



November 5, 2018

J. Spencer Williams
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3545 Whitehall Park Drive, Suite 400
Charlotte, NC 28273

2018-01A
ERISA Sec.
3(21)(A)
IRC Sec.
4975(e)(3)

Dear Mr. Williams:

This is in response to your request for an advisory opinion on behalf of the Retirement Clearinghouse, LLC, regarding the RCH Auto Portability Program. You asked for the opinion of the Department of Labor (Department) on the status of certain parties as “fiduciaries” within the meaning of section 3(21)(A) of the Employee Retirement Income Security Act (ERISA) and section 4975(e)(3) of the Internal Revenue Code (Code) as a result of actions undertaken as part of the RCH Program.¹

According to your request, the RCH Program is designed to help employees who may have multiple job changes over their career consolidate small accounts held in a prior employer’s individual account plan and rollover IRA into a new employer’s 401(k) or other defined contribution individual account plan. The objective of the RCH Program is to improve overall asset allocation, eliminate duplicative fees for small retirement savings accounts, and reduce leakage of retirement savings from the tax-deferred retirement saving system.

The RCH Program portability services related to your request involve: (1) automatic rollovers of mandatory distributions under Code section 401(a)(31)(B) and account balances from terminated defined contribution plans into default IRAs pursuant to 29 CFR 2550.404a-2 and 29 CFR 2550.404a-3, respectively, and (2) the subsequent automatic roll-in of funds in such default IRAs to an individual account plan maintained by a new employer when the IRA owner changes jobs. These RCH Program portability services use a “locate, match, and transfer” technology that involves periodic queries of cooperating record-keepers’ systems to ascertain if the IRA owner has become a participant in an individual account plan through re-employment and then effects a transfer of funds from the individual’s IRA to that new plan.²

The RCH Program is implemented through a series of agreements with sponsors of ERISA-covered defined contribution plans and third-party record-keepers. Plans adopt the RCH Program through a written agreement with RCH or the plan’s record-keeper. Record-keepers also enter into agreements

¹ Under Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1), the authority of the Secretary of the Treasury to issue rulings under Code section 4975 was transferred, with certain exceptions not here relevant, to the Secretary of Labor. References in this letter to ERISA sections should be read to refer to the corresponding sections of the Code.

² The RCH Program includes a range of services to plans, plan participants, and IRA owners beyond the portability services described in this letter. This letter does not address any ERISA issues related to those services or the fiduciary status of any party with respect to any of those services.

with RCH to participate in RCH's electronic records matching technology to locate and match participants in connection with plans that have adopted the RCH Program. Participating plan sponsors may designate RCH, or the record-keeper, to be the plan's default IRA provider for automatic rollovers of mandatory distributions under Code section 401(a)(31)(B) and for distributions from terminated defined contribution plans. Your request states that these transactions will comply with 29 CFR 2550.404a-2 for mandatory cash-outs under Code section 401(a)(31)(B), and 29 CFR 2550.404a-3 for distributions from terminated defined contribution plans.³ Participating plan sponsors agree to adopt plan amendments and resolutions necessary to carry out transfers under the RCH Program and agree that the plan will make disclosures to plan participants and beneficiaries about the program. For example, the RCH Program agreements require plan administrators to describe the RCH Program and disclose all Program fees and expenses to participants and beneficiaries in the plans' summary plan description. The plans also agree that RCH and participating record-keepers may use plan data to facilitate the RCH Program. An unaffiliated bank will be the custodian of the RCH default IRAs, and financial institutions unrelated to RCH or its affiliates will provide all investment products and investment management services for the RCH default IRAs.

