1. Application of IRS Notice 2015-49. Notice 2015-49 (attached Exhibit A) announced that the Treasury and IRS planned to amend the required minimum distribution regulations under Code section 401(a)(9) to provide that qualified defined benefit plans generally would not be permitted to replace annuities currently being paid with a lump sum payment or other accelerated forms of distributions. The Notice indicated that the amendments to the regulations would apply retroactively as of the date the Notice was issued. Furthermore, the Notice explained that “in light of the pending guidance, any private letter ruling or determination letter issued by the IRS or the IRS Office of Chief Counsel involving a plan that provides for a lump sum risk-transferring program will generally include a caveat expressing no opinion” as to the lump sum program.

In response to this guidance, the Department of Treasury’s (“Treasury’s”) Priority Guidance Plan was updated to detail that the indicated guidance would be issued. However, the Fourth Quarter Update to Treasury’s 2017-2018 Priority Guidance Plan (copy below) indicates that the Treasury’s regulatory project on lump sum windows for defined benefit plan participants has been closed without publication.

2. Department of Labor Advisory Opinion 2018-01A. The Department of Labor (DOL) issued an advisory opinion to Retirement Clearinghouse, LLC (“RCH”) – Advisory Opinion 2018-01A (attached Exhibit B)- in response to a request by RCH, for the DOL’s opinion on the status of certain parties as “fiduciaries” within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act (ERISA) and Section 4975(e)(3) of the Internal Revenue Code (Code) as a result of actions undertaken as part of RCH’s Auto-Portability Program. According to RCH, “Auto portability is the routine, standardized, and automated movement of a retirement plan participant’s 401(k) savings account from their former employer’s plan to an active account in their current employer’s plan.” Essentially, accounts that are involuntarily distributed to IRAs in accordance with Code section 401(a)(31)(B) are then able to be transferred to a new employer plan automatically once RCH identifies that the IRA owner is a participant within that plan.
The DOL indicated that choosing to have a plan participant in the RCH Program is a fiduciary decision which, thus, requires that the action be prudent and solely in the interest of plan participants and beneficiaries. As such, plan fiduciaries must determine that the auto-portability program (in this instance the RCH program) is a necessary service, a reasonable arrangement, and that the compensation paid to provider is reasonable. The responsible plan fiduciaries must also monitor the arrangement and ensure that the plan’s continued participation is consistent with ERISA’s standards.

The DOL also addressed the fiduciary status of the plan sponsor of the former employer plan and the plan sponsor of the new employer’s plan. In both instances, the DOL announced that neither plan sponsor would be a fiduciary. With respect to the fiduciaries of the former employer’s plan, although they were fiduciaries in deciding to transfer accounts to the default IRA and also participating in the auto-portability program, they would have no involvement or responsibility for the decision to transfer IRA assets into a new employer plan. With respect to the fiduciaries of the new employer’s plan, although they would be responsible for determining whether the roll-in of assets from the default IRA is consistent with plan terms and for accepting the roll-in and allocating the assets to investment alternatives in the new plan, they are not taking an action that details an exercise fiduciary authority in connection with the auto-portability program provider’s separate decision to rollover the IRA assets into the new employer plan.

The DOL also addressed the fiduciary status of RCH for transferring default IRA funds to the plan of the new employer. While affirmative consent is sought to permit/direct the transfer, in instances in which that consent is not obtained, RCH will direct the transfer of assets from the default IRA into the new employer’s plan. The DOL concluded that, in instances in which the consent of the IRA holder is not obtained, RCH would be acting as a fiduciary in directing the transfer of funds.

This advisory opinion comes in conjunction with a news release that invited public comment on a proposed exemption related to the consolidation of small retirement savings accounts in 401(k) plans and IRAs when workers change jobs (see attached Exhibit C).

3. Family Savings Act (H.R. 6757). Under Section 109 of the legislation (attached Exhibit D), required minimum distributions from retirement plans would be eliminated completely for anyone who has less than $50,000 in the account at the end of the year. While novel, the idea is not unique as it was proposed first by President Obama in his budget proposals to Congress back in 2017. The Obama proposal was actually even more expansive than the Family Savings Act as it would have provided that if you have less than $50,000 when you turn age 70 1/2, you are permanently exempt from RMDs on your retirement account. The proposal on the Family Savings Act more narrow and only exempts employer retirement plans and not IRAs. In addition, the account would have to be re-evaluated annual such that growth in the account to make it more than $50,000 would require RMDs to be made until the account again was less than $50,000.
EXHIBIT A
Notice 2015-49

