

# Washington Pulse

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## DOL Releases Proposed Regulations for Automatic Portability Transactions

The Department of Labor (DOL) has released [proposed regulations](#) related to the implementation of section 120 of the SECURE 2.0 Act (SECURE 2.0). Section 120 of SECURE 2.0 amended Internal Revenue Code Section ([IRC Sec.](#)) [4975](#) to add a prohibited transaction exemption to permit the receipt of fees and compensation by an automatic portability provider for services provided in connection with an automatic portability transaction. This exemption applies to qualified 401(a) plans (other than defined benefit plans), 403(a) plans, 403(b) plans, governmental 457(b) plans, and traditional and Roth individual retirement arrangements (IRAs).

### Background

Automatic portability transactions are designed to assist workers in remaining connected to their retirement assets when they change jobs. The DOL first issued guidance on this topic in response to a request for an advisory opinion and prohibited transaction exemptive relief regarding a specific auto portability program. [Advisory Opinion 2018-01A](#) addressed the status of certain parties as “fiduciaries” as a result of actions undertaken as part of the program, including that plan sponsors act in a fiduciary capacity when making the decision to participate in the auto portability program. [Prohibited Transaction Exemption \(PTE\) 2019-02](#) provides a specific auto portability provider the ability to receive certain fees in connection with the transfer of assets from a default IRA to an individual’s new plan account without the individual’s consent as long as certain conditions are met until July 31, 2024.

### Relief Provided for Automatic Portability Providers engaged in Automatic Portability Transactions

SECURE 2.0 creates a new statutory exemption under IRC Sec. 4975 which allows an automatic portability provider to receive a fee in connection with an automatic portability transaction. The DOL’s proposed regulation defines an automatic portability provider as an entity that executes transfers of assets from a worker’s “default IRA” to a “transfer-in plan” in which the worker is an active participant. An automatic portability provider must execute an automatic portability transaction on the same terms to all default IRAs and transfer-in plans that contract to receive these services. The default IRA is established by a plan administrator of a “transfer-out plan” for the benefit of an individual due to a mandatory distribution or involuntary cashout, in accordance with existing law and regulations.

- **Transfer-out Plan.** The plan administrator of a transfer-out plan initiates a mandatory distribution and automatic rollover after an employee separates from service with a vested account balance below the plan’s defined mandatory distribution threshold.
- **Default IRA.** A default IRA is an IRA established in accordance with IRC Sec. 401(a)(31)(B) to receive funds distributed from a transfer-out plan as a rollover transaction.

- **Transfer-in Plan.** A transfer-in plan receives the assets from the default IRA when an IRA owner is matched with an account in an eligible employer-sponsored plan at a new employer. The transfer-in plan must permit the assets to be rolled in.

The decision to contract with an auto portability provider is optional; therefore the auto portability process will only be available to those plan sponsors who, along with their service providers (i.e., recordkeepers) choose to participate.

## Requirements to Gain Relief under the Proposed Prohibited Transaction Exemption

There are several conditions that must be met for an automatic portability transaction to be covered by the statutory exemption in IRC Sec. 4975(d)(25).

- **Fiduciary Acknowledgement.** Once contracted by an employer of a transfer-out plan to provide auto portability services, an automatic portability provider must acknowledge its fiduciary status with respect to a default IRA in writing. The written acknowledgement must also be made in three separate notices to the IRA owner— an initial enrollment notice, a pre-transaction notice, and a post-transaction notice.
- **Contracts and Compensation.** Fees and compensation related to the automatic portability provider's services must be reasonable, fully disclosed, and approved in writing by a fiduciary of the transfer-in plan in advance of any services performed. The determination of what is considered a reasonable fee or compensation is based on facts and circumstances. The proposed regulation provides guidance on a number of specific circumstances.
  - The proposed regulation prohibits the receipt or payment of third-party compensation, other than a direct fee to be paid by a plan sponsor of a transfer-in plan, as long as the fee paid by the plan sponsor is in lieu of a fee imposed on an IRA owner.
  - An automatic portability provider may share a portion of its fee or compensation with another entity serving in the role of an automatic portability provider.
  - The limitation on fees and compensation will not prevent an automatic portability provider from receiving fees or compensation for services provided to a retirement plan or IRA that are in addition to the fees and compensation associated with an automatic portability transaction.
  - An automatic portability provider may not receive fees or compensation to execute an automatic portability transaction for the retirement plan it (or an affiliate) sponsors or maintains.
- **Data Usage and Protection.** Automatic portability providers must follow strict data usage and protection guidelines in order to gain relief under the proposed prohibited transaction exemption. An automatic portability provider
  - Can use data only to execute automatic portability transactions or locate missing account owners.
  - Cannot market or sell to third-parties account owner data that is obtained in connection with an automatic portability transaction.
  - Must safeguard data and take appropriate remedial steps if account holder data is compromised.
- **Open Participation.** An automatic portability provider must offer the same terms for automatic portability transactions to all transfer-in plans they provide services for, and they cannot limit or restrict a plan, recordkeeper, or IRA provider (including a trustee, custodian, or issuer) from engaging other automatic portability providers to offer automatic portability transaction services.
- **Notices.** An automatic portability provider must send notices to a variety of interested parties if the entity begins operating an automatic portability transaction program that is intended to rely on the prohibited transaction relief provided by section 4975(d)(25).
  - **Notice to the Secretary of Labor.** An automatic portability provider must notify the DOL at [auto-portability@dol.gov](mailto:auto-portability@dol.gov) within 90 calendar days of the date they begin operating an automatic portability transaction program. The notice must confirm that the automatic portability provider is operating an automatic portability program and state the legal name as well as any trade or D/B/A name of each of the business entities relying on the relief provided by the prohibited transaction exemption.
  - **Notice to a Plan Administrator.** An automatic portability provider must provide a model description of the automatic portability program, including details about fees and expenses related to the overall program and automatic portability transactions to plan administrators of participating transfer-out and transfer-in plans. Automatic portability providers must also notify plan administrators of their responsibility to include the model description of the automatic portability program and any fees

related to an automatic portability transaction in its summary plan description or summary of material modification.

