Consumer Federation of America

NATIONAL EMPLOYMENT LAW PROJECT

December 24, 2018

Employee Benefits Security Administration (EBSA)
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210
Attn: Application No.D-11938

Re: Notice of Proposed Exemption Involving Retirement Clearinghouse, LLC (RCH)

Ladies and Gentlemen:

On behalf of the Consumer Federation of America (CFA)[1] and the National Employment Law Project (NELP)[2], we write in response to the Department's proposed individual prohibited transaction exemption involving Retirement Clearinghouse, LLC (RCH).[3] While we certainly share the Department's goal of improving retirement savings portability and its concern about leakage from the retirement savings system, we are skeptical that the proposed RCH Program would adequately address these problems. We fear that, rather than meaningfully improving the retirement savings marketplace for workers by creating a workable mechanism to consolidate and grow their retirement savings, the RCH Program may leave investors no better off, and potentially worse off, than they are today, while at the same time producing a windfall for a private company. This outcome would be particularly troubling, given that the RCH Program would impact America's mobile workers with small balances – those who can least afford to lose any of their hard-earned savings. Given these concerns, and the fact that this program is an experiment, it's imperative the Department ensure that there are sufficient guard-rails in place to curb any potential abuse and ensure that if the program does not deliver on its stated objectives, the Department quickly terminates the exemption.

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[1] CFA is a non-profit association of nearly 300 national, state, and local pro-consumer organizations. It was formed in 1968 to represent the consumer interest through research, advocacy and education.

[2] NELP is a non-profit research and policy organization that for more than 45 years has sought to ensure that America upholds the promise of opportunity and economic security for all workers.

[3] Notice of Proposed Exemption Involving Retirement Clearinghouse, LLC (RCH or the Applicant)-Located in Charlotte, North Carolina, 83 Fed. Reg. 55741, November 7, 2018, https://bit.ly/2QK5e6f.

Summary

The objective of the RCH Program is to "improve overall asset allocation, eliminate duplicative fees for small retirement saving accounts, and reduce leakage of retirement savings from the tax-deferred retirement saving system."[4] However, it is not clear how the proposal would achieve these goals. First, the proposal never explains how it would improve overall asset allocation, nor does the proposal contemplate how the transferred funds would be invested or who would be responsible for those investment decisions. But it's difficult to see how the transferred funds would be invested differently from how they typically are invested now, in cash-like vehicles. Second, the proposal never explains how it would eliminate duplicative fees for small retirement savings, outside of the narrowest of circumstances, and it's not clear that the total costs imposed on workers' accounts under the RCH Program would be lower than the total costs imposed on forced transfer IRAs under the status quo. Our concern is that workers could end up paying the same or a greater magnitude of fees, just in a different form, and they would not experience meaningful benefits under the RCH program. Third, it's not clear how the proposal would reduce leakage of retirement savings from the tax-deferred retirement system. Given that implementation of the RCH Program is likely to be cumbersome and fraught with practical, legal, and competitive concerns and challenges, it's not clear plan sponsors and record-keepers will agree to participate. In addition, given the evidence that participants are willing to pay the high costs of taking voluntary cash-outs in order to gain access to their money, it's unrealistic to expect a different result under the RCH program.

The reality is that this proposal is an experiment and it is possible that it could potentially leave workers worse off than they are today. For those reasons, the risks associated with the program must be limited. We recommend that the Department: 1) ensure that RCH shares in fiduciary responsibility and liability at all times and in all respects; 2) reduce the proposed five-year exemption to three years; 3) maintain the requirement that RCH may not receive more than reasonable compensation for its services, and 4) maintain the requirement of having annual independent audits of the RCH Program.

Our understanding of the problem, our concerns with the proposal, and our recommendations to the Department are discussed in further detail below.

1. Forced Transfers and Leakage from the Retirement Savings System Can Significantly Erode Mobile Workers' Retirement Savings.

A. Forced-transfers

Forced-transfers can significantly erode the retirement savings of mobile workers, who often have the smallest amounts saved. When a worker has saved $5,000 or less in a 401(k) plan and changes jobs without deciding what to do with their money, the plan can force a transfer of the worker's account savings into an individual retirement account (IRA) without the worker's consent. The savings in the IRA typically are invested poorly, in cash-like vehicles that don't participate in market growth and struggle to even keep pace with inflation. At the same time, forced-transfer IRAs are subject to a variety of fees that significantly erode mobile workers' savings over the long-term.

[4] *Id*.

The problem of investing this money poorly is the result of existing Department regulations, issued in 2004, which provide an Automatic Rollover Safe Harbor for plan fiduciaries transferring forced-out participants' accounts. Under this safe harbor, plan fiduciaries are deemed to satisfy their fiduciary duties under ERISA with respect to the selection of the IRA provider and the initial investment choice for the rolled-over funds if they comply with certain conditions.[5] Among the safe harbor's conditions are requirements that the investment into which the account is rolled must be "designed to preserve principal and provide a reasonable rate of return, whether or not guaranteed, consistent with liquidity;" and must "seek to maintain, over the term of the investment, the dollar value equal to the amount rolled over."[6] These conditions effectively limit fiduciaries to transferring the assets to money market funds, certificates of deposit, or assets with similarly low investment risk typically deemed appropriate for holding money for a short term.

The Department has had opportunities to clarify that, in the case of forced-transfer IRAs, plan fiduciaries can select target date funds, which are allowed in the plan Qualified Default Investment Alternative (QDIA) context, as the initial investment choice for the rolled-over funds in order to enable long-term growth of the assets. But the Department has refused to do so, claiming that doing so would be inconsistent with the purposes that Congress intended for forced-transfer IRAs. It stated in the safe harbor release, for example:

> The Department continues to believe that an investment strategy adopted by a participant while in a defined contribution plan or a default investment chosen by a plan fiduciary at a particular point in time would not necessarily continue to be appropriate for the separating participant in the context of an automatic rollover, particularly given the relatively small account balances typically covered by the safe harbor. Further, the Department believes that, consistent with Congress' intent to preserve retirement assets for participants, the investment products in which mandatory distributions can be invested under the safe harbor should be limited to investment products that are consistent with this goal of preservation. In the Department's view, this would be limited to the class of investment products designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity.

More recently, the Government Accountability Office (GAO) recommended expanding the types of investment alternatives that are available under the safe harbor for plan sponsors using forced transfers, and the Department disagreed with the recommendation.[7]

At the same time forced-transfer IRAs often hold cash-like vehicles that don't participate in market growth and struggle to even keep pace with inflation, forced-transfer IRAs are subject to a variety of fees that significantly erode workers' savings. The GAO collected forced-transfer IRA information from ten forced-transfer IRA providers, including information about the fees charged, the default investments used, and the returns obtained.[8] The GAO found that low returns coupled with administrative fees, ranging from $0 to $100 or more to open the account and $0 to $115

[5] Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor, 69 Fed. Reg. 58017, August 28, 2004, https://bit.ly/2rO2aqR.
[6] *Id*.
[7] United States Government Accountability Office, 401(K) PLANS: Greater Protections Needed for Forced Transfers and Inactive Accounts, GAO-15-73, November 2014, https://bit.ly/2BBi6Ba.
[8] *Id*. at 10.

annually, "can steadily decrease a comparatively small stagnant balance."[9] The GAO then projected the effects of different fee and investment return combinations on a $1,000 balance over time. According to the GAO's analysis, "While projections for different fees and returns show balances decreasing at different rates, generally the dynamic was the same: small accounts with low returns and annual fees decline in value, often rapidly."[10] For example, among the 19 combinations analyzed, GAO's analysis showed an average decrease in a $1,000 account balance of about 25 percent over just 5 years.[11] The GAO concluded, based on its analysis, that, "Most forced-transfer IRA balances in accounts we analyzed will decrease if not transferred out of forced-transfer IRAs and reinvested, because the fees charged to the forced-transfer IRAs often outpace the low returns earned by the conservative investments prescribed by DOL's safe harbor."[12] Additionally, the GAO found that participants can end up with multiple forced-transfer IRAs over time— each incurring its own administrative fees.[13]

Forced-transfer IRAs often become long-term investments as participants leave jobs and their savings are forgotten or neglected. According to the GAO study, one forced-transfer IRA service provider that GAO interviewed estimated that half of the accounts they opened are for missing participants.[14] Moreover, many unclaimed accounts may remain so indefinitely.[15] For example, one provider that GAO interviewed reported that nearly 70 percent of the accounts it had opened within the last 5 years remained open and unclaimed. [16] To the extent participants find these lost savings years after they've left their previous job, their accounts are often significantly smaller than when they were when they left their job as a result of low returns and the variety of fees that the accounts incur in the interim.

