



4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2019-02;

Exemption Application No. D-11938]

Notice of Exemption Involving Retirement Clearinghouse, LLC

(RCH or the Applicant),

Located in Charlotte, North Carolina

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Five-Year Exemption.

SUMMARY: This document contains a notice of a five-year exemption issued by the Department of Labor (the Department) from the restrictions of the Internal Revenue Code of 1986, as amended (the Code). The exemption permits RCH to receive certain fees in connection with the transfer under the RCH Program, of an individual's Default IRA or Eligible Mandatory Distribution Account assets to the individual's New Plan Account, without the individual's affirmative consent, provided the conditions described below are satisfied.

DATES: This exemption will be in effect for five years from the date this notice is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693-8456. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 7, 2018, the Department published a notice of proposed exemption in the Federal Register, at 83 FR 55741, in connection with RCH's Auto-Portability Program (the RCH Program). The RCH Program provides individuals who are changing jobs with a means to transfer retirement assets from their prior employers' plans to their new employers' plans. To do this, the RCH Program features "locate and match" technology that coordinates between multiple record-keeper systems. The RCH Program identifies when an individual with a Default IRA (or Eligible Mandatory Distribution Account) has opened a New Plan Account with his or her current employer. The RCH Program facilitates the transfer of those Default IRA (or Eligible Mandatory Distribution Account) assets to the New Plan Account, following the individual's failure to respond to two letters stating that

the assets will be transferred if he or she fails to respond within the later of: Sixty days of the first letter; or thirty days of the second letter.

Relief under this exemption is solely available for the payment by a Default IRA of a Transfer Fee and a Communication Fee to RCH in connection with the transfer of \$5,000 or less (with a limited exception, described below) from the Default IRA to a New Plan Account, pursuant to either a Default IRA Model Transfer or a Conduit Model Transfer.

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. For a more comprehensive discussion of the mechanics of the RCH Program, including required disclosures, fees and confidentiality and data protection obligations, please see the notice of proposed exemption, at 83 FR 55741.

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing. All comments and requests for a hearing were due by December 24, 2018. The

Department received one written comment from RCH, and 13 written comments from other interested persons, covering a broad range of issues, which are discussed below.¹ After considering the entire record, the Department has determined to grant the exemption, subject to the revisions described below.

WRITTEN COMMENTS

1. Two Commenters Opposed the Exemption. One of the two commenters opposing the exemption stated that an employee's assets should be rolled in or out of their retirement account at the employee's discretion. The commenter stated further that a transfer to a new employer's Plan may not be in an employee's best interest if the new Plan has higher fees or does not accept Roth contributions. The other commenter stated the exemption overstates the fee-related benefits to affected IRAs since most fee structures are percentage-based. The commenter stated further that investment options available through a 401(k) plan tend to be more limited than those available

¹ The Department received correspondence from one other person, who requested to be informed if any hearing was to be held in connection with the proposed exemption.

through an IRA or Roth IRA.²

Department's Response. The Department's safe harbor regulation permits Plan fiduciaries to direct the transfer of separated employees' small Plan-account balances to Default IRAs, only if protective conditions are met. This exemption contains additional conditions applicable for transfers of Default IRAs to New Plan Accounts, under the RCH Program. Before authorizing a Plan's participation in the RCH Program, a Plan fiduciary who is independent of RCH must review the terms of the RCH Program, and determine, consistent with its duties under Section 404 of ERISA, that the Plan's participation in the RCH Program is prudent. All fees, direct or indirect, that RCH and related parties (including participating record-keepers) receive in connection with the Program must be approved by the responsible Plan fiduciary of the old employer Plan. RCH has no authority to unilaterally change the types or amounts of these fees. In addition, all fees under the RCH Program must not exceed reasonable compensation, within the meaning of Section 408(b)(2) of ERISA. Thus, the exemption

² This commenter also stated that the rollover process is often particularly cumbersome and that custodians can do more to streamline the asset transfer processes and improve participant access to information.

protects separated employees from excessive fees both through fiduciary review and approval, and through the overarching condition that compensation be no more than reasonable.

Under the RCH Program, and the exemption requires that, affected individuals receive multiple accurate notices written in plain English, containing all relevant information, so they can decide for themselves which retirement-related investment vehicles are most appropriate for their Default IRA assets. For example, the first letter, the Mandatory Distribution Letter, informs individuals that their Plan accounts will be automatically rolled over into a default IRA unless they provide affirmative direction regarding their account disposition within 30-90 days. The Mandatory Distribution Letter also explains distribution options, discloses all fees and features of the RCH Program, and includes a Code-required notice explaining various tax rules for eligible rollover distributions. Following an account rollover into a default IRA, individuals receive the Welcome Letter, which describes the IRA's investment options and includes a statement regarding 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 individual that, unless they direct otherwise, the IRA may be transferred to their new employer's Plan after 60 days. For the duration of the IRA's existence, RCH or the record-keeper annually notifies the individual of the automatic transfer process as part of an IRA annual statement. Transfers under the RCH Program to a New Plan Account occur only if: the individual does not timely respond to the notices; or the individual affirmatively approves the transfer.

RCH itself also has fiduciary responsibilities with respect to the RCH Program. Unless it has received the individual's express affirmative consent for the transfer, RCH acts as a fiduciary in causing the transfer of the individual's retirement account assets from a Default IRA (or Eligible Mandatory Distribution Account) to the individual's New Plan Account. Similarly, in situations where a Default IRA maintained by a third party record-keeper is transferred to an RCH Default IRA, absent the individual's affirmative consent, RCH acts as a fiduciary

both in affecting the transfer of the individual's Default IRA to the RCH Default IRA and subsequently to the new employer's Plan.

In response to the commenter's observation about asset-based fees, the Department notes that custodians of IRAs typically charge a range of fees that are not included within the asset-based fees. These charges are taken directly from the IRA's assets, and may include monthly administration fees, transfer fees, and account closing fees. Whether or not the assets in a particular Default IRA would benefit from a transfer under the RCH Program that triggers some of these fees and/or eliminates others, is fact specific. Notwithstanding this, individuals will likely benefit from transfers of their Default IRAs under the RCH Program, where those IRAs are subject to fixed reoccurring fees that are greater than the IRAs' investment returns. Individuals should be able to quantify the impact a transfer under the RCH Program would have on their Default IRAs' assets, using the multiple detailed plain English notices provided by RCH or participating record-keepers.

Regarding Roth IRAs, RCH represents that RCH may

accept Roth Accounts as Default IRAs, but designated Roth IRAs are not eligible to participate in the transfer function of the RCH Program. Accordingly, the Department has added new condition (t) to Section I, which precludes the transfer of Roth IRA assets to New Plan Accounts under the RCH Program.

2. Two Commenters supported the exemption, as written. Two commenters supported the exemption without changes, and stressed that the exemption would reduce retirement-asset leakage.

3. Three commenters sought expansion of the exemption. Three commenters advocated an expansion of the exemption to permit transfers of "pre-existing" safe harbor IRAs to New Plan Accounts. "Pre-existing" Default IRAs are already-established IRAs. These IRAs hold assets that the Plan transferred to the IRA, without a Plan Fiduciary's prior approval of participation in the RCH Program.

Department's Response: The Department declines to make the requested revision. An essential protection of this exemption is a Plan fiduciary's independent evaluation of the RCH Program and determination that the Program is appropriate for the Plan's participants and beneficiaries.

