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Emailed to: e-ORI@dol.gov

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

Re: RIN 1210-AB71
Savings Arrangements Established by States for Non-governmental
Employees

Ladies and Gentlemen:

Prudential has long been committed to expanding retirement savings opportunities for all working Americans.¹ It is well recognized that far too many of today's working Americans do not have access to retirement savings programs in their workplace. We believe the subject proposed rulemaking in conjunction with the Department's interpretive guidance (§ 2509.2015-02) represent an important commitment to work with states in attempting to address issues critical to the retirement security of millions of Americans. However, we are very troubled by the Department's use of its regulatory and interpretive authority to favor state plan sponsorship over the private sector by effectively empowering states with the authority to use automatic enrollment in conjunction with payroll deduction IRAs and sponsor multiple employer plans, while specifically precluding the use of such tools and plans by private sector sponsors.

As recognized by the Department, more than 68 million working Americans currently do not have an opportunity to participate in a workplace based retirement savings program.² The solution to this problem cannot, in our view, be left solely to the states, as the Department's guidance appears to suggest, but must encompass private sector

¹ See Prudential white paper entitled *Multiple Employer Plans: Expanding Retirement Savings Opportunities* (2015) at http://research.prudential.com/documents/rp/mep_paper_final_2015.pdf.

² 80 Fed. Reg. 72008 (November 18, 2015), ftn 1.

efforts, with regulatory and interpretive guidance that encourages and facilitates private sector plan sponsorship. We look forward to working with the Department on the development of such guidance. In the interim, we respectfully submit the following observations and comments on the Department's November 18, 2015 guidance.

Comments on Proposed Rule - §2510.3-2(h)³

At the outset, we are concerned that the Department unnecessarily, in our view, opted to pursue guidance that not only precludes private sector employers from utilizing an automatic enrollment feature as part of their payroll deduction program, but imposes conditions on both states and participating employers that may serve to limit a state's certainty as to the status of its arrangement under title I of ERISA, while exposing both the state and participating employers to increased risks and liabilities.

In our view, the Department could – and should - have reasonably interpreted its existing payroll deduction IRA guidance (29 CFR § 2510.3-2(d) and 2509.99-1) to conclude that an automatic enrollment feature with adequate advance notice and a reasonable period for employees to opt out does not contravene the requirement that such programs be “completely voluntary” with respect to employee participation in a payroll deduction IRA program⁴ Such an interpretation, being an interpretation of the Agency's own guidance, would, in our view, almost certainly be entitled to judicial deference.⁵ Moreover, such an interpretation would have been wholly consistent with the policies underlying the Department's 1999 guidance (29 CFR § 2509-99-1) to further employee savings opportunities through payroll deduction arrangements.⁶

³ 80 Fed. Reg. 72006 (November 18, 2015).

⁴ While the Department noted that courts in various contexts have found opt-out arrangements inconsistent with a “completely voluntary” arrangement, we note that such arrangements were different from the payroll deduction IRA programs at issue in the proposed rule. Most of the cited cases appeared to involve group insurance arrangements under which employee contributions paid for current insurance coverage and, as a result, were unlikely refundable after the coverage period. In contrast, employees contributing to a payroll deduction IRA program have the ability to opt-out, recover their contributions, or roll such contributions over to an IRA outside the program. Such rights, in our view, argue strongly in favor of a “completely voluntary” program. In other contexts, both the Congress and the Department have found that adequate advance notice, coupled with a right to direct investments is tantamount to a participant's exercise of control. See ERISA sections 404(c)(5), 514(e) and 29 CFR § 2550.404c-5. If an exercise of control can be deemed, it arguably would be completely voluntary.

⁵ In contrast to the Department's interpretation in § 2509.2015-02, it would appear that the posited interpretation could satisfy the factors set forth in *Skidmore v Swift*, 323 US at 140 (1944).

⁶ We also note that in describing the requirements of the payroll deduction regulation at 29 CFR § 2510.3-2(d), the Interpretive Bulletin at paragraph (a) of 29 CFR 2509.99-1 merely references “voluntary” contribution, rather than the “completely voluntary,” raising a question as to whether the Department over-interpreted the significance of “completely” in explaining why the regulation was necessary, particularly when considered with an employee's unilateral right to rollover funds to an IRA outside the state program, as required by paragraph (h)(1)(iv) of the proposal.

