REVISED UNIFORM UNCLAIMED PROPERTY ACT

REPORTER'S COMPILATION OF RECOMMENDATIONS AND SUGGESTIONS FOR REVISION SUBMITTED BY STAKEHOLDERS

After the first meeting of the Drafting Committee, various stakeholders submitted suggestions and recommendations for revision of the 1995 Uniform Unclaimed Property Act (the "Act") in response to the issues that were discussed at the meeting, and made suggestions in addition to the 76 issues that were discussed.

Their recommendations and suggestions were reviewed and have been rearranged to give the Committee access to this information in a way that allows comparison of the sometimes differing suggestions in the context of the issues presented and juxtaposed to the particular Section of the Act that would be impacted or affected were the suggestion to be accepted for inclusion in the revised Act.[i] Each potentially affected Section of the Act is reproduced in full in italics to provide easy access to the current Act.

As a preliminary matter, before addressing the issues that have been raised for discussion of revisions of the 1995 Act it has been suggested that a "Purpose" section be added to the Act, either as a prefatory statement or a new numbered section.

The recommendation by ICI is that such provision "should expressly state that the purpose of the Act is to reunite those owners who are truly lost and cannot be found with their property. As such, all provisions in the Act should be interpreted in a way that will best serve the interests of a lost owner." ICI proposed the following language:

> *NEW SECTION:*
>
> *SECTION #. RULES OF CONSTRUCTION; PURPOSE.*
>
> *(a) This [Act] shall be conservatively construed and applied to promote its underlying purposes and policies to:*

> *(1) Protect owners of property from their property being prematurely presumed abandoned and delivered to the State; Protect unknown owners of property by locating them and restoring their property to them; and*
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> *(3) Ensure that, until such time as property can be restored to an unknown owner, the value of such property and the owner's interest in such property is protected to the maximum extent possible. Consistent with the provisions of (a), the administrator or any person acting on behalf of the administrator shall: Avoid taking any action under this [Act] regarding an owner's property that would result in any diminution in the value of such property or result in the owner incurring any penalties, tax or otherwise, that can reasonably be avoided; and*
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> *(2) Ensure, to the maximum extent possible, that when the property is restored to the owner, the value of such property has not been negatively impacted by the provisions of this [Act] or any action taken by the administrator under this [Act].*
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> ***Comments:*** *The revisions to this Section correspond to the Investment Company Institute's ("ICI's) Recommendation 1, which recommends that the Act include a "Purpose" section expressly providing that the Act shall be construed to best serve the interests of an owner who is truly lost. Such a provision is important to avoid states implementing the Act in a way that promotes the states' economic interest at the expense of a lost owner.*

The reason given for such a purpose provision is to reinforce the notion that the original intent of the Unclaimed Property Act was to protect the interests of lost owners and reunite them with their property.

A similar suggestion was made by the ABA with the recommendation that the Statement of Purpose include the following subparts:

> (1)*The purpose of this [Act] is to facilitate the return of unclaimed property to its rightful owner.*
>
> (2)*Under the circumstances described in this [Act], the State may take custody of unclaimed property from the holder on behalf of the owner.*

(3)*The State's right to take custody of property under the [Act] is derived from that of the owner and, except as expressly set forth in the [Act], the State shall have no greater right to the property than the owner.*

(4)*The State shall hold all unclaimed property on behalf of the owners thereof in perpetuity until the owner reclaims such property.*

(5)*This [Act] shall be preempted to the extent that it conflicts with any federal law.*

NAUPA Comments of October 29th:

Given the role of the Commissioners' Prefatory Note in Uniform Acts, NAUPA questions the necessity of a preamble to the Uniform Unclaimed Property Act. Additionally, until the specific scope and direction of a new Uniform Unclaimed Property Act is determined, the crafting of a preamble would be premature.

UNIFORM UNCLAIMED PROPERTY ACT (1995)

Issues 1–7 pertain to Section 1 of the 1995 Act.

Section 1 of the 1995 Act reads as follows:

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 an 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 mounts 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 a 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" under Section 1 of the Act?

