To: Department of Labor

From: Scott Stolz

Re: **Savings Arrangements Established by States for Non-Governmental Employees**

Date: January 7, 2016

I have had numerous opportunities to interact with the Department of Labor regarding its proposed Conflicts of Interest Fiduciary Rule. One of the primary concerns of the financial services industry is the potential legal liability that this rule could create. It seems logical to me to assume that "best interests" is likely to be defined as "best" and/or "cheapest" investment option as determined by various parties after the fact. The recent ERISA lawsuit against Anthem, Inc. on the basis that the Vanguard investment options were too expensive appears to be a perfect example of lawsuit based on one law firm's arbitrary interpretation of a Fiduciary Standard. The Department of Labor has consistently taken the position that these legal concerns are unfounded. In fact, the Department has gone as far as stating that they have been confused about why the industry even has a these concerns. After all, their reasoning goes, ERISA standards are clear and have never led to excessive litigation, so why should this new proposed rule yield different results?

In light of the Department's opinion, I find this proposed rule a bit confusing. In fact, I would argue that it's in direct conflict with the Department's opinion on the potential liability of the Fiduciary rule. Here we have several states that would like to offer what is essentially a state mandated retirement plan for any employees that are not covered under a work plan. For this to succeed operationally, not only must the state set up such a plan, but employers must establish a means for their employees to fund the plan through payroll deduction. Yet, neither the states nor the employers are willing to move forward if it means they would be subject to ERISA. Apparently, they have the same concerns about potential liability that the financial services industry has expressed over the last nine months. The states have therefore asked the Department to provide them a safe harbor exclusion from ERISA. And low and behold, the Department has now proposed just that.

In addition to the conflicting messages sent by the Department, I can't help but wonder why private industry is required to comply with ERISA but the states are not? It clearly isn't because the states are more proficient at providing for a secure retirement for individuals. All one has to do is look at the condition of most state pension plans to see that this is not the case. Ironically, Illinois, the poster child for pension plan troubles is one of the three states asking for the safe harbor. Perhaps if the state was required to serve as a fiduciary in regards to the retirement assets it currently has, millions of state employees would not be facing a potential retirement crises.

It appears as though the Department is picking winners and losers. The financial services industry has been labeled as greedy and untrustworthy and therefore should be subject to hundreds of pages of rules and requirements, while the states are viewed as virtuous and paternal and therefore are worthy of an exemption. At the best this is poor public policy. At the worst it's just plain dangerous.