Use of Lump Sum Payments to Replace Lifetime Income Being Received By Retirees Under Defined Benefit Pension Plans

I. PURPOSE

This notice informs taxpayers that the Treasury Department and the IRS intend to amend the required minimum distribution regulations under § 401(a)(9) of the Internal Revenue Code to address the use of lump sum payments to replace annuity payments being paid by a qualified defined benefit pension plan. The regulations, as amended, will provide that qualified defined benefit plans generally are not permitted to replace any joint and survivor, single life, or other annuity currently being paid with a lump sum payment or other accelerated form of distribution. The Treasury Department and the IRS intend that these amendments to the regulations will apply as of July 9, 2015, except with respect to certain accelerations of annuity payments described in section IV of this notice.

II. BACKGROUND

Section 401(a)(9) prescribes required minimum distribution rules for a qualified plan under § 401(a). In general, under these rules, distribution of each employee’s entire interest must begin by the required beginning date. The required beginning date generally is April 1 of the calendar year following the later of (1) the calendar year in which the employee attains age 70½ or (2) the calendar year in which the employee retires. However, the ability to delay distribution until the calendar year in which an employee retires does not apply in the case of a 5-percent owner (as defined in § 416).

If the entire interest of the employee is not distributed by the required beginning date, § 401(a)(9)(A) provides that the entire interest of the employee must be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of the employee or lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee or the life expectancy of the employee and a designated beneficiary). Section 401(a)(9)(B) prescribes required minimum distribution rules that apply after the death of the employee.

Section 1.401(a)(9)-6, A-1(a) provides that absent an applicable exception, in order to satisfy § 401(a)(9), distributions of an employee’s entire interest must be paid in the form of periodic annuity payments for the employee’s or beneficiary’s life (or the joint lives of the employee and beneficiary) or over a period certain that is no longer than a period permitted under § 1.401(a)(9)-6, A-3 or A-10, as applicable (which is approximately equal to the joint and last survivor life expectancy of the employee and an assumed beneficiary who is 10 years younger than the employee, with a longer period if the sole beneficiary is the employee’s spouse and the spouse is more than 10 years younger). The regulations prohibit any change in the period or form of the
distribution after it has commenced, except in accordance with § 1.401(a)(9)-6, A-13. If certain conditions are met, § 1.401(a)(9)-6, A-13(a) permits changes to the payment period after payments have commenced in association with an annuity payment increase described in § 1.401(a)(9)-6, A-14.

Section 1.401(a)(9)-6, A-1(a) also provides that the payments must be nonincreasing or may increase only as otherwise provided, such as permitted increases described in § 1.401(a)(9)-6, A-14. Section 1.401(a)(9)-6, A-14(a)(4) permits annuity payments to increase “[t]o pay increased benefits that result from a plan amendment.” In addition, § 1.401(a)(9)-6, A-14(a)(5) permits annuity payments to increase “to allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a lump sum upon the employee’s death,” but no similar rule is provided with respect to conversion of an employee’s annuity benefit during an employee’s life or conversion of a beneficiary’s annuity other than upon the employee’s death.

The § 401(a)(9) provisions and related regulations regarding pension plan annuities were crafted to provide an administrable way to ensure that a distribution of the employee’s benefit will not be unduly tax-deferred. For example, a pension plan cannot permit an employee who has passed the required beginning date to defer distribution of the bulk of the employee’s benefit (and thus defer the tax) until later in life, while taking relatively small periodic benefits in the interim. In addition, under the regulations, a defined benefit pension plan cannot permit a current annuitant to commute annuity payments to a lump sum or otherwise accelerate those payments, except in a narrow set of circumstances specified in the regulations, such as in the case of retirement, death, or plan termination. See § 1.401(a)(9)-6, A-13(a) and (b). If a participant has the ability to accelerate distributions at any time, then the actuarial cost associated with that acceleration right would result in smaller initial benefits, which contravenes the purpose of § 401(a)(9).

A number of sponsors of defined benefit plans have amended their plans to provide a limited period during which certain retirees who are currently receiving joint and survivor, single life, or other life annuity payments from those plans may elect to convert that annuity into a lump sum that is payable immediately.¹ These arrangements are sometimes referred to as lump sum risk-transferring programs because longevity risk and investment risk are transferred from the plan to the retirees. For purposes of compliance with the requirements of § 401(a)(9), the addition of such a right to convert a current annuity into an immediate lump sum payment has been treated in some instances as an increase in benefits that is described in § 1.401(a)(9)-6, A-14(a)(4) (with the result that the annuity payment period would be permitted to change under § 1.401(a)(9)-6, A-13(a)).