Another problem relating to forced-transfer IRAs is that existing law allows plans to exclude a participant's savings that were rolled into the plan when calculating whether the participant may be forced out.[17] This means that separated participants with 401(k) accounts of any size can be forced from a plan if the vested balance from the plan they leave, which excludes any money that is attributable to a rollover to the plan, is $5,000 or less.

Assume, for example, that a worker leaves a job with a $4,000 vested balance in their employer's 401(k). Because only $4,000 is attributable to this plan, she could experience a forced transfer to an IRA, where the $4,000 would be held in cash in accordance with the Automatic Rollover Safe Harbor, discussed above. Meanwhile, that forced-transfer IRA would be subject to a variety of fees that reduce the value of that account. Next, assume that the worker gets a new job where she accumulates $3,500 in her new employer's 401(k). Because only $3,500 is attributable to this 401(k) plan, she could experience another forced transfer to an IRA, where the $3,500 is held in cash in accordance with the safe harbor. Meanwhile, that IRA would be subject to a variety of fees that reduce the value of the account. The worker could continue to experience forced transfers, even though the total amount, spread between accounts, would be well over $5,000, because each vested

[9] *Id*.
[10] *Id*.
[11] *Id*. at 11.
[12] *Id*. at 9.
[13] *Id*. at 17.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] 26 U.S.C. §§ 401(a)(31) and 411(a)(11)(D).

balance is under $5,000.[18] Even worse, if she rolled all of the forced transfers into a new 401(k) so that the total balance was well over $5,000, she would still experience a forced-transfer if the money she contributed and became vested in that plan was less than $5,000. Existing policy and practices make it more likely that mobile workers who don't accumulate enough savings to get over the $5,000 threshold whenever they participate in a new plan will experience multiple forced-transfers, to their detriment.

Use of forced-transfer IRAs is common among 401(k) plans, according to various evidence the GAO has analyzed. According to one annual industry survey, for example, about half of active 401(k) plans force out separated participants with balances of $1,000 to $5,000.[19] In addition, data provided by the Social Security Administration (SSA) suggests that millions of workers holding billions of dollars have experienced forced-transfers. According to the SSA data, for example, from 2004 through 2013, separated employees left more than 16 million accounts of $5,000 or less in workplace plans, with an aggregate value of $8.5 billion.[20] Forced transfer no doubt erode mobile workers' retirement savings and demand a serious solution.

B. Leakage from the retirement savings system as a result of involuntary and voluntary cash-outs.

As with forced transfers, which keep money in the tax-preferred retirement system albeit on unfavorable terms, leakage of retirement savings out of the tax-preferred retirement system occurs at the highest percentages among individuals with the smallest accounts. Leakage arises in two main ways: involuntary cash-outs by employers and voluntary cash-outs by employees. First, if a participant has saved $1,000 or less in a 401(k) plan and changes jobs without indicating what should be done with the money, the plan can engage in an involuntary cash-out.[21] Involuntary cash-outs may make sense from a plan administration perspective, as they can reduce the number of participants and the plan expenses attributable to those participants.[22] Involuntary cash-outs can also reduce the administrative responsibilities of keeping track of and providing disclosures to former employees, as well as limiting plan fiduciaries' responsibility and liability. However, involuntary cash-outs can be extremely detrimental to plan participants, decreasing the likelihood that the money will be invested for long-term growth, and increasing the likelihood that the participant has to pay taxes and penalties on the distribution.

