

ISSUES FOR CONSIDERATION IN THE REVISION OF THE UNIFORM
UNCLAIMED PROPERTY ACT (1995)

REPORTER'S PREFATORY NOTE

A Statement of Issues to be considered by the Drafting Committee at its first meeting to be held in Washington, DC on February 21-22, 2014 has been posted on the ULC Website and circulated to the members of the Drafting Committee, Advisory Members, Observers, Stakeholders and other Interested Parties.

This Statement is a compilation of suggestions brought to the Committee by numerous sources. The Study Committee conducted a Stakeholders' meeting in Washington, DC on April 24, 2013 attended by 43 stakeholders representing a spectrum of organizations interested in the drafting project and with a stake in its success. The Report of this meeting provided us with a number of issues which have been incorporated into this Statement.

We received thoughtful, thorough position papers from the Council on State Taxation (COST) and the National Association of Unclaimed Property Administrators (NAUPA). Nathan Barnett, Gregory Day and Justin Houser of the Wilmington, DE law firm Morris, Nichols, Arsht & Tunnell, LLC, prepared an exhaustive Memorandum of Issues for Revision of the Uniform Unclaimed Property Act (1995). We most appreciate the efforts and thought that have gone into these submissions and have incorporated suggestions into the Statement.

Belmont College of Law student interns, Sean Alexander and Kimiya Sarayloo, and I have organized these ideas and suggestions into the Statement of Issues to be considered by the Committee in what we hope will prove to be a usable format. Our organizing principle has been to present the issues in the sequence of the Sections of the 1995 Act that would be affected by the issues if approved by the Committee for incorporation into the revised Act.

As comprehensive as this Statement is hoped to be, it is likely that it is not exhaustive of the universe of possible issues to be considered. The Committee invites your further and continued suggestions and ideas as the drafting process goes forward.

Charles A. Trost
Reporter & Draftsman

TABLE OF CONTENTS

	Page
SECTION 1. DEFINITIONS.....	2
SECTION 2. PRESUMPTIONS OF ABANDONMENT.	6
SECTION 3. CONTENTS OF SAFE DEPOSIT BOX OR OTHER SAFEKEEPING DEPOSITORY.	10
SECTION 4. RULES FOR TAKING CUSTODY.....	11
SECTION 5. DORMANCY CHARGE.....	12
SECTION 6. BURDEN OF PROOF AS TO PROPERTY EVIDENCED BY RECORD OF CHECK OR DRAFT.	13
SECTION 7. REPORT OF ABANDONED PROPERTY.....	13
SECTION 8. PAYMENT OR DELIVERY OF ABANDONED PROPERTY.	16
SECTION 9. NOTICE AND PUBLICATION OF LISTS OF ABANDONED PROPERTY.	17
SECTION 10. CUSTODY BY STATE; RECOVERY BY HOLDER; DEFENSE OF HOLDER.....	18
SECTION 11. CREDITING OF DIVIDENDS, INTEREST, AND INCREMENTS TO OWNER'S ACCOUNT.	19
SECTION 12. PUBLIC SALE OF ABANDONED PROPERTY.	20
SECTION 13. DEPOSIT OF FUNDS.	21
SECTION 14. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.....	22
SECTION 15. FILING CLAIM WITH ADMINISTRATOR; HANDLING OF CLAIMS BY ADMINISTRATOR.	23
SECTION 16. ACTION TO ESTABLISH CLAIM.	24
SECTION 17. ELECTION TO TAKE PAYMENT OR DELIVERY.	25
SECTION 18. DESTRUCTION OR DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL COMMERCIAL VALUE; IMMUNITY FROM LIABILITY.	26
SECTION 19. PERIODS OF LIMITATION.	26
SECTION 20. REQUESTS FOR REPORTS AND EXAMINATION OF RECORDS.....	27
SECTION 21. RETENTION OF RECORDS.....	29
SECTION 22. ENFORCEMENT.	30
SECTION 23. INTERSTATE AGREEMENTS AND COOPERATION; JOINT AND RECIPROCAL ACTIONS WITH OTHER STATES.....	31
SECTION 24. INTEREST AND PENALTIES.	32
SECTION 25. AGREEMENT TO LOCATE PROPERTY.	33
SECTION 26. FOREIGN TRANSACTIONS.....	34
SECTION 27. TRANSITIONAL PROVISIONS.	34
SECTION 28. RULES.....	34
SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	35
SECTION 30. SHORT TITLE.	35
SECTION 31. SEVERABILITY CLAUSE.....	35
SECTION 32. EFFECTIVE DATE.	35
SECTION 33. REPEALS.....	35

UNIFORM UNCLAIMED PROPERTY ACT (1995)

SECTION 1. DEFINITIONS.

In this [Act]:

(1) "Administrator" means [insert name of appropriate officer].

(2) "Apparent owner" means a person

whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder.

(3) "Business association" means a corporation, joint stock company, investment company, partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, [land bank], safe deposit company, [safekeeping depository], financial organization, insurance company, mutual fund, utility, or other business entity consisting of one or more persons, whether or not for profit.

(4) "Domicile" means the State of incorporation of a corporation and the State of the principal place of business of a holder other than a corporation.

(5) "Financial organization" means a savings and loan association, [building and loan association, savings bank, industrial bank,] bank, banking organization, or credit union.

(6) "Holder" means a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act].

(7) "Insurance company" means an association, corporation, or fraternal or mutual benefit organization, whether or not for profit, engaged in the business of providing life endowments, annuities, or insurance, including accident, burial, casualty, credit life, contract performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage protection, and workers' compensation insurance.

(8) "Mineral" means gas; oil; coal; other gaseous, liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and nonfissionable ores; colloidal and other clay; steam and other geothermal resource; or any other substance defined as a mineral by the law of this State.

(9) "Mineral proceeds" means amounts payable for the extraction, production, or sale of minerals, or, upon the abandonment of those payments, all payments that become payable thereafter. The term includes amounts payable:

(i) for the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties, and delay rentals;

(ii) for the extraction, production, or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments, and production payments; and

(iii) under an agreement or option, including a joint operating agreement, unit agreement, pooling agreement, and farm-out agreement.

(10) "Money order" includes an express money order and a personal money order, on which the remitter is the purchaser. The term does not include a bank money order or any other instrument sold by a financial organization if the seller has obtained the name and address of the payee.

(11) "Owner" means a person who has a legal or equitable interest in property subject to this [Act] or the person's legal representative. The term includes a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant, or payee in the case of other property.

(12) "Person" means an individual, business association, financial organization, estate, trust, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) "Property" means tangible property described in Section 3 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom. The term includes property that is referred to as or evidenced by:

- (i) money, a check, draft, deposit, interest, or dividend;
- (ii) credit balance, customer's overpayment, gift certificate, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds, or unidentified remittance;
- (iii) stock or other evidence of ownership of an interest in a business association or financial organization;
- (iv) a bond, debenture, note, or other evidence of indebtedness;
- (v) money deposited to redeem stocks, bonds, coupons, or other securities or to make distributions;
- (vi) an amount due and payable under the terms of an annuity or insurance policy,

including policies providing life insurance, property and casualty insurance, workers' compensation insurance, or health and disability insurance; and

(vii) 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.

