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NAPA NATIONAL ASSOCIATION OF PLAN ADVISORS
NTSA NATIONAL TAX-DEFERRED SAVINGS ASSOCIATION

November 3, 2014

Connecticut Retirement Security Board
Office of the State Comptroller
55 Elm Street
Hartford, CT 06106

Attn: CRSB Request for Public Comment

The American Society of Pension Professionals & Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), and the National Tax-Deferred Savings Association ("NTSA"), are pleased to respond to this request for written comments in order to help the Connecticut Retirement Security Board ("CRSB") with its market feasibility study as well as its development and implementation of a public retirement plan for private sector employees.

ASPPA and its sister organizations NAPA and NTSA 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. Our members are professionals of all disciplines within the retirement industry, including: consultants, administrators, actuaries, accountants, attorneys, and investment professionals that are united by a common dedication to the private employer-sponsored retirement system.

ASPPA, NAPA, and NTSA have consistently and actively supported proposals to expand retirement plan coverage in the private workforce. This has included auto-enrollment IRA[1] proposals that would require employers to offer payroll reduction savings at work through private sector providers while encouraging employers to set up private sector qualified retirement plans. ASPPA, NAPA, and NTSA have also supported similar state-based proposals such as the California Secure Choice Retirement Savings Trust Act, as enacted in 2012, and the statutory language contained in Sections 180-185 of the Connecticut Public Act No. 14-217, as enacted in 2014.

Per the guidance provided by this request for written comment, ASPPA, NAPA, and NTSA will answer only those questions relevant to our organization's expertise and experience. These questions and responses are listed below.

[1] "IRA" means either an individual retirement account, as defined under Section 408(a) of the Internal Revenue Code of 1986 ("IRC"), or an individual retirement annuity, as defined under IRC Section 408(b).

Plan Design

Question 1: What plan structure would you recommend in order to meet the statutory goals and design features (listed above)?

ASPPA, NAPA, and NTSA recommend that the state-run plan for employees of private employers be structured as an automatic enrollment IRA ("auto-IRA") arrangement similar to the federal auto-IRA legislation introduced by Representative Richard Neal (D-MA, 1st), and the auto-IRA proposal included in the Obama Administration's latest budget. These proposals contain a requirement that employers with 10 or more employees offer an auto-IRA arrangement only if those employers chose not to sponsor any other type of private retirement plan for their eligible employees or exclude a substantial portion of the employer's workforce from participation in a plan.

The auto-IRA structure is a good fit for a state-run retirement plan for employees of private employers because of the desire of the state to avoid fiduciary and other obligations under the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 185(a)(13) of the Connecticut Public Act No. 14-217 specifically directs the Connecticut Retirement Security Board ("CRSB") to avoid having the state-run plan implicate ERISA. A state-run *qualified* retirement plan, whether a 401(k)-type plan or a defined benefit plan administered by the state, would by definition make the state-run plan an "employee pension benefit plan" under ERISA and violate the statute.

Notwithstanding the statutory violation, there would be many consequences if the state were to choose to create a state-run *qualified* retirement plan. If the state goes that route, it would become an ERISA fiduciary on all plans that are covered by their program because the state would be selecting the investments and presumably serving as plan administrator. There are also other risks associated with non-compliance with federal rules under both ERISA and the Internal Revenue Code ("IRC"), such as a loss of expected tax deductions for employers who adopt the plan if any mistake is made, and penalties if required disclosures are not completed on a timely basis. These rules are important – they are designed to protect rank and file workers. They are also complicated, time consuming to administer, and generally apply separately to each adopting employer. Although the state could contract the fulfillment of these ERISA and IRC responsibilities to an outside vendor, the state would retain ultimate legal responsibility for the administration and operation of the plan.

Using the auto-IRA arrangement as the basis for a state proposal avoids many of the complications of a state-run *qualified* retirement plan and satisfies the statutory goal of ensuring that the state plan is not treated as an "employee pension benefit plan" under ERISA. A state proposal that requires employers of a certain size that do not already sponsor a private retirement plan of any type to auto-enroll employees into an IRA program allows for the expansion of payroll deduction retirement savings without placing additional responsibility and liability on the small business owners that are most likely to be affected by such a requirement, as well as on the state itself.