Second, voluntary cash-outs arise when a participant chooses to take a distribution from the plan. Unfortunately, the prevalence of voluntary cash-outs is high. According to a white paper by Boston Research Technologies (BRT), which appeared to be commissioned by RCH, the cash-out rate for all transitioning workers is more than 30 percent and among workers with under $5,000 in their account, the cash-out rate is substantially higher, at approximately 80 percent.[23] In many

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[18] *See* United States Government Accountability Office, 401(K) PLANS: Greater Protections Needed for Forced Transfers and Inactive Accounts, November 2014, at 17, https://bit.ly/2BBi6Ba.
[19] *Id*. at 7.
[20] *Id*. Just because these accounts were eligible for forced transfers does not mean that they experienced a forced-transfer.
[21] 26 U.S.C. §§ 401(a)(31)(B).
[22] *See* Fred Reish and Bruce Ashton, The Benefits of Mandatory Distributions, Drinker Biddle, February 2013, https://bit.ly/2LthLVI.
[23] Warren Cormier, Making the Right Choice the Easiest Choice: Eliminating Friction and Leaks in America's Defined Contribution System, Boston Research Technologies, November 2017, https://bit.ly/2ia35gH.

instances, the decision to take a voluntary cash-out may not be the optimal long-term decision, while in other instances, it may be entirely rational, depending on the circumstances. BRT and RCH conducted a phone survey of workers who recently left their job and were expressing an interest in cashing out their retirement account balances. Among survey respondents, the most cited reason for wanting to cash out was the allure of the availability of the money, followed by needing the money to cover household expenses, pay off debt, and cover an emergency, respectively.[24] Moreover, the prospect of having to pay penalties for accessing the money doesn't appear to be an effective disincentive. According to the BRT white paper, for example, over 80 percent of people who cashed out said they were aware of the penalties, yet still decided to cash out. The reality is that, when given an opportunity to receive a cash payout, people are willing to pay the costs to access the money, even in instances when it is not the optimal long-term decision to do so. No doubt, leakage from the retirement savings system erodes mobile workers' retirement savings and demands a serious solution.

2. It is not clear that the proposed RCH Program would solve the problems highlighted above, and there's good reason to be skeptical about its effectiveness.

As discussed above, there are a variety of ways that forced-transfer IRAs and leakage from the retirement savings system result in bad outcomes for retirement savers. These deficiencies in the system demand a serious solution. However, we're not convinced that the proposed RCH Program is that solution.

According to RCH, its program is "designed to help employees who may have multiple job changes over their careers consolidate small accounts held in prior employers' individual account plans and rollover IRAs into their new employers' 401(k) or other defined contribution individual account plan."[25] The objective of the RCH Program is to "improve overall asset allocation, eliminate duplicative fees for small retirement saving accounts, and reduce leakage of retirement savings from the tax-deferred retirement saving system."[26]

In essence, the RCH Program would consist of rolling over forced-transfers and involuntary cash-outs from workers' former 401(k) plans into default IRAs. Then, the RCH program would use a "locate, match, and transfer" technology to search cooperating record-keepers' systems in order to find if a worker (IRA owner) has become a participant in a new 401(k) plan. Once a match is made, RCH would transfer the IRA funds to the worker's new 401(k) plan. The RCH Program would be implemented through a series of agreements with plan sponsors and record-keepers. Participating plan sponsors would 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. Participating record-keepers would agree to participate in RCH's electronic records matching technology to locate and match participants in connection with plans that have adopted the RCH Program.[27]

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[24] *Id*. at 6. A 2015 BRT/RCH study found that 37% of workers cashed out their retirement savings to meet an emergency.
[25] Notice of Proposed Exemption Involving Retirement Clearinghouse, LLC (RCH or the Applicant)-Located in Charlotte, North Carolina, 83 Fed. Reg. 55741, November 7, 2018, https://bit.ly/2QK5e6f.
[26] *Id*.
[27] *Id*.

