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Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Savings Arrangements Established by States for Non-Governmental
Employees; RIN 1210-AB71

Dear Sir/Madam:

The Investment Company Institute¹ appreciates the opportunity to comment on the Department of Labor's ("Department") proposed regulation regarding savings arrangements established by states for non-governmental employees ("Proposal").² The Proposal would provide a safe harbor from coverage under the Employee Retirement Income Security Act of 1974 ("ERISA") for certain payroll-deduction IRA arrangements established and maintained by state governments. Under the safe harbor, these state arrangements would not be treated as employee benefit plans under ERISA, as long as specified conditions are met, including that state law requires certain employers to make the program available to employees.

The Institute strongly supports efforts to promote retirement security for American workers. We certainly understand and appreciate the interest shown by the Department and various states in ensuring that workers have sufficient resources for retirement. While we share the goal of increasing workplace retirement plan access, we have significant concerns about creating a fragmented, state-by-

¹ The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of \$17.9 trillion and serve more than 90 million U.S. shareholders.

² Savings Arrangements Established by States for Non-Governmental Employees, 80 Fed. Reg. 72006 (November 18, 2015).

state system of retirement savings. The policies espoused by the Proposal and the accompanying interpretive guidance (Interpretive Bulletin 2015-02, the “IB”)³ have the potential to harm the voluntary system for retirement savings that is working to help millions of American private-sector workers achieve retirement security.

As described below, our concern lies not only with the general policy rationale underlying the Proposal and IB—to promote state-based retirement savings programs as a coverage solution—but also with the specific approach taken by the Department in the Proposal and IB. Specifically, we are concerned that this approach would do away with the protections of ERISA for state-administered workplace savings programs, nullify ERISA preemption in the face of precisely the kind of conflicting state laws that necessitated the preemption doctrine in the first place, and grant states the ability to use tools not otherwise available to private-sector employers and retirement plan providers today. Instead of promoting the development of a confusing patchwork of state programs and providing competitive advantages to those programs, we urge the Department and other policymakers to pursue national solutions to increasing coverage that build on the current voluntary system.

As discussed in detail in this letter, our concerns include the following:

- First, the Department has not demonstrated that the elimination of ERISA’s protections is appropriate for state-based arrangements. ERISA’s protections for retirement plan participants are exceptionally important and the Department’s analysis supporting its conclusion that state-run automatic enrollment IRA programs would not be ERISA employee benefit plans is at best incomplete. In prior circumstances where the Department provides a wholesale exemption from ERISA’s protective and remedial scheme, it has done so after finding that the protections of ERISA are not needed. We believe that this key determination is missing from the Proposal and supporting materials. The preamble lacks any explanation of why ERISA’s protections would not benefit state savings program participants or that those programs already incorporate their own employee protections so as to render ERISA’s fiduciary, trust and remedial scheme redundant. The Department must justify why ERISA protections are unnecessary in this context and carefully consider the likely consequences of not having clear legal standards apply to the state-run programs. The Department’s cavalier approach to undefined state-run programs is in particularly perplexing contrast to the excessively prescriptive proposal regarding advice to 401(k) and IRA participants. Ultimately, we believe the Department should determine that the substantive consumer protections provided under a state savings program

³ Interpretive Bulletin Relating to State Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71936 (November 18, 2015).

are a sufficient replacement for the protections of ERISA, before providing any exemption from ERISA coverage.

- Second, the Proposal fails to consider the great importance of ERISA's preemption provision to avoid subjecting employers to a patchwork of different and likely conflicting requirements under potentially 50 state laws. Employers that operate in multiple states or employ workers residing in more than one state will face significant burdens complying with differing requirements regarding covered employees, the type of retirement plan that will exempt an employer from the state's program, contribution rates, and automatic enrollment features, among others. As explained below, the Proposal's preemption analysis (or lack thereof) contrasts with the Department's prior positions on preemption. At the very least, the Department should clarify that state laws attempting to set minimum standards for ERISA plans would be preempted.
- Moreover, the Proposal would provide states with an unfair advantage over the private sector. It would bestow special privileges on states that decide to enter the retirement savings marketplace. In particular, with respect to the IB, we disagree with the Department's reasons for distinguishing states from other retirement plan service providers in the context of multiple employer plan ("MEP") sponsorship. The decision to allow states to sponsor "open" MEPs, while continuing to preclude small businesses from participating freely in an open MEP offered by the private sector, is short-sighted and based on weak logic. The Department has not sufficiently justified its conclusion that mere state sponsorship of a MEP would satisfy the employer representation and commonality requirements that it generally applies in the context of MEPs. The advantages the Proposal and IB provide to states in the marketplace could result in public plan options supplanting the private sector, which in turn is likely to result in loss of the flexibility and innovation that characterize the current voluntary private retirement system.
- Finally, while we believe the potential costs, burdens, and harm caused by the Proposal will be significant, we also question whether it will achieve the benefits the Department seeks. The Proposal's Regulatory Impact Analysis raises important questions about how state-based retirement savings programs will affect overall retirement savings; such programs' effectiveness in increasing workplace retirement plan coverage; and the impact of such programs on certain workers who may not benefit from automatic enrollment into a payroll-deduction savings program. As the Department seems to recognize by its questions, the benefits to be gained from these initiatives may not be as substantial as the Department hopes. Moreover, it is important to recognize that, for reasons discussed below, automatic enrollment through mandatory state-

sponsored IRAs may not have the same impact on participation and savings as automatic enrollment has had in private-sector 401(k) plans.

I. Payroll Deduction IRA Proposal

The Department states that the Proposal was prompted by recent actions of at least a few states attempting to provide state-administered retirement plans for private-sector workers. These state-level initiatives generally are in response to concerns that private-sector employees in these states do not have sufficient access to retirement savings opportunities through their employers. Because certain state initiatives (*e.g.*, California, Illinois, and Oregon) depend on a determination that the savings arrangement at issue would not be subject to ERISA, the Department intends for the Proposal to clear up any confusion on the application of ERISA and allow the states to move forward with their programs. The question of ERISA preemption is another hurdle for states to overcome in setting up their programs and, in the preamble to the Proposal, the Department attempts to dispense with the notion that such state laws would be superseded by ERISA.

Specifically, the proposed regulation at 29 CFR § 2510.3-2(h) would provide that, for purposes of Title I of ERISA, the terms “employee pension benefit plan” and “pension plan” do not include an individual retirement plan (as defined in Internal Revenue Code section 7701(a)(37)) established and maintained pursuant to a state payroll deduction savings program if the program satisfies all of the conditions set forth in paragraphs (h)(1)(i) through (xii) of the proposed regulation. In the preamble to the Proposal, the Department explains its view that “compliance with these conditions will assure that the employer’s involvement in the state program is limited to the ministerial acts necessary to implement the payroll deduction program as required by state law” and that “the proposed conditions would give employees sufficient freedom not to enroll or to discontinue their enrollment, as well as meaningful control over their IRAs.”⁴

Conditions of the proposed safe harbor include, among others, that:

- The program is established by a state pursuant to state law;
- The program is administered by the state establishing the program, or by a governmental agency or instrumentality of the state, which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;

⁴ 80 Fed. Reg. 72006, 72009 (November 18, 2015).

- The state assumes responsibility for the security of payroll deductions and employee savings;
- The state adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;
- Participation in the program is “voluntary” for employees;
- The involvement of the employer is limited to the following: (A) collecting employee contributions through payroll deductions and remitting them to the program; (B) providing notice to the employees and maintaining records regarding the employer’s collection and remittance of payments under the program; (C) providing information to the state necessary to facilitate the operation of the program; and (D) distributing program information to employees from the state and permitting the state to publicize the program to employees;
- The employer contributes no funds to the program; and
- The employer’s participation in the program is required by state law.

The Proposal further provides that a state savings program would not fail to satisfy the safe harbor merely because the program uses automatic enrollment, including automatic increases in contribution levels, with the opportunity to opt out. Because the safe harbor would apply solely to state-mandated programs, it would not provide authority for including an automatic enrollment feature in a privately administered payroll deduction IRA currently excluded from ERISA-coverage under existing Department regulations.

One of the key differences between the proposed new safe harbor for state-mandated payroll deduction IRA programs and the Department’s existing safe harbor regulation for payroll deduction IRAs promulgated in 1975⁵ (and further explained in Interpretive Bulletin 99-1) is the treatment of automatic enrollment. The existing safe harbor regulation provides that ERISA does not cover a payroll deduction IRA arrangement so long as four conditions are met: the employer makes no contributions, employee participation is “completely voluntary,” the employer does not endorse the program and acts as a mere facilitator of a relationship between the IRA vendor and employees, and the employer receives no consideration except for its own expenses. The Department notes in the Proposal’s preamble that the 1975 safe harbor would not permit arrangements with automatic enrollment, due to the condition that an employee’s participation be “completely voluntary.”⁶ In other

⁵ 29 CFR 2510.3-2(d).

⁶ 80 Fed. Reg. 72008.

words, employees who are automatically enrolled would not be participating on a “completely voluntary” basis.

The Proposal’s preamble explains the Department’s view that in the context of a state-mandated automatic enrollment payroll-deduction IRA program, which was not contemplated at the time of the 1975 regulation, the need for the “completely voluntary” standard is lessened because “undue employer influence or pressure to enroll is far less of a concern” and “the state’s active involvement and the limitations on the employers’ role removes the employer from the equation such that the payroll deduction arrangements are not established or maintained by an employer or employee organization within the meaning of ERISA section 3(2).”⁷ Thus, by using a “voluntary” standard in the Proposal, rather than a “completely voluntary” standard, the Department is proposing that a state payroll deduction IRA program incorporating automatic enrollment with the opportunity to opt out will not be considered an “employee pension benefit plan” or “pension plan” under ERISA.

