From the Desk of Senator Herman E. Baertschiger, Jr.

sifma

Invested in America

MEMORANDUM IN OPPOSITION
HB 2960 Rep. Read
On Senate Floor

Thank you for the opportunity to submit this statement for the record on behalf of the Securities Industry and Financial Markets Association (SIFMA)[1]. SIFMA is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. Many of our members have an active presence in Oregon, where they provide various services to investors and retirement plans, including advisory services, investment opportunities and plan recordkeeping.

While SIFMA has a number of wide-ranging concerns about the plan proposed in HB 2960 – and generally opposes states entering into an already robust private market to compete with its own residents (including nearly 59,000 individuals in the financial services industry in Oregon) – we write today to bring to your attention 3 specific concerns about the bill's drafted language that, if left unaddressed, may have disastrous consequences for the state and its taxpayers, Oregon's small businesses, and Oregon savers: (1) the Senate should clarify that the market and legal analyses (the results of which will need to be used in the development of the proposed plan) must be performed prior to the development of the proposed plan; (2) the Senate should follow the House's intent and require the Board to determine ERISA-applicability prior to the development of the plan; and (3) the Senate should reconsider the budget analysis and provide the Oregon Retirement Savings Board with the flexibility to design a plan which will be the best fit for Oregon savers.

- First, as it is currently drafted, HB 2960 would establish the Oregon Retirement Savings Board and require the Board to develop and administer a state run retirement plan for private sector workers while **simultaneously** conducting market and legal analyses to determine the feasibility of the plan. It is vital that the bill language is clarified to ensure that the pre-requisite studies – which would provide crucial, Oregon-specific data points necessary for the development of an effective plan – be conducted prior to the complex and costly development of the plan.

- Second, SIFMA commends the members of the Oregon House of Representatives for recognizing the importance of determining the relationship between the proposed plan and the Employee Retirement Income Security Act of 1974 (ERISA) – which provides fundamental protections for employee retirement savings. In the current version (HB 2960B), subsection 2 of Section 15 states that, "If the board determines that the plan developed by the board under section 2 of this 2015 Act would qualify as an employee benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the board may not establish the plan."

  While the Board may not establish a plan if the plan is determined to be an ERISA-covered plan, the Board itself is **not required** to make such a determination. The House of Representatives included this language for very specific, well considered reasons. Should the proposed plan be determined to be an ERISA-covered plan, the State may impose a fiduciary duty upon itself, as well as its small employers, and subject itself to a wide range of routine penalties. For example,

[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA has offices in both New York and Washington, D.C. For more information, visit http://www.sifma.org.

ERISA-covered retirement plans are required to provide roughly a dozen different notices to investors at various times, and providers are generally penalized **$100 per notice, per day**. Which means that if the plan provider fails to provide two notices to a single participant, and the error is uncovered 12 months later, the State (or the employer) could face fines up to $2,400 for that **single instance**. This is a number that can grow rapidly, especially given the auto-enroll feature of the proposed plan.

In fact, the Employee Benefits Security Administration (EBSA), which enforces ERISA, collected more than **$1 billion** in penalties last year for such compliance failures. Moreover, in their Congressional budget submissions, EBSA listed "vigorous enforcement" as their top focus, and set a collections goal of **$1.3 billion** for the upcoming year.

Further, the U.S. Department of Labor may determine that it is only certain aspects of the proposed plan that would trigger ERISA coverage – further information that could be very important in the initial design of the program. Because no state currently runs or sponsors a state run retirement plan for private sector workers,[2] these are questions that still need to be addressed. As such, it is imperative that HB 2960 be amended to reflect the House's original intent to protect the State and its employers, and require the Board make an ERISA determination prior to the development of the proposed plan.

- Third, SIFMA is concerned that the appropriation provided for in HB 2960B grossly under-estimates the real cost of HB 2960. The appropriation, according to the Budget Report of HB 2960B, designates $420,000 to be used for the market and legal analyses. In 2014, the State of Minnesota (which ranks 21st in population among the 50 states) dedicated $400,000 for a similar study, but rescinded the RFP without finding a firm to perform the study. In Connecticut (which ranks 29th in population), a similar proposal generated a fiscal estimate of $2.4 million for study and start-up costs, and $6 to $8 million for plan designs, marketing, additional staff, and reporting. Illinois (which ranks 5th in population) estimated that such a plan would require $15 - $20 million in start-up costs over the first two years. Under HB 2960B, Oregon (ranking 27th in population) would set aside less than $1 million for both the study **and** start-up costs. Underestimating the State's fiscal responsibility can only lead to negative outcomes, including: (1) the State could face additional, unexpected costs in the next budget and plan development would be delayed; (2) the Board could face dissolution when its funding expires; or (3) the Board could be forced to implement cost-saving measures that compromise the proposed plan and directly harm budding investors.

  As such, SIFMA encourages the Oregon Senate to re-evaluate the estimated fiscal responsibility under the proposed plan and provide the Board with additional flexibility to pursue the most effective and efficient retirement solution based on the outcome of the market and legal analyses. For instance, after the studies, the Board may determine that the most effective and efficient solution would be to allow employers to choose from a variety of identified retirement savings plans that meet the specific criteria set forth by HB 2960, as well as later criteria identified by the Board. While that may or may not be the best solution for Oregon, it is important that the Board is given the necessary flexibility to the ensure that the plan it develops is the best solution for Oregon.

Thank you in advance for consideration of our concerns. If you have any questions, seek any further information, or if there are any other matters on which we may be of assistance, please contact our counsel Elise Brown at (503) 970-1235 or elisebrown@ebipublicaffairs.com, or Marin Gibson of SIFMA at (212) 313-1317 or mgibson@sifma.org.

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[2] Illinois and Massachusetts have both authorized the development of a plan, but neither state has funded or established a plan.