



NATIONAL ASSOCIATION OF
UNCLAIMED PROPERTY ADMINISTRATORS

A Network of the National Association of State Treasurers

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

**Before the U.S. Department of Labor
2019 Advisory Council on Employee Welfare and
Pension Benefit Plans**

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Table of Contents

A.	Introduction and Overview	1
B.	NAUPA responses to testimony by other stakeholders.....	3
I.	Other stakeholder testimony expressing concerns over plan transfer of uncashed checks to state unclaimed property programs	3
II.	Other stakeholder testimony concerning the alternative disposition of uncashed plan checks	5
III.	Other stakeholder testimony assessing the effectiveness of state unclaimed property programs ...	7

Supplemental Materials

C.	NAUPA supplemental testimony in response to ERISA Advisory Council follow-up inquiries.....	10
I.	What do state claim rates look like for property of low, intermediate, and high values?	10
II.	What do state claim rates look like for property where the holder has already done extensive due diligence?	12
III.	What is the rationale behind the decision for individual states to pay, or not pay interest on owner claims?.....	15
IV.	State indemnification of plans: what are its characteristics, and how would it work?	18
V.	How would the concept of early/off cycle reporting operate?	21
VI.	What is the difference between membership in NAUPA and participation in MissingMoney.com, and how can owners search on a “national” basis?	23
VII.	How would the states propose to assist plans and record keepers with addressing an ostensible 40 year “backlog” of outstanding checks?.....	25
VIII.	Other Council Questions	27
Appendix.....		29

A. Introduction and Overview

The National Association of Unclaimed Property Administrators (“NAUPA”) is comprised of the unclaimed property programs¹ 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.²

NAUPA appreciates the interest of the ERISA Advisory Council (the “Council”) in addressing uncashed ERISA retirement plan benefit checks and the role that the states can play in returning funds to beneficiaries. Our member states were grateful for the opportunity to provide oral testimony at the Council’s meeting on June 26, 2019. That meeting demonstrated to all stakeholders the Council’s sincere desire to determine the utility of state unclaimed property programs in addressing the “missing participant” problem.

NAUPA reiterates that state governments already have the best solution to the problem of uncashed checks from ERISA plans.

This supplemental testimony has two purposes:

- First, in Part B, NAUPA comments on certain written and oral testimony made by other stakeholders.
- Second, in Part C, NAUPA addresses specific supplemental requests of the Council’s Issue Group, including:
 - I. What do state claim rates look like for property of low, intermediate, and high values?
 - II. What do state claim rates look like for property where the holder has already done extensive due diligence?
 - III. What is the rationale behind the decision for individual states to pay, or not pay interest on owner claims?
 - IV. State indemnification of plans: what are its characteristics, and how would it work?

¹ 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*.”

² 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 or tax agency.



- V. How would the concept of early/off cycle reporting operate?
- VI. What is the difference between membership in NAUPA and participation in MissingMoney.com, and how can owners search on a “national” basis?
- VII. How would the states propose to assist plans and record keepers with addressing the 40 year “backlog” of uncashed checks?
- VIII. Other Council questions

NAUPA previously testified that there is both continuous paid and earned media creating awareness of state unclaimed property programs and their search websites. These additional, recent news stories buttress NAUPA’s testimony. Recent news stories are provided as a supplement to this testimony (see appendix, **Exhibit F**).

B. NAUPA responses to testimony by other stakeholders

I. Other stakeholder testimony expressing concerns over plan transfer of uncashed checks to state unclaimed property programs

NAUPA has reviewed the testimony of other stakeholders with respect to concerns over the reporting of uncashed plan distributions to state unclaimed property programs. NAUPA appreciates these concerns, and believes that they can be substantially alleviated, although not through state efforts alone.

- (1) Guidance by the Department of Labor, concerning the acceptability of the utilization of state unclaimed property programs by retirement plans, is necessary.

NAUPA concurs on this point. It is the current lack of Department of Labor guidance (and indeed, previous agency opinions discouraging state reporting) that has prevented the transfer of uncashed checks from extant ERISA plans to state unclaimed property programs. We agree with other stakeholders that a “safe harbor” should be established for state unclaimed property reporting, and that the Department of Labor should either direct the use of state programs, or indicate those factors that a plan should consider in determining whether transfer of uncashed check funds to states is appropriate.

NAUPA agrees with the comments of one stakeholder that the Department of Labor should engage in a “true regulatory project,” adopting administrative rules following notice and an opportunity for comment by all stakeholders.

- (2) Guidance is needed on what steps are required of a plan *prior to* the transfer of uncashed distributions to a state unclaimed property.

NAUPA observed that most other stakeholders did not believe that there were definitive requirements regarding what constitutes a “diligent search” for a participant owed an uncashed plan distribution. While NAUPA agrees that this question should be definitively resolved, NAUPA cannot offer its view as to the efforts required of a plan fiduciary to discharge its responsibility in this regard. NAUPA does note that the requirements of a holder under state unclaimed property laws to locate an owner of prior to reporting and remittance to a state program (generally, a notice mailing to the owner’s last known address where the amount due is not immaterial) are less robust than those efforts contemplated by the Department of Labor. Thus, NAUPA believes that states would likely accept the diligent search requirements ultimately articulated by the Department of Labor as satisfying the state search requirements.

Within this supplemental testimony there are two discussions concerning owner search. The first relates to the lost securityholder search requirements of the Securities and Exchange Commission.³ The

³ See Section C (II), *infra*.

second is NAUPA's view that different "diligent search" procedures should be required for the current backlog of decades of relatively small, uncashed plan checks.⁴

- (3) The complexities and potential cost involved in a plan complying with the differing laws and reporting requirements of state unclaimed property programs makes those programs sub-optimal.

NAUPA believes that the states are prepared to work with retirement plans and the Department of Labor to create uniform abandonment periods and reporting standards.

As discussed in this supplemental testimony,⁵ states have the authority to accept property either "early" or "late," and to allow for reports to be filed on alternative (i.e., other than statutorily stated) dates. NAUPA further believes that the states would be agreeable to the Department of Labor establishing uniform abandonment periods and reporting standards for transfer of uncashed plan checks applicable to all states, through rulemaking. Consistent protocols across states (who already utilize a common reporting format) should additionally eliminate stakeholder concerns.

Further, as NAUPA previously testified, every plan should already be reporting unclaimed property not covered by ERISA. Uncashed payroll and vendor checks are not governed by ERISA, but are covered by the unclaimed property laws of every state. Plans should also be filing state and local tax returns in many state and local jurisdictions. Other firms in the financial industry routinely report unclaimed property on a regular basis using the federal common law established by the U.S. Supreme Court requiring holders to report based on the state of the last known address of the owner.

While reporting to multiple states is a compliance issue, the Council should keep in mind that (a) non-ERISA businesses routinely report unclaimed property (and plans should already be doing this for non-ERISA property), and (b) NAUPA and its member states are willing to work with the Department of Labor and plans to streamline the reporting process.

- (4) Because most states do not pay reappearing owners earnings on their property for the period that it is held in custody by the state, a plan might be held liable for transferring uncashed check funds to a state unclaimed property program.

NAUPA views this issue intertwined with the Department of Labor establishing a safe harbor for the utilization of state unclaimed property programs for the disposition of uncashed plan checks. If in considering the other benefits offered by state programs⁶ the Department of Labor establishes a safe harbor for their use by plans, we presume that attendant issues will also be addressed, i.e. whether outstanding check funds would cease to represent plan assets upon their transfer to a state. If the

⁴ See Section C (VII), *infra*.

⁵ See Section C (V), *infra*.

⁶ See Section C (III), *infra*.

question of the appropriateness of reporting to a state unclaimed property program is resolved, NAUPA believes that states would defend and/or indemnify holders should claims against plans later arise.⁷

II. Other stakeholder testimony concerning the alternative disposition of uncashed plan checks

The testimony of other stakeholders included an assessment of alternatives to state unclaimed property programs for uncashed check disposition.

(1) Forfeitures of uncashed plan checks.

In observing that states make use of unclaimed funds until such time as the owner of the property can be located and paid, a stakeholder suggested that state unclaimed property programs were the equivalent of a forfeiture with a right of restoration; hence, state programs did not offer a different option than already available to plans. NAUPA does not believe that the comparison is accurate because in a forfeiture, there is typically no ongoing effort to locate a participant, and no meaningful opportunity for the participant to learn about the existence of their property. In comparison, state unclaimed property programs, through their established internet websites, aggressive publicity campaigns, and ongoing use of state databases, make it possible for an owner of property to find the assets due them.

