January 15, 2016

Via Email: e-ORI@dol.gov

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

Attention: RIN 1210-AB71 Savings Arrangements Established by States for Non-Governmental Employees

To Whom It May Concern:

We are writing to provide comments on the Department of Labor's proposed rule regarding "Savings Arrangements Established by States for Non-Governmental Employees."

In pursuit of the goal of enhancing retirement security for all Americans, we have previously engaged in a wide range of policy discussions.[1] While the federal government provides over $100 billion a year in tax subsidies to encourage contributions to a range of accounts associated with retirement, the majority of these benefits accrue to middle- and upper-income households. Low- and moderate-income Americans, especially those working part-time or for small businesses, are less likely to be offered a tax-preferred retirement plan at work.

One promising way to fill this gap is to promote greater access to savings plans. We believe there is great potential in creating well-design plans which incorporate a set of automatic features that take advantage of the best insights from the field of behavioral economics. Research has clearly demonstrated that making a retirement plan available to employees through their job, while an important first step, is still not as effective as automatically enrolling those workers in a plan but allowing them to opt-out.[2] Furthermore, automatic enrollment is popular among workers, who appreciate its convenience and simplicity. We have also been convinced by evidence that the right set of defaults, including auto-enrollment, payroll deductions, and auto-escalation, are

[1] Reid Cramer is Director and Michael Calabrese is Senior Fellow in the Asset Building Program at New America. Their expertise has provided analytical support for the development of a number of savings and retirement security proposals. See Newamerica.org for a fuller description of their work.
[2] Madrian, Brigitte. 2014. "That Was Easy: The Importance of Auto Features in Promoting Retirement Savings." Washington DC: AAPR Policy Institute.

powerful and should be used to promote important policy goals, such as expanding the participation of low and moderate-income workers in retirement savings plans. Over the past decade, thousands of employers have opted to automatically enroll their workers in 401(k) and other retirement plans. Low- and moderate-income Americans are just as likely to benefit from automatic enrollment and should not be left behind.

The Administration's AutoIRA proposal would create important new opportunities to save, but in the absence of federal action, we have worked with state-based efforts to expand participation and increase the savings opportunities for their citizens.

We strongly support the Administration's efforts under the leadership of Secretary Tom Perez to provide the legal guidance to clarify the relationship between State payroll deduction savings programs and the Employee Retirement Income Security Act of 1974 (ERISA). This guidance to create a safe harbor exemption from ERISA for certain State payroll deduction savings programs, which would clarify the circumstances under which these programs may be established and maintained without creating "employee benefit plans" subject to ERISA, would be a major step forward.

However, further clarification of several key provisions in the proposed rule would further reduce confusion and uncertainty, which in turn would greatly assist states in their efforts to expand retirement coverage for their low- and moderate-income workers. With changes to these administrative and operational provisions, the Proposed Safe Harbor would become an even stronger tool for States to partner with the private sector in promoting responsible payroll savings programs that fully safeguard workers' interests and promote increased savings.

Employer Mandate §2510.3-2(h)(1)(x)

Paragraph (h)(1)(X) links a program's ability to nudge employees into saving via auto-enrollment with a requirement that their employers must join the program; without an employer mandate, only employees who affirmatively elect to contribute may save. We are concerned that because the Proposed Safe Harbor would only apply to employers that are required by State law to participate in the payroll deduction program it would unfairly prevent others from participating. By limiting the participation of other very small employers, and even the self-employed, the potential impact of these efforts will be weakened. This approach also creates needless compliance and enforcement requirements, which will undermine achieving significant policy goals. The employer mandate provision would likely prevent states that choose not to include a mandate from establishing a payroll deduction IRA program with auto-enrollment.

We urge the Department to eliminate the employer mandate requirement and strike paragraph (h)(1)(x).

The Department appears to be concerned that an employer that is not required to participate in the program will be in a position to improperly influence employees to contribute. We believe that so long as an employer has no discretion in choosing program investments, default contribution rates, the IRA custodian, recordkeeper, advisors, communication, etc., an employer voluntarily joining the program will not be in a position to influence employee choices any more than an employer subject to a mandate. Yet there is no reason why an employer that chooses to join a State program would even want to unduly influence its employees to participate in the program.

Employees will not be exposed to greater risk from employer activities if the employer voluntarily decided to join a State program with automatic savings. Legally, an opt-out mechanism is as much a completely voluntary election as an opt-in. While new to IRA-based programs, an opt-out approach with auto-enrollment is simply a tool to help individuals save; it does not change the dynamic that such saving is voluntary. Those wishing not to save in this manner will be free to opt-out. Automatic enrollment with an opt-out for savings programs was initially developed to encourage employees to make 401(k) contributions, which must be considered elective (i.e., voluntary), and the IRS has previously ruled that contributions made under an opt-out are voluntary.

Some ineligible employers may inadvertently or intentionally “sneak” into the Program and auto-enroll their employees. The Proposed Safe Harbor suggests that such non-mandated employers could cause an entire program to fail the safe harbor and become an ERISA plan, with potentially disastrous consequences for the thousands of participating employers and millions of employees.

