

**Advisory Council on Employee Welfare  
and Pension Benefit Plans**

Report to the Honorable Eugene Scalia,  
United States Secretary of Labor

**Voluntary Transfers of Uncashed Checks  
from ERISA Plans to  
State Unclaimed Property Programs**

November 2019

## NOTICE

This report was produced by the Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council (the “Council”). The Council was established under section 512 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) to advise the Secretary of Labor on matters related to welfare and pension benefit plans. This report examines issues arising from voluntary transfers of uncashed distribution checks by pension plans subject to ERISA to state unclaimed property programs.

The contents of this report do not represent the position of the Department of Labor (the “Department”).

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## ABSTRACT

The 2019 ERISA Advisory Council explored whether there are circumstances under which a defined benefit or defined contribution pension plan might consider voluntary transfers of uncashed distribution checks to a state unclaimed property program in order to advance the goal of reuniting participants and beneficiaries who cannot be found or who are nonresponsive (“Missing Participants”) with their retirement savings.<sup>1</sup> The 2019 Council did not include welfare plans within the scope of its work, as many welfare benefit plans are insured or self-funded from operating cash of the plan sponsor, which, the Council believed, would have raised additional issues. The 2019 Council also purposefully did not address what steps are necessary or appropriate to locate Missing Participants, which was the subject of a 2013 Council report and is currently the subject of much public policy debate. Finally, the 2019 Council assumed that, consistent with prior Department of Labor guidance, state unclaimed property laws that purport to require transfers of uncashed retirement checks to state unclaimed property programs are preempted by ERISA. Therefore, the focus of the Council was to gain an understanding of the nature and operation of state unclaimed property programs and to evaluate the extent to which they might advance the goal of reuniting Missing Participants with their retirement savings and whether there are circumstances under which a plan fiduciary might voluntarily transfer uncashed checks to a state unclaimed property program.

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<sup>1</sup> The Council’s issue statement uses the terms “permissive transfer” and “state unclaimed property fund.” This Report uses the terms “*voluntary* transfer” and “state unclaimed property *program*,” which are more commonly used and descriptive.

## ACKNOWLEDGEMENTS

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## I. RECOMMENDATIONS

Based on the testimony received and for the reasons stated, the Council recommends that the Department publish the following:

1. Guidance (i) clarifying that uncashed distribution checks are assets of the plan within the meaning of section 3(42) of ERISA<sup>2</sup> and (ii) reaffirming that ERISA preempts state unclaimed property laws with respect to such assets;
2. Guidance stating that a transfer of amounts attributable to a Missing Participant's uncashed check to a state unclaimed property program constitutes a payment of benefits under ERISA; and
3. Guidance stating that (i) a plan fiduciary will be viewed as having satisfied its fiduciary responsibility to the extent the fiduciary transfers amounts attributable to a Missing Participant's uncashed check to a state unclaimed property program that meets minimum standards, as defined by the Department and informed by the discussion below, including allowing claims in perpetuity, and (ii) in connection with any such transfer, a plan fiduciary may rely on a state program's representation that it meets such minimum standards.

The Council is of the view that guidance addressing voluntary transfers to state unclaimed property programs should not be in derogation of other available options for addressing uncashed checks, such as involuntary rollovers or transfers to taxable accounts, or forfeiture-and-restoration as provided under current Treasury regulations. Similarly, the Council recommends that the guidance should confirm that it is up to the plan to decide the extent to which it engages in any voluntary transfers to state programs. This includes a plan's ability to choose, for example, to transfer uncashed checks only below a certain value (e.g., \$100) or only of a certain type (e.g., required minimum distributions) to state unclaimed property programs while utilizing other options for larger uncashed checks or other types of payments. Similarly, consistent with a

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<sup>2</sup> We did not hear testimony on and are not addressing whether the plan's asset is the contractual right to repayment, the underlying dollars held in a plan disbursement account or some other property right.

voluntary approach, a plan could choose to transfer uncashed checks only for participants or beneficiaries resident in certain states.

The Council also notes that these recommendations are based on current law and the absence of a federal registry or “clearinghouse” for reporting or handling uncashed retirement checks. As discussed below, several countries maintain either a national clearinghouse or a registry and the Council is aware of legislative proposals for the creation of something along these lines in the United States. Some witnesses suggested that the Pension Benefit Guaranty Corporation (the “PBGC”) could serve such a role; however, it is the Council’s understanding that the PBGC is of the view that it does not currently have statutory authority for such a role and, in any event, this issue is outside the Council’s mandate. Some members of the Council, however, believe that a federal approach to uncashed checks would be preferable to the voluntary state-by-state approach outlined by the Council in this report.

## **II. PRIOR COUNCIL REPORTS**

The Council’s report builds on prior reports by the Council. In 2013, the Department asked the Council to examine methods of maintaining contact with participants, so they do not become Missing Participants, and methods of finding participants once they become Missing Participants. The Council issued a report based on the testimony of plan sponsors, retiree advocacy groups, service providers, accountants, policy organizations, and related trade associations, and representatives of governmental agencies, including the Department, the Social Security Administration (“SSA”) and the PBGC.<sup>3</sup> The Council recommended that the Department develop a standard of best practices, provide additional legal guidance, and coordinate with other government agencies. In the 2013 report, the Council recommended specifically that the Department issue updated guidance on ERISA preemption of state abandoned property laws with respect to Missing Participants and guidance clarifying the status of assets used to satisfy benefit payment obligations while a benefit check remains uncashed.

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<sup>3</sup> Locating Missing and Lost Participants, Advisory Council on Employee Welfare and Pension Benefit Plans Report: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/about-us/erisa-advisory-council/2013-locating-missing-and-lost-participants.pdf>.

### **III. BACKGROUND**

The Department asked the 2019 Council to explore whether there are circumstances in which a plan fiduciary may, consistent with its fiduciary obligations, elect voluntarily to transfer amounts to a state unclaimed property program owed to a participant or beneficiary who cannot be reasonably located by the plan and for whom the plan has abandoned location efforts.<sup>4</sup>

The Council has narrowed its focus on Missing Participants and state unclaimed property programs in two respects. First, the Council is only addressing uncashed distribution checks. Unlike unpaid benefits, plans ordinarily subject distribution checks to income tax withholding and reporting. Thus, as discussed in more detail below, the issue of uncashed distribution checks generally does not implicate a comparison of taxable and non-taxable options, which introduces a material degree of complexity. Also, the Council was not prepared to address issues of valuation of unpaid accrued benefits in defined benefit plans. Second, the Council is only addressing defined contribution and defined benefit retirement plans. We are not considering health and welfare plans, which may present different plan-asset, state-regulatory and ERISA-fiduciary considerations.

#### **1. The Missing Participant Problem**

According to the U.S. Bureau of Labor Statistics (BLS), “[t]he median number of years that wage and salary workers had been with their current employer was 4.2 years in January 2018.” A subsequent BLS news release dated August 22, 2019 noted, “Individuals born in the latter years of the baby boom (1957-64) held an average of 12.3 jobs from ages 18 to 52.”<sup>5</sup>

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<sup>4</sup> In January 2019, GAO issued a report addressing tax and ERISA issues associated with unclaimed savings in individual retirement accounts (“IRAs”) and defined contribution plans. The report recommended that DOL specify the circumstances, if any, under which uncashed distribution checks from active retirement plans may be transferred to state unclaimed property programs. GAO Retirement Accounts: Federal Action Needed to Clarify Tax Treatment of Unclaimed 401(k) Plan Savings Transferred to States, GAO 19-88 at <https://www.gao.gov/assets/700/696525.pdf>. In a comment on the draft report, the Department stated that it plans “to continue to evaluate whether there are circumstances in which transfer of uncashed distribution checks from an ongoing plan to a state unclaimed property fund advances the goal of reuniting missing participants with their retirement savings.” GAO 19-88 at 51. This Report is intended to help in that continuing evaluation.

<sup>5</sup> Number of Jobs, Labor Market Experience, and Earnings Growth: Results From A National Longitudinal Survey, at <https://www.bls.gov/news.release/nlsoy.nr0.htm>.

One of the likely consequences of these job transitions is that the worker participates and accrues benefits in multiple employer-sponsored retirement plans. Over time, the worker could lose contact with those plans. That lost contact may hinder the distribution of the worker's accrued benefits for multiple reasons, such as: (1) the worker might forget – to the extent that he or she ever understood that he or she had accrued a benefit payable from a retirement plan, (2) the worker might forget the name of the retirement plan that owes the benefits, (3) the name of the prior employer or the retirement plan itself might change and the worker might not know about the change, (4) the worker might not know or have the resources to contact the retirement plan, or (5) the worker might decide that the benefit accrued under the retirement plan is too small to warrant the effort needed to receive the benefit.

There is no guidance directly addressing the obligations of fiduciaries to locate missing or unresponsive participants in ongoing retirement plans. However, the Department of Labor has issued guidance addressing Missing Participants in terminated plans. Field Assistance Bulletin 2014-01 provides that “[c]onsistent with their obligations of prudence and loyalty, plan fiduciaries must make reasonable efforts to locate Missing Participants or beneficiaries . . . . However, after a plan fiduciary reasonably determines . . . that a participant or beneficiary cannot be located, the fiduciary may distribute the Missing Participant’s or beneficiary’s benefits” to an IRA, taxable account or a state unclaimed property program, among other options.<sup>6</sup>

The Field Assistance Bulletin suggests a number of search steps that a prudent fiduciary should always take before abandoning efforts to find a Missing Participant, regardless of the size of the participant’s account balance because such efforts involve so little cost and such a high chance of success. However, other more expensive approaches may be required where account balances are larger. Thus, for example, a plan fiduciary should ordinarily use search options like certified mail, checking plan and employer records, running free electronic search tools, and reaching out to plan beneficiaries. Additional search steps like the use of “Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases and analogous services that may involve charges” may be appropriate, depending on costs. Thus, the

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<sup>6</sup> Field Assistance Bulletin 2014-01 (August 14, 2014).