The decision to transfer plan assets to a Default IRA subject to the RCH Program is a fiduciary decision under Section 3(21) of ERISA, and is fully subject to the fiduciary protections of Title I of ERISA. Accordingly, the exemption ensures that a Plan fiduciary who is independent of RCH (an independent plan fiduciary), in advance of the Plan's participation in the Program: reviews the material terms of the Program, including the reasonableness and necessity of the fees and services; evaluates the impact that the Plan's participation in the Program may have on the Plan, and on its participants and beneficiaries; reviews the terms of the Plan's arrangements with its default IRA custodians and service providers, with consideration given to the possibility that those default IRA assets may ultimately be transferred to new employer Plans (resulting in additional fees) through the Program; and determines that participation in the Program is fully consistent with the Fiduciary's obligations under ERISA, including its fundamental duties of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B).

Because "pre-existing" Default IRAs lack these fiduciary safeguards with respect to the RCH Program, the

Department finds that their inclusion in the Program would not be in the interest of the affected plans, participants and beneficiaries, and IRA owners, or protective of their rights.

4. Two Commenters Expressed Concern Regarding the Proposed Exemption. One commenter expressed skepticism about trusting an aggregator to roll assets out of an IRA to a new 401k Plan, due to the aggregator's disincentive to give up these assets. The commenter stated that the exemption should impose penalties on the aggregator for failing to follow through with account transfers. Another commenter similarly sought greater liability for RCH, and recommended that the Department retain the annual audit and the "no more than reasonable compensation" provisions.

Department's Response: The exemption is structured to address these concerns. The exemption, which retains the referenced provisions, requires that transfers under the RCH Program be made according to fixed, disclosed timeframes, and that an independent auditor test a representative sample of transfers to determine whether those timelines were met. These audit reports will be reviewed by the Department, and will be part of the public

record. The Department notes that failure by RCH to comply with the terms of this exemption may result in prohibited transactions that give rise to excise taxes under the Code.

5. One Commenter Seeks a Class Exemption. One commenter recommended that the Department convert the exemption into a class exemption that would be available to any entity meeting the requirements of the exemption.

Department's Response: At the present time, the Department is not aware of any other service providers that provide the transition services offered by RCH and who operate their business in a manner similar to RCH. Therefore, the Department does not have a record upon which to make a valid determination regarding the feasibility of providing exemptive relief on a class basis.

6. One Commenter Suggested Certain Tax Disclosures. One commenter stated that distribution checks sent to participants should include a disclosure explaining the tax consequence of cashing out of retirement accounts.

Department's Comment: Prior to receiving distribution checks, affected individuals receive Mandatory Distribution Letters, which include a Code-required notice explaining various tax rules for eligible rollover distributions.

7. One Commenter Proposed a Wide Range of Additional Protections. Another commenter proposed a variety of changes to the exemption, which are addressed as follows:

A. According to the commenter, the exemption largely does not address how RCH will invest and oversee participant accounts before another account is located, and a significant number of participants may not join another retirement Plan for years or decades.

Department's Response: Independent Plan fiduciaries, and not RCH, select and approve the investment vehicles for Default IRAs that receive assets directly from the Plan. An individual who does not join another Plan for decades will receive "Annual Statements," alerting the individual that, among other things, he or she may direct RCH to transfer the account balance into another account.

B. The commenter (and one other commenter) recommended that RCH assume more fiduciary responsibility. The commenter suggested that the Department require RCH to prudently select and monitor all funds invested or, alternatively, an independent Plan fiduciary could ensure that all participant accounts are prudently invested.

Department's Response: As noted above, Plan

fiduciaries that are independent of RCH must select and approve the investment vehicles that contain Default IRA assets (prior to the RCH Program's identification of a New Plan Account). Before selecting the RCH Program, the independent Plan fiduciary must: review the material terms of the Program; understand the impact that the Plan's participation in the Program may have on the Plan, and on its participants and beneficiaries; review the terms of the Plan's arrangements with its default IRA custodians/service providers, with consideration given to the possibility that those default IRA assets may ultimately be transferred to new employer Plans (and incur additional fees in connection therewith) through the Program. Once selected, the plan sponsor must periodically monitor the RCH Program, to ensure that the Plan's continued participation remains in the interest of, and protective of, the Plan and its participants and beneficiaries.

The Department also notes that the sponsor of a plan that participates in the RCH Program retains its fiduciary obligations with respect to the plan's Eligible Mandatory Distribution Accounts, and that the account owner receives complete disclosure of the terms and fees associated with

the Program and retains the ongoing authority to transfer funds out of the Program.

If assets in a Mandatory Distribution Account, or other plan assets, are transferred to a Default IRA, the exemption requires that affected individuals receive multiple accurate notices written in plain English, containing all relevant information, so they can decide for themselves which retirement-related investment vehicles are most appropriate for their Default IRA assets. The Mandatory Distribution Letter explains distribution options, discloses all fees and features of the RCH Program, and includes a Code-required notice explaining various tax rules for eligible rollover distributions. Thereafter, individuals receive Welcome Letters, which describe the IRA's investment options and include statements regarding 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 Letters also specifically inform individuals that, unless they direct otherwise, the IRA may be transferred to their new employer's plan after 60 days. For the duration of the IRA's existence, RCH or the record-keeper provide an

"Annual Statement" regarding: the Program's material features; all fees the account will pay under the Program; and all compensation, direct or indirect, of any type, received by RCH, related parties and participating record-keepers in connection with the Program. Transfers under the RCH Program to a New Plan Account occur only if: the individual does not timely respond to the notices; or the individual affirmatively approves the transfer.

C. The commenter additionally suggested that it would be beneficial to participants to require participating Plans to explain the RCH arrangement in any Plan communication regarding the mandatory distribution or termination distribution.

Department's Response: As noted above, under the exemption, RCH or the record-keeper must provide individuals with multiple detailed notices that explain all aspects of the Program, including how the Program works, a statement of all material Program features and a complete and accurate statement of all fees that are charged to accounts in the Program, including all compensation, direct or indirect, of any type received by RCH, related parties and participating record-keepers. The exemption also

requires that that all fees and expenses under the Program be fully disclosed in participating Plan's summary plan descriptions.

D. The commenter also recommended that the independent Plan fiduciary should ensure that not only is each fee necessary and as modest as possible, but that the totality of all fees is reasonable.

Department's Response: As noted above, the Department agrees that it is critically important that an independent Plan fiduciary review and approve the Plan's participation in the RCH Program. The duties of the fiduciary include ensuring that the fees associated with the RCH Program are necessary and reasonable. The exemption further requires an Independent Auditor to determine, among other things, whether the fees and compensation, direct or indirect, of any type, received by RCH, related parties and participating record-keepers in connection with the Program did not exceed reasonable compensation. Finally, Section 408(b)(2) of ERISA and Section 4975(d)(2) of the Code independently require that RCH, the related service providers, and record-keepers, in fact, receive no more than reasonable compensation for their services.

E. The commenter also said that RCH will have some bias to retain accounts as long as possible to maximize its fees and suggested that the Plan fiduciary who is independent of RCH should be directed to monitor the timeliness of RCH's account matching and roll-over practices.

Department's Response: The exemption is structured to address this concern, as described in paragraph 4 above.

F. The commenter also recommended that RCH should be required to disclose its participating record-keepers in the materials it provides to Plans and participants.

Department's Response: As noted above, individuals receive a number of letters from RCH or participating record-keepers that provide material information on service providers and record-keepers. The first letter is a Mandatory Distribution Letter, which names the service providers to the Default IRA that would be established should the individual not respond to the letter. Specifically, the Mandatory Distribution Letter identifies: the name of the investment provider; the specific investment(s) in which the IRA's assets will be invested; the name of the Default IRA's custodian; and each type of

fee (and its amount) applicable to the Default IRA.

