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Submitted vie email: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AB71

Dear Secretary Perez:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to provide comments regarding the Department of Labor's ("Department") proposed regulation under the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") describing circumstances in which a payroll deduction savings program, including one with automatic enrollment, would be eligible for a safe harbor and not be considered an employee pension benefit plan under ERISA.[2] SIFMA also includes within these comments some thoughts on the Department's interpretive bulletin concerning the application of ERISA to certain state laws designed to expand the retirement savings options available to private sector works through ERISA-covered retirement plans, including state sponsorship of a multiple employer plan or the use of a Marketplace-based initiative.[3] SIFMA appreciates the opportunity to comment and hopes that our comments are helpful to the Department as it assesses the impact of the proposed rule and the Interpretive Bulletin.

[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 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, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Proposed Rule Sec. 2510.3-2(h) http://www.gpo.gov/fdsys/pkg/FR-2015-11-18/pdf/2015-29426.pdf
[3] Interpretive Bulletin 2015-02, http://www.gpo.gov/fdsys/pkg/FR-2015-11-18/pdf/2015-29427.pdf

SIFMA shares the Department's concern that American workers are not saving enough for retirement. We strongly believe individuals need to save more, along with more education for everyone, and more partnering between employers, providers and employees. This is a challenge that we need to address as a society. Financial literacy and general investment education needs to become a part of the basic education provided throughout the school years. For those already past those years, there needs to be collaborative outreach by the states, the federal government, employers and providers to educate individuals about compounding interest, finding appropriate investments, monitoring their portfolio, and making changes when appropriate. Additionally, support for not-for-profit organizations that work to educate existing and prospective investors on financial decision-making would be an important part of any solution.

We believe, however, that a state required payroll deduction savings IRA program as envisioned by the Department's proposed rule is a step in the wrong direction because it does not address the fundamental issues preventing individuals from saving for retirement, such as competing financial demands and the need for individuals to prioritize retirement savings.[4] It could lead to as many as 50 different systems across the country with different eligibility requirements, different default investments, and different withdrawal requirements. Furthermore, implementing the type of plan detailed in the proposed rule would add significant costs to the States to operate the program,[5] while simultaneously crowding out the private market, which today provides a wide variety of individual retirement account options for any individual ready to contribute a percentage of their annual compensation towards retirement. Moreover, the States would be highly unlikely to provide the same level of education, service and guidance as private sector providers. This proposed rule from the Department, which provides a roadmap for states who want to create a plan that avoids ERISA preemption, is not the best path to improve retirement savings and security in this country.

Summary of the Proposed Rule

The Department's proposed regulation Sec. 2510.3-2(h) would expand the options for a state payroll deduction plan as long as it meets certain conditions. Those conditions are intended to ensure that the

[4] Additionally, "no money left after paying bills" was cited as the number one obstacle to saving for retirement in a 2015 AARP report, *High Anxiety: New York City Gen X and Boomers Struggle with Stress, Savings and Security*.
[5] A fiscal estimate from Illinois puts the start-up costs between \$15M and \$20M; a California report provided a start-up financing estimate between \$73M and \$129M; and a Connecticut estimate found that such an initiative utilizing a traditional IRA investment vehicle could remove almost \$70M from the state economy annually.

employer's involvement in the state program is limited to the ministerial acts necessary to implement the payroll deduction program under state law. Those conditions include:

- Established by State law;
- Administered by the State, which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;
- State assumes responsibility for the security of payroll deduction and employee savings;
- State adopts measures to ensure that employees are notified of their rights under the program and creates a mechanism for enforcement of those rights;
- Participation is voluntary for the employees;
- No restriction on withdrawals, nor cost or penalty on transfers or rollovers;
- All rights are enforceable only by the employee, beneficiary, or State;
- Involvement of the employer is limited to (1) collecting employee contributions through payroll deductions and remitting them to the program, (2) providing notice to the employees and maintaining records regarding the deduction and remittance, (3) providing information to the State for facilitating the program, and (4) distributing program information to employees from the State;
- Employer contributes no funds to the program and provides no other monetary incentive to employees to participate in the program;
- Employer is required to participate by state law;
- Employer can have no discretionary authority, control or responsibility under the program; and
- Employer can receive no direct or indirect compensation in the form of cash or otherwise, other than the reimbursement of the actual costs of the program to the employer.