Field Assistance Bulletin appropriately reflects a balancing of cost and probability of success, reflecting that the cost to the plan may not be justified by the probability of success.<sup>7</sup>

## **2. The Uncashed Check Problem**

A plan most commonly discovers that it has Missing Participants when a distribution check goes uncashed. Uncashed checks may arise for any number of reasons, including because:<sup>8</sup>

- the check is issued to the worker at an address that is no longer valid;
- the worker chooses not to cash the check either because of a concern that such action would render the worker ineligible for government or other types of financial assistance or in the belief that a delay in cashing the check will delay recognition in income for income-tax purposes;
- the worker chooses not to deposit the check because the dollar amount of the check is so small;
- the worker chooses to delay deposit of checks until several are issued as a way to accumulate a “savings” balance.

The Council believes that uncashed checks are most commonly related to situations when the participant has not actively requested a distribution. These situations include distributions related to things like required minimum distribution (“RMD”) payments, cash-outs if the employee terminates with a vested balance of \$1,000 or less, a refund of loan repayments that were made after the loan has been paid off, company matching contributions after the account has been fully distributed, cash dividends for plans with company stock, and trailing dividends received after the full distribution. The dollars at the individual participant-level tend to be

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<sup>7</sup> Presumably this guidance reflects the standards generally applicable to fiduciaries in active plans as well as terminated plans, although the Council heard testimony from plan sponsors that there is a need for the Department to issue guidance on the appropriate fiduciary steps for locating Missing Participants in an active plan. Notwithstanding this testimony, the Department specifically asked the Council not to address the issue of fiduciary obligations to locate Missing Participants in active plans. We understand, however, that the Department is aware of this perspective and did not believe that recommendations from the Council would be productive.

<sup>8</sup> Several witnesses encouraged the Department to consider endorsing technologies, such as ACH and wire transfers, that would reduce the number of uncashed checks overall.

relatively small, with the SPARK Institute, a trade association of recordkeepers, reporting that based on a survey of its members:

- 78% of uncashed distribution checks in defined contribution plans are for less than \$100;
- 98% of checks are for less than \$1,000; and
- 0.2% were for an amount greater than \$20,000.

Notwithstanding the small dollars typically involved in an uncashed distribution check payable to a Missing Participant, the aggregate dollars associated with such checks appear to be material. With over 700,000 private retirement plans, covering over 136 million participants and \$8.6 trillion in assets as of 2016, these small amounts add up.<sup>9</sup> The testimony suggested that, in the year 2017, roughly 4.5% of all checks go uncashed. Roughly 5 million checks were issued from defined contribution plans, which would suggest that 225,000 checks may have gone uncashed in defined contribution plans alone. Based on the experience of Council members, and testimony and conversations with recordkeepers, the value of uncashed retirement plan checks likely exceeds \$100 million per year but could be considerably larger. This suggests that the total value of uncashed retirement plan checks could easily exceed \$500 million cumulatively.

Even though the dollars involved for any given participant or beneficiary may be modest, the Council recognizes that these monies still have the potential to make a meaningful difference in the financial security for many Americans. For this reason, the Council believes that the primary consideration in addressing uncashed distribution checks is to reunite Missing Participants with their savings the most effective way possible. However, this objective needs to be balanced in light of the costs to the plan and the likelihood of reuniting Missing Participants with their retirement savings.

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<sup>9</sup> See EBSA, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2016* (December 2018) at <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>.

### 3. The Absence of National or Federal Solutions

Many countries maintain central repositories or clearinghouses for Missing Participants and uncashed benefits.<sup>10</sup> However, in the United States, there is no institution or national database that captures information about Missing Participants.<sup>11</sup>

There is a reporting regime for unpaid benefits. However, uncashed distribution checks appear to fall through the cracks. Under the existing information reporting rules, plans file the Form 8955-SSA to report unpaid accrued vested benefits from a retirement plan that are owed to participants who have separated from service. The reported information is shared with the Social Security Administration and, upon application for Social Security benefits, a notice from the Social Security Administration informs the participant that he or she might be entitled to vested benefits from the plan. However, benefits that have been distributed from a plan are not reported on the Form 8955-SSA. Thus, there is no reporting mechanism for amounts that have been paid to an IRA in an involuntary distribution or distributed to a state unclaimed property program. Moreover, it appears that once a check has been distributed and subjected to income tax it would no longer be subject to reporting on Form 8955-SSA, even though the check has not been cashed.

As a result, each plan must determine how to handle uncashed checks on its own without the benefit of a centralized repository or an information reporting regime. It is, therefore, not surprising that plans have developed a variety of methods to handle the issue.

## IV. COMMON APPROACHES TO UNCASHED CHECKS

When a distribution check is issued to a participant, the plan withholds income tax and issues a Form 1099-R, thereby reporting the distribution as taxable income. The assets of the plan attributable to the check are typically transferred into a checking account. The checking account

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<sup>10</sup> See GAO *Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings*, GAO 18-19 (2018) (Appendix III, summarizing the treatment of missing participants in five countries).

<sup>11</sup> In June 2016, Senators Elizabeth Warren (D-Mass) and Steve Daines (R-MT) introduced the Retirement Savings Lost and Found Act, which would establish a clearinghouse to assist participants' in locating lost or forgotten retirement savings accounts. S. 3078, 114th Cong. (2016); see also Retirement Savings Lost and Found Act, H.R. 5805, 114th Cong. (2016).

may be an account dedicated to the plan or may be an omnibus account maintained on the books of the plan's trustee or recordkeeper. The check will typically become void after the passage of a specified amount of time, for example, 120 days from issuance. If the check becomes void, the plan may initiate steps to locate the participant and reissue the check. However, in circumstances in which the plan fiduciary is unable to locate the participant after reasonable due diligence, the plan is faced with a quandary – what should it do with the uncashed check?

The Council heard testimony that many plans take no action with respect to unpaid balances sitting in the plan's disbursement account after making an appropriate search for the missing or unresponsive participants. As a result, checks may sit indefinitely in an uncashed or "voided" state in the plan's disbursement account. These uncashed checks sit in a legal limbo, neither part of the plan's assets, as reported on its financial statements, nor wholly outside of the plan because the money is still in a plan-related account. The probability that such monies will be reunited with affected participants depends upon the extent of the employer's continuing search efforts or the participant appearing and demanding payment.

Other plans take a more proactive approach with respect to amounts attributable to uncashed distribution checks held in the plan's benefit disbursement account. There are essentially two approaches:

- transfer the uncashed check amount to an IRA or to a federally insured taxable individual account in an involuntary transfer ("involuntary rollovers or transfers to taxable accounts"), or
- forfeit the uncashed check amount to the plan with a right of restoration pursuant to Treasury regulations ("forfeiture and reinstatement").

We discuss each of these two approaches below, which along with "do nothing," appear to cover how the vast majority of ERISA-covered retirement plans address uncashed checks.

## 1. Involuntary Rollovers or Transfers to Taxable Accounts

Under the Internal Revenue Code (“Code”) and ERISA, a plan generally may not distribute benefits to a participant who has experienced a distributable event – termination of employment, retirement, disability or death – without the participant’s affirmative consent. However, Code section 411(a)(11)(A) provides an exception if the participant’s vested account balance (or, in the case of a defined benefit plan, the present value of a participant’s nonforfeitable benefit) is \$5,000 or less.

If the participant’s vested account balance (or, in the case of a defined benefit plan, the present value of a participant’s nonforfeitable benefit) exceeds \$1,000 but is not more than \$5,000, the plan must roll the amount over to an “individual retirement plan” (that is, an IRA) absent directions from the participant, and the plan may choose to roll over amounts that are less than or equal to \$1,000.<sup>12</sup>

ERISA includes a fiduciary safe harbor that treats a participant as electing to rollover a cash-out of \$5,000 or less if certain requirements are met.<sup>13</sup>

The primary requirements for the safe harbor protection are that:

- The funds must be invested in a product that meets the requirements for preservation of principal and provide a reasonable rate of return, whether or not guaranteed, consistent with liquidity (generally, a money market fund); and
- The fees and expenses for the IRA, including investment expenses, must not exceed the fees and expenses charged by the provider for comparable rollover IRAs.

Once the IRA is established, the IRA owner may choose to keep the IRA with the IRA provider, transfer the account to another IRA custodian, roll in the balance to an eligible employer-sponsored benefit plan, or take a distribution.

Some plans and third-party service providers have applied the small-sum rollover rules to uncashed checks of Missing Participants. Under this practice, the amount of an uncashed check

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<sup>12</sup> Code § 401(a)(31)(B).

<sup>13</sup> ERISA § 404(a)(3); 29 C.F.R. § 2550.404a-2.

is restored to the plan and then distributed into an IRA pursuant to the involuntary rollover rules. In one variation, the rollover is treated as having after-tax employee contributions due to prior taxation. In another, the plan restores previously withheld taxes and reverses prior tax reporting of the amount of the uncashed check.

The Council also understands that other plans treat an uncashed distribution check as outside of the plan and have such checks “transferred” to taxable savings accounts for the benefit of each affected participant. These taxable accounts are generally maintained like involuntary rollover IRAs with the balance invested in a capital preservation investment. The latter approach is in fact a necessity for amounts that are not rollover-eligible, such as required minimum distributions.

## **2. Forfeiture-and-Reinstatement**

Many plans provide that if a participant or beneficiary cannot be located, the amount of the benefit is forfeited, subject to restoration if the participant or beneficiary later returns to make a claim for benefits. The amounts that are forfeited are used for the benefit of the plan, typically to pay reasonable plan expenses but also to reduce employer contributions.

The IRS expressly recognizes forfeiture-and-reinstatement as an acceptable method for dealing with Missing Participants for plan qualification purposes. Specifically, Treasury Regulation § 1.411(a)-4(b)(6) permits plan sponsors to forfeit amounts owed to Missing Participants into the plan as long as the benefits are reinstated upon the participant’s return and claim for benefits. Moreover, Treasury Regulations do not require the plan to credit the former employee’s account with any subsequent gains or losses.<sup>14</sup>

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<sup>14</sup> See Treasury Regulation § 1.411(a)-7(d)(4)(v). Several witnesses testified that the Department’s regional offices have taken the position that forfeiture and reinstatement is impermissible, despite the fact that the methodology is specifically contemplated in Treasury regulations. In particular, witnesses described that the Department has asserted that it is a prohibited transaction for a plan to forfeit amounts previously owed to Missing Participants, presumably because forfeiture may confer a benefit on the employer. Although outside the scope of our report, the Council strongly recommends guidance clarifying the ongoing viability of forfeiture-and-reinstatement.

