January 19, 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, D.C. 20210

Attn: State Savings Arrangements Safe Harbor

Re: Comments on Department of Labor Proposal Regarding State-Sponsored Retirement Savings Programs (RIN 1210-AB71)

Ladies and Gentlemen:

Voya Financial, Inc. ("Voya")[1] appreciates the opportunity to comment on the recent Department of Labor (the "Department") proposal (the "Proposal")[2] to adopt a "safe harbor" within which certain state-sponsored payroll deduction programs would not be subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Department's Proposal is intended to tackle a crisis in retirement savings: millions of American workers lack access to workplace retirement savings plans, disproportionately those who work for small employers. As America's Retirement Company™, we agree with the Department that there is an urgent need to address this retirement savings gap, and that a necessary step in doing so is to expand access to workplace retirement savings plans.

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[1] Voya Financial, Inc. (NYSE: VOYA) serves the financial needs of approximately 13 million individual and institutional customers in the United States. A *Fortune 500* company, Voya's guiding principle is centered on solving the most daunting financial challenge facing Americans today — retirement readiness. Working directly with clients and through a broad group of financial intermediaries, independent producers, affiliated advisers and dedicated sales specialists, Voya provides a comprehensive portfolio of asset accumulation, asset protection and asset distribution products and services. With a dedicated workforce of approximately 6,500 employees and an independent sales force of approximately 2,200 registered representatives, Voya is grounded in a mission to help Americans save, invest and protect for a secure retirement.

[2] 80 Fed. Reg. 72006 (November 18, 2015).

We do not, however, believe the system that would be enabled by the Proposal – a 50-state patchwork of government-administered retirement savings vehicles with inconsistent state and local regulations, low annual contribution limits, no opportunity for employer contributions and limited access to retirement planning and advice – would successfully address the retirement savings gap. Rather, we believe the Department should take steps to encourage small employers to adopt 401(k) and similar retirement savings plans that have a long track record of helping Americans successfully prepare for retirement, and to provide their employees with access to retirement planning and advice. Furthermore, we are concerned that creation of a patchwork of state government-administered plans would take momentum away from subsequent implementation of solutions that would more successfully address the retirement savings gap. We therefore respectfully urge the Department to withdraw the Proposal entirely, and to pursue the alternative means of addressing the retirement savings gap that we describe in this letter.

The Department describes the Proposal as resolving an issue of federal pre-emption of state law. At the most technical level, this is accurate – but this description does not convey the significant policy choice the Proposal represents. If the Proposal is not adopted, state laws mandating IRA savings programs with auto-enrollment features will be invalid as preempted by federal law.[3] Adoption of the proposal would thus enable the creation of an entirely new system of mandatory, state-administered retirement savings plans, spread across 50 states,[4] with attendant issues of state law conflicts, lack of uniformity and questions regarding portability (different rules in each state, and different systems, placing a burden on employees and employers as they move from state to state). Consequently, the Department's Proposal is not merely addressing a technical matter of law – it is flipping a switch that will enable a new system

[3] Section 514 of ERISA pre-empts any state law that "relates to" any employee benefit plan subject to ERISA. Federal courts have interpreted this section as pre-empting state laws that would, among other things, mandate any benefit structure subject to ERISA. Indeed, the three states that to date have adopted laws creating mandatory IRA programs of the type described in the Proposal (Illinois, California and Oregon) included in their laws provisions preventing implementation unless and until confirmation is received that the programs will not be subject to ERISA. IRA programs that do not include auto-enrollment features are already exempted from ERISA's application under the Department's Rule 2510.3-2(d), provided the programs meet the other conditions of the rule, though the Department presumably views auto-enrollment as key to enhancing retirement savings for the currently underserved market – a position with which we agree.

[4] Plus the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island and the Canal Zone, should any such governmental entity wish to adopt mandatory IRA savings programs. See ERISA Section 3(10) (defining "State" for purposes of ERISA).

of state-mandated retirement plans to grow. We believe this is a significant public policy decision, and urge the Department to carefully consider whether this is the most effective way to address the retirement savings gap.

