

MEMO# 32039

November 6, 2019

ERISA Advisory Council Presents Recommendations on Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds

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November 6, 2019 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Abandoned Property and Escheatment
Pension RE: ERISA Advisory Council Presents Recommendations on Permissive Transfers of
Uncashed Checks from ERISA Plans to State Unclaimed Property Funds

On November 5, the ERISA Advisory Council (the “Council”) held a meeting to present its recommendations to the Department of Labor’s Employee Benefits Security Administration (EBSA) on the topic “Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds.” The Council’s stated objective was to review the treatment and procedures utilized by state unclaimed property funds, which may vary significantly between states and “to explore 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.”[\[1\]](#)

The Council provided the following recommendations:

1. DOL should issue guidance clarifying that uncashed distribution checks are “plan assets” within the meaning of ERISA section 3(42) and reaffirming that ERISA preempts state unclaimed property laws to the extent of such assets.
2. DOL should 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.
3. DOL should issue guidance stating that (A) 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 DOL, and that (B)

in connection with any such transfer, a plan fiduciary may rely on a state program's representation that it meets such minimum standards.

In reviewing its observations that led to the recommendations, the Council reminded EBSA that it had limited its scope to uncashed distribution checks. Because participants generally already have been taxed on the value of these checks, preserving the preferential tax treatment does not appear to be a material fiduciary consideration when considering the options for addressing uncashed checks. It follows that this fact makes state unclaimed property funds a more appropriate option than it may be for assets of missing participants that have not yet been distributed. The Council urged DOL to provide a fiduciary "safe harbor," noting the operational complexity involved, the differences among the 50 states' programs, and the small values of the majority of the uncashed checks. The Council also clarified that the other options for disposing of uncashed checks (rollovers to IRAs, transfers to taxable accounts, and forfeiture-and-restoration) should continue to be available for plans to use.

A copy of the Council's full report will be posted on DOL's website in 2020.

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[Attachment](#)

endnotes

[1] See 2019 ERISA Advisory Council 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>. The Council also stated that it would not address what steps are necessary or appropriate for ERISA plans to take in locating missing participants. ICI submitted a letter to the Council in connection with the Council's August 28 hearing. See ICI Memorandum No. 31921, dated August 28, 2019, *available at* https://www.ici.org/my_ici/memorandum/memo31921.