(14) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Utility" means [a person who owns or operates for public use any plant, equipment, real property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas] [insert cross reference to statute defining public utility].

Issue #1. Should there be a definition of "address"?

Issue #2. Should the definition of "money order" be revised to prevent holders from taking advantage of the seven year dormancy period?

Issue #3. Should the definition of "property" be expanded to include U.S. Savings Bonds, allow for offset of debts to the State owed by the owner, and if so provide a mechanism for enforcement against the U.S. Treasury?

Issue #4. Life Insurance Proceeds: Section 1(13)(vi) includes within the definition of "property" amounts due and payable under the terms of an insurance policy.

(a) Should the provisions of the 1981 Act relating to unclaimed proceeds of life insurance policies be reinstated?

(b) If so, should there be a requirement that "proof of death" be refined to include identification of policy holders and insured lives within the Social Security Administrations "death master file" (DMF) or similar database?

(c) If so, should there be a new duty imposed on the life insurer to perform DMF matching on a regular basis, and if so, how often?

(d) If these changes are made, should the salient provisions of the NCOIL Model Act be incorporated into this revised Act?

Issue #5. (a) Definition of "Holder": Because of the broad definition of a "holder" of unclaimed property who is obligated to report that property, in some situations where multiple parties are arguably holders, it is unclear who is obligated to report certain property. This is particularly true in the areas of securities and rebate programs. Should the term "holder" be defined less broadly or more specifically so as to avoid there being more than one person deemed the "holder" of the same property? See Memorandum § II.B.8.

(b) Should there be limitations or conditions placed on the ability of a holder of unclaimed property to avoid liability by assigning the property or liability to a third party?

Issue #6. Definition of Domicile: (a) Should the definitions of "domicile" in (4) be expanded to include other forms of business entities such as partnerships and limited liability companies?

(b) Should the definition of Domicile address the effects of mergers, acquisitions, consolidations, and liquidations?

Issue #7. New Types of Unclaimed Property: Several types of property have emerged since the passage of the 1995 Act with respect to which there is no clear guidance as to their escheatability as unclaimed property. These include stored value /gift cards, payroll cards, virtual currency such as Facebook Credits, Bitcoin, and the like, unused subscriptions and Software-as-a-Service (SaaS), including "cloud"-based products, unused tickets/licenses, unclaimed class action distributions, promotional programs, Health Savings Accounts and 529 Plans, insurance benefits, and business inventory. Each type of emergent property has its own unique characteristics which merit discussion as to whether it constitutes unclaimed property and warrants separate definition. See Memorandum § II.C.1.

Issue #8. Derivative Rights Doctrine: Although the derivative rights doctrine is not expressly mentioned in the Uniform Act, many courts and commentators have found that it serves as the basis for unclaimed property laws. The derivative rights doctrine maintains that a state's interest in unclaimed property can be no greater than the owner's rights to the same. Recently, however, some courts have opined that other bases for unclaimed property statutes independent of the derivative rights doctrine may exist. Because the derivative rights doctrine has served as a basis for much of the conceptual framework of the limits of unclaimed property laws, any finding that it is not a fundamental underpinning of unclaimed property laws could

have a material impact on the interpretation of state unclaimed property laws. See Memorandum § II.A.

SECTION 2. PRESUMPTIONS OF ABANDONMENT.

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below for the particular property:

(1) traveler's check, 15 years after issuance;

(2) money order, seven years after issuance;

(3) stock or other equity interest in a business association or financial organization, including a security entitlement under [Article 8 of the Uniform Commercial Code], five years after the earlier of (i) the date of the most recent dividend, stock split, or other distribution unclaimed by the apparent owner, or (ii) the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner;

(4) debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, five years after the date of the most recent interest payment unclaimed by the apparent owner;

(5) a demand, savings, or time deposit, including a deposit that is automatically renewable, five years after the earlier of maturity or the date of the last indication by the owner of interest in the property; but a deposit that is automatically renewable is deemed matured for purposes of this section upon its initial date of maturity, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder;

(6) money or credits owed to a customer as a result of a retail business transaction, three years after the obligation accrued;

(7) gift certificate, three years after December 31 of the year in which the certificate was sold, but if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate's face value;

(8) amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, three years after the obligation to pay arose or, in the case

of a policy or annuity payable upon proof of death, three years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;

(9) property distributable by a business association or financial organization in a course of dissolution, one year after the property becomes distributable;

(10) property received by a court as proceeds of a class action, and not distributed pursuant to the judgment, one year after the distribution date;

(11) property held by a court, government, governmental subdivision, agency, or instrumentality, one year after the property becomes distributable;

(12) wages or other compensation for personal services, one year after the compensation becomes payable;

(13) deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable;

(14) 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, three years after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or 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; and

(15) all other property, five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs.

(b) At the time that an interest is presumed abandoned under subsection (a), any other property right accrued or accruing to the owner as a result of the interest, and not previously presumed abandoned, is also presumed abandoned.

(c) Property is unclaimed if, for the applicable period set forth in subsection (a), the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.

(d) An indication of an owner's interest in property includes:

(i) the presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;

(ii) owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease, or change the amount or type of property held in the account;

(iii) the making of a deposit to or withdrawal from a bank account; and

(iv) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.

(e) Property is payable or distributable for purposes of this [Act] notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.

Issue #9. Should the abandonment of unclaimed corporate bonds be defined differently? Should the abandonment period of municipal bonds be expressly addressed?

Issue #10. Should gift cards and gift certificates be defined? Should the determination of abandonment of a gift card be revised to take into account the date of the owner's last use of the card and to reconcile with the federal regulatory guidelines of preemption?

Issue #11. Should verifiable electronic contact be added to the Act as constituting an indication of the owner's continuing interest in the property?

Issue #12. Presently, the 1995 Uniform Act provides that a record of the issuance of a check, draft or similar instrument is *prima facie* evidence of an obligation. There is thus a presumption of abandonment which must be rebutted by a holder, although what is needed to rebut such a presumption is often ill-defined. Should the Act better and more clearly address when the presumption is triggered and when (and how) a Holder can rebut the

presumption? See Memorandum § II.B.6.

Issue #13. Should (2) be revised to cover the situation where particular property has been claimed by someone other than the “apparent owner” and is no longer in the hands of the former “holder”?

Issue #14. The period of dormancy, after which property is presumed abandoned, has been consistently shortened over the years. Considering that states have developed non-uniform dormancy periods, should any of the time periods set forth for presumed abandonment be changed – either increased or decreased in light of what some states have done?

Issue #15. Are the “triggering events” overly broad and do they need reconsideration, particularly with respect to accounts often held for the benefit of a minor such as 529 Plans, and accounts such as Roth Retirement accounts and Health Savings accounts, which are to be held for a very long time and invested in growth or income earning accounts?

