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Via Electronic Delivery

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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Rule; Employee Benefits Security Administration; Automatic Portability Regulation RIN 1210-AC21

To Whom It May Concern:

This is the U.S. Chamber of Commerce's (Chamber) response to the Department of Labor's (DOL) proposed regulation on the automatic portability statutory prohibited transaction exemption (PTE) added by Section 120 of the SECURE 2.0 Act (SECURE 2.0) (Proposed Regulation). The Chamber supports automatic portability as a way to increase retirement savings. However, the Chamber is concerned that certain provisions in the Proposed Regulation would discourage automatic portability by making it more difficult for an automatic portability provider (APP) to operate and for a plan sponsor to participate in such a program. We are also concerned that a number of provisions in the Proposed Regulation are not within the scope of the statute and how DOL may try to apply these provisions to other individual and class PTEs in the future. As such, we request DOL reexamine the Proposed Regulation to ensure the success of automatic portability programs.

Background

In 2018 DOL issued Advisory Opinion 2018-01A relating to whether certain entities involved in an automatic portability transaction were fiduciaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA). In the Advisory Opinion, DOL noted that the objective of an automatic portability 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."[1]

In 2019, DOL issued Prohibited Transaction Exemption 2019-02 (PTE 2019-02), which was an individual, five-year exemption allowing Retirement Clearinghouse to receive fees for its automatic portability program that matches a former employees' eligible mandatory distribution accounts individuals' new employer's plan, subject to the exemption's conditions.

[1] Advisory Opinion 2018-01A, p. 1 available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/2018-01a.pdf.

Section 120 of SECURE 2.0 provides for a statutory exemption for automatic portability programs, with provisions similar to those in PTE 2019-02, codified at 26 U.S.C. Section 4975(d)(25), (f)12). Section 120(d) provides that no later than December 29, 2023, the Secretary of Labor (Secretary) may, but is not required to, issue regulations in the following areas:

- Requiring an APP to provide individuals notice before the pre-transaction notice.
- Requiring an APP to disclose to plans information required to be provided by a covered service provider pursuant to section 29 C.F.R. Section 2550.408b–2(c).
- Requiring a plan to fully disclose fees related to an automatic portability transaction in its summary plan description or summary of material modifications, as relevant.
- Requiring a plan to invest amounts received on behalf of a participant pursuant to an automatic portability transaction in the participant's current investment election under the plan or the default investment if no election has been selected.
- Prohibiting or restricting third party compensation (other than a direct fee the plan sponsor pays for the transfer).
- Prohibiting exculpatory provisions in an APP contract or communications with individuals disclaiming or limiting its liability if there is an improper transfer.
- Requiring an APP to take actions to ensure that participant and beneficiary data is current and accurate.
- Limiting the use of data related to automatic portability transactions for any purpose other than executing the transaction or locating missing participants.
- Providing for corrections procedures if an auditor determines the APP was not in compliance.
- Ensuring the appropriate participants and beneficiaries receive all required notices and disclosures.
- Making clear that the exemption provided in Code Section 4975(d)(25) applies solely to automatic portability transactions.

On November 7, 2023, the Portability Services Network (PSN) announced that it was fully operational, 12 months after it was announced in 2022. The purpose of the PSN is to "help tens of millions of under-served and under-saved Americans keep their retirement savings invested and working for them when they change jobs."[2] The PSN is an industry run solution, and it covers nearly 60 percent of all workers who are saving through an employer-sponsored retirement plan.

