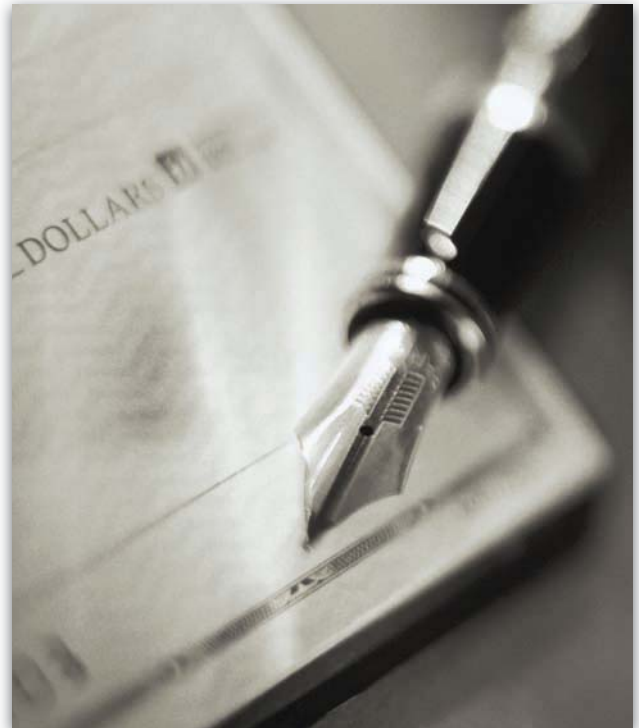


WHAT TO DO WITH THOSE UNCASHED CHECKS

BY TERRY DUNNE



People all over the country are owed money from their former employer's retirement plan. Companies have attempted to send the distributions to participants but the checks came back as "address unknown" or the checks were just never cashed.

There may be billions of dollars around the country in these unclaimed benefits—uncashed distribution checks. Most companies experience this problem each year and large companies may have thousands of these uncashed checks they'd like to resolve.

When a retirement plan issues a check to a participant of the plan,

the funds technically remain part of the plan until the participant or a beneficiary cashes the check. If the participant doesn't cash or roll the check over, the plan should treat the participant's account as continuing, the participant should be credited with the appropriate share of future earnings (if applicable), and the funds should be available to the participant

whenever she comes calling for her retirement balance. Yet it appears that such treatment may be rare.

These situations are often complicated when a financial institution is serving as the custodian or recordkeeper and distributes the assets of the plan. In these situations, the money may come off the plan books entirely. It's common that the financial institution retains the float on these types of funds that are earmarked as plan distributions. The logic is that this is intended to be for a relatively short time while the exchange of funds is pending, but what happens if that transaction isn't completed? What now is the plan's responsibility? What's the financial institution's responsibility?

Ultimately, with uncashed checks, the plan fiduciary/administrator must recognize that the participants' balances remain plan assets and the plan sponsor retains ongoing fiduciary responsibility until the funds are restored to the plan or the participant receives the distribution. The plan sponsors have two options:

- Ensure that the funds are restored to the plan; or
- Search for the participants and establish a safe harbor IRA for automatic rollovers for missing or non-responsive participants.

DISTRIBUTION CHECKS ARE PLAN ASSETS UNTIL CASHED

According to the United States Department of Labor (DOL), plan funds that have been distributed remain qualified plan assets until they're cashed by the participant. ERISA Opinion Letter 93-24A (09/13/1993) was the first DOL guidance to address "float" situations. The DOL letter stated that use of benefit distribution checks by a plan fiduciary or service provider to earn float would constitute a prohibited

transaction precisely because benefit distribution checks constitute plan assets. In 1994, the DOL clarified its position in an Information Letter to the American Bankers Association (ABA). The DOL stated that the ABA's position—that amounts in disbursement accounts are no longer plan assets once transferred to such account—was erroneous. The DOL stated that a plan fiduciary's or service provider's decision to handle plan assets in such a way as to benefit itself by earning interest or float constitutes prohibited self-dealing even if the assets are moved to an account designated for distribution. Additionally, DOL Field Assistance Bulletin 2002-03 outlines the obligations of plan fiduciaries and service providers regarding disclosure and procedures for handling float earned from plan assets. The bulletin says that for uncashed distribution checks there must be an agreement with the plan regarding any float earned on plan assets. And it requires the agreement to disclose the float as a fee and describe the time frames for, and the anticipated rates of returns from, the float.

The DOL, therefore, views plan distributions as plan assets until the check is cashed by the participant or his or her beneficiary, or when applicable, rolled into an IRA in the name of the participant or beneficiary. Even if the plan treats these amounts as forfeitures, the plan and the plan sponsor are responsible for reporting these amounts. And the plan (or the plan sponsor if the forfeiture account doesn't have sufficient funds) must pay a valid claim made by the previously non-responsive/missing participant.

CAN THE FUNDS GO BACK TO THE EMPLOYER?

Under no circumstances should the money go back to the employer (instead of the plan) or be used for plan purposes other than forfeitures if allowed under the plan document. The plan fiduciary is liable for those

amounts even if the participant can't be found. And a service provider/financial institution could be liable if it misdirects funds relating to the uncashed checks.

SHOULD THE ASSETS BE ESCHEATED?

The DOL has opined that a plan should not escheat (return to the state) funds that belong to a non-responsive participant [ERISA Opn. Ltrs. 79-30A (May 14, 1979); 94-41A (Dec. 7, 1994)]. State escheat laws relating to retirement funds are generally preempted by ERISA. If a plan issues a benefit check to a participant or beneficiary, and the check goes uncashed beyond the negotiable period, the underlying funds continue to be owned by the plan subject to the right of the missing participant to later claim them. According to DOL guidance, if state unclaimed property statutes were applied to require an ongoing active plan to pay amounts held by the plan on behalf of terminated employees to the state, the application of that statute would be preempted by Section 514(a) of ERISA [See Advisory Opinion 94-41A (Dec. 7, 1994)].

With respect to state unclaimed property laws, there is a 7th Circuit case (Commonwealth Edison Co. v. Vega) that addresses whether ERISA retirement funds were covered by the Illinois Uniform Disposition of Property Act. Under Com Ed, the State of Illinois was attempting to claim uncashed checks relating to payments to participants in an ERISA-covered retirement plan. The state was unsuccessful because the uncashed checks were considered to be plan assets; the plan had not fulfilled its obligation to the participants to provide the promised benefits. Therefore the state could not claim the funds, which ultimately had to be returned to the plan.

The DOL filed an amicus brief in Com Ed that was based on the principles set forth in its 1993 and 1994 rulings: Benefit distributions

remain plan assets until they're in the hands of the participant. If the participant can't be located, then the plan fiduciary is still responsible for those assets. The fiduciary must retain the funds in the plan or, where appropriate, establish an IRA rollover for the missing participant.

In the context of a terminating plan, the immediate need to do something is essential since a plan is not terminated until all assets are distributed. For defined contribution plans, the DOL has issued a regulatory safe harbor for rollover distributions in 29 CFR Section 2550.404a-3.

To qualify for safe harbor protection, a fiduciary must provide notice that includes a distribution election to participants. If the participant doesn't respond, a fiduciary must then take steps, consistent with its duty under ERISA Section 404(a)(1), to locate the participant before making a distribution (DOL Field Assistance Bulletin 2004-02).

If the participant fails to respond/make an election, a fiduciary may then proceed to make a distribution to an IRA meeting the conditions of the DOL's safe harbor.

In circumstances where a fiduciary could not or chooses not to distribute to an IRA, the DOL has also provided guidance on distributions from terminated defined contribution plans to bank accounts and escheatment to state unclaimed property funds. Such distributions aren't covered by the regulatory safe harbor. The DOL has provided this guidance and methods of distributions to an IRA and other methods to permit a plan fiduciary to wind up the plan's affairs and to handle the issue of uncashed checks properly.

TO PLAN FIDUCIARIES: ESTABLISH PROCEDURES

As a result of the DOL guidelines outlined in this article, plan fiduciaries should have provisions in their plan documents and service agreements covering uncashed checks

and providing specific procedures and timeframes for returning the funds to the plan. For example, the DOL has suggested that if there is an agreement covering float, uncashed check reports should be issued and reviewed by appropriate plan fiduciaries once the uncashed check is 90 days old.

WHY ROLLOVER TO IRAs?

Allowing funds for missing or non-responsive participants to remain in the plan can be problematic:

- The plan continues to incur costs associated with administering the accounts for missing participants.
- The participants remain disconnected from their retirement funds.
- The funds may not be accumulating interest or earnings.
- Fiduciary responsibility requires attempted regular communications with all participants, including those represented only by the uncashed checks.
- If the uncashed checks are handled improperly, fines or lawsuits could result.

Uncashed checks and other funds representing the interest of missing or non-responsive participants can be rolled over to a qualified IRA provider. Typically, the IRA provider or custodian will open an IRA in the name of the participant and invest the proceeds in an investment designed to minimize risk, preserve principal, provide a reasonable rate of return, and maintain liquidity (in line with DOL guidelines for rollovers). Examples include money market funds, interest-bearing savings accounts, certificates of deposit, and stable value products.

Most IRA custodians will conduct additional search efforts aimed at locating the participants. And if the

plan did mandatory withholding at the time of the initial distribution, an IRA can be set up for the balance rolled over. Additionally, a plan has the right to reclaim the withholding from the IRS. Upon the rollover of the funds and the confirmation that the IRAs have been established, the plan will have met its fiduciary responsibilities.

CONCLUSION

A common problem facing plan fiduciaries is what to do with assets associated with uncashed distribution checks. The check may have been returned to the plan sponsor or service provider as undeliverable by the U.S. Postal Service or the check may have been delivered but never cashed by the participant.

The uncashed checks are plan assets and rightfully belong to the participants. Thus the plan sponsor has ongoing fiduciary responsibility and should do what it is trained to do to protect the resources for the participants represented by the uncashed checks.

If the company considers the participants missing or non-responsive, then in coordination with the terms of the plan, the plan sponsor may utilize automatic IRA rollovers for participant balances less than \$5,000 and fit within the DOL's safe harbor requirements, or larger amounts without the DOL's safe harbor protection.

The DOL has indicated that a plan should not escheat funds that belong to a missing/non-responsive participant unless as a possible solution if IRAs are not chosen by the fiduciary for non-responsive participants of terminating plans. **PG**



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