Rollovers to Default IRAs

In the case of ongoing plans, RCH receives from the employer, plan, or record-keeper information identifying separated participant accounts that are subject to mandatory distribution under the Code. RCH or the record-keeper sends out a "mandatory distribution letter" to separated participants that explains the plan's distribution options, discloses all fees and features of the RCH Program, includes a Code-required notice explaining various tax rules for eligible rollover distributions, and advises participants that their plan account will be automatically rolled over into a default IRA unless they provide affirmative direction regarding the disposition of their accounts. The mandatory distribution letters also advise that individuals may opt out of the automated transfer service to a new employer's plan and includes a toll-free number and information on contacting RCH or the record-keeper. In the case of a terminating plan, RCH or the record-keeper sends a similar letter to all participants tailored to the circumstance of a terminating plan. You indicate that all RCH Program communications are written to be easily understood by the recipient.

In the case of mandatory distributions under Code section 401(a)(31)(B) and distributions from terminated defined contribution plans made to an RCH default IRA, the fees received by RCH are: (1) a one-time communication fee covering the cost of notices and communications associated with the Program; (2) a monthly administrative fee covering the provision of administrative services to the IRA; (3) a distribution fee in the event that the IRA is terminated and the IRA owner decides to cash out or transfer the IRA account balance to another qualified retirement plan; (4) a sub-transfer agency fee that the IRA investment provider selected by the responsible plan fiduciary as part of the plan's adoption of the RCH Program pays to RCH; and (5) a roll-in fee paid if the IRA is terminated and the IRA account balance is rolled in to a new employer plan with the assistance of RCH.⁴ Under the Program, changes in the types or amounts of these fees would have to be approved prospectively by a fiduciary of a participating plan.

³ Whether the regulations' conditions are satisfied is a factual question on which the Department generally will not opine in advisory opinions. See section 5.01 of ERISA Procedure 76-1.

⁴ Once RCH has identified a match that will lead to a transfer to a new employer's plan, neither RCH nor the record-keeper will charge the IRA the monthly fee in connection with the IRA account. In addition, RCH will receive no sub-transfer agency fee with respect to the account after three days following the date the relevant sell order is placed.

In cases where a participating record-keeper and not RCH is the plan's default IRA provider, the RCH Program would transfer the funds in the record-keeper's default IRA to the new employer's plan through a RCH default IRA. In these instances the RCH default IRA will act, in effect, as a conduit. You represent that this step is necessary in order to increase operational efficiencies that enable auto-portability to be scalable and cost effective, and, therefore, reasonably priced to the participants and IRA owners. In all instances where the RCH default IRA is used as a conduit, RCH only collects a one-time communication fee and a one-time transfer fee for locate, match and roll-in services from the participant account. In all instances where the RCH default IRA is used as a conduit in the process of transferring a participant's account from a third party IRA to their current employer plan, RCH waives all ordinary and customary fees associated with the RCH default IRA, including fees for administration and closing the account (distribution fee). RCH will perform locate and match services for all accounts - whether the account is in an RCH or third-party IRA - for an indefinite period and no fee for these services will be charged to the participant account until the actual roll-in transaction is scheduled to be completed. RCH deducts the single fee for locate, match and roll-in services from the participant's account after the participant account is confirmed to be in the current employer's plan and the roll-in is scheduled to be completed.

Transfers to a New Employer's Plan

Shortly after an employee's account is rolled over to the default IRA, RCH or the record-keeper sends a welcome letter to the former plan participant/now IRA owner. The welcome letter describes the IRA's investment options and all the Program's associated fees and features, including information regarding the possible future transfer of the IRA into a new employer's plan. The welcome letter also specifically informs the IRA owner that, unless the IRA owner directs otherwise, the IRA may be transferred to a new employer's plan after 60 days. As with the mandatory distribution letter, the welcome letter advises the IRA owner that he or she may call RCH or the record-keeper to opt out of the transfer service. For the duration of the IRA's existence, RCH or the record-keeper annually notifies the IRA owners of the automatic transfer process as part of an IRA annual statement. You indicate that once the assets are transferred to the IRA, the participant's former employer has no discretion or authority over the IRA, including any future transfer of the IRA assets to a new employer's plan.

