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McCourt School of Public Policy

VIA EMAIL: e-ORI@dol.gov
January 19, 2016

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 Avenue, NW
Washington, DC 20210

Re: Proposed Rule 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 Assistant Secretary Borzi:

The Georgetown University Center for Retirement Initiatives ("Center") appreciates your leadership in helping to clear a path for states to take the initiative and establish programs to strengthen retirement security for millions of Americans. As the U.S. Government Accountability Office (GAO) recently reported to Congress, the "coverage gap" among private sector workers is significant with only one half of private sector workers participating in a retirement savings programs through work and the lack of access to a workplace retirement plan is the primary reason for not participating.[1]

Indeed, the Center, a research center of the McCourt School of Public Policy, was founded with the mission to address this challenge and to strengthen the retirement security of American families by developing and promoting the bipartisan adoption of innovative state policies, legislation, and administrative models, including promoting the value of pooled funding and professional management, to expand the availability and effectiveness of retirement solutions. The Center performs a vital role assisting states by:

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[1] U.S. GAO, *Retirement Security: Federal Action Could Help State Efforts to Expand Private Sector Coverage,* GAO-15-556, p. 15 (Sept. 2015).

- Connecting state policymakers, scholars, and industry experts;
- Analyzing legislative and regulatory developments and assisting with program design.
- Sharing research, best practices, and success stories with state policymakers; and
- Serving as a resource to all states and stakeholders in addressing the challenge of achieving retirement security for more Americans and promoting policies that will strengthen the economy.

We applaud the Department of Labor ("Department" or "DOL") for developing a two-step approach to help states tailor solutions that work best for their citizens with the issuance of this proposed regulation ("Proposed Regulation") for payroll deduction Individual Retirement Account ("IRA") programs[2] and the Interpretive Bulletin 2015-02 ("Interpretive Bulletin") for plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").[3]

This letter first provides our broad comments and then our recommendations on provisions of the Proposed Regulation, including suggestions for specific changes where appropriate. Although the Interpretive Bulletin became effective immediately upon issuance on November 18, 2015, we also offer some comments related to its provisions that, in some instances, are similar to those raised by the Proposed Regulation.

General Comments on the Proposed Regulation

An Important Step to Help Clear the Path Forward for States

The Center commends the Department's efforts to close the "coverage gap" by increasing workers' access to retirement savings plans through their employers. The Proposed Regulation provides important clarity and guidance for states as they develop and implement state-based automatic IRA programs, which have the potential to greatly improve retirement security.

Many workers are concerned about their retirement savings outlook.[4] According to the AARP, an estimated 54.9 million Americans between the ages of 18 and 64 worked for employers who did not offer a retirement plan in 2013.[5] And the retirement income deficit – the difference between what people have currently saved for retirement and what they should have saved at this point – is $4 to $14 trillion.[6]

More Americans would take advantage of retirement plans if they were offered at work. Unfortunately, too many workers reach retirement with little or no private retirement savings.[7]

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[2] 80 Fed. Reg. 72006 (Nov. 18, 2015).
[3] 80 Fed. Reg. 71936 (Nov. 18, 2015).
[4] National Institute on Retirement Security, *Retirement Security 2015: A Roadmap for Policy Makers,* (Mar. 2015).
[5] AARP, *Workplace Retirement Plans Will Help Workers Build Economic Security*, Fact Sheet 317, October 2014. http://www.aarp.org/content/dam/aarp/ppi/2014-10/aarp-workplace-retirement-plans-build-economic-security.pdf
[6] Jack VanDerHei, Ph.D., Statement before the United States Special Committee on Aging hearing, *Bridging the Gap: How Prepared are Americans for Retirement?* (March 12, 2015); National Institute on Retirement Security, *The Retirement Savings Crisis: Is It Worse Than We Think?* (June 2013).
[7] Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2014* (May 2015) available at http://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf

Prompt Action is Critical to Supporting State Initiatives

We strongly urge the Department to issue a final rule as soon as possible. Many states considering state programs are beginning their legislative sessions and it would be very helpful to have a final rule before the state sessions end. In addition, other states have already passed legislation and need a final rule so they can meet their implementation goals, which may be as early as 2017.[8]

SPECIFIC COMMENTS ON THE PROPOSED REGULATION

Expand the Scope of the Safe Harbor to Include Local Governments

The Center is supportive of efforts by local governments to create retirement plans for private sector workers. For example, cities, such as New York City with a population of more than 8 million residents, are currently contemplating establishing programs.

