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Submitted Electronically

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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

Attn: Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees

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

Greetings:

On behalf of the American Council of Life Insurers ("ACLI")[1], we offer these comments on the Department of Labor's ("Department") proposed rule regarding retirement savings arrangements established by state political subdivisions for non-governmental employees (the "Proposal").[2]
On November 18, 2015, the Department issued a proposed regulation providing that, for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the terms "employee benefit pension plan" and "pension plan" do not include an IRA established and maintained pursuant to a state payroll deduction savings program, if certain conditions contained therein are met. By letter dated January 19, 2016 (attached), ACLI provided comments on the proposed state-run plan

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[1]The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 280 member companies operating in the United States and abroad. ACLI advocates in state, federal, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing 95 percent of industry assets. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.
[2] 81 *Fed. Reg*. 59581 (Aug. 30, 2016).

regulation. The Department finalized its state-run plan regulation on August 30, 2016[3], and, concurrently, issued the Proposal. The Proposal would amend the Department's final state-run plan regulation to extend it to political subdivisions. As such, and given that the Department states that its final state-run plan regulation "largely adopts" the proposed state-run plan regulation's general structure, ACLI reiterates the concerns raised in our January 19, 2016 comment letter, as such concerns are also applicable to the Proposal.

ACLI and its members continue to have concerns about the negative effects the final state run plan regulation, and the Proposal to extend that regulation to political subdivisions, will have both on employers and retirement savers. ACLI finds no justification in ERISA for the favored treatment afforded to states under the final rule or state political subdivisions under the Proposal, relative to private sector provided programs. Further, as detailed below, ACLI has concerns regarding certain changes the Department made in the final state-run plan rule that would presumably also apply to programs implemented and maintained by state political subdivisions.

Recommendation

The final state-run plan rule, and the Proposal, continue, without sufficient basis, to provide states and political subdivisions with an unfair advantage over the private sector. ACLI recommends that, in lieu of amending the final state-run plan regulation to extend it to state political subdivisions, the Department amend it to provide an exception from Title I of ERISA to employer payroll deduction IRA arrangements regardless of whether the employer chooses a state or state political subdivision program, if available, or a private sector IRA. This is especially important for employers and employees interested in such a program that are located fully or partially in a state that does not establish an IRA program. This Proposal should be withdrawn and replaced with an amendment to the final state-run plan regulation to support the use of automatic enrollment and automatic contribution escalation with IRAs offered by the private sector and those offered by states.

The Department's Political Subdivision Proposal

The Proposal would provide an exception under Title I of ERISA for certain mandated state political subdivision-based IRA programs for private-sector employees under applicable political subdivision legislation. Under this exception, such an IRA could be offered at the workplace without establishing an employee pension benefit plan under Title I of ERISA. Furthermore, under the Proposed Rule, employers that choose a state political subdivision-based IRA program are not subject to Title I of ERISA even when such program includes automatic payroll deduction and automatic contribution escalation.

As with the state-run plan final regulation, it continues to be unclear what policy the Department seeks to advance with this Proposal. The Proposal's exemption from ERISA for certain state political subdivision-sponsored plans for private sector employees runs counter to the Department's other rulemaking effort to broaden ERISA fiduciary obligations on those who serve retirement savers. For example, under the Proposal, plan participants do not know whether the state and/or state political subdivision officials responsible for the plan can assert sovereign immunity which could leave them without remedy in the event of injury.

[3] 81 *Fed. Reg*. 59464 (Aug. 30, 2016).

The Definition of "Qualified Political Subdivision"

The Department proposes to amend the final state-run plan rule to include a plan sponsored and maintained by a "qualified political subdivision.' The Proposal defines "qualified political subdivision" as a government unit of a state, including a city, county or similar governmental body that –

1. Has the authority, implicit or explicit, under state law to require employer's participation in the payroll deduction savings program;
2. Has a population equal to or greater than the population of the least populous state (excluding the District of Columbia and U.S. territories; and
3. Is not located in a state that pursuant to state law has established a state-wide retirement program for private-sector employees.

Criteria one and two appear both arbitrary and problematic. First, although a political subdivision may have the explicit or implicit authority under state law to require employer participation in a payroll deduction program, leaving aside the question of ERISA pre-emption, such authority does not translate into the experience or knowledge required to actually maintain and operate such a program. In general, one may surmise that most if not all states have some experience operating a pension program for state employees. In many cases, this knowledge and experience may not be present at the political subdivision level. The Department does not address, nor does it provide any justification for, its assumption that political subdivisions would possess the knowledge or experience necessary to develop, operate and maintain an individual account retirement program for consumers - including the knowledge and experience to implement and enforce "necessary and appropriate" consumer protections present in products offered by financial service firms who are subject to federal and/or state consumer protection laws. Further, we question whether a political subdivision will have the ongoing resources necessary to sponsor such a program.

