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Remarks of Brian H. Graff
on behalf of the
American Society of Pension Professionals and Actuaries

Connecticut Retirement Security Board

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Thank you Co-Chairman Lembo, Co-Chairman Nappier, and other members of the Connecticut Retirement Security Board, for the opportunity to speak with you today in support of a state required automatic enrollment IRA arrangement for employees of private employers that do not sponsor any other type of private retirement plan. My name is Brian Graff, and I serve as Executive Director and Chief Executive Officer of the American Society of Pension Professionals and Actuaries, or "ASPPA".

I speak today on behalf of ASPPA and its sister organizations, the National Association of Plan Advisors and the National Tax-Deferred Savings Association. Together, these organizations represent more than 18,000 retirement plan professionals nationwide. Our members provide consulting and administrative services for qualified retirement plans covering millions of American workers. We have consistently and actively supported proposals to expand retirement plan coverage. This has included support of state-based automatic enrollment IRA proposals like the plan contemplated by Public Act No. 14-217. We are closely monitoring the development of similar state-based proposals in California, Illinois, Massachusetts, Maryland and other states.

I am here today to respond to some questions about how the Employee Retirement Income Security Act of 1974 – called ERISA – applies to a state required automatic enrollment IRA structure, including what features trigger ERISA coverage and whether ERISA preemption could apply. As you already know, there are no clear legal answers, but I will do my best to share with you our understanding of relevant legal guidance and our views about how to structure a proposal for implementing a program that could limit the risk that ERISA issues will interfere with the goal of expanding employee access to workplace savings options.

The Act specifically directs that the program must avoid treatment as an employee benefit plan subject to ERISA. Before I comment on whether specific features – such as automatic enrollment – will cause a plan to be subject to ERISA, I would like to provide a general overview of guidance in this area.

Generally, ERISA describes an "employee pension benefit plan" that will be subject to ERISA as a plan or program established or maintained by an employer that either provides retirement income to employees, or results in a deferral of income by employees to or beyond termination of their employment. Because a state required automatic enrollment IRA structure would be designed to provide retirement income, the critical question will be whether the structure requires employers to "establish or maintain" a plan.

The United States Department of Labor – or DOL – issued a regulation in 1975 establishing a safe harbor for payroll deduction IRA programs to encourage those employers that do not otherwise maintain an ERISA-covered retirement plan to help employees save for retirement. Under this regulation, an IRA is not a pension plan subject to ERISA if –

- No contributions are made by the employer;
- Participation is completely voluntary for employees; and
- The employer's activities with respect to the IRA is limited to administrative activities like allowing the IRA vendor to publicize the program, collecting contributions through payroll deductions, and remitting the contributions.

The regulation allows an employer to be reimbursed by the IRA vendor for payroll deduction services but the employer may not receive any other consideration in connection with the program. An employer also cannot endorse any IRA vendor to employees.

In 1999, DOL issued Interpretive Bulletin 99-1 to provide additional guidance about activities employers could perform to facilitate employee participation in a payroll deduction IRA, without triggering employee pension benefit plan status under ERISA. The Interpretive Bulletin describes additional permitted administrative activities, such as, for example, distributing vendor informational materials, encouraging employees to save for retirement by providing educational information, and assuming the internal costs of implementing and maintaining a payroll deduction program. Employers may also select just one vendor to receive payroll deductions. But, employers cannot endorse any IRA vendor, negotiate with a vendor to obtain terms that are not generally available to similar customers, or exercise influence over the investments offered by the IRA vendor.

The Interpretive Bulletin also makes it clear that the DOL's regulation is a "safe harbor," which means that a payroll deduction IRA program might not fully conform to the safe harbor conditions but still would not be a plan subject to ERISA. We believe that this "safe harbor" character of the regulation is important as we look at how to apply it to new structures.

