TheStandard®

January 19, 2016

Mailed Electronically: e-ORI@dol.gov

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

RE: Savings Arrangements Established by States for Non-Governmental Employees (RIN 1210-AB71)

Greetings:

Standard Retirement Services, Inc. ("Standard") appreciates the opportunity to comment on the Department of Labor's proposed rule and accompanying interpretive bulletin providing guidance to states on state-sponsored savings programs for private sector employees.

Standard is an Oregon-based retirement plan services provider with a national presence. We have been providing retirement plan products and services to employer groups for more than 80 years, and currently provide services to over 3000 plans nationwide.[1] This experience has given Standard the tools to develop solutions suited to the needs of both plan sponsors and participants.

I. The Department's Proposed Regulation dealing with Savings Arrangements Established by States for Non-Governmental Employees.

Standard strongly supports efforts to increase and expand opportunities for employees to participate in workplace retirement savings programs. Because there is currently no requirement for employers to offer such plans, the marketplace for retirement plan services is a healthy and competitive one. Still, despite efforts to increase coverage, many individuals working in the private sector have no access to workplace retirement plans, and inadequate retirement savings.

The reasons for lack of access are many. Small employers are often operating on thin margins, and cannot afford either an employer contribution, or the substantial compliance costs incumbent upon sponsoring a qualified plan. Others cannot devote the time it takes to set up and run a plan. Still others believe their employees value a retirement plan less than other types of employee benefits. Congress, regulators and service providers have over time introduced product innovations to address these hurdles, such as automatic IRAs, simplified testing for 401(k) plans, availability of safe harbor plan designs, and automatic enrollment. Yet a significant portion of our workforce remains without a workplace savings plan.

1 As of 9/30/15, based on internal company data.

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In an effort to address this lack of access, several states have recently passed legislation aimed at creating a state-based pathway to workplace savings. Two common features of state programs germane to the Department's guidance are (1) automatic enrollment in the state program, since automatic enrollment has proven to increase participation when utilized in qualified plans, and (2) a desire for exemption from ERISA for both the employer and the state.

Typically, such state plans are based on ERISA §2510.3-2(d), which provides an exception from Title I of ERISA for an individual retirement account (IRA) facilitated by an employer. However, §2510.3-2(d) requires that an employer have minimal involvement with the program, other than to publicize the arrangement and forward contributions to an IRA provider. This "minimal involvement" requirement has historically been interpreted to preclude automatic enrollment as a feature for IRA employer programs.

To facilitate such state plans, the Department's current proposed regulation creates a new exception, similar to §2510.3-2(d), but one which allows an automatic enrollment as long as the IRA program is a state-sponsored plan which meets certain specified requirements.

The goal of creating greater access to workplace retirement savings and increasing individual's ability to save is laudable, and we are happy to see this issue receiving attention from our legislatures. However, we have several concerns about the Department's proposal, and we appreciate the opportunity to bring them to your attention.

A. **Lack of ERISA Consumer Protections.** As noted, most of the state-based savings programs we have reviewed contain a requirement that both the employer and the state sponsoring the program be exempt from Title I of ERISA ("ERISA"). This is perhaps understandable in that retirement savings programs sponsored by a state for their own employees are exempt from ERISA, and states therefore have little practical knowledge of its detailed requirements. It could also be viewed as a tacit admission of the responsibility and complexity involved in sponsoring a qualified plan.

However, ERISA provides vital consumer protections to retirement plan participants, including: fiduciaries who are required to act solely in the best interests of participants, plan assets being held in trust and not comingled with other assets, the timely deposit of contributions, investments appropriate to the participant's age and risk characteristics, the provision of important notices regarding plan rights and benefits, and the provision of legal recourse. Historically, the Department has vigorously defended and expanded ERISA coverage in order to protect participants.

Rather than insulate themselves from fiduciary responsibility under ERISA, states having their citizen's best interests in mind should be eager to embrace such protections. We are very concerned, therefore, that the Department appears willing to create a system wherein neither an employer nor the state sponsoring a plan will be obligated to comply with ERISA's protective framework. This is particularly troublesome in that some states have a questionable track record in protecting their own employees' pension assets.[2]

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[2] http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/07/the-state-pensions-funding-gap-challenges-persist
http://www.nytimes.com/2015/05/26/us/politics/illinois-pension-crisis.html?_r=0
http://www.oregonlive.com/politics/index.ssf/2015/11/pers_costs_to_soar_in_2017_and.html

The Department's proposed regulation contemplates a retirement program where neither the employer nor the state has fiduciary responsibility to participants of the program. We believe this runs counter to the Department's obligation to insure plan participant's retirement savings are safeguarded, and does a disservice to participants. Accordingly, we urge the Department to continue to protect retirement plan participants, and withdraw the proposed regulation.

As a possible alternative, if the Department is willing to allow automatic enrollment as part of a state-based IRA program exempt from ERISA, there is no legitimate interest in granting such an exemption only to a state entity. A similar enhancement could and perhaps should be part of an employer-sponsored IRA program. The Department could simply add language to §2510.3-2(d), allowing for automatic contributions with notice requirements and opt-out rights similar to those provided to qualified plans. States wishing to require employers doing business in their states to provide some type of workplace savings could still mandate use of such an automatic IRA *without* the expense of creating an entire new state bureaucracy to run such a program. Such an alternative would have the advantage of utilizing the existing IRA framework, providing certainty for plan participants. We strongly encourage the Department to give serious consideration to this alternative.

B. **Harmful long-term effect on health of existing qualified plan system.** We are also concerned that promotion of state-based automatic IRA programs, while done with the best of intentions, will do long-term damage to the existing qualified retirement plan system.

Currently, qualified plans provide participants a number of advantages an employer IRA-based program does not provide.[3] Qualified plans have a higher deferral limit than is available in an IRA, provide the opportunity for an employer contribution, and contain greater consumer protections. In addition, virtually all qualified plan service providers give participants easy access to model portfolios appropriate to a participant's age and risk tolerance, financial education and tools, and access to financial advice. Lastly, plan sponsors are able to take advantage of certain tax advantages of sponsoring a qualified plan. We believe that for most participants, such plans are superior to an IRA-based program.

However, sponsoring a qualified plan comes with costs for employers. Compliance with tax code and DOL regulations is complicated, time consuming and costly, and plan sponsors must be willing to assume fiduciary responsibility for the plan.

We fear that state IRA-based programs could incent some employers to choose such a program over a qualified plan, and may encourage employers who currently sponsor a qualified plan to terminate such plans in favor of utilizing a state-run system, in order to reduce their responsibility, liability, and costs. This would clearly be to the detriment of plan participants, who ultimately would be left with less retirement savings in the long run.

In addition, Title I of ERISA exists at a federal level in order to provide nationwide consistency and certainty to both participants and plan sponsors. Today, regardless of a participant's state of residence, he or she can be confident that their retirement savings are subject to laws and protections that apply in every jurisdiction. Employers who have operations in multiple states can operate their retirement plans under one consistent set of rules. Allowing potentially 50 different jurisdictions to create 50 different retirement systems

[3] http://money.usnews.com/money/retirement/articles/2015/07/20/savings-showdown-401-k-s-vs-iras

is extremely troublesome, can could lead to a confusing array of conflicting state programs, providing fewer protections to participants, and greatly increasing compliance costs to employers.

C. **The State acting as a service provider in competition with the private sector**. There seems to be no compelling public policy rationale for a state to step into a competitive, healthy marketplace such as currently exists in the retirement plan service provider market, nor for the Department to create an exemption from Title I of ERISA for state-run plans, when a much simpler exemption could be crafted that would accomplish the same goal. As noted above in I.A.1, if the Department is willing to allow automatic enrollment as part of a state-based IRA program, there is no legitimate reason that automatic enrollment should not be part of existing exemption §2510.3-2(d). States wishing to require their domestic employers to provide some type of workplace savings could still mandate use of such an automatic IRA, without the expense of creating an entire new state bureaucracy to run such a program. We strongly encourage the Department to give serious consideration to this alternative.

In conclusion, rather than acquiescing to well-intentioned but misguided efforts by a handful of states, the Department should instead continue its focus on protecting plan participants. The Department should work with the industry and with the Internal Revenue Service to streamline and simplify qualified plan regulations. Such efforts would include consolidating and simplifying required notices and their delivery requirements, providing safe harbors for proven successful plan design and best practices, and removing roadblocks that prevent small employers from adopting qualified plans. The current proposed regulation will almost certainly create a two-tiered system in which some individuals have access to robust employer-sponsored qualified plans, with greater savings opportunities, education, savings tools and ERISA protections; while others only have access to a state-run IRA program with little to no consumer protections and a far reduced opportunity for individuals to save an adequate amount for retirement.

II. The Department's Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974.

With regard to the Department's Interpretive Bulletin relating to state savings Programs, we offer the following observations and concerns:

A. **The Marketplace Approach**. With respect to the Marketplace Approach, we strongly support such efforts, and believe such marketplaces will provide a good starting point for small employers to locate a service provider who best meets their and their participant's needs.

B. **The Prototype Plan Approach**. The Prototype Plan approach contemplates a state essentially becoming a service provider to qualified plans. As noted above, we do not believe states should compete with the private sector, nor do we believe the states are well equipped to step into the private sector plan market. We do strongly encourage the Department to update its interpretive bulletin to require that, should a state step into such a role, the state would be subject to the same requirements as private service providers, such as ERISA §408(b)(2) requirements, and the upcoming conflict of interest rules. Such a requirement would help ensure plan sponsors could continue to meet their fiduciary obligations, and ensure the state acts in the best interests of plan participants.

C. **The Multiple Employer Plan (MEP) Approach.** Our concern with states competing with the private sector extends to the Multiple Employer Plans (MEP) approach the Department has articulated. Ironically, the Department's current position on MEPS as set forth in Advisory Opinion 2012-04A has had a chilling effect on the private sector's ability to establish and maintain MEPS. This position is particularly injurious to small business, which cannot take advantage of the economies of scale a MEP could provide. There seems to be little to no policy justification to treat MEPs sponsored by willing service providers differently than states which now desire to perform the same functions. Indeed, a MEP sponsored by a willing service provider would provide plan participants with greater consumer protections under ERISA. We therefore urge the Department to issue new guidance allowing service providers to act in the best interests of plan sponsors and plan participants by sponsoring MEPs.

Again, we appreciate the opportunity to provide comments on the Proposed Regulations and Interpretive Bulletin, and urge your consideration of the points raised. We are happy to answer any questions or to provide additional assistance to the Department.

Sincerely,

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