A. The Department abdicates its jurisdiction to the states without adequate analysis

In explaining why a state payroll deduction IRA program incorporating automatic enrollment with the opportunity to opt out will not be considered an “employee pension benefit plan” or “pension plan” under ERISA, the Department places significant weight on the fact that employers subject to the state mandate would not be voluntarily offering the savings program, and thus are “removed from the equation.” While this is technically true, the determination of ERISA plan status should focus also on the need for ERISA protections for participants, in addition to the level of employer involvement. As the Department notes, “[p]ension plans covered by ERISA are subject to various statutory and regulatory requirements to protect the interests of the plan participants . . . [t]hese include reporting and disclosure rules and stringent conduct standards derived from trust law for plan fiduciaries.” The Department’s analysis inexplicably assumes that these ERISA protections are not needed when the state steps into the role of the employer in offering a benefit plan to private-sector employees.⁸ In doing so,

⁷ 80 Fed. Reg. 72009.

⁸ 80 Fed. Reg. 72010 (“State administration . . . presumably ensures that the program will be administered in accordance with the interests of the state’s citizens.”). The Department bases its analysis on the presumption that states will do the right thing, but effectively ignores the fact that state-run retirement programs for private-sector workers will create significant costs and administrative complexity, especially for private employers with multi-state operations and employees who reside in various states. The programs risk excessively burdening the ability of employers to freely engage in interstate operations and activities, implicating the Commerce Clause, Article 1, Section 8, Clause 3 of the U.S. Constitution, and, as discussed in greater detail below, embody precisely the concern of Congress in crafting the preemption provision in section 514 of ERISA.

the Department ignores its own established precedent and effectively abdicates its jurisdiction without sufficient analysis.

1. The Department fails to demonstrate that ERISA's protections are not necessary for state-sponsored retirement programs.

When it passed ERISA in 1974, Congress was primarily concerned with providing vital protections to participants and beneficiaries vis-a-vis their employers in connection with private pension plans.⁹ The evidence before Congress reflected two principal concerns threatening pension programs prior to ERISA—mismanagement of funds accumulated to pay benefits and the failure to pay promised benefits.¹⁰ The protections crafted by Congress to ensure the protection of participants under ERISA include standards requiring (among other things) reporting to the federal government, disclosures to participants and beneficiaries, strict standards of fiduciary conduct, trust and prohibited transaction rules, standards governing benefit claims, and a remedial scheme including ready access to courts.¹¹

Shortly after ERISA was passed, the Department promulgated a series of regulations exempting certain arrangements from ERISA's broad definitional provisions. Importantly, in every case where the Department has provided a regulatory coverage exemption for certain types of arrangements that would otherwise be covered, it has done so based on a determination that the program at issue, for one reason or another, did not need ERISA's protections.

For example, immediately after ERISA was passed, the Department announced its intention to issue regulations "that will make it clear that other programs, including certain employer practices . . . under which employees are paid as a part of their regular compensation directly by the employer and under which no separate fund is established will not subject to the employer to . . . any duties under Title I of the Act."¹² Less than six months later, the Department issued proposed rules that became its current "payroll practices" exemption which exempts from ERISA certain practices such as the payment

⁹ *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985); *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989).

¹⁰ See, e.g., 120 Cong. Rec. 4279-80 (1974) (Statement of Rep. Brademas); 120 Cong. Rec. 4277-78 (1974) (Statement of Rep. Perkins).

¹¹ ERISA § 2(a), (b).

¹² 39 Fed. Reg. 42234, 36 (Dec. 4, 1974).

of vacation, sick and holiday pay from the employer's general assets.¹³ The preamble to the proposed payroll practices exemption includes the following explanation of the basis of the regulation.

[Paid vacations] . . . are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms of Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage.¹⁴

The Department's "payroll practices" exemption makes sense given the policies underlying ERISA and the nature of its specific protections. An employer's payment of benefits similar to wages from its general assets, such as sick leave or vacation pay, presents none of the abuses that ERISA attempts to resolve.¹⁵ There is no specific fund vulnerable to mismanagement, nor is there any special risk of loss that is different from the risk of nonpayment of wages.¹⁶

In 1975, the Department also proposed the regulation that now excludes owner-only plans from ERISA.¹⁷ In that proposal, the Department explained that its decision to exclude these plans from ERISA was based on its view that the Title I protections are unnecessary for a plan covering only a sophisticated business owner and spouse, the abuses which ERISA sought to control are unlikely in such a plan, and extending ERISA to these plans could "divert resources of the Department of Labor from administering Title I in situations where genuine abuses existed or could arise."¹⁸ A similar justification was given for the current ERISA exemption for partner-only plans.¹⁹

¹³ 40 Fed. Reg. 24642 (June 9, 1975).

¹⁴ *Id.* at 24642-43.

¹⁵ *McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 36 (1st Cir. 1998); *Morash*, 490 U.S. at 120.

¹⁶ *Id.*

¹⁷ 40 Fed. Reg. at 24643.

¹⁸ *Id.*

¹⁹ *Id.* ("In addition, in a plan or program covering only partners, the protection which Title I was designed to provide is unnecessary, because partners are generally capable of protecting their own interests under existing law.")

More recently, the Department used a similar justification when it announced that Treasury's *myRA* program is not an employee benefit plan under ERISA.²⁰ The Department noted in its analysis that investments held in a *myRA* account would be limited to a new Treasury retirement savings bond, which offered principal protection and incurred no fees. Based on its review of the entire scope of the *myRA* program the Department indicated in its *myRA* letter that it does not believe "Congress intended in enacting ERISA that a federal government retirement savings program created and operated by the U.S. Department of the Treasury would be subject to the extensive reporting, disclosure, fiduciary duty, or other requirements of ERISA, which were established to ensure against the possibility that employees' expectation of a promised benefit would be defeated through poor management by the plan sponsor and other plan fiduciaries."²¹ In doing so, the Department cited *Massachusetts v. Morash*,²² noting the importance that "courts...look to 'the provisions of the whole law, and to its object and policy' in deciding what type of benefit programs are covered by ERISA."

We note that the *myRA* program, as currently structured, does not involve automatic enrollment and is completely voluntary, for both participating employers and employees. Based on the Department's analysis in the Proposal, one would have expected that the lack of employer involvement would have been a key factor in the *myRA* analysis as well. In contrast, the Department does not appear to give it much weight, or at least not as much as the weight given to its determination that the *myRA* program did not appear to need ERISA's protections "to ensure against the possibility that employees' expectation of a promised benefit would be defeated through poor management by the plan sponsor and other plan fiduciaries."²³

²⁰ See Letter to J. Mark Iwry, U.S. Department of the Treasury, from John J. Canary, Director of Regulations and Interpretations, dated December 15, 2014.

²¹ Furthermore, the *myRA* program is simply a Treasury bond held within an IRA wrapper and, if adopted by an employer, would meet the criteria for the "completely voluntary" payroll-deduction IRA safe harbor. Arguably, therefore, the Department did not need to assert a congressional intent justification in the *myRA* letter.

²² 490 U.S. 107 (1989).

²³ Notably, the exemption for governmental plans under section 4(b) of ERISA is available only for a plan established and maintained by a government for its own employees. We believe it is quite instructive that Congress expressly limited the governmental exemption to plans for governmental employees, rather than for any employees. In this context, there is clear statutory language about how the governmental plan exemption works and little room for interpretation. The Department is arguably side-stepping the clear language of the governmental plan exemption by concluding that the payroll-IRA arrangement is not a "plan," based in part on the fact that a government entity is establishing the program. This appears to be circular reasoning and warrants further examination and analysis.

These regulatory exemptions illustrate that the Department will provide a wholesale exemption from ERISA's protective and remedial scheme for certain arrangements when it has specifically determined that the protections of ERISA are not needed under the facts and circumstances. We believe that this key determination is missing from the Proposal. The preamble does not explain why state savings programs that would fall within the proposed exemption would not benefit from ERISA's protections or would already incorporate their own employee protections so as to render ERISA's fiduciary, trust and remedial scheme redundant.

While we do not question the good intentions behind these state initiatives, good intentions alone do not ensure that program assets will be managed and administered commensurate with ERISA's high fiduciary standards. In our view, the Department makes unsupported assumptions about a state's qualifications, expertise, and ability to operate free of conflicts in offering private-sector retirement solutions. It is entirely possible that some state programs will be well-managed under the strictest of principles. It should be of deeper concern to DOL that all such programs are managed in this way. And the well-documented problems associated with state and local public pensions make clear that this cannot simply be taken for granted. Even with the best intentions, governments are fallible.

