

March 29, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Automatic Portability Regulations RIN 1210-AC21

SUBMITTED VIA
WWW.REGULATIONS.GOV

Re: Auto-Portability Proposed Regulations and PTE, RIN-1210-AC21

Dear Madam or Sir:

The American Retirement Association (ARA) thanks the Department of Labor (the "Department") for the opportunity to comment on the proposed regulation implementing the statutory prohibited transaction exemption under section 4975 of the Internal Revenue Code ("Code" or "IRC") for certain automatic portability transactions.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 35,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Discussion

I. Prospective Effect of Implementing Regulations and Interim Interpretive Policy

The Department requested comments on whether there should be a delayed applicability date to allow for automatic portability providers and plan fiduciaries to make any changes to automatic portability programs or related contracts or arrangements that may be needed or desired in light of the final rule. The ARA believes that a delay in implementation is not necessary, as such a delay may effectively postpone the availability of auto-portability, but that the Department should consider announcing a delayed enforcement period, during which "good faith" compliance would be sufficient. A delayed applicability date would allow service providers time to implement the regulations, but may prevent some service providers from implementing auto-portability services that are already developed and substantially comply with the statute. A delayed enforcement position and interim "good faith" compliance period would allow all service providers time to refine their systems and procedures without unnecessarily delaying the implementation of auto-portability services that would provide valuable services to participants.

II. Scope of Prohibited Transaction Relief

In general, the ARA recommends that the Department adopt a principles-based approach to regulating and enforcing the PTE for auto-portability transactions. Because auto-portability services are still in their infancy, the Department cannot reasonably predict all the ways in which solutions may be developed to serve participants and keep them connected with their retirement funds. Creating too much rigidity, such as by specifying the types of services covered by IRC §4975(d)(25), may have the consequence of chilling the development of valuable participant services. Rather, ARA recommends that the Department focus on regulating through key principles (as it routinely does in other fiduciary matters), such as mandating participant disclosure, duties of loyalty and prudence, and reasonable compensation. These principles are consistent with fiduciary law and broadly understood within the financial services industry. The principles will serve to protect participants without stunting the promising potential benefits of auto-portability for plan participants. Therefore, the ARA does not recommend adding additional specificity at this time regarding the types of services that are covered by Code section 4975(d)(25).

1. Fee and Compensation Disclosure Requirements

The proposed regulation discusses disclosure requirements under 29 CFR 2550.408b-2(c). The Department notes: “Since the automatic portability provider would generally be precluded from receiving third-party compensation under other provisions of the proposal, the Department does not believe the provisions of 2550.408b-2(c) related to a covered service provider under 2550.408b-2(c)(1)(iii)(C) – ‘other services for indirect compensation’ – would be relevant.” This statement appears to be generally accurate. However, we note that auto-portability service providers are likely to have recordkeeper-partners that also serve as investment managers. To the extent that IRAs operated by those recordkeeper-partners are invested in products managed by investment managers affiliated with the recordkeepers, the recordkeeper-partners may be receiving indirect compensation from the transaction.

This potential for investment in IRA products managed by recordkeeper affiliates raises the question of whether the Department should expand the scope of the Regulation and PTE(s) to cover a list of potential sub-transactions involved in effecting the auto-portability transaction, such as investment in proprietary products by a recordkeeper affiliate and receipt of compensation with respect to such investments. As noted, the ARA believes a principles-based approach is best, especially in the early years of implementation of auto-portability, when the industry and plan sponsors are developing systems and procedures and it is too soon to sift through where the problems may lie. ARA believes those arrangements generally would not be problematic and participants should be protected by existing regulations and prohibited transaction exemptions. Thus, ARA does not recommend expanding the scope of the Regulation and PTE(s) at this time, when such expansion may prove unnecessary.

However, it may be helpful for the Department to note in the preamble to the final rule whether any ancillary transactions are prohibited transactions and the associated PTE to ensure the industry is aligned with the Department’s interpretation. In addition, to the extent the Department believes that proprietary investments with recordkeeper affiliates are prohibited transactions not covered by an existing PTE, then ARA is concerned that auto-portability could not reasonably be put into effect without expanding the scope of exemptions specifically to cover these aspects of the transactions. Again, the

ARA is not aware of reasons such an expansion is required, but wishes to avoid future enforcement surprises that will unduly restrict the availability of auto-portability for participants.

2. Plan-to-Plan Transfers Without a Rollover IRA

One feature of IRC §4975(f)(12) and the Proposal is that it calls for a Rollover IRA as the intermediary vehicle for receiving funds before they are automatically transferred to the plan of an individual's new employer. The ARA suggests that the Department consider exercising its general exemption authority to permit auto-portability transactions directly from the former employer's plan to the new employer's plan when the new employer information is known. For example, when a participant terminates employment with employer A and begins a new job immediately with employer B (and both employers participate in an auto-portability network), it would be reasonable for the auto-portability transaction to take place directly between the two plans. Eliminating the intermediate step may permit development of an auto-portability solution with lower costs for retirement investors, minimize the amount of time that funds remain out of the market, and minimize confusion for the participant who must be informed about an IRA in which they will not participate in for any meaningful amount of time. In addition, this would allow the auto-portability of funds in a participant's designated Roth account, which currently cannot be rolled over from an IRA to a qualified plan (and therefore would have to remain in an IRA and be subject to fees from that arrangement that might not apply if the entire balance were transferred to the new employer plan).

The plan-to-plan approach is not authorized by IRC §4975(d)(25), but ARA believes such an approach is within the Department's power to permit under its general exemptive authority. Further, ARA recommends that the plan-to-plan approach be permitted, but not required, to ensure plans may use whichever auto-portability structure is administratively feasible and appropriate.

3. Data Usage and Protection

Data security and utilization is a rapidly developing topic with emerging legal and regulatory guidance coming from various institutions, including state and national governments and various agencies. ARA believes that the Proposal's prohibition on the use of data for any purpose other than the execution of automatic portability transactions or locating missing participants is reasonable and appropriate. ARA specifically is concerned about any broad exemption such as permitting the use of data relating to IRA owners for other purposes that benefit the IRA owners. Such a broad standard could be interpreted too broadly and permit the use of owner information in ways that undermine participant confidence and privacy and could invite costly litigation about whether a purported benefit to an IRA owner was in fact a benefit or how much direct or indirect benefit auto-portability providers may receive from use of the data, which could result in increased cost to participants and reduced confidence. The clear standard in the Proposal may also protect auto-portability providers against claims that their data usage policy conflicts with other legal and regulatory guidance.¹

ARA wishes to note, however, it does believe in ensuring that investors can receive services that may improve their financial wellbeing. Many ARA members offer plan participants financial wellness services

¹ While auto-portability providers might argue that the doctrine of ERISA preemption would protect them from being subject to data utilization standards developed by other jurisdictions such as states, it is not clear that ERISA preemption applies to data: thus, avoiding such conflicts may be the preferred approach with respect to this limited circumstance and would avoid costly litigation that ultimately increases the cost of the services.

in ways that are customized, personalized, easily accessible, and increasingly affordable. Technologies to offer such services rely on using the participant data that is readily available to service providers, within reasonable limits and subject to appropriate privacy and cybersecurity protections. In the context of a plan, there is a fiduciary monitoring the services to ensure the additional services are in the interest of the retirement saver, which is not present in the IRA. Thus, while we think the general rule that IRA owner data cannot be used for other purposes is appropriate, ARA also recommends that the Department clarify IRA owners can consent to the use of their data to access these services. This will preserve access to valuable services for the retirement investor while also protecting the IRA owner who is no longer benefiting from the oversight of a plan fiduciary.

4. Small Account Balances

The Department specifically requested comments on exemptive relief for Default IRAs involving rollovers of mandatory distributions with a value of \$1,000 or less. The Proposal does not expressly include such mandatory distributions because IRC §4975 defines the term “automatic portability transaction” to mean only mandatory IRA rollover transactions pursuant to Code section 401(a)(31)(B)(i). Similar to how the Department used its authority to apply the safe harbor regulation to distributions under \$1,000, ARA strongly recommends the Department exercise its general exemption authority to permit auto-portability transactions to distributions under \$1,000. These small accounts are regularly attributable to lower income and younger workers. Maintaining these savings for retirement is important to improving the retirement outcome of these workers. Further, allowing plan sponsors to implement a single process for all cashout distributions will likely increase the adoption of auto-portability services to benefit participants. ARA sees no downside to extending the auto-portability exemption to distributions of \$1,000 or less, and only benefits to impacted participants.

Affected Entities and Usage Estimates

In general, the ARA believes it is too early to assess with any accuracy the extent to which auto-portability will take hold, so our comments on this subject are limited.

The ARA believes the Department’s estimates of affected plans are reasonable. At a high level, ARA member experience is that, historically, a large majority of employers and therefore service providers have tended to use plan provisions that include mandatory distributions below \$1,000 and auto-rollovers from \$1,000 to \$5,000 (now \$7,000).

However, we note that there is a movement among some third party administrators (“TPAs”) and recordkeepers to encourage plan sponsors to adopt provisions for automatic rollover of any balance below \$7,000, even those below \$1,000. The purpose of this approach is twofold: first, to reduce overall retirement account leakage, and second, to eliminate uncashed checks with respect to small distributions. If the Department extends the exemption to balances under \$1,000, then more accounts would be affected.

Notices

1. Culturally and Linguistically Appropriate Notices

Current regulatory guidance regarding the style of writing and access to translation services for retirement investors who do not speak or read English are fragmented. For example, healthcare notices

typically include information regarding how to access a translation in at least fifteen languages, as mandated by the Affordable Care Act, but the only similar requirement for retirement plans is far more limited (for example, 29 CFR 2520.102-21). The ARA recommends that the Department consider broadly (i.e., not just for purposes of the Proposal) the desirability of approaching notice-writing and foreign language rules in a more comprehensive fashion, preferably in concert with other regulators.

2. SPD Content

The preamble to the Proposal notes that the Department believes that plans participating in auto-portability services must describe the automatic portability program in the plan's summary plan description (SPD) to comply with the SPD content requirements in 29 CFR 2510.102-2.

ARA respectfully asks the Department to reconsider that interpretation and also permit participants to receive information regarding an auto-portability program in communications that are separate from the SPD. The SPD is required to "be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." The participant's rights under the auto-portability arrangement are more accurately described as rights as an IRA owner and not under the plan. Thus, we believe that a separate description is consistent with current rules. Further, plans currently provide fee and other information that is not contained in the plan document (and therefore is not included in the systems that produce the SPDs) through separate notices. Similarly, information regarding the auto-portability fees will not be in the plan document or in the systems that produce the SPDs. Therefore requiring such information to be in an SPD will be burdensome. ARA believes that the provision of this information in a separate notice will not impair a participant's understanding of the arrangement and therefore, allowing separate provision of the information is reasonable and appropriate.

3. Notices to IRA Owner – The Initial Enrollment Notice

ARA recommends the following model language for the Initial Enrollment Notice to IRA owners in advance of the automatic portability transaction.

The IRA that was established on your behalf with (Name of IRA Custodian) because of your distribution from the XYZ Company, Inc. 401(k) may automatically transfer to your next employer's retirement plan unless you elect otherwise. This process is administered by (Name of the Portability Provider).

If you become eligible to participate in another employer plan that is enrolled in (Portability Provider)'s service, then your account will be transferred to that plan automatically unless you elect otherwise. If your account is automatically transferred, your IRA will be charged a fee of _____. You will receive another notice if (Name of the Portability Provider) matches you with a transfer plan. The notice will be sent 60-90 days before your IRA is transferred to your new employer's plan and you will have the ability to opt out of the distribution at that time.

You may elect to take a distribution of your IRA (or leave your IRA with (Name of IRA Custodian)) instead of participating in the automatic portability service. You can exercise control of your IRA at any time by contacting (Name of IRA Custodian) and (contact information and procedures). You also can designate a beneficiary for your IRA by contacting (Name of IRA Custodian) and (contact information and procedures).

You can receive additional information by contacting:

(Portability Provider Name)
(Portability Provider Contact)

Or

(IRA Custodian Name)
(IRA Custodian Contact)

4. The Timeframe for the Initial Enrollment Notice

ARA believes that provision of a notice 15 days after the IRA owner is initially enrolled in the auto-portability program is a reasonable timeframe. However, ARA suggests that the Department clarify that the notice may be provided before the IRA is established (such as with the employer’s notice to a participant prior to cashout from the plan).

5. Pre-Transaction Notice

ARA agrees with the Department that it is critical for IRA owners to be informed of their rights prior to action being taken by default so that the owner has a reasonable time to respond. ARA believes that the Proposal’s timeframe of delivery 60-90 days before a transaction is initiated is reasonable. ARA further recommends that the Department ensure that participants have at least 45 days after provision of the notice to make an election. This should allow participants time to seek professional help making a decision and also allow for adequate time to receive forwarded mail. ARA supports a standard timeframe, regardless of who the portability provider is or their affiliation, if any, with the IRA provider.

6. Post-Transaction Notice

ARA recommends the following model language for the Post Transaction Notice.

You were matched with an account in the employer-sponsored retirement plan maintained by your current employer, (New Employer). Your IRA that was established on your behalf with (Name of IRA Custodian) because of your distribution from (Prior Employer Plan Name) has been automatically transferred to (Name of Employer Plan). The following details the information about the transfer:

Amount: \$ _____
Plan Sponsor: _____
Plan Name: _____
Fees Charged to IRA for transfer: \$ _____

You can contact (Name of Portability Provider) at (contact information, including phone number).

7. Undeliverable Notices

The Proposal currently requires the auto-portability provider to deliver notices using measures reasonably calculated to ensure actual receipt of the material. It does not however, provide any specifics regarding procedures that must be followed if a notice is returned as undeliverable.

ARA recommends that the Department issue guidance regarding procedures to locate missing participants. While ARA generally supports a principles based approach, some minimum guidance on the procedures, timing, and frequency of searches that must be followed by automatic portability providers would be helpful. Reasonable measures may include a search by a commercial search provider and credit bureaus within 45 days after receipt of returned mail and at least once every six months if no address is located.

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ARA appreciates the opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Allison Wielobob, ARA's General Counsel, at AWielobob@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.