III. ANTICIPATED AMENDMENTS TO THE REGULATIONS UNDER SECTION 401(a)(9)

The Treasury Department and the IRS intend to amend the regulations under § 401(a)(9) that address the distribution of an employee’s interest after the required beginning date. Those regulations reflect an intent, among other things, to prohibit, in most cases, changes to the annuity payment period for ongoing annuity payments from a defined benefit plan, including changes accelerating (or providing an option to accelerate) ongoing annuity payments. The Treasury Department and the IRS have concluded that a broad exception for increased benefits in § 1.401(a)(9)-6, A-14(a)(4) that would permit lump sum payments to replace rights to ongoing annuity payments would undermine that intent. Accordingly, the Treasury Department and the IRS intend to propose amendments to § 1.401(a)(9)-6, A-14(a)(4) to provide that the types of permitted benefit increases described in that paragraph include only those that increase the ongoing annuity payments, and do not include those that accelerate the annuity payments. The exception for changes to the annuity payment period provided in § 1.401(a)(9)-6, A-13 (as intended to be amended) would not permit acceleration of annuity payments to which an individual receiving annuity payments was entitled before the amendment, even if the plan amendment also increases annuity payments.

This notice does not provide guidance with respect to the federal tax consequences of a lump sum risk-transferring program under § 401(a)(4), 411, 415, 417, or 436, or any other section of the Code except for § 401(a)(9).

IV. EFFECTIVE DATE

The Treasury Department and the IRS intend that the amendments to the regulations under § 1.401(a)(9)-6 described in this notice will apply as of July 9, 2015. However, the Treasury Department and the IRS anticipate that the amendments to the regulations will not apply to an acceleration of ongoing annuity payments that is in association with a plan amendment specifically providing for implementation of a lump sum risk-transferring program: (1) adopted (or specifically authorized by a board, committee, or similar body with authority to amend the plan) prior to July 9, 2015; (2) with respect to which a private letter ruling or determination letter was issued by the IRS prior to July 9, 2015; (3) with respect to which a written communication to affected plan participants stating an explicit and definite intent to implement the lump sum risk-transferring program was received by those participants prior to July 9, 2015; or (4) adopted pursuant to an agreement between the plan sponsor and an employee representative (with which the plan sponsor has entered into a collective bargaining agreement) specifically authorizing implementation of such a program that was entered into and was binding prior to July 9, 2015. An acceleration of ongoing annuity payments that is in association with a plan amendment implementing a lump sum risk-transferring program that satisfies one of these four conditions is referred to in this notice as a “Pre-Notice Acceleration.”
The IRS will not challenge the treatment of a Pre-Notice Acceleration as an increase in benefits that is described in the current § 1.401(a)(9)-6, A-14(a)(4) (which, as noted, permits annuity payments to increase to pay increased benefits that result from a plan amendment). Accordingly, in the case of a Pre-Notice Acceleration, the annuity payment period will be permitted to be changed under § 1.401(a)(9)-6, A-13(a).

V. PRIVATE LETTER RULINGS OR DETERMINATION LETTERS

In light of the pending guidance, any private letter ruling or determination letter issued by the IRS or the IRS Office of Chief Counsel involving a plan that provides for a lump sum risk-transferring program will generally include a caveat expressing no opinion as to the federal tax consequences of the lump sum risk-transferring program. However, the IRS and the IRS Office of Chief Counsel may determine that the addition of a right to make a Pre-Notice Acceleration is an increase in benefits that is described in the current § 1.401(a)(9)-6, A-14(a)(4). See section 6.09 of Rev. Proc. 2015-1, 2015-1 I.R.B. 1.

VI. DRAFTING INFORMATION

The principal authors of this notice are Michael P. Brewer and Thomas C. Morgan of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities).
November 5, 2018

J. Spencer Williams
Founder, President and CEO
Retirement Clearinghouse, LLC
3545 Whitehall Park Drive, Suite 400
Charlotte, NC 28273

Dear Mr. Williams:

This is in response to your request for an advisory opinion on behalf of the Retirement Clearinghouse, LLC, regarding the RCH Auto Portability Program. You asked for the opinion of the Department of Labor (Department) on the status of certain parties as “fiduciaries” within the meaning of section 3(21)(A) of the Employee Retirement Income Security Act (ERISA) and section 4975(e)(3) of the Internal Revenue Code (Code) as a result of actions undertaken as part of the RCH Program.1

According to your request, the RCH Program is designed to help employees who may have multiple job changes over their career consolidate small accounts held in a prior employer’s individual account plan and rollover IRA into a new employer’s 401(k) or other defined contribution individual account plan. The objective of the RCH Program is to improve overall asset allocation, eliminate duplicative fees for small retirement savings accounts, and reduce leakage of retirement savings from the tax-deferred retirement saving system.

