National Association of Insurance and Financial Advisors

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January 19, 2016

VIA ELECTRONIC FILING – www.regulations.gov

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

RE: RIN 1210-AB71 – Proposed Rule on Savings Arrangements Established by States for Non-Governmental Employees

To Whom It May Concern:

The National Association of Insurance and Financial Advisors ("NAIFA") appreciates this opportunity to comment on the Department of Labor's ("Department") proposed rule pertaining to savings arrangements established by states for non-governmental employees.[1]

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

Executive Summary

While NAIFA appreciates and shares the Department's concerns about inadequate retirement savings among American workers, we believe that the above-referenced proposed safe harbor under the Employee Retirement Income Security Act ("ERISA") for state-established individual retirement accounts ("IRAs") is neither necessary nor an effective solution for promoting retirement planning and security. Further, the safe harbor would create unfair and needless

[1] 80 Fed. Reg. 72006 (Nov. 18, 2015).

competition with private market retirement saving solutions. NAIFA therefore urges the Department to refrain from creating the safe harbor for state-run IRAs.

Should the Department proceed with its proposed safe harbor, NAIFA cautions the Department against creating an uneven regulatory playing field between state-administered IRAs and private IRAs. The Department should clarify that, for purposes of all Department regulations applicable to IRAs, state-run IRAs and private IRAs will be treated the same.

<u>Comments on the Proposed Rule</u>

The Proposed Rule is Unnecessary and does not Address the Root Problems Underlying Inadequate Retirement Planning

The stated purpose of the Department's proposal is to reduce the risk that state programs which satisfy the safe harbor's criteria would be preempted by ERISA. By removing legal uncertainty regarding the applicability of ERISA, the Department seeks to encourage the adoption of these state programs that would require employers who do not already provide a retirement plan to auto-enroll their employees in a state-run retirement savings option. The Department appears to assume, then, that inadequate retirement planning among American workers is being driven by lack of access to retirement savings products. That simply is not the case. A vibrant private-sector retirement planning market already exists, which offers a comprehensive array of affordable retirement solutions to individuals and businesses.

The main obstacles to saving for retirement are job insecurity, pressure to make ends meet, and a lack of awareness of the need to save for retirement and the savings options available. Therefore, to effectively promote better retirement planning in the U.S., Americans must be better educated about the importance of planning and saving, and be provided with practical tools—during the wealth accumulation and distribution phases—to achieve a secure retirement.

While the proposed safe harbor could result in some increase in the percentage of people having an IRA (for some period of time), it would not help with investor education or better long-term planning. The safe harbor does not address the amount or duration of time over which workers are saving, the downsides of premature distributions, or other retirement savings options that are available and may be more appropriate for low- and middle-income investors

Ultimately, these state-run IRAs will produce needless competition with private market solutions and states will expend limited public resources setting up and administering savings arrangements that are no different than those readily available through the private sector, rather than focusing their efforts and resources on the root causes behind inadequate retirement savings through financial literacy campaigns, consumer education programs, and outreach efforts.

The Department Should Avoid Creating an Uneven Playing Field between Private IRAs and State-Administered IRAs

If private-market IRAs have to compete with these state-run programs, they must be able to do so on a level playing field. To the extent the Department exercises regulatory authority over

IRAs, it should treat state-run IRAs the same as private sector IRAs. Any other approach would entail the Department picking winners and losers, and unfairly disrupting the marketplace for these products. Thus, NAIFA urges the Department to clarify that state-run IRAs will be on equal footing with private IRAs under all Department regulations.

The Department's proposed rule clarifies that state-established IRAs which satisfy the safe harbor's requirements will not be considered ERISA plans; they will simply be treated as IRAs. While the proposed rule would alleviate ERISA preemption concerns for these state-run programs, it does not address larger regulatory questions stemming from the Department's regulation of IRAs. Although the Internal Revenue Service has primary responsibility for IRA oversight,[2] the Department does have authority to define prohibited transactions and design prohibited transaction exemptions ("PTEs") for IRAs—authority the Department has exercised recently in a major regulatory proposal (discussed in further detail below).