A. **While RCH's objectives are laudable, it's not clear how the RCH Program would deliver on those objectives. Specifically, it's not clear how the proposal would improve asset allocation, eliminate duplicative fees outside of the narrowest of circumstances, or reduce leakage.**

1. It's not clear how the proposal would improve asset allocation and there are reasons to be skeptical that it will.

The proposal never explains how it would improve asset allocation, nor does the proposal contemplate how the transferred funds would be invested or who would be responsible for those investment decisions. Given that plan sponsors' decision to participate in the RCH program is a fiduciary act and plan sponsors would be subject to fiduciary standards in selecting and monitoring the RCH Program,[28] we assume that plan fiduciaries would continue to be responsible for the decision of how to initially invest the money transferred to the default IRA. We further assume that the Department's Automatic Rollover Safe Harbor, discussed above, remains in effect under this program. If these assumptions are correct, we do not see how the proposal would improve asset allocation. Rather, we assume the safe harbor would ensure that the money being rolled over to the default IRA would be held in cash-like vehicles, just as occurs now. We don't see why plan sponsors would suddenly risk violating the terms of the safe harbor by placing these funds in different investments, such as age-appropriate target-date funds that improve asset allocation, because doing so would potentially increase their fiduciary liability.[29]

Furthermore, it is not reasonable to assume that, merely because assets are consolidated in default IRAs, savers will create better asset allocation for those assets. Evidence shows that a significant portion of savers forget or neglect these investments accounts, and there's no reason to believe that they will suddenly become engaged in investment decisions in this context. Thus, it's not reasonable to assume that once the assets are transferred from 401(k) plans into cash-like vehicle inside RCH's default IRA, savers will then decide to invest that money in more appropriate asset allocations, including age-appropriate target date funds, for example. Accordingly, we don't see how the RCH Program would improve asset allocation.

2. It's not clear how the proposal would eliminate duplicative fees outside of the narrowest of circumstances, and it's not clear that the total costs imposed on workers' accounts under the RCH Program would be lower than the total costs imposed on their forced transfer IRAs under the status quo.

The proposal never explains how it would eliminate duplicative fees for small retirement savings, outside of the narrowest of circumstances. No analysis is provided, for example, comparing the various fees that are charged on existing forced-transfer IRAs with the various fees that would be charged under the RCH Program. We assume that this statement about eliminating duplicative fees refers to the fact that participants can end up with multiple forced-transfer IRAs over time—each incurring its own administrative fees. It is true that the RCH Program would stop this specific

[28] *See* Letter from Louis J. Campagna, Division of Fiduciary Interpretations, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, to J. Spencer Williams, RCH, November 5, 2018, at 4-5, https://bit.ly/2Ctt3qo.

[29] If our assumption is incorrect and the safe harbor conditions don't apply to forced transfers in this context, a better solution would be for the Department to change those conditions more to broadly to apply to all forced transfer situations.

redundant fee practice because, once the accounts are consolidated, a participant would pay only one administrative fee to RCH. That would certainly help alleviate the problem of paying duplicative fees in that one narrow instance.

However, as discussed above, the GAO collected forced-transfer IRA account information from 10 forced-transfer IRA providers, including information about the fees they charged, and found that fees range from $0 to $100 or more to open the account and $0 to $115 annually. The GAO found that these various fees can steadily decrease a comparatively small and stagnant balance. Similarly, the proposal lists a variety of fees participants in the RCH Program would ultimately pay, including:

- a monthly administrative fee;
- 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;
- a sub-transfer agency fee that the IRA investment provider pays to RCH;
- a one-time communication fee; and
- a distribution/roll-in fee (a Transfer Fee).[30]

We have no way of knowing what these various fees will end up being. Even if the RCH Program does eliminate certain duplicative fees, it is not at all clear that participants would pay total fees of a lesser magnitude than those that are currently assessed on forced-transfer IRAs. Moreover, the one fee we do know the amount of, the transfer/roll-in fee, would be significant on a percentage basis for many participants – as high as 10 percent of the amount rolled in to the worker's new 401(k).[31] We struggle to see how a 10 percent fee, which happens to be the same amount as the tax penalty for early withdrawals, is reasonable and in a participant's best interests.

The unfortunate economic reality is that small accounts can be costly to administer on an individual basis. That is one reason why plan sponsors and record-keepers have an incentive to force these small accounts out of the plan in the first place. It's also important to remember that RCH is not a charity. It is only going to operate in this space if it can profit, but it appears that its business model relies on charging large fees on small accounts, on a percentage basis. It would be an ironic and unfortunate outcome if RCH's business model were based on profiting off of those smallest of account holders, who can least afford to pay excessive fees and lose any of their hard-earned savings, particularly when the RCH Program is being marketed as a program to help these individuals.