The RCH Program portability services related to your request involve: (1) automatic rollovers of mandatory distributions under Code section 401(a)(31)(B) and account balances from terminated defined contribution plans into default IRAs pursuant to 29 CFR 2550.404a-2 and 29 CFR 2550.404a-3, respectively, and (2) the subsequent automatic roll-in of funds in such default IRAs to an individual account plan maintained by a new employer when the IRA owner changes jobs. These RCH Program portability services use a “locate, match, and transfer” technology that involves periodic queries of cooperating record-keepers’ systems to ascertain if the IRA owner has become a participant in an individual account plan through re-employment and then effects a transfer of funds from the individual’s IRA to that new plan.2

The RCH Program is implemented through a series of agreements with sponsors of ERISA-covered defined contribution plans and third-party record-keepers. Plans adopt the RCH Program through a written agreement with RCH or the plan’s record-keeper. Record-keepers also enter into agreements

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1 Under Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1), the authority of the Secretary of the Treasury to issue rulings under Code section 4975 was transferred, with certain exceptions not here relevant, to the Secretary of Labor. References in this letter to ERISA sections should be read to refer to the corresponding sections of the Code.

2 The RCH Program includes a range of services to plans, plan participants, and IRA owners beyond the portability services described in this letter. This letter does not address any ERISA issues related to those services or the fiduciary status of any party with respect to any of those services.
with RCH to participate in RCH’s electronic records matching technology to locate and match participants in connection with plans that have adopted the RCH Program. Participating plan sponsors may designate RCH, or the record-keeper, to be the plan’s default IRA provider for automatic rollovers of mandatory distributions under Code section 401(a)(31)(B) and for distributions from terminated defined contribution plans. Your request states that these transactions will comply with 29 CFR 2550.404a-2 for mandatory cash-outs under Code section 401(a)(31)(B), and 29 CFR 2550.404a-3 for distributions from terminated defined contribution plans.\(^3\) Participating plan sponsors agree to adopt plan amendments and resolutions necessary to carry out transfers under the RCH Program and agree that the plan will make disclosures to plan participants and beneficiaries about the program. For example, the RCH Program agreements require plan administrators to describe the RCH Program and disclose all Program fees and expenses to participants and beneficiaries in the plans’ summary plan description. The plans also agree that RCH and participating record-keepers may use plan data to facilitate the RCH Program. An unaffiliated bank will be the custodian of the RCH default IRAs, and financial institutions unrelated to RCH or its affiliates will provide all investment products and investment management services for the RCH default IRAs.

**Rollovers to Default IRAs**

In the case of ongoing plans, RCH receives from the employer, plan, or record-keeper information identifying separated participant accounts that are subject to mandatory distribution under the Code. RCH or the record-keeper sends out a “mandatory distribution letter” to separated participants that explains the plan’s distribution options, discloses all fees and features of the RCH Program, includes a Code-required notice explaining various tax rules for eligible rollover distributions, and advises participants that their plan account will be automatically rolled over into a default IRA unless they provide affirmative direction regarding the disposition of their accounts. The mandatory distribution letters also advise that individuals may opt out of the automated transfer service to a new employer’s plan and includes a toll-free number and information on contacting RCH or the record-keeper. In the case of a terminating plan, RCH or the record-keeper sends a similar letter to all participants tailored to the circumstance of a terminating plan. You indicate that all RCH Program communications are written to be easily understood by the recipient.

In the case of mandatory distributions under Code section 401(a)(31)(B) and distributions from terminated defined contribution plans made to an RCH default IRA, the fees received by RCH are: (1) a one-time communication fee covering the cost of notices and communications associated with the Program; (2) a monthly administrative fee covering the provision of administrative services to the IRA; (3) a distribution fee in the event that the IRA is terminated and the IRA owner decides to cash out or transfer the IRA account balance to another qualified retirement plan; (4) a sub-transfer agency fee that the IRA investment provider selected by the responsible plan fiduciary as part of the plan’s adoption of the RCH Program pays to RCH; and (5) a roll-in fee paid if the IRA is terminated and the IRA account balance is rolled in to a new employer plan with the assistance of RCH.\(^4\) Under the Program, changes in the types or amounts of these fees would have to be approved prospectively by a fiduciary of a participating plan.

