The Asset Management Industry
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MEMO# 31510

November 30, 2018

DOL Issues Guidance on Auto-Portability Program

[31510]

November 30, 2018 TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Issues Guidance on Auto-Portability Program

DOL has issued two pieces of guidance regarding an "auto-portability" program offered by the firm Retirement Clearinghouse (RCH). The program is designed to facilitate the consolidation of small employee accounts in plans and IRAs when individuals change jobs. In an advisory opinion, DOL describes the fiduciary status of RCH and plan sponsors when they take certain actions regarding the RCH program.[1] DOL also proposed an individual exemption from ERISA's prohibited transaction rules which would allow RCH to receive fees under the program, provided certain conditions are met.[2]

Description of Auto-Portability Program

Both the advisory opinion and the proposed exemption include an overview of the RCH auto-portability program. Under current law, when a defined contribution (DC) plan participant terminates employment with the plan sponsor with an account balance of $5,000 or less, the plan sponsor can force out the account by defaulting it into an automatic rollover IRA.[3] Often, these terminated participants are changing jobs and eventually will have a new DC plan at a subsequent employer. The goal of RCH's program is to match these default IRAs with their owners' new employers' plans and to consolidate the accounts.

Plan sponsors can choose to participate in the program in a number of ways.[4] They can use RCH's program to establish automatic rollover IRAs for terminating participants with small accounts. Plans also have the option to use the program by forcing a cashout from the plan only when RCH locates a match (*i.e.*, a new employer's plan) for a terminated participant with a small account. In addition, sponsors of terminating DC plans can use the program for default distributions. Plans forcing out accounts can designate either RCH or another IRA provider (such as the plan's recordkeeper) to be the plan's provider of default IRAs.

RCH will perform periodic searches to determine whether any of the IRA owners in the program have become a participant in a new employer's retirement plan.[5] RCH (or the

other default IRA provider) sends notices regularly that explain the RCH program, including a disclosure of all fees, to individuals both before they are defaulted into an IRA, in a welcome letter sent when the assets are defaulted into the IRA, and in an annual statement.

Once RCH matches an IRA owner with a new account in an employer plan and validates the information, RCH (or the other default IRA provider) sends the individual a letter, requesting consent to transfer the IRA to the new employer plan. If the participant fails to respond within 30 days, either giving affirmative consent for the rollover or declining it, then RCH activates its default roll-in transaction provisions. Under these procedures, the employer sponsoring the new plan must first agree to accept the roll-in, and then RCH closes the IRA, directs the roll-in to the employer plan, and notifies the IRA owner of the transfer.[6]

Advisory Opinion on Fiduciary Status of RCH and Plan Sponsors

In the advisory opinion, DOL describes the fiduciary status of RCH and plan sponsors who either participate in the program as a "former" employer plan or as a "new" employer plan.

When a plan sponsor makes the decision to participate in the RCH program, it acts in a fiduciary capacity, and ERISA's general fiduciary standards and prohibited transaction rules apply regarding the selection and monitoring of the program. DOL explains:

> Thus, the responsible plan fiduciaries must evaluate the package of services and separate service providers that are part of the RCH Program and conclude that the services, including the portability services, are appropriate and helpful to carrying out the purposes of the plan, and that the compensation paid or received by the service providers is no more than reasonable taking into account the services provided and available alternatives.

Regarding the plan sponsor's duty to monitor the arrangement, DOL elaborates in footnote 8, stating:

> For example, to the extent the RCH Program is more costly than a default IRA program without the RCH Program portability services, the adopting plan fiduciaries should consider whether the number of successful matches and account consolidation transfers achieved through use of the RCH Program merit the additional expense of being part of the program.

A plan sponsor acts as a fiduciary in the decision to participate in the RCH program and in the decision to transfer accounts from the plan to the default IRAs. However, based on RCH's representations, DOL opines that the plan sponsor would not act as a fiduciary beyond the distribution out of the plan, at which point the former employee is no longer a plan participant. Similarly, the sponsor of the new employer plan acts as a fiduciary in accepting the rollover from RCH, but it does not have fiduciary responsibility for RCH's decision to roll the IRA assets into the new employer plan.

Where the IRA owner does not give affirmative consent[7] for a transfer to the new employer's plan, RCH acts as a fiduciary in deciding to transfer the default IRA to the new employer's plan (including, if applicable, transfers from another default IRA to RCH's conduit IRA).

Proposed Exemption

In the proposed exemption, DOL explains that when RCH transfers assets from a default IRA to a new employer plan without affirmative consent of the accountholder, RCH's receipt of the transfer fee[8] constitutes a prohibited transaction. DOL proposes to grant this exemption to allow the fee, subject to a number of conditions, including that RCH must:

1. submit to an annual audit by an independent auditor;
2. not sell or market the plan or participant data it obtains in connection with the program to third parties, nor use this data for any purpose other than administering the program;
3. not receive any direct or indirect fees or compensation from third parties, other than an asset-based, sub-transfer agency fee paid to RCH from an IRA investment provider for shareholder services related to the investment options of RCH's default IRA;
4. not restrict or limit unrelated third parties' ability to develop a competitor locate-and-match program;
5. ensure that all fees and expenses under the program are fully disclosed in participating plans' SPDs; and
6. reasonably ensure that participant and beneficiary data are current and accurate, and that the appropriate individuals receive all the required notices and disclosures.

DOL proposes that the exemption will be effective for five years, and explains that, in the renewal process, RCH would provide information on how beneficial the program has been. Comments regarding the proposed exemption are due on December 24, 2018.

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endnotes

[1] Advisory Opinion 2018-01A is *available at* https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/advisory-opinions/2018-01a.pdf.

[2] The proposed exemption was published at 83 Fed. Reg. 55741 (November 7, 2018), and is *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-11-07/pdf/2018-24377.pdf.

[3] Plans are permitted to force out the small accounts ($5,000 or less) of employees who terminate employment. If the terminated employee fails to take a distribution after receiving notice, the plan can distribute the account by sending a check to the participant if the account balance is less than $1,000, but must roll over the account into an IRA if the account balance is at least $1,000 and not greater than $5,000. These rollovers must comply with DOL regulation 2550.404a-2.

[4] Note that RCH does not accept participants into the program unless RCH has a valid email address for the individual. Footnote 5 of the Advisory Opinion describes RCH's ongoing search process for participants in the program to minimize the program having "lost" participants.

[5] RCH accesses this information through a series of agreements with DC plan

recordkeepers to participate in RCH's records matching technology.

[6] When another entity (such as the plan's recordkeeper) serves as the default IRA provider and RCH matches an IRA owner with a new employer plan, the IRA assets must first be transferred to an RCH conduit IRA before it can be transferred to the new plan through RCH's default roll-in transaction provisions.

[7] DOL notes that the failure to respond to communications about default transfers "is not tantamount to affirmative consent." In footnote 11, DOL continues, clarifying that "[a]lthough a recipient's failure to respond to a communication may be treated as consent under some circumstances…, in the Department's view, service providers deciding to transfer an individual's plan or IRA account generally cannot avoid fiduciary responsibility for exercising authority or control over plan assets… through a 'negative consent' process with individual participants or beneficiaries."

[8] The various fees under the program are described at 83 Fed. Reg. 55744. The transfer fee, defined in Section III(i) of the exemption, is a fee paid to RCH for processing the transfer of assets from the default IRA to the new employer plan.