The current Act does not have a definition of address. It has been suggested that there should be one. There are two reasons for having an "address." The first is for the obvious reason of giving notice to the owner. The other reason is that it provides information needed to identify the first priority jurisdiction if that information is available. The latter obviously allows for an "address" that may not be adequate for the delivery of mail. The U.S. Supreme Court in *Texas v. New Jersey* [cite needed] discussed the concept of an address. The consensus coming from the Issue Conference was to use the definition developed by NAUPA, as follows:

> "Address" means any description, code or indication of the location of the apparent owner that sufficiently identifies the state of residence of the owner, regardless of whether such description, code or indication of location is sufficient to direct the delivery of mail.
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> **NOTE:** as an alternative to "sufficiently identifies," "Adequately," "reasonably," or "definitively" could be utilized. The U.S. Supreme Court's test is that a state must be able to demonstrate that an owner did in fact have a last known address in that State.
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> ICI makes three recommendations which relate to "address:"
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> (1) to permit notice to an owner to be sent via first class mail or by electronic mail (if the owner has consented to email notifications);
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> (2) to exempt from the Act securities accounts with only APO/FPO addresses; and
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> (3) to provide that first class mail is sufficient without requiring that it be registered or certified.

Additionally, it was suggested that there be two definitions of "address" depending on its purpose—to deliver mail or determine state of residence.

Note: Issue #28 points out that some state statutes allow for the retaining only zip

codes as the "holders" [*sic*] [should be "owners"] addresses, while others find zip codes to be insufficient for determining a state's priority under the 1981 Act which says the "last known address" must be "sufficient for the purpose of delivery of mail."

There are really two purposes for an owner's address: first, to enable the holder and the state to deliver notices to the owner, and that requires an address "sufficient for the delivery of mail." Second is an "address" sufficient to identify the state in which the owner resides to establish that state's "first priority" status.

However, an address "sufficient for the delivery of mail" is not as easily determined as it might appear. To ensure delivery of mail to a resident of New York City living in a large apartment building, the address may require for delivery the full name of the party and the apartment or unit number. An address to J. Smith, 501 5th Avenue may not be sufficient if there are multiple units at that address and more than one J. Smith. On the other hand, the post office in Birney, Montana serves about 25 ranching families. Mail addressed to "Alice, Birney, MT" may be a sufficient address. However, in neither instance is there confusion over the "owner's" state of residence for determining the state with first priority.

ABA's recommendations

The ABA recommends that Section 1 of the UUPA be revised to include a definition of "last known address" that is generally consistent with the definition set forth in the 1981 version of the UUPA (the "1981 Act").

The 1981 Act defined "last known address" to mean "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail." The Comment to this provision stated that this definition is "consistent with most state laws which have defined an address." The 1995 version of the UUPA (the "1995 Act") did not define a "last known address,"

and this lack of guidance has resulted in confusion among states and holders regarding where property should be reported where the holder has some information regarding the address of the owner, such as a zip code or state of location, but lacks a full mailing address. States have split on the issue, with some states arguing that a zip code or other information short of a full mailing address is sufficient, while other states argue that a full mailing address must be available.

The ABA advises to avoid pre-emption when it comes to the issue of defining address

ABA recommends that the Drafting Committee avoid including provisions in the UUPA that are likely to be challenged on the basis that they conflict with federal law and thus are preempted. Defining "last known address" based on a complete mailing address is consistent both with the common meaning of the term "address" as well as with the federal common law rules adopted by the U.S. Supreme Court that base the state's jurisdiction to escheat on whether the holder has a record of the owner's "address."

ABA believes that such a definition is less likely to be challenged on the basis that it conflicts with these federal common law rules. Notably, such a definition is also consistent with the general purpose of state unclaimed property laws to return missing property to the rightful owner, as a complete mailing address is certainly helpful, if not necessary, to accomplish this purpose.

SIFMA's Recommendations

The definition section should address the application of priority rules where there is a state of record, even in the absence of a bona-fide street address.

Sec. 4 (1) the last known address of the apparent owner, as shown on the records of the holder, regardless of existence of bona fide street address, is in this State;

Issue #2

Should the definition of "money order" under §1(10) be revised to prevent holders from taking advantage of the seven year dormancy period?

