THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401

January 19, 2016

Via e-mail e-ORI@dol.gov

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

RE: **Helping States Expand Retirement Coverage**

Comments on *Savings Arrangements Established by States for Non-Governmental Employees* (RIN 1210-AB71) and *Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974* (RIN 1210-AB74)

Dear Mr. Secretary:

As you know, an estimated one million Marylanders lack retirement savings and are at risk of financial distress when they eventually retire. The primary reason that they lack retirement savings is that their employers do not offer a pension plan or other retirement savings opportunity at work. If something is not done to solve this challenge, Maryland, along with every other state and the federal government, will ultimately be faced with a crisis of catastrophic proportions. However, this crisis is avoidable if we act now.

We have been charged by the Presiding Officers of the Maryland General Assembly with developing a program under which Maryland can provide easier automatic retirement savings options for those whose employers do not offer one. As you know, our ability and that of other states to act depends on being able to do so consistent with federal law, and many of the issues raised by the programs we are considering are groundbreaking.

We commend you and the Department of Labor (the department) both for the proposed rule regarding Savings Arrangements Established by States for Non-Governmental Employees (a notice of proposed rule making (NPRM)) and the accompanying Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974 (the bulletin).

We strongly support the approach taken by the department, aimed as it is at providing states with both flexibility and certainty in fashioning programs appropriate for the needs of their respective citizens and residents. In this letter, we recommend changes for your consideration that we believe will result in better programs with broader coverage and providing greater retirement security. In some instances, we recommend that the department provide greater flexibility; in others, greater clarity and certainty. The following recommendations have been developed in consultation with members of the Maryland Commission on Retirement Security and Savings, of which we are Co-chairs. While each member of the commission may not agree with every recommendation, each recommendation has the support of a majority of the commission.

General Recommendations

Recognize that States are Different from Private Providers and Can Be Counted On to Protect Participants

The department recognizes that state governments are and will remain different from the private sponsors or providers of retirement plans. Governments have no profit motive and are far more publicly accountable than private businesses. The department has recognized this in both the NPRM and bulletin by offering greater flexibility with respect to state-sponsored programs.

Nonetheless, we believe that the department can and should go further. In both the NPRM and the bulletin, the department has based many of its judgments about the scope of potential employer participation on prior Employee Retirement Income Security Act (ERISA) guidance, in particular on the assumption that an employer would pick and choose a plan *of its own design or from a private provider*. We think the circumstances of employers auto-enrolling their employees *in a state-sponsored program are* entirely different: employers will not have the ability to appoint trustees of the state program. Furthermore, employers will have absolutely no control over selection of the plan (other than agreeing to offer auto-enrollment in it to their employees), choice of investments, investment managers or advisors, default contribution rates, or the choice of administrators.

For these reasons, we think the department can and should provide even more flexibility to auto-enroll employees into a state plan than either the NPRM or the bulletin currently provides. If the department did so, it would make it much easier for states both to collaborate and to reduce costs and fees. Our specific suggestions follow.

For State Programs, Avoid Different Standards for the ERISA and Non-ERISA Approaches

Many states, in considering what approach to follow for their program, avoided working within the ERISA. They did so, in part, because of ongoing concerns about preemption but also because of the ERISA's higher standards and the application of those standards to employers. Many of the small businesses that a state program could help simply would not consider participation if doing so resulted in application of traditional ERISA fiduciary obligations to them.

The department now recognizes this issue and has changed some of its traditional guidance, for example, by allowing states to offer multiple employer plans (MEP) that previously would have been prohibited. Nonetheless, with regard to employer legal obligations, the department still proposes to maintain a lower standard for participation in a state-sponsored individual retirement account (IRA) than in a state-sponsored ERISA plan. Under the NPRM, an employer that participates in a state IRA is not a fiduciary[1]. However, if a state offered an ERISA plan, the department says that participating employers will retain "limited" fiduciary responsibilities.[2]

The department's position is, we think, worth reconsidering. The department has urged us to consider incorporating an ERISA approach, and we would like to be able to do so. However, the more restrictive standard makes it less likely that we or other states will choose to offer an ERISA plan and much less likely that employers, given a choice, would participate in one. We urge the department to recognize the special circumstances of state-sponsored programs and, as much as possible, avoid setting different standards for employer participation in one or the other. This issue is discussed in more detail below.

Allow Individual Participation

Whatever program Maryland does eventually adopt, there will be some Marylanders, as well as residents of other states, whose employers will not be subject to a state mandate; do not elect to voluntarily participate; and do not provide other retirement savings alternatives. Such individuals are, of course, legally allowed to make IRA contributions under the existing safe harbor. The department should clarify that employees of nonparticipating employers should be permitted to elect to participate in a state IRA program without jeopardizing the program's status under the new safe harbor.