The Proposed Regulation defines "State" by reference to section 3(10) of ERISA.[9] Although it is unclear, ERISA section 3(10) may not include cities or other lower-levels of government. Allowing programs to be established at all levels of government would play a key role in expanding access to workplace savings programs, especially within states that do not themselves elect to establish state-based payroll deduction IRA programs. Citizens who do not live in states that establish such programs should be permitted to look to cities and other governmental entities and instrumentalities to save for retirement. Further, many cities, counties, and other governmental entities and instrumentalities have retirement plans for public employees, as states do.

The Proposed Regulation's definition of "State" could be amended as follows:

> **(3) For purposes of this section, the term State shall ~~have the same meaning as defined in~~ *include those entities described in* section 3(10) of ERISA *and shall include cities and other governmental entities and instrumentalities.*[10]**

Alternatively, the Department could define "State" with regard to ERISA section 514(c)(2). That definition includes political subdivisions, rather than limiting the scope of the safe harbor to the entities specifically identified in ERISA section 3(10).

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[8] Some states relied on the existing payroll deduction IRA safe harbor and prior Department guidance in crafting their programs. However, the Department made significant and unexpected pronouncements in the Proposed Regulation that have made states' reliance on the existing safe harbor questionable. Those states are now relying entirely on the Department finalizing the Proposed Regulation.

[9] Prop. Reg. § 2510.3-2(h)(3).

[10] For purposes of this letter, additions to text are indicated by italics and deletions are indicated by strike-through.

Permit Multi-State Collaboration

The Center is not in favor of requiring employers or employees participating in a state program to have a connection with the state. Any nexus requirement could unintentionally impede states' ability to collaborate in forming regional programs and could impede the ability of cities or counties in a state, or for multiple states in a region, from being able to establish their own program compacts.

Allow States to Have Reasonable Withdrawal and Fee Limitations

Withdrawal and fee limitations may, in some cases, permit states to offer a variety of investments that would serve the interests of participants and beneficiaries. The Proposed Regulation could be read to prevent states from offering investments that would provide increased diversification through less liquid investments. Also, states may not be able to offer certain guaranteed investments and annuities, even though the Department has emphasized the importance of lifetime income options.[11] Finally, the Proposed Regulation could be interpreted to prevent states from implementing policies designed to mitigate employees taking early distributions from their IRA accounts, which is a form of "leakage." Leakage has been found to have a severe effect on retirement readiness.[12]

In addition, some reasonable withdrawal and fee restrictions may be necessary to protect the integrity of state-based payroll deduction IRA programs or reduce overall costs. For example, it may be inefficient to allow frequent and repeated withdrawals of small amounts. The Department opined that restrictions bearing a reasonable relationship to the "administrative costs attendant to such transfers" would be permissible with regard to ERISA section 404(c) plans.[13] Such restrictions could help participants and beneficiaries by reducing the administrative costs they would otherwise have to bear.

The Department should remove the requirement relating to withdrawal and fee limitations, if it is able to do so. If the Department is unable to remove the requirement, we would support that the restriction be amended as follows:

> **(vi) The program does not ~~require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and does not otherwise~~ impose any restriction on withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code *that, in the determination of the State, or governmental agency or instrumentality of the State, are unreasonable. A program does not exceed the limitations of this paragraph merely because it provides, directly or indirectly, investments with liquidity limitations, investment guarantees, or withdrawal guarantees.***

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[11] Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253, 5254 (Feb. 2, 2010).

[12] Jack VanDerhei, Employee Benefit Research Institute, The Impact of Leakages on 401(k) Accumulations at Retirement Age, Testimony to ERISA Advisory Council, 9 (June 17, 2014), *available at* https://www.ebri.org/pdf/publications/testimony/T-180.pdf.

[13] Final Regulation Regarding Participant Directed Individual Account Plans, 57 Fed. Reg. 46906, 46918 (Oct. 13, 1992).