Issue #16. Should Payroll Cards be classified as “unpaid wages” subject to a one-year dormancy period, as a deposit account subject to a longer dormancy period, or as general intangible property?

Issue #17. With respect to the value held or represented in a Payroll Card, should the Act be revised to address whether the “holder” is the employer, the card issuer, or account servicer? Who has the more up to date and reliable records and who has to maintain those records?

Issue #18. With respect to SVC’s, is the amount presumed to have been abandoned the initial “face value” of the SVC, or the value remaining on the card at the time of presumed abandonment?

Issue #19. Should instruments of value such as SVC’s and gift certificates be subject to escheat at all under the derivative rights doctrine if they are only redeemable for tangible property or services, and not cash? If so, is the limitation of 60% of face value the correct amount?

Issue #20. Should SVC’s and gift certificates be treated the same or as equivalents for unclaimed property purposes, and if not, how should they be treated differently and why?

Issue #21. Should the dormancy period with respect to SVC’s run from the date of first purchase, or from the date of last use or withdrawal, or from the last date the SVC was recharged or uploaded in value?

Issue #22. Should the other forms of value recently evolved such as Bitcoin

and like electronic stores of value be made subject to unclaimed property, and if so, under what rules?

Issue #23. Are the standards under the Act relating to presumed abandonment of securities adequate and realistic, or do other standards need to be applied, particularly with respect to the use of electronic "mailing" and with respect to foreign owners? Is the NCOIL model legislation developed over the last five years – or some other model – an appropriate model to follow in this issue? See Memorandum § II.B.10.

Issue #24. Since 1998, at least fourteen states have adopted a business-to-business exemption, which exempts certain property from escheat connected to transactions between two or more business associations. The underlying basis is that such transactions do not generate "unclaimed property" which a state has an interest in protecting. States have varied, however, in the precise details of what constitutes an exempt transaction and whether a certain entity qualifies as a business association. Should this revision of the Uniform Act attempt to balance the trend in favor of business-to-business exemptions and the interests of states in all forms of unclaimed property? See Memorandum § II.C.3.

Issue #25. With respect to presumption of abandonment for electronic accounts, should a revised Act clarify "sufficient contact" so as to avoid improperly triggering the dormancy period? Perhaps a revision could contemplate password protected access to the accounts at a specified frequency.

SECTION 3. CONTENTS OF SAFE DEPOSIT BOX OR OTHER SAFEKEEPING DEPOSITORY.

Tangible property held in a safe deposit box or other safekeeping depository in this State in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, are presumed abandoned if the property remains unclaimed by the owner for more than five years after expiration of the lease or rental period on the box or other depository.

Issue #26. The 1995 Act applies only to Holders of intangible property with the exception stated in this section. There are two related issues: (a) should the coverage be extended to contents of other storage facilities such as airport lockers and storage warehouses, and (b) who should be responsible for converting tangible property to cash—the holder or the State?

SECTION 4. RULES FOR TAKING CUSTODY.

Except as otherwise provided in this [Act] or by other statute of this State, property that is presumed abandoned, whether located in this or another State, is subject to the custody of this State if:

(1) the last known address of the apparent owner, as shown on the records of the holder, is in this State;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;

(3) the records of the holder do not reflect the last known address of the apparent owner and it is established that:

(i) the last known address of the person entitled to the property is in this State; or

(ii) the holder is domiciled in this State or is a government or governmental subdivision, agency, or instrumentality of this State and has not previously paid or delivered the property to the State of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address of the apparent owner, as shown on the records of the holder, is in a State that does not provide for the escheat or custodial taking of the property and the holder is domiciled in this State or is a government or governmental subdivision, agency, or instrumentality of this State;

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a foreign country and the holder is domiciled in this State or is a government or governmental subdivision, agency, or instrumentality of this State;

(6) the transaction out of which the property arose occurred in this State, the holder is domiciled in a State that does not provide for the escheat or custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a State that does not provide for the escheat or custodial taking of the property; or

(7) the property is a traveler's check or money order purchased in this State, or the issuer of the traveler's check or money order has its principal place of business in this State and the issuer's records show that the instrument was purchased in a State that does not provide for the escheat or custodial taking of the property, or do not show the State in which the instrument was

purchased.

Issue #27. Thirty-six states have incorporated “third-priority” rules of escheatment, which instructs that when a holder is not domiciled in a state providing for the escheatment of a particular type of property, priority is afforded to the state in which the transaction occurred. Commentators have argued that this rule violates the Supreme Court’s holding in Texas v. New Jersey, which, they argue, contemplates escheat first to the state in which the owner is domiciled, and second to the state in which the holder is located. They maintain that if there is no escheat under these rules, the property simply is not escheatable. See Memorandum § II.C.2. Is subsection (6) which provides a third alternative consistent with a violation of the holding of the U.S. Supreme Court in Texas v. New Jersey? Can the section be revised to fairly allocate the unclaimed property and avoid the holder receiving an inappropriate windfall?

Issue #28. Some state statutes allow for the recording of holder addresses, such as retaining only zip codes, which have been found to be insufficient for the purpose of determining a state’s priority, in that the 1981 Uniform Act states that last known address must be “sufficient for the purpose of the delivery of mail.” Likewise, where property is in the possession of holders with multiple addresses in different states, tension may exist between states attempting to escheat such property. Does there need to be a more precise definition regarding address sufficiency. See Memorandum § II.B.7

Issue #29. Under the Uniform Acts, a state may claim title to foreign addressed unclaimed property held by an in-state corporation. Should this be revisited? See Memorandum § II.B.9.

Issue #30. Should the address presumption for beneficiaries included in the 1981 Uniform Act at § 7(b) be incorporated into the revised Act?

SECTION 5. DORMANCY CHARGE.

A holder may deduct from property presumed abandoned a charge imposed by reason of the owner's failure to claim the property within a specified time only if there is a valid and enforceable written contract between the holder and the owner under which the holder may impose the charge and the holder regularly imposes the charge, which is not regularly reversed or otherwise canceled. The amount of the deduction is limited to an amount that is not unconscionable.

Issue #31. An amount which is deducted by the holder from presumed abandoned property reduces the amount that the holder must remit to the state. Is the "unconscionable" amount the correct standard, or should there be a "safe harbor" amount expressed as a fixed amount or a percentage? On the other hand, if the amount is established by contract between two competent parties, should the state interfere in that contract unless the owner could have challenged it?

SECTION 6. BURDEN OF PROOF AS TO PROPERTY EVIDENCED BY RECORD OF CHECK OR DRAFT.

A record of the issuance of a check, draft, or similar instrument is prima facie evidence of an obligation. In claiming property from a holder who is also the issuer, the administrator's burden of proof as to the existence and amount of the property and its abandonment is satisfied by showing issuance of the instrument and passage of the requisite period of abandonment. Defenses of payment, satisfaction, discharge, and want of consideration are affirmative defenses that must be established by the holder.

