March 29, 2024

Submitted electronically via www.regulations.gov

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

RE: RIN 1210-AC12 – Automatic Portability Transaction Regulations

Dear Sir or Madam:

The American Benefits Council ("the Council") is pleased to provide comments on the U.S. Department of Labor's (DOL) proposed regulations that would implement the new statutory prohibited transaction exemption under Section 4975 of the Internal Revenue Code (Code).[1] This new exemption, added by Section 120 of the SECURE 2.0 Act of 2022 (SECURE 2.0), provides an exemption for the receipt of fees and compensation by an automatic portability provider (APP) for services provided in connection with an automatic portability transaction (APT). The Council was proud to strongly support the enactment of SECURE 2.0, and Section 120 is among a number of provisions that Congress included to deal with the problem of missing and unresponsive participants.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

[1] 89 Fed. Reg. 5,624 (Jan. 29, 2024).

The Council's members include all of the entities that have formed the Portability Services Network (PSN),[2] which is actively working to build upon and expand its automatic portability network and discuss joining the network with plan sponsors. Because automatic portability is one of many voluntary features of SECURE 2.0, for it to be a success and of interest to plan sponsors, it is important that the regulation not impose unnecessary burdens on a plan sponsor that chooses to add automatic portability to its cash-out plan feature.

Our letter makes three key points:

- We reiterate the Council's longstanding concerns about the approach DOL has taken to how a fiduciary should deal with missing and unresponsive participants.

- DOL should remove the aspect of the proposal that requires a plan sponsor to appoint a special plan official specifically charged with monitoring APTs. This is unnecessary micromanagement of a plan sponsor's fiduciary process to monitor service providers and plan transactions.

- DOL should remove the unnecessary disqualification provisions it has copied from the QPAM changes, which could cause unnecessary disruption to plan sponsors.

THE NEED FOR BETTER RULES FOR MISSING AND UNRESPONSIVE PARTICIPANTS

Before addressing our comments on the proposed regulation, we want to reiterate the Council's longstanding efforts to address issues regarding missing and responsive participants.[3] The Council has expressed concern to DOL a number of times regarding the aggressive stance that some regional enforcement offices have taken regarding the

[2] PSN currently consists of six recordkeepers, Alight, Empower, Fidelity, Principal, TIAA, and Vanguard, and also includes Retirement Clearinghouse ("RCH"), which obtained the individual prohibited transaction exemption upon which Section 120 of SECURE 2.0 is based. The Council's membership also includes recordkeepers that are not part of PSN and are not interested in offering APTs at this time.

[3] While the term "missing participants" is often used to refer to any participants, beneficiaries, or alternate payee who have not claimed a benefit, it is important to keep in mind that there are a number of different situations. Sometimes, a participant's contact information is incorrect and efforts to find correct contract information has been unsuccessful. Sometimes, the plan sponsor or IRA provider believes that it has correct contract information, but the participant refuses to respond to correspondence to get the participant to receive a benefit due to them. It is also common that a participant dies (sometimes without the plan knowing), and efforts to make contact with the beneficiary or estate are unsuccessful.

DOL "terminated vested participant" enforcement project.[4] Missing participant audits are among the most common enforcement actions that Council members raise with us in terms of their concerns; one of the frequent issues is that these audits can drag on for years.

As we have highlighted for over a decade, there is a critical need for a safe harbor setting forth what plan sponsors must do to try to find missing participants. On January 12, 2021, DOL issued a "best practices" document for fiduciaries which laid out "red flags" that DOL states that it had seen in investigations that indicate a problem with missing or unresponsive participants.[5] The best practices guidance does not help plan sponsors because it is inconceivable that any plan would do all of the best practices. To do so would impose unreasonable costs on the remaining participants. This leaves employers with no more help than they had before – great uncertainty facing long and costly audits.

PBGC has 80,000 missing participants and its general approach has been to wait for the 80,000 missing participants to contact the agency. DOL has to our knowledge exercised no oversight of the PBGC regarding this concerning situation, generally leaving 80,000 missing participants out on their own.[6] The handling of this 80,000-participant issue at PBGC is inconsistent with the DOL approach toward private plan sponsors where there have been constant audits during which some employers are routinely asked to provide the same information or documents they have provided to the same auditors years earlier.

