



January 28, 2015

The Honorable Neal Kurk, Chair
House Finance Committee
107 North Main Street
Concord, New Hampshire 03301

RE: HB 239 – AN ACT establishing a statutory commission to study the creation of a state retirement security program and making an appropriation therefore.

Dear Chair Kurk:

Thank you very much for the opportunity to submit this statement for the record on behalf of the Securities Industry and Financial Markets Association (SIFMA)¹. SIFMA represents the shared interests of hundreds of securities firms, banks and asset managers. Moreover, many of our members have a presence in New Hampshire, where they provide various services to investors and retirement plans, including advisory services, investment opportunities and plan recordkeeping.

We agree there is a savings challenge in this country. Individuals need to save more for retirement and need to better understand the benefits of compounding interest, diversification, and not accessing retirement savings accounts for other purposes, as well as the availability of retirement products in which they could enroll. Additional education is part of this process, with age appropriate programs for children and adults. Enhanced federal and state programs and incentives encouraging more employers to offer these plans and more employees to utilize them would be helpful, and SIFMA would be happy to work with the State on such efforts.

For instance, SIFMA strongly supports the new retirement accounts, known as MyRAs, launched by the Department of the Treasury in December 2014. These are Roth IRA-style accounts that allow employees with access to direct deposit to begin saving for retirement in a safe, simple, and affordable plan that is portable and backed by the U.S. government (www.MyRA.treasury.gov). We strongly urge New Hampshire to fully evaluate this new federal program before developing a costly state alternative.

SIFMA supports the federal MyRA program, but we believe that HB 239 is a step in the wrong direction. Enacting the program set forth in this proposed study would burden the State with the costs and liability of developing, establishing and administering a new state program – a program that would directly compete with the private market, which today provides a wide variety of individual retirement account options for employees who are ready to contribute a percentage of their annual compensation towards retirement.

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA has offices in New York and in Washington, D.C. For more information, visit <http://www.sifma.org>.

SIFMA would also suggest that, before establishing a new program, the State should review the many different existing product offerings to determine if there is a gap in availability and consider what factors - other than access - may be preventing workers from taking advantage of existing options. The State should also consider the costs of trying to develop, establish, and maintain such a program.

Current Provider Market in New Hampshire

One of the underlying premises for this proposal is that New Hampshire businesses and private employers do not currently have access to reasonably priced retirement savings plans. This simply is not true. The market for retirement savings alternatives in New Hampshire is robust and highly competitive, with a wide range of products and services offered by a variety of New Hampshire providers, including brokers, mutual fund complexes, insurance companies, banks and credit unions. These industries provide numerous fairly priced retirement savings options, including 401(k), 403(b), 401(a), and 457(b) plans, as well as SIMPLE, SEP and traditional and Roth IRAs.

Moreover, in instances where an employer does not provide a plan, IRAs are readily available at most financial institutions in New Hampshire and around the country, in various formats, including online do-it-yourself, with limited financial advisor support from a call center, or with a one on one financial advisor relationship.

Additionally, as previously mentioned, the U.S. Department of the Treasury recently launched a new product called a MyRA. This account is a safe, simple, and affordable solution available to employees who have access to direct deposit and which offers a number of benefits; it allows for quick, simple, voluntary enrollment for employees (enrollment takes less than 10 minutes); provides all the tax benefits of a Roth IRA; is fully portable (including between states); requires no employer contribution; invests directly in the Government's Thrift Savings Plan (pooling the investments); and is provided with no fees to the saver.

Given the variety and breadth of current options in the marketplace, there is no reason for the State to enter into direct competition with New Hampshire financial services companies who are employing a large number of workers in the State and who are already providing these services at no direct cost to the State.

Costs of a State Run Retirement Plan

Another premise underlying the plan proposed for study is that the costs to the State will be minimal or non-existent. That is also simply not true. A few states have estimated the cost of establishing such a program, and we have the benefit today of looking at those studies to see how this might work in New Hampshire.

