

VIA ELECTRONIC MAIL

September 29, 2016

Ms. Phyllis C. Borzi
Assistant Secretary
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
2000 Constitution Avenue, NW
Washington, DC 20210

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

Dear Assistant Secretary Borzi:

On August 30, 2016, the Department of Labor (DOL) published both a final rule allowing states to operate payroll deduction savings programs for private-sector employees without causing the states or private-sector employers to establish employee pension benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and a request for public comment on expanding the existing safe harbor to state political subdivisions in order to increase retirement savings (Proposed Rule).¹

The Financial Services Institute² (FSI) appreciates the opportunity to comment on this important proposal. FSI and its members are committed to working with all stakeholders to address the retirement savings crisis but remain concerned that the Proposed Rule will result in unintended consequences for retirement savers, small businesses, states, and municipalities. Therefore, we suggest that the safe harbor not be expanded to state political subdivisions. Our reasons are discussed in the comments below.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the U.S., there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives. These financial advisors are self-employed independent contractors, rather than employees of Independent Broker-Dealers (IBD).

¹ Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 59581 (proposed Aug. 30, 2016).

² The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

FSI member firms provide business support to financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners who typically have strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations and retirement plans with financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals.

Discussion

FSI appreciates the opportunity to comment on the Proposed Rule. FSI's members are well acquainted with the retirement savings crisis and are committed to helping Main Street investors understand how important it is to save for their retirement. However, we are concerned the Proposed Rule will result in overlapping programs, confusion for employers and their employees, and increased liability for political subdivisions. We suggest that the final rule's safe harbor for states not be expanded to include state political subdivisions. Our concerns are discussed in greater detail in the comments below.

A. Introduction

On August 30, the DOL issued a final regulation establishing a safe harbor under ERISA for state payroll deduction savings programs with automatic enrollment. In comments submitted when the rule was first proposed, FSI expressed concern that the proposal would result in higher costs for small businesses and investors.³ To avoid these unintended consequences, FSI recommended establishing a marketplace-style plan similar to the plan already instituted in Washington State, along with actively promoted financial literacy programs. Under this approach, a designated third-party would assume responsibility for administrative and asset management functions, rather than requiring the state or municipality to assume that role and the resulting liability.

Also on August 30, the DOL proposed to extend the safe harbor created for states to qualified state political subdivisions. FSI members remain concerned that the final rule and this Proposed Rule will have unintended, negative consequences for retirement savers, small businesses, states, and municipalities. While the DOL asserts that the expansion of the safe harbor to political subdivisions will increase retirement savings, FSI contends that the uncertainty and confusion resulting from overlapping programs will not further this goal.

B. Expanding the safe harbor would result in regulatory overlap and confusion

The Proposed Rule defines a political subdivision as including any city, county or similar governmental body, which must meet the following criteria to qualify for the proposed safe harbor: (1) A minimum population, (2) The authority to require employers' participation in the

³ Letter from David Bellaire, General Counsel, the Financial Services Institute, to Phyllis Borzi, Assistant Secretary of Labor, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor (Jan. 19, 2016) (available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB71/00005.pdf>).

payroll deduction savings program, and (3) be in a state without a state-wide retirement savings program. While the DOL asserts that the proposed definition is designed to reduce the number of political subdivisions that qualify for the safe harbor, FSI remains concerned that expanding the Proposed Rule may result in employers being subject to a multiplicity of overlapping political subdivision programs. This is extremely confusing for employers, particularly those operating in densely populated areas with multiple political subdivisions, such as Northern Virginia where Arlington County is surrounded by Fairfax County. Further, overlapping plans could be confusing for employees, particularly given how often workers change jobs in the current market. Job changes are more likely to involve crossing into a different political subdivision than a different state. The Proposed Rule's stated purpose is to expand access to retirement savings. However, adding complexity and confusion will do the opposite. The plan should be as simple and easy as possible to encourage employees to save.

The Proposed Rule also does not address the effect on the status of a payroll deduction savings program of a qualified political subdivision if the state in which the subdivision is located subsequently establishes a state-wide program. The DOL presumes "the state would take into account the nature and existence of the subdivision's program and act in a measured and calculated way so as to avoid or mitigate undesirable overlap," and the final regulation need not address the issue.⁴ FSI members are concerned that this presumption will result in uncertainty and confusion for small businesses and their employees. Specifically requiring a subsequently implemented state program to preempt or incorporate a subdivision's program would mitigate potential overlap and confusion.

C. FSI is concerned the Proposed Rule's qualification criteria are too broad

While FSI appreciates the DOL's effort to limit the universe of potentially eligible political subdivisions to 88,⁵ we contend that the criteria used to do so are insufficient to determine whether a political subdivision has the experience, capacity, and resources necessary to design and operate a payroll deduction savings program. As the DOL observes, population fluctuates, which could result in a political subdivision falling below the required threshold after it has established a program. Indeed, a large decrease in population could jeopardize the viability of the program, therefore we believe it is not in the best interest of investors or the political subdivisions themselves to lock in a population level at the point in time when the program is established. In an extreme case, such as Detroit, a significant population decline in a previously large urban area can have disastrous consequences for its retirement systems. Therefore, we suggest requiring the political subdivision to demonstrate that it is likely to remain above the population threshold for a period not less than ten years. Further, we suggest requiring a political subdivision to wind down a program if they fall below that threshold at the conclusion of three consecutive calendar years.

FSI is also concerned the Proposed Rule will result in increased liability for political subdivisions that have fewer resources to manage the financial exposure. Thus, we suggest further limiting the universe of eligible political subdivisions by adopting the suggested requirement that a political subdivision have demonstrated capacity to design and operate a payroll deduction savings program. Many cities and counties are struggling to manage existing retirement plans for

⁴ Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 59581, at 59585-6.

⁵ *Id.* at 59585.

their own workers, it would not be prudent to entrust them with additional responsibilities unless they have demonstrated the ability to administer them.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with the DOL on this and other important regulatory efforts

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.
Executive Vice President & General Counsel