

DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Part 2550**

RIN 1210-AC21

Automatic Portability Transaction Regulations**AGENCY:** Employee Benefits Security Administration (EBSA), Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document contains a proposed rule that would implement the statutory prohibited transaction exemption under section 4975 of the Internal Revenue Code (Code) for certain automatic portability transactions. Section 120 of the SECURE 2.0 Act of 2022 amended Code section 4975 to add a statutory 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. The Department of Labor is proposing this regulation because, with certain exceptions not relevant here, section 102 of Reorganization Plan No. 4 of 1978 transfers the authority of the Secretary of the Treasury to issue certain regulations, rulings, opinions, and exemptions under Code section 4975 to the Secretary of Labor. Consistent with this transfer of authority, Congress authorized and directed the Department of Labor to issue regulations under Code section 4975 to implement provisions of section 120 of the SECURE 2.0 Act.

DATES: Comments on these proposed rules are due on March 29, 2024.**ADDRESSES:** EBSA encourages interested persons to submit their comments on these proposed rules online. You may submit comments, identified by RIN 1210-AC21, by either of the following methods:

Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

Mail: 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.

Instructions: All submissions must include the agency name and Regulatory Identifier Number RIN 1210-AC21 for this rulemaking. If you submit

comments online, do not submit paper copies. All comments received will be posted without change on www.regulations.gov and www.dol.gov/agencies/ebsa and will be made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information in your comment that you do not want publicly disclosed. Comments are public records that are posted online as received and can be retrieved by most internet search engines.

Docket: Go to the Federal eRulemaking Portal at <https://www.regulations.gov> for access to the rulemaking docket, including any background documents and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

FOR FURTHER INFORMATION CONTACT:

Scott Ness, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500 or Joseph Brennan, Office of Exemption Determinations, Employee Benefits Security Administration, (202) 693-8456. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:**A. Background Regarding Automatic Portability Transactions**

Section 120 of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act)¹ 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, the 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.² 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.³

1. Mandatory Distributions of Small Account Balances

Under the Code, qualified retirement plans are permitted to include provisions requiring an immediate distribution to a separating participant without the participant’s consent if the present value of the participant’s vested accrued benefit does not exceed \$5,000⁴ (for distributions made after December 31, 2023, the \$5,000 threshold is increased to \$7,000).⁵ These transactions are generally referred to as “mandatory distributions.”

Code section 401(a)(31)(B) provides that a trust will not constitute a qualified trust unless the plan of which the trust is a part provides that: (1) if a mandatory distribution of more than \$1,000 is to be made; and (2) the participant does not elect to have such distribution paid directly to an eligible

² 2021 Form 5500 Data, U.S. Department of Labor.

³ Although the Department believes this body of plans is the one primarily relevant for purposes of the application of the statutory exemption, the Department notes that additional defined contribution plans that do not file a Form 5500 or Form 5500-SF and certain defined benefit plans are eligible to make mandatory distributions. See the regulatory impact analysis sections in this document for a discussion of the plans and participants impacted by this proposed regulation.

⁴ Code sections 411(a)(11) and 417(e). See Code section 411(a)(11)(D) for circumstances where the amount of a distribution may be greater than \$5,000 if a participant made a previous roll-in to a plan from an IRA. In such circumstances, the roll-in funds are not considered in determining the \$5,000 vested accrued balance, so a larger amount of assets could be subject to a mandatory distribution under the terms of the plan.

⁵ See SECURE 2.0 Act Sec. 304, updating dollar limit for mandatory distributions.

¹ Public Law 117-328, Dec. 29, 2022, Division T.

retirement plan or to receive the distribution directly, then (3) the plan administrator must transfer such distribution to an IRA of a designated trustee or issuer.⁶ These distributions are referred to as “automatic rollovers of mandatory distributions.” Code section 401(a)(31)(B)(i) requires the plan administrator to notify the participant in writing, either separately or as part of the notice required under Code section 402(f), that the participant may transfer the distribution to another IRA.⁷ Code section 402(f)(1)(A) requires plan administrators to provide a participant with a written notice within a reasonable period of time before making an automatic rollover of a mandatory distribution explaining, among other things, the following: (1) the Code provisions under which the participant may elect to have the distribution transferred directly to an eligible retirement plan and that if an election is not made, such automatic rollover of a mandatory distribution is subject to the provisions of Code section 401(a)(31)(B); (2) the provision requiring income tax withholding if the distribution is not directly transferred to an eligible retirement plan; and (3) the provisions under which the distribution will not be taxed if the participant transfers the distribution amount (including amounts withheld under Code section 3405) to an eligible retirement plan within 60 days of receipt.⁸

The Secretary of Labor (the Secretary) issued regulations in 2004 providing safe harbors for such automatic rollovers of mandatory distributions from a plan subject to Title I of the Employee Retirement Income Security Act (ERISA) which provide that (1) a plan administrator’s designation of an IRA to receive the automatic rollover and (2) the initial investment choice for the rolled-over funds will be deemed to satisfy the fiduciary responsibility provisions of ERISA section 404(a) if the safe harbor requirements are met.⁹ Specifically, plan administrators complying with the Department’s fiduciary safe harbor regulations must

invest the former participant’s assets in an investment product designed to preserve principal and provide a reasonable rate of return.¹⁰ An IRA established pursuant to Code section 401(a)(31)(B) and/or in compliance with the Department’s regulation is commonly referred to respectively as a “Default IRA” or “Safe Harbor IRA.”

2. 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.¹¹ 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.

To roll in funds from an IRA to the transfer-in plan, the transfer-in plan must permit such roll-ins. Additionally, an automatic portability provider must have access to records for the Default IRA and transfer-in plan sufficient to make a match. The general concept of “locate, match, and transfer” involves making queries of cooperating recordkeepers’ systems to determine if a Default IRA owner has become a participant in an employer-sponsored retirement plan through re-employment (*i.e.*, the transfer-in plan).¹² If the individual is matched with an account in the transfer-in plan, the automatic portability transaction is designed for the automatic portability provider to roll the individual’s IRA assets into the individual’s account in the transfer-in plan. Automatic portability transactions may be particularly important and helpful to workers who have lost contact with their retirement plans

when they change jobs, cannot be located because the plan does not have updated address information or other contact information for separated employees, or refuse to respond to plan communications about their retirement account. When an automatic portability provider transfers funds from the transfer-out plan to a Default IRA without a participant’s active involvement, the risk of funds becoming lost or difficult to locate increases. Therefore, automatic portability transactions are intended to benefit participants and IRA owners that are unresponsive or considered missing.¹³

3. Current DOL Individual Prohibited Transaction Exemption for Automatic Portability Transactions

When an automatic portability provider transfers assets from an IRA to a new employer’s plan without the IRA owner’s affirmative consent, the automatic portability provider is exercising fiduciary discretion for purposes of the prohibited transaction provisions of the Code.¹⁴ The assessment of a fee against the IRA, in turn, implicates the prohibited transaction provisions in Code section 4975(c)(1). The Department first issued guidance regarding an automatic portability transaction before the enactment of the SECURE 2.0 Act. Retirement Clearinghouse (RCH) approached the Department in 2018 for sub-regulatory guidance and prohibited transaction exemptive relief regarding its multi-part automatic portability framework (the RCH Program). In response, the Department issued Advisory Opinion 2018–01A (AO 2018–01A)¹⁵ and an administrative prohibited transaction exemption (PTE 2019–02)¹⁶ in connection with the RCH Program. AO 2018–01A concerned the status of certain parties involved in the RCH Program as “fiduciaries” within the meaning of ERISA section 3(21)(A) and Code section 4975(e)(3).¹⁷ In AO 2018–01A, the Department stated that plan sponsors exercise discretion in their fiduciary capacity and would be

⁶ Code section 401(a)(31)(B)(i) requires the transfer be made to an “individual retirement plan,” defined by Code section 7701(a)(37) as an individual retirement account described in Code section 408(a) and an individual retirement annuity described in Code section 408(b). See IRS Notice 2005–5, 2005–1 C.B. 337, regarding the applicability of Code section 401(a)(31)(B) to retirement plans under Code sections 401(a), 401(k), 403(a), 403(b), and 457(b) (https://www.irs.gov/irb/2005-03_IRB).

⁷ Code section 401(a)(31)(B)(i).

⁸ See 29 CFR 2550.404a–2; Code section 401(a)(31)(B)(i); and Code section 402(f).

⁹ See 69 FR 58017 (Sep. 28, 2004).

¹⁰ 29 CFR 2550.404a–2(c)(3)(i).

¹¹ This may be, but is not necessarily, a Safe Harbor IRA established in accordance with the Department’s regulations at 29 CFR 2550.404a–2 because all Safe Harbor IRAs are generally Default IRAs, but not all Default IRAs are Safe Harbor IRAs.

¹² The concept of “locate, match, and transfer” is discussed in more detail below.

¹³ The Department notes that Code section 4975(f)(12) defines an automatic portability transaction with respect to an individual that has not affirmatively consented to the transfer. An individual who affirmatively consents may still have IRA assets rolled into a new plan through the same mechanisms, although it would not technically fall within the statutory definition.

¹⁴ See the discussion of AO 2018–01A, below.

¹⁵ Available at: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/2018-01a.pdf>.

¹⁶ See 83 FR 55741 (Nov. 7, 2018) (proposed exemption) and 84 FR 37337 (July 31, 2019) (granted exemption).

¹⁷ AO 2018–01A (Nov. 18, 2018).

subject to the general fiduciary standards of ERISA when deciding whether to participate in the RCH Program. The advisory opinion further explained that, without the individual's affirmative consent, RCH acted as a fiduciary within the meaning of Code section 4975(e)(3) in deciding whether to transfer the assets from an individual's Default IRA to the individual's new employer plan.¹⁸ Furthermore, the Department indicated that an individual's failure to respond to RCH's communications about a default transfer of the assets in the individual's account to the new employer's plan is not tantamount to affirmative consent by the individual to the default transfer and does not relieve RCH from fiduciary status and related responsibilities.¹⁹

The Department additionally stated in AO 2018–01A that, unlike the Department's automatic safe harbor regulations,²⁰ which pertain to the automatic rollover of an individual's retirement plan mandatory distribution into an IRA, no similar statutory or regulatory provision provides relief from fiduciary responsibility for the "default" transfer of assets from the Default IRA to a new employer's plan.²¹ Therefore, it was necessary for RCH to receive a prohibited transaction exemption from the Department in order for RCH to receive a fee or other compensation when it exercised fiduciary authority to make the default transfer of assets from the Default IRA to a new employer's plan.²² At RCH's request, the Department issued PTE 2019–02, an administrative exemption that provides such prohibited transaction relief for RCH.²³ Due to the novelty of the RCH Program, the Department limited the relief provided in PTE 2019–02 to a five-year term, which expires on July 31, 2024. To receive prohibited transaction relief beyond the five-year term, RCH would need to submit an additional individual administrative exemption request to the Department.

B. Overview of the SECURE 2.0 Act Statutory Exemption for Automatic Portability Transactions

Section 120 of the SECURE 2.0 Act added a statutory exemption in Code section 4975 that allows an automatic portability provider to receive a fee in connection with executing an automatic portability transaction that largely mirrors the relief the Department granted RCH in PTE 2019–02. The availability of the statutory exemption to all automatic portability providers that meet its requirements generally eliminates the need for RCH, and other automatic portability providers, to request an administrative PTE for relief similar to the relief the Department granted in PTE 2019–02. Specifically, the statutory exemption in Code section 4975(d)(25) provides a conditional prohibited transaction exemption from the restrictions in Code sections 4975(c)(1)(D) and (E) for an automatic portability provider to receive fees and compensation for services provided "*in connection with an automatic portability transaction*" if the conditions set forth in Code section 4975(f)(12) are met.²⁴

Code section 4975(f)(12)(A)(i) generally defines an automatic portability transaction as a transfer of assets from a Default IRA²⁵ to a transfer-in plan after the IRA owner has been given advance notice of the transfer and has not affirmatively opted out. The "transfer-in" plan covered by the definition is any employer-sponsored retirement plan (other than a defined benefit plan) that is: a qualified trust, an annuity plan described in Code section 403(a), an eligible deferred compensation plan described in Code section 457(b) which is maintained by an eligible employer described in Code section 457(e)(1)(A), or an annuity contract described in Code section 403(b).²⁶

Notably, the SECURE 2.0 Act amendment to the Code does not specifically include any references to a transfer-out plan (*i.e.*, the plan engaging in the mandatory distribution and automatic rollover). As discussed above, the existence of a transfer-out plan is a necessary precursor to an automatic portability transaction, but the transfer-out transaction is already governed by mandatory distribution and automatic rollover provisions in the Code that are

discussed above, and the Department already has provided conditional fiduciary and prohibited transaction relief for such transactions under its automatic rollover safe harbor regulations.²⁷ Similarly, the general fiduciary principles regarding an individual's default investments in the transfer-in plan and the Department's regulations on qualified default investment alternatives will govern the transfer-in plan sponsor's responsibilities once the assets are transferred from the individual Default IRA into the transfer-in plan.²⁸

As noted, Code section 4975(d)(25) provides prohibited transaction relief if the conditions set forth in Code section 4975(f)(12) are met. Specifically, Code section 4975(f)(12) and this proposed regulation require:

- the automatic portability provider to acknowledge its fiduciary status with respect to the IRA;
- that the automatic portability provider's fees do not exceed reasonable compensation;
- restrictions to be placed on an automatic portability provider's use of plan participant and IRA owner data;
- participation in the program to be available on the same terms for all eligible transfer-in plans;
- the automatic portability provider to conduct at least monthly searches for transfer-in plan accounts;
- the automatic portability provider to timely execute automatic portability transactions;
- the automatic portability provider's discretion to affect the timing or amount of the transfer pursuant to an automatic portability transaction to be limited; and
- the automatic portability provider to retain records demonstrating it is complying with the exemption conditions, conducting an annual audit, and maintaining a website with a list of participating recordkeepers and the automatic portability provider's fees.

Section 120 of the SECURE 2.0 Act also provides that, not later than 12 months after the date of its enactment, the Secretary shall issue such guidance as may be necessary to carry out the purposes of the amendments made by section 120, including regulations or other guidance which:

1. Require an automatic portability provider to provide a notice to individuals on whose behalf the default IRA is established in advance of the pre-transaction notice;
2. Require an automatic portability provider to disclose to a responsible plan fiduciary information about the

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 5–6.

²⁰ 29 CFR 2550.404a–2 and 2550.404a–3.

²¹ *Id.* at 6. The Department notes that Code section 4975(f)(12) applies only to transfers made under Code section 401(a)(31)(B)(i), so the fiduciary relief provided in 29 CFR 404a–3 is not applicable to transactions covered by 4975(d)(25).

²² AO 2018–01A addressed the fiduciary status of an automatic portability provider but did not address whether a prohibited transaction would occur.

²³ 84 FR 37337.

²⁴ Emphasis added.

²⁵ The statutory definition specifically references "an individual retirement plan which is established on behalf of an individual and to which amounts were transferred under section 401(a)(31)(B)(i)."

²⁶ These are plans described in clause (iii), (iv), (v), or (vi) of Code section 402(c)(8)(B).

²⁷ 29 CFR 2550.404a–2.

²⁸ 29 CFR 2550.404c–5.

provider's fees, compensation, and services as required of covered service providers pursuant to DOL regulations under ERISA section 408 (*i.e.*, 29 CFR 2550.408b–2(c));

3. Require plans involved in the automatic portability transaction to fully disclose fees related to an automatic portability transaction in its summary plan description or summary of material modifications;

4. Require plans involved in the automatic portability transaction 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, if no election is made or permitted, in the plan's qualified default investment alternative under the Department's Qualified Default Investment Alternative (QDIA) regulations (*i.e.*, 29 CFR 2550.404c–5) or another investment selected by a fiduciary with respect to such plan;

5. Prohibit or restrict the receipt or payment of third-party compensation (other than a direct fee paid by a plan sponsor which is in lieu of a fee imposed on an IRA owner) by an automatic portability provider in connection with an automatic portability transaction;

6. Prohibit exculpatory provisions in an automatic portability provider's contracts or communications with individuals disclaiming or limiting liability in the event that an automatic portability transaction results in an improper transfer;

7. Require an automatic portability provider to take actions necessary to reasonably ensure that participant and beneficiary data is current and accurate;

8. Limit the automatic portability provider's use of data related to automatic portability transactions for any purpose other than the execution of such transactions or locating missing participants, except as permitted by the Secretary;

9. Provide for corrections procedures in the event an auditor determines the automatic portability provider was not in compliance with the statute and related regulations, including deadlines, supplemental audits, and corrective actions which may include a temporary prohibition from relying on the statutory exemption;

10. Ensure that participants and beneficiaries receive all the required notices and disclosures; and

11. Make clear that the statutory exemption applies solely to the automatic portability transactions described in the statutory exemption, and, to the extent the Secretary deems necessary or advisable, specify how the

application of the exemption relates to or coordinates with other statutory provisions, regulations, and administrative guidance.²⁹

Some interested stakeholders have communicated to the Department that they have already developed products and established procedures for an automatic portability service and that they do not believe any further guidance from the Department is necessary to effectuate the purpose of section 120 of the SECURE 2.0 Act. However, the Department believes that regulations, as compared to some other form of guidance, are needed to implement section 120(c) of the SECURE 2.0 Act in a manner that addresses and reinforces the consumer protections in the above list of statutory conditions and requirements. Furthermore, the Department believes that these proposed regulations will provide a broader cross-section of interested and affected entities with the opportunity to formally comment on the proposal, whether implementing regulations are necessary, and whether elements of the proposed requirements should be modified or eliminated to best support Congress' intent in passing the new statutory exemption.

C. Prospective Effect of Implementing Regulations and Interim Interpretive Policy

The Department is proposing that any final rule adopted based on this proposal would be effective 60 days after publication in the **Federal Register** and that the requirements of the final rule would have prospective applicability. The Department specifically solicits comments on whether there should be some delayed applicability date to allow for automatic portability providers and plan fiduciaries to make any changes to automatic portability programs or related contracts or arrangements that may be needed or desired in light of the final rule. This approach is intended to make it clear the statutory exemption is available in accordance with the effective date of the SECURE 2.0 Act while acknowledging that there may be a need to transition contracts or arrangements to meet specific requirements of the final rule.

As noted above, section 120 of the SECURE 2.0 Act directed the Secretary to issue such guidance as may be necessary to carry out the purposes of the amendments made by section 120 no later than 12 months after the date of the enactment of the Act. Compliance

²⁹ See Public Law 117–328, Dec. 29, 2022, Division T, Sec. 120(c).

with the conditions and requirements in Code sections 4975(d)(25) and 4975(f)(12) is an independent statutory obligation for parties seeking their prohibited transaction relief that is not dependent upon the issuance of regulations or guidance by the Department. For the period from publication of this proposed regulation until after the Department issues a final regulation or other applicable administrative guidance, automatic portability providers and plan fiduciaries are expected to comply with the requirements of Code sections 4975(f)(12) and 4975(d)(25) using a good faith, reasonable interpretation of the law taking into account the list of consumer protection conditions and requirements in section 120(c) of the SECURE 2.0 Act.³⁰ During that period, to the extent an automatic portability provider or plan fiduciary believes there is some uncertainty regarding whether the automatic portability program or the parties' conduct in connection with the program complies with the statutory provisions, the Department expects that the provider or fiduciary will strictly adhere to the requirements in Code section 4975(f)(12) and act in a manner that furthers the financial interests of the affected plan, plan participant, or IRA owner taking into account the consumer protection conditions and requirements listed in section 120(c) of the SECURE 2.0 Act.

D. Overview of the Proposed Regulation

Certain provisions of ERISA Title I, such as the provisions on prohibited transactions, have parallel provisions enacted in Title II of ERISA and codified in the Code. When ERISA was passed,

³⁰ The Department expects to issue a final rule before the first annual audit would be required pursuant to the requirement in Code section 4975(f)(12)(B)(xi)(II) under which an automatic portability provider must "conduct an annual audit, in accordance with regulations promulgated by the Secretary of Labor, of automatic portability transactions occurring during the calendar year to demonstrate compliance with this paragraph and any regulations thereunder and identify any instances of noncompliance therewith, and shall submit such audit annually to the Secretary of Labor, in such form and manner as specified by such Secretary." However, because a final rule may be published part way through the first audit period, the Department specifically solicits comments on whether the final rule should provide an alternative pursuant to which the submission of the annual audit for the first year could be delayed and submitted together with the audit for the second year. See, for comparison, 29 CFR 2520.104–50—Short plan years, deferral of accountant's examination and report. The Department also requests comment on whether certain aspects of this proposal that would be subject to audit review should have a specific delayed effective date because the aspect of the proposal may take additional time for an automatic portability provider to fully implement.

regulatory authority over Title I resided with the Secretary of Labor while regulatory authority over Title II resided with the Secretary of the Treasury. To rationalize the administration and interpretation of these parallel provisions, Reorganization Plan No. 4 of 1978, 5 U.S.C. App., divided the interpretive and rulemaking authority between the Secretaries of Labor and of the Treasury, so that, in general, the agency with regulatory and interpretive responsibility for a given provision of ERISA Title I would also have regulatory and interpretive responsibility for the parallel provision in the Code. Among the sections transferred to the Department were certain of the prohibited transaction provisions (including exemptions) in Code section 4975. Title I's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to Title I-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975, apply both to Title I-covered pension plans that are tax-qualified pension plans, as well as other specified tax-advantaged arrangements, including IRAs.

Although the new automatic portability transaction prohibited transaction exemption appears only in Code section 4975 and directly pertains to transactions involving IRAs, the Secretary of Labor still retains regulatory authority over certain prohibited transaction provisions under Code section 4975, as provided in Reorganization Plan No. 4 of 1978. Consistent with that authority, section 120 of the SECURE 2.0 Act directs the Secretary of Labor to issue regulations and guidance related to the new statutory exemption for automatic portability transactions.

Therefore, the proposed regulation would add a new § 2550.4975f–12 to the Department's fiduciary regulations at 29 CFR part 2550. The proposed regulation tracks the requirements under Code section 4975(f)(12) that must be satisfied in order for the automatic portability transaction to be covered by the statutory prohibited transaction exemption in Code section 4975(d)(25). Paragraph (a) describes the general scope of the statutory exemption and regulation. Paragraph (b) sets forth the conditions an automatic portability provider must satisfy for a transaction to qualify as an "automatic portability transaction" and for the exemption to apply. Paragraph (c) sets forth proposed annual audit and correction procedure requirements. Paragraph (d) sets forth website requirements that must be met for automatic portability providers to satisfy the statutory exemption and proposed regulation. Paragraph (e)

describes prohibitions on the automatic portability provider's use of exculpatory provisions in contracts or communications disclaiming or limiting their liability in the event an improper transfer of assets in connection with an automatic portability transaction occurs. Paragraph (f) sets forth the record retention requirement automatic portability providers must meet to satisfy the statutory exemption and proposed regulation. Paragraph (g) defines certain terms used in the proposed regulation.

1. Scope of Prohibited Transaction Relief

The relief provided by Code section 4975(d)(25) and the proposed exemption is limited to Code sections 4975(c)(1)(D) and (E) for the receipt of fees and compensation by an automatic portability provider for services provided in connection with an automatic portability transaction and Code section 4975(c)(1)(F) for the receipt of fees by an automatic portability provider from a plan sponsor in lieu of fees imposed on an IRA owner. Neither the statutory exemption in Code section 4975(d)(25) nor the proposed regulation contains an exemption for other acts described in Code section 4975(c)(1)(D) and (E) (relating to the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan and to fiduciaries dealing with the income or assets of plans in their own interest or for their own account) that are not in connection with the automatic portability transaction. Additionally, neither the statutory exemption in Code section 4975(d)(25) nor the proposed regulation contains an exemption for acts described in Code section 4975(c)(1)(F) (relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the income or assets of the plan) except for the limited relief for a fee paid by a plan sponsor, noted above. Such acts described in Code sections 4975(c)(1)(D), (E), and (F) are separate transactions not described in Code section 4975(d)(25). Further, neither the statutory exemption in Code section 4975(d)(25) nor this proposed regulation contains an exemption from other provisions of the Code, such as section 401, or other provisions of law which may impose requirements or restrictions relating to the transactions that are exempt under Code section 4975(d)(25). As defined in Code section 4975(f)(12)(A)(ii) and in this proposed regulation, an automatic portability provider is a person, other than an

individual, who executes the automatic portability transaction on the same terms to all transfer-in plans and Default IRAs that use the provider.

The Department interprets the "in connection with" language from Code section 4975(d)(25) to include only those services and related fees and compensation that would not otherwise occur or be incurred if not for the automatic portability transaction or anticipation of a future automatic portability transaction. The Department requests comments on whether additional specificity regarding the types of services that are covered by Code section 4975(d)(25) should be included, for example, by a definition added to the regulations that identifies the types of services. Further, if a commenter believes more specificity would be helpful, the Department requests that the commenter include a proposed definition, list, or other identification of the services that should be covered.

2. Acknowledgment of Fiduciary Status

Code section 4975(f)(12)(B)(i) and this proposed regulation requires an automatic portability provider to acknowledge that it is a fiduciary with respect to the IRA in an automatic portability transaction.³¹ Pursuant to the statutory text authorizing the Secretary to specify the time and format of such an acknowledgment, paragraph (b)(1) of this proposed regulation requires the automatic portability provider to acknowledge in writing that it is a fiduciary as defined in Code section 4975(e)(3) upon being engaged by a plan fiduciary, as well as in the required notices and disclosures, described below, to plan participants and IRA owners. This fiduciary acknowledgement is designed to ensure that the fiduciary nature of the relationship is clear to the automatic portability provider and responsible plan fiduciaries as well as to affected participants and IRA owners.³² The automatic portability provider's acknowledgment of its fiduciary status may include a description of the scope of the fiduciary status of the automatic portability provider and may explain that, consistent with Code section 4975(e)(3), the automatic portability provider is not a fiduciary under the Code's definition with respect to any

³¹ As described in Code section 4975(f)(12)(A)(i)(I).

³² This is generally when an individual fails to respond to notices and the automatic portability provider directs the transfer of assets and assesses fees. See AO 2018–01 for a more detailed description of fiduciary status in automatic portability arrangements.

assets or administration of the plan or IRA with respect to which the automatic portability provider does not (1) have any discretionary authority, discretionary control, or discretionary responsibility (2) exercise any authority or control, and (3) render investment advice for a fee or other compensation, nor have any authority or responsibility to render such investment advice. The Department notes that it is possible that the automatic portability provider may have fiduciary status under other laws, *e.g.*, the Federal securities laws. The acknowledgment required by the exemption does not reach such status but the Department notes that the acknowledgment required by the exemption should not be presented in a way that misinforms or misleads individuals regarding potential fiduciary status under such other laws.

3. Fees

(a) Reasonable Compensation

Subject to two exceptions described below, Code section 4975(f)(12)(B)(ii)(I) and this proposed regulation permit an automatic portability provider to receive fees and compensation for services provided in connection with the automatic portability transaction, provided that the fees and compensation do not exceed reasonable compensation. The proposed regulations incorporate the existing standard regarding reasonable compensation for the provision of services found at 26 CFR 54.4975-6(e).

(b) Fee and Compensation Disclosure Requirement

This proposed regulation mirrors the statutory text by requiring the automatic portability provider to disclose to a responsible plan fiduciary of the transfer-in plan the information that a service provider to the plan would be required to disclose under 29 CFR 2550.408b-2(c). For purposes of this requirement, the disclosures would relate to the automatic portability provider's services as an automatic portability provider and not other services that may be provided. For purposes of this disclosure requirement, the automatic portability provider will be considered to be a "covered service provider" under 2550.408b-2(c)(1)(iii)(A) and (B) providing services as a fiduciary and as a recordkeeper. Since the automatic portability provider would generally be precluded from receiving third-party compensation under other provisions of the proposal, the Department does not believe the provisions of 2550.408b-2(c) related to a covered service provider under

2550.408b-2(c)(1)(iii)(C)—"other services for indirect compensation"—would be relevant. The Department seeks comments on whether there are particular compliance issues under 2550.408b-2(c) for automatic portability providers that the Department should specifically address in a final rule.

(c) Prohibition of Fees for Automatic Portability Transactions Involving a Plan of the Automatic Portability Provider or Its Affiliates

The statute prohibits an automatic portability provider from receiving any fees or compensation in connection with an automatic portability transaction involving a plan which is sponsored or maintained by the automatic portability provider. In other words, the automatic portability provider may execute such transactions, but it may not receive fees for doing so. In the Department's view, the statutory reference to the automatic portability provider in this circumstance should be read to include any affiliates of the automatic portability provider. Accordingly, paragraph (b)(2)(iv) of the proposed regulation mirrors the statutory provision by prohibiting an automatic portability provider from receiving any fees or compensation in connection with an automatic portability transaction involving a plan that is sponsored or maintained by the automatic portability provider but includes plans maintained by any of the automatic portability provider's affiliates.

(d) Prohibition on Receipt of Third-Party Compensation in Connection With Automatic Portability Transactions

Section 120(c)(5) of the SECURE 2.0 Act provides the Secretary with the regulatory authority to prohibit or restrict the receipt or payment of third-party compensation (other than a direct fee paid by a plan sponsor that is in lieu of a fee imposed on an IRA owner) by an automatic portability provider in connection with an automatic portability transaction. The proposed regulation includes text that mirrors the statutory text allowing a direct fee to be paid by a plan sponsor if it is in lieu of a fee imposed on an IRA owner. The proposed regulation includes one exception to the general restriction on third-party compensation. Specifically, under the proposal, an automatic portability provider would be able to share a portion of its fee or compensation with another automatic portability provider as long as the overall fee paid, directly or indirectly, by the plan or IRA does not increase as compared to the fees disclosed in the

description provided to the plan administrator and in the initial enrollment notice provided to the IRA owner.

