FINANCIAL SERVICES ROUNDTABLE

VIA http://www.regulations.gov

January 19, 2016

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Savings Arrangements Established by States for Non-Governmental Employees

Ladies and Gentlemen:

The Financial Services Roundtable ("FSR") [1] welcomes the opportunity to comment on the United States Department of Labor's (the "Department") proposal entitled "Savings Arrangements Established by States for Non-Governmental Employees" (the "Proposal").[2] The Proposal provides conditions (a "safe harbor") under which state-mandated payroll deduction savings arrangements for private-sector employees would not be considered employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA").[3] The Proposal is intended to "reduce the risk" that state-run savings arrangements with automatic enrollment would be preempted by ERISA.

FSR and our members support retirement security and increased incentives and opportunities for Americans to plan, save, and invest to meet their needs in retirement. Through its "Save 10" awareness initiative, FSR has been working to educate private sector employers

[1] As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Savings Arrangements Established by States for Non-Governmental Employees* [RIN: 1210-AB71], 80 Federal Register 72006 (Nov. 18, 2015) ("Proposing Release"), *available at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28542.

[3] *Id*.

about important retirement savings tools, such as auto-enrollment. FSR also supports efforts to improve access to coverage and to educate workers on the need for adequate savings targets and the availability of financial products designed to help them meet their unique needs throughout their retirement.

Americans already have access to a variety of products and services to promote sound investment decisions and retirement planning. Raising awareness of the availability and affordability of these products and services will only increase participation and retirement security. FSR believes the broad availability of retirement savings opportunities is important because savings increase domestic investment, encourages economic growth, and results in higher wages, financial freedom, and a higher standard of living.[4]

Americans have made impressive gains in retirement savings since the enactment of ERISA in 1974. Commencing in 1975, when private pension funds' assets were $244.3 billion,[5] private retirement assets surged to $24.7 trillion in 2014, which included $7.4 trillion in IRAs and $6.8 trillion in defined contribution plans.[6]

Issues for Consideration

FSR is concerned that a determination to authorize only state-sponsored plans to provide an opportunity for smaller employers to offer easy and convenient retirement savings programs to their employees will likely lead to significant retirement assets being invested without the protections of ERISA, in programs that may materially differ from state to state and be influenced by considerations that are not consistent with the objectives of ERISA. FSR believes implementation of the Proposal would not build on and increase Americans' gains in retirement savings, but would potentially have a negative impact on retirement savings.

The Safe Harbor Risks "Crowding-Out" ERISA-Covered Plans. The necessity for the proposed safe harbor from ERISA arises because the states seek to avoid ERISA's statutory and regulatory requirements, which include "reporting and disclosure rules and stringent conduct standards . . . for plan fiduciaries."[7] We understand that the costs, regulatory burdens, and liability associated with compliance with ERISA's complex statutory and regulatory provisions

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[4] *See also*, OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks").

[5] INSURANCE INFORMATION INSTITUTE and THE FINANCIAL SERVICES ROUNDTABLE, THE FINANCIAL SERVICES FACT BOOK at 50 (2011) (citing Board of Governors of the Federal Reserve System, June 10, 2010)).

[6] INVESTMENT COMPANY INSTITUTE, 2015 INVESTMENT COMPANY FACT BOOK at 137, available at https://www.ici.org/pdf/2015_factbook.pdf.

[7] *See*, Proposing Release at 72007.

also are reasons that many small private-sector employers[8] (including not-for-profit entities) have not established ERISA plans.

We believe the likely result of the Proposal would be to "crowd-out" ERISA plans in the small employer marketplace, in favor of state-run savings plans that do not include any opportunity for employer matching contributions or higher savings (or deferral) rates for employees—meaning less money saved for and by employees. Small employers that currently offer ERISA plans—as well as employers that currently do not—would have a reduced incentive to establish and maintain ERISA plans for their employees.

We note that some states are pushing for additional employer-sponsored coverage without recognizing the role that other programs have to shore up retirement security. For example, for lower-income workers, Social Security by design is intended to have much more robust replacement rates as a percentage of their wages or salary.[9]

Competition in the market as an alternative to state plans would better serve the unique needs of employees. Private-sector solutions could increase performance and innovation in the small employer marketplace. However, in the absence of regulatory relief under ERISA, state plans would enjoy a competitive advantage over private-sector providers.