Moreover, it is not clear as yet how any of these state programs will be administered or how the assets accumulated in the programs will be managed. For example, according to a report recently made public by the California Secure Choice Retirement Savings Investment Board, which is studying options for the California program, the Board is considering three different possible investment structures with varying implications.²⁴ One is referred to as a "dynamic asset allocation strategy" that becomes less risky near retirement with no guarantee against losses, implemented through either a managed account or target date fund. Another option is a "pooled IRA with reserve fund," which would be a state-issued special purpose retirement savings bond, with a variable interest rate set by the Board and a "soft guarantee" to reduce but not prevent losses. According to the report's description of the bond, in years when the investment fund has a "surplus return," the surplus would be used to cover shortfalls during negative return years. The third option under consideration is a variable annuity with a guaranteed minimum withdrawal benefit, offered through a private insurance product. Although the specific details of each option would determine whether the investment structure could be used within an IRA (only an IRA-based program would be eligible for the safe harbor), the fact that the Department is willing to issue a blanket exemption from ERISA coverage without knowing such fundamental details is disturbing and unprecedented. With respect to the savings bond option for

²⁴ See <http://www.treasurer.ca.gov/scib/staff/2015/20151207/5.pdf>; see also <http://calpensions.com/2015/12/14/state-savings-plan-may-have-no-firm-guarantee/>.

example, the Department, at a minimum, should first examine the nature of the guarantee and the intended management of the underlying reserve fund, and determine whether ERISA protections are warranted, before granting an exemption.

We trust that the Department does not intend for a lower standard to apply for private-sector workers covered by a state-run plan than for those workers covered by an employer-established plan. For these reasons, it is imperative for the Department to more fully describe its reasons for granting state governments an exemption from ERISA not specifically provided for in the law. The analysis must be based on more than simply a presumption that the states will do a good job. Such a presumption, and the lack of any real consumer protective conditions in the safe harbor, will open a wide door for problems. At the very least, the Department must understand the entire scope of the program before concluding that ERISA's protections are not necessary to protect the benefits of employees.

2. State-mandated automatic enrollment IRA programs do not warrant special treatment.

State-mandated automatic enrollment IRAs involve many of the same issues as any privately-sponsored automatic enrollment IRA program. Examining the existing 1975 payroll deduction IRA safe harbor, the Department relies on the fact that “[w]hen a program meets the conditions of the safe harbor, employer involvement in the arrangement is minimal and employees’ control of their participation in the program is nearly complete . . . [i]n such circumstances, it is fair to say that each employee, rather than the employer, individually establishes and maintains the program.” We agree with the reasoning behind the 1975 safe harbor, and believe that it should be applied—unaltered—to the situation at hand. When a state establishes and maintains a program that automatically enrolls private-sector employees, requiring an affirmative action on the part of the employee to opt out, it is not intellectually honest to say that each employee individually establishes and maintains the program. Rather, the state is substituting its judgment for that of the individual employee’s. As the Department notes, a payroll deduction IRA with automatic enrollment does not meet the “completely voluntary” standard, regardless of who imposes the automatic enrollment feature (the state government or a private-sector employer).

Selecting investment options and directing among those options normally are considered fiduciary acts. In the context of a typical retail IRA, the IRA owner making his or her own investment choices is considered to be the fiduciary, and in the context of an ERISA-covered participant-directed individual account plan, there is special relief under section 404(c)(5) if the plan fiduciary selects a qualified default investment alternative on behalf of the automatically-enrolled participant and other requirements (*e.g.*, notice) are met. Yet, here there does not appear to be any fiduciary duty applicable

to a state selecting investment options and directing investments on behalf of participants, except to the extent that a given state's laws would apply such a duty. The Department has altogether ignored these questions in proposing its generally-applicable safe harbor.

Without clear application of legal standards under ERISA, or even federal securities laws, a state would seem to have a significant amount of discretion in designing its program. This could lead to attempts to include features such as guaranteed or smoothed investment returns, or use of investment structures that are not regulated under federal securities law, with the belief—understandable in light of the Proposal—that states have carte blanche and no obstacles exist under federal law. As mentioned earlier, discussions currently underway in California illustrate these concerns about state design features and the dangers of such unfettered discretion.²⁵ We note that, in this respect, it will be important for other federal regulators, such as the Treasury Department and SEC, to provide guidance on how the Internal Revenue Code rules surrounding IRAs and securities law would impact the state initiatives.²⁶

3. The Department should determine that a state's consumer protections sufficiently protect workers covered by a state-sponsored plan before granting any ERISA safe harbor.

Accordingly, we believe a significant shortcoming of the Department's proposed safe harbor regulation lies in the fact that it does not examine the full scope of the state program to determine if substantive consumer protections, such as fiduciary requirements, procedures for resolving disputes, required procedures for the handling and custody of participant contributions, substantive disclosure requirements or tracking and identification of lost or missing savers have been incorporated.²⁷ The Department's failure to consider whether comparable state-law protections exist for workers, independent of and separate from the requirements for lack of employer control, is a critical oversight in the Proposal.

We acknowledge that section (h)(1)(iii) of the proposed regulation conditions the availability of the safe harbor on the state assuming responsibility for the security of payroll deductions and

²⁵ See note 24 and accompanying text, *supra*.

²⁶ See discussion of application of federal securities laws and IRA rules in letter from ICI to Connecticut Retirement Security Board, dated November 3, 2014, available at: <https://www.ici.org/pdf/28513.pdf>.

²⁷ In particular, the Department should require states to be clear about the efforts states must take to locate and distribute assets to workers, including how these accounts should be treated under state escheatment provisions. See, e.g., Institute letter to Pension Benefit Guaranty Corporation, dated Aug. 20, 2013, pp. 9-10, available at <https://www.ici.org/pdf/27481.pdf>, for a discussion of state abandoned property laws in the context of missing plan participants and IRA owners.

employee savings. While this appears to be an attempt to incorporate protective safeguards into the safe harbor, this provision is too vague to be effective. Without specifying more detail on how to comply with a requirement to assume responsibility for the security of payroll deductions and employee savings, states will be left to their own determinations as to what compliance efforts are required. As the Department notes in the IB, state sovereign immunity laws could potentially disrupt the enforcement of federal standards (such as safeguarding employee contributions) imposed on states.²⁸ The Department clearly should explain what actions a state would have to take in this regard.

That said, before the Department provides an exemption from ERISA coverage, we believe that it should make and record a determination that the substantive consumer protections provided under a state savings program are a sufficient replacement for the protections of ERISA. Instead of providing a blanket exemption from ERISA for all state-mandated IRA programs, such as in the Proposal, the Department should instead review the substantive consumer protections provided by each state savings program before specifically exempting such a state program from ERISA. The Department should also consider defining minimum standards that applicable state consumer protection laws should incorporate in order for the program to sidestep ERISA coverage. At a bare minimum, any final regulation should incorporate a requirement that any state-mandated IRA program be subject to the generally applicable consumer protection laws of the state.

4. The Department should be consistent in the Proposal and the IB with respect to whether a state effectively acts as the employer.

We believe the Department's analysis of whether a state-run automatic payroll deduction IRA program is an "employer plan" conflicts with the Department's analysis in the IB relating to whether a state can sponsor a multiple employer plan. The Department concludes in the Proposal's preamble that the state's active involvement and limitations on the employer's role means that the payroll deduction IRA arrangements described in the Proposal would not be established or maintained by an employer or employee organization within the meaning of ERISA section 3(2). In the IB, however, the Department concludes that, in the context of a state-sponsored MEP, "a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the interest of the participating employers." Essentially, the Department is saying that because of this "connection," a state would qualify as the "employer" under section 3(2), given the definition of "employer" in section 3(5) of ERISA ("employer" means any person acting directly as an employer, or *indirectly in the interest of an employer*, in relation to an employee benefit plan"). It is

²⁸ See note 47 and accompanying text, *infra*.

puzzling, then, why the state should not be considered to meet the same definition of “employer” in the context of running an automatic payroll deduction IRA program. If the IB’s analysis under ERISA sections 3(2) and 3(5) is applied consistently to both a state-run MEP and a state-run automatic IRA program, then an automatic payroll-deduction IRA program run by a state likewise should be considered an ERISA-covered employee benefit plan.

B. The Department should expand its ERISA preemption analysis

In the preamble to the Proposal, the Department explains that the objective of the proposed safe harbor is to reduce the risk of such state programs being preempted if they were ever challenged. In this regard, section 514 of ERISA provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by the statute. The Department bases its conclusion that a mandated payroll deduction IRA program would not be preempted by ERISA on its own separate conclusion (discussed above) that such a program would not be an “employee benefit plan” under the safe harbor. The Department acknowledges, however, that the courts could reach a contrary conclusion. We believe that a court assessing a preemption-based challenge to such a state law would very likely find ERISA to preempt the state law, depending of course on the specific details of that state law.

1. The Department subjects employers to as many as 50 state savings programs, a burden that ERISA was designed to avoid.

At the time ERISA was drafted, Congress recognized that it needed to establish a uniform federal scheme governing ERISA-covered plans that provided a single set of standards governing the administration of plans.²⁹ This uniform federal scheme was needed so that employers would not be

²⁹ See 120 Cong. Rec. 29197 (1974) (Statement of Rep. Dent) (“Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . . The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).” See also 120 Cong. Rec. 29933 (1974) (Statement of Sen. Williams) (“It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.”).

subject to a patchwork of different and potentially conflicting requirements under the laws of as many as fifty states.³⁰

A uniform scheme of regulation was particularly necessary for those employers that operate in several states or nationwide. Without uniform federal rules, multistate employers could conceivably be required to make certain benefits available in some states but not others, to comply with certain fiduciary protections in some states but not others, keep records in some states but not others, and be subject to disparate remedial schemes. Congress accomplished uniform federal regulation of employee benefits plans through ERISA's broad preemption provision, which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."³¹ The Supreme Court has consistently recognized that ERISA's preemption provision is "conspicuous for its breadth" and "clearly expansive."³²

We believe that requiring employers to comply with the requirements of various state mandated automatic IRA programs undermines the basic purpose of ERISA. Employers that operate in several states will face significant administrative burdens that the Department has not sufficiently acknowledged or economically justified. Particularly in the case of multi-state and nationwide employers, the Department's scheme would require an employer to master potentially as many as 50 different state savings program laws, all with disparate requirements governing covered employees, qualifying employer-provided retirement coverage, contribution amounts, methods for contributing, auto-enrollment or affirmative election requirements, and numerous other administrative rules. This is precisely the kind of "patchwork" of varied state regulation that the drafters of ERISA intended to avoid through ERISA preemption. In this regard, the Supreme Court has specifically held that a state law that required an employer "to maintain a familiarity with the law of all 50 states" is preempted by ERISA.³³

In addition to the duties that the Department has explicitly proposed to impose on employers, including collecting and remitting contributions, maintaining records regarding contributions remitted, providing information to the state, and distributing information to employees, several other

³⁰ *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

³¹ ERISA § 514(a).