For example, a plan similar to the one described for study in HB 239 – which included a similar “self-sustaining” provision – was considered in Illinois in 2014. The fiscal note attached to the bill provided a two year estimate of \$15 to \$20 million for start-up costs, including employees, consultants, lawyers, actuaries, office space, and other expenses necessary to properly design, implement, and operate the program. While Illinois subsequently authorized the development of this program, it has yet to fund it.

Another similar plan was considered, but not passed, in Connecticut in 2014 (SB 249). The fiscal note on this bill focused primarily on lost tax revenue.² The initial analysis predicted \$66.1 million - \$165.2 million in lost revenue annually. When the bill was amended to make it a Roth IRA, the revenue loss could not be documented, as it “is dependent on the investment earnings of contributions to, and timing of withdrawals from, the Roth IRAs established under the amendment.”

Further, once a plan is established, the State would incur ongoing operational, oversight, compliance and insurance costs. We are aware of two studies (from 2007 and 2009) that have examined the cost of creating a state-sponsored plan. One study, authored by the Maryland Supplemental Retirement Plans (MSRP) in 2007, concluded that a “state sponsored voluntary accounts program is potentially viable but will require significant long-term state expense.” A 2009 Washington State report estimated that a state sponsored basic IRA plan that provided retirement savings options to 20,000 participants would have start-up costs of \$1.9 million and annual on-going state costs of almost \$1.4 million. We understand the numbers are dated, but it is probably fair to assume that these numbers have only increased, not decreased, over the intervening years.

No Other State Runs a Plan for Non-Public Workers

Additionally, many proponents of this type of plan argue that this is a low risk proposition as there are already similar programs operating in other states. This is not true. Since 2010, 19 states have looked into the possibility of establishing a state run retirement plan for private sector workers, but to date, no state has established such a plan. As previously noted, Illinois enacted a law authorizing a plan, but has yet to fund and establish it. Massachusetts also passed a law in 2012 to authorize a state run plan for very small non-profits, but no system has been established.

In 2012, California created a Secure Choice Retirement Savings Investment Board to explore the issue. However, before a plan can be established, the Board must conduct a privately or federally funded market analysis and feasibility study “to determine whether the legal and practical conditions for implementation can be met,” and the program cannot proceed unless the IRS finds that the program qualifies for the same favorable federal income tax treatment as IRAs, the Department of Labor finds that such a plan is not an employee benefit plan under the federal Employee Retirement Income Security Act (ERISA), and the Board concludes, based on the analysis, that the program will be self-sustaining. The Board is currently in the process of hiring a law firm and issuing an RFP for its market analysis and feasibility study. Then, the Board must go back to the legislature for approval before implementing any plan. All of this suggests a fairly lengthy and expensive process.

New Hampshire may want to wait to consider the outcomes in Illinois and California before moving forward with a similar plan.

ERISA

We are also concerned about the conflicts that would undoubtedly arise between federal regulations governing retirement plans and laws enacted by individual states – in effect, what the Employee Retirement Income Security Act (ERISA) has addressed since its enactment in 1974. Current private sector plans must fully satisfy ERISA, and part of the costs of the plan being put forward relate to, in our view, the federal regulations vendors already face in the retirement space. We

² <http://www.cga.ct.gov/2014/FN/2014SB-00249-R000276-FN.htm>

believe the state will also become subject to such requirements. We believe ERISA would appropriately apply in the case of a state sponsored plan run for private employees and would create substantial ERISA compliance costs and financial liability that the state would not be immune to. The Department of Labor issued an Advisory Opinion to Connecticut Governor Malloy in 2012 which is relevant here.