Comments on the Proposed Rule

Mandatory Auto IRA Not the Best Option for Retirement

The challenge with a mandatory IRA program is that employers will take this option as the easy way to avoid creating a more expansive and substantive 401(k), SEP or SIMPLE plan. IRA programs are helpful supplemental retirement savings plans, and are also useful for individuals who have departed employment and are interested in expanding their investment and distribution options by rolling out of an employer plan.

Instead, the states and the federal government should consider providing tax benefits and other incentives to encourage expansion of employer provided 401(k) plans to help individuals prepare for retirement. Among other advantages, employer sponsored 401(k) plans have higher contribution limits, which allow for a more substantial buildup of savings for retirement. In addition, when employers voluntarily establish plans, they provide the additional benefit of acting as a fiduciary overseeing investment management fees, administrative expenses, selecting quality investment options, providing financial education and sometimes making employer contributions. The federal government should focus on encouraging employer sponsored plans to help individuals save for retirement.

Employer Limitations Will Not Help Savers

The proposed regulation makes clear that, for the safe harbor to apply, there can be no employer contributions and no monetary incentive to the employees to participate in the program. The fact that there is no match dramatically limits how these accounts will grow. In addition, data shows that while auto enrollment increases overall participation, it actually decreases the average savings rate.[6] This is a clear reason the focus needs to be on educating individuals about the importance of saving for retirement. Employer involvement must be limited, but this involvement can include collecting contributions, providing notices and program information to employees, and keeping records that are provided to the state. The explanation of the proposed rule notes that an employer can allow employees company time to review materials and use company computers to make elections.[7] It is unclear how a state would be able to oversee employers to monitor such practices. The Department should provide guidance to the states and the investment managers they may engage regarding the potential ERISA implications should an employer cross the limited involvement line.

Furthermore, the proposal makes it clear that an employer's use of the state as a recordkeeper would not turn that employer into an ERISA fiduciary. However, the Department has not extended the same comfort to plans for non-profits and hospitals.[8] A non-profit employer with a plan for its employees who has engaged a recordkeeper in order to meet the ERISA safe harbor of keeping limited involvement as an employer may find itself deemed to have become an ERISA fiduciary by the Department for engaging the recordkeeper.

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[6] http://investmentwatchblog.com/people-tend-to-put-more-in-their-401k-if-they-do-it-voluntarily-law-undercuts-retirement-savings/
[7] Proposed Rule citation, FN 16.
[8] 403(b) plans for 501(c)(3) organizations

Concerns About States Avoiding ERISA and Benefits of ERISA Coverage

We are also concerned about the Department providing guidance that appears to be focused on avoiding ERISA applicability. ERISA provides many benefits, which are highlighted on the Department of Labor's own website. These benefits include spousal protections, vesting standards, and disclosure of important investment information. ERISA also establishes standards of conduct for plan managers and other fiduciaries, as well as requiring transparency and accountability, ensuring that participants have access to information about their plans. As states establish plans outside of ERISA, the Department of Labor will have no role in ensuring that those participants and their retirement savings will be protected. For example, one of the Department's enforcement priorities has been the timely deposit of participant contributions by the employer into plan accounts.[9]

ERISA preemption also provides for uniformity among the states and limits confusion and conflicts that might arise for employees who move from one state to another, as well as for employers who oversee employees within multiple states. Under the current proposed rule, different states would most likely have different rules governing operation, accumulation and distributions. This is particularly a concern when an employer operates across multiple states, or when the employer operates in one state and the employee lives in another. It raises issues of which state's tax rules apply upon withdrawal, or which state's beneficiary or unclaimed property rules apply. These were among the many reasons for the enactment of ERISA's broad preemption provision.[10]

Moreover, exempting state plans from ERISA will have significant consequences for large amounts of retirement savings. Just this month, the Connecticut Retirement Security Board reported that its recommended plan, designed with the current proposal in mind, could, if implemented, have $1 billion in assets under management in the first two years.[11] This is particularly notable as Connecticut ranks just 29th in population among the 50 states and is home to roughly 1% of the U.S. population. If each state

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[9] In fact, the Department initiated the Contributory Plans Criminal Project in 2010 where the Department noted that contributory plans can be vulnerable to criminal abuse where employers may convert employee payroll contributions for their own personal use or misapply employee contributions to cover other expenses. More information can be found at http://www.dol.gov/ebsa/newsroom/fsCPCP.html

[10] ERISA Sec. 514(a)

[11] http://www.osc.ct.gov/crsb/docs/finalreport/CRSB_January_1_Report.pdf

were to implement a similar plan, extrapolating that estimate across all 50 states, that would mean upwards of $100 billion in assets in funds without ERISA protections in a very short period of time.

