

# THE UNCLAIMED PROPERTY LEDGER

2ND QUARTER 2008



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Highlights of current events

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**Er, What? ERISA**

*By Christa DeOliveira*

This article covers the responsibilities of fiduciaries for ERISA-based pension plan property. It also explores related court cases, DOL opinions and information, and differing beliefs on whether state unclaimed property laws are preempted by ERISA.

### ABOUT SMS VANACORE

SMS Vanacore's focus is to educate and assist our clients with unclaimed property and to locate the owners of unclaimed property.

### CONTRIBUTOR'S CORNER

**Individual Retirement Accounts (IRA)**

*By the Unclaimed Property Task Force of the Securities Industry and Financial Markets Association (SIFMA)*

An interesting look into IRAs and the challenges to holders connected with the ambiguity and risks associated with unclaimed property.

## CURRENT EVENTS

During June, Lennie Kaufman and Nick Nichols spoke at the client conference for Registrar and Transfer Company. Their presentation covered current topics in the areas of searching for lost owners and escheatment, in a presentation entitled, "[Es]cheaters never prosper". The presentation was well received by the conference attendees.

SMS Vanacore will be attending the Shareholder Services Association (SSA) National Conference in Williamsburg July 22-25.

On August 21, SMS Vanacore will be attending the Regional Unclaimed Property Professionals (UPPO) Conference in Chicago.

SMS Vanacore will be attending the Midwest Securities Transfer Association (MSTA) Meeting in Chicago on September 11-12.

## HOT TOPIC

**Er, What? ERISA**

*By Christa DeOliveira*

In the 1960s there were several high profile pension plan failures primarily due to inadequate funding. These failures triggered media coverage, public hearings, several failed legislative efforts, and eventually a crescendo of public outcry. This galvanized Congress into action and they passed the Employee Retirement Income Security Act (ERISA). President Gerald Ford signed ERISA into law on Labor Day, September 2, 1974.

ERISA was enacted mainly to prevent mismanagement and fraud of employer pension plans and to ensure the security of retirement income for millions

of participants and their beneficiaries. While ERISA does not mandate any particular benefits, it does set uniform minimum standards for private sector employers choosing to offer plans. Congress' intent was to establish uniform standards requiring employers to conform to one set of laws for interstate plans, making administration more feasible and economical. Employee welfare plans are also regulated under ERISA; however, this article focuses primarily on pension plans.

**ERISA pension plans include plans such as defined benefit plans, 401(k), profit sharing plans, Employee Stock Ownership Plans (ESOP), and money purchase plans.**

Under ERISA every plan must have a fiduciary. A fiduciary is an individual or entity that exercises discretionary authority or control over a plan's assets or management, has responsibility for the plan's administration, or is paid to provide investment advice. Individuals with the responsibility to monitor fiduciaries are fiduciaries themselves. Their primary responsibility is to run the plan solely in the best interest and for the "exclusive benefit" of a plan's participants and beneficiaries, as outlined in section 404 of ERISA. A fiduciary must act prudently, diversify plan investments to minimize the risk of big losses, abide by the terms of the plan documents, (insofar as they are consistent with ERISA) avoid any conflicts of interest, and not engage in transactions on behalf of the plan that benefit related parties.

A fiduciary shoulders significant responsibility and one found deficient may be sued and found liable to repay any plan losses or any personal profits made through improper use of plan assets. Courts can take appropriate ac-



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tion against fiduciaries that breach their duties under ERISA up to and including their removal. The consequences can be costly for fiduciaries that have been found to not act for the exclusive benefit of plan participants and their beneficiaries.

Title I of ERISA subsection 514(a) is often referred to as the ERISA preemption clause and it is pivotal to this discussion. It contains a broad preemption provision stating, “except as provided in subsection (b)... any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” are superseded. Subsection 514(b) expressly saves or excludes state laws regulating insurance, banking, and securities from this preemption provision. Many have asserted that state unclaimed property laws relative to pension plans are superseded by this preemption clause.