We have also actively pursued reforms at the legislative level to improve various agency processes and address employer concerns about missing plan participants. The Council publicly supported the Retirement Savings Lost and Found Act, portions of which were incorporated into Section 303 of SECURE 2.0, which requires DOL to set up an online registry no later than the end of 2024. Another idea that was in the Retirement Savings Lost and Found Act and that was incorporated in SECURE 2.0 was an update to Code Section 411(a)(11) which permits plans to distribute small balances immediately at

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[4] The terminated vested participant project is described here: https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement.

[5] See https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.

[6] The only step forward in this area was facilitated not by the DOL national office, but rather by the Advocate, in cooperation with the Chicago EBSA Regional Office in 2017, years after the missing participant issues arose. This effort led to an agreement between PBGC and EBSA regarding missing participants. But, as recognized by the Advocate, more work needs to be done. The agreement only generated $11 million of benefits being paid in fiscal year 2022, leaving 80,000 missing participants unpaid.

termination of employment. SECURE 2.0 increased this limit to $7,000, which was needed as the limit had not been updated in more than 20 years.

Along with the new registry, and the increased cash-out limit, we believe that automatic portability will be an important tool to help reunite small balance participants with their savings. But to be clear, neither automatic portability nor any of the other SECURE 2.0 changes are a substitute to the need for a workable approach to DOL guidance and enforcement approaches to missing and unresponsive participants.

DOL SHOULD REMOVE UNNECESSARY BURDENS IN THE REGULATION

Because automatic portability is an optional plan feature, it is critical that plan sponsors are not saddled with unnecessary burdens if they choose to adopt the feature. We understand that the PSN and/or individual PSN members will comment on some of the specifics of the proposal to address requirements that DOL is proposing that are in excess of what is required in the statute. For our letter, we focus on two aspects of the proposal which are completely unnecessary and should be removed.

DOL should remove the special fiduciary "monitor" requirement.

Under the proposal, in order for the APP to receive an exemption for the fees it collects in connection with APTs, each plan that accepts APTs must designate a plan official responsible for monitoring transfers into the plan and confirming that amounts received on behalf of a participant are invested properly. This requirement is not contained in the statute and was not contained in the individual exemption that DOL granted to RCH. DOL's only explanation for this requirement is that it believes that "proper monitoring of automatic portability transactions by the transfer-in plan is also critical to ensuring the successful execution of the transactions, and, accordingly, the proposal includes a monitoring requirement."[7] In support of its authority to simply impose this requirement, DOL cites Section 120(c) of SECURE 2.0. This provision does give DOL authority to issue "such guidance as may be necessary" to carry out the purpose of the exemption. The provision then lists some specific areas where guidance may be needed, but a new requirement on plan sponsors along these lines is not listed.

This requirement is not "necessary" to carry out the purpose of the exemption. When a plan sponsor adopts automatic portability, the plan fiduciary has the obligation to prudently select and monitor the APP. In addition, like any other plan transaction, the plan fiduciary has a duty to oversee those transactions, but certainly not to oversee *every* transaction. DOL itself admits that proper monitoring of APTs is already required

[7] 89 Fed. Reg. at 5,632.

by "general prudence obligations."[8] In addition, in the Advisory Opinion issued to RCH, DOL has already laid out guidance on the fiduciary obligations that apply to a plan fiduciary when it adopts automatic portability.[9]

We are extremely concerned that DOL is micromanaging the fiduciary process and exceeding its authority. We cannot think of any other comparable requirement to designate a particular plan official to monitor one aspect of plan administration. Plans are not required now, for example, to designate a special plan official to monitor normal voluntary rollover transactions, which might be much larger than APTs (as APTs are limited to cash-outs under $7,000). Moreover, the need for a special monitor plan official suggests this official must monitor and review *each and every* APT and might be strictly liable for any issues associated with an APT transaction. Just like every other aspect of fiduciary oversight, the amount of monitoring depends on the facts and circumstances.

We are also concerned that this "monitor" requirement undermines the existing fiduciary safe harbor for automatic rollovers. Each APT will begin with a cash-out, which is placed into an IRA pursuant to Code Section 401(a)(31)(B), before being transferred to the new plan if a search reveals the participant is an active participant in another employer's plan. DOL has issued a fiduciary safe harbor that protects a fiduciary if the cash-out IRA rollover meets the requirements of the regulation.[10] While there are no fiduciary safe harbors in connection with APTs, *per se*, there is a fiduciary safe harbor in connection with that initial rollover, which is one half of the transaction.