January 29, 2024, more than 12 months after SECURE 2.0 was enacted, DOL published the Proposed Regulation, which would add substantial administrative burdens and costs to automatic portability transactions beyond what is in the statute or what was in PTE 2019-02. In the preamble to the Proposed Regulation, DOL noted that some stakeholders communicated to DOL that no further guidance was needed from DOL to effectuate Section 120, especially because products and procedures have already been developed to provide

[2] "PRESS RELEASE: Portability Services Network Launches Nation's First Solution to Move Workers' Retirement Savings When Changing Jobs", November 7, 2023 available at https://psn1.com/press-releases#:~:text=CHARLOTTE%2C%20NC%E2%80%94November%207%2C,them%20when%20they%20change%20jobs.

automatic portability services.[3] In response, DOL stated that it believes that regulations, as compared to some other form of guidance, are needed to implement Section 120 to address and reinforce the consumer protections in the statutory conditions and requirements. As explained below by section as they appear in the Proposed Regulation, the Chamber is asking DOL to reconsider its position on a number of these provisions not only because of the additional administrative burden and cost they would add, but also because of DOL's lack of statutory authority to add additional conditions not otherwise provided for in the statute.[4]

Discussion

Effective Date

The effective date for the Proposed Regulation is 60 days after published in the Federal Register. Given the sweeping changes in the Proposed Regulation, such as adding additional notices, requiring additional work from plan sponsors, which would require updated contracts, and requiring language services that currently are not in place, compliance with a 60-day effective date would be impossible. At the very least, there would need to be a 12 to 24- month effective date if these additional requirements were added.

Fee Disclosure

Clause (b)(2)(ii) of the Proposed Regulation provides that the APP must ensure that all fees are disclosed to and approved by the plan fiduciary before any automatic portability transaction. In the preamble, DOL requested comments on whether additional specificity regarding the disclosure of other types of services and fees for such services is needed. The statute is sufficiently clear as to what fees for what services must be disclosed, and DOL does not need to provide additional guidance.

Fiduciary Status

26 U.S.C. Section 4975(12)(B)(i) provides that for the automatic portability transaction to apply, an APP must acknowledge in writing, at such time and in such format as specified by the Secretary, that the provider is a fiduciary with respect to the individual retirement account (IRA) that is established on behalf of the individual who was cashed out of the prior employer's plan.

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[3] Because the PSN was working toward full operation based on PTE 2019-02 and SECURE 2.0 Section 120, in a letter dated April 7, 2023 relating to implementing SECURE 2.0, the Chamber stated that although the statute provided that DOL may issue regulations, there was no need for additional regulations or guidance. Letter available at https://www.uschamber.com/retirement/u-s-chamber-letter-outlines-priorities-to-implement-secure-2-0.

[4] Section 120(c) specifically provided that DOL may issue regulations in a number of areas no later than December 29, 2023. DOL has missed this deadline and, arguably, its authority to issue regulations or guidance in the enumerated areas has lapsed. It appears that Congress explicitly included the deadline to lessen the administrative and cost burden regulations could have on the ongoing PSN and to encourage its growth. As such, DOL should reconsider its authority to regulate in the enumerated areas.

Under Subparagraph (b)(1) of the Proposed Regulation, the APP would need to acknowledge fiduciary status with respect to the IRA in connection with its processing of automatic portability transactions upon being engaged by an employer or plan sponsor and in the notices to participants. Given that the statute only requires acknowledging fiduciary status to the IRA holder, any final regulation should not require the APP to acknowledge to the plan sponsor that it is a fiduciary under the Internal Revenue Code (Code) to the IRA. Furthermore, it should be sufficient for the first notice to the IRA holder to contain this notice. Finally, DOL should acknowledge and any required notices should be clear that fiduciary status is for a potential future transaction, namely when the money is being moved, and there is no general, ongoing fiduciary status or fiduciary status when the searches are being conducted.

Data Usage

Under the statute, the APP may not market or sell data relating to the IRA or to the participants of the employer-sponsored plan that receives the money from the IRA. Subparagraph (b)(3) of the Proposed Regulation provides that the APP may not market or sell to third-parties participant-related data or IRA data the APP accesses or obtains in connection with the automatic portability transaction to third parties. The APP also must take all necessary steps that a reasonable fiduciary would take to safeguard participant and individual retirement plan data to the extent the APP exercises control over the data. Finally, if data is improperly accessed, the APP must take appropriate remedial action to safeguard the data based on the sensitivity of the accessed data and the nature and severity of the breach.