The Department's recently proposed fiduciary duty rule presents one example of how imposition by the Department of substantial restrictions and requirements on the private IRA market without requiring equivalent restrictions and responsibilities in the state-run IRA market threatens to unfairly undermine the competitiveness of private-market products and establish varying levels of investor protections. In that rule-making, the Department has proposed an expanded definition of "investment advice fiduciary" under the Internal Revenue Code ("IRC"), along with a very complex, onerous PTE for IRA advisors (the Best Interest Contract Exemption). The proposed fiduciary duty rule portends a dramatic increase in the Department's involvement in the IRA space—a development that will cost private IRA advisors a great deal in terms of compliance costs and restructuring client relationships.

The Department has not said how state-run IRAs will be treated under the new fiduciary duty regime, or whether state IRA advisors and service providers (i.e., the state and its instrumentalities) will be held to the same (or any) standards of conduct. A state administering an arrangement that meets the proposed safe harbor's criteria would seemingly be acting as both a service provider and an investment advice fiduciary (and potentially a managing fiduciary).[3] Fiduciaries and service providers are "disqualified persons" under the IRC and are subject to a host of prohibited transactions.[4] And although the IRC prohibited transaction penalty does not apply to "governmental plans," as defined in 26 U.S.C. § 414(d), the state arrangements at issue in the Department's proposed rule do *not* appear to satisfy that definition.[5] As a result, just like

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[2] The proposed rule does not express any view on the Internal Revenue Code's application to these state-run arrangements.

[3] The state, according to the safe harbor requirements, would be charged with establishing and operating the program, and investing employees' savings or selecting investment options from which employees may choose.

[4] *See* 26 U.S.C. § 4975.

[5] "Governmental plan" is defined as "a plan established and maintained *for its employees* by the Government of the United States, by the government of any State or political subdivision thereof,

private investment advice fiduciaries and service providers, it would appear that these state-run IRAs (to the extent they are offering fiduciary investment advice within the Department's definition) should have to either avoid engaging in prohibited transactions (including restrictions on self-dealing, third-party compensation, etc.), fulfil the requirements of an exemption,[6] or pay a penalty.

The Department should clarify that it will apply its fiduciary duty rule—and all other Department rules and restrictions involving IRAs—to these state-run programs. Maintaining a level playing field for private and state-administered IRAs would promote stated policy objectives of the Department. The Department has touted its fiduciary duty rule as a *necessary* action to protect investors and ensure that financial advisors are acting in their clients' best interest. Surely, that goal applies equally in both the private IRA and state-run IRA contexts. The Department may believe that conflicts of interest are less likely to occur with state-run IRAs than in the private market.[7] There is no need, however, for the Department to pre-judge or speculate on the issue--as discussed above, if the states do indeed avoid conflicts of interest (i.e., prohibited transactions), they will avoid PTE requirements and penalties.

Conclusion

NAIFA urges the Department to withdraw its proposed safe harbor rule and avoid creating needless competition with the private retirement planning market. Without the safe harbor, states may be encouraged to invest scarce public resources in more meaningful solutions to the current retirement savings crisis.

If the Department does proceed to a final rule, NAIFA encourages the Department to clarify that it will apply the same rules to state-run IRAs that it applies to private IRAs. Advisors and service providers to private IRAs must, at the very least, be able to compete on equal footing with their counterparts in the state IRA space. And IRA investors should be able to rely on the same protections, regardless of who establishes and administers their IRA.

Thank you very much for considering NAIFA's comments on this proposed rule. Please contact the undersigned if you have any questions or would like to discuss our comments in greater detail.

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or by any agency or instrumentality of any of the foregoing." 26 U.S.C. § 414(d) (emphasis added).

[6] Interestingly, it does not appear that a state could take advantage of the Best Interest Contract Exemption—the exemption designed for IRA advisors. The exemption defines "adviser" as (1) a fiduciary of an IRA by reason of providing investment advice; (2) *who is an employee, independent contractor, agent, or registered representative of a financial institution*; and (3) who satisfies applicable federal and state regulatory and licensing requirements.

[7] It is not difficult to imagine, however, that a state could receive some consideration from third parties seeking to have their products offered through the state's savings arrangement.

Yours Truly,

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