³² *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Travelers*, 514 U.S. at 653.

³³ *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (ERISA preempted a state law that operated to revoke the designation of a divorced spouse as a plan beneficiary, even though the state law specifically permitted sponsors to opt out of its application).

administrative burdens are readily evident and will impact employers if the Proposal is finalized in its current form. To comply with state savings programs under the Department's regulatory scheme, employers will be required to:

- Evaluate whether the employer's ERISA-covered (or other) retirement program is sufficient to exempt the employer from participating in the state savings program, and for what employee groups;
- To the extent the employer's retirement program fails to cover some groups of employees, or involves a waiting period permissible under current law, employers will have to substantively evaluate whether they must contribute to the state savings program for some groups but not for others, and for some period of time for some employees;
- Keep track of the employer's total workforce on a periodic basis to the extent state savings programs apply only to employers who employ a threshold number of employees;
- Keep track of employee elections to participate in the state savings program and affirmative denials of participation (for those programs that involve automatic enrollment);
- To the extent that the state law imposes contribution requirements for those employees that work a certain number of weekly or monthly hours, keep track of employee hours;
- To the extent that the state law imposes different contribution rates, exclusions or other rules for different categories of employees (such as different rules for part-time, full-time, hourly, salaried, temporary, seasonal, managerial, supervisory, officers or directors, professional, highly compensated, etc.) the employer would be required to keep track of various groups, and the implications of those groups;
- Keep track of hours worked in various states for employees that cross state lines or work in multiple locations.

For employers that operate in multiple states, these programs would subject employers to a challenging and potentially ever-changing constellation of complex mandates and administrative rules.

2. Prior Department positions on preemption starkly contradict the Proposal.

We note that the Department's analysis in the Proposal is in sharp contrast to its prior positions on ERISA preemption. For example, a recent 9th Circuit case involved a San Francisco ordinance that required San Francisco employers to pay a tax to the City of San Francisco computed on a per hour basis, per employee.³⁴ The tax would be used by the city to support a city-administered program that provided health care to uninsured local residents. Under the ordinance, employers are required to contribute amounts to the city program for their own employees who do not participate in an employer-sponsored health plan. The result was a complex administrative scheme not unlike what may happen with state-mandated IRAs. The Department filed an *amicus* brief in that case arguing that the San Francisco ordinance itself required San Francisco employers to establish their own ERISA plans in order to comply with the ordinance.³⁵ To support its position, the Department relied on legal authorities establishing that an ERISA plan is created anytime an employer "establishes an ongoing administrative scheme," and the circumstances are such that a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.³⁶ The Department concluded that the administration required of an employer to simply pay the assessment to the city created a separate ERISA plan under these well-established coverage tests.³⁷ Because the San Francisco ordinance interfered with uniform plan administration, the Department argued that it should be preempted.³⁸

Although the 9th Circuit ultimately disagreed with the Department's position, we note that the same arguments made by the Department in its brief could be used to argue that (1) the employer's

³⁴ *Golden Gate Rest. Ass'n v. San Francisco*, 546 F.3d 639 (9th Cir. 2008).

³⁵ *Brief for the Secretary of Labor as Amicus Curiae, Golden Gate Rest. Ass'n v. San Francisco*, 546 F.3d 639 (9th Cir. 2008) (No. 07-17370). *See also Retail Indus. Leaders Ass'n. v. Fielder*, 475 F.3d 180 (4th Cir. 2007) (involving a challenge to a Maryland law that required companies with more than 10,000 employees in Maryland to spend eight percent of total wages on health insurance costs or contribute the difference to a state Medicaid fund). In *Fielder*, the Department filed an *amicus* brief arguing that the Maryland law was preempted because it interfered with ERISA's goal of exclusive federal regulation of benefit plans and that there was no way to comply with the law without creating or affecting ERISA-covered plans. *Brief of the Secretary of Labor as Amicus Curiae, Retail Indus. Leaders Ass'n. v. Fielder* (Nos. 06-1840, 06-1901). The 4th Circuit affirmed the district court's judgment that the Maryland law is preempted by ERISA. *See also* DOL Adv. Op. 2008-02A (Feb. 8, 2008) (opining that a Kentucky state law has a prohibited connection with ERISA plans because it prohibits automatic enrollment arrangements in such plans and regulates an employer's decisions on how it provides employee medical coverage and plan funding).

³⁶ *Fort Halifax*, 482 U.S. at 10; *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982).

³⁷ *DOL Brief*, at *13-17.

³⁸ *DOL Brief*, at *23-28.

administrative activities necessary to comply with the state savings program creates its own separate ERISA plan, and (2) the state law establishing the state savings program should be preempted by ERISA. That said, regardless of the preemption status of state-mandated IRA programs, we believe that the Department has ignored the substantial burdens that these programs will impose on employers, some of which are enumerated above. In its final regulation, the Department should address how employers are to deal efficiently with these obligations and the potential for inconsistent state rules.

3. The Department must clarify that laws attempting to set minimum standards for plans would be preempted.

The Department must also clarify that ERISA preempts any state law that would clearly impact or influence the administration of an employer's own ERISA plan. In this regard, the state laws creating auto-IRA programs enacted to date (California, Illinois, and Oregon) generally exclude employers that sponsor a retirement plan from any obligation to participate in the state program. To the extent state legislation establishing such a program excluded only those employers that sponsor plans that automatically enroll employees at certain payroll deduction levels from the state mandate, or directly or indirectly require minimum coverage, eligibility, or participation requirements, ERISA preemption clearly would be triggered. This is because the effect of such state laws would be to cause employers to either amend their plans to provide for automatic enrollment at specified contribution levels or participate in the state program.

In this respect, such a state law would appear to "relate[s] to" an employee benefit plan within the plain meaning of the term established by *Shaw v. Delta Airlines, Inc.*³⁹ In *Shaw*, the Supreme Court held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."⁴⁰ As noted by the Department in the preamble, "the Court has concluded that ERISA preempts state laws that: (1) mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself."⁴¹ State programs that exclude only those employers who sponsor plans that automatically enroll employees at certain payroll deduction levels, would not only seem to mandate employee benefit structures, but, by binding employers to particular plan features or

³⁹ 463 U.S. 85 (1983).

⁴⁰ 463 U.S. at 96-97.

⁴¹ 80 Fed. Reg. 72007, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 658 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 14 (1987).

contribution levels, would appear to function to regulate ERISA plans. Without clear guidance on this point from the Department, states may be more likely to design their laws to set minimum standards for the employer's own plans and run a greater risk of being preempted.

The Department also should clarify that the safe harbor would not be available to the extent a state savings program requires an employer to enroll employees that are not eligible for the employer's ERISA plan. The Proposal indicates that a state savings program will not fail to satisfy the provisions of the safe harbor merely because the program "[i]s directed toward those employees who are not already *eligible* for some other workplace savings arrangement."⁴² The Department does not discuss the rationale for this provision in the preamble to the Proposal or explain its intended purpose. It appears that this provision could be misinterpreted to make the safe harbor available to state savings programs that purport to extend to employees who are not eligible for their employer's ERISA plan. Such an interpretation, however, would trigger ERISA preemption since ERISA establishes standards for plan eligibility.⁴³ A state law that requires an employer to enroll employees who are not eligible for the employer's ERISA plan would clearly impact or influence the design and administration of that plan because it would effectively establish new state-specific standards for plan eligibility that are in conflict with ERISA.

II. Interpretive Bulletin 2015-02

In addition to proposing a safe harbor for state-run automatic enrollment IRA programs, the Department also published Interpretive Bulletin 2015-02, which is intended to describe the parameters under which states could operate an ERISA-covered plan for private-sector workers without running afoul of ERISA preemption. More specifically, the Interpretive Bulletin lays out three approaches for creating or facilitating ERISA-covered plans that, in the Department's opinion, should not be preempted by ERISA, "provided employers participate voluntarily and ERISA's requirements, liability provisions, and remedies fully apply to the state programs."⁴⁴

- *Marketplace approach* – The first approach is where states establish a marketplace to connect eligible employers with qualifying savings plans available in the private sector marketplace. The marketplace would not itself be an ERISA-covered plan, and the arrangements available to employers could include ERISA-covered plans and non-ERISA saving arrangements. The

⁴² Proposed 29 CFR 2510.3–2(h)(2)(i) (emphasis added).

⁴³ See ERISA § 202.