This requirement to appoint a "special" fiduciary plan official flies in the fact of nearly 50 years of thinking about how fiduciary committees should do their jobs. There is no one single correct approach to how the named fiduciary of a plan should go about monitoring service providers who process various transactions. We do not require a plan sponsor to appoint a particular plan official to monitor benefit calculations, hardship withdrawals, or loans, all of which impact far more participants in a plan (and much bigger benefits) than automatic portability. We leave that to normal principles of prudence, and flexibility is critical.

In short, this plan official monitor requirement is unnecessary and should be deleted.

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[8] Id. at 5,632-22.

[9] Advisory Opinion 2018-01A (Nov. 5, 2018), available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/2018-01a.pdf.

[10] 29 C.F.R. 2550.404a-2.

DOL should remove the special requirement for "culturally and linguistically appropriate" notices.

SECURE 2.0 requires certain notices be sent to participants in connection with APTs. DOL proposes to add a condition that these notices be provided in a "culturally and linguistically appropriate manner." DOL offers no justification for requiring a special standard for notices for this one optional plan feature – a special standard that applies to no other disclosure or notice participants receive with respect to their retirement plan. (DOL states that it pulled this idea from certain health plan notices required under the Affordable Care Act, where the considerations are quite different.) Similar to the concern above about requiring the appointment of a special plan official, this is especially troubling where all this SECURE 2.0 provision does is provide relief from the excise tax in Section 4975 of the Code for payment of fees to an APP. And this addition is particularly unnecessary because Congress already included a standard in the exemption, namely that notices are "written in a manner calculated to be understood by the average person and shall not include inaccurate or misleading statements."

THE DISQUALIFICATION PROVISIONS ARE UNNECESSARY AND LACK DUE PROCESS

The proposal also contains rules, not contained in the statutory exemption, which parallel very concerning similar provisions that DOL proposed to add to the class exemption for qualified professional asset managers, or QPAM (PTE 84-14). Under the proposed change to the QPAM exemption, DOL gave itself the authority to disqualify an investment manager from relying on the exemption based on issuing a "written ineligibility notice" that alleges certain prohibited conduct. As we noted in our comments on the QPAM proposal, this grants DOL too much discretion in disqualifying a QPAM and the proposed process for issuing these notices lacks procedural safeguards for parties who may disagree with DOL's assessment.

Unfortunately, this language has appeared again. DOL, out of thin air, gave itself the ability to impose whatever "supplemental audits and corrective actions" it wishes, and to impose a temporary restriction on the APP relying on the exemption if the APP *or an affiliate* is found to have engaged in certain conduct. This includes an allegation that the APP or an affiliate provided information that DOL believes is materially misleading, or if the APP or any affiliate is the subject of a foreign or domestic felony of various types, whether or not that conviction had anything to do with processing APTs.[11]

[11] See Proposed 29 C.F.R. 2550.4975f-12(b)(10)

Again, DOL has given itself the authority to, basically, put a service provider out of business with no process, let alone *due* process.[12] For the Council's perspective, just as with the QPAM changes, we are focused on the disruption to plan sponsors that will result if the APP that a plan sponsor has engaged is suddenly unable to process APTs. Especially because there is currently only one APP, it would be essentially impossible to replace the APP when DOL suddenly prevents an APP from relying on the exemption, meaning the plan fiduciary cannot follow the terms of the plan. It is no answer to say that all the members of the PSN are established companies who should have no reason to worry. This is a fundamental question of fairness and avoiding disruption.

CONCLUSION

The Council supports automatic portability and hopes it is a success for those plan sponsors who decide to add it to their plan. We were happy to see DOL move fairly quickly to propose rules to implement the new exemption. Because the Council believes strongly that DOL should provide guidance whenever possible by giving an opportunity for notice and comment, we commend DOL for doing this project through a proposed regulation.

That said, we urge you to make the changes mentioned in our letter to make automatic portability as attractive as possible to plan sponsors.

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If you have any questions, please contact me at 202-289-6700 or ldudley@abcstaff.org. Thank you for considering the issues outlined in this letter.

Sincerely,

Lynn Dudley
Senior Vice President, Global Retirement and Compensation Policy

[12] The QPAM changes at least include a process for the investment manager to seek a conference and to make an appeal to DOL. Even if the QPAM procedures are adequate (they are not), theses proposed automatic portability regulations do not even include a minimum due process.