As with the first criterion, the second criterion (population size) appears arbitrary and does not translate into the ability of a governmental body to develop, operate and maintain an individual account retirement program for consumers. The Department fails to address any nexus between population size and knowledge, ability, experience, or resources to operate IRAs for consumers. Is Philadelphia, Pennsylvania better suited to market IRAs than Latrobe, Pennsylvania, simply because it has a greater population? If so, why?

Finally, the third criterion illustrates the overarching problems associated with overlapping political subdivisions. The Department, in addressing the potential problem associated with a state adopting a program after one of its political subdivisions previously had done so, "presumes" that states would act in a "measured and calculated way as to avoid or mitigate any undesirable overlap". The Department provides no justification or basis for this "presumption." Rather, to the contrary, while the Department specifically identifies such overlaps as a potential problem, it fails to provide that either a requirement or a mechanism be present as a condition of satisfying the safe harbor. Nor does the Department address any consumer protections that would be necessary as part of a "mitigation." As it stands, an employer with employees in various states could potentially be subject to mandated retirement programs implemented by a various states, cities, or other municipalities in which it conducts business, more than one of which could potentially apply to the same employee. This is clearly inconsistent with both Congressional intent and the Department's prior positions with regard to ERISA preemption.

Consumer Protections

In the final state run plan rule's regulatory impact analysis, the Department concludes that it is unlikely that state initiatives will "crowd-out" many ERISA-covered plans. However, the Department states that, if states do, "some workers might lose ERISA protected benefits that could have been more generous and more secure than state-based (IRA) benefits if states do not adopt consumer protections similar to those Congress provided under ERISA."[4] As such, the Department explicitly acknowledges that participants in state run plans (and purportedly under the Proposal, participants in state political subdivision-run plans) would not initially, and may not ever have the same level of consumer protections as those provided under ERISA.

Further, although commenters requested that the Department require states to adopt various consumer protections, such as conditions requiring deposits to be made to IRAs within a maximum number of days, civil and criminal penalties for deposit failures, and education programs for employees regarding how to identify employer misuse of payroll deductions, the Department inexplicably declined to include such requirements in its safe harbor. Instead, the Department states that it "encourages the states to adopt consumer protections…as necessary or appropriate" and concluded that "each state is best positioned to calibrate the type of consumer protections needed to secure payroll deductions."[5]

Moreover, the Department, in addressing the safe harbor's requirement that the state must assume responsibility for the security of payroll deductions, concludes that this condition "would be satisfied if the state established and followed a process to ensure that employers transmit payroll deductions safely, appropriately, and in a timely fashion."[6] Accordingly, the regulatory consumer protections applicable to the timing of payroll deduction contributions for private-sector plans[7] is not applicable to state or state political division sponsored plans. The Department provides no basis for this double standard. The inclusion of a payroll deduction transmission timing requirement in a safe harbor - especially one that provides for auto-enrollment - will provide a powerful incentive for those seeking to use the safe harbor protection to ensure that employee payroll deductions are transmitted safely, appropriately, and in a timely manner as non-compliance will subject the plan to ERISA's Title I requirements.

Employee Withdrawal Restrictions

In response to comments, the Department modified the final state-run plan rule to remove the proposed rule's condition that would have prohibited states from imposing any restrictions, direct or indirect, on employee withdrawals from their IRAs. The Department provides several reasons for its decision to remove this provision from the final state-run plan rule, including the ability of states to guard against leakage, the ability of states to design programs with diversified investment strategies, and the ability of the states to offer lifetime income options, such as annuities. While it may be necessary or prudent to impose such a restriction on the redemption of certain investments, in general, it would not be appropriate for a state to impose a restriction that would prevent an employee or retiree from rolling out of the state-based IRA to another IRA. A rollover to another IRA may be in the best interest of the employee or retiree, for example, due to subpar investment performance or a lack of a guaranteed lifetime income feature. Under the final rule and Proposal, a state or political subdivision could market an IRA with no withdrawal restrictions, then impose such restrictions on existing IRA owners at a later date. Currently, private-sector administered programs may be designed to prevent leakage, include diversified investment strategies, and include lifetime income options, while limiting employee withdrawal restrictions only to those permitted by applicable law. States – and political subdivisions – should be held to the same standards.

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[4] 81 *Fed. Reg*. 59475.
[5] 81 *Fed. Reg*. 59470.
[6] *Id.*
[7] *See* 29 CFR 2510.3-102.

Implications of Proposal on U.S. Trade Obligations

In our January 19, 2016 comment letter, we raised several implications of the state-run plan proposal with regard to U.S. obligations to trading partners. We noted that, under U.S. trade agreements, including the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), the North American Free Trade Agreement (NAFTA), and the U.S.-Korea Free Trade Agreement, U.S. federal and state governments generally have an international obligation to treat foreign service providers no less favorably than domestic service providers in the financial services sector, including domestic government-managed entities.[8]

Depending on the specific nature of the state-sponsored or political subdivision-sponsored program, private foreign retirement plan providers could expect to operate in competition with state-run or state political subdivision-run pension programs. Exempting such programs from ERISA or other fiduciary duty requirements that apply to private foreign providers would result in an un-level playing field by creating a more favored class of pension providers subject to a more lax regulatory standard. This would give rise to concerns that the United States is not abiding by its international trade obligations. This situation could leave the United States vulnerable to trade agreement disputes brought by trading partners which would challenge the favored treatment provided to state-run pension programs by virtue of their being exempt from ERISA requirements.

In our January 19, 2016, letter, we urged both the U.S. Department of Labor and state governments instituting state-sponsored retirement programs for private sector employees to ensure that such programs do not provide any unfair advantages and are consistent with U.S. trade agreements, which promote conditions for fair and efficient market competition. It does not appear that the Department addressed this issue in the final state-run plan rule, and we once again urge the Department to consider this issue, with respect to both state-sponsored and state political subdivision-sponsored retirement programs for private-sector employees.

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Although the Department chose to caption one section of its explanation of changes it made to the final state run plan rule "Ability to Experiment,"[9] employees working to save for a secure retirement should not be subject to an "experiment" conducted by either a state or a state political subdivision, especially given the Department's decision to allow states and, purportedly political subdivisions, the option to choose the consumer protections, if any, applicable to their programs.

ACLI recommends that the Department withdraw the Proposal and replace it with guidance or an amendment to provide an exception from Title I of ERISA to employer automatic enrollment payroll deduction IRA arrangements regardless of whether the employer chooses a state program, if available, or a private sector IRA. In addition to possessing the experience and resources necessary to administer such a program, private sector providers, and the products they offer, are subject to robust state and federal regulatory regimes designed to protect consumers.[10]

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[8] This obligation is referred to as the "national treatment" obligation for trade in services, contained in Art. XVII(1), General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994). Similar obligations are present within U.S. bilateral and multilateral free trade agreements. *See, e.g.,* Art. 1405.1-2, North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992; Art. 13.1-13.2, U.S.-Korea Free Trade Agreement, Jun. 30, 2007.

[9] 81 *Fed. Reg.* 59466.

[10] For examples, *see* Appendix to ACLI's July 21, 2015 comment letter to EBSA on Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32).

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on this subject.

Respectfully,

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Attachment

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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
Attn: State Savings Arrangements Safe Harbor

Subject: Savings Arrangements Established by States for Non-Governmental Employees (RIN 1210-AB71)

Greetings:

On behalf of the American Council of Life Insurers ("ACLI")[11], we offer these comments on the Department of Labor's ("Department") proposed rule and guidance to states on state-sponsored retirement savings programs for private sector employees. The Department proposes to provide a new safe harbor exception to the definition of "employee pension benefit plan" to exclude certain mandatory state sponsored IRA programs from Title I of the Employee Retirement Income Security Act ("ERISA")(the "Proposal"). The Department has issued Interpretive Bulletin 2015-02 (29 CFR § 2509.2015–02), providing guidance that, among other issues, supports the implementation of state sponsored "open" multiple employer plans that would be subject to Title I of ERISA (the "Interpretive Bulletin").

ACLI supports efforts to expand workplace savings opportunities. Payroll deduction is an effective means to facilitate retirement savings. At present, our members operate under a paradigm in which no employer is required to provide a savings plan to its workers. Thus, the marketplace for

[11] The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 300 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

workplace retirement products and services is robust and competitive. For decades, ACLI members have been actively at work encouraging employers in all industries, both large and, in particular, small, to establish and maintain workplace savings arrangements.