The third-party compensation restriction in the proposed regulation is limited to fees and compensation in connection with the automatic portability transaction and would not prevent an automatic portability provider from receiving fees for services provided to an IRA or employer-sponsored retirement plan that are in addition to services provided in connection with the automatic portability transaction. However, the prohibited transaction relief provided in Code section 4975(d)(25) applies only to fees and compensation received in connection with the automatic portability transaction. The automatic portability provider would need to rely upon other statutory or administrative exemptions if it receives fees for providing additional services that involve prohibited transactions.

4. Data Usage and Protection

Code section 4975(f)(12)(B)(iii) prohibits an automatic portability provider from using data it obtains in connection with automatic portability transactions for any purpose other than to execute the automatic portability transactions or locate missing participants as part of its automatic portability service, except as permitted by the Secretary. The automatic portability provider is specifically prohibited by the statute from marketing or selling data relating to the IRA or to the plan participants. Paragraph (b)(3) of the proposed regulation parallels the statutory language by not permitting the use of data for any purpose other than the execution of automatic portability transactions or locating missing participants. For purposes of the restriction on marketing or selling IRA data, the Department interprets this to include specific data regarding the IRA owner. The Department is not proposing any exceptions to this restriction. However, the Department welcomes comments on whether the regulations should permit use of data for other purposes, and, if it should, what those other purposes would be, whether allowing use of data for those purposes would provide a benefit to IRA owners and plan participants, and what regulatory protections should be applied to that use of the data.

In support of the obligation to limit use of data, the proposed regulation provides that the automatic portability provider must take steps that a prudent fiduciary would take to safeguard plan participant and IRA data in its

possession or under its control.³³ The proposal further would require, if data were improperly accessed, that the automatic portability provider take appropriate remedial actions to safeguard the data based on the sensitivity of the accessed data and the nature and severity of the breach. The Department seeks comment on whether the regulation should include specific data security requirements, such as a requirement to carry insurance to cover data breaches.

5. Open Participation

Paragraph (b)(4) of this proposed regulation parallels Code section 4975(f)(12)(B)(iv) by requiring as a condition of the availability of the exemption that the automatic portability provider offer automatic portability transactions on the same terms to any transfer-in plan. This proposed requirement does not mean that fees can never change. Rather, at any given time, the fees paid for automatic portability transactions should be the same for any transfer-in plan that engages the automatic portability provider.

Based on the general regulatory authority granted to the Secretary in section 120(c) of the SECURE 2.0 Act, the Department is also proposing that open participation would require that the automatic portability provider not restrict or limit the ability of an employer-sponsored retirement plan, IRA provider (including trustees under Code section 408(a), custodians under Code section 408(h), or issuers under Code section 408(b)), or recordkeeper to engage other automatic portability providers to execute automatic portability transactions. In proposing this requirement, the Department recognizes that numerous service providers that have existing systems for automatic rollovers of mandatory distributions may want to supplement their services with automatic portability transaction features. Plan fiduciaries or service providers may determine that there are cost-effective ways to integrate services of more than one automatic portability provider to increase the likelihood of successfully locating participant funds for transfer into the transfer-in plan.

³³ See generally Cybersecurity Program Best Practices at <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf>; Online Security Tips at <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/online-security-tips.pdf>; and Tips for Hiring a Service Provider with Strong Cybersecurity Practices at <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/tips-for-hiring-a-service-provider-with-strong-security-practices.pdf>.

6. Notices

(a) Notice to the Department

The Department has an obligation under the statute to monitor and enforce the audit reporting requirements for automatic portability providers relying on the exemption, including deadlines for submitting the audit report to the Department. Accordingly, under the proposed regulation, within 90 calendar days of the date that the automatic portability provider begins operating an automatic portability transaction program that is intended to rely on prohibited transaction relief provided by section 4975(d)(25), the automatic portability provider must notify the Secretary at auto-portability@dol.gov that it is operating as an automatic portability provider in accordance with Code section 4975(d)(25). The automatic portability provider must report the legal name of each business entity relying upon the exemption and any name (e.g., trade or Doing Business As (DBA) name) under which the business entity may be operating. This notification needs to be updated to report a change to the legal or operating name(s) of the automatic portability provider that is relying upon the exemption. The automatic portability provider will have 90 calendar days to report a change to the legal or operating name. The automatic portability provider may also notify the Department if it is no longer operating in reliance upon the exemption. The notification requirement will allow the Department to monitor and enforce the audit report requirements.

(b) Model Description of Automatic Portability Program for Use in Summary Plan Descriptions by Transfer-Out and Transfer-In Plans

In the Department's view, to comply with the summary plan description (SPD) content requirements in 29 CFR 2510.102-2 that the SPD "shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan," participating transfer-out plans and transfer-in plans subject to ERISA's SPD requirements must include a description of the automatic portability program in the plan's SPD. Further, section 120(c)(3) of the SECURE 2.0 Act provides the Secretary with authority to require a transfer-in plan to fully disclose fees related to an automatic portability transaction in its SPD or summary of material modifications (SMM) to the extent an SMM is used to fulfill this SPD disclosure requirement.

The Department's existing regulatory safe harbors for automatic rollovers by

the transfer-out plan already require plan administrators for ERISA Title I plans to provide participants with an SPD or SMM that describes the plan's automatic rollover provisions. The SPD or SMM also must include: (1) an explanation that the mandatory distribution will be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity; (2) a statement indicating how fees and expenses attendant to the IRA will be allocated (i.e., the extent to which expenses will be borne by the IRA owner alone or shared with the distributing plan or plan sponsor); (3) the name, address and phone number of a plan contact (to the extent not otherwise provided in the SPD or SMM) for further information concerning the plan's automatic rollover provisions; and (4) the IRA provider and the fees and expenses attendant to the IRA.

The Department proposes a requirement that the automatic portability provider provide the administrator of participating plans with a description of the automatic portability program, including fees and expenses, that the administrator could use in fulfilling its SPD obligations, as relevant. The Department requests comments on whether the final rule should set forth specific content requirements for an automatic portability provider model notice.

(c) Notices to IRA Owner

This proposed regulation specifies two notices an automatic portability provider is required to send to IRA owners before an automatic portability transaction is executed and one notice after the automatic portability transaction is executed, as described below.

i. Initial Enrollment Notice

Section 120(c)(1) of the SECURE 2.0 Act authorizes the Secretary to require the automatic portability provider to provide a notice to IRA owners in advance of the pre-transaction notice specified in Code section 4975(f)(12)(B)(v). Consistent with this authority, this proposed regulation includes a requirement that an automatic portability provider provide an "initial enrollment notice" to the IRA owner no later than 15 calendar days after the IRA is enrolled in an arrangement that includes an automatic portability transaction component. The Department assumes that the date of enrollment will generally be the date that an IRA is established in connection with a mandatory distribution. However, for IRAs that were established

prior to the existence of the new statutory exemption, or established and then later added into an automatic portability arrangement, the enrollment date may be a later date (e.g., when the IRA provider begins acting as an automatic portability provider or engages an automatic portability provider to begin including the IRA in a locate-and-match service).

The Department requests comments regarding the 15-calendar-day timeframe for sending the initial enrollment notice, particularly if the automatic portability provider is not the provider of the IRA. In this regard, the Department requests comments about the process by which IRAs that are not established with or provided by the automatic portability provider would engage an automatic portability provider and how the automatic portability provider would ensure that such a notice would be provided.

The Department proposes that the initial enrollment notice would include a variety of information regarding the nature of the automatic portability transaction and additional aspects of the IRA arrangement that are required to be included in the pre-transaction notice, discussed below. The Department anticipates that this notice requirement could be satisfied by including the information specified in proposed paragraph (b)(5)(iv) in the notice required under Code section 401(a)(31)(B) upon the establishment of a Default IRA.

ii. Pre-Transaction Notice

Paragraph (b)(5)(iv) of the proposed regulation incorporates the statutory provisions of Code section 4975(f)(12)(B)(v) requiring the automatic portability provider to provide a pre-transaction notice to the IRA owner at least 60 days before an automatic portability transaction occurs with information describing the automatic portability transaction, fees to be received in connection with the transaction, the right to elect not to participate in an automatic portability transaction, distribution options, deadlines for making elections, a telephone number for the automatic portability provider, and the right to and procedures for designating a beneficiary.

The proposed regulation provides additional clarification regarding the timing of the pre-transaction notice by requiring that the notice be sent no earlier than 90 days in advance of the automatic portability transaction. This is intended to ensure that the notice is sent sufficiently close to the actual execution of the automatic portability transaction so that the assets of the IRA

do not remain there for an unreasonable period waiting to be rolled-in to the transfer-in plan.

The Department seeks comments on the proposed pre-transaction notice and whether additional information should be required. The Department is particularly interested in comments regarding 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, as well as any plain language examples to help the IRA owner better understand the various aspects of an automatic portability arrangement. Relatedly, the Department requests comment on whether model disclosures or model language for the pre-transaction notice would be helpful and encourages commenters who support a model disclosure or model language, model charts, or other formats submit suggestions for the model language, chart or format they believe would help ensure readability and accessibility for the target audience. The Department also requests comment on whether a final rule should specify a minimum amount of time that the IRA owner has to make an election to opt out of the automatic portability transaction, e.g., no sooner than 10 days before the anticipated execution of the automatic portability transaction identified in the pre-transaction notice.

iii. Post-Transaction Notice

This post-transaction notice, which would occur after a transfer-in plan receives an individual's IRA funds, is the last notice that the automatic portability provider would be required to provide to the IRA owner or plan participant. Paragraph (b)(5)(v) of this proposed regulation incorporates the statutory requirements in 4975(f)(12)(B)(vi). The statute requires that no later than three business days after the completion of an automatic portability transaction, the automatic portability provider shall provide notice to the IRA owner of the actions taken by the automatic portability provider with respect to the IRA. The statute also requires the notice to include all relevant information regarding the location and amount of any transferred assets, a statement of fees charged against the IRA or transfer-in plan account in connection with the transfer, and a contact phone number for the automatic portability provider.

The proposed regulation provides some minor clarifying language intended to explain the Department's view regarding the information needed to satisfy the statutory language. For

instance, the proposed regulation adds that (1) a description of the actions taken by the automatic portability provider specifically includes that the individual was matched with an account in a new employer plan, (2) relevant information regarding the amount of transferred assets includes the name of the employer and name of the plan where the assets were transferred, and (3) the telephone number required by the statutory text is a customer service telephone number.

The Department requests comment on whether model disclosures or model language for the post-transaction notice would be helpful and encourages commenters to submit language or formats they believe would help ensure readability and accessibility for the target audience.

(d) Consolidation of Automatic Portability Provider Notices With Other Disclosures

The Department understands that an automatic portability provider may also be the designated provider of Default IRAs for a transfer-out plan and may be providing notices required by the Code and/or the Department's Safe Harbor Regulation. To the extent that the automatic portability provider has been engaged to provide notices to participants in connection with mandatory distributions on behalf of employer-sponsored plans, the notices and disclosures to individuals required by the statutory exemption and this proposed regulation would not have to be provided separately. However, the automatic portability provider should take care to ensure that the information required by the notice provisions to individuals in this proposed regulation is clearly displayed to reduce possible confusion with other provided information.

(e) Accessibility of Disclosures to Participants and IRA Owners

Paragraph (b)(5)(vi) of this proposed regulation parallels the statutory text of Code section 4975(f)(12)(B)(vii) by requiring all required notices to participants and IRA owners to be written in a manner calculated to be understood by the average person and not include inaccurate or misleading statements. The proposed regulation includes provisions intended to clarify and explain this requirement. In the Department's view, the idea of an "average person" in the context of understanding the notices under the exemption should be read as the average person receiving the notices rather than an abstract concept of an average person at large. Accordingly, the proposed

regulation speaks in terms of the average intended recipient of the notices. The proposal also specifies that the disclosures must be accurate, not misleading,³⁴ and sufficiently comprehensive to apprise the individual of their rights and obligations under the automatic portability program, must not be formatted to have the effect of misleading, misinforming, or failing to inform the recipient, and be written in a culturally and linguistically appropriate manner (see discussion below). In fulfilling these requirements, the proposed regulation requires the automatic portability provider to 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 use of clear cross references, and a table of contents. These proposed requirements are modeled on the Department's regulation governing the style and format of SPDs that plan administrators are required to provide plan participants and beneficiaries.³⁵

(f) Culturally and Linguistically Appropriate Standards for Required Notices and Disclosures to Participants and IRA Owners

The proposed regulation would require that notices and disclosures to participants and IRA owners be provided in a culturally and linguistically appropriate manner in certain situations. The proposal essentially adopts the ACA standard for group health benefit notices.³⁶ Specifically, if the address of a recipient of a required notice or disclosure is in a county where 10 percent or more of the population is literate only in the same non-English language, the notice or disclosure must include a prominent statement in the relevant non-English language about the availability of language services. The automatic portability provider would also be required to provide a verbal customer assistance process in the non-English

language and provide written notices in the non-English language upon request.

(g) Ensuring Participants and IRA Owners Receive Notices

Section 120(c)(10) of the SECURE 2.0 Act authorizes the Secretary to issue regulations to ensure that the participants and IRA owners, "in fact, receive all required notices and disclosures." Furthermore, Section 120(c)(7) of the SECURE 2.0 Act grants the Secretary regulatory authority to require the automatic portability provider "to take actions necessary to reasonably ensure that participant and beneficiary data is current and accurate." To this end, paragraph (b)(5)(vii) of the proposed regulation would require the automatic portability provider to adopt and implement prudent policies and procedures to ensure that it obtains individual participant and IRA owner data necessary to effectively administer the automatic portability program and that the participant and IRA owner data in its possession or control is current and accurate. The proposed regulation also specifies that notices and disclosures to participants and IRA owners must be made using methods that satisfy the disclosure requirements in 29 CFR 2520.104b-1(b). The regulation at 29 CFR 2520.104b-1(b) provides a general standard that covered materials shall be furnished using "measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." The Department requests comments on how an automatic portability provider 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. The Department also invites comments on whether the regulation should specifically address electronic disclosure of notices and disclosures under the exemption, including how to deal with undeliverable electronic notices.

7. *Frequency of Searches*

The proposed regulation parallels the Code section 4975(f)(12)(B)(viii) requirement that the automatic portability provider query on at least a monthly basis whether any individual with an IRA has an account in a transfer-in plan. The Department believes that verification of the information used in connection with performing searches is important to carrying out the purposes of the statutory exemption. Accordingly,

under the proposal, the automatic portability provider must perform ongoing participant address validation searches via automated checks of (1) National Change of Address records, (2) two separate commercial locator databases, and (3) any internal databases maintained by the automatic portability provider. If a valid address is not obtained from the automated checks, the automatic portability provider must also perform a manual internet-based search. The proposal would require these verification steps to be performed at least twice in the first year an account is entered into the automatic portability provider system and once a year thereafter. The Department invites comments on whether additional or different verification steps should be required and on whether a final regulation should specifically list other information to be used in the searches that may aid in validating a match, for example, beneficiary information. In the Department's view, the statutory exemption's description of the search requirement envisions the automatic portability provider taking reasonable steps to verify the accuracy of the information used for conducting the required searches.

The Department requests comment on whether the final regulations should permit the query to be performed by a partnering recordkeeper in addition to the automatic portability provider and how the automatic portability provider would share information with recordkeepers for purposes of running the query. If the Department permits this under the final regulations, the Department anticipates that the ultimate obligation to ensure the required searches are performed would remain with the automatic portability provider. The Department also requests comment on whether there should be specific parameters or obligations for partnering recordkeepers if they are permitted to run the queries. Finally, if any commenter believes partnering recordkeepers should be permitted to run queries, the Department requests any additional information that would support the need and rationale for permitting this under a final regulation.

8. *Monitoring Transfers*

The Department believes 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. The Department believes general prudence obligations would require such monitoring but is including this

³⁴ The Department would consider it misleading, for example, for the automatic portability provider to include in notices to individuals any exculpatory clauses or indemnification provisions that are not permitted under this proposed regulation or by applicable law.

³⁵ 29 CFR 2520.102-2.

³⁶ See, e.g., 29 CFR 2590.715-2715 and 2590.715-2719(e).

requirement in the proposed regulation pursuant to the general regulatory authority provided to the Department in section 120(c) of the SECURE 2.0 Act and the authority transferred to the Secretary under section 102 of Reorganization Plan No. 4 of 1978. Paragraph (b)(7) of the proposed regulation requires that the automatic portability provider ensure that each transfer-in plan for whom the automatic portability provider performs automatic portability transactions designates a plan official responsible for monitoring transfers into the plan and confirming that amounts received on behalf of a participant are invested properly. Under the proposal, amounts received would be deemed to be invested properly if made according to the participant's current investment election under the plan or, if no election is made or permitted, in the plan's qualified default investment alternative under 29 CFR 2550.404c-5 or in another investment selected by a fiduciary with respect to such plan.

9. *Timeliness of Execution*

Code section 4975(f)(12)(B)(ix) requires timely execution of transfers by requiring the automatic portability provider to transfer the liquidated account balance of the IRA as soon as practicable. Paragraph (b)(8) of the proposed regulation incorporates the statutory text and includes provisions intended to clarify the statutory requirement. First, the proposal clarifies the timeliness of execution is measured from the date after the final deadline passes for the affected individual to affirmatively elect not to participate in the transaction, as specified in the pre-transaction notice. The proposed regulation also provides that the automatic portability provider must follow timeframes formally established in policies and procedures, discussed in more detail below. The proposal does not include a specific timeframe for what would be considered "as soon as practicable" but requests comments on whether the final rule should include such a specific timeframe or other clarification of the standard.

10. *Limitation on Exercise of Discretion and Policies and Procedures*

Code section 4975(f)(12)(B)(x) provides that the automatic portability provider will neither have nor exercise discretion to affect the timing or amount of the transfer pursuant to an automatic portability transaction other than to deduct the appropriate fees. Paragraph (b)(9) of the proposed regulation incorporates the statutory limitation on discretion and expands upon the

statutory text by specifying that an automatic portability provider will be deemed to satisfy the limited discretion requirement if it establishes, maintains, and follows policies and procedures regarding the process for executing automatic portability transactions. The policies and procedures must set specific standards and timeframes that are equally applied to all automatic portability transactions. The Department is proposing the policies and procedures to operationalize the limited discretion standard in accordance with the general regulatory authority granted to the Secretary under section 120(c) of the SECURE 2.0 Act and the authority transferred to the Secretary under section 102 of Reorganization Plan No. 4 of 1978. The policies and procedures are intended to ensure that the automatic portability provider is acting in accordance with its obligations under the exemption and these regulations and consistently with the intent of the statutory exemption. The Department also believes the policies and procedures will ensure that there is appropriate operational documentation by the automatic portability provider to support the audit, described below.

The policies and procedures must, at a minimum, specifically and prudently address: (1) the process to ensure that transfer-in plans designate a plan official that will be responsible for monitoring transfers into the plan due to automatic portability transactions; (2) the process and timing for liquidating the assets of the Default IRA to cash and closing the IRA; (3) the process for verifying and validating that the correct fees are withdrawn from the Default IRA; (4) the process and timing for transmitting assets to the transfer-in plan; (5) verifying the assets were received by the transfer-in plan; and (6) sending all notices to plan participants or individuals on whose behalf a Default IRA is established as required in this proposed regulation.

11. *Audit and Corrections*

(a) *Audit and Audit Report*

Code section 4975(f)(12)(B)(xi) includes a requirement for an annual audit to be conducted in accordance with regulations promulgated by the Secretary. The statute requires that an audit be conducted that demonstrates compliance with Code section 4975(f)(12) and any regulations thereunder and that identifies any instances of noncompliance with the statute or such regulations. The statute requires the automatic portability provider to submit a copy of the auditor's report to the Secretary in such

form and manner as specified by the Secretary.

(b) *Auditor and Auditor's Report*

After consideration, the Department is proposing that the audit be an independently conducted audit to best ensure that the automatic portability provider is executing automatic portability transactions in a manner that is consistent with ERISA and that promotes the retirement security of workers. An auditor will be considered independent if: (1) the auditor is a person or an entity that the automatic portability provider does not own or control, and (2) the auditor does not derive more than two percent of its annual revenue from services provided directly or indirectly to the automatic portability provider or any of its affiliates. In addition, the auditor must have the appropriate technical training and proficiency necessary to carry out the audit. The Department invites comments regarding the two percent threshold. The Department believes the two percent threshold supports a presumption of independence but requests comment with supporting rationale if affected entities believe a higher threshold should be permitted. Additionally, the Department requests comment on what additional protections commenters would propose to support one or more higher thresholds.

Paragraph (c) of this proposed regulation would also require the independent auditor to review the automatic portability provider's policies and procedures as well as representative samples of the required disclosures and related automatic portability transactions sufficient for the auditor to make the required audit determinations and findings. The findings must be memorialized in a written audit report, which would include the following: (1) the number of completed automatic portability transactions during the audit period; (2) whether the required notices met the timing and content requirements of these regulations; (3) whether the required notices were written and delivered in a manner reasonably designed to ensure that affected individuals would both receive and understand the notices; (4) whether any required notices were returned as undeliverable and what steps were taken by the automatic portability provider to address undeliverable notices; (5) whether the appropriate transfer-in plan accounts received all the assets due as a result of the automatic portability transactions; (6) a summary of all fees charged by the automatic portability provider (and any

affiliates) for services in connection with automatic portability transactions, including whether those fees increased since the last report; (7) whether the fees and compensation received by the automatic portability provider (including its affiliates) are consistent with the fees authorized by the appropriate fiduciaries and did not exceed reasonable compensation; (8) whether all requirements of section 4975(f)(12) and these proposed regulations were satisfied with respect to: (a) the policies and procedures and (b) the transactions and disclosures that were reviewed; (9) a summary of compliance issues reported to or discovered by the auditor, the auditor's recommendations, and the extent to which the automatic portability provider has addressed or is addressing the issues pursuant to the correction procedures; (10) any other recommendations from the auditor to improve the policies and procedures and overall execution of automatic portability transactions; and (11) a description of the auditor's audit methodology. In order to assist the auditor in the review, the automatic portability provider is required to grant the auditor access to its automatic portability operations and records (including, as necessary, the operations and records of its affiliates) sufficient to allow the auditor to make the determinations and findings noted above.

Section 120(d) of the SECURE 2.0 Act requires the Secretary to provide periodic reports to Congress that include a variety of information related to automatic portability transactions and portability arrangements more generally. The Department envisions that most of the information required for this report to Congress will come from information included in the audit reports filed by automatic portability providers. Therefore, the Department is proposing that the written audit report would also include: (1) the number of automatic rollovers of mandatory distributions from qualified plans into Default IRAs that are included in the automatic portability program;³⁷ (2) the number of completed automatic portability transactions; and (3) the number of Default IRAs separately in each of the following categories: (a) which have been transferred to designated beneficiaries, (b) for which the automatic portability provider is

searching for next of kin due to a deceased IRA owner without a designated beneficiary, and (c) that were reduced to a zero balance while in the automatic portability provider's custody.

If the automatic portability provider does not have direct access to any information required to be included in the audit report, the automatic portability provider would be required, as a condition of its services, to obtain appropriate information from partnering recordkeepers and participating plans in their possession or control, on request from the automatic portability provider, so it can be provided to the independent auditor and incorporated into the audit report.³⁸ The Department seeks comments on the availability of any information not otherwise directly accessible by the automatic portability provider and if there are any barriers to obtaining this information from participating recordkeepers or employer-sponsored plans. The Department also seeks comment on whether there are other readily available sources for such information that would be accessible to the Department.

i. Timing of Audit Report & Certification

This proposed regulation would require the independent auditor to complete the audit within 180 calendar days following the annual period to which the audit relates. The automatic portability provider must then submit a copy of the written audit report to the Department at *auto-portabilityaudit@dol.gov* within 30 calendar days of completion. The automatic portability provider's submission to the Department must also include a certification, under penalty of perjury, that the automatic portability provider reviewed the audit report and that, to the best of its knowledge at the time, it has addressed, corrected, or remedied any noncompliance or inadequacy, or has an appropriate written plan to address any such issues identified in the audit report.

(c) Corrections

Section 120(c)(9) specifically grants the Secretary authority to provide for correction procedures in the event the auditor determines the automatic portability provider was not in compliance with the statute and related regulations. To effectuate the intent of this provision, the Department is

proposing three components for corrections.

First, the Department is providing an opportunity for an automatic portability provider to make certain self-corrections. Under paragraph (c)(9)(i), the Department would not consider a non-exempt prohibited transaction to have occurred due to a violation of the requirements of Code section 4975(f)(12) and these regulations with respect to a transaction, provided that either the violation does not result in investment losses to the Default IRA or the automatic portability provider made the IRA whole for any resulting losses. In order to self-correct in those situations, the automatic portability provider would be required to correct the violation and document the correction in writing within 30 calendar days of correction. The correction would only be permitted if it occurs no later than 90 calendar days after the automatic portability provider learned of the violation or reasonably should have learned of the violation. Finally, all instances of noncompliance and accompanying corrections would be required to be reported in writing to the auditor and the auditor would have to agree that the transaction did not result in investment losses or that the IRA was made whole. The Department solicits comments on whether specific criteria should be included in the final rule on measuring investment losses and make whole requirements.

The second component for corrections involves additional recommendations from the auditor. If the auditor determines that the automatic portability provider was not in compliance with any provision of Code section 4975(f)(12) or these regulations during the audit period, the auditor must identify the instances of noncompliance in the audit report along with its recommended corrections. An automatic portability provider would not be treated as having failed to comply with any provision of Code section 4975(f)(12) or these regulations, provided it corrects any instance of noncompliance identified by the auditor as soon as reasonably practicable according to the auditor's recommendations.

The Department believes that the first two components for corrections will provide an automatic portability provider with additional incentive to take the audit process seriously, timely identify and correct violations of Code section 4975(f)(12) and these proposed regulations, and use the audit process to correct deficiencies in the automatic portability provider's operations to avoid potential future violations,

³⁷ Sec. 120(d)(1)(A)(i) uses the term "automatic cash outs" but the Department believes, based on the context, that it is referring to automatic rollovers of mandatory distributions as that term is used throughout this preamble.

³⁸ The automatic portability provider may not have direct access to all the information identified in section 120(d) of the SECURE 2.0 Act if, for instance, the automatic portability provider is not the provider or custodian of all IRAs for which it will execute automatic portability transactions.

penalties, losses to IRA owners/plan participants, and lawsuits.

The third and final component for corrections would involve the Secretary requiring an automatic portability provider to submit to supplemental audits and corrective actions if significant compliance issues are uncovered. The Department is proposing the following scenarios involving the automatic portability provider or an affiliate under which the Secretary may impose additional corrective actions: (1) engaging in a systematic pattern or practice of violating any provision of section 4975(f)(12) or an implementing regulation; (2) intentionally violating any provision of section 4975(f)(12) or an implementing regulation; (3) providing materially misleading information to the Secretary, Secretary of the Treasury, or the auditor in connection with automatic portability transactions; (4) a foreign or domestic criminal conviction involving or arising out of the conduct of the automatic portability program or any automatic portability transaction; or (5) a foreign (or foreign equivalent)³⁹ or domestic criminal conviction for any felony involving the following crimes: 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.

12. Automatic Portability Provider website

The proposed regulation in paragraph (d) parallels the statutory language in Code section 4975(f)(12)(B)(xii) requiring the automatic portability provider to: (1) maintain a website which contains a list of recordkeepers with respect to which the automatic portability provider carries out automatic portability transactions and (2) list all fees paid to the automatic portability provider. Under the proposed regulation the list would have to include the fees and the identity of the party or account that is paying the particular fee. The proposal also requires that the website include the number of plans and participants

³⁹ The Department does not expect that foreign crimes will arise frequently in connection with automatic portability providers, but if they do, impacted entities may contact the Department for guidance. Additionally, the Department requests comment regarding whether any additional process should be provided for foreign crimes before the Department imposes supplemental audits or corrective actions, particularly those foreign crimes that raise issues regarding their equivalence to a domestic crime.

covered by each recordkeeper. The Department solicits comments on whether other documents or materials should be required to be posted on the website, for example, a copy of the independent auditor's audit report redacted as needed to protect confidential business information, if any, in the audit report.

Because the Department anticipates that automatic portability providers may include a range of other services and information, customer support features, and functionalities in addition to automatic portability transactions, the proposal would also require the website to display automatic portability transaction-related information in a way that differentiates that information from other information or elements of the website (e.g., separately identifying the automatic portability transaction fees and services from fees and services in connection with establishing and custody of a Default IRA).

The Department intends that these website disclosures and additional parameters will make it easier for plan sponsors to independently assess the overall cost of an automatic portability arrangement in connection with signing up for an automatic portability transaction service covered by the statutory exemption and this regulation.

13. Limitations on Exculpatory Provisions

Section 120(c)(6) of the SECURE 2.0 Act specifically provides the Secretary with the authority to place limitations on exculpatory provisions due to an improper transfer of Default IRA assets. Therefore, the Department is proposing that the automatic portability provider may not include exculpatory provisions in its contracts disclaiming or limiting the automatic portability provider's liability in the event that the automatic portability transaction results in an improper roll-in to the transfer-in plan. However, this requirement would not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a party independent of the automatic portability provider and its affiliates, or damages arising from acts outside the control of the automatic portability provider. Section 120(c)(6) of the SECURE 2.0 Act does not specifically address other exculpatory provisions. The Department 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.