RCH has subsequently represented, and this exemption now requires, in Section I(v), that RCH will maintain a list of participating record-keepers on its website, with a link to that list in its letters to affected individuals.

G. The commenter additionally suggested that RCH should be required to ensure that all RCH notices and materials explain in plain and clear language participants' right to opt out of RCH, and that RCH provide all such documents in paper form, unless the participant has specifically requested electronic communications.

Department's Response: The exemption requires that the notices provided by RCH must be written in plain English, and these notices must be delivered by first class mail.

H. The commenter stated that the exemption does not provide any procedures for participant complaints about RCH, and that the Department should require RCH to notify participants of their right to file complaints with the Department of Labor.

Department's Response: Individuals with complaints about their Plan benefits may contact EBSA's Office of Outreach, Education and Assistance. More information may be

found at <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/organization-chart#section11>. Persons with questions about their IRAs may find helpful information from the IRS at: <https://www.irs.gov/retirement-plans/individual-retirement-arrangements-iras>. The exemption now also requires that individuals receiving Mandatory Distribution notices are effectively given the opportunity to opt-out of the RCH Program, by the use of an operational phone number with a clearly available opt-out choice in the main menu.

8. *Another Commenter Sought a Revision to Section I(b) of the Exemption.* Another commenter supported the exemption, but recommended a revision to Section I(b), which provides, as a condition for relief, that "RCH does not sell or market Plan or Plan participant-related data RCH accesses or obtains to third parties in connection with the Program, nor does RCH use the data for any purpose other than administration of the Program." In particular, the commenter requested that the Department remove the phrase "...nor does RCH use the data for any purpose other than administration of the Program." In the alternative, the commenter recommends that Section I(b) allow this use

if the independent Plan fiduciary consents. In support of its recommendation, the commenter states that all custodians, record-keepers and other service providers to the retirement industry aggregate and use data for a variety of business related purposes, such as building IT solutions, planning for emergency contingencies, pricing the services of their vendors, and in response to government requests and often aggregate data to learn about how individuals save, how to best engage participants, and how participants are allocating investments, among other things.

Department's Response: In response to the comment, the Department has revised Section I(b). The condition now permits the use of a Plan's data by RCH, but only for RCH's internal business operations as they relate to the RCH Program. The revised condition specifically provides that "RCH does not sell or market Plan or Plan participant-related data RCH accesses or obtains to third parties in connection with the Program. Nor does RCH use the data for any purpose other than administration of the Program, without the express consent of the Plan fiduciary, after full disclosure by RCH of how the data will be used[.]"

9. RCH Requested the Following Revisions to the Proposed Exemption:

A. Remove the Exemption's Five-Year Term

RCH states that the exemption establishes a mechanism to ensure continued satisfaction of the requirements of section 408(a) of ERISA. RCH notes that the exemption requires an Independent Auditor to conduct an annual audit of the Program. RCH states that "the Independent Auditor's reports will provide the Department with information sufficient to determine that the "asset transfers ... were performed accurately, without undue delay, and with RCH receiving no more than the fees and compensation disclosed to, and approved by, the applicable independent Plan fiduciaries."

RCH states further that its success in achieving its corporate objectives should be irrelevant to the Department for purposes of determining whether the exemption meets the statutory requirements of "section 408(a) of ERISA." RCH notes that the Department maintains the authority to revoke or modify the exemption at any time, and that requiring RCH to submit an application in five years would be unnecessarily duplicative and result in a substantial

economic and administrative burden to RCH.

Department's Response: The Department has decided not to remove the exemption's five year term. As noted by one of the commenters (who recommended that the duration of the exemption be reduced to three years) the RCH Program is novel. At present, there is insufficient data for the Department to confidently determine precisely how likely the Program is to achieve its goals of: reducing asset leakage; improving retirement savings outcomes for former Plan participants with small account balances; and avoiding abuse. Given the exemption's protective conditions, including the required annual determination by the independent auditor, to be reviewed by the Department, regarding whether the New Plan Accounts, participants and beneficiaries received all the assets they were due, the Department has decided that the exemption's five year term is appropriate. Assuming RCH later seeks an extension of this exemption, the Department expects to use the data contained in the audits as one of the bases for determining whether and for how long additional relief is warranted.

B. Remove the \$5,000 Limitation. RCH requests that the exemption be modified to limit the availability of the

exemption to amounts described under section 401(a)(31)(B)(ii) of the Code, rather than the actual dollar limitation of \$5,000. RCH states that, absent such a revision, the Program would be significantly disrupted if Congress were to change the limits under Code section 401(a)(31)(B)(ii). RCH states that requiring Plans under the Program to keep track of two limits could result in a substantial administrative burden that would contravene the Program's intention of complementing the already existing safe harbor provisions of the Code and regulations at 29 C.F.R. § 2550.404a-2.

RCH requests further that the account balance limitation under the exemption be applied as of the time of the transfer from an individual's prior employer Plan to a Default IRA. In this respect, RCH states that account balances with less than the Code section 401(a)(31)(B) limitation at the time of transfer to a Default IRA may grow due to investment performance over time. However, RCH states that investment gains in Default IRAs accrue incrementally and requests that these accounts be eligible to participate in the Program.

Department's Response: The Department has added new

paragraph (v) to Section I of the exemption, which permits the transfer of more than \$5,000 to a New Plan Account if the amounts transferred exceed \$5,000 solely because of investment gains attributable to the assets held in the individual's Default IRA(s) and/or Eligible Mandatory Distribution Account(s).

C. Exemptive Relief for Communication Fee. In its exemption application, RCH described a \$6 communication fee (the Communication Fee), which it said reimburses RCH for a portion of the cost of issuing the notices and forms associated with effectuating the transfer of assets under the Program. However, RCH did not request relief for the Communication Fee in its application. Now RCH states that "because RCH receives the Communication Fee only after it engages in the Locate and Match process, sends the notices, and transfers the individual's assets to the New Plan Account, it may require relief for its receipt of the Communication Fee."

Department's Response: The Department has revised the exemption to permit RCH's receipt of the Communication Fee, provided that the fee does not cause RCH to receive more than reasonable compensation, within the meaning of Section

408(b)(2) of ERISA and Section 4975(d)(2) of the Code. The Communication Fee is subject to the same conditions applicable to RCH's receipt of a Transfer Fee. Among other things: an independent Plan fiduciary must approve the fee; as noted above, the Independent Auditor must determine, among other things, whether the fees and compensation, direct or indirect, of any type, received by RCH, including the Communication Fee, exceed reasonable compensation; and the fee must not cause RCH, in fact, to receive more than reasonable compensation. This revision notwithstanding, however, the Department makes no factual determination, as to the reasonableness of the specific amount charged by RCH. The Communication Fee, like other fees under this exemption, is subject to the reasonable compensation requirement and the auditor's review.

D. Beneficiaries under the Program. RCH requests that the Department remove all references to "beneficiaries" participating in the Program throughout the proposed exemption, particularly in sections I(e)(2), I(1)(2), I(r), and I(s) of the operative language of the proposed exemption, because the inclusion would cause substantial hardship to RCH. RCH states that the Program

is designed to assist job changers who participate in a Plan to consolidate their Eligible Mandatory Distribution Accounts and Default IRA balances with their New Plan Accounts. According to RCH, by definition, the consolidation of beneficiary accounts falls outside the parameters of the Program. RCH Safe Harbor IRAs are separate retirement accounts from the prior employer plan.

