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

Attention: State Savings Arrangements Safe Harbor

Via Email: e-ORI@dol.gov

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

To Whom It May Concern:

On behalf of our members, the Insured Retirement Institute[1] ("IRI") appreciates the opportunity to provide comments to the Department of Labor ("DOL") regarding its proposed regulation titled "Savings Arrangements Established by States for Non-Governmental Employees" (29 CFR Part 2510), as published in the Federal Register, Volume 80, No. 222 on November 18, 2015. The proposed regulation would establish a new safe harbor under the Employee Retirement Income Security Act of 1974 ("ERISA") for state governments to create and administer automatic enrollment payroll deduction savings arrangements for private-sector employees whose employers do not offer retirement savings plans.

[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95% of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

IRI and its members support efforts to increase access to retirement savings plans so workers can more easily save for retirement. However, we have a number of concerns about the approach taken in the proposed regulation. In this letter, we will identify and explain our concerns, and offer constructive suggestions to help DOL achieve its goal of expanding coverage while also recognizing the critical role of private-sector solutions in making workplace retirement savings arrangements available to American workers.

IRI research has shown that, with 79 million Baby Boomers in or nearing retirement, and 10,000 reaching retirement age every day, the United States is facing important retirement savings challenges. According to the most recent IRI report on the Boomer generation, only 69% of working Baby Boomers and 50% of retired Boomers report having any money saved for retirement. Of those who reported having savings, only about one-third have saved more than $100,000. Additionally, IRI research found Baby Boomers are having difficulties meeting their current financial obligations, with almost 20% of Boomers saying they stopped contributing to their retirement plans.[2]

This research supports the need for efforts to expand retirement plan coverage. We are concerned, however, that the proposed regulation will discourage employers from offering their employees one of the wide variety of private-sector retirement savings arrangements available today because the proposed regulation would permit state-run arrangements to offer features that make it easier for employers to administer and employees to participate, such as automatic enrollment and automatic escalation features. The existing ERISA exemptions for private-sector arrangements do not allow for the inclusion of these valuable features.

**The Proposed Regulation Disadvantages Many Employers**

A primary objective of the proposed regulation is to create a new safe harbor to facilitate the establishment of state-run retirement savings arrangements not subject to ERISA and facilitate the use of automatic enrollment in these arrangements. To the extent that the arrangement's non-ERISA status is retained, concerns expressed in the proposed regulation regarding potential challenges under ERISA and possible preemption can thus be avoided. However, we would note three specific concerns:

1. The relief provided by the new safe harbor would only apply to an arrangement adopted by a state, leaving out those states with no such arrangement as well as all of the privately maintained non-ERISA arrangements established in compliance with existing safe harbors in DOL regulations § 2510.3-2(d) (safe harbor IRA programs) and (f) (safe harbor 403(b) programs). This creates multiple classes of employers across state lines, who would be treated differently and inequitably. This is inconsistent with Congressional intent in the adoption of ERISA which intends for a uniform set of rules to apply nationwide.

[2] Insured Retirement Institute, *Boomer Expectations for Retirement 2015, Fifth Annual Update on Retirement Preparedness of the Boomer Generation.*

2. The relief also would appear to create a new and independent automatic contribution option independent of existing guidance under the Internal Revenue Code ("Code")[3]. Thus for example it would appear to impose no specific requirements or time limitations that would otherwise be applicable to automatic contribution arrangements under both ERISA and non-ERISA savings arrangements. This could result in the loss of all applicable participant protections embodied in those existing Code provisions, as well as the certainty that existing guidance provides with respect to tax treatment.

3. The proposed safe harbor would apply to plans created by states, but the conditions of the safe harbor include a number of limitations on the role of employers. While the states cannot control individual employers, a single employer engaging in activities beyond those permitted by the proposal could cause the entire program to lose the benefit of the safe harbor.