⁴⁴ 80 Fed. Reg. 71937 (November 18, 2015).

marketplace programs recently enacted in Washington and New Jersey are examples of such an approach.

- *Prototype plan* – The second approach would be a state-sponsored "prototype plan" in which the prototype plan documents could (but would not have to) designate the state or a state designee as "named fiduciary" and "plan administrator" of the plan (taking on fiduciary liability). Otherwise, the adopting employer in a prototype arrangement generally assumes the same fiduciary obligations associated with sponsorship of any ERISA-covered plan.
- *Open-MEP* – The third approach would be a state-sponsored multiple employer plan ("state MEP") that could be either a defined contribution (DC) or defined benefit (DB) plan. According to DOL, a state could design a DC MEP so that the participating employers could have limited fiduciary responsibilities, but would still have the duty to prudently select the arrangement and to monitor its operation. If structured properly, any participating employer would not be the "sponsor" of the plan and also would not act as the plan administrator or named fiduciary, according to the guidance.

We applaud the Department for recognizing the need to encourage the use of ERISA-based approaches, and, in particular, for highlighting the advantages associated with the Marketplace approach. While we understand the IB is effective November 18, 2015, without any comment period, we are compelled to express our concern that the guidance with respect to state MEPs confers unfair and unjustifiable advantages for states that may compete directly with private firms interested in offering similar products and services.

Prior guidance from the Department has recognized that a single multiple employer plan may exist where a cognizable or bona fide group or association of employers, acting in the interest of its employer members, establishes a benefit program for the employees of member employers and exercises control over various administrative functions on behalf of those members.⁴⁵ But when several unrelated employers merely execute identical trust agreements or other similar documents to provide benefits, in the absence of any genuine organizational relationship between the employers (such as a common trade association), the Department has concluded that no employer group or association exists.⁴⁶ In effectively concluding that employers joining a state MEP would not be subject to its long-held "commonality" requirement, the Department takes the position that "a state has a unique

⁴⁵ See Advisory Opinions 2003-17A and 2001-04A.

⁴⁶ See, e.g., Advisory Opinions 2012-03A and 2012-04A.

representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that the state should be considered to act indirectly in the interest of the participating employers." According to the Department, this unique state role distinguishes the state MEP from other business enterprises that underwrite benefits or provide administrative services to several unrelated employers. Therefore, the guidance effectively allows states, but not the private-sector, to sponsor "open" MEPs (allowing groupings of otherwise unrelated employers to participate).

We do not object to the concept of an open MEP, but rather to the idea that a state should be permitted to run such a plan while a private-sector provider would not. We do not agree that the Department has offered sufficient justification for its differential treatment of state governments as potential sponsors of open MEPs from other marketplace participants interested in taking on the same responsibilities. As discussed earlier in relation to the proposed safe harbor for state-run IRA programs, the Department appears to be making unsupported assumptions about a state's qualifications, expertise, and ability to operate free of conflicts in offering private-sector retirement solutions. Moreover, in the context of a MEP, where the full range of ERISA fiduciary obligations would apply to the MEP sponsor, we see no justification for treating a would-be state MEP sponsor from a would-be private-sector open MEP sponsor. Both would be subject to the same consequences in the case of fiduciary breach, although in the case of a state sponsor, the Department acknowledges that state sovereign immunity laws "would have to be evaluated carefully to ensure they do not conflict with ERISA's remedial provisions."⁴⁷ This recognition alone suggests that the Department is not fully confident in its decision to single out states for special treatment and there does not appear to be any justifiable reason for permitting only states to sponsor open MEPs.

We also note that a state does not appear to be an authorized sponsor of an ERISA-covered plan, under a literal reading of the statute. Section 3(2) of ERISA requires that an "employer" or "employee organization" (or both) establish or maintain an employee pension benefit plan. Section 3(5) defines "employer" to be "any *person* acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan" (emphasis added). Section 3(9), in turn, defines "person" to be "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." Notably, a state or other governmental entity is not listed in the definition of "person," which raises questions as to the fundamental ability of a state to sponsor an ERISA plan for private-sector employees. If Congress

⁴⁷ 80 Fed. Reg. 71940, footnote 17.

had intended for a state to be able to serve in such capacity, it would have included an explicit reference to states somewhere in this definitional framework.⁴⁸

In the right circumstances, the open MEP could be a powerful tool to increase the number of employers offering plans. The Institute supports legislation that would ease restrictions on open MEPs established as DC plans, but targeting the provision to employers with no more than 100 employees—the employer segment most in need of solutions to encourage retirement plan sponsorship.⁴⁹ Allowing small employers to participate in a MEP—regardless of the employer’s industry or any other preexisting relationship with other participating employers or the plan sponsor—will reduce administrative and compliance costs and burdens, and ultimately improve the availability of retirement plans to employees of small employers. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options. By providing a level of liability relief for investment options offered under the plan, small employers would be encouraged to participate in a MEP, while at the same time ensuring that plan participants are protected. We believe any MEP legislation should also include important safeguards to ensure the legitimacy of the sponsoring entity and that fiduciary standards are met.

Allowing states the unique ability to offer an open MEP, particularly without the limitations described above, would be very likely to diminish single employer plan sponsorship (which has distinct advantages) and provide state actors with unjustified competitive advantages in the marketplace for retirement plan products and services. In combination with the proposed safe harbor from ERISA for state-run IRA programs, the Department’s guidance could cause public plan options to supplant the private sector. We believe such a significant change will likely result in loss of the flexibility and innovation that characterize the current voluntary private retirement system.⁵⁰ We therefore urge the Department to reconsider the guidance on MEPs set forth in the IB.

⁴⁸ In this respect, in crafting ERISA, Congress was precise in its determination of the role state governments should play in retirement plan sponsorship. There are several instances where ERISA explicitly references state governments. For example, the term “State” is defined in ERISA section 3(10) (immediately after the definition of “person”); states are referenced in the section 3(32) definition of “governmental plan,” which is excluded from ERISA coverage under section 4(b)(1); and section 514 provides that ERISA shall supersede any state laws relating to any employee benefit plan not exempt under 4(b). The fact that Congress did not include states in the definition of “person” signals that it did not intend for a state to be a private-sector plan sponsor.

⁴⁹ For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

⁵⁰ See Statement of Paul Schott Stevens, President & CEO Investment Company Institute, before the U.S. House of Representatives Committee on Ways and Means, Subcommittee on Oversight, September 30, 2015, available at www.ici.org/pdf/15_house_ways_means_fiduciary.pdf.

III. Regulatory Impact Analysis

The Department's Regulatory Impact Analysis raises questions about the potential for state initiatives to foster retirement security, including the possible unintended negative consequences to workers targeted by the state initiatives. We agree that these questions should be analyzed prior to moving forward with the Proposal, especially in light of the concerns we raise above, including that the state programs intended to be covered by the Proposal have not been fully vetted by the Department, and that the Proposal could promote a fragmented patchwork of state-level retirement systems lacking the protections of ERISA and without the benefits of private market competition. As the Department seems to recognize by its questions, the benefits to be gained from these initiatives may not be as substantial as anticipated and, in fact, some workers who do not opt out of these programs may be harmed. Analysis of the data on retirement plan coverage suggests that workers not currently covered by retirement plans tend to have other more pressing financial needs or savings goals. Even as the Department itself has noted, there is concern of causing inadvertent harm to workers who fail to opt out but really cannot afford to contribute to the plan.⁵¹ Analysis of household balance sheet data indicates that households without retirement accumulations tend to face significant and immediate pressing financial stresses, which would only be heightened if they are automatically enrolled into these plans and a portion of their wage income is set aside into a retirement savings account. Finally, it is important to recognize that automatic enrollment through mandatory state-sponsored IRAs may not have the same impact on participation and savings as automatic enrollment has had in private-sector 401(k) plans.

⁵¹ 80 Fed. Reg. 72012. The Department mentions that such inadvertent savings could cause damage to the overall household balance sheet if, for example, debt were incurred or not paid down. The Department mentions the possibility that a college student might reasonably focus on paying down student loans and a young family might focus on saving for education. Household survey data from the Survey of Consumer Finances provide evidence that there is a life cycle of saving: Households tend to focus on building education, a family, or money to purchase a home earlier in life, before focusing on saving for retirement later in life; see Figure 1 in Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf; see also Figure 7.2 in Investment Company Institute, *2015 Investment Company Fact Book: A Review of Trends and Activities in the U.S. Investment Company Industry* (2015), available at www.icifactbook.org. In addition, the Federal Reserve Bank of New York Consumer Credit Panel data indicate that in 2015:Q3, student loan debt was \$1.2 trillion, which is larger than the \$0.7 trillion in credit card debt and the \$1.0 trillion in auto loan debt. See Federal Reserve Bank of New York, The Center for Microeconomic Data, *Consumer Credit Panel, Household Debt & Credit*, "2015:Q3 Data," available at www.newyorkfed.org/microeconomics/data.html. Federal Reserve Board researchers note that "[t]he level of education loan debt held by U.S. families has increased dramatically over the past decade;" see page 26 in Bricker et al., "Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances," *Federal Reserve Bulletin* 100, no. 4 (September 2014), available at www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf. They also analyze how education debt burden varies across households.

