

TAX ALLIANCE FOR ECONOMIC MOBILITY

January 19, 2016

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

RE: Comments on Department of Labor Proposed Rule Regarding Savings Arrangements
Established by States for Non-Governmental Employees (RIN 1210-AB71)

To Whom It May Concern:

The Tax Alliance for Economic Mobility (TAEM)¹ is a national coalition of asset-building advocates, tax reform experts, researchers, representatives of organizations that serve communities of color, and grassroots constituents working together to advance federal policies that expand savings and investment opportunities for lower-income households through reform of the U.S. tax code.

A number of TAEM members have individually² or as part of TAEM³ expressed support for more robust retirement coverage options for low- and moderate-income workers. Specifically, TAEM and its members have endorsed a federal automatic Individual Retirement Account (IRA) and, in the absence of a federal solution, support state auto-IRAs and other similar retirement programs.⁴ As you know, many states pursuing their own retirement initiatives have called for federal guidance to provide the legal certainty necessary to move forward. We the undersigned members of TAEM welcome and strongly support the Administration's recent efforts to provide this guidance, which we are confident will help states expand retirement coverage options for low- and moderate-income workers.

A number of TAEM member organizations will be providing detailed comments in response to your proposed rule regarding savings arrangements established by States for non-governmental employees. In addition, the undersigned members of TAEM are taking this opportunity to give feedback in some broad areas that we hope the Department of Labor (DOL) will consider as it finalizes its proposal and continues to develop retirement policies targeted at low- and moderate-income Americans.

¹ For more information, see TAEM's website, www.taxallianceforeconomicmobility.org.

² See, for example, [Center for American Progress](#) (2013), [Center for Budget and Policy Priorities](#) (2013), and [New America](#) (2011).

³ See, for example, TAEM's retirement [policy options list](#) (2014), and TAEM's [letter to the Senate Finance Committee's Savings and Investment Working Group](#) (2015).

⁴ See, for example, [AARP](#), [New America](#) (2013), and [New America](#) (2015).

TAX ALLIANCE FOR ECONOMIC MOBILITY

Significant step forward

On November 18, 2015, DOL published two legal opinions: (1) a proposed rule regarding savings arrangements established by States for non-governmental employees; and (2) an 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). The undersigned TAEM members consider both of these actions as major steps forward for expanding retirement security for low- and moderate-income workers.

Unfortunately, most existing federal policies geared towards expanding retirement security do not help those most in need. Each year, the federal government provides well over \$100 billion in tax subsidies to encourage Americans and their employers to establish and contribute to 401(k)s, IRAs, and other tax-preferred retirement vehicles. But the vast majority of these benefits accrue to the wealthiest households, most of whom would have saved on their own even without the tax break.⁵ One reason these tax benefits are so upside-down is unequal access to the retirement accounts themselves. Low- and moderate-income Americans, especially those working part-time or for small businesses, are less likely than their wealthier counterparts to be offered a tax-preferred retirement plan at work. Studies indicate that most Americans – including low- and moderate-income ones – take advantage of retirement plans at work *if offered*.⁶ But as a result of low employer offer rates, many low- and moderate-income workers reach retirement with little to no private savings. In fact, in 2014 nearly one-third of non-retired Americans reported having absolutely no private retirement savings or pension.⁷ Though most of these individuals will have access to Social Security, the indispensable bedrock of the U.S.'s retirement system, those benefits are often too low to maintain retirees' standard of living.

Ideally, this gap in retirement plan access would be closed with a federal auto-IRA program, as President Obama proposed as part of his fiscal year 2010, 2011, 2012, 2013, 2014, 2015, and 2016 budgets, or some other universal solution. However, given congressional inaction, the undersigned TAEM members support states that are stepping into the void and offering auto-IRA or other retirement programs of their own.

Moreover, we believe these programs strengthen the role of private financial service providers. State savings arrangements give employees a good deal of control over their accounts, including the ability to roll them over to investment plans managed by private firms. Many of the state plans will also likely be managed by private investment companies in partnership with states and through a competitive bidding process, demonstrating a key role for the private sector in these programs.

By providing legal guidance to states regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to their state programs, DOL has helped reduce confusion and uncertainty in state capitals across the country and has paved the way for a meaningful expansion of retirement coverage.

⁵ <http://www.cbpp.org/research/retirement-tax-incentives-are-ripe-for-reform?fa=view&id=4063>

⁶ <http://www.gao.gov/assets/680/672419.pdf>

⁷ <http://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf>

TAX ALLIANCE FOR ECONOMIC MOBILITY

Importance of automatic features

The undersigned TAEM members commend DOL for proposing a safe harbor that allows states to incorporate critical automatic features – representing some of the best current thinking in behavioral science – into their IRA plan design.

Most importantly, the proposed safe harbor makes automatic enrollment in a retirement plan possible for millions of Americans. Scores of academic studies prove that making a retirement plan available to employees through their job, while an important first step, is still not as effective as automatically enrolling those workers in the plan (with an option to opt-out).⁸ Furthermore, automatic enrollment is popular among workers, who appreciate its convenience and simplicity.⁹ This is why, over the past decade, thousands of employers across the country have opted to automatically enroll their workers in 401(k) and other retirement plans. Low- and moderate-income Americans are just as likely to benefit from automatic enrollment and should not be left behind.

