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*Submitted Electronically*

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Re: Proposed Rules for the Oregon Retirement Savings Plan

Dear Ms. Olson:

We are pleased to provide these comments on the proposed rules for the Oregon Retirement Savings Plan (ORSP).<sup>1</sup> Our comments relate solely to the employer exemption provisions of the proposed rules set forth in Division 15—in particular, the implications of section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), the federal law governing private-sector employee benefits. Section 514 provides that ERISA preempts or supersedes any state law that relates to an employee benefit plan. As explained below, ERISA’s preemption of state laws relating to employee benefit plans directly impacts the application of any state-run retirement program for private-sector workers. Our comments offer suggestions on how to structure the ORSP employer exemption in light of ERISA preemption.

The Investment Company Institute<sup>2</sup> is a leading global association of regulated funds, including mutual funds. ICI members play a major role in helping Americans save for a secure retirement, providing investments and other services to retirement plans and individual retirement savers in

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<sup>1</sup> The proposed rules are available here:

<http://www.oregon.gov/treasury/ORSP/Documents/CLEAN%20ORSP%20Proposed%20Rules%20-%20Draft%20for%202017.1.12.pdf>.

<sup>2</sup> 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 members manage total assets of US\$18.6 trillion in the United States, serving more than 95 million US shareholders, and US\$1.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

Oregon and across the nation. About half of defined contribution plan and individual retirement account (IRA) assets are invested in mutual funds, which makes the mutual fund industry especially attuned to the needs of retirement savers. We have a strong interest in ensuring the success and integrity of the private retirement system. Accordingly, we want to highlight the importance of ERISA in protecting retirement savers and the key role of the federal preemption doctrine in the proper functioning of ERISA's protections.

As you know, the US Department of Labor (DOL) has issued guidance on state-run retirement programs for private-sector workers, describing certain features of such programs that, if satisfied, would lead DOL to conclude that a program is not an employer-sponsored plan subject to ERISA.<sup>3</sup> As DOL has acknowledged, however, state programs like Oregon's could still be found to be preempted by ERISA, regardless of whether the program/state law complies with the DOL safe harbor conditions. The consequences of a finding of preemption would be quite severe. The program likely would need to be dismantled or at least significantly overhauled.

Bearing this in mind, the Oregon Retirement Savings Board (Board) should structure the program to minimize the chances that a court would find ERISA preemption to apply. At a minimum, this would entail exempting from the program all employers who offer a "Qualified Plan" (as defined in the regulation) to some or all of the employer's employees, not just on a temporary (*i.e.*, conditional) basis. Any additional criteria for a permanent exemption, such as requiring the Qualified Plan to cover all employees (including groups or categories of employees that lawfully can be excluded from eligibility under an ERISA plan), could be viewed as setting minimum standards for ERISA plans, which, as a result, could trigger ERISA preemption, as explained further below. Moreover, the resulting burdens to plan sponsors of having to comply with one or more state laws in addition to ERISA, are likely to discourage employers, including Oregon employers, from offering full-blown retirement plans to any of their employees.

#### Applicability of the ORSP to Private-Sector Employers

Oregon HB 2960 provides that the plan developed and established by the Board must require an employer to offer its employees the opportunity to contribute to the plan through payroll deductions, unless the employer offers a qualified retirement plan, including but not limited to a plan qualified under section 401(a), section 401(k), section 403(a), section 403(b), section 408(k), section 408(p) or section 457(b) of the Internal Revenue Code. HB 2960 also states that the Board shall adopt rules that establish the process and requirements for an employer to obtain an exemption from offering the plan if the employer offers a qualified retirement plan as described above.

The proposed rules under consideration by the Board include the following provision regarding obtaining an exemption from the ORSP:

- (1) An Employer may file a Certificate of Exemption with the Plan by certifying, in a form and manner specified by the Plan, that the Employer offers a Qualified Plan to all of its Employees within 90 days of hire.
- (2) An Employer may file a conditional Certificate of Exemption by certifying, in a form and manner specified by the Plan, that the Employer offers a Qualified Plan to some but not all of its Employees within 90 days of hire. An Employer with a conditional Certificate of Exemption may be required to register with the Plan at a later time.

We understand that the Board intends to change the language above regarding the 90-day requirement. As stated on the Board's website: "[t]he rules are not intended to mandate businesses with waiting periods of more than 90 days for their employer plans to facilitate the state's plan." We appreciate and agree with the intent to change the proposal in this regard. The language of HB 2960 clearly does not contemplate limiting waiting periods to 90 days, nor does it contemplate or compel a rule limiting a permanent exemption to employers offering a Qualified Plan to *all* of their employees (regardless of whether the plan has a waiting period for enrollment).

Providing such a limited exemption from the ORSP mandate is not only unjustified and counterproductive, but also likely will result in the application of ERISA's preemption doctrine to the state law establishing the ORSP. Below, we discuss the ERISA preemption doctrine and its application to the ORSP and similar state-run retirement programs for private-sector workers.

#### ERISA Preemption Doctrine Is Broad and Crucial to Administration of Benefit Plans

Section 514 of ERISA generally provides that Title I of ERISA supersedes any state laws insofar as they relate to any employee benefit plan described in section 4(a) of ERISA. 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.<sup>4</sup> This

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<sup>3</sup> 29 CFR §2510.3-2(h). At the time of this letter, Congressional Review Act resolutions that would repeal this DOL guidance are pending before the US Congress.

<sup>4</sup> 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

uniform federal scheme was needed so that employers would not be subject to a patchwork of different and potentially conflicting requirements under the laws of as many as 50 states.<sup>5</sup>

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. The Supreme Court has consistently recognized that ERISA's preemption provision is "conspicuous for its breadth" and "clearly expansive."<sup>6</sup>

Ultimately, it is up to a court of law to determine whether and how ERISA applies to any state-run program and whether ERISA preempts such a program.<sup>7</sup> As DOL explained in the preamble to the proposed ERISA safe harbor rule:

[T]he fact that state programs do not create ERISA covered plans does not necessarily mean that, if the issue were litigated, the state laws would not be preempted by ERISA. The courts' determinations would depend on the precise details of the statute at issue, including whether the state's program successfully met the requirements of the safe harbor.<sup>8</sup>

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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.").

<sup>5</sup> *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).

<sup>6</sup> *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Travelers*, 514 U.S. at 653.

<sup>7</sup> A participant, for example, could bring a legal challenge arguing that ERISA protections do apply to the program. Similarly, an employer that becomes subject to a state law mandate could bring a legal challenge against the state law on ERISA preemption grounds. The ERISA exemption for governmental plans would not apply here because the program would cover private-sector employees instead of governmental employees.

<sup>8</sup> 80 Fed. Reg. 72011. In the preamble to the final rule, DOL again noted this uncertainty. "The Department cannot predict what actions states will take, stakeholders' propensity to challenge such actions' legal status, either absent or pursuant to the final rule, or courts' resultant decisions." 81 Fed. Reg. 59464 at 59473.

### ERISA Preemption Has Clear Implications for HB 2960 and the Proposed Rules

Because HB 2960 effectively conditions its mandate on an employer not offering an ERISA plan,<sup>9</sup> the state law appears to “relate to” employee benefit plans covered by ERISA within the plain meaning of the term established by *Shaw v. Delta Airlines, Inc.*<sup>10</sup> 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.”<sup>11</sup> As noted by DOL in the preamble to its proposed safe harbor, “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.”<sup>12</sup>

Although there is a legitimate argument that the ORSP could be preempted by ERISA as it currently stands, an even stronger argument for federal preemption would result if the Board’s rules do not provide a permanent exemption for employers who offer Qualified Plans (even if the employer’s plan does not cover all workers). State programs that exclude only those employers who sponsor plans covering all employees, would not only seem to mandate employee benefit structures, but, by binding employers to particular plan features, would appear to function to regulate ERISA plans.

ERISA establishes standards for plan eligibility.<sup>13</sup> A state law requiring an employer to enroll employees who are not eligible for the employer’s ERISA plan clearly impacts or influences the design and administration of that plan. Such a state law effectively establishes new state-specific standards for plan eligibility that are in conflict with ERISA. The law would cause employers to either amend their plans to qualify for the state’s exemption or participate in the state program. The state law mandate essentially operates as a penalty for certain plan designs that are permissible under ERISA. ERISA preempts a state law that directly or indirectly imposes minimum coverage, eligibility, or participation requirements on ERISA plans. We therefore urge the Board to extend the ORSP unconditional exemption to any employer that sponsors a Qualified Plan for some of its employees.

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<sup>9</sup> Generally, tax-qualified retirement plans of the types listed in HB 2960 sponsored by a private-sector employer are subject to ERISA.

<sup>10</sup> 463 U.S. 85 (1983).

<sup>11</sup> 463 U.S. at 96-97.

<sup>12</sup> 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).

