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Via electronic mail: 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: Survey of State Return Rates and Comments on Treatment of ERISA Property in Unclaimed Property Audits

Dear Mr. Good:

Thank you for the opportunity to present information regarding the administration of unclaimed property statutes from the claimants' and holders' perspectives to the ERISA Advisory Council (the "Council"). I am a member of The Holders Coalition, ("Coalition")[1] which represents institutions whose members hold or represent owners of property, as well as of the Unclaimed Property Professionals Organization ("UPPO").[2] We applaud the efforts of the Council to protect Participants' retirement assets. The goal of abandoned property statutes is to reunite owners with assets they forgot about or never knew about. However, policies that ensure that funds can remain with owners in the first instance, like the Department of Labor's guidance on Missing Participants Searches[3] or the Securities and Exchange Commission's Lost Securityholder and Unresponsive Payee Regulations[4] are much more beneficial to owners.

[1] The Coalition was initially formed to assist the Uniform Law Commission ("ULC") in the development and approval of the Revised Uniform Unclaimed Property Act of 2016 ("RUUPA 2016"). Throughout the multi-year process, the members of the Coalition earnestly worked with the ULC's Drafting Committee and other participating stakeholders to develop the RUUPA 2016, sharing valuable testimony, insight, and expertise on legal, regulatory, technical, and operational matters. With the adoption of the RUUPA 2016 by the ULC, the Coalition continues to work together to address common issues impacting the owners of property.

[2] UPPO is the national trade association of unclaimed property holders and service providers. UPPO represents over 425 unclaimed property holders and service providers and 1,500 unclaimed property professionals of diverse industries and employer size. UPPO provides education to holders and advocates for fairness in unclaimed property laws and regulations.

[3] Field Assistance Bulletin No. 2014-01, Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans

[4] 17 C.F.R. § 240.17Ad-17, Lost Securityholders and Unresponsive Payees

We support three basic principles, all of which are aligned with the Advisory Council's mandate:

- Communication with owners or their heirs designed to prevent escheatment of assets is of utmost importance;
- If funds are to be escheated, there must be clear guidance on the process and said escheatment must be deemed to be "in good faith";[5]
- Once escheated, policies must be in place to ensure that the maximum amount of property can be returned to owners.

On this last point, the survey conducted by the Claimant Representative Committee of UPPO on the success of states in returning property to owners will be particularly informative. As requested, I will also discuss what holders have encountered when under audit for unclaimed property compliance with respect to ERISA property.

From 1994 – 1999 I served as Deputy General Counsel to the Treasurer of the Commonwealth of Massachusetts, where I had responsibility for the Unclaimed Property Division and the State Board of Retirement, which oversees the Commonwealth's second largest public pension fund. In the Unclaimed Property Division, we prided ourselves each year on returning more money to owners than the prior year. There is nothing more satisfying as a state official than paying owners money they had forgotten about, or that they never knew about, which is often the case when paying heirs or beneficiaries. I am delighted when I hear the current Massachusetts Treasurer speak about the high return rates he has achieved – he is blowing the old return rate out of the water, returning over a hundred million dollars each year. I applaud this accomplishment and hope the trend continues across the country.

I recall that while with the Unclaimed Property Division, many of my fellow state administrators were disappointed by the holding in the *Commonwealth Edison v. Vega*[6] case, as they truly felt that the property should be escheatable. Perhaps because I also represented the Commonwealth's pension fund, the decision was perfectly logical. Specifically, the Massachusetts pension statute prohibits the transfer of outstanding pension checks to the Unclaimed Property Fund. While the checks are of course always available to the participants or their heirs, until such time as they are claimed by an owner, they serve to reduce the unfunded liability of the Plan. I saw both the *Vega* decision and the Massachusetts statutory procedures as the most beneficial to the parties most impacted, namely, the participant and the plan sponsor.

While both the Retirement Fund and the Unclaimed Property Fund are capable of reissuing an outstanding check when an owner makes a claim, there is an expense to processing the claim, as well as issuing and reconciling the check. This expense is more properly borne by the Retirement Fund. The one thing that the Retirement Fund does not do, however, is publicize the fact that there is an outstanding check. As the states'

[5] The escheatment must be deemed to have been "in good faith" or most state statutory indemnification provisions will not be available to the holder reporting the property. See e.g. Mass. Gen. Laws ch. 200A §15D.
[6] 174 F.3d 870 (1999).

testimony in June demonstrated to the Council, their use of their own websites, missingmoney.com, Facebook, social media, traditional advertising and newspaper publication allows them to return hundreds of millions of dollars each year to owners and their heirs, a tremendous accomplishment that should be continued. However, these efforts should also be reviewed in the context of how the funds are reported to the states, as well as what happens once the states receive unclaimed property, and practical limitations on what actions the states can take to reunite owners with their property.

The majority of the funds received by the states is due to routine annual compliance. Most states also conduct audits as part of their enforcement efforts. The majority of the audits are conducted by contract audit firms whose fees are determined by the amount of property reported to the states as a result of the audit. There is some criticism to the use of contingent fee auditors, as well as pending legal challenges to its constitutionality,[7] particularly when the auditor is using an estimate to arrive at a potential liability to be paid.[8] The use of estimates will be discussed further since it impacts the return rates, since there are no names or addresses associated with the amounts paid to the state. However, in the context of outstanding pension checks with a participant's name and address associated, the issues of liability are clearer and should not be impacted by how the auditor who identified the check is compensated.

Post-*Vega*, auditors adjusted their methodology of reviewing ERISA property. While there was a recognition that the unclaimed property statutes were preempted, in my experience, the auditors parsed what constitutes ERISA property. On audits that I have defended, auditors have advanced the position that once a check is issued, it is separated from the trust and no longer ERISA property subject to preemption. Escheatment of these checks was cast as required, not voluntary. There have also been efforts to distinguish checks issued by ERISA plans by type. For example, holders have been asked to prove that a check was issued for an "ERISA-related purpose, such as medical payments", as opposed to paying for a general expense, such as rent. Some holders and their advocates rejected this approach with some success and there have been fewer ERISA issues in audits that I have worked on recently.

However, at least one auditor representing dozens of states currently requires extensive analysis of ERISA plans. Holders are required to identify each benefit plan offered, detail relevant characteristics of each plan, attest whether a plan is ERISA qualified, provide evidence of IRS recognition re: same, and request outstanding checklists from the plan administrators. These audits continue, with results varying based on the knowledge of the holder, the experience of the holder advocate and the aggressiveness of the auditor. While I have personally not had a demand for a client to pay outstanding checks from an ERISA plan for a few years, I remain concerned that the described analysis is being performed by staff auditors at contract firms. In my experience, these determinations must take into account several different complex areas of law which can stump seasoned

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[7] Univar, Inc. v. Geisenberger, et al., No. 1:2018-cv-01909 (D. Del. filed Dec. 3, 2018).
[8] Plains All American Pipeline L.P. v. Cook et al., 866 F.3d 534 (2017).

ERISA attorneys. I fear that delegating these decisions to auditors who are only experienced in unclaimed property audit requirements leads to an over-simplification of this important issue.

The Advisory Council requested information on state return rates once property has been remitted. The Claimants Representative Committee ("CRC") of UPPO spent two years surveying the states to determine actual rates of return. The survey examined how return rates are impacted by laws and policies that govern public access to account information; owner access to private sector service providers; private sector investment in owner location, notification and entitlement documentation; why owners hire service providers; and the risk of fraud. The CRC's objective was to apply a data-driven approach to identify best practices that maximize reunification while preserving balanced consumer protection. The goal is to work with individual states and/or the National Association of Unclaimed Property Administrators ("NAUPA") to introduce best practices nationwide, thereby leading to the return of additional funds to owners. The CRC also sought to identify any barriers to implementing any particular element of these best practices, in order to address potential solutions cooperatively with NAUPA.

The CRC members are experienced in many of the issues impacting return rates. While the return rate can easily be described as a fraction, the numerator of which is property returned to owners, the denominator of which is property reported to the state, a true "apples to apples" comparison is difficult to arrive at, as there are a multitude of variables that make such a comparison very nuanced. For example, many states do not report the value of securities reported. However, they do report the liquidated value of securities that are returned to owners. Therefore, the numerator has been increased, while the denominator has not been similarly increased to account for the property, leading to a higher return rate. Some other examples are that property that is paid is frequently related to a report from many years prior, again providing an accurate numerator of property returned, but an inaccurate denominator against which to compare it.

Conversely, a state that receives an abundance of owner unknown property will have a higher denominator, without the opportunity to reunite the property with its owners. Examples of owner unknown property that increase the states' receipts are estimates of unclaimed property, which occurs routinely on audit; unredeemed gift cards; and property reported in the aggregate. Data conversions and the age of the records can also contribute to a loss of identifying information for property. Foreign property received by the states may contain names and addresses, yet it stands little chance of being reunited with its owners. These issues will increase a denominator, but have no impact on the numerator, and should be considered when calculating a return rate.

In order to account for all of these variables, the CRC sent detailed surveys to the states. We had hoped to be able to produce subsets of the return rate, similar to the way that Massachusetts presented its return rate in NAUPA's testimony from June.[9] However, many states indicated that they did not have the capability to

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[9] See Bracken Testimony at page 1.

extract their results at the granular level required. Therefore, the survey was simplified to ask for only two data elements:

- What is the total dollar amount of all property received from 2013 – 2017?
- What is the total dollar amount of all claims paid from 2013 – 2017?

While additional information was accepted if provided, the simplified questions generated responses from all 50 states and the District of Columbia. Independent research was also utilized in the CRC's analysis. For example, the CRC received information from state administrators and public reports regarding the total dollar value of fraudulent claims paid over the prior three years. The CRC reviewed the relevant provisions of each state's statutes governing the information that is to be made available to claimants; the ability of claimants to utilize the services of a claimant representative in the claim process; and the general regulation of claimant representatives. Finally, the CRC reviewed each state's website and unclaimed property search functions to determine the information that is available to the public when searching for property. With the permission of the CRC and UPPO, the survey results are included with this letter.

Return Rate Survey: The results of three states were not included in the summary conclusions as the CRC is reviewing the methodology used in those three states in terms of property that was reported. The rates in these states appear to be impacted by statutory requirements that more stringently analyze owner contact information, making it clear that further analysis is necessary. The remaining forty-eight jurisdictions are divided into four groups from the highest to lowest return rate. Within each group, the states are listed in alphabetical order rather than by performance. Group 1 had the highest average return rate; Group 4 had the lowest average return rate. The return rate achieved by the top twelve states, not including the three outliers, was 48%. The CRC then assumed that if the states with lower return rates adopted policies similar to those with higher return rates, the lower performing states would see an increase in returns, to 48%. The CRC then applied the 48% return rate to the dollar amount of the property received by the states with lower return rates to arrive at the amount it would be possible to return to owners if some improvements were made to the claim process.

- The research reveals the twelve states in Group 1 had an average return rate of 48%, while the twelve states in Group 4 had an average return rate of just 22%.
- The states in Group 1 maintained an average return rate more than double the average return rate of those in Group 4 over the five-year period.
- The impact of this gap is $3.1 billion held by the states in Group 4 that could be returned to owners by revising existing laws and policies.
- The cumulative five-year shortfall of all states below those in Group 1 is $4.9 billion dollars.
- The lowest reported return rate for an individual state was just 9%.

As the NAUPA testimony from June indicated, the more information the states receive from holders, the more successful they are at returning property to owners.[10] This paradigm holds true for the potential owner: the more information the owner has about the property, the more likely she will be to proceed with a claim. For example, if I see my name on the missingmoney.com site, I am much more likely to pursue a claim if I have an idea of how much the property is worth. Based on the time needed to file a claim, even with the streamlined online processes that may be available depending on the state, obviously I am more likely to proceed with a claim for $500, as opposed to one for $50. However, another claimant may find that it is time well spent to recover $50.

Unfortunately, many of the states with lower return rates do not provide meaningful information publicly, which has a direct and negative impact on the number of claims presented. Some of the reasons given by the states for not employing more claimant-friendly policies were fear of fraudulent claims; consumer protection concerns; and existing statutes. The CRC considered each of these issues with additional state input and research of publicly available information.

With respect to the risk of fraud, forty-seven states responded to this portion of the survey. Twenty-five states responded that they did not track data related to fraud; five states had the data but would not provide it; eight states reported that no fraudulent claims had been paid during the period; and nine states provided the amounts fraudulently paid. The average amount paid to fraudulent claimants was under 1% of the total amount paid per year.

The fraud survey results indicate that there is no significant fraud risk associated with displaying the full dollar amount, reported name, address, property type and holder name on state-sponsored websites. Results further indicate that the states' stringent claim evaluation processes are very effective at preventing fraudulent payments. Applying these numbers to the shortfall in reunification of the states with lower return rates in Group 4 puts the issue into perspective: states that limit the data available to prevent fraud arguably avoid 1% of fraudulent claims, which would be $31,000,000 combined across all twelve states. However, these limitations effectively prevent the filing of claims that could return $837,000,000 to rightful owners. Clearly this justification for not making more information available must be carefully scrutinized.

The CRC's review of the information available on state-sponsored search sites revealed:

- 50 states provide the full name reported for the owner
- 36 states provide the name of the holder reporting the property
- 35 states provide the full address reported for the owner
- 21 states provide the type of property reported
- 3 states provide the dollar amounts reported

[10] Id.

Depending upon the state, additional information is available pursuant to FOIA. In all states additional information is available once a claimant has demonstrated a potential entitlement to the property. However, what is necessary to demonstrate potential entitlement varies by state and can be very challenging. In some states, this may be accomplished with a simple call and identification of a prior address. In other states, however, a potential claimant must upload front and back pictures of a license, plus proof of previously residing at the address reported. All of this must be done before the state will reveal how much money is at stake, a practice which will clearly discourage some claimants from pursuing their property. This lack of transparency could result in a failure to claim $50, or $500, or $50,000, with no clear justification for such a policy. Additionally, while the enhanced electronic claim process can be a boon to some claimants, to others, particularly the elderly, it can be intimidating. There are also some inconveniences inherent in the use of automated claim processes. For example, system-generated email responses from the states' claim processing frequently end up in the claimant's spam folders, further delaying the return of funds to the owner.

Maximizing disclosure of reported information makes it easier for consumers to self-determine ownership and reduces the administrative burden related to claims or inquiries from people who are not the owner. Disclosing the actual account balance allows an owner to determine if it is worth the time, effort and expense of recovery and maximizes private sector investment in location and notification efforts.

This issue is further exacerbated when the owner is deceased. When an heir or beneficiary inquires about property, the conditions for revealing information can be onerous. Many states offer a streamlined process for smaller claims that negates the need to begin or re-open probate proceedings. However, probate is almost always required for larger claims, and many claimants simply do not have the funds to advance for probate costs, bonding fees and legal expenses, particularly when the value of the property is unknown and in light of the uncertainty of the claim being approved. Any costs advanced will also not see a return on investment for an extended period, as many states afford themselves a minimum of six months to process claims, with many taking over a year. This is particularly true of higher value claims, which typically must go through multiple levels of review of prior to approval.[11]

Additionally, states restrict owners from hiring experienced representatives to assist them in the claim process. This further reduces the number of claimants, and it results in less likelihood of claims being approved when people with no expertise in the area are forced to file claims without professional assistance. While it is true that most states do not charge any fees for processing a claim, and most states attempt to be helpful in instructing claimants on what is needed to file a complete claim, there is no state that assists in compiling the documentation necessary to pay a claim. Nor is there any state that can or should advance fees when needed, for example, for probate. Therefore, the limitations placed on the owners' ability to utilize the services of professional representatives have a very negative impact on return rates.

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[11] See e.g. Massachusetts regulations requiring review and approval by three different employees prior to approval. 960 Mass. Code. Regs. §4.04 (2001).

The CRC's review of statutes and policies governing claims, private sector service provider restrictions, and unclaimed property account information restrictions, compared to return rates, suggests that reunification is significantly increased when laws and policies include strong private sector participation though investment, flexible fees, direct payment of fees to service providers, comprehensive account information sharing, and reasonable registration requirements.

As the June testimony from the representatives of NAUPA demonstrated, the states can be incredibly successful at reuniting owners with their property in certain circumstances, for example, the property is reported with an address and a social security number for the owner, and that address is in-state.[12] However, these are the reunifications that are relatively simple to achieve, typically by the use of widely available and inexpensive address update services. This outreach can just as easily be accomplished by the Plan sponsor, with many additional benefits. Further, if the sponsor conducts the outreach, the cost of outreach will be borne by the Plan instead of by the taxpayer. It is very likely that the Plan will be able to process a claim more quickly than the state will, since the Plan will have much more knowledge about the payment and the Participant, and will not be handling the same volume of claims.[13] Just last month a state's own audit of its Unclaimed Property Division revealed that the Division did not act on 48% of the 17,128 claims tested within 90 days as required by state statute. Payment of claims could take as long as twenty-two months.[14]

One additional benefit to the Plan conducting the search and outreach is that there is no need to transmit the Participant's social security number to the state, thereby eliminating the risk of a security incident, as is unfortunately all too common when data is shared with additional parties. Finally, there is an inherent incentive for the Plan to reunite the property with the Participant, since the Plan has or had a relationship with the Participant. There is no corresponding incentive for the states, as they do not have a relationship with the Participant. Further, if the state is not successful in reuniting owners with their property, the penalty to the state is more money in the unclaimed property fund.

What the state testimony did not discuss are the more complex cases of owner reunification. While contact can usually be re-established fairly quickly with an owner whose property is unclaimed due to an outdated address, when the owner is deceased, it is not as simple to identify beneficiaries and heirs, or to establish their entitlement. For this subset of owners, whether or not the property continues to be held by the Plan or is escheated, reunification efforts should include more significant outreach, comparable to the deep searches that are recommended for lost securityholders if the initial mandatory searches are not successful.[15] In these

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[12] See Bracken Testimony at page 1.

[13] According to the June testimony of the NAUPA representatives, millions of claims are processed each year. Mayer Testimony at page 5. Some states do not have the resources to handle this volume. See Damschen Testimony at page 2.

[14] Colorado Office of the State Auditor, Performance Report, Division of Unclaimed Property, at p. 19 (July 2019).

[15] See e.g. In the Matter of The Bank of New York, File No. 3-12269 (Securities and Exchange Comm'n Apr. 24, 2006).

instances, the assistance of professionals can and should be embraced in order to return the maximum amount of funds to owners.

<u>Conclusion</u>

The states are undoubtedly committed to returning property to rightful owners and many can rightly boast of their investments in initiatives to reunite owners with their property. However, as the CRC survey results demonstrate, only fifteen states have an average return rate of 48% or better. The remaining states, which constitute the majority of the country, have return rates between 9% and 41%. Many states are embracing technology and social media to increase these rates, but it is clear that additional steps must also be employed in order for the mandate of returning property to rightful owners to be fulfilled. The survey shows that billions of dollars are impacted by these policy deficiencies. Therefore, it is recommended that if escheatment is more widely adopted as an option for addressing certain ERISA property, that there be clear guidance with respect to the transfer, and that the escheatment be deemed to be in good faith so that holders are indemnified. However, we stress that it would be more beneficial to have the owners reunited with their property prior to escheatment, and urge additional guidance be developed for outreach while the funds are still with the Plan sponsor.

We thank the Council for allowing us to share the results of the CRC survey as you consider this important topic. If you have any further questions, please do not hesitate to contact Jameel Turner at jturner@baileycav.com or (614) 229-3260 or me at jborden@bcg-up.com or (781) 307-1300.

Sincerely,

Jennifer Borden

Jennifer C. Borden