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\(^3\) Whether the regulations’ conditions are satisfied is a factual question on which the Department generally will not opine in advisory opinions. See section 5.01 of ERISA Procedure 76-1.

\(^4\) Once RCH has identified a match that will lead to a transfer to a new employer’s plan, neither RCH nor the record-keeper will charge the IRA the monthly fee in connection with the IRA account. In addition, RCH will receive no sub-transfer agency fee with respect to the account after three days following the date the relevant sell order is placed.
In cases where a participating record-keeper and not RCH is the plan’s default IRA provider, the RCH Program would transfer the funds in the record-keeper’s default IRA to the new employer’s plan through a RCH default IRA. In these instances the RCH default IRA will act, in effect, as a conduit. You represent that this step is necessary in order to increase operational efficiencies that enable auto-portability to be scalable and cost effective, and, therefore, reasonably priced to the participants and IRA owners. In all instances where the RCH default IRA is used as a conduit, RCH only collects a one-time communication fee and a one-time transfer fee for locate, match and roll-in services from the participant account. In all instances where the RCH default IRA is used as a conduit in the process of transferring a participant’s account from a third party IRA to their current employer plan, RCH waives all ordinary and customary fees associated with the RCH default IRA, including fees for administration and closing the account (distribution fee). RCH will perform locate and match services for all accounts - whether the account is in an RCH or third-party IRA - for an indefinite period and no fee for these services will be charged to the participant account until the actual roll-in transaction is scheduled to be completed. RCH deducts the single fee for locate, match and roll-in services from the participant’s account after the participant account is confirmed to be in the current employer’s plan and the roll-in is scheduled to be completed.

Transfers to a New Employer’s Plan

Shortly after an employee’s account is rolled over to the default IRA, RCH or the record-keeper sends a welcome letter to the former plan participant/now IRA owner. The welcome letter describes the IRA’s investment options and all the Program’s associated fees and features, including information regarding the possible future transfer of the IRA into a new employer’s plan. The welcome letter also specifically informs the IRA owner that, unless the IRA owner directs otherwise, the IRA may be transferred to a new employer’s plan after 60 days. As with the mandatory distribution letter, the welcome letter advises the IRA owner that he or she may call RCH or the record-keeper to opt out of the transfer service. For the duration of the IRA’s existence, RCH or the record-keeper annually notifies the IRA owners of the automatic transfer process as part of an IRA annual statement. You indicate that once the assets are transferred to the IRA, the participant’s former employer has no discretion or authority over the IRA, including any future transfer of the IRA assets to a new employer’s plan.

RCH periodically (no less than monthly) distributes account information to all record-keepers that participate in the auto portability program. Participating record-keepers use the RCH data to search their IRA/participant records to identify potential matches of plan and IRA accounts. When RCH matches a participant in a new employer’s plan to his or her former plan or IRA account, RCH validates the account information and sends a “consent letter” requesting that the IRA owner/participant consent to transfer the IRA funds/plan account to the new employer’s individual account plan. The notice is sent to the address provided to RCH by the record-keeper for the participant’s new employer’s plan based on the assumption that the new employer’s plan has the most up-to-date address for the individual. The participant can approve this “roll-in transaction” through affirmative consent when enrolling in the new employer plan, through a secure website or voice response system, or over the phone to a call center. If the IRA owner/participant does not respond within 30 days of receipt of the consent letter by affirmatively assenting or declining the roll-in, the RCH Program activates its default roll-in transaction provisions.5 Before a default roll-in occurs, the new employer’s plan must agree to accept the roll-in

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5 You stated that individuals cannot participate in the portability features of the RCH Program unless RCH has a valid address for the person. After RCH receives participant census information from participating plans, RCH’s services include ongoing participant address validation searches via automated checks of National Change of Address records, two separate
under the terms in the new employer’s plan.6 Once the new employer plan consents to the roll-in, RCH effects the roll-in and sends a notice to the IRA owner/participant of the transfer of IRA funds to the new employer's plan.

As described above, some plan sponsors may select a record-keeper (or its affiliate) instead of RCH as the default IRA provider. If the record-keeper participates in the RCH Program, the mandatory distribution letter, welcome letter, and consent letter will all be sent to the individual by the participating record-keeper or RCH. In the case of a match, assets from a default IRA maintained by the participating record-keeper will be transferred to the new employer plan through a RCH default IRA acting as a conduit.