It is of course not the Department, but the states themselves, enacting laws that would benefit from the Proposal's safe harbor, and in that respect the Department is merely removing an obstacle, not making policy. Yet these states, recognizing the fiscal strain created by underfunded retirees needing state services, are acting in the absence of a uniform and credible strategy at the federal level,[5] and no state, as far as we are aware, has suggested that a patchwork of state plans is the best fix. Rather, it seems the states are doing the best they can, with the tools available to them, to address the retirement savings gap in the absence of federal leadership. We respectfully suggest that the better course of action in this circumstance is for the Department, as the federal regulator with jurisdiction over retirement savings plans, not to support a state-based system created in the absence of federal leadership – but instead to support a federal strategy that will encourage small employers to make 401(k) and similar plans more broadly available to their employees.

Concurrently with publication of the Proposal, the Department published interpretive guidance clarifying that ERISA does not pre-empt certain voluntary state-based programs that make ERISA and non-ERISA plans available to employers (the "Interpretive Bulletin").[6] In the Interpretive Bulletin, the Department confirmed its view that, because of the voluntary nature of these programs (distinguished from the mandatory programs addressed by the Proposal), the state laws that create them are not pre-empted by ERISA – even if the plans themselves may be subject to ERISA. While this comment letter relates to the Proposal and not to the Interpretive Bulletin, we support any efforts by states to make high-quality, private-sector retirement saving and advice solutions available to the currently underserved market, and encourage states to focus their efforts on solutions with proven track records.

[5] Federal legislation has been proposed, so far unsuccessfully, that would require most employers who do not offer another workplace savings plans to provide one to their employees. See, for example, the Automatic IRA Act of 2015, H.R. 506, 114th Cong. (2015).

[6] Interpretive Bulletin 2015-02, 80 Fed. Reg. 71937 (Nov. 18, 2015) (the "Interpretive Bulletin"). States adopting or considering voluntary programs include Washington (creating a "marketplace" in which employers can access coverage under either ERISA or non-ERISA plans), Massachusetts (creating a prototype plan for use by small nonprofit organizations) and Maryland (considering establishment of a state-sponsored multiple employer plan).

As noted above, we agree that a retirement savings crisis exists, and we commend the Department for taking steps to address it. We share the Department's goal of making more Americans retirement ready. Set forth below are our more detailed comments on the Proposal.

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1) 401(k) and similar ERISA-based plans will more successfully address the retirement savings gap than state-mandated IRAs.

The goal of any solution to the retirement savings gap should be to make currently underserved Americans <u>retirement ready</u> – financially independent through retirement. In our experience serving approximately 4.5 million retirement customers in the United States, retirement readiness is best achieved through a combination of (i) automatic enrollment, (ii) a sufficiently high limit for employee contributions, (iii) flexibility for employers to match contributions, (iv) access to high-quality retirement planning and advice and (v) availability of an appropriate range of investment alternatives, including actively managed funds.

The state-based system facilitated by the Proposal would only allow employee contributions up to the annual pre-tax contribution limit for IRAs (currently $5,500), would not permit any employer match,[7] and would not appear to offer meaningful access to retirement planning and advice. We contrast this with the current pre-tax deferral limit for 401(k) plans of $18,000 per year, with matching employer contributions allowed, and an active market for providing in-plan advice and retirement planning.

Plainly, encouraging small employers to offer retirement plans with meaningful savings and growth opportunities, rather than requiring[8] them to provide IRAs that must stay outside of the bounds of ERISA, will better position currently underserved employees to become retirement ready. We believe, therefore, that the Department's goal of increasing the retirement readiness of

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[7] An employer match would cause the plan to fall outside of the Proposal's safe harbor and be subject to ERISA.

[8] The Proposal's safe harbor would only apply to IRAs that entitle workers to opt out of making contributions. Thus, the mandatory nature of state programs with auto-enroll features, while presumably contributing towards increased participation in a currently underserved market, may be challenged by lower compensated employees choosing to stop contributing to a plan in which there is no employer match to incentivize participation.

the currently underserved population would be met more effectively by identifying and addressing the reasons why small employers are often hesitant to make 401(k) and similar plans available to their employees.