Also, as discussed above, because existing law allows plans to exclude a participant's savings that were rolled into a new 401(k) plan when calculating whether the participant may be forced out of that 401(k) plan when they leave, it appears that, even where a worker consolidates their assets in the RCH Program and those consolidated assets are greater than $5,000, those consolidated assets may not count toward the vested balance in their new 401(k) plan. As a result, if a worker doesn't save more than $5,000 in their new plan, they could continue to experience forced transfers under the RCH Program, where they would repeatedly pay the various fees associated with the RCH Program.

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[30] Notice of Proposed Exemption, 83 Fed. Reg. 55744.

[31] RCH states that the distribution/roll-in fee will not exceed $59 for account balances of $590 or more and if a participant's balance falls below $590 at the time of consolidation, the Transfer Fee will be reduced to not more than 10 percent of the balance.

Using the same example as above, the same participant could experience multiple forced transfers under the RCH program and pay a transfer/roll-in fee every time they move from job to job. For example, assume a participant leaves a job with a $4,000 vested balance in their employer's 401(k). Because only $4,000 is attributable to this plan, she could experience a forced transfer to the RCH default IRA, where the participant's account would be subject to the various fees, highlighted above. Assuming the worker gets a new job and her account is matched to her new employer's 401(k), the money would be transferred into the new 401(k), and she would pay the transfer fee. Next, assume that the participant accumulates another $3,500 vested balance at this employer's 401(k). Despite the fact that she's accumulated a total of $7,500, because only $3,500 is attributable to this 401(k) plan, she could experience another forced transfer to the RCH default IRA. There, she'd pay the various fees associated with the RCH Program. Assuming the worker gets a new job and her account is again matched to her new employer's 401(k), the money would be transferred into the new 401(k), and she would pay another transfer fee. This process could repeat itself until the worker accumulated a large enough vested balance in a 401(k) so as not to be subject to a forced transfer, or until the worker rolled over the total balance to an IRA on her own.

In an ideal world, once the participant's total account value, including the value from any rollovers, reached the $5,000 threshold, that money would no longer be subject to a forced transfer. This would have the added benefit of keeping the money inside a plan, where the ongoing costs are likely to be lower than the RCH default IRA and where the money is likely to be better invested, in a QDIA, for example. However, absent a change in law, it doesn't appear that the RCH Program would solve this problem.

Again, it's difficult to know how the assessment of various fees will work in practice because the proposal provides no analysis of the various fees that will be charged under various scenarios and how those scenarios would compare with existing practice. Our concern is that workers will end up paying the same or a greater magnitude of fees, just in a different form, and they won't experience meaningful benefits under the RCH program.

3. It's not clear how the proposal would reduce leakage of retirement savings from the tax-deferred retirement system and there are reasons to be skeptical that it would in fact do so.

While leakage of retirement savings from the tax-deferred retirement saving system is a huge problem, and we welcome thoughtful approaches to reduce leakage, it's not clear whether the proposed RCH Program would be successful in tackling this problem. We fear that the program's ability to deliver on this objective is being significantly oversold. According to the proposal, RCH posits that its program could reduce retirement savings leakage by more than 50 percent for those workers who receive cash distributions when they change their jobs.[32] We do not think their assumption is realistic.

First, while it is true that, in theory, the RCH program could decrease the prevalence of involuntary cash-outs by employers, it's not clear that it will do so in practice. For one reason, choosing RCH could potentially increase plan fiduciaries' liability. As discussed above, when plan sponsors choose to have a plan participate in the RCH program, they are acting in a fiduciary

[32] Notice of Proposed Exemption, 83 Fed. Reg. 55745.

capacity, and would be subject to the general fiduciary standards and prohibited transaction provisions of ERISA in selecting and monitoring the RCH Program.[33] According to the Department's advisory opinion on the RCH plan:

> 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 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 standards.[34]

Given the fiduciary responsibility and liability associated with these decisions, many plan sponsors may determine that the costs and risks of participating in the RCH Program outweigh the benefits, particularly with regard to the smallest accounts and because the program is untested. In addition, as discussed below, additional operational challenges to implementing the program are likely to decrease the likelihood that plan sponsors participate in the RCH Program. These dynamics call into question the extent to which involuntary cash-outs will decrease.

