ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

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

Re: Automatic Portability Regulations, RIN 1210–AC21

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the Notice of Proposed Rulemaking entitled "Automatic Portability Transaction Regulations," (Proposal or Proposed Rule) issued by the Department of Labor (DOL) on January 29, 2024.[1] ERIC appreciates the guidance the IRS, the Department of the Treasury, and the Department of Labor have provided in connection with the *SECURE 2.0 Act of 2022* (SECURE 2.0), including this Proposed Rule.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

ERIC strongly supported SECURE 2.0, including Section 120, which added a statutory exemption from the prohibited transaction rules for the receipt of compensation by an "automatic portability provider" (APP) for services provided with respect to an "automatic portability

[1] 89 Fed. Reg. 5624 (Jan. 29, 2024).

transaction." By including this section, Congress intended to reduce leakage from the retirement system and improve outcomes for retirement savers.[2]

Section 120 allows –but does not require –defined contribution plan sponsors to offer automatic portability features. In implementing this provision, DOL should not impose burdens on plan sponsors or service providers that will unduly discourage participation in automatic portability arrangements. In certain areas of the Proposal, DOL has introduced complexity and administrative costs that are not required by the statute. Those provisions of the NPRM should be eliminated from any final rule.

Background:

Section 120 of SECURE 2.0 contains a number of requirements that must be satisfied for a transaction to qualify as an "automatic portability transaction" for purposes of prohibited transaction relief. In implementing these requirements, the statute generally requires DOL to issue regulations that require, among other things:

- APPs to send notices to individuals on whose behalf default IRAs are established in advance of the statutorily-required pre-transaction notice;
- APPs to provide disclosures to plans pursuant to DOL regulations under ERISA section 408;
- Plans to include fee APP fee information in the plan's summary plan description or summary of material modifications;
- Plans to invest to invest amounts received on behalf of a participant pursuant to an automatic portability transaction pursuant to the participant's current investment election or in the plan's qualified default investment alternative if no election has been made;
- The prohibition or restriction of receipt or payment of third-party compensation by an APP in connection with a transaction, other than a direct fee paid by a plan sponsor;
- An APP's contracts or communications with individuals not disclaim or limit liability in the event the transaction results in an improper transfer
- An APP to take actions necessary to reasonable ensure that participant and beneficiary data is current and accurate
- The limitation of data use related to automatic portability transactions except to execute the transactions or locate missing participants, unless DOL permits otherwise;
- That the appropriate participants and beneficiaries in fact receive all the required notices and disclosures. [3]

[2] In this respect, default IRAs are typically invested in principal preservation products. 29 C.F.R. sec. 2550.404a-2(c)(3)(i).
[3] Sec. 120 (c) of the SECURE 2.0 Act.

The Department's Proposed Rule Could be Simplified and Better Encourage Auto-Portability with Three Changes.

1) Eliminate Plan Official Designation

Under the Proposal, the automatic portability provider only receives prohibited transaction relief if the provider ensures that each plan that participates appoints a "plan official" responsible for monitoring transfers into the plan and ensuring that the rolled-over funds are invested properly.[4] The formal appointment of a plan official in this way is unduly burdensome and will likely discourage sponsors from participating in automatic portability arrangements. In the Proposal's preamble, DOL also acknowledged that ERISA's general prudence obligations would already require such monitoring.[5] The Department did not include this condition in its earlier automatic portability class exemption.[6] If DOL retains this condition, the automatic portability provider should be able to meet it by confirming that the plan administrator has directed the recordkeeper to invest the rollover this way.

2) Reduce Disclosure Burdens

The statute provides for extensive disclosures to retirement savers both before and after an automatic portability transaction.[7] These disclosures must be "*written in a manner calculated to be understood by the average person and shall not include inaccurate or misleading statements*."[8] The Department has gone several steps further in imposing very burdensome requirements. For example, the NPRM requires an auto-portability provider to make non-English language copies of required notices available, and to offer non-English language call center support, if the provider sends a notice to a terminated participant residing in a county where 10 percent or more of the population is literate only in the particular non-English language.[9] This is not mandated by the statute. In fact, it will simply serve to increase the administrative costs of sponsoring a retirement benefit, which will ultimately be borne by participants.

3) Provide Effective Date and Transition Relief.

We understand that plan sponsors have already begun participating in auto-portability programs. Once these regulations are finalized, those programs will need to be updated to reflect the provisions in the final rule. The NPRM proposes an effective date of 60 days after the final rule is published in the Federal Register. That time should be expanded to 180 days to accommodate and implement the final rules. Additionally, the Department should provide

[4] Proposed 29 C.F.R. sec. 2550.4975f-12(b)(7).
[5] 89 Fed. Reg. at 5632.
[6] 84 Fed. Reg. 37,337 (July 31, 2019); *see also* Advisory Opinion 2018-01A (explaining the fiduciary obligations of plan sponsors that choose to participate in an automatic portability program).
[7] Internal Revenue Code sec. 4975(f)(12)(B)(v) and (vi).
[8] Internal Revenue Code sec. 4975(f)(12)(B)(vii).
[9] Proposed 29 C.F.R. sec. 2550.4975f-12(b)(5)(vi)(B).

transition relief for programs already operating in good faith with a reasonable interpretation of the statute.

Conclusion

Thank you for the opportunity to submit comments on this Proposal. We look forward to discussing these issues with you. Please let us know if we can assist as you consider those issues.

Sincerely,

Andy Banducci