Another stakeholder commented that forfeiture is consistent with ERISA, because it allows unclaimed funds to be utilized for the benefit of plan participants, and not some other purpose. Testimony was also offered that transferring to a state unclaimed property program the funds owed to a missing a missing participant was not a proper use of a *plan's* assets. In NAUPA's view, this testimony represents a very narrow reading of ERISA. We believe that ERISA can also be viewed as ensuring that *all participants* receive the benefits owed them (particularly where those benefits have their genesis in salary deferrals).⁸ NAUPA additionally believes that the transfer of uncashed plan distributions to a state unclaimed property program is consistent with ERISA.⁹

(2) Rollover IRAs.

⁷ See Section C (IV), *infra*.

⁸ NAUPA understands the appeal of forfeitures to retirement plans. Indeed, the historical context of forfeitures makes sense: rather than unclaimed funds sitting idle, they should be put to use, and a good use is the reduction of plan expenses. However, there should be an inquiry whether presently, given the technologies available to locate missing participants, that forfeiture is the appropriate disposition for uncashed distributions and whether forfeiture, notwithstanding its permitted use, is in fact inconsistent with a plan's discharge of its fiduciary duties.

⁹ See California State Controller, Advisory Opinion Request to the U.S. Department of Labor, June 7, 2017 (Exhibit 1 to National Association of Unclaimed Property Administrators, *Written Statement on Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs Before the U.S. Department of Labor 2019 Advisory Council on Employee Welfare and Pension Benefit Plans*, June 26, 2019 (testimony of G. Allen Mayer).

Testimony was offered that because the Department of Labor has already deemed rollover IRAs as acceptable vehicles for the transfer of uncashed check funds from plans, there is no need to consider other options, including the utilization of state unclaimed property programs. NAUPA submits that the concept of fiduciary duty, there is an ongoing requirement to review any and all options to best promote retirement security and other objectives of ERISA.

Testimony asserted that rollover IRAs provide the greatest benefit to a missing participant and a greater opportunity to ultimately claim their entitlement. Respectfully, NAUPA's previous testimony¹⁰ cited a Governmental Accounting Office study that demonstrated that in many instances a plan distribution transferred to a rollover IRA could lose value over time because of fees. Further, NAUPA respectfully notes that the rollover IRA industry has not provided statistics concerning its success in owner unification. While one witness offered his belief that the websites of rollover IRA administrators are "at least as effective" as states, there was no data offered to support this assertion.¹¹ While individual state unclaimed property websites and missingmoney.com receive tens of millions of search inquiries annually, testimony provided by rollover IRA administrators did not include any statistics for their searchable websites.¹²

(3) Other approaches to uncashed plan distributions

Several stakeholders advocated for change in how distributions made by plans that remain uncashed are handled. For instance, testimony was offered that if a check was not presented for payment, that the funds be reinstated to the account, with no 1099 issued. NAUPA views this issue as one of plan administration, to be appropriately addressed by the Department of Labor. However, NAUPA believes that this may not solve the problem of connecting owners with their unclaimed funds.

- First, it is unclear how reinstatement of a distribution results in locating and making payment to the missing participant. Absent some requirement to search for the missing participant on an *ongoing* basis, reinstatement to the account of an uncashed distribution overlooks the problem. Continuing to treat an uncashed distribution as a taxable event, where a 1099 is issued and the

¹⁰ See National Association of Unclaimed Property Administrators, *Written Statement on Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs Before the U.S. Department of Labor 2019 Advisory Council on Employee Welfare and Pension Benefit Plans*, June 26, 2019, pp. 21-22 (testimony of G. Allen Mayer). In testimony to the Council on June 26, 2019, rollover IRA administrators acknowledged that smaller uncashed plan check balances transferred to rollover IRAs would most likely be eliminated through account fees.

¹¹ The rollover IRA search website described in testimony requires that an individual provide their social security number in order to undertake a search. In the experience of the states, such a requirement tends to discourage the public, as a matter of identify fraud, from searching for unclaimed property. While states uniformly request social security numbers to verify a claimant's entitlement to property, states do not request this information in order to search for unclaimed assets.

¹² Because there are multiple rollover IRA administrators and (ostensibly) multiple rollover IRA searchable websites, it is unclear how an individual would determine which website to initiate a search. In comparison, an individual would perform a search on the state website in which the individual currently resides or formerly resided. Moreover, an individual can search the unclaimed property records of more than 40 states through the states' national database, missingmoney.com.



Internal Revenue Service notifies the missing participant of a tax reporting deficiency, will more likely result in the participant being located. Additionally, transfer of the uncashed check funds to a state unclaimed property program could result in the (previously) lost participant being made aware of all of their entitlements (and not merely uncashed check funds held in the custody of the state), where the plan has informed the state, and the state in turn notifies the reappearing participant, of the account balance of other property still held by the plan.¹³

- Second, reinstatement to an account of the funds represented by an uncashed check may be incongruous where the check's issuance was mandated by the plan (e.g., required lump-sum payment being taken at an age certain), or where the plan has elected to force a transfer for a terminated employee (and the vested balance is less than \$1,000). In these instances, it would appear that the participant's account would be closed, and reinstatement not possible.

III. Other stakeholder testimony assessing the effectiveness of state unclaimed property programs

The testimony of other stakeholders concerning the transfer of uncashed retirement plan checks to state unclaimed property programs included the assessment of the effectiveness (and other aspects) of state unclaimed property programs. While NAUPA welcomed this testimony and found much of it to be instructive, certain statements included in the testimony on this subject warrant comment by NAUPA.

- (1) Other stakeholder testimony concerning state success in locating owners.

NAUPA found surprising the testimony of several stakeholders who stated that if a plan, in undertaking a diligent search, had failed to locate a missing participant, that the state would be similarly unsuccessful. This testimony suggests that to the extent that there is an uncashed plan check problem, that problem is unsolvable. Further testimony asserted that the only remaining uncashed checks maintained by plans that have conducted diligent searches are checks where the participant name or address cannot be identified, which thusly state unclaimed property programs would unlikely return to rightful owners.¹⁴

While NAUPA applauds retirement plans and their recordkeepers who have successfully utilized credit bureau and other proprietary databases to locate lost participants, we seriously question whether all missing participants that can be found, have been found. NAUPA believes that this testimony overlooked several important dynamics of state unclaimed property programs:

- First, the states possess unique search tools, not available to or utilized by plans and their recordkeepers.

¹³ For a further discussion of this possible teaming arrangement between retirement plans and states, see section C (VIII), *infra*.

¹⁴ To the extent that there are material amounts of uncashed check funds owed to participants whose identities cannot be determined, this is an entirely different problem that should be addressed.

- Second, owners locate their property held in custody by the state more frequently than states locate owners. States are a “one-stop shop” to search for unclaimed property, and aggressively advertise to promote and reinforce the idea that residents should check their website annually or semi-annually.

Another stakeholder’s testimony questioned the utility of state searchable websites, suggesting that a missing participant’s property could have been received by a state where the participant never lived or worked, and thus would not be readily identifiable. This testimony highlights why NAUPA and the states have stressed the importance of reporting property to the state of last known address of the owner. In addition to being mandated by federal common law, reporting on this basis will greatly increase the probability of a missing participant recovering their property.

(2) Other stakeholder testimony concerning administration of state programs.

A stakeholder noted that state unclaimed property programs have no federal regulatory oversight, implying that states are not suitable as custodians for uncashed retirement plan checks. This is the equivalent of arguing that states should not be able to impose taxes because there is no federal regulatory oversight of state departments of revenue. States collectively take in, and return to owners, billions of dollars annually in unclaimed property. Every state unclaimed property program is subject to independent audit and legislative oversight. Further, as public entities, state programs are subject to open records and other sunshine laws with which private sector entities do not have to comply.

The same stakeholder testified that state unclaimed property programs owe no duties to missing participants. While NAUPA agrees that state unclaimed property administrators do not operate as fiduciaries under ERISA, this does not mean that they do not have accountability. State unclaimed property programs—and the elected officials overseeing them—are accountable to the citizens of their respective states.

Another stakeholder testified that because the states are already administering a myriad of different types of unclaimed property,¹⁵ adding uncashed retirement plan checks would likely be overly burdensome, and that the states would have difficulty in mastering the nuances of ERISA-related distributions. States are more than capable of assuming custody of uncashed checks issued by ERISA plans, as states have successfully administered a variety of other financial assets.

Testimony was also offered that some service providers did not have a positive view of state unclaimed property programs, and that consequently states were not perceived as being able to act in the best interests of missing participants. This testimony was based on experiences in conjunction with compliance examinations which, when questioned by the Council, the stakeholder indicated that the service provider complaints were from a decade ago. NAUPA is unclear how a dispute as to a holder’s

¹⁵ Examples provided by the stakeholder include real estate. However, with the exception of safe deposit box contents, all unclaimed property administered by state programs is intangible in nature.



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duties that may have arisen in a compliance examination a decade or more ago is relevant to the states' current (and future) effectiveness in returning uncashed plan distributions to missing participants.