In the preamble to the Proposed Regulation, DOL asks whether the regulation should permit use of data for other purposes. At this point, DOL should not allow for uses beyond what is in the statute, nor should DOL prescribe how data must be maintained or protected because determining the appropriate maintenance and protection is up to each APP and will vary depending on the facts and circumstances. Further, there is concern that an overly prescriptive requirement could easily become outdated. Finally, the final regulation should not include specific data security requirements, such as a requirement to carry insurance to cover data breaches, because this determination should be left up to each APP and will depend on the fact and circumstances.

In any final regulation, DOL should keep in mind that the APP is a fiduciary to the IRA for purposes of Title II only. This means that the fiduciary standards under Title I do not apply. Section 102 of Executive Order: Reorganization Plan No. 4 of 1978 (Reorganization Plan 4) provides that "except as otherwise provided in Section 105 of this Plan, all authority of the Secretary of the Treasury to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of Labor: regulations, rulings, opinions, and exemptions under section 4975 of the Code."[5] In issuing any final regulation, DOL should keep in mind that nothing in Reorganization Plan 4 gives DOL the authority to

[5] Executive Order: Reorganization Plan No. 4 of 1978 available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4#section3 .

apply Title I standards to Title II only plans.

Open Participation

Paragraph (b)(4) of the Proposed Regulation follows 26 U.S.C. Section 4975(f)(12)(B)(iv) by requiring the automatic portability provider to offer automatic portability transactions on the same terms to any transfer-in plan. In the final regulation, DOL should clarify that this only relates to fees, and other contractual terms may vary.

Notices

Subparagraph (b)(5) of the Proposed Regulation provides for notices to the DOL, plan sponsors and to participants. With respect to participant notices, in addition to the pre-transaction and post-transaction notices required by statute, clause (b)(5)(iii) of the Proposed Regulation adds an additional participant notice. Specifically, the APP must provide an initial enrollment notice upon the plan's enrollment in the autoportability program. This notice must be provided to each participant within 15 days of the plan's enrollment in the program and explain the possibility of a future automatic portability transaction. We suggest deleting this requirement because as fundamental matter, participants need to receive information when it actually applies to them. In this case, when their account would be subject to an automatic portability transaction. For many participants, the contents of the initial notice will not apply because they will have account balances over $7,000 when the plan enrolls in the program. Furthermore, even for those whose accounts may be below the threshold when the plan enrolls in the program, their accounts likely will be more than that when they terminate employment. Finally, given that the Proposed Regulation also require that the APP provide a model notice with the same information as the initial notice to the plan sponsor to include in the summary plan description, there is no need for the exact same notice to be sent to all participants, many of whom will never have an automatic portability transaction apply.

The statute requires that a participant receive a pre-transaction notice, and the notice must include:

- A description of the transaction and the fees that will be charged and any other compensation the APP will receive;
- A description of the individual's right to affirmatively elect not to participate in the transaction, other available distribution options, the deadline to make an election, the procedures for the election and a telephone number for the APP;
- The individuals right to designate a beneficiary and the procedures for doing so; and
- Such other disclosures as the Secretary of Labor may require.

In addition to the statutory requirements, under subclause (b)(5)(iv)(B) of the Proposed Regulation, the pre-transaction notice also must include a "statement requesting the individual's affirmative consent to transfer the assets from the individual retirement plan to the account in the employer-sponsored retirement plan." We suggest this be removed because not only is it contrary to what the statute requires for an automatic portability transaction, but it is also could be misleading. The statute allows for an automatic portability

transaction to occur if the APP does not receive affirmative consent. Nowhere in the statutory exemption does it require that the APP receive an affirmative consent. Furthermore, by including this in the notice, it could mislead an individual into believing that if the individual does not affirmatively consent, the account will not be transferred.