To be clear, we are not suggesting that fiduciary responsibility should not attach to the RCH selection and monitoring process. Instead, what we are suggesting is that, in addition to, or instead of plan sponsors' shouldering all of the fiduciary responsibility for the RCH selection and monitoring process, RCH should bear a significant portion of the fiduciary responsibility associated with selecting and monitoring their program. That would decrease the risk that plan sponsors forgo the RCH program and it would direct responsibility and liability where it is most appropriate, given that this is a for-profit, experimental program and RCH is seeking exemptive relief to administer it.

Second, it's not realistic to assume that the RCH Program will decrease the amount of voluntary cash-outs by separating employees. Given the evidence, discussed above, that suggests that participants are willing to pay the high costs of taking voluntary cash-outs today in order to gain access to their money and forgo what may be more optimal long-term alternatives in the process, it's unrealistic to expect a different result under the RCH program. The reality is that even the best of defaults is unlikely to be sufficient to override participants' affirmative decision to want to gain access to cash.

Given these dynamics, we believe that RCH's statement that its proposal could reduce retirement savings leakage by more than 50 percent for individuals with small accounts who receive cash distributions is more aspirational than realistic.

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[33] *See* Letter from Louis J. Campagna, Division of Fiduciary Interpretations, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, to J. Spencer Williams, RCH, November 5, 2018, at 4-5, https://bit.ly/2Ctt3qo.

[34] *Id*.

B. Additional concerns about implementation make it unlikely that the RCH program will yield the benefits that RCH predicts.

It is generally agreed that, for the RCH program to be successful, it will require the full cooperation by plan sponsors and record-keepers. As discussed above, the program will be implemented through a series of agreements with plan sponsors and record-keepers. The more cooperation in the implementation of these agreements, the more likely it will be that workers match with their RCH default IRAs. The higher the percentage of matches, the more effective the RCH Program will be. But by the same token, the less cooperation in the implementation of these agreements, the less likely it will be that workers match with their RCH default IRAs, and the less effective the RCH Program will be.

Specifically, participating plan sponsors would need to adopt plan amendments and resolutions in order to carry out transfers under the RCH Program and agree that the plan will make disclosures to plan participants and beneficiaries about the program. And, as discussed above, plan sponsors would also need to agree to accept fiduciary responsibility for the decisions they make in selecting and monitoring the RCH program. There's no way of knowing whether and to what extent plan sponsors will participate in this process, but given the operational and legal challenges and uncertainties involved, there's reason to be skeptical that they will participate *en masse*.

Participating record-keepers would need to agree to participate in RCH's electronic records matching technology to locate and match participants in connection with plans that have adopted the RCH Program. This would require them to share participant data with RCH, which they may not be inclined to do for competitive reasons, as it could mean losing out on their ability to capture rolled over assets. Record-keepers may have additional motives not to fully cooperate. The proposal states that RCH may not restrict or limit the ability of unrelated third parties to develop, market and/or maintain a locate-and-match process separate from RCH's process. As a result, a record-keeper could invent its own program to compete with RCH and have an incentive to withhold participant data from RCH so as not to give its competition an advantage. Yet withholding participant data would ensure lower match rates and lower success rates for both competing programs. In the end, we don't see why all record-keepers would put aside their own financial interests and risk ceding a competitive advantage to others in the market by cooperating in the RCH program.