Clarify States May Delegate Responsibilities to Third Parties

The Proposed Regulation provides that a state-based payroll deduction IRA program would not lose the protections of the safe harbor if the program utilizes service providers for operation and administration, so long as the state, or a governmental agency or instrumentality designated by the state, retains "full responsibility for the operation and administration of the program."[14] The requirement that states retain "full responsibility" could be read to suggest that a state must always be fully liable for all operational and administrative decisions. However, many states hire service providers to perform certain tasks, and states should be permitted to delegate all or some of the associated legal responsibility to those services providers. Notably, ERISA provides precisely such a framework as fiduciaries can legally delegate certain legal responsibilities.[15]

To address this concern, the Proposed Regulation could be amended by adding the following:

> ***(h)(2)(iv) Delegates legal responsibility for operating or administering the program to one or more service providers, including the investment of program funds, provided that the State, or governmental agency or instrumentality designated by the State, retains responsibility for selecting and monitoring such providers.***

Clarify States Can Offer Financial Incentives to Employers

Some states would like the flexibility to consider financial incentives for employers that participate in a state payroll deduction IRA program. For example, a state may decide it would be helpful to provide a new tax credit or utilize existing tax incentives to offset costs of the program to the employer.[16] However, the Proposed Regulation could be interpreted as prohibiting such incentives because it provides that an employer may not receive any "direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of actual costs of the program."

INTERPRETIVE BULLETIN 2015-02

GENERAL COMMENTS ON THE INTERPRETIVE BULLETIN

The Center applauds the Department's issuance of the Interpretive Bulletin, clearing the way for states to consider state sponsored ERISA programs and providing states with a broader

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[14] Prop. Reg. § 2510.3-2(h)(2)(ii).

[15] *See, e.g.,* ERISA § 405(d); 29 C.F.R. § 2509.75-8 FR-17 (stating an appointing fiduciary's responsibility with regard to other fiduciaries and trustees it has appointed is to review their performance "at reasonable intervals.")

[16] *See* Georgetown University, McCourt School of Public Policy, Center for Retirement Initiatives, Comparison of Retirement Plan Design Features, By State: California, Illinois, Massachusetts, Oregon, and Washington (Sept. 2015), *available at* http://cri.georgetown.edu/wp-content/uploads/2015/11/CRI-State_Comparison-Chart-FINALtoweb11-11-15.pdf.

range of options for how they may design government-sponsored retirement savings programs. Providing states the opportunity to now offer, for example, multiple-employer plans ("MEPs") is a major step in this direction. The Center is concerned, however, that fewer states will consider this option and the other options outlined in the Interpretive Bulletin, unless the Department provides additional clarity to the states and removes potential obstacles to implementation.

SPECIFIC COMMENTS ON THE INTERPRETIVE BULLETIN

Clarify Employers Do Not Assume Fiduciary Responsibilities

In the Interpretive Bulletin, the Department opines that employers participating in a state-sponsored multiple employer plan ("MEP") would have the fiduciary responsibility to "prudently select the arrangement and to monitor" the MEP. The Center is concerned that language will prevent many states from considering the creation of a MEP.

We respectfully disagree with the conclusion that employers participating in a MEP are fiduciaries merely because they elect to participate in the plan. Under ERISA, a person is a fiduciary if she or he (i) takes on certain statutory roles with respect to the plan (a "statutory fiduciary") or (ii) exercises discretionary authority or control over the management or administration of a plan or provides investment advice for a fee (a "functional fiduciary"). As the Department notes, the state – and not the participating employers – would take on the role of statutory fiduciary, including acting as the named fiduciary and the plan administrator.[17] The employer also would not be a functional fiduciary because it generally would have no discretion over the management and administration of plan assets.[18] Because employers participating in state-sponsored MEPs generally would be neither statutory nor functional fiduciaries, there is no legal basis for concluding that participating employers have a fiduciary responsibility to select and monitor the MEP.[19]

As a policy matter, it is counterproductive to make a participating employer a fiduciary of a MEP. The purpose of establishing a state-sponsored MEP is to expand coverage by making it easy for employers – particularly smaller employers – to offer a quality retirement plan to their employees. In order to effectuate that goal, the state-sponsored MEPs are intended to almost completely eliminate the regulatory and legal burdens on employers, including any risk or responsibility for acting as a fiduciary. Making employers fiduciaries is not necessary because the MEPs will already be managed and administered by competent fiduciaries. In fact, the fiduciaries of the state-sponsored MEPs will often be considerably more sophisticated than the participating employers and will likely have fewer conflicts of interest.