ERISA and its framework provide a national, uniform law to protect employee benefits. ACLI and its members have concerns about the negative effects the Department's Proposal and Interpretive Bulletin will have both on employers and retirement savers. ACLI finds no support in ERISA for the favored treatment afforded to state-based programs under the Proposal and Interpretive Bulletin. Therefore, ACLI and its members recommend an alternative approach that will encourage workplace savings nationally.

Summary of Recommendations

ACLI recommends that the Department provide an exception from Title I of ERISA to employer payroll deduction IRA arrangements regardless of whether the employer chooses a state program, if available, or a private sector IRA. This is especially important for employers and employees interested in such a program that are located in a state that does not establish an IRA program. This Proposal should be withdrawn and replaced with guidance on or an amendment to the current IRA safe harbor at ERISA §2510.3-2(d) to support the use of automatic enrollment and automatic contribution escalation with IRAs offered by the private sector and those offered by states.

Regarding the Interpretive Bulletin, ACLI recommends that the Department revise both Advisory Opinion 2012-04A and the Interpretive Bulletin to comport with the law, i.e., it is sufficient that a person sponsoring a multiple employer plan establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association acting as an employer.

The Department's Proposal

The Proposal would provide an exception under Title I of ERISA for certain state-based IRA programs mandated to be offered by private employers under state legislation. Under this exception, such an IRA could be offered at the workplace without establishing an employee pension benefit plan under Title I of ERISA. Furthermore, under the Proposal, employers that choose a state-based IRA program are not subject to Title I of ERISA even when such program includes automatic payroll deduction and automatic contribution escalation. While not explicitly stated, it is clear that a failure on the part of an employer or the state to adhere to the requirements set forth in the Proposal will result in the application of Title I of ERISA to the state plan and the employer and/or all employers that offer the plan.

It is unclear what policy the Department seeks to advance with this Proposal. The Proposal's exemption from ERISA for certain state-sponsored plans for private sector employees runs counter to the Department's other rulemaking effort to broaden ERISA fiduciary obligations on those who serve retirement savers. Under the Proposal, plan participants do not know whether the state and state officials responsible for the plan can assert sovereign immunity which could leave them without remedy in the event of injury. Nor is it known what standards of conduct are applicable to any service provider a state engages. For employers, the Department makes clear that an employer's use of the state as a recordkeeper would not cause the employer to be an ERISA fiduciary. However, the Department maintains that a similar engagement of a recordkeeper by a not-for-profit employer for its non-ERISA 403(b) plan would result in fiduciary status.

State Mandates and the Current IRA Safe Harbor

Employer Mandate to Provide a Workplace Plan - A few states have enacted laws mandating that employers offer savings arrangements to their employees. In general, employers are subject to these state laws if they do not offer a retirement plan to all of their employees. Under these laws, a state program is the default program should an employer fail to choose an alternative program or expand the coverage of its existing plan to all employees. Thus, under these state laws, the decision as to what plan is to be offered to an employee rests with the employer. It is the employer who decides whether to expand its existing plan's coverage, offer some other private sector solution or adopt the state based program. For an employer subject to such a mandate, there should be an IRA safe harbor that provides an exception to Title I of ERISA regardless of whether the employer chooses to make available a private sector IRA or a state-based IRA.

As to whether such a state law mandate is pre-empted by ERISA, we agree with the Department that this is a matter to be decided by the courts. Unfortunately, for employers that currently sponsor ERISA employee benefit plans, the Department offers no greater certainty as to whether ERISA pre-empts state laws that mandate action with respect to employees that are permissibly excludible under ERISA.

Automatic Enroll Mandate – In addition to an employer mandate to offer a savings arrangement to their employees, there are state laws that mandate that employers that choose the state IRA plan automatically enroll these employees in the state program. ACLI supports the use of automatic enrollment and automatic contribution escalation. Our members actively advocate for the adoption of these features with their plan sponsor customers. ACLI recommends that, instead of this Proposal for a new state-based IRA safe harbor, the Department should provide guidance on or amend the current IRA safe harbor to make clear that a voluntary election to contribute to a private sector or state-based IRA includes an automatic enrollment election and an automatic contribution escalation election. The relief can be predicated upon compliance with conditions based upon the requirements of existing law applicable to cash or deferred arrangements.

