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January 19, 2016

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

Attention: State savings Arrangements Safe Harbor

Via online submission: http://www.regulations.gov

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

To Whom It May Concern:

I am writing to comment on the Department of Labor's proposed rule on Savings Arrangements Established by States for Non-Governmental Employees. As a lawyer, and a small businessman operating a law practice with several employees, I have in the past sponsored a 401(k) plan. I have found that based on the cultural and demographic make-up of my employee base, that this has not been a valued benefit. I have therefore not sponsored such a plan for several years.

I am troubled, but not surprised by state policy makers that believe they know better than I what is best for my business and my employees. Such hubris is appalling and the Federal Government should not be encouraging states to interfere in employee/employer relationships.

Nevertheless I assume the Department and the states will continue to move forward with interference, so I need to point out a significant flaw in the Department's proposed rule.

As an employer, my employees are very important to me and so is their protection. As a former sponsor of a 401(k) plan, I am familiar with the protections afforded to employees under ERISA. These are necessary and important under this Federal statute. Under no circumstances do I trust that a state program that is exempt from the Federal statutory requirements could come close to providing the protections afforded by ERISA. The proposed rule provides guidance to states for establishing a program that is outside of ERISA and its protections. In order to meet the requirements and fall outside ERISA, there are several conditions that must hold. Among those is the requirement that employer involvement is limited to certain ministerial tasks (2510.3-2(h)(1)(viii)).

The fact is that states have no right and cannot control my involvement as an employer regarding my relationship with my employees. In fact, if one of these state programs mandated that I provide this benefit to my employees, it seems I could easily ensure ERISA protection for them simply by endorsing the program beyond the requisite ministerial tasks. In fact, to be certain, I could easily implement due diligence and oversight procedures, and file a Form 5500 to ensure there is no ambiguity as to the ERISA applicability to "my" employee benefit pension plan, as determined at employer rather than program level.

It seems to me, therefore that unless structured as a registered investment company, the investment manager would then become an investment fiduciary for ERISA money under the program. Even as a registered investment company, this would likely implicate ERISA on the entire program, and given the mandate, would likely implicate preemption, as discussed in detail in the preamble. It seems that the guidance offered under this proposed rule is predicated on a very shaky house of cards, dependent on the actions or inactions of small employers such as my firm.

I strongly recommend that the Department reconsider its proposal, or we will likely see significant litigation in this area that could otherwise have been avoided. If the Department insists on moving forward with the proposal, then I strongly suggest making clearer the ERISA implications to the state and the investment managers if there is any deviation from the guidance, including by parties over which the state has no control.

Thank you for the opportunity to provide this comment.

Sincerely,

David Schachter, Esq.