In our experience, small employers are often reluctant to offer retirement plans that are subject to ERISA because of the costs and liabilities associated with doing so. Prominent among concerns our clients have expressed are (i) costs associated with non-discrimination testing and the potential for return of excess deferrals, (ii) mandatory employer contribution costs associated with alternative methods of meeting discrimination testing requirements through either a Simple IRA Plan for Small Businesses[9] or a Safe Harbor 401(k) Plan[10], (iii) immediate vesting requirements that do not promote employee loyalty[11], (iv) potential liability associated with ERISA fiduciary status, and (v) time needed to administer the plan. We therefore suggest that the Department, in coordination with the Internal Revenue Service, and supporting legislation where required, seek to streamline the process for small employers to offer plans in compliance with ERISA and applicable tax law. Specifically, we believe the following steps would meaningfully enhance participation in the ERISA plan market by employers who do not currently offer workplace retirement savings plans to their employees:

- **Eliminate Counterproductive Barriers to Establishment of Safe Harbor 401(k) Plans and Simple IRA Plans for Small Businesses:** Non-discrimination testing requirements (actual deferral percentage, actual contribution percentage, top-heavy testing) present significant challenges for small employers, where the small pool of participants can make compliance statistically challenging. These requirements are waived for employers who adopt Simple IRA Plans for Small

[9] Simple IRA Plans for small businesses with fewer than 100 employees require employer matching contributions up to 3% of compensation or 2% of total eligible compensation.

[10] IRC Sections 401(k)(12) and 401(k) 13, as well as Internal Revenue Regulation1.401(k)-3 describe alternative methods for meeting nondiscrimination requirements (commonly referred to as a "Safe-Harbor 401(k) Plan"). These methods require either (1) an employer contribution of 100% match up to 3% of eligible employee contributions and 50% of the next 2% of eligible employee contributions; or (2) an employer contribution of 3% percent of eligible employee compensation regardless of whether the employee has made a contribution.

[11] Simple IRA Plans for Small Businesses require 100% immediate vesting and Safe Harbor 401(k) Plans require 100% immediate vesting on safe harbor contributions (Note: Safe Harbor 401(k) Plans that have an automatic enrollment feature, and, in theory, have more associated match costs because of increased participation, permit a 2-year cliff vesting schedule (*see* IRC Section 401(k)(13)(D)(iii)).

Businesses and Safe-Harbor 401(k) Plans, but these alternatives require an employer match and, in many cases, immediate vesting of the employer match. These requirements act as disincentives to employers who might otherwise make ERISA plans available to their employees. We believe it would better prepare currently underserved American workers for retirement to reduce or eliminate these costs – thus increasing the number of small employers willing to make ERISA plans available. Indeed, that view is consistent with the Department's rationale for the Proposal – which eliminates entirely ERISA's application to a system in which no employer match is even permitted. In our experience, plans with assets under $1 million are the most likely to be terminated, and often have challenges growing, so we think the greatest relief should be provided to the smallest plans. We therefore suggest the following as ways to reduce costs to small employers and make ERISA plans more widely available in the workplace:

- **Allow Flexible Match Optimization:** Recent studies have shown that employers can increase overall contributions made to retirement plans if, instead of matching employee contributions dollar-for-dollar up to a modest cap (e.g., 100% match up to 3% of compensation), they match a lower percentage up to a higher cap (e.g., 25% match up to 10% of compensation).[12] This type of arrangement would not, however, satisfy the dollar-for-dollar match requirements for Safe Harbor 401(k) Plans. Permitting the match requirement to be satisfied through an optimization formula, rather than a dollar-for-dollar match, would support the Department's goals of improving overall retirement readiness.

- **Vesting of Employer Contributions:** Currently, Simple IRA Plans for Small Businesses and Safe Harbor 401(k) Plan employer contributions for plans with no auto-enrollment feature must be immediately 100% vested. In our experience, delayed vesting of the employer match / contribution is

[12] Benartzi, S. (2012). *Save More Tomorrow: Practical Behavioral Finance Solutions to Improve 401(k) Plans*. New York, NY: Penguin. See pp. 64-69.

an important retention and incentive tool – one that is lost for employers who wish to rely on alternative methods of meeting non-discrimination testing requirements. We recommend eliminating this requirement entirely – or, as an alternative, permitting plans with assets below a reasonable threshold, such as $500,000, to use a multi-year vesting schedule even where there is no auto-enrollment feature.

