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Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
Attention: State Savings Arrangements Safe Harbor
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via email to: e-ORI@dol.gov; RIN 1210-AB71

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

BlackRock, Inc. (together with its affiliates, "BlackRock"),[1] as a leading manager of pension assets, believes it is more important than ever to (a) make it easier for employers, in particular small employers, to provide their employees with a retirement savings plan; (b) encourage and facilitate retirement savings, starting at an early age; and (c) support well-designed investment programs for individuals planning to retire and for those in retirement. We are pleased to comment on the Department of Labor's ("DoL") proposed rule addressing Savings Arrangements Established by States for Non-Governmental Employees (the "Proposed Rule").[2]

Approximately 68 million US employees do not have access to a retirement savings plan through their employers.[3] It is currently estimated that one-third of private sector workers are employed by small businesses and more than half of these employers do not offer a retirement plan.[4] Given this gap in coverage, there is broad agreement that we have a retirement crisis in the United States. However, there is currently no consensus regarding how to address the issue, in part because of the patchwork of existing programs and in part because of the political stalemate in Washington. To address this gap and help increase savings, more than half of the states have begun exploring their own solutions to the retirement crisis. While each state program has different features, the basic concept is to provide individuals who do not have access to an employer-based retirement plan with an easy and cost-effective way to save and invest for retirement.

These state-based programs encountered a major stumbling block, as the DoL and other private and public sector market participants expressed concern that they would be preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[5] Noting

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1 BlackRock is one of the world's leading asset management firms. Our client base includes pension plans, endowments, foundations, charities, official institutions, insurers and other financial institutions, as well as individuals around the world.

2 80 Fed. Reg. at 72006 (Nov. 18, 2015).

3 *Id.*

4 GAO, Testimony Before the Committee on Health, Education, Labor, and Pensions, U.S. Senate, Statement of Charles A. Jeszeck, Director Education, Workforce, and Income Security, "Retirement Security: Challenges and Prospects for Employees of Small Business" (Jul. 16, 2013) at 1, available at http://www.gao.gov/assets/660/655889.pdf.

5 At a hearing of the Oregon Task Force on Retirement Savings, DoL staff said that a state run retirement plan for private sector workers could create significant liability for the state and its private employers. Joint Interim Task Force on Oregon Retirement Savings (HB 3436) (Jun. 10, 2014); *See also* DOL Advisory Opinion 2012-01A (Apr. 27, 2012), available at http://www.dol.gov/ebsa/regs/aos/ao2012-01a.html ("Participation of private nonprofit employers in the Connecticut State Plan…would adversely affect the status of the State Plan as governmental plan under ERISA section 3(32)").

disappointment in Congress' failure to approve a national automatic individual retirement account ("IRA") program for workers without access to a workplace retirement plan, President Obama asked the DoL to help support these state efforts.[6] The DoL responded with the Proposed Rule and the accompanying "Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974" ("Interpretive Bulletin").[7]

BlackRock welcomes innovation at the state level to create potential retirement savings solutions, and the Proposed Rule and Interpretive Bulletin may help foster further development and implementation of these programs. However, **as explained more fully below, without broader reforms to ERISA and the Internal Revenue Code of 1986, as amended (the "Code") at the federal level, the Proposed Rule risks creating regulatory arbitrage and reducing retirement savings, particularly if small employers that have adopted ERISA plans stop offering them in favor of a simpler state alternative or small employers that have not adopted an ERISA plan are discouraged from doing so in the future.** And although these programs are targeted to small employers, there is no reason why mid-size and even large employers could not close their 401k plans and instead offer the state program. While the Interpretive Bulletin is helpful in making a state-sponsored multiple employer plan ("MEP") a more attractive option for states to offer an ERISA plan, we question whether many states will be willing to establish a program that complies with ERISA's fiduciary and extensive reporting and disclosure obligations, and we question why a similar option should not be available to private sector entities who are willing to establish and run an MEP. Thus, to provide more meaningful reform in the absence of a single national solution, we urge Congress, the DoL and the Department of Treasury ("Treasury") to consider and move forward with legislative and regulatory changes that reduce the legal risks, burdens and complexity of establishing and maintaining a plan and create a regulatory environment that genuinely fosters ease of plan adoption, increased savings and wise investing.

