



**Written Statement on Transfers of Uncashed Checks from ERISA Plans  
to State Unclaimed Property Programs**

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**On Behalf of the National Association of Unclaimed Property  
Administrators (“NAUPA”)**

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**Pension Benefit Plans**

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## Preface

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The National Association of Unclaimed Property Administrators (“NAUPA”) is comprised of the unclaimed property programs<sup>1</sup> of all 50 states, the District of Columbia, and the Commonwealth of Puerto Rico, as well as several foreign jurisdictions. The organization’s objective is to facilitate collaboration and otherwise support program administrators in reuniting all unclaimed assets with rightful owners. NAUPA is an affiliate of the National Association of State Treasurers.<sup>2</sup>

I serve as Chief of Staff to Illinois State Treasurer Michael W. Frerichs. Treasurer Frerichs administers the Illinois Revised Uniform Unclaimed Property Act and the Illinois unclaimed property program, I-Cash. Previously, I served as Treasury General Counsel, and as Counsel to I-Cash. Along with the Illinois Treasury, I am active in NAUPA, and I currently chair the organization’s Legal Committee.

NAUPA appreciates the invitation of the ERISA Advisory Council (the “Council”) to address the matter of uncashed ERISA retirement plan benefit checks, and the role that the states can play in ensuring receipt of these entitlements by beneficiaries. Indeed, the organization is extremely pleased to see this issue being examined. Several years ago, NAUPA member states (led by California<sup>3</sup>) initiated a dialogue with the U.S. Department of Labor (“Department of Labor”) concerning the utilization of state unclaimed property programs to locate and pay missing participants owed unclaimed benefits.

We recognize that this written statement is of greater length and detail than those typically submitted to the Council. In NAUPA’s view, this was necessary for two reasons. First, the Council typically deals with modification to existing plan requirements or protocols. That is really not the case with uncashed plan checks. Second, in speaking with the Council’s issue working group, it became clear that there was a knowledge gap concerning state unclaimed property programs. While the primary focus of NAUPA’s testimony will be to provide information to the Council on the operation and effectiveness of those state programs, NAUPA believes that it is constructive to additionally discuss why state programs are superior to alternative avenues for the disposition of uncashed plan checks, and to offer specific recommendations to achieve the Council and the Department’s desired outcomes.

In this overview of state unclaimed property programs being provided to the Council, the general approaches and protocols of *most states* will be considered. NAUPA acknowledges that some states follow different processes in some areas. And, it is NAUPA’s understanding that the Council has not requested an exhaustive treatise on unclaimed property law and practices in all 50 states. Instead this

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<sup>1</sup> In its issue statement, the ERISA Advisory Council has used the alternative terminology of “state unclaimed property *funds*.” However, the more commonly used (and descriptive) reference is “unclaimed property *programs*.”

<sup>2</sup> While the majority of unclaimed property programs are administered by state treasuries, in some states the program is administered by a different agency, e.g. state controller.

<sup>3</sup> On June 7, 2017, the California State Controller issued an advisory opinion request to the Department of Labor concerning the applicability of California’s unclaimed property law to uncashed plan distributions, and solo 401(k) plans. The Department of Labor has not yet issued an advisory opinion to California. A copy of the advisory opinion request, and a follow-up memorandum, is included in Appendix-Exhibit I.

statement will focus on what the vast majority of states are already doing, which is resulting in the return of billions of dollars to rightful owners annually.

While no two state unclaimed property statutes are identical, certain core principals and procedures have been codified and are followed by most states. Virtually all of the states have adopted, in whole or in part, one of the Uniform Unclaimed Property Acts promulgated by the Uniform Law Commission in 1954, 1966,<sup>4</sup> 1981, 1995, or 2016. Statutory references in this statement are made to these Uniform Acts rather than to individual state enactments.

As directed by representatives of the Council, this statement will not address the issue of whether the Employee Retirement Security Act of 1974 (“ERISA”) preempts the application of state unclaimed property laws to uncashed plan checks.

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<sup>4</sup> Because only a few states have retained any of the provisions from the 1954 Uniform Disposition of Unclaimed Property Act or its 1966 revision, statutory references to model unclaimed property legislation in this statement will be limited to the 1981, 1995 and 2016 Acts.

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## Executive Summary

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1. State unclaimed property programs function for the purpose of safeguarding and returning the property of missing owners. State programs are both fully capable and eager to serve this function with respect to uncashed plan checks.
2. State unclaimed property programs have evolved over time to proactively and effectively reunite owners with unclaimed assets. Significant increases in the amounts of property returned have been made possible by the internet and other technologies.
3. The public is drawn to state unclaimed property program websites through their active, ongoing promotion through both paid and earned media.
4. States are currently receiving over \$7 billion annually in unclaimed property, a substantial portion of which is being returned to owners. It is anticipated that the return rate with respect to uncashed plan checks would be in excess of 60 percent of reported amounts.
5. Generally, an owner may recover property from a state unclaimed property program in perpetuity.
6. In transferring uncashed checks to a state unclaimed property program, a plan would be relieved of further liability and in many cases, indemnified.
7. State unclaimed property programs have developed robust claims processing and payment operations, which could accommodate a large influx of uncashed plan checks.
8. While most state unclaimed property programs do not pay interest on uncashed check funds, other features of state programs may make this consideration less significant.
9. While state unclaimed property programs are not currently authorized to rollover tax-advantaged assets, this may not be relevant as to most uncashed plan checks currently outstanding.
10. Uncashed plan checks must be reported to the state of last known address of the missing participants pursuant to federal common law, but in addition to legal reasons there are practical reasons for doing so.
11. The unclaimed property laws of the states have varying periods of dormancy and reporting dates for the reporting of uncashed plan checks, but simplified reporting approaches are possible.
12. State unclaimed property programs are superior to other options available to plans for the disposition of uncashed checks, absent a demonstration that the other options are as effective in reuniting missing participants with their retirement benefits.
13. To resolve the existing backlog of uncashed plan checks in a timely and cost-effective manner, a creative approach, involving plan/state unclaimed property program collaboration, may be desirable, as well necessary.
14. Some of the features that the Council is looking to state unclaimed property programs to provide may be inapplicable to uncashed plan checks already in existence but could be highly relevant with respect to future check issuances made under revised regulatory guidance.

## Analysis

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### **A. Introductory statement concerning the purpose and role of unclaimed property programs and appropriateness for the handling of uncashed plan checks.**

State unclaimed property programs are considered both consumer protection programs and a system to protect private property rights. The purpose of unclaimed property laws is to require entities in possession of unclaimed property (“holders”) to attempt to return lost assets to rightful owners. If this is unsuccessful, the state receives the property, seeks to locate its owners, and restores their property to them. The state maintains protective custody of the property, and the rights of the owner to recover the property are not forfeited or extinguished.

Unclaimed funds are used for public purposes until claimed by the rightful owner. Longstanding public policy has been that it is better for unclaimed funds to be used for a public purpose rather than providing an unearned windfall to holders.<sup>5</sup> However, the goal is not to generate revenue for the state. In virtually no state does unclaimed property have a material state budgetary impact. Every elected official and appointed agency head overseeing an unclaimed property program desires to return *all* collected amounts to rightful owners.

States have invested significant resources to more fully achieve the purpose of their unclaimed property programs. In addition to upgrading technology, this has included the hiring and retention of qualified, full-time professional staff who are dedicated to the mission of reuniting missing owners with their assets. The substantial costs involved in operating unclaimed property programs are absorbed by state government. The expense of locating lost owners, and returning their property to them, is not assessed on entities possessing unclaimed property or passed along to claimants. Reappearing owners receive the full amount that was transferred to the state.

As reflected by year-over-year increases in claims volume and value, the public is benefiting from the states’ improved efficiencies. States will continue to identify and implement processes resulting in higher percentages of property collected being returned to rightful owners.

Plans have other options to address uncashed checks. However, NAUPA believes that the key question is how effective those other options are in reuniting participants with their unclaimed benefits. If fiduciaries desire to accomplish more than simply removing open liabilities from their books, then the Council should take note of the fact that states are currently returning substantial volumes of lost property to rightful owners, in an efficient and cost-effective manner. The states can help here. And, the states *do* want to be involved in returning unclaimed retirement benefits due their citizens.

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<sup>5</sup> See, e.g., *State by Lord v. First National Bank*, 313 N.W.2d 390, 393 (Minn. 1981)

## B. How states came to return substantial amounts of property.

### 1. Historical context of state return of unclaimed property to missing owners

Unclaimed property laws date back to colonial times, but the current “custodial” unclaimed property model did not come into being until the early 1900s. Initially, only a few jurisdictions enacted such statutes, and those states received—and returned—minimal amounts of unclaimed assets, which usually related to decedents’ estates. This changed after World War II, when the economy grew substantially, payment systems were created, and new financial products became available. Most Americans came to own financial assets, and a percentage of these assets became abandoned.

In 1954, after identifying unclaimed property as a growing problem and, noting that “only ten states have adopted really comprehensive legislation covering the field,”<sup>6</sup> the Uniform Law Commission promulgated the Uniform Disposition of Unclaimed Property Act. Under this initial model unclaimed property legislation, “holders” in possession of unclaimed property initially reported but did not transfer unclaimed assets to the state. Based on the reported information, the state would publish the names of lost owners in a newspaper in the county where the owner resided and send a letter to the owner’s last known address. Lost owners were directed back to holders to recover their property. If an owner did not reestablish contact with the holder within six months, the owner’s property would then be transferred to the state.

One by one, states enacted the 1954 Uniform Disposition of Unclaimed Property Act, as well as updated acts adopted by the Uniform Law Commission in 1966 and 1981. Each of these model acts followed the same bifurcated reporting process, with publication of owner names *prior* to the remittance of property to the unclaimed property program. The states would receive very few claims, other than for the owner who failed to timely respond to a notice, or who had independently identified a right to property that had already been transferred into state custody, and who had been directed back to the state by the reporting entity. There was no active promotion of unclaimed property programs by states, and no compiled lists of all owners due property. Indeed, most states filed the hard copy reports, and maintained an index of unclaimed accounts on 3” x 5” cards.

In the late 1980s certain larger states began to reassess both the reporting/remitting process, and the role that government could play in *proactively* reuniting missing owners with property. Texas was the first state to allow reporting entities to remit all property at the time of the filing of the report;<sup>7</sup> This meant that when owner names were published, claimants were directed to obtain payment of their property not from the reporting entity, but from the state (however, reporting entities remained responsible for attempting to contact owners and pay their property directly to them, prior to transferring custody to the state). This required the state to hire and train additional personnel to handle claim inquiries. Texas (and soon thereafter, other states following its lead) realized that

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<sup>6</sup> 1954 Uniform Disposition of Unclaimed Property Act (prefatory note).

<sup>7</sup> In adopting the 1995 Uniform Unclaimed Property Act, the Uniform Law Commission noted that most states had eliminated the bifurcated reporting/remitting of property, and it was removed from that and subsequent model unclaimed property acts.

statewide publication of names, as opposed to the previous practice of only publishing in an owner's last known county of residence, would result in a higher probability of locating owners. More owners were found, and more claims were paid. At this same time, states were for the first time focusing on unclaimed property compliance, which resulted in significantly greater collections. States no longer simply had agencies where unclaimed property was sent; they had created, unclaimed property programs to administer lost assets.

This evolution is demonstrated by the unclaimed property collections and claims payment experience of Florida. The State's unclaimed property program, administered by the Department of Financial Services, maintains historical statistics for each fiscal year of the program's operation, dating back to its establishment in 1961. For the first 15 years of the program, collections averaged less than \$500,000 annually, with fewer than 100 claims (totaling less than \$100,000) paid each year. However, after 30 years (FY 1991), collections had reached the \$40 million annual level, with more than 10,000 claims totaling \$8.5 million paid.

The advent of electronic databases, personal computers, and networks made it possible for states to better store and access data, thus becoming more responsive to claim inquiries and managing the processing of claims. The first unclaimed property IT system was developed and implemented in multiple states. Elected officials and agency heads overseeing unclaimed property programs began to recognize the value of this public service, and media began to promote it. Program staff set up booths at state fairs and sporting events and other public venues, seeking to help attendees find lost property due them. Lists of missing owners entitled to property were created by legislative districts and provided to state legislators. Driver's license bureaus were provided with unclaimed property owner records and enlisted to direct owners back to the program, in conjunction with a license renewal.

The states were getting creative, and they were finding and paying missing owners. By the late 1990s, some unclaimed property programs were returning approximately 30 percent of the amounts collected, and states were pleased with these results.

And then, the internet happened.

## 2. The remarkable impact of the internet in facilitating a financial lost & found

### a. Individual state searchable websites

The internet has become the ultimate tool in reuniting missing owners with their assets. It allows an individual anywhere in the world to research the existence of unclaimed property at any time of day or night. It significantly augments the ability of a state to return lost property, because the state is no longer limited to situations where the program locates a missing owner. Instead, the owner can find unclaimed assets through his or her own efforts and self-identify as being owed property.

The impact of searchable state unclaimed property websites has been extremely significant. Referring back to the Historical Statistics compiled by the Florida Department of Financial Services, in FY 2005, the year in which the state established a searchable website, \$96 million was returned through 169,388 claims. A decade later (in FY 2015), Florida returned \$253 million through 395,094 claims. During FY

2018, Florida paid 623,326 claims totaling \$322 million. While Florida does not rely exclusively on its website to connect with missing owners,<sup>8</sup> without question the internet is a major component in Florida's success in returning property.

All NAUPA member states have searchable websites, and now rely upon them heavily in reuniting missing owners with lost assets. NAUPA member states have worked diligently to educate the public about the existence and operation of the websites, through paid and earned<sup>9</sup> media and through viral promotion on modern social media platforms. Perhaps the best promotion comes from word of mouth: individuals who identify property on the websites and successfully recover it tell their friends and family. Or, in many cases, they will perform searches on behalf of friends and family.

While initially individuals who identified property through an online search were required to print, complete, and submit a claim form, all states now facilitate the filing of an electronic form. For many states' websites the information that the user enters online is transferred in real-time to the state's unclaimed property database. The database does an immediate evaluation of the details provided and within minutes, an email is sent containing a claim form with customized evidence language informing the recipient of the documentation required to complete their claim. Additionally, the majority of states are offering a secure method for claimants to upload their supporting documentation. A claimant no longer has to mail documents into the department which significantly increases the rate of return of property to the rightful owners.

In my state of Illinois in calendar year 2013, 40 percent of claims paid were initiated from a website search. Five years later in 2018, a full 67 percent of all claims paid were from website searches. Our website allows potential unclaimed property owners the advantage of visiting the site one time, performing multiple searches, and entering their information once to create claims on multiple properties. Within seconds, the claimant receives an email notification containing detailed instructions on how to complete their claim. Supporting documentation, if needed, can be uploaded, securely, online and associated to the claim in our database within minutes.

All state searchable websites receive considerable traffic. In preparation for this testimony NAUPA received data from 11 states<sup>10</sup> on the number of searches conducted on their websites during the period January 31, 2019 through June 9, 2019. For these 11 states, 5.9 million searches were conducted, with an average number of daily searches in excess of 45,000. In general, there was a correlation between the population of a state and the number of searches conducted, although this was not always the case. The range in average daily searches was from 402 to 11,695.

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<sup>8</sup> For instance, Florida, like many other states, uses an informational database to obtain current owner addresses upon receipt of a report, and then immediately mails a notice to any owner with an updated address.

<sup>9</sup> "Earned" media consists of "free" publicity gained as a result of promotional efforts (as distinguished from "paid" advertising).

<sup>10</sup> Alabama, the District of Columbia, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Michigan, South Dakota, Utah and Wyoming. Collectively, the population of these states represents 15 percent of the population of the United States.

b. The states' national searchable website

The effectiveness and reach of individual state websites is enhanced through the states' national unclaimed property search website, MissingMoney.com.<sup>11</sup> Established by NAUPA in 1999, this website allows the public to simultaneously search 130 million records of reported unclaimed property for 40 states, the District of Columbia, Puerto Rico, and several Canadian provinces. There is no charge for performing searches through the website, and in most instances an on-line claim may be filed through the website. Searches can be conducted in either English or Spanish, and there are plans to add additional language options.

Since its creation 20 years ago, more than 875 million searches have been performed on MissingMoney.com. The current average number of searches conducted *daily* is 150,000. As of 2019, a total of 22.5 million owner claims have been filed through the website,<sup>12</sup> including 11.5 million claims filed by individuals residing in a state different from the state receiving the claim.

3. Proactive state efforts to return unclaimed property

State unclaimed property programs are well-established, easy to use, and trusted by the general public. Millions of individuals routinely search state websites for property owed to them, their family, and their friends. The hundreds of thousands of claimants that receive property from state programs each year continue to communicate their recoveries. As in the past, the "good government" characteristics of state unclaimed property programs continue to garner earned media.

States do not, however rely exclusively on their websites. First, not all members of the public are aware of unclaimed property programs or understand the work that they do. Second, some individuals either do not have access to the Internet or for one of many reasons will not search for their property online. Thus, there is an ongoing need to both promote unclaimed property programs, and to perform proactive outreach to locate missing owners.

a. Owner location

Approximately two-thirds of states have staff devoted specifically to locating and achieving direct contact with owners of unclaimed property. Beyond determining the current whereabouts of the owner, these staff locators assist in the filing of the claim. This is necessary because some owners (in particular, elderly individuals) are highly skeptical that the state is in possession of property owed to them. Generally, program locators focus on higher-value properties.

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<sup>11</sup> <https://www.missingmoney.com>. NAUPA's oral testimony to the Council will include a demonstration of this website.

<sup>12</sup> Some states allow for claims originating on MissingMoney.com to be filed through the website; in other cases, the claim is "exported" to an individual state website and filed there. The claim numbers for MissingMoney.com do not include claims exported to individual state websites and thus, the utility of the national database is understated.

State unclaimed property programs seek opportunities to engage directly with the public and assist in searching for property on a “hands-on” basis. Public events where unclaimed property kiosks have been set up include county and state fairs, sporting events, malls, concerts, and similar venues. Some states stage telethons, with staff taking telephone calls from individuals in a televised program hosted by a network affiliate.

Matching of owners of unclaimed property to state tax records and the systematic issuance of a payment for their property (discussed at length below) represents the ultimate in owner location. States will continue to explore further approaches for returning property to owners without requiring the submission of a claim form.

#### b. Owner outreach

Traditionally, the primary means of performing owner outreach were the publishing of owner names in newspapers and mailing a notice to an owner’s last known postal address.

Most states have found that the publication of individual owner names in newspapers is no longer cost-effective. However, a minority of states still publish owner names, some state-wide, and some in the county of the owner’s last known address. For those states that no longer publish owner names, there is nonetheless a periodic notice published in newspapers statewide, explaining the unclaimed property program and encouraging readers to perform a search on the program’s website. These notices are most frequently published following a state’s receipt of annual holder reports, which results in substantial new owners and properties being added to the searchable database.

Similarly, many states have discontinued mailing a notice to the reported address of the owner, because the entity who possessed the owner’s property is required by statute to send a notice to the owner prior to transferring the property to the state; moreover, in most cases, the owner no longer resides at the reported address. Instead, a number of unclaimed property programs run all owner addresses against an information database (such as Accurant or Clear) in order to determine if a more current address for an owner is available. Where a better address is obtained, the state then mails a notice to the owner at the updated address. These same databases also provide email addresses and phone numbers for owners which programs can then use to perform direct follow-up.

#### c. Publicity

States undertake a variety of approaches to promote awareness of unclaimed property programs, and to explain how they serve the public. The primary thrust of the messaging is to “check the website.” For most states, publicity consists of a mix of paid and earned media, with individual states determining what approach will be most effective. In Massachusetts, advertisements promoting the program and the “Find Mass Money” website are broadcast on both AM and FM radio stations daily.

Increasingly, states are making use of social media, including Facebook, Twitter, and Instagram. Postings cover both the program generally, and specific claims “success” stories. Some programs have paid for advertising on Facebook and have experienced a significant spike in claim inquiries as a result.<sup>13</sup>

Unclaimed property programs typically have access to a communications director within their parent agency. These individuals are effective in working with media to arrange for news coverage of the unclaimed property program. There is a great degree of interest in government returning property, and the media is highly receptive to the many feel good stories that programs provide. Programs frequently issue press releases when a new property return goal is met, or another milestone achieved.

A compilation of recent news articles concerning state unclaimed property programs is included in Appendix-Exhibit II.

#### 4. Changes in technology and processing to accommodate increased claims volumes

It has been necessary for all states to be able to build and maintain robust claims processing capabilities. Not all states process and pay over a half-million claims per year, but a number of states (in addition to Florida) do. Even Wyoming, the smallest state by population, processed and paid nearly 7,000 claims in the last fiscal year.

In recent years most unclaimed property programs have implemented one or more of the following process improvements to ensure timely and competent claims administration:

##### a. Expanding state website functionality

In addition to enhanced online search and filing capabilities, states have also expanded their website for ease of the public’s use in other ways. Many states have added upload functionality for claimants to upload their documentation in a secure manner. Eliminating the need to mail physical evidence has increased the response and payment of claims. Claimants are also notified from the time the claim is created, through internal status changes and when the claim is approved for payment via two processes. They can track their claim’s progress on the state’s website; most states have implemented a near real-time progress of a claim. Additionally, some states send out notices via email after milestone statuses are achieved on a claim (i.e. documentation received, processed, approved, payment).

##### b. “Fast tracking” of certain types of unclaimed property claims

Historically, states processed all unclaimed property claims in a similar manner, regardless of the value or other characteristics. In the face of mounting claims volumes, state unclaimed property programs reassessed this approach. After considering various risk factors, states ascertained that claims could be handled on an expedited or “fast tracked” basis, utilizing machine learning capacities. While specifications vary among states, generally a claim can be “fast tracked” when the following criteria are met:

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<sup>13</sup> NAUPA’s oral testimony to the Council will include a description of how the Utah unclaimed property program utilizes social media.

- The property was reported in the name of a single individual owner;
- The claim was filed by the presumptive single individual owner;
- The claim was filed on-line;
- The claim did not involve a stock certificate or a bank remittance instrument;
- The claim provided information that was verified through an automated commercial database; and
- The property value was insubstantial (e.g., < \$1,000)

Primarily utilizing software developed by unclaimed property program service providers, which included a number of anti-fraud<sup>14</sup> and other safeguards, states were able to shift a substantial volume of claims through this automated process. It is estimated that approximately 30 percent of claim submissions can now be handled in this manner, freeing up claims personnel for higher value and more complex claims.

As with all unclaimed property claims, payments issued through the “fast tracked” procedures are reviewed by internal auditors to ensure their integrity. This includes an ongoing assessment of the overall accuracy of the approach. Over time, as they develop a track record that only rightful owners are being paid through the process, many states have increased the maximum value of claims that can be “fast tracked.”

- c. Obtaining updated owner addresses in other state records to make payments to owners without the necessity of filing a claim

Many unclaimed property programs have leveraged the records of other state agencies to locate the current whereabouts of missing owners. The California State Controller, who administers the unclaimed property program, has since 1996 obtained through the California Franchise Tax Board current taxpayer addresses, for those owners of unclaimed property reported with a tax identification number. Similarly, other states have utilized motor vehicle registration, land, and other government records to obtain updated owner addresses.

In 2014, the Wisconsin unclaimed property program, which is administered by that State’s Department of Revenue, secured the enactment of legislation<sup>15</sup> to create an innovative process to both obtain a current, verified address for a lost owner, and to unilaterally issue payment of property due them. Now the unclaimed property program annually provides tax operations the names and, where available, the social security numbers of reported owners of unclaimed property.<sup>16</sup> Tax operations advises the unclaimed property program whether the owner filed an income tax return during the current year and,

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<sup>14</sup> States combat fraud on an ongoing basis. It is the public dissemination of information concerning unclaimed property that allows for these assets to be returned to missing owners; however, at the same time it results in some individuals attempting to criminally claim money that is not theirs. The measures taken to prevent and identify fraud are extensive but will not, for security reasons, be discussed in this public document.

<sup>15</sup> 2013 Wisconsin Act 308, enacted April 16, 2014.

<sup>16</sup> Wis. Stat. § 177.19(1).

if so, the address of the owner listed in the return.<sup>17</sup> Where a match is made<sup>18</sup> and the property has a value of \$2,000 or less the unclaimed property program issues payment to the owner, without the filing of a claim form.<sup>19</sup> If the owner's property is \$2,000 or more, the unclaimed property program mails a claim form to the owner at the updated address.<sup>20</sup>

The initial automated matching of unclaimed property and tax records occurred in June 2015. The matching process resulted in nearly \$12 million in unclaimed property being distributed directly to 95,670 owners. For the period encompassing the 2016 fiscal year through February 2018, the Wisconsin Department of Revenue paid out an additional \$10 million to 70,000 more owners through this new data matching system.<sup>21</sup>

The Wisconsin approach to data matching and systematic issuance of unclaimed property payments to rightful owners was embraced by NAUPA, which proposed it to the Uniform Law Commission (ULC) for inclusion in the 2016 Revised Uniform Unclaimed Property Act. The ULC acted on NAUPA's recommendation, adopting provisions mandating data sharing by other state agencies with the unclaimed property program<sup>22</sup> and authorizing the program to make payments directly to verified owners without the requirement of a claim form.<sup>23</sup>

Five states<sup>24</sup> have thus far adopted the 2016 Revised Uniform Unclaimed Property Act including its provisions for data sharing by other agencies and systematic payment to verified owners. An additional three states<sup>25</sup> have implemented programs similar to Wisconsin's. While not all of these states have yet

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<sup>17</sup> Wis. Stat. § 177.19(2).

<sup>18</sup> The Department of Revenue excludes from matching any tax return where there is suspected or confirmed fraud.

<sup>19</sup> Wis. Stat. § 177.19 (3)(b)(1).

<sup>20</sup> Wis. Stat. § 177.19 (3)(b)(2). Because the identity of the owner has already been verified, the claim form requires minimal additional information from the owner, and once filed undergoes expedited review and payment.

<sup>21</sup> *Id.* Wisconsin's unclaimed property law requires newspaper publication of the names of owners entitled to unclaimed property; however, if the State itself can locate the owner and either make payment or initiate a claim, that owner name need not be published. The tax-matching and claims protocols make it possible for Wisconsin to timely locate and pay many lost owners, thus reducing the State's publication expenses.

<sup>22</sup> 2016 Revised Uniform Unclaimed Property Act, § 504.

<sup>23</sup> 2016 Revised Uniform Unclaimed Property Act, § 903(b). A state has the option to determine the maximum value of property to be paid without the requirement of a claim form; the placeholder provided by the ULC was \$250.

<sup>24</sup> Colorado, Illinois, Kentucky, Tennessee, and Utah

<sup>25</sup> Illinois, Louisiana, and Rhode Island.

completed the process, the results to date have been incredibly successful.<sup>26</sup> It is expected that additional state unclaimed property programs will seek legislation<sup>27</sup> authorizing these methodologies.<sup>28</sup>

d. Utilization of informational databases

In order to protect the interests of the rightful owner, it is important that a state unclaimed property program only pay the person actually entitled to an asset. In addition to the potential for a person with the same name as a reported owner mistakenly claiming property, there is a possibility of claims fraud.

In seeking documentation from claimants, states must take into consideration the potential burden imposed through seeking extensive claims evidence, particularly with respect to property that became payable decades ago. The objective of the unclaimed property program will not be achieved if claimants are required to provide documentation that cannot be reasonably retrieved.

While states are uniquely positioned to validate the identity of their own citizens through vital, tax, and other records, states also extensively use informational databases such as Lexis/Nexis Accurint and Thomson Reuters Clear ID in order to validate submitted claimant information, and to obtain needed information that could be missing from a claim.<sup>29</sup> A claimant may be unable to document residence at a prior address. These types of informational databases will provide an individual's address history. They also include additional information that only the claimant would know and can be asked of the claimant by the state as required to verify the legitimacy of the claim filings. These databases, in conjunction with state agency databases (including Department of Health death records) provide a uniquely robust, secure, and accurate method to validate claims.

The ability of state unclaimed property programs to not only locate very substantial numbers of missing owners, but to also return their property in a professional and timely manner, has only been possible through ongoing process improvements. States are continually presented with the challenge of reviewing and paying an increasing volume of claims, and it is anticipated that programs will be required to develop further innovations in order to maintain standards.

**In the event that retirement plans were to report substantial volumes of uncashed plan checks, NAUPA believes that its member states would be fully capable of managing the resulting influx of**

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<sup>26</sup> During the past year, Illinois issued claim payments totaling \$13 million processed via tax match to 126,000 owners. Louisiana paid \$10.5 million to rightful owners via tax match, representing 25 percent of its total claims volume. Rhode Island paid more than \$10 million to more than 35,000 owners through its initial tax match.

<sup>27</sup> Under the laws of most states, information maintained by a taxing authority cannot be utilized for a purpose not expressly authorized by statute. Because the unclaimed property program typically is providing its data to the taxing authority, and only obtaining back updated address records, there is virtually no risk of disclosure of any sensitive information.

<sup>28</sup> However, for the nine states (Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, and Washington) that either do not have a personal income tax or who do not tax wages, matching to state income tax records is not an option.

<sup>29</sup> The most significant data point in claims validation is the owner's social security number. To the extent that records of uncashed plan checks include the beneficiary's social security number, many of the claims validation issues that sometimes arise will be avoided.

**owner claims.** A precedent is provided by the significant influx of matured life insurance policy proceeds (approximately \$3 billion<sup>30</sup>) received by the states during the period 2012 through 2017. The states proved able to successfully administer this increase in collections, outreach, and claims.

**C. Return rates among states and factors impacting them.**

NAUPA most recently compiled information concerning state collection and return rates for fiscal year 2015. All states, the District of Columbia, and Puerto Rico provided data. For that year, the states collectively reported unclaimed property receipts of \$7.763 billion, and claims paid of \$3.235 billion.

Currently, NAUPA is obtaining collection and claims numbers for more recent periods. At such time as the information is compiled, NAUPA reasonably believes that it will reflect both increased collections and increased paid claims.

As an example, here is data for all liquid unclaimed property remitted and returned in Illinois for the five most recent fiscal years (in millions of dollars) – please note that Illinois adopted the 2016 Revised Uniform Unclaimed Property Act in 2017 and shortened many abandonment periods from five years to three years.<sup>31</sup>

Year	All Liquid Property <sup>32</sup>		
	Remitted	Claimed	%Claimed
FY15	\$229.2	\$112.1	49%
FY16	\$177.5	\$120.9	68%
FY17	\$196.6	\$111.3	57%
FY18	\$383.2	\$138.3	36%
FY19 (part)	\$438.7	\$201.9	46%

But, a portion of property reported is literally unclaimable because it is reported without the name or address of the owner. Under the federal common law established by the U.S. Supreme Court,<sup>33</sup> unclaimed property is reportable to the state of last known address of the owner; however, where the owner’s state of last known address is undocumented, the property is reportable to the state of incorporation of the entity owing the property.<sup>34</sup> All states receive some volume of “owner unknown”

<sup>30</sup> See “Life Insurers Fight States,” *Wall Street Journal*, Feb 26, 2016. “So far, the 22 biggest U.S. life insurers by premiums... have paid out more than \$7.4 billion on old policies, either directly to beneficiaries or to state unclaimed-property departments.”

<sup>31</sup> As a result of the shortened period of abandonment under the 2016 Revised Uniform Unclaimed Property Act, Illinois has experienced a temporary increase in reported properties in FY18 and FY19.

<sup>32</sup> This data does not include the value of returned tangible property or unliquidated securities.

<sup>33</sup> See discussion concerning the Supreme Court’s priority rules in section (F), below.

<sup>34</sup> The state of incorporation also receives, by way of default, property due owners with last known addresses in foreign countries. While the states collectively pay millions of dollars annually to foreign claimants, it is not as feasible for a state to perform active outreach to residents of other countries, when compared to residents in their

property;<sup>35</sup> however, banking center states, in which major financial firms are domiciled, receive substantial sums<sup>36</sup> which cannot be tied to an identifiable owner. Limiting the data to only properties reported with names, naturally, increases the return rate as the below data indicates.

<b>Property with Names</b>			
Year	Remitted	Claimed	%Claimed
FY15	\$194.9	\$104.6	54%
FY16	\$150.7	\$116.2	77%
FY17	\$176.0	\$107.0	61%
FY18	\$339.0	\$134.2	40%
FY19 (part)	\$384.0	\$194.5	51%

Properties that are reported with a Social Security Number or other taxpayer identification number with an in-state address are, as discussed above, able to be matched more easily with state tax records and commercial databases. As a result, return rates are even better and the data below reflects this. **As plans should have participant SSNs this is more analogous to the return rate that Illinois achieves with similar properties (after the holder has been unable to locate and return the property).**

<b>IL Property with SSN</b>			
Year	Remitted	Claimed	%Claimed
FY15	\$90.2	\$75.3	83%
FY16	\$69.2	\$72.6	105% <sup>37</sup>
FY17	\$115.8	\$73.6	64%
FY18	\$149.3	\$92.3	62%
FY19 (part)	\$217.8	\$130.9	60%

The Illinois State Treasurer proposed that other states provide recent data (June 1, 2018 to May 30, 2019) to NAUPA in order to enable a multi-state study. As a result, collection and claims data was

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own state. Accordingly, return rates for property where the owner is outside of the United States are comparatively lower.

<sup>35</sup> State unclaimed property laws generally include an “aggregation amount,” a value under which an entity reporting unclaimed property is not required to (but may) provide an owner name and address. These values vary by state, from properties with a value of less than \$5 (as in Illinois) to less than \$100. Aggregation amounts have an historical basis, dating back to a period when unclaimed property reports were prepared by hand or typewritten, and when all states published the names of missing owners in newspapers. The rationale was to spare entities reporting unclaimed property from the effort of detailing smaller accounts, and to spare states the incredible expense associated with advertising. However, aggregation of small properties is not mandatory; an entity reporting unclaimed property may include names and addresses for all owners, regardless of the value of their property. Where property is reported in the aggregate, the ability of the state to locate and pay the associated owners is greatly limited

<sup>36</sup> It is not uncommon for a major bank to report \$60 million or more annually to its state of domicile in unclaimed property without an owner name or address. Much of this property relates to unidentifiable remittances received by banks and mis-postings of transactions. Additionally, some types of remittance instruments are routinely issued without recording the name and address of the remitter or payee.

<sup>37</sup> Property is often reported in one year and returned in a subsequent year. As a result, a return rate can occasionally be more than 100%.

compiled for 14 states,<sup>38</sup> representing a mix of small, medium and large states, representing 25 percent of the U.S. population.

Below is a summary chart of the resulting data for the most recent twelve months (in millions of dollars) using the same categories as used above for the Illinois-specific data. Please note that for properties similar to the uncashed checks from ERISA plan (i.e. reported to the state of the owner with a taxpayer identification number) the return rate is 70 percent.<sup>39</sup> Again, this is only after the holder of unclaimed property was unsuccessful in reuniting the property with the rightful owner. States succeed 70 percent of the time for properties for which the private businesses had a zero percent return rate.

#### 12-Month Multi-State Unclaimed Property Data

	Remitted	Claimed	%Claimed
All Liquid Property	\$1,899.9	\$932.5	49%
Property with Names	\$1,605.9	\$863.4	54%
In State Property with SSN	\$778.6	\$548.3	70%

#### D. Significant aspects of state administration of unclaimed property (including Council identified issues of rates of return paid to owners and tax treatment)

##### 1. The claims processing cycle and denied claims

The basic outline for a state unclaimed property program's receipt, review and payment of claims are provided for by statute.<sup>40</sup> The following is an explanation of a typical state program claims process:

- Claim is created, with a majority of claims created online by claimant themselves
- Claimant is systematically sent a claim form with detailed instructions on how to substantiate their claim; claimant gathers documentation and remits it to the state
- State reviews documentation
  - If all requested documentation is received, claim moves to the approval process;
  - If additional documentation is required, claimant receives a follow-up 'evidence request' for additional documentation
- Claim moves through the state's approval process; the number of levels of approval depends on the total value of the claim and/or the disposition of the property

<sup>38</sup>Including Alabama, the District of Columbia, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Michigan, North Dakota, South Carolina, South Dakota, Texas, Utah, and Wyoming. These states were among 20 who were contacted for no other reason than their common use of a single data management contractor, which facilitated timely collection of data on a tight turnaround basis.

<sup>39</sup>When considering only amounts \$100 or greater, the return rate was even higher (72 percent).

<sup>40</sup> See, e.g., 1981 Uniform Act, §§ 24 and 26; 1995 Uniform Act, §§ 15-16; 2016 Revised Uniform Act, §§ 901-906.

- After final approval, the claim will be paid; if the claim cannot be substantiated, it may be denied or additional ‘evidence requests’ may be sent to the claimant

Most state statutes dictate a time in which a claim must be approved or denied. Generally, the statutory timeframes are elongated (e.g., 90 days) and do not comport with claimant expectations.<sup>41</sup> For all unclaimed property programs, the goal is to pay claims as quickly as possible while maintaining appropriate accuracy. For many states, the average turnaround time from the creation of a claim to the issuance of payment is 28 calendar days. Some programs regularly submit 90 percent of approved claims for payment within 5 business days of receipt. Claims made by the heirs of deceased owners are more legally complex and, therefore, usually require more time, as do situations where the claimant does not provide required information. Conversely, a “fast track” claim may be paid several days from the date of filing.

Where a claim is denied, the claimant has a right of appeal. However, it is standard state practice to explain to a claimant in writing the basis on which the claim was denied. The most frequent reason for rejection of a claim is insufficient evidence of legal ownership. Where this is the case, the state will generally advise the claimant as to the types of additional information needed to substantiate the claim. In most cases, the additional information is provided, and the claim is approved; in other cases, the claimant does not pursue the claim.<sup>42</sup> Formal administrative appeals of denied claims seldom occur.

## 2. Rate of return (interest) paid to owners

As a general rule, states do not pay interest on all property types during the period it is maintained in the state’s custody. However, a subset of states do pay interest on property that was interest-bearing at the time of transfer to the state, and all states credit owners with dividends received on securities held in the state’s name. A small number of states<sup>43</sup> pay interest on all property held in custody.

Neither the 1981 Uniform Unclaimed Property Act nor the 2016 Revised Uniform Unclaimed Property Act direct that the state pay interest on property held in state custody. The 1995 Uniform Act limits the payment of interest to properties where the reporting entity was paying the owner interest.<sup>44</sup> State legislatures, in adopting these Uniform Acts, have generally not added a requirement to pay interest on unclaimed property claims.

Likewise, plans and their service providers do not pay interest on benefit distributions for the period that they remain uncashed.

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<sup>41</sup> One of the goals of unclaimed property program operations is to minimize claimant complaints, which are often received through state legislators or (worse) the unclaimed property agency head.

<sup>42</sup> In the states’ experience, some claimants believe that they should be entitled to claim property simply because they share the same name as a reported owner. While states endeavor to do everything possible to complete the claims process for a claimant who is *actually entitled* to property, states understandably can’t pay an individual simply on the basis of their submission of a claim.

<sup>43</sup> Massachusetts, Michigan, New Jersey, and Ohio.

<sup>44</sup> 1995 Uniform Unclaimed Property Act, § 11.

We can appreciate the preference of fiduciaries that plan participants receive some interest on outstanding distributions. This might ensure that the benefit would not lose value over time, as a result of inflation. However, NAUPA submits that in transferring custody to a state unclaimed property program, a lost participant is more likely to be found and paid, as contrasted with other options.<sup>45</sup>

### 3. Reporting entity relief from liability

Upon the transfer of unclaimed property to the state, the state assumes full responsibility for the safekeeping of the property. Provided that the reporting entity has acted in good faith, under the unclaimed property statutes of every state the reporting entity is relieved of all liability, for any claim then existing or which may subsequently arise.<sup>46</sup> A majority of states also provide reporting entities with statutory indemnification or an alternative hold-harmless provision.<sup>47</sup>

A plan fiduciary would be fully discharged from its obligation to make payment to a beneficiary upon transferring funds to the state. The state assumes the obligation to do so, as well as to defend the entity who transferred property to the state against the claims of third parties.

### 4. Reimbursement of reporting entity payments made to owners

Not infrequently, a reporting entity may choose to make payment to a reappearing owner notwithstanding the prior transfer of that owner's property to a state unclaimed property program. This is done as a convenience to the owner. When this occurs, the reporting entity is entitled to receive the reported funds back from the state. All state statutes expressly authorize this arrangement.<sup>48</sup>

This process also serves to return funds to reporting entities where it is determined that property was transferred to the state in error, e.g., it is subsequently discovered that a check reported as uncashed had in fact been paid.

### 5. Tax reporting and treatment

For most state unclaimed property programs, tax reporting is performed with respect to taxable events that occurred with respect to property while in the state's custody. This would include issuing form 1099s for any interest paid the by the state; for dividends received on securities registered in state name; and for proceeds from liquidation of securities, either through corporate action or sale by the state. Any such tax reporting is performed on claimed properties only, in the year in which the property is paid to an owner. For most claims, there is no tax reporting required because a taxable event, if any, occurred upon the property becoming payable or distributable, and not upon its transfer to the state.

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<sup>45</sup> As noted elsewhere in this statement, the rate of return on unclaimed property is ultimately irrelevant if the owner is never successfully located and paid.

<sup>46</sup> See, e.g., 1981 Uniform Unclaimed Property Act, § 20(a); 1995 Uniform Unclaimed Property Act, § 10(b); 2016 Revised Uniform Unclaimed Property Act, § 604(a).

<sup>47</sup> See, e.g., 1981 Uniform Unclaimed Property Act, § 20(e); 1995 Uniform Unclaimed Property Act, § 10(f); 2016 Revised Uniform Unclaimed Property Act, § 604(b).

<sup>48</sup> See, e.g., 1981 Uniform Unclaimed Property Act, § 20(e); 1995 Uniform Unclaimed Property Act, § 10(f); 2016 Revised Uniform Unclaimed Property Act, § 604(b).

State unclaimed property programs have sought guidance from the Internal Revenue Service (IRS) concerning tax reporting for unclaimed property, including the ability to treat reported Individual Retirement Accounts as tax-free rollovers, both in terms of receipt and upon an owner filing a claim. The desire to obtain clarity from the IRS on the proper tax treatment of unclaimed IRAs has not been limited to state programs; the Information Reporting Program Advisory Committee (IRPAC) has repeatedly asked the IRS to clearly define custodian reporting requirements.<sup>49</sup> At the present time, no state has received authorization from the IRS to treat reported IRAs on a rollover basis. Some claimants desiring to reinstate an IRA reported as unclaimed have acted under IRS Rev. Proc. 2016-47, which allows for a waiver of the 60-day rollover requirement in certain circumstances. However, states do not view this as optimal, and they will continue to attempt to develop workable approaches with the IRS.

With respect to the Council's focus on uncashed plan checks, where payment has *already* been issued, any tax reporting and withholding has been performed, and has not been handled as an IRA rollover, the necessity of a state to provide rollover treatment is unclear. Admittedly, the ability of states to facilitate rollovers might be significant in the future, with respect to certain distributions that have not yet been made,<sup>50</sup> or if lump sum account balances were to additionally be transferred to unclaimed property programs. But as to distributions previously made and currently outstanding, tax reporting and any required reporting and withholding has presumably already occurred.

#### 6. Permanency of record keeping by state unclaimed property programs

State recordkeeping systems maintain all data indefinitely. The records retained include, but are not limited to, all reported owner data, identification of the entity filing the report, receipt of the property transferred to state custody, claims filed, and claims paid.

States do not purge recorded data at any time. Data backups are performed on a routine basis.

The 2016 Revised Uniform Unclaimed Property Act includes state record retention requirements.<sup>51</sup>

#### 7. Disposition of property receipts and impact on owner claims

Funds received by a state unclaimed property program are generally maintained in program accounts until the end of the fiscal year. At that time, the balance of funds, less a reserve to ensure adequate liquidity for the ongoing payment of claims pending future collections, is transferred. Depending on state law, the funds may be moved to a trust fund, the general fund, or some combination thereof.

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<sup>49</sup> On March 29, 2018, the IRS issued Revenue Ruling 2018-17, which directed IRA custodians to withhold 10 percent of the value of an unclaimed IRA to be transferred to a state unclaimed property program, and to issue a form 1099R. This requirement was to take effect January 1, 2019. However, following a dialogue with IRA custodians, the IRS issued Notice 2018-90, delaying the implementation of the ruling until January 1, 2020. The states are hopeful that an alternative approach to mandatory backup withholding for unclaimed IRAs can be agreed to by IRS in the current year.

<sup>50</sup> As discussed in section G(1) below, NAUPA questions the appropriateness of a rollover of an unclaimed mandatory distribution.

<sup>51</sup> 2016 Revised Uniform Unclaimed Property Act, § 802.

For most states, unclaimed property funds are transferred to the general fund. However, in conjunction with this transfer, the state, acting in accordance with Governmental Accounting Standards Board (“GASB”) Statement No. 21,<sup>52</sup> makes a claims probability analysis. The analysis, which is performed utilizing the unclaimed property program’s historical claims experience, determines the “accounting liability” for transferred funds that are likely to be later claimed. The state recognizes the accounting liability value, and not the value of unclaimed funds transferred to the general fund, likely to be paid out by the state at a future date. Each year, the accounting liability is reviewed and adjusted to reflect the claims experience for the previous 12 months.

The transfer of unclaimed funds to general funds does not impact an owner’s ability to receive payment from a state unclaimed property program. As noted by GASB Statement No. 21, the state maintains the “legal liability” to repay all reported amounts. With few exceptions, an owner has the right to reclaim property in perpetuity. Accordingly, plan fiduciaries should be assured that if a beneficiary or heir makes claim to property owed to them, they will be paid.

#### 8. Data security protocols

State-managed unclaimed property programs have demonstrated an excellent track record with respect to data security for tens of millions of property owners and their heirs over the last several decades. Most unclaimed property programs are housed within the fiscal management function of state governments—the state treasurer, the department of revenue, or similar agencies. These entities process millions of financial transactions between citizens and their state government and often adopt standards for data protection required by the Internal Revenue Service and United States Treasury. As a result, most unclaimed property management systems offer a variety of data security protections mandated by the IRS. The leading system in the market offers encryption as recommended in NIST 800-53(r4). This mandates several levels of encryption: in transit, at rest, and internally between application components. Other legacy systems typically offer encryption in transit (i.e., reports, such as unclaimed property reports, submitted to the state) at a minimum.

State unclaimed property websites do not represent a security risk for property owners. The data that is available for public-facing is limited to a subset of information required for owners to search for and initiate a claim for property. State websites protect the submission of claimant data by using advanced encryption methods and a variety of other tools to protect the integrity of owner data and to prevent access and mass downloads.

The 2016 Revised Uniform Unclaimed Property Act includes express state data security requirements.<sup>53</sup>

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<sup>53</sup> 2016 Revised Uniform Unclaimed Property Act, § 1406(c).

**E. Statutory and other legal reporting protocols (including Council identified issues concerning plans with participants in multiple states, and the period before property is presumed abandoned<sup>54</sup>)**

All state unclaimed property programs follow the federal common law dictating to which jurisdiction unclaimed property must be reported. These rules were established by the U.S. Supreme Court starting in 1965<sup>55</sup> to resolve conflicting state unclaimed property claims. The rules can be briefly summarized as follows: unclaimed property is reportable to the state of last known address of the owner in the records of the holder. If there is no address of record for the owner, or the owner's last known address is in a foreign country, the unclaimed property is reportable to state of incorporation of the entity that owes the property.<sup>56</sup>

Absent modification of the federal common law by Congress, states are legally required to follow these priority rules.<sup>57</sup> However, states support the "state of last known address of the owner" concept, because reporting unclaimed property on this basis increases the likelihood of recovery by the owner. Even where an owner no longer resides at the address of record, it is still probable that they have relocated within the same state.<sup>58</sup> Additionally, an owner searching for unclaimed property is more likely to contact an unclaimed property program in a state where the owner resides or formerly resided.<sup>59</sup> And significantly, even after moving away from a state (or in the event of death), an owner is likely to still have family or friends in that state, which may provide a conduit for determining the owner's (or an heir's) whereabouts.<sup>60</sup>

Reporting the property to the owner's state of last known address increases the probability that the asset will be recovered by the owner. For this reason (along with the underlying Supreme Court mandates) NAUPA would encourage a retirement plan to report on this basis. This would mean that a plan with uncashed checks owed to participants with last known addresses in multiple states would be

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<sup>54</sup> The Council's issue statement referenced as an issue the "period before *escheatment* to the states." While the term "escheatment" is still occasionally used as being synonymous with state *custodial* unclaimed property laws, NAUPA itself seeks to avoid the term due to its legal definition of a state taking title to property. This is virtually never the case with respect to modern unclaimed property legislation.

<sup>55</sup> *Texas v. New Jersey*, 379 U.S. 674.

<sup>56</sup> *Id.* at 680-83.

<sup>57</sup> Under the Full Faith and Credit clause of the U.S. Constitution, a state is prohibited from assuming custody of unclaimed property that is subject to administration by another state, and the respective state unclaimed property laws mirror the Supreme Court's priority rules.

<sup>58</sup> In 2015-16, 86% of individuals relocating their residence in the United States remained in the same state; 64% remained in the same county. While a greater number of individuals moved in prior years, the same state/same county percentages have remained relatively consistent. See U.S. Census Bureau, "CPS Historical Migration/Geographic Mobility Tables (2018)," downloadable at <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html?kbid=93121&gclid=>

<sup>59</sup> Realizing that this may not be self-evident to all members of the public, state unclaimed property program messaging has stressed the utility of individuals searching for unclaimed property to contacting both their state of current residence and any former residence.

<sup>60</sup> In proactively searching for owners, which is primarily but not exclusively undertaken with respect to larger unclaimed amounts, a state will routinely contact an owner's relatives or former neighbors in an effort to ascertain a current residence.

required to file reports in multiple states. **NAUPA recommends that a plan report unclaimed property to the state of the owner's last known address.**

While a plan sponsor's staff responsible for administration may be unfamiliar with unclaimed property reporting, it is highly probable that other personnel at that employer are already filing unclaimed property reports to multiple states annually with respect to other company operations. NAUPA member states accept a common reporting format, which is available at no cost; however, most companies utilize customized versions that are sold by various software companies. Many larger companies will outsource their reporting through a service provider, and the major record keepers utilized by medium and larger plans have been preparing and filing their own reports with states (consisting of brokerage accounts, mutual funds, disbursements) for many years. Because of the customer footprint of these major record keepers, they are already reporting in every state and have been for decades.

Not all state reporting parameters (i.e., abandonment periods) are identical. Most states consider a check unclaimed and reportable if it remains uncashed for three years; however, in approximately 15 states the abandonment period is five years.<sup>61</sup> States with three-year abandonment periods collect more unclaimed property per capita than states with five-year periods, and they also return more property. It stands to reason that the shorter the period that an owner has been lost before a search is commenced, the more likely they will be found (and with respect to retirees, the more likely they will still be living). Every state unclaimed property law requires that the entity owing the property first attempt to notify the owner about the existence of the property and provide the owner with an opportunity to claim it directly from that entity.<sup>62</sup>

NAUPA believes that a three-year period of abandonment, running from the date of issuance of a check, where there has been no communication from the owner and a holder search has been unsuccessful, is a reasonable period for presuming the associated funds to be unclaimed. Where a check did not reach the beneficiary and was returned by the post office as undeliverable, it seems probable that if the owner was aware of the entitlement, some status inquiry would not have been made. Using a "reasonable person" standard, a 36-month abandonment period seems reasonable.<sup>63</sup>

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<sup>61</sup> The 1981 Uniform Unclaimed Property Act established the five-year abandonment period; however, in the 1990s, many states (following the lead of California and Texas) began reducing the abandonment period for uncashed checks to three years. The 2016 Revised Uniform Unclaimed Property Act adopted the three-year abandonment period.

<sup>62</sup> While state unclaimed property laws do not limit the efforts that an entity in possession of unclaimed property can undertake to locate an owner, they do specify the mailing of a notice where the property exceeds a threshold value (typically \$50) and the last known address is not known to be inaccurate (as evidenced by returned mail). The past pronouncements of the Department of Labor as to what constitutes a "diligent search" by a fiduciary are generally more rigorous than state requirements. Presumably, states would waive their own (different) statutory search requirements where a plan had conformed to Labor requirements. In the event that uncashed plan distribution checks are ultimately transferred to state custody, NAUPA would recommend that a plan note such disposition in any communications to missing participants.

<sup>63</sup> Plan paying agents and disbursing trustees would be in a position to provide reliable data as to the time frames under which plan checks clear. Based on its experiences, NAUPA presumes that there is significant encashment during the two weeks following check issuance, with small levels of presentment over the ensuing six months, and minimal activity after one year. Variables in these presentment rates would include the size of the checks, and the extent to which a plan systematically followed up concerning outstanding payments, e.g. at 90 days from issuance.

Under the laws of those states with five-year abandonment periods for uncashed checks—as with the unclaimed property laws of all states—there is the ability to report property early.<sup>64</sup> This is a mechanism under which a plan could report all uncashed distributions to all states, utilizing a three-year period of dormancy. A plan could report and remit the uncashed check funds to all states, using a common filing date. While it is correct that there are variances in state filing dates<sup>65</sup> and reporting periods,<sup>66</sup> states will accommodate reporting entities requiring a modified schedule, where the reporting entity so notifies the program. Statutory reporting dates notwithstanding, states routinely receive and process reports of unclaimed property virtually every working day.

## **F. Issues with alternatives for reuniting unclaimed retirement plan distributions with missing participants**

The Council’s issue statement notes that plans have “a number of options to handle uncashed checks.” One of the options listed is the “voluntary distribution to a state unclaimed property fund.” NAUPA is pleased that the Council considers state unclaimed property programs to represent an acceptable alternative. Unfortunately, the conventional wisdom has been that an active plan that is subject to ERISA cannot remit uncashed check funds to the states. As a result, NAUPA believes that the superior benefits of state reporting have never been fully considered.

NAUPA believes that, as a general proposition, the state unclaimed property option provides fiduciaries with the best opportunity to reunite missing participants with their retirement savings.

### **1. Rollover to an Individual Retirement Account**

Rollover of uncashed plan checks to an Individual Retirement Account (IRA) may not be appropriate.

Where the participant has reached retirement age and the uncashed check represents a mandatory distribution, transferring those funds into a tax-deferred account appears to circumvent the IRS mandate that a distribution must be taken and income tax recognized. Moreover, the rollover IRA would itself become reportable unclaimed property shortly after its establishment.<sup>67</sup>

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<sup>64</sup> See 1981 Uniform Unclaimed Property Act § 27(b); 1995 Uniform Unclaimed Property Act, § 17(b); 2016 Revised Uniform Unclaimed Property Act § 608(b). The primary concern of states regarding the premature reporting is the sufficiency of the reporting entity’s owner search efforts. However, where a plan had followed the Department of Labor’s historically required search steps for missing participants, a state would be assured that the owner was indeed lost.

<sup>65</sup> More than 40 state statutes include a uniform report filing period between July 1 and November 1; the laws of the remaining states generally provide for a spring reporting period.

<sup>66</sup> More than 40 state statutes provide for a calendar year reporting period; the laws of the remaining states generally provide for a fiscal year reporting period.

<sup>67</sup> Generally, the reporting of IRAs under state unclaimed property law is required three years after “the date...specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty,” 1995 Uniform Unclaimed Property Act, § 2(a)(14). See also 1981 Uniform Unclaimed

Where the amount of the uncashed plan check is relatively small, it is questionable whether the transfer of the underlying funds to a rollover IRA comports with a plan's fiduciary responsibilities. The time and expense required to establish the rollover IRA would not be justifiable, and custodian fees would likely consume the entirety of the asset within a short period of time. Further, some rollover IRA custodians require a minimum asset value to set-up the rollover IRA.

Rollover IRAs may be suited for forced transfers, where a participant has separated from employment, has not yet reached retirement age, and has vested benefits of \$1,000 to \$5,000. In theory, the IRA would grow, at least preserving the retirement benefit by keeping pace with inflation. However, a 2014 Government Accountability Office ("GAO") report<sup>68</sup> found that custodian fees outpaced investment returns for most IRAs that it analyzed.<sup>69</sup>

NAUPA understands that many rollover IRA custodians perform research to obtain current addresses for lost owners. Under the rules of the Securities and Exchange Commission, where the IRA is invested in securities, lost security holder searches are required.<sup>70</sup> NAUPA believes that most of the address research is performed utilizing credit bureau database aggregators such as Equifax or TransUnion. In all probability, the plan or its service provider utilized these same tools in an effort to locate the current whereabouts of a missing participant, prior to the establishment of the rollover IRA. The rollover IRA custodian in many cases will be accessing the same information that previously proved unfruitful for the plan. Thus, the beneficiary and the plan would bear additional transactional costs for no benefit.

It is NAUPA's additional understanding that at least one rollover IRA custodian has established a website<sup>71</sup> to assist the public in recovering unclaimed retirement benefits. We support all efforts to reunite owners with lost property. However, we are unable to ascertain the utility of this and similar websites. We are certain that this website does not receive the same level of publicity and activity that state unclaimed property websites do.

## 2. Rollover to an annuity

Guaranteed annuity contracts ("GACs") are being addressed separately from rollover IRAs by NAUPA, because of the general view in the insurance industry that the reporting of ERISA-related GACs to state unclaimed property programs is preempted. While the states do not agree with this view, there are minimal volumes of unclaimed GACs that are reported as unclaimed property.

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Property Act, § 12(b). and 2016 Revised Uniform Unclaimed Property Act, § 202(a). Individual IRAs are not covered by ERISA and have historically been reported and remitted to state unclaimed property programs.

<sup>68</sup> United States Government Accountability Office, "401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts," GAO-15-73, November 11, 2014.

<sup>69</sup> By way of example, the GAO calculated that \$1,000 left in a forced-transfer IRA, after a \$50 set-up fee, a \$50 annual fee and a \$65 annual search fee, assuming a 0.11% rate of return, would erode to zero in nine years. NAUPA has observed substantially higher annual fees, as well as significant charges for transferring the IRA to another custodian, by IRA rollover custodians.

<sup>70</sup> Rule 17Ad-17, codified at 17 CFR § 240.17Ad-17.

<sup>71</sup> The National Registry of Unclaimed Benefits, [www.unclaimedretirementbenefits.com](http://www.unclaimedretirementbenefits.com), affiliated with PenChecks Trust.

Assuming that rollover of unclaimed benefits to GACs would be appropriate (for the same reasons as noted in the IRA rollover discussion above), the participant's entitlements would be preserved, but it is unclear how the participant would become aware of the GAC. The whereabouts of the participant is likely unknown when a GAC is established, and neither insurance regulators (in the absence of a regulatory settlement agreement) nor unclaimed property laws require that an insurance company undertake efforts to obtain current addresses for missing annuitants.

The recent discovery of large numbers of deceased insureds entitled to death benefits resulted in many states adopting laws requiring that insurers compare their policy records to the Social Security Administration Death Master File ("DMF"). However, the search requirement is designed only to identify deceased insureds and annuitants, and not to obtain accurate addresses for individuals who are living. Moreover, the Model Unclaimed Life Insurance Benefits Act adopted by the National Council of Insurance Legislators (NCOIL), as well as laws adopted by individual states, includes an exception for "an annuity used to fund an employment-based retirement plan or program where...the insurer is not committed by the terms of the annuity contract to pay death benefits to the beneficiaries of specific plan participants."<sup>72</sup>

An example of why GACs may not benefit missing participants is the recent accounting irregularities at the MetLife Insurance Company. MetLife was found to have improperly released reserves (i.e., took into income) for 13,712 annuity certificates, resulting in the non-payment of \$189 million in benefits "lost or delayed."<sup>73</sup> In a consent order entered into with the New York Department of Financial Services, MetLife was cited for a number of failures, including not attempting to locate annuitants to which it owed benefits.<sup>74</sup> MetLife agreed to undertake various corrective measures, including performing outreach to annuitants five years prior to their retirement date, and the engagement of "a third-party servicer that specializes in locating beneficiaries that are due benefits and have not been paid," with MetLife "paying all expenses incurred by the third-party servicer."<sup>75</sup>

MetLife's internal GAC control issues resulted in the filing of a class action suit, *Roycroft v. MetLife*.<sup>76</sup> In his amended complaint, Roycroft stated that many retirees were unaware that they were entitled to annuity benefits and alleged *inter alia* that MetLife was responsible for "maintaining current identification and location information for Annuitants and Beneficiaries and establishing and

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<sup>72</sup> National Council of Insurance Legislators, Model Unclaimed Life Insurance Benefits Act, as readopted by the NCOIL Life Insurance & Financial Planning Committee on March 16, 2019 and the NCOIL Executive Committee on March 17, 2019, § 3(A), downloaded from <http://ncoil.org/wp-content/uploads/2019/03/Unclaimed-Property-Model-2019-Readoption.pdf>.

<sup>73</sup> Insurancenewsnet.com, "MetLife to Pay \$189 Million to Policyholders for Pension Failures," January 29, 2019, downloaded from <https://insurancenewsnet.com/oarticle/dfs-superintendent-vullo-announces-that-metlife-will-pay-a-19-75-million-fine-and-provide-189-million-in-restitution-to-policyholders-for-failures-related-to-pension-benefit-transfers#.XPRn9ohKiUk>

<sup>74</sup> New York Department of Financial Services, "DFS Superintendent Vullo Announces that MetLife will Pay a \$19.75 Million Fine and Provide \$189 Million in Restitution to Policyholders for Failures Related to Pension Benefit Transfers," press release date January 28, 2019, downloaded from [www.dfs.ny.gov/search/site?search=%24189+million](http://www.dfs.ny.gov/search/site?search=%24189+million)

<sup>75</sup> *Id.*

<sup>76</sup> Case No. 1:18-cv-05481(AKH(BCM)) (S.D. NY 2018)

implementing protocols, process and procedures for identifying and locating them, and paying their benefits.”<sup>77</sup> However, in ruling on MetLife’s motion to dismiss, the court disagreed with all of Roycroft’s legal theories, and expressly found that Roycroft had “not plausibly alleged that a fiduciary duty existed” between MetLife and members of the class.<sup>78</sup> The court cited New York law<sup>79</sup> for the proposition that the relationship between parties to an insurance contract is legal, rather than equitable.

Whether MetLife is indicative of GACs throughout the life insurance industry is not known. However, NAUPA believes that state unclaimed property programs offer a superior means for owners to recover missing assets. State websites allow the public to identify unclaimed property, and the combination of state focus on and unique tools for the proactive location of owners maximizes the likelihood that a lost owner will be found. As with all of the alternative options available to plans for the disposition of uncashed checks, the question should be which alternative is most likely to locate a participant and reunite them with their money.

### 3. Forfeiture with a right of restoration

While acknowledging the legal basis for inclusion of a forfeiture provision within a plan, NAUPA views forfeitures as directly antithetical to the payment of retirement savings to missing participants. Forfeitures fail to address the underlying problem of beneficiaries not receiving their rightful entitlements. If a plan is unsuccessful following a *one-time effort* in locating a beneficiary and then proceeds to forfeit that beneficiary’s assets, presumably there will be no subsequent location efforts undertaken and there will be no means through which a beneficiary or heir can obtain or will even receive notification of the existence of the assets.

In comparison, state unclaimed property programs offer the opportunity for a beneficiary *on an ongoing basis* to identify and collect property owed to them. A beneficiary can at no charge search the state’s internet website or even call the state and inquire. States undertake a number of different actions (address updating, publication, social media, etc.) in an effort to locate owners. Increasingly, states are utilizing state tax records and other databases to confirm identity and make payment directly to rightful owners, without the need of the owner filing a claim form.

In addition to the absence of an ongoing search component in a forfeiture scenario, there are additional troubling aspects with respect to forfeitures. A 2014 document prepared by the American Bar Association’s (ABA) Joint Committee on Employee Benefits (which can be found at Appendix-Exhibit III) noted the following:

For defined contribution plans, redepositing uncashed check amounts into a plan’s forfeiture account may be suboptimal because:

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<sup>77</sup> *Id.*, Amended Class Action Complaint, September 21, 2018, ¶ 45.

<sup>78</sup> *Id.*, Order Granting Defendant’s Motion to Dismiss, January 15, 2019.

<sup>79</sup> See *Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 264, 724 N.Y.S. 2d 3,7 (N.Y. App. Div. 1<sup>st</sup> Dep’t 2001).

- i. Uncashed checks, which represent vested amounts, are qualitatively different from forfeited amounts (e.g., unvested match and/or profit-sharing contributions) in which participants and beneficiaries do not have a vested interest.
- ii. With respect to uncashed checks which are issued solely by salary deferrals, reallocating those amounts to other participants or using those amounts to pay plan expenses seems inappropriate.
- iii. As forfeiture accounts must be used to pay plan expenses or reallocated to other participants every year, there is a risk that the plan sponsor will not have assets available to fund the outstanding check amount when participant or beneficiary requests that the check be reissued to him or her.
- iv. Records of amounts redeposited into a forfeiture account may be lost over time, especially if the plan's recordkeeper or TPA changes or a plan merger occurs.
- v. Reestablishing participant's account under the plan in order to redeposit the uncashed check amount into such account may not be appropriate, especially if the uncashed check represents a required distribution from the plan.<sup>80</sup>

It is NAUPA's understanding that the accounting procedures to affect a forfeiture can be cumbersome, and for this reason forfeitures are challenging to undertake. If a plan has not previously forfeited uncashed benefit checks and now elects to do so, the plan could seemingly encounter a number of problems. Under the forfeiture requirements, the amounts forfeited would need to be offset against plan expenses (or reallocated to other participants) within the year the forfeitures were performed. As noted in the ABA document cited from above, while a "mass" forfeiture could create a significant windfall for a plan in one year, in subsequent years there could be insufficient liquidity to make payment to reappearing owners for their forfeited benefits. This was also a concern expressed by Department of Labor staff in 2012, when the Council, in its "Missing Participants" issue analysis, advocated support of a more flexible forfeiture approach in order to address unclaimed plan property.<sup>81</sup>

#### 4. Transfer to a federally insured benefit account

Rollover of unclaimed benefits to a bank IRA has the *potential* for growth in the asset, provided that the rate of return exceeds the institution's service charges for managing the account. However, from the time that the IRA is established, until it is deemed unclaimed under a state unclaimed property law, there is little likelihood that a search will be undertaken to find the owner. Banks are not required by their regulators to locate missing account holders, and unclaimed property laws do not mandate search efforts until the IRA is presumed unclaimed, which would typically be when the owner reaches the age

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<sup>80</sup> American Bar Association, Joint Committee on Employee Benefits (JCEB), "Retirement Plans: Uncashed Checks and Missing Participants," discussion outline for meeting with Treasury and IRS representatives, May 8, 2014, p. 7.

<sup>81</sup> At the time, Department of Labor staff were equally unenthusiastic about a Council proposal for "secondary forfeiture accounts" and liberalization of forfeiture requirements.

of 73 ½.<sup>82</sup> It is reasonable to assume that in most cases that if the owner is lost when the rollover IRA is created, then the owner will remain lost and will be turned over to the states as unclaimed property.

It is unclear how a beneficiary or heir, who not does re-establish contact with the plan and receive specific information about the location of the rollover IRA, would ever learn of the IRA's existence or learn where it is custodied. It is important for the Council to bear in mind that it is not easy for an individual to personally identify or track-down missing assets. The design of state unclaimed property programs is to radically simplify this process. Where unclaimed property is transferred to the state, the owner need only perform an internet search or place a call to the state's offices in order to locate missing property. States are dedicated to and are becoming increasingly successful in making the public aware of the ability to find and recover lost assets through these programs. In many instances, the state will successfully find and notify the owner of the existence of unclaimed property, without the owner even conducting a search.

While only a minority of states currently pay interest on amounts reclaimed by owners, even those states offer a substantial advantage over a rollover IRA at a bank, because it is significantly more likely that the states will locate the owner, allow him or her to recover the property, and invest it or otherwise utilize it in a manner that the owner personally deems appropriate.

##### 5. Expansion of the Pension Benefit Guaranty Corporation's Missing Participant Program

Expansion of the Pension Benefit Guaranty Corporation's ("PBGC") Missing Participant Program, while not identified by the Council, may be proposed as an option for handling uncashed plan checks. The program is not currently available to active plans, but industry representatives have previously recommended that Congress approve the PBGC accepting unclaimed property from all plans.<sup>83</sup>

Expansion of the PBGC Missing Participant Program is a suboptimal option. It would create a new and substantial federal bureaucracy, when the states have a preexisting system that is already reuniting a large number of lost owners with their unclaimed property. A duplicative system would also create confusion for the public as the states are already conducting extensive media campaigns for the state unclaimed property system.

The PBGC operating model proposes that all costs will be assumed by either plans or (most likely) missing participants. Program expenditures (and consequently services) would be limited by the "benefit transfer" fees received by the PBGC. Because both diligent search expenses and the costs of operating the PBGC program would likely be paid from missing participant benefits, the PBGC program would reduce the amounts, if any, returned. The PBGC's ability to provide services (either directly or through a contractor) would be dictated by the fees received from plans. To the extent that the PBGC's assumptions are incorrect, and insufficient fees are generated to cover operating costs, the agency

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<sup>82</sup> In most states, an unclaimed IRA is reportable three years from the data of mandatory distribution, i.e. 70 ½ years + 3 years = 73 ½ years.

<sup>83</sup> See, e.g., Jan Jacobson, Senior Counsel, Retirement Policy, American Benefits Council, to Office of General Counsel, Pension Benefit Guaranty Corporation, August 20, 2013, p.2.

would face a conundrum. Rather than increasing fees to achieve optimal service levels, the PBGC might maintain the initial fee and simply reduce functionality (and thus, effectiveness in locating and paying missing participants). The existing PBGC missing participant search database already has limited functionality and capacity, especially when compared to state unclaimed property websites.<sup>84</sup>

There is a very different dynamic between owners who are aware of the existence of lost assets and who seek to find them, and owners who are unaware they are entitled to unclaimed property. The states have significantly increased their return rates not merely by attempting to locate owners due property, but by expanding outreach and encouraging owners to search for property even if they have no reason to believe there is anything due them. Unclaimed property is counter-intuitive; most individuals do not intentionally abandon assets. To overcome skepticism that “the government returns money,” the states have invested substantial time, money, and effort advertising their search websites. Motivating individuals “just to look” has not come easily, but the states have been able to achieve this through a mix of paid, free, and social media. As any advertising agency can confirm, most important has been the “tell your friends” phenomenon. Owners who have found property through state websites share this fact with others in their social circle. When they discuss their good fortune and vouch for the legitimacy of the program, their contacts undertake their own searches.

Absent an aggressive promotional plan, it is unlikely that an expanded PBGC website would become widely known and utilized. Even with an advertising budget, the PBGC is not positioned to generate the type of “buzz” that states regularly create when an elected official is televised handing a check to an owner, or the program operates a property search booth at the county fair or other community event, or an individual is made aware of the existence of unclaimed property held by the state when they renew their driver’s license.

While the PBGC will pay interest on the benefits it administers, the interest may not prove material or make the participant whole, depending on when a missing participant recovers property. The payment of interest is irrelevant, however, if the missing participant does not learn of and recover property through the PBGC.<sup>85</sup>

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<sup>84</sup> NAUPA reasonably believes that even its smallest member states process and pay more claims annually than does the PBGC. Unlike the PBGC website, state websites use “fuzzy” logic to facilitate inexact name matching; have the ability to upload claims documentation; provide claims status tracking; and are in compliance with Americans with Disabilities Act requirements.

<sup>85</sup> In the December 22, 2017 release of the final rule for the expansion of the Missing Participant Program to include the voluntary reporting of missing participants in terminated defined contribution plans, the PBGC projected that it would “unite missing participants with an estimated \$26 million worth of lost retirement benefits each year,” in contrast with the agency historical return rate of \$2.27 million per year. 82 Fed. Reg. 60,815. The amounts returned by the PBGC during 2018 are not known by NAUPA.

## G. Additional issues for Council consideration

### 1. Differential treatment of historical and future uncashed checks

NAUPA suggests that the Council consider the existence of two different populations of uncashed checks, requiring different solutions. The first is the checks, dating back to 1974, that have already been issued; the second is the checks to be issued in the future.

#### a. Checks currently outstanding

To the best of NAUPA's knowledge, the Department of Labor has not expressly mandated that active plans undertake efforts to contact beneficiaries who failed to cash plan distribution checks. There are currently tens, if not hundreds, of millions of dollars in uncashed checks, owed to tens of thousands of participants, that ought to be returned to their rightful owners. In some cases, individual plans are presumably aware of the existence and extent of their uncashed payments to beneficiaries and are in a position to address them. But, NAUPA reasonably believes that there are large volumes of uncashed checks that are not being actively administered, because the plan has been terminated; is orphaned; the checks are held by a previous service provider, as a result of a plan merger or plan change in outsourcer; the service provider issued the checks from an omnibus account and cannot currently identify the plan; the checks are immaterial; or the checks are old and have simply been forgotten.

A "clean-up" of the uncashed plan checks dating back more than 40 years would be a massive undertaking, particularly where the uncashed checks are not being administered by the plan itself.<sup>86</sup> Older records would need to be converted, and in some cases even key-punched; sufficient information would need to be gathered to ensure proper owner identification; beneficiaries would need to be contacted; claimant responses (a significant portion of which are likely to come from heirs) would need to be vetted; and check reissuances would need to be processed. Given the anecdotal reports of significant numbers of plan checks outstanding, addressing the uncashed check backlog could take years to complete.

There will be costs associated with these processes. Presumably plans will, consistent with prior Department of Labor guidance, pass this cost along to missing participants; however, even if plans were willing to absorb this administrative cost, in many instances there will be no extant plan (because it was previously terminated, is orphaned, or potentially cannot be identified in a service provider's records). The most significant cost is likely to be associated with owner searches. Consider how successful those searches will be, through the tools available to plans and service providers, for checks issued 10, 20, or even more years ago; various search steps can be undertaken, but the probability of success is

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<sup>86</sup> Both plans and regulators have shared with states their belief that records of uncashed plan distributions, regardless of the date of issuance, have been maintained by third party record keepers in an orderly, accessible fashion. However, when questioned by states, there has been acknowledgement that this view is an assumption. In the experience of the states, entropy is particularly applicable to records of unclaimed property. NAUPA anticipates that the effort required to retrieve records and compile reports of all uncashed checks will be significant.

dubious.<sup>87</sup> In all likelihood, entitlements will be reduced through the cost of search efforts that do not result in locating the beneficiary. And with respect to the assumed large volume of checks for immaterial amounts, anything beyond a cursory search effort is likely economically impractical.

NAUPA recommends that the Council, and the Department of Labor, consider whether mandating that plans perform extensive searches for owners of old, outstanding plan checks will be cost-effective in achieving the desired results. While the states agree that retirement plans, along with all other types of business entities, should actively address unclaimed property, this situation may warrant a special approach. Specifically, does it make sense for active plans to employ the required search steps of terminating plans, with respect to four decades of outstanding checks where owner location efforts were not previously performed?<sup>88</sup> Perhaps with respect to this backlog (and *not* checks issued on a go-forward basis), a more streamlined approach, with states involved in the compilation of the uncashed check records and with greater reliance placed on the states to locate and pay missing participants, would be appropriate.

With respect to the operational challenges of compiling historical records and producing accurate reports of uncashed plan checks, unclaimed property programs can play a broader role in facilitating a solution. The states, through contractors acting under state supervision, have previously managed similar industry-wide “clean-ups,” and have underwritten the associated expense. NAUPA believes its member states can collaborate with the retirement industry (specifically, plan record keepers, where it is presumed that most uncashed check records reside) to pull together the data and compile reports. This will expedite the process, ensure the needed information is provided, and minimize the cost for plans, service providers, and participants.

#### b. Checks issued prospectively

The Retirement Savings Lost and Found Act, introduced in the U.S. Senate in 2016<sup>89</sup> and reintroduced in 2018,<sup>90</sup> proposed a number of approaches for addressing the problem of lost participants, and the unclaimed amounts due them. Included in the legislation was a provision providing for the rollover of uncashed check funds to either the U.S. Treasury or a newly established federal program, where the check proceeds would be invested and grow on a tax-deferred basis.<sup>91</sup> Notably, this provision was applicable only to plan checks issued subsequent to the effective date of the legislation. The exclusion of previously issued distributions likely involved some tax considerations, but also a determination that to attempt to apply a series of new standards to 40 years of uncashed checks was impractical.

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<sup>87</sup> In comparison, because of the manner in which they operate and the unique resources available to them, state unclaimed property programs successfully locate many long-lost owners of property, which the entities in possession of the assets were unable to find.

<sup>88</sup> Put another way, does a fiduciary have a duty (and should the Department of Labor require fiduciaries) to undertake extensive efforts to locate and pay a missing participant a stale-dated uncashed plan check, where those efforts will be expensive and likely unsuccessful, if state unclaimed property programs will more likely find and pay that participant, without the plan or the owner incurring the associated costs?

<sup>89</sup> S. 3078, 114<sup>th</sup> Cong.

<sup>90</sup> S. 2474, 115<sup>th</sup> Cong.

<sup>91</sup> *Id.*, § 3(3).

The manner in which uncashed plan distributions should be handled *in the future*, for tax and other purposes, is an active, fluid debate. To date the Department of Labor has not fully articulated the search requirements for active plans, and all options to the plan for the disposition of ultimately unclaimed benefits. The Internal Revenue Service (“IRS”) has issued a field directive indicating that a plan need not make a required distribution to a participant, if the participant is deemed lost and efforts to locate the participant have been unsuccessful.<sup>92</sup> As of today, the IRS, with the collaboration of the Department of Labor, is drafting rules specifically to address missing participants.<sup>93</sup> NAUPA does not have insight into what those regulations will allow or mandate.

Federal law *yet to be implemented* will likely significantly impact the treatment of *future* distributions that remain unclaimed. The resulting changes may make it more important for state unclaimed property programs to receive IRS approval for rollovers, and the states’ ability to pay interest on missing participant assets may become a more significant factor in considering the transfer of property to their custody. NAUPA desires to be, but is not yet part of, this regulatory reform discussion.

Significantly, however, most of these issues currently under discussion will not impact the plan distributions that were previously issued. On this basis, NAUPA recommends that historical uncashed checks and future uncashed checks receive different consideration, and that protocols for the transfer of uncashed plan checks to state programs be revisited once new IRS rules are finalized.

## 2. Undistributed account balances

The Council’s issue statement is limited to uncashed plan checks. However, a participant entitled to receive an uncashed check may be entitled to additional benefits, not yet distributed by the plan.<sup>94</sup> This would most likely arise in the context where under the terms of the plan, the participant receives annual minimum distributions, as opposed to being paid an entire lump-sum distribution upon reaching a plan-defined age.

NAUPA understands that a discussion of transferring undistributed plan account balances to state custody presents substantially more complex questions than does the transfer of checks. However, a plan could conceivably maintain an account balance for an owner in perpetuity. As such, there should be consideration given to the disposition of unclaimed, undistributed balances. States do not wish to negatively impact individuals’ retirement security through terminating an active investment. However, where the participant (and spouse, if any) is determined to be deceased, or has reached a natural age exceeding standard mortality tables, the basis on which the asset remains in the plan becomes questionable. The states, through NAUPA, hope to have the opportunity to address the matter of unclaimed, undistributed account balances with the Council in the future.

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<sup>92</sup> Thomas J. Petit, Acting Director, EP Examinations, Department of the Treasury, Internal Revenue Service, “Memorandum for Employee Plans (EP) Examination Employees,” Control No. TE/GE04-1017-0033, October 19, 2017.

<sup>93</sup> Allyson Versprille, “IRS Still Drafting Rules on Missing Retirement Plan Participants,” *Bloomberg Law, Benefits & Retirement Compensation News*, May 30, 2019.

<sup>94</sup> The participant could also be entitled to additional uncashed plan checks, which had not yet been become reportable to or otherwise transferred to the state.

## H. Minimum state program standards for assuming custody of uncashed plan checks

It is NAUPA's primary objective to assist its member states in maximizing the return of unclaimed property to rightful owners. As discussed at the beginning of this statement, in recent years all unclaimed property programs have significantly increased owner returns, and process improvements to improve return rates are ongoing.

With respect to a state's operation of its unclaimed property program, and specifically with respect to the custody of uncashed plan distribution checks, NAUPA believes that the following policies and procedures should be implemented:

1. The ability of the public to make inquiries concerning unclaimed property by mail, telephonically and via the internet.
2. The maintenance of a publicly accessible website to conduct unclaimed property searches at no charge.
3. The capacity for the on-line submission of owner claims.
4. The processing/payment of an owner's claim regardless of the value of the claim, and without charge to the claimant.
5. Allowing owner claims in perpetuity, without regard to when the property was received by the state.
6. Instituting data controls for the encryption and other security of reported information, as well as anti-fraud measures.
7. Maintaining records of all reported data and paid claims in perpetuity.
8. Relieving an entity transferring property to the state from further liability.
9. Permitting an entity who reported property to pay a reappearing owner directly and obtain reimbursement from the state.
10. Following all IRS reporting requirements that are expressly applicable to state unclaimed property programs.

NAUPA believes that to receive custody of uncashed plan checks, a State should have these policies and procedures in place. For the vast majority of NAUPA's member states, all of these objectives have already been achieved. A few states have not yet fully implemented each recommended practice and procedure. Note that aside from advocating a searchable internet website (which all NAUPA member states have already established and maintain on a constant basis), NAUPA does not make specific recommendations as to state outreach activities. As will be described in oral testimony to the Council, individual states are in fact very efficient and best qualified in identifying the optimal means of program promotion and owner location suitable for their particular demographics.

## Recommendations

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1. The United State Department of Labor should clarify that a state unclaimed property program may assume custody of uncashed plan checks from both active and terminated plans.
2. The United States Department of Labor should evaluate all existing options that a plan has for the disposition of uncashed checks and determine if these options are as effective as state unclaimed property programs in reuniting missing participants with their retirement savings.
3. The United State Department of Labor should facilitate the engagement of state unclaimed property program representatives in discussions with United State Department of the Treasury, Internal Revenue Service in developing protocols for the tax reporting of unclaimed accounts.
4. The United States Department of Labor should issue administrative rules for the reporting of uncashed plan checks to state unclaimed property programs. Such rules should consider the recommendations of the ERISA Advisory Council and should involve input from state unclaimed property programs or their representatives in their drafting.
5. The ERISA Advisory Council should consider whether existing U.S. Department of Labor protocols for locating missing participants in terminating plans are practical for the “clean-up” of a significant volume of uncashed plan checks dating back to 1974, and instead contemplate a more streamlined approach undertaken in conjunction with state unclaimed property programs.
6. The ERISA Advisory Council should continue its evaluation of state unclaimed property programs and identify minimum standards for state custody of uncashed plan checks, to be recommended to the United State Department of Labor.
7. The recommendations of the ERISA Advisory Council concerning uncashed plan checks should not only address checks under the responsibility and control of a plan, but additionally checks not associated with any active or identified plan and in the control of service providers.
8. The ERISA Advisory Council should expand its review of state unclaimed property programs to consider what role the states can play in reuniting missing participants with other types of retirement savings, including undistributed account balances.
9. Any reporting of uncashed plan checks should be to the state of last known address of the missing participant, in observance of federal common law and existing unclaimed property reporting protocols that increase the likelihood that the participants will be found and paid.

## **Appendix**

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**California State Controller Advisory Opinion Request to  
the United States Department of Labor dated June 7, 2017,  
and Supplemental Memorandum dated June 13, 2018.....Exhibit I**

**Representative press coverage of state unclaimed property  
programs.....Exhibit II**

**American Bar Association Joint Committee of Employee  
Benefits, "Retirement Plans: Uncashed Checks and Missing  
Participants, meeting with Treasury and IRS representatives,  
May 8, 2014, presentation outline.....Exhibit III**