Additionally, our understanding is that, based on current interpretations of ERISA's multiple employer provisions, such individuals would not be permitted to participate in a state-sponsored MEP. We urge the department to consider whether such participation could be accommodated.

Allow Financial Incentives to Employers

The primary reason why most small businesses do not offer retirement plans is cost. States might choose to address this by providing state tax incentives to employers that enroll in a state program. However, under the NPRM, such incentives might be interpreted as being outside the safe harbor.[3] Furthermore, under the bulletin, it is unclear whether such incentives might be considered preempted. We recommend clarification that states can provide financial incentives to encourage participation without compromising either approach.

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[1] This is so because, under the safe harbor, a participating employer is not establishing or maintaining a plan within the meaning of the ERISA 3(2). NPRM, p. 16

[2] Interpretive Bulletin, p. 9

[3] 29 C.F.R. § 2510.3-2(d)(1)(iv)

Suggestions for the Proposed Regulation

Allow State Plans That Do Not Require a Mandate

The safe harbor established by the NPRM would only apply when employer participation is mandated by state law. Many states would benefit from the additional flexibility to design programs that allow for voluntary enrollment in some circumstances. Even states with mandatory programs will have some employers, *e.g.*, employers falling below a minimum size threshold, that will not be subject to the mandate. (For example, the Illinois employment size threshold of 25 employees would exclude about 90% of all firms and about 20% of all workers[4] – that would imply exclusion of a much higher percentage of workers without an employer provided plan.)

To be sure, the department pointed out that the existing regulatory safe harbor would be available to employers who are not subject to a state mandate. However, the department also takes the position that auto-enrollment of employees – even if they can opt out at any time – does not meet the "completely voluntary" test that the department created in 1975. The department is well aware that the difference between imposing an opt-in requirement instead of an opt-out requirement would result in millions of people not saving at all. A program that lacks such features would not be nearly as effective.

We are aware of the department's concern that an employer's decision to participate in an IRA program, coupled with a decision by that employer to automatic enrollment, *might* be considered enough employer involvement for the program to be considered established or maintained by the employer and, hence, be an ERISA plan. However, an employer's election to participate in an already established state program is fundamentally different from employer's selection from the myriad of private programs, where the employer has the ability to select the provider and the features of the program. A state program would be designed by the state, and its features would generally not be a matter of employer discretion. We believe that this distinction provides a clear basis to permit automatic enrollment of employees in the context of a state-sponsored IRA. Furthermore, because the department is, in fact, defining the scope of the safe harbor through the regulatory process, we contend that it has some discretion in defining the boundaries of that safe harbor.

The department, in the NPRM, accepts the continued validity of the "completely voluntary" test it promulgated 40 years ago. It goes on to cite a variety of instances where an opt-out provision is not easily reversible (*e.g.*, when a child is assigned to a same-sex school and the parents are notified of their ability to opt out only with an obscure notice sent home after the child has already chosen activities). The applicability of such cases to an entirely reversible at-any-time contribution to a Roth IRA is questionable. Given all that we have learned in the 40 years since the department promulgated the completely voluntary test, and the important

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[4] Source: 2012 *Economic Census* of U.S. Firms, U.S. Census Bureau

difference of enrollment in a state-sponsored program versus an unregulated private one, we urge the department to reconsider this judgment in the final rule.

Allow States to Work Together

States should have the flexibility to participate in multistate IRA programs. States, including Maryland, frequently enter into multistate compacts and other agreements. Sometimes these agreements are regional, and sometimes even broader. The NPRM should permit states the flexibility to join together to establish multistate, or even reciprocal, IRA programs without violating the safe harbor.

Allow Commercially Reasonable Withdrawal Limitations

The proposed safe harbor requires that a state place no limitations on withdrawal beyond those provided under the tax code. As a matter of policy, we agree that the imposition of penalties on early withdrawals is not appropriate. However, "leakage" is a serious issue with regard to retirement savings; furthermore, some IRA products necessarily have limitations on withdrawals (*e.g.*, annuities). If the department wants to encourage state programs, states should have at least the same ability as commercial providers to include commercially reasonable withdrawal restrictions in the programs they design. Without the ability to place reasonable withdrawal restrictions, a program's investment design may be limited, possibly resulting in higher administrative costs, less diverse investments, or both. As the clear aim of the NPRM and the bulletin are to provide more avenues for states to find ways to promote individual retirement savings, commercially reasonable withdrawal restrictions are consistent with that aim.