- **Increase opportunities for small employers to participate in Multiple Employer Plans ("MEPs"):**
  - Remove artificial barriers to creation of "open" multiple employer plans ("MEPs"); The Department has interpreted ERISA to require a "nexus" between employers that participate in a multiple employer plan. No such nexus is required under the text of ERISA, applicable provisions of the Internal Revenue Code, or case law. The "nexus" requirement, in our view, does not serve any public policy and artificially restricts the market for "open" multiple employer plans, where small employers can benefit from economies of scale and greater collective negotiating power.
  - Eliminate rules that impute non-compliance (e.g., with non-discrimination rules) of one employer that participates in a MEP to the entire plan – thus putting all participants at risk for actions of parties over which they have no control.
- Clarify and enhance rules permitting electronic delivery of plan documentation and communications, and simplify and streamline required disclosures that impose costs on small employers.

2) *The Proposal is inconsistent with the Department's pending fiduciary proposal.*

The Department recently proposed to revise the definition of the term "investment advice" under ERISA's definition of "fiduciary", together with a proposed new Best Interest Contract exemption, and amendments to Prohibited Transaction Class Exemption 84-24 and other existing prohibited transaction class exemptions (collectively, the

"Proposed Fiduciary Standard").[13] The Proposed Fiduciary Standard would significantly expand the reach of ERISA by expanding the circumstances in which an investment recommendation with respect to ERISA plan or IRA assets would be deemed investment advice, thus triggering ERISA fiduciary status.

The Proposed Fiduciary Standard would have the most pronounced impact on participants in small to mid-sized plans (those with assets under $100 million or with fewer than 100 participants), where key exceptions from fiduciary status would not apply. As we noted in our comment letter on the Proposed Fiduciary Standard, we are concerned that expanding the scope of ERISA as proposed would jeopardize retirement income, accelerate leakage from retirement plans and limit plan participants' and IRA owners' access to information – the opposite of the Department's goal of expanding access to quality retirement planning and asset management for America's workers and retirees.

According the Department, the purpose of the Proposal is to limit ERISA's scope in order to exempt a new and potentially significant segment of the retirement savings market from ERISA. This segment would disproportionately include those who work for small employers. In other words, the Department now has two pending proposals that would move in opposite directions for the underserved small-employer market. Where private industry provides solutions, the Proposed Fiduciary Standard would tighten ERISA's application, enhance the burdens on service providers and others, and, in our view, have the effect of restricting, not increasing, access to retirement solutions in the underserved market. Where state governments provide solutions, the Proposal would provide a blanket exemption from ERISA for retirement plans offered to the very workers that it seeks to protect with the Proposed Fiduciary Standard.

We can think of no public policy served by these conflicting standards. Rather than lowering barriers to effective participation in high-quality retirement plans and providing opportunities for private industry to provide products and services that have a long track record of success, the Department is increasing barriers to private industry while eliminating barriers to state government-administered plans that would be less effective at addressing the retirement savings gap. The private sector has proven highly effective at getting American workers

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[13] 80 Fed. Reg. 21927 (Apr. 20, 2015); 80 Fed. Reg. 21960 (Apr. 20, 2015); and 80 Fed. Reg. 22010 (Apr. 20, 2015).

retirement ready where regulatory barriers do not prevent them from doing so. We share the Department's view that access to workplace retirement plans must be increased in the small-employer market – but do not agree that promoting government-administered solutions over the private sector is the answer.

3) The Proposal will make subsequent adoption of a federal strategy more difficult and may lead to overlapping federal and state systems.

The Department may consider the Proposal to be an incremental step towards addressing the retirement savings gap, with further improvements to follow. We caution the Department against such a view. We believe a 50-state system of state-administered IRA programs would be difficult or impossible to dismantle, once built, and, if other layers are added at the federal level in the future, there will be an even more confusing "50 plus one" patchwork of state and federal standards, rather than a single, streamlined standard.[14]

If the Department is making the Proposal because it believes federal legislation is required in order to have a meaningful federal solution to the retirement savings gap, we urge the Department to work with legislators, private industry and other stakeholders in crafting an appropriate federal framework, such as the suggestions we provide above, rather than creating a state-based system that could later be layered onto a federal solution.

[14] Consider, for example, the system of banking regulation, in which multiple federal regulators (The Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation) and banking regulators in all 50 states, regulate banks in an often confusing and overlapping system. The many attempts over the years to simplify and streamline this system, including proposals to centralize banking regulation at the federal level, have met with stiff resistance and have largely failed.

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We appreciate this opportunity to comment on the Proposal and would be happy to answer any questions or provide additional assistance to the Department.

Sincerely,

Charles Nelson
Chief Executive Officer, Retirement

Voya Financial, Inc.