Issue #32. Normally a person claiming to be the owner of property has the burden of proof to establish that he is the owner. This section gives the state a more limited burden of proof than that placed on the putative owner. While courts have recognized this as a valid exception to the derivative rights doctrine, it remains a point of contention and potential litigation. Does this rule have it right or does it need to be reconsidered? If so, should it be expanded to encompass all records of unclaimed property, or should it be further limited?

SECTION 7. REPORT OF ABANDONED PROPERTY.

(a) A holder of property presumed abandoned shall make a report to the administrator concerning the property.

(b) The report must be verified and must contain:

- (1) a description of the property;
- (2) except with respect to a traveler's check or money order, the name, if known, and last known address, if any, and the social security number or taxpayer identification number, if readily ascertainable, of the apparent owner of property of the value of \$50 or more;
- (3) an aggregated amount of items valued under \$50 each;

(4) in the case of an amount of \$50 or more held or owing under an annuity or a life or endowment insurance policy, the full name and last known address of the annuitant or insured and of the beneficiary;

(5) in the case of property held in a safe deposit box or other safekeeping depository, an indication of the place where it is held and where it may be inspected by the administrator, and any amounts owing to the holder;

(6) the date, if any, on which the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(7) other information that the administrator by rule prescribes as necessary for the administration of this [Act].

(c) If a holder of property presumed abandoned is a successor to another person who previously held the property for the apparent owner or the holder has changed its name while holding the property, the holder shall file with the report its former names, if any, and the known names and addresses of all previous holders of the property.

(d) The report must be filed before November 1 of each year and cover the 12 months next preceding July 1 of that year, but a report with respect to a life insurance company must be filed before May 1 of each year for the calendar year next preceding.

(e) The holder of property presumed abandoned shall send written notice to the apparent owner, not more than 120 days or less than 60 days before filing the report, stating that the holder is in possession of property subject to this [Act], if:

(1) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(2) the claim of the apparent owner is not barred by a statute of limitations; and

(3) the value of the property is \$50 or more.

(f) Before the date for filing the report, the holder of property presumed abandoned may request the administrator to extend the time for filing the report. The administrator may grant the extension for good cause. The holder, upon receipt of the extension, may make an interim payment on the amount the holder estimates will ultimately be due, which terminates the accrual of additional interest on the amount paid.

(g) The holder of property presumed abandoned shall file with the report an affidavit

stating that the holder has complied with subsection (e).

Issue #33. (a) Should the revised Act create a uniform method of reporting by Holders to the state? See Memorandum § II.C.5. There are currently many different reporting forms, times and methodology, with some states requiring inclusion of reports by physical mail and others requiring electronic filings. Rules vary substantially from one state to another. The cost of complying with potentially 53 jurisdictions can impose a needless financial burden on holders which could be mitigated by a single unified and uniform method to report and remit unclaimed property. What should a uniform form look like and what should be the preferred method of filing and paying.

(b) Should holders be allowed to perform due diligence in seeking to locate owners at an earlier time if they choose to do so?

Issue #34. In addition to a lack of uniform standards for filing reports and transmitting property, the requirements imposed on holders for seeking and notifying apparent owners varies substantially from state to state. Are the time periods for notification set out in this section reasonable and realistic? Should they be changed, and if so, to what periods?

Issue #35. Initially in 1966 the minimum value was set at \$3.00, which was raised to \$25 in the 1981 Act. The current minimum under the 1995 Act is \$50. (a) Is that amount the right amount, or given the cost of compliance should it be increased? Should the minimum amounts and reporting requirements be uniform for all property types?

Issue #36. Should a revised Act include a provision regarding voluntary escheatment prior to the end of the dormancy period? This may be pertinent considering that several state administrators are considering related statutory amendments and it also implicates the release of holder liability. If this issue is addressed in the revisions, it may be beneficial to exclude stocks and interest bearing accounts from voluntary escheatment to avoid liability issues.

Issue #37. Should the revised act reconsider aggregate reporting, which typically entails a \$50 threshold, especially considering that the securities industry provides for such detailed reporting in amounts less than \$50. With advances in technology is detailed reporting for amounts not meeting the threshold as onerous as it once was? If not, what are the implications?

SECTION 8. PAYMENT OR DELIVERY OF ABANDONED PROPERTY.

(a) Except for property held in a safe deposit box or other safekeeping depository, upon filing the report required by Section 7, the holder of property presumed abandoned shall pay, deliver, or cause to be paid or delivered to the administrator the property described in the report as unclaimed, but if the property is an automatically renewable deposit, and a penalty or forfeiture in the payment of interest would result, the time for compliance is extended until a penalty or forfeiture would no longer result. Tangible property held in a safe deposit box or other safekeeping depository may not be delivered to the administrator until [120] days after filing the report required by Section 7.

(b) If the property reported to the administrator is a security or security entitlement under [Article 8 of the Uniform Commercial Code], the administrator is an appropriate person to make an indorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with [Article 8 of the Uniform Commercial Code].

(c) If the holder of property reported to the administrator is the issuer of a certificated security, the administrator has the right to obtain a replacement certificate pursuant to [Section 8-405 of the Uniform Commercial Code], but an indemnity bond is not required.

(d) An issuer, the holder, and any transfer agent or other person acting pursuant to the instructions of and on behalf of the issuer or holder in accordance with this section is not liable to the apparent owner and must be indemnified against claims of any person in accordance with Section 10.

NOTE: Section 8(a) "or other safekeeping depository"—Depending on the resolutions of issue #26 the term "other safekeeping depository" may need to be revised.

Issue #38. Should the Act be revised to address worthless or nontransferable securities and take into account dematerialization of securities? Should the states' discretion in enacting protocols governing the delivery and transfer of unclaimed securities and interest in mutual funds be broadened or expanded? If so, how?

SECTION 9. NOTICE AND PUBLICATION OF LISTS OF ABANDONED PROPERTY.

(a) The administrator shall publish a notice not later than November 30 of the year next following the year in which abandoned property has been paid or delivered to the administrator. The notice must be published in a newspaper of general circulation in the [county] of this State in which is located the last known address of any person named in the notice. If a holder does not report an address for the apparent owner, or the address is outside this State, the notice must be published in the [county] in which the holder has its principal place of business within this State or another [county] that the administrator reasonably selects. The advertisement must be in a form that, in the judgment of the administrator, is likely to attract the attention of the apparent owner of the unclaimed property. The form must contain:

(1) the name of each person appearing to be the owner of the property, as set forth in the report filed by the holder;

(2) the last known address or location of each person appearing to be the owner of the property, if an address or location is set forth in the report filed by the holder;

(3) a statement explaining that property of the owner is presumed to be abandoned and has been taken into the protective custody of the administrator; and

(4) a statement that information about the property and its return to the owner is available to a person having a legal or beneficial interest in the property, upon request to the administrator.

