Senate Must Scrap Obama's Unsound Retirement Rule Exemption

By Paul Schott Stevens

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The current Congress has great opportunities to strengthen our retirement system by expanding access to workplace retirement plans. First, however, it has to defend the investor protections that workers need when they're enrolled in a plan.

Although most working Americans have either a defined contribution plan, such as a 401(k), or a defined benefit plan through their job, millions with the means and willingness to save do not.

Drawing upon decades of research on how Americans save for retirement, the Investment Company Institute has concluded that the best way forward is to build on the success of our current system by making it easier for employers to provide retirement savings options to their employees.

For years, we have advocated for solutions like open multiple employer plans (open MEPs), which would allow businesses to band together in forming retirement plans that reduce administrative plan costs through economies of scale. We also have encouraged the creation of a simpler 401(k) plan that would make providing a retirement plan even easier, especially for small employers.

These ideas have bipartisan support and build upon proven models of success. Unfortunately, the same cannot be said about new programs to automatically enroll private-sector workers into state- or city-run retirement plans.

Some states are embracing private solutions. The most active states, however, are setting up government programs that are projected to offer high-cost accounts with low returns—enrolling workers who often can't afford to have their pay reduced.

Yet last year, the Obama administration's Department of Labor (DOL) paved the way for these state and municipal plans by granting them an exemption from the Employee Retirement Income Security Act of 1974 (ERISA)—an exemption that takes away basic participant protections that private retirement plans have offered for more than 40 years.

Those ERISA protections are basic but important. The law requires that plan sponsors segregate assets and invest them in a timely fashion; consider the reasonableness of fees; and disclose risks, investment objectives, fees and other aspects of plan investments. Most importantly, plan participants can hold those running the plans legally accountable when they fail to meet these obligations.

These protections are particularly important when plans rest on shaky economic foundations—as these state-run plans do. Research has demonstrated that a combination of small account balances, high opt-out rates, lower-than-expected contribution rates and various costs that seem to have been ignored by the states will bring the sustainability of these plans into question.

Analyses of the plans in Oregon and California, for instance, demonstrate that fees as a percentage of assets will be extraordinarily high as the states work to cover start-up costs and manage millions of low-balance accounts.

Note that when California got a good look at its plan's cost, it removed, for six years, the proposed cap that would have held fees at 1 percent. (Meanwhile, the average expense ratio paid on equity mutual funds in individual retirement accounts, or IRAs, offered by the private sector was just 0.69 percent.) Absent ERISA, states won't be required to consider the reasonableness of fees.

ERISA also requires that retirement plan accounts be portable. But the DOL's exemption would let state and municipal governments bar workers from transferring their money to other savings vehicles — and California may do just that, locking up workers' funds.

If state or local officials mishandle the billions of dollars flowing into these plans, the private-sector workers who have been automatically enrolled will have no clear recourse, thanks to the ERISA exemption.

That's a risky gamble given the track record of fraud and mismanagement in state and municipal pensions. The very governments that would manage these plans have already run up a collective $3 trillion in public pension shortfalls.

The Senate may soon consider resolutions to overturn the misguided DOL exemption. The resolutions do nothing to stop states from experimenting with these new retirement plans. But a vote to overturn the Obama rules will help ensure that those state plans operate under the same vital ERISA consumer protections that the private sector has followed for more than four decades.

The House has already passed the resolutions and the Senate should follow suit. It's essential that Congress stand behind requiring state and municipal governments to act solely in the interest of those they seek to automatically enroll in new and untested retirement plans.

The robust growth of the US retirement system since the enactment of ERISA is no accident. The law works. Average assets set aside for retirement were almost seven times higher in September 2016 than they were in 1975, after adjusting for inflation and population growth.

More than 60 million participants in more than 640,000 private-sector defined contribution plans have accumulated more than $5.3 trillion in assets, on top of another $7.8 trillion in assets held by more than 57 million IRA-owning taxpayers.

Congress can and should build upon that record of strength. But first the Senate must do away with the Department of Labor's misguided ERISA exemption.

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