A. The Proposal does not reflect the complexity of factors associated with retirement plan coverage, which may result in economic harm to workers the Proposal attempts to benefit

As an initial matter, we note that discussions about retirement plan coverage often rely on misleading or incomplete coverage statistics. The Institute has published extensive research on the difficulties that arise in determining the scope of retirement plan coverage. The most commonly used data understate retirement plan coverage,⁵² and the most commonly used measure—a snapshot of coverage at a single point in time across workers of all ages, incomes, and degrees of attachment to the workforce—is not a good indicator.⁵³ It is important to understand the typical characteristics of the workers at employers that do not offer plans in order to formulate effective solutions to increasing

⁵² The most commonly used data to analyze retirement plan coverage is the Current Population Survey (CPS), which is a household survey. The CPS typically shows lower rates of pension coverage than surveys of business establishments, such as the National Compensation Survey (NCS). For example, the CPS data show that 59 percent of all full-time, full-year private-sector wage and salary workers had pension coverage in 2013 (pension coverage includes DB and/or DC plans; ICI tabulations of 2014 CPS data). The March 2014 NCS, on the other hand, shows that 65 percent of all private-industry workers and 74 percent of all full-time private-industry workers had access to a pension. See Table 1 in U.S. Department of Labor, Bureau of Labor Statistics, “Employee Benefits in the United States – March 2014,” *News Release* USDL-14-1348 (July 25, 2014), available at www.bls.gov/ncs/ebs/sp/cbmr0020.pdf. The March 2015 NCS reports that 66 percent of all private-industry workers and 76 percent of all full-time private-industry workers had access to a pension. See U.S. Department of Labor, Bureau of Labor Statistics, “Employee Benefits in the United States – March 2015,” *News Release* USDL-15-1432 (July 24, 2015), available at www.bls.gov/news.release/pdf/ebs2.pdf.

This analysis uses the March 2014 CPS data which provide insight into benefits available in 2013. The CPS, which tends to understate retirement plan coverage, changed the survey in March 2015 and the survey changes inadvertently impacted the retirement plan coverage question responses. The March 2015 CPS data for 2014 find that retirement plan coverage dropped in 2014, and particularly among the groups of workers most likely to have retirement plans at work. Copeland (2015) concludes that “[t]he unexplainable decreases in the participation level after the CPS redesign and the conflicting time series of the participation levels in CPS relative to other surveys raise doubts about the use of CPS data to assess future retirement plan coverage policies.” See Copeland, “The Effect of the Current Population Survey Redesign on Retirement-Plan Participation Estimates,” *EBRI Notes* 36, no. 12, Washington, DC: Employee Benefit Research Institute (December 2015): 1–11, available at www.ebri.org/pdf/notespdf/EBRI_Notes_12_Dec15_CPS-WBS.pdf.

⁵³ The most commonly used measure to judge retirement plan coverage is a snapshot of coverage at workers’ current employers across the entire private-sector workforce. This measure is a poor indicator of whether households will have retirement plan coverage at some point over their lifetimes and approach retirement with retirement accumulations. If this snapshot measure is refined to take into consideration the lifecycle of saving, to recognize the role that Social Security plays in replacing lifetime wage income for lower-income households, and to account for the degree of connection to the workforce—it is clear that the majority of private-sector workers most likely to contribute to an employer-sponsored retirement plan have pension plan coverage as part of their compensation. See Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf. Put another way, the number of private-sector workers who are likely to be focused on saving for retirement but do not have access to an employer-sponsored retirement plan is lower than suggested by a cursory look at the aggregate data.

coverage among the minority of workers who are without access. As explained below, the majority of private-sector workers without employer-sponsored retirement plan coverage are younger, lower-income, or less connected to the workforce. As a result, many of these workers may face financial stresses and savings priorities more pressing than retirement saving.

B. The Department acknowledges that workers not currently participating in retirement plans at work may have other more pressing financial priorities

The Department of Labor notes that “inadequate retirement savings can mean sacrificing or skimping on food, housing, health care, transportation, and other necessities.”⁵⁴ For many workers not covered by employer-sponsored retirement plans, the Department acknowledges that these sacrifices or hardships may occur during their working years as well. In this respect, workers not currently covered by employer-sponsored retirement plans tend to be younger, lower-income, or less connected to the workforce. As a result, they may have other, more immediate savings priorities. Part-time employment in particular may be a signal of financial stress. In noting that the state initiatives might have some unintended consequences for such workers, the Department explains:

Workers who would not benefit from increased retirement savings could opt out, but some might fail to do so. Such workers might increase their savings too much, unduly sacrificing current economic needs. Consequently they might be more likely to cash out early and suffer tax losses, and/or to take on more expensive debt. Similarly, state initiatives directed at workers who do not currently participate in workplace savings arrangements may be imperfectly targeted to address gaps in retirement security. For example, a college student might be better advised to take less in student loans rather than open an IRA, and a young family might do well to save more first for their children's education and later for their own retirement.⁵⁵

The Department is correct to point out that these workers may have other priorities for take-home pay, as important as retirement savings is. The data suggest that about three-quarters of private-sector workers without retirement plan coverage may be focused on other savings goals or experiencing other financial stresses. The policy rationale underlying the state initiatives does not give adequate consideration to the fact that retirement savings is not the beginning of the financial difficulties for many of these individuals. It also does not give due regard to the important resource that Social

⁵⁴ 80 Fed. Reg. 72007.

⁵⁵ 80 Fed. Reg. 72012.

Security plays in replacing earnings for U.S. retirees, particularly lower-income workers, who get high earnings replacement rates from Social Security.⁵⁶

A substantial portion of private-sector workers not currently covered by retirement plans at work may face immediate financial stresses. For example, nearly four in 10 (39 percent) of the 50.6 million private-sector wage and salary workers aged 21 to 64 who work for employers that do not sponsor retirement plans are part-time, part-year (*see* Figure 1). Part-time, part-year work in a given year may be an indicator of financial stress, whether it is a long-term or temporary situation. If these workers usually work part-time or part-year, they are less likely to have additional disposable income to reduce their current consumption to save for retirement because the vast majority of part-time, part-year workers have low earnings.⁵⁷ As low lifetime earners, these workers likely will receive a high earnings replacement rate from Social Security.⁵⁸ If some of these workers who are currently working part-time or part-year usually work full-time or for a full year, then earnings in the current year likely are below typical earnings, and these individuals are unlikely to want to reduce current consumption further by saving—for retirement or for any reason. In either case, part-time, part-year workers are unlikely to be focused on saving for retirement in the current year.

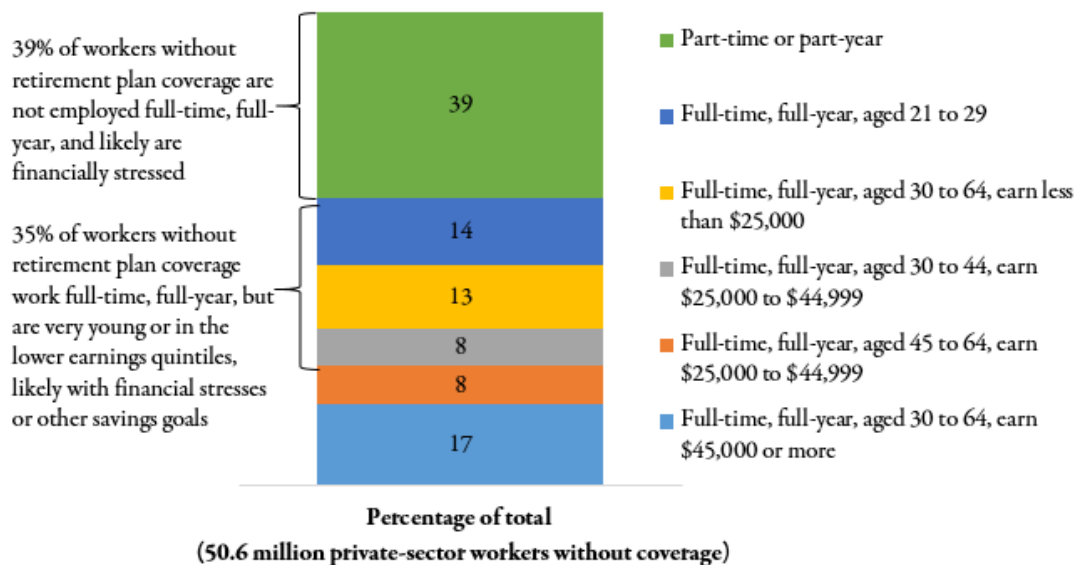
⁵⁶ The Congressional Budget Office reports estimated replacement rates from scheduled Social Security payments, and Social Security replaces a higher percentage of pre-retirement earnings for workers in lower-income households than it does for workers in higher-income households. *See* Congressional Budget Office, *CBO's 2015 Long-Term Projections for Social Security: Additional Information* (December 2015), available at www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51047-SSUpdate.pdf.

⁵⁷ *See* Tables 41 and 42 in Brady and Bogdan "Supplemental Tables for Who Gets Retirement Plans and Why, 2013," available at www.ici.org/info/per20-06_data.xls.

⁵⁸ *See* note 56.