(b) The administrator is not required to advertise the name and address or location of an owner of property having a total value less than \$50, or information concerning a traveler's check, money order, or similar instrument.

Issue #39. The notice by newspaper publication provisions of this section are rather antiquated given the advances in media technology since 1995. Nevertheless, newspapers still enjoy wide circulation and are more relied upon by older citizens who are in turn more likely to be owners of abandoned property. Should the notice requirements include notice by electronic means such as searchable databases on the internet? If so should the notice provisions also continue to require notice by newspaper publications as a backup or augmentation of electronic means?

Issue #40. While many state unclaimed property administrators will say that it is their primary responsibility to unite owners with their long abandoned property, the economic reality is that in many, if not all jurisdictions, unclaimed property receipts are a significant source of state revenue which is a major augmentation of the tax base as a source of state revenue. Is the duty to diligently search for owners and hand over funds in their custody compromised by the pressure to recover and retain for state purposes the maximum amount of potential revenue available? Should the Act include provisions which incentivize administrators to return more property to the owners such as allowing a fee or percentage of the recovered amount to be retained by the administrator to augment the operating fund of his department, or to create incentives discouraging less than diligent attempts to locate owners, by allowing owners to recover interest on the deposits at least equal to the state's current outside borrowing costs.

Issue #41. Should the title of Section 9 be changed to "Owner Notification?"

SECTION 10. CUSTODY BY STATE; RECOVERY BY HOLDER; DEFENSE OF HOLDER.

(a) In this section, payment or delivery is made in "good faith" if:

(1) payment or delivery was made in a reasonable attempt to comply with this [Act];

(2) the holder was not then in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing, based on the facts then known, that the property was presumed abandoned; and

(3) there is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice.

(b) Upon payment or delivery of property to the administrator, the State assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property.

(c) A holder who has paid money to the administrator pursuant to this [Act] may subsequently make payment to a person reasonably appearing to the holder to be entitled to payment. Upon a filing by the holder of proof of payment and proof that the payee was entitled

to the payment, the administrator shall promptly reimburse the holder for the payment without imposing a fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a traveler's check or money order, the holder must be reimbursed upon filing proof that the instrument was duly presented and that payment was made to a person who reasonably appeared to be entitled to payment. The holder must be reimbursed for payment made even if the payment was made to a person whose claim was barred under Section 19(a).

(d) A holder who has delivered property other than money to the administrator pursuant to this [Act] may reclaim the property if it is still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the apparent owner has claimed the property from the holder.

(e) The administrator may accept a holder's affidavit as sufficient proof of the holder's right to recover money and property under this section.

(f) If a holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another State claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim resulting from payment or delivery of the property to the administrator.

(g) Property removed from a safe deposit box or other safekeeping depository is received by the administrator subject to the holder's right to be reimbursed for the cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse the holder out of the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

Issue #42. Record Retention by State. Should the Act be amended to require states to retain records of property it receives and which it has turned over to owners? If so, for how long and in which form? Should electronic imaging and storage be a permissible means of record storage, and if so what safeguards should be required?

SECTION 11. CREDITING OF DIVIDENDS, INTEREST, AND INCREMENTS TO OWNER'S ACCOUNT.

If property other than money is delivered to the administrator under this [Act], the owner

is entitled to receive from the administrator any income or gain realized or accruing on the property at or before liquidation or conversion of the property into money. If the property was an interest bearing demand, savings, or time deposit, including a deposit that is automatically renewable, the administrator shall pay interest at a rate of [insert legal rate] percent a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after delivery or the date on which payment is made to the owner. Interest on interest bearing property is not payable for any period before the effective date of this [Act], unless authorized by law superseded by this [Act].

SECTION 12. PUBLIC SALE OF ABANDONED PROPERTY.

(a) Except as otherwise provided in this section, the administrator, within three years after the receipt of abandoned property, shall sell it to the highest bidder at public sale at a location in the State which in the judgment of the administrator affords the most favorable market for the property. The administrator may decline the highest bid and reoffer the property for sale if the administrator considers the bid to be insufficient. The administrator need not offer the property for sale if the administrator considers that the probable cost of sale will exceed the proceeds of the sale. A sale held under this section must be preceded by a single publication of notice, at least three weeks before sale, in a newspaper of general circulation in the [county] in which the property is to be sold.

(b) Securities listed on an established stock exchange must be sold at prices prevailing on the exchange at the time of sale. Other securities may be sold over the counter at prices prevailing at the time of sale or by any reasonable method selected by the administrator. If securities are sold by the administrator before the expiration of three years after their delivery to the administrator, a person making a claim under this [Act] before the end of the three-year period is entitled to the proceeds of the sale of the securities or the market value of the securities at the time the claim is made, whichever is greater, plus dividends, interest, and other increments thereon up to the time the claim is made, less any deduction for expenses of sale. A person making a claim under this [Act] after the expiration of the three-year period is entitled to receive the securities delivered to the administrator by the holder, if they still remain in the custody of the administrator, or the net proceeds received from sale, and is not entitled to receive any

appreciation in the value of the property occurring after delivery to the administrator, except in a case of intentional misconduct or malfeasance by the administrator.

(c) A purchaser of property at a sale conducted by the administrator pursuant to this [Act] takes the property free of all claims of the owner or previous holder and of all persons claiming through or under them. The administrator shall execute all documents necessary to complete the transfer of ownership.

Issue #43. Should military decorations and medals be exempt from sale of tangible property? If so, what other items of a similar nature (Olympic medals and trophies, for instance) might be exempt from sale?

Issue #44. In addition to publication of notice or sale of abandoned property in a newspaper, should other means (electronic) be authorized or required?

Issue #45. Should the Act be amended to authorize sale of abandoned property by the state to be implemented by internet or some other form of electronic auction?

SECTION 13. DEPOSIT OF FUNDS.

[(a) Except as otherwise provided by this section, the] [The] administrator shall promptly deposit in the [general fund] of this State all funds received under this [Act], including the proceeds from the sale of abandoned property under Section 12. [The administrator shall retain in a separate trust fund at least [\$100,000] from which the administrator shall pay claims duly allowed.] The administrator shall record the name and last known address of each person appearing from the holders' reports to be entitled to the property and the name and last known address of each insured person or annuitant and beneficiary and with respect to each policy or annuity listed in the report of an insurance company, its number, the name of the company, and the amount due.

[(b) Before making a deposit to the credit of the [general fund], the administrator may deduct:

- (1) expenses of sale of abandoned property;
- (2) costs of mailing and publication in connection with abandoned property;
- (3) reasonable service charges; and

(4) expenses incurred in examining records of holders of property and in collecting the property from those holders.]

Issue #46. Since in theory funds which belong to the owner are merely held by the state as custodian indefinitely and are thus an open-ended liability to the state, why is it appropriate to dictate by statute how the treasurer should handle what is essentially a cash management problem concerning how to budget for an open ended contingent future liability. The state has the use of all the money it holds until and unless it is called upon to pay it over to the owner. Should the separate trust fund requirement be eliminated?