<sup>13</sup> See ERISA § 202.

### Disregarding ERISA Preemption Will Exacerbate Employer Burdens

ERISA preemption serves a crucial function in ensuring that private employers who voluntarily sponsor retirement plans are not subject to a myriad of state laws that would expose them to untenable compliance burdens and costs that would only serve to dis-incentivize them from continuing plan sponsorship. Particularly in the case of multi-state and nationwide employers, an employer could be required 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.<sup>14</sup>

In addition to the explicit duties that a state-run IRA program like the ORSP imposes on participating employers, including collecting and remitting contributions, maintaining records regarding contributions remitted, providing information to the state, and distributing information to employees, several other administrative burdens are readily evident and will impact employers. For example, 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;
- 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;
- Closely scrutinize employee elections to participate in the state savings program and affirmative denials of participation (for those programs that involve automatic enrollment);
- Develop systems and protocols to implement any state-law requirements for different contribution rates, exclusions or other rules for different categories of employees (such as

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<sup>14</sup> *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).

different rules for part-time, full-time, hourly, salaried, temporary, seasonal, managerial, supervisory, officers or directors, professional, highly compensated); and

- Develop an extensive recordkeeping system to calculate how many hours each employee works in each state, to the extent an employee crosses state lines or works in multiple locations.

These programs subject small businesses and other employers operating in multiple states to a challenging and potentially ever-changing constellation of complex mandates and administrative rules. For example, an employer based in Oregon with employees residing in another state (such as California) or an employer based outside of Oregon with employees residing in Oregon, could be subject to multiple state-based regimes that could directly conflict as applied to an individual employee, depending on the reach of the state law.

#### Limiting Employer Exemption Will Have Negative Impact on Plan Sponsorship

As mentioned earlier, limiting the state law exemption to employers with retirement plans covering all of their employees could lead to unintended negative consequences beyond the possible preemption of the state law—namely the disincentive for employers in Oregon to offer full-blown retirement plans to employees. DOL itself has expressed concern (outside the context of preemption analysis) about the possibility of states requiring participation in state-run retirement programs by employers who offer retirement plans to some but not all employees. In the final regulation setting forth conditions for its state plan safe harbor, DOL specified that a state savings program will not fail to satisfy the safe harbor merely because the program is directed toward those employers that do not offer some other workplace savings arrangement.<sup>15</sup> This language represents a change from the DOL's proposed safe harbor, which provided that a state savings program would not fail to qualify for the safe harbor merely because the program is directed toward those *employees* who are not already *eligible* for some other workplace savings arrangement.<sup>16</sup>

DOL explained that this change is intended to reflect the concerns expressed by commenters that the proposed language could lead states to focus on the eligibility of particular employees for the employer's plan, which could be overly burdensome to some employers who would have to continuously monitor eligibility for the employer's ERISA plan and eligibility for the state program on an individual employee basis.<sup>17</sup> While we see this as further support for the application of ERISA preemption, DOL acknowledged merit in the commenters' observation that this burden could be a disincentive to an employer offering a retirement plan to any employees. This should be of upmost

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<sup>15</sup> 29 CFR §2510.3-2(h)(2)(i).

<sup>16</sup> 80 Fed. Reg. 72014.

<sup>17</sup> 81 Fed. Reg. 59468.

concern to the Board in designing the ORSP. It is crucial that the state program not deter employers from sponsoring their own retirement plans. If mandatory state-run retirement programs do not uniformly exempt employers that sponsor retirement plans, the voluntary employer-sponsored retirement system—which provides much greater benefits to private-sector employees than the currently-envisioned state-run IRA programs ever could—could become a thing of the past.

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The Institute strongly supports efforts to promote retirement security for American workers. For the reasons discussed above, we urge the Board to provide a permanent exemption from the state-run program to all private-sector employers who offer a retirement plan to some or all of the employer's employees. This will not only benefit Oregon workers generally, but also will help minimize the chances that a court would find ERISA preemption to apply to the ORSP. We hope the Board finds this information helpful as it considers the impact of the ORSP rules on Oregon's retirement savers and employers. If you need additional information or have questions regarding our comments, please contact the undersigned at (202) 326-5815 or [david.blass@ici.org](mailto:david.blass@ici.org), or David Abbey, Deputy General Counsel – Retirement Policy, at (202) 326-5920 or [david.abbey@ici.org](mailto:david.abbey@ici.org).

Sincerely,

/s/ David W. Blass

David W. Blass  
General Counsel