However, RCH notes that once RCH Safe Harbor IRAs are established, affected individuals have the opportunity to designate beneficiaries to their respective IRAs, either on-line or by filling out the IRA custodial account agreement. RCH represents that if the IRA account holder dies, and there is no named beneficiary, RCH tries to locate and contact the individual's next of kin through the different search methods at its disposal. Once located, RCH communicates with the next of kin to either inform him or her of their benefit, to find any other beneficiaries, or to obtain contact information for the deceased account holder's estate.

Department's Response: The Department is not removing the exemption's references to "beneficiaries." As RCH notes above, individuals with RCH Safe Harbor IRAs may

designate a "beneficiary," and the exemption's conditions continue to mandate certain protections for these persons. The exemption now mandates that each notice provided to individuals with RCH Safe Harbor IRAs must inform them that they may designate a "beneficiary," and the notice must clearly describe the process by which this may be achieved. The exemption further requires that, consistent with RCH's representation above, if an RCH Safe Harbor IRA account holder dies, and there is no named beneficiary, RCH will try to locate and contact the individual's next of kin through the different search methods at its disposal. Once located, RCH will communicate with the next of kin to either inform him or her of their benefit, to find any other beneficiaries, or to obtain contact information for the deceased account holder's estate.

Plan fiduciaries are directed to the GENERAL INFORMATION section of the exemption, which states, among things, that the general fiduciary responsibility provisions of section 404 of ERISA require a fiduciary to discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section

404(a)(1)(B) of ERISA. Therefore, independent Plan fiduciaries must fulfill their fiduciary duties with respect to beneficiaries under their Plans, as well as with respect to Plan participants, when deciding whether to adopt and retain the RCH Program.

E. Use of Participant Data. Section I(b) of the operative language provides that: "RCH does not sell or market Plan or Plan participant-related data RCH accesses or obtains to third parties in connection with the Program, nor does RCH use the data for any purpose other than administration of the Program; . . ."

RCH requests the addition of the clause "without the express consent of the Plan fiduciary" to the end of Section I(b) of the proposed exemption. The Applicant adds that it does not intend to sell any Plan or participant data to third parties.

Department's Response: As noted above, Section I(b) now permits RCH to use a Plan's data, but only for RCH's internal business operations as they relate to the RCH Program. In particular, Section I(b) provides: "RCH does not sell or market Plan or Plan participant-related data RCH accesses or obtains to third parties in connection with

the Program. Nor does RCH use the data for any purpose other than administration of the Program, without the express consent of the Plan fiduciary, after full disclosure by RCH of how the data will be used[.]”

F. Third Party Restrictions. Section I(d) of the proposed exemption provides that: “(d) RCH does 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 that facilitates the transfer of Default IRA assets or Eligible Mandatory Distribution Account assets;”

RCH requests that the Department revise Section (I) (d) to clarify that the exemption does not restrict RCH from pursuing legal claims against those that may violate the law. In addition, RCH states that it is in general agreement with Section I(d)’s limitation, but has concerns regarding its breadth and potential implications. RCH states that it believes the purpose behind Section I(d) is to preclude RCH from entering into exclusivity agreements with record-keepers or Plan sponsors which would preclude other service providers from providing services similar to the Program. RCH further states that the exemption should

not preclude RCH from pursuing available remedies under the law for misconduct by those persons that provide similar services, such as pursuing a legal claim against a third party that violates any intellectual property right of RCH.

Specifically, RCH requests that Section I(d) of the proposed exemption be revised to accommodate this concern and reflect that "RCH does 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 that facilitates the transfer of Default IRA assets or Eligible Mandatory Distribution Account assets. Notwithstanding the foregoing, nothing in this section limits or precludes RCH from pursuing legal claims available to it under the law."

Department's Response: The Department has decided not to revise this condition. RCH's proposed revision is overbroad because a contract claim is a type of "legal claim." Section I(d) should be interpreted as prohibiting RCH from contractually insulating itself from competition, or from otherwise entering into arrangements, agreements or understandings with third parties, in a manner that precludes unrelated service providers from developing and

providing services similar to the RCH Program. Section I(d) does not, however, limit the ability of RCH to pursue legal claims arising from third party misconduct, such as a violation of its intellectual property rights.

G. Exculpatory Provisions. Section I(n) of the proposed exemption provides that: "RCH does not include exculpatory provisions in its contracts disclaiming or limiting RCH's liability in the event that the RCH Program results in an improper transfer from a Default IRA or Eligible Mandatory Distribution Account."

RCH states that, by its terms, Section I(n) could be interpreted as prohibiting RCH from limiting its liability from errors caused by third parties, and RCH should not be precluded from disclaiming liability for improper transfers caused by third parties participating in the Program.

Therefore, RCH requests that the Department revise Section I(n) to add: "However, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a party independent of RCH and its affiliates, or damages arising from acts outside the control of RCH."

Department's Response: Section I(n) was not intended

to prohibit RCH from limiting its liability from errors caused by third parties. The Department has revised Section I(n) in the manner requested by RCH.

H. Pre-Existing IRAs. RCH requests that the Department expand relief under the proposed exemption to cover Default IRA accounts that have already been established with RCH or third party record-keepers. RCH states that RCH and third party record-keepers currently maintain a substantial number of Default IRAs that could benefit from the Program through consolidation with New Plan Accounts.

RCH states that no transfer of participant funds from a Default IRA currently held with RCH or a third party record-keeper would occur without the Plan sponsor of the participant's new Plan first approving the Program. RCH states that the safeguards established by the exemption, such as the requirement that Plan sponsors approve fees associated with the Program, would also be present for Default IRAs maintained by RCH and third party record-keepers.

Department's Response: The Department declines to

make the requested revision. An essential protection of this exemption is a Plan fiduciary's independent evaluation of the RCH Program and determination that the Program is appropriate for the Plan's participants and beneficiaries. The decision to transfer plan assets to a Default IRA subject to the RCH Program is a fiduciary decision under Section 3(21) of ERISA, and is fully subject to the fiduciary protections of Title I of ERISA. Accordingly, the exemption ensures that a Plan fiduciary who is independent of RCH (an independent plan fiduciary), in advance of the Plan's participation in the Program: reviews the material terms of the Program, including the reasonableness and necessity of the fees and services; evaluates the impact that the Plan's participation in the Program may have on the Plan, and on its participants and beneficiaries; reviews the terms of the Plan's arrangements with its default IRA custodians and service providers, with consideration given to the possibility that those default IRA assets may ultimately be transferred to new employer Plans (resulting in additional fees) through the Program; and determines that participation in the Program is fully consistent with the Fiduciary's obligations under ERISA,

including its fundamental duties of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B).

Because "pre-existing" Default IRAs lack these fiduciary safeguards with respect to the RCH Program, the Department finds that their inclusion in the Program would not be in the interest of the affected plans, participants and beneficiaries, and IRA owners, or protective of their rights.

I. Conditions Related to the Independent Auditor. RCH

requests that the annual reports required to be submitted to the Department by the Independent Auditor be protected from disclosure under the Freedom of Information Act (FOIA). RCH states that it is concerned that including the annual report as a part of the public record could result in the disclosure of confidential trade secrets and proprietary business information that would not be subject to the protections under FOIA. RCH states that, while it is comfortable with the Department receiving the annual report in furtherance of the Department's continued evaluation of the Program, the report should not be made publicly-available, due to the significant potential that doing so would unnecessarily expose confidential trade

secrets that are not otherwise available to third parties.

