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August 23, 2019

By Electronic Mail: [good.larry@dol.gov](mailto:good.larry@dol.gov)

Mr. Larry Good  
Executive Secretary  
ERISA Advisory Council  
US Department of Labor  
Suite N-5623  
200 Constitution Ave., NW  
Washington, DC 20210

Re: ICI Comments Regarding Permissive Transfers of Uncashed Checks from ERISA  
Plans to State Unclaimed Property Funds

Dear Mr. Good:

The Investment Company Institute<sup>1</sup> is providing this written statement in connection with the August 27-29, 2019 meeting of the 2019 ERISA Advisory Council (the “Council”) on the topic, “Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds.” The Council seeks input in providing recommendations to the Department of Labor (the “Department”), on “whether there are circumstances in which voluntary transfers of uncashed distribution checks to a state unclaimed property fund advances the Department of Labor’s goal of reuniting Missing Participants with their retirement savings.”<sup>2</sup>

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<sup>1</sup> The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$23.3 trillion in the United States, serving more than 100 million US shareholders, and US\$6.9 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org), with offices in London, Hong Kong, and Washington, DC. The ICI has extensive experience in issues relating to the states’ unclaimed property laws.

<sup>2</sup> See the 2019 ERISA Advisory Council’s Issue Statement, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from%20erisa-plans-to-state-unclaimed-property-funds.pdf> (“Issue Statement”).

We commend the Council for embracing the important issue of reuniting missing participants with their retirement savings and we welcome presenting our views on how best to accomplish this important undertaking. ICI supports efforts to help ensure that plan participants have access in their retirement years to all the savings accumulated during their working years. As described in more detail below, we continue to recommend that the Pension Benefit Guaranty Corporation's (PBGC) missing participant program be further expanded to accept assets on behalf of any missing DC plan participant, whether their plan is terminated or active.<sup>3</sup> We believe that such an expansion of the PBGC program generally offers a more optimal solution to the issue of missing participants, including the problems associated with uncashed distribution checks. Until the adoption of that inter-agency solution, however, we recommend that the Department issue guidance facilitating the use of state unclaimed property funds as one of several permissible options for the handling of uncashed distribution checks by issuing guidance clarifying a plan's obligations when using such an option.

Following an introduction and summary of our recommendations in Section I below, this letter in Section II urges that the Department clarify that a voluntary distribution to a state unclaimed property fund made in accordance with the express terms of the applicable plan document is a "settlor," i.e., non-fiduciary function. In Section III, we urge the Department to issue guidance providing a safe harbor for the voluntary transfer of uncashed checks to a state unclaimed property fund and reaffirming its broad view of ERISA preemption of state unclaimed property and escheat laws. Finally, in Section IV, we urge the Department to acknowledge the need to expand the PBGC's missing participant program to accept assets on behalf of any missing DC plan participant, whether their plan is terminated or active.

## **I. Introduction and Summary of Recommendations.**

The issue of uncashed checks within the US retirement system is not new. A participant's benefit distribution may go uncashed for a variety of reasons. In some cases, a check will go uncashed because the participant's address on file does not match her current address. In these so-called "missing participant" situations, plan fiduciaries are often put on notice that a participant's address is not current when the check sent to the participant at his or her last known address is returned by the US post office as undeliverable. Once made aware of the issue, plan fiduciaries will take steps to find a current address for a missing participant.<sup>4</sup>

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<sup>3</sup> See letter from David M. Abbey to Regulatory Affairs Group, Office of the General Counsel, PBGC (November 21, 2016), available at <https://www.ici.org/pdf/30412a.pdf> ("ICI Letter to PBGC").

<sup>4</sup> While not specifically applicable to missing participants in active plans, plan fiduciaries will often follow the Department's Field Assistance Bulletin 2014-01 (August 14, 2014) ("FAB 2014-01") to locate missing participants. FAB 2014-01 describes several steps a fiduciary must undertake, consistent with its duties of prudence and loyalty, to locate the missing participants and beneficiaries of a terminating defined contribution plan. If, after taking such steps, the fiduciary cannot locate missing participants or beneficiaries, FAB 2014-01 states that one potential option for the distribution of missing participants' benefits may be escheatment to a state unclaimed property fund.

