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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 ("CRSB"), for the opportunity to speak with you today in support of a state required automatic enrollment IRA[1] 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 ("ASPPA"). I speak today on behalf of ASPPA and its sister organizations, the National Association of Plan Advisors ("NAPA"), and the National Tax-Deferred Savings Association ("NTSA").

ASPPA, together with 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 support of state-based automatic enrollment IRA proposals that could require employers to offer payroll reduction savings at work through private sector providers, such as the type of arrangement described by the statutory language contained in Sections 180-185 of the Connecticut Public Act No. 14-217, as enacted in 2014 (the "Act"). ASPPA, NAPA and NTSA are closely monitoring the development of similar state-based proposals in California, Illinois, Massachusetts, Maryland and other states.

[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).

I am here today to respond to some questions about how the Employee Retirement Income Security Act of 1974 ("ERISA") may apply to a state required automatic enrollment IRA structure, including features that could 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 state required automatic enrollment IRA program that limits the risk that ERISA issues will interfere with the goal of expanding employee access to workplace savings options.

<u>Definition of "Plan" Covered by ERISA – In General</u>

The Act contemplates that CRSB will design a state-run retirement plan with certain features including (among other things) a process for streamlined enrollment of potential plan participants by automatic enrollment of each employee unless the employee chooses to opt out of participation in the plan.[2] The Act also specifically directs that the plan must avoid treatment as an employee benefit plan subject to requirements under ERISA.[3] Before commenting on whether specific features – such as automatic enrollment with an opt-out plan design – will cause a plan to be treated as a plan subject to ERISA, I would like to provide a general overview of guidance in this area.

Subject to some exceptions, ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce.[4] Section 3(2) broadly defines an "employee pension benefit plan" or "pension plan" to mean (as relevant here) "any plan fund or program … established or maintained by an employer or an employee organization, or by both, to the extent that by its express terms or a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond …" Because a state required automatic enrollment IRA structure would be designed to provide retirement income, the critical question will be whether the structure could require employers to "establish or maintain" the plan.

The U.S. Department of Labor ("DOL") has issued a regulation, at 29 Code of Federal Regulations Section 2510.3-2(d) (the "IRA Regulation"), establishing a safe harbor for payroll deduction IRA programs. The purpose of the IRA Regulation is to encourage those employers that do not choose to establish and maintain an ERISA-covered retirement plan to help their employees save for retirement by payroll deductions to IRAs. This regulation specifies that an IRA will not be a pension plan subject to ERISA if –

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[2] Section 185(a)(17) of the Act.

[3] Section 185(a)(13) of the Act.

[4] ERISA § 4. ERISA section 4(b)(1) exempts from ERISA coverage any employee benefit plan that is a "governmental plan" as defined by ERISA section 3(32). A state-run retirement plan probably would not be exempt from ERISA as a governmental plan because DOL has stated that a plan that is extended to cover more than a de minimis number of private sector employees will not be considered a governmental plan. *See* DOL Advisory Opinions 2005-21A (Dec. 21, 2005) and 2005-17A (June 22, 2005).

- No contributions are made by the employer;
- Participation is completely voluntary for employees;
- The employer's activities with respect to the IRA are solely limited to: without endorsement, permitting the IRA sponsor[5] to publicize the program to employees, collecting contributions through payroll deductions, and remitting the contributions to the IRA 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.

The IRA Regulation was initially issued in 1975, and over the years a number of interpretive questions developed about the permitted scope of employer involvement that could trigger ERISA plan status. In 1999, DOL issued Interpretive Bulletin 99-1 (the "Interpretive Bulletin"), which summarized this Interpretive guidance and restated DOL's views on employer involvement in providing voluntary payroll deduction systems for contributions to IRAs. DOL explained that it intended to clarify "the circumstances under which an employer may facilitate employees' voluntary contributions without thereby inadvertently establishing or maintaining an employee benefit pension plan within the scope of section 3(2) of ERISA."[6]