However, as noted above, rather than an interpretive approach that would have accommodated both private sector and state sponsored programs, the Department proposed a safe harbor that, if adopted, would only benefit employees of employers in those states that offer or mandate participation in a state payroll deduction program. If, consistent with what was believed to be the Department's long held view, payroll deduction programs continue to represent a viable means by which employers can offer their employees an opportunity to save for retirement,⁷ we strongly encourage the Department to reconsider its analysis of its existing payroll deduction guidance and clarify that the use of automatic enrollment features by an employer would not, in and of itself, affect the voluntary nature of the program for purposes of 29 CFR §§ 2510.3-2(d) and 2509.99-1.

Should the Department continue to pursue its limited safe harbor approach to guidance, we submit the following for consideration.

Paragraph (h)(1)(ii) of the proposal provides that the state or subdivision thereof is responsible for investing employee savings or selecting investment alternatives for employees to choose. Paragraph **(h)(2)(ii)** clarifies that a state may utilize one or more service providers to operate or administer the program, but the state or subdivision thereof retains full responsibility for the operation and administration of the program. Inasmuch as a state otherwise meeting the conditions of the safe harbor will be operating and maintaining a program **not** subject to ERISA's fiduciary standards, the questions presented by the aforementioned paragraphs is what standards of conduct, if any, will states be subject to with respect to how they invest employees' monies and select investments from which employees may choose? In addition, to assist states in more fully understanding the liabilities and risks attendant to offering such programs and attaining the expected benefits, it would be helpful for the Department to clarify whether and to what extent a state operating a program within the safe harbor may be subject to the prohibited transaction and related excise tax provisions of the Internal Revenue Code (including the Department of Labor's investment advice regulation and related exemptions). It would also be helpful for states and participating employers to understand whether or to what extent noncompliance with the conditions of the safe harbor may result in a state program being treated as an ERISA-covered plan and the implications of such coverage for both states and participating employers.

Paragraph (h)(1)(iii) of the proposal provides that the state assumes responsibility for the security of payroll deductions and employee savings. We note that the preamble accompanying the proposed rule provides no guidance to the states as to the types of programs, audits, etc. that would be necessary to assure the Department that they met such requirements. In an effort to bring certainty to compliance with this condition of the safe harbor, we believe it would be helpful if the Department delineated for the

⁷ 29 CFR § 2509-99-1(b).

states the minimum requirements necessary to demonstrate a commitment to ensuring the timely receipt of employee contributions and the collection of delinquent contributions.⁸

Paragraph (h)(1)(vi) of the proposal provides that the program does not require an employee or beneficiary to retain any portion of contributions or earnings in the program and does not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers. We request that this provision be clarified to distinguish restrictions, costs, or penalties imposed by the program itself from restrictions, costs and penalties that are a feature of an investment available to employees through the program. Specifically, we request that the Department clarify that a program that offers investments with reasonable limitations upon withdrawals or fees or penalties on transfer or rollover will not, itself, cause a program to run afoul of this requirement, provided that all such limitations, restrictions, fees or penalties are disclosed to employees in advance.⁹ Such a clarification would avoid the elimination of certain investments intended to satisfy the Department's safe harbor, while affording states the flexibility to prudently select investment options determined to best meet the needs of participating employees. It would also recognize the value that certain investment products, including insurance products, may offer retirement savers in the form of lower costs, greater returns and insurance guarantees, some of which may be available only with reasonable liquidity restrictions and fees.

Paragraph (h)(1)(vii) provides that all rights of the employee under the program are enforceable "only by the employee, ..., or the State" Inasmuch as noncompliance by a state, or possibly a participating employer, with any one condition of the safe harbor may result in the establishment of an ERISA-covered plan and given the Department's interest in protecting employees in the workplace generally, we recommend that the Department amend this paragraph to make clear that nothing in the regulation precludes an action by the Secretary of Labor on behalf of one or more employees covered by the program.