In other cases, the address on file is current but the participant simply chooses not to cash the check.<sup>5</sup> Testimony at the Council's June 26 hearing revealed that some participants may not want to cash their distribution checks because doing so would cause them to lose access to Medicaid or other government benefits.<sup>6</sup> In most cases, however, it appears that the small size of the check provides little urgency to cash it.<sup>7</sup> In this respect, it is not uncommon for small balances to accumulate in defined contribution (DC) plans.<sup>8</sup> These small balances often include trailing dividends and fee reimbursement payments paid after the participant has requested and received a full distribution of their account. They might also involve distributions of small balances paid to satisfy required minimum distribution (RMD) rules, and automatic cash outs of small amounts.<sup>9</sup>

Witnesses at the June hearing discussed the various options currently available to plan fiduciaries to deal with uncashed checks, but expressed frustration that there is no guidance from the Department on any of these options, outside of the context of terminating DC plans (including abandoned plans) or automatic cash outs of balances not exceeding \$5,000.<sup>10</sup> This lack of guidance is particularly problematic in the case of a decision to transfer uncashed distribution checks to unclaimed property funds given the myriad and complex state policies and practices that must be considered simply to transfer small account balances associated with uncashed checks.

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<sup>5</sup> As other witnesses explained at the June hearing, not all uncashed checks belong to missing participants. It is not uncommon for participants to receive and not cash disbursement checks. See Robinson, Aliya, Written Testimony of the ERISA Industry Committee submitted to the ERISA Advisory Council (June 26, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from-erisa-plans-to-state-unclaimed-property-funds-robinson.pdf> ("ERIC Testimony") at page 2; Sepsakos, George M. and Walsh, Kevin L., Written Testimony of Groom Law Group submitted to the ERISA Advisory Council (June 26, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from-erisa-plans-to-state-unclaimed-property-funds-sepsakos-and-walsh.pdf> ("Groom Testimony") at page 1.

<sup>6</sup> See Groom Testimony at page 1.

<sup>7</sup> Witnesses at the June hearing testified that even checks that have been affirmatively requested can remain uncashed. See Hadley, Michael L., Written Testimony on behalf of the SPARK Institute submitted to the ERISA Advisory Council (June 26, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from-erisa-plans-to-state-unclaimed-property-funds-hadley-davis-and-harman.pdf> ("SPARK Testimony") at page 3.

<sup>8</sup> Nearly 80 percent of uncashed checks are for amounts less than \$100. See SPARK Testimony at page 2.

<sup>9</sup> See SPARK Testimony at page 2.

<sup>10</sup> FAB 2014-01.

Testimony submitted to the Council at the June hearing details the significant differences amongst the states in the application and administration of their escheatment and unclaimed property fund statutes.<sup>11</sup> These include differences in:

- the states' dormancy triggers (i.e., what event causes the dormancy clock to start),<sup>12</sup> and the applicable dormancy periods (i.e., the period after which abandoned property must be remitted to the state),<sup>13</sup>
- whether some version of the Uniform Unclaimed Property Act (UUPA) or Revised Uniform Unclaimed Property Act (RUUPA) has been adopted and the extent to which it is followed,<sup>14</sup>
- whether state civil immunity protection extends to property voluntarily remitted,<sup>15</sup> and
- each state's success rates in returning escheated property to its rightful owner.<sup>16</sup>

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<sup>11</sup> All 50 US states and the District of Columbia have escheatment statutes and the Council astutely recognizes that “the treatment and procedures utilized by state unclaimed property funds . . . may vary significantly between states.” See Issue Statement at page 1.

<sup>12</sup>As reflected in the Revised Uniform Unclaimed Property Act (RUUPA), states are abandoning the returned mail dormancy trigger and replacing it with a “no contact” trigger. Under this new trigger, if the owner of the account *has not affirmatively contacted the financial institution during the dormancy period, the owner is deemed to have abandoned the account. **This is true even if the mail sent to the owner during the entirety of the dormancy period has not been returned to the financial institution as undeliverable.*** Compounding the problem is the fact that, as reflected in the RUUPA, automated account activity is not always considered by the states to satisfy the “contact” requirement to avoid escheatment. In other words, if an account owner has opted to purchase additional shares on an automated basis—such as through the reinvestment of dividends or payroll deductions—or to make automatic redemptions from an account, such activity will not save the account from being deemed abandoned by a state that requires the account owner to initiate contact with the financial institution to avoid starting the dormancy clock.

<sup>13</sup> Importantly, the dormancy period applicable to property depends on the type of that property. For example, under the states' laws, the dormancy period for an uncashed check may differ from the dormancy period for the account on which the check is drawn. For an overview of the variation in states' dormancy periods, see Groom Testimony at pages 3 to 5.

<sup>14</sup> 39 states and the District of Columbia have adopted some version of the UUPA. See Groom Testimony at page 3.

<sup>15</sup> Plan fiduciaries may be unwilling to transfer uncashed checks to state unclaimed property funds because it is unclear that voluntarily doing so under a state's unclaimed property law would receive civil liability protection under the applicable state statute. Section 604 of the RUUPA contains an express provision to protect holders of property that remit unclaimed property to a state. Revised Uniform Unclaimed Property Act (2016), Uniform Law Commission.

