AMERICAN
RETIREMENT
ASSOCIATION
Working for America's Retirement

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September 27, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: State Savings Arrangements Safe Harbor
RIN 1210-AB76
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees
RIN 1210-AB76

Dear Madam or Sir:

The American Retirement Association (the "ARA") is writing in response to the request for comments on the proposed rule regarding Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees (the "Proposal").[1] ARA wishes to thank the Department of Labor (the "Department") for the thought, time and effort put into the initiative.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA") and the ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

Discussion

In a final regulation published coincident with the Proposal, the Department provided a new "safe harbor" under which an individual retirement plan, as defined in Internal Revenue Code Section 7701(a)(37) (hereinafter referred to as an "IRA Plan" or "IRA Program"), if established and maintained pursuant to a payroll deduction program that was mandated by state law, would not be considered to be an "employee pension benefit plan" or "pension plan" under Title I of the

[1] RIN 1210-AB76, 81 Fed. Reg. 59581 (August 30, 2016).

Employee Retirement Income Security Act of 1974 ("ERISA").[2] The Proposal would extend the "safe harbor" under certain circumstances to payroll deduction savings programs mandated under the laws of certain state political subdivisions.

The ARA has previously voiced our support for proposals that expand access to workplace retirement savings programs such as "auto-IRAs."[3] It is also our long held belief that automatic enrollment is an important and effective tool for increasing savings rates and employee participation. We were disappointed, however, that the new safe harbor, as finalized, was not extended to comparable payroll deduction programs established and administered by private sector providers as we had recommended in our comments on the original proposal. We continue to believe that private sector providers have the experience and distribution channels to make these programs successful and that automatic enrollment with an "opt-out" feature has become so commonplace, that it too should be considered a completely voluntary program.

Although the ARA is generally supportive of proposals to expand workplace savings arrangements, we believe the proposed extension of the new "safe harbor" to state political subdivisions will be problematic on public policy grounds for a number of reasons. We therefore recommend against expanding the safe harbor in this way.

The Proposal would extend the safe harbor only to programs mandated by a state political subdivision (with authority to do so) in states where no state law establishes such a program for private sector employers.[4] The Proposal also requires the political subdivision to have a population equal to or greater than the least populous state.[5] The preamble notes that approximately 88 political subdivisions would potentially qualify under these parameters.[6]

Notwithstanding that the proposed standards would reduce the universe of qualifying political subdivisions, expansion of the safe harbor to 88 different sets of rules will be particularly problematic for an employer who has employees dispersed around the country. It would potentially subject an employer's payroll savings program to mandates that could vary significantly from one town to the next. In addition, another set of rules would apply to employees working in cities that do not qualify for the safe harbor. This would make for a very confusing set of mandates with some arrangements offered by an employer qualifying for the ERISA exemption while others would not. This would be particularly true where political subdivisions are contiguous or overlapping as could happen, for example, where a county and city within that county both adopt mandates. It also would be difficult to monitor which employees are covered by a mandate if they transfer between work locations that could easily be in the same metropolitan area.

Additional complexity would result from having to monitor and compare the population of a political subdivision against that of the least populous state. The Proposal does not address the consequences of a qualifying political subdivision losing that status due to a drop in population

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[2] ERISA Reg. §2510.3-2(h), 81 Fed. Reg. 59464 (2016).
[3] *See* testimony of Judy Miller, ARA Director of Retirement Policy, to the U.S. House of Representatives Committee on Ways and Means, April 17, 2012, available at http://www.asppa.org/Resources/Testimony.
[4] Proposed ERISA Reg. §2510.3-2(h) (4), 81 Fed. Reg. 59592 (2016).
[5] Id.
[6] 81 Fed. Reg. 59585 (2016).

but one would assume the arrangement would no longer qualify for the exemption. This could potentially result in arrangements seesawing between the safe harbor being available and then withdrawn. The same problem would arise when a state mandate is enacted which would then disqualify a political subdivision's pre-existing program. The cost and complexity of moving in and out of the safe harbor would frustrate both employers and their employees.

Employers are much better prepared to address differing human resources requirements relating to their employees if they are applied based on the boundary lines of a state. Many employers have operations only within a single state, which greatly simplifies how the new exemption would be applied. Employers with multi-state operations typically have amassed the experience and staff expertise to apply laws that vary from one state to another. For example, multi-state employers regularly deal with different state laws regarding workers compensation, state income tax withholding and workplace safety requirements. Therefore, it makes far more sense to limit the new safe harbor to mandates that are subject to clear delineation on a state-by-state basis.

Another concern in extending the safe harbor to state political subdivisions is the varying degrees of financial sophistication that are present at that level of government. There is a real potential for a well-meaning subdivision to embark upon such a program and then find they are lacking in the expertise and resources to properly manage the program. States generally have the experience associated with managing and administering sophisticated state retirement programs for government employees. The suggestion in the Preamble that some type of standard could be developed to determine whether a political subdivision is capable of managing such a program is unrealistic. Such a standard would inherently include a great deal of subjectivity and additionally would necessitate monitoring on an ongoing basis. Given the breadth and diversity of political subdivisions across the country, it is difficult to imagine how this monitoring responsibility could be allocated.

The ARA believes that the Department should be patient and give the States time to consider statewide programs. Obviously, the publication of the final rule exemption for state mandated programs will result in many more states moving forward. The Department should give states time to do this before subjecting employers (and their employees) to the chaos of different rules and programs of state political subdivisions.

In light of the forgoing concerns and considerations, ***the ARA recommends***, that the non-ERISA safe harbor for payroll deduction savings arrangements not be extended to programs mandated under the laws of state political subdivisions.

The ARA appreciates the ongoing opportunity to work with the Department on these issues of great importance to our diverse membership of professionals. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

/s/
Marcy L. Supovitz, CPC, QPA, QKA
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/s/
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President-Elect
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cc:

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Department of Labor