SECTION 14. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.

(a) After property has been paid or delivered to the administrator under this [Act], another State may recover the property if:

(1) the property was paid or delivered to the custody of this State because the records of the holder did not reflect a last known location of the apparent owner within the borders of the other State and the other State establishes that the apparent owner or other person entitled to the property was last known to be located within the borders of that State and under the laws of that State the property has escheated or become subject to a claim of abandonment by that State;

(2) the property was paid or delivered to the custody of this State because the laws of the other State did not provide for the escheat or custodial taking of the property, and under the laws of that State subsequently enacted the property has escheated or become subject to a claim of abandonment by that State;

(3) the records of the holder were erroneous in that they did not accurately identify the owner of the property and the last known location of the owner within the borders of another State and under the laws of that State the property has escheated or become subject to a claim of abandonment by that State;

(4) the property was subjected to custody by this State under Section 4(6) and under the laws of the State of domicile of the holder the property has escheated or become subject to a claim of abandonment by that State; or

(5) the property is a sum payable on a traveler's check, money order, or similar

instrument that was purchased in the other State and delivered into the custody of this State under Section 4(7), and under the laws of the other State the property has escheated or become subject to a claim of abandonment by that State.

(b) A claim of another State to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within 90 days after it is presented. The administrator shall allow the claim upon determining that the other State is entitled to the abandoned property under subsection (a).

(c) The administrator shall require another State, before recovering property under this section, to agree to indemnify this State and its officers and employees against any liability on a claim to the property.

Issue #47. Should the Act be amended to impose a mutual affirmative duty on the states to exchange and/or turn over any property which has come into the hands of one state that in fact should have been turned over to another state?

SECTION 15. FILING CLAIM WITH ADMINISTRATOR; HANDLING OF CLAIMS BY ADMINISTRATOR.

(a) A person, excluding another State, claiming property paid or delivered to the administrator may file a claim on a form prescribed by the administrator and verified by the claimant.

(b) Within 90 days after a claim is filed, the administrator shall allow or deny the claim and give written notice of the decision to the claimant. If the claim is denied, the administrator shall inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant may then file a new claim with the administrator or maintain an action under Section 16.

(c) Within 30 days after a claim is allowed, the property or the net proceeds of a sale of the property must be delivered or paid by the administrator to the claimant, together with any dividend, interest, or other increment to which the claimant is entitled under Sections 11 and 12.

(d) A holder who pays the owner for property that has been delivered to the State and which, if claimed from the administrator by the owner would be subject to an increment under Sections 11 and 12, may recover from the administrator the amount of the increment.

NOTE: Edit in Section 15(b): Add "if any" after "evidence."

Issue #48. The section seems to say and the Comment confirms that there is no limit to the number of times an unsuccessful claimant can file a claim to property. Should the section be revised to establish some outside limit on the number of times a claim can be filed for the same property by the same putative owner?

SECTION 16. ACTION TO ESTABLISH CLAIM.

A person aggrieved by a decision of the administrator or whose claim has not been acted upon within 90 days after its filing may maintain an original action to establish the claim in the [appropriate] court, naming the [administrator] as a defendant. [If the aggrieved person establishes the claim in an action against the administrator, the court may award the claimant reasonable attorney's fees.]

Issue #49. There does not appear to be any time period by the lapse of which the person aggrieved by the action or inaction of the administrator with respect to a claim may seek judicial review. Should there be a limitation on that time period, and if so what is the appropriate limit?

Issue #50. This section provides for an award by the court of reasonable attorney's fees to a successful claimant.

(a) Should there be a cap on the amount of fees tied in some way to the amount at issue?

(b) Should there also be a discretionary award of reasonable expenses of litigation incurred by a successful claimant?

(c) Should the attorney's fees (and expenses) provision be reciprocal and also allow the administrator who successfully resists the appeal to recover his reasonable attorney's fees and expenses of litigation?

(d) If allowed, should the award include attorney's fees and expenses incurred prior to the commencement of litigation?

Issue #51. Neither this section, nor any other section of the Act, establishes a specific procedure under which a person who has been determined by or on behalf of the administrator to be a holder of property who is in default of the obligation to report and turn over property to the state, may bring an action in court to obtain a judicial determination or adjudication of whether or not

the administrator's determination is valid. While Section 22 gives the administrator a judicial remedy to enforce his determination, there is no time limit under which the administrator must proceed in court. Such a determination has financial consequences to the putative holder, and may serve as a financial disclosure item which can cause economic harm while it appears as an outstanding contingent liability.

Issue #52. Should there be a statutory right to file suit to determine the validity of a determination by the administrator that a putative holder has failed to report and turn over property that he is holding, and if so in what court, when and under what conditions?

Issue #53. Section 24 of the Act provides for interest and penalties which accrue against the putative holder until he turns over the property to the state which the administrator has determined he is holding for another. Should there be a provision which would allow a putative holder to contest the administrator's determination of his liability, in whole or in part, to deposit the disputed portion of the money asserted to be due to be paid to the state and thereby toll the running of liability for penalties and interest during the pendency of his action for adjudications of his liability?

Issue #54. Some maintain that the lack of a workable, balanced administrative appeals process results in the expending of substantial resources before a decision may be challenged. Should there be an intermediate administrative review of the administrator's determination which must be exhausted prior to commencement of suit? If so, should the appealing suit be a trial de novo or on the administrative record?

SECTION 17. ELECTION TO TAKE PAYMENT OR DELIVERY.

(a) The administrator may decline to receive property reported under this [Act] which the administrator considers to have a value less than the expenses of notice and sale.

(b) A holder, with the written consent of the administrator and upon conditions and terms prescribed by the administrator, may report and deliver property before the property is presumed abandoned. Property so delivered must be held by the administrator and is not presumed abandoned until it otherwise would be presumed abandoned under this [Act].

Issue #55. Should the act be amended to expand the scope and circumstances under which property may be reported and turned over to the

State in order to permit property to be turned over to the State by the holder after the holder has performed its due diligence? If so, should the consent of the Administrators be required?

SECTION 18. DESTRUCTION OR DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL COMMERCIAL VALUE; IMMUNITY FROM LIABILITY.

If the administrator determines after investigation that property delivered under this [Act] has no substantial commercial value, the administrator may destroy or otherwise dispose of the property at any time. An action or proceeding may not be maintained against the State or any officer or against the holder for or on account of an act of the administrator under this section, except for intentional misconduct or malfeasance.

Issue #56. Should the Act be revised to authorize the Administrator to disclaim property tendered to him or destroy property turned over to him where in his judgment the costs of custody or disposition exceeds the value of the property?

SECTION 19. PERIODS OF LIMITATION.

(a) The expiration, before or after the effective date of this [Act], of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute, or court order, does not preclude the property from being presumed abandoned or affect a duty to file a report or to pay or deliver or transfer property to the administrator as required by this [Act].