<sup>16</sup> These rates differ significantly from state to state. One article cited in the Groom testimony, *Hidden treasure: a study of unclaimed property management by state government*, observes that, “[a]ccording to the National Association of Unclaimed Property Administrators (NAUPA), for FY 2011, state unclaimed property offices returned \$2.25 billion in assets to rightful owners through 2.5 million claims *while still retaining \$41.7 billion dollars in assets*” (emphasis added). A more recent (2015) report by the California Legislative Analyst Office shows similar findings in connection with California's unclaimed property fund. *Unclaimed Property: Rethinking the State's Lost and Found Program*, California Legislative Analyst Office (February 10, 2015) at page 3. As documented by the report, California estimates that it will reunite less than \$1 billion of \$7.2 billion in unclaimed property with owners. Finally, NAUPA's written testimony includes a series of recommended policies and procedures that should be implemented to assist states' efforts to maximize the return of unclaimed property to

Because the prior written testimony thoroughly documents these differences, we will not repeat them in detail here. What is important, however, is the recognition that determining whether to turn plan assets over to state unclaimed property funds can be a labyrinth of complexity, particularly in deciphering the states' success rates in returning assets to rightful owners. This complexity is of course compounded for plans with participants in multiple states. In fact, as confirmed by the testimony of several witnesses, the primary reason that the great majority of plans currently do not remit uncashed checks to state unclaimed property funds is due to the lack of guidance for dealing with this complexity and the resulting potential fiduciary exposure that such uncertainty brings.<sup>17</sup> The lack of guidance explains, in part, why leaving the benefit in the plan or forfeiting the benefit with a right of restoration are the most commonly used options for addressing uncashed checks.<sup>18</sup>

Considering the variability across the state programs, in terms of both their administrative procedures and their effectiveness in returning assets to rightful owners, we believe it is crucial for the Department to provide clear and objective guidance for sending uncashed checks to state unclaimed property programs. While such transfer is not a perfect solution to the problem of uncashed checks, it is an important option for plan sponsors and recordkeepers to have. There are situations, especially with respect to uncashed checks, where other disposition options (such as opening an IRA or a bank account on behalf of a non-responsive individual) are not practical or feasible. Factors such as the amount involved and the nature of the distribution (e.g., RMDs) can make escheatment the most reasonable of the available options, despite any downsides associated with the state programs. Moreover, particularly for small amounts, undertaking a costly fiduciary evaluation of the merits of any individual state program would make escheatment much less viable. For these reasons, we recommend the following:

- The Department should clarify that a voluntary distribution to a state unclaimed property fund made in accordance with the express terms of the applicable plan document is a “settlor,” i.e., non-fiduciary function. Plan design decisions, as expressed in plan amendments (or in resolutions or amendments to create or terminate a plan) are generally viewed under ERISA as “settlor” rather than “fiduciary” in nature. In other contexts (such as allocation of plan fees and expenses), the Department has recognized that, provided the terms of the plan are consistent with ERISA’s fiduciary responsibility provisions, a fiduciary’s range of decisions can be

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rightful owners, but acknowledges that not all member states have them in place and that it “does not make specific recommendations as to state outreach activities.” Mayer, G. Allen, Written Testimony on behalf of the National Association of Unclaimed Property Administrators submitted to the ERISA Advisory Council (June 26, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-cbsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from-erisa-plans-to-state-unclaimed-property-funds-mayer.pdf> (“NAUPA Testimony”).

<sup>17</sup> See ERIC Testimony at page 2; Jacobson, Jan M., Written Testimony on behalf of American Benefits Council submitted to the ERISA Advisory Council (June 26, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-cbsa/about-us/erisa-advisory-council/2019-permissive-transfers-of-uncashed-checks-from-erisa-plans-to-state-unclaimed-property-funds-jacobson.pdf> (“ABC Testimony”) at page 4.

<sup>18</sup> See ABC Testimony at page 3.

significantly limited by the terms of the plan. In this context, a plan sponsor should be able to amend a plan document to require that uncashed check amounts be escheated to a state unclaimed property fund, and that decision should be considered “settlor” in nature.

- The Department should issue guidance consistent with FAB 2014-01, providing a safe harbor for the voluntary transfer of uncashed checks to a state unclaimed property fund and reaffirming its broad view of ERISA preemption of state unclaimed property and escheat laws. Current guidance in this area is too limited, addressing only terminated DC plans and automatic cash-out situations. For plans to feel comfortable using escheatment, a safe harbor should also take into account the difficulty associated with assessing the intricacies of different state programs by providing blanket protection for the plan’s decision to remit an uncashed check to a state under the laws of the state where the participant last resided.
- The Department should acknowledge the need to expand the PBGC’s missing participant program to accept assets on behalf of any missing DC plan participant, whether their plan is terminated or active.<sup>19</sup> A centralized repository for these assets would make it easier for participants and beneficiaries to locate and retrieve their retirement plan benefits. The PBGC program would offer other advantages as compared to state programs, such as interest accrual, preservation of tax deferral where appropriate, and periodic searches for missing participants.