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[17] 80 Fed. Reg. at 71938.

[18] There are circumstances in which a participating employer could become a functional fiduciary. For example, an employer would become a fiduciary if it failed to timely remit participant contributions to a plan. 29 C.F.R. § 2510.3-102.

[19] There is no material difference between participating employers in a MEP and participating employers in a multiemployer plan. We are not aware of any authority indicating that an employer would be a fiduciary with respect to a multiemployer plan if the employer merely participates in the plan by remitting contributions as due.

Allow the State to Delegate its Fiduciary Responsibilities to Third Parties

The Center also urges the Department to consider amending the Interpretive Bulletin to make it clear that a state can delegate fiduciary responsibility for the management and administration of a MEP to third-parties. Some state-sponsored MEPs will assign fiduciary responsibilities to designated boards, commissions, or individuals. The state itself may not be a statutory or functional fiduciary. It would be helpful if the Department would clarify that potential fiduciary liability is limited to those designated fiduciaries and not the state.

The Department's suggestion that a state's exercise of sovereign immunity generally may conflict with ERISA also creates uncertainty.[20] The Department should clarify that there is no conflict with ERISA if states generally maintain sovereign immunity with respect to state officers and officials not specifically designated as fiduciaries and who do not perform fiduciary functions with regard to the plan.

Expand the Definition of "State" to Include Other Governmental Entities

The Center would like to see the Interpretive Bulletin expanded to provide additional flexibility and clarity to allow all governmental entities (and groups of governmental entities) to sponsor MEPs. As drafted, the Interpretive Bulletin only specifically addresses MEPs established by states. However, cities and other governmental entities may wish to start MEPs, and for purposes of ERISA, those entities should be treated the same as states. Cities, for example, have a unique representational interest in the health and welfare of their citizens that connects them to the employers that choose to participate in a MEP and their employees. Like states, they should be viewed as creating the requisite nexus of commonality for purposes of establishing a MEP. Similarly, the Interpretive Bulletin contemplates MEPs sponsored by a single state, but groups of states or localities may wish to collaborate and form regional or reciprocal programs. The Department to amend the Interpretive Bulletin to allow them the flexibility to do so.

Permit the Use of Financial Incentives

The Center recommends that the Department clarify that ERISA would not preempt a state law providing incentives for employers to participate in state-sponsored MEPs and/or establish their own employer-provided retirement plans. As noted above, a state may decide to provide a tax credit to offset the cost of setting up a payroll deduction system. Such incentives should not be preempted as they are not attempting to regulate ERISA-covered plans. However, it would be helpful for the Department to provide clarity by amending the Interpretive Bulletin or providing further guidance.

Clarify Employer Choice of the State Plan Option Would Not be Preempted

One of the alternative approaches under consideration is that a state may adopt legislation mandating that covered employers provide retirement savings vehicles to their employees, with the options for satisfying such a mandate to include both participation in an ERISA-covered plan

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[20] 80 Fed. Reg. at 71940 fn. 17.

(such as a state MEP) and non-ERISA options (such as a state IRA program). As drafted, however, the Interpretive Bulletin does not appear to cover an instance where an employer that fails to make an affirmative election will be considered to have elected to join a state MEP. If the state mandate were structured in this manner, an employer's participation in the state MEP by default would nevertheless be considered voluntary and should, therefore, escape preemption. The Department clarify its position that a mandate structured in this manner would not be preempted.

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The Center applauds the Department for its work to improve retirement security for all Americans, and we appreciate the opportunity to comment on the Proposed Regulation and the Interpretive Bulletin. Once finalized, the Department's policies have the potential to help close the coverage gap and assist millions of people have more affordable and convenient ways to save for retirement.

Respectfully submitted,

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