The current definition of "money" order is so broad as to permit sophisticated issuers to create instruments that technically fit the definition and allow the seven year dormancy period allowed in § 2(a)(2). To avoid this result, NAUPA proposes the following revised definition:

> *"Money order" is an express money order or personal money order, purchased by an individual. The term does not include a bank money order or any other instrument sold by a financial organization, or any instrument on which a business association, financial organization, or insurance company is the remitter.*

NAUPA also suggests a new subsection be added to § 2 which expressly provides that where a different abandonment period for the medium (money order) on which an unclaimed asset was paid and the abandonment period for the underlying obligation, the abandonment period for the underlying property types takes precedence.

Issue #3:
The definition of property under § 1(13)

(A)) What should the definition of property include?

UPPO's Recommendations:

UPPO supports the renumbering of Section 1 DEFINITIONS subsections 14 through 16, "Record", "State", and "Utility", to subsection 15 through 17, to account for a new subsection 14, which will include the following exclusions to the definition of the word "property":

(14) The term "property" does not include:

(i) ERISA plans;

(ii) 529 plans;

(iii) Any property due or owning from a business association to another business association in the ordinary course of business, including but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates;

(iv) Wholesale credits due or owing from a business association to another business association in the ordinary course of business, including but not limited to, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates;

(v) Uninvoiced Payables. "Uninvoiced Payables" are amounts due between business associations, from a holder who is a buyer to a creditor who is the seller of goods ordered by a holder in the ordinary course of business when the goods were received and accepted by the holder, but which for any reason were never invoiced by the seller;

(vi) Promotional Programs not redeemable for cash or for which no monetary consideration was provided;

(vii) Unused Subscriptions not redeemable for cash.

This section of the Revised Act is effective immediately and also applies to amounts that, on the effective date, are in the possession, custody or control of the holder.

NAUPA suggests abandonment parameters for college savings plans, as a new subsection to Section 2:

> *property in a college savings plan or prepaid plan established under section 529 of the Internal Revenue Code of the United States, five years from the date of last indication of interest by the owner, provided that the beneficiary has reached, as of five years from the date of last indication of interest by the owner, the age of 26 years. If the beneficiary has not yet reached as of five years from the date of last indication of interest by the owner the age of 26 years, the property is not presumed abandoned until such time as the beneficiary reaches the age of 26 years.*

NAUPA is opposed to the exemption of property subject to ERISA.

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

Before considering whether the definition of "property" should be expanded to include U.S. Savings Bonds, it is important to examine existing caselaw on this issue, which suggests that such a definition would be preempted by federal statutes and regulations pertaining to U.S. savings bonds. *See Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 407 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 2735 (2013) ("federal statutes and regulations pertaining to United States savings bonds preempt the States' unclaimed property acts insofar as the States seek to apply their acts to take custody of the proceeds of the matured but unredeemed savings bonds.").

> The Third Circuit in *Treasurer of New Jersey v. U.S. Dep't of Treasury* stated as follows:

> The States' unclaimed property acts conflict with federal law regarding United States savings bonds in multiple ways. First, in advancing the goal of making the bonds "attractive to savers and investors," see Free, 369 U.S. at 669, 82 S.Ct. at 1093, Congress has authorized the Secretary to implement regulations specifying that "owners of savings bonds may keep the bonds after maturity." 31 U.S.C. § 3105(b)(2)(A).25 The plaintiff States' unclaimed property acts, by contrast, specify that matured bonds are abandoned and their proceeds are subject to the acts if not redeemed within a time period as short as *408 one year after maturity. See, e.g., N.J. Stat. Ann. § 46:30B–41.2. Such provisions starkly conflict with savings bonds regulations imposing "conditions governing their redemption." 31 U.S.C. § 3105(c)(4); see 31 C.F.R. § 315.5(a) (providing that the registered owner of the bond is presumed conclusively to be the owner); § 315.15 (providing that savings bonds are "payable only to the owners named on the bonds, except as specifically provided in these regulations and then only in the manner and to the extent so provided."); § 315.20(b) (providing that the Department of the Treasury will recognize a claim of ownership or interest in a bond only if "established by valid, judicial proceedings"); § 315.35(a) (providing that payment may be made only to persons entitled to it under the regulations); § 315.39 (providing that the owner of the bond may present it to an authorized paying agent for redemption). *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 407-08 (3d Cir. 2012).

In *Treasurer of New Jersey v. U.S. Dep't of Treasury* the Third Circuit also found that "the States' desired application of their unclaimed property acts would violate the constitutional principles of intergovernmental immunity that 'states may not directly regulate the federal government's operations or property[.]'" *Id*. at 410.