Department's Response: The Department is not revising the exemption as requested. RCH has not identified any confidential or privileged information required by, or that would be contained in, the audit. The Department expects the audit will provide helpful information to Plan fiduciaries seeking to determine whether to participate in the RCH Program. In addition, the public availability of the audit report provides a mechanism for the informed review and assessment of the RCH program by experts and analysts other than the Department, and creates an additional incentive for a compliant program. In sum, the condition promotes compliance, assists plan fiduciaries in discharging their responsibilities, and makes the exemption more administrable for the Department by increasing effective oversight by persons other than the Department. The Department has added clarifying language to Section I(m) of the exemption, making it clear that the auditor is free to make recommendations to RCH to assist with RCH's compliance with the exemption, and these recommendations must be included in the audit report submitted to the Department.

J. Lost and Missing Procedures. Section I(r) of the exemption provides that: "RCH is required to "verify the accuracy of all participant ... data ... when assets are first transferred to a Default IRA or Eligible Mandatory Distribution Account. RCH may engage its processes for identifying lost and missing participants upon the receipt of returned mail that is described by the U.S. Post Office as 'undeliverable.'"

RCH states that it is unclear as to the meaning of the term "verify the accuracy" and the Department's intention behind this condition. RCH states that it performs its processes for identifying lost and missing participants upon the receipt of returned mail identified as undeliverable. For example, where an individual's account balance is transferred to a RCH Safe Harbor IRA, RCH will send the Welcome Letter and other notices to the last known address of the individual. If the mail is returned as undeliverable to RCH, RCH continues to search for the individual and seeks to locate the individual through the RCH locate-and-match process. If RCH identifies a New Plan Account for the individual, RCH will

begin sending the notices to the address associated with the New Plan Account.

RCH requests that the Department amend Section I(r) to reflect that RCH will engage in its search process upon receiving returned mail described as undeliverable mail from the U.S. Post Office; and that RCH should not be required to conduct searches for individuals where there is no indication that the address on file with the Plan sponsor of the participant's prior employer is correct. RCH states that requiring RCH to conduct searches without considering the veracity of the underlying participant data would serve no meaningful purpose and cause a substantial administrative burden to RCH that may not be currently supported by its fees.

Department's Response: Plan fiduciaries have an obligation to ensure the accuracy and integrity of the data they furnish to RCH. In an effort to more clearly describe the scope of RCH's responsibilities once that data is received by RCH, the Department is deleting Section I(r) and expanding Section I(s), as set forth in the proposed exemption. Previously, proposed Section I(s) required that, "RCH takes all prudent actions necessary to

reasonably ensure that the Plan's participant and beneficiary data is current and accurate, and that the appropriate participants and beneficiaries, in fact, receive all the required notices and disclosures, until the assets are transferred under the Program to a New Plan Account." Now Section I(r) states that, "At all times during a Plan's participation in the RCH Program, from when an IRA is first established and subject to the RCH Program until the final transfer out of the IRA's assets from the RCH Program, RCH takes all prudent actions necessary to reasonably ensure that the Plan's participant and beneficiary data is current and accurate, and that the appropriate participants and beneficiaries, in fact, receive all the required notices and disclosures.

The Department notes that this exemption requires that the independent auditor ensure that: individuals are, in fact, receiving all of the notices; and the assets these individuals are entitled to make their way to the proper New Plan Accounts.

K. Timing of Notices. Section I(f) of the proposed exemption states, in part, that: the notices required under the terms of the exemption will be sent no later than the

following business day after: "(1) RCH receives a file from the Plan sponsor that an individual is eligible for mandatory distribution . . . (2) RCH receives the individual's assets within a Default IRA; ... and (4) the Locate and Match process verifies that the individual maintains a New Plan Account;. . ."

RCH requests a revision to Section I(f) to allow RCH three business days to send the notices (i.e., three business days after the triggering event for each notice).

Department's Response: The Department concurs with RCH's request, and has revised the exemption accordingly.

L. Definition of Default IRA. Section III (h) of the proposed exemption states that: "the term "Default IRA" means "an individual retirement account with assets that is described in Section 408(a) of the Code and established pursuant to, and satisfies the requirements of, Section 401(a)(31) of the Code and regulations at 29 C.F.R. § 2550.404a-2;. . ."

RCH requests that the exemption be revised to permit the Program to cover Default IRAs that are: (a) established as a result of a plan termination under 29 C.F.R. § 2550.404a-3; and (b) remain under the Code section

401(a)(31)(B)(ii).³ RCH also recommends adding a definition of a "Conduit IRA" for transactions involving Conduit Model Transfers to avoid confusion. A "Conduit Model Transfer" occurs when assets are transferred from an Eligible Mandatory Distribution Account or Non-RCH Default IRA through the conduit of an RCH Default IRA.

Department's Response: The Department concurs, in part, with RCH's request. Section III(h) now includes Default IRAs that are established as a result of a Plan termination under 29 C.F.R. § 2550.404a-3. For clarity, the Department has revised the heading to I(g) to better explain what a Conduit Model Transfer is.

M. "Independent of Influence, Suggestion, and Assistance by RCH."

The exemption provides that the selection of the investment options by the Plan sponsor "must be made independent of influence, suggestion or assistance by RCH, and RCH may not in any way, directly or indirectly, act in a manner that affects the amount of sub-transfer agency fees it receives under the Program." RCH states that,

³ RCH notes that the definition of "plan" under Section III(d) of the proposed exemption includes individual account, defined contribution plans that satisfy the automatic rollover rules under 29 CFR 2550.404a-2 or 3. See DOL Advisory Opinion 2018-01A (November 5, 2018).

while it does not provide any investment advice to Plan fiduciaries with respect to the selection of the investment option utilized within the Default IRA, it is unclear as to the meaning of "influence, suggestion or assistance," as such terms are without significant guidance under ERISA or the Code. RCH states that it is concerned that these terms will result in confusion on the part of the Independent Auditor when evaluating the Program and RCH's compliance with the terms of the exemption.

RCH states that, as is customary by providers of default IRAs, RCH currently makes investment options available to a Plan sponsor that selects the RCH automatic rollover services. RCH expresses concern that, merely by offering such investment options, it could be argued that RCH has suggested or influenced the investment selection, within the meaning of the exemption. RCH further states that, while it does not provide investment advice with respect to any particular investment option, it may provide access to information and educate the Plan sponsor regarding the various investment options that RCH makes available. RCH states that Plan sponsors often ask questions related to the differences between investment

options available under the Program before making an investment selection. In this regard, RCH states that it is concerned that such education could be construed as "assistance" deemed improper for purposes of the exemption.

RCH requests that the Department remove references to "influence, suggestions and assistance," and amend Section I(c) of the proposed exemption to reflect that RCH may not provide "investment advice in connection with the Plan sponsor's selection of the Default IRA's investment option under the Program and that RCH may not directly or indirectly, act in a manner that affects the amount of sub-transfer agency fees it receives under the Program."

Alternatively, to the extent that the Department determines to keep this language, RCH requests that the Department clarify that RCH's limitation of the number of investment options for selection by the Plan sponsor would not result in "influence or suggestion" as prohibited under Section I(c) of the exemption.

Department's Response: While the Department is not wholly persuaded that the phrase "independent of influence, suggestion or assistance by RCH" is unclear or that it will cause confusion for the Independent Auditor, it believes

that RCH's proposed amendment serves the intended purpose and has adopted it. Accordingly, Section I(c) of the exemption now provides that "RCH may not provide investment advice in connection with the Plan sponsor's selection of investment options under the Program and RCH may not directly or indirectly, act in a manner that affects the amount of sub-transfer agency fees it receives under the Program."