Automatic Enrollment under the Current Safe Harbor

As the Department is aware, when properly structured, the contribution and investment elections under automatic enrollment and automatic contribution escalation features are treated as completely "voluntary" elections. Employees must be provided with sufficient notice of the election that will apply absent their direction otherwise and afforded an effective opportunity to make alternative elections to contribute more or less than the default amount (or not at all) and into investments other than the default investment.

The provisions in the Internal Revenue Code (the "Code") that address both eligible and qualified automatic contribution arrangements were enacted to provide certainty that cash or deferred arrangements can include automatic enrollment. Unlike 401(k), 403(b), 457(b), SEPs and SIMPLE plans, a payroll deduction IRA offers employees the option to direct a portion of their pay to an IRA, i.e., IRA contributions are not made on a cash or deferred basis. Whether or not a contribution to an IRA is deferred from taxation depends upon the type of IRA and an individual's eligibility to deduct the contributions from income determined based upon the individual's gross income or the gross income of both the individual and a spouse determined at year end.

Nevertheless, the rules applicable to automatic contribution arrangements for cash or deferred arrangements provide a framework that could be used as a basis for determining whether or not an election under an IRA is voluntary. For example, §414(w)(2) of the Code provides that an "eligible automatic contribution arrangement" must afford an opportunity for the employee to elect not to make a contribution or to make an election at some other rate permitted under the program. Before a contribution is made, employees must receive a notice of their rights and obligations that is sufficiently accurate and comprehensive to apprise the employee of his or her rights and obligations and is written in a manner calculated to be understood by the average employee to whom the arrangement applies. As noted above, unlike qualified plans, the tax implications of a contribution to an IRA will differ from individual to individual as there are income limits applicable to contributions to a ROTH IRA and the deductibility of contributions to a Traditional IRA. Thus, it is important that employees be informed of possible tax implications of a default contribution. Likewise, employees should be advised of the tax implications of a withdrawal, premature or otherwise.

Another component of an automatic contribution arrangement is a default investment. Unlike a cash or deferred arrangement, in general, contributions made to an IRA can be withdrawn at will (although they may be subject to a premature withdrawal tax penalty). Thus, it should be sufficient that the employee be properly informed of the default investment and the employee's rights to transfer to another investment under the IRA or to another IRA or to take a distribution in cash.

Finally, the Proposal requires that a state take responsibility for the "security of payroll deductions." Under the current IRA safe harbor, employers are responsible for the security of payroll deductions. To ensure the safety of payroll deductions, the Department could make the safe harbor's Title I exception contingent upon the timely remittance of the contributions to the individual retirement account or individual retirement annuity, e.g., require as a condition of the exception that the contributions be remitted to the individual retirement account custodian or individual retirement annuity provider no later than the earliest date on which such contributions can be reasonably segregated from the employer's general assets.

<u>The Interpretive Bulletin and Open "MEPs"</u>

Interpretive Bulletin 2015-02 may lead the states to conclude that they are the only agents that can establish and sponsor a multiple employer plan ("MEP") for more than one unrelated employer (a.k.a. an "open MEP"). ERISA §2530.210(c)(3) makes clear that, for purposes of ERISA, a "multiple employer plan" shall mean a multiple employer plan as defined in §413 (b) and (c) of the Code. Neither §413(c) of the Code nor Treasury Regulation §1.413-2 require a "unique nexus" between the employers that maintain a multiple employer plan. For purposes of the Code and therefore ERISA, a multiple employer plan is a plan maintained by more than one employer. No "nexus" is required.

The Department's position in Interpretive Bulletin 2015-02 and Advisory Opinion 2012-04A is at odds with the law. ERISA §3(5) does not require that there be a group or association of employers acting for an employer, it merely notes that such group or association is an example of a person acting indirectly in the interest of an employer.[12] The key word in the definition is the word "*including*." If Congress intended that <u>only</u> such group or association could be such person, it would not have used the word "including." Advisory Opinion 2012-04A notes that the requester's submission failed to support a conclusion that a bona fide association or group of employers sponsors the plan. While, based on the facts and circumstances as presented by the opinion's requester, that may be correct, there is no need for a person to demonstrate under the law that there is a bona fide association or group of employers for such person to act "indirectly in the interest of the employers." Based upon the Interpretive Bulletin, it would appear that the Department agrees, as it finds no need for there to be a "bona fide association or group of employers" for a state to sponsor a multiple employer plan. Instead, the Department advances a new theory of a "nexus" in which a state has a "unique representational interest" in the health and welfare of its citizens whereby it can act "indirectly in the interest" of its citizens' employers. Simply put,

[12] See ERISA Section 3(5), 29 USC 1002(5). "The term 'employer' means any person acting directly or as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan*; and includes a group or association of employers acting for an employer in such capacity*." (emphasis added)

this special "nexus" distinguishes states from private business enterprises. While states are different from other business enterprises, nothing in the law leads one to conclude that a business enterprise cannot be a person that can act "indirectly in the interest of the employers" with respect to an employee benefit plan as defined in ERISA §3(5).[13] Further, in applying the Department's new "nexus" theory, one may maintain that an employer providing a retirement plan for its employees is also maintaining an interest in the health and welfare of its employees.