Other plans may elect to use Code section 401(a)(31)(B) for mandatory distributions only after the RCH Program’s locate and match services identifies the separated participant as having an active plan account in a new employer’s plan. In cases in which a separated participant fails to respond to the mandatory distribution letter, RCH will send a consent letter as described above to the participant. If after 30 days the individual has yet to contact RCH and approve or disapprove the transfer, RCH will send a second consent letter to the individual. If at the expiration of the second 30 day window the participant still has not responded to the notices, the participant’s assets will be transferred from the former employer’s plan to a RCH default IRA acting as a conduit before being transferred to the plan of the participant’s new employer.

Fiduciary Status of Plan Sponsors for the Selection of the RCH Program

When plan sponsors or other responsible fiduciaries choose to have a plan participate in the RCH Program, they are acting in a fiduciary capacity, and would be subject to the general fiduciary standards and prohibited transaction provisions of ERISA in selecting and monitoring the RCH Program. Fiduciaries must act prudently and solely in the interest of the plan’s participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable plan administration expenses, and must comply with the documents and instruments governing the plan to the extent consistent with the provisions of Titles I and IV of ERISA.7 Plan fiduciaries considering the RCH Program are also responsible for ensuring that the RCH Program is a necessary service, a reasonable arrangement, and the compensation received is no more than reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2) (including the Department’s implementing regulations). Thus, the responsible plan fiduciaries must evaluate the package of services and separate service providers that are part of the RCH Program and conclude that the services, including the portability services, are appropriate and helpful to carrying out the purposes of the plan, and that the compensation paid or received by the service providers is no more than reasonable taking into account the services provided and available commercial locator databases, and RCH internal databases. These searches occur twice in the first year a participant account is entered into the RCH system and once a year thereafter. RCH will also perform manual Internet-based search activities if a valid address is not obtained from the automated checks.

6 This letter does not address any fiduciary issues related to decisions on investment of rolled in assets to investment options in the new employer’s plan, including application of 29 CFR 2550.404c-5 (QDIA regulation).
7 See ERISA sections 404(a)(1)(A), (B) and (D).
alternatives. The responsible plan fiduciaries must also monitor the arrangement and periodically ensure that the plan’s continued participation in the RCH Program is consistent with ERISA’s standards.8

**Fiduciary Status of Plan Sponsors for Default Transfer of IRA Funds to Plan of New Employer**

If a person is a fiduciary with respect to certain activities involving the RCH Program, it does not necessarily make that person a fiduciary with respect to all aspects of the RCH Program.9 Rather, a determination of whether a person is a fiduciary generally requires a factual analysis of the types of functions performed and actions taken by the person.

Your letter indicates that once the assets are transferred to the default IRA, the plan sponsor of the former employer’s plan has no discretion or authority over the decisions of the IRA owner or RCH related to any future transfer of the default IRA assets. Also, you represented that before RCH transfers default IRA funds to a new employer’s plan, the new employer’s plan must adopt the RCH Program under which it will acknowledge that the transfer of IRA funds is consistent with the plan’s terms and that it will accept the roll-in. As described above, RCH will also notify the participant and seek affirmative consent to the transfer. But, if the participant does not affirmatively consent after receiving the notices, RCH will assume responsibility to direct the roll-in from the default IRA or RCH IRA acting as a conduit into the individual’s current employer plan.

Based on these representations, it is the view of the Department that the plan sponsors of the former and new plans would not be acting as a fiduciary with respect to the decision to transfer the individual’s default IRA into the new employer’s plan. Once a plan fiduciary properly distributes the entire benefit to which a plan participant is entitled, the distribution ends the individual’s status as a participant covered under the plan within the meaning of 29 CFR 2510.3-3(d)(2)(ii)(B) and the distributed assets are no longer plan assets under ERISA.10 Although, the fiduciaries of the former employer’s plan would be fiduciaries in deciding to transfer accounts to default IRAs and in deciding to have the plans participate in the RCH Program, they would not be involved in or responsible for the decision in individual cases to transfer IRA assets to a new employer plan. Further, although the fiduciaries of the new employer plan would be responsible for determining whether the roll-in is consistent with their plan’s terms and in accepting the roll-in (including allocating the assets to investment alternatives in the new plan), those actions do not cause the fiduciaries of the new employer’s plan to exercise fiduciary authority in connection with RCH’s separate decision to roll the IRA assets into the new employer plan.