N. Description of the Relief. Section I(p) of the exemption provides that, "RCH does not have discretion under the RCH Program to affect the timing or amount of the transfer, other than to deduct the appropriate fees[.]" RCH states that the deduction of fees, the amount and timing of which is approved by a plan fiduciary in advance, does not cause a person to become a fiduciary under ERISA or the Code. RCH requests relief for the exercise of discretion in transferring an account that results in the payment of a fee. Specifically, RCH requests that the Department remove the clause "other than to deduct the appropriate fees" from Section I(p) of the Proposal.

Department's Comment: The Department is not revising Section I(p). This condition, as written, is clear and

unambiguous and consistent with the Department's understanding of the Program. As represented by RCH, RCH will not have any discretion to affect the timing or amount of the transfers described herein.

O. Qualified Default Investment Alternative. Section I(j) of the exemption provides that: "Amounts transferred under the Program to the New Plan Account will be automatically invested according to the individual's current investment elections under the terms of the Plan or, if no such elections were made, under the qualified default investment alternative as defined under ERISA section 404(c) (5) and established under the terms of the Plan[.]"

RCH states that, while many Plans maintain a default fund, not all default funds satisfy the requirements of ERISA section 404(c) (5) and regulations thereunder. Notwithstanding the foregoing, the plan fiduciary that selects any plan default fund is responsible for selecting the fund in accordance with its fiduciary responsibilities under ERISA. The failure of an investment option to satisfy section 404(c) (5) of ERISA results in no loss of protection for the participant under ERISA because plan

fiduciaries remain responsible for compliance with section 404 of ERISA. Participants of Plans that maintain a default fund that does not conform to section 404(c)(5) of ERISA should not be precluded from participating in the Program and accessing its benefits.

RCH requests that the Department revise Section I(j) of the proposed exemption to permit such Plans to participate in the Program and recommends that the Department revise Section I(j) to state that "if no such elections were made, under the qualified default investment alternative as defined under ERISA section 404(c)(5) or other default fund selected by the plan's fiduciary."

Department's Response: The Department concurs with the comment, and has revised the exemption accordingly.

10. RCH's Other Clarifications

RCH seeks certain clarifications to the proposed exemption that the Department does not view as relevant to its determination of whether to grant this exemption. These requested clarifications may be found as part of the public record for Application No. D-11938. On its own motion, the Department has made several minor non-substantive clarifying revisions to the operative language

of the exemption.

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Exemption Application No. D-11949) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 7, 2018, at 83 FR 55741.

GENERAL INFORMATION

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Code, including any prohibited transaction provisions to which the exemption does not

apply and the general fiduciary responsibility provisions of section 404 of ERISA, which, among other things, require a fiduciary to discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department makes the following determinations: the exemption is administratively feasible, the exemption is in the interests of affected plans and of their participants and beneficiaries, and the exemption is protective of the rights of participants and beneficiaries of such plans;

(3) The exemption is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory

exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describe all material terms of the transaction which is the subject of the exemption.

Accordingly, the following exemption is granted under the authority of section 408(a) of ERISA and 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011):

FIVE YEAR EXEMPTION

The sanctions resulting from the application of Code section 4975, by reason of sections 4975(c)(1)(D) and (E) of the Code, shall not apply to the receipt of a Transfer Fee and a Communication Fee, as defined in Section III(i) and (p) respectively, by RCH in connection with the transfer of assets from an individual's Default IRA, as defined in Section III(h), to the individual's New Plan Account, as defined in Section III(a) (the Transfer),

following the individual's failure to respond to two letters informing the individual that the assets will be transferred if he or she fails to contact RCH within the later of: sixty days of the first letter; or thirty days of the second letter. Except as permitted by Section I(v), relief under this exemption is solely available for the payment of a Transfer Fee and a Communication Fee by a Default IRA to RCH in connection with the transfer of \$5,000 or less from the Default IRA to a New Plan Account, pursuant to either a Default IRA Model Transfer (as defined in Section III(l)) or a Conduit Model Transfer (as defined in Section III(k)).

Section I. Conditions

(a) Any and all fees and compensation, direct or indirect, associated with the Program, including the Transfer Fee and the Communication Fee, must be fully disclosed to, and approved by, in the applicable agreement, a Plan fiduciary that is independent of RCH (an independent Plan fiduciary), prior to the transfer from the Plan to the Default IRA. The fees and compensation (direct or indirect) RCH receives in connection with a Conduit Model

Transfer, as defined in Section III(k), are limited to a Transfer Fee and a Communication Fee paid by a Default IRA;

(b) RCH does not sell or market Plan or Plan participant-related data RCH accesses or obtains to third parties in connection with the Program. Nor does RCH use the data for any purpose other than administration of the Program, without the express consent of the Plan fiduciary, after full disclosure by RCH of how the data will be used;

(c) RCH does not receive any fees or compensation, direct or indirect, from third parties other than an asset-based sub-transfer agency fee paid to RCH from an IRA investment provider; any such IRA investment provider must be selected by an independent Plan fiduciary. RCH may not provide investment advice in connection with the Plan sponsor's selection of investment options under the Program and RCH may not directly or indirectly, act in a manner that affects the amount of sub-transfer agency fees it receives under the Program.

The asset-based sub-transfer agency fee must be solely for shareholder services related to the investment options in which IRA assets are invested under the Program and may not exceed reasonable compensation as within the meaning of

Section 408(b)(2) of ERISA, Section 4975(d)(2) of the Code, and 29 CFR 2550.408c-2 of the Department's regulations.

RCH will not fail to meet the terms of the condition solely because an independent Plan fiduciary selects and approves investment options in which IRA assets are invested under the RCH Program from a list provided by RCH;

(d) RCH does 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 that facilitates the transfer of Default IRA assets or Eligible Mandatory Distribution Account assets;

(e) The disclosures described below in paragraphs (f) and (g) must be:

(1) written in a manner calculated to be understood by the average intended recipient. To the extent reasonably possible, such disclosures must limit or eliminate technical jargon and long, complex sentences, and use clarifying examples and illustrations. No communication required by this exemption shall be made or written in a way that misleads, misinforms, or fails to properly inform the intended recipient; and

(2) sent to the last known address of the individual after RCH verifies the accuracy of the participant data (including the participant's and any beneficiary's social security number, first name, last name, middle name or initial, address, city, state, zip code, date of birth, and phone number);

(f) **Transfers From RCH Default IRAs to New Plan**

Accounts. RCH will direct the transfer of assets from a RCH Default IRA to a New Plan Account only after RCH furnishes the following notifications to the individual in the manner required by paragraph (e) above:

(1) **Mandatory Distribution Letter.** RCH must provide a "Mandatory Distribution Letter" to an individual who is eligible for mandatory distribution under section 401(a)(31)(B) of the Code prior to establishing a Default IRA for that individual. The Mandatory Distribution Letter is sent no later than three business days after RCH receives the file from the Plan sponsor indicating that the individual is eligible for mandatory distribution under section 401(a)(31)(B) of the Code, and must include:

(A) A description of the available Plan distribution options, including the independent Plan fiduciary's selection of the Default IRA;

(B) A notice that the individual has 30-90 days (as determined by the independent Plan fiduciary) to contact RCH and specify a different distribution option before his or her account is transferred into the Default IRA;

(C) A description of how the Program works, including a description of all material Program features and a complete and accurate statement of all fees that are charged to accounts in the Program, as well as all compensation, direct or indirect, of any type received by RCH, related parties and participating record-keepers in connection with the Program;

(D) An explanation of distributions eligible for rollover treatment as required under section 402(f) of the Code;

(E) A statement that at any time the individual can direct RCH to transfer the balance into the ERISA-covered Plan of his or her current employer or to another account;

(F) A statement that unless the individual specifies an alternative distribution option, the individual's Plan balance will be transferred into a Default IRA;

(G) A notice that if the Locate and Match process, as defined in Section III(b), finds that the individual maintains another Plan account sponsored by his or her current employer, RCH will send the Consent Letter, described below, and seek the individual's consent to transfer assets from the Default IRA to the Plan of the individual's current employer; and

(H) A statement that the individual may opt out of the transfer by calling or writing RCH, and an explanation of how such individual can effectively opt out.