Figure 1
About Three-Quarters of Workers Without Retirement Plan Coverage Likely Have Other Financial Priorities

Percentage of private-sector wage and salary workers, aged 21 to 64, whose employers do not sponsor a retirement plan, 2013



Note: Components do not add to 100 percent because of rounding. See Figure 6 in the research paper for additional detail.
Source: Investment Company Institute tabulations of March 2014 Current Population Survey; see Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014)

Another 35 percent of private-sector workers without retirement plan coverage at work are very young or lower earners, which suggests they may well have other savings goals, have less need to supplement Social Security benefits, or have other financial goals and stresses. Of this 35 percent, the 14 percent who are full-time, full-year but aged 21 to 29 are likely to be saving for other goals, such as a home, for the family, or education.⁵⁹ The primary concern for the 13 percent of full-time, full-year private-sector workers aged 30 to 64 earning less than \$25,000 per year more likely will be that they do not have enough to spend on food, clothing and shelter. In fact, many are eligible for government income assistance so that they will be able to spend more than what they earn on these items. If these workers consistently have low earnings throughout their careers, Social Security will replace a high

⁵⁹ According to 2013 Survey of Consumer Finances data, 32 percent of households with head of household aged 21 to 29 indicate that saving for home purchase, the family, or education is their primary savings goal, while only 13 percent of such young households report that retirement is their primary savings goal. See Figure 7.2 in Investment Company Institute, *2015 Investment Company Fact Book: A Review of Trends and Activities in the U.S. Investment Company Industry* (2015), available at www.icifactbook.org. Household education loan debt has grown in recent years; see discussion in note 51.

percentage of their lifetime earnings, allowing these workers to use more of their wage income to meet current needs and allowing them to delay additional saving for retirement.⁶⁰ The remaining 8 percent of private-sector workers age 30 to 44 who earn between \$25,000 and \$44,999 a year may have the ability to save, but may have other saving priorities, such as starting a household and providing for the needs of their children. Given that they get a substantial replacement rate from Social Security, they are likely to delay saving for retirement until later in life.⁶¹

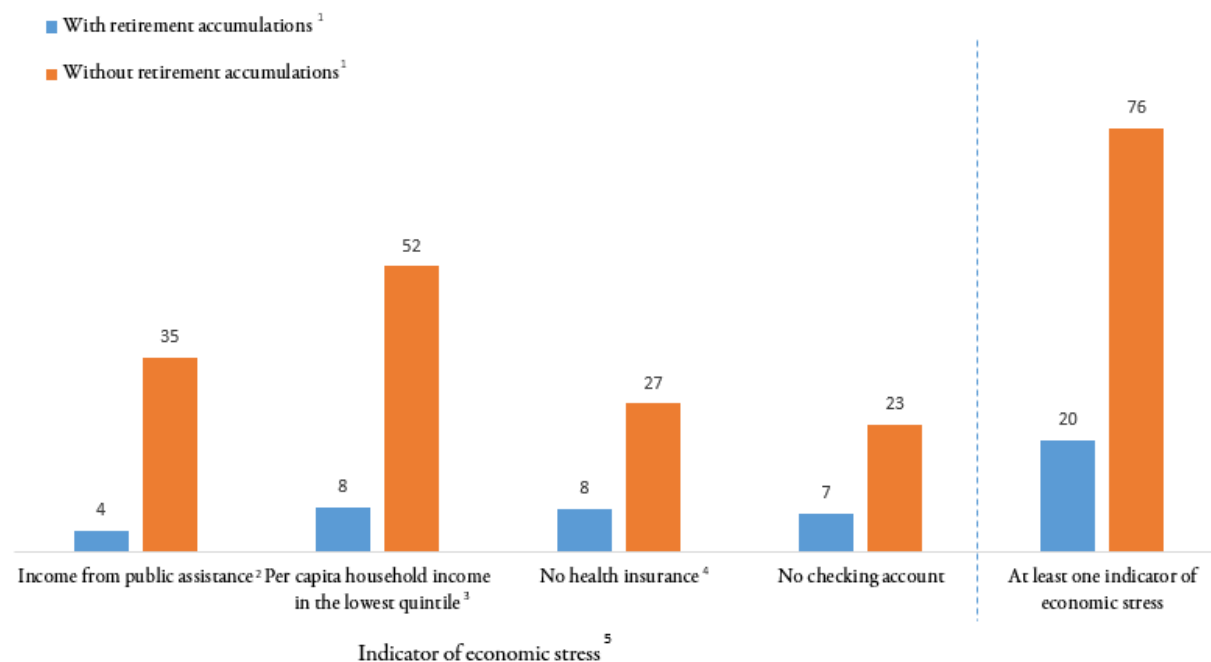
Analysis of household balance sheet data indicates that households without retirement accumulations are more likely to face significant and immediate pressing financial stresses compared with those with retirement accumulations. For many households, their financial difficulties did not begin with retirement. Focusing on older households who have had much of a lifetime to address retirement savings needs, the data show that those without retirement accumulations tend to have indicators of financial stress.

Figure 2 examines older households—those with a head aged 55 to 64, whether working or not—by their retirement accumulation status. Retirement accumulations can be in the form of DC plans, IRAs, or DB benefits. Older households without retirement accumulations are more likely to report that they received income from public assistance: 35 percent of households without retirement accumulations, compared with 4 percent with retirement accumulations. Older households without retirement accumulations are more likely to be lower income: 52 percent are in the lowest per capita household income quintile, compared with 8 percent of households with retirement accumulations. More than one-quarter (27 percent) of older households without retirement accumulations have no health insurance and almost one-quarter (23 percent) do not have checking accounts. All told, 76 percent of older households without retirement accumulations face at least one of these financial stresses, compared with only 20 percent of households with retirement accumulations.

⁶⁰ For a simulation exercise that explores the relationship and timing of 401(k) plan saving taking into account the role that Social Security plays for American workers in preparing for retirement, see Brady, “Who Benefits from the U.S. Retirement System,” *ICI Research Perspective* 21, no. 7 (November 2015), available at www.ici.org/pdf/per21-07.pdf.

⁶¹ See Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf and Tables 41 and 42 in Brady and Bogdan, “Supplemental Tables for Who Gets Retirement Plans and Why, 2013,” available at www.ici.org/info/per20-06_data.xls.

Figure 2
Older Households Without Retirement Accumulations Tend to Have Financial Stresses
Percentage of U.S. households aged 55 to 64 by retirement accumulation status, 2013



¹Retirement accumulations include retirement assets and DB benefits. Retirement assets include DC plan assets (401(k), 403(b), 457, thrift, and other DC plans) and IRAs (traditional, Roth, SEP, SAR-SEP, and SIMPLE), whether from private-sector or government employers. DB benefits include households currently receiving DB benefits and households with the promise of future DB benefits, whether from private-sector or government employers.

²Income from public assistance includes TANF, SNAP, and other forms of welfare or assistance such as SSI.

³Households with a head aged 55 to 64 at the time of the survey were ranked by per capita household income before taxes in 2012.

⁴No health insurance indicates that no individual in the household had public or private health insurance.

⁵Households may fall into multiple categories.

Note: The sample represents 23.0 million households with head of household aged 55 to 64 in 2013; 73 percent had retirement accumulations and 27 percent did not.

Source: Investment Company Institute tabulations of 2013 Survey of Consumer Finances

C. Automatic enrollment in state-mandated IRA programs may not have the same results as automatic enrollment in voluntary private-sector plans

The impact of automatic enrollment in state-mandated payroll deduction IRA programs may not be as large as observed in the private sector, because automatic enrollment in the private sector tends to occur in larger plans and often is combined with other participation incentives such as employer contributions (which provide an immediate and positive return to saving) and the availability

of participant loans (which provides flexible access to the savings).⁶² In addition, extensive participant education on the importance of saving and investing, through materials and website tools, plays a key supporting role in private-sector plans. These features, all of which contribute to the success of automatic enrollment in the voluntary private retirement system, may not be present in the context of state-mandated payroll-deduction IRAs (particularly employer matching contributions).

Automatic enrollment has been studied in the context of private-sector 401(k) plans adding the feature to already existing plans.⁶³ These plans typically have extensive educational programs in place including materials to promote the importance of saving for retirement, explanations of investment types and the trade-off between risk and return, and the features of their plans.⁶⁴ Household survey results highlight that about nine in 10 households with DC plan accounts agreed that their employer-sponsored retirement plan helped them to think about the long-term, not just their current needs.⁶⁵

Automatic enrollment is not without costs, and has been adopted more widely by larger employers in the private sector.⁶⁶ There are potentially significant costs associated with the creation of these plans, both for the states (and the taxpayers in those states) and the small employers forced to update their payroll systems to deal with implementing the new programs. Automatic enrollment creates a large number of low-balance accounts, which create costs in terms of recordkeeping and account services. Whereas the workforces of employers without retirement plans differ from those with

⁶² In the case of state-sponsored retirement plans that are IRAs, individuals could access the accounts through withdrawals. However, amounts withdrawn may be subject to penalties and/or income tax.

⁶³ For example, see Madrian and Shea, "The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior," *The Quarterly Journal of Economics* 116, no. 4 (2001): 1149-1187, available at <http://qje.oxfordjournals.org/content/116/4/1149.abstract>.

⁶⁴ See Plan Sponsor Council of America, *57th Annual Survey of Profit Sharing and 401(k) Plans: Reflecting 2013 Plan Experience*, Chicago: Plan Sponsor Council of America (2014), which reports on the educational materials and activities used in 401(k) plans and the goals of the educational programs.

⁶⁵ See Figure 2 in Schrass, Holden, and Bogdan, "American Views on Defined Contribution Plan Saving," *ICI Research Report* (January 2015), available at www.ici.org/pdf/ppr_15_dc_plan_saving.pdf. Results are based on a survey of more than 3,000 U.S. adults from mid-November to mid-December 2014, of which more than half owned DC plan accounts.