Questions 3&4: What amount would you recommend as the default contribution rate? Why? Would you recommend the plan automatically increase participant's contributions over time? If so, by how much and at what time?

ASPPA, NAPA, and NTSA recommend that the automatic, or "default," contribution level for a participant under the state-run plan be at least 3% of a participant's compensation, and that the state-run plan also include an automatic escalation feature that increases a participant's contributions over time to a maximum of 15% of compensation. A participant should have the ability to change this default rate at elected periods, but no less than four times per year.

The plan design could include gradual increases in the minimum automatic enrollment contribution rates so that when the program first becomes effective, a participant is not surprised by any drastic changes in take home pay. For instance, the minimum automatic enrollment contribution rates could be gradually increased from 3% to 6% of compensation over the years immediately following the establishment of the plan.

The Employee Benefits Research Institute ("EBRI") modeled the impact of increasing default deferral rates in qualified retirement plans with automatic enrollment from the typical plan design of 3% of participant compensation to 6% of participant of compensation.[2] EBRI found that in 2012 more than 25% of those in the lowest-income quartile who had previously not been successful under actual plan default contribution rates would now attain retirement income adequacy as a result of raising the auto-deferral rate to 6%.

ASPPA, NAPA, and NTSA recognize that many financial experts believe that a default rate of 3% of a participant's compensation is far too low to generate sufficient assets for a comfortable retirement. However, with an automatic escalation feature that increases a participant's contributions to their individual account by 1% of pay per year, it does not matter as much where the participant starts but rather where the participant finishes.

Question 5: Would you recommend immediate vesting of the participant's contributions? What about the employer's contributions?

Under federal statute, a participant's contributions into a retirement account are always immediately and 100% vested. IRC Section 408(a)(4), relating specifically to IRAs, states that "the interest of an individual in the balance of his account is nonforfeitable."

As stated above in Question 1, **ASPPA, NAPA, and NTSA recommend** the state-run plan be structured as an auto-IRA arrangement in order for the state to avoid fiduciary and other ERISA obligations. The Department of Labor ("DOL") has issued regulations and guidance[3] that sets forth the requirements that an IRA must satisfy in order to not be considered an "employee pension

[2] Jack VanDerhei, *Increasing Default Deferral Rates in Automatic Enrollment 401(k) Plans: The Impact on Retirement Savings Success in Plans with Automatic Escalation*, Employee Benefits Research Institute (2012) available at: http://www.ebri.org/pdf/notespdf/EBRI_Notes_09_Sept-12.HCS-AE.pdf

[3]DOL Regulation 29 CFR 2510.3-2(d) supplemented by DOL Interpretive Bulletin 99-1 (29 CFR 2509.99-1)

benefit plan” under ERISA. (These regulations and guidance will discussed more fully in response to Questions 17&18.) The regulations and guidance specifically state that there shall be no contributions made by the employer into these arrangements.

Question 6: How would you recommend minimizing the funds that participants withdraw from their retirement accounts prior to their retirement in order to minimize fees assessed on the funds (or pre-retirement “leakage”)?

To minimize pre-retirement leakage, it would be tempting to simply prohibit distributions from the state-run plan until retirement age. However, because other available IRA vehicles provide more flexibility, and because employers would bear the brunt of complaints from participating employees who are denied access to moneys in the accounts, such a prohibition may serve mainly to make the state-run plan unattractive to employers and employees, and be counter-productive.

ASPPA, NAPA, and NTSA recommend that participant education be provided on the advantages of saving *for retirement*, as well as the tax penalties incurred by early withdrawal, and that direct transfers to another retirement vehicle be available to avoid the need to take a cash distribution in order to move savings to another tax-preferred account.

Question 7: Do you have any additional concerns about the plan design features? If so, how could those concerns be addressed?

