STATE OF CONNECTICUT

RETIREMENT SECURITY BOARD

CO-CHAIRS: STATE COMPTROLLER KEVIN LEMBO & STATE TREASURER DENISE L. NAPPIER

Staff Report to CRSB

Re: ERISA Fiduciary Liability

March 4, 2015 CRSB Meeting

Brian Graff, CEO of ASPPA, and Roberta Ufford, Groom Law Group, graciously provided further guidance on another ERISA question. Other states have started looking to provide ERISA protections and fiduciary liability on behalf of the state board, without placing such liability on the employers whose employees participate in the plan.

Providing ERISA protections would alleviate the concerns about the lack of a fiduciary standard of care around the participants' investments. Illinois provides for such fiduciary liability on its Board, but requires that employers not be subject to ERISA liability in its Secure Choice statute.

So how can Connecticut do the same?

- The program can require the Board to comply with an "ERISA like" standard of care.
- The program must still follow the DOL safe harbor regulations for employers offering payroll deduction IRAs, as described by Brian Graff in his testimony before the Board.
- The Board would be subject to a fiduciary standard of care that is similar to the ERISA standard, but it would be enforceable under state law rather than in an action under ERISA.
- Enforcing an "ERISA like" standard of care does not mean that ERISA itself would apply, therefore, the plan would still satisfy the statutory requirement that ERISA not apply.
- Most state and local pension boards are already regulated in this way - a state or local statute imposes "ERISA-like" fiduciary duties that are enforceable under state laws but not enforced under ERISA because governmental plans are exempted from ERISA.

Attorney Ufford's full guidance is below:

It should be possible to design a state required automatic enrollment IRA program that requires the Board to comply with an "ERISA like" standard of care enforceable under state law (not ERISA), without imposing ERISA or other fiduciary liability on employers who comply with the mandate to offer a payroll deduction IRA if no other plan is offered.

Connecticut law mandates that the Board design a program that avoids ERISA, which means that the program must be designed so that employers will not be viewed as "establishing or maintaining" a pension plan as described by ERISA. If employers do not establish or maintain an ERISA plan, no person - including any employer or the Board - will have any duties or responsibilities under ERISA, or any related ERISA liability. ASPPA's comments to the Board earlier this month discussed that, to avoid treatment as an ERISA-covered plan, it will be important to adhere as closely as possible to the DOL safe harbor regulation for payroll deduction IRAs.

Even though ERISA would not apply to the Board, the Board can still be subject to a fiduciary standard of care that is very similar to the standard imposed under ERISA, but enforceable under state law rather than in an action under ERISA. This is how the Illinois Secure Choice Savings Program is structured. Specifically, Section 25 describes the "fiduciary duty" of the State Board that administers the Program, and the members of the Board and its staff, using wording very similar to the words that are used in ERISA to define the fiduciary standard of care. Using similar words does not, however, make ERISA apply. Instead, if there is a breach of fiduciary duty by the Illinois Board, a claim must be brought in state court under state law. It's worth noting that most state and local pension boards are already regulated in this way - a state or local statute imposes "ERISA-like" fiduciary duties that are enforceable under state laws but not enforced under ERISA because governmental plans are exempted from ERISA.