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January 5, 2016

Connecticut Retirement Security Board
c/o Office of the State Comptroller
55 Elm Street
Hartford, Connecticut 06106

Re: *Impacts of Recent USDOL Proposals on State-Run Retirement*

Dear Members of the Connecticut Retirement Security Board:

I write to you on behalf of the approximately 300 member companies of the American Council of Life Insurers (ACLI). ACLI advocates for public policy that supports the insurance 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, disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums.

In November 2015, the United States Department of Labor ("DOL") released two documents that directly relate to efforts by Connecticut to establish a state-run retirement program. The DOL published: (1) a proposed regulation which would attempt to provide a new safe harbor which would exclude certain mandatory state sponsored IRA programs from the consumer protections included in Title I of ERISA; and, (2) an interpretive bulletin outlining advantages to states in utilizing an ERISA plan approach to establish a state-run retirement program. If this sounds confusing, it is. The two documents show the conflict under which the DOL is operating regarding state-run retirement plans. While the proposed regulation would provide a safe harbor to allow certain state-run programs to avoid ERISA requirements, in the interpretive bulletin - DOL states the advantages of utilizing an ERISA plan approach, from a consumer savings and protection perspective.

The conflicting messages presented by the DOL in the IB and the proposed rule are troubling and demonstrate the inherent risks associated with the state operating a retirement program for private sector workers. On the one hand, DOL is proposing a path forward for states to operate a retirement program, while noting that such a program, even if operated in complete compliance with the proposed "safe harbor", may still be pre-empted by ERISA. On the other hand, DOL provides an interpretive bulletin discussing the advantages, from a consumer protection and retirement savings perspective, of an ERISA plan.

Because of the DOL's mixed messages on ERISA versus non-ERISA coverage for state-run plans, we urge Connecticut to proceed with caution. More specifically, we would urge you to support implementing legislation based upon a marketplace model, like that adopted in Washington state, which maintains ERISA protections, allows current retirement services providers to participate, and includes many, though not all, of the provisions the CRSB report to the legislature.

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Background:

In July 2015, President Barak Obama directed the DOL to develop a regulation to support the growing number of states trying to promote broader access to workplace retirement saving opportunities for America's middle class workers. The DOL indicated the rule would clarify how states can move forward with state-sponsored retirement savings programs, including with respect to requirements to automatically enroll employees and for employers to offer coverage, in ways that are consistent with federal laws governing employee benefit plans.

In its preamble to the proposed regulation, the DOL makes clear that "the fact that state programs do not create ERISA covered plans does not necessarily mean that, if the issue were litigated, the state laws would not be preempted by ERISA." The DOL goes on to warn that such a program "may be preempted by other Federal laws apart from ERISA."

DOL proposed regulation:

The proposed regulation, ***Savings Arrangements Established by States for Non-Governmental Employees***, attempts to clarify how states can move forward with state-sponsored retirement savings plans without such programs being subject to Title I of ERISA. Under the proposal, the state may utilize one or more service or investment providers to operate and administer the program, provided that the state is fully responsible for the operation and administration of the program. Thus, a state program could offer employees a choice of private IRA providers with the state designating a default provider for automatic enrollment.

The proposed safe harbor would be available to state managed IRA programs that include automatic enrollment and automatic escalation. Since this proposal would not amend the existing IRA safe harbor under ERISA, employers who choose to work directly with a private sector provider to offer a similar program would be establishing an ERISA plan. The proposed ERISA exemption is only available to a state IRA program with mandatory employer participation. Establishment of this type of a dual retirement protection regulatory scheme is detrimental to employees and unfair to current retirement services providers.

Under the proposal, the state savings program may be offered to employees who are not already eligible for some other workplace savings arrangement. This means that states could require employers with savings plans to enroll "ineligible employees," e.g., part-time worker, seasonal workers.

The proposed regulation would require the following conditions to be met in order to establish a non-ERISA plan:

1. The program is established by a state pursuant to state law;

2. The program is administered by the state establishing the program, or by a governmental agency or instrumentality of the state, which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;

3. The state assumes responsibility for the security of payroll deductions and employee savings;

4. The state adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;

5. Participation in the program is voluntary for employees;

6. The program does not require that an employee or beneficiary retain any portion of contributions or earnings in his or her IRA and does not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers permitted under the Internal Revenue Code;

7. All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the state;

8. The involvement of the employer is limited to the following:

(A) Collecting employee contributions through payroll deductions and remitting them to the program;

(B) Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;

(C) Providing information to the state necessary to facilitate the operation of the program; and

(D) Distributing program information to employees from the state and permitting the state or such entity to publicize the program to employees;

9. The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program;

10. The employer's participation in the program is required by state law;

11. The employer has no discretionary authority, control, or responsibility under the program;

12. The employer receives no direct or indirect consideration in the form of cash or otherwise, other than the reimbursement of the actual costs of the program to the employer (see #8); and

13. A state program may utilize automatic payroll deductions and may require automatic contribution increases if these activities are specifically directed under State law. Under the proposal, employees must be permitted to opt out or elect some other contribution amount and must be given adequate notice of the right to make such elections.