ASPPA, NAPA, and NTSA recommend that the state-run plan ensure the portability of the auto-IRA benefits by allowing participants to transfer their assets directly to another retirement savings vehicle at any time.

Under current Internal Revenue Service (“IRS”) rules, an individual is permitted to transfer funds between the same types of retirement accounts without taking a distribution whenever an individual wants without any tax penalty, a transaction known as a “trustee-to-trustee” transfer. Individuals who wish to move funds between two types of retirement accounts by receiving a distribution from one account then depositing the funds to another account, a transaction known as a “rollover,” must do so within 60 days of receiving the funds and can only move funds between IRAs once every 12 months, otherwise those funds may be subject to federal income tax. The availability of direct transfers allows employers to transmit all payroll deductions to the same provider without binding employees to investing with that same provider. Once a deposit is made to the employer’s selected provider, the employee could simply transfer it to the IRA of their choice.[4]

[4] In fact, Department of Labor (“DOL”) guidance regarding operating a payroll deduction IRA program without becoming covered by ERISA requires an employer to fully disclose any restrictions on an employee’s ability to transfer or rollover contributions to another IRA in advance of the employee’s decision to participate if the employer is transmitting contributions to a limited number of providers. (DOL Interpretive Bulletin 99-1) This guidance is discussed more fully in the response to Questions 17&18.

Administrative Issues

Questions 12-14: How would you recommend qualified employers structure the payroll deduction process to credit the plan participant's contributions to his or her individual retirement account through payroll deposit? How would you recommend managing the enrollment, receipt, and recordkeeping of employee payroll contributions and transactions? How would you recommend managing rollovers and closures of plan accounts?

ASPPA, NAPA, and NTSA recommend that the private sector manage and administer the state-run retirement plan. In fact, the private sector role is critical in this endeavor. An entire pension industry of record keepers, financial services companies, consulting firms, and other professional firms, is already in place and in some cases are already maintaining payroll deduction accounts that function exactly like the auto-IRA arrangement discussed in Question 1.

The number of small accounts established under the state-run plan would present special challenges. The majority of these accounts are expected to have small balances and it is critical that employee savings not be eaten up by fees. However, using collective investment and uniform administrative processes allows providers to keep fees low. Competition among private sector firms will drive innovation resulting in better services for employees. And importantly, it is private sector providers that will be encouraging employers that are offering the auto-IRA arrangement to step up to a more robust arrangement that includes employer contributions.

Questions 15&16: How would you recommend identifying eligible employers and their employees? Do you have any additional concerns about the administration of this plan? If so, how could those concerns be addressed?

The DOL's guidance regarding operating a payroll deduction IRA program without becoming covered by ERISA should be followed closely in determining what information is disseminated through the employer and what information is provided directly to participating employees by the auto-IRA arrangement.

ASPPA, NAPA, and NTSA recommend that electronic delivery of information be the default means of communication, to allow for more engagement and interaction on the part of participants, and reduce operational costs. However, any participant that wants to receive disclosures in paper form should be permitted to do so.

Legal Issues

Questions 17&18: How would you recommend obtaining a favorable ruling from the Department of Labor that the plan is either exempt from ERISA coverage under an exception or that ERISA does not cover the plan? How would you recommend obtaining a ruling from the IRS that the plan qualifies for favorable income tax treatment as individual retirement accounts?

Section 184 of the Connecticut Public Act No. 14-217 (the "Act") states that the CRSB shall conduct a market feasibility study to determine the goals and design features of the plan. Section 185 of the Act specifically describes the goals and design features of the plan. These goals and design features include:

- "plan portability through maintenance of individual retirement accounts for each plan participant" [Section 185(a)(6) of the Act]
- "compliance with all applicable requirement of federal and state laws, rules, and regulations" [Section 185(a)(11) of the Act]
- "ensuring that the plan participants and the individual retirement accounts qualify for the favorable federal income tax treatment ordinarily accorded to individual retirement accounts under the Internal Revenue Code" [Section 185(a)(12) of the Act]
- "ensuring that the plan is not treated as an employee benefit plan under the federal Employee Retirement Income Security Act of 1974" [Section 185(a)(13) of the Act]

