Executive Summary to
The Secretary of Labor
November 5, 2019
The 2019 ERISA Advisory Council

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Topics for 2019

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

Beyond Plan Audit Compliance: Improving the Financial Statement Audit Process
Voluntary Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs
Uncashed Checks Issue Group

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  Issue Chair
Linda M. Kerschner
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The Missing Participant Problem:

- Workers have many jobs throughout their working lifetime
- Workers lose track of plans, and plans lose track of workers

The Uncashed Check Problem:

- Involuntary distributions
  - Small-sum cash-outs, RMDs, trailing dividends, etc.
  - Checks are sent to address that is no longer current
- Some participants may choose not to cash checks
Recordkeeper testimony indicated:

- Low dollar amounts of individual uncashed checks
  - 98% are for less than $1,000
  - 78% are for less than $100
  - Only 0.2% are for an amount greater than $20,000

- Nonetheless, aggregate dollars are likely significant
  - 4.5% of all checks go uncashed
  - Total dollar amount very difficult to estimate
  - With “backlog,” total value of uncashed checks could be enormous
Regulatory Background

No Current Federal Solution:

- No central pension repository/national clearinghouse
- PBGC’s Expanded Missing Participant Program limited to terminated plans
- Retirement Savings Lost and Found Act (proposed in previous Congress)

Council’s recommendations assume that there is no federal or national solution
Current plan practices for handling uncashed checks vary:

- “Do nothing”
- Involuntary rollovers or transfers to taxable accounts
- Forfeiture-and-restoration

Unusual for ERISA plans to use voluntary transfers to state unclaimed property programs, but non-ERISA plans routinely effect mandatory transfers.
Scope of Council’s Work

Approach:

- Gain an understanding of the nature and operation of state unclaimed property programs
- Evaluate extent to which the voluntary utilization of such programs could advance the goal of reuniting missing participants with their pensions and retirement savings

Purposefully excluded from scope:

- Welfare plans
- Accrued benefits – uncashed distribution checks only
- Locating missing participants
State Unclaimed Property Programs

Supreme Court has resolved the question of which state’s law controls:

- State of last known address of property owner (as shown on records of property holder) has priority over other states
  - State programs view participant or beneficiary as property owner

- If holder has no address for property owner or if address is outside the U.S., law of state of holder’s domicile controls
Common features of state unclaimed property programs:
- Transfer is **not** escheatment to states
- “Dormancy” period—property unclaimed for 3 to 5 years
- Due diligence requirements after dormancy
  - Notice to owners, prescribed content, method of delivery
- Report and remittance
  - Once-yearly (although due dates not uniform)
- Transfer of property to state relieves the holder of its obligation to the owner
- Indemnification of holder against claims of owner
Common features of state unclaimed property programs:

- Off-cycle and early reporting permitted
- Searchable websites
- Outreach to community
- Professional staff (for higher dollar amounts)
- Except for two states, ability to submit claims in perpetuity
- Paper or electronic claims process (with increasing use of “fast-track” process below a de minimis threshold)
- Except for 4 states, no earnings are paid on uncashed checks
- State programs do not charge fees
State Unclaimed Property Programs (Cont’d)

“Return rates” for state unclaimed property programs:

- Total amount returned to owners during measuring period divided into total amount received by state during same period—can result in significant fluctuations in return rates year-to-year
- Return rates highly dependent on value of property and data (e.g., SSNs) provided to programs
- No return rate data for uncashed plan distribution checks available
“Return rates” for state unclaimed property programs (based on a review of 14 states, 25% of US population, 6/1/18-5/31/19 survey period)

- 72% of dollar value for in-state property where a SSN is provided and the value is greater than $100
- 41% for property of less than $100; might be more representative of uncashed retirement checks (20% of number of properties with a value of less than $100)
“Return rates” for unclaimed property governed by SEC due diligence protocol for lost property (based on a review of 25 states, 35% of US population, 6/1/18-5/31/19 survey period)

- 343,423 unclaimed securities-related properties
- 50% return rate after extensive due diligence (171,747 returned to owners)
Many employee benefit plans are reluctant to avail themselves of state unclaimed property programs:

- Confusion regarding interplay between ERISA preemption and voluntary utilization of state programs
- Unfamiliarity with state unclaimed property programs
- Reluctance to take on 50+ jurisdiction compliance burden
- FAB 2014-01 expressing preference for auto-IRAs
Many employee benefit plans are reluctant to avail themselves of state unclaimed property programs:

- Concerns regarding permissibility under ERISA (transfer to a state is neither “providing benefits to participants” nor “defraying reasonable expenses of administering the plan”)
- Concerns regarding ERISA liability (defense against future participant claims)
All of the options for addressing the uncashed check problem start from the premise that the participant has been taxed on the value of the check, notwithstanding that the check has not been cashed.

As a result, tax deferral, the 10% addition to income for early distributions, and income inclusion do not appear to be material fiduciary considerations when evaluating options for addressing uncashed distribution checks.
Council Observations – Likelihood of Reuniting Missing Participants with Lost Retirement Savings

- Uncashed distribution checks for participants who cannot reasonably be located through appropriate plan searches are unlikely to be reunited with participants through involuntary rollovers/taxable transfers and forfeiture-and-restoration.

- State unclaimed property programs have features that increase the probability that missing participants will be reunited with their benefits.

- The probability of recovery is higher in states that embrace certain practices, particularly data matching with other state agencies such as state revenue offices.
Council Observations – Operational Complexity

- Employers and plan service providers have experience with state unclaimed property programs for non-ERISA plans and other types of property, which suggests that operational complexity can be resolved.
- State programs work with large holders of unclaimed property to facilitate early and off-cycle transfers.
- Plans and service providers will have leverage to encourage state programs to minimize and eliminate unnecessary complexity if transfers are not mandatory.
There are differences in state programs that may be relevant to a fiduciary decision to transfer uncashed distribution checks to a particular state, *e.g.*, whether claims remain in perpetuity.

But given the number and dollar amount for any given plan involved in uncashed distribution checks, it is not reasonable to expect plans to prudently select and monitor each state to which it effects voluntary transfers.

Plans should be able to rely on a fiduciary “safe harbor” for state programs that meet minimum standards.
Recommendation #1

The Council recommends that the Department issue guidance:

- Clarifying that uncashed distribution checks are “plan assets” within the meaning of ERISA § 3(42), and
- Reaffirming that ERISA preempts state unclaimed property laws to the extent of such assets
Recommendation #2

The Council recommends that the Department issue guidance stating that a transfer of amounts attributable to a missing participant’s uncashed check to a state unclaimed property program constitutes a payment of benefits under ERISA.
Recommendation #3

The Council recommends that the Department issue guidance stating that

- A plan fiduciary will be viewed as having satisfied its fiduciary responsibility under ERISA to the extent the fiduciary transfers amounts attributable to a missing participant’s uncashed check to a state unclaimed property program that meets minimum standards, as determined by the Department (informed by the discussion in the Council’s report), and
Recommendation #3 (Cont’d)

The Council recommends that the Department issue guidance stating that

- In connection with any such transfer, a plan fiduciary may rely on a state program’s representation that it meets such minimum standards
Beyond Plan Audit Compliance: Improving the Financial Statement Audit Process
Plan Audit Working Group

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DOL raised concerns about the “commoditization” of the annual financial statement audit of employee benefit plans

DOL asked Council to consider ways to improve the value and utilization of the plan audit

Council endeavored to discover whether various professionals and stakeholders in the benefits community shared DOL’s concern

2010 Council previously reported on the quality of plan audits and auditors, and recommended that DOL coordinate efforts with the AICPA
Employee Retirement Income Security Act of 1974, as amended

- Requirement that the plan administrator “engage, on behalf of all plan participants, an independent qualified public accountant . . . [to] conduct an examination of [the plan’s] financial statements. . . .”

Early versions of ERISA gave the Department more power to regulate the audit standards
Industry-Regulatory and State Licensing Standards

- State Boards of Accountancy have authority over CPAs
- Accounting standards contained in GAAP
- Auditing standards set forth in GAAS
- AICPA plays a central role in setting auditing standards for the profession
- Members of AICPA’s Employee Benefit Plan Audit Quality Center follow additional-self-imposed policies/procedures
- Outcome of any particular audit also depends upon the relevant training, knowledge, experience, and professional judgment of the auditor
In early 2015, AICPA’s Auditing Standards Board (ASB) formed a task force to improve the quality of employee benefit plan audits, with the active participation of EBSA’s Office of Chief Accountant.

In April 2017, the ASB issued an Exposure Draft of a proposed statement on auditing standards addressing audits of employee benefit plans.

## Council’s Observations

- ERISA limits the purpose and use of a financial statement audit
- DOL has not been provided with the authority to change the scope or standards of the audit
- Most of DOL’s observed deficiencies appear to be technical and procedural errors made by auditor
- Firms performing only one or two audits per year had a 76 percent deficiency rate, while firms performing at least 100 audits per year had a deficiency rate of 12 percent
The number of plan auditors has decreased from over 7,500 down to 5,000, and the approximately 2,500 members of EBPAQC perform 85% of the total number of audits.

Improvement in audit quality will result in more accurate financials, but not clear whether improved audit quality would result in (i) greater regulatory compliance, or (ii) greater protection from fraud and theft.

Council heard testimony that plan administrators do not understand the value of audits and would welcome additional educational outreach.
Council’s Observations (Cont’d)

- Development of additional requirements or incentives would not be justified and/or effective
- SAS No. 136 should improve the quality of audits and provide more transparency and assurance for participants/beneficiaries
- Targeting the related professional community would be an efficient method of spreading education
Recommendation

Based on testimony and research and for the reasons stated herein, the Council recommends that the Department make available to plan administrators ("PA") new educational resources and access to tools and data regarding the uses of financial statement audits, specifically:
Send notice to PAs advising them of their responsibilities to select, retain, and interact with the independent auditor of the plan’s financial statements, and of the tools available to assist them in these responsibilities

Basis:

- Renew 2015 initiative to send notice to each PA for upcoming plan year
- Remind PA of (a) its obligations under ERISA, (b) educational materials available on DOL’s website, and (c) the availability of other educational materials from professional associations
- Council encourages DOL to obtain the necessary budgetary resources to fund the production and distribution of this notice to the broad population of relevant PAs
Recommendation (Cont’d)

- Publish a revised brochure regarding the selection, retention, and interaction with an independent auditor of the plan’s financial statements, including a best practice checklist.

**Basis:**

- Reissue updated version of brochure now titled “Selecting an Auditor for Your Employee Benefit Plan” to include the PA’s responsibilities with respect to retaining and communicating with the auditor.
- Increased attention due to the issuance of SAS No. 136.
- Include a checklist of best practices for PAs to consult when engaging an auditor – see sample in Council report.
Recommendation (Cont’d)

➤ Publish a list of the most common deficiencies found in plan audits

Basis:

- Informal survey data indicates that PAs and their advisors strongly favor the publication of such a list
- List would be a tool by which to monitor the auditor’s performance
- Previous DOL studies appear to contain sufficient information from which such a list could be collated, categorized, and contextualized

The 2019 ERISA Advisory Council
Recommendation (Cont’d)

Make more information available to PAs and their advisors regarding auditors who perform financial statement audits for employee benefit plans, *e.g.*, add features to EFAST2 to allow for searches of filings by auditor

**Basis:**
- Create a searchable list of auditors that have performed benefit plan financial statement audits
- Helps evaluate an auditor by identifying the volume of previous experience performing employee benefit plan audits
- Development of this tool was viewed favorably by the vast majority of PAs and their advisors that responded to the informal surveys provided to Council
Expand the DOL’s financial statement audit education programs to target plan advisory groups in its outreach

Basis:

- Specifically address the professional plan advisor community
- Evidence suggests that (a) PAs rely to a great extent on their advisors, and (b) the professional advisor community was insufficiently informed about DOL’s concerns with respect to the plan audit process
- An efficient way to spread DOL’s message
Thank You