We have no way of knowing the extent to which record-keepers will participate in the RCH Program and matches will result, but we question whether RCH's estimates are realistic. According to RCH's estimates, which are based on a simulation by the Employee Benefits Research Institute (EBRI) and Boston Research Technologies, assuming that all record-keepers to plans participate in the RCH program, the probability of the RCH program finding a missing participant in a new employer's plan is 66% (of all accounts owned by participants in the Program) in the first year.[35] But, as RCH acknowledges, the likelihood of a match is highly dependent on the number of record-keepers actually participating in the RCH program. And as discussed above, given the competitive dynamics at play, we do not believe it is reasonable to assume that all record-keepers will participate. We think that the only way 100% of record-keepers would participate is if RCH

[35] Notice of Proposed Exemption, 83 Fed. Reg. 55744.

provided something of value in exchange for their participation, which would raise its own set of concerns.

Reinforcing the speculative nature to RCH's estimates, if record-keepers that participate in the RCH Program comprise 50% of the retirement market, the match rate would fall to 33%, according to the simulation.[36] And extrapolating these estimates even further, if record-keepers that participate in the RCH Program comprise 25% of the retirement market, the match rate would plummet to less than 17%. Furthermore, the experience from the initial launch of RCH's auto portability program appears to demonstrate the risk of not having significant record-keeper participation. The findings appear to suggest that, with only one record-keeper participating in the initial launch, the program experienced a 2.5% match rate.[37]

In sum, implementation of the RCH Program is likely to be cumbersome and fraught with practical, legal, and competitive concerns and challenges. The less cooperation and participation on the part of plan sponsors and record-keepers, the less likely workers' new 401(k)s will be matched to their RCH default IRAs and the less effective the RCH Program will be. If the program is not effective, mobile workers will not receive the program's intended benefits.

3. **This proposal must be strengthened and the risks associated with the program must be limited.**

This proposal is an experiment and there are a variety of ways it can turn out, including potentially leaving workers worse off than they are today and exposing plan sponsors to fiduciary liability that logically rests with RCH. It is therefore essential to ensure that there are sufficient guard-rails in place to curb any abuse and ensure that if the program does not deliver on its stated objectives, the Department quickly terminates the exemption. Toward this end, the Department should:

- Ensure that RCH shares in fiduciary responsibility and liability at all times and in all respects, including the selection of RCH, the ongoing investment management decisions once the money is in RCH's default IRA, and the transfer from RCH's default IRA to the participant's new employer's 401(k). Based on our reading of the proposed exemption, RCH would be a fiduciary only with respect to the decision to transfer an individual's RCH default IRA to the individual's new employer's 401(k), which leaves open gaps in protection and inappropriately foists fiduciary liability onto plan sponsors.
- Reduce the proposed five year exemption to three years. Because the results of this experiment are unpredictable and a lot can go wrong in five years, we do not agree that providing a five year exemption is in the interest of affected participants and protective of their rights. Rather, we think it is critical that the Department reassess the program in three years rather than five. Three years will provide a reasonable time for implementation of the RCH program. We expect that, in that time, the Department will have a decent sense of how the program is working, whether significant adjustments are necessary, or whether the program should be terminated altogether. Regardless, we urge the Department to keep a

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[36] *Id*.
[37] Warren Cormier, Making the Right Choice the Easiest Choice: Eliminating Friction and Leaks in America's Defined Contribution, Boston Research Technologies, at 10, https://bit.ly/2ia35gH.

careful eye on the RCH Program and, if it results in unplanned for harms or other unintended consequences, terminate the exemption promptly.

- Maintain the requirement that RCH may not receive more than reasonable compensation for its services. As discussed above, we question whether a 10 percent transfer fee is reasonable and whether the total costs assessed will be reasonable. It is critical to preserve this required condition to protect participants from paying unreasonable fees for the RCH Program.
- Maintain annual audits of the RCH Program so that both an independent entity and the Department can carefully review and analyze how the program is working and to ensure compliance with ERISA and Code requirements.

Conclusion

While we hope that the RCH program significantly benefits mobile workers by improving their ability to move from job to job while maintaining and maximizing the retirement benefits that they've earned, we are not convinced that the RCH Program will deliver on its intended benefits. We fear that the program may leave investors no better off, and potentially worse off, than they are today while producing a windfall for a private company. Given these concerns, it's imperative that the Department ensure that there are sufficient guard-rails in place to curb any potential abuse and ensure that if the program does not deliver on its stated objectives, the Department quickly terminates the exemption.

Respectfully submitted,

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