

ERISA ADVISORY COUNCIL
PERMISSIVE TRANSFERS OF UNCASHED CHECKS FROM
ERISA PLANS TO STATE UNCLAIMED PROPERTY FUNDS
AUGUST 28, 2019

MILLENNIUM TRUST COMPANY, LLC

My name is Kevin Clark, and I am the Senior Vice President and National Business Development and Sales Director for Millennium Trust Company, LLC. I am joined today by John Perugini, Millennium Trust's General Counsel. It is our pleasure to be here to testify on behalf of Millennium Trust, and to describe the value that we and others in the automatic rollover industry can provide with respect to the final resolution of uncashed checks on behalf of plan sponsors.

Millennium Trust is a limited purpose trust company regulated by the Illinois Department of Financial and Professional Regulation. We are a leading, tech-enabled provider of retirement and institutional services and are committed to the evolving needs of individuals, employers, advisors and retirement services partners, such as record keepers and third-party administrators. We empower our clients with trusted expertise, exceptional service and access to a wide range of solutions, including automatic rollover individual retirement account (IRA) solutions, self-directed IRA solutions, direct rollover IRA solutions, workplace savings solutions, fund custody, and ancillary services. Whether clients are managing retirement plan assets, running a business or wanting choice beyond traditional asset options, we provide flexible and digital solutions to support our clients' success. Since our founding in 2000, we have grown to custody over \$26 billion in assets.

The ERISA Advisory Council is considering the efficacy of various options available to employer-sponsored benefit plans for the disposition of uncashed checks, including:

- Rollover to an individual retirement account or annuity;
- Forfeiture with right of restoration; and
- Voluntary distribution to a state unclaimed property fund.

Millennium Trust is the largest independent provider of automatic rollover IRAs, which we view as the best solution for the disposition of uncashed checks.

Overview of the Automatic Rollover Process

As a general rule, employer-sponsored retirement plans, such as 401(k) plans, may not distribute benefits to a plan participant without the consent of the participant; however, to help plans avoid the proliferation of small balance accounts and the attendant administrative burdens,

fiduciary liability and increased plan costs for all participants, ERISA and the Internal Revenue Code provide an important exception to this general rule – an employer-sponsored retirement plan may provide for the mandatory distribution of the plan balance of any employee that becomes separated from the employer/plan sponsor if that balance is less than \$5,000 (known as the cash-out limit).

In 2001, Congress, through the Economic Growth Tax Relief Reconciliation Act (EGTRRA), imposed an important new requirement on mandatory distributions. For any mandatory distribution from a plan of more than \$1,000, the plan sponsor must establish an IRA for the benefit of the former employee at a qualified IRA custodian, such as Millennium Trust, unless the separated employee, in response to a notice from the plan sponsor, directs the plan sponsor to send the distribution directly to the separated employee or to another institution. This mandatory rollover of a plan balance to an IRA in the name of a former employee is referred to as an automatic rollover. *The requirement to establish an IRA for mandatory distributions of more than \$1,000 is intended to reduce leakage from the retirement savings system, preserve the tax-advantaged status of a plan participant's retirement assets and avoid income tax withholding and premature distribution penalties that could result if the distribution were sent directly to the participant.* Mandatory distributions of \$1,000 or less may also, but are not required to be, automatically rolled over into IRAs for the benefit of former employees. A plan sponsor may alternatively send checks directly to former employees for these smaller mandatory distributions, which practice has contributed, in no small part, to the uncashed checks issues that are the subject of this hearing.

EGTRRA also directed the Department of Labor to establish safe harbors for plan sponsors that transfer funds to an IRA provider. Under this safe harbor, automatically rolled-over funds must be invested initially in an investment product designed to preserve principal and provide a reasonable rate of return, consistent with liquidity. The initial investment of rolled-over funds is determined and directed by the plan sponsor. Thereafter, any investment decisions with respect to an IRA may be directed solely by the owner of the IRA or the owner's advisor or agent.

The automatic rollover IRA solution provides value to plan sponsors, missing and non-responsive participants, the remaining participants in a plan, and the retirement system generally by:

- preserving the tax-deferred status of a missing or non-responsive participant's retirement funds, including uncashed checks;
- searching for and communicating with missing and non-responsive participants to reunite them with their retirement savings; and
- helping plans reduce costs, administrative burdens and fiduciary liability by transferring small plan balances, including those represented by uncashed checks, to IRAs, thereby allowing plan sponsors to more efficiently and effectively serve active participants.

In a sense, Millennium Trust may be viewed as an extension of the retirement plans with which we work. Our solution keeps former plan participants' funds in the retirement system and allows those individuals the opportunity to continue to invest and grow their retirement savings.

There are several reasons why we believe the automatic rollover industry is best-positioned to solve the perennial problem of uncashed checks:

- the same benefits described above with respect to the automatic rollover of smaller plan balances would be available to recipients of uncashed checks;
- we are already an integral part of the retirement services industry, with established ongoing relationships with record keepers, and essentially can serve as a “one-stop shop” for rollover IRAs and uncashed checks;
- we help prevent “leakage” of retirement savings; and
- we already have the infrastructure in place to handle the transfer of funds to the states when escheatment is required under applicable law.

Our testimony today will focus on the advantages that the automatic rollover industry provides to plan sponsors and participants with respect to uncashed checks.

I. Preserving the tax-deferred status of missing participants' retirement funds

As mentioned above, mandatory distributions by plan sponsors of balances between \$1,000 and \$5,000 of separated missing or non-responsive participants must be rolled over into an automatic rollover IRA. Many plan sponsors also roll over balances of \$1,000 or less, which preserves the tax-deferred status of the former participants' retirement savings.

For balances of \$1,000 or less, however, plans may alternatively issue checks to missing or non-responsive participants. By definition, missing or non-responsive participants have not requested and are not expecting to receive checks, and for this and many other reasons discussed at the June 2019 hearings held by the ERISA Advisory Council, the checks often remain uncashed. There are other situations in which checks may be sent to participants, including excess loan repayments, trailing dividends or required minimum distributions. In these situations, the plan sponsor may not be able to locate the participant, and when it can, the generally small, unrequested checks often go uncashed.

The simplest way to reduce the number of uncashed checks is to reduce the number of checks sent in the first place. For example, the single most effective way to prevent uncashed checks would be for plan sponsors to modify their plan so that smaller balances are deposited in an automatic rollover IRA unless the participant affirmatively elects to receive the distribution in cash. This would reduce leakage in the retirement system, preserve the tax-deferred status of the funds (to the extent such funds are plan assets) and prevent a plan participant from being subject to deleterious tax consequences. Requiring this plan design for balances under \$1,000 would, of

course, require a change in the law, but the ERISA Advisory Council and the Department of Labor can recommend plan sponsors consider this plan feature.

II. Reuniting missing participants with their funds

Once a participant's account balance is transferred to Millennium Trust, we open an IRA, conduct search procedures to determine the best available address for the IRA owner, and then send a welcome kit to the IRA owner. This welcome kit alerts the participant to the fact that his or her account now resides at Millennium Trust, and provides information about the participant's options. It is, of course, much more than a state unclaimed property fund would provide. The IRA owner is instructed to contact us, verify his or her identity (as required by the Customer Identification Program provisions of the USA Patriot Act), and take control of his or her retirement savings.

Of course, many participants do not respond immediately, and in some cases, mail is returned as undeliverable. Accordingly, ongoing periodic searches and outreach are an integral part of Millennium Trust's re-unification solution. But, importantly, even in those instances where a correct address is found and a participant, for whatever reason, elects not to respond to Millennium Trust's outreach, his or her retirement funds remain in a Millennium Trust IRA, invested in an investment product designed to preserve principal and provide a reasonable rate of return, consistent with liquidity, and tax-deferred status is maintained.

Our affirmative outreach to, and periodic searches for, missing participants are important considerations for plan sponsors who strive to ensure that their former participants ultimately receive the benefits they were entitled to under their former plan, as is our commitment to client service. Representatives at our call centers are available to answer any questions IRA owners may have, including in response to the communication they receive at the time their accounts are established. During the first half of 2019, our client service teams handled over 360,000 phone calls. IRA owners also have access to a web portal, similar to the systems used by many plans and with which participants will be familiar.

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

At Millennium Trust, the account owner has access to educational materials on retirement savings, and if the account owner chooses to keep his or her IRA at Millennium Trust, he or she has the opportunity to invest in a wide array of available assets, make additional, ongoing contributions to the IRA and consolidate retirement savings held at other institutions. Accordingly, an automatic rollover IRA not only helps prevent leakage and negative tax consequences to a former plan participant, but it may also serve as a springboard for an individual to grow his or her retirement savings and improve financial security.

To the extent uncashed checks represent plan assets that are eligible for rollover, Millennium Trust may open an IRA for the participant; for uncashed checks representing assets that may not be rolled over into an IRA,¹ a plan sponsor may direct us to open a taxable custodial account to custody the assets, search for the rightful owner and help to ensure that such owner receives the benefits to which he or she was entitled under the plan. In each case, we would provide the same services, including determining current address and performing periodic searches, giving the participant the opportunity to take possession of, and determine the ultimate disposition of, his or her funds. While many states have improved public engagement in recent years to help people claim escheated property, we believe our processes generally are more direct, periodically searching to determine the best available address for an individual and then affirmatively reaching out to such individual with a tailored communication.

It should be noted that one claimed advantage of transferring uncashed checks to the states is that, while the owner of the funds would not receive any investment returns on the unclaimed assets, he or she would also not be charged a fee. While fees are an important consideration for plan sponsors, they are only one of a number of considerations, including preserving tax-deferred status, opportunities for former participants to invest and grow their retirement savings, efficacy of efforts to find the rightful owner and client service.

III. Increasing Plan Efficiency and Reducing Plan Costs

Automatic rollover IRAs allow plans to reduce costs (by moving missing participants' small balance plan accounts to IRAs) and focus their resources on active participants. The same holds true for the transfer of uncashed check amounts to an automatic rollover provider. Once transferred, it is the automatic rollover provider's responsibility to search for the participant. This approach not only furthers the plan sponsor's goal of re-uniting the former participant with the plan benefits he or she is entitled to receive, but also reduces plan costs, fiduciary liability and administrative burden with respect to uncashed checks, and greatly benefits the participants remaining in the plan, who would otherwise be forced to indirectly subsidize those efforts through the payment of plan fees.

In many cases, the automatic rollover provider becomes a plan sponsor's "one-stop shop" for both missing participants' accounts and uncashed checks. Further, a plan sponsor's ongoing relationship with a single automatic rollover provider allows it to periodically monitor and review the provider's performance, and, when appropriate, change providers for future distributions. Millennium Trust actively competes against a number of other trust companies

¹ The Internal Revenue Service recently provided guidance to plan sponsors on the taxation, reporting, and withholding rules that apply to distributions from plans where the participant fails to cash the check. See Revenue Ruling 2019-19. We understand that the IRS plans to release additional guidance on issues related to missing and unresponsive participants. While we appreciate that the ERISA Advisory Council advises the Department of Labor, not the IRS, we suggest DOL work with the IRS to provide additional guidance on the tax issues associated with uncashed checks that are rolled over to an IRA or transferred to a taxable account.

that also offer automatic rollover services, and to do so we must provide high value service to plan sponsors and recordkeepers, a good experience for participants (who might otherwise complain to their former employers), competitive fees, and quality investments consistent with the DOL safe harbor. This “free-market” approach contrasts sharply with escheatment under state law, where the holder of unclaimed funds is determined by geography alone.

IV. Compliance with State Unclaimed Property Laws

In weighing the value of transferring uncashed checks to the states or utilizing an automatic rollover provider, plan sponsors will need to consider the resources and infrastructure necessary to comply with each state’s unclaimed property laws, the potential for penalties and interest for failure to timely escheat, and the possibility of multiple state audits. Plan sponsors would be required to amend plan documents to allow for voluntary escheatment of uncashed checks. They would also be required to employ human and technological resources to interpret and comply with the escheatment laws of various states, or hire third-party consultants to assist in the escheatment process. These requirements increase administrative burdens, plan costs and risk, all of which are ultimately borne by the participants that remain in the plan.

Unlike plan sponsors, automatic rollover providers, as “holders” of property that may become escheatable, already are subject to the states’ unclaimed property laws, and have the resources and infrastructure in place to regularly escheat dormant accounts to the states.

At Millennium Trust, we have invested in human and technological resources and developed systems and procedures to ensure that escheatable accounts are timely remitted to the various states. In addition, we utilize the services of outside providers and legal counsel to assist in the twice-yearly analysis of potentially escheatable accounts and the actual mechanics of escheatment, which, as you know, vary by state. Plan sponsors considering escheatment of uncashed checks would need to devote resources to developing and implementing those procedures for all 50 states, and would likely need to pay, as we do, outside service providers to assist in the process. Plan sponsors would also bear the risk of penalties and interest for failure to timely escheat, and would be subject to audit by the states. These are risks that Millennium Trust and other automatic rollover providers already bear.

V. Conclusion

With appropriate guidance from the Department of Labor, we believe the solution for uncashed checks already exists. Millennium Trust and others in the automatic rollover industry have proven expertise in preserving missing participants’ retirement funds, searching for and finding missing participants and handling escheatment of unclaimed accounts. We are fully capable of providing the same benefits for recipients of uncashed checks.