The Interpretive Bulletin explains that, so long as the employer maintains neutrality as to an IRA sponsor in its communications, an employer may engage in a variety of administrative activities without converting a payroll deduction IRA into an ERISA-covered plan, including by, for example, encouraging employees to save for retirement by providing general information on the IRA payroll deduction program and educational materials, answering employees' inquiries about the mechanics of a payroll deduction program, providing informational materials written by the IRA sponsor (including materials that may include the employer's name or logo), and assuming internal costs of implementing and maintaining a payroll deduction program. The Interpretive Bulletin specifically allows employers to limit the number of IRA sponsors to which employees may make payroll deduction contributions – including selecting only one IRA sponsor to receive payroll contributions – so long as (a) limits on transferring or rolling over the contributions to another IRA sponsor are disclosed to employees before they contribute and (b) the employer does not negotiate to obtain special terms for its employees that are not generally available to similar purchasers of the IRA or exercise any influence over the investments made or permitted by the IRA sponsor.[7]

[5] The regulation at 29 CFR § 2510.3-2(d) and Interpretive Bulletin 99-1 (see note 6 and accompanying text) both mean, by reference to "IRA sponsor", a financial institution that offers IRAs to the public.

[6] "Interpretive Bulletin 99-1; Payroll Deduction Programs for Individual Retirement Accounts," 64 Fed. Reg. 33000, 33001 (June 18, 1999) (codified at 29 CFR § 2909.99-1).

[7] Interpretive Bulletin 99-1(c), (d) and (e).

The Interpretive Bulletin also makes clear that the IRA Regulation is a "safe harbor" under which a payroll deduction IRA will not be considered to be an ERISA-covered plan.[8] Therefore, there may be circumstances under which an IRA payroll deduction program would not be treated as a plan established or maintained by an employer for purposes of ERISA, even though employer actions may not fully conform to the safe harbor conditions of the IRA Regulation.[9] This "safe harbor" character of the Regulation is an important point in considering how to interpret and apply its conditions to new structures.

<u>A State-Required Auto-Enroll Design Could Be Structured to Avoid ERISA Coverage</u>

A retirement plan designed as a payroll deduction IRA program that complies with the safe harbor conditions of the IRA Regulation and the Interpretive Bulletin should not be treated as an employee benefit plan covered by ERISA, in accordance with Section 185(a)(13) of the Act. However, neither the IRA Regulation nor the Interpretive Bulletin address whether the automatic enrollment with an opt out plan design, as envisioned in Section 185(a)(17) of the Act, will comply. Specifically, neither address whether automatic enrollment with an opt out design will satisfy the condition that employee participation must be "completely voluntary." A related question is whether administration of an automatic enrollment with opt out feature may require employer activities that exceed the limits on employer involvement of the IRA Regulation.

ASPPA, NAPA and NTSA are not aware of legal guidance that directly addresses whether a payroll deduction IRA that includes an automatic enrollment with opt out design will trigger employee benefit plan status under ERISA. That said, we believe the better view is that this design can be structured to avoid ERISA coverage so long as the automatic enrollment with opt out feature at a specified default rate is mandated by law or regulation and is not an employer option.[10] 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 still controls whether or not to participate. Further, to the extent that an automatic enrollment with opt out design may appear 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,

[8] Interpretive Bulletin 99-1(b).

[9] For example, in DOL Advisory Opinion 2001-03A (February 15, 2001), DOL agreed that, in connection with an insurance company demutualization, employers serving as holders of certain group annuity contracts in connection with payroll deduction IRAs and tax-deferred annuities (TDAs) otherwise exempt from coverage under 29 CFR § 2510.3-2(d) and (f), could vote in connection with a plan of reorganization relating to the demutualization transaction and select a method for allocating demutualization proceeds without causing the IRAs and TDAs to become subject to ERISA. DOL acknowledged that these activities could exceed limits on employer involvement set forth in the regulation and noted that its conclusion took into account (a) the insurance company actions, independent of the employers, required the employer action, (b) employers would be acting in accordance with specific provisions under New Jersey law and a plan of reorganization approved by New Jersey' insurance commissioner, and (c) the vote and decision on allocation would be unique, one-time activities that would not involve the employer retaining any discretion regarding ongoing administration or operation of the IRAs or TDAs.

[10] Section 185(a)(10) of the Act contemplates that the CRSB will include as a plan feature a default contribution rate and process by which plan participants may elect to change their level of contribution.

as I discussed in my overview of the IRA Regulation, its purpose is to address whether an employer 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 established under law or regulation, and does not have or exercise any discretion with respect to employee participation.

