J. M. (Jack) Towarnicky

March 27, 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

To Whom It May Concern:

My comments regarding the auto portability regulations are my own and do not necessarily reflect the interests or positions of any employer, association, or entity with which I am affiliated or employed – past, present, or future.

Recommendations:

In finalizing the regulations, the Department of Labor should:

- Require specific notices be provided by the "auto portability provider" to the plan sponsor/plan administrator, in advance of selecting the "auto portability provider" and agreeing to "auto portability" processes, where such notice specifically confirms that any rollover of Roth 401k assets from the employer-sponsored, tax-qualified plan to a Roth IRA will preclude a subsequent transfer of those same assets to another employer-sponsored, tax-qualified plan – defeating the principal purpose of "auto portability".
- Require specific information in every notice to participants that will identify the risk that Roth 401k assets will be stranded in a Roth IRA, and that once transferred, the opportunity to consolidate assets in an employer-sponsored plan is lost ***forever***.
- Reach out to the Department of Treasury, Internal Revenue Service (IRS) to encourage the IRS to reconsider and update the adequacy of the required notice under §402.
- Reach out to the IRS and encourage the IRS to confirm that Conduit IRA processing (where distributed Roth 401k assets are not commingled with any other assets) allow for a later transfer to a predecessor or subsequent employer's tax-qualified plan that otherwise accepts Roth direct transfers.
- Adjust the proposed regulations to allow the plan sponsor/plan administrator and "auto portability provider" the option of up to a 90-day delay from the date of the distribution to hold the distribution "in limbo" while the "auto portability provider" reaches out to the participant to identify the limits on subsequent Roth rollovers in an attempt to identify a predecessor or subsequent employer's plan to accept a "direct transfer" or Roth 401k assets.

Background:

In the proposed regulation, the Department identifies the following justifications for the statutory exemption added by SECURE 2.0 Section 120:

- Default IRAs, while intended to preserve retirement assets in conservatively managed accounts, typically yield only minimal returns for investors while often imposing considerable fees. A 2014 study by the Government Accountability Office (GAO) found that, ''fees outpaced returns in most of the [forced-out] IRAs analyzed'' and that account balances ''tended to

decrease over time.'' GAO also found the average return to be less than two percent for money market funds, which are typical investments for Default IRAs. In contrast, many accounts rolled into a worker's new employer's plan likely will be invested in the plan's default investment, usually target date funds, which typically outpace the return on money market funds.

- Most Default IRA owners will stay invested in money market funds for a substantial length of time; recent data suggest roughly 40 percent of these accounts remain in principal-preserving investments for at least 10 years.
- With job turnover, a single individual may end up with multiple Default IRAs, further complicating the management of their retirement account assets, and in many cases, exposing participants to duplicative fees that might otherwise have been avoided if their assets were consolidated into a single account.
- These Default IRAs are established by employers on behalf of non-responsive participants; therefore, they are more susceptible to being abandoned or forgotten by participants.
- Reducing cashouts and retaining assets in the retirement system is an important retirement policy objective, particularly for those workers with small balance accounts who may be struggling to accumulate significant retirement assets.

Conflict:

The conflict arises because of the IRS interpretation to limit transfers of Roth 401k assets between plans to direct transfers, precluding a rollover first to a Roth IRA followed by a second rollover to a predecessor or subsequent employer's 401k plan that accepts Roth 401k transfers. By definition, an "automatic portability transaction" would include a "temporary" period in a Roth IRA.

Keep in mind that once approved, there is no obvious reason to limit "automatic portability transactions" solely to monies received resulting from mandatory distributions as described in section 401(a)(31)(B) of the Code, as a result of plan provisions that apply to involuntary distributions. So, this issue may become more substantial given SECURE 2.0's embrace of Roth features.

See: https://www.irs.gov/pub/irs-tege/rollover_chart.pdf

Proposed Regulation – Roth Provisions:

In the proposed regulations, the only mention of Roth is in the preamble/Supplementary on the first page, where it says, as part of background information:

SUPPLEMENTARY INFORMATION:
A. Background Regarding Automatic Portability Transactions

Section 120 of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act) amended Internal Revenue Code (Code) section 4975 to add a statutory prohibited transaction exemption for the receipt of fees and compensation by an ''automatic portability provider'' for services provided in connection with an ''automatic portability transaction.'' Specifically, Code section 4975(d)(25) provides prohibited transaction relief if the conditions set forth in Code section 4975(f)(12) are met. In the retirement plan context, portability refers to the process of transferring workers' retirement savings from one tax- advantaged plan or account to another when their covered service with an employer terminates (***e.g., from a traditional 401(k) plan account to a traditional individual retirement plan— such as an individual retirement account or annuity described in Code section 408(a) or (b) (IRA)—or from a Roth 401(k) plan account to a Roth IRA.*** As described in more detail below,

t***he term ‘‘automatic portability transaction’’ means a transaction in which mandatory distributions pursuant to Code section 401(a)(31)(B)(i) from an employer-sponsored retirement plan to an IRA established on behalf of an individual are subsequently transferred to an eligible employer-sponsored plan in which such individual is an active participant***, after such individual has been given advance notice of the transfer and has not affirmatively opted out of such transfer. According to the most recent Department of Labor (Department) annual report (Form 5500) data, there are an estimated 635,000 defined contribution plans, covering an estimated 86.6 million participants with account balances totaling $9.3 trillion in assets. With the proliferation of these accounts, there is a particular need for this type of automatic portability solution to help ensure participants remain connected to their retirement savings when they change jobs.

Later, it defines Automatic Portability Transactions:

Automatic Portability Transactions An automatic portability transaction as defined in Code section 4975(f)(12)(A)(i) builds on the portability concept and is part of a larger framework for facilitating the movement of assets from one tax- favored retirement plan to another. The overall terms and details of an automatic portability framework would generally be memorialized in contracts with recordkeepers, plan sponsors, and the automatic portability provider. ***A comprehensive automatic portability framework includes three key components. First, there is a ‘transfer-out’’ plan that initiates a mandatory distribution. Second, there is an IRA established in accordance with Code Section 401(a)(31)(B) (a Default IRA) to receive (via a rollover) and hold the distributed funds. Third, there is a ‘‘transfer-in’’ plan that receives the roll- in distribution from the Default IRA when an IRA owner is matched with an account in an eligible employer-sponsored plan at a new employer.***

Conclusion:

Given SECURE 2.0’s embrace of Roth features, a process where compliance with the involuntary distribution requirements serves to preclude subsequent aggregation of Roth assets in a predecessor or subsequent employer’s 401k plan appears to be inconsistent with the intent of Section 120 of the SECURE 2.0 Act of 2022.

Sincerely,

J. M. (Jack) Towarnicky