RCH periodically (no less than monthly) distributes account information to all record-keepers that participate in the auto portability program. Participating record-keepers use the RCH data to search their IRA/participant records to identify potential matches of plan and IRA accounts. When RCH matches a participant in a new employer's plan to his or her former plan or IRA account, RCH validates the account information and sends a "consent letter" requesting that the IRA owner/participant consent to transfer the IRA funds/plan account to the new employer's individual account plan. The notice is sent to the address provided to RCH by the record-keeper for the participant's new employer's plan based on the assumption that the new employer's plan has the most up-to-date address for the individual. The participant can approve this "roll-in transaction" through affirmative consent when enrolling in the new employer plan, through a secure website or voice response system, or over the phone to a call center. If the IRA owner/participant does not respond within 30 days of receipt of the consent letter by affirmatively assenting or declining the roll-in, the RCH Program activates its default roll-in transaction provisions.⁵ Before a default roll-in occurs, the new employer's plan must agree to accept the roll-in

⁵ You stated that individuals cannot participate in the portability features of the RCH Program unless RCH has a valid address for the person. After RCH receives participant census information from participating plans, RCH's services include ongoing participant address validation searches via automated checks of National Change of Address records, two separate

under the terms in the new employer's plan.⁶ Once the new employer plan consents to the roll-in, RCH effects the roll-in and sends a notice to the IRA owner/participant of the transfer of IRA funds to the new employer's plan.

As described above, some plan sponsors may select a record-keeper (or its affiliate) instead of RCH as the default IRA provider. If the record-keeper participates in the RCH Program, the mandatory distribution letter, welcome letter, and consent letter will all be sent to the individual by the participating record-keeper or RCH. In the case of a match, assets from a default IRA maintained by the participating record-keeper will be transferred to the new employer plan through a RCH default IRA acting as a conduit.

Other plans may elect to use Code section 401(a)(31)(B) for mandatory distributions only after the RCH Program's locate and match services identifies the separated participant as having an active plan account in a new employer's plan. In cases in which a separated participant fails to respond to the mandatory distribution letter, RCH will send a consent letter as described above to the participant. If after 30 days the individual has yet to contact RCH and approve or disapprove the transfer, RCH will send a second consent letter to the individual. If at the expiration of the second 30 day window the participant still has not responded to the notices, the participant's assets will be transferred from the former employer's plan to a RCH default IRA acting as a conduit before being transferred to the plan of the participant's new employer.

Fiduciary Status of Plan Sponsors for the Selection of the RCH Program

When plan sponsors or other responsible fiduciaries choose to have a plan participate in the RCH Program, they are acting in a fiduciary capacity, and would be subject to the general fiduciary standards and prohibited transaction provisions of ERISA in selecting and monitoring the RCH Program. Fiduciaries must act prudently and solely in the interest of the plan's participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable plan administration expenses, and must comply with the documents and instruments governing the plan to the extent consistent with the provisions of Titles I and IV of ERISA.⁷ Plan fiduciaries considering the RCH Program are also responsible for ensuring that the RCH Program is a necessary service, a reasonable arrangement, and the compensation received is no more than reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2) (including the Department's implementing regulations). 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

commercial locator databases, and RCH internal databases. These searches occur twice in the first year a participant account is entered into the RCH system and once a year thereafter. RCH will also perform manual Internet-based search activities if a valid address is not obtained from the automated checks.

⁶ This letter does not address any fiduciary issues related to decisions on investment of rolled in assets to investment options in the new employer's plan, including application of 29 CFR 2550.404c-5 (QDIA regulation).

⁷ See ERISA sections 404(a)(1)(A), (B) and (D).

alternatives. The responsible plan fiduciaries must also monitor the arrangement and periodically ensure that the plan's continued participation in the RCH Program is consistent with ERISA's standards.⁸

Fiduciary Status of Plan Sponsors for Default Transfer of IRA Funds to Plan of New Employer

If a person is a fiduciary with respect to certain activities involving the RCH Program, it does not necessarily make that person a fiduciary with respect to *all* aspects of the RCH Program.⁹ Rather, a determination of whether a person is a fiduciary generally requires a factual analysis of the types of functions performed and actions taken by the person.