⁶⁶ See Utkus and Young, *How America Saves, 2015: A report on Vanguard 2014 defined contribution plan data*, Valley Forge, PA: The Vanguard Group (2015), available at <https://institutional.vanguard.com/iam/pdf/HAS15.pdf>.

retirement plans,⁶⁷ the experience with participation may be lower and opt-out may be higher for these state-mandated IRA programs compared with the voluntary private-sector plan experience.

Participants opting out after accounts have been created may also generate costs for those workers (such as tax penalties or consumer debt), perhaps occasioning avoidable financial stress. The Department expresses concern that certain workers who fail to opt out may be very economically vulnerable, and Beshears et al. (2012) provides some justification for that concern presenting evidence that 401(k) defaults are particularly influential for low-income individuals.⁶⁸ As explained earlier, workers at employers without retirement plans often are lower-income (57 percent have annual earnings of \$27,000 or less).⁶⁹

The participation and opt-out experience in the state-mandated IRA programs also may differ from the private-sector experience not only because of different firm sizes and different workforce composition, but because 401(k) plans with automatic enrollment tend to have other plan features that also encourage participation and reward contributions. Thus, it is difficult to disentangle the impact of one plan feature in isolation and some of the results achieved with automatic enrollment may also be reflecting the influence of other plan features. Analyzing a sample of nearly 54,000 401(k) plans with 100 participants or more and at least \$1 million in plan assets finds that 401(k) plans tend to have combinations of plan features (*see* Figure 3).⁷⁰ The most common combination offers workers employer contributions into their accounts, which provides immediate growth in the 401(k) balance, and participant loans, which provides flexibility that promotes larger contributions.⁷¹

⁶⁷ Differences in workforce composition appear to be a primary cause for the lower rate at which small employers sponsor retirement plans. *See* Figure 4 and discussion in Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

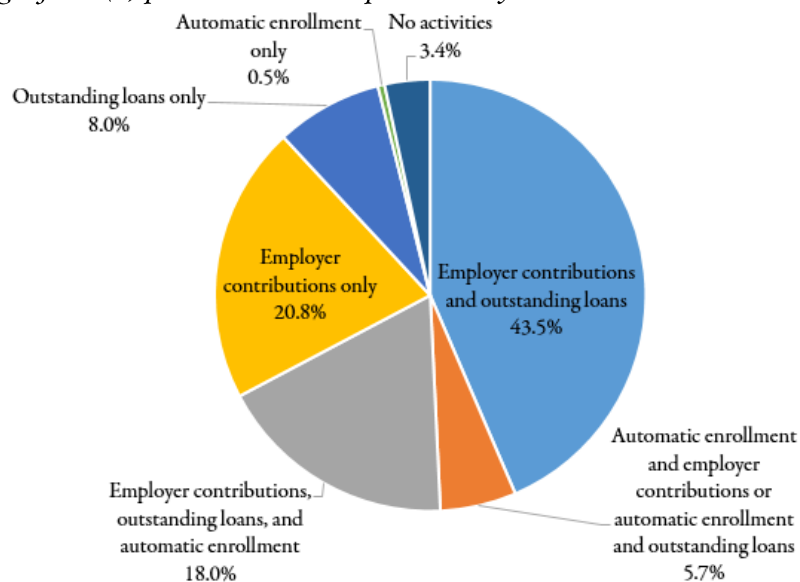
⁶⁸ *See* Beshears, Choi, Laibson, and Madrian, “Default Stickiness among Low-Income Individuals,” *Social Security Administration Retirement Research Consortium Paper* (October 11, 2012), available at <http://gsm.ucdavis.edu/sites/main/files/file-attachments/lowincomedefaults.pdf>.

⁶⁹ *See* Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf and Table 9 in Brady and Bogdan, “Supplemental Tables for Who Gets Retirement Plans and Why, 2013,” available at www.ici.org/info/per20-06_data.xls.

⁷⁰ *See* BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2013*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (December 2015). Available at www.ici.org/pdf/ppr_15_dcplan_profile_401k.pdf.

⁷¹ *Ibid.* *See also* Beshears, Choi, Laibson, and Madrian, “The Impact of 401(k) Loans on Saving,” *NBER Retirement Research Center Paper*, no. NB 09-05, Cambridge, MA: National Bureau of Economic Research (September 2010), available at www.nber.org/aging/rrc/papers/orrc09-05.pdf.

Figure 3
401(k) Plan Sponsors Tend to Use Combinations of Plan Designs
Percentage of 401(k) plans with selected plan activity combinations, 2013



Note: The sample is nearly 54,000 401(k) plans with 100 participants or more and at least \$1 million in plan assets. See Exhibits 1.8 and A.1 in the report for additional detail. Components do not add to 100 percent because of rounding. Sources: BrightScope Defined Contribution Plan Database and Investment Company Institute tabulations of U.S. Department of Labor 2013 Form 5500 Research File; see BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2013* (December 2015)

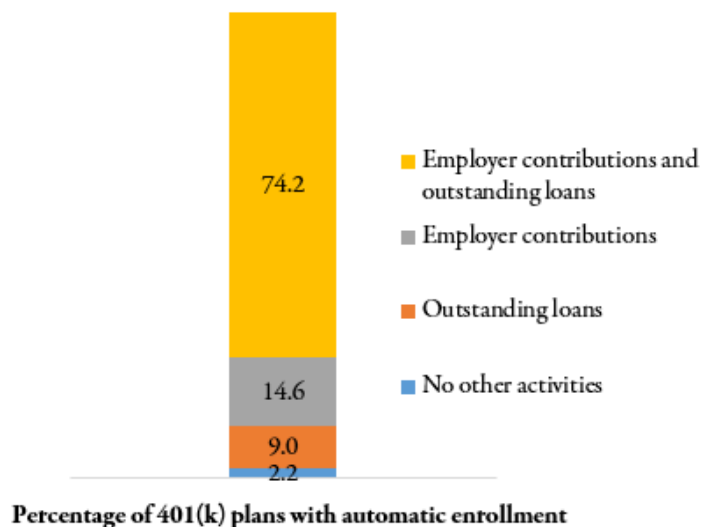
While state-mandated automatic enrollment IRA programs would offer access to the accounts through withdrawals, which provides some flexibility, they would not have employer or state contributions. Private-sector 401(k) plans with automatic enrollment are more likely to have both employer contributions and participant loans outstanding than plans without automatic enrollment. In 2013, 74 percent of 401(k) plans in the sample with automatic enrollment had employer contributions and outstanding participant loans (see Figure 4). Nearly nine in 10 401(k) plans in the sample with automatic enrollment had employer contributions.⁷²

⁷² Beshears et al. (2007) studied savings plan participation at nine firms with automatic enrollment and variation in their match structures. Although they caution that the potential existence of firm-level omitted variables means the results should be interpreted with caution, they conclude that the analysis suggests that “moving from a typical matching structure—a match of 50 [percent] up to 6 [percent] of pay contributed—to no match would reduce participation under automatic enrollment at six months after plan eligibility by 5 to 11 percentage points.” See Beshears, Choi, Laibson, and Madrian, “The Impact of Employer Matching on Savings Plan Participation under Automatic Enrollment,” *NBER Retirement Research Center Paper*, no. NB 07-09, Cambridge, MA: National Bureau of Economic Research (August 2007), available at www.nber.org/aging/rrc/papers/orrc07-09.pdf.

Figure 4

401(k) Plans with Automatic Enrollment Are Likely to Have Both Employer Contributions and Outstanding Loans

Percentage of 401(k) plans with automatic enrollment and selected additional plan design feature combinations, 2013



Note: The sample is about 13,000 401(k) plans with 100 participants or more, at least \$1 million in plan assets, and automatic enrollment. For additional detail, *see* Exhibit 1.9 in the report. A plan was determined to allow participant loans if any participant had a loan outstanding at the end of plan year 2013.

Sources: BrightScope Defined Contribution Plan Database and Investment Company Institute tabulations of U.S. Department of Labor 2013 Form 5500 Research File; *see* BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2013* (December 2015)

In sum, substantial research data provide reason to believe that the state initiatives may not be as effective at increasing retirement plan participation and savings as is hoped. Firms that do not sponsor plans are more likely to have workforces that place less value on retirement benefits than other forms of compensation. These workers may be saving primarily for reasons other than retirement—such as education, buying a house, or starting a family—or may have day-to-day needs that preclude focusing on current saving for retirement. The documented success of automatic enrollment has occurred within a voluntary system far different from the state-mandated programs under consideration. Rather than promoting the development of a confusing patchwork of state programs and providing competitive advantages to the establishment of those programs, without any clear benefit, we urge policymakers to pursue national solutions to increasing coverage that build on the current voluntary system. In this respect, the Institute believes that policies that cooperate with, rather than coerce, employers, who best know the demographics and needs of their workers, present far more efficient and effective solutions for expanding coverage.

* * * *

We hope you find the foregoing comments helpful to your consideration of the Proposal and IB. If you need additional information or you have questions regarding our comments, please feel free to contact the undersigned at (202) 326-5815 or david.blass@ici.org, or David Abbey, Deputy General Counsel – Retirement Policy, at (202) 326-5920 or david.abbey@ici.org, or Sarah Holden, Senior Director, Retirement and Investor Research, at (202) 326-5915 or sholden@ici.org. We welcome the opportunity to discuss these comments further or to provide additional information to you and your staff as you work on this important issue.

Sincerely,

/s/ David W. Blass

David W. Blass
General Counsel