ABA's Recommendations

In light of the Third Circuit's decision in *Treasurer of New Jersey v. U.S. Dept. of Treasury*, 684 F.3d 382, 406 (3d Cir. 2012), the ABA recommends that a new section (f) be added to Section 2 of the UUPA to provide that the UUPA does not apply to property held by or owing to the United States government.

At the briefing committee meeting, it was noted that if the State is the actual owner of the Savings Bond the Treasury will pay it over to the State. It was also stated that there is authority which precludes escheatment of U.S. Savings Bonds to the unclaimed property administrator. *Trenton, NJ v. U.S. Treasury*, 3d Cir (2012). [Ethan Millar is to provide authority

on this point.] (*Weingarten* Case.)

NAUPA recommends that a new Section be included in the revised Act that would allow states to pursue claims for unredeemed bonds held by the Bureau of Public Debt by adopting the approach successfully undertaken by Kansas in 2014.

NAUPA recommends the following specific provision be added:

Section [NEW]: United States Savings Bonds; Procedure for Escheat

(a) *Notwithstanding any provision this Act to the contrary, United States savings bonds that have fully matured and have ceased bearing interest and that are presumed abandoned pursuant to section 2(a)(12) of this Act shall escheat to the State and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the State of [_____].*

~~(b) *Within 180 days after a United States savings bond has been*~~ *presumed abandoned, in the absence of a claim having been filed with the administrator for such savings bond, the administrator shall commence a civil action in the district court of [ ] County for a determination that such savings bond shall escheat to the State. The administrator may postpone the bringing of such action until sufficient savings bonds have accumulated in the administrator's custody to justify the expense of such proceedings.*

(c) *If no person shall file a claim or appear at the hearing to substantiate a claim or where the court shall determine that a claimant is not entitled to the property claimed by such claimant, then the court, if satisfied by evidence that the administrator has substantially complied with the laws of this state, shall enter a judgment that the subject United States savings bonds have escheated to the state.*

(d) *The administrator shall redeem from the Bureau of the Fiscal Service of the United States Treasury such United States savings bonds escheated to the State and the proceeds from such redemption of United States savings bonds shall be deposited in accordance with Section 13 of this Act.*

(e) *Notwithstanding any provision of this Act to the contrary, any person making a claim for the United States savings bonds escheated to the State under Section [TBD] or for the proceeds from such bonds, may file a claim with the administrator. Upon providing sufficient proof of the validity of such person's claim, the*

administrator may pay such claim.

NAUPA also suggests that specific language be included in the Revised Act to address the second part of Issue #3 allowing for an offset of debts owed by the owner of escheated property to the state as follows:

> (e)*Upon receiving notice from a governmental entity that an apparent owner owes a past-due legally enforceable debt, the administrator shall, following confirmation of the apparent owner's entitlement to the property, offset the property, in whole or in part, to satisfy the debt or delinquent child support. For purposes of this subsection, "past due legally-enforceable debt" shall include:*
>
> (1)*current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance;*
>
> (2)*court fines, fees, costs, surcharges, or restitution; or*
>
> (3)*state taxes, penalties or interest.*

If added, this provision should more appropriately become sub-paragraph (e) of Section 15 which deals with payment of claims to owners, with appropriate revision of subparagraph (c) of Section 15.

Additonal NAUPA recommendations:

NAUPA recommends that the definition of property be retained and exemptions should not be included in the uniform act. NAUPA's specific inclusions to the definition of property are: electronic or virtual currency, funds on deposit or held in trust for the prepayment of a funeral or other final expense; and the proceeds of sale, less any lawful charges, from the liquidation of the contents of a self-storage or similar leased storage unit or space.

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 redefined to include identification of policy holders and insured lives within the Social Security Administrators "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?

NAUPA proposes to clarify reporting requirements for unclaimed life insurance policies including expressly providing that the death of the insured triggers the running of the abandonment period; that the limiting age should only be used to determine abandonment if the life insurer does not know that the insured is deceased; waiving the requirement of a death certificate or other specific documentation for life insurance property to be deemed payable; and providing relief from interest and penalties where an insurer's failure to timely report policy proceeds is for reason of lack of knowledge of the insured's death. Additionally, reduce abandonment periods for policy proceeds from three years, to two years for policies that have matured or terminated and one year for policies reaching the limiting age.