Section 185(a)(17) of the Act envisions that the Board will develop a plan that provides for streamlined enrollment of potential plan participants, including automatic enrollment of employees unless they opt out. We believe that, to meet the goals of increasing access to and enrollment in a workforce retirement savings program, it is critical that automatic enrollment be included in both the state program, and in any private payroll deduction IRA programs that would satisfy the employers' obligation to offer a workplace retirement savings arrangement. A recent United States Government Accountability Office report, which indicates that automatic enrollment IRA arrangements could significantly increase retirement savings, with households in lowest earnings quartile possibly benefiting the most, reinforces our belief that automatic enrollment is essential to expanding retirement savings.

However, the effect of including an automatic enrollment with opt out as a feature for a state required plan raises ERISA questions, which are not addressed by the DOL's regulation for payroll deduction IRAs or the Interpretive Bulletin. There may be two issues. First, does an automatic enrollment with opt out feature satisfy the condition that employee participation must be "completely voluntary?" Second, could employer administration of an automatic enrollment design involve activities that exceed the limits on employer involvement described by the regulation and the Interpretive Bulletin?

While we are not aware of legal guidance that directly addresses these questions, we believe that an automatic enrollment with opt out design can be structured to avoid ERISA coverage, provided that automatic enrollment with opt out at a specified default rate is mandated by law or regulation, and it is not an employer option. First, so long as employees have a reasonable opportunity to opt out from making contributions, enrollment should still be considered *voluntary* on the part of the employee because the employee controls whether or not to participate. Further, even if an automatic enrollment with opt out design could seem to encourage or force employee action – and thus appear less than "completely voluntary" – the State and *not* the employer is responsible. This is important because the purpose of the DOL's regulation for payroll deduction is to address whether an <u>employer</u> is establishing or maintaining a plan. We think that an employer should not be treated as engaging in activities to establish or maintain a plan where the employer is merely complying with a legal mandate requiring implementation of payroll deductions at a default rate, and does not have or exercise any discretion with respect to employee participation. This analysis finds support in certain DOL interpretations, as discussed in more detail in our written testimony.

You also asked us to address whether allowing or requiring employer contributions to a state required payroll deduction IRA could trigger ERISA coverage. On this question, both DOL's regulation and the Interpretive Bulletin make it clear that employer contributions to a payroll deduction IRA will cause the arrangement to be an employee pension benefit plan subject to ERISA. We are not aware of any interpretations that would suggest otherwise. Accordingly, we recommend that the Board's proposed plan design does not reference employer contributions.

I will turn now to the question of ERISA preemption. ERISA includes a very broad provision that preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan …" The United States Supreme Court has discussed the scope of this provision in multiple cases and concluded that a state law is preempted if it, for example, mandates particular employee benefit structures or the administration of benefits, or mandates the creation of an ERISA plan. Even so, ERISA should not preempt a state law mandate that does not either require the establishment of an ERISA-covered plan or otherwise interfere in the operation or administration of ERISA-covered plans.

This means that a state law mandating that employers that do not choose to offer a workplace saving plan must offer employees an automatic enrollment IRA should not be preempted by ERISA because it does not require an employer to establish an ERISA-covered plan or to make any changes to an existing ERISA plan. Of course, this good outcome requires that the state required automatic enrollment IRA structure as implemented does not involve a plan subject to ERISA. Therefore, it will be critical to develop a design that adheres as closely as possible to the safe harbor conditions in DOL's regulation and the Interpretive Bulletin.

In our written testimony, I have provided some general information about DOL's procedures for answering requests for guidance about the application of ERISA in particular situations, which I hope will be helpful to you. As you know, state-based automatic IRA proposals – and ERISA issues relating to these proposals – have garnered national attention. We understand that DOL staff is already considering the ERISA plan status and preemption issues that are raised by these proposals, and, informally, we have heard that DOL staff is reluctant to issue guidance at present. We would be happy to work with the Board to learn more about DOL's views and to explore other approaches to develop certainty around these legal issues.

Thank you for the opportunity to work with you on this important initiative to secure access to workplace retirement savings for more citizens of the State of Connecticut. I am happy to discuss these issues further and answer any questions that you may have.