**Fiduciary Status of RCH for Transfer of Default IRA Funds to Plan of New Employer**

Absent affirmative consent of the IRA owner/participant, RCH acts as a fiduciary within the meaning of section 4975(e)(3) of the Code in deciding to transfer the individual’s RCH default IRA to the individual’s new employer plan. The individual’s failure to respond to the RCH Program communications about default transfers is not tantamount to affirmative consent by the participant/IRA

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8 For example, to the extent the RCH Program is more costly than a default IRA program without the RCH Program portability services, the adopting plan fiduciaries should consider whether the number of successful matches and account consolidation transfers achieved through use of the RCH Program merits the additional expense of being part of the program.

9 See, e.g., Interpretative Bulletin 75-8, Q-FR-16 and ERISA section 405(b)(1).

10 See Field Assistance Bulletin 2014-01 (Aug. 14, 2014). If, however, the distributed benefit is reduced due to a fiduciary breach with respect to the plan, the individual retains standing to sue the breaching fiduciary under ERISA section 502(a)(2), even though the participant’s account balance has been distributed to an IRA. See LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248 (2008).
owner to default transfers to the new employer’s plan, and does not relieve RCH from fiduciary status and responsibilities.\textsuperscript{11} Unlike 29 CFR 2550.404a-2 and 2550.404a-3 with respect to the default transfer of a participant’s account into an IRA, no similar statutory or regulatory provision provides relief from fiduciary responsibility for “default” transfers of the IRA funds to the new employer’s plan.

Similarly, absent affirmative consent of the IRA owner/participant, in situations where a default IRA maintained by a third party record keeper is transferred to an RCH default IRA acting as a conduit to facilitate the transfer to a new employer’s plan, RCH acts as a fiduciary within the meaning of section 4975(e)(3) of the Code in directing the transfer of the individual’s default IRA to the RCH default IRA and subsequently to the new employer’s plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter does not address the prohibited transaction implications of RCH receiving additional fees as a result of exercising fiduciary discretion in the transfers described above, and we understand that RCH applied for an individual exemption under ERISA section 408(a) and Code section 4975(c)(2) for certain transactions involved in its program.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

\textsuperscript{11} Although a recipient’s failure to respond to a communication may be treated as consent under some circumstances involving a plan sponsor, trustee, or other named fiduciary, see, e.g., Advisory Opinion 2001-02A, in the Department’s view, service providers deciding to transfer an individual’s plan or IRA account generally cannot avoid fiduciary responsibility for exercising authority or control over plan or IRA assets within the meaning of ERISA section 3(21)(A)(i) or Code section 4975(e)(3)(A) through a “negative consent” process with individual participants or beneficiaries.
EXHIBIT C
WASHINGTON, DC – The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) today invited public comment on a proposed exemption related to the consolidation of small retirement savings accounts in 401(k) plans and IRAs when workers change jobs. The Department welcomes innovation in the area of retirement asset portability, and encourages additional proposals.

Frequently, employees leaving their current place of employment with small account balances in the company's 401(k) plan often either take a distribution of their retirement savings or move the account into an IRA. The same outcome frequently occurs with small retirement accounts when a company terminates its 401(k) plan.

An auto portability program seeks to improve asset allocations by consolidating small retirement savings accounts, eliminate duplicative fees for small retirement savings accounts, and reduce leakage of retirement savings from the tax-deferred retirement saving system. Employees would be told their 401(k) savings will be moved to tax-favored IRAs when they leave a job or if the plan is terminated, and that the employee's savings in the IRA then would be automatically transferred to the 401(k) plan of the new employer when the employee finds a new job.

The Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 prohibits a plan or IRA fiduciary from using its discretion to cause the plan or IRA to pay the fiduciary a fee. The Department has the authority, however, to grant exemptions that are protective of and in the interests of plan participants and IRA owners. The Department looks forward to receiving input from the public, including any data or factors that it should consider as part of the exemption, including protective conditions for participants and beneficiaries.
The proposed exemption gives the public an opportunity to present comments. All written comments and requests for a hearing should be sent to EBSA's Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington, D.C., 20210. Attention: Application No. D-11938. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: e-oed@dol.gov, or by FAX to (202) 693-8474 within 45 days. The application for exemption and the comments received will be available for public inspection in EBSA's Public Documents Room, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, NW, Washington, D.C., 20210.

**Agency:** Employee Benefits Security Administration  
**Date:** November 7, 2018  
**Release Number:** 18-1810-NAT  
**Contact:** Megan Sweeney  
**Phone Number:** 202-693-4661  
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treated as a Roth IRA only if the custodial
account was a designated Roth account.”.

(b) Effective Date.—The amendment made by
this section shall apply to plan terminations occurring
after December 31, 2018.

