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January 13, 2016

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

Re: RIN 1210-AB71

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S., with more than 7 million people in the plans we serve, Empower Retirement appreciates the opportunity to share our comments and concerns regarding the Department of Labor, Employee Benefits Security Administration's (EBSA) recent proposal of regulations governing Savings Arrangements Established by States for Non-Governmental Employees.

At Empower we are keenly aware of the coverage challenges facing our nation's retirement programs. We applaud any efforts that would encourage American workers to save for and be better prepared for retirement. We also believe, however, that employer sponsored plans offer the best vehicle for helping workers achieve their retirement goals. As was noted in Interpretive Bulletin 2015-02, there are a number of advantages inherent to employer sponsored retirement plans over Individual Retirement Accounts (IRAs), including the ability to make employer contributions, higher contribution levels, the ability to consolidate retirement savings accounts over the course of one's working career, and the protections afforded by the Employee Retirement Income Security Act (ERISA).

At Empower we have supported the establishment of an Automatic IRA program at the federal level. While all evidence supports the advantages of employer sponsored plans, any measures that encourage retirement savings are helpful. We recognize that a federal program

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would require an act of Congress, but we believe those American workers and the businesses that employ them would be best served by a uniform set of rules and standards to which they must comply. Employers with workers in different states would face new administrative challenges in complying with the provisions of multiple state programs.

In reviewing the proposed guidance on state savings arrangements, there are several provisions that raise some concerns.

The Department requests comment on the extent to which these state arrangements might extend beyond the boundaries of the state. Specifically: "The proposal does not address whether the employees that participate in the program must be employed within the state that establishes the program, or alternatively whether the covered employees must be residents of the state or employed by employers doing business within the state." We believe that any safe harbor should be limited to only those employees who are residents of the state and employed by an employer whose principal place of business is within the state sponsoring the program. If the proposal allows individual states to impose a mandate on any company to which it can legally impose its laws based on the very complex rules governing state jurisdiction, the result would be that small employers, particularly those who operate near state lines and may have employees in multiple states, may need legal counsel to understand whether they are subject to these state arrangements. The mandate must be clear in its application in a common sense way that small employers can interpret and must not leave open the possibility that a single employer be required to participate in multiple state plans.

The proposal also states: "A state program that meets all of the foregoing conditions will not fail to qualify for the safe harbor merely because the program is directed toward employees who are not already eligible for some other workplace savings arrangement." We fear this could introduce new burdens on those employers who have already taken on the fiduciary responsibility, expense and administrative duties associated with sponsoring a retirement plan covered by ERISA. States should not require employers to automatically enroll employees, such as interns, part-time and seasonal workers and other employees who have not met plan's eligibility requirements. Should the employer have employees in different states, they could face the burden of complying with multiple state arrangements while still maintaining their own ERISA covered retirement savings plan.

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It would seem unnecessarily punitive to subject employers who have taken the admirable step of providing a workplace savings program to these state arrangements. Any final rule should make clear that any employer sponsoring a qualified plan should not be subject to these arrangements for any of their employees.

We are also concerned about the number of very significant questions left open by the proposed rule. For example, what are the consequences of a single employer acting inconsistently with the safe harbor (e.g. making employer contributions)? Does the entire program become an ERISA plan? Is there an opportunity to "cure" individual failures? We also believe that the application of the DOL's Proposed Rule on the definition of fiduciary needs to be addressed. The IRA proposal makes it clear that a state does not become an ERISA fiduciary by offering the safe harbor program, but wouldn't it be a fiduciary with respect to all the individual participant accounts by virtue of selecting the default investment or the investment manager?

There are also many logistical issues to consider which, if left unaddressed could impose unreasonable burdens on employers and/or interfere with the success of the programs. For example, what if the employer does not use a professional payroll vendor – can states be required to mandate that cost? If the state covers the cost or provides a vendor solution, we believe that solution should be required to support both state mandated IRA and ERISA plan based options. Having an external payroll vendor is critical to being able to support a payroll deduction based ERISA plan and is a key reason why many small employers cannot cost effectively offer a plan. If states are going to address the payroll vendor issue, it should be done in a way that encourages choice and the opportunity for employees to have access to the enhanced benefits of an employer sponsored plan.

Finally, we believe that any efforts to expand access to payroll deduction based retirement savings should include consideration of expanding the availability of Open Multiple Employer Plans. Interpretive Bulletin 2015-02, which the DOL published in conjunction with its IRA guidance, recognized the value of Open MEPs in addressing the coverage issue and expanded its "nexus" condition to a state's general interest in the welfare of its citizens, which is a broader connection than the type of industry group or association type nexus that's been previously recognized. We applaud the Department in encouraging Open MEPs and other employer plan based arrangements in IB 2015-02, but would like to further encourage it to

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broaden the nexus requirement for Open MEPs in the context of programs offered by private industry. Private industry is better positioned than individual states to design and implement programs that are attractive to employers and employees, cost effective, and successful in helping employees obtain their retirement savings goals. To the extent the Department has concerns about fees, conflicts of interest, etc. in the private sector that it is not concerned with in state offered programs, those concerns, to the extent not already addressed by the Department's recently implemented fee disclosure rules and soon to be implemented fiduciary rule, can be addressed by requiring additional information to be provided in any Form 5500 filed by an Open MEP. There is no compelling rationale for limiting access to employer sponsored plans by only allowing states to offer an Open MEP solution.

We appreciate this opportunity to share our thoughts and comments and would welcome further discussion.

Sincerely,

Edmund F. Murphy, III | President
Empower Retirement

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