We discuss each of these recommendations below.

## **II. The Department should clarify that a voluntary distribution to a state unclaimed property fund made in accordance with the express terms of the applicable plan document is a “settlor,” i.e., non-fiduciary function.**

As discussed above, the difficulties associated with uncashed checks are more acute because the Department has issued very limited guidance applicable to missing participants in active plans or more specifically to the use of state unclaimed property funds for the handling of uncashed checks. A fiduciary making a decision—among various available options—to voluntarily escheat uncashed checks to a state unclaimed property fund would generally be required to determine that escheatment is a prudent option.<sup>20</sup> In the absence of clear authority stating otherwise, it might be argued that the fiduciary is obligated to consider whether escheatment would be a superior option to, for example, continuing to search for the participant on a recurring basis, the cost of implementing an escheatment process for the plan, and the ultimate likelihood that the benefit payments would ultimately reach the participant or beneficiary. A fiduciary would potentially be subject to liability if the decision to escheat

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<sup>19</sup> See ICI Letter to PBGC.

<sup>20</sup> See, e.g., FAB 2014-01 (“Plan fiduciaries must be able to demonstrate compliance with ERISA’s fiduciary standards for all decisions made to locate missing participants and distribute benefits on their behalf.”).

is not prudent.<sup>21</sup> As discussed above, however, the differences in treatment and policies and practices utilized by state unclaimed property funds—particularly with respect to efforts to locate account owners—can make a decision to escheat or not fraught with uncertainty, especially where consideration of such a decision requires comparison to other potential options.

Notwithstanding the foregoing, a plan sponsor should be able to draft its plan documents to require escheatment of benefit payments in cases where the benefit payments go uncashed and where, more particularly, the amount involved and the nature of the distribution (e.g., RMD) make transferring the amounts to a state unclaimed property fund a suitable option. Plan design decisions, as expressed in plan amendments (or in resolutions or amendments to create or terminate a plan) are generally viewed under ERISA as “settlor” in nature.<sup>22</sup> Under traditional trust law, as well as ERISA, the trustee of a trust is required to adhere to fiduciary duties, but the settlor (i.e., creator) of the trust is not.<sup>23</sup> Thus, a plan sponsor’s settlor decision to amend a plan, to, for example, provide for escheatment of uncashed checks, would not generally be subject to ERISA’s fiduciary responsibility or prohibited transaction rules.<sup>24</sup>

While a plan sponsor’s decision to amend a plan is not generally considered fiduciary in nature, the person implementing the decision is still subject to ERISA’s fiduciary responsibility provisions.<sup>25</sup> In this regard, a plan fiduciary is required to follow the terms of the plan insofar as those terms are consistent with ERISA.<sup>26</sup> Thus, ERISA itself contemplates that adhering to a plan document (drafted as a settlor act) could result in a violation of ERISA’s fiduciary responsibility provisions. Along these lines, the Supreme Court has held that a plan document cannot be drafted to trump ERISA’s fiduciary responsibility provisions.<sup>27</sup>

Provided that the terms of the plan are consistent with ERISA’s fiduciary responsibility provisions, however, a fiduciary’s range of options can be made subject to limitations by the terms of the plan. The Department has discussed the application of these principles in several different contexts. For example, in Field Assistance Bulletin 2003-03 (May 19, 2003) (“FAB 2003-03”), the Department addressed a fiduciary’s responsibility to consider different approaches for the allocation of plan fees and expenses

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<sup>21</sup> See ERISA § 409.

<sup>22</sup> *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444-45 (1999).

<sup>23</sup> *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

<sup>24</sup> See DOL Advisory Opinion 2003-04A (March 26, 2003) (“The Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management, of plans, explaining that these so-called ‘settlor’ functions include decisions relating to the establishment, design and termination of plans, and generally are not fiduciary activities governed by ERISA.”).

<sup>25</sup> DOL Advisory Opinion 2001-01 (Jan. 18, 2001).

<sup>26</sup> ERISA § 404(a)(1)(D).

<sup>27</sup> *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) (“[T]he duty of prudence trumps the instructions of a plan document . . .”).

among participants. If the plan document is silent, FAB 2003-03 states that a fiduciary should, consistent with its duties of prudence and loyalty, undergo a process of weighing the effects of different allocation methods on different classes of participants, and come to a reasonable conclusion. On the other hand, if the plan document prescribes a certain method of fee and expense allocation, the fiduciary's analysis ends at following the plan document because the terms of the plan document "in effect, becomes part of defining the benefit entitlements under the plan." Under other circumstances, the Department stated a fiduciary must follow the terms of the plan unless it can "articulate well-founded reasons why doing so would violate" ERISA, and that a fiduciary may not choose a different course of action merely because it would have selected such an alternative if the plan document was silent on the issue.<sup>28</sup>

As noted above, the Department has described that the voluntary escheatment of benefits of missing participants and beneficiaries to a state unclaimed property fund may be a permissible option under ERISA. While FAB 2014-01 only addresses terminating DC plans, the principles articulated therein provide support for the proposition that the voluntary escheatment of uncashed check amounts to state unclaimed property funds is consistent with ERISA.

Thus, if a plan sponsor were to amend a plan document to require that uncashed check amounts be escheated to a state unclaimed property fund, the responsibilities of the plan's fiduciaries would be significantly narrower than if the plan documents did not address the issue. In the absence of plan language directing a fiduciary to act, the fiduciary may be required to weigh different options for distributing the benefit amount. Under these circumstances, a fiduciary's decision may be subject to challenge or second-guessing upon review. On the other hand, to the extent that the plan fiduciary adhered to the terms of a plan document that directs the plan fiduciary to escheat the unclaimed benefit amounts—particularly for specific amounts or types of distributions—the plan fiduciaries' primary responsibility would be to simply follow the plan document's command to escheat the payments to a state unclaimed property fund.

For these reasons, we believe that the Council should recommend that the Department issue guidance that clarifies that voluntary escheatment of uncashed check amounts paid from an ongoing plan is permissible under ERISA and that a plan term that directs the plan fiduciary to escheat uncashed check amounts would be consistent with ERISA.

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<sup>28</sup> DOL Information Letter to Ian D. Lanoff (Sept. 28, 1995).



**III. The Department should issue guidance consistent with Field Assistance Bulletin 2014-01, providing safe harbor protection for the voluntary transfer of uncashed checks to a state unclaimed property fund and reaffirming its broad view of ERISA preemption of state unclaimed property and escheat laws.**

While it is critical that the Department clarify that a plan term directing the plan fiduciary to escheat uncashed check amounts is consistent with ERISA—especially in narrowing the circumstances where other permissible options must also be given consideration—plan fiduciaries also need guidance for those situations where the plan terms do not require a particular action for the handling of uncashed checks.

The Department has issued guidance applicable to missing participants in terminated plans. As discussed above, for example, FAB 2014-01 provides guidance on how fiduciaries of terminated plans can fulfill their obligations under ERISA to locate missing participants and properly distribute the participants' account balances. The guidance allows the transfer of assets of missing participants to an IRA, to an interest-bearing federally insured bank account, or to a state unclaimed property fund in the state of the participant's last known residence.<sup>29</sup>

The Department also has provided guidance regarding the automatic cash out rule, which permits a DC plan to automatically distribute the account of a participant who terminates employment if his account balance is \$5,000 or less.<sup>30</sup> In addition to the guidance issued by the Department, the IRS has issued guidance regarding missing participants and RMDs.<sup>31</sup> This was a key step to allow plans to avoid

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<sup>29</sup> FAB 2014-01. Related to terminated plans, the Department has issued regulations in connection with its Abandoned Plan Program, which allows the asset custodian of an abandoned individual account plan to terminate and wind up the plan, including making distributions to participants and beneficiaries. Under these final regulations, the Department's safe harbor explicitly allows distributions of \$1000 or less to be made to the unclaimed property fund of the state in which the participant's or beneficiary's last known address is located or an interest-bearing federally insured bank account (if the amount distributed is less than the minimum amount required to be invested in an individual retirement plan product offered by the qualified termination administrator to the public at the time of the distribution). 29 CFR 2550.404a-3(d)(iii).

<sup>30</sup> If the account exceeds \$1,000 but does not exceed \$5,000, then the plan administrator, after notifying the participant, must roll over the cash out amount to an IRA. DOL regulations provide a safe harbor for meeting fiduciary duties in connection with these automatic distributions. 29 CFR 2550.404a-2 (safe harbor for automatic rollovers to individual retirement plans). These rules were not created for the purpose of addressing missing participants. However, an automatic rollover only occurs when a participant is nonresponsive and takes no affirmative action in response to the notice that precedes the distribution. (Related to automatic rollovers, the Department has approved a program sponsored by Retirement Clearinghouse that uses data to match these default IRAs with the owners' new employer plans. DOL Advisory Opinion 2018-01A (November 5, 2018) and Prohibited Transaction Exemption 2019-02, 84 Fed. Reg. 37337 (July 31, 2019)) If the account balance is \$1,000 or less, then the plan may automatically send a check to the participant to cash out the account. When checks of \$1,000 or less are sent to participants, they are often never cashed.

<sup>31</sup> Memorandum for Employee Plans (EP) Examinations Employees (October 19, 2017) (Missing Participants and Beneficiaries and Required Minimum Distributions); Memorandum for Employee Plans (EP) Examinations Employees (February 23, 2018) (Missing Participants and Beneficiaries and Required Minimum Distributions – 403(b) Plans). Note

repeatedly sending out checks that they know will go uncashed, in the case of missing participants who are required to receive RMDs.

While the guidance described above is helpful, the retirement community needs additional guidance from the Department regarding the handling of benefit checks<sup>32</sup> that are not cashed and more broadly, regarding missing participants in active plans.<sup>33</sup> This guidance must go beyond the settlor versus fiduciary guidance described in Part II of this letter and provide a safe harbor describing plans' options for disposition of uncashed checks.

As discussed in more detail below, the Department should issue guidance consistent with FAB 2014-01, recognizing safe harbor protection for the voluntary transfer of uncashed checks to a state unclaimed property fund and reaffirming its broad view of ERISA preemption of state unclaimed property and escheat laws.

**A. The Department should issue a safe harbor for plan fiduciaries' disposition of uncashed checks.**

The safe harbor should make clear that plan fiduciaries have no obligation to examine the policies and procedures employed by a state in administering a program. Plans would be more likely to consider remitting assets to state unclaimed property funds if there were a streamlined process which does not require a review and analysis of individual state programs. A requirement to research the state of the participant's last known residence for each participant with an uncashed check and compare each of those states against other options for disposition of the amount, would, quite simply, make this option a non-starter for most plans. Rather, the Department should acknowledge its agreement that it is acceptable for any state program to receive the assets of participants who have resided in that state.

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that earlier this month, the IRS also issued Revenue Ruling 2019-19, concluding that an individual's failure to cash a distribution check he or she received from a qualified plan does not permit the individual to exclude the amount of the distribution from gross income and does not alter the employer's withholding or reporting obligations.

<sup>32</sup> In addition to uncashed checks issued to participants and beneficiaries, plans sometimes are faced with uncashed checks issued to service providers for the reasonable and necessary expenses of administering the plan. The ability to use voluntary escheatment to a state unclaimed property fund in this context is similarly important.

<sup>33</sup> See letter from American Benefits Council, American Council of Life Insurers, Committee on Investment of Employee Benefit Assets, The ERISA Industry Committee, Investment Company Institute, Plan Sponsor Council of America, the Society for Human Resource Management, Securities Industry and Financial Markets Association, the SPARK Institute, and US Chamber of Commerce, to Preston Rutledge (June 25, 2018), available at <https://www.ici.org/pdf/31288a.pdf>. The 2013 ERISA Advisory Council recommended that the Department "[i]ssue guidance addressing plan fiduciary obligations to locate missing and nonresponsive participants and beneficiaries in active and frozen defined contribution plans that parallels the guidance for terminated plans in FAB 2004-02 [the predecessor to FAB 2014-01]." See page 2 of the Council's report entitled "Locating Missing and Lost Participants." The GAO made a similar recommendation in a recent report. See "Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings," US Government Accountability Office (January 31, 2018), available at <https://www.gao.gov/products/GAO-18-19>.

We understand that states may have their own specific rules for accepting the transfer of unclaimed property, including dormancy period requirements. Rules such as these may not make sense as applied to voluntary escheatment situations. Therefore, it would be helpful for the Department's guidance to specify that—at least for ERISA purposes—a plan may voluntarily transfer uncashed checks to a state unclaimed property fund without regard to that state's dormancy periods or notice requirements applicable to required transfers.<sup>34</sup>

The guidance also should confirm that the other options discussed above—rolling the amount into a default IRA, putting the amount in a forfeiture account, sending the amount to an interest-bearing federally insured bank account (particularly in the case of RMD payments), or simply leaving the amount in the plan—are also acceptable actions.

In addition, we agree with other witnesses at the June hearing who explained that the guidance should have a special rule for de minimis amounts.<sup>35</sup> As SPARK noted, nearly 80 percent of these uncashed checks are for amounts less than \$100. For amounts under the threshold amount, search requirements would be much less significant, since under the duty of prudence, expensive searches for very small amounts could not be justified. This approach is consistent with positions the Department has taken in the past. For example, in the Department's regulations for its Abandoned Plan Program, the Department explicitly provided that Qualified Termination Administrators may treat small account balances as forfeited, if the amount is less than the estimated share of plan expenses allocable to that account and use such amounts to defray plan expenses.<sup>36</sup> Related to this point, we note that some states have minimum thresholds for remitted property (e.g., \$25 or \$50).<sup>37</sup>

**B. The Department should confirm that ERISA broadly preempts states' unclaimed property and escheat laws and that any escheatment by plans is completely voluntary.**

As the Council highlights in its Issue Statement, the Department has consistently applied a broad view of ERISA preemption of state unclaimed property and escheat laws.<sup>38</sup> The fact that the Department has, in certain circumstances,<sup>39</sup> confirmed that a plan fiduciary may voluntarily transfer amounts to a

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<sup>34</sup> In this regard, express confirmation by the Department that ERISA preempts the application of any state penalties for failure to follow the state's rules for involuntary escheatment is essential to protect plan sponsors and participants.

<sup>35</sup> See SPARK Testimony at page 2; Groom Testimony at page 2.

<sup>36</sup> See 29 CFR 2578.1(d)(2) (ii)(A).

<sup>37</sup> We believe NAUPA would be willing to provide information to the Council on any state minimum thresholds.

<sup>38</sup> See e.g., DOL Advisory Opinion 1994-41A (Dec. 7, 1994). See Groom Testimony at p. 6.

<sup>39</sup> As described above, the Department has explicitly authorized escheatment of amounts under \$1,000 from terminated plans and in the winding down up of abandoned plans. Further, we have heard reports that in audits under the Department's missing participant enforcement initiative, Department agents have, in some cases, requested that a plan escheat certain amounts due to missing participants.

state unclaimed property fund does not suggest a change to its stance on ERISA preemption of compulsory escheatment.

We strongly recommend that, if the Council recommends additional guidance permitting voluntary escheatment to state unclaimed property funds, it includes a recommendation that the Department issue guidance both to respect the authority of the plans to make decisions regarding disposition of plan assets and protect plans from states' compelling the escheatment or remittance of any assets related to ERISA plans.

For example, while the Council's current consideration is limited to participants' uncashed checks, NAUPA's testimony at the June hearing signals the states' interest in getting access to ERISA assets beyond those represented by uncashed checks. Significantly, NAUPA's testimony at the June hearing recommended that "... there should be consideration given to the disposition of unclaimed, undistributed [plan] balances."<sup>40</sup>

It is also illuminating that, during the rewrite of the RUUPA, ICI and other witnesses representing the interests of shareholders repeatedly advocated that RUUPA include a provision that expressly recognizes ERISA's preemption of the states' unclaimed property laws. NAUPA and the states involved in the RUUPA process strongly opposed our efforts because they did not want to concede ERISA's preemption.<sup>41</sup> Further highlighting this concern, our members report that in some audits by state unclaimed property funds, the auditors have not been willing to acknowledge that they cannot require investment companies to escheat assets in ERISA plans. In some cases, our members are forced to fight protracted battles with the states to protect these assets from forced escheatment.

Should the Council recommend that the Department facilitate the voluntary escheatment of participants' uncashed checks, the Council should also strongly recommend that the Department expressly and unequivocally affirm that such recommendation does not, in any way, alter ERISA's preemption over state law and that no state has any authority to compel such escheatment for any amount related to an ERISA plan. It further should affirm that, although a state may accept a voluntarily remitted uncashed check, such state has no authority to impose on the plan remitting the check any notice or reporting requirements the state imposes on other holders of property that are required to submit unclaimed property to the state, nor any late penalty for amounts remitted later than would be required if escheatment were required.

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<sup>40</sup> NAUPA Testimony at page 30.

<sup>41</sup> NAUPA and the states prevailed on this issue and, consequently, RUUPA does not include a provision expressly recognizing ERISA's preemption.

**IV. The Department should urge expansion of the PBGC's missing participant program to accept amounts from active DC plans.**

Finally, while not explicitly included within the scope of the Council's study, the Council should make clear its position that the PBGC's missing participant program would in most cases be a more optimal option as a depository for uncashed checks.

Until recently, PBGC's missing participant program was only available for use by defined benefit plans. The Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating DC plans to transfer assets of missing participants to PBGC, effective after the issuance of final regulations. The PBGC proposed regulations to expand its program in 2016 and finalized them in December 2017.<sup>42</sup> Today, the program is available to accept assets on behalf of missing participants of terminating DC plans. As we explained in ICI's comment letter on PBGC's proposed rule, this expansion "will facilitate efforts to ensure that defined contribution plan participants are ultimately reunited with their unpaid retirement account balances needed for a secure retirement."<sup>43</sup> As we explained in our letter:

Transferring assets to PBGC will surely result in a better outcome for the participant or beneficiary than escheatment to a state. This is particularly true for participants and beneficiaries with small account balances. The ability to locate such assets from a centralized location with a centralized database—in contrast to the myriad of systems of fifty states and the District of Columbia—will facilitate a participant's ability to locate and claim benefits. A transfer to PBGC will also help participants avoid adverse tax consequences because, unlike state escheatment, such transfers will not constitute a taxable distribution. Moreover, assets held by PBGC under the Program will continue to earn interest.<sup>44</sup>

The 2013 ERISA Advisory Council recommended that DOL issue guidance that explicitly allows an active plan to presume that a participant or beneficiary who fails to cash a benefit check after a specified period of time may be treated as a lost participant or beneficiary.<sup>45</sup> In our letter to PGBC, we agreed with the Council's recommendation, urging "PBGC to modify the Program to accept distributions from a plan in the form of a check which remains uncashed in such circumstances."<sup>46</sup> We urge the Council to once again recommend that the Department work with the PBGC to seek expansion of the

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<sup>42</sup> See 81 Fed. Reg. 64700 (September 20, 2016) (proposed rule); 82 Fed. Reg. 60800 (December 22, 2017) (final rule).

<sup>43</sup> ICI Letter to PBGC at page 2.

<sup>44</sup> Id. at pages 2-3.

<sup>45</sup> See 2013 ERISA Advisory Council Report entitled "Lost and Missing Participant," available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-locating-missing-and-lost-participants.pdf> at pages 2-3.

<sup>46</sup> ICI Letter to PBGC at page 6. In our letter, we also argued that "[t]he retirement community needs additional guidance from DOL regarding the handling of benefit checks that are not cashed." Id. at page 5.

PBGC program to accept voluntary transfers of amounts from active DC plans, including assets in the form of uncashed checks.

Unsurprisingly, in its testimony, NAUPA describes use of the PBGC's program as a "suboptimal option."<sup>47</sup> NAUPA's characterization is not only suspect, it defies logic. For example, NAUPA claims that PBGC would need to create a "new and substantial federal bureaucracy." But, of course, the PBGC's program already exists. PBGC has many years of experience managing the program for defined benefit plan participants, and it has already expanded the program to terminated DC plans. As the program already exists for ERISA plans, we fail to see how it would "create confusion for the public," as the NAUPA testimony also suggests. To the contrary, we believe that plan participants are more likely to look for ERISA assets on the centralized PBGC's database than choosing between multiple states' websites. Furthermore, the PBGC performs periodic active searches for missing participants on an ongoing basis.<sup>48</sup> In contrast, as the June testimony revealed, the states do not uniformly engage in proactive searches for individuals for whom they hold only small amounts.

NAUPA also criticizes the potential for PBGC to charge participant accounts for administration,<sup>49</sup> while minimizing the fact that the benefits held by PBGC will earn interest and be protected against investment losses. Whether a participant would end with a larger account by avoiding any fees, versus receiving interest credits depends on a number of factors, including the amount of time before the assets are claimed. Further, we understand that in many states it is legal for abandoned property locator services to charge owners a fee for assistance completing the otherwise free process of claiming assets from a state.<sup>50</sup>

While we continue to believe that escheating uncashed checks to the states is an acceptable option, in most circumstances, we believe PBGC's program presents the most optimal solution.

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<sup>47</sup> See NAUPA Testimony at page 26.

<sup>48</sup> "PBGC will actively search for missing participants." "The missing participants program provides the promise of a "one-stop shop" for workers to find lost benefits from terminated retirement plans, augmented by active searches by PBGC to find those to whom benefits are owed." 82 Fed. Reg. 60800, at page 60815.

<sup>49</sup> PBGC charges a one-time \$35 fee per missing distributee, payable when benefit transfer amounts are paid to PBGC. PBGC will not assess any charge for amounts transferred to PBGC of \$250 or less. There are no ongoing maintenance fees and no distribution charges under the program. PBGC declined to specify whether this fee should be paid by the plan sponsor or charged to a participant's account. 82 Fed. Reg. 60800, at pages 60801-2 and 60803-4.

<sup>50</sup> See "Finder companies can legally charge you just to get your own money back from the state," Denver Post, published September 23, 2016 and updated September 25, 2016; available at: <https://www.denverpost.com/2016/09/23/finder-companies-charge-for-putting-you-in-touch-with-your-own-money/>.

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In conclusion, we urge the Council to recommend that the Department facilitate the use of state unclaimed property funds as one of several permissible options for the handling of uncashed distribution checks. The Department should issue guidance clarifying a plan's obligations when using such an option in the manner described above.

We thank the Council for allowing us to share our views on this important topic. If you have any questions or wish to discuss these issues further, please do not hesitate to contact David Abbey at 202-326-5920 ([david.abbey@ici.org](mailto:david.abbey@ici.org)), Elena Chism at 202-326-5821 ([elena.chism@ici.org](mailto:elena.chism@ici.org)), or Shannon Salinas at 202-326-5809 ([shannon.salinas@ici.org](mailto:shannon.salinas@ici.org)).

Sincerely,

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