The Department's proposal should also address why it is choosing to exempt certain plans from ERISA, as opposed to easing various burdens of ERISA generally which could allow for an expansion of small business retirement plan coverage. Given the Department's stated interest in expanding small business coverage, there could be a variety of avenues the Department could pursue to ease those burdens. Some examples are repeal of the top-heavy rules, reducing the administrative costs and requirements through streamlined reporting and testing, and increasing contribution limits, all of which would encourage small business owners to start plans. The Department has not provided sufficient rationale for exempting these particular plans from ERISA protections.

DOL treats the State differently than other employers in defining voluntary.

The proposed regulations state that, for the safe harbor to apply, participation in the program must be voluntary for employees. However, the proposed regulation makes clear that a state program can impose a mandate on employers to offer the program if they do not otherwise offer a retirement plan and the program can require that employers automatically enroll employees who do not opt out. This new definition of what it means for a program to be "voluntary" versus "completely voluntary" is arbitrary and cannot be found elsewhere in the law. It is a new definition of voluntary created to allow for opt-out, as opposed to the previous requirement of opt-in. The Department's regulations set the standard for when ERISA does not cover a payroll deduction IRA arrangement. Among the limitations are that it provides that employee participation must be "completely voluntary."[12] The Department recognizes in its proposal that for participation to be considered "completely voluntary," it must be self-initiated by the employee. Further, the Department notes several court cases which have held that opt-out arrangements are not consistent with a requirement for a "completely voluntary" arrangement.[13] To avoid this result, the Department offers up a new safe harbor that would allow a state to avoid the "completely voluntary" requirement merely because it is a state.

Additionally, we would highlight that this does not address state laws against "taking" from employees. By mandating a program that includes automatic enrollment, this "taking" from employees may well be

[12] 29 CFR 2510.3-2(d)
[13] Proposed Rule citation, FN 12.

the missing participant accounts of the future, as individuals might not assert ownership and responsibility for these accounts.

Further, how does the Department intend to address the state wage withholding laws which prohibit a "taking" of an employee's wages? We assume that any state law creating such a plan would need to include a waiver, or equivalent, from state wage withholding laws.

The Department does recognize that its scope is limited, and that it is not expressing any view regarding the application of provisions of the Internal Revenue Code. This issue would need to be addressed for a state to provide comfort to its citizens regarding the possibility of excise taxes should there be a prohibited transaction within the IRA.[14]

The "No Restrictions" Requirement Needs Further Analysis.

Under the proposed regulation, the program cannot require that an employee retain any portion of contributions or earnings in his or her IRA and cannot otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers. SIFMA commends the Department for including this requirement which will support portability, interstate mobility, and provide appropriate access for individuals, primarily those with lower income, who might need to access their money for living expenses. However, this raises many questions: What are the parameters for getting the money back out of the "plan"? What is the length of time in which one must request their money back? Won't further guidance be needed from the IRS? Is this eligible for rollover like any other IRA? How will portability be handled?

We would also note that there are income limitations on both traditional IRAs and Roth IRA programs, and it is unclear how this would be monitored, and how individuals will be educated about the penalties and taxes that would apply should those restrictions not be followed. The Administration recognized the challenges of auto enrollment and opt-out administration for IRAs, which led the Treasury Department to limit the *my*RA program to being a Roth IRA program.[15]

[14] Internal Revenue Code Sec. 4975 Tax on Prohibited Transactions
[15] More information can be found at https://myra.gov/

DOL Needs to Create a Model Notice for Employers

Under the program, the employer would be required to provide notice to the employees with regard to the auto enrollment. Will the Department be issuing a model notice? If not, what are the elements that an employer needs to be sure is included within the notice? How prominently must the notice be displayed? Would this be part of an individual's general new employment packet?