This view is supported by DOL interpretations recognizing that employer administrative activities required to comply with law or regulation do not necessarily cause a plan to become a plan subject to ERISA. One example is guidance issued by DOL in Field Assistance Bulletin 2007-02 ("FAB 2007-02"), which relates to tax-deferred annuity programs under Section 403(b) of the Internal Revenue Code ("403(b) plans"). 403(b) plans are exempt from ERISA if conditions are met under a safe harbor exemption under 29 Code of Federal Regulations Section 2510.3-2(f), which has conditions substantially similar to the IRA Regulation. In 2007, the IRS issued regulations imposing significant new compliance obligations on employers in connection with 403(b) plans, and there was concern that employers could not comply with the new IRS regulations without triggering ERISA plan status. FAB 2007-02 concludes that employers may undertake a wide range of administrative activities necessary to comply with their compliance obligations under IRS regulations while still complying with conditions under the safe harbor regulation for 403(b) plans. The DOL emphasized that, notwithstanding the additional administrative activities necessary to comply, employers could still avoid triggering ERISA plan status so long as plan documents still describe a limited employer role and allocate all discretionary determinations to the investment provider or employee participant and the employer does not negotiate terms of products offered by investment providers.[11]

It is critical that automatic enrollment be included in both the state program and in private payroll deduction IRA programs that satisfy the employers' obligation to offer a workplace retirement savings arrangement. The United States Government Accountability Office ("GAO") projects that a federally required automatic enrollment IRA arrangement for employees of private employers would significantly increases retirement savings. An August 2013 GAO report on the topic found that 36% of households could see an increase in savings if these arrangements were implemented, with the lowest earnings quartile benefiting the most, as the GAO calculated a 66% increase in savings among that group.[12] ASPPA, NAPA and NTSA recommend that automatic enrollment at a specified rate, with opt out, be required for both the state arrangement and for any private payroll deduction IRA arrangement that satisfies the requirement to offer a workplace retirement savings plan.

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[11] *See also* Field Assistance Bulletins 2006-02 (Oct. 27, 2006) and 2004-01 (Apr. 7, 2004), relating to health savings accounts ("HSAs") established to pay or reimburse certain qualified medical expenses, and DOL Advisory Opinion 2001-03A, described at note 9.

[12]United States Government Accountability Office, *Automatic IRAs – Lower-Earning Households Could Realize Increases in Retirement Income*, (August 2013), available at http://gao.gov/assets/660/657171.pdf

Employer Contributions Could Trigger ERISA Coverage

The IRA Regulation and Interpretive Bulletin makes clear that DOL's position that employer contributions to a payroll deduction IRA will cause the arrangement to be an employee pension benefit plan subject to ERISA, and we are not aware of any interpretations that would suggest otherwise.[13] Accordingly, ASPPA, NAPA and NTSA recommend that there should be no references to employer contributions in the CRSB's proposed plan design.

ERISA Preemption

ERISA section 514(a) provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan …"[14] The Supreme Court has interpreted this provision broadly, explaining that a state law is preempted if it mandates employee benefit structures or their administration, interferes with the uniform regulation and administration of employee benefit plans by *e.g.*, mandating the provision of certain benefits or requiring plans to calculate benefits differently in different locations, or mandates the creation of ERISA plans.[15]

ERISA should not, however, 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. For example, in a case involving a San Francisco ordinance requiring employers to spend a required amount on employee health care, the Ninth Circuit Court of Appeals held that the ordinance was not preempted because it did not require employers to establish their own ERISA plans or to make any changes to their existing ERISA plans.[16]

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[13] On December 15, 2014, the DOL issued an information letter to J. Mark Iwry, addressing whether an employer that makes available to employees the U.S. Department of Treasury's MyRA program would be treated as establishing or maintaining a plan covered by ERISA. Concluding that an employer generally would not be establishing or maintaining a plan by offering the MyRA program, DOL specifically conditioned its opinion on (among other conditions) an "absence of employer funding."

[14] ERISA section 514(b) includes a number of exemptions from preemption by ERISA, which are outside the scope of this discussion.

[15] *See Egelhoff v. Egelhoff*, 532 U.S. 141,148 (2001) (state laws preempted if they regulate plan administrative matters, such as beneficiary designations, or otherwise interfere with nationally uniform administration); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (state laws that mandate employee benefit plan structures or administration, or provide alternate enforcement mechanisms are preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1,16-17 (1987) (state laws mandating the creation of an ERISA plan are preempted).