The Council heard testimony from the American Benefits Council that, in a brief survey they conducted of their members, nearly half (49%) used the forfeiture-and-reinstatement method. The others used involuntary rollovers.

## **V. STATE UNCLAIMED PROPERTY PROGRAMS**

### **1. Overview**

The Department asked the Council to explore whether there are circumstances under which a plan might instead of the above approaches consider voluntary transfers of uncashed distribution checks owed to Missing Participants to a state unclaimed property program.

The purpose of state unclaimed property programs is to safeguard and return the property of missing owners. Unclaimed property programs are created and operated pursuant to state unclaimed property laws, which historically have been based on model acts promulgated by the National Conference of Commissioners on Uniform State Laws (“Uniform Law Commission”). Today virtually all states have adopted, in whole or in part, one of the Uniform Unclaimed Property Acts issued by the Uniform Law Commission in 1954, 1966, 1981, 1995, or 2016, with only a few states retaining any of the provisions from the 1954 or 1966 versions. Thus, although there is variation among state laws, certain core principles and procedures have been codified through adoption of the 1981, 1995, or 2016 model statutes and are followed by most state unclaimed property program programs. These core principles and procedures are summarized below.

The purpose of state unclaimed property laws is to require entities in possession of unclaimed property (“holders”) to attempt to return lost assets to the rightful owners. If the holder is unsuccessful at reuniting the asset with its missing owner, after a period of presumed abandonment (set at three to five years, depending on state law), the holder must turn the asset over to the state unclaimed property program. Under precedent established by the U.S. Supreme Court in a series of cases involving the rights of states to assert jurisdiction over intangible personal property, the Court adopted, as a matter “of ease of administration and of equity,” the rule that the state of the last known address of the owner of the property, as shown on the records of the property holder, has priority over other states to the property. If there is no address of

record for the owner, the holder must report and turn over the unclaimed property to the state of the holder's domicile (e.g., for a corporation, the state of incorporation).<sup>15</sup>

Once the unclaimed property is remitted to the state, the state acts as a custodian of the asset. The missing owner (or the owner's heirs, successors, and assigns) recovers the property by submitting a claim to the state's unclaimed property program. Except in two states where property forfeits after a period of time and cannot be claimed in the future by the owner, the rights of the owner to recover the property are not forfeited or extinguished. The right of the owner (and, after his or her demise, the right of his or her heirs) to recover the property remains in perpetuity.

Today, state unclaimed property programs maintain searchable web sites to publicize unclaimed property and reunite missing owners with their assets. There is also a national web site, MissingMoney.com, which facilitates aggregation of the state data and enables multistate searches for unclaimed property. Currently 40 states, the District of Columbia, Puerto Rico, and Alberta, Canada participate in the MissingMoney.com database, which enables a single multi-state search for missing property. For states that do not participate in the national MissingMoney.com database, the website provides a link to the state's database. Missingmoney.com is a free service to the members of the public who use it. Since its inception in 1999, the MissingMoney.com web site has had 875 million searches that resulted in 22.5 million claims. The site currently has 130 million searchable properties listed online and averages over 83,000 searches each day.

State unclaimed property program programs have professional staff who search for owners using informational databases such as Accurint and Clear Id. They also use news media and social media to promote and drive traffic to MissingMoney.com or state websites, and set up booths at state fairs, sporting events, and other public venues to help attendees find lost property. In addition, the various state programs have developed state-specific methods designed effectively to connect with their citizens. For example, Meaghan Aguirre, Director of Unclaimed Property for the State of Nebraska, testified that her office publishes an annual "tabloid" newspaper with the names of owners for unclaimed property reported during the year with a value of \$25 or more (increasing to \$50 in 2020). This annual tabloid is published in all 16 of Nebraska's daily

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<sup>15</sup> See *Texas v. New Jersey*, 379 U.S. 674, 683 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972); and *Delaware v. New York*, 507 U.S.490 (1993).

newspapers. Dennis Johnston, the Deputy Treasurer and Unclaimed Property Administrator for the State of Utah, testified that Utah experienced success with a social media campaign using Facebook, Twitter, Instagram, and YouTube but had a dismal response to billboard ads. In contrast, the State of Idaho, next door, had a very large positive response to billboards in the northern panhandle region. Allen Mayer, Chief of Staff for the Illinois State Treasurer, testified that some states stage live telethons, with professional staff taking telephone calls from individuals. In Massachusetts, advertisements promoting the “find Mass Money” website are broadcast daily during annual awareness campaigns on both AM and FM radio stations.

To submit a claim for property held in a state unclaimed property program, the owner either downloads, completes, and submits a paper claim form or files an electronic claim form. Filing an electronic claim form expedites the claim verification and documentation process. Many state databases permit claimants to upload the documentation necessary to prove their claims rather than mailing physical evidence, which increases the response and payment of claims. States also have developed automated “fast track” software systems to process claims that meet certain criteria and involve amounts under a specified dollar amount (e.g., under \$1,000). Several of the state witnesses explained how the electronic matching of unclaimed property owner records with records held by other state offices, such as driver’s license bureaus and, more recently, state income tax records, facilitates the return of lost property to its owner. More recently, several states, led by Wisconsin, have developed automated systems to automatically issue payment of unclaimed property under \$2,000 if there is an owner match with a current state income tax return.

State unclaimed property laws generally indemnify the holder of unclaimed property against claims in connection with the transfer of property to a state unclaimed property program and subsequent events, such as the failure to credit interest on amounts attributable to uncashed checks.

The state unclaimed property laws of many states allow the programs to receive property that has not yet reached the statutory period of dormancy. The state unclaimed property program also can agree to modify the date on which a report is to be filed. Even where the state’s unclaimed property statute does not provide express authority to accept property prior to the expiration of

the statutory abandonment period or to allow for the submission of a report other than on the stated filing date, states may make such accommodations for so-called early or off-cycle reporting on an administrative basis.

## **2. Reasons for Low ERISA Plan Utilization**

### **i. Confusion about application of ERISA preemption**

Plans may not be utilizing state unclaimed property programs for uncashed checks because of a lack of awareness of the option. The Department has indicated that state unclaimed property laws are preempted by ERISA.<sup>16</sup> As a result, many employers may not have considered that it is possible to transfer property voluntarily to a state unclaimed property program.<sup>17</sup> Indeed, the only reference to the possibility of a voluntary transfer to a state unclaimed property program is in Field Assistance Bulletin 2014-01, which is a non-binding memo to the enforcement branch of the Department and, as discussed in more detail below, treats involuntary rollovers to IRAs as a preferred approach.

### **ii. Concerns about legality**

One witness suggested that the voluntary payment of uncashed check amounts to states might itself be viewed as a violation of ERISA's statutory rules. In this regard, ERISA requires that plan fiduciaries discharge their duties "for the exclusive purpose of ... providing benefits to participants and their beneficiaries ... and ... defraying reasonable expenses of administering the plan ...."<sup>18</sup> Distributing plan assets to a state unclaimed property program, even on the theory or belief that the state might, eventually, be able to reunite the participant with his or her plan benefit, is arguably inconsistent with this statutory command. In contrast, leaving the assets in the plan (or, more specifically, returning the amount represented by the uncashed checks to the plan's trust) does not violate this principle and, to the extent those sums can then be used to defray plan costs, is "more" consistent with ERISA § 404(a)(1)(A) than payment to the states.

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<sup>16</sup> ERISA § 514(a); Adv. Op. 94-41A (Tex.); Adv. Op. 79-30A (Calif.); Adv. Op. 78-32A (Ill.).

<sup>17</sup> See also GAO 19-88 at 33-35.

<sup>18</sup> ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A).

**iii. Concerns about liability**

Plans are also concerned that, if a participant later were to come forward and demand payment from the plan with respect to amounts that the plan fiduciary had voluntarily reported and remitted to the state, the plan would have an inadequate defense to an action brought under ERISA § 502(a). The Council, however, also heard testimony that a plan would have a good defense to the extent it engaged in a prudent process to locate the participant and only then transferred assets to a state unclaimed property program.

**iv. Perception of complexity**

Witnesses also shared that most plans are reluctant to take on the administrative burden that voluntary transfers to state unclaimed property programs could entail. In the first place, many large employers (and even medium-sized employers) have plans with participants in all 50 states, plus the District of Columbia, the Commonwealth of Puerto Rico, U.S. territories and possessions, and even outside the United States (e.g., retirees living in Costa Rica).

The Council heard from state witnesses who explained that it is the law of the state in which the beneficial owner of property was last located (as shown on the books and records of the property holder) that controls. The resolution of this issue – favoring of the “owner” rather than the “holder” – creates obvious compliance burdens for a multistate employer by setting up a potential obligation to have familiarity with the laws of all 50 states, plus the District of Columbia, Puerto Rico, and United States territories and possessions.

Although the Council heard from state witnesses who explained that there was some uniformity in state laws, due to the adoption by the states of the Uniform Law Commission’s Uniform Unclaimed Property Act, that uniformity is not absolute. In particular, states can and do have different time periods following which property is deemed to have been “abandoned” for purposes of triggering application of state unclaimed property law. Most states have either three years or five years for triggering application of their unclaimed property law. State laws also differ in the area of “statutory due diligence,” i.e., the specific efforts that states require holders of property to undertake prior to reporting and remitting that property to the state. Witnesses representing employers/plan sponsors indicated that they were reluctant to take on this

administrative burden voluntarily, particularly given that any added expense would likely ultimately be borne by the plan participants themselves.

The issue of on-going benefit payments also raises administrative concerns for employers. For example, if a participant is in payment status (e.g., receiving annuity payments from a defined benefit plan or installment payments from a defined contribution plan) and then goes missing, there is no mechanism, even under a voluntary process involving state unclaimed property programs, to report and remit the entirety of the participant's or beneficiary's plan benefit, i.e., the amount of future checks that presumably would also go uncashed. Plans would thus be in the position of reporting and remitting only a portion of the participant's or beneficiary's benefit that is represented by uncashed checks, while retaining the remainder in the plan. A participant or beneficiary who later comes forward to claim his or her past due benefits now must go to two entities, the plan and the state, to receive the totality of his or her benefit, and the plan must keep records, indefinitely, with regard to the portion remitted to the states and the portion still retained by the plan. This process would repeat itself as additional checks went uncashed and were turned over to the states. Many plan administrators and recordkeepers will stop cutting new benefits checks for a participant or beneficiary, once they see that prior checks are going uncashed, only resuming payment once it is confirmed that the checks will indeed be cashed.

**v. Perception of state unclaimed property programs as benefitting states**

Other perceived deficiencies in using state unclaimed property laws as a means of “reuniting” participants with their retirement savings or aspects of their retirement savings include the perception that unclaimed property programs are used to benefit the state.

**VI. WITNESS TESTIMONY**

**1. Academics**

The Council asked Amy Hess, the UTK Distinguished Service Professor Emeritus at the University of Tennessee College of Law, to address two specific points. First, what is the difference between property that escheats to a state and property that is held by a state under the Uniform Unclaimed Property Act? Second, what are the common law duties of a trustee of a private express trust when the trustee issues a check to a beneficiary of the trust in payment of a

distribution from the trust, but the check is never cashed and the trustee has tried unsuccessfully to locate the beneficiary?

Professor Hess testified that for state unclaimed property programs operating under the Uniform Unclaimed Property Act, assets transferred to the program are held in perpetual custodianship. The property remains in custodianship in perpetuity so that the owner may come forward to claim it at any time. In contrast, escheatment is a common law concept rooted in state laws of intestate succession, which control the disposition of the assets of a decedent that are not disposed of by a will or a will substitute, such as a beneficiary designation or a trust. Professor Hess explained that, if no next of kin are alive to take the decedent's property under the intestate succession statute, then the decedent's assets are transferred to (or technically, "escheated") to the state treasury and used for the benefit of the state. Thus, according to Professor Hess, it is legally inaccurate to refer to a voluntary transfer of assets to a state unclaimed property program as "escheatment" (meaning a forfeiture of the property to the state). Rather, the transfer of assets to an unclaimed property program results in a perpetual custodianship for the benefit of the missing owner.

Regarding the duties of common law trustees, Professor Hess explained that due to the possibility of personal liability for a misdelivery of trust assets, trustees of private express trusts proceed with caution when distributing trust assets. Professor Hess observed that, based on her over forty-five years of experience with trust administration, common law trustees rarely had to deal with large sums of uncashed beneficiary checks. Because of the rule imposing absolute liability on a trustee who misdelivers trust assets, a trustee who knew of outstanding uncashed distribution checks likely would request instructions from the court as to what to do with the uncashed checks and would follow the court's orders. Professor Hess stated that it is possible private trustees believe that they should turn over uncashed checks to the state unclaimed property custodian, perhaps even without a court order. She indicated that there is support for this course of action in the scholarly literature.

## **2. State Representatives**

A number of state unclaimed property professionals testified on behalf of the National Association of Unclaimed Property Administrators ("NAUPA"). NAUPA's membership is

comprised of representatives from the unclaimed property programs of all 50 states, the District of Columbia, and the Commonwealth of Puerto Rico, as well as several foreign jurisdictions.

NAUPA's perspective was that state unclaimed property programs are the best solutions to the uncashed check problem as compared to the other options that are available to plans – involuntary cash-out to an IRA or taxable account, or forfeiture-and-reinstatement – based on the extent to which each option is effective in reuniting Missing Participants with their retirement benefits.

In the view of the state unclaimed property representatives, state unclaimed property programs are superior at reuniting participants with their retirement benefits. The representatives reported they have access to a number of resources that IRA providers and plan administrators do not, including, among others, earned and paid advertising, searchable individual state databases, a national searchable website; many have on-line claims forms, dedicated program staff, and some have access to other state records (such as state department of motor vehicle records and state income tax records) to locate property owners.

The state representatives presented testimony regarding the extent to which state unclaimed property programs have been successful in reuniting owners with their property. Based on a survey covering the period from June 1, 2018 to May 31, 2019, NAUPA submitted testimony suggesting that 14 states that participated in their survey have a return rate<sup>19</sup> of 72% for in-state property where a social security number is provided and where the value of the property is greater than \$100. They acknowledged that this ratio is only 41% for property with a value of less than \$100, which might be more representative of uncashed retirement checks, and that the return rate is 20% when looked at through the lens of the number of properties with a value of less than \$100.

The states did not have direct evidence of return rates for uncashed checks attributable to missing retirement plan participants. This reflects the very low level of usage by ERISA-covered plans

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<sup>19</sup> The return rate is the ratio of property returned to owners in a given period to the property taken in by the state unclaimed property program or programs during the same period. It is not a measure of the extent to which a particular item of property is returned to its owner. However, it is a proxy for the likelihood that property will be returned to an owner. The witnesses used a variety of terms for this ratio, including recovery ratio and success ratio. This report uses the term return rate.

but also the lack of separate recordkeeping for uncashed checks attributable to non-ERISA plans. However, the states viewed the return rates for analogous property as the key metric. In this regard, the states pointed to property governed by the Securities and Exchange Commission's lost property rules as highly probative because the holders of this type of property are subject to extensive due diligence requirements that are comparable to the due diligence requirements applicable to ERISA plans under Field Assistance Bulletin 2014-01. The SEC rules mandate that holders of securities perform searches to locate missing owners prior to transfer to state unclaimed property programs. These searches are comparable to the searches that plan administrators generally conduct for missing plan participants and typically also include utilization of credit bureau database aggregators.

NAUPA obtained data from 25 state unclaimed property programs that collectively represented 35 percent of the U.S. population. The analysis indicated that during the period June 1, 2018 through May 31, 2019, the states included in the data set received 343,423 securities-related properties for which the holder was unable to locate the owner. During the same period, these states returned 171,747 securities-related properties, for a return rate of 50 percent. The Council determined that the fact that states are able to return fully one-half of the properties reported where previously holders performed a robust search for the owners to be significant, given that the holders of the securities, after conducting due diligence pursuant to federal law, had experienced a zero percent return rate and thus remitted the securities to state unclaimed property programs.

The state witnesses highlighted the absence of any return rate information with regard to involuntary rollovers to IRAs, transfers to taxable accounts, or forfeiture-and-reinstatement, inferring that the other available options for reuniting participants with their retirement savings likely enjoy substantially lower success rates.

The states also rebutted concerns about the complexity of a state-by-state solution in at least two ways. First, while acknowledging that no two state unclaimed property statutes are identical, the states pointed out that certain core principles and procedures have been codified and are followed by most states. In this regard, virtually all states have adopted, in whole or in part, one of the Uniform Property Acts promulgated by the Uniform Law Commission in 1954, 1966, 1981, 1995

or 2016. Thus, all states have searchable databases and perform public outreach. Second, the states argued that state unclaimed property programs provide a “one stop shop” through a national searchable database for unclaimed property, MissingMoney.com.

The states addressed employer concerns about liability by pointing out that every state unclaimed property program relieves the reporting entity of all liability from claims by an owner associated with the property’s transfer to the state and a majority of states also provide reporting entities with statutory indemnification or an alternative hold-harmless provision. Thus, plans would, for the most part, be indemnified from claims that a participant was entitled to earnings on amounts transferred to the states or that the plan acted imprudently in voluntarily transferring amounts attributable to uncashed checks to the states. The indemnification provisions would not, however, protect a plan from claims that it failed to take appropriate steps to locate a participant or that the plan inappropriately benefitted from float while a check was outstanding.

The states acknowledged that all but four states do not credit interest on amounts attributable to uncashed checks. But they pointed out that they do not charge for their services or the processing of checks and that the potential earnings on typical uncashed check amounts are *de minimis*. The states also pointed out that forfeiture-and-reinstatement does not provide for earnings and that IRA providers that receive involuntary rollovers charge fees that effectively – in their view – negate the potential earnings on such amounts. The 2014 GAO Report on Forced Transfers and Inactive Accounts also found that fees outpaced returns in most of the IRAs they analyzed and that the value of involuntary rollover IRAs tend to decrease over time.<sup>20</sup>

In response to suggestions that a federal repository or clearinghouse for uncashed retirement checks might be a better solution, the state representatives argued that it makes more sense that retirement benefits would be handled alongside other types of lost property than it would that retirement benefits would be handled separately. They acknowledged the counterargument that it is odd to shift from a federal retirement system to a state system but pointed out that these nuances may be lost on Missing Participants. The state representatives also highlighted that

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<sup>20</sup> GAO, *401(k) Plans, Greater Protections Needed for Forced Transfers and Inactive Accounts*, GAO-15-73 (2014) (recommending that DOL expand the default investment options available for small sum cash-outs beyond money market funds).

building an infrastructure at the federal level that is comparable to the infrastructure already in place at the state level would be incredibly costly and duplicative.

With respect to concerns about the administrative or operational complexity associated with 50+ jurisdictions' unclaimed property programs, particularly in light of the differences in state abandonment periods, the state witnesses expressed a willingness to work with plans and their service providers to accommodate off-cycle or early filings, i.e., filings that do not, strictly speaking, meet each state's abandonment period requirements. The state witnesses indicated that the states commonly facilitate off-cycle and early filings provided that the holder has made a good-faith effort to locate the owner of the property.

One issue the states highlighted is the problem of "old and cold" checks. The states hypothesized that there are millions of dollars attributable to uncashed checks of Missing Participants that are many years old. The states' primary concern was that plans would feel compelled to conduct costly searches for these Missing Participants with very little probability of locating participants. This in turn they felt would serve as a significant deterrent from plans electing to address the Missing Participant problem.

The state representatives recommended that the Department issue a number of clarifications, and these recommendations are found in the NAUPA Witness statement. One noteworthy recommendation is that the Department provide guidance defining minimum standards for state unclaimed property funds to which plans may transfer uncashed distribution checks, specifically the following standards:

- i. Ability for the public to inquire by mail, telephone and online
- ii. Free public website to conduct unclaimed property searches
- iii. Online submission of owner claims
- iv. Processing of claims without charge
- v. Claims allowed in perpetuity
- vi. Data protection
- vii. Maintaining records in perpetuity
- viii. Relieving transferring plan of liability
- ix. Reimbursement to transferring entity that pays a reappearing owner
- x. Following IRS reporting requirements

### 3. Employers

Kevin Walsh and George Sepsakos, principals at the Groom Law Group, provided written and oral testimony to the Council based on their work with plan sponsors and plan service providers. Their testimony emphasized the need for guidance from the Department on what plans should do with uncashed checks and suggested that the guidance take the form of a safe harbor framework, rather than simply result in an enforcement initiative. They reviewed the Department's and courts' long-held position that state unclaimed property laws are preempted by ERISA and offered alternatives to transferring distributions to state unclaimed property programs, including mandating that plans (i) open an IRA using the stale checks for individuals, (ii) forfeit the amount of the stale checks after a reasonable effort is made with the understanding that the check would be reissued if the participant comes forward, or (iii) with appropriate legislative action, transfer the stale check to a central repository.

Jan Jacobson, Senior Counsel of the American Benefits Council ("ABC") and Aliya Robinson, Senior Vice President of the ERISA Industry Committee, also provided written and oral testimony to the Council. Ms. Jacobson described the results of a brief survey of the American Benefits Council's members. The survey results highlighted that the plan sponsors' concerns with voluntary transfers to state unclaimed property programs focused on the lack of uniformity among state rules and state reporting requirements, that distributees may file claims for earnings that may have been generated as a result of transfers to the state unclaimed property program, and they indicated that they need guidance as to the steps to follow prior to transfers and as to their ability to voluntarily transfer uncashed checks to state unclaimed property programs. ABC felt it critical that ERISA's broad preemption provisions be preserved and protected. Ms. Robinson reviewed the challenges that plans have with monitoring, cancelling, and reissuing checks with small dollar amounts when recipients fail to deposit them, and reviewed the steps that plans take to best ensure the receipt of these payments, such as encouraging direct deposit of payments in lieu of paper checks. She also stated that plans were concerned with potential claims that the plan improperly transferred uncashed check amounts to state unclaimed property programs because of ERISA's preemption of state laws, and that clear, consistent, and streamlined guidance from the Department would be integral to addressing these concerns and help beneficiaries to find amounts that are due to them. Both witnesses said they would like to

see guidance that would be beneficial to both plan sponsors and beneficiaries such as allowing plan sponsors to choose which state to use with notice to participants, or allowing voluntary transfers to a central repository or federal agency.

Testimony heard from the plan sponsor representatives was uniform in its emphasis that the Council's report should be a platform for additional guidance from the Department and facilitate plans' ability to effectively administer its benefits programs and not the impetus for an enforcement initiative. They emphasized that any guidance from the Department should streamline plans' processes and administrative burdens, state what actions are needed to locate missing participants prior to the state unclaimed property process, require states to have uniformity in rules and reporting, and declare that a plan sponsor's voluntary decision to transfer uncashed distribution checks to state unclaimed property programs will not trigger additional liability.

#### **4. Consumer Representatives**

The Council heard testimony from Jane Smith, Policy Analyst for the Pension Rights Center. Ms. Smith expressed a preference for a federal agency to be designated as a repository of uncashed checks. She proposed that the PBGC would be the logical choice. In her view, the PBGC would be a central repository, afford ERISA fiduciary protections to the funds, protect the tax-deferred accumulation of retirement accounts (enabling future tax-free rollovers to employer or IRA accounts, avoiding several types of federal and state taxes and penalty taxes), preserve beneficiary, insurance records and spousal and former spouse's rights, provide interest on account holdings, utilize a logical and searchable site for finding pension benefits, and ensure lost retirement accounts will be held for the sole benefit of the participant into perpetuity. Ms. Smith noted that other countries have such registries that both help locate Missing Participants and help participants and beneficiaries locate their lost plans.

The Pension Rights Center also expressed skepticism that state unclaimed property programs are a logical place for participants to look for their benefits, noting that there is not a clear process for determining which state program may have the participants' account. She also expressed skepticism about the states' reported return rates. She further expressed concern that the transfer to state unclaimed property programs results in the loss of important ERISA protections and

noted that states generally do not credit interest on amounts attributable to uncashed checks. The fact that there are 50 states with different rules and practices was also a concern.

Further, the Pension Rights Center indicated serious concern about participants not being notified of where their benefit accounts are transferred and the resulting difficulty participants have in locating and obtaining their ERISA benefits.<sup>21</sup>

Ms. Smith concluded that state unclaimed property programs are not the best arrangement for ERISA benefits and that a far better approach would be a federal agency designated as a repository for uncashed checks. In this regard, she recommended an expansion of the PBGC program for Missing Participants such that employers terminating defined contribution plans be required to transfer accounts for Missing Participants to the PBGC program, employers with Missing Participants from active plans be required to list the names of persons missing after a diligent search and be permitted to transfer such accounts to the PBGC program voluntarily, employers making small balance distributions under \$5,000 be required to report the name of the Missing Participant and the location of their account balances to the PBGC, and she suggested that the PBGC could be authorized to receive amounts of forced uncashed checks under \$1,000 with the associated names placed in the searchable database.

## **5. Unclaimed Property Professionals**

The Council also heard testimony from William Berger of Keane Unclaimed Property, which provides unclaimed property communications, compliance and consulting services, and Jennifer

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<sup>21</sup> The Pension Rights Center testified that there is a lack of information reporting that participants can leverage to locate their missing retirement benefits. They may have no way to locate the IRA or state unclaimed property program to which their benefit may have been distributed. Moreover, with plan and business mergers, even amounts held within the plan may be difficult to locate and in the absence of any Social Security Administration reporting may be lost. The Council is not making recommendations on this set of issues because it is outside the scope of our charge but we note that the Department may want to consider whether information about the handling of uncashed distribution checks should be covered by the plan's summary plan description to at least create a book of record that could be requested and consulted.

Borden, who testified on behalf of the Holders Coalition and the Unclaimed Property Professionals Organization (“UPPO”).<sup>22</sup>

Mr. Berger indicated that unclaimed property programs are complicated, with no two states having the same laws or reporting due dates. He indicated that there are four primary steps to unclaimed property reporting and compliance and that there are complexities with each one: analysis, due diligence, reporting and remittance. The analysis involves the what, when and where things need to be reported, and maintaining the states’ administrative guidance, statutory directives, and rules and regulations can be a formidable task. Due diligence requires notices being sent to the last known address of the owner before funds can be transferred and those notice requirements vary for timing, letter content, method of delivery, and even attestations of the mailing. State reporting requirements have different reporting date requirements, electronic formats for the submissions, and codes used for reporting of the property type. The remittance of the property is typically by check or electronic funds transfer (“ETF”), and some states require ETF, Fed wire, or ACH transfers. Reports must be delivered by the appropriate state deadline and through the state specified electronic media with the required cover sheet. In addition, some states’ unclaimed property laws require negative reporting if the holder has no unclaimed property eligible for reporting in a particular year. Therefore, Mr. Berger emphasized that any guidance from the Department addressing the voluntary transfer of uncashed checks should be very clear as to the definition of uncashed checks, which states plan fiduciaries can use, if there is a dollar threshold for these transfers and can these amounts be determined and changed by the holder, what is the expected frequency of the transfer, and the expectation that the plan be prepared to handle increased owner communications and check reissuance that will result from the states’ required due diligence, and be prepared to monitor state legislation that alters reporting requirements.

Ms. Borden on behalf of UPPO presented the results of its most recent survey of return rates for state unclaimed property programs covering the years 2013-2017. The Coalition asked the states to provide the total amount of property received and the total amount of claims paid for the five-

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<sup>22</sup> The Holders Coalition represents institutions whose members hold property. UPPO is a national trade association representing holders of unclaimed property and service providers. Its membership includes over 425 unclaimed property holders and service providers and 1,500 unclaimed property professionals.

year period 2013 – 2017. UPPO received data from all 50 states (and the District of Columbia) for the five-year period, and produced an aggregate “return rate” for each of the 51 jurisdictions. The resulting return rate—a percentage produced by dividing the amount of property returned to the owners over a five-year period by the amount received by the state over that same period—is a five-year average rate similar to the annual “owner return rate” calculated by the state unclaimed property programs. The results ranged from a high of 95.34% to a low of 8.59%. Three states – Indiana, Nebraska, and Wisconsin – had return rates exceeding 60%. The average (not including the three states with the 60+% return rate) was 48%.

According to UPPO, better return rates are due to a number of factors. For example, states that did “data matching” – checking the name of the owner, as reported by the holder of the property, against state databases such as department of revenue (tax) records, drivers’ license/motor vehicle records, or other records – had higher return rates than states that did no data matching. (It is the Council’s understanding that, at present, only four states currently do data matching.) Additionally, some states will publish more information about the property (name of owner, last known address of owner, nature of the property, name of original holder, amount held by state), whereas other states, due to privacy concerns, will publish less information. UPPO found a positive correlation between the amount of information available to potential claimants/owners regarding the property and a state’s owner return rate, without noticing an appreciable increase in the rate of fraud. Differences in the claims process and, in particular, the amount of documentation a state requires from the owner before paying on the claim also affected the owner return rate (with greater levels of documentation negatively affecting return rates). Finally, they found that whether a state permitted third-parties to file claims on behalf of owners in return for a finder’s fee had an impact on the likelihood of reunification (with states permitting such third-party work generally achieving higher owner return rates).

Ms. Borden also explained that other anomalies could account for lower return rates. For example, if a state were to receive a lot of “owner unknown” property or amounts paid to it based on estimates (which, by definition, does not include owner names), that would increase the denominator and thus lower the return rate.

## **6. Recordkeepers**

Representatives of two recordkeepers testified before the Council: Holly Tardif and Garrett Hohimer from Alight Solutions and William Jeffries from Empower Retirement. Additionally, Michael Hadley testified on behalf of the SPARK Institute, an association which represents defined contribution recordkeepers and other groups. The approaches to dealing with uncashed checks differed by recordkeepers as did their perspective on the potential benefits of using state unclaimed property programs.

Recordkeepers service state and local governmental plans that are not subject to ERISA and therefore are subject to mandatory compliance with state unclaimed property laws. The recordkeepers indicated that they had developed infrastructures to facilitate transfers to state unclaimed property programs. They also acknowledged that they had other lines of business, e.g., IRAs, that are subject to state unclaimed property laws and that they routinely transfer property to the state programs.

Two themes emerged from the testimony. First, the recordkeepers indicated that they offered robust search services to help reunite missing participants with their retirement benefits and that they generally were able to locate participants if they had basic information like a social security number. They expressed doubt that state unclaimed programs would be able to improve upon their efforts. Second, they expressed that plan sponsors would need a compliance roadmap for dealing with missing or unresponsive participants. They did not think it was reasonable to have plan fiduciaries monitor 50+ jurisdictions' unclaimed property programs and that this burden would result in plan costs that are not proportionate to the issue of uncashed distribution checks. But in general, the recordkeepers expressed openness to the possible use of transfers to state unclaimed property programs as a solution to the problem of uncashed checks of Missing Participants.

## **7. Auto-IRA Providers**

Representatives of three auto-IRA providers testified before the Council: Kevin Clark and John Perugini from Millennium Trust Company; Peter and Spiro Prevolos from PenChecks; and Spencer Williams from the Retirement Clearinghouse. These companies generally positioned

their services – rollovers to IRAs and transfers to taxable accounts – as private, market-based solutions to the uncashed check problem. They indicated that their services help plans reduce costs, administrative burdens and fiduciary liability by accepting transfers of small plan balances, including those represented by uncashed checks, to IRAs or taxable savings accounts.

The auto-IRA providers generally noted that they engage in extensive efforts to reunite Missing Participants with their retirement savings, including using commercial locator services and credit reporting agencies. Retirement Clearinghouse described a new program it was developing that would leverage data from defined contribution plan recordkeepers to take involuntary rollovers and transfer them to the Missing Participant’s new employer’s plan.<sup>23</sup> None of the providers, however, provided data about the extent to which participants are reunited with their savings.

The providers indicated that, although transfers are generally invested in money market mutual funds, IRA owners have the ability to invest their account balances in other funds and they earn interest while invested in money market funds. The providers indicated that their fee structures are designed to be reasonable but acknowledged that some account balances could be reduced or even eliminated by fees.

There was differing testimony on the tax status of uncashed distribution checks that are transferred to the providers. Some plans transfer amounts attributable to uncashed distribution checks to taxable savings accounts that are invested in money market funds. PenChecks noted, however, that it works with plans to restore previously withheld taxes and reverse tax reporting and, therefore, preserve the tax preferred status of retirement savings. In this regard, PenChecks indicated that tax consequences may be reversed within three years of a check distribution. Once reversed, the balance may be rolled over into an IRA pursuant to the DOL safe harbor if the amounts were under \$5,000. PenChecks stated that the “functional process” to restore the withheld taxes was “merely nothing more than a true-up recordkeeping entry on the current tax reporting of a custodian that regularly withholds and remits taxes.”

Millennium suggested that part of the problem with uncashed checks, many of which consist of balances under \$1,000, could be resolved if plan sponsors amended their plans so that smaller

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<sup>23</sup> Prohibited Transaction Exemption (PTE) 2019-02, [84 Fed. Reg. 37337](#) (July 31, 2019).

balances were deposited in rollover IRAs unless the participant affirmatively elected to receive the distribution in cash.

## **8. Representative of the PBGC**

Stephanie Cibinic, Deputy Assistant General Counsel of Regulatory Affairs in the Office of the General Counsel at the PBGC, provided two perspectives: the perspective of an administrator of a central repository for uncashed distribution checks and the perspective of a plan administrator. Ms. Cibinic noted that official PBGC guidance is issued in writing and her comments were her own and not that of the PBGC.

Ms. Cibinic noted that the PBGC maintains a Missing Participants Program which was expanded in 2018 from defined benefit plans to also cover terminated defined contribution plans. The purpose of the expanded Program is to connect plan participants with benefits due if the participant is missing when their retirement plans are terminated. The PBGC holds the benefits for Missing Participants and beneficiaries in a trust account separate from other programs of the PBGC and assists participants in finding and receiving retirement plan benefits. Since the expansion, the defined contribution segment of the Program has received benefit amounts or information identifying where benefits are held covering about 52 defined contribution plans on behalf of 1,100 Missing Participants with assets that total approximately \$18 million. The majority of those filings and transfers occurred in a little over the first seven months of 2019 as reported on August 29, 2019 to the Council.

There is no fee for transferring Missing Participant benefit amounts if the amount is \$250 or less. The Program accepts Missing Participant benefits regardless of how small. Benefits are held in perpetuity until the participant or their beneficiaries are found and interest is credited to the transferred benefit amounts at the federal midterm rate in accordance with the statute. The PBGC searches for Missing Participants initially and then periodically thereafter without regard to the size of the benefit. Found participants can continue to grow their retirement savings tax-free by receiving their benefits as rollovers into qualified retirement plans or an IRA. The PBGC website also contains a centralized unclaimed retirement benefits registry where a terminated plan participant may search for their benefits by name or by plan.

Separately, from the perspective of a plan administrator, Ms. Cibinic noted that the PBGC has a well-defined policy and procedures for routine monitoring of reports on outstanding checks of 90 days and stale dated checks that remain uncashed for 180 or more days. They compare uncashed checks to the Social Security Administration's Death Master File to determine if a participant has died. If no record of death is listed they attempt to obtain a death certificate. On death when a participant's benefit provides for survivor or beneficiary benefits, they search for the beneficiary and when found reissue benefit checks due. If a Missing Participant is not deceased and the search for a new address is successful, the PBGC determines if the check is stale dated and if so reissues the benefit amount with earnings credited back to the date of the original check. If the Missing Participant cannot be located, or when located the Missing Participant does not cash the check, the benefit amount due the Missing Participant remains in a trust account with the PBGC in perpetuity unless claimed by the participant or beneficiaries.

Ms. Cibinic stated that the PBGC does not have statutory authority to accept uncashed distribution checks of Missing Participants in active plans; it is limited by statute to Missing Participants in terminated defined benefit and defined contribution plans.<sup>24</sup>

## **VII. COUNCIL OBSERVATIONS**

### **1. Tax Considerations**

In Field Assistance Bulletin 2014-01, the Department expressed a preference for IRA rollovers in the context of Missing Participants in terminating defined contribution plans. In fact, the Department went so far as to state that other options, including transfer to a state unclaimed property program, should only be considered if there is "some other compelling reason based on the particular facts and circumstances." The Department's preference for rollovers in the context of terminating plans is based on "the potential considerable adverse tax consequences to the plan participant" of a transfer to a state unclaimed property program (or other non-tax-favored

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<sup>24</sup> The Council understands that a plan may indirectly effect a transfer of uncashed distribution checks of Missing Participants in an active plan to the PBGC through a spin-off and termination transaction, in which the portion of the plan attributable to Missing Participants is spun-off into a separate plan and then terminated. Taken to its logical extreme and ignoring transaction costs, such an approach might support transfers on individual Missing Participants in active plans to the PBGC. The Council did not actively consider this notion because it views it as outside the scope of the Report.

repository, such as a bank account). Those adverse tax consequences can include “[immediate] income taxation, mandatory income-tax withholding[,] and a possible additional tax for premature distributions.” Implicit in this analysis is the view that a transfer from a plan to a state unclaimed property program is a taxable distribution and we assume for purposes of our report that such transfers are in fact taxable distributions.<sup>25</sup>

Significantly, however, all of the options for addressing the uncashed check problem appear to start from the premise that the participant has been taxed on the value of the check, notwithstanding that the check has not been cashed. As a practical matter, plans generally impose income tax withholding on distributions to participants. That is, income tax withholding is triggered by issuance of the check. While the Council heard testimony to the effect that it is possible to reverse income tax withholding and that some plans indeed have a practice of effectively unwinding taxation for uncashed checks in certain circumstances, this does not appear to be a widespread practice. Instead, Missing Participants who receive uncashed checks appear ordinarily to be subject to income tax consequences at the time of the issuance of the plan check. Moreover, very recent IRS guidance may call into question whether a reversal of tax reporting and withholding on checks sent to Missing Participants is always appropriate by holding that the distribution of a check to a participant is a taxable distribution, thereby triggering income taxation, mandatory withholding and a possible additional tax for premature distributions, even if the check was never cashed.<sup>26</sup>

Thus, the issue before the Council – uncashed checks of Missing Participants – starts from the premise that, unless the check was returned to the plan and the income tax withholding was reversed, the participant has already been subject to the tax consequences associated with a distribution from the plan. The resulting question is, therefore, what to do with the after-tax

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<sup>25</sup> The Internal Revenue Service has never directly addressed whether a payment from a plan to a state unclaimed property program is a taxable distribution subject to federal income tax. However, the Department’s understanding of the tax law as reflected in Field Assistance Bulletin 2014-01 is consistent with analogous subsequent IRS guidance. See Revenue Ruling 2018-17 (treating a payment from an IRA to a state unclaimed property program as a taxable distribution); see also GAO 19-88 (including letter from the IRS stating that they provided input to DOL on this aspect of Field Assistance Bulletin 2014-01).

<sup>26</sup> See Revenue Ruling 2019-19. The guidance does not, however, address whether a check sent to a participant who never receives the check, for example, because it is sent to a stale address, has had a taxable event. The ruling merely indicates that a participant cannot turn their back on income by choosing not to cash a check. The Council believes it would be helpful if the IRS were to issue clarifying guidance around the treatment of uncashed checks paid to Missing Participants.

proceeds associated with the uncashed check. For these reasons, the Council does not view the preference for rollovers reflected in Field Assistance Bulletin 2014-01 as apposite to the issue at hand and generally regards the tax implications of a transfer to a state unclaimed property program as largely the same as those applicable to an involuntary cash-out of amounts attributable to a previously distributed check or even the use by a plan of forfeiture-and-reinstatement under Treasury Regulation 1.411(a)-4(b)(6). In each case, the participant has already been subjected to income taxation on the uncashed distribution check amount.

## **2. Likelihood of Reuniting Missing Participants with Lost Retirement Savings**

Testimony reflected that plan sponsors and IRA providers routinely use appropriate methods to locate Missing Participants (generally those listed in Field Assistance Bulletin 2014-01), including steps that involve greater costs such as the use of fee-based internet search tools, commercial locator services, and credit reporting agencies. However, once these methods of outreach have been exhausted and a participant is identified as missing, the ongoing use of the same search approaches are unlikely to be materially successful.

Moreover, even for Missing Participants who subsequently remember an unpaid benefit, it can be difficult to locate that benefit. It may have been paid to an IRA provider but the participant may not have any connection to, or information about, the IRA provider. Similarly, there are few searchable databases for IRA providers and we understand that plan recordkeepers typically do not include information about IRA providers in connection with plan recordkeeping changes, which means that a plan's recordkeeper may not be able to tell the participant where their benefit went even if the participant is able to locate their recordkeeper. And often the names of plan sponsors and plans change through mergers or other consolidations so that participants may have trouble locating their former plan at all.

Taken as a whole, the Council observed that amounts attributable to uncashed distribution checks of participants who have not been located through conventional search methods are unlikely to be reunited with the beneficiary. In this regard, witnesses representing plan recordkeepers and IRA providers did not offer up data or other information on the extent to which Missing Participants are ever reunited with their retirement savings but generally conceded that the odds were low. This raises the specter that the use of mandatory distributions to IRAs or taxable

accounts merely defers transfers to state unclaimed property programs after the imposition of what may be substantial IRA fees for little if any economic benefit. Similarly, it suggests that forfeiture-and-reinstatement may be largely forfeiture.

In contrast, state unclaimed property programs have a number of features that may increase the likelihood that Missing Participants will be reunited with their lost retirement savings.

According to the states that testified, ongoing outreach efforts to return unclaimed property to owners vary among the states based on what each state found to be most effective for their demographics. Outreach efforts may involve a combination of methods, e.g., booths at state fairs, billboard advertising, radio and television advertising, that is not duplicative of the conventional search methods utilized by plans.

Moreover, a few states have embraced search methods that are simply not available to the private sector. These search methods generally involve leveraging data bases, such as state tax records or Department of Motor Vehicle records, and materially raise the chances of reuniting Missing Participants with their retirement savings. Notably, the states testifying offered evidence that these search efforts yielded material recoveries above-and-beyond conventional search methods typically used by plan fiduciaries. States using these methods were reported to have 2013 to 2017 return rates that ranged from 65% to 95% compared to states that do not use these methods, who were reported to have return rates of 8.59% to 58.75%.

Additionally, participating states provide an online, searchable database of unclaimed property, MissingMoney.com. For states that do not participate in the MissingMoney.com database, the site provides a link to the unclaimed property site of each state.

Thus, the Council views transfers to state unclaimed property programs as providing a greater likelihood of reuniting Missing Participants with their retirement savings than other available approaches.

### **3. Operational Complexity with Transfers to State Unclaimed Property Programs**

One of the primary concerns of the plan community is the administrative complexity of transferring amounts attributable to uncashed checks to 50 different states as well as the territories. The state witnesses generally took the position that a plan could not transfer all

uncashed checks to the state in which the plan administrator or the plan trust is domiciled. Instead, their view is that even in a voluntary transfer regime the appropriate state to receive amounts attributable to uncashed checks is the state of the participant's last known address. This view has some logic in that a Missing Participant is unlikely to know where the plan's trust is located but will know where he or she has lived. However, for plans with participants who reside in multiple or even all 50 states, it potentially raises significant complexity for plans.

As a threshold matter, transfers of uncashed checks to multiple states involves the inherent complexity associated with sending money to multiple locations and using different file feeds. Also, states generally have different approaches as to when a holder of property should treat property as abandoned, referred to as the dormancy or abandonment period. The dormancy period among states generally ranges from 3 to 5 years. The states also have different owner-notification requirements such as content of letters, time period when letters may be sent, and manner of sending. The deadlines for holders to report and remit unclaimed property to the states also varies. Plans expressed concern about having to age uncashed checks of Missing Participants for various periods, having to comply with differing notification regimes, and meeting different deadlines for reporting and remitting funds to the states. Others pointed out that the greatest likelihood of reuniting Missing Participants with their lost retirement benefits is a search for the participant closest in time to the original issue date of the check. The longer a Missing Participant goes without finding his or her retirement benefits, the less likely they are to ever be reunited, which suggests that these abandonment periods may be at odds with the Department's purpose of reuniting participants with their lost retirement benefits.

The state witnesses made a number of points in response to concerns about complexity and timing considerations. First, they shared that every state works with large holders of lost property on early or "off-cycle" transfers. They shared that these off-cycle transfers generally forgo state required dormancy periods, provided that the holder has made reasonable, good-faith efforts to locate the owner of the property. Further, the state witnesses shared that this would ordinarily be the case for ERISA plans given the fiduciary obligation to locate Missing Participants. Second, the state witnesses pointed out that many employers, recordkeepers and other plan service providers are familiar with state unclaimed property programs since other types of property held by employers are subject to state unclaimed property laws. In this regard,

many recordkeepers service non-ERISA plans, such as state and local retirement plans, that are subject to state unclaimed property law. For this reason, recordkeepers may already have extensive experience with transfers to the state unclaimed property programs of many states. Third, the states emphasized that there is considerable uniformity among the states requirements concerning transfers of unclaimed property, largely as a result of the adoption of model unclaimed property laws.

The Council is keenly aware of the administrative complexities associated with state unclaimed property programs; however, the Council has kept in mind that the issue at hand is not a mandate for plans to transfer unclaimed property to the states but rather an option that a plan administrator may voluntarily choose to utilize. The Council anticipates that the states, which seem desirous of receiving unclaimed property from ERISA plans and then attempting to return the property to property owners, will readily agree to early and off-cycle transfers of uncashed checks from ERISA-governed plans.

With early and off-cycle reporting, different state dormancy periods, notice requirements and filing deadlines should not be a material barrier to utilization. In this regard, it should be readily apparent that the prudent fiduciary efforts of plan administrators to locate Missing Participants are more than sufficient to satisfy state concerns that they not receive property unless there has been a reasonable good-faith effort to first find the property owner. Similarly, we would expect that plans and their recordkeepers with material experience working with state unclaimed property programs will be more likely to elect to transfer uncashed checks of Missing Participants to states. The Council also believes that the states are sufficiently incentivized to work with plan fiduciaries and their representatives to establish workable and consistent protocols. To the extent the states prove unreasonable, plans will be in a position to simply forego transfers of uncashed checks for Missing Participants to state unclaimed property programs.

#### **4. Differences Among States**

One critical issue is the extent to which there are material differences among the states that a plan fiduciary should consider in deciding whether to transfer assets attributable to uncashed checks to state unclaimed property programs. To the extent there are material differences, it

could suggest that plan fiduciaries have an obligation to review each state unclaimed property program, which would be a daunting and potentially cost prohibitive task.

In general, the Council observed that there are certain core features of state unclaimed property programs that are common across their programs. State unclaimed property programs are maintained for the purpose of safeguarding and reuniting owners with missing property and, except for two states, they serve as perpetual custodians of the funds, with use of the money to finance their operations until it is reunited with their owners, but never become legal owners.

There is variation in the approaches that each state takes to satisfy its fiduciary obligation. For example, some states may have substantially larger advertising budgets while other states may rely more on lower tech solutions, such as a booth at the state fair. Larger states may have larger staff. The Council believes, however, that these differences are in many situations appropriate based on differences in population, demographics and the particular character of a state.

The Council also does not believe that it makes sense to specify a minimum return rate or that it is reasonable to expect plan fiduciaries to review return rates for each of the states. As discussed above, there is some material variation in the return rates of each of the states. However, some of the variation appears to be attributable to the characteristics of the states. For example, Delaware logically has a lower return rate than other states because it is often the default recipient of unclaimed corporate property for which the holder has no owner address or where the last known address of the owner is outside the United States. In those situations, established case law provides that the state of incorporation of the holder governs. Approximately half of all public companies and 66% of the Fortune 500 have elected to incorporate in Delaware due to the ease of resolving disputes and under certain conditions favorable state corporate income tax laws. This leads to Delaware having a disproportionate volume of unclaimed property and logically a lower return rate relative to other states. The Council did not hear witness testimony or have access to data that definitively explained the variations in return rates among the other states, but it may be that return rates can be expected to be different for states with larger or smaller urban populations or other regional and local characteristics.

Moreover, the Council is aware that state unclaimed property programs are rapidly evolving. It is clear, for example, that the advent of the internet has been transformative in improving return rates and it would not make sense to set mechanical requirements.

The Council appreciates the approach suggested by NAUPA for the establishment of minimum standards for state programs and thinks that it could be a practical way of ensuring that the benefits of Missing Participants are transferred to states that have sound practices in place for reuniting Missing Participants with their retirement benefits. Moreover, the Council believes that such a minimum standards list could spur state programs to align their practices; for example, the two states that do not provide claims in perpetuity might be motivated to change their practices.

It is, however, not a simple exercise to define the required minimum standards. It was clear from the testimony that states utilizing other state records to locate Missing Participants have a materially higher return rate than the states that do not. For example, Wisconsin is one of the first states to use state tax records to search for and pay out unclaimed property of state residents. Wisconsin has a return rate in excess of 60%. The Council generally believes that all states should utilize other state records to the extent possible. The materially higher return rates suggest that a best practice should be use of other state records. However, it is very difficult to articulate a data matching standard. For example, there are states that do not have income taxes at all and while other options like utilization of DMV records might offer an alternative, the Council is simply not familiar enough with the alternatives and considerations to confidently assert that data matching with other state records should be a requirement. While it makes sense to encourage the growth of best practices, it will be very difficult for plans to transfer uncashed distribution checks to the states if not every state meets these minimum standards.

Another consideration is the extent to which the states credit interest on amounts attributable to uncashed benefit checks. Only Massachusetts, Michigan, New Jersey and Ohio credit interest on all unclaimed property held by the state. A few Council members were troubled by this failure to credit interest, viewing the absence of a time-value of money adjustment as indicative of a forfeiture. Other members of the Council were not troubled by the failure to credit interest because the other available options do not appear to effectively credit interest. A plan that

utilizes forfeiture-and-reinstatement is merely obligated to provide a re-appearing participant with the amount forfeited. There is no required adjustment for the time-value of money. And the Council generally understands that IRA providers typically charge ongoing fees that may exceed the interest credit on average amounts attributable to uncashed checks. These amounts are by law invested in capital preservation vehicles like money market funds and the low average balances typically mean that hard dollar IRA fees, e.g., a \$35 annual fee, are more than enough to effectively eliminate any time-value-of-money adjustment and have the potential to deplete small balances in their entirety. But there is an argument that the crediting of interest should be considered a requirement.

There are other possible considerations, for example, some plans may not be willing to transfer uncashed checks to state unclaimed property programs if a state may assert that such use causes the plan to have a nexus with the state. This might suggest requiring states to waive any argument for nexus based on use of state unclaimed property programs. Other considerations could involve notifying plans when participants are located so that future checks could be sent to the right address. But taken as a whole, while the Council views a minimum standards list as a logical approach to mitigating the burden of fiduciary reviews of 50+ jurisdictions, the Council is not comfortable based on the record with specifying such a list.

## **5. Potential Backlog of Uncashed Checks**

As mentioned above, the states highlighted that there may be substantial amounts attributable to uncashed checks of participants who went missing many years ago. The concern is that plans should not have to conduct costly searches for these participants given the very low probability of success and that such costs would deter plans from addressing the Missing Participant problem. The Council is sympathetic to the issue identified by the states but has chosen not to make a recommendation as it is outside the scope of this report.

## **VIII. REASONS FOR RECOMMENDATIONS**

### **1. Uncashed Checks as Plan Assets**

The 2019 Council recommends guidance clarifying that uncashed distribution checks attributable to Missing Participants are assets of the plan within the meaning of section 3(42) of ERISA and

the Department's regulations thereunder and, therefore, that plan administrators have fiduciary responsibilities with respect to such assets. Based on testimony, the Council believes that some plans may be leaving assets attributable to uncashed checks in the plan's or recordkeeper's disbursement account and may not be taking steps to locate participants with outstanding checks. Amounts attributable to these checks may sit indefinitely in the disbursement account. These assets are unlikely to be reunited with Missing Participants and are not benefiting the plan. The Council believes that this may be occurring in no small part because there is a lack of guidance about whether uncashed checks are assets of the plan with the fiduciary obligations that accompany plan asset status. The Council believes that guidance clarifying that uncashed checks are plan assets would encourage plan fiduciaries to act prudently with respect to such uncashed checks and would also clarify that state unclaimed property laws are preempted by ERISA with respect to such uncashed checks.<sup>27</sup>

There is no guidance addressing whether uncashed checks are plan assets. The plan asset regulations do not directly address the issue.<sup>28</sup> It is natural that plan fiduciaries would be uncertain about the status of uncashed checks because the IRS generally treats the uncashed checks as having been paid in a taxable distribution to the participants. Moreover, uncashed checks usually are not reflected in the plan's trust or other financial reports. However, the Department has indicated that in situations outside the scope of the plan assets regulations (generally applying to participant contributions and investments), ordinary notions of property rights under non-ERISA law should be applied to identify plan assets. The process includes consideration of any contracts, plan documents or other legal instruments.

The Council understands that a check is generally a document evidencing a claim by the payee against the payor created by the maker to satisfy an obligation of the maker to the payee. The payor receives money of the maker to satisfy the payee's claim and discharge the maker's obligation. Cashing the check satisfies the payee's claim against the payor and the maker's obligation to the payee. The maker, however, has the contractual right to recover the amounts

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<sup>27</sup> See GAO 19-88 (identifying as an issue whether ERISA preemption applies to uncashed distribution checks).

<sup>28</sup> DOL Reg. §§ 2510.3-101 and -102.

transferred to the payor if the check becomes void or is otherwise cancelled. In our view, this strongly supports the conclusion that an uncashed check is a plan asset.<sup>29</sup>

The notion that an uncashed check is a plan asset is clearly reflected in the manner in which plans currently proactively handle uncashed checks. The underlying assets attributable to an uncashed check unquestioningly are plan assets when the assets are transferred back to the plan for disposition through involuntary rollover to an IRA or forfeiture-and-reinstatement. It makes little sense if there is no corresponding plan asset during the intervening period in which a check is outstanding.

## **2. Remittance of Uncashed Checks to a State as a Distribution of Benefits**

The Council also recommends that the Department issue guidance stating that a transfer of amounts attributable to uncashed checks to a state unclaimed property program is a payment of benefits within the meaning of sections 403(c) and 404(a) of ERISA and, as a result, that such amounts cease to be plan assets and that the plan's obligation with respect to the participant has been satisfied to the extent of such transfer.

As reflected above, in the absence of guidance, it is not entirely clear that plan administrators may permissibly transfer uncashed check amounts to a state unclaimed property program consistent with their fiduciary obligations to use plan assets exclusively to pay plan expenses or plan benefits. The Council believes that it would be helpful to clarify that a transfer of amounts attributable to an uncashed check is a payment of benefits and, as a result, the plan's obligation with respect to the participant has been satisfied to the extent of the transfer.

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<sup>29</sup> The question of whether the underlying dollars in a plan disbursement account are plan assets has been a source of controversy and confusion. See *In re: Fidelity ERISA Float Litigation*, 829 F.3d 55, 60-62 (1<sup>st</sup> Cir. 2016) (holding that amounts held in an omnibus plan disbursement account are not plan assets but reserving on whether the same would be true if a plan had an unconditional right to receive repayment); Brief of The Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants, *In re: Fidelity Float Litigation* (reserving on whether amounts held in a plan disbursement account are plan assets); see also Field Assistance Bulletin 2002-03 (treating float on amounts held in plan disbursement accounts as compensation but not addressing the plan asset question); Letter from Robert Doyle to Judith A. McCormick (Aug. 11, 1994); Advisory Opinion 93-24A (Sept. 13, 1993). We did not hear testimony on, and are not addressing, whether the plan's asset is the plan's contractual right to repayment or the underlying dollars held in the plan disbursement account. However, the Council's recommendation is not meant to disrupt existing structures and practices by which retirement plans effect distributions. We are not, for example, suggesting that amounts attributable to uncashed checks that are held in a plan or omnibus disbursement account must be held in trust, set aside from other assets held in the disbursement account or included on the Form 5500.

### 3. Voluntary Transfers as Consistent with ERISA Fiduciary Duties

The Council also recommends that the Department issue guidance confirming that a plan may elect to voluntarily transfer amounts attributable to uncashed checks to a state unclaimed property program.

Although the Department has previously indicated that voluntary transfers to state unclaimed property programs are permitted, the Department indicated that it was not a “preferred” option. More generally, there remains confusion about the interplay between preemption and voluntary transfers to state unclaimed property programs with testimony reflecting that plan administrators are surprised that such transfers are permitted. The Council believes that transfers to state unclaimed property programs have an improved chance of helping to reunite Missing Participants with their retirement savings.

The Council does not believe that any of the options that are available to plans should be viewed as “preferred”; instead, we believe that each option has a potential role to play in addressing the problem of uncashed distribution checks. In other words, the Council is of the view that voluntary transfers are in the nature of an “additional tool in the toolbox” that plan administrators have available for addressing the problem of uncashed checks owed to Missing Participants. Similarly, the Council believes that a plan is free to determine for itself the extent to which it will engage in voluntary transfers of uncashed checks to state unclaimed property programs. Plan administrators are in the best position to assess what makes the most sense for their own plans. Some plans might determine, for example, that adopting an ongoing program of voluntary transfers involves too much administrative complexity or cost but believes that a special, one-time, transfer to tackle a backlog of uncashed checks (e.g., uncashed check reflecting amounts owed to participants who, despite the plan’s reasonable efforts to locate them, have been missing for more than  $x$  years) would be in the best interest of the plan and its participants and beneficiaries. Another plan might determine that, given its plan demographics and balancing the cost and benefit of a voluntary process, a process of annual voluntary transfers to state unclaimed property programs makes sense but decides to limit its program to a single state (or a few states) where it has a significant number of Missing Participants. Finally, a plan administrator might decide, again balancing costs and benefits to the plan and its participants and beneficiaries, to

adopt a program of voluntary transfers for checks below a particular threshold (e.g., \$100) or for checks of a certain type (e.g., required minimum distributions) while continuing to employ other processes for larger amounts or other types of payments. This type of flexibility, rather than an “all or nothing” approach, will, the Council believes, make it more likely that plans will consider voluntary transfers to state unclaimed property programs as part of an overall solution to the problem of uncashed checks.

#### **4. Safe harbor**

We recommend that the Department issue guidance stating that a plan fiduciary shall not be treated as failing to satisfy the duty of prudence to the extent assets are transferred to a state unclaimed property program that meets minimum standard requirements.

The burden of conducting a fiduciary due diligence review of each of the 50 states and the territories is not insignificant. The Council believes that plans will be reluctant to voluntarily transfer uncashed benefit checks to state unclaimed property programs in the absence of some simplification and that it is appropriate for the Department to alleviate this burden by specifying minimum standards.

We have not, however, developed a specific list of requirements. The Council believes that NAUPA’s list of minimum standards offers a helpful starting point but that further work needs to be done to explore whether other elements should be required, such as data matching with state records and interest crediting.

Finally, we believe that a plan fiduciary should be able to rely on a state’s representations or certification that the state has met the to-be-determined minimum standards. A plan should not have to evaluate each state’s compliance with the criteria. This is an area in which plans generally do not have expertise and, as importantly, in which the cost of the due diligence to the plan will quite possibly exceed the value of the due diligence. Put simply, the dollar amounts per participant and per plan are largely modest in size, even if the cumulative amount at issue is significant and the value to the individual may be material. In such a setting, it is important that plans have an administratively feasible and cost-effective means of ascertaining whether to voluntarily transfer assets to a particular state’s unclaimed property program.