We would recommend that the Department be sure to include information about the accessibility of the money in the IRA and the tax and penalty implications of any transaction in or out of the IRA. This should also include information about who is managing the assets, what options they have for investing, and who they can contact with questions about their IRA.

State Should be a Co-Fiduciary under ERISA

Since the State is responsible for investing the employee savings or for selecting investment alternatives for employees to choose, the State should be considered a co-fiduciary under ERISA. As the party selecting the investment line-up, they should be responsible for ensuring the investment mix, as well as overseeing each of the particular investments as appropriate. This would keep the proposal consistent with the Department's position to increase investor protections, as well as with long-established and effective investor protection requirements long complied with by all employers and retirement products.

Lack of Regulatory Impact Analysis

In its proposal, the Department indicates that they do not need to undertake a full regulatory impact analysis, nor a regulatory flexibility analysis with regard to small business, because they deem the proposed rule as imposing no requirement or costs on employers. We would disagree with this characterization of the proposal, since multiple states have reviewed the costs of various plans and determined there to be potentially significant costs.[16]

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[16] *See* "Report to the Legislature," Connecticut Retirement Security Board, Jan. 1, 2016, pp. 5, 11 – 12, 34 – 45; "Presentation of Top Two Investment Options," Overture Financial, LLC, Agenda Item 1 of Jan. 11, 2016 meeting of California Secure Choice Retirement Savings Investment Board, pp. 48 – 49; Connecticut SB 249 (2014), Fiscal Note; Illinois SB 2758 (2014), Fiscal Note; West Virginia HB 4375, Fiscal Note; *See also* "Washington Voluntary Accounts: Report to the Legislature," Washington State Dept. of Retirement Systems, Jan. 2009, pp. 34 – 46; "Voluntary Employee Accounts Program Study," Maryland Supplemental Retirement Plans, 2007, pp. 1, 11 – 13.

Comments on the Interpretive Guidance

The Department should consider the Marketplace approach, enacted by Washington State in 2015, which appears to be a strong public-private partnership model that will better disseminate retirement savings education information publicly and provides full investor protections under ERISA. It is also much less expensive for states to put in place and is much less likely to lead to crowding out of more robust retirement savings options already available. For example, Washington State had the law introduced, enacted, appropriated the full fiscal note of $526,000, conducted stakeholder meetings, released an RFI, and proposed multiple rules from both of the relevant agencies in under a single year.[17] Additionally, the Marketplace model is the only initiative examined by the Department in either the proposed rule or interpretive guidance that both provides investors full ERISA protections, and protects state governments from ERISA liability.

On the Prototype Plan Approach, in March of 2012, Massachusetts enacted legislation authorizing the state to create a state operated qualified defined contribution plan for small not for profit employers. The state treasurer was required to develop a plan in compliance with ERISA and obtain IRS approval. Almost four years later, no such plan is in effect. Before recommending such an approach, DOL should explore whether there were cost, liability and/or operational issues that kept Massachusetts from implementing this statute.

On the multiple employer plan ("MEP") Approach, it is unclear as to why the Department made a distinction between a state-run open MEPs and a private sector open MEPs. Since the goal is to expand coverage, and the same fiduciary responsibilities would apply in both situations, it appears to be a differentiation without merit.

The Department refers to the fact that the state has a "unique representational interest in the health and welfare of its citizens"; yet, employers have a similar representational interest in the retirement readiness success of their employees. By allowing the private sector to offer open MEPs as well, coverage could be expanded to many additional individuals and would not lead to many of the same concerns about potentially lower savings rates and few ERISA protections for participants of small business plans.

[17] See Washington St. SB 5826 (2015), introduced Feb. 4, 2015; Washington St. Chapter 296, 2015 Laws (1st Special Session), enacted May 18; Washington St. Chapter 4, 2015 Laws (3rd Special Session), p.23, effective date June 30, 2015 (biennial operating budget); WSR 16-02-038, filed Dec. 30, 2015 (Dept. of Financial Institutions proposed rulemaking); WSR 16-02-050, filed Dec. 31, 2015 (Dept. of Commerce proposed rulemaking).

Conclusion

Thank you for the opportunity to provide these comments. Please feel free to contact the undersigned at 202-962-7329 if you have any questions.

Sincerely,

Lisa J Bleier

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