[16] *Golden Gate Restaurant Assoc. v. San Francisco*, 546 F.3d 639 (9th Cir. 2008), *rehearing denied*, 558 F.3d 1000 (9th Cir. 2009), *cert. denied*, 561 U.S. __, 130 S.Ct. 3497 (2010). In briefs submitted to the 9th Circuit, DOL took the position that ERISA preempted the San Francisco ordinance because DOL concluded that an employer could only comply by creating or or altering an ERISA plan. However, in a subsequent brief to the Supreme Court recommending denial of a writ of certiori, the Solicitor General explains that DOL reexamined its view and (without necessarily conceding that the ordinance did not involve creation of an ERISA plan) acknowledges that ERISA would not preempt the ordinance so long as the ordinance did not require employers to create or alter an ERISA covered plan to comply. *See* Brief for the United States as Amicus Curiae, *Golden Gate Restaurant Assoc. v. San Francisco*, No. 08-1515 (S.Ct., cert. denied 561 U.S. __ , 130 S.Ct. 3497 (June 28, 2010)).

Similarly, a state law mandating that employers that do not otherwise offer a tax-qualified plan must offer employees an automatic enrollment IRA should not be preempted by ERISA so long as the mandate does not require an employer to establish an ERISA-covered plan or to make any changes to an existing plan. Of course, this good outcome requires that the state required automatic enrollment IRA structure does not involve an employee pension benefit plan covered by ERISA. Therefore, it will be critical for a state required payroll deduction IRA to be structured so that it adheres as closely as possible to the conditions set forth by the IRA Regulation and Interpretive Bulletin by limiting employer involvement to administrative activities that do not require discretionary determinations about the terms of employee participation.

DOL Advisory Opinion Procedures

The DOL generally answers inquiries of individuals or organizations that may be directly or indirectly affected by ERISA as to their status under ERISA and the effect of certain acts and transactions through an advisory opinion or information letter. Procedures for requests are described by ERISA Procedure 76-1.[17]

- An advisory opinion is an opinion of DOL as to the application of one or more sections of ERISA, or regulations, Interpretive Bulletins or exemptions issued under ERISA. DOL's procedures provide that only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion. In practice, however, ERISA practitioners refer to DOL's discussion as to the application of ERISA in advisory opinions as authoritative and courts also may (but do not always) defer to DOL's legal analysis set out in advisory opinions.
- An information letter issued by DOL is informational only and is not binding on DOL with respect to any particular factual situation. Information letters may explain DOL's views about how ERISA may apply but do not provide a formal opinion as to the outcome of its analysis in a particular circumstance.

DOL's procedures require applicants for an advisory opinion to initiate the process by filing a written request. Requests are sent to the DOL's Employee Benefit Security Administration Office of Regulations and Interpretations and other offices within DOL are often involved to assist in review of the requested guidance. While the request is under review, DOL may request a meeting, and applicants may request a conference if DOL indicates that it may deny the request. DOL has complete discretion to grant or deny requests.

In practice, most applicants engage in a "pre-submission" process with DOL staff by seeking a meeting to discuss a possible request for guidance before filing a formal request. It is helpful to

[17] http://www.dol.gov/ebsa/regs/aos/ao_requests.html.

provide DOL staff with an outline of relevant facts and issues for review before the meeting. Based on these discussions with DOL staff, an applicant can refine and submit a formal request, or take another approach to the problem. However, a pre-submission meeting only allows initial reactions from DOL. Any DOL staff views expressed in the pre-submission process are preliminary and subject to change after more fulsome DOL staff review.

In our experience, DOL staff takes a careful and thoughtful approach to the advisory opinion process. It is unusual for DOL to reply to an advisory opinion request in less than one year after the formal request is submitted, and this process often takes much longer. In some cases, where similar issues are submitted by multiple applicants, DOL may elect to respond with a different form of guidance, such as a field assistance bulletin, an Interpretive Bulletin or even by changes to regulation, and this may extend the time to receive guidance.

As you know, state-based automatic IRA proposals – and ERISA issues relating to these proposals – have garnered national attention. DOL staff is already considering these proposals, and we understand that they are reluctant to issue guidance at present. ASPPA, NAPA and NTSA would be happy to work with the CRSB 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 the CRSB 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.