(2) Welcome Letter. RCH must furnish each individual a "Welcome Letter" immediately upon the transfer of assets to a Default IRA. The Welcome Letter is sent no later than three business days after RCH receives an individual's assets in a Default IRA. The Welcome Letter must include:

(A) A notice that RCH opened an IRA on behalf of the individual;

(B) All relevant information regarding the Default IRA, including: applicable account fees; the name of the investment fund into which the individual's assets were transferred; the fund's symbol; the total dollar amount of assets invested; the number of fund shares; and the fund share price;

(C) A trade confirmation;

(D) RCH's contact information, including toll-free numbers for the service center and on-line access instructions;

(E) A full and complete statement of all fees charged to the Default IRA, and all compensation, direct or indirect, of any type, received by RCH, related parties and participating record-keepers in connection with administration of the Program;

(F) A notice that the individual may contact RCH and transfer his or her balance from the Default IRA to another account at any time before RCH locates and verifies the individual's account at the Plan sponsored by his or her current employer;

(G) A statement that RCH will not transfer the Default IRA for at least 60 days from the date of the

Welcome Letter. The notice shall further state that if the individual takes no action within the 60 days, and if the Locate and Match process finds that the individual maintains a New Plan Account, RCH will send the Consent Letter and seek the individual's consent to transfer the assets of the Default IRA to the Plan of the individual's new employer. The notice will also state that if the individual fails to contact RCH within 30 days of receiving the Consent Letter, RCH will transfer the Default IRA balances to the Plan of the individual's current employer.

(3) Annual Statements. At least annually, RCH must furnish an "Annual Statement" to the individual which includes a statement of:

(A) All fees the account will pay under the Program and a statement of all the Program's material features, including a complete and accurate statement of all compensation, direct or indirect, of any type, received by RCH, related parties and participating record-keepers in connection with the Program;

(B) A statement that the individual may contact RCH and direct RCH to transfer the balance into the Plan of his or her current employer or another account if

he or she contacts RCH before RCH locates the individual's account at their new employer Plan; and

(C) A statement that if the Locate and Match process finds that the individual maintains another individual account plan sponsored by his or her current employer, RCH will send the Consent Letter and seek the individual's consent to transfer the assets of the Default IRA to the Plan sponsored by the individual's current employer. The notice will also state that if the individual fails to contact RCH within 30 days of receiving the Consent Letter, RCH will transfer the Default IRA balances to the Plan sponsored by the individual's current employer.

(4) Consent Letter. For transfers of assets from a Default IRA to the New Plan Account, no later than three business days after verification through the Locate and Match Process that the individual has opened a New Plan Account, RCH must send the Consent Letter, which must include:

(A) A notification that the individual's Default IRA has been matched with the individual's New Plan Account;

(B) A request for the individual's consent to transfer the assets from the Default IRA to the New Plan Account. The Consent Letter will also state that if the individual fails to contact RCH within 30 days of receipt of the Consent Letter, RCH will transfer the Default IRA balances to the Plan sponsored by the individual's current employer.

(C) A statement of all fees and other compensation, direct or indirect, of any type, associated with the Program and with the transfer of assets to the Plan sponsored by his or her current employer.

(g) **Conduit Model Transfers (i.e., Transfers from Eligible Mandatory Distribution Accounts or Non-RCH Default IRAs through the Conduit of RCH Default IRAs)**. Assets will be transferred from an Eligible Mandatory Distribution Account to a RCH Default IRA and then to a New Plan Account, or from a non-RCH Default IRA to an RCH Default IRA and then to a New Plan Account, only after the following notifications are provided to the individual in the manner required by paragraph (e) above: (1) A Mandatory Distribution Letter that is sent when it is determined under the RCH Program that an individual on whose behalf a

non-RCH Default IRA has been established, or an Eligible Mandatory Distribution Account has been maintained at a prior employer, has opened a New Plan Account at the individual's current employer. The Mandatory Distribution Letter will contain the information described in paragraph (f), as applicable, and will note that if the individual fails to contact RCH within 60 days of the Consent Letter described below, the individual's account balance will be transferred to the Plan of the individual's current employer through an RCH Safe Harbor IRA unless the individual opts out of the transfer;

(2) A Consent Letter is sent when the RCH Program determines that an individual on whose behalf a non-RCH Default IRA has been established, or on whose behalf an Eligible Mandatory Distribution Account is maintained at a prior employer, has opened a New Plan Account at the individual's current employer. The Consent Letter will fully state the fees and other compensation, direct or indirect, of any type, associated with the RCH Program, and will explain that if the individual fails to opt out of the RCH Program within 60 days of receiving the Consent Letter, the assets will be transferred to the New Plan Account.

(3) Another Consent Letter is sent if, after 30 days following the first Consent Letter, the participant has not contacted RCH with instructions to opt in or opt out of the RCH Program. The Consent Letter will explain that, unless the individual opts out of the RCH Program within 30 days of receiving the letter, RCH will direct the transfer of the assets to the New Plan Account;

(h) The Plan maintaining the New Plan Account and the Plan maintaining the Eligible Mandatory Distribution Account are each a qualified retirement Plan as described under section 401(a) of the Code;

(i) The Plan maintaining the New Plan Account has authorized the transfer of assets from other qualified retirement accounts;

(j) Amounts transferred under the Program to the New Plan Account will be automatically invested according to the individual's current investment elections under the terms of the Plan or, if no such elections were made, under the qualified default investment alternative as defined under ERISA section 404(c)(5) and established under the terms of the Plan, or other default fund selected by the independent Plan fiduciary;

(k) The RCH Default IRA does not incur any fees or charges, direct or indirect, after the Program identifies a match with a New Plan Account, except for the Transfer Fee and Communication Fee;

(l) RCH submits to an annual audit, performed by a qualified independent auditor, as defined in Section III(j). The auditor must review a representative sample of transactions and related undertakings, sufficient for the auditor to make the following determinations:

(1) Whether the notices met the timing and content requirements of this exemption, and were written and delivered in a manner reasonably designed to ensure that affected individuals would both receive and understand the notices;

(2) Whether the asset transfers were conducted in accordance with this exemption and the applicable written agreement, and the New Plan Accounts and participants and beneficiaries received all the assets they were due;

(3) Whether the fees and compensation, direct or indirect, of any type, received by RCH, related parties and participating record-keepers in connection with the Program

are consistent with the fees authorized by appropriate Plan fiduciaries; were properly disclosed to the affected individuals in accordance with the terms of this exemption; and did not exceed reasonable compensation, within the meaning of Section 408(b)(2) of ERISA, Section 4975(d)(2) of the Code, and 29 CFR 2550.408c-2 of the Department's regulations;

(4) Whether individuals receiving Mandatory Distribution notices were effectively given the opportunity to opt-out by the use of a phone number that was operational and with a clearly available opt-out choice in the main menu; and

(5) Whether the conditions of this exemption have been met;

(m) The Auditor must complete the audit within 6 months following the 12-month period to which the audit relates, and the Auditor must submit a written report to the Office of Exemption Determinations within 30 days of completion detailing its findings, and the report will be part of the public record for this exemption. The written report must: describe the Auditor's methodology in performing the Audit; contain a detailed description of the

Auditor's findings; and include any recommendations the Independent Auditor may make to assist with RCH's compliance with the terms of this exemption;

(n) RCH does not include exculpatory provisions in its contracts disclaiming or limiting RCH's liability in the event that the RCH Program results in an improper transfer from a Default IRA or Eligible Mandatory Distribution Account. However, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a party independent of RCH and its affiliates, or damages arising from acts outside the control of RCH;

(o) RCH does not provide investment advice, as described in ERISA section 3(21) or Code Section 4975(e)(3) and accompanying regulations, with respect to the assets held in a Default IRA or Eligible Mandatory Distribution Account;

(p) The Program queries on at least a monthly basis whether a participant with a New Plan Account in the Program has either a Default IRA or an Eligible Mandatory Distribution Account covered by the Program. If the Program identifies a match, and the affected individual

does not respond in a timely manner to the required notifications, RCH will immediately direct the transfer of the assets of the Default IRA or Eligible Mandatory Distribution Account to the participant's New Plan Account following the Settlement Date, as defined in Section III(m). RCH does not have discretion under the RCH Program to affect the timing or amount of the transfer, other than to deduct the appropriate fees;

(q) All fees and expenses under the Program must be fully disclosed in participating Plans' summary plan descriptions;

(r) At all times during a Plan's participation in the RCH Program, from when an IRA is first established and subject to the RCH Program until the final transfer out of the IRA's assets from the RCH Program, RCH takes all prudent actions necessary to reasonably ensure that the Plan's participant and beneficiary data is current and accurate, and that the appropriate participants and beneficiaries, in fact, receive all the required notices and disclosures, until the assets are transferred under the Program to a New Plan Account.

(s) RCH may not receive a Transfer Fee or

Communication Fee in connection with a roll-in transaction to an ERISA-covered Plan sponsored or maintained by RCH;

(t) Roth IRAs assets are not transferred to New Plan Accounts under the RCH Program;

(u) RCH will maintain a list of participating record-keepers on its website, with a link to that list in its letters to affected individuals;

(v) A transfer to an individual's New Plan Account may exceed \$5,000, if the amounts transferred exceed \$5,000 solely because of investment gains attributable to the assets held in the individual's Default IRA(s) and/or Eligible Mandatory Distribution Account(s);

(w) Individuals receiving Mandatory Distribution notices must effectively be given the opportunity to opt-out by the use of an operational phone number with a clearly available opt-out choice in the main menu;

(x) Each notice provided to individuals with RCH Safe Harbor IRAs must afford the opportunity to designate a "beneficiary," and the notice must clearly describe the process by which this designation may be achieved;

(y) If an RCH Safe Harbor IRA account holder dies, and there is no named beneficiary, RCH will try to locate and

contact the individual's next of kin through the different search methods at its disposal. Once located, RCH will communicate with the next of kin to either inform him or her of their benefit, to find any other beneficiaries, or to obtain contact information for the deceased account holder's estate.

Section II. Record-keeping Requirements.

(a) RCH maintains for 6 years the records necessary to enable the persons described below to determine whether the conditions of this exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred if, solely because of circumstances beyond the control of RCH, the records are lost or destroyed before the 6-year period ends; and

(2) No party in interest other than RCH will be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination as required below:

(b) (1) Except as provided in Section II(b) (2) and notwithstanding any provisions of section 504(a) (2) of the Act, the records referred to in Section II(a) are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any individual or fiduciary of a Plan participating in the Program; and

(iii) None of the persons described in Section II(b) (1) (ii) shall be authorized to examine trade secrets of RCH, or commercial or financial information which is privileged or confidential.

Section III. Definitions

(a) The term "New Plan Account" means any account maintained by a Plan that has received contributions or experienced investment activity within the preceding three months and is held for the benefit of an individual that maintains active employment with the Plan sponsor;

(b) The term "Locate and Match" means the technological process relied upon by RCH and participating record-keepers to identify multiple accounts maintained by the same individual.

(c) The term "Eligible Mandatory Distribution Account" means an account with assets that is eligible for mandatory distribution under section 401(a)(31) of the Code at the individual's prior employer Plan;

(d) The term "Plan" means an individual account defined contribution plan that satisfies the automatic rollover rules under 29 C.F.R. sections 2550.404a-2 or 3;

(e) The term "Program" means the RCH Auto Portability Program as it is described in this exemption and as it applies to Eligible Mandatory Distribution Accounts and Default IRAs, as defined in this section;

(f) The term, "RCH" means Retirement Clearinghouse LLC or any affiliates;

(g) The term "record-keeper" means record-keepers that are independent of RCH and any affiliates of the record-keepers who elect to participate in the Program;

(h) The term "Default IRA" means an individual retirement account that is described in Section 408(a) of

the Code, and established pursuant to and in compliance with the requirements of Section 401(a)(31) of the Code and regulations at 29 C.F.R. § 2550.404a-2; or an individual retirement account established as a result of a plan termination under 29 C.F.R. § 2550.404a-3;

(i) The term "Transfer Fee" means the fee paid to RCH for processing the transfer of assets from the Default IRA or Eligible Mandatory Distribution Account to the Current Plan Participant Account;

(j) The term "Independent Auditor" means a person or entity with extensive knowledge of ERISA, the Code and the types of transactions described in this exemption, who is capable of reviewing and analyzing the Program and the requirements of this exemption in a manner sufficient to perform the audit, and who has been retained by RCH to conduct the audit required by this exemption. The Independent Auditor may derive no more than 2 percent of its annual compensation from services provided directly or indirectly to RCH or any of its affiliates or related parties;

(k) In a "Conduit Model Transfer," RCH first transfers an individual's assets from either an Eligible Mandatory

Distribution Account or a non-RCH default IRA, to an RCH default IRA, and then transfers the assets to a New Plan Account based upon the RCH Program's determination that the individual has opened a New Plan Account sponsored by the individual's current employer;

(l) In an "RCH Default IRA Model Transfer," an individual's Eligible Mandatory Distribution Account or non-RCH default IRA assets are transferred first to an RCH default IRA, and then the assets are transferred to a New Plan Account, based upon the RCH Program's determination that the individual has opened a New Plan Account sponsored by the individual's current employer;

(m) The term "Settlement Date" means the settlement date set forth in an applicable mutual fund's prospectus. In no case will the Settlement Date be later than three business days after the date the relevant sell order is placed. RCH has no discretion regarding the timing of the Settlement Date;

(n) An "affiliate" of a person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(o) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(p) The term "Communication Fee" means the \$6 communication fee RCH receives under the Program. The Communication Fee reimburses RCH for a portion of the cost of issuing the notices and forms associated with effectuating the transfer of assets under the Program.

This exemption will be in effect for five years from the date this notice is published in the Federal Register.

Signed at Washington, DC.

Lyssa Hall, Director
Office of Exemption Determinations
Employee Benefits Security
Administration
U.S. DEPARTMENT OF LABOR