⁸ For example, the Department could clarify the extent to which the trust and fiduciary principles discussed in Field Assistance Bulletin No. 2008-01, relating to the collection of delinquent contributions, would apply to states for purposes of compliance with the proposed safe harbor. <http://www.dol.gov/ebsa/pdf/fab2008-1.pdf>.

⁹ Such a clarification, in our view, could be included in either paragraph (h)(1)(vii) or in paragraph (h)(2) making clear that a state savings program will not fail to satisfy the provisions of (h)(1) merely because the program: (iv) Includes investment alternatives that may impose reasonable restrictions, costs or penalties on withdrawals, transfers or rollovers, provided that notice of any such restrictions, costs or penalties is furnished to participants and beneficiaries in advance of the investment. For an example of the confusion surrounding this provision, see *Report to Legislature, State of Connecticut Retirement Security Board, January 1, 2016*.

Paragraph (h)(1)(viii) conditions applicability of the safe harbor for state programs on employer compliance with certain delineated requirements. While some of the requirements are similar to the limits set forth in the regulatory exclusion at 29 CFR § 2510.3-2(d), we are concerned that compliance with such requirements may in some instances be beyond the control of the state; thereby leaving applicability of the safe harbor with respect to a state program highly uncertain at any given point in time. We note that employers opting to offer a payroll deduction program outside of ERISA have an incentive to ensure compliance with the requirements of § 2520.3-2(d). We are concerned that that same incentive may not exist under the proposed safe harbor for state sponsored programs given that many employers may be participating solely because of a state mandate, rather than voluntarily.

This aspect of the Department's proposal, therefore, highlights questions as to the impact of noncompliance by one or more employers with the requirements imposed by paragraph (h)(1)(viii). For example, assume that one or more employers fail to remit some contributions, as required by paragraph (h)(1)(viii)(A); or fail to maintain adequate records regarding the collection or remittance of contributions, as required by paragraph (h)(1)(viii)(B); or fail to distribute the information described in paragraph (h)(1)(viii)(D). Does such noncompliance result in the state program becoming an ERISA-covered plan or does such noncompliance result in the noncompliant employer having established an ERISA-covered plan (which, in turn, might take the employer outside the scope of the state mandate by virtue of now maintaining an ERISA-covered retirement plan for its employees) or could the noncompliant employer be viewed as maintaining a payroll deduction IRA program within the meaning of § 2520.3-2(d), assuming all the conditions of that regulation are otherwise met? We believe the Department's views on these issues are critical to providing the states the certainty they need both respect to the viability of their program and with respect to their exposure to responsibilities and liabilities under ERISA. In addition, the Department's responses are critical to potential or actual participating employers in terms of their exposure to responsibilities and liabilities that may result from one or more noncompliant participating employers and their analysis as to whether to sponsor a retirement plan independent of the state program to the extent there is uncertainty attendant to such programs.

Paragraph (h)(1)(ix) conditions the applicability of the safe harbor on, among other things, an employer providing "no bonus or other monetary incentive to employees participating in the program." It is not clear to us why the Department, in pursuing a safe harbor that is intended to expand retirement coverage and savings, would affirmatively preclude an employer from incentivizing its employees to save. It is not hard to imagine that some employers may want to encourage such savings through a bonus, pay increase, or some other monetary or non-monetary reward. We encourage the Department to eliminate this condition from the safe harbor. We further note that

such a limitation does not exist with respect to employers that opt to offer a payroll deduction IRA program pursuant to 29 CFR § 2510.3-2(d).

Regulatory Impact Analysis

In proposing the subject safe harbor, the Department clearly recognizes that it will be providing a needed mechanism for states to move forward with IRA-based mandatory savings programs. In the absence of such a safe harbor or similar guidance from the Department, such state efforts clearly would be frustrated. The Department, therefore, must, in our view, take into account in determining whether the rulemaking is economically “significant” for purposes of E.O. 12866 and whether the rulemaking impacts a substantial number of small entities for purposes of compliance with Regulatory Flexibility Act, the ultimate impact of the rulemaking on employers, particularly small employers, in states, potentially all states, that may take advantage of the Department’s safe harbor.

