



March 29, 2024

Assistant Secretary Lisa M. Gomez
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Automatic Portability Transaction Regulation (RIN 1210-AC21)

Dear Assistant Secretary Gomez:

AARP, which advocates for the more than 100 million Americans age 50 and older, is pleased to submit comments on the Department of Labor’s (“Department”) proposed Automatic Portability Transaction Regulation,¹ which implements Section 120 of the SECURE 2.0 Act of 2022. AARP has long fought to improve protections for retirement savers, including the preservation and portability of retirement amounts.

This proposed regulation would provide a statutory exemption for the receipt of fees and compensation for services related to an automatic portability transaction or the consolidation of small accounts conducted by an automatic portability provider.² While AARP has long endorsed the concept of a retirement clearinghouse to “lessen perceived burdens for employers and plans that do not wish to hold small accounts”³ and reduce leakage from retirement savings accounts, we have also urged the Department to provide necessary standards to protect participants during rollovers. While the Department has provided several safeguards, we would urge that more be done to ensure the protection of participants who find themselves subject to an automatic portability transaction. These safeguards include ensuring fee transparency, proper disclosures, integrating automatic portability transactions within the Retirement Savings Lost and Found program, and providing the public with a venue to assess automatic portability providers.

We outlined many of these same concerns and questions in a 2019 letter to the Department.⁴ In that proposal, the exemption was limited to a five-year period, which allowed for the effectiveness of the program to be evaluated, including determining whether it served the best

¹ Automatic Portability Transaction Regulations, 89 Fed. Reg. 5,624 (proposed Jan. 29, 2024).

² SECURE 2.0 Act of 2022, Pub. L. 117-328, Division T § 120 (Dec. 29, 2022).

³ David Certner, “Statement of David Certner on Behalf of AARP Submitted to the ERISA Advisory Council, U.S. Department of Labor on Lifetime Income Solutions as a Qualified Default Investment Alternative,” 4 (Aug. 15, 2018), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2018-lifetime-income-solutions-as-a-qdia-certner-written-statement-08-15.pdf>.

⁴ Comment Letter from David Certner, Legislative Counsel and Legislative Director, AARP, to Alexander Acosta, Secretary of the Department of Labor re: Proposed Exemption Involving Retirement Clearinghouse, Application No. D-11938 (Dec. 28, 2018).

interests of participants.⁵ As codified, the program for which the exemption was provided has changed dramatically. It is now called the “Portability Services Network” (PSN), which is described as “an industry-led utility to accelerate adoption of auto portability.”⁶

The initial exemption was granted for small retirement account balances (now under \$7,000⁷) of individuals who had separated from an employer. These balances were sent to safe harbor IRAs where they remained until they were matched with plans of the individuals’ new employers. While these transactions appear to remain the same, their structure and the parties involved have evolved.

For example, the PSN website features an infographic explaining the transaction but does not mention the use of a safe harbor IRA at all. This is where the participating recordkeepers and/or the PSN collects the fee related to the transfer to the new employer’s retirement plan.⁸

Though the term “utility” is mentioned throughout the PSN website many times, indicating that the network’s membership is not limited, currently the PSN has just seven owner members.⁹ These seven also represent the seven largest recordkeepers in the United States. We hope to see this membership expanded to other automatic portability providers in the future.

The explanation of the process could also be vastly improved. Fully understanding the steps involved with the automatic portability transaction requires scrolling through multiple pages of the PSN website. The Department may want to consider providing a model description of this transaction and content requirements that the average person would understand. Currently, the PSN website does not meet the proposal’s mandate of accessibility.¹⁰

Given the brief period of time between the Department granting the prohibited transaction and Congress codifying an exemption in SECURE 2.0, AARP urges the Department to closely monitor the PSN and bring to light any issues with the program that do not serve participants’ best interests. We highlight some areas of concern below.

Fees

AARP applauds the Department for requiring reasonable fees. However, as the PSN is constructed, it appears that a fiduciary or multiple fiduciaries will have to determine whether fees at separate and distinct segments of the automatic portability transaction are reasonable under different provisions providing fiduciary and prohibited transaction relief. These include the

⁵ Prohibited Transaction Exemption 2019-02, 84 Fed. Reg. 37,337 (exemption granted July 31, 2019).

⁶ See Portability Services Network home page, <https://psn1.com/>.

⁷ SECURE 2.0 Act of 2022, Pub. L. 117-328, Division T § 307 (Dec. 29, 2022) (updating the dollar limit for distributions to a safe harbor IRA from \$5,000 to \$7,000, effective for distributions made after Dec. 31, 2023).

⁸ Portability Services Network, “How Does Auto Portability Work?,” <https://psn1.com/learning-center/about-auto-portability/how-does-auto-portability-work>.

⁹ Portability Services Network, “PSN Participating Owner Members and Members,” <https://psn1.com/auto-portability/regulatory-information/participating-recordkeepers>.

¹⁰ 89 Fed. Reg. at 5,630 (AARP would like to see the final rule set forth specific content requirements for an automatic portability provider model notice as well as a model description of such transaction.). See also 89 Fed. Reg. at 5,632 -35 (detailing the requirements for the automatic portability provider website).

transfer out of the employer’s plan, the safe harbor IRA, and the transfer into the new employer’s plan along with the new employer plan’s qualified default investment alternatives.¹¹ It should be made clear to the fiduciary, plan sponsor, and participants which fiduciary bears the fiduciary responsibility for each decision relating to this transaction.

The PSN posted the “key aspects” of its fee structure on the website, noting that it is “designed as a utility to deliver the lowest cost to participants.”¹² According to these key aspects, participants are charged a “nominal, one-time fee” of up to \$30.¹³ AARP appreciates fee transparency, but such transparency must also describe what is included in the fee. Additionally, it may not be clear what part of the aggregate fee amount is related to the automatic portability transaction; the safe harbor IRA likely charges an annual fee for maintaining the account, while service providers charge a fee to distribute accounts to a safe harbor IRA.¹⁴ While the Department’s exemption covered the entirety of the automatic portability transaction, SECURE 2.0’s statutory exemption only codifies the second part of the portability transaction – from the safe harbor IRA to the new employer’s plan.¹⁵ It is this dissection of the automatic portability transaction that may be confusing to the public. The points at which fees are imposed are not easily understood by the average individual since the concept of an automatic portability transaction is described as the transfer from one employer’s retirement plan to another employer’s retirement plan.

Disclosure

SECURE 2.0 requires plans in the automatic portability transaction to disclose fees related to the transaction in its summary plan description (SPD).¹⁶ Current law requires participants be given the SPD only once every five years. The Department should consider requiring plans to include an explanation of the automatic portability transaction in any plan communication to participants relating to a mandatory or termination distribution. In addition, such communication should include the participating recordkeepers of the PSN. Plan participants and beneficiaries should not be required to seek this information out on the PSN website.

AARP is pleased to see that the statute and the Department seek to ensure that automatic portability notices are “written in a manner calculated to be understood by the average person and not include inaccurate or misleading statements.”¹⁷ It is crucial that notices are clear and descriptions of this novel program, including how individuals can opt out of an automatic portability transaction, are written in plain language. Moreover, this information should be prominent and not buried in a lengthy disclosure. Finally, AARP urges the Department to provide

¹¹ See 89 Fed. Reg. at 5,626.

¹² Portability Services Network, “Our Fees,” <https://psn1.com/learning-center/about-psn/what-are-psns-fees> (We believe this fee covers the part of the automatic portability transaction from a safe harbor IRA to the new employer’s retirement plan, but it is not entirely clear.).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ SECURE 2.0 Act of 2022, *supra* note 2 (amending IRC § 4975(f) to add new rules relating to automatic portability transactions, which are defined as a transfer of assets made from an IRA to which assets were transferred under IRC § 401(a)(31)(B)(i) to an employer-sponsored retirement plan).

¹⁶ *Id.*

¹⁷ 89 Fed. Reg. at 5,631.

such information in paper form unless the participant or beneficiary has explicitly requested electronic communications.

Connection with the Department's Lost and Found Program

The PSN and automatic portability transactions are designed to streamline transfers between accounts and assist with the disproportionate number of missing participants related to small retirement accounts. Accordingly, we urge the Department to integrate automatic portability transactions within the Retirement Savings Lost and Found program, which was also established in the SECURE 2.0 Act.¹⁸ The Lost and Found program was designed to serve as a database to enable retirement savers, who might have lost track of their pension or 401(k) plan, to search for the contact information of their plan administrator. If automatic portability transactions flourish and expand, the plan administrator may not have information about the entity which holds an individual's retirement savings. The account could have been transferred to a different entity since the initial mandatory distribution. It is crucial that the Department work with the PSN to track accounts that are involved in automatic portability transactions so that the registry does not lack information that would assist participants in finding their "lost accounts", such as those small accounts that were cashed out. Together, these tools have the potential to make a meaningful difference in consolidating and managing retirement accounts and ensure that individuals have access to and can locate all of their hard-earned savings.

Participant Complaints

We note that there have been some concerning complaints about some of the owner members of the PSN. As the Department noted in the preamble to the proposal, "automatic portability transactions are intended to benefit participants and IRA owners that are unresponsive or considered missing."¹⁹ We hope the complaints cited are simply outliers and not representative of what individuals who may become participants in an automatic portability transaction will experience. However, we urge the Department to provide participants with more information and a location for consumer complaints.

Though we appreciate that the Department's proposal has pre-transaction notice requirements that must have contact information for the automatic portability provider, toll-free customer service numbers are not sufficient in the event there are participant complaints.²⁰ The Department should consider providing a mechanism for participant complaints and require the portability provider to provide the Department with data about complaints received and addressed. Otherwise, individuals will resort to taking their complaints to various corners of the internet rather than a centralized public place like the Department or a section of the Department's website. Consequently, there will be little information on the quality of service provided by automatic portability providers available to the Department, plan fiduciaries, or individuals performing their own due diligence. The notices required under this proposal should also include information notifying individuals of the right to file complaints directly with the Department.

¹⁸ SECURE 2.0 Act of 2022, *supra* note 2 at § 303.

¹⁹ 89 Fed. Reg. at 5,625.

²⁰ 89 Fed. Reg. at 5,669.

Conclusion

AARP appreciates the Department's guidance and commitment to enhancing the portability of small retirement plan accounts, which is an important step in protecting and enhancing workers' retirement savings. As most Americans already believe they have not saved enough for a dignified retirement, it is incumbent on all of us to protect participants under any program that seeks to streamline and automate retirement services. We welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Clark Flynt-Barr of our Government Affairs office at cflyntbarr@aar.org.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs