17. Either party may terminate this MOU for the other party's breach hereof, with ninety (90) days' notice in writing to the other party's address specified in paragraph (4) above; provided, however, that before any such notice is provided the terminating party must notify the opposite party of the alleged breach and must have a meet and confer regarding the alleged breach. Upon the effective date of termination of this MOU (90 days after proper notice has been given), the Agencies may enforce the Exemption Requirement as to all of ERIC's members for alleged violations of the Exemption Requirement occurring on or after such date. ERIC and its members specifically reserve the right to seek relief in federal court to enjoin such enforcement on or after after the effective date of termination of this MOU.

18. This MOU may be executed in counterparts. The Parties shall consider facsimile, scanned, or photocopied signatures valid signatures for purposes of execution of this MOU as of the date of their receipt hereto

19. This MOU shall be governed by and construed according to the laws of the State of Illinois, without regard to conflicts of law principles.

20. This MOU constitutes the entire MOU between the Parties with respect to the subject matter hereof, and any prior oral or written statements concerning the same are merged herein for all purposes and shall have no independent force and effect.

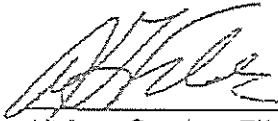
21. The Parties represent and warrant that their undersigned representatives are authorized to execute this MOU on their behalf and hereby acknowledge that each has received the advice of counsel in connection with entering into this MOU.

22. Any amendment to this MOU must be in writing and executed by the Parties.

IN WITNESS WHEREOF, the Parties have caused this MOU to be executed by their duly authorized officers.

The ERISA Industry Committee

By:

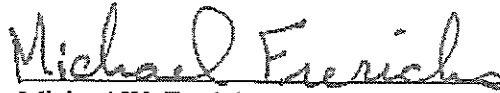


Annette Guarisco Fildes
President and Chief Executive Officer

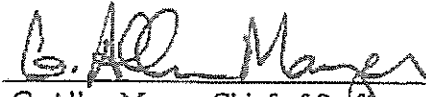
3/26/19

Date

OFFICE OF THE ILLINOIS STATE
TREASURER, on behalf of itself and
the ILLINOIS SECURE CHOICE
SAVINGS BOARD



Michael W. Frerichs
Illinois State Treasurer and Chairperson
of the Illinois Secure Choice Savings
Board

By: 
G. Allen Mayer, Chief of Staff

4-4-19
Date