We note first that the “minimal” employer involvement contemplated by the proposal in the state program does not necessarily equate to “minimal” burden or “minimal” costs being expended by employers. The Department’s regulatory impact analysis appears to contemplate that at least some subset of employers will need to update their payroll systems to accommodate a state program and specifically requests information and data to make a thorough assessment. We suggest that, even if the cost of a systems change is small, the aggregate number of impacted employers impacted by the safe harbor will result in an annual effect on the economy of more than \$100 million or more. We further note that impact of the safe harbor on employers goes beyond mere payroll system updating, but, in fact, contemplates that all employers will be providing notices to their employees and maintaining records regarding the collection and remittance of contributions (paragraph (h)(1)(viii)(B); providing information to the state necessary to facilitate the operation of the program (paragraph (h)(1)(viii)(C); and distributing program information to employees (paragraph (h)(1)(viii)(D), all of which will involve employer time and effort and; therefore, should be taken into account in determining whether the rulemaking is significant for EO 12866 purposes.

In addition, as recognized by the Department, the compliance “costs that are incurred could fall most heavily on small and start-up companies, which tend to be the least likely to offer pensions.”¹⁰ We agree with the Department’s assessment and for that reason, given the magnitude of the small employer community nationwide, questions are raised concerning the basis for the Department’s conclusion that the safe harbor “would not have a significant economic impact on a substantial number of small entities” for purpose of the Regulatory Flexibility Act.¹¹

¹⁰ 80 Fed. Reg. 72012

¹¹ 80 Fed. Reg. 72013.

Comments on Interpretive Bulletin § 2509.2015-2¹²

While the Department did not invite public comment on its “interpretive” guidance, we nonetheless would like to share our concerns with the Department regarding the limited scope of the guidance and the novel interpretation set forth in support of state sponsorship of multiple employer plans (MEPs).

With regard to the scope of the subject guidance, we are troubled that the Department chose to limit its guidance to state sponsorship of MEPs. For several years there has been recognition that far too many working Americans do not have access to workplace based retirement plans and a growing recognition that private sector open MEPs could play a role in addressing this problem. This recognition is evidenced in part by the fact that bipartisan legislation has been introduced in both the House and the Senate that would promote and foster the use of MEPs through private sector sponsorship.¹³ Until the subject guidance, the Department has refrained from providing any guidance, regulatory or interpretive, that would expand MEP sponsorship and participation opportunities.¹⁴ Unfortunately, when the Department ultimately decided to engage in efforts to address the retirement coverage gap, rather than issuing guidance that would serve to expand the opportunities for MEP sponsorship generally, the Department elected to support only open MEPs sponsored by a state; a position that, in our view, tips the scale away from private sector plan sponsorship to government run retirement programs.¹⁵

The private retirement system has worked well for millions of working Americans.¹⁶ In this regard, we believe that the Department of Labor, in addition to assisting states, should be attempting to build on the successes of the private retirement system by, among other things, removing impediments to plan sponsorship, including the use of MEPs. Therefore, we strongly encourage the Department, in consultation with the Department of the Treasury and the Internal Revenue Service, to issue interpretive and/or regulatory guidance that will facilitate the establishment and operation of open MEPs by private sector entities.

¹² 80 Fed. Reg. 71936 (November 18, 2015).

¹³ For example, S. 266 (Collins-Nelson), H.R. 557 (Buchanan-Kind), H.R. 4067 (Kind-Richert).

¹⁴ See ERISA Advisory Opinion Nos. 2012-04A and 2008-07A

¹⁵ We note that the Department’s efforts to amend the definition of “fiduciary” may, by virtue of the proposed constraints placed on engaging small employers, further complicate the offering of private sector solutions; resulting in a further tilt in favor of government operated or sponsored programs. See proposed paragraph (b)(1) of proposed §2510.3-21 (80 Fed. Reg. 21957, April 20, 2015).

