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DEFINED CONTRIBUTION AUTO-PORTABILITY PROGRAM IS FIRST TO GAIN DOL APPROVAL

By Mercer's Margaret Berger and Brian Kearney
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In This Article

An auto-portability arrangement for defined contribution (DC) plans and rollover IRAs has secured a prohibited transaction exemption (PTE) from the Department of Labor (DOL), completing the regulatory framework for these programs. Portability programs seek to prevent "leakage" — when workers switching jobs cash out their retirement benefits.

AUTO-PORTABILITY

DC plan fiduciaries can select an IRA and make a direct rollover of an account balance without participant consent if the benefits are small (more than $1,000 and up to $5,000) or payable from certain terminated DC plans. Under the auto-portability arrangement approved by DOL, fiduciaries will delegate this responsibility — including handling participant communications and establishing conduit IRAs — to the Retirement Clearinghouse LLC (RCH).

Plan sponsors can join the program through a written agreement with RCH or the plan's recordkeeper and can designate either entity as the default IRA provider. Participating sponsors must agree to make the necessary plan amendments, let RCH and the recordkeeper use the plan's data to facilitate the program, and provide certain disclosures about the program to participants and beneficiaries. For example, the RCH contract requires sponsors to describe the program, including fees and expenses charged by RCH, in the summary plan description.

RCH contracts with recordkeepers to participate in an electronic records matching program, under which RCH will make periodic searches to determine if any clearinghouse participants have opened DC plan accounts with new employers. If RCH finds a match, the participant's funds will be rolled in to the new employer's plan unless the participant opts out or the new plan doesn't accept rollovers.

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FIDUCIARY RESPONSIBILITY

DOL last year issued Advisory Opinion (AO) 2018-01A to address fiduciary concerns about the arrangement. Neither the prior employer nor the new plan sponsor will have fiduciary liability for the IRA rollover to the new plan — responsibility for that decision lies with RCH. However, both the former and new employer have some fiduciary responsibilities in the arrangement.

Former employer. An employer's decision to enroll in the program is a fiduciary act. The PTE says that before a plan's fiduciaries agree to enroll, they must:

- Review the program's terms, including the reasonableness and necessity of the fees and services.
- Evaluate the impact that participating in the program may have on the plan and its participants and beneficiaries.
- Review the agreement's terms with the plan's default IRA custodians and service providers, weighing the possibility that default IRA assets may ultimately be transferred to a new employer's plan and result in additional fees.
- Determine that participation in the program is consistent with the fiduciaries' ERISA duties of prudence and loyalty.

Plan fiduciaries will also need to periodically monitor the arrangement and determine whether it remains in the plan's best interest. For example, if the program costs more than a default IRA program without RCH's portability services, the fiduciaries should consider whether the number of successful matches and account transfers achieved merit the additional expense of participating in the program.

New employer. Fiduciaries of the plan sponsored by the participant's new employer will be responsible for determining whether each incoming rollover complies with plan terms, including the allocation of the assets to the plan's investment alternatives.

PROHIBITED TRANSACTION EXEMPTION

RCH will charge a fee when a participant's conduit IRA is rolled into a new employer's DC plan. Because RCH will be acting as a fiduciary for that rollover decision, the transaction ordinarily would be prohibited self-dealing under ERISA, invalidating the entire program. But the final PTE provides a structure for RCH to move forward.

Changes From Proposal

The final PTE is almost identical to the proposal and imposes several conditions on the program, including fee restrictions, participant communications, recordkeeping requirements, annual audits and several other requirements. Over RCH's objection, the PTE will last only five years. When the PTE expires, RCH will have to provide statistics showing whether the program provided meaningful benefits to a significant number of people.

In response to comments, DOL made several minor changes to the PTE, including:

- Roth IRAs assets may not be transferred to new plan accounts.
- RCH must maintain a list of participating recordkeepers on its website.
- Individuals must have an opportunity to opt out by telephone before the accounts are transferred.
- RCH may not sell or market participant data and may only use the data it obtains for internal business operations, unless the plan fiduciary expressly consents to use of the data for another purpose disclosed by RCH.
- Accounts exceeding $5,000 may be transferred to a new employer's plan if the excess come solely from investment gains.

MORE CLEARINGHOUSES YET TO COME?

The PTE doesn't let RCH restrict unrelated third parties from developing a similar "loan-and-match" process, although RCH is free to take legal action (for instance, if a violation of intellectual property rights occurs). But the AO and final PTE relate only to RCH, so any companies looking to develop similar clearinghouse programs will have to pursue their own AOs and PTEs.

RELATED RESOURCES

- Final PTE 2019-02 (DOL, July 31, 2019)
- Advisory Opinion 2018-01A (DOL, Nov. 5, 2019)

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