14. Record Retention

This proposed regulation incorporates the statutory language in Code section 4975(f)(12)(B)(xi)(I) regarding record retention by requiring that an automatic portability provider maintain, for not less than six years, records sufficient to demonstrate compliance with the requirements of the statute and this proposed regulation and make them available to authorized employees of the Department and the Department of the Treasury within 30 calendar days of a written request. This proposal also includes clarifying language regarding the record retention requirement and its impact on the prohibited transaction relief provided by Code section 4975(d)(25), which clarifying language the Department has frequently included in administrative prohibited transaction exemptions. First, the proposal provides that no prohibited transaction will be considered to have occurred if, solely because of circumstances beyond the control of the automatic portability provider, the records are lost or destroyed before the six-year period ends (e.g., due to a natural disaster). Second, an automatic portability provider's failure to maintain the records necessary to determine whether the conditions of Code section 4975(d)(25) and this regulation have been met will result in the loss of the relief provided under this exemption only for the transaction or transactions for which such records are missing or have not been maintained. Such failure does not affect the relief for other transactions if the automatic portability provider maintains records for such other transactions in compliance with the record retention requirements.

15. Definitions

The Department included three definitions in proposed paragraph (g). The proposed definition of "affiliate" is consistent with the Department's definition of affiliate in many other regulations.⁴⁰ Likewise, the definition of "control" is intended to be consistent with the Department's use of that term in other regulations.⁴¹ The definition of "individual retirement plan" refers to an individual retirement account or annuity described in Code section

⁴⁰ A person or entity is an "affiliate" if, directly or indirectly (through one or more intermediaries) it controls, is controlled by, or is under common control with such person or entity; or is an officer, director, or employee of, or partner in, such person or entity. Unless otherwise specified, an "affiliate" refers to an affiliate of the automatic portability provider.

⁴¹ The term "control" means the power to exercise a controlling influence over the management or policies of an entity or person other than an individual.

408(a) or 408(b). The Department requests comment on whether any other definitions may be necessary to provide additional clarity to the proposed regulation.⁴²

E. Request for Public Comments

The Department invites comments from interested persons on all facets of the proposed rule. Commenters are free to express their views not only on the specific provisions of the proposal as set forth in this document, but on any issues germane to the subject matter of the proposal. Comments should be submitted in accordance with the instructions at the beginning of this document.

Without limiting the generality of the above request for comments, the Department requests comments on whether the rule should include provisions that specially address issues related to IRA beneficiaries. The statutory provisions envision an automatic portability transaction as a transfer of assets “made from an individual retirement plan which is established on behalf of an individual and to which amounts were transferred under section 401(a)(31)(B)(i)” to an eligible employer-sponsored retirement plan in which “such individual is an active participant.” The statutory provisions do not expressly reference moving funds for a beneficiary from a default IRA to an employer-sponsored plan in which the beneficiary participates. The statutory provisions similarly require notices to “the individual on whose behalf the individual retirement plan . . . is established.” Nonetheless, the Department notes the recordkeeping provisions in the statute expressly reference the automatic portability provider taking steps to ensure it has accurate beneficiary information and the statutory provisions on the required Report to Congress call for separate identification of IRAs transferred to designated beneficiaries and IRAs for which a next of kin is being identified after the death of the IRA owner without a designated beneficiary. Accordingly, the Department is interested in comments on whether the final regulation should address specific beneficiary issues, and, if the commenter believes it should, the Department asks that the commenter identify the issue or issues and include recommendations on how the issue or issues should be addressed in the regulation.

⁴² As one example, should the Department define “active participant” or is this term generally understood?

The Department also specifically requests comments on exemptive relief for Default IRAs involving rollovers of mandatory distributions with a value of \$1,000 or less. The proposal does not expressly include such mandatory distributions in light of the SECURE 2.0 Act amendment of Code section 4975 defining the term “automatic portability transaction” to mean 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. As noted elsewhere in this document, Code section 401(a)(31)(B)(i) refers to distributions of nonforfeitable accrued benefits the present value of which is in excess of \$1,000 but less than or equal to \$7,000. The Department confronted a similar issue in implementing section 657(c)(2)(A) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), which directed the Department to issue regulations providing safe harbors under which (1) a plan administrator’s designation of an institution to receive the automatic rollover, and (2) the initial investment choice for the rolled-over funds would be deemed to satisfy the fiduciary responsibility provisions of section 404(a) of ERISA. Section 657 of EGTRRA also referenced Code section 401(a)(31)(B) automatic rollovers. However, in its final rule in 2004, the Department, in response to public comments, included mandatory distribution amounts of \$1,000 or less noting that, although not described in Code section 401(a)(31)(B), tax-qualified retirement plans are permitted to distribute to a separating participant without the participant’s consent provided the present value of the participant’s vested accrued benefit did not exceed the maximum value at that time of \$5,000.⁴³ The Department said that, after taking into account the purpose and provisions of the safe harbor regulation, it was persuaded that application of the safe harbor to rollovers of mandatory distributions of \$1,000 or less was appropriate because the availability of the safe harbor for such distributions might increase the likelihood that such amounts will be

⁴³ See 29 CFR 2550.404a–2(d); Final Rule on Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor, 69 FR 58018 (Sept. 28, 2004).

rolled over to individual retirement plans and thereby may promote the preservation of retirement assets without compromising the interests of the participants on whose behalf such rollovers are made.⁴⁴ In addition, some plans may find it advisable to provide for automatic rollovers of all sizes of small accounts to avoid the issues that arise when distribution checks remain uncashed.⁴⁵ Thus, in light of the fact that the regulatory exemption in Code section 4975 established by the SECURE 2.0 Act specifically references 401(a)(31)(B), the Department is interested in public comments on whether it should use its general exemption authority under ERISA section 408(a) to provide parallel exemptive relief for mandatory distributions of \$1,000 or less for reasons similar to those noted above in connection with the Department’s automatic rollover safe harbor in 29 CFR 2550.404a–2.

F. Regulatory Impact Analysis

The Department has examined the effects of this proposed rule as required by Executive Order 12866,⁴⁶ Executive Order 13563,⁴⁷ the Congressional Review Act,⁴⁸ the Paperwork Reduction Act of 1995,⁴⁹ the Regulatory Flexibility Act,⁵⁰ section 202 of the Unfunded Mandates Reform Act of 1995,⁵¹ and Executive Order 13132.⁵²

1. *Executive Order 12866 (Regulatory Planning and Review), Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review)*

Under E.O. 12866 (as amended by Executive Order 14094), the Office of Management and Budget (OMB)’s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result

⁴⁴ Id. at 58019.

⁴⁵ See “The Benefits of Mandatory Distributions,” A White Paper by Fred Reish and Bruce Ashton (2013)(available at https://fredreish.com/wp-content/uploads/2013/03/The-Benefits-of-Mandatory-Distributions-A-White-Paper-February-2013_NEW.pdf).

⁴⁶ Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

⁴⁷ Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

⁴⁸ 5 U.S.C. 804(2) (1996).

⁴⁹ 44 U.S.C. 3506(c)(2)(A) (1995).

⁵⁰ 5 U.S.C. 601 *et seq.* (1980).

⁵¹ 2 U.S.C. 1501 *et seq.* (1995).

⁵² Federalism, 64 FR 43255 (Aug. 10, 1999).

in a rule that may: (1) have an annual effect on the economy of \$200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. OMB has determined that this revision is a significant regulatory action under section 3(f)(1) of E.O. 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

2. Need for Regulation

When American workers change jobs, they often encounter frictions that result in reduced retirement savings in aggregate. This regulation will alleviate some of those frictions, resulting in more retirement savings, which will improve Americans' preparation for retirement. This is particularly beneficial given the wider context that many workers have insufficient retirement savings. Only 57 percent of households headed by 55–64 year olds held any retirement savings accounts in 2022, and the median amount in those accounts was \$185,000.⁵³ The Federal Reserve reports that only one-third of Americans view their retirement savings plan as sufficient to meet their needs in retirement.⁵⁴ This is consistent with projections by VanDerhei (2019)

showing that about 41 percent of households ages 35 to 64 will run short of money in retirement.⁵⁵ Similarly, Brown et al. (2018) find that nearly 77 percent of Americans are behind in saving for retirement given their age and income.⁵⁶

Previous generations of American workers who had a retirement plan usually had a defined benefit (DB) pension plan that promised fixed payments to them upon retirement. An employee's retirement benefit under a DB plan often is based on a percentage of their final year's compensation multiplied by their total years of employment with the sponsoring employer.⁵⁷ Workers who changed jobs and moved to another plan, however, received less benefits from DB plans, as these plans often had a five-year cliff vesting policy, so a worker who stayed at a job for fewer than five years received no retirement benefits from that job. Even when a worker accrued benefits under a former employer's DB plan, the effects of inflation often meant that their final year's salary earned from their former employer tended to be lower than their final year's salary earned from a subsequent employer before retirement. Since the employee's final year's salary is a key factor in the benefit formula, they would receive lower lifelong pension benefits as a result of switching jobs even if they worked the same number of years at the same salaries.

In recent decades defined contribution (DC) plans have supplanted DB plans as the most prevalent type of pension plan provided to workers.⁵⁸ DC plans, such as 401(k) plans, base their benefit on employer and employee contributions to an individual's account and the investment earnings on their account balance. Currently, 49 percent of private industry workers (59 percent of full-time private industry workers) are participating in a

DC plan.⁵⁹ For workers that change jobs frequently, DC plans have certain portability advantages over traditional DB plans. Public policies such as this new automatic portability statutory exemption and this proposed regulation can further benefit participants by facilitating portability among DC plans and IRAs.

In the current retirement system where employer-sponsored DC plans are the primary vehicle available for employees to save for retirement, an employee separating from service with an employer may be suddenly confronted with an important financial decision regarding how to handle retirement assets they have accrued in their employer's DC plan. Making it simpler for employees to consolidate their retirement accounts and maintain their tax-favored status can improve retirement security for American workers.

Currently, employees who change jobs generally have the following four options for handling their retirement assets:

1. Leave the assets in their former employer's plan. The separating employee can do this if the value of their accrued benefit under the plan meets any threshold imposed by the plan, which can be at most \$7,000 beginning in 2024. (A participant might choose this option because they find the former plan's services, investments, and fees to be attractive or because of simple inattention.)
2. Roll over their savings into a retirement plan sponsored by their new employer.
3. Roll over their assets into an IRA.
4. Cash out the balance.

The first three of these options, where the assets are in a plan or an IRA, retain their tax-preferred status. A cashout, on the other hand, results in the loss of tax-preferred status for those assets. It is no longer earning investment returns that are tax-deferred. The funds are distributed directly to the employee and are subject to regular income taxes. Additionally, a 10 percent penalty tax applies if the employee is under age 55 throughout the year in which they terminate service with the employer and if the employee does not qualify for an exception.

When a plan participant separates from service with an employer with an account balance in the former employer's DC plan, the former employer has the option to immediately

⁵³ 2022 Survey of Consumer Finance. "Retirement Account by Age of Reference Person," The Fed—Table: Survey of Consumer Finances, 1989–2022 (federalreserve.gov).

⁵⁴ Federal Reserve. "Survey of Household Economics and Decisionmaking." 2022.

⁵⁵ Jack VanDerhei, "Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model." Employee Benefit Research Institute (March 7, 2019).

⁵⁶ Jennifer Brown, Joelle Saad-Lessler, and Diane Oakley. "Retirement in America: Out of Reach for Working Americans?" National Institute on Retirement Security. 2018.

⁵⁷ U.S. Bureau of Labor Statistics, Employee Benefits, "Retirement plan provisions for private industry workers in the United States," Table 2, reference year 2022, (April, 2023). Available at: <https://www.bls.gov/ebs/publications/retirement-plan-provisions-for-private-industry-workers-2022.htm>.

⁵⁸ Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975–2021*, (September 2023), Table E4, (September 2023), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>.

⁵⁹ U.S. Bureau of Labor Statistics, National Compensation Survey, Series: NBU290000000000000026313 & NBU29000000000000002526313, (March, 2023), Available at: <https://data.bls.gov/cgi-bin/srgate>.

cash out account balances of \$5,000 or less without the participant's consent (if the plan has a provision allowing the immediate distribution).⁶⁰ These distributions are a form of cashout and are often referred to as "mandatory distributions." If, however, the participant's account balance is between \$1,001 and \$5,000, and the participant does not elect to have the account balance paid to an eligible retirement plan or receive the distribution directly in cash, then the plan administrator of the former employer's plan must transfer such account balance to a so-called "Default IRA" if this is required by the plan's provisions. These distributions are commonly referred to as "force-outs" or "automatic rollovers of mandatory distributions."⁶¹ As part of the SECURE 2.0 Act, Congress raised the \$5,000 threshold to \$7,000 (effective for distributions occurring after December 31, 2023).⁶²

Default IRAs, while intended to preserve retirement assets in conservatively managed accounts, typically yield only minimal returns for investors while often imposing considerable fees.⁶³ 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."⁶⁴ 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. Observing data on small balance rollover IRAs in general suggests that 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.⁶⁵

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. Also, 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.

Cashouts affect participants by removing their assets from tax-favored retirement accounts. A 2023 study by Wang, Zhai, and Lynch found that over 40 percent of separating employees report cashing out at least some of their retirement account balance, consistent with reporting from numerous recordkeepers suggesting a cashout rate of approximately 40 percent among separating participants with account balances below \$5,000.⁶⁶ VanDerhei (2019) analyzes individuals age 35 to 64, projects forward their main sources of retirement resources, estimates how much they will fall short, aggregates that across all individuals, and calculates a present value, estimating an aggregate retirement savings shortfall in excess of \$3 trillion. In light of this shortfall, 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.⁶⁷

Taking a cashout or taking no action at all may seem like the simplest and most expedient courses of action for a small-balance account participant upon job separation but can result in sub-optimal outcomes. A 2013 GAO study found that the rollover process was complex, inefficient, and burdensome for participants.⁶⁸ These findings were reinforced by a 2019 GAO report, which suggested that frictions in the rollover process likely contributed to participants cashing out their accounts prematurely.⁶⁹ Both studies advised that

improving the processes for account consolidation after job separation is imperative to reducing the leakage of assets from the retirement system.

Plan account portability is thus integral to the retention and accumulation of retirement assets for workers. Measures to improve account portability would serve to reduce participant losses due to cashouts (and the associated taxes and penalties for early withdrawals), lost accounts, duplicative fees arising from multiple accounts, and boost average investment return.

The SECURE 2.0 Act includes a new statutory prohibited transaction exemption that seeks to improve retirement plan portability by permitting an automatic portability provider to perform automatic portability transactions for participants with Default IRA accounts established as a result of a mandatory distribution from a former employer's plan if the individual does not respond to their former plan's administrator's notices.⁷⁰ If an automatic portability provider meets the conditions of the statutory exemption, it can transfer assets from a worker's Default IRA to their active account in their new employer's DC plan. The proposed rule would implement the new statutory exemption.

3. Baseline and Post Statute and Regulation Scenarios

Prior to the passage of SECURE 2.0 Act, RCH operated in the automatic portability marketplace using PTE 2019-02 which is the "baseline" scenario for this analysis. As discussed previously, the PTE was issued for a five-year term. The need to renew the PTE, and the uncertainty associated with its continual renewal, creates uncertainty for the marketplace. The baseline includes the assumptions of future renewals of PTE 2019-02 for RCH and the mandatory distribution threshold to be at the pre-statute level of \$5,000. SECURE 2.0 Act raised the mandatory distribution threshold for a plan administrator to transfer assets into a Default IRA from \$5,000 to \$7,000 and creates a statutory exemption that eliminated the uncertainty in the marketplace about the continued existence of PTE 2019-02, which should encourage the marketplace to expand its reach in the Defined Contribution universe.⁷¹ The analysis looks at the

Could Provide Insight into Early Withdrawals." Report to the Chairman, Special Committee on Aging, U.S. Senate. (2019).

⁷⁰ Internal Revenue Code section 4975(d)(25).

⁷¹ Brian Croce, "SECURE 2.0 Enshrines Auto Portability Into Law," *Pensions and Investments*,

⁶⁰ Code sections 411(a)(11) and 417(e).

⁶¹ Code section 401(a)(31)(B)(i).

⁶² See SECURE 2.0 Act, Sec. 304.

⁶³ Government Accountability Office (GAO). "401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts." (2014).

⁶⁴ *Id.*

⁶⁵ Lucas Goodman, Anita Mukherjee, and Shanthi Ramnath (2023): "Set it and forget it? Financing retirement in an age of defaults", *Journal of Financial Economics*, vol 148, p.47-68. Investment Company Institute. "The IRA Investor Profile: Traditional IRA Investors' Activity, 2007-2016." (September 2018), Appendix: Figure A.2, Page 68.

⁶⁶ Yanwen Wang, Muxin Zhai, and John G. Lynch, Jr. "Cashing Out Retirement Savings at Job Separation." (2023). Vanguard. "How America Saves." 2023. Alight. "Universe Benchmarks Report: How Workers Are Saving and Investing in Defined Contribution Plans." (2023). Alight. "Distributions from Defined Contribution Plans: What Do Workers Do with their Retirement Savings After They Leave Their Employers? A Deep Dive into Post-Termination Behavior, 2008-2017." (2019). Lucas Goodman, Jacob Mortenson, Kathleen Mackie, and Heidi R. Schramm, "Leakage from Retirement Savings Accounts in the United States," (2021) *National Tax Journal*, 74(3), 689-719.

⁶⁷ VanDerhei, "Retirement Savings Shortfalls," 2019.

⁶⁸ Government Accountability Office. "401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants." Report to Congressional Requesters. (2013).

⁶⁹ Government Accountability Office. "Retirement Savings: Additional Data Analysis

combined impacts of the SECURE 2.0 Act and the proposed regulations and does not distinguish between the two.

The baseline assumes that the recordkeepers currently performing automatic portability transactions continue to be the only recordkeepers providing automatic portability transactions in the future, therefore the percent of plans and accounts covered by automatic portability remains unchanged at 65 percent. However, the percent of plans and accounts covered by automatic portability is expected to increase in the post-rule and regulation scenario, increasing from 65 percent to 90 percent by year 10.⁷² This is actually a simplification, the average of a number that likely would have grown slightly in the absence of the Secure 2.0 Act. Before passage of the Act, in October 2022, there were only three recordkeepers who had joined the automatic portability consortium. of 2022, the Secure 2.0 Act was signed in late December 2022, and very soon shortly thereafter other large recordkeepers joined. While much of this growth in consortium members is likely related to the prospect and enactment of legislation, there might have been some growth even without the legislation. The inclusion of automatic portability in the Secure 2.0 Act increases awareness of the program and that publicity may promote growth.

This assumption is based on 2016 testimony by RCH and EBRI before the ERISA Advisory Council wherein they stated that the ability to locate and match accounts to conduct automatic portability transfers is “highly dependent on market adoption.”⁷³ As the network grows, there is a greater likelihood of being able to match a separating participant with their new employer’s plan. As a result, the benefits of belonging to the network increase, encouraging more recordkeepers to join. It is anticipated

that as a result of the legislation and the reduced uncertainty, more recordkeepers will join the consortium, and this dramatic growth is reflected in the post-rule estimates. Section 9 “Uncertainty” provides an alternative estimate reflecting growth in the number of recordkeepers joining the network in the baseline scenario. The Department requests comment on the portion of the expansion in recordkeepers joining the network that would be attributable to the proposal.

4. Affected Entities

4.1. Automatic Portability Providers

Retirement Clearinghouse (RCH), originally founded as RolloverSystems in 2001, was the first company to approach the Department for sub-regulatory guidance and prohibited transaction relief to offer an automatic portability program to plans. RCH asserted that its services would facilitate automatic rollovers into Default IRAs from accounts in plans of individuals’ former employers that are eligible for mandatory distributions under Code section 401(a)(31)(B), automatic rollovers into Default IRAs of account balances from terminated DC plans, and automatic roll-in of funds held in Default IRAs to an individual account plan maintained by the IRA owner’s new employer when the Default IRA owner changes jobs and has an account in their new employer’s DC plan. In 2019, the Department issued PTE 2019–02, an individual prohibited transaction exemption permitting RCH to receive certain fees in connection with the transfer of an individual’s Default IRA to the individual’s account in a new employer-sponsored plan, without the individual’s affirmative consent.⁷⁴

Since then, RCH’s footprint in the automatic portability space has grown with its formation of the Portability Services Network (PSN). This network currently consists of founding owning members RCH and six recordkeepers: Alight, Empower, Fidelity, Principal, TIAA, and Vanguard, and it can incorporate an unlimited number of additional member recordkeepers. While PSN operates as a separate entity from RCH that is controlled by RCH’s founding owning members, PSN solely relies on the technological infrastructure and operations established by RCH.⁷⁵ PSN’s website currently states that it does not charge a fee to recordkeepers

or plan sponsors for its automatic portability services; instead, it charges participants a one-time fee when their account balances are transferred into a new employer’s plan. Currently, the maximum transfer fee is \$30, and the fee could be lower for smaller accounts.⁷⁶

The automatic portability provider market is new and complex. Therefore, there is significant uncertainty regarding how many entities will offer automatic portability services in the future and how the automatic portability marketplace will evolve. Barriers to entry exist in the business model, because entities must have sufficient access to plan and IRA participant data and information systems technology that would allow it to match a worker’s default IRA with their plan account and transfer the employee’s Default IRA to their new employer’s plan. The larger the amount of data available to the automatic portability provider, the more successful it will be in matching participants’ Default IRAs with their active accounts in a new employer’s plan.

Based on the best available data, the Department estimates that PSN currently covers more than 60 percent of account holders in large DC plans⁷⁷ and that its market share is likely to increase further due to the new statutory prohibited transaction exemption. Due to the aforementioned barriers to entry for potential automatic portability providers, the Department is unaware of any entities other than PSN that are currently planning to become an automatic portability provider in reliance on Code section 4975(d)(25).⁷⁸ Therefore, for purposes of this analysis, the Department assumes that PSN will be the only entity providing automatic portability provider services pursuant to the statutory exemption. The Department assumes this will be the case even though RCH was granted PTE 2019–02, because the individual exemption has a limited five-year term that expires on July 31, 2024, while the

(January 27, 2023) at <https://www.pionline.com/retirement-plans/secure-20-enshrines-auto-portability-law#:~:text=The%20SECURE%202.0%20provision%20stipulates,sell%20data%20relating%20to%20the>.

⁷² In other words, for an affected participant who changes jobs in year 10, there is a 90 percent chance that their former plan has a recordkeeper that belongs to PSN and also a 90 percent chance that their new plan has a recordkeeper that belongs to PSN. This means that 81 percent of the workers who switch from one DC plan to another in year 10, have a small balance account, and do not take any affirmative action, would experience an automatic portability transaction.

⁷³ Retirement Clearinghouse, LLC, Employee Benefit Research Institute, and contributor Boston Research Technologies. “Auto Portability Research & Simulation: Automating Plan-to-Plan Transfers for Small Accounts.” Consolidated Testimony in front of the ERISA Advisory Council, June 8, 2016.

⁷⁴ See 83 FR 55741 (Nov. 7, 2018) (proposed exemption) and 84 FR 37337 (July 31, 2019) (granted exemption).

⁷⁵ Portability Services Network, *Our Structure*, (2023), <https://psn1.com/learning-center/about-psn/structure-of-psn>.

⁷⁶ Portability Services Network, *Our Fees*, (2023), <https://psn1.com/learning-center/about-psn/what-are-psns-fees#:~:text=Key%20aspects%20of%20PSN's%20fee,be%20processed%20at%20no%20charge>.

⁷⁷ Plans classified as large constitute nearly 90 percent of account holders in plans required to file the Form 5500 and must submit the Schedule C of the Form 5500, which covers service providers, such as recordkeepers. Plans considered small do not report this information. Calculation based on tabulations of the 2021 EBSA Private Pension Plan Bulletin Research File.

⁷⁸ The Department is aware of one additional entity that had expressed interest in becoming an automatic portability provider; however, the Department understands this entity is no longer moving ahead with plans to become an automatic portability provider.

statutory exemption does not, and RCH would have to request additional relief from the Department to continue relying on PTE 2019–02 after its five-year term expires. If, counter to the Department's assumption, it turns out that there is more than one automatic portability provider, the Department anticipates that the number of automatic portability providers would be very small because of the barriers to entry. They might specialize by geography or by types of plan; for example, one automatic portability provider might specialize in plans for government employees. It seems likely that their networks would overlap so both automatic portability providers could be successful in making many matches. The Department welcomes comments regarding how many automatic portability providers there would be, as well as data and other information that will allow the Department to further assess how the automatic portability marketplace will develop.

4.2. Recordkeepers

As discussed above, the Department assumes that PSN will be the only automatic portability provider in the market. PSN is structured with seven "owner members," who have board control. It allows for open recordkeeper membership without board control. In September of 2023, PSN stated that the owner members, which include Alight, Empower, Fidelity, Principal, RCH, TIAA, and Vanguard, were the only members at that time.⁷⁹ There is significant uncertainty regarding how many recordkeepers will join PSN. The Department believes that automatic portability transactions will be a desirable feature for plan sponsors and participants, which may drive growth in recordkeeper participation. Recordkeepers do not incur a direct cost to join PSN. The Department requests comment on how many recordkeepers would choose to join PSN.

While this analysis assumes that PSN will be the only automatic portability provider, the Department acknowledges that another automatic portability provider may enter the market. Entry of additional automatic portability providers may impact the number of affected recordkeepers and the manner in which those recordkeepers are affected by this proposed regulation.

According to the Department's analysis of 2021 Form 5500 data, there were 1,951 recordkeepers providing

services to private sector DC retirement plans.⁸⁰ As described in more detail in subsection 3.1 above, the six recordkeepers that are founding owner members of PSN administer accounts for over 60 percent of account holders in large DC plans that file Form 5500. The Department estimates that by the end of the ten-year estimation period for this analysis, roughly 90 percent of the DC account holders in plans filing Form 5500 would be associated with participating recordkeepers. As an illustration, this level of recordkeeper participation could be achieved if the next 12 largest recordkeepers, in terms of account holders serviced, fully participated in the program. Because the market is currently dominated by large recordkeepers, the Department anticipates that additional entry into the market will be initially dominated by other large recordkeepers. However, because of the low cost to participate in the PSN, it is possible that most recordkeepers will eventually participate in it. The Department solicits comments on its assumptions and estimates regarding recordkeeper participation.

4.3. Plans, Plan Participants, and the Number of Automatic Portability Transactions

This section derives an estimate of the number of automatic portability transactions. It does so by (1) identifying plans, participants, and assets covered by PSN-participating recordkeepers, (2) estimating the number of accounts below the mandatory distribution threshold, and (3) estimating employment separations and post-separation behavior. It estimates these figures under the baseline scenario and under implementation of the statute and regulation.

4.3.1. Plans, Participants and Assets

The proposed regulation has the potential to affect participants with account balances in any employer-sponsored retirement plan that is: (1) a qualified trust; (2) an annuity plan described in Code section 403(a); (3) an eligible deferred compensation plan described in Code section 457(b) which is maintained by an eligible employer described in Code section 457(e)(1)(A); or (4) an annuity contract described in Code section 403(b).⁸¹ Approximately

635,000 DC plans reported participants with account balances on their 2021 Form 5500. These plans cover 86.6 million participants with total account balances of \$9.3 trillion.

To understand the number of plans, participants and assets that could be impacted one would need to know if the plan's recordkeeper is part of the PSN network and if their account balance is below the mandatory distribution threshold (\$5,000 baseline or \$7,000 post statute and regulation) when they separate from employment. To identify plans with PSN-participating recordkeepers the Department queried Form 5500 Schedule C data, which has information on a plan's service providers. The data has limitations. In particular, only large plans are required to submit the Schedule C, which means the majority of plans do not have to file the Schedule C. However, the group of retirement plans required to submit the Schedule C covers nearly 90 percent of participants with account balances and 90 percent of assets, which are the main variables of interest.

The query of Schedule C data showed that the six recordkeepers that are founding owner members of PSN provided services to over 34,600 large plans (40 percent of large plans) with 47 million account holders (61 percent of account holders in large plans). These plans held \$5.5 trillion in assets (66 percent of large plan assets) in 2021.⁸²

Some plans with participants that may be impacted by the proposed rule are not required to file the Form 5500, for example state and local governmental plans. Account holders who participate in state and local governmental plans that are not covered by ERISA may also be affected by the proposed rule if their plan sponsor contracts with an automatic portability provider to provide automatic portability services. According to BLS employment data, there are almost 20 million currently employed state and local government workers in the United States.⁸³ The March 2021 National Compensation Survey: Employee Benefits in the United States indicates that 18 percent of state and local

discussion, please see section 9. Uncertainty. The number of participants is left static throughout the ten-year time period of analysis. While this could impact the overall estimate of the benefits and costs, it does not impact the relative difference between benefits and costs.

⁸² Tabulations presented are based on the 2021 EBSA Private Pension Plan Bulletin Research File.

⁸³ BLS Series Report(s) from the Current Employment Statistics program: CES9092000001 & CES9093000001, Dec 2022 data element, data accessed 10/2/2023 from: <https://data.bls.gov/cgi-bin/srgate>. 5,087,000 state employees and 14,370,000 local government employees.

⁷⁹ Portability Services Network, *PSN Participating Owner Members and Members*, (2023), <https://psn1.com/auto-portability/regulatory-information/participating-recordkeepers>.

⁸⁰ The analysis only included plans with nonzero plan assets and nonzero participants. Calculations based on the 2021 Form 5500.

⁸¹ While this rulemaking technically may apply to separated, vested DB participants as well, the Department believes that it is rare that they would be affected by the rule and therefore does not include them in its estimates. For further

government workers participate in a defined contribution plan.⁸⁴ Without more granular data, it is difficult for the Department to determine a reasonably specific proportion of these workers that could be affected by the proposed rule. However, the Department estimates that up to 3.5 million state and local government workers participate in a DC plan that may also incorporate a mandatory distribution provision for small account balances.⁸⁵

4.3.2. Accounts With Balances Less Than the Mandatory Distribution Amount

The proposed regulation directly affects participants with account balances less than \$7,000 in a plan at the time of separation from employment, previously only \$5,000.⁸⁶ To estimate the number of affected participants, the Department considered the separation rate for participants within this group and the proportion of

DC plan accounts with balances under \$7,000.