In the preamble to the Proposed Regulation, DOL asks whether additional information should be required in the notices, particularly "whether specific information should be provided to the IRA owner explaining the significance of transferring assets into an employer sponsored plan as opposed to retaining those assets in an IRA...."[6] There is concern that adding additional information other than what is required in the statute would dilute the important information the statute requires to be in the notice. Furthermore, the APP is not going to have the specifics of each employer's plan to explain the difference between the IRA and the employer plan. A general statement as required in the SPD, the pre-transaction notice that the money will be transferred, and the APP's contract information will provide the individual with the most important information and the ability to obtain further information if necessary.

Clause (b)(5)(v) of the Proposed Regulation lists the information that must be provided in the post-transaction notice. Subclause (B) requires the notice to include all information regarding the location and amount of any transferred assets which includes, but is not limited to, the name of the employer and the name of the plan. We suggest any final regulation delete the "but is not limited to" phrase because it otherwise suggest that other information is required to be included. However, any final regulation should make clear that the APP may, but is not required to, include additional information.

Under the statutory exemption, the participant notices must "be written in a manner calculated to be understood by the average person and shall not include inaccurate or misleading statements."[7] Subclause (b)(5)(vi)(A) of the Proposed Regulation expands on this to require that participant notices be "written in a manner calculated to be understood by the average person, which for purposes of these regulations, is the average intended recipient." This same clause also requires that notices must be written in a culturally and linguistically appropriate manner. This clause also provides that the APP must "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of the typical intended recipient and the complexity of the terms of the program. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the uses of clear cross references, and a table of contents be included."

Subclause (C) of the Proposed Regulation lays out the standards for culturally and linguistically appropriate notices, which includes:

[6] 89 Fed. Reg.5624, 5631 (January 29, 2024).
[7] 26 U.S.C. § 4975(f)(12)(B)(vii).

- Providing oral language service that include the ability to answer question in any applicable non-English language and provide assistance with automatic portability transactions in the non-English language;
- Providing, upon request, a notice or disclosure in any applicable non-English language; and
- Including in the English version of all required notices and disclosures, a statement displayed in any applicable non-English languages clearly indicating how to access the language services provided by the automatic portability provider.

Subclause (D) provides the applicable non-English language is a language in "any county in which ten percent or more of the population is literate only in the same non-English language, as determine in guidance published by the Secretary of Labor."

Current regulations require that ERISA disclosures be written "calculated to be understood by the average plan participant."[8] This same standard often applies to notices under the Code. For example, the safe harbor notice for Code section 401(k) plans must be "written in a manner calculated to be understood by the average employee eligible to participate."[9] This standard is similar to the statutory exemption, namely that the disclosure be written to be understood by the average person. The proposed standard that disclosures are required to be written for the "average intended recipient" is contrary to both the language in the statutory exemption and the current ERISA and Code standard. On a more practical note, this standard would be impossible to meet. In the preamble to the Proposed Regulation, DOL states that the "idea of an a 'average person' in the context of understanding the notices under the exemption should be read as the average person receiving the notice rather than an abstract concept of an average person at large."[10] However, given that hundreds of thousands of Americans receive their retirement benefits through their employers, both in the private and public sector, there is no "average person receiving the notice." Given the breadth of who possibly could receive this notice, the level of education, reading comprehension, and financial literacy is equally broad. As such, the standard for automatic portability transaction notices should follow what is required under the statutory exemption, namely written in a manner to be understood by the average person.

Given that there is no "average" intended recipient, any final regulation also should delete the requirement that the APP must "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of the typical intended recipient and the complexity of the terms of the program" in Subclause (b)(5)(vi)(A).[11]

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[8] 29 CFR § 2520.102-3 (providing the standard for contents in a summary plan description).
[9] Code § 401(k)(12)(D).
[10] 89 Fed. Reg. 5624, 5632 (January 29, 2024).
[11] The remainder of this subclause goes on to explain what this means. Specifically, according to DOL, this means that "[c]onsideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the uses of clear cross references, and a table of contents be included." While we agree that the elimination of technical jargon and complex sentences should be a goal in drafting participant and