Advisory Opinion 2012-01A³ was issued in response to the State's attempt to provide health insurance coverage for certain private sector workers who contracted with the state. DOL advised that private sector employers are not governmental agencies or instrumentalities and that therefore a provision exempting governmental plans from ERISA did not apply. The analysis for coverage of private sector employees in a pension benefit plan should be comparable. Joe Canary, Director of DOL's Office of Regulations and Interpretations, seemed to confirm this at a June 2014 Oregon Retirement Savings Task Force meeting when he said, "Governmental plans have to provide benefits to employees of the government. So, even if the government is involved in a private sector plan, that would not make that a governmental plan."

Further, SIFMA believes that ERISA would not only apply to the State, but its obligations could well extend to each participating employer. DOL Advisory Opinion 2012-04A⁴ found that, where a plan is made up of numerous employers with no "genuine organizational relationship," both the "persons who operate the arrangement" and "each employer sponsor" would be subject to ERISA's fiduciary provisions.

There is additional guidance from the Department of Labor that would be applicable as well. While there is a safe harbor for certain payroll deduction arrangements, several requirements, including limited employer involvement, would need to be satisfied. Employer contributions are just one of the things that would presumably trigger ERISA applicability under this safe harbor. DOL's Joe Canary stated at the Oregon meeting referenced above, "[i]f the employer is making contributions into the arrangement, that from an ERISA perspective, it is a very big indicator that the employer is establishing and maintaining that plan, is funding that plan."

Once ERISA application is clear, then the State would be liable for complying with it. These liability concerns include liability for a breach of fiduciary duty under ERISA, which entails:

- Liability for failure to file the necessary IRS forms and accounting mistakes;
- Liability for any complications of complying with annual non-discrimination testing;
- Liability for a breach of fiduciary duty under ERISA, which includes liability for paying unreasonable plan expenses and monitoring all the investment options offered or utilized within the plan and making timely adjustments as determined necessary; and
- Liability for ensuring that no prohibited transactions are occurring, including monitoring for conflicts between a plan and a party in interest.

³ <http://www.dol.gov/ebsa/regs/aos/ao2012-01a.html>

⁴ <http://www.dol.gov/ebsa/regs/aos/ao2012-04a.html>

Complicating matters further is the fact that many of the requirements of ERISA are repeated under the Internal Revenue Code. The IRS has noted that “[a]gencies have become increasingly concerned with the growing number of requests for governmental plan determinations from plan sponsors whose relationships to government entities are increasingly remote,” and is therefore also considering defining what constitutes a governmental plan themselves.⁵

However, even if it is determined that ERISA does not apply to the plan under consideration, that is not necessarily a positive for investors. While ERISA compliance does mean additional costs, it also means additional guaranteed rights for plan participants, including, for example, portability and spousal protection. We are concerned that employees who save for retirement in a state plan will not have the same rights and protections that are provided under the federal regime.

Positive Steps Moving Forward

SIFMA would like to work with state policymakers to expand retirement plan coverage. We believe that education about the options that currently exist for individuals and small and non-profit employers, particularly MyRAs, could help increase coverage significantly. For example, many low and moderate-income workers are unaware of the federal Saver’s Credit, and many small employers are not aware that the federal government provides a \$500 per year tax credit for three years if a business starts a new plan. Further, some small employers may still be unfamiliar with the ability to offer a low cost IRA based retirement program or other federal options.

Additionally, there are educational programs at the federal level about the benefits to any employer offering a retirement plan to employees that could be replicated on the state level at what we think would be a minimal cost in time and money. This could entail partnerships between small employer groups, various providers and the State, such as by holding meetings at schools or civic organizations at a local level. An alternative for the partnerships would be to consider a central marketplace for employers and employees to easily review their existing options. SIFMA would be happy to work with the State on such efforts.

We appreciate your willingness to consider our concerns. Please do not hesitate to contact me at 212-313-1311.

Sincerely,



Kim Chamberlain
Managing Director and Associate General Counsel
State Government Affairs

CC: All Members, House Finance Committee

⁵ <http://www.irs.gov/Retirement-Plans/IRS-and-Treasury-Request-Comments-on-Possible-Approaches-to-Governmental-Plan-Guidance-1>