While the Department lacks data specifically on DC accounts with less than \$7,000, there are related data that are useful in the construction of an estimate. The Employee Benefit Research Institute (EBRI) reported that in 2020, 40 percent of 401(k) plan accounts with balances had less than \$10,000 in their accounts and 28 percent had less than \$5,000 in their account.⁸⁷ The Department used this data to estimate that approximately 33 percent of DC plan accounts will have balances below the new mandatory distribution threshold of \$7,000. Additionally, the Department estimates that 28 percent of DC plan accounts would have balances below the current mandatory distribution threshold of \$5,000 that represent the baseline. The Department requests comment on these assumptions and this estimate.

4.3.3. Affected Accounts

Table 1 shows the estimates of the number of accounts, how the affected accounts are identified, and how the affected accounts are impacted in the baseline scenario and post-rule scenario for the first year in the estimation period. This section explains the assumptions and calculations used to obtain the estimates in the table. A similar table could be constructed for each year, with the difference for each year being the percent of accounts covered by the automatic portability network. A key takeaway from the table is the increase in accounts in plans with the automatic portability feature from the baseline to the post-rule scenario. The increase in these accounts is the source of much of the benefits of the rule. Bolded numbers at the bottom of a table are numbers that flow into a subsequent table.

TABLE 1—AFFECTED ACCOUNTS

	Baseline	Post-rule
Defined Contribution Plan Account Holders	86,573,634	86,573,634
× Job Separation Rate Associated with Modest Account Balances	20%	20%
= Annual Account Churn	17,314,727	17,314,727
× Proportion with Balance of \$7,000 or less	33%	33%
= Affected Accounts	5,713,860	5,713,860
× Proportion of Separating Account Holders Subject to Mandatory Distribution	85%	100%
= Accounts Subject to Mandatory Distribution ¹	4,848,124	5,713,860
Accounts Not Subject to Mandatory Distribution ¹	865,736	0

¹ These values flow into Table 3.

A 2023 report by Vanguard suggests that accounts with balances below \$10,000, which is the most similar balance category that aligns with the mandatory distribution limit and therefore used as a proxy for this group, are primarily held by participants with household incomes of less than \$50,000.⁸⁸ The Federal Reserve Economic Well-Being of U.S. Households Survey of Household Economics and Decisionmaking (SHED) survey provides data on voluntary and involuntary employment separations by

income range. Based on SHED data from 2018–2022, the Department assumes a separation rate of 20 percent for workers with annual household incomes of less than \$50,000.⁸⁹ The Department uses this factor as the separation rate for small balance plans in its estimations.

The Department is interested in the post-separation behavior of both the employer/plan sponsor and account owner. A survey conducted by the Callan Institute in 2022 found that 65 percent of DC plan sponsors sought to retain assets of both retirees and

terminated participants, with 85 percent seeking to retain assets of retirees and 65 percent seeking to retain assets of other terminated participants.⁹⁰ This study also suggests that plan sponsors seek to retain separating employees' plan assets due to cost efficiencies, although half of the responding plan sponsors did not have a strategy in place for asset retention. The Department seeks comment from entities such as plan sponsors and recordkeepers with information on plan policies and

⁸⁴ BLS, "National Compensation Survey: Employee Benefits in the United States", (September 2021), Employee Benefits in the United States, March 2021 (*bls.gov*).

⁸⁵ Calculated as: 18% × (5,087,000 state employees + 14,370,000 local government employees) = 3,502,260.

⁸⁶ There are some accounts that could have balances above the \$7,000 threshold that are still subject to a mandatory distribution. See Code section 411(a)(11)(D) for circumstances where the amount of a distribution may be greater than \$5,000

if a participant made a previous roll-in to a plan from an individual retirement plan. In such circumstances, the roll-in funds are not considered in determining the \$5,000 vested accrued balance, so a larger amount of assets could be subject to a mandatory distribution under the terms of the plan.

⁸⁷ Sarah Holden, Steven Bass, and Craig Copeland. "401(k) Plan Asset Allocation, Account Balances and Loan Activity in 2020," EBRI Issue Brief #576. November 29, 2022. Retirement Clearinghouse, LLC, Employee Benefit Research Institute, and contributor Boston Research Technologies. "Auto Portability Research &

Simulation: Automating Plan-to-Plan Transfers for Small Accounts." Consolidated Testimony in front of the ERISA Advisory Council, June 8, 2016.

⁸⁸ Vanguard. "How America Saves." 2023.

⁸⁹ Federal Reserve. "Economic Well-Being of U.S. Households in 2022." (2023). <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

⁹⁰ Callan Institute. "2023 Defined Contribution Trends." <https://www.callan.com/research/2023-defined-contribution-trends-survey/>.

participant behavior after job separation related to small balance accounts. Two recordkeepers servicing 8 million accounts, Alight and Vanguard, published separate experience studies regarding post-separation actions in 2023.⁹¹ These reports have informed the

Department’s understanding of the disposition of small balance accounts. As presented in table 2, the two studies report similar rates of cashouts. However, the proportion of accounts rolling over and remaining with the

prior employer’s plan varied significantly. These differences may be attributable to differing economic conditions, differing levels of financial literacy, or by plan design elements unique to the recordkeeper.

TABLE 2—POST-SEPARATION BEHAVIOR FOR SMALL BALANCE ACCOUNTS
[\$1,000–\$4,999]

Year published	Recordkeeper	Accounts	Cashout (%)	Remain in plan (%)	Rollover (%)
2023	Vanguard	5,000,000	34	51	15
2023	Alight	3,000,000	39	28	33
Behavior Assumptions without Automatic Portability Feature *			36	42	22
Behavior Assumptions with Automatic Portability Feature (Based on RCH Pilot)			27	42	31

* Weighted average of values from Vanguard and Alight reports. Automatic portability is estimated to decrease cashouts by 25% across eligible accounts, which increases rollovers by approximately 40%.

The Department developed its estimates related to post-separation actions using both studies to create weighted averages based on the number of accounts in each study. Therefore, the Department estimates that 36 percent of separations will result in a cashout in the absence of the enhanced automatic portability plan feature provided in this proposal and statutory exemption. The Department acknowledges that the experience of these two service providers may not be representative of the experience for all plan recordkeepers and requests comments or additional data concerning this assumption.

This proposal would affect plan participants differently depending on the size of their account balance. As discussed above, under current law, a separating employee with a DC plan account balance of \$7,000 or less can be “cashed out” of the plan by their employer without their consent. A separating employee with DC plan savings between \$1,001 and \$7,000 can only be “forced out” of their plan into a Default IRA through an automatic rollover if they do not provide

directions to the employer after receiving a notice from the plan’s administrator.⁹²

Alternatively, this proposal would allow for “automatic portability transactions.” These are transactions in which assets held in a Default IRA established on behalf of an individual from a mandatory distribution from an employer-sponsored retirement savings plan 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. As shown above in table 2, the Department estimates that the statutory exemption would reduce the propensity to cash out for separating participants with small accounts by 25 percent. The basis for this estimate is a pilot study of automatic portability conducted by RCH which reduced cashout rates for small balance account holders by approximately 50 percent.⁹³ The specific way the pilot study was implemented, however, suggests that this finding is larger than we would observe under the statutory exemption.

The pilot study had a selected sample of participants who had been matched to a current, active account. Participants received a letter encouraging them to call and speak with someone who would provide advice or guidance about their options and offer to help them implement a rollover.

Table 3 shows how the affected accounts are sorted in the Department’s estimation process for year one. For both the baseline and the post-rule scenario, the first step is to group the accounts based on whether or not the account belongs to a plan with the automatic portability feature and accounts subject to a mandatory distribution requirement. There are 865,736 accounts that are not subject to mandatory distribution in the baseline because their balances are between \$5,001 and \$7,000. These accounts are subject to mandatory distribution in the post-rule scenario. The assumptions from table 2 are then applied to these groups to estimate the share of small accounts post-separation being cashed out, remaining in the plan, and those rolled over.⁹⁴

⁹¹ Vanguard. “How America Saves.” 2023; Alight. “Universe Benchmarks Report.” 2023.

⁹² See Code section 401(a)(31)(B) as amended by the SECURE 2.0 Act. Previously, this “force out” applied to a separating employee with DC plan savings between \$1,001 and \$5,000.

⁹³ Boston Research Technologies. “Eliminating Friction and Leaks in America’s Defined Contribution System.” 2013.

⁹⁴ These estimates are calculated as follows: 36% baseline cashout rate × 25% decline from automatic portability = 9 percentage points. The estimated

post-rule cashout rate is the baseline cashout rate, 36%, minus 9%, which equals 27%. The estimated post-rule rollover rate is the baseline rollover rate of 22%, plus the 9% increase from automatic portability, which equals 31%.

TABLE 3—YEAR ONE DISPOSITION OF ACCOUNTS

Disposition of accounts	Baseline ¹			Post-rule	
	Accounts subject to mandatory distribution	Accounts not subject to mandatory distribution ¹	Total	Accounts subject to mandatory distribution	Total
Accounts with Balances Below \$7,000 ..	4,848,124	865,736	5,713,860	5,713,860	5,713,860
Cashout:					
Number of Accounts	1,461,709	311,665	1,773,374	1,722,728	1,722,728
Remain in Plan:					
Number of Accounts	2,036,212	363,609	2,399,821	2,399,821	2,399,821
Rollover:					
Number of Accounts	1,350,202	190,462	1,540,664	1,591,310	1,591,310
× <i>Estimated Percent of Rollovers Going into Default IRAs</i>	60%	0%	.....	60%	60%
Total Default IRAs	810,122	0	810,122	954,786	954,786
× <i>Year One Account Coverage by AP Network</i> ²	65%	65%	65%	65%	65%
Automatic Portability Feature	526,579	0	526,579	620,611	620,611
No Automatic Portability Feature ³	283,543	0	283,543	334,175	334,175

¹ In the baseline, accounts with assets between \$5,001 and \$7,000 are not subject to mandatory distribution. In the post-rule scenario, all accounts with assets below \$7,000 are subject to mandatory distribution.

² Coverage by the AP network is expected to expand in the post rule scenario while the baseline is assumed to remain constant. The post rule scenario is modeled using the following coverage assumptions: $A_i = \{65\%, 72\%, 78\%, 82\%, 84\%, 86\%, 88\%, 89\%, 90\%, 90\%\}$; where element i = years 1 through 10.

³ 35 percent of accounts are not assumed to be covered by the AP network in year one. The percent of accounts not covered by the AP network in subsequent years may be calculated as $1 - A_i$.

Finally, the Department estimates the number of default IRA accounts expected to be generated from the roll over activity in year one. Research finds that approximately 60 percent of all small account balance IRA rollovers (default IRAs) are the result of automatic rollovers of mandatory distributions.⁹⁵

⁹⁵ Approximately 60% is an estimate of the share of IRAs below the current mandatory distribution threshold of \$5,000, established from a rollover,

The estimates of accounts rolling over for the first year described in table 3 are applied to the 60 percent factor to generate the estimated number of affected accounts expected to roll over

that remain fully invested in money market funds after one year of opening. See Figure 6.8. Investment Company Institute. “The IRA Investor Profile: Traditional IRA Investors’ Activity, 2007–2016.” (2018). Goodman, Mukherjee, and Ramnath, “Set It and Forget It,” 2023.

into a default IRA. This is the group where the automatic portability transactions will occur. These calculations continue into table 4, where the number of Default IRAs is shown over each of the first ten years, followed by the number of Default IRAs with automatic portability features, as well as the number that ultimately result in an automatic portability transaction each year.

TABLE 4—TEN YEAR COUNTS OF DEFAULT IRA AND AUTOMATIC PORTABILITY (AP) TRANSACTIONS

Estimation period	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Total
<i>Baseline (RCH/PSN Operates, \$5,000 Distribution Limit)</i>											
Coverage/Match Factor	65%	65%	65%	65%	65%	65%	65%	65%	65%	65%	65%
Default IRAs	810,122	810,122	810,122	810,122	810,122	810,122	810,122	810,122	810,122	810,122	8,101,220
Accounts with AP	526,579	526,579	526,579	526,579	526,579	526,579	526,579	526,579	526,579	526,579	5,265,790
AP Transfers	337,484	337,484	337,484	337,484	337,484	337,484	337,484	337,484	337,484	337,484	3,374,840
<i>Post-Rule (RCH/PSN Grows, \$7,000 Distribution Limit)</i>											
Coverage/Match Factor	65%	72%	78%	82%	84%	86%	88%	89%	90%	90%	
Default IRAs	954,786	976,384	994,897	1,007,239	1,013,410	1,019,581	1,025,752	1,028,837	1,031,923	1,031,923	10,084,732
Accounts with AP	620,611	702,996	776,020	825,936	851,264	876,840	902,662	915,665	928,731	928,731	8,329,456
AP Transfers	397,749	519,606	630,585	699,159	724,418	766,494	809,360	817,864	839,779	824,156	7,029,170
<i>Differences between the Baseline and Post-Rule:</i>											
Default IRAs	144,664	166,262	184,775	197,117	203,288	209,459	215,630	218,715	221,801	221,801	1,983,512
Accounts with AP	94,032	176,417	249,441	299,357	324,685	350,261	376,083	389,086	402,152	402,152	3,063,666
AP Transfers	60,265	182,122	293,101	361,675	386,934	429,010	471,876	480,380	502,295	486,672	3,654,330

* The Department estimates that approximately 1.4% of all accounts that are matched for an automatic portability transaction will not be transferred due to account holder opt-out. The coverage/match rates can not be applied directly to the estimates in the table to obtain other estimates in the table. The drop in Automatic Portability transfers from year 9 to year 10 is a function of the coverage/match rates being the same in both years in the estimation model.

5. Benefits

This section describes the benefits of the proposed regulation in comparison to the baseline before the statutory exemption for automatic portability transactions was enacted by SECURE 2.0 Act. As previously stated, RCH/PSN already relies on relief the Department provided in PTE 2019–02, an administrative individual exemption, to provide automatic portability provider services. In general, the benefits of the proposed regulation are derived from the removal of the uncertainty associated with the need to rely on an individual exemption. Moreover, RCH/PSN will benefit from this proposed regulation because they would not have to request additional relief from the Department when the five-year term of PTE 2019–02 expires.

The establishment of a statutory exemption encourages the growth of the

market for automatic portability providers. As previously stated, the Department assumes that RCH currently represents roughly 65 percent of the accounts in the system and that they have a success rate of 65 percent in matching accounts in that system. This results in roughly 337,000 automatic portability transfers estimated to occur each year in the baseline. This is compared to the expansion that results from the rule where the Department estimates the number of automatic portability transfers to grow to approximately 825,000 at the end of the estimation window. This estimate represents automatic portability coverage for approximately 90 percent of the accounts in the DC system. This is anticipated to result in \$2.8 billion of undiscounted benefits arising through:

- An increase in potentially affected accounts due to the increase in the

mandatory distribution threshold from \$5,000 to \$7,000;

- Projected account balance appreciation and higher returns;
- Reduction of duplicative fees; and
- Consolidation of abandoned accounts.

Retaining assets in retirement accounts and avoiding cashouts is an objective of the statute and proposed rules. Table 5a shows the value of assets retained in the retirement accounts through a reduction of the amount of assets cashed out. The impact of the rule is the difference in the value of accounts that cashout post-rule relative to the baseline. This amount is not classified as a benefit. Table 5b shows each component of the quantified benefit stream measured as improvements between the baseline scenario and the post proposed rule scenario. The increase overtime in affected accounts is incorporated into the values displayed.

TABLE 5A—VALUE OF AFFECTED ACCOUNTS
[\$ in millions]

Year	1	2	3	4	5	6	7	8	9	10	Total
<i>Retirement Assets Retained via Cashout Avoidance:</i>											
Rule	\$5,334	\$5,202	\$5,086	\$5,007	\$4,967	\$4,926	\$4,886	\$4,865	\$4,844	\$4,844	\$49,962
– Baseline	5,461	5,461	5,461	5,461	5,461	5,461	5,461	5,461	5,461	5,461	54,609
<i>= Assets Retained</i>	127	259	375	454	494	534	575	596	617	617	4,647
<i>Present Value of Assets Retained by Discount Rate:</i>											
3 Percent	123	244	343	403	426	448	468	470	473	459	3,856
7 Percent	118	226	306	346	352	356	358	347	335	313	3,059

TABLE 5B—VALUE OF AFFECTED ACCOUNTS
[\$ in millions]

Year	1	2	3	4	5	6	7	8	9	10	Total
<i>Value of Reallocation of Assets:</i>											
Rule	\$29,218	\$27,792	\$26,380	\$24,954	\$23,554	\$22,267	\$21,058	\$19,905	\$18,839	\$17,842	\$231,808
– Baseline	29,249	27,570	26,013	24,569	23,229	21,987	20,835	19,767	18,776	17,857	229,851
<i>= Benefits</i>	– 31	222	367	385	325	280	223	139	63	– 15	1,957
<i>Value of Duplicated Account Fees:</i>											
Rule	17	39	65	94	125	157	191	225	261	295	1,469
– Baseline	14	28	43	57	71	85	99	113	128	142	780
<i>= Benefits</i>	3	10	22	38	54	72	92	112	133	153	689
<i>Value of Abandoned Accounts Consolidated:</i>											
Rule	12	16	19	21	22	23	24	25	25	25	211
– Baseline	10	10	10	10	10	10	10	10	10	10	101
<i>= Benefits</i>	2	5	9	11	12	13	14	14	15	15	110
<i>Annual Total:</i>											
Rule	29,247	27,846	26,464	25,069	23,701	22,447	21,273	20,155	19,125	18,162	233,488
– Baseline	29,273	27,609	26,066	24,636	23,310	22,082	20,944	19,890	18,913	18,009	230,732
<i>= Benefits</i>	– 26	237	398	433	390	365	329	265	211	153	2,756
<i>Present Value of Benefits by Discount Rate:</i>											
3 Percent	– 26	224	364	385	337	306	267	209	162	114	2,342
7 Percent	– 25	207	325	331	278	243	205	154	115	78	1,911

Lastly, it should enhance the ability of American workers to achieve their retirement savings goals by consolidating retirement funds into fewer accounts and investing assets consistent with their retirement needs. These benefits are described in more detail in the following subsections.

5.1. Benefits for Plan Participants

The Department expects that DC plan participants with small account balances that are subject to the Code's mandatory distribution rules would benefit from increased access to automatic portability transactions in several ways. First, their retirement account balances would be consolidated in their new employer's plan, which would reduce participants' exposure to duplicative fees. Second, the incidence of missing participants and abandoned accounts would decrease as a result of the automatic portability providers matching a Default IRA with an individual's account in their new employer's plan. Third, moving assets from a Default IRA to a DC plan would likely provide greater investment returns, on average, as the assets are reallocated from being invested in money market funds to target date funds and other, more diversified investments.

5.1.1. Account Consolidation

One potential outcome of a highly mobile labor force (one in which employees change jobs frequently) is the proliferation of retirement accounts. Data from the Federal Reserve indicates that approximately 20 percent of employees with a DC plan account and household incomes below \$50,000 changed jobs in the past year.⁹⁶ As participants change jobs, mandatory distributions into a Default IRAs can result in individuals owning several retirement accounts.⁹⁷ Once potential outcome of multiple accounts is individuals paying management or recordkeeping fees for several accounts. GAO reported a median annual recordkeeping flat fee of \$42 per account. Although modest, this fee can contribute to an erosion of accumulated retirement assets, especially if applied to multiple, small-balance accounts.⁹⁸ Thus, each account consolidation

⁹⁶ Federal Reserve. "Economic Well-Being of U.S. Households in 2022." (2023). <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

⁹⁷ Employee Benefit Research Institute. "EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2017 Update." (2020).

⁹⁸ Government Accountability Office. "401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts." (2014).

provides a benefit to participants equal to the value of any associated fees or expenses arising from maintaining an additional retirement account that would be eliminated through consolidation net of the transfer fee discussed in section 6.4 of the Costs section below. Accordingly, the Department estimates that over the 10-year estimation window, account consolidations will total approximately 3.7 million additional accounts when compared to the baseline, yielding approximately \$689 million in undiscounted benefits for participants accruing from the reduction of duplicative fees for multiple accounts over the 10-year estimation period.⁹⁹

5.1.2. Missing Participants and Abandoned Accounts

Another consequence of the proliferation of small-balance accounts is the potential for a high volume of retirement assets that are "abandoned" by participants. Over time, DC plan account holders that have separated from their employers may become disconnected from their retirement assets as a result of mandatory distributions into Default IRAs. Abandonment of these accounts may be attributable to any number of reasons but are often the result of participants that are missing (cannot be found by the plan provider), unresponsive (failing to respond to communications from the plan provider), or unaware that an account has been established on their behalf. Goodman, Mukherjee, and Ramnath (2023) found that 0.4 percent of retirement-aged IRA owners abandoned their IRAs, amounting to \$66 million (in 2016 dollars).¹⁰⁰ Because this figure only relates to retirees, it represents only a fraction of the assets that exist in abandoned IRAs for the larger pool of IRA owners of all ages; a portion of these IRA owners would have been impacted by mandatory distributions. The Department estimates that 1.0 percent of Default IRA owners will abandon their IRAs, which is consistent with Goodman, Mukherjee, and Ramnath (2023).¹⁰¹ It seems likely

⁹⁹ The estimate is calculated as follows: 3,654,330 account consolidations × \$42 = \$153,481,860 in benefits. \$153,481,860 × average of 4.5 years receiving benefit per account = \$689,003,322 in total benefits. At a discount rate of 3 percent, this results in \$552,051,586 in total benefits. At a discount rate of 7 percent, this results in \$417,450,008 in total benefits.

¹⁰⁰ In this study, account abandonment is proxied by a failure to claim the account over ten years after a legal requirement to do so; specifically, the required minimum distribution requirement. Goodman, Mukherjee, and Ramnath, "Set It and Forget It," 2023.

¹⁰¹ *Id.*

that IRA owners who experienced force-outs may have higher abandonment rates than other IRA owners. Owners who experienced force-outs allowed themselves to be defaulted into an IRA instead of taking action to perform a rollover or obtain a cashout, indicating they may have a tendency to be unaware or passive, characteristics that may increase the likelihood of abandonment. From FY 2017 through FY 2023, EBSA benefit advisors have located 4,732 participants through a joint initiative with the Pension Benefit Guaranty Corporation (PBGC) to connect individuals with retirement benefits valued at \$227.6 million.

Given the threshold for mandatory distributions increases to \$7,000 in 2024 while the adoption of auto-enrollment policies by plan sponsors continues to expand, there will be an increased number of potential Default IRAs, and, as a result, the number of accounts that might be abandoned or have missing participants will also increase.¹⁰² However, over time the Department estimates a minimum of approximately 37,000 accounts will be saved from abandonment with the statutory exemption over the 10-year estimation period (1.0 percent of the approximately 3.6 million accounts that will be consolidated through automatic portability transactions when compared to the baseline). The Department further estimates the consolidation of abandoned accounts would provide approximately \$109.6 million in undiscounted benefits for participants over the 10-year estimation window when compared to the baseline.¹⁰³ The Department requests comment on these estimates.

5.1.3. Improve Asset Allocation

Upon job separation, some employees with small-balance accounts between \$1,001 and \$7,000 (in 2024)¹⁰⁴ can be forced out of their previous employer's plan by a mandatory distribution of

¹⁰² *Id.*

¹⁰³ The estimate is calculated as follows: 3,654,330 account consolidations from automatic portability transactions × 1% of retirement accounts that are abandoned = 36,544 abandoned accounts consolidated. 36,544 accounts × \$3,000 average account balance for Default IRAs = \$109,632,000. At a discount rate of 3 percent, this results in \$90,685,800 in total benefits. At a discount rate of 7 percent, this results in \$71,592,717 in total benefits.

¹⁰⁴ See Code section 411(a)(11)(D) for circumstances where the amount of a distribution may be greater than \$5,000 (\$7,000 beginning in 2024) if a participant made a previous roll-in to a plan from an individual retirement plan. In such circumstances, the roll-in funds are not considered in determining the \$5,000 vested accrued balance, so a larger amount of assets could be subject to a mandatory distribution under the terms of the plan."

their accumulated retirement assets that is automatically rolled over to a Default IRA.¹⁰⁵ The Department has issued regulations providing a safe harbor that requires the employee's former employer to invest amounts held in a Default IRA in an investment product that preserves principal and provides a reasonable rate of return.¹⁰⁶ In practice, many plans seek to implement the safe harbor by investing in money market funds; however, the tradeoff for relative safety is potential returns. A 2014 GAO study reported that the average return for money market funds in the preceding 10 years was 1.5 percent, considerably lower than the average 6.3 percent return for target date funds common among 401(k) plans.¹⁰⁷ Moreover, few participants take action to reallocate these default investments away from money market funds.¹⁰⁸

The difference in the average rate of return between these two typical investment strategies could have a substantial impact on the value of retirement assets for investors with small-balance accounts, which are susceptible to capital erosion from fees and inflation. GAO projected investment outcomes over 30 years and found that an initial balance of \$1,000 was estimated to be valued at over \$2,700 under the average returns for target-date funds (6.3 percent) but \$0 under the average returns for money market funds (1.5 percent), largely as a result of account fees outweighing minimal returns.¹⁰⁹ This suggests that assets transferred into Default IRA accounts, which are typically invested in low-risk money market funds, could be better preserved and invested elsewhere.¹¹⁰ Consolidating these assets in a DC plan could improve the asset allocation of, and potentially better preserve, retirement assets for many retirement investors.

As presented in table 4 of the Affected Entities section, the Department estimates that just over 10 million Default IRAs will be created in the ten-

year estimation period, compared to 8.1 million in the baseline, a change of approximately 2.0 million accounts. Of these 10 million Default IRAs, 8.3 million are assumed to be in the automatic portability network under the rule (compared with 5.3 million at the baseline). The results are that 7.1 million accounts will be moved into a new employer's DC plan via automatic portability, compared with 3.4 million in the baseline, an improvement of 3.7 million between the two scenarios. This results in an asset allocation with a more favorable return for account owners.

Similar to the GAO analysis, the Department utilized updated data covering the 15 most recent years to estimate the returns to money market funds characteristic of Default IRAs and for target-date funds (TDFs) typical of DC plans, further supporting an analysis of how the change in asset allocation might potentially alter investment outcomes as a result of automatic portability transactions. Returns to money market funds from 2008 to 2022 averaged 0.7 percent, while returns to TDFs averaged 8.1 percent over the same period.

The Department estimates that this reallocation of assets from Default IRAs to DC plans would result in approximately \$2.0 billion in additional benefits when compared to the baseline value.¹¹¹

5.1.4. Reduced Participant Benefits Because More Participants Are Subject to Mandatory Distributions

The increase in the mandatory distribution threshold from \$5,000 to \$7,000 means that some separating participants will have fewer choices about how to deal with their account. This reduces the net benefits for those plan participants. Prior to the passage of the SECURE 2.0 Act, many separating participants in this account balance range would have left their account in their former employer's plan, but some of those participants would now be subject to a mandatory distribution into a Default IRA. If the account assets end up in a Default IRA, the Department

expects that the participant would generally be worse off than in their former employer's plan because the assets would be subject to little or no growth given that they typically would be invested in money market funds and subject to relatively high fees. Other separating participants in the \$5,000 to \$7,000 range may end up being rolled into a new employer's plan; they would be better or worse off depending on how the services, products, and fees in the new employer's plan compared to the former employer's plan and depending on how long the assets lingered in the Default IRA before being rolled over into the new employer's plan. Overall, the affected participants would be worse off on average.

5.2. Benefits for Plans, Automatic Portability Providers, and Other Service Providers

The estimated benefits for participants that are described in the preceding subsection result from the predictability the proposed rule provides to the marketplace. This predictability is intended to encourage the growth and efficiency of the automatic portability market. RCH/PSN will no longer need an administrative individual exemption or to apply to the Department for additional relief when the term PTE 2019-02 expires in 2024. For the same reason, the proposed rule removes barriers to entry for potential future automatic portability providers. The proposed rule will bring increased certainty to the robust network of entities involved in automatic portability arrangements, consisting of the automatic portability provider(s), recordkeepers, plans and plan sponsors, and plan participants and Default IRA owners, which will increase the reach, efficiency, and long-term viability of automatic portability transactions.

5.3. Benefits for Financial Institutions

Financial institutions would benefit from more assets being kept in consolidated, retirement savings accounts and being invested rather than being cashed out because the financial institutions would earn more fees. Cashouts from small balance accounts are typically taken as cash and spent. The loss of retirement assets associated with cashing out small balance accounts and Default IRAs will be considerably curtailed with the adoption of automatic portability programs by plans sponsors and recordkeepers. At job separation, a small balance account holder (who has an account with \$5,000 or less, or beginning in 2024, an account with \$7,000 or less) can be forced out of their former employer's retirement plan.

¹⁰⁵ Code section 401(a)(31)(B); see SECURE 2.0 Act, Sec. 304, Updating Dollar Limit for Mandatory Distributions.

¹⁰⁶ 29 CFR 2550.404a-2(c)(3)(i).

¹⁰⁷ Government Accountability Office (GAO). "401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts." (2014).

¹⁰⁸ Goodman, Mukherjee, and Ramnath, "Set It and Forget It," 2023. Investment Company Institute. "The IRA Investor Profile." 2018. 80% is an estimate of the share of IRAs below the current mandatory distribution threshold of \$5,000, established from a rollover, that remain fully invested in money market funds after one year of opening. See Figure A.2 in the Appendix.

¹⁰⁹ Government Accountability Office (GAO). "401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts." (2014).

¹¹⁰ *Id.*

¹¹¹ Returns from DC plans are estimated using an asset distribution characteristic of typical default investments for TDFs, 80% stocks (S&P 500 annual returns) and 20% bonds (Baa Corporate returns). Returns for Default IRAs are estimated using an asset distribution characteristic of typical default investments for Default IRAs, 98% Treasury Bills and 2% Treasury Bonds. NYU Stern School of Business. *Historical Returns on Stock, Bonds, and T-Bills: 1928-2022*. Accessed: https://pages.stern.nyu.edu/~adamodar/New_Home_Page/data.html. At a discount rate of 3 percent, this results in \$1,699,169,773 in benefits. At a discount rate of 7 percent, this results in \$1,422,157,975 in benefits.

While a rollover may result in procedural or paperwork burdens for the participant, a cashout is often the most straightforward option. Automatic portability programs, however, have the potential to reduce such burdens for

participants, resulting in a higher volume of rollovers and fewer cashouts. Because cashouts are negatively correlated with the size of account balances (*i.e.*, small account balances are more likely to be cashed out), the

likelihood of cashouts at future job separations is expected to decrease as more assets remain in an individual's DC plan account, compounding the benefits of automatic portability transactions over time.

TABLE 6—ACCOUNTING STATEMENT

	Estimate (primary)	Year dollar	Discount rate (%)	Period covered
Benefits:				
Non-Quantified:				
<ul style="list-style-type: none"> Increased mandatory distribution threshold leads to cost savings for plans but reduced benefits for separating participants. Increased ease of retirement planning due to account consolidation. 				
Annualized Monetized (\$ Millions/Year)	\$191.12	2023	7	2024–2033
	234.19	2023	3	2024–2033
Costs:				
Annualized Monetized (\$ Millions/Year)	\$1.21	2023	7	2024–2033
	1.42	2023	3	2024–2033
Transfers:				
Non-Quantified:				
<ul style="list-style-type: none"> Requiring automatic portability providers to offer the same terms to any plan will ensure sponsors not be restricted from engaging with more than one provider. This reduces barriers to entry, which is a transfer to providers entering the market, and encourages lower fees, which is a transfer to participants. Increasing the mandatory distribution threshold will reduce participant choice in how they handle their accounts. Conversely, this will give sponsors increased latitude in how they handle accounts. No longer having to administer small accounts is a transfer from participants to sponsors. Decreasing the number of Default IRA accounts will affect financial institutions that service these accounts. This will represent a transfer to institutions that service employer plans. 				
Annualized Monetized (\$ Millions/Year)	52.00	2023	7	2024–2033
	65.55	2023	3	2024–2033

6. Costs

This analysis estimates the changes to cost burdens associated with the provision of automatic portability services under the proposed rule when compared to a baseline where the automatic portability provider operates under PTE 2019–02. The costs presented can be generally grouped into two categories: start-up and ongoing.

The start-up costs are associated with updating processes or documents to bring existing practices into compliance with the proposed rule where there is a difference between operations under the PTE when compared to the proposed rule. The ongoing costs generally represent costs incurred due to both the increase in the threshold from \$5,000 to \$7,000 which is expected to create more default IRA accounts which is the group

that automatic portability transactions occur within, and the growth of the automatic portability system which is assumed to result from the proposed rule. Over the first 10 years, the Department estimates an undiscounted cost of approximately \$16,206,196, annualized to \$1,620,620.¹¹² The undiscounted stream of estimated costs is presented in table 7 below.

TABLE 7—ESTIMATED COSTS ASSOCIATED WITH RULE
[\$ in thousands]

Year	1	2	3	4	5	6	7	8	9	10	Total
Materials and Postage	\$2	\$3	\$9	\$14	\$16	\$19	\$21	\$22	\$24	\$23	\$154
Labor Costs	6,206	88	572	895	1,041	1,226	1,415	1,483	1,580	1,547	16,052
Total All Cost	6,208	90	581	909	1,057	1,245	1,436	1,505	1,604	1,570	16,206
Present Value of Total Cost:											
3 Percent	6,027	85	532	808	912	1,042	1,168	1,188	1,229	1,168	14,160
7 Percent	5,802	79	474	693	754	829	894	876	872	798	12,073

6.1. Preliminary Assumptions and Cost Estimate Inputs

For purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the

percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.¹¹³ Accordingly, the Department estimates that 96.1 percent of the disclosures sent to plan participants would be sent

electronically, and the remaining 3.9 percent would be sent by mail.¹¹⁴ For disclosures sent by mail, the Department estimates that entities will

¹¹² Using a 3 percent discount rate results in a cost savings of approximately \$14,160,023, annualized to \$1,416,002. Using a 7 percent discount rate results in a cost savings of approximately \$12,073,029, annualized to \$1,207,303.

¹¹³ 67 FR 17264, 85 FR 31884.

¹¹⁴ The Department estimates 96.1 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic

disclosures under the 2002 electronic disclosure safe harbor (58.3 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (37.8 percent).

incur a cost of \$0.66¹¹⁵ for postage and \$0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel would perform the tasks associated with information collection requests at an hourly wage rate of \$63.45 for clerical personnel, \$128.11 for a top executive, \$116.86 for an auditor, \$132.93 for a plan fiduciary, \$155.61 for a web designer, \$159.34 for a legal professional, and \$190.63 for a financial manager.¹¹⁶

6.2. Acknowledgement of Fiduciary Status

Pursuant to the statutory text authorizing the Secretary to specify the time and format of such an acknowledgment, § 2550.4975f-12(b)(1) of this proposed regulation requires the automatic portability provider to acknowledge in writing that it is a fiduciary as defined in Code section 4975(e)(3) upon being engaged by a plan fiduciary, as well as in the required notices and disclosures to plan participants and IRA owners that are described below.

The automatic portability provider's acknowledgment of its fiduciary status may include a description of the scope of the fiduciary status of the automatic portability provider and may explain that the automatic portability provider is not a fiduciary, consistent with Code section 4975(e)(3), with respect to any assets or administration of the plan or IRA with respect to which the automatic portability provider does not (1) have any discretionary authority, discretionary control or discretionary responsibility, (2) exercise any authority or control, and (3) render investment advice for a fee or other compensation, nor have any authority or responsibility to render such investment advice.

Although PTE 2019-02 discussed RCH's fiduciary status, it did not explicitly require a fiduciary acknowledgment as a condition of the exemption. Therefore, the proposed regulation has the potential to incrementally increase the costs to RCH/PSN. The Department assumes the time it would take to draft the fiduciary acknowledgment would be minimal and anticipates that a single standard acknowledgment would be included in

contracts with plan sponsors. If language is not already included in contracts, the Department estimates that RCH/PSN would send a one-page supplemental acknowledgement to each plan sponsor with an estimated cost of \$159 in legal costs to develop the supplemental acknowledgement and \$391,275 in clerical costs¹¹⁷ to provide the notices to the estimated 185,000 plans RCH/PSN currently services at an incremental cost of \$2.12 per plan. Contracts executed after the date of a final rule would likely incorporate the acknowledgement for a de minimis additional cost.

The Department also anticipates the acknowledgement in each of the three notices to plans participants/IRA owners (initial enrollment, pre-transaction, and post-transaction notices) would use a standardized and identical acknowledgment. The Department requests information about other costs associated with the requirement to disclose fiduciary status.

6.3. Data Usage and Protection

The statutory exemption specifically prohibits the automatic portability provider from marketing or selling data relating to the IRA or to the plan participants. Section 2550.4975f-12(b)(3) of the proposed regulation parallels the statutory language by not permitting the use of data for any purpose other than the execution of automatic portability transactions or locating missing participants. The Department is not proposing any exceptions to this restriction. A similar restriction was placed on RCH in PTE 2019-02, so the Department does not expect an additional cost to RCH/PSN due to the proposal.

The Department, however, did not include an express data protection condition in PTE 2019-02 similar to that included in the proposed regulation. Therefore, compared to existing requirements on RCH/PSN, the Department expects that the proposed regulation could add costs. However, the Department also expects that these costs would fall under normal operating expenses borne by businesses when dealing with the types of sensitive data necessarily required to execute automatic portability transactions. The Department requests comment on this assumption.

6.4. Cost of Transactions Fees

As previously discussed, there is a transaction fee stated to be roughly

¹¹⁷ The hour burden is estimated as: 185,000 plan fiduciaries × 2/60 hours = 6,167 hours. The equivalent cost is estimated as: 185,000 plan fiduciaries × 2/60 hours × \$63.45 = 391,275.

between \$15 and \$30 per transferred account, depending on the account balance. This fee is applied only when a transfer occurs and is deducted from the funds in the account being transferred. The Department estimates there to be an additional 60,265 transactions in year one, and an average of 399,341 transactions annually in years two through ten. The Department uses the mid-point of the fee range stated, \$22.50, as the expected average fee. Therefore, the Department estimates the aggregate transaction fees to be approximately \$1.4 million in year one, and period two through ten to have aggregate fees on average of nearly \$9 million per year.¹¹⁸

6.5. Notices and Disclosures

6.5.1. Notice to the Secretary of Labor

Under the proposed regulation, within 90 calendar days of the date that the automatic portability provider begins operating an automatic portability transaction program that is intended to rely on prohibited transaction relief provided by Code section 4975(d)(25), the automatic portability provider must notify the Secretary at *auto-portability@dol.gov* that it is operating as an automatic portability provider in accordance with Code section 4975(d)(25). The automatic portability provider must report the legal name of each business entity relying upon the exemption and any name (e.g., trade or DBA name) the business entity may be operating under. This notification needs to be updated to report a change to the legal or operating name(s) of the automatic portability provider that is relying upon the exemption.

Because PTE 2019-02 was issued to a single entity, there was no such requirement in the exemption. However, the Department believes based on the small number of expected automatic portability providers entering the market, that the possible cost burden associated with submitting the simple notice via email to the Department to be roughly \$16, which is estimated as 15 minutes of a clerical worker's time with an hourly wage rate of \$63.45. While this notification would need to be updated to report a change to the legal or operating name(s) of the automatic portability provider that is relying upon the exemption, the Department expects that such a change would be rare and thus does not estimate an associated cost.

¹¹⁸ 60,265 additional transactions × \$22.50 transaction fee = \$1,355,963 in year 1. In years 2-10, an average of 399,341 additional transactions × \$22.50 per transaction = \$8,985,163.

¹¹⁵ United States Postal Service. "First-Class Mail." (2023). <https://www.usps.com/ship/first-class-mail.htm>.

¹¹⁶ Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebbsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

6.5.2. Fee and Compensation Disclosure

The proposed regulations incorporate the existing standard regarding reasonable compensation for the provision of services found at 26 CFR 54.4975–6(e). This proposed regulation mirrors the text of the statutory exemption by requiring the automatic portability provider to disclose the information that a service provider to the plan would be required to disclose under 29 CFR 2550.408b–2(c) to a responsible plan fiduciary of the transfer-in plan. For purposes of this requirement, the disclosures would relate to the automatic portability provider's services performed as an automatic portability provider but not to other services that may be provided.

The proposed regulation includes text that mirrors the statutory text allowing a direct fee to be paid by a plan sponsor if it is in lieu of a fee imposed on an IRA owner. The proposed regulation includes one exception to the general restriction on third-party compensation. Specifically, under the proposal, an automatic portability provider would be able to share a portion of its fee or compensation with another automatic portability provider as long as the overall fee paid, directly or indirectly, by the plan or IRA does not increase as compared to the fees disclosed to plan fiduciaries, plan participants, and IRA owners.

PTE 2019–02 requires RCH to fully disclose fees to a plan fiduciary and receive written approval from the plan fiduciary. Therefore, the Department expects that no change in cost will occur as a result of this requirement in the proposed regulation.

6.5.3. Initial Enrollment Notice

The Department proposes that the initial enrollment notice would include a variety of information regarding the nature of the automatic portability transaction and additional aspects of the IRA arrangement (the same information to be included in the pre-transaction notice), discussed below. The Department anticipates that this notice requirement could be satisfied by including the information in the notice otherwise required under Code section 401(a)(31)(B) upon the establishment of a Default IRA.

PTE 2019–02 requires a “Mandatory Distribution Letter” be sent to participants before establishing a Default IRA. PTE 2019–02 also requires a “Welcome Letter” to be sent to the same individual no later than three business days after the Default IRA receives the distributed assets. Together, these two letters must include all the

information required in the initial enrollment notice in the proposed regulation. The Department estimates the revision and combination of these documents to satisfy the proposed rule will take an hour of an attorney's time at a wage rate of \$159.34 resulting in a total cost of \$159.34 to RCH/PSN. Because RCH/PSN is permitted to consolidate the two notices required under PTE 2019–02 into a single notice, a burden savings of 22,182 hours in the first year and 20,194 hours in subsequent years of a clerical worker's time with an equivalent cost savings of approximately \$1.3 million each year would result.¹¹⁹

The mailing and material costs are also expected to be reduced due to the combination of two notices into one. As previously noted, the Department assumes that 3.9 percent of recipients enumerated in the previous paragraph will receive mailed notices, and that the remainder will receive notices electronically, resulting in roughly 665,458 fewer notices in the first year and on average 605,806 fewer in subsequent years being mailed. Since the initial enrollment notice provides an opportunity for RCH/PSN to consolidate two notices into one. This reduction of notices being sent has an associated estimated cost savings of nearly \$23,600 in the first year and \$21,500, on average, in subsequent years.¹²⁰

6.5.4. Pre-Transaction Notice

Section 2550.4975f–12(b)(5)(iv) of the proposed regulation incorporates the statutory provisions of Code section 4975(f)(12)(B)(v). The proposed regulation provides additional clarification regarding the timing of the pre-transaction notice by requiring that the notice be sent no earlier than 90 days in advance of the automatic portability transaction.

¹¹⁹ The Department assumes RCH will combine these notices as a cost savings measure, resulting in 6,117,708 fewer notices needing to be prepared and sent over the 10-year period. The cost savings is calculated as $-6,117,708 \text{ notices} \times 2/60 \text{ hours to prepare each notice on average} \times \$63.45 \text{ wage rate for clerical staff} = -\$12,938,952.42$, annualized to \$1,293,895.24.

¹²⁰ The materials and mailing burden is calculated as: Year one—665,458 fewer notices required $\times 3.9\%$ mailed = 25,953 fewer notices. Each notice is estimated as 5 pages and mailed first class at a cost of \$0.66 per notice. The cost is $(5 \text{ pages} \times \$0.05 \text{ per page}) = \$0.25 \text{ per notice} + \$0.66 \text{ for postage, resulting in a cost of } \$0.91 \text{ per notice. } \$0.91 \times -25,953 \text{ fewer notices} = \text{a savings of } \$23,617.10$. Subsequent years average: 605,806 fewer notices required $\times 3.9\%$ mailed = 23,626 fewer notices. Each notice is estimated as 5 pages and mailed first class at a cost of \$0.66 per notice. The cost is $(5 \text{ pages} \times \$0.05 \text{ per page}) = \$0.25 \text{ per notice} + \$0.66 \text{ for postage, resulting in a cost of } \$0.91 \text{ per notice. } \$0.91 \times 23,626 \text{ fewer notices} = \text{a savings of } \$21,500.04$.

PTE 2019–02 included a pre-transaction notice, referred to as a “Consent Letter.” The letter is required to be sent before moving Default IRA assets into a transfer-in plan after the locate and match service makes a match. The content of the Consent Letter is substantially the same as the pre-transaction notice required by the statute and incorporated into the proposed regulation. The Department believes there will be a minimal transition cost to RCH/PSN attributable to bringing the “Consent Letter” into compliance to serve as the pre-transaction notice. This is estimated to take one hour of a legal professional's time at a wage rate and total cost of \$159.34.

The Department estimates that there will be a 61,121 increase in pre-transaction notices in the first year and that there will be, on average, 384,265 additional notices in subsequent years. This increase will result in roughly 2,037 hours in year one and, on average, 12,809 hours in subsequent years of clerical workers' time at 2 minutes per notice on average, at a rate of \$63.45 for a total net cost of roughly \$129,271 in year one and, on average, \$812,720 in subsequent years. The notices are expected to consist of no more than two pages. The mailing and materials cost associated with the pre-transaction notices are estimated as 2,384 notices being sent in the first year at an estimated cost of \$1,812 and, on average, 14,986 notices sent in subsequent years with an estimated average cost of \$11,390.¹²¹

6.5.5. Post-Transaction Notice

This post-transaction notice, which would occur after a transfer-in plan receives an individual's IRA funds, is the last notice that the automatic portability provider would be required to provide to the IRA owner or plan participant. Section 2550.4975f–12(b)(5)(v) of this proposed regulation incorporates the statutory requirements. The statute requires that no later than three business days after the completion of an automatic portability transaction, the automatic portability provider shall

¹²¹ The materials and mailing burden is calculated as: Year one 61,121 notices $\times 3.9\%$ mailed = 2,384 notices. Each notice is estimated as 2 pages and mailed first class at a cost of \$0.66 per notice. The cost is $(2 \text{ pages} \times \$0.05 \text{ per page}) = \$0.10 \text{ per notice} + \$0.66 \text{ for postage, resulting in a cost of } \$0.76 \text{ per notice. } \$0.76 \times 2,384 \text{ notices} = \$1,811.63$. Subsequent years average: 384,265 $\times 3.9\%$ mailed = 14,986 notices. Each notice is estimated as 2 pages and mailed first class at a cost of \$0.66 per notice. The cost is $(2 \text{ pages} \times \$0.05 \text{ per page}) = \$0.10 \text{ per notice} + \$0.66 \text{ for postage, resulting in a cost of } \$0.76 \text{ per notice. } \$0.76 \times 14,986 \text{ notices} = \$11,389.60$.

provide notice to the IRA owner of the actions taken by the automatic portability provider with respect to the IRA. The statute also requires the notice to include all relevant information regarding the location and amount of any transferred assets, a statement of fees charged against the IRA or transfer-in plan account in connection with the transfer, and a customer service contact phone number for the automatic portability provider.

PTE 2019–02 did not require a post-transaction notice. Therefore, as compared to the statutory requirements, this new requirement has the potential to add cost to PSN/RCH as an automatic portability provider. The Department estimates the development of a model notice will take a legal professional two hours at an hourly wage rate of \$159.34 for a total cost of \$319 in the first year.

The Department estimates that in the first year 397,749 notices will be sent to account owners and, on average, 736,825 notices to IRA owners subsequent years within the projection window creating an hour burden of 13,258 and 24,561 respectively, assuming 2 minutes per notice, on average, of clerical workers’ time. The post-transaction notice is expected to be no longer than two pages. Therefore, the Department estimates an equivalent cost of approximately \$0.8 million in the first year and an average of \$1.6 million in each subsequent year within the projection window.¹²²

As discussed at the beginning of this section, the Department estimates that 3.9 percent of the notices would be sent by mail. The Department estimates that

an automatic portability provider would incur a cost of \$0.76 to send each disclosure, which is comprised of \$0.66 for postage and \$0.10 for the paper and printing costs of two pages. Therefore, the materials and postage costs are estimated as 15,512 notices at \$0.76 per notice totaling \$11,789 in the first year and an average of 28,736 notices at \$0.76 per notice totaling \$21,839, on average, in years 2 through 10.

6.5.6. Culturally and Linguistically Appropriate Notices

The proposed regulation would require that notices and disclosures to participants and IRA owners be provided in a culturally and linguistically appropriate manner if their address is in a county where 10 percent or more of the population is literate only in the same non-English language. To determine whether a county meets this threshold, the Department relies on American Community Survey (ACS) data published by the United States Census Bureau. In the 2016–2020 ACS data, 230 counties or county equivalents met or exceeded the 10 percent threshold (rounded to the nearest percent).¹²³

In these counties, the automatic portability provider must include in the English versions of all required notices and disclosure, a statement prominently displayed in any applicable non-English language, which clearly indicates how to access the language services provided by the automatic portability provider. The Department estimates that satisfying this requirement would result in a de minimis cost. The automatic

portability provider would also be required to provide oral language services (such as a telephone customer assistance hotline) that include answering questions in any applicable non-English language and providing assistance with automatic portability transactions in any applicable non-English language.

Additionally, the automatic portability provider would be required to provide, upon request, a notice or disclosure in any applicable, non-English language. In the 2016–2020 ACS, the Department identified eight languages that met the 10 percent threshold in at least one county. The eight languages were Spanish, Chinese, Navajo, Tagalog, Samoan, Carolinian, and Chamorro. For the purposes of this analysis, the Department estimates that an automatic portability provider will need to translate the notices into eight languages. Document translation costs vary depending on the length of the document, the complexity of the document, and the complexity of the language.¹²⁴ One source estimates that the average translation cost per page ranges between \$20 and \$130.¹²⁵ Due to the potential complexity of the documents, the Department assumes the cost will be towards the higher-end of the range and therefore, on average, it will cost \$100 per page to translate the notices in this proposal. The Department requests comment on this cost assumption. The translation costs for the initial enrollment notice, pre-transaction notice, and the post-transaction notice are summarized in the table below.

TABLE 8—TRANSLATION COSTS

	Languages	Pages	Cost per page	Cost
Initial Enrollment Notice	8	5	\$100	\$4,000
Pre-Transaction Notice	8	2	100	1,600
Post Transaction Notice	8	2	100	1,600
Total .....	.....	9	.....	7,200

A similar analysis conducted by the Department estimated that the average requests for translations of written documents averages 0.098 requests per

1,000 health benefit plan members.¹²⁶ For the purposes of this analysis, the Department assumes that recipients of the notices in this proposal would request translations at the same rate.

The estimated number of translated notices requested is summarized in the table below. The Department requests comment on how frequently translations would be requested for such notices.

¹²² Values calculated as follows: Year 1—397,749 notices × 2/60 clerical hours = 13,258 burden hours. \$63.45 clerical worker wage × 13,258 burden hours = \$841,239. Subsequent years: 736,825 notices × 2/60 clerical hours = 24,561 burden hours. \$63.45 clerical worker wage × 25,572 burden hours = \$1,558,384.

¹²³ The relevant ACS data set used is the U.S. Census, 2016–2020 American Community Survey 5-

Year Estimates, Table B16001, Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, available at <https://data.census.gov/cedsci/table?tid=ACSDT5Y2020.B16001>.

¹²⁴ American Translators Association, *How Much Does a Translation Cost?* (May 2023), <https://www.atanet.org/client-assistance/how-much-does-translation-cost/>.

¹²⁵ Lettier, Mariel, *Translation Rates in 2023—A Complete Guide*, Rush Translate, (2023), <https://rushtranslate.com/blog/translation-rates#:~:text=for%201000%20words,-,What%20is%20the%20average%20rate%20for%20translation%20per%20page%3F,certified%20translation%20and%20charges%20%2424.95>.

TABLE 9—TRANSLATED NOTICES REQUESTED

	Year 1	Years 2–10 (average)
Initial Enrollment Notice:		
<i>Total Initial Enrollment Notice</i>	954,786	1,014,438
× <i>Percent Requesting Translated Notice</i>	0.0098%	0.0098%
= <i>Translated Notices Distributed</i>	94	100
Pre-Transaction Notice:		
<i>Total Pre-Transaction Notice</i>	403,397	747,287
× <i>Percent Requesting Translated Notice</i>	0.0098%	0.0098%
= <i>Translated Notices Distributed</i>	40	74
Post-Transaction Notice:		
<i>Total Post-Transaction Notice</i>	397,749	736,825
× <i>Percent Requesting Translated Notice</i>	0.0098%	0.0098%
= <i>Translated Notices Distributed</i>	39	73
Total Translated Notices Distributed	173	246

Note: Components may not sum to parts due to rounding.

The Department assumes that it would take a clerical professional two minutes to prepare and send each disclosure. The Department assumes that all of the translated notices would

be sent by mail. The Department requests comment on this assumption. Additionally, the Department estimates that an automatic portability provider would incur a cost of \$0.76 to send each

disclosure, including \$0.66 for postage and \$0.05 for the printing costs of each page. The hour burden, equivalent cost, postage, and material costs are summarized in the table below.

TABLE 10—BURDEN TO PREPARE AND SEND TRANSLATED DISCLOSURES

	Year 1	Years 2–10 (average)
Prepare and Send Notice (automatic portability provider):		
Number of Notices	173	246
× <i>Annual Hour Burden per Transaction (Hours)</i>	2/60	2/60
= <i>Total Hours</i>	5.8	8.2
× <i>Labor Cost (Clerical Professional)</i>	\$63.45	\$63.45
= <i>Equivalent Cost</i>	\$366	\$528
Material and Postage Cost (automatic portability provider):		
Initial Enrollment Notices:		
Number of Notices Sent by Mail	94	100
× <i>Postage and Material Cost per Notice (5 Pages)</i>	\$0.91	\$0.91
= <i>Postage and Material Cost</i>	\$86	\$91
Pre-Transaction Notices:		
Number of Notices Sent by Mail	40	74
× <i>Postage and Material Cost per Notice (2 Pages)</i>	\$0.76	\$0.76
= <i>Postage and Material Cost</i>	\$30	\$56
Post-Transaction Notices:		
Number of Notices Sent by Mail	39	73
× <i>Postage and Material Cost per Notice (2 Pages)</i>	\$0.76	\$0.76
= <i>Postage and Material Cost</i>	\$30	\$55
Total Hour Burden	6	8
Total Equivalent Cost	\$366	\$528
Total Postage and Material Cost	\$146	\$202

Note: Components may not sum to parts due to rounding.

6.5.7. Summary Plan Description

The Department proposes a requirement that the automatic portability provider provide the administrator of participating plans with a model description of the automatic portability program, including fees and expenses, that the administrator could use in fulfilling its SPD obligations, as applicable.

PTE 2019–02 included an SPD condition but was silent on which party

had the obligation to ensure compliance. However, given the fact that RCH was the entity in control of the fees, the Department expects that the SPD condition of PTE 2019–02 would have been fulfilled in a manner similar to that in the proposed regulation. Therefore, the Department estimates no additional incremental burden to RCH/PSN as a result of the proposed regulation.

6.6. Searches

The proposed regulation parallels the Code section 4975(f)(12)(B)(viii) requirement that the automatic portability provider query on at least a monthly basis whether any individual with an IRA has an account in a transfer-in plan. Under the proposal, the automatic portability provider must perform ongoing participant address validation searches via automated checks of National Change of Address

records, two separate commercial locator databases, any internal databases maintained by the automatic portability provider, and a manual internet-based search if a valid address is not obtained from the automated checks. The proposal would require these verification steps to be performed at least twice in the first year an account is entered into the automatic portability provider system and once a year thereafter.

PTE 2019–02 included an identical requirement regarding monthly searches. The Department assumes that this process is automated via technology and has de minimis marginal cost with respect to number of records being searched; therefore, this aspect of the proposal is not expected to add additional cost to RCH/PSN. PTE 2019–02 also included a general requirement to take “all prudent actions necessary to reasonably ensure that the Plan’s participant and beneficiary data is current and accurate.” Although RCH represented to the Department that it would perform address validation searches in line with the requirement in the proposed regulation, the condition in PTE 2019–02 did not specify the frequency of those searches nor the additional parameters in the proposal regarding participant address validation searches. The Department believes, due to the representation from RCH in connection with the individual exemption, that the proposed regulation will therefore not add additional cost. However, the Department requests comment on whether the current framework for executing automatic portability transactions of RCH/PSN is expected to include a process for ongoing address validation searches for Default IRAs that are included in the arrangement (*i.e.*, those which are eligible to be moved into a transfer-in plan through the execution of an automatic portability transaction).

6.7. Monitoring Transfers

Section 2550.4975f–12(b)(7) of the proposed regulation requires that the automatic portability provider ensure that each transfer-in plan for whom the automatic portability provider performs automatic portability transactions designates a plan official responsible for monitoring transfers into the plan and confirming that amounts received on behalf of a participant are invested properly.

Although the Department believes that monitoring transfers is a necessary component of an automatic portability arrangement, PTE 2019–02 did not include a condition explicitly mandating that a plan official monitor

transfers into the plan. As compared to PTE 2019–02, the Department does not believe the proposed requirement regarding monitoring transfers will likely add cost because that should be a normal act of routine plan administration when assets are rolled into a plan.

6.8. Policies and Procedures

Section 2550.4975f–12(b)(9) incorporates the statutory limitation on discretion and expands upon the statutory text by specifying that an automatic portability provider will be deemed to satisfy the limited discretion requirement if it establishes, maintains, and follows policies and procedures regarding the process for executing automatic portability transactions.

PTE 2019–02 included a condition on the limitation of discretion but did not include a policies and procedures component that would result in the condition being satisfied. The Department believes that it would be standard business practice for RCH/PSN to have policies and procedures in place to govern the various conditions of PTE 2019–02 to ensure that all automatic portability transactions are executed consistently and in a manner that can be independently audited. Although an automatic portability provider is not required to establish the policies and procedures to satisfy the limited discretion aspect of the statute and proposed regulation, the Department anticipates that RCH/PSN will choose to take advantage of the “deemed satisfied” aspect of the proposed regulation. The Department assumes that a legal professional with a wage rate of \$159.34 will spend 10 hours reviewing the existing policies and procedures to ensure compliance with the requirements in the proposed rule, resulting in an equivalent cost of \$1,593.40.¹²⁷ In subsequent years, 2 hours is assumed for a legal professional to review and update the procedures at an estimated cost of \$319 per annum.¹²⁸

6.9. Audit

Code section 4975(f)(12)(B)(xi) includes an annual audit requirement to be conducted in accordance with regulations promulgated by the Secretary. The statute requires that an audit be conducted that demonstrates

¹²⁷ The hour burden is estimated as: 1 automatic portability provider × (10 hours) = 10 hours. The equivalent cost is estimated as: 1 automatic portability provider × (10 hours) × \$159.34 = \$1,593.40, rounded to \$1,593.

¹²⁸ The hour burden is estimated as: 1 automatic portability provider × (30/60 hours) = 30/60 hours. The equivalent cost is estimated as: 1 automatic portability provider × (2 hours) × \$159.34 = \$318.69, rounded to \$319.

compliance with Code section 4975(f)(12) and any regulations thereunder and that identifies any instances of noncompliance with the statute or such regulations. The statute requires the automatic portability provider to submit a copy of the auditor’s report to the Secretary in such form and manner as specified by the Secretary.

PTE 2019–02 required an annual audit conducted by an independent auditor. The auditor is required to review a representative sample of transactions and related undertakings, sufficient for the auditor to make a variety of determinations regarding compliance with PTE 2019–02. Those findings must then be included in a report that is sent to the Office of Exemption Determinations at the Department, the cost of which is discussed below.

The timing for submission of the audit report in the proposed regulation follows the timing from PTE 2019–02. However, as compared to PTE 2019–02, the proposed regulation has a minor difference as a result of the proposed correction provisions. Rather than have the auditor submit the report directly to the Department as was the case under PTE 2019–02, the proposed regulation requires that the audit report shall be provided first to the automatic portability provider, who will thereafter submit the report to the Department after reviewing the audit report and certifying that it has done so.

The parameters of the audit in the proposed regulation, while intended to align with the PTE 2019–02 audit, provide more detail regarding the form and content of the audit, in consideration of the statutory requirements and other areas where the Department has proposed requirements for the purposes of regulatory clarity. The audit requirement of the proposed regulation also accounts for the corrections that may occur in accordance with this proposal. PTE 2019–02 did not specifically include correction parameters. The cost associated with the proposed correction mechanisms is described in the next section.

The Department anticipates the audit parameters of the proposed regulation will add cost to RCH/PSN as compared to what they might otherwise have incurred under PTE 2019–02. First, the proposed regulation requires the audit report to include the total number of completed automatic portability transactions during the audit period. Second, the proposed regulation requires the audit report to address specifically whether, in the reviewed

sample, the appropriate accounts in the transfer-in plan received all the assets due as a result of the automatic portability transaction.

Due to the increase in required actions for the audit, the Department estimates the proposed regulation will increase the cost of performing the audit by roughly 20 percent. The Department estimates audit costs in the absence of the proposed rule to be close to \$25,000 per year. Therefore, the Department estimates that the proposed rule will increase audit costs by approximately \$5,000 per year. The Department seeks comment on this estimate.

There are several actions the automatic portability provider will need to take in support of the audit requirements, which are outlined below. To ensure the accuracy of certain information that the Secretary is required to provide to Congress periodically, the proposed regulation requires the audit report to include information that was not specifically contemplated under PTE 2019–02, and which may not be directly in the automatic portability provider's possession. If the information is not in the possession of the automatic portability provider, the proposed regulation requires the automatic portability provider to require contractually that the information to be provided in connection with its services as an automatic portability provider. If this obligation is not already included in RCH/PSN's contracts with recordkeepers and plans, RCH/PSN may need to update those agreements. The Department estimates updating the standardized contracts would take a lawyer one hour at a wage rate and total cost of \$159.34. Assuming that all 185,000 plans currently covered by the automatic portability provider would have their contracts updated with the standard contract, the Department estimates that a plan fiduciary will spend 15 minutes to execute the updated contract. This results in a burden of 46,250 hours of plan fiduciaries' time, at a wage rate of \$134.93, resulting in a total cost of \$6,240,513.¹²⁹ Combining these two components of this portion of the proposed rule results in an equivalent cost of \$6,240,672.

Although anticipated under PTE 2019–02, there was not an explicit condition for the automatic portability provider to include a certification filed

¹²⁹ The cost to update the contracts is calculated as: 185,000 participating plans × (15/60) hours × \$134.93 plan fiduciary wage rate = \$6,240,512.50. Accounting for the \$159.34 cost for a lawyer to update the contract results in a total of \$6,240,671.84, which is rounded in the text.

with the written audit report, under penalty of perjury, that the automatic portability provider has reviewed the audit report. Nor was there a condition requiring the automatic portability provider to certify that it has addressed, corrected, or remedied any noncompliance or inadequacy in its compliance or has an appropriate written plan to address any such issues identified in the audit report. Because the Department believes RCH/PSN would necessarily be reviewing the audit under PTE 2019–02, it has not attributed a cost to that specific aspect of the proposed regulation. However, with respect to the certifications, the Department estimates that it will take a legal professional 3 hours to draft the certifications and a senior executive 30 minutes to execute the certification, for an added cost of \$542 in the first year and \$64 in subsequent years.¹³⁰

Finally, there would be additional resources expended in collecting and providing the additional records and for the plan to submit the audit report to the Department in place of the auditor. The Department estimates a clerical worker with a wage rate of \$63.45 would spend an additional 5 hours collecting and providing documentation and records for the audit and approximately 15 minutes sending the report once finalized. The resulting cost burden for these actions is \$333.¹³¹

6.10. Corrections

To effectuate the intent of this provision, the Department is proposing three components for corrections in the event the auditor determines the automatic portability provider was not in compliance with the statute and related regulations: an opportunity for an automatic portability provider to make certain self-corrections; additional recommendations from the auditor; and the Secretary requiring an automatic portability provider to submit to supplemental audits and corrective actions if significant compliance issues are uncovered.

Although PTE 2019–02 did not include any correction provisions, the Department believes the availability of self-correction will generally provide a benefit to RCH/PSN as opposed to a

¹³⁰ The cost to draft the certification is a one-time cost calculated as: 3 hours × \$159.34 lawyer wage rate = \$478.02, rounded to \$478. A senior executive would need to execute the certification annually. The certification cost is calculated as (30/60) hours × \$128.11 sr. executive wage rate = \$64.06, rounded to \$64. Therefore, the first year cost is \$478.02 + \$64.06 = \$542.08.

¹³¹ The cost to support and transmit the audit by a clerical worker is estimated as: (5 hours × \$63.45 wage = \$317.25) + ((15/60) hours × \$63.45 wage rate = \$15.86) = \$333.11.

cost. However, in connection with the proposed regulation's correction provisions, the automatic portability provider must establish policies for the corrections permitted by the proposal. The Department expects that RCH/PSN will need to develop policies related to corrections that may not already be included in other pre-existing policies and procedures governing their program. The Department assumes the policies would be developed by an in-house attorney with a wage rate of \$159.34 and would take roughly 20 hours resulting in a one-time cost of \$3,187.

Additionally, the proposed regulation also includes provisions relating to the auditor's review of the automatic portability provider's compliance that were not specifically included in PTE 2019–02. If the auditor identifies any instances of noncompliance, then RCH/PSN would be required by the proposal to correct those issues as soon as reasonably practicable. The Department believes there may be some added cost associated with remediating compliance issues. The Department lacks the information necessary to identify the extent of noncompliance issues that might be uncovered. However, in order to correct issues, the Department assumes that both a Senior Executive and a lawyer would likely be involved. The Department estimates each would spend 10 hours considering and developing remedies to audit findings. The cost for the lawyer is estimated as 10 hours at a wage rate of \$159.34 resulting in a cost of \$1,593. The cost for the Senior Executive is similarly estimated as 10 hours at a wage rate of \$128.11 resulting in a cost of \$1,281.10. Lastly, a summary of the corrective actions taken is to be sent to the auditor. The Department assumes that a clerical worker with a wage rate of \$63.45 will spend two hours organizing and communicating the summary to the auditors, at a cost of \$127. The total annual cost to address audit findings and communicate the summary of actions taken is estimated as the sum of these three costs, \$3,001.

The ability of the Department to impose additional supplemental audits and corrective actions could also add cost. For instance, if the Department were to impose a supplemental audit, the expected cost to RCH/PSN would likely be the same as the cost of the required annual audit. The Department estimates that no more than one supplemental audit would be imposed in any particular year, but also expects the imposition to be rare. To account for the possibility, the Department assumes one supplemental audit would occur in

the fifth year of the estimation window at a cost of \$30,000, which is the estimated cost of the annual audit.

If the Department were to impose a temporary prohibition on relying upon the statutory exemption, the cost to RCH/PSN associated with that would generally be a function of the number of automatic portability transactions multiplied by the revenue per transaction for the period in which they could not use the exemption. Due to the novelty of the arrangement, the Department currently lacks data to estimate the magnitude of this cost.

6.11. Website

The proposed regulation in paragraph (d) parallels the statutory language in Code section 4975(f)(B)(xii) requiring the automatic portability provider to: (1) maintain a website which contains a list of recordkeepers with respect to which the automatic portability provider carries out automatic portability transactions; (2) list all fees paid to the automatic portability provider; and (3) indicate the number of plans and participants covered by each recordkeeper. Under the proposed regulation, the list would have to include the fees and the identity of the party or account that is paying the particular fee. The proposal would also require the website to display automatic portability transaction-related information in a way that differentiates that information from other information or elements of the website (e.g., separately identifying the automatic portability transaction fees and services from fees and services in connection with establishing and maintaining custody of a Default IRA).

PTE 2019–02 required a website that includes a list of all participating recordkeepers but did not require the additional detail regarding a list of all fees paid to the automatic portability provider, or the number of plans and participants covered by each recordkeeper. The Department anticipates that this information will be readily available to RCH/PSN and that they will update their website to include all the information in a format that meets the requirements in the proposed rule.

The Department estimates that a Senior Executive would spend one hour providing a web designer the requirements for the disclosures in the first year, resulting in an equivalent cost of \$128.¹³² Additionally, the

¹³² The hour burden is estimated as: 1 automatic portability provider × (1 hour) = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider × (1 hour) × \$128.11 = \$128.11, rounded to \$128.

Department estimates that it would take a web designer five hours to update and test the website in the first year, resulting in an equivalent cost of \$778.¹³³ The Department estimates that it would take a web developer one hour in subsequent years to make any necessary revisions or updates to the disclosures, resulting in an equivalent cost of \$156.¹³⁴

6.12. Limitations on Exculpatory Provisions

The limitation on exculpatory provisions in the proposed regulation is substantially identical to the limitation in PTE 2019–02. Therefore, the Department anticipates no additional cost to RCH/PSN.

6.13. Record Retention

This proposed regulation incorporates the statutory language in Code section 4975(f)(12)(xi)(I) regarding record retention by requiring an automatic portability provider to maintain, for not less than six years, records sufficient to demonstrate compliance with the requirements of the statute and this proposed regulation and make them available to authorized employees of the Department and the Department of the Treasury within 30 calendar days of a written request.

PTE 2019–02 had a broader recordkeeping provision with respect to who could request records as compared to the statutory provision. The Department believes this could result in cost savings to RCH/PSN because plan fiduciaries and IRA owners can no longer request the records. However, the Department does not believe this will change the cost of retaining the records. The Department does not know how many plan fiduciaries or IRA owners would request records, but expects it would be infrequent, resulting in a de minimis cost reduction to RCH/PSN.

7. Transfers

7.1. Transfers Resulting From Open Participation

Section 2550.4975f–12(g) of this proposed regulation parallels Code section 4975(f)(12)(B)(iv) by requiring, as a condition of the availability of the exemption, that the automatic portability provider offer automatic

¹³³ The hour burden is estimated as: 1 automatic portability provider × (5 hours) = 5 hours. The equivalent cost is estimated as: 1 automatic portability provider × (5 hours) × \$155.61 = \$778.05, rounded to \$778.

¹³⁴ The hour burden is estimated as: 1 automatic portability provider × (1 hour) = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider × (1 hour) × \$155.61 = \$155.61, rounded to \$156.

portability transactions on the same terms to any transfer-in plan. The Department is also proposing that open participation would require that the automatic portability provider not restrict or limit the ability of an employer-sponsored retirement plan, IRA custodian or IRA provider, or recordkeeper to engage other automatic portability providers to execute automatic portability transactions. PTE 2019–02 required RCH to offer the program in a functionally identical manner as the open participation requirement of the statute. However, it did not include a condition similar to the proposed regulation requirement that ensures a plan sponsor is not restricted from engaging more than one automatic portability provider. Since this requirement reduces barriers to entry, it will tend to encourage RCH/PSN to keep its fee low to discourage other automatic portability providers from competing in the market. This would represent a transfer from RCH/PSN to participants in the form of lower fees and to other automatic portability providers (if others enter the market), in the form of lower barriers to entry.

7.2. Transfer of Foregone Government Revenue to Participants

Assets that stay in the tax-preferred retirement system rather than being cashed out will not be subject to regular income tax until a future date when they are distributed. They will also avoid altogether the 10 percent penalty tax on early distributions that would have applied to many cashouts. As the participants pay less in taxes, this represents a transfer from the government to participants in the form of increased tax expenditures supporting the retirement system.

The Department estimates that over the ten-year estimation period the proposed rule will lead to 1.5 million fewer cashouts with a value of approximately \$4.6 billion. The Department assumes that the marginal income tax rate for small account holders would be 12 percent.¹³⁵ The Department also assumes that a 10 percent tax penalty applies to half of the foregone cashouts. The other foregone cashouts are assumed to fall under one of the exceptions; for example, the separating participant turns 55 or older

¹³⁵ U.S. Internal Revenue Service, “IRS Provides Tax Inflation Adjustments for Tax Year 2024” website at [https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024#:~:text=Marginal%20rates%3A%20For%20tax%20year.for%20married%20couples%20filing%20jointly\).&text=The%20lowest%20rate%20is%2010,for%20married%20couples%20filing%20jointly\).](https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024#:~:text=Marginal%20rates%3A%20For%20tax%20year.for%20married%20couples%20filing%20jointly).&text=The%20lowest%20rate%20is%2010,for%20married%20couples%20filing%20jointly).)

in the calendar year in which they take the distribution, or they are disabled, or they have certain medical expenses.¹³⁶ The Department estimates that the amount of the transfer from the government to participants would be about \$790 million.¹³⁷

8. Regulatory Alternatives

Section 6(a)(3)(C)(iii) of Executive Order 12866 requires a significant regulation, and encourages other regulations, to include an assessment of the costs and benefits of potentially effective and reasonable alternatives to the planned regulation. The Department considered several alternative approaches in developing this proposed regulation which are discussed below.

8.1. Do Not Issue Regulations—Rely Only on Sub-Regulatory Guidance

The Department considered not proposing regulations with respect to the automatic portability provision included in section 120 of the SECURE 2.0 Act. Section 120(c) directs the Secretary of Labor to “issue such guidance as may be necessary to carry out the purposes of the amendments made by this section, including regulations or other guidance” no later than 12 months after the enactment of the statute. To this end, the Department has considered whether its responsibilities under section 120(c) could be satisfied by issuing only sub-regulatory guidance. The Department considered issuing guidance stating that compliance with the individual exemption would be sufficient to comply with the statutory exemption. However, since the Department anticipates that entities not engaging in automatic portability transactions may wish to enter the automatic portability market in the future, the Department maintains that issuing the proposed regulation would address any uncertainty on complying with the statutory exemption in a manner that is consistent with directives expressed in section 120(c).

8.2. Issue More Limited Regulations

The Department considered issuing limited regulations concerning only the portions of section 4975(f)(12) focused on the audit and the acknowledgement

of fiduciary status, both of which called on the Department to promulgate regulations to determine compliance. In so doing, the Department could have issued sub-regulatory guidance with respect to compliance with the rest of the exemption. The Department did ensure that these proposed regulations provide the necessary blueprint for completing a comprehensive audit and sufficient acknowledgement of fiduciary status. However, given that regulations were to be proposed, the Department believes that more comprehensive regulations ensure that automatic portability transactions are protective of plan participants and beneficiaries. Furthermore, the Department believes that the novel nature of automatic portability transactions necessitates comprehensive proposed regulations followed by a notice-and-comment process in which stakeholders can provide input.

8.3. Do Not Require an Initial Enrollment Notice

The Department considered not including a requirement for an initial enrollment notice in the proposed regulations. The statute only requires that an automatic portability provider furnish IRA owners with a pre-transaction notice and a post-transaction notice. However, section 120(c)(1) gives the Department the statutory authority to require that automatic portability providers furnish a notice “in advance of” the pre-transaction notice. The Department was not mandated to require additional notices and could have considered the pre-transaction notice sufficient to provide IRA owners with information regarding the automatic portability transactions. However, the Department determined that the initial enrollment notice helps to ensure the IRA owner’s awareness and understanding of the automatic portability transaction, including but not limited to, the individual’s right to affirmatively elect not to participate in the transaction, the other available distribution options, the procedures to take advantage of such options, and the procedures for doing so.

8.4. Audit Does Not Have To Be “Independent”

The Department considered proposing an audit that could be conducted as an internal audit. However, the Department determined that the factors which led to the inclusion of an independent audit in PTE 2019–02 still exist with respect to the execution of automatic portability transactions, even under the new statutory exemption. The novelty of these types of transactions leads the

Department to believe that the enhanced oversight and credibility associated with an independent audit favors the Department’s approach in the proposed regulation.

8.5. Exemptive Relief for Default IRAs Involving Rollovers of Accounts With a Value of \$1,000 or Less

In section E of the preamble the Department is requesting comments on whether it should exercise its general exemption authority under ERISA section 408(a) to provide the same exemptive relief to mandatory distributions with a value of \$1,000 or less that the statutory exemption provides to mandatory distributions described in Code section 401(a)(31)(B) with a value between \$1,001 and \$7,000. The estimated benefits and costs in the regulatory impact analysis for this proposed rule include all accounts with balances of \$7,000 or less. As discussed in section E, that analysis aligns with the scope of Department’s safe harbor regulation at 29 CFR 2550.404a–2 for automatic rollovers to individual retirement plans and with PTE 2019–02. Excluding accounts with balances of \$1,000 or less from the regulatory impact analysis for the proposed rule results in a reduction in the ten-year undiscounted total estimated benefit to \$1.7 billion¹³⁸ (compared to \$2.8 billion in the main analysis),¹³⁹ reduction in incremental costs to \$12.6 million¹⁴⁰ (compared to \$16.2 million in the main analysis),¹⁴¹ and an increase of 2.3 million automatic portability transactions (compared to an increase of 3.7 million in the main analysis). This results in lower net benefits, but those net benefits are still substantial.

The Department has substantial uncertainty surrounding these estimates and made simplifying assumptions to obtain the estimates. The Department seeks comment and data on the following issues. The number of mandatory distributions or accounts with a balance of \$1,000 or less is not certain. The most relevant data available comes from a 2023 Public Retirement Research Lab report concerning public

¹³⁸ Using a 3 percent discount rate, this results in total benefits of \$1,451,914,016. Using a 7 percent discount rate, this results in total benefits of \$1,184,887,753.

¹³⁹ Using a 3 percent discount rate, this results in total benefits of \$2,341,907,159. Using a 7 percent discount rate, this results in total benefits of \$1,911,200,700.

¹⁴⁰ Using a 3 percent discount rate, this results in total costs of \$11,259,790. Using a 7 percent discount rate, this results in total costs of \$9,869,114.

¹⁴¹ Using a 3 percent discount rate, this results in total costs of \$14,160,023. Using a 7 percent discount rate, this results in total costs of \$12,073,029.

¹³⁶ U.S. Internal Revenue Service, “401(k) Resource Guide—Plan Participants—General Distribution Rules” website, at <https://www.irs.gov/retirement-plans/plan-participant-employee/401k-resource-guide-plan-participants-general-distribution-rules#tax-on-early-distributions>.

¹³⁷ $(\$4,646,579,157 * 12\%) + (\$4,646,579,157 * 50\% * 10\%) = \$789,918,457$. Using a 3 percent discount rate, this results in transfers totaling \$655,539,147. Using a 7 percent discount rate, this results in transfers totaling \$519,964,549.

defined contribution plans which indicated that 16 percent of all account balances were \$1,000 or less. The report also found that 42 percent of all accounts had balances less than \$7,000.¹⁴² The primary analysis assumes that all accounts below the distribution threshold are treated the same and the account owners respond similarly regardless of the account balance. The Department seeks data on whether mandatory distributions with \$1,000 or less are treated differently by plan sponsors and how the account owners' responses may differ.

9. Uncertainty

The Department acknowledges that there is significant uncertainty in how the automatic portability provider market will develop in the future. The Department requests comments on these sources of uncertainty. For instance, there may be only one automatic portability provider in the future, PSN, or there may be multiple automatic portability providers, which would allow for specialization on the part of the automatic portability providers. If additional firms ultimately enter the market as automatic portability providers, resulting in a less concentrated market with more competitors, that would likely lead to lower fees, better quality service, and less profits for RCH/PSN. These benefits and transfers would accrue to the other automatic portability providers and to participants.

In the baseline scenario, the number of recordkeepers joining PSN was expected to be flat. However, additional recordkeepers could join the network. The model was adjusted to have the number of recordkeepers increase at half the rate as was used for the post-statute and regulation scenario. Changing this assumption led to a ten-year undiscounted total estimated benefit of \$615.0 million¹⁴³ (compared to \$2.8 billion in the main analysis),¹⁴⁴ \$9 million in incremental costs¹⁴⁵ (compared to \$16.2 million in the main

analysis),¹⁴⁶ and an increase of 1.3 million automatic portability transactions (compared to an increase of 3.7 million in the main analysis). Changing this assumption results in lower net benefits, but those net benefits are still substantial.

There is uncertainty about the number of future automatic portability transactions, in large part because the Department is unclear how the proposed rule will impact DB plans and participants. While the Department believes that the statutory regulation applies to both DB and DC plan participants, the Department assumes that DB plan participants will rarely be affected by this proposed rule. DB plan benefits are generally derived from a formula based on an employee's wages and years of service, which an employee is only entitled to once they are fully vested. Vesting periods vary, however, with five-year "cliff" vesting being very common and for which few vested participants would separate from service with benefits that are less than \$7,000. However, participants in DB plans with graded vesting would be more likely to have accrued benefits below the threshold. The Department requests comments on the number of DB plans and participants that would be affected by this statutory exemption and how they would be impacted.

While the share of workers covered by DB plans has continued to decline, those covered by DC plans have increased substantially, with 45 percent of civilian workers participating in DC plans compared to just 19 percent participating in DB plans.¹⁴⁷ If DC plan coverage continues to increase in the future, the amount of automatic portability transactions will likely also increase.

Workers affected on the margin by increased retirement plan coverage would likely have a lower income on average than workers currently covered by a retirement plan and therefore would tend to contribute less to their plan. Employers sponsoring new plans may also contribute less. These factors would lead to more small balance accounts that would be subject to forced transfers into Default IRAs. These workers would also be more likely to experience a larger number of job turnovers on average, so there would be more Default IRA owners. Under the assumption that DC plan coverage will increase in the future, Default IRA

owners would be more likely to have coverage at their new jobs, leading to more automatic portability transactions.

There are also many factors at the level of individual employee behavior that will affect the impact of the statutory exemption and any accompanying regulations. This includes employee decisions about whether to contribute to their DC plan, which will be influenced by plan designs that have automatic enrollment. Furthermore, employee decisions about how to handle their account when separating from a job will be key. It is difficult to know what the trends will be around such decisions in the future since they may be affected by financial advice, and any possible changes to the scope of coverage under DB pension plans and Social Security. While the scale of such developments is difficult to predict, they will surely have a substantial impact on the scope of automatic portability transactions, the number of participants, plans, and financial institutions affected, as well as the size of the benefits and costs.

G. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the NPRM. To obtain a copy of the ICR, contact the PRA addressee below or go to *RegInfo.gov*. The Department has submitted a copy of the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the

¹⁴² Public Retirement Research Lab, *Secure 2.0 Act Low-Balance Distribution Limit Changes: A Look by Age and Tenure*, (2023), *SECURE 2.0 Act Low-Balance Distribution Limit Changes: A Look by Age and Tenure* (*ebri.org*).

¹⁴³ Using a 3 percent discount rate, this results in total benefits of \$529,400,846. Using a 7 percent discount rate, this results in total benefits of \$439,280,667.

¹⁴⁴ Using a 3 percent discount rate, this results in total benefits of \$2,341,907,159. Using a 7 percent discount rate, this results in total benefits of \$1,911,200,700.

¹⁴⁵ Using a 3 percent discount rate, this results in total costs of \$8,265,330. Using a 7 percent discount rate, this results in total costs of \$7,488,188.

¹⁴⁶ Using a 3 percent discount rate, this results in total costs of \$14,160,023. Using a 7 percent discount rate, this results in total costs of \$12,073,029.

¹⁴⁷ U.S. Bureau of Labor Statistics, *National Compensation Survey*, (March, 2023).

validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Department’s PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by March 29, 2024 to ensure their consideration.

ICRs are available at RegInfo.gov (reginfo.gov/public/do/PRAMain). Requests for copies of the ICR can be sent to the PRA addressee:

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210

By email: ebsa.opr@dol.gov

1. Preliminary Assumptions and Cost Estimate Inputs

For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic

disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department’s 2002 and 2020 electronic disclosure safe harbors.¹⁴⁸ Accordingly, the Department estimates that 96.1 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 3.9 percent would be sent by mail.¹⁴⁹ For disclosures sent by mail, the Department estimates that entities will incur a cost of \$0.66¹⁵⁰ for postage and \$0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel would perform the tasks associated with information collection requests at an hourly wage rate of \$63.45 for clerical personnel, \$128.11 for a Senior Executive, \$134.93 for a plan fiduciary, \$155.61 for a web developer, and \$159.34 for a legal professional.¹⁵¹

2. Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Impact Analysis, the Department expects that the statutory exemption and accompanying proposed regulation would impose paperwork burdens on automatic portability providers and plans. For the purposes of this analysis, the Department assumes that there will only be one entity providing automatic portability provider services. The Department acknowledges that there is significant uncertainty in how the automatic portability provider market will develop in the future. For a larger

discussion on the factors the Department considered in this estimate, refer to the Affected Entities section of the Regulatory Impact Analysis.

In 2023, PSN noted that their member recordkeepers represent over 185,000 employer-sponsored retirement plans.¹⁵² PSN does not clarify what type of plans are included in this estimate or whether all of these plans are eligible for automatic portability services. The Department relies on this estimate for purposes of this analysis with the acknowledgement of this uncertainty. The Department requests comment on how many plans are expected be eligible for automatic portability services in the near future, as well as what percentage of plans might be eligible in the future.

As discussed in the Affected Entities section of the Regulatory Impact Analysis, the Department estimates that there are 954,786 account holders for whom default IRAs will be established in the first year, 976,384 in year two and 994,897 in year three. The Department requests comment on this estimate, as well as how it would likely change after the exemption becomes effective. The table below summarizes the Department’s estimate for the accounts eligible for automatic portability transactions, the number of accounts that would opt out of automatic portability transactions, and the number of executed automatic portability transactions. For more information on how these estimates were calculated, refer to the Affected Entities section of the Regulatory Impact Analysis.

TABLE 11—AFFECTED PARTICIPANTS/ACCOUNTS

	Year 1	Year 2	Year 3
Participants (Total)	954,786	976,384	994,897
Accounts Located and Matched for Automatic Portability	403,397	526,984	639,538
Accounts Opting Out of Automatic Portability	5,648	8,953	8,953
Automatic Portability Transactions	397,749	519,606	630,585

3. Acknowledgement of Fiduciary Status

The proposed regulation requires the automatic portability provider to acknowledge in writing that it is a fiduciary upon being engaged by a plan fiduciary. The Department anticipates

that a single standard acknowledgement would be included in contracts with plan sponsors. The Department estimates that it would take a legal professional one hour to draft this acknowledgement in the first year,

resulting in an hour burden of one hour with an equivalent cost of \$159.¹⁵³

Additionally, the Department estimates that 185,000 acknowledgements of fiduciary status¹⁵⁴ would be sent to plan

¹⁴⁸ 67 FR 17264, 85 FR 31884.

¹⁴⁹ The Department estimates 96.1 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.3 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (37.8 percent).

¹⁵⁰ United States Postal Service. “First-Class Mail.” (2023). <https://www.usps.com/ship/first-class-mail.htm>.

¹⁵¹ Internal DOL calculation based on 2023 labor cost data. For a description of the Department’s methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

¹⁵² Portability Services Network, *An Industry Led Utility*, (2023), <https://psn1.com/>.

¹⁵³ The hour burden is estimated as: 1 automatic portability provider × 1 hour = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider × 1 hour × \$159.34 = \$159.34, rounded to \$159.

¹⁵⁴ As of 2023, PSN estimated that their members represented 185,000 employer-sponsored retirement plans. (Portability Services Network, *A Retirement Industry-Led Utility*, (2023), <https://psn1.com/learning-center/about-psn/a-retirement-industry-led-utility>).

fiduciaries in the first year and that it would take a clerical professional two minutes to prepare and send the acknowledgement. This results in an hour burden of 6,167 hours with an equivalent cost of \$391,275.¹⁵⁵ The Department expects that acknowledgements sent in subsequent years would be included in contract documents and would result in a de minimis burden.

The Department assumes that the acknowledgement of fiduciary status generally would be sent electronically. Therefore, the Department assumes there would be no associated material or postage cost.

4. Summary Plan Description

The proposal would require the automatic portability provider to provide the administrator of participating plans with a model description of the automatic portability program for plan sponsors to include in their summary plan description (SPD), including fees and expenses, as applicable. The Department anticipates that the automatic portability provider would draft and send the same standard model description to all plans. The Department estimates that drafting the SPD would take a legal professional 10 hours, resulting in an hour burden of 10 hours with an equivalent cost of \$1,593 in the first year.¹⁵⁶ The Department estimates that it would take a clerical professional two minutes to prepare and send the summary plan description to each of the 185,000 plans, resulting in an annual hour burden of 6,167 hours and an equivalent cost of \$391,275.¹⁵⁷

The Department assumes that this document would be sent electronically and thus would not incur any postage or material costs.