Nowhere in the statutory exemption are notices required to be "written in a culturally and linguistically appropriate manner." In fact, neither ERISA nor Code disclosures are required to meet this standard. Instead, this standard only applies to certain disclosures for individual and group health plans. Specifically, Section 2719 of the Affordable Care Act (ACA) requires group health plans and health insurance issuer offering group or individual health insurance coverage must implement an effective appeals process for appeals of coverage determinations and claims. This process must provide notice to enrollees, in a culturally and linguistically appropriate manner, of available internal and external appeals processes and the availability of any applicable office of health insurance consumer assistance or ombudsman established under section 2793 of the ACA to assist such enrollees with the appeals processes. DOL, the Department of the Treasury and the Department of Health and Human Services (Tri-agencies) have interpreted this to mean that all claims and appeals notices must meet the culturally and linguistically standard, not just the notice of available internal and external appeals process and the applicable office of health insurance consumer assistance.[12] Section 2715 of the ACA also requires that the summary of benefits and coverage be provided in a culturally and linguistically appropriate manner.

The same as what DOL is now proposing for automatic portability notices, under regulations, the Tri-Agencies provided that issuers and group health plans will be considered to have provided notices in a culturally and linguistically appropriate manner if:

- The plan or issuer provides oral language services (such as a telephone customer assistance hotline) that include answering questions in any applicable non-English language and providing assistance with filing claims and appeals (including external review) in any applicable non-English language;
- The plan or issuer provides, upon request, a notice in any applicable non-English language; and
- The plan or issuer includes in the English versions of all notices, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the plan or issuer.

The applicable-non-English language is determined with respect to an address in any United States county where more than ten percent or more of the population residing in the county is literate only in the same non-English language.[13]

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individual communications, we are concerned with DOL's overly prescriptive proposal of exactly what must be in the automatic portability disclosures and how DOL will apply this standard in the future. For example, there will be certain lengthy disclosures, such as summary plan descriptions, where a table of contents is appropriate. However, for shorter disclosures such as a post-transaction disclosure, a table of contents is not appropriate because it may be as long as the disclosure. Similarly, there are times where an example is helpful, such as explaining different investment options, but there are also times where examples are not necessary and simply add to the length of a disclosure and the likelihood the disclosure will not be read. Any final regulation should not include overly prescriptive requirements of how disclosures should be written or produced.

[12] See 29 C.F.R. 29 CFR § 2590.715-2719(e).

[13] 29 C.F.R. 29 CFR § 2590.715-2719(e).

Nowhere in the statutory exemption are notices relating to automatic portability transactions required to be provided in a culturally and linguistically appropriate manner. Had Congress wished to apply the ACA health care standard to retirement plan notices, such as the automatic portability transaction, it would have done so. Given that the ACA was enacted in 2010, 12 years before SECURE 2.0, presumably Congress was aware of the standard they created in the ACA for issuers and group health plans, and, had they wished to apply this standard to the statutory exemption for automatic portability transactions, they would have done so.

Paragraph 120(c) spells out the DOL's regulatory authority, and nowhere in that paragraph does it provide that DOL has the authority to require retirement plan notices relating to automatic portability to abide by the standards that Congress has only applied to health plans and issuers in the ACA. There is concern that DOL is using the PTE process and this particular regulation to impose standards that may only be done through legislative changes. As such, DOL should not include such provisions in any final regulations.

In the preamble to the Proposed Regulation, DOL requested comments on how an APP "would handle undeliverable mail and whether specific additional regulatory protections should be established for individuals with respect to whom the automatic portability provider has received returned mail."[14] DOL also invited comments on whether the regulation should address electronic disclosure of notices and disclosures under the exemption. How an APP will address returned mail must be included in its process and procedures (as required in subparagraph (b)(9) of the Proposed Regulation), and this should be sufficient and no further guidance is needed. With respect to electronic delivery, 26 CFR Section 1.401(a)-21 provides sufficient guidance on electronic disclosure with respect to retirement plans under the Code.