FSR urges the Department to convene an advisory committee that would include small employers and plan sponsors and administrators to examine barriers to expanding ERISA-covered plans (*e.g.*, top-heavy rules, and reporting and non-discrimination testing requirements) for small employers prior to adopting a final rule. The Department, in collaboration with the Department of the Treasury ("Treasury"), should use the work of the committee to inform their respective legislative and regulatory recommendations to relieve the burdens that make it impractical for too many small employers to provide ERISA plans for their employees.

State Plan Eligibility Requirements Implicate ERISA's Preemption Provisions. The Proposal also would appear to permit state savings programs to impact plan sponsors in a manner that is inconsistent with ERISA's preemption provisions. In this respect, the Proposal provides that a state savings program will not fail to satisfy the safe harbor merely because the program "[i]s directed toward those employees who are not already *eligible* for some other workplace savings arrangement."[10] However, plan eligibility requirements are clearly an area of core ERISA concern.[11] State savings programs that purport to apply to employees that are not eligible for their employer's ERISA plan also would frustrate the purposes of ERISA's preemption

8 *See also*, Proposing Release at 720012 (noting that small and start-up companies "tend to be least likely to offer pensions").

9 *See*, Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013*, EMPLOYEE BENEFIT RESEARCH INSTITUTE (Oct. 2014) (noting that of the 68 percent of workers not covered by workplace plans, 26.4 percent were 25 years or younger or 65 years or older; 43.6 percent worked part-time; and 43 percent earned $20,000 or less annually), *available at* https://www.ebri.org/pdf/briefspdf/EBRI_IB_405_Oct14.RetPart.pdf.

10 Proposed 29 C.F.R. § 2510.3–2(h)(2)(i) (emphasis added).

11 *See*, ERISA § 202 (setting minimum participation standards for ERISA plans).

provision to ensure that plan sponsors are subject to a uniform body of benefits law.[12] The Department should clarify that state savings programs would not satisfy the provisions of the safe harbor to the extent such programs apply to employees of an employer that sponsors an ERISA plan.

The Department Has Underestimated the Hurdles to the Successful Operation of State-Run Auto IRA Programs. The Department has indicated a willingness to provide relief for IRA–based programs that include automatic enrollment. However, the Department has not acknowledged that there are hurdles to providing for automatic enrollment in an IRA. Unlike automatic enrollment for employer-sponsored retirement plans where Congress created an exemption for premature withdrawals, there is no such relief for IRAs. The Treasury myRA program provides relief by using a Roth IRA as a framework for the accounts.

Further, the states have not indicated any appreciation of the need to oversee the timeliness of the employers' transmission of payroll contributions to the employees' accounts, which has been a long-standing enforcement priority for the Department. Without the Department's enforcement and oversight, states will have no choice but to be involved in tracking down missing contributions and potentially engaging in civil and criminal suits when contributions go missing.

We urge the Department to address the structural concerns noted above to ensure that employees will not be at risk.

Potential Adverse Impact on Access to Affordable Advice. Employees who do not opt-out of the state-run plan will begin to accumulate savings in their IRAs. While it is important that employees save for retirement, it is also important that they have access to professional assistance that will encourage them to remain in a savings plan (in lieu of a lump-sum distribution) and "on target" to meet their financial goals for retirement; and that will help them to understand the tax ramifications of contributions to and withdrawals from IRAs, including early withdrawal penalties. Employees cannot look to the small employer for this assistance because the proposed safe harbor limits the employer to ministerial functions.

Multiple Employer Plan Relief for Private-Sector Employers. FSR believes a more effective long-range approach to address the Department's concerns about promoting retirement savings[13] would be to ensure the continued availability of robust ERISA plans for Americans working for small employers. We note the Department's Interpretive Bulletin favors state-

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[12] *See*, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (noting that ERISA's preemption provision aims "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government" and to reduce "the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.").

[13] *See*, DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1984* [RIN: 1210-AB74], 80 Federal Register 71936, at 71937 (Nov. 18, 2015) ("Interpretive Bulletin"), *available at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28540 (noting the importance of encouraging employees to save for retirement and employers to make available opportunities for employees to save).

sponsored multiple employer plans ("MEP") given the "nexus" to employees and employers in the state created by the state's "unique representational interest in the health and welfare of its citizens."[14] However, any company that is authorized to conduct business in the state likewise has a vital interest in the health and welfare of the state's citizens, who include the company's employees, customers, suppliers, and stakeholders.