¹⁶ See [Our Strong Retirement System: A success story at https://www.ici.org/pdf/ppr_13_strong_retirement.pdf](https://www.ici.org/pdf/ppr_13_strong_retirement.pdf)

Turning to the substance of the guidance, we are concerned that the Department's analysis in favor of state sponsorship of MEPs appears to be without support in past interpretations or the statute. We, therefore, are concerned that the guidance may not garner the judicial deference necessary to assure states that any state sponsored MEP program would not run afoul of ERISA or its preemption provisions.

First, we understand that judicial deference to agency interpretations typically turns on, among other things, the thoroughness evident in an agency's interpretation, the validity of its reasoning, and its consistency with earlier interpretations.¹⁷ In its effort to accommodate state sponsorship of MEPs, however, the Department appears to have abandoned its long held views regarding MEP sponsorship in favor a new interpretation that finds, for purposes of ERISA plan sponsorship, "a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that a state should be considered to act indirectly in the interest of the participating employers."¹⁸ The Department, providing no analysis or explanation as to what is "unique" about a state's representational interest or how such interest supports plan sponsorship, may limit a court's ability to afford the interpretation deference with respect to the application of ERISA or its preemption provisions, without regard to the well intentioned policy goals of the guidance.¹⁹ In addition to expanding its scope to encompass private sector arrangements, we encourage the Department to further clarify and expand its analysis taking into account the foregoing.

Second, we are concerned that the Department's analysis may not, without further explanation, fully comport with the statute. As recognized by the Department , for a "person" (other than an employee organization) to sponsor an ERISA-covered plan, such "person" must either act directly as the employer or indirectly in the interest of an employer in relation to an employee benefit plan.²⁰ The Department then expresses the view that "a state has a "unique representational interest" such that it can be considered to "act indirectly in the interest of the participating employers."²¹ The analysis, however, does not explain how a "state," as defined in ERISA section 3(10), can be a "person" for purposes of plan sponsorship under Title I of ERISA. In this regard, we note that ERISA section 3(9) defines the term "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization."

¹⁷ See *Skidmore v Swift & Co.* 323 US at 140

¹⁸ § 2509.2015-02(b), 80 Fed. Reg. 71939

¹⁹ Deference may be further complicated by the fact that neither the provisions of ERISA section 210 nor the provisions of Internal Revenue Code section 413(c), or the regulations issued thereunder, provide support for the interpretation set forth in the subject guidance.

²⁰ § 2509.2015-02(b), 80 Fed. Reg. 71938

²¹ See § 2509.2015-02(b), 80 Fed. Reg. 71939

Inasmuch as the ERISA's definition of "person" does not include a "state" or any other governmental entity or subdivision thereof, we are concerned that courts might find, contrary to the Department's guidance, that states cannot sponsor ERISA-covered plans.²² Such uncertainty raises questions for both states and participating employers. For example, should a state's MEP be found not to constitute an ERISA-covered plan, would each employer participating in that MEP be treated as maintaining their own standalone ERISA-covered plan, with respect to which they are responsible for compliance with the reporting, disclosure, fiduciary and other requirements of ERISA?

Taking into account the foregoing discussion, we strongly encourage the Department to provide the clarifications necessary to bring certainty to the issue as to whether a state can, consistent with ERISA, sponsor multiple employer plans.

We also encourage the Department to work with the Department of the Treasury to resolve tax issues relating to the risk of plan disqualification and participating employer liability attendant to noncompliance with the tax qualification requirements by any one participating employer. Such risk and liability will continue to be a concern for potential MEP participating employers so long as these issues remain unresolved.

We thank the Department for the opportunity to share these comments. Should you have any questions or wish to discuss any of the matters discussed herein, please contact Robert J. Doyle, Vice President, External Affairs, at robert.j.doyle@prudential.com or 202.306.9455.

Best Regards,



Christine Marcks

Copy to: Phyllis C. Borzi, Assistant Secretary
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²² The Department appears to have recognized this ERISA coverage problem in an information letter from John J. Canary to J. Mark Iwry, U.S. Department of the Treasury (December 15, 2014) finding that a governmental entity can sponsor a retirement savings program for private sector employees without that program being treated as an ERISA-covered plan. While the referenced letter related to the myRA offered by the federal government, the rationale would appear applicable to any governmental entity.