Searches

Under the statutory exemption (26 U.S.C. Section 4975(d)(25)((viii)), the APP is required to search monthly whether the individual with an IRA also has an account with an employer. The statutory exemption does not specify how these searches must be performed. However, subparagraph (6) of the Proposed Regulation lays out very detailed requirements for how searches must be done, including ongoing address validation searches via automated checks of (i) the National Change of Address records, (ii) two separate commercial location databases and (iii) any internal databases maintained by the APP. Furthermore, if a valid address is not obtained from the automated checks, the APP must also perform a manual internet-based search. These verifications must be performed at least twice in the first year the account is in the APP's system and at least annually after that. Given that databases and optimal searches will change over time, there is concern with the specificity in the Proposed Regulation and also that these provisions are not aligned with the reality of searching for a new employer and an employee account.

In the preamble to the Proposed Regulation, DOL asked whether queries should be

[14] 89 Fed. Reg.5624, 5633 (January 29, 2024).

allowed to be done by partnering recordkeepers, and whether regulations are needed to address this. Queries should be allowed to be done by the partnering recordkeepers; however, no addition regulations are needed in this area because it is a contractual matter between the APP and the partnering recordkeeper.

Designate Plan Official

Subparagraph (b)(7) of the Proposed Regulation requires the APP ensure the employer-sponsored plan that accepts transfers into the plan designate a plan official responsible for monitoring transfers into the plan due to automatic portability transactions, including ensuring the amounts received on behalf of a participant are invested properly. Accounts are deemed to be invested properly if made in accordance with the participant's current elections or any default election. This provision was neither in the original PTE, the statutory exemption, or the list of regulatory authority under the statutory exemption. Furthermore, from a practical perspective, employers do not have access to each participant's account to monitor how each individual account is being invested. It would be nearly impossible for an APP to require this to be in a contract with the employer, and it would effectively eliminate any automatic portability transactions. Finally, such a requirement is not necessary as the plan sponsor has the general fiduciary duty to monitor the APP just as it would any other service provider. As such, any final regulation should delete this provision. Instead, a final regulation could provide that the APP's policies and procedures (under current subparagraph (b)(8)) and the plan document will reflect that money rolled into the plan because of an automatic portability transaction will be invested in accordance with a participant's election or the default election if there is no current election.

Timing of Transfers

Subparagraph (b)(8) of the Proposed Regulation requires that transfers must occur as soon as practicable. The Chamber agrees with this approach as compared to a more prescriptive approach.

Policies and Procedures

Subparagraph (b)(9) lists the criteria that must be in the APP's policies and procedures, including that any plan that accepts transfers designate a representative that is responsible for monitoring transfers into the plan and the investment of amounts receive. This should be deleted for the reasons discussed above.

Audit

Both PTE 2019-02 and the statutory exemption provided for an annual audit. However, the Proposed Regulation expands significantly on the requirements in both of these. As such, were many of these requirements to be in a final regulation, the first audit should be delayed depending on when the final regulation is issued to give both the APP and auditors time to respond to a final regulation.

Subparagraph (c)(6) of the Proposed Regulation requires that if the APP does not have

access to the record or information to be included in the audit, the APP, as a condition of its service, must require that the appropriate information be provided to the APP. This sentence is too open-ended, and it should be deleted. There may be sensitive information from the plan sponsor or recordkeeper that may not be shared. Conditioning whether the APP may serve a particular recordkeeper or plan sponsor based an open-ended requirement to divulge information an entity may not be able to divulge could ultimately make automatic portability transactions unfeasible.

Subparagraph (c)(7) of the Proposed Regulation requires the audit be completed within 180 days of the annual period to which it relates, and it must be filed with the DOL within 30 days of that. However, subparagraph (8) of the Proposed Regulation requires the APP include a certification with the report that it reviewed the audit report, and addressed, corrected, or remedied any noncompliance or inadequacy in its compliance or has an appropriate written plan to address any such issues. Depending on the nature of the audit findings, 30 days may not be adequate and any final regulations should allow for an extension of an additional 30 days if needed.