Indeed, it is likely that private-sector providers will be called upon to support any state-sponsored MEP, whether through the provision of investment options or recordkeeping, compliance and other administrative services, as the states have not previously been subject to and are likely unfamiliar with ERISA requirements. Furthermore, the duty of prudence under ERISA requires the hiring of outside experts if the plan fiduciary (in this case, the state) does not have the requisite knowledge or expertise. Given that private-sector experience and resources will likely be a critical component of state-sponsored MEPs, the private sector should have equal opportunity to sponsor these arrangements directly.

If the Department were willing to provide relief that would allow for reporting and disclosure on an aggregated basis for MPEs generally, then private sector solutions, sponsored by entities with years of experience in managing assets and doing recordkeeping for ERISA plans, could develop programs that would both afford greater flexibility for small employers to provide additional benefits on behalf of their employees (*e.g.*, matching contributions, profit-sharing contributions or money purchase contributions) that would enhance the retirement savings of such employees and still afford the employees the benefits and protections of ERISA. Allowing private sector organizations with the experience to collect and process contributions, address differences in plan designs and to administer efficiently such programs—all within the parameters of ERISA—would further the purposes of ERISA while enhancing retirement savings for the employees of small employers.

As we noted above, the costs, burdens, and liability imposed by ERISA deters many small employers from providing an ERISA plan for their employees. However, the ability to participate in an open MEP could provide efficiencies that may encourage small employers to provide their employees with access to an ERISA-covered plan. Although private sector employers and service providers have encouraged the Department and Treasury to provide helpful guidance to facilitate open MEPs, we are concerned that the Department has only provided a path for a state-run plan option without addressing the concerns raised by the private sector. We believe the open MEP concept—run through the private sector—would have a significant impact on coverage. Certainly a state-run option only would lack important competition. Accordingly, FSR urges the Department to grant authority to the private-sector to establish MEPs for small employers who wish to share administrative requirements and costs associated with managing an ERISA plan.

Finally, although the Interpretive Bulletin raises substantive policy issues and provides state-sponsored MEPs with a competitive advantage over private-sector providers, the Department did not provide notice and solicit public comment prior to publication of the Interpretive Bulletin in final form. FSR urges the Department to engage in notice-and-comment

[14] *Id*. at 71939.

rulemaking (including a regulatory impact analysis) in respect of the matters addressed in the Interpretive Bulletin.

The Proposal Appears "Economically Significant" under Executive Order 12866. The Department has submitted the Proposal under a "tentative" OMB determination that the rule is not "economically significant." Executive Order 12866 established the current framework governing the various degrees of cost-benefit analyses that must be submitted as justification for regulations. As a cabinet level agency, the Department must satisfy more stringent requirements. We are concerned that the effects of the proposed safe-harbor have not been adequately studied and justified with quantitative and qualitative measures, including the impacts on service providers, and the limitations on employees' savings.

In our view, the Department's Proposal appears "economically significant" because it will have an annual impact on the economy of $100 million or more. Under Executive Order 12866, any agency that proposes a regulation that is economically significant must submit the following studies to the Office of Information and Regulatory Affairs:

> (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
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> (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
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> (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Although it appears highly likely that the Proposal will allow states to create government-administered auto-IRA plans that will impact more than $100 million in retirement assets, the Department has failed to submit any of these detailed studies.

By the Department's own admission, the Proposal has the potential to affect 68 million workers across the United States who currently "do not have access to a retirement savings plan through their employers."[15] We find it difficult to imagine a scenario where the expansion of retirement savings to even a fraction of those workers would not have an annual impact on the economy of at least $100 million. We note the likely scenario of employers switching from private-sector to state-administered plans to avoid ERISA's costs, burdens, and fiduciary liabilities also would appear to be economically significant. In many ways, the Proposal may not just impact the economy, but create an entirely new retirement economy valued well in excess of $100 million.

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FSR appreciates the opportunity to submit comments on the Department's Proposal. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at Richard.Foster@FSRoundtable.org, or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs at Felicia.Smith@FSRoundtable.org.

Sincerely yours,

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[15] *See*, Proposing Release at 72006.