Your letter indicates that once the assets are transferred to the default IRA, the plan sponsor of the former employer's plan has no discretion or authority over the decisions of the IRA owner or RCH related to any future transfer of the default IRA assets. Also, you represented that before RCH transfers default IRA funds to a new employer's plan, the new employer's plan must adopt the RCH Program under which it will acknowledge that the transfer of IRA funds is consistent with the plan's terms and that it will accept the roll-in. As described above, RCH will also notify the participant and seek affirmative consent to the transfer. But, if the participant does not affirmatively consent after receiving the notices, RCH will assume responsibility to direct the roll-in from the default IRA or RCH IRA acting as a conduit into the individual's current employer plan.

Based on these representations, it is the view of the Department that the plan sponsors of the former and new plans would not be acting as a fiduciary with respect to the decision to transfer the individual's default IRA into the new employer's plan. Once a plan fiduciary properly distributes the entire benefit to which a plan participant is entitled, the distribution ends the individual's status as a participant covered under the plan within the meaning of 29 CFR 2510.3-3(d)(2)(ii)(B) and the distributed assets are no longer plan assets under ERISA.¹⁰ Although, the fiduciaries of the former employer's plan would be fiduciaries in deciding to transfer accounts to default IRAs and in deciding to have the plans participate in the RCH Program, they would not be involved in or responsible for the decision in individual cases to transfer IRA assets to a new employer plan. Further, although the fiduciaries of the new employer plan would be responsible for determining whether the roll-in is consistent with their plan's terms and in accepting the roll-in (including allocating the assets to investment alternatives in the new plan), those actions do not cause the fiduciaries of the new employer's plan to exercise fiduciary authority in connection with RCH's separate decision to roll the IRA assets into the new employer plan.

Fiduciary Status of RCH for Transfer of Default IRA Funds to Plan of New Employer

Absent affirmative consent of the IRA owner/participant, RCH acts as a fiduciary within the meaning of section 4975(e)(3) of the Code in deciding to transfer the individual's RCH default IRA to the individual's new employer plan. The individual's failure to respond to the RCH Program communications about default transfers is not tantamount to affirmative consent by the participant/IRA

⁸ 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.

⁹ See, e.g., Interpretative Bulletin 75-8, Q-FR-16 and ERISA section 405(b)(1).

¹⁰ See Field Assistance Bulletin 2014-01 (Aug. 14, 2014). If, however, the distributed benefit is reduced due to a fiduciary breach with respect to the plan, the individual retains standing to sue the breaching fiduciary under ERISA section 502(a)(2), even though the participant's account balance has been distributed to an IRA. See *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008).

owner to default transfers to the new employer's plan, and does not relieve RCH from fiduciary status and responsibilities.¹¹ Unlike 29 CFR 2550.404a-2 and 2550.404a-3 with respect to the default transfer of a participant's account into an IRA, no similar statutory or regulatory provision provides relief from fiduciary responsibility for "default" transfers of the IRA funds to the new employer's plan.

Similarly, absent affirmative consent of the IRA owner/participant, in situations where a default IRA maintained by a third party record keeper is transferred to an RCH default IRA acting as a conduit to facilitate the transfer to a new employer's plan, RCH acts as a fiduciary within the meaning of section 4975(e)(3) of the Code in directing the transfer of the individual's default IRA to the RCH default IRA and subsequently to the new employer's plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter does not address the prohibited transaction implications of RCH receiving additional fees as a result of exercising fiduciary discretion in the transfers described above, and we understand that RCH applied for an individual exemption under ERISA section 408(a) and Code section 4975(c)(2) for certain transactions involved in its program.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

¹¹ Although a recipient's failure to respond to a communication may be treated as consent under some circumstances involving a plan sponsor, trustee, or other named fiduciary, *see, e.g.*, Advisory Opinion 2001-02A, 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 or IRA assets within the meaning of ERISA section 3(21)(A)(i) or Code section 4975(e)(3)(A) through a "negative consent" process with individual participants or beneficiaries.