- **Notices to a default IRA Owner.** Two notices must be sent prior to the completion of an automatic portability transaction with one additional notice provided after the automatic portability transaction is completed. Each of the three notices is required to include specific information and must be provided within a certain timeframe relative to the completion of the automatic portability transaction.
  - **Initial Enrollment Notice.** This notice must be provided within 15 calendar days of a default IRA's enrollment or participation in an arrangement that includes an automatic portability transaction component.
  - **Pre-Transaction Notice.** This notice must be provided to a default IRA owner at least 60 but no more than 90 calendar days before an automatic portability transaction occurs.
  - **Post-Transaction Notice.** This notice must be provided to a default IRA owner within three business days after an automatic portability transaction is completed.

In certain situations, notices must be written in a culturally and linguistically appropriate manner which requires, among other things, that the notice include a prominent statement in the relevant non-English language that describes the availability of specific language services. Finally, in order to ensure account owners receive the applicable notices, the automatic portability provider must establish judicious policies and procedures for obtaining accurate census and contact data.

- **Data Verification.** In addition, automatic portability providers are required to take the necessary steps to verify the accuracy of the data that is used for conducting a locate-and-match. The automatic portability provider is also required to touch base with recordkeepers on at least a monthly basis to determine if a default IRA owner has an active account with an employer-sponsored plan.
- **Oversight of Asset Transfer.** An automatic portability provider is responsible for making sure that transfer-in plans designate a plan official to monitor the transfers into the plan and confirm that assets are invested appropriately. The proposed regulation deems assets to be invested properly if they are made according to the participant's current investment election under the plan, or if no current election is made, in the plan's qualified default investment alternative or in another investment selected by a fiduciary of the transfer-in plan.
- **Timeliness of Execution.** The automatic portability provider is also required to transfer account balances to the transfer-in plan "as soon as practicable" following formally established policies and procedures.
- **Exercise of Discretion Limitation.** An automatic portability provider will not possess or be able to exercise discretion over the timing or amount of an asset transfer as part of an automatic portability transaction other than to deduct the appropriate processing fees. An automatic portability provider will be deemed to satisfy this standard if they establish, maintain, and follow written policies and procedures with respect to the process for executing automatic portability transactions.
- **Completed Audits.** An automatic portability provider must also retain an independent auditor to conduct an annual audit to demonstrate compliance with the automatic portability provider's policies and procedures, requirements outlined in IRC Sec. 4975(d)(25), (f)(12) and any corresponding regulations. The proposed regulation requires the auditor to complete the mandatory audit process within 180 calendar days following the annual period to which the audit relates. The automatic portability provider is then required to submit a copy of the written audit report within 30 calendar days to the DOL via email to [auto-portabilityaudit@dol.gov](mailto:auto-portabilityaudit@dol.gov).
- **Correction Methods.** An automatic portability provider has the opportunity to correct any failures to comply with IRC Sec. 4975(f)(12) and the related proposed regulations by following one of three established correction components, as applicable.
  - The first correction component permits the automatic portability provider to self-correct within a limited timeframe when the violation does not result in investment losses to the default IRA or the automatic portability provider makes the default IRA whole.
  - However, if the auditor determines that the automatic portability provider was not in compliance, the second correction component requires the auditor to identify the noncompliant instances and recommended correction method in their final audit report. The automatic portability provider must correct any noncompliant instance as soon as reasonably practicable, according to the auditor's recommendations.
  - And finally, the third correction component requires an automatic portability provider undergo supplemental audits and additional corrective actions as determined by the DOL if significant compliance issues are identified.

- **Website.** The automatic portability provider must maintain a website which displays specific information regarding the automatic portability program, including a list of participating recordkeepers.
- **Exculpatory Provisions Limitation.** The automatic portability provider may not use exculpatory provisions in contracts or communications disclaiming or limiting the automatic portability provider's liability.
- **Record Retention.** Records demonstrating compliance with IRC Sec. 4975(f)(12) and the related regulation must be maintained by an automatic portability provider for at least six years after an automatic portability transaction has occurred.

## Next Steps

The DOL is proposing that any final rule that is adopted based on this proposed regulation would be effective 60 days after publication in the *Federal Register*. However, an entity serving as an automatic portability provider may use a good faith, reasonable interpretation of the law, taking into account the list of consumer protection conditions and requirements in section 120(c) of SECURE 2.0, in addition to the requirements of [IRC Sec. 4975\(f\)\(12\)](#) and [4975\(d\)\(25\)](#) until final regulations are released.

The DOL is accepting written comments until March 29, 2024. In particular, the DOL has requested comments regarding whether the proposed rule should include provisions that specifically address issues related to IRA beneficiaries as well as whether the DOL should provide parallel exemptive relief for mandatory distributions with a value of \$1,000 or less.

Ascensus will continue to follow any new guidance as it is released. Visit [ascensus.com](https://ascensus.com) for the latest developments.