(b) An action or proceeding may not be maintained by the administrator to enforce this [Act] in regard to the reporting, delivery, or payment of property more than 10 years after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property. In the absence of such a report or other express notice, the period of limitation is tolled. The period of limitation is also tolled by the filing of a report that is fraudulent.

Issue #57. Under the 1995 Act, a holder who fails to file a required report and turn over property held for another, or who filed a fraudulent report, has no statute of limitations to bar the state's claims. This puts a putative

holder against whom a determination of liability has been made under an enormous burden. To the extent that it allows the state to claim money acting for and standing in the shoes of the owner which the owner is precluded from claiming under an applicable statute of limitations, it allows the owner to override his failure to act within the prescribed time and recover property from the state that he could not recover directly from the holder.

Issue #58. The 1995 Uniform Act provides for a period of limitations which runs from the date that a report was filed, and which is tollable, while the 1981 Uniform Act provides for a period of limitations which runs from the date that property is reportable, and is not tollable, therefore functioning like a statute of repose. See Memorandum § II.B.2. Should there be a statute of limitations or statute of repose which fixes an absolute bar date back to which the state cannot commence an action against a putative holder? If so, what is the appropriate bar date and what relationship should it have to other periods of limitations?

Issue #59. The Uniform Acts contain provisions prohibiting the expiration of statutes of limitation, whether imposed by statute or contract. Some commentators have maintained that these anti-limitations provisions are interpreted too broadly, and that an exemption is called for where the limitations period is not intended to evade unclaimed property reporting requirements, such as where transactions are between businesses. Should the Act be revised to provide such an exemption?

SECTION 20. REQUESTS FOR REPORTS AND EXAMINATION OF RECORDS.

(a) The administrator may require a person who has not filed a report, or a person who the administrator believes has filed an inaccurate, incomplete, or false report, to file a verified report in a form specified by the administrator. The report must state whether the person is holding property reportable under this [Act], describe property not previously reported or as to which the administrator has made inquiry, and specifically identify and state the amounts of property that may be in issue.

(b) The administrator, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with this [Act]. The administrator may conduct the examination even if the person believes it is not in possession of

any property that must be reported, paid, or delivered under this [Act]. The administrator may contract with any other person to conduct the examination on behalf of the administrator.

(c) The administrator at reasonable times may examine the records of an agent, including a dividend disbursing agent or transfer agent, of a business association or financial association that is the holder of property presumed abandoned if the administrator has given the notice required by subsection (b) to both the association or organization and the agent at least 90 days before the examination.

(d) Documents and working papers obtained or compiled by the administrator, or the administrator's agents, employees, or designated representatives, in the course of conducting an examination are confidential and are not public records, but the documents and papers may be:

(1) used by the administrator in the course of an action to collect unclaimed property or otherwise enforce this [Act];

(2) used in joint examinations conducted with or pursuant to an agreement with another State, the federal government, or any other governmental subdivision, agency, or instrumentality;

(3) produced pursuant to subpoena or court order; or

(4) disclosed to the abandoned property office of another State for that State's use in circumstances equivalent to those described in this subdivision, if the other State is bound to keep the documents and papers confidential.

(e) If an examination of the records of a person results in the disclosure of property reportable under this [Act], the administrator may assess the cost of the examination against the holder at the rate of [\$200] a day for each examiner, or a greater amount that is reasonable and was incurred, but the assessment may not exceed the value of the property found to be reportable. The cost of an examination made pursuant to subsection (c) may be assessed only against the business association or financial organization.

(f) If, after the effective date of this [Act], a holder does not maintain the records required by Section 21 and the records of the holder available for the periods subject to this [Act] are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay to the administrator the amount the administrator reasonably estimates, on the basis of any available records of the holder or by any other reasonable method of estimation, should have been but was not reported.

Issue #60. The last sentence of Section 20(b) authorizes the administrator to “contract with any other person to conduct the examinations on behalf of the administrator.” This provision provides the authority under which some administrators enter into contracts with outside independent auditing firms, often on a contingency fee basis, which gives the auditors the authority to examine the books and records of putative holder in order to audit for, and if appropriate determine deficiencies in, required reporting of property held for owners and turning it over to the state. This provision has proven to be one of the most controversial provisions in the Act. Few state administrators maintain staff auditors in the numbers and with the skills necessary to carry out an appropriate number of audits to reasonably secure voluntary compliance with the requirements of the Act. They say taking this tool away from them will seriously compromise their ability to do their job and erode a significant part of the state’s revenue base. On the other hand, many in the holder community believe that an auditor whose compensation is determined on a contingency basis in whole or in part and upon whether (and in what amount) his audit results in a determination of a deficiency may compromise the reliability of the auditor’s findings. See Memorandum § II.B.3 and Memorandum § II.C.

(a) Should the quoted provision in Section 20(b) be eliminated or modified, and, if so in what way or ways?

(b) Are there reasonable alternatives that could be made available to state administrators which would enable them to secure an appropriate level of audit expertise and manpower to safeguard the legitimate interests of the state without needing to use a system that is seen by many in the holder community as inherently flawed?

SECTION 21. RETENTION OF RECORDS.

(a) Except as otherwise provided in subsection (b), a holder required to file a report under Section 7 shall maintain the records containing the information required to be included in the report for 10 years after the holder files the report, unless a shorter period is provided by rule of the administrator.

(b) A business association or financial organization that sells, issues, or provides to others for sale or issue in this State, traveler's checks, money orders, or similar instruments other than third-party bank checks, on which the business association or financial organization is directly liable, shall maintain a record of the instruments while they remain outstanding, indicating the State and date of issue, for three years after the holder files the report.

Issue #61. Should the Act be revised to provide greater specificity regarding the records the holder is required to maintain after filing the report and turning over unclaimed property in his hands?

Issue #62. The 1995 Uniform Act altered the period for which holders are required to retain records from ten years after unclaimed property is reportable to ten years after unclaimed property is reported. The various record keeping records mandated by the Act differ substantially from one jurisdiction to another and for differing purposes. For example, the record keeping requirements for tax purposes is seven years for the IRS and many states. Should there be a maximum period for retention of records, beyond which no penalty or adverse consequences could befall the putative holder whose records had not been returned longer than the required period, and if so, what should that period be? See Memorandum § II.B.5.

Issue #63. There are differing periods with respect to different property and types of property. Should there be one period of retention for all?

Issue #64. Should estimations of liability be allowed to establish a putative holder's liability to turn over property, and if so, under what circumstances?

Issue #65. Should auditors be allowed to base their determinations of liability based on statistical sampling methods, and if so, what methods should be allowed and under what circumstances? What safeguards can be put in place to protect putative holders from being deprived of their property by the auditor's use of flawed or unreliable sampling methodology?

SECTION 22. [LEGAL] [JUDICIAL] ENFORCEMENT.

The administrator may maintain an action in this or another State to enforce this [Act].

The court may award reasonable attorney's fees to the prevailing party.