I. Potential Unintended Consequences of State-Based Retirement Programs

In the Preamble to the Proposed Rule, the DoL requests input on policy issues raised by state-based retirement programs and on the potential for those programs to foster retirement security. The Proposed Rule and Interpretive Bulletin help relieve specific concerns that have been raised by proposed state-based retirement programs, and, in that respect, they represent a step in the right direction. However, it is critical that rules and guidance on narrow, technical issues do not obscure the broader context. That broader context requires consideration of whether state-based programs could have an adverse impact on retirement savings in the long term. We strongly disagree with the DoL's statement that the benefits offered by ERISA-covered programs, such as 401(k) plans, have advantages such that it is "unlikely that state initiatives will crowd-out" ERISA covered plans.[8] ERISA's and the Code's complex and burdensome requirements already deter small employers from establishing and maintaining plans.[9] The chilling effect of ERISA's and the Code's complex rules is underscored by the fact that a threshold requirement in a number state programs, including those enacted in California and

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6 Remarks by the President at White House Conference on Aging (Jul. 13, 2015), available at https://www.whitehouse.gov/the-press-office/2015/07/13/remarks-president-white-house-conference-aging.

7 80 Fed. Reg. at 71936 (Nov. 18, 2015).

8 80 Fed. Reg. at 72012 (Nov. 18, 2015).

9 GAO, Report to Congressional Requesters, Private Pensions, Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship, GAO-12-326 (Mar. 2012), at 18-20, available at http://www.gao.gov/assets/590/589055.pdf ("GAO 2012 Report").

Illinois, is that ERISA not apply.[10] Given the daunting administrative burdens and the fiduciary risk associated with ERISA and Code compliance, it is only natural to expect employers, in particular small employers, to embrace a less cumbersome state program as an alternative, even if the program's savings rates are lower and its investment alternatives are more limited. The DoL's proposed new definition of fiduciary threatens to exacerbate this problem, as the proposal will make it even more difficult and expensive for small employers and individuals to gain access to the education and advice they need to set up a plan, save and invest for their retirement.[11] In addition, by offering a non-ERISA option to states, the proposed rule is likely to undermine the interest in states' adopting a MEP, as described in the Interpretive Bulletin.

A. Suggestions for Reform at the Federal Level

ERISA imposes general fiduciary standards on those who establish and maintain a plan and includes broad and complex prohibited transaction rules. In a defined contribution plan, these fiduciary obligations include the obligation to select and monitor appropriate investment options for employees. Penalties for a breach are severe. Further, ERISA and the Code impose significant administrative burdens and associated costs on plan sponsors, including maintaining plan documents, providing specific disclosures to participants and beneficiaries, ensuring compliance with non-discrimination rules and filing of government reports. Virtually all plans, including those sponsored by small employers, are required to submit Form 5500 to the federal government.[12] Small employer defined contribution plans must provide participants (subject to certain exceptions and alternative reporting for SEP or SIMPLE IRA plans) with a periodic benefit statement,[13] a summary annual report,[14] a summary plan description,[15] notice of an opportunity to change elective deferrals[16] and the ERISA-required participant disclosures.[17] If a plan uses automatic enrollment with investment into a qualified default investment alternative ("QDIA"), it must provide another specific notice to employees annually.[18] The instructions for required forms are often confusing, and for many small plan sponsors it is complicated just to determine whether they need to complete a certain form or provide a particular disclosure.

The Code's non-discrimination rules, which must be satisfied to obtain and maintain tax qualified status, tend to disproportionately burden small employers.[19] These top-heavy requirements are complex and burdensome and, depending on the type of plan, may require annual testing. This results in additional administrative burden, refunds to highly compensated employees and corrective contributions for non-highly compensated employees. The existing

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[10] California Secure Choice Retirement Savings Trust Act, Cal. Gov't. Code Tit. 21 § 20139 (2012), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1234; Illinois Secure Choice Savings Program Act, Ill Pub. Act. 098-1150 (2015), available at http://www.ilga.gov/legislation/publicacts/98/PDF/098-1150.pdf.

[11] For more information, see BlackRock, Comment Letter, Definition of the Term "Fiduciary"; Conflict of Interest Proposed Rule - Department of Labor (Jul. 21, 2015), available at http://www.blackrock.com/corporate/en-us/literature/publication/dol-definition-of-fiduciary-conflict-of-interest-proposed-rule-072115.pdf.

[12] 29 U.S.C. § 1021(a) and (b).

[13] 29 U.S.C. § 1025; DOL Field Assistance Bulletin 2006-3 and 2007-3.

[14] 29 U.S.C. § 1024(g)(3); 29 C.F.R. §§ 2520.104b-10, 2520.104-46(b) and 2520.104b-1.