We further commend DOL for giving states the ability to designate a default IRA sponsor or investment option for those workers who do not make an affirmative election. Ample evidence demonstrates the immense power of defaults (indeed, the aforementioned success of automatic enrollment in retirement plans is one such example). As such, state governments should be able to design a program that works well for participants even if they fail to take certain affirmative steps in the plan initiation process.

We also support DOL's proposal to allow states to establish a schedule of automatic increases to the default rate of contributions to the auto-IRA program based on increases in pay – often called “automatic escalation.” Like automatic enrollment and default options, automatic escalation is a proven way to harness the power of status quo bias to help build up workers' retirement savings.¹⁰ Finally, the undersigned TAEM members appreciate that, by issuing its accompanying interpretive bulletin, DOL has also given states the option of sponsoring ERISA-regulated plans. ERISA already allows for all of the automatic features described above, and also provides built-in consumer protections (see below) and the possibility for employer contributions, which makes it a potentially valuable option for some states.

Importance of consumer protections

The undersigned TAEM members recognize that allowing employers to automatically enroll workers in a retirement plan outside the confines of ERISA's legal protections carries some risk, but we believe the potential benefits of state-sponsored auto-IRA plans to low- and moderate-income working families justify the creation of this new legal channel.

Furthermore, we commend DOL for crafting a safe harbor that minimizes these risks by severely curtailing the employer's role in selecting and administering the plan, and by ensuring workers have “adequate notice” of their right to opt-out of the program and have “meaningful control” over their

⁸ <http://www.aarp.org/content/dam/aarp/ppi/2014-10/spotlight12-importance-auto-features-promoting-retirement-savings-AARP-ppi-econ-sec.pdf>

⁹ <http://www.ifebp.org/inforequest/0159990.pdf>

¹⁰ <http://www.chicagobooth.edu/capideas/magazine/summer-2013/retirement-savings?cat=more>

TAX ALLIANCE FOR ECONOMIC MOBILITY

IRAs. Importantly, in order to gain entry into the safe harbor, states must “create[] a mechanism for enforcement of those rights.” As DOL wrote in its proposal, state governments are naturally incentivized to “administer[] [the program] in accordance with the interests of the state’s citizens.”

As such, we are hopeful that states will write provisions into their auto-IRA laws that protect consumers and their money against poorly disclosed fees, fund mismanagement, and creditors’ claims, among other potential retirement plan pitfalls.

Potential improvements

The undersigned TAEM members recognize the complexity of designing a safe harbor that is not overly onerous on states and will withstand legal challenge. Overall, we commend the structure and details of the safe harbor DOL constructed. However, there are a few issues that we think could benefit from clarification or revision:

- By limiting the entities that can administer safe harbor auto-IRA programs to states, the proposed regulation effectively prohibits cities, counties, other state subdivisions, and multi-state coalitions from pursuing their own auto-IRA schemes. While we recognize that not all state subdivisions or regional coalitions may be up to the administrative challenge of establishing a new retirement plan for the private sector workers within their borders, we believe that cities and counties in states that are not pursuing their own plans – or multiple states as part of a regional coalition – should be able to petition DOL for that authority.
- The proposed regulation states that a “state must...administer the program either directly or through a governmental agency or other instrumentality.” And while most references to “state” in the proposed regulation are paired with the parenthetical “(or the designated governmental agency or instrumentality),” some are not (see paragraph (h)(1)(iii) and (iv)). Many states have adopted plans that delegate administrative and other duties to a quasi-independent board, but the regulation is not entirely clear on how much authority can be legally delegated. We recommend allowing states flexibility, for example, in delegating authority to set default savings rates and other key program design elements. We believe that it would be helpful to know with certainty that such arrangements are within the safe harbor. We also recommend providing clarity on the definition of “instrumentality.” It would be beneficial to make sure the definition ensures the instrumentality has an appropriate connection to the government putting the program in place.
- The proposed regulation never fully explains what it means when it uses the words “responsible” and “assume responsibility” in paragraphs (h)(1)(ii) and (iii), which leaves many questions unanswered. For example, do states, and by extension state taxpayers, need to take on a certain amount of legal or financial responsibility to satisfy these requirements? Can states delegate legal or financial responsibility to third parties, as is common practice in many current employee benefit arrangements? Further clarification would be helpful.
- The proposed safe harbor bars employers from receiving any “direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program.” It is unclear, however, if this requirement would bar states from

TAX ALLIANCE FOR ECONOMIC MOBILITY

combining the employer mandate with employer tax credits or other government benefits that could further incentivize employer participation. For example, it may be exceedingly difficult if not impossible for states to accurately calculate the “actual costs” accrued by each participating employer, and it may be impractical for the amount of each tax credit to vary by employer. As such, we believe allowing state flexibility makes sense and would suggest further clarification in the final rule.

- Regarding the required mandate at (h)(1)(x), we believe that states that choose to establish a savings program but do not mandate *all of the employers* in their state to participate (e.g., Illinois’s mandate only covers employers with 25 or more workers), should be afforded flexibility so that, under certain circumstances, employers not mandated to participate can still choose to automatically enroll their workers in the state plan.

Thank you for your consideration of these comments.

Sincerely,

Asset Building Program, New America
Corporation for Enterprise Development (CFED)
Financial Security Program, Aspen Institute
Greenlining Institute
Institute on Assets and Social Policy, Brandeis University
Massachusetts Budget and Policy Center
National Council of La Raza
PolicyLink
UCLA Asian American Studies Center