Issue #66. In addition to recovery of attorney's fees, should the prevailing party also be entitled to an award of his reasonable expenses of litigation?

Issue #67. Should the award of fees be made subject to a cap based on an absolute number or a percentage of the amount recovered or awarded?

Issue #68. How does one need to “prevail” in order to be the “prevailing party”?

Issue #69. Should the administrator’s right to bring an enforcement action be conditioned on some precedent event such as a refusal by a putative holder to allow access to his books and records, or to refuse to pay over amounts for which he has been determined by the administrator to be liable or delinquent?

Issue #70. If there is a condition precedent to the filing of a suit for enforcement, should there be a limit on the time in which such subsequent action for enforcement could be brought? And if so, what is the appropriate limit?

Issue #71. Should there be a provision under which a holder or putative holder could bring an action against the administrator, and if so under what conditions, if any?

Issue #72. Should this Act provide authorization for the State to bring an action against the federal government to recover abandoned U.S. Savings Bonds?

SECTION 23. INTERSTATE AGREEMENTS AND COOPERATION; JOINT AND RECIPROCAL ACTIONS WITH OTHER STATES.

(a) The administrator may enter into an agreement with another State to exchange information relating to abandoned property or its possible existence. The agreement may permit the other State, or another person acting on behalf of a State, to examine records as authorized in Section 20. The administrator by rule may require the reporting of information needed to enable compliance with an agreement made under this section and prescribe the form.

(b) The administrator may join with another State to seek enforcement of this [Act] against any person who is or may be holding property reportable under this [Act].

(c) At the request of another State, the attorney general of this State may maintain an action on behalf of the other State to enforce, in this State, the unclaimed property laws of the other State against a holder of property subject to escheat or a claim of abandonment by the other State, if the other State has agreed to pay expenses incurred by the attorney general in maintaining the action.

(d) The administrator may request that the attorney general of another State or another attorney commence an action in the other State on behalf of the administrator. With the approval of the attorney general of this State, the administrator may retain any other attorney to commence an action in this State on behalf of the administrator. This State shall pay all expenses, including attorney's fees, in maintaining an action under this subsection. With the administrator's approval, the expenses and attorney's fees may be paid from money received under this [Act]. [The administrator may agree to pay expenses and attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action.] Any expenses or attorney's fees paid under this subsection may not be deducted from the amount that is subject to the claim by the owner under this [Act].

Issue #73. Should the Act be revised to relax the formalities of interstate cooperation and allow cooperation between and among the states and the informal exchange of information regarding unclaimed property?

SECTION 24. INTEREST AND PENALTIES.

(a) A holder who fails to report, pay, or deliver property within the time prescribed by this [Act] shall pay to the administrator interest at the annual rate of [12 percent] [two percentage points above the annual rate of discount in effect on the date the property should have been paid or delivered for the most recent issue of 52-week United States Treasury bills] on the property or value thereof from the date the property should have been reported, paid or delivered.

(b) Except as otherwise provided in subsection (c), a holder who fails to report, pay, or deliver property within the time prescribed by this [Act], or fails to perform other duties imposed by this [Act], shall pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of [\$200] for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maximum of [\$5,000].

(c) A holder who willfully fails to report, pay, or deliver property within the time prescribed by this [Act], or willfully fails to perform other duties imposed by this [Act], shall pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of [\$1,000] for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maximum of [\$25,000], plus 25 percent of the value of any property that should have been but was not reported.

(d) A holder who makes a fraudulent report shall pay to the administrator, in addition to

interest as provided in subsection (a), a civil penalty of [\$1,000] for each day from the date a report under this [Act] was due, up to a maximum of [\$25,000], plus 25 percent of the value of any property that should have been but was not reported.

(e) The administrator for good cause may waive, in whole or in part, interest under subsection (a) and penalties under subsections (b) and (c), and shall waive penalties if the holder acted in good faith and without negligence.

Issue #74. There is a decided lack of uniformity among the various states as to the amount of interest that should be charged, if any, on property that should have been but was not timely reported and turned over to the appropriate state, what penalties, if any, should be imposed on a delinquent or uncooperative holder, and whether and under what conditions interest and penalties can be waived. Should the drafting committee reexamine this section with a view towards establishing a provision addressing interest and penalties which is more likely to be uniformly accepted and adopted? See Memorandum § II.B.4.

Issue #75. Should the penalty provisions of the Act be revised and expanded to address intentional noncompliance with the duties imposed by the Act on holders, or an intentional attempt to circumvent its requirements?

SECTION 25. AGREEMENT TO LOCATE PROPERTY.

(a) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property that is presumed abandoned is void and unenforceable if it was entered into during the period commencing on the date the property was presumed abandoned and extending to a time that is 24 months after the date the property is paid or delivered to the administrator. This subsection does not apply to an owner's agreement with an attorney to file a claim as to identified property or contest the administrator's denial of a claim.

(b) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property is enforceable only if the agreement is in writing, clearly sets forth the nature of the property and the services to be rendered, is signed by the apparent owner, and states the value of the property before and after the fee or other compensation has been deducted.

(c) If an agreement covered by this section applies to mineral proceeds and the agreement

contains a provision to pay compensation that includes a portion of the underlying minerals or any mineral proceeds not then presumed abandoned, the provision is void and unenforceable.

(d) An agreement covered by this section which provides for compensation that is unconscionable is unenforceable except by the owner. An owner who has agreed to pay compensation that is unconscionable, or the administrator on behalf of the owner, may maintain an action to reduce the compensation to a conscionable amount. The court may award reasonable attorney's fees to an owner who prevails in the action.

(e) This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation.

Issue #76. Should the Act be revised to create a new section dealing with requirements for maintaining the confidentiality of business records similar to those imposed on taxing authorities?

SECTION 26. FOREIGN TRANSACTIONS.

This [Act] does not apply to property held, due, and owing in a foreign country and arising out of a foreign transaction.

SECTION 27. TRANSITIONAL PROVISIONS.

(a) An initial report filed under this [Act] for property that was not required to be reported before the effective date of this [Act] but which is subject to this [Act] must include all items of property that would have been presumed abandoned during the 10-year period next preceding the effective date of this [Act] as if this [Act] had been in effect during that period.

(b) This [Act] does not relieve a holder of a duty that arose before the effective date of this [Act] to report, pay, or deliver property. Except as otherwise provided in Section 19(b), a holder who did not comply with the law in effect before the effective date of this [Act] is subject to the applicable provisions for enforcement and penalties which then existed, which are continued in effect for the purpose of this section.

SECTION 28. RULES.

The administrator may adopt [pursuant to the Administrative Procedures Act] rules necessary to carry out this [Act].

SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

SECTION 30. SHORT TITLE.

This [Act] may be cited as the Uniform Unclaimed Property Act (1995).

SECTION 31. SEVERABILITY CLAUSE.

If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 32. EFFECTIVE DATE.

This [Act] takes effect

SECTION 33. REPEALS.

The following acts and parts of acts are repealed:

- (a) (b) (c)

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