[15] 29 U.S.C. §§ 1022 and 1024(a)(6), (b)(1), (b)(2), (b)(4) and (c); 29 C.F.R. §§ 2520.102-2, 2520.102-3, 2520.104b-1, 2520.104b-2 and 2520.104b-3.

[16] 26 C.F.R. §§ 1.401(k)-1(e)(2)(ii) and 1.403(b)-5(b)(2).

[17] 29 C.F.R. § 2550.404a-5.

[18] 29 U.S.C. § 1104(c)(5).

[19] GAO 2012 Report at 18-20. Defined benefit, defined contribution and SEP IRA plans are subject to the top-heavy rules. SIMPLE IRA plans and some safe harbor 401(k) plans are exempt. 26 U.S.C. §§ 416(g)(4)(G) and (H).

safe harbors from non-discrimination testing require employer matching or profit sharing contributions, which may be too expensive for a small employer and/or difficult to sustain over an extended period of time. SEP and SIMPLE IRA plans offer a less complicated alternative, but these plans also require employer contributions.[20]

We believe that ERISA and tax rules can be simplified or eliminated without creating the risk of harm to participants and beneficiaries that ERISA and the Code seek to avoid. Congress, the DoL and Treasury should review the statutory and regulatory requirements and consider alternative changes that critically focus on eliminating unnecessary obstacles and simplifying and clarifying legal obligations, particularly those relating to reporting and disclosure, for small employers. For example, the DOL could further streamline and simplify ERISA reporting and disclosure filings (including eliminating Form 5500 filings entirely for defined contribution plans that offer only registered mutual funds, bank maintained collective funds or index-based separate accounts as investment alternatives). In addition, either the DoL or Congress should take action to more broadly facilitate private sector sponsored open-employer MEPs. If private sponsors can establish MEPs without the existing requirement that there be a nexus among the participating employers, that could provide a much greater stimulus to establishing MEPs than permitting states to do so. States require legislative change and may not have the resources to establish a MEP, and some have indicated that operating a program in compliance with ERISA is problematic. If open-MEPs are generally available, we believe that the limited employer involvement and significantly reduced administrative burdens could entice small employers to adopt these ERISA plans. We also suggest that Congress consider eliminating "top heavy" testing for small employer plans. In our view, these federal level changes are critical to mitigate the risk of limiting retirement savings if state programs are launched and employers opt to use state programs instead of establishing and maintaining an ERISA plan.

B. State Programs May Provide *Part of* a Retirement Solution, But there Remain Significant Challenges to Moving Forward

BlackRock supports alternative solutions that can help individuals save and invest wisely for retirement. In our view, innovative state programs with the following characteristics, as contemplated by the Proposed Rule, could provide a promising tool to help individuals save and invest wisely for retirement: (i) programs are structured as IRAs, (ii) employers that do not otherwise offer a plan are *mandated* to contribute a specific percentage of each employee's pay, but employees may affirmatively opt out; and (iii) assets are automatically contributed to an investment that could qualify as a QDIA, as defined in ERISA, and additional investment options are simple, diversified and consistent with those that would be available in a plan that would satisfy the requirements under Section 404(c) of ERISA (*e.g.*, at least three diversified investment alternatives).[21] To further enhance their programs, states should provide significant and easy to understand retirement education, including information and tools that can assist individuals in determining, achieving and managing desired income levels in retirement. As electronic investment advisory services (*e.g.*, robo-advisers) become more established, states can consider ways to incorporate these services to help participants with additional investment advice. Finally, to facilitate rollovers from the state program to a personal IRA, states could follow the example in the state of Washington and work with IRA providers to establish a portal or marketplace that makes the process easy and cost-effective.

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[20] 26 U.S.C. §§ 408(k) and (p).

[21] Although states, including California and Oregon, may desire to guaranty a particular minimum benefit, purchasing insurance or otherwise providing a guarantee would likely significantly increase cost and complexity, particularly with respect to portability. If programs are successful, the feature of a guaranteed return of principal or income can be introduced at a later date.

These types of state-based programs are simpler, and they should have lower administrative burdens and costs than those associated with establishing a single employer plan (*i.e.*, documentation associated with establishing a plan, transmitting documents to employees, regulatory filings, etc.). Under the Proposed Rule, the program would not be an employee benefit plan. The employer should not have fiduciary responsibility; its only obligation would be to make information available to, and to arrange payroll deduction for, employees. The automatic enrollment feature should have a more significant impact on retirement savings than President Obama's ***myRA*** program. The larger asset base should make institutional asset management expertise and a lower cost structure available to these small businesses and their employees. Establishing a target date, balanced fund or other appropriate default investment alternative, consistent with the approach used by many defined contribution plans, should help ensure assets are invested wisely for the future.

