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May 4, 2021

The Honorable Heather Sanborn, Co-chair

The Honorable Denise Tepler, Co-chair

Honorable Members of the Health Coverage, Insurance, and Financial Services Committee

c/o Legislative Information Office

100 State House Station

Augusta, ME 04333

Dear Senator Sanborn, Representative Tepler, and Honorable Members of the Health Coverage, Insurance, and Financial Services Committee;

I am writing to you on behalf of the American Council of Life Insurers (ACLI) and the Maine chapter of the National Association of Insurance and Financial Advisors (NAIFA- ME) and our memberships to express our concerns with LD 1622, which would create the Maine Retirement Savings Program (Program).

We applaud your efforts to help Maine residents prepare for retirement by proposing a program that would make it easier for more people to participate in a retirement savings program. As leaders in the industry, we know the importance of preparing for and protecting retirement savings throughout a person's working life. We also recognize how auto-enrollment for retirement savings programs increase the percentage of participants and adds to the overall preparedness of people in retirement. We appreciate the challenges for many employers, primarily small companies and sole proprietors, in establishing a retirement savings plan for their employees due to the administrative and overhead costs of establishing and maintaining a plan. Although the program you are proposing in LD 1622 seeks to address some of these issues, we believe there are some key issues that need to be addressed in order to achieve the desired outcome.

**The Program Conflicts with Federal Law**

In § 175 (1), it states that "eligible employers shall not be a fiduciary, or considered to be a fiduciary, over the Program. However, the Program described in the bill is an auto-enrollment IRA plan for private workers. U.S. Department of Labor regulations provide a safe harbor from ERISA regulations for certain payroll deduction IRAs, but only if participation is completely voluntary (opt-in) for employees and if the employer does not endorse the program. The opt-out approach described in LD 1622 is not completely voluntary. In addition, making participation by an employer in the Program voluntary clearly requires the participating employer to endorse the plan, making it an employer-sponsored plan and subjecting the employer to all the liabilities and responsibilities of ERISA. A state cannot exempt a

program from federal law by simply stating it does not apply or that requirements under the federal law may not be imposed.

In § 3 of the proposal it states that the Program designed by the board “may not implement the program if and to the extent that the board determines that the program is preempted by the federal Employee Retirement Income Security Act of 1974, as amended, 29 United States Code, Section 1001 et seq.” This provision highlights the fact that the state cannot decide that this is not an employer-sponsored plan. That would be up to the U.S. DOL, which regulates all employer-sponsored retirement plans and which has indicated that auto-enrollment IRAs do indeed implicate the employer as a sponsor and create liability under ERISA in a recent amicus brief.

Similar programs have been established in other states, including California, where small business employers have filed a legal challenge in federal court, arguing that the plan subjects employers to liabilities and risks under ERISA. The Department of Labor has issued a Statement of Interest in that case indicating that that plan does indeed conflict with governing statute, would subject employers to ERISA and is pre-empted. In order to avoid a similar outcome with the Program, it would be prudent either to make employee enrollment opt-in only, or at the very least, to seek an opinion from the Department of Labor as to whether or not the program comports with ERISA before beginning enrollment.

#### **Similar Programs in Other States Have Struggled**

In 2016, Connecticut enacted a similar state-run program entitled the Connecticut Retirement Security Program, but it has spent \$1 million and is now out of funds before implementation could begin. CalSavers in California is now in general enrollment after seven years of preparation, but the program is already under legal challenge and the Department of Labor has said it may intervene. Oregon’s program has been the most successful, but the \$5.2 million loans from taxpayers have not been repaid and initial studies show a high rate of “leakage” because of early withdrawal of funds. The Illinois program was passed in 2014 but is just beginning general enrollment, while the Maryland plan passed in 2016 has not begun enrollment.

#### **The Passage of the SECURE Act Makes the Program Unnecessary**

Fortunately, there is a better path to addressing small employer retirement plan coverage. Recognizing the need to help more Americans prepare for their retirement, ACLI and NAIFA have been diligently working with Congress for ten years to pass the SECURE Act, which became law in December 2019. The SECURE Act will make it easier for small employers to adopt into a multiple employer retirement plan, where most of the fiduciary and administrative responsibilities are performed by the plan’s professional service provider. Employers therefore will have less costs and administrative burdens while being able to offer their employees robust plans with all the features of a traditional, single employer plan. Under the SECURE Act, employers no longer be required to share “a common characteristic,” such as being in the same industry, nor be subject to the “one bad apple” rule that could disqualify the plan for all employers. These modifications, along with auto-enrollment, auto-escalation and inclusion of long-term, part-time workers will expand the number of employers offering plans and increase the participation percentage and savings rates of the employees.

The SECURE Act makes it easier and more affordable for companies to establish retirement savings plans for their employees that have the protections provided under ERISA which would not be present in the Program. These protections include mandatory payroll remittance to a fund, liability of the employer to choose a plan that is safe and reliable, employer liability for any error in the administration of the plan including failure to remit money to the investment company when withheld from an employee’s paycheck, and a legal framework for challenging the employer’s handling of a retirement

program. All of these participant protections come with penalties for the employer which do not exist in the Program.

The SECURE Act also provides tax incentives to employers who choose to establish a program, either individually or through participation in a multiple-employer plan ("MEPs"). It will take significant state resources for Maine to establish the Program and continued resources to maintain it going forward. Other states that have passed similar programs have seen startup costs ranging from \$18 million to \$170 million, which does not include continued support of the program. Rather than spend similar Maine taxpayer resources to establish a program that may very well be challenged under federal law, you could instead create a state tax incentive for businesses that establish a new retirement plan for their employees, mirroring the federal tax credits available under the SECURE Act.

In closing, we commend you for looking for ways to help Maine residents prepare for their retirement. It is vitally important for all Americans to have access to programs that can ensure their financial security throughout their retirement. We believe the SECURE Act has opened a door to make this a reality and we encourage you to focus your efforts on helping companies take advantage of this new federal framework. Programs such as this are well intentioned and focused on the shared goal of financial security for all. However, the experiences of many other states who have already tried to establish similar programs suggest that this is not the right path for Maine or its residents.

Thank you for the opportunity to provide our thoughts on LD 1622. We would be happy to meet with you after the 2021 legislative session to discuss ideas on how best to encourage Maine employers to participate in programs made possible by the passage of the SECURE Act.

Sincerely,



Michelle Carroll Foster



Terri Wright, CLU  
NAIFA ME Chapter Signature