The Asset Management Industry
SERVING INDIVIDUAL INVESTORS

INVESTMENT COMPANY INSTITUTE

Washington, DC // Brussels // London // www.ici.org

DOL Proposal on State-Run Retirement Programs Promotes Confusing Patchwork of Laws

DOL Proposal on State-Run Retirement Programs Promotes Confusing Patchwork of Laws

ICI Letter Notes Proposal Lacks Sufficient Study of Participant Protections

Washington, DC, January 20, 2016–The Department of Labor (DOL) proposal designed to help states create retirement plans for private-sector workers would spur a confusing, state-by-state patchwork of savings programs that could lack the strict federal protections mandated for private employers' retirement plans, the Investment Company Institute (ICI) said in a newly filed comment letter to DOL.

"ICI strongly supports efforts to promote retirement security for American workers and appreciates the Department's interest in ensuring the adequacy of workers' retirement resources," said ICI President and CEO Paul Schott Stevens. "Unfortunately, the Department's proposal and guidance would promote the development of a fragmented scheme of retirement savings programs that vary state by state—without any clear benefit and with potential harm to our current national, voluntary retirement system. Policymakers should pursue national solutions to achieve expanded coverage, building on the current voluntary system."

DOL's Policy Rationale and Lack of Specific Approach Are Misguided

The DOL proposal and its accompanying guidance support policies that could harm the voluntary system for retirement savings that now helps millions of private-sector American workers achieve retirement security, ICI said in the letter.

ICI also strongly disagreed with the proposal's exemption from Employee Retirement Income Security Act of 1974 (ERISA) protections for certain retirement savings programs established and maintained by

state governments without sufficient understanding about the management and administration of such programs. These state programs could lack critical protections provided by ERISA—including reporting to federal agencies, disclosures to participants and beneficiaries, and strict fiduciary standards—designed to prevent mismanagement and other abuses.

DOL's Analysis of the Status of State Programs Under ERISA Is Inadequate

ICI faulted DOL's decision to cede jurisdiction under ERISA to the states, finding the Department's legal analysis inadequate. DOL should have considered the need for ERISA protections for participants, in addition to focusing on employer involvement in the plans, ICI said. Rather than proposing a blanket exemption, as it has done, DOL should determine, on a case-by-case basis, that ERISA's protections are unnecessary with respect to a particular state's program before any such program is excluded from ERISA.

DOL appears to make unsupported assumptions about states' qualifications to offer private-sector retirement solutions, expertise, and ability to operate free of conflicts. Importantly, the DOL was not in a position to make a blanket determination that ERISA protections are not needed since details of the administration and asset management of state programs are still unclear—even in states that have enacted legislation.

DOL's Views on ERISA Preemption Are Flawed, Foster Patchwork of State Laws

Since its passage in 1974, ERISA has preempted state laws governing private-sector employee retirement plans. ICI expressed concern that DOL's proposal attempts to nullify that preemption, which specifies that ERISA supersedes any and all state laws relating to any employee benefit plan the statute covers. It is clear, ICI said, that Congress intended ERISA's preemption provision to ensure that employers would not be subjected to a patchwork of potentially 50 states' different and possibly conflicting requirements. The analysis supporting DOL's attempt to nullify preemption falls short, ICI said, arguing that at the very least DOL must clarify that state laws that could directly or indirectly serve to set minimum standards for ERISA plans would be preempted.

Giving State Programs Special Privileges Would Create an Unlevel Playing Field

ICI further expressed concern that the DOL proposal would give a competitive advantage to the state-run payroll-deduction IRA arrangements excluded from ERISA by allowing those state-based programs to provide for automatic enrollment and escalation of contributions—features not available for such programs offered through the private sector. Under separate guidance accompanying the proposal, states would also be allowed to sponsor an open multiple employer plan (MEP). In an open MEP, otherwise unrelated employers jointly sponsor a single plan. Existing DOL guidance generally precludes private businesses from sponsoring open MEPs for unaffiliated employers.

Regulatory Impact Analysis Fails to Consider Full Scope of Effects on Workers

ICI also addressed questions raised in the DOL proposal's Regulatory Impact Analysis (RIA) regarding the potential for state initiatives to foster retirement security, including the possible unintended negative consequences to workers targeted by the state initiatives. ICI suggested DOL consider strong, research-based evidence that some lower-income workers may not be helped by this proposal.

In addition, the benefits of the proposal may not measure up to the level anticipated in the RIA, which assumes the participation and opt-out experience in the state-mandated IRA programs will be the same as the experience of voluntary private-sector retirement plans. ICI pointed out weaknesses in that assumption, including the fact that 401(k) plans with automatic enrollment tend to have other plan features that also encourage participation and reward contribution. A study by ICI and BrightScope suggests that some of the results achieved with automatic enrollment may reflect the influence of other plan features. Based on this, the letter said, the RIA should take into account that without features other than auto-enrollment—including employer contributions, which would not be permitted in the state plans under the proposal—the state initiatives may not increase retirement plan participation and savings as effectively as is hoped.