Citation: 1995 Uniform Act Section 2(a)(8) 2(e), and 24(a),(b).

Objective: update statute to reflect current regulatory-compliance requirements of state unclaimed property programs and life insurance departments.

ACLI objects to inclusion in the Revised Act of any suggestion that the appearance of a name on the DMF constitutes proof of death, and provides a discussion of the myriad of problems with the accuracy of the DMF. ACLI suggests that at most a name match on the DMF might trigger an obligation on the part of the holder (the insurance company) to investigate a possible death of an insured life, but a name match cannot be a surrogate for customary proof of

death, such as an official death certificate. ACLI makes the following points in support of its objection.

> **Death Master File requirements should be a matter of insurance law, not unclaimed property law.** (WI Commissioner of Insurance also takes this position, however the Illinois Commissioner of Insurance letter counters this).
>
> Cause for optimism that state treasury officials will refrain from an over-reaching appeal to the Uniform Law Commissioners arrived on April 7, 2014, when the National Association of Unclaimed Property Administrators (NAUPA) commented upon proposed amendments to the NCOIL *Model Life Insurance Benefits Act*.. The NAUPA letter is appended. In it, NAUPA reminds us that it fully supported the NCOIL Model Act as it was adopted in 2011. It advocates to NCOIL that any amendments to the NCOIL Model Act not undercut its purpose to require life insurance industry use of the Death Master File to help ensure that all benefits are paid to deceased insureds in a timely manner.

The ACLI agrees with these basic points and is glad that NAUPA looks to NCOIL for continued leadership in the formulation of legislative guidance respecting life insurance company duties.

To the extent there is or should be a requirement for insurers to use the Death Master File, the requirement should be lodged in state insurance law, not unclaimed property law. There appears to be a broad-based consensus among all interested parties including unclaimed property authorities that insurance company Death Master File requirements should be articulated as a matter of insurance law. NCOIL quickly realized the importance of creating a foundation in law for the novel ides of the unclaimed property auditor and approved its Model in 2011, the year the first global settlements were announced between a small number of large insurers and the states.

The NCOIL Unclaimed Property Task Force met March 7, 2014, to review the NCOIL Model Act and consider strengthening consumer protections related to unclaimed life insurance benefits. NCOIL leaders requested that all proposed amendments be submitted in markup form by April 8. All of the proposals submitted respect the basic notion that insurance companies should utilize the Death Master File to enhance identification of deceased insureds and as a basis of additional duties to search for beneficiaries, though scope of Death Master File comparisons to in force business is controversial. The Task Force will deliberate upon these matters during the NCOIL 2014 Summer Meeting in Boston.

Separately, the National Association of Insurance Commissioners

(NAIC) this year established an Unclaimed Life Insurance Benefits Working Group, which first met on March 31, 2014. Many interested parties urged the NAIC Working Group to endorse the NCOIL Model Act. An alternative view suggested that NAIC use the regulatory settlements reached between several large life insurance companies and numerous state insurance officials. These regulatory settlements – much like the unclaimed property audit global settlements – require the settling insurance companies to use the Death Master File in specific ways. Naturally, the NAIC guidance is expected to rely upon insurance regulatory jurisdiction to achieve its goals.

States are addressing Death Master File requirements as a matter of insurance law, not unclaimed property law.

Eleven states have adopted modern laws requiring insurance companies to use the Death Master File to diminish unclaimed life insurance benefits: Alabama, Indiana, Kentucky, Maryland, Mississippi, Montana, Nevada, New Mexico, New York, North Dakota, and Vermont. Another two states' legislatures (Georgia and Tennessee) have approved bills and sent them to their respective governors for enactment, where they are pending. Except for one, the new state laws are based upon the NCOIL Model Act (the New York law is not considered technically to be based on the NCOIL Model but nonetheless includes similar Death Master File requirements). Of the modernizing states, only Vermont anomalously amended its unclaimed property laws – all the other states respected the NCOIL intention that its guidance be embedded within state insurance codes. For reasons explained below, it should be preferable public policy to amend state insurance laws with the modern guidance, as intended by NCOIL.

