

TYPES NOT MAPPED YET January 27, 2020 | TTR not mapped yet | Lori W. Jones

What should plan administrators do about uncashed retirement plan checks?

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While a precise number is not known, it has been estimated that the total amount of retirement benefits unclaimed by U.S. employees exceeds \$100 billion.¹ Contributing factors may include “missing participants” who fail to maintain contact with former employers, participants losing track of multiple retirement accounts, participants’ inability to consolidate multiple retirement accounts, the impact of mergers and acquisitions on retirement plans, and plan terminations.

In January 2019, the U.S. Government Accountability Office (“GAO”) issued a report titled, *Retirement Accounts; Federal Action Needed to Clarify Tax Treatment of Unclaimed 401(k) Plan Savings Transferred to States*.² As part of the report, the GAO conducted a state survey which indicated that, in 2016 alone, plans transferred about \$35 million in unclaimed retirement benefits to state unclaimed property programs in 17 states.³ The GAO report reviewed current Internal Revenue Service (IRS) and Department of Labor (DOL) guidance on the issue. The IRS has addressed the transfer of funds from an individual retirement account (IRA) to a state unclaimed property program.⁴ However, the guidance is limited to traditional IRAs and does not extend to employer-based arrangements such as simplified employee pensions (SEPs) or SIMPLE IRAs. In addition, the guidance does not address whether there are any circumstances in which an IRA owner, who recovers his or her funds from the state unclaimed property program, can subsequently roll it into an IRA. While the DOL has provided guidance on the circumstances under which a terminating retirement plan may transfer a participant’s benefits to a state unclaimed property program,⁵ the guidance does not extend to active retirement plans.

The GAO’s report contained three primary recommendations.

First, the GAO recommended that the IRS work with the Department of the Treasury to clarify, if transfers of unclaimed retirement benefits from retirement plans to state unclaimed property programs are treated as distributions, the tax reporting and withholding requirements, if any, that apply to such transfers.

Second, the GAO recommended that the IRS work with the Department of the Treasury to consider adding the transfer of retirement benefits to state unclaimed property funds from terminating defined contribution plans to the list of circumstances eligible for rolling over retirement benefits after the 60-day rollover period.

Third, the GAO recommended that the Secretary of Labor specify the situations in which uncashed retirement plan checks from ongoing retirement plans can be transferred to state unclaimed property programs.

The GAO extended to the IRS and the DOL an opportunity to review and comment on the draft GAO report prior to publication. The IRS indicated that it would work with the Treasury Department to consider the recommendations directed to it. The DOL expressed its position that eliminating or reducing uncashed retirement plan checks is the “best solution” to the problem.⁶ The DOL also noted the challenges stemming from the differences in state unclaimed property laws, and the need for notice and comment rulemaking and coordination with the Treasury Department and the IRS before additional guidance can be issued.

IRS guidance on taxation of uncashed retirement plan checks and missing participants

On September 3, 2019, the IRS published Revenue Ruling 2019-19 dealing with a participant’s failure to cash in 2019 a distribution check received from a qualified retirement plan.⁷ The IRS ruled that a distribution check that could have been cashed in 2019 will be included in the participant’s gross income in 2019. The IRS also ruled that the participant’s failure to cash a distribution check does not change the plan administrator’s obligations with respect to withholding federal income taxes and payment of withheld taxes to governmental authorities. Finally, the

IRS ruled that the plan administrator continued to be obligated to report the distributed amount on a 2019 Form 1099-R issued to the participant, notwithstanding the participant's failure to cash the check. The IRS indicated that the above rulings apply whether the participant keeps the check, returns the check to the plan, destroys the check or cashes the check in a subsequent tax year.

In the ruling, the IRS noted that it is still analyzing issues arising in other circumstances involving uncashed retirement plan checks. This includes uncashed checks with respect to missing participants. Thus, Revenue Ruling 2019-19 does not address the focus of the GAO's January 2019 report.

On related issue, on September 17, 2019, the IRS updated its webpage with guidance on missing participants. ⁸ The webpage cross-references to guidance on missing participants in the newest version of the EPCRS program in Revenue Procedure 2019-19, and cites other available methods, including methods of locating missing participants outlined in the DOL's Field Assistance Bulletin 2014-01 for terminating defined contribution plans.

On October 8, 2019, the Department of the Treasury issued its 2019-2020 Priority Guidance Plan. ⁹ Included is its priorities is guidance on missing participants, including guidance on uncashed retirement plan checks. The Department noted the issuance of Revenue Ruling 2019-19, so it is unclear whether additional guidance on this topic can be expected.

ERISA advisory council recommendations on voluntary transfers of uncashed retirement plan checks to state unclaimed property programs

In mid-2019, the ERISA Advisory Council on Employee Welfare and Pension Benefit Plans ("Council") began reviewing issues that employers face in dealing with plan benefits payable to participants who are lost or missing or who do not respond to efforts to communication regarding benefit distributions. The stated purpose of the review was:

"to explore whether there are circumstances in which voluntary transfers of uncashed retirement plan checks to a state unclaimed property fund advances the Department of Labor's goals of reuniting Missing Participants with their retirement savings." ¹⁰

Meetings were held in late June and August 2019 at which a number of vendors, organizations representing plans and employers, and service providers testified on the issue. On November 4 - 5, 2019, the Council held meetings to finalize recommendations to the Secretary of Labor on voluntary transfers of uncashed retirement plan checks to state unclaimed property programs.

The following is summary of the recommendations gleaned from an unofficial transcript of the Council's November 4 - 5, 2019 meeting:

1. The DOL should make clear that uncashed retirement plan checks are plan assets subject to ERISA for which ERISA plan fiduciaries have a fiduciary responsibility, they are not subject to state unclaimed property laws on a mandatory basis. Such state laws are preempted by ERISA.
2. The DOL should clarify that a voluntary transfer of an uncashed retirement plan check to a state unclaimed property program constitutes a distribution of benefits for purposes of ERISA. Once transferred, the check is no longer a plan asset and all ERISA fiduciary obligations are extinguished.
3. The DOL should develop a safe harbor with respect to voluntary transfers of uncashed retirement plan checks to a state unclaimed property program. Under the safe harbor, an ERISA fiduciary is deemed to satisfy its ERISA fiduciary duties if it transfers uncashed checks to a state unclaimed property program that meets certain minimum standards to be developed by the DOL. Although the Council discussed elements that the DOL might consider in determining minimum standards (e.g., allowing participant claims in perpetuity), it did not provide specific recommendations. The safe harbor, however, should permit plan administrators to rely on a certification by a state unclaimed property program that it meets the DOL minimum standards.

The Council expects to issue a full written report with respect to its review and recommendations in the first quarter of 2020.

Conclusion

Uncashed retirement plan checks is an intractable administrative issue that plagues retirement plan administrators. The Council notes in the description of its review objectives that a plan administrator has a number of options for dealing with an uncashed retirement plan check, in addition to a transfer to a state unclaimed property program. These options include (depending on the type of retirement plan):

- Rollover of benefits to an IRA;
- Forfeiture under the plan with a right of restoration; and
- Transfer of benefits to a federal insured benefit account. ¹¹

The unofficial transcript makes clear that the Council's focus on voluntary transfers of uncashed checks to state unclaimed property programs is not intended to restrict the ability of plan administrators to implement multiple options in dealing with uncashed retirement plan checks.

Hopefully, recent efforts to address uncashed retirement plan checks will lead to guidance from the DOL and IRS to plan administrators of active retirement plans that is more comprehensive, not only with respect to uncashed retirement plan checks, but also with respect to missing participants, one of the root causes of uncashed retirement plan checks.

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1. E.A. Bruce & J. Turner, Lost Pension Money: Who is Responsible? Who Benefits?, 3 J. Marshall L. Rev. 695 (2004) [↔](#)
2. Federal Action Needed to Clarify Tax Treatment of Unclaimed 401(k) Plan Savings Transferred to States, United States Government Accountability Office Report to Ranking Member, Committee on Finance, U.S. Senate (January 2019); <https://www.gao.gov/assets/700/696525.pdf> [↔](#)
3. Id. [↔](#)
4. See Rev. Rul. 2018-17 rules that an IRA custodian is required to withhold federal income tax from an IRA transferred to a state unclaimed property fund and report such transfer on IRS Form 1099-R. [↔](#)
5. Field Assistance Bulletin 2014-01 [↔](#)
6. <https://www.gao.gov/assets/700/696525.pdf> at p 51. [↔](#)
7. <https://www.irs.gov/pub/irs-drop/rr-19-19.pdf> [↔](#)
8. <https://www.irs.gov/retirement-plans/missing-participants-or-beneficiaries> [↔](#)
9. <https://www.americanbenefitscouncil.org/pub/?id=B7461D54%2D1866%2DDAAC%2D99FB%2D4CE2E55715FE> [↔](#)
10. <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> [↔](#)
11. Id. [↔](#)

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