



April 11, 2017

The Honorable Tracy Kraft-Tharp, Chair
The Honorable Faith Winter, Vice Chair
House Business Affairs and Labor Committee
200 East Colfax Ave., Room LSB-A
Denver, CO 80203

RE: H.B. 1290, An Act Concerning the Creation of the Colorado Secure Savings Plan.

Dear Chair Kraft-Tharp and Vice Chair Winter:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is a national trade association which brings together the shared interests of hundreds of broker-dealers, banks and asset managers. Many of our members have a strong presence in Colorado, where they provide services to investors and retirement plans, including advisory services, investment opportunities and plan recordkeeping.

We appreciate the opportunity to provide comments on H.B. 1290, An Act Concerning the Creation of the Colorado Secure Savings Plan. We commend the bill sponsors for their commitment to improving retirement savings. We agree that there is a retirement savings challenge in this country and that action must be taken to address this challenge. We, however, respectfully disagree that a state-run retirement savings plan for private sector workers is an appropriate solution.

As you consider the legislation, we urge you to take the following into account:

- **Access to Retirement Savings.** The market for retirement savings products in Colorado is robust and highly competitive, and has seen notable growth over recent years. The securities industry employs over 21,000 people in the state, and more than 110,000 people are employed by entities falling within the broader category of finance and insurance. These industries all 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. Where an employer does not provide a plan, IRAs are readily available on-line and at most financial institutions.
- **Underlying Obstacles to Savings.** With a variety of options already available, factors other than access may be keeping people from saving. It is important that any state proposal address some of the underlying issues with retirement under-saving, including, for example, competing financial needs and a lack of understanding about the importance of saving over time. In fact, an AARP survey has found that “No money left after paying bills” was the leading obstacle to retirement savings. We would encourage the State to first determine why its residents aren’t saving enough before proposing a solution.

¹ SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over \$2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over \$16 trillion in assets and managing more than \$62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. For more information, visit <http://www.sifma.org>.

- **ERISA Applicability.** As you may know, there has been significant debate across the country as to whether a state-run plan for private sector workers is a plan covered by the Employee Retirement Income Security Act of 1974 (ERISA). According to the U.S. Department of Labor (“DOL”), “[p]ension plans covered by ERISA are subject to various statutory and regulatory requirements These include reporting and disclosure rules and stringent conduct standards derived from trust law for plan fiduciaries.”

While the DOL, under the prior administration, had issued rules that provide states and certain municipalities with a limited safe harbor from ERISA, there is significant federal uncertainty. The U.S. Congress recently passed a resolution (H.J.R. 67) that repeals the safe harbor for municipalities; a similar resolution on state run plans is still pending (H.J.R. 66). Additionally, with a new incoming Labor Secretary and the Executive Office of the President issuing a statement supporting a repeal of the safe harbor, it is also possible that DOL will re-evaluate the rule on its own initiative.

Notably, the State of Minnesota released a study of state-run retirement plans earlier this year, and found that, if there was no safe harbor, ERISA would:

- Prohibit states from requiring private employers to offer an ERISA-covered plan;
- Require that participation be *completely* voluntary (which would likely disqualify an auto-enroll payroll deduction IRA²); and
- Supersede all state laws.

The existence of an effective safe harbor is critical to H.B. 1290. Indeed, the legislation states that “the Board shall not implement the plan if . . . it is determined that the plan is an employee benefit plan and state or employer liability is established under [ERISA].” Given that this is the case, we would encourage you to wait and see if federal legislative or regulatory action happens in the near term before moving forward with any legislation.

- **Employers With Strong Retirement Plans Will Likely Re-evaluate, Thereby Lowering Overall Retirement Saving.** We are also very concerned that H.B. 1290 will encourage Colorado employers with strong existing plans to drop their current plan in favor of the state alternative. The State is looking to enhance-- not reduce -- retirement saving, and offering options that encourage employers with existing plans to instead enroll in a state offering, with lower permissible contribution levels and no matching funds, would be counterproductive to that objective.

² See Department of Labor RIN 1270-AB71 (29 CFR Part 2510), Proposed Rule (stating that: “One of the 1975 payroll deduction IRA safe harbor’s conditions is that an employee’s participation must be “completely voluntary.” The Department intended this term to mean considerably more than that employees are free to opt out of participation in the program. Instead, the employee’s enrollment must be self-initiated. In various contexts, courts have held that opt-out arrangements are not consistent with a requirement for a “completely voluntary” arrangement.”); See Also Department of Labor Information Letter 2014-12-15 (Stating that the myRA would not be covered by ERISA due to its voluntary nature, and highlighting that the myRA does not contemplate automatic enrollment); See Also Bloomberg BNA, Davis Harman, “States dive headfirst into retirement coverage debate – but will their initiatives run afoul of federal law?” Feb. 2015 (stating that, “... it is generally thought that the inclusion of an automatic enrollment feature results in employer involvement in excess of that allowed under the [1975 IRA] safe harbor. In fact, the federal Automatic IRA bills have included a specific exemption from ERISA because, otherwise, an automatic enrollment payroll deduction IRA, even one required by law, would be treated as an ERISA plan.”).

- **Federal myRA.** As you may know, in late 2015, the U.S. Department of Treasury launched a new retirement program known as myRA (www.myRA.gov). It is specifically targeted to help low-income workers, small businesses, and those without access to an employer-sponsored retirement program, and it is a simple, safe, affordable, and voluntary way for employees to save for retirement. SIFMA strongly supports the myRA program and would encourage the legislature to compare this program to the Secure Choice Program before moving forward.
- **Studies.** In addition, H.B. 1290 appears to require three studies: a financial feasibility study; a study assessing the effects that greater financial education would have on retirement savings; and a study on the effectiveness of a small business marketplace. These studies are being done at the same time a specific solution to the retirement savings problem is being developed. We would encourage you to consider doing at least the financial education study and the small business marketplace study before latching on to a specific solution. If, for example, the results of the studies suggest that additional education and/or a marketplace based solution (as described below) could appropriately address the issue without the creation of a new state mandate and infrastructure, then the state would presumably want to explore those alternatives.
- **Marketplace Programs.** In May 2015, Washington State enacted and funded the first voluntary small business retirement plan “Marketplace” in the nation, which focuses on private providers and myRA and establishes a web-portal structure to connect private sector employers with qualifying plan vendors. The program is expected to launch later this year. A second-in-the-nation Marketplace was established in New Jersey in January 2016. We would encourage you to look at these Marketplace laws to see if their voluntary nature, strong education and outreach components, and low cost/low risk of liability approach are of potential interest before moving forward with a far more costly and comprehensive plan.

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

Sincerely,



Kim Chamberlain
Managing Director and Associate General Counsel
State Government Affairs

CC: House Business Affairs and Labor Committee