Another six state legislatures have in 2014 considered or are considering the NCOIL Modern Act to modernize their insurance laws. They are Iowa, Louisiana, Massachusetts, Oklahoma, Pennsylvania, and Rhode Island. Only one of the legislatures is contemplating amending its unclaimed property laws to require Death Master File comparisons by life insurance companies (Tennessee; see *infra* at page 9).

A consensus public policy is emerging. The new laws are consistent with the long-standing practice, imposed by insurance statute, requiring submission of a claim and proof of death before life insurance proceeds become payable. This does not necessarily mean that modifications to traditional administrative processes are unnecessary. Life insurers share the regulators' stated goal of ensuring that all proceeds are paid to proper beneficiaries. The legislative process – contrary to the adversarial process characteristic of regulatory audits – provides a forum for developing a reasoned solution. This process is well under way throughout the country.

No requirement existed for insurers to use the Death Master File prior

to the new, NCIL Model Act laws.

Although several life insurers have acceded to the demands of regulators in order to resolve unclaimed property audits and market conduct examinations, no court has yet cast aside the traditional proof of death requirement, and no court has adopted the state treasurers' position that dormancy begins automatically upon the insured's death. To the contrary, courts around the country have considered and rejected these claims.

Unclaimed property law should not alter the substantive law of contract upon which insurance is based.

It is appropriate for government auditors to hunt for and discover unclaimed property but improper for them to invent property for purposes of declaring it abandoned. Unclaimed property laws today apply to broad categories of intangible property and financial instruments, including life insurance proceeds. These statutes universally incorporate the "proof of death" requirement found in state insurance laws.

While unclaimed property statutes vary, the generally reflect one of three model unclaimed property acts promulgated by the Uniform Law Commissioners. The model laws establish that the State's role is purely custodial: "[T]he State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." The State has no greater right than the owner of the abandoned property.

Under the model laws, dormancy begins upon the submission of actual proof of death or upon another explicit triggering event. For example, under the original 1954 Model Act, "[u]nclaimed funds" referred to "all moneys held and owing by any life insurance corporation" for more than seven years "after the moneys became due and payable." *See Uniform Unclaimed Property Act* (1954) at
§ 3(b). The 1954 Model Act also provided that a "life insurance policy not matured by actual proof of death of the insured" is nevertheless presumed to be matured if the policy remains in force "when the insured attained the limiting age under the mortality table on which the reserve is based." *Id.* (Emphasis added). In other words, the 1954 Model Act contained two triggers – maturation by actual proof of death or, if the policy remained in force, presumptive maturation to the limiting age.

Many states' unclaimed property statutes reflect the 1981 Model Act, which also incorporates the principle that life insurance benefits are not payable in the absence of due proof of death. *See, e.g.*,
§ 717.107 through 717.1401, Florida Statutes (2013); 1981 Model Act § 7(c). Florida's statute acknowledges that "maturity" generally occurs upon "actual proof of death of the insured." However, Florida's statute identifies two additional circumstances when a policy may be deemed matured: when the "company knows the insured or annuitant had died"

and when the insured "has attained, or would have attained if he or she were living, the limiting age under the mortality table on which the reserve is based."
§ 717.107(3)(a) and (b), Fla. Stat. (2013).

Instead, a claimant must show that the insured has died while the policy is in force arising from a cause that is not excluded from coverage. *See* W. Va. Code § 33-13-25 (listing limitations that may be included in insurance contracts conditioning the insurance companies' responsibility to pay proceeds to a beneficiary, such as in the case of suicide). As a result, the "due proof of death" requirement is not a mere administrative requirement for collecting an obligation that is already fixed and certain. Rather, it is an essential ingredient for creating the obligation (*i.e.*, the "property") in the first place.

Inclusion of a Death Master File requirement in the *Uniform Unclaimed Property Act* will alter materially the very laws upon which insurance is offered.

Hence, any recommendation that Death Master File requirements for insurance companies be amended into the *Uniform Unclaimed Property Act* should be rejected as beyond the scope of the Act. After decades of experience – including recent experience – it is clear that (1) there is no practical need to expressly require Death Master File use in the unclaimed property laws to accomplish the auditor's goals to persuade insurers to use it; and (2) amending unclaimed property laws with Death Master File requirements will create ambiguity within state laws as to interpretation and statutory conciliation.

Inclusion of a Death Master File requirement in the *uniform Unclaimed Property Act* will create an adversary relationship between state unclaimed property and insurance authorities, creating a chaotic regