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DOL Addresses Small Retirement Account Balance Auto-Portability Program

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DOL recently issued an advisory opinion and proposed a prohibited transaction exemption concerning a program designed to automatically move an individual's small account from a prior employer's defined contribution plan to a default IRA and then ultimately into that individual's account in a new employer's defined contribution plan. The program, which would charge asset-based fees for accounts over $50, aims to eliminate duplicative fees for small retirement savings accounts and reduce leakage of retirement savings. While the proposed prohibited transaction exemption is pending, plan sponsors should consider whether they might want to participate in this program.

Background

Under current law, employers can mail a check to former employees with balances of $1,000 or less, making it easier for employees to cash out these small accounts. For balances between $1,000 and $5,000, employers must either transfer those funds to an individual retirement account (IRA) or keep them in the plan, unless the employee directs otherwise. Because of DOL regulations, IRAs set up to receive these funds are generally invested in either a money market or certificate of deposit, which offer low returns. This can result in leakage from individuals' retirement savings or the account being subject to hefty fees and low returns.

Retirement Clearinghouse, LLC (RCH) designed the RCH Auto-Portability Program (RCH Program) to address these problems by helping employees "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 RCH Program would apply to mandatory distributions between $1,000 and $5,000 that are subject to direct rollover requirements under Code Section 401(a)(31)(B) as well as to automatic rollovers of account balances from terminated defined contributions plans. It would first transfer these distributions into a default IRA. Then, using technology that periodically monitors cooperating recordkeepers' systems to determine if the IRA owner has become a participant in an individual account plan through new employment, it would

automatically roll the assets of the default IRA into the account in the new employer's plan — unless the IRA owner affirmatively declines within 30 days of receiving notice of the impending roll-in. Before an automatic roll-in takes place, the new employer's plan must agree to accept it.

Under the Program, if RCH is the default IRA provider, RCH would receive a roll-in transfer fee of 10 percent of the account balance for balances of more than $50, but not to exceed $59. This is in addition to a:

- Monthly administrative fee covering administrative services to the IRA
- Distribution fee if the IRA is terminated, and the IRA owner decides to cash out or transfer the account balance to another qualified retirement plan
- Sub-transfer agency fee that the IRA investment provider pays to RCH after the provider is selected by the plan's independent fiduciary
- One-time communication fee that reimburses RCH for the cost of issuing notices and forms associated with effectuating the transfer to a default IRA

RCH would not receive a fee for account balances of $50 or less, and a 20 percent reduction in fees would apply to an account holder where the annual volume of roll-in transactions exceeds $1 million per year. If RCH is not the default IRA provider, it would only charge the communication and transfer fee.

Guidance to facilitate auto-portability

On November 7, 2018, in response to RCH's requests, DOL issued an advisory opinion (AO) and proposed a prohibited transaction exemption. According to the accompanying DOL news release, the RCH Program "seeks to improve asset allocations by consolidating small retirement savings accounts, eliminate duplicative fees for small retirement savings accounts, and reduce leakage of retirement savings from the tax-deferred retirement system."

Advisory opinion clarifies fiduciary status

The DOL explained that plan fiduciaries would be subject to ERISA's fiduciary standards — and any associated liability — when they opt to participate in the RCH Program under which plan accounts will be transferred to default IRAs. As such, they must evaluate the package of services and service providers that participate in the Program to determine whether the services are appropriate and helpful for carrying out the purposes of the plan and the compensation reasonable, and they must monitor the program periodically once it is implemented. Additionally, the new employer plan receiving the roll-in would be responsible for determining whether the roll-in is consistent with plan terms.

The AO clarified, however, that neither the plan fiduciaries choosing to participate in the RCH Program nor the fiduciaries of the new employer plan that agrees to accept the roll-in transactions would be considered fiduciaries for purposes of the transfer of assets in the default IRA into the new employer's plan. Rather, absent affirmative consent of the IRA owner, RCH would act as the fiduciary

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in transferring the default IRA into a new employer plan. This means that plans choosing to participate in the RCH program will not bear the risk of fiduciary liability for the transfer of assets from the default IRA into the new employer's plan.

Proposed prohibited transaction exemption, subject to conditions

ERISA generally prohibits a plan or IRA fiduciary from self-dealing by causing the plan or IRA to pay the fiduciary a fee. However, DOL can grant exemptions from this otherwise prohibited transaction in cases where it deems an approach protective and in the interest of plan participants and IRA owners. RCH requested a prohibited transaction exemption for its collection of fees under this Program, which is needed because of its status as a fiduciary in the transfer from the default IRA account into the new employer's plan.

DOL proposed the exemption, reasoning that, among other features, the Program has the potential to meaningfully reduce retirement savings leakage when individuals change jobs. DOL also noted RCH's representation that it has no financial incentives that would lead a reasonable person to believe it is steering accounts to services providers based on its own financial interests and that the fee amount is frozen at the time the decision is made to transfer the assets to the new employer's plan.

DOL imposed several conditions on the proposed exemption, however, including:

- Requiring the disclosure to and approval by an independent fiduciary of all fees and compensation associated with the program
- Detailed participant disclosures at each stage of the process
- Monthly search-and-match searches
- An annual independent audit

Further, the proposed exemption prohibits RCH from receiving any additional fees or compensation, limiting the ability of other service providers to provide similar locate-and-match services, and selling or marketing plan or participant related data accessed or obtained in connection with the Program.

The DOL proposed to limit the term of the exemption to five years. In seeking to renew the exemption after that period, RCH will have to provide information on the extent to which the Program has meaningfully benefited a significant number of individuals, including an analysis of success in matching accounts with new employer plans and accuracy and timeliness of the asset transfers.

Comments on the proposed exemption are due on December 24, 2018.

Plan sponsor considerations

Whether or not the RCH Program can achieve its stated goals will depend on how many plans and recordkeepers are willing to participate. The Program may appeal to plan sponsors wanting to clear small balances from their plans — though the ability to do so is already available using automatic

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rollovers into IRAs. Others may be turned off by the prospect of bearing fiduciary responsibility for opting to participate in, and use plan assets toward the cost of, the Program — even absent any fiduciary risk associated with the transfer from the default IRA into a new employer's plan.

Moreover, it is not clear how many employers would agree to accept these small accounts for incoming participants in their plans. For a plan that generally accepts rollovers, accepting a roll-in under the RCH program may not add much administrative complexity, but would result in the imposition on the employee's account of a transfer fee not otherwise imposed. However, if the plan does not accept rollovers in general, it is hard to know what might motivate the plan sponsor to implement procedures to accept RCH Program roll-ins.

In closing

Plan sponsors should consider whether the RCH Program could benefit their outgoing and/or incoming participants. Once the DOL finalizes the exemption, RCH will presumably be looking to build a network of interested plan sponsors and recordkeepers.

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