On the other hand, these state programs face a number of significant challenges other than ERISA, and the issues outlined below may hamper any state efforts to move forward. First, it is expensive for states to establish a program and then maintain an operational and compliance infrastructure. It will also be costly for states to provide ongoing needed investment education and/or advice. Most of the current state mandatory payroll deduction IRA proposals require that the programs be self-sustaining, which could be a difficult hurdle to overcome. Over time one would reasonably expect that the ongoing costs should be less than those associated with establishing a single employer plan; however, startup costs, in particular, could be significant and public funding may be needed. To fund The National Employment Savings Trust ("NEST"), the low-cost default provider in the United Kingdom, contributions are subject to an additional fee of 1.8 percent until those costs are recouped.[22] New Zealand's KiwiSaver program was initially funded through a combination of government subsidies and incentives, which were gradually eliminated or reduced over time.[23]

IRA contribution limits are significantly lower than those applicable to 401(k) and other ERISA plans, and the Proposed Rule prohibits employer contributions which could result in individuals saving *less* through state programs than they would have saved for retirement through private programs. While the Interpretive Bulletin facilitates state-sponsored MEPs and prototype plans subject to ERISA, it does not resolve concerns regarding the states' willingness to accept ERISA responsibility or their practical ability to implement an open-MEP program subject to the extensive requirements in ERISA and the Code. Several of the state programs contemplate the inclusion of a guarantee. Both principal and income guarantees may be difficult to obtain. Even if a provider is identified, the cost may be prohibitive. State programs must also address portability if an employee changes jobs and moves to another state or starts working for an employer who offers an ERISA plan. Portability is made more complicated if different states have different programs with different rules.

By contrast, reforms at the federal level may motivate smaller employers to establish ERISA plans. These plans benefit from higher contribution limits and fiduciary protections. Further, the

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22 GAO, Report to the Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, Retirement Security, "Federal Action Could Help State Efforts to Expand Private Sector Coverage" (Sep. 2015) at 82, available at http://www.gao.gov/assets/680/672419.pdf ("September 2015 GAO Retirement Security Report").

23 *See* Parliamentary Counsel Office of New Zealand, KiwiSaver Act 2006, reprint as of Jun. 1, 2015, available at http://www.legislation.govt.nz/act/public/2006/0040/latest/whole.html#DLM378380; SuperLife, KiwiSaver – A General Guide for Employers (Jun. 2015), Appendix C, available at http://www.superlife.co.nz/files/attachments/Resources%20for%20employers/KiwiSaver%20Employers%20Guide.pdf.

suggestions for changes at the federal level outlined above would not create the same complexity and concerns regarding inconsistency, as a patchwork of different state programs.

II. Benefits of Automatic Withholding with Opt-Out

The Preamble to the Proposed Rule notes that one of the unintended consequences of state-mandated auto-IRA programs may be that some "workers who would not benefit from increased retirement savings could opt out, but some might fail to do so."[24] While this may occur, the risk can be mitigated by providing clear and repeated disclosure and education regarding the right to opt out. Moreover, we believe that the benefits of increased retirement savings for a majority of individuals that would result from automatic enrollment outweigh this risk. Automatic or mandatory payroll deduction represents an effective way to improve savings and, in contrast with the federal government, several states have been able to move forward with legislation that includes these features. Studies show that if savings are "automatic", then more people will save more.[25] The Pension Protection Act of 2006 ("PPA") is a good example of a legislative change that improved savings by making saving easier. Through the PPA, Congress and the DoL enacted legislation and implemented regulations designed to make it simple to increase savings and improve investment of those savings.[26] The PPA provided for automatic enrollment, automatic escalation and QDIAs, which were intended to collectively improve retirement outcomes. Research has shown that the PPA has positively impacted participation rates, particularly among younger employees.[27] The number of companies using automatic enrollment and automatic escalation in the United States continues to increase. Based on this success and recent legislative efforts, automatic enrollment of military personnel in the federal Thrift Savings Plan will be implemented in 2018.[28]

The United Kingdom implemented reforms that require private sector employers to automatically enroll eligible workers in a workplace retirement savings program and created NEST to provide employers with essentially a default investment option for employee contributions.[29] This

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[24] 80 Fed. Reg. 72012 (Nov. 18, 2015).

[25] *See* U.S. Department of the Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals (Feb. 2015) at 134, available at http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf ("In 401(k) plans, automatic enrollment has tended to increase participation rates to more than nine out of ten eligible employees. In contrast, for workers who lack access to a retirement plan at their workplace and are eligible to engage in tax-favored retirement saving by taking the initiative and making the decisions required to establish and contribute to an IRA, the IRA participation rate tends to be less than one out of ten"); J. Mark Iwry and David C. John, The Retirement Security Project, "Pursuing Universal Retirement Security Through Automatic IRAs" (2009) at 6, available at http://www.brookings.edu/~/media/research/files/papers/2009/7/automatic-ira-iwry/07_automatic_ira_iwry.pdf (showing that take-up rate for IRAs is 1 out of 10 and 9 out of 10 for participation in a 401(k) with automatic enrollment); Bipartisan Policy Center, "Rethinking Retirement Plans", Statement of James Smith (Oct. 21, 2015), available at http://bipartisanpolicy.org/events/rethinking-retirement-plans/. James Smith notes that auto-enrollment has been a "game changer" resulting in higher contribution levels and increased financial awareness.

[26] Notice of Proposed Rulemaking - Default Investment Alternatives under Participant Directed Individual Account Plans, 71 Fed. Reg. 56806, 56807 (Sep. 27, 2006).

[27] Based on a study of 11.7 million participants in Fidelity-administered plans, plans that offer auto enrollment grew from 2% to 21% in the five years following passage of the PPA. In plans with auto-enrollment, the participation rate for eligible employees in plans jumped to 82%. For plans without auto-enrollment, the participation rate for eligible employees is 55%. This effect is particularly powerful on younger, eligible employees age 20 to 24 where the participation rate is 76% in plans with auto enrollment but only 20% in those plans without it. *See* Steven Miller, "On PPA's 5th Anniversary, Impact on 401(k) Plans Proves Significant," Society for Human Resource Management (Dec. 19, 2011), available at: http://www.shrm.org/hrdisciplines/benefits/articles/pages/ppaimpact.aspx.

[28] *See* Kirsten Grind, Wall Street Journal, Companies to Workers: Start Saving More – Or We'll Do It for You (Oct. 15, 2015), available at http://www.wsj.com/articles/companies-to-workers-start-saving-moreor-well-do-it-for-you-1444901580?mg=id-wsj; Public Law. 114-92 (S. 1356), available at https://www.congress.gov/bill/114th-congress/senate-bill/1356.

[29] *See* September 2015 GAO Retirement Security Report at 32: "Initial opt-out rates have been lower than expected, and U.K. experience has shown the value of harnessing inertia to improve outcomes for workers."

initiative, which is analogous to the auto-IRA approach adopted or being considered by states, has succeeded in bringing individuals into retirement savings programs, and fewer people have opted out than predicted.[30] Automatic enrollment has also been used effectively in New Zealand's KiwiSaver program, and government officials have maintained that automatic enrollment is critical because too many people – even those who want to save – will not actively seek out participation."[31] These are all positive examples of the use of automatic enrollment, which we believe can be used effectively to help address the material shortfall in retirement savings in the United States.

III. Comments on Language of the Proposed Rule

The language of the Proposed Rule achieves its objective of creating a safe-harbor from the applicability of ERISA for state sponsored mandatory payroll deduction IRA programs. We believe the Proposed Rule should be amended to permit an employer to provide general information and education regarding the state program or saving and investing generally without violating the terms of the safe harbor. As drafted, the employer's role is limited to distributing information regarding the state program prepared by the state or permitting the state to publicize the program. The prescriptive language of the Proposed Rule would appear to preclude an employer from answering an employee's questions regarding the state program, without risking that the safe harbor would no longer apply. Additional educational information regarding retirement and investing may be helpful to an employee in determining whether he or she should opt out. We believe that this type of education and assistance should not turn an employer into a plan sponsor and will facilitate our shared goal of improving retirement outcomes for all Americans.

We thank the DoL for providing BlackRock the opportunity to comment on the Proposed Rule. Please contact me if you have any questions or comments regarding BlackRock's views.

Sincerely,

Barbara Novick
Vice Chairman

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30 *See* September 2015 GAO Retirement Security Report at 26: "A government study published in March 2015 found that since implementation of reforms began in October 2012, stakeholders perceived them as successful to date. The government reported that by the end of 2014 more than 5 million workers had been automatically enrolled and only 12 percent of workers had opted out in 2014."

31 *See* September 2015 GAO Retirement Security Report at 31-32.