5. Policies and Procedures

The proposal requires automatic portability providers to establish, maintain, and follow written policies and procedures to ensure that they obtain or have access to current and accurate census and contact data on individual participants and IRA owners and to specify standards and timeframes that apply to all automatic portability

¹⁵⁵ The hour burden is estimated as: 185,000 plan fiduciaries \times 2/60 hours = 6,167 hours. The equivalent cost is estimated as: 185,000 plan fiduciaries \times 2/60 hours \times \$63.45 = \$391,275.

¹⁵⁶ The hour burden is estimated as: 1 automatic portability provider \times 10 hours = 10 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 10 hours \times \$159.34 = \$1,593.40, rounded to \$1,593.

¹⁵⁷ The hour burden is estimated as: 185,000 plans \times 2/60 hours = 6,167 hours. The equivalent cost is estimated as: 185,000 plans \times 2/60 hours \times \$63.45 = \$391,275.

transactions. The proposal also includes the ability for the automatic portability provider to establish policies and procedures in connection with the limitation on the exercise of discretion. An automatic portability provider will be deemed to satisfy the limited discretion requirement if it establishes, maintains, and follows policies and procedures regarding the process for executing automatic portability transactions.

The Department estimates that it would take a legal professional approximately 10 hours to establish, or modify as applicable, policies and procedures satisfying the requirements in the first year, resulting in an hour burden of 10 hours in the first year with an equivalent cost of \$1,593.¹⁵⁸ In subsequent years, the Department estimates that it would take a legal professional two hours for the automatic portability provider to modify the policies and procedures as needed, resulting in an hour burden of two hours with an equivalent cost of \$319.¹⁵⁹

6. Audit

The proposal requires automatic portability providers to retain an independent auditor to conduct an annual audit to demonstrate compliance and identify any noncompliance issues. The auditor shall, at a minimum, review: the policies and procedures, a representative sample of the required disclosures, a representative sample of automatic portability transactions, and the requirements of section 4975(d)(25), 4975(f)(12), and these regulations. The auditor shall prepare a written audit report signed by the auditor.

The Department estimates that it would take a clerical professional five hours to collect and provide records to the independent auditor, resulting in an annual hour burden of five hours with an equivalent cost of \$317.¹⁶⁰ While the Department lacks precise information on how much it would cost an automatic portability provider to hire an independent auditor to satisfy the required conditions, the Department

¹⁵⁸ The hour burden is estimated as: 1 automatic portability provider \times 10 hours = 10 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 10 hours \times \$159.34 = \$1,593.40, rounded to \$1,593.

¹⁵⁹ The hour burden is estimated as: 1 automatic portability provider \times 2 hours = 2 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 2 hours \times \$159.34 = \$318.68, rounded to \$319.

¹⁶⁰ The hour burden is estimated as: 1 automatic portability provider \times 5 hours = 5 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 5 hours \times \$63.45 = \$317.25, rounded to \$317.

estimates that it would cost \$30,000. This estimate is based on information previously provided by stakeholders for similar audits, and the Department requests comment on this figure.

The Department estimates that it will take a legal professional three hours to draft the certification in the first year, resulting in an hour burden of three hours and equivalent cost of \$478.¹⁶¹ The Department estimates that it would take a senior executive 30 minutes to execute the certification, resulting in an annual hour burden of 30 minutes with an equivalent cost of \$64.¹⁶² Finally, the Department approximates that it would take a clerical professional 15 minutes to send the report to the Department once finalized, resulting in an hour burden of 15 minutes and an equivalent cost of \$16.¹⁶³

The proposal requires that the written audit include certain information, described in the regulatory text. If the automatic portability provider does not have direct access to this information, the proposal would require the partnering recordkeepers and participating plans to provide such information as a condition of receiving the automatic portability provider's services. This obligation may require an automatic portability provider to update requirements with its recordkeepers and plans. The Department estimates that updating the standardized contracts would take a legal professional at the automatic portability provider one hour, resulting in an hour burden of one hour and an equivalent cost of \$159.¹⁶⁴ Additionally, the Department estimates that it would take 15 minutes for plan fiduciaries to execute the updated contract, resulting in an hour burden of 46,250 hours with an equivalent cost of \$6,240,513.¹⁶⁵

¹⁶¹ The hour burden is estimated as: 1 automatic portability provider \times 3 hours = 3 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 3 hours \times \$159.34 = \$478.02, rounded to \$478.

¹⁶² The hour burden is estimated as: 1 automatic portability provider \times 30/60 hours = 30/60 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 30/60 hours \times \$128.11 = \$64.06, rounded to \$64.

¹⁶³ The hour burden is estimated as: 1 automatic portability provider \times 15/60 hours = 15/60 hours. The equivalent cost is estimated as: 1 automatic portability provider \times 15/60 hours \times \$63.45 = \$15.86, rounded to \$16.

¹⁶⁴ The hour burden is estimated as: 1 automatic portability provider \times 1 hour = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider \times 1 hour \times \$159.34 = \$159.34, rounded to \$159.

¹⁶⁵ The hour burden is estimated as: 185,000 plans \times 15/60 hour = 46,250 hours. The equivalent cost is estimated as: 185,000 plans \times 15/60 hour \times \$134.93 = \$6,240,512.50, rounded to \$6,240,513.

7. Corrections

If the auditor determines the automatic portability provider was not in compliance with the statute and related regulations, the proposal includes an opportunity for self-correction.

As such, the proposal would require the automatic portability provider to establish policies for the corrections permitted by the proposal. The Department assumes that establishing such policies and procedures would take a legal professional 20 hours in the first year, resulting in an hour burden of 20 hours and an equivalent cost of \$3,187.¹⁶⁶

In the case of a violation, the automatic portability provider would be required to correct the violation and document the correction in writing within 30 calendar days of correction. The Department does not expect that an automatic portability provider would have a violation on an annual basis, and the Department acknowledges that the correction and related documentation could vary significantly, depending on the nature of the violation. For the purposes of this analysis, the Department considers the cost on an average annual basis. The Department estimates that, on average, it would take a clerical professional two hours to draft and send the documentation of the correction, resulting in an average annual hour burden of two hours and an equivalent cost of \$127.¹⁶⁷

8. Notices and Disclosures

8.1. Notice to the Secretary of Labor

Under the proposed regulation, within 90 calendar days of the date that the automatic portability provider begins operating an automatic portability transaction program that is intended to rely on prohibited transaction relief, the automatic portability provider must notify the Secretary. Because PTE 2019–02 was issued to a single entity, there was no such requirement in the exemption. However, the Department believes based on the small number of expected

automatic portability providers entering the market, that the possible cost burden associated with submitting the simple notice via email to the Department to be roughly \$16, which is estimated as 15 minutes of a clerical worker's time with an hourly wage rate of \$63.45. This notification needs to be updated to report a change to the legal or operating name(s) of the automatic portability provider that is relying upon the exemption. The Department expects that such a change would be rare and thus does not estimate an associated cost.

8.2. Fee and Compensation Disclosure Requirement

The proposed regulation requires the automatic portability provider to disclose fees and compensation to a fiduciary of the employer-sponsored plan and receive an approval in writing in advance of the transaction. This includes fees and compensation received, directly or indirectly, by the automatic portability provider (including its affiliates) for services provided in connection with the automatic portability transaction. The Department assumes that the disclosure would be standard across transactions, requiring an update no more frequently than once a year. The Department requests comment on this assumption.

The Department estimates that preparing the disclosures of fees and compensation would take a legal professional two hours in the first year to draft the disclosure. This results in a burden of two hours and an equivalent cost of \$319 in the first year.¹⁶⁸ The Department estimates that it would take a clerical professional two minutes to prepare and send the disclosure to the fiduciary of the estimated 185,000 plans, resulting in a burden of 6,167 hours in the first year and an equivalent cost of \$391,275.¹⁶⁹

The Department assumes that the disclosure and approval would be sent electronically between the automatic portability provider and the plan. Therefore, the Department assumes there would be no associated material or postage cost.

8.3. Initial Enrollment Notice

The proposal requires an automatic portability provider to send each individual on whose behalf the individual retirement plan was established an initial notice within 15 calendar days of the individual retirement plan's enrollment or participation in an arrangement that includes the possibility of a future automatic portability transaction executed by the automatic portability provider. The Department estimates that preparing this disclosure would take a legal professional two hours, resulting in an hour burden of two hours and an equivalent cost of \$319.¹⁷⁰

As discussed above, the Department estimates that the disclosures would be sent to an average of 975,35 individuals in the first three years, and that it would take a clerical professional two minutes to prepare and send the disclosures. This results in an average hour burden of 32,512 hours with an average equivalent cost of roughly \$2 million per year.¹⁷¹ The Department estimates that an automatic portability provider would incur \$0.66 for postage and \$0.25 for the paper and printing costs of five pages, which the Department estimates to cost on average \$34,615 per year in the first three years.¹⁷²

8.4. Pre-Transaction Notice

639,538 in the third year. The Department estimates that drafting this notice would take a legal professional two hours in the first year and that preparing and sending each disclosure would take a clerical professional two minutes.

As discussed at the beginning of this section, the Department estimates that 3.9 percent of the notices would be sent by mail. The Department estimates that an automatic portability provider would incur a cost of \$0.76 to send each disclosure, including \$0.66 for postage and \$0.10 for the paper and printing costs of two pages. The hour burden, equivalent cost, postage, and material costs are summarized in the table below.

¹⁶⁶ The hour burden is estimated as: 1 automatic portability provider × 20 hours = 20 hours. The equivalent cost is estimated as: 1 automatic portability provider × 20 hours × \$159.34 = \$3,186.80, rounded to \$3,187.

¹⁶⁷ The hour burden is estimated as: 1 automatic portability provider × 2 hours = 2 hours. The equivalent cost is estimated as: 1 automatic portability provider × 2 hours × \$63.46 = \$126.90, rounded to \$127.

¹⁶⁸ The hour burden is estimated as: 1 automatic portability provider × 2 hours = 2 hours. The equivalent cost is estimated as: 1 automatic

portability provider × 2 hours × \$159.34 = \$318.68, rounded to \$319.

¹⁶⁹ The hour burden is estimated as: 185,000 plans × 2/60 hours = 6,167 hours. The equivalent cost is estimated as: 185,000 plans × 2/60 hours × \$63.45 = \$391,275.

¹⁷⁰ The hour burden is estimated as: 1 automatic portability provider × 2 hours = 2 hours. The equivalent cost is estimated as: 1 automatic portability provider × 2 hours × \$159.34 = \$318.68, rounded to \$319.

¹⁷¹ The detailed annual hour burden is estimated as:

Year 1: 954,786 individuals × 2/60 hours = 31,826 hours. The equivalent cost is estimated as: 31,826 hours × \$63.45 = \$2,019,372.

Year 2: 976,384 individuals × 2/60 hours = 32,546 hours. The equivalent cost is estimated as: 32,546 hours × \$63.45 = \$2,065,052.

Year 3: 994,897 individuals × 2/60 hours = 33,163 hours. The equivalent cost is estimated as: 33,163 hours × \$63.45 = \$2,104,207.

¹⁷² The detailed cost is estimated as: (((954,786 year 1) + (976,384 year 2) + (994,897 year 3)) = 2,926,067 × 3.9% = 114,117 × (5 pages × \$0.05 + \$0.66 postage) = \$103,846 total for the three years. \$103,846.47/3 = \$34,615 period average.

TABLE 12—BURDEN AND COST TO DRAFT NOTICE
[Automatic portability provider]

	Year 1	Year 2	Year 3
Affected Entities	1	.....	.....
× Annual Hour Burden per Entity (Hours)	2	.....	.....
= Total Hours	2	.....	.....
× Labor Cost (Legal Professional)	\$159.34	.....	.....
= Equivalent Cost	\$318.68	.....	.....

Note: Components may not sum to parts due to rounding.

TABLE 13—BURDEN AND COST TO PREPARE AND SEND NOTICE
[Automatic portability provider]

	Year 1	Year 2	Year 3
Number of Notices	403,397	526,984	639,538
× Annual Hour Burden per Transaction (Hours)	2/60	2/60	2/60
= Total Hours	13,447	17,566	21,318
× Labor Cost (Clerical Professional)	\$63.45	\$63.45	\$63.45
= Equivalent Cost	\$853,184.66	\$1,114,570.24	\$1,352,623.70

Note: Components may not sum to parts due to rounding.

TABLE 14—MATERIAL AND POSTAGE COST
[Automatic portability provider]

	Year 1	Year 2	Year 3
Number of Notices	403,397	526,984	639,538
× Percent of Notices Sent by Mail	3.9%	3.9%	3.9%
= Number of Notices Sent by Mail	15,732	20,552	24,942
× Postage and Material Cost per Notice	\$0.76	\$0.76	\$0.76
= Material and Postage Cost	\$11,956.32	\$15,619.52	\$18,955.92

Note: Components may not sum to parts due to rounding.

8.5. Post-Transaction Notice

The proposal requires an automatic portability provider, not later than three business days after an automatic portability transaction is completed, to provide notice to the individual on whose behalf the individual retirement plan was established. As discussed above, the Department estimates that 397,749 automatic portability

transactions would occur in first year, 519,606 in the second year, and 630,585 in the third year. The Department estimates that drafting this notice would take a legal professional two hours in the first year and that preparing and sending each disclosure would take a clerical professional two minutes.

As discussed at the beginning of this section, the Department estimates that

3.9 percent of the notices would be sent by mail. The Department estimates that an automatic portability provider would incur a cost of \$0.76 to send each disclosure, including \$0.66 for postage and \$0.10 for the paper and printing costs of two pages. The hour burden, equivalent cost, postage, and material costs are summarized in the table below.

TABLE 15—BURDEN TO DRAFT NOTICE
[Automatic portability provider]

	Year 1	Year 2	Year 3
Affected Entities	1	.....	.....
× Annual Hour Burden per Entity (Hours)	2	.....	.....
= Total Hours	2	.....	.....
× Labor Cost (Legal Professional)	\$159.34	.....	.....
= Equivalent Cost	\$318.68	.....	.....

Note: Components may not sum to parts due to rounding.

TABLE 16—BURDEN TO PREPARE AND SEND NOTICE
[Automatic portability provider]

	Year 1	Year 2	Year 3
Number of Notices	397,749	519,606	630,585
× Annual Hour Burden per Transaction (Hours)	2/60	2/60	2/60
= Total Hours	13,258	17,320	21,020
× Labor Cost (Clerical Professional)	\$63.45	\$63.45	\$63.45

TABLE 16—BURDEN TO PREPARE AND SEND NOTICE—Continued
[Automatic portability provider]

	Year 1	Year 2	Year 3
= Equivalent Cost	\$841,239.14	\$1,098,966.69	\$1,333,687.28

Note: Components may not sum to parts due to rounding.

TABLE 17—MATERIAL AND POSTAGE COST
[Automatic portability provider]

	Year 1	Year 2	Year 3
Number of Notices	397,749	519,606	630,585
× Percent of Notices Sent by Mail	3.9%	3.9%	3.9%
= Number of Notices Sent by Mail	15,512	20,265	24,593
× Postage and Material Cost per Notice	\$0.76	\$0.76	\$0.76
= Equivalent Cost	\$11,789.12	\$15,401.40	\$18,690.68

Note: Components may not sum to parts due to rounding.

8.6. Culturally and Linguistically Appropriate Notices

The proposed regulation would require that notices and disclosures to participants and IRA owners be provided in a culturally and linguistically appropriate manner if the address of a recipient is in a county where 10 percent or more of the population is literate only in the same non-English language. In these counties, the automatic portability provider must include in the English versions of all required notices and disclosure, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the automatic

portability provider. The Department estimates that satisfying this requirement would result in a de minimis cost.

Additionally, the automatic portability provider would be required to provide, upon request, a notice or disclosure in any applicable non-English language. In the 2016–2020 ACS data, 230 counties or county equivalents met or exceeded the 10 percent threshold (rounded to the nearest percent).¹⁷³ In the 2016–2020 ACS, the Department identified eight languages that met the 10 percent threshold in at least one county. The eight languages were Spanish, Chinese, Navajo, Tagalog, Samoan, Carolinian, and Chamorro. For

the purposes of this analysis, the Department estimates that an automatic portability provider will need to translate the notices into eight languages. Document translation costs vary depending on the length of the document, the complexity of the document, and the complexity of the language.¹⁷⁴ One source, estimates that the average translation cost per page ranges between \$20 and \$130.¹⁷⁵ The Department assumes that, on average, it will cost \$100 per page to translate the notices in this proposal. The translation costs for the initial enrollment notice, pre-transaction notice, and the post-transaction notice are summarized in the table below.

TABLE 18—TRANSLATION COSTS

	Languages	Pages	Cost per page	Cost
Initial Enrollment Notice	8	5	\$100	\$4,000
Pre-Transaction Notice	8	2	100	1,600
Post Transaction Notice	8	2	100	1,600
Total .....	.....	9	.....	7,200

A similar analysis conducted by the Department estimated that the average requests for translations of written documents averages 0.098 requests per 1,000 health benefit plan members.¹⁷⁶

For the purposes of this analysis, the Department assumes that recipients of the notices in this proposal would request translations at the same rate. The estimated number of translated

notices requested is summarized in the table below. The Department requests comment on how frequently translations would be requested for such notices.

¹⁷³ The relevant ACS data set used is the U.S. Census, 2016–2020 American Community Survey 5-Year Estimates, Table B16001, Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, available at <https://data.census.gov/cedsci/table?tid=ACSDT5Y2020.B16001>.

¹⁷⁴ American Translators Association, *How Much Does a Translation Cost?* (May 2023), <https://www.atanet.org/client-assistance/how-much-does-translation-cost/>.

¹⁷⁵ Lettier, Mariel, *Translation Rates in 2023—A Complete Guide*, Rush Translate, (2023), <https://rushtranslate.com/blog/translation-rates#:~:text=>

for%201000%20words.-,What%20is%20the%20average%20rate%20for%20translation%20per%20page%3F,certified%20translation%20and%20charges%20%2424.95.

¹⁷⁶ 81 FR 92316.

TABLE 19—TRANSLATED INITIAL ENROLLMENT NOTICES REQUESTED

	Year 1	Year 2	Year 3
Total Initial Enrollment Notices	954,786	976,384	994,897
× Percent Requesting Translated Notice	0.0098%	0.0098%	0.0098%
= Translated Notices Distributed	94	96	97

Note: Components may not sum to parts due to rounding.

TABLE 20—TRANSLATED PRE-TRANSACTION NOTICES REQUESTED

	Year 1	Year 2	Year 3
Total Pre-Transaction Notices	403,397	526,984	639,538
× Percent Requesting Translated Notice	0.0098%	0.0098%	0.0098%
= Translated Notices Distributed	40	52	63

Note: Components may not sum to parts due to rounding.

TABLE 21—TRANSLATED POST-TRANSACTION NOTICES REQUESTED

	Year 1	Year 2	Year 3
Total Post-Transaction Notices	397,749	519,606	630,585
× Percent Requesting Translated Notice	0.0098%	0.0098%	0.0098%
= Translated Notices Distributed	39	51	62

Note: Components may not sum to parts due to rounding.

The Department assumes that it would take a clerical professional two minutes to prepare and send each disclosure. The Department assumes that all of the translated notices would

be sent by mail. The Department requests comment on this assumption. Additionally, the Department estimates that an automatic portability provider would incur a cost of \$0.66 for postage

and \$0.05 for the material and printing costs of each page. The hour burden, equivalent cost, postage, and material costs are summarized in the table below.

TABLE 22—BURDEN TO PREPARE AND SEND TRANSLATED DISCLOSURES
[Automatic portability provider]

	Year 1	Year 2	Year 3
Number of Notices	173	199	222
× Annual Hour Burden per Transaction (Hours)	2/60	2/60	2/60
= Total Hours	5.8	6.6	7.4
× Labor Cost (Clerical Professional)	\$63.45	\$63.45	\$63.45
= Equivalent Cost	\$365.90	\$420.89	\$469.53

Note: Components may not sum to parts due to rounding.

TABLE 23—MATERIAL AND POSTAGE COST FOR THE TRANSLATED INITIAL ENROLLMENT NOTICES

	Year 1	Year 2	Year 3
Initial Enrollment Notices:			
Number of Notices Sent by Mail	94	96	97
× Postage and Material Cost per Notice (5 Pages)	\$0.91	\$0.91	\$0.91
= Postage and Material Cost	\$85.54	\$87.36	\$88.27

Note: Components may not sum to parts due to rounding.

TABLE 24—MATERIAL AND POSTAGE COST FOR THE TRANSLATED PRE-TRANSACTION NOTICES

	Year 1	Year 2	Year 3
Pre-Transaction Notice:			
Number of Notices Sent by Mail	40	52	63
× Postage and Material Cost per Notice (2 Pages)	\$0.76	\$0.76	\$0.76
= Postage and Material Cost	\$30.40	\$39.52	\$47.88

Note: Components may not sum to parts due to rounding.

TABLE 25—MATERIAL AND POSTAGE COST FOR THE TRANSLATED POST-TRANSACTION NOTICES

	Year 1	Year 2	Year 3
Post-Transaction Notice:			
Number of Notices Sent by Mail	39	51	62
× Postage and Material Cost per Notice (2 Pages)	\$0.76	\$0.76	\$0.76
= Postage and Material Cost	\$29.64	\$38.76	\$47.12

Note: Components may not sum to parts due to rounding.

9. Website

The proposal would require the automatic portability provider to maintain a website with three categories of disclosures: (1) a description of all the fees and compensation received, directly or indirectly, by the automatic portability provider for services provided in connection with the automatic portability transaction; (2) a list of recordkeepers for each employer-sponsored retirement plan with respect to which the automatic portability provider carries out automatic portability transactions; and (3) the number of plans and participants covered by each recordkeeper. The Department assumes that an automatic portability provider would already have such a website, readily available access to the required information, and would only incur costs associated with drafting and posting the required disclosures.

The Department estimates that a senior executive employed by the automatic portability provider would spend one hour providing a web designer the requirements for the disclosures in the first year, resulting in an hour burden of one hour with an equivalent cost of \$128.¹⁷⁷ Additionally, the Department estimates that it would take a web designer five hours to update and test the website in the first year, resulting in an hour burden of five hours and equivalent cost of \$778.¹⁷⁸ The Department estimates that it would take a web developer one hour in subsequent years to make any necessary revisions or updates to the disclosures, resulting in an hour burden of one hour with an equivalent cost of \$156.¹⁷⁹

¹⁷⁷ The hour burden is estimated as: 1 automatic portability provider × 1 hour = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider × 1 hour × \$128.11 = \$128.11, rounded to \$128.

¹⁷⁸ The hour burden is estimated as: 1 automatic portability provider × 5 hours = 5 hours. The equivalent cost is estimated as: 1 automatic portability provider × 5 hours × \$155.61 = \$778.05, rounded to \$778.

¹⁷⁹ The hour burden is estimated as: 1 automatic portability provider × 1 hour = 1 hour. The equivalent cost is estimated as: 1 automatic portability provider × 1 hour × \$155.61 = \$155.61, rounded to \$156.

10. Recordkeeping

An automatic portability provider would be required to maintain records sufficient to demonstrate compliance with the requirements of Code section 4975(f)(12) and this regulation. The Department expects adequate records will be automatically generated through the systems created by the automatic portability provider and thus would not create an additional burden.

The proposal would require the records to be made available to any duly authorized employee or representative of the Department of Labor or the Department of the Treasury within 30 calendar days of the date of a written request for such records. The Department estimates that providing records to the Department would take a clerical professional two hours on average to prepare and send requested records, resulting in a per request equivalent cost of \$127.¹⁸⁰ The Department expects that such requests would occur rarely. As such, the Department estimates that one request a year would result in an average annual burden of \$127.

11. Summary

The paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Automatic Portability Transaction Regulations.

OMB Control Number: 1210–NEW.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 185,001.

Estimated Number of Annual Responses: 2,384,846.

Frequency of Response: Initially, Annually, and when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 92,887.

Estimated Total Annual Burden Cost: \$97,985.

¹⁸⁰ The hour burden is estimated as: 1 automatic portability provider × 2 hours = 2 hours. The equivalent cost is estimated as: 1 automatic portability provider × 2 hours × \$63.45 = \$126.90, rounded to \$127.

H. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁸¹ imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.¹⁸² Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. The Department's IRFA is below.

The Affected Entities of the Regulatory Impact Analysis identifies automatic portability providers, recordkeepers, and plans as entities potentially impacted by the proposal. While there may be a substantial number of small recordkeepers and plans affected by the proposal, the Department has determined that there would not be a significant impact on these entities.¹⁸³ The analysis below estimates the effect on small automatic portability providers.

1. Need for and Objectives of the Rule

Section 120 of the SECURE 2.0 Act of 2022 amended Code section 4975 to add a statutory exemption for the receipt of fees and compensation by an automatic portability provider for services provided in connection with an automatic portability transaction. This proposed rule implements the statutory prohibited transaction under Code section 4975 for automatic portability transactions.

When a plan participant intentionally or unintentionally leaves money in a former employer's defined contribution

¹⁸¹ 5 U.S.C. 601 et seq.

¹⁸² 5 U.S.C. 601(2), 603(a); also see 5 U.S.C. 551.

¹⁸³ For recordkeepers, the proposal would require automatic portability providers to contractually require certain information be provided in connection with its services as an automatic portability provider. This would likely require the automatic portability provider to update contracts with plans. The Department estimates that this would require plan fiduciaries to execute the updated contract. The Department estimates that this would take a plan fiduciary 15 minutes. The Department does not consider this to be a significant impact on plans. For plans, the proposal would not require a substantial action, with respect to the requirements under PTE 2019–02.

plan, depending on plan provisions the former employer has the option to cash out balances of \$5,000 or less and to force a transfer of balances between \$1,001 and \$5,000 to a Default IRA. This Default IRA transfer is commonly referred to as a “force-out” and is only implemented if the participant does not elect to have the account balance paid directly to an eligible retirement plan or to receive the balance directly. As part of the SECURE 2.0 Act, the \$5,000 threshold is being raised to \$7,000.¹⁸⁴

Default IRAs, while intended to preserve retirement assets in conservatively managed accounts, typically yield only minimal returns for investors while often imposing considerable fees.¹⁸⁵ Additionally, these Default IRAs, established on behalf of participants, are more susceptible to being abandoned or forgotten while potentially exposing those with multiple accounts to unnecessary losses from duplicated fees that might otherwise be avoided were their assets consolidated into a single account. Cashouts also directly impact participants by removing their assets from tax-favored retirement accounts.¹⁸⁶

Automated portability services allow plan providers to transfer assets into the plan of a participant’s new employer, effectively automating roll-ins from Default IRAs established on behalf of the separated employee to consolidate

assets into an active, employer-sponsored defined contribution plan.

2. *Affected Small Entities*

The Department anticipates an automatic portability provider would be classified as NAICS 522320, Financial Transactions Processing, Reserve, and Clearinghouse Activities. According to the size standards set by the Small Business Administration, entities with NAICS 522320 are considered small if they have average annual receipts less than \$47 million.¹⁸⁷ According to data published by the NAICS Association, by this standard, approximately 99 percent of entities with NAICS 522320 are considered small entities.¹⁸⁸

As discussed in the Regulatory Impact Analysis, the Department assumes that only one entity would rely on the proposed exemption. This entity, RCH, in service of PSN, has stated that the maximum per-transaction fee for its services is \$30.¹⁸⁹ Further, as discussed in the Regulatory Impact Analysis, the Department estimates that there would be 60,265 additional transactions in the first year and an average of 399,341 additional transactions in years two through ten. If the average transaction fee ranged between \$15 and \$30, the annual additional receipts in the first year for this service would be between \$0.9 and \$1.8 million¹⁹⁰ and between \$6.0 million and \$12.0 million in years two through ten.¹⁹¹

The automatic portability services operations at RCH represent just one portion of the business. However, because the entity is private, the Department does not have access to its total annual receipts. While the Department estimates that the annual receipts of RCH may exceed the small entity size thresholds, the Department cannot confirm. Accordingly, the Department has conducted an analysis of the costs imposed by the proposal.

3. *Impact of the Rule*

As discussed in the Regulatory Impact Analysis, the Department assumes that one entity would rely on the proposed exemption. The Department is presenting the estimated costs and costs savings of this entity, RCH/PSN. RCH/PSN currently operates under an individual exemption, PTE 2019–02. The Regulatory Impact Analysis considers the costs and cost savings this proposal would impose, with respect to the requirements under PTE 2019–02.

The Department estimates that the proposal would result in a cost savings for an automatic portability provider operating under the conditions in PTE 2019–02. The table below summarizes the costs and cost savings under the proposal. For more information on these estimates, refer to the Cost section of the Regulatory Impact Analysis.

TABLE 26—PER ENTITY COSTS AND COST SAVINGS FOR AUTOMATIC PORTABILITY PROVIDERS

	Year 1	Years 2–10 (average)
Acknowledgment of Fiduciary Status	\$391,434.34	.....
Policies and Procedures	1,593.40	\$318.68
Independent Audit	6,034.53	5,397.17
Corrections to Audit	6,188.20	3,001.40
Website Requirements	906.16	155.61
Notice to the Secretary of Labor	15.86	.....
Initial Enrollment Notice ^a	^b (1,426,704.81)	^b (1,302,599.20)
Pre-Transaction Notice ^a	132,859.13	824,218.62
Post Transaction Notice ^a	855,059.22	1,580,430.41
Total	^b (32,613.97)	1,110,922.70

Note: Components may not sum to parts due to rounding.

^a Includes costs associated with providing disclosures in a culturally and linguistically appropriate manner.

^b This value represents a cost savings, when compared to requirements for RCH/PSN under PTE 2019–02.

¹⁸⁴ See SECURE 2.0 Act, Sec. 304.

¹⁸⁵ Government Accountability Office (GAO). “401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts.” (2014).

¹⁸⁶ The Code does not require a mandatory distribution of \$1000 or less to be rolled into an IRA.