We respectfully suggest that DOL address these concerns by directing its efforts to expand coverage on employers rather than providing a path for states to act as plan providers. Specifically, in lieu of the proposed safe harbor for state-run plans, the DOL should simply modify the existing safe harbors referenced above to:

1. Allow all IRA and 403(b) programs and arrangements covered by the existing safe harbors to offer automatic enrollment and automatic escalation features, subject to the requirements already applicable to automatic features in non-safe harbor plans; and,

2. If desired, clarify that the existing IRA safe harbor is available for IRA programs offered or required under applicable state law so long as participation by individual employees remains voluntary.

To implement these suggestions, the DOL should make the following revisions to the existing safe harbors:

§ 2510.3-2 Employee pension benefit plan.

**(d)** ***Individual Retirement Accounts.***

**(1)** For purposes of title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code<u>, under a program established by the employer or by a state or other party on behalf of one or more employers,</u> provided that—

[3] See: 26 CFR 1.414(w)-1.

**(ii)** Participation is ~~completely~~ voluntary for employees or members (for purposes of this subparagraph (ii), participation shall not be considered involuntary solely because it involves an automatic contribution arrangement, with or without an automatic escalation feature, that otherwise complies with applicable requirements under the Code for such arrangements, or because participation in a state program is mandatory for the employer but not for an employee.)

**(f)** ***Tax sheltered annuities.*** For the purpose of title I of the Act and this chapter, a program for the purchase of an annuity contract or the establishment of a custodial account described in section 403(b) of the Internal Revenue Code of 1954 (the Code), pursuant to salary reduction agreements or agreements to forego an increase in salary, which meets the requirements of 26 CFR 1.403(b)-1(b)(3) or a state-savings program as described in § 2510.3-2 (h) shall not be "established or maintained by an employer" as that phrase is used in the definition of the terms "employee pension benefit plan" and "pension plan" if

**(1)** Participation is ~~completely~~ voluntary for employees (for purposes of this paragraph (1), participation shall not be considered involuntary solely because it involves an automatic contribution arrangement, with or without an automatic escalation feature, that otherwise complies with applicable requirements under the Code for such arrangements);

These existing ERISA safe harbors have been largely unchanged since ERISA was enacted, and therefore do not reflect improvements in account administration made possible by modern technology. IRI's recommended changes would enable DOL to recognize the ease with which today's plan sponsors and service providers can implement auto-enrollment and auto-escalation features without impeding the ability of individuals to retain control over their retirement planning decisions, including whether to participate and how much to contribute.

It has been shown that auto-enrollment and auto-escalation features help participants save more and increase their savings over time, thereby increasing their earnings and overall savings for retirement.[4] Allowing auto-enrollment and auto-escalation in all types of savings arrangements, whether offered by a state or by a private-sector provider, would help DOL increase the number of workers participating in retirement savings arrangements.

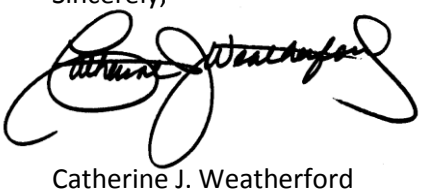
Similarly, IRI believes DOL should expand its guidance regarding multiple employer plans (MEP) offered by states in the "Interpretative Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by ERISA" (29 CFR Part 2509) issued by DOL concurrently with the proposed regulation (as published in the Federal Register, Vol. 80, No. 222). This guidance, which permits states to sponsor and

[4] Insured Retirement Institute, IRI Fact Book 2015, 14th Edition

administer MEPs for non-government employers, does not offer the same option to private-sector plan sponsors who want to establish or participate in similar MEPS because private-sector MEPs would lack the nexus required under the DOL's existing MEP rules. However, if the DOL has determined the required nexus exists to allow for the creation of a state-run MEP, IRI believes the same nexus should permit the establishment of private-sector MEPs.

Thank you again for the opportunity to comment on the proposed regulation and interpretative bulletin. Please feel free to contact Jason Berkowitz, IRI's Vice President & Counsel for Regulatory Affairs (jberkowitz@irionline.org, 202-469-3014), or Paul Richman, IRI's Vice President for Regulatory Affairs & Compliance (prichman@irionline.org, 202-469-3004), if you have any questions or would like to discuss this matter further.

Sincerely,



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