Clarify the Ability to Delegate Authority to a State Agency or State-chartered Corporation

The NPRM specifies that various aspects of a state-mandated IRA must be specified by state law in order to fall within the safe harbor. However, by far, the preferable practice would be for the specifics of program design to be delegated to a board, commission, or agency, rather than codified in legislation. We also note that Section 514(c)(1) of ERISA, 29 U.S.C. § 1144(c)(1), includes an expansive definition of state law that would encompass such delegated authority. We therefore request that the language of the NPRM be clarified to encompass the delegation of authority.

Suggestions for the Interpretive Bulletin

Let State Programs, Not Employers, Be Fiduciaries

One of the key objectives of states considering the establishment of state-sponsored MEPs (State MEP) is to minimize the burdens on the participating employers. In general, the bulletin is helpful in this regard. For example, the bulletin notes that the ERISA reporting and disclosure obligations would be centralized, rather than falling to the individual employers.

Unfortunately, with respect to employer fiduciary obligation, the bulletin is less helpful. It says that, while employers could be freed from the bulk of the fiduciary duties ordinarily associated with the maintenance of an employee benefit plan, some limited fiduciary responsibilities would remain: the duty to prudently select the arrangement and to monitor its operation would continue to apply. We respectfully suggest that the department reconsider this judgment, for several reasons that follow.

First, as a practical matter, it is unclear how an employer could effectively and meaningfully monitor and evaluate the administration of a State MEP when it has no control over the design of the program or the appointment of its trustees.

Second, because the department already allows employers to choose a privately sponsored IRA without fiduciary obligation, they should not be discouraged by the risk of additional liability from allowing their employees automatically to enroll in a better, far more accountable state plan (particularly if that plan has full ERISA protections).

We believe that the model of MEPs is instructive. It has long been established that, if an employer's only role with regard to a MEP is to bargain its participation in the plan, bargain its contribution rate, and actually contribute to the plan, the employer is not a fiduciary to that plan. The only time such an employer would ordinarily be considered a fiduciary to the plan is if it withheld contributions from its employee's pay and failed to remit those contributions. We believe the same model should hold true for a properly constructed State MEP.

Clarify That a State Auto-enrollment Requirement is Not Preempted Merely Because a State Offers an ERISA Plan

The bulletin discusses preemption and says "neither ERISA section 514 specifically, nor federal preemption generally, are insurmountable obstacles to all state programs...[that use] ERISA-covered plans." Unfortunately, the bulletin is otherwise silent and provides no actual guidance as to what might be permissible. Based on the precedent established by the Ninth Circuit in *Golden Gate Restaurant Association v. the City and County of San Francisco*[5], it would help if the department stated that a state auto-enrollment requirement is not preempted merely because the state offers an ERISA plan as a means of complying with that requirement, so long as employers have other means of compliance.

Clarify That States Can Establish Plans without Taxpayer Liability

An additional obstacle to the creation of State MEPs and other retirement savings programs is the fear of additional, unanticipated financial obligations on state treasuries and taxpayers. In a defined contribution plan, a state would not assume any funding liability. The concern, therefore, is over a state's potential fiduciary liability. We believe that the states must have the flexibility to

[5] 546 F.3d 639 (9th Cir.2008), *cert. denied,* 130 S Ct. 3497 (2010)

assign fiduciary responsibilities to the appropriate boards or committees without concern that the state overall, or its officials, may be held liable for the actions of the fiduciaries.

Consequently, we ask the department to clarify its position regarding state liability. We ask that the bulletin be modified to provide that, in the department's view, a state may assign fiduciary responsibilities to the appropriate boards, commissions, offices, or officials, without concern that the exercise of sovereign immunity by state offices and officials not assigned such responsibilities would not conflict with ERISA's remedial provisions.

We very much appreciate the approach taken by the department in its proposals and recognize all you have done to expand opportunities for a secure retirement. We submit these suggestions in the hope of further advancing that goal.

We look forward to working with you and the department as we develop a program for the million Marylanders who need it.

Sincerely,

Douglas J. J. Peters
Co-chair

C. William Frick
Co-chair

Maryland Commission on Retirement Security and Savings

DJJP:CWF/PSA/km

cc: President Thomas V. Mike Miller, Jr.
Speaker Michael E. Busch
Senator Nathaniel J. McFadden
Senator Jim Rosapepe
Senator Andrew A. Serafini
Delegate Ben Barnes
Delegate Jefferson L. Ghrist
Delegate Cheryl D. Glenn
State Treasurer Nancy K. Kopp
Ms. Martha Burman
Ms. Sarah E. Mysiewicz Gill
Mr. Joshua Gotbaum
Mr. Paul A. Green
Mr. Gary Kleinschmidt
Ms. Nailah Gobern Lee
Mr. Terry F. Neimeyer
Mr. James R. Racheff
Ms. Michelle P. Thomas
Ms. Kathleen Kennedy Townsend