¹⁸⁷ U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, (March 17, 2023), <https://www.sba.gov/sites/>

sba.gov/files/2023-03/2023-03-03-Table%20of%20Size%20Standards%20Effective%20March%2017%20-%202023%20-%20281%29%20-%20281%29_0.pdf.

¹⁸⁸ This estimate is based on data released by the NAICS Association. (NAICS Association, *Market Analysis Profile: NAICS Code & Annual Sales*, (2022), <https://www.naics.com/custom-market-analysis-profiles/>.)

¹⁸⁹ Portability Services Network, *Our Fees*, [https://psn1.com/learning-center/about-psn/what-](https://psn1.com/learning-center/about-psn/what-are-psns-fees#:-:text=Key%20aspects%20of%20PSN's%20fee,be%20processed%20at%20no%20charge)

[are-psns-fees#:-:text=Key%20aspects%20of%20PSN's%20fee,be%20processed%20at%20no%20charge](https://psn1.com/learning-center/about-psn/what-are-psns-fees#:-:text=Key%20aspects%20of%20PSN's%20fee,be%20processed%20at%20no%20charge).

¹⁹⁰ The lower bound estimate is calculated as 60,265 additional transactions × \$15 = \$903,975. The upper bound estimate is calculated as 60,265 additional transactions × \$30 = \$1,807,950.

¹⁹¹ The lower bound estimate is calculated as 399,341 additional transactions × \$15 = \$5,990,115. The upper bound estimate is calculated as 399,341 additional transactions × \$30 = \$11,980,230.

4. Duplicate, Overlapping, or Relevant Federal Rules

The proposal is intended to align with the requirements in the individual exemption PTE 2019–02. The proposal also incorporates the statutory exemption requirements in the SECURE 2.0 Act and supplements them accordingly. While PTE 2019–02 and the statutory exemption, as supplemented by this proposal, differ slightly, the Department has worked to ensure that the requirements are complimentary. Because PTE 2019–02 and the statutory exemption provide prohibited transaction relief for the same categories of transactions, RCH/PSN will only need to rely on either the statutory or individual exemption. Therefore, it is important for the requirements of the statutory and individual exemptions to be aligned.

Please note that RCH/PSN most likely will rely on the statutory exemption, because it has an unlimited term while the class exemption is limited to a five-year term that expires on July 31, 2024. The Department expects that RCH/PSN will rely upon the statutory exemption and this proposal once it becomes effective rather than PTE 2019–02. Because PTE 2019–02 is an individual exemption granted solely to RCH and its affiliates, any other automatic portability providers that enter the market will only be able to rely upon the statutory exemption and this proposal, so there will be no duplicative requirements imposed on them.

5. Description of Alternatives Considered

This section of the IRFA analysis addresses alternatives the Department considered when developing the proposal. As stated above in this Regulatory Impact Analysis, the Department estimates that only one automatic portability provider would operate under the proposal. Therefore, the regulatory alternatives considered for small entities does not differ from those considered in the Regulatory Impact Analysis. The Department considered the following alternatives:

- *Relying Only on Sub-Regulatory Guidance*—Section 120(c) directs the Secretary of Labor to “issue such guidance as may be necessary to carry out the purposes of the amendments made by this section, including regulations or other guidance” no later than 12 months after the enactment of the statute. The Department considered whether its responsibilities under section 120(c) of SECURE 2.0 could be satisfied by issuing only sub-regulatory guidance.

- *Issuing More Limited Regulations*—The Department considered issuing limited regulations concerning only the portions of Code section 4975(f)(12) focused on the audit and the acknowledgement of fiduciary status, both of which called on the Department to promulgate regulations to determine compliance. In so doing, the Department could have issued sub-regulatory guidance with respect to compliance with the rest of the exemption.

- *Not Requiring an Initial Enrollment Notice*—The Department considered not including a requirement for an initial enrollment notice in the proposed regulations. The statute only requires that an automatic portability provider furnish IRA owners with a pre-transaction notice and a post-transaction notice. Additional notices were left to the discretion of the Department in connection with carrying out the purposes of the statutory exemption.

- *Not Requiring the Audit to be an Independent Audit*—The Department considered proposing an audit that could be conducted as an internal audit.

A more in-depth discussion of the regulatory alternatives and the Department’s decision process is included in the Regulatory Alternatives section of the Regulatory Impact Analysis above.

I. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.¹⁹² For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any Federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments, or the private sector.¹⁹³

J. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires adherence by Federal agencies to specific criteria in the process of their formulation and implementation of policies that have “substantial direct effects” on the states, the relationship between the national

government and states, or on the distribution of power and responsibilities among the various levels of government.¹⁹⁴ Federal agencies promulgating regulations that have federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department’s view, this proposal will not have federalism implications because it would not have direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among various levels of government. The Department welcomes input from affected states regarding this assessment.

Statutory Authority

This regulation is issued pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135), section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, Public Law 117–328, 136 Stat. 4459, and under Secretary of Labor’s Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Individual retirement accounts, Pensions, Plans.

For the reasons set forth in the preamble, the Department is proposing to amend 29 CFR part 2550 as follows:

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor’s Order No. 1–2011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. At 727 (2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat 38. Sec. 2550.404a–2 also issued under sec. 657 of Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112. Sec. 2550.4975f–12 also issued under Pub. L. 117–328, 136 Stat. 4459.

■ 2. Add § 2550.4975f–12 to read as follows:

¹⁹² 2 U.S.C. 1501 *et seq.* (1995).

¹⁹³ Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

¹⁹⁴ Federalism, 64 FR 153 (Aug. 4, 1999).

§ 2550.4975f-12 Rules relating to automatic portability transactions.

(a) *In general and scope of exemption.*

(1) Internal Revenue Code (Code) section 4975(d)(25) exempts from the excise taxes imposed by Code section 4975(a) and (b), by reason of Code sections 4975(c)(1)(D) and (E), the receipt of fees and compensation by an automatic portability provider for services provided in connection with an automatic portability transaction. Code section 4975(d)(25) further exempts from the excise taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(F), the receipt of a fee by an automatic portability provider from an employer-sponsored retirement plan sponsor in lieu of a fee imposed on an individual retirement plan owner. Code section 4975(f)(12) establishes conditions for automatic portability transactions to be covered by the exemption. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. This section implements the statutory exemption and conditions set forth at Code section 4975(d)(25) and (f)(12).

(2) *Automatic portability transaction.* An automatic portability transaction is a transfer of assets made:

(i) From an individual retirement plan which is established on behalf of an individual and to which amounts were transferred under Code section 401(a)(31)(B)(i),

(ii) To an employer-sponsored retirement plan described in clause (iii), (iv), (v), or (vi) of Code section 402(c)(8)(B) (other than a defined benefit plan) in which such individual is an active participant, and

(iii) After such individual has been given advance notice of the transfer and has not affirmatively opted out of such transfer.

(3) *Automatic portability provider.* An automatic portability provider is a person, other than an individual, that executes transfers described in paragraph (a)(2) of this section.

(4) Code section 4975(d)(25) does not contain an exemption for other acts described in Code section 4975(c)(1)(D) and (E) (relating to transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan and to fiduciaries as defined in Code section 4975(e)(3) dealing with the income or assets of plans in their own interest or for their own account) that are not services provided in connection with automatic portability transactions. Services shall not be considered

provided in connection with an automatic portability transaction if the services would have been provided in the absence of an automatic portability transaction or anticipation of a future automatic portability transaction. Except as described in paragraph (a)(1) of this section, Code section 4975(d)(25) does not contain an exemption for acts described in Code section 4975(c)(1)(F) (relating to fiduciaries as defined in Code section 4975(e)(3) receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the income or assets of the plan). Such acts are separate transactions not described in Code section 4975(d)(25). Code section 4975(d)(25) also does not contain an exemption from other provisions of the Code, such as section 401, or other provisions of law which may impose requirements or restrictions relating to the transactions which are exempt under section 4975(d)(25).

(b) This paragraph (b) sets forth conditions that must be satisfied in order for an automatic portability transaction to be covered by the statutory exemption in Code section 4975(d)(25).

(1) *Acknowledgment of fiduciary status.* The automatic portability provider shall acknowledge in writing that it is a fiduciary with respect to the individual retirement plan in connection with its processing of automatic portability transactions:

(i) Upon being engaged by an employer-sponsored retirement plan; and

(ii) In the notices to individuals described in paragraphs (b)(5)(iii) through (v) of this section.

(2) *Fees and compensation.* The fees and compensation received, directly or indirectly, by the automatic portability provider (including its affiliates) for services provided in connection with the automatic portability transaction (including any fees or compensation in connection with, but received before, the transaction):

(i) Do not exceed reasonable compensation, as the term is defined in 26 CFR 54.4975-6(e); and

(ii) Are fully disclosed to and approved in writing in advance of the transaction by a fiduciary of the employer-sponsored retirement plan described in paragraph (a)(2)(ii) of this section which is independent of the automatic portability provider. The information that shall be disclosed includes the information that is required to be disclosed under § 2550.408b-2(c) by a covered service provider as defined in § 2550.408b-2(c)(1)(iii)(A) (services

as a fiduciary within the meaning of ERISA section 3(21)) and § 2550.408b-2(c)(1)(iii)(B) (recordkeeping services).

(iii) An automatic portability provider (including its affiliates) may not receive or pay third-party fees or compensation to any party in connection with an automatic portability transaction. This restriction on third-party compensation does not apply to a fee paid by the sponsor of an employer-sponsored retirement plan that is in lieu of a fee imposed on an individual retirement plan owner or a fee that is shared with another automatic portability provider, as long as the overall fee associated with the automatic portability transaction does not increase as compared to the fees disclosed to the plan administrator and individuals in the notices described in paragraphs (b)(5)(ii) and (iii) of this section. This restriction does not prevent an automatic portability provider (or its affiliates) from receiving fees for services provided to an individual retirement plan or employer-sponsored retirement plan that are in addition to services provided in connection with the execution of automatic portability transactions. The prohibited transaction relief provided in Code section 4975(d)(25) does not apply to fees or compensation paid by an employer-sponsored retirement plan or to fees or compensation for such additional services.

(iv) *Automatic portability provider-sponsored plan.* An automatic portability provider (including its affiliates) shall not receive any fees or compensation in connection with an automatic portability transaction involving a plan that is sponsored or maintained by the automatic portability provider or an affiliate.

(3) *Data usage and protection.* An automatic portability provider (including its affiliates) shall not market or sell to third parties participant-related data or individual retirement plan data that the automatic portability provider accesses or obtains in connection with an automatic portability transaction. An automatic portability provider shall take all necessary steps that a reasonable fiduciary would take to safeguard participant and individual retirement plan data to the extent the automatic portability provider exercises control over the data. If data is improperly accessed, the automatic portability provider shall take appropriate remedial actions that to safeguard the data based on the sensitivity of the accessed data and the nature and severity of the breach.

(4) *Open participation and limitation on exclusive engagements.* (i) The

automatic portability provider shall offer to execute automatic portability transactions on the same terms to any employer-sponsored retirement plan described in paragraph (a)(2)(ii) of this section.

(ii) The automatic portability provider shall not restrict or limit the ability of unrelated third parties to develop, market, and/or maintain a locate-and-match process or to execute automatic portability transactions separate from the automatic portability provider. The automatic portability provider also shall not restrict the ability of an employer-sponsored retirement plan, individual retirement plan provider (including custodians, trustees, and issuers), or recordkeeper to engage other automatic portability providers to execute automatic portability transactions.

(5) *Notices*—(i) *Notice to the Secretary of Labor*. Within 90 calendar days of the date that the automatic portability provider begins operating an automatic portability transaction program that is intended to rely on the prohibited transaction relief provided by Code section 4975(d)(25), the automatic portability provider shall notify the Secretary of Labor at *auto-portability@dol.gov* that it is operating as an automatic portability provider and relying on Code section 4975(d)(25), (f)(12), and these regulations. Each automatic portability provider that relies upon the exemption must report the legal name of each business entity relying upon the exemption in the email to the Secretary and any name under which the automatic portability provider may be operating. This notification needs to be reported only once unless there is a change to the legal name or operating name(s) of the automatic portability provider relying upon the exemption. The automatic portability provider shall have 90 calendar days to report a change to the legal or operating name. The automatic portability provider may notify the Secretary if it is no longer operating in reliance upon this exemption.

(ii) *Notice to plan administrator*. The automatic portability provider shall provide each plan administrator a model description of the automatic portability program, including fees and expenses related to the automatic portability program and automatic portability transactions. For any employer-sponsored plan that is subject to ERISA's summary plan description requirement, the automatic portability provider shall send a notice to each administrator of such plan that participates in an arrangement with the automatic portability provider that the administrator must fully describe the

automatic portability program and disclose fees related to an automatic portability transaction in its summary plan description or summary of material modifications. The model description must be written in a manner so that it could be used by the plan administrator to fulfill summary plan description or summary of material modifications obligations, as relevant.

(iii) *Initial enrollment notice*. The automatic portability provider shall furnish each individual on whose behalf the individual retirement plan was established an initial notice within 15 calendar days of the individual retirement plan's enrollment or participation in an arrangement that includes the possibility of a future automatic portability transaction executed by the automatic portability provider. The notice shall include:

(A) A description of the automatic portability transaction, including that the automatic portability provider will send a notice at least 60 calendar days, but no more than 90 calendar days, in advance of executing an automatic portability transaction;

(B) A description of the applicable account fees that will be charged in connection with the automatic portability transaction;

(C) A clear and prominent description of the individual's right to affirmatively elect not to participate in the transaction, the other available distribution options, and the procedures to take advantage of such options;

(D) The contact information for the automatic portability provider and the individual retirement plan provider (if not the automatic portability provider), including toll-free customer service numbers; and

(E) The right to designate a beneficiary and the procedures to do so, including the appropriate party to contact if the automatic portability provider is not the provider of the individual retirement plan.

(iv) *Pre-transaction notice*. The automatic portability provider shall furnish each individual on whose behalf the individual retirement plan was established a pre-transaction notice. The notice shall be provided at least 60 calendar days, but not more than 90 calendar days, in advance of an automatic portability transaction. The notice shall include:

(A) A description of the automatic portability transaction and a complete and accurate statement of all fees which will be charged and all compensation which will be received by the automatic portability provider (including its affiliates) in connection with the transaction. The description of the

automatic portability transaction shall include that the individual retirement plan assets will not be transferred for at least 60 calendar days from the date of the notice, that the individual has been matched with an account in an employer-sponsored retirement plan of a current employer, the name of the employer, and the name of the plan;

(B) 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;

(C) A description of the individual's right to affirmatively elect not to participate in the transaction, the other available distribution options, the deadline by which the individual must make an election, and the procedures for doing so. The description shall indicate that if the individual does not affirmatively consent or elect not to participate by the deadline, the automatic portability provider will consider the individual to have given consent to the automatic portability transaction;

(D) The contact information for the automatic portability provider and the individual retirement plan provider (if not the automatic portability provider) including toll-free customer service numbers that the individual may contact to make an election, pursue other available distributions options, or for other information or assistance with the automatic portability program; and

(E) The right to designate a beneficiary and the procedures to do so for the individual retirement plan if it is not transferred to an employer-sponsored retirement plan in which the individual is an active participant, including the appropriate party to contact if the automatic portability provider is not the provider of the individual retirement plan.

(v) *Post-transaction notice*. Not later than 3 business days after an automatic portability transaction is completed, the automatic portability provider shall provide notice to the individual on whose behalf the individual retirement plan was established of:

(A) The actions taken by the automatic portability provider with respect to the individual retirement plan, including that the individual was matched with an account in an employer-sponsored retirement plan of the individual's current employer;

(B) All relevant 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;

(C) A statement of fees charged against the individual retirement plan

by the automatic portability provider or its affiliates in connection with the transfer; and

(D) A customer service telephone number at which the individual can contact the automatic portability provider.

(vi) *Accessibility of notices.* (A) The notices described in paragraphs (b)(5)(iii) through (v) of this section shall be written in a manner calculated to be understood by the average person, which for purposes of these regulations, is the average intended recipient. The disclosures must be accurate, not include inaccurate or misleading statements, and be sufficiently comprehensive to apprise the individual of their rights and obligations under the automatic portability program, must not be formatted to have the effect of misleading, misinforming or failing to inform the recipient, and be written in a culturally and linguistically appropriate manner. In fulfilling these requirements, the automatic portability provider shall 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 use of clear cross references, and a table of contents be included.

(B) *Standards for culturally and linguistically appropriate notices.* An automatic portability provider is considered to provide relevant notices and disclosures in a “culturally and linguistically appropriate manner” if the automatic portability provider meets all the requirements of the paragraph (b)(5)(vi)(C) of this section with respect to the applicable non-English languages described in paragraph (b)(5)(vi)(D) of this section.

(C) *Requirements.* (1) The automatic portability provider must provide oral language services (such as a telephone customer assistance hotline) that include the ability to answer questions in any applicable non-English language and provide assistance with automatic portability transactions in any applicable non-English language;

(2) The automatic portability provider must provide, upon request, a notice or disclosure in any applicable non-English language; and

(3) The automatic portability provider must include in the English versions of all required notices and disclosure, a statement prominently displayed in any applicable non-English language clearly

indicating how to access the language services provided by the automatic portability provider.

(D) *Applicable non-English language.* With respect to an address in any United States county to which a notice is sent, a non-English language is an applicable non-English language if ten percent or more of the population residing in the county is literate only in the same non-English language, as determined in guidance published by the Secretary of Labor.

(vii) *Ensuring participants receive notices and disclosures.* The automatic portability provider shall adopt and implement prudent policies and procedures to ensure that it obtains or has access to current and accurate census and contact data on individual participants and individuals on whose behalf an individual retirement plan is established, necessary to effectively administer the automatic portability program. An individual cannot participate in the automatic portability provider’s automatic portability transaction program unless the automatic portability provider has a reasonable basis for believing the automatic portability provider has a valid address for the individual. Notices and disclosures to participants and individuals must be made using methods that satisfy the disclosure requirements in § 2520.104b–1(b) of this chapter.

(6) *Frequency of searches.* The automatic portability provider shall use a locate-and-match service to query cooperating record-keepers, on at least a monthly basis, whether the individual for whose benefit the individual retirement plan is established has an active account in an employer-sponsored retirement plan. The automatic portability provider shall take prudent steps to verify the accuracy of the individual’s information (including such information as the participant’s social security number, first name, last name, middle name or initial, date of birth, phone number, etc.) to ensure the match is correct. The verification steps must include ongoing participant address validation searches via automated checks of:

(i) National Change of Address records;

(ii) Two separate commercial locator databases; and

(iii) Any internal databases maintained by the automatic portability provider. If a valid address is not obtained from the automated checks, the automatic portability provider must also perform a manual internet-based search. These verification steps must be performed at least twice in the first year

an account is entered into the automatic portability provider system and once a year thereafter.

(7) *Monitoring transfers into an employer-sponsored retirement plan.* The automatic portability provider shall ensure that an employer-sponsored retirement plan that accepts transfers into the plan in connection with an automatic portability transaction designates 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. Amounts received are deemed to be invested properly if made in accordance with the participant’s current investment election under the plan or, if no election is made or permitted, in the plan’s qualified default investment alternative under § 2550.404c–5 or in another investment selected by a fiduciary with respect to such plan.

(8) *Timeliness of automatic portability transaction execution.* If the automatic portability provider identifies a match, and the affected individual does not affirmatively elect not to participate in the transaction within the timeframe indicated in the pre-transaction notice, the automatic portability provider shall, after liquidating the assets of the individual retirement plan to cash in accordance with the timeframes established in the policies and procedures adopted pursuant to paragraph (b)(9) of this section, transfer the account balance of such plan as soon as practicable to the participant’s account in the employer-sponsored retirement plan.

(9) *Limitation on exercise of discretion and on policies and procedures.* The automatic portability provider shall neither have nor exercise discretion to affect the timing or amount of the transfer, other than to deduct the appropriate fees as described in paragraph (b)(2) of this section. An automatic portability provider will be deemed to satisfy this paragraph (b)(9) if it establishes, maintains, and follows written policies and procedures that set specific standards and timeframes that apply to all automatic portability transactions. The policies and procedures shall, at a minimum, address:

(i) The process to ensure that an employer-sponsored retirement plan that accepts transfers into the plan in connection with an automatic portability transaction designates a representative that will be responsible for monitoring transfers into the plan due to automatic portability transactions and investment of amounts received;

(ii) The process and timing for liquidating the assets of the individual retirement plan to cash and closing the individual retirement plan;

(iii) The process for verifying and validating that the correct fees are withdrawn from the individual retirement plan;

(iv) The process and timing for transmitting assets to employer-sponsored retirement plans;

(v) The process for verifying the assets were received by the employer-sponsored retirement plan; and

(vi) The process for sending all required notices to plan participants or individuals on whose behalf an individual retirement plan is established, in accordance with paragraph (h) of this section.

(c) *Annual audit and corrections.* (1) An automatic portability provider shall retain an independent auditor to conduct an annual audit to assist the automatic portability provider in demonstrating compliance with the automatic portability provider's policies and procedures, the requirements of Code section 4975(d)(25), (f)(12), and these regulations and identifying any instances of noncompliance. The auditor shall, at a minimum, review: the policies and procedures, a representative sample of the required disclosures, a representative sample of automatic portability transactions, and the requirements of Code section 4975(d)(25), 4975(f)(12), and these regulations. The auditor shall have appropriate technical training and proficiency with respect to ERISA Title I, the Code, and the automatic portability transactions described in these regulations to conduct the audit.

(2) *Independence of auditor.* An auditor is independent if the automatic portability provider does not have an ownership interest in or control the auditor and the auditor derives no more than two percent of its annual revenue from services provided directly or indirectly to the automatic portability provider or any of its affiliates.

(3) *Access to information.* The automatic portability provider shall grant the auditor access to its automatic portability operations and records (including, as necessary, the operations and records of its affiliates) sufficient to allow the auditor to make the determinations and findings required by these regulations.

(4) *Audit report findings and determinations.* The auditor shall prepare a written audit report signed by the auditor. The written audit report shall include the following findings and determinations:

(i) The total number of completed automatic portability transactions during the audit period;

(ii) Whether the notices in the reviewed sample met the timing and content requirements of Code section 4975(f)(12) and these regulations and were delivered in a manner reasonably designed to ensure affected individuals would receive the notices;

(iii) Whether any required notices were returned as undeliverable and what steps were taken by the automatic portability provider to address undeliverable notices;

(iv) Whether the notices in the reviewed sample were written in a manner reasonably calculated to be understood by the average intended recipient, including whether the notices include inaccurate or misleading statements;

(v) Whether the appropriate accounts in the employer-sponsored retirement plan in the reviewed sample received all the assets due as a result of the automatic portability transaction;

(vi) A summary of the fees individuals were charged by the automatic portability provider (and any affiliates) for services provided in connection with automatic portability transactions, including whether those fees increased since the last report;

(vii) Whether the fees and compensation received by the automatic portability provider (including its affiliates) in connection with the automatic portability transactions are consistent with the fees authorized by appropriate plan fiduciaries and did not exceed reasonable compensation, as described in paragraph (b)(2)(i) of this section;

(viii) Whether all requirements of Code section 4975(f)(12) and these regulations were satisfied with respect to:

(A) The policies and procedures; and
(B) The transactions and disclosures that were reviewed;

(ix) A summary of compliance issues reported to or discovered by the auditor, the auditor's recommendations, and the extent to which the automatic portability provider has addressed or is addressing the issues pursuant to the correction procedures in paragraph (c)(9) of this section;

(x) Any other recommendations from the auditor to improve the policies and procedures and overall execution of automatic portability transactions to ensure compliance with the requirements of Code section 4975(f)(12) and these regulations; and

(xi) A description of the auditor's methodology and procedures in performing the audit.

(5) *Additional information to be included in the audit report.* The written audit report shall also include:

(i) The number of mandatory distributions into individual retirement plans described in paragraph (a)(2)(i) of this section for which the automatic portability provider is conducting searches as required by paragraph (b)(6) of this section; and

(ii) The number of individual retirement plans described in paragraph (a)(2)(i) of this section:

(A) Which have been transferred to designated beneficiaries;

(B) For which the automatic portability provider is searching for next of kin due to the death of an account holder without a designated beneficiary; and

(C) That were reduced to a zero balance while in the automatic portability provider's custody.

(6) *Records not in possession of the automatic portability provider.* If the automatic portability provider does not have access to the records or information to be included in the audit report, the automatic portability provider, as a condition of its services, shall require that the appropriate information is provided to the automatic portability provider.

(7) *Timing of the audit report and submission to the Secretary of Labor.* The written audit report shall be completed within 180 calendar days following the annual period to which the audit relates. The automatic portability provider shall submit the written audit report to the Secretary of Labor at auto-portabilityaudit@dol.gov within 30 calendar days of completion.

(8) *Certification of audit review and addressing compliance issues.* The automatic portability provider shall include a certification filed with the written audit report, under penalty of perjury, that the automatic portability provider reviewed the audit report. The automatic portability provider shall also certify that it has addressed, corrected, or remedied any noncompliance or inadequacy in its compliance or has an appropriate written plan to address any such issues identified in the audit report.

(9)(i) *Correction procedures.* The automatic portability provider shall establish procedures for the correction of failures to comply with Code section 4975(f)(12) and these regulations. The procedures shall, at a minimum, require the automatic portability provider to notify the auditor during the applicable audit cycle of any correction(s) the automatic portability provider made on its own. The automatic portability provider may engage in corrections on

its own, without the auditor's input and without losing relief under Code section 4975(d)(25), if:

(A) Either the violation did not result in losses to the individual retirement plan or the automatic portability provider made the individual retirement plan whole for any resulting losses;

(B) The automatic portability provider corrects the violation and documents the correction in writing within 30 calendar days of correction;

(C) The correction occurs no later than 90 calendar days after the automatic portability provider learned of the violation or reasonably should have learned of the violation; and

(D) All instances of noncompliance and accompanying corrections are reported in writing to the auditor.

(ii) *Auditor recommendations.* If the auditor determines the automatic portability provider was not in compliance with any provision of Code section 4975(f)(12) or these regulations during the audit period, the auditor shall identify the instances of noncompliance in the audit report along with a description of corrective actions taken by the automatic portability provider and any recommended additional corrections. An automatic portability provider will not be treated as having failed to comply with any provision of Code section 4975(f)(12) or these regulations, provided it corrects any instance of noncompliance identified by the auditor as soon as reasonably practicable.

(10) *Additional corrective actions.* The Secretary of Labor may require the automatic portability provider to submit to supplemental audits and corrective actions, including a temporary prohibition from relying on the exemption if the automatic portability provider or an affiliate is found to be:

(i)(A) Engaging in a systematic pattern or practice of violating any provision of Code section 4975(f)(12) or this regulation;

(B) Intentionally violating any provision of Code section 4975(f)(12) or this regulation; or

(C) Providing materially misleading information to the Secretary of Labor, Secretary of the Treasury, or the auditor in connection with automatic portability transactions; or

(ii) The subject of a foreign or domestic criminal conviction:

(A) Involving or arising out of the conduct of the automatic portability program or any automatic portability transaction; or

(B) 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.

(d) *Website.* (1) The automatic portability provider shall maintain a website which displays:

(i) A description of all the fees and compensation received, directly or indirectly, by the automatic portability provider for services provided in connection with the automatic portability transaction;

(ii) A list of recordkeepers for each employer-sponsored retirement plan with respect to which the automatic portability provider carries out automatic portability transactions; and

(iii) The number of plans and participants covered by each recordkeeper.

(2) The website is not required to be limited to the information described in paragraphs (d)(1)(i) through (iii) of this section, and may include other information, for example, about the automatic portability provider, the automatic portability program, or other services provided to employer-sponsored retirement plans or individual retirement plans, but the automatic portability provider must ensure that the information described in paragraphs (d)(1)(i) and (ii) of this section is displayed in a way that clearly sets forth the automatic portability transaction fees and compensation separately from other fees and compensation.

(e) *Limitation on exculpatory provisions.* The automatic portability provider shall not include exculpatory provisions in its contracts or communications with individuals described in paragraph (a)(2)(i) of this section disclaiming or limiting the automatic portability provider's liability in the event the automatic portability provider causes an improper transfer of assets in connection with an automatic portability transaction. This limitation does not prohibit disclaimers for:

(1) Liability caused by an error, a misrepresentation, or misconduct of a party independent of the automatic portability provider and its affiliates, or

(2) Damages arising from acts outside the control of the automatic portability provider.

(f) *Record retention requirements.*

(1)(i) An automatic portability provider

shall, for not less than 6 years after the automatic portability transaction has occurred, maintain records sufficient to demonstrate compliance with the requirements of Code section 4975(f)(12) and this regulation.

(ii) No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the automatic portability provider before the end of the six-year period. An automatic portability provider's failure to maintain the records necessary to determine whether the conditions of Code section 4975(f)(12) and this regulation have been met will result in the loss of the relief provided by Code section 4975(d)(25) and this regulation only for the transaction or transactions for which such records are missing or have not been maintained.

(2) The records maintained to demonstrate compliance with the requirements of Code section 4975(f)(12) and this regulation shall be made available to any duly authorized employee or representative of the Department of Labor or the Department of the Treasury within 30 calendar days of the date of a written request for such records by the Department of Labor or the Department of the Treasury.

(g) *Definitions.* (1) A person or entity is an *affiliate* if, directly or indirectly (through one or more intermediaries) it controls, is controlled by, or is under common control with such person or entity; or is an officer, director, or employee of, or partner in, such person or entity. Unless otherwise specified, an *affiliate* refers to an affiliate of the automatic portability provider.

(2) The term *control* means the power to exercise a controlling influence over the management or policies of an entity or person other than an individual.

(3) The term *individual retirement plan* means:

(A) An individual retirement account described in Code section 408(a); and

(B) An individual retirement annuity described in Code section 408(b).

Signed at Washington, DC, this 16th day of January 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

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