We believe that an employer mandate is not a legally necessary condition for the Safe Harbor for a State program using auto enrollment and it would unfairly exclude certain employees. If the Department determines that some form of employer mandate is necessary for the safe harbor, then we believe this condition can be relaxed to prevent the problems of excluding workers at small businesses and other employers not covered by the mandate. If the mandate condition remains, we urge the Department to add the following new paragraph (h)(2)(iv):

(iv) Allows employees to participate in a State savings program, including the automatic election and increase provisions in (iii) above, even if such employees’ employer is not required to participate under paragraph (h)(1)(x), or the employer is required to participate, but the employees are not affected by such requirement. This paragraph (iv) shall only apply to a State savings program under which State law requires employers meeting specified conditions, such as minimum number of employees, doing business in the State or years in existence, participate in the program.

Delegation of Authority §2510.3-2 (h)(1)(x)

The proposed regulation says that a “state must…administer the program either directly or through a governmental agency or other instrumentality.” And while most references to “state” in the proposed regulation are paired with the parenthetical “(or the designated governmental agency or instrumentality),” some are not (see paragraph (h)(1)(iii) and (iv)). Many states have adopted plans that delegate administrative and other duties to a quasi-independent board, but the regulation is not entirely clear on how much authority can be legally delegated. We recommend allowing states flexibility, for example, in delegating authority to set default savings rates and other key program design elements. We believe that it would be helpful to know with certainty that such arrangements are within the safe harbor.

Thus, the Proposed Safe Harbor should be clarified to provide that if the program is established *under State legislation, even if it delegates authority to a board or other State-appointed person, the program would be considered to be established pursuant to state law.*

Paragraph, Section (h)(2)(iii) suggests that a program's auto-contribution and escalation features should be "specified under state law." A State legislature should be able to delegate authority to set or change the contribution/escalation rates to an appointed board or other person. *Therefore, this paragraph should be changed to delete the word "specified."*

Program Administration §2510.3-2 (h)(1)(ii) & (2)(ii)

The Proposed Safe Harbor could be read to limit a State's ability to delegate various duties to money managers, recordkeepers and other third parties. Thus, paragraph (ii) provides "[t]he program is administered by the State ...or by a governmental agency or instrumentality of the State, which is responsible for investing employee savings or for selecting investment alternatives for employees to choose." Similarly, paragraph (h)(2)(ii) permits a program to use service providers, if the State or designated governmental agency or instrumentality "retains full responsibility for the operation and administration of the program."

We expect that the programs established by states will often be operated by third parties. Besides typical recordkeeping, reporting, communication and distribution functions, Program moneys will be invested by professional managers (either directly or through designated investment vehicles). States should be able to allocate legal responsibility to vendors as long as the delegating authority retains responsibility for selecting and monitoring the vendor. These third parties should be responsible for their own actions and contractually assumed duties; consumer protections would still apply. The Safe Harbor should clearly reflect this outsourcing approach. Also, the singling out of investments in Section (h)(1)(ii) is confusing.

We recommend that these two paragraphs be revised as follows:

(h)(1)(ii) "The program is administered by the State establishing the program, or by a governmental agency or instrumentality of such State or by a committee, board or other person selected pursuant to State law."

(h)(2)(ii) "A program that utilizes one or more service or investment providers and consultants to operate and administer the program, including the investment of program funds, will not fail to meet the requirements of this section, provided that the State or other person described in paragraph (h)(1)(ii) of this section, is responsible for selecting, monitoring and, as such person deems appropriate, replacement of the providers or consultants."

Allowing Other Entities to Experiment

If states don't act, we believe other government entities might seek to act on their own and pursue policy which expands access to savings plans. However, the proposed rule appears to limit the entities that can administer safe harbor auto-IRA programs to states, and this would needlessly block cities, counties, other state subdivisions, and multi-state coalitions from pursuing their own auto-IRA schemes. While we recognize that there are administrative challenges in establishing a new retirement plan, we believe that those entities should be able to petition DOL for that authority.

Minimizing Withdrawals by Promoting Additional Savings Opportunities

We know from experience that people will make withdrawals from their savings plans and use resources prior to retirement. When people experience job loss, income shocks, and other unexpected contingencies, they will choose to access the financial resources at their disposal. We do not believe the federal government should impose penalties on these withdrawals and commend the rules for the provision in paragraph (vi) that would not permit a program to impose any "restriction," "cost" or "penalty" on an employee's ability to withdraw, transfer or rollover their IRA.

However, we do see a need for additional innovation that can both protect resources deposited to accounts and promote broad financial security. We believe this can be best done by finding ways to connect workers to additional accounts that can hold savings flexibly. Over the long term, we see a great deal of value in the development of a bifurcated system that helps people make deposits to both a retirement account and a more flexible savings account. This approach would help people build up the pockets of savings that they can tap at discretion to prevent the need to withdrawal money for their retirement plan and we urge the Department to leave the door open for such needed innovation.

Conclusion

In sum, we strongly support the Department's goal of allowing States to establish payroll deduction IRA savings programs that are exempt from ERISA regulations. The exemption will enable States to partner with private sector investment managers, recordkeepers, custodians and other third parties to create simple, low-cost programs and enable lower income workers to save for retirement. We believe that eliminating the mandate condition and making certain other simplifications and clarifications to the Proposed Safe Harbor will extend the benefits of these IRA savings programs to more lower-income employees and reduce program administrative costs without sacrificing any worker safeguards.

Thank you for your consideration of these comments.

Sincerely,

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