IRC Section 408(a)(2) requires that the trustee of an IRA must be a bank "or such other person who demonstrates to the satisfaction for the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section". Thus, unless a bank is appointed to serve as trustee of the state-run plan, the Trustees will have to request approval of the Secretary of the Treasury to operate as the trustee of an IRA arrangement. However, given the clear intent, and the ability to liberally construe the provisions to effectuate that intent, it is difficult to argue that the accounts would not be IRAs, and qualify for the tax treatment afforded IRAs.

Demonstrating that the state-run plan is not subject to ERISA is dependent on assuring that the accounts are in fact IRAs, and following the guidance the DOL has provided for assuring payroll deduction IRA arrangements are not subject to Title I of ERISA.

Assuming that the state-run plan will consist of IRAs, the path to avoiding being subject to ERISA has been laid out in DOL guidance. Section 2510.3-2(d) of the regulations issued by the DOL sets forth the following requirements that an IRA must satisfy in order to not be considered an "employee pension benefit plan" or a "pension plan" subject to Title I of ERISA:

- No contributions are made by the employer
- Participation is completely voluntary for employees
- The sole involvement of the employer is without endorsement to permit the sponsor to publicize the program to employees, to collect contributions through payroll deductions, and to remit them to the sponsor; and
- The employer receives no consideration in the form of cash or otherwise, other than

reasonable compensation for services actually rendered in connection with payroll deductions.

In order to "encourage retirement savings" and to summarize and restate "its views on employer involvement in providing voluntary payroll deduction systems for contributions to IRAs" the DOL issued Interpretive Bulletin 99-1 (29 CFR 2509.99-1) on June 18, 1999. This bulletin "clarifies the circumstances under which an employer may facilitate employees' voluntary contributions to IRAs by providing an IRA payroll deduction program without thereby inadvertently establishing or maintaining an employee benefit pension plan within the scope of section 3(2) of ERISA."

However, Interpretive Bulletin 99-1 does not specifically address whether automatic enrollment with an opt-out plan design envisioned in Section 185(a)(17) of the Act makes participation in the state-run plan "completely voluntary" for employees. The state may want to request an Advisory Opinion from the DOL for guidance on this specific issue.

ASPPA, NAPA, and NTSA recommend that the CRSB strictly comply with the rules set forth by the DOL in DOL Regulation Section 2510.3-2(d) and Interpretive Bulletin 99-1 in order to ensure that the auto-IRA arrangements contemplated by the state-run plan do not become employee pension benefit plans subject to Title I of ERISA. To that end, we suggest that there be no references to employer contributions when enabling legislation is enacted. Furthermore, any educational materials distributed to employees through the employers must not make the employer appear to be endorsing the state-run plan. Interpretive Bulletin 99-1 includes guidance on this issue for payroll deduction IRA arrangements.

Questions 19&20: What recommendations, if any, would you have toward amending or enacting statutes and/or regulations in order to improve the legal requirements of the plan? Would you recommend any amendments to the enacting legislation of the CRSB (P.A. 14-217)? Do you have any additional legal concerns surrounding this plan? If so, how could those concerns be addressed?

ASPPA, NAPA, and NTSA are not aware of further statutes or regulations which would be necessary to enact in order to strengthen the legal basis for the state-run plan. However, a change to federal law to eliminate roadblocks to establishing an IRA for an individual who is defaulted into the state-run plan would help streamline the implementation of an auto-IRA arrangement. For example, section 2(d)(1)(B) of H.R. 2035, introduced by Representative Richard Neal (D-MA, 1st) in the 113th Congress, would address this concern by treating the auto-IRAs required by his legislation as accounts established under an ERISA employee benefit plan *solely* for purposes of the customer identification program established under section 5318(l) of title 31 of the U.S. Code.