The proposed DOL regulation establishes a dual-tier system for consumers' retirement protection. Those employees in the state-sponsored system will not have ERISA consumer protections, while private sector workers with private plans will be fully covered by ERISA's consumer protections. In addition to the difference in financial protections, the economics of having to comply with ERISA may push some employers to drop existing retirement coverage forcing more workers into the unprotected state plan. Finally, because the DOL state plan proposal has lower contribution limits and prohibits employer contributions, a movement from an ERISA covered plan to a non-ERISA covered state plan could result in a decrease in worker's retirement savings.

DOL interpretive bulletin:
On the same day it released the proposed regulation, the DOL also issued ***Interpretive Bulletin 2015-02 ("IB"): State Savings Programs That Sponsor or Facilitate Plans Covered by the ERISA***. This IB sets forth DOL's views concerning the application of ERISA to certain state laws designed to expand the retirement

savings options to private sector workers through the use of ERISA-covered plans. In the IB, DOL states that there are several advantages to states utilizing an ERISA plan approach, including:

- Employers as well as employees can make contributions;
- Contribution limits are higher than for other state approaches that involve IRAs that are not intended to be ERISA-covered plans;
- ERISA plan accounts have stronger protection from creditors;
- Tax credits may allow small employers to offset part of the costs of starting certain types of plans, and
- Utilizing ERISA plans provides a “well-established uniform regulatory structure with important customer protections, including fiduciary obligations, automatic enrollment rules, recordkeeping and disclosure requirements, legal accountability provisions, and spousal provisions.

In the IB, DOL discusses three approaches states may utilize to promote retirement savings among private sector workers using ERISA-covered plans.

The first is the Washington state “marketplace” approach, whereby a state establishes a program to connect eligible employers with qualifying savings plans available in the private sector market. An employer using the “marketplace” approach could either establish an ERISA plan or plan or arrangement that is exempt from ERISA (such as a payroll deduction IRA arrangement satisfying DOL’s current payroll deduction IRA safe harbor).

The second approach is a “prototype” plan approach whereby a state would develop a prototype plan that employers could adopt. Each adopting employer would assume the same fiduciary obligations associated with sponsorship of any ERISA-covered plan, while the plan document could designate the state or a state designee to assume certain plan administrative and asset management functions.

The final approach discussed by DOL in the IB is the Multiple Employer Plan (MEP) approach. According to the IB, this approach involves a state establishing and obtaining IRS tax qualification for a multiple employer 401(k) plan, defined benefit plan or other tax-favored retirement savings program. Under this approach:

- The plan documents would provide that the Plan is subject to Title I of ERISA and is intended to comply with the Internal Revenue Code’s tax qualification requirements;
- The state, or a designated governmental agency or instrumentality would be the ERISA plan sponsor, named fiduciary, and plan administrator responsible (either directly or through one of more contract agents, which could be private-sector providers) for administering the plan, selecting service providers, communicating with employees, paying benefits, and providing other plan services.

An employer’s involvement would generally be limited to enrolling employees in the state MEP and forwarding voluntary employee and employer contributions to the plan. Accordingly, a participating employer would not be the plan sponsor, plan administrator, or assume fiduciary responsibility.

The IB explains that, unlike financial institutions that can sell retirement plans to employers, a state can act indirectly in the interest of employers and sponsor a MEP under ERISA because the state is tied to the contributing employers and their employees by a special "representational interest" in the health and welfare of its citizens. According to the IB, this unique nexus "distinguishes the state MEP from other business enterprises that underwrite benefits or provide administrative services to several unrelated employers."

Conclusion:

We believe that there is a path forward that synchronizes some of the proposals in the January 1, 2016 CRSB Report to the Legislature with the DOL's IB. In 2015, Washington State adopted legislation creating a state-sponsored marketplace for private sector retirement plan providers. The program is designed to reach truly underserved segments of the workforce, including small employers, part-time, seasonal and low-to-moderate income workers. The marketplace approach also preserves and promotes the offering of plans by licensed financial services providers. These licensed agents and brokers maintain their roles in marketing, placing and supporting workers' retirement plans. The state-based initiative created in Washington is voluntary for both the employer and the worker. The plans that would be available to employers may include:

- Voluntary payroll deduction IRAs with no employer endorsement, no auto-enrollment, no default investments (an ERISA "Safe Harbor" Plan);

- The federal myRA retirement savings program (not subject to ERISA);

- A tax qualified "SIMPLE Plan" (subject to streamlined ERISA rules);

- A payroll deduction IRA arrangement with auto-enrollment features (subject to ERISA);

- A 403b, 401k, MEP, with or without auto-enrollment features (subject to ERISA).

The DOL's IB outlines the benefits to consumers for just such an approach. We look forward to working with the CRSB as you develop the legislative framework for a Connecticut plan.

Sincerely,

Kate Kiernan

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