Also, the exclusivity given to a State under this Interpretive Bulletin to launch a MEP will erode market discipline. The market forces and competition that work towards improving products and uncovering weak performers will be absent under the exclusive right given to the State to establish and sponsor MEPs under the Interpretive Bulletin.

Advisory Opinion 2012-04A has had a chilling effect on the establishment and maintenance of MEPs as well as the cost of operating and maintaining existing plans, all to the detriment of the employees of small businesses. ACLI recommends that the Department revise both the Advisory Opinion and the Interpretive Bulletin to comport with the law, i.e., it is sufficient that a person (as defined in ERISA §3(9)) sponsoring a MEP establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association acting as an employer.

Implications of Proposal on U.S. Trade Obligations

Exempting state-sponsored plans for private sector employees from ERISA requirements could also raise concerns regarding U.S. obligations to trading partners. Under U.S. trade agreements, including the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), the North American Free Trade Agreement (NAFTA), and the U.S.-Korea Free Trade Agreement, U.S. federal and state governments generally have an international obligation to treat foreign service providers no less favorably than domestic service providers in the financial services sector, including domestic government-managed entities.[14]

Depending on the specific nature of the state-sponsored program required by a state's law, private foreign retirement plan providers could expect to operate in competition with state-run pension programs. Exempting such state programs from ERISA or other fiduciary duty requirements that apply to private foreign providers would result in an un-level playing field by creating a more favored class of pension providers subject to a more lax regulatory standard. This would give rise to concerns that the United States is not abiding by its international trade obligations. This situation could leave the United States vulnerable to trade agreement disputes brought by trading partners which would challenge the favored treatment provided to state-run pension programs by virtue of their being exempt from ERISA requirements.

Both the U.S. Department of Labor and state governments instituting state-sponsored retirement programs for private sector employees should ensure that such programs do not provide any unfair advantages and are consistent with U.S. trade agreements, which promote conditions for fair and efficient market competition.

[13] See also the definition of "person" at ERISA §3(9). Of note, the definition does not include a state, state agency, or political subdivision of a state.

[14] This obligation is referred to as the "national treatment" obligation for trade in services, contained in Art. XVII(1), General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994). Similar obligations are present within U.S. bilateral and multilateral free trade agreements. *See, e.g.,* Art. 1405.1-2, North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992; Art. 13.1-13.2, U.S.-Korea Free Trade Agreement, Jun. 30, 2007.

Relaxed Supervision of State Plans is at Odds with International Supervision Principles

The importance of proper supervision of retirement plans is supported in the ten principles issued by the International Organization of Pension supervisors (IOPS)[15]. These principles require the supervisory authority on retirement plans to act with independence, have sufficient resources and adequate powers, exercise proportionate, consistent and risk-based supervision and act in a transparent consultative manner. All of these requirements need to be enforced using sound governance. Allowing a state to run state-owned/administered retirement plans presents serious supervisory challenges under the IOPS principles since a single entity would own, administer and supervise the plan. In particular, this arrangement would threaten the governance best practice, as articulated by the IOPS[16], which requires, among other things, a clear division of responsibilities for supervisory decisions with serious impact, regular independent internal and external audits; and an efficient conflict of interest resolution policy.

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ACLI recommends that the Department withdraw the Proposal and replace it with guidance or an amendment supporting the use of automatic enrollment and automatic contribution escalation with IRAs offered under the existing safe harbor at ERISA §2510.3-2(d). Further, ACLI recommends that the Department revise both Advisory Opinion 2012-04A and the Interpretive Bulletin to support the establishment and maintenance of open MEPs sponsored by the private sector.

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on this subject.

Respectfully,

James H. Szostek　　　　　　　　Howard M. Bard

[15] www.iopsweb.org

[16] http://www.iopsweb.org/principlesandguidelines/IOPS%20%20Good%20Practices%20on%20Governance%20of%20Pension%20Supervisory%20Authorities.pdf