SEC. 108. CLARIFICATION OF RETIREMENT INCOME AC-
COUNT RULES RELATING TO CHURCH-CON-
TROLLED ORGANIZATIONS.

(a) In General.—Section 403(b)(9)(B) of the Inter-
nal Revenue Code of 1986 is amended by inserting “(in-
cluding an employee described in section 414(e)(3)(B))”
after “employee described in paragraph (1)”.

(b) Effective Date.—The amendment made by
this section shall apply to plan years beginning after De-

SEC. 109. EXEMPTION FROM REQUIRED MINIMUM DIS-
TRIBUTION RULES FOR INDIVIDUALS WITH
CERTAIN ACCOUNT BALANCES.

(a) In General.—Section 401(a)(9) of the Internal
Revenue Code of 1986 is amended by adding at the end
the following new subparagraph:

“(H) Exception from required mini-
imum distributions during life of em-
ployee where assets do not exceed
$50,000.—
“(i) IN GENERAL.—If on the last day of any calendar year the aggregate value of an employee’s entire interest under all applicable eligible retirement plans does not exceed $50,000, then the requirements of subparagraph (A) with respect to any distribution relating to such year shall not apply with respect to such employee.

“(ii) APPLICABLE ELIGIBLE RETIREMENT PLAN.—For purposes of this subparagraph, the term ‘applicable eligible retirement plan’ means an eligible retirement plan (as defined in section 402(c)(8)(B)) other than a defined benefit plan.

“(iii) LIMIT ON REQUIRED MINIMUM DISTRIBUTION.—The required minimum distribution determined under subparagraph (A) for an employee under all applicable eligible retirement plans shall not exceed an amount equal to the excess of—

“(I) the aggregate value of an employee’s entire interest under such plans on the last day of the calendar year to which such distribution relates, over
“(II) the dollar amount in effect under clause (i) for such calendar year.

The Secretary in regulations or other guidance may provide how such amount shall be distributed in the case of an individual with more than one applicable eligible retirement plan.

“(iv) INFLATION ADJUSTMENT.—In the case of any calendar year beginning after 2019, the $50,000 amount in clause (i) shall be increased by an amount equal to—

“(I) such dollar amount, multiplied by

“(II) the cost of living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting ‘calendar year 2018’ for ‘calendar year 2016’ in subparagraph (A)(ii) thereof.

Any increase determined under this clause shall be rounded to the next lowest multiple of $5,000.
“(v) PLAN ADMINISTRATOR RELIANCE ON EMPLOYEE CERTIFICATION.—An applicable eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) shall not be treated as failing to meet the requirements of this paragraph in the case of any failure to make a required minimum distribution for a calendar year if—

“(I) the aggregate value of an employee’s entire interest under all applicable eligible retirement plans of the employer on the last day of the preceding calendar year does not exceed the amount in effect for such year under clause (i), and

“(II) the employee certifies that the aggregate value of the employee’s entire interest under all applicable eligible retirement plans on the last day of the preceding calendar year did not exceed the dollar amount in effect under clause (i).

“(vi) AGGREGATION RULE.—All employers treated as a single employer under
subsection (b), (c), (m), or (o) of section 414 shall be treated as a single employer for purposes of clause (v).”.

(b) **Plan Administrator Reporting.**—Section 6047 of such Code is amended by redesignating subsection (g) as subsection (h) and by inserting after subsection (f) the following new subsection:

“(g) **Account Balance for Participants Who Have Attained Age 69.**—

“(1) In general.—Not later than January 31 of each year, the plan administrator (as defined in section 414(g)) of each applicable eligible retirement plan (as defined in section 401(a)(9)(H)) shall make a return to the Secretary with respect to each participant of such plan who has attained age 69 as of the end of the preceding calendar year which states—

“(A) the name and plan number of the plan,

“(B) the name and address of the plan administrator,

“(C) the name, address, and taxpayer identification number of the participant, and
“(D) the account balance of such participant as of the end of the preceding calendar year.

“(2) Statement furnished to participant.—Every person required to make a return under paragraph (1) with respect to a participant shall furnish a copy of such return to such participant.

“(3) Application to individual retirement plans and annuities.—In the case of an applicable eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B)—

“(A) any reference in this subsection to the plan administrator shall be treated as a reference to the trustee or issuer, as the case may be, and

“(B) any reference in this subsection to the participant shall be treated as a reference to the individual for whom such account or annuity is maintained.”.

(c) In General.—The amendments made by this section shall apply to distributions required to be made in calendar years beginning more than 120 days after the date of the enactment of this Act.