Costs and Fees

Questions 21-25: How would you recommend minimizing ongoing administrative costs and fees associated with the plan? How would you recommend calculating the estimated startup costs of the plan? What would you estimate those costs to be? How would you recommend covering those startup costs? How would you recommend minimizing any administrative cost to the employers? How would you recommend achieving transparency and accountability in the management of the retirement funds? Do you have any additional concerns regarding the costs of this plan?

ASPPA, NAPA, and NTSA recommend that the CRSB require service providers involved with the state-run plan to make reasonable fee disclosures to the CRSB and plan participants in order to be granted authority to provide services to the plan. These disclosures should include an advance notice of available investment options offered by the service provider, a chart comparing the fees of the available investment options offered by the service provider, a categorization of any charges applicable to the plan participant's individual account, a description of the purpose of the charges, and information on the past performance of the various investment options offered by the service provider.

Retirement Plan Vendors Website

Questions 26-30: What level of interest would vendors have in establishing a secure website to assist qualified employers in identifying vendors of retirement plans that may be implemented by qualified employers in lieu of participation in the plan? How should the Board determine that interest? How would you recommend establishing a process for vetting vendors to include on the website? What information is most important for employers to know about vendors on the website? How would you recommend operating the website effectively and efficiently, in a manner that minimizes liability? Do you have any additional concerns on creating a secure website for vendors of retirement plans for the use of eligible employers?

Section 185(a)(19) of the Act directs the CRSB to establish "a secure Internet web site to assist qualified employers in identifying vendors of retirement arrangements that may be implemented by qualified employers in lieu of participation in the plan". Section 185(a)(19) of the Act encourages private sector involvement through an online clearinghouse where qualified employers will be able to identify private sector providers that are offering retirement products that will fulfill the obligations of qualified employers under the Act. This section is instrumental to the success of the state-run plan.

The private sector is eager and willing to participate in providing retirement plan solutions for businesses that currently do not offer retirement plans for their employees. The web site envisioned under Section 185(a)(19) provides a distribution tool for these private sector companies to use, and is an efficient way to increase retirement plan coverage in the private workforce. ASPPA, NAPA, and NTSA are highly confident that there will be significant interest from private sector providers of retirement products to participate on the website and applaud the Connecticut legislature for including this provision in the Act.

Additional Information

Question 37: What is your personal story? How would this program benefit you? Or harm you? Why?

It is well established that for most Americans the key to successfully preparing for retirement is having access to a workplace savings program. According to the Employee Benefit Research Institute ("EBRI"), more than 70% of employees earning between $30,000 and $50,000 participate in a 401(k)-type program when it is offered to them at work, while fewer than 5% of those same employees save on their own in an IRA when they are not covered by a workplace retirement savings plan. That is a compelling differential, and it is due in large part to the convenience and inertia resulting from savings through payroll deduction and the "culture of saving" that is often fostered due to the existence of the workplace retirement plan.

But there is a problem. Despite our best efforts, there are far too many Americans without access to a retirement plan at work. EBRI's most recent estimates indicate that more than 51.4% of all workers and 39.6% of full-time workers are lacking retirement plan coverage. This translates to tens of millions of American workers without access to a workplace retirement plan.

The problem is not the lack of a product. There are plenty of retirement plan products available at a reasonable cost, including straightforward payroll deduction IRAs. Rather, the problem is one of distribution — that is, small business retirement plans are sold, not bought. Small business owners are too busy running their own businesses to focus on offering a retirement plan. Someone has to convince them to do it.

The retirement plan industry cannot afford to sit on the sideline on this issue any longer. That is why ASPPA, NAPA and NTSA decided early in the game to get involved, to acknowledge there is a problem, and to have a seat at the table and offer constructive solutions, not absolute objections. One solution that ASPPA, NAPA, and NTSA think will be most effective is to require employers above a certain size to offer a retirement plan for employees and to ensure that private sector products satisfy the requirement. ASPPA, NAPA, and NTSA believe that if this principle is followed, dramatic gains can be achieved in closing the existing retirement plan coverage gap among American workers. Ultimately, that should be everyone's shared goal.