Additional Corrective Actions

Subparagraph (c)(9) of SECURE 2.0 Section 120(c)(9) provides that the Secretary may issue regulations to:

> provide for corrections procedures in the event an auditor determines the automatic portability provider was not in compliance with this provision and related regulations as specified in paragraph (12)(B)(ix)(II) of section 4975(f) of such Code, as so added, including deadlines, supplemental audits, and corrective actions which may include a temporary prohibition from relying on the exemption provided by paragraph (25) of section 4975(d) of such Code, as added by this section.

Subparagraph (c)(1) of the Proposed Regulation provides that the Secretary may require the APP to submit to supplemental audits and corrective actions, including a temporary prohibition from relying on the exemption, if the APP or an affiliate is found to be, among other activities:

- Engaging in a systematic pattern or practice of violating any provision of Code section 4975(f)(12) or this regulation;
- Is the subject of a foreign or domestic criminal conviction:
    - Involving or arising out of the conduct of the automatic portability program or any automatic portability transaction; or
    - For any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, misappropriation of funds or securities, or conspiracy to commit any such crimes or a crime in which any of the foregoing crimes is an element.

First, although paragraph 120(c)(9) allows the Secretary to provide for corrections procedures if an auditor determined the APP was not in compliance with the requirements in the statutory exemption and related regulation, it does not provide DOL the authority to

provide additional disqualifying events.

Under the Proposed Regulations, an APP could no longer rely on the exemption if it or an affiliate is found to be engaging in a systematic pattern or practice of violating any provision of Code section 4975(f)(12) or an implementing regulation. The Proposed Regulation is unclear who would be making this determination, namely is it the auditor or the DOL. The Proposed Regulation also does not define what is a pattern or practice or what types of violations are included, such as willful versus unintentional. The Proposed Regulation does not state whether it needs to be a repeated violation of the same provision or violations of separate provisions. Finally, the Proposed Regulation provides no recourse to the APP if this determination is made, which leaves the APP with no due process to rebut any DOL findings that could subject them to business closure. As such, this section should be removed.

We are very concerned with DOL's inclusion of the foreign affiliate conviction as a disqualifying event. As explained in more detailed below, given that there is no nexus between an automatic portability transaction which may only occur in the United States and for which the APP has not discretion, and a foreign affiliate's conviction of one of the listed crimes in a foreign country, the only conclusion is that this was included in the Proposed Regulation to justify its inclusion in the proposed amendments to PTE 84-14 relating to qualified professional asset managers (QPAMs), the PTE procedure final regulation, and the proposed changes to PTE 2020-02.

Before 2004, neither DOL nor industry had conditioned eligibility to rely on class PTE 84-14 (QPAM exemption) on whether a foreign affiliate had been convicted of crime in a foreign jurisdiction. However, in 2004, out of an abundance of caution, an entity applied for an individual QPAM exemption based on the possibility that an affiliate in Korea, Japan or Taiwan might in the future have a criminal conviction because of dual-penalty laws, which hold the employer liable for acts of an employee. After 2004, even though PTE 84-14 was never amended to explicitly include foreign crimes of an affiliate as a disqualifying event (even though the PTE had been amended for other reasons), DOL granted 8 individual QPAM exemptions based on foreign convictions not related to the QPAM business. Although DOL has claimed that it has been its long-standing position that foreign convictions are a disqualifying event for PTE 84-14, it did not attempt to amend PTE 84-14 until 2022 when, among other proposed changes to PTE 84-14, it explicitly included any foreign conviction of an affiliate, whether related to the QPAM business or not, as a disqualifying event for an entity acting as a QPAM in the United States.[15]

In addition, in March of 2022 DOL amended the prohibited transaction exemption procedures to require any applicant (and certain corporate officers and fiduciaries) to include a list of all foreign convictions from the past 13 years.[16] Finally, seemingly to bolster this "long standing" interpretation, the proposed amendments to PTE 2020-02 would provide for a loss of eligibility based on a litany of crimes unrelated to providing investment advice, including

[15] 87 Fed. Reg. 45204 (July 27, 2022).
[16] 89 Fed. Reg. 4662 (Jan. 24, 2024).

any equivalent foreign crimes, not only by the investment professional and the financial institution, but also by an affiliate of the financial institution.[17] An affiliate also would include any officer, director, partner, employee, or relative (by lineal decent) of the investment professional or the financial institution.

Similar to the amendments to PTE 84-14 and 2020-02, in the Proposed Regulation, DOL has not shown how the criminal conviction of a foreign affiliate of an APP is related to or detrimental to individuals for whom the APP is providing automatic portability services within the United States relating to assets held in trust in the United States. As such, any final regulation should delete the reference to foreign crimes.

Website Content

Paragraph (d) of the Proposed Regulation requires the APP maintain a website that displays the following:

- A description of all the direct and indirect fees and compensation the APP receives for services provided in connection with the automatic portability transaction;
- A list of recordkeepers for each employer-sponsored retirement plan with respect to which the automatic portability provider carries out automatic portability transactions; and
- The number of plans and participants covered by each recordkeeper.

DOL did not explain in the preamble to the Proposed Regulation why the website would need to include the number of plans and participants covered by each recordkeeper or what purpose this would serve. Furthermore, given that this number changes daily, it would be outdated at best. Finally, because of the proprietary nature of this information, it is very unlikely that recordkeepers would share such information with the APP. Given that the statute only requires the APP maintain a website containing a list of recordkeepers for each plan and a list of all fees related to the automatic portability transaction, the requirement to list the number of plans and participants and covered by each recordkeeper should be deleted in any final regulation.

In the preamble to the Proposed Regulation, DOL solicited comments on whether other documents or materials should be required to be posted on the website, such as a redacted copy of the auditor's report.[18] Given that the statutory exemption spells out what must be on the APP's website, no additional information should be required to be on it. This is especially true of the auditor's report, which is not a public document, and is meant as a compliance tool for both APP and DOL.

Exculpatory provisions

Subparagraph 120(c)(6) provides that the Secretary may issue regulations that

[17] 88 Fed. Reg. (Nov. 3, 2023).
[18] 89 Fed. Reg.5624, 5635 (January 29, 2024).

"prohibit exculpatory provisions in an automatic portability provider's contracts or communications with individuals disclaiming or limiting its liability in the event that an automatic portability transaction results in an improper transfer." Paragraph (e) of the Proposed Regulation does that by stating that the APP may not "include exculpatory provisions in its contracts or communications with individuals who are the IRA owners disclaiming or limiting the APP's liability if the APP causes an improper transfer of assets in connection with an automatic portability transaction." The Proposed Regulation carves out disclaimers for: (1) liability caused by an error, a misrepresentation, or misconduct of a party independent of the APP or (2) damages arising from acts outside the control of the APP.

In the preamble to the Proposed Regulation, DOL requests comments on whether the prohibition on exculpatory provisions should be broader and include violations of the prohibited transaction provisions in Code section 4975 generally and ERISA in connection with any conduct of the automatic portability provider or an affiliate that is subject to Title I.[19] The Proposed Regulation is within the statutory authority Congress provided DOL for promulgating regulations relating to exculpatory provisions, and nothing further is needed. Furthermore, it is unclear why DOL would need to include language relating to Title I, given that the APP is solely a Title II fiduciary.

Conclusion

The Chamber appreciates the opportunities to comment on the Proposed Regulation. We believe autoportability will benefit individuals and help them prepare for a more secure retirement. As such, we hope DOL will consider our comment to ensure the success of autoportability programs, which ultimately will increase individual retirement savings.

Sincerely,

Chantel Sheaks

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce

[19] 89 Fed. Reg.5624, 5636 (January 29, 2024).