However, the *Uniform Unclaimed Property Act (1995)*, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), directs that “an amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits” are subject to escheat. The previous Act from 1981 also contained similar language. Many states’ unclaimed property laws also have specific provisions covering ERISA property. In contrast, other states do not accept ERISA property and will even return it if it is turned over to them.

#### UNCLAIMED PROPERTY ADVISORY OPINIONS FROM DEPARTMENT OF LABOR (DOL)

ERISA has provisions for requesting interpretations through the DOL’s Office of Regulations and Interpretations. The office answers inquiries in the form of advisory opinions. These advisory opinions apply the legislation to a specific set of facts as outlined in the inquiry. The DOL’s position has historically been ERISA not only preempts state laws conflicting with it, but broadly preempts all state laws relating to employee benefit plans. This has been illustrated in the advisory opinions from the DOL on the subject of unclaimed property laws in connection with ERISA. Additionally, the DOL sent a letter to the NCCUSL dated March 3, 1995, during the drafting of the 1995 Act, elucidating the DOL’s position that ERISA preempts state unclaimed property laws.

In the *Advisory Opinion 78-32A* dated December 22, 1978, the question was asked whether ERISA preempts the State of Illinois Uniform Disposition of Unclaimed Property Act. The DOL considered the provisions of the Act, the ERISA preemption provisions and the legislative history of the preemption provisions. It determined that the Illinois Act was preempted by ERISA. The Illinois’ Attorney General’s Office disagrees with this position and in 1996 posted an opinion that can be reviewed at [www.illinoisattorneygeneral.gov/opinions/1996/96-OIO.pdf](http://www.illinoisattorneygeneral.gov/opinions/1996/96-OIO.pdf).

In the *Advisory Opinion 79-30A* dated May 14, 1979, the inquiry regarded California’s Unclaimed Property Law. The query raised by Fairchild Camera and Instrument Corporation was about a provision in California’s statutes that called for escheating employee benefit trust distributions after seven years of becoming payable. The DOL concluded that to the degree California’s unclaimed property laws relate to ERISA plans, the laws are preempted.

The *Advisory Opinion 83-39A* dated July 29, 1983, to the Director of the Bureau of Abandoned Property for the State of New York is the only advisory opinion regarding unclaimed property where the DOL did not advise preemption. Section 1316 of the New York Abandoned Property Law addressed taking custodial possession of insurance proceeds from group accident or health insurance policies, where the proceeds are due and owing for the duration of the dormancy period. Several insurance companies had asserted that Title I of ERISA section 514(a) preempts the New York law. However, the DOL’s view in this case was the law in question was a law regulating insurance and it should not be preempted.

*Advisory Opinion 94-41A* dated December 7, 1994, deals with the Luby’s Cafeteria, Inc. Profit Sharing and Retirement Trust and questions whether section 514(a) of ERISA preempts Texas’ unclaimed property statutes specifically addressing distributions for missing participants or beneficiaries. The DOL asserted the laws were preempted as they apply to the retirement plan and escheating would affect the function of the plan by reducing the plan assets. Additionally, the statute was not saved from preemption as it does not regulate insurance, banking, or securities. Subsequent to this, Texas had a policy of deferring audits of ERISA-based plans until after the questions surrounding unclaimed property and ERISA had been settled. The procedures are currently being reviewed and there are plans to update their audit manual. Ongoing plans are typically not reviewed, however terminating plans being audited are evaluated on a case by case basis.

#### COURT CASES ADDRESSING ERISA AND UNCLAIMED PROPERTY

There are four court cases specifically involving ERISA and unclaimed property and there have been some differences in their outcomes. It is important to note, there is no distinction in ERISA between the welfare and pension plans covered.

Michigan Court of Appeals heard the case *Attorney General v. Blue Cross & Blue Shield of Michigan* in 1988. The court ruled ERISA did not supersede Michigan’s unclaimed property laws for uncashed medical benefit checks issued under prepaid benefit contracts. In this case, unclaimed funds rather than being a plan asset were actually being held by Blue Cross & Blue Shield. The court determined the unclaimed property law



was a law of general application and did not affect the plan's structure, administration, or the type of benefits provided. It found the effect of the state's statutes on the ERISA plan was too tenuous or remote to merit preemption. Additionally, the court asserted escheat was traditionally an exercise of state authority. For these reasons, the court ruled ERISA did not preempt Michigan's unclaimed property laws.

Similarly, in 1989 the Second Circuit Court of Appeals heard the *Aetna Life Insurance Co. v. Borges* case. This court also ruled ERISA did not supersede Connecticut's unclaimed property laws relative to uncashed employee benefit checks issued by the health insurer. It was determined Connecticut's unclaimed property law had only a "tenuous, remote and peripheral" impact upon the ERISA plan. The Court emphasized that without more explicit direction from Congress, it could assume that Congress did not intend for state's traditional authority over unclaimed property laws to be superseded by ERISA, as they are laws of general application and not directed at employee benefit plans. Aetna petitioned to the United States Supreme Court to review this decision, but the high court declined.

In 1999, Seventh Circuit Court of Appeals heard the *Commonwealth Edison Co. v. Vega* case regarding the custodial taking of an ERISA defined benefit pension plan's uncashed checks. The court determined if Illinois unclaimed property laws were enforced it would result in the "confiscation of interest and the usurpation of plan administration." Specifically, the administration of the plan would be usurped by beneficiaries needing to apply to the state rather than directly to the plan for escheated uncashed benefit checks, thereby making the state the plan administrator with respect to these assets. The court ruled that making the State of Illinois the de facto plan administrator is in and of itself a violation of ERISA. Secondly, ERISA was violated further by depleting the plan's assets by taking away the "interest value of the money". In other words, the plan's assets would be depleted when the State of Illinois confiscates the interest that would have otherwise been earned on those assets. Finally, the court stated that subjecting the plan to the burden of compliance with "numerous variations" of unclaimed property laws of the 44 different states in which its participants reside would further deplete plan assets. The Court ruled the Illinois unclaimed property laws "directly and substantially" relate to the ERISA plan and therefore are preempted. After the decision in this case, the State Treasurer of Illinois filed a petition requesting the Supreme Court to review the *Commonwealth Edison Co.* decision. Twenty-eight states joined together in an amicus brief supporting the Treasurer's position. For a second time, the Supreme Court declined to hear a case regarding ERISA and unclaimed property.

In 1999, the Federal District Court of Northern California heard arguments in the case of *Manufacturers Life Insurance Co. v. East Bay Restaurant and Tavern Retirement Plan*. At issue was California's attempted seizure of uncashed annuity checks issued by Manufacturer's Life Insurance Company on behalf of the East Bay Restaurant and Tavern Unions and Employers ERISA pension plan. The insurance company was contractually obligated to give premium refunds, upon request, for all missing annuitants not located. It was determined the annuity contract was itself a plan asset, based on the derivative value of the guarantee of the refund for unclaimed benefits being returned to the plan upon request, thereby benefiting

all plan participants until locating the missing participants. The court found California was "seeking to insert itself between the ERISA plan and an asset of the plan, the annuity contract" and attempting to "seize funds to which the ERISA plan has a contractual right". Like in the *Commonwealth Edison case*, the court felt this amounted to "the confiscation of interest and usurpation of administration" as California was "attempting to not merely govern the payout of plan benefits, but to manage plan assets". Additionally, it was determined in this case the ERISA preemption was not "saved" as the unclaimed property laws were determined not to be laws regulating insurance. The court determined California's unclaimed property laws were superseded by ERISA.

*Steelman v. Prudential Ins. Co. of America* was heard by the United States District Court, Eastern District of California in 2007. The case dealt with an ERISA plan's claim on insurance demutualization proceeds. Specifically, the demutualization plan provided that if an owner could not be located, the proceeds due him would be paid out in cash and turned over to the state where the original contract was issued. The insurance company asserted immunity based on the immunity granted by California's unclaimed property law. The court determined that while California's unclaimed property law conferred immunity for escheated funds, this immunity was preempted by ERISA and would not bar plaintiffs' claims under ERISA.

Disagreement and litigation will likely continue until either the Congress or Supreme Court clarifies the extent to which state laws are superseded. However, there are patterns in the cases: when a state law's relationship to ERISA is too remote, tenuous or peripheral to impact the plan or found to be a law regulating insurance, banking, or securities, then the state's law is not superseded. If it is determined the application of the unclaimed property laws relate to a plan directly and substantially and would deplete plan assets directly or deprive a plan of interest, and a state attempting to seize plan assets interferes with the administration of the plan, then in these situations the unclaimed property laws have been preempted.



## DOL'S BULLETIN ON FINDING MISSING PARTICIPANTS AND DISTRIBUTION OPTIONS FOR TERMINATING PLANS

Fortunately, over the last few years there has been welcome guidance on how to address terminating plans. On September 30, 2004, the DOL released *Field Assistance Bulletin No. 2004-2* ([www.dol.gov/ebsa/regs/fab\\_2004-2.html](http://www.dol.gov/ebsa/regs/fab_2004-2.html)) addressing the fiduciary duties of finding missing participants and distribution options for terminating defined contribution plans. A spokesman for the department stated one of the purposes of this bulletin is to give direction to the department's auditors. The guidance offered in this bulletin was well received since previously there was little official direction on how to terminate a defined contribution plan. Knowledge of the auditors' criteria is valuable for effecting compliance measures.

After a plan's termination date, plan assets must be distributed as soon as feasible to meet the IRS requirements for completing a plan's termination. Plan administrators must contact all participants and receive direction from them on how to distribute account balances. This notice requirement covers all participants, even those who were previously not vested, since participants automatically vest upon termination of a plan. Unresponsive participants are deemed missing and impede plan administrators' ability to settle a plan's financial affairs.



### ■ Required Search Methods:

- Use Certified Mail to determine whether a participant can be found at the address on file.
- Check related plan records cross-referencing a participant's address with other sources, such as the employer or a group medical plan. In instances where there are privacy concerns, it would be appropriate for the keeper of the record to contact or forward a letter on behalf of the retirement plan asking the participant to contact the retirement plan administrator.
- Identify and contact any named beneficiaries requesting them to contact or forward a letter to a participant on the retirement plan's behalf.
- Use the letter-forwarding service offered by the IRS or the Social Security Administration. (Information on these services is available at [www.irs.gov/retirement/article/0,,id=110106,00.html](http://www.irs.gov/retirement/article/0,,id=110106,00.html) and <http://policy.ssa.gov/poms.nsf/lnx/0203365001?OpenDocument>.)

### ■ Other Search Methods

If the required search methods are ineffective, a plan fiduciary should consider other alternatives. The bulletin directs fiduciaries to consider the size of the participant's account relative to the associated costs when making a decision on which other search methods to use. Other search methods a fiduciary may use are:

- Internet search tools
- Commercial locator services
- Credit reporting agencies

### ■ Distribution Options

When plan participants cannot be located or have not provided affirmative distribution directions for benefits from the terminated plan, fiduciaries will be obligated to consider distribution options. Individual retirement plan rollovers into an individual retirement account or an annuity are the preferred distribution options. The DOL advises these options be considered first as they are more likely to preserve retirement assets. In this scenario assets continue to receive a deferral of income tax like the original plan received. This allows the participants to avoid the mandatory 20 percent income tax withholding requirement and the 10 percent additional tax that may be assessed for premature distributions.

Alternative arrangements should be made when the plan fiduciary is unable to find an individual plan provider that is willing to accept the rollover distribution. In such instances opening a bank account in the missing participant's name or transferring assets to a state's unclaimed property fund are the suggested alternatives. The fiduciaries should carefully weigh their fiduciary duties and the potential personal income tax implications to the participant of these alternative arrangements.

When opening a bank account it must be federally insured. Other variables that must be taken into consideration are the opening interest rate, account restrictions, guaranty periods, and any associated bank fees. Additionally, once the participant is located, he must have an unconditional right to withdraw funds from the account.

A fiduciary may also consider transferring or escheating a missing participant's account balance to the custody of the state of the last known address of the missing participant. The DOL maintains that for ongoing plans it is the fiduciary's responsibility to preserve plan assets and *not* reduce them through escheat. In this FAB bulletin, the DOL makes the distinction that deciding to voluntarily escheat missing participants' account balances, where permissible, constitutes a plan distribution resulting in termination of both the "property owner's status as a participant and property's status as plan assets under ERISA".

In the past some plan fiduciaries have deposited an account's entire balance as a tax withholding. The bulletin directs 100 percent income tax withholding is unacceptable. This option is not deemed to be in the best interest of participants and their beneficiaries, thus violating ERISA's fiduciary requirements.

Implementing the decision to terminate a defined contribution plan requires searching for missing participants and determining appropriate distribution options in the absence of their distribution direction. The DOL provides multiple alternatives to achieve this, making it clear potentially effective search methods with nominal associated expenses should always be used.

their significant fiduciary responsibilities and associated liabilities. Ultimately, these nest eggs are what people are relying on for retirement.

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## TERMINATING ABANDONED PLANS

If you stumble onto an orphaned or abandoned plan, the Employee Benefits Security Administration (EBSA) of the DOL has published the *Termination of Abandoned Individual Account Plans* with an effective date of May 22, 2006 for guidance. The guidance offers substantial information on how to facilitate plan termination and distribution of benefits from pension plans that have been abandoned by their sponsoring employers. The regulation is extensive and can be viewed at [www.dol.gov/ebsa/regs/fedreg/final/2006003814.htm](http://www.dol.gov/ebsa/regs/fedreg/final/2006003814.htm).

■ The final rule outlines three regulations:

- First, it establishes a procedure for financial institutions holding the assets of an abandoned individual account plan to terminate the plan and distribute benefits to the plan's participants and beneficiaries, with limited liability.
- Second, it provides a fiduciary safe harbor for making distributions from terminated plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution.
- Third, it establishes a simplified method for filing a terminal report for abandoned individual account plans.

The final rule specifically outlines that setting up accounts on a participant or their beneficiary's behalf does not violate the *Patriot Act*, as accounts are not "activated" until the owner comes forward. This has been a concern for financial institutions and plan administrators for terminating plans.

Not surprisingly, both holders of ERISA-based assets and states can be confused and sometimes disagree on how to handle this property. The tension between many states asserting a claim on dormant ERISA pension plan property and the fiduciary requirement to manage ERISA plans for the exclusive benefit of the participants and their beneficiaries leaves holders in a conundrum. In the absence of further clarification, holders must carefully weigh the possible courses of action with this property, always bearing in mind

## ABOUT SMS VANACORE

SMS Vanacore's experienced team designs custom unclaimed property programs to fit our client's particular needs. We tailor programs to help reduce unclaimed property liability, retain assets under management, service shareholders, and maintain compliance with SEC and state regulations. Our full scope of services include:

- SEC Compliance Searches
- Extensive Investigative Searches
- Address Verification and Due Diligence Mailings
- Initial Compliance Programs
- State Unclaimed Property Reporting
- New Account Verification and Fraud Mitigation Programs
- Compliance Consulting Services
- Monitoring of Unclaimed Property Laws and Regulations

## CONTRIBUTORS CORNER

### Individual Retirement Accounts (IRA)

*By the Unclaimed Property Task Force of the Securities Industry and Financial Markets Association (SIFMA)*

In 1974 Congress passed the Employee Retirement Income Security Act (ERISA) to clarify and provide non-abusive circumstances under which pensions could be created. Individual Retirement Accounts (IRAs) were introduced under the same legislation in the Internal Revenue Code (the "Code") and became effective January 1, 1975 to benefit people who were not covered by an employment-based retirement plan. However, IRA assets are not subject to ERISA and are generally considered escheatable.

As of 2006, the Employee Benefit Research Institute estimated that there were \$4.23 trillion dollars in IRA assets, surpassing the assets held in both private sector defined contribution plans 401(k) and defined benefit plans (traditional

pensions). Of that total, it is estimated that 47 percent is held by their owners at mutual fund companies and 38 percent in brokerage accounts. With the growth of IRAs as a tax-advantaged means of building wealth, and retiring baby boomers poised to tap these accounts en masse, it is likely that these disbursements will become the largest source of retirement income for private-sector employees outside of social security.

Although the most common investments that comprise IRAs include stock, bonds, mutual funds, and certificates of deposit; IRAs in certain circumstances may also include other investment opportunities such as real estate, private placements, notes, and operating businesses. In fact, rather than specifying which types of investments are permissible, the Code only identifies which investments are prohibited, e.g. life insurance contracts, rugs, and alcoholic beverages.

IRAs can be opened by business owners to provide retirement benefits for the business owners and their employees with Simplified Employee Pension (SEP) IRAs. A Savings Incentive Match Plan for Employees (SIMPLE) IRA allows both employer and employee contributions, similar to a 401(k) plan. Tax-advantaged accounts such as the Coverdell Educational Savings Accounts also require the careful focus of holders. However, for the purpose of this article we will focus on the two types of IRAs that individuals may establish independent of their employers and account for the majority of IRA assets:

*Traditional IRAs:* contributions may be either deductible or nondeductible, and earnings accrue tax-free; however, withdrawals in excess of nondeductible contributions are taxable.

*Roth IRAs:* contributions are nondeductible, but earnings accrue tax-free and all qualified withdrawals are tax-exempt.



IRAs generally involve a trust account agreement between the owner and the trustee. The trustee or custodian of an IRA must be a bank, or must have received approval from the IRS Commissioner to serve as a nonbank trustee or nonbank custodian. When unclaimed property is turned over to a state's custody, it has traditionally been referred to as the state "stepping into the shoes of the rightful owner" until such time as the owner comes forward and asserts a claim. However, with IRAs that are turned over to the state would it more closely approximate the state "stepping into the shoes" of the IRA trustee? It is not apparent whether or not the state would also require such explicit approval of the IRS Commissioner in order to maintain the integrity of the tax-advantaged status of the assets or if the nature of the asset would be altered.

Absent death, the IRS dictates that for a Traditional IRA the required minimum distributions (RMDs) for an individual must begin no later than April 1 following the year the owner reaches age 70½. For a Roth IRA there is no requirement to take distributions at any age. If an individual IRA owner dies, under both the Traditional and Roth IRA, the asset transfers to the beneficiary. The concept of the beneficiary is an integral part to the life of an IRA, as it is often used as an estate planning tool. In the event or subsequent discovery of the owner's death, the notification to the beneficiary for states may prove difficult since there is largely no requirement or infrastructure to report IRA beneficiaries to the state during the escheat process.



The IRS requires that a 1099-R be remitted by the trustee for all withdrawals. Early distributions prior to 59½ are subject to an additional 10 percent tax. Would states that require custody of these assets prior to their distribution date also be required to file the 1099-R if the assets are disbursed from the account at a later date? Although the state does not pay income tax, if it does not withhold the taxes due on behalf of the rightful owner or remit a 1099-R as would have otherwise been required by the holder upon the disbursement, then in theory the rightful owner could subsequently claim the full market value of the IRA from the state at a future date without any tax withholding or reportable 1099-R.

For the holders/trustees of IRA assets, the escheatment process around tax-advantaged assets are unique to other property types, as the disbursement of the assets to the state can have significant tax ramifications to the rightful owner by triggering a taxable event under IRS code, and irreparably impact the tax advantaged status on the account. There is no indication given by the IRS that assets removed and possibly liquidated from an IRA trust by a state can be re-established by the owner when claiming the funds at a later date.

The IRS prohibits a person providing services to a plan from borrowing plan assets. Ordinarily, if someone other than the owner or a beneficiary of a Traditional IRA engages in a prohibited transaction, that person may be liable to the IRS for 15 percent on the amount involved in the prohibited transaction and a 100 percent additional tax, if the prohibited transaction is not corrected in a timely manner. It is not clear what, if any consequences there would be if a state uses IRA assets that would be otherwise considered an early distribution.

Additionally, unlike other property types, assets in an IRA account are not payable or distributable to the owner until certain conditions set forth by the IRS are met. The lack of user generated activity or presumed abandonment is not one of the listed conditions. Under the *Uniform Unclaimed Property Act (1995)*.

Property in an individual retirement account, defined benefit plan, or other account or plan that is qualified for tax deferral under the income tax laws of the United States is presumed abandoned if it is unclaimed three years after the earliest of a) the date of the distribution or attempted distribution of the property, b) the date of the required distribution as stated in the plan or trust agreement governing the plan, or c) the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty.



Can a state go beyond the *Uniform Unclaimed Property Act (1995)* and impose on the IRA trustee to make disbursements if they are neither allowed under the trust agreement or federal tax law? While some states require the property not be escheated until the owner is at least 70 1/2 and the dormancy period has expired, other states declare by law that the property becomes abandoned, regardless if a distribution is required under the income tax laws of the United States, if mailings to the account are repeatedly returned undeliverable or after the holder has discontinued mailings to the apparent owner. Some states assert simply a lack of any owner generated activity or contact is enough to begin the aging process of the dormancy period, regardless of the age of the owner. Holders should be diligent to comply with state laws, but remain cognizant of IRS requirements.

To the extent that some states either explicitly or implicitly affirm that the process of escheating an IRA is considered a disbursement, they do not address the fundamental issue of RMDs. Specifically, does the state expect to receive only the minimum disbursements required by the IRS, or do they expect the lump sum? The *Uniform Unclaimed Property Act (1995)* seems to indicate that the RMD approach for escheating a Traditional IRA may be more appropriate since the RMD represents the point in time "under the tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty". Although the state laws are generally silent on this, it is assumed by many holders that most states expect a lump sum. For those holders that make the decision to liquidate and escheat the IRA assets, they may want to consider whether they are doing so without the explicit support of IRS and state laws.

The IRA assets must be maintained for the exclusive benefit for its owner/beneficiary. With the absence of owner contact, it is not apparent if the holder should be disbursing the assets of a Traditional IRA at either the earliest possible age, or choose the option of a lump sum taxable withdrawal. By taking a passive approach, or abstaining from taking any discre-

tionary action on the liquidation of the IRA trust, the default event would require disbursements to begin at the RMD age, and allow the account to maintain its tax-advantaged status for the lost owner as long as possible.

The IRS allows an individual owner of two or more Traditional IRAs to satisfy the RMDs for all IRAs by taking the combined required amount from only one of their Traditional IRAs. With reference to the *Uniform Unclaimed Property Act (1995)*, since the holder has no knowledge whether the owner may be taking the RMD from an unrelated IRA account held at another institution, it is not "determinable by the holder" the time "specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty." Therefore, even if the holder liquidated Traditional IRA assets to escheat in accordance with a calculated RMD schedule, it may still be liquidating IRA assets that were not required to be liquidated under the Code.

Since a qualified disbursement from a Roth IRA would not result in a taxable event after 59 1/2, if the trustee disburses the account's assets at any age it would eliminate the tax-advantaged status without any compensating benefit to the owner or beneficiary. With reference to the *Uniform Unclaimed Property Act (1995)*, specific to a Roth IRA, for as long as an owner is alive, there would not be any specified age "in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty." Therefore, it could be reasoned that Roth IRAs may not be escheatable.

If the holder must depend upon the age of the owner to determine when the asset becomes escheatable, what happens if the holder has either lost or does not have record of the birth date? Some states dictate the assumed age the holder should use. However, the IRS wants the trustee to obtain the correct birth date through some external means and does not provide a presumed age to use under any circumstances.

The unique risks associated with the escheat of IRA assets are evident and the challenges to the holder to simultaneously comply with the Code, state abandoned property laws, and the holder's obligation over servicing a non-forfeitable asset will remain until the ambiguity surrounding many of these issues is clarified. Until then, holders should diligently focus on their IRA assets while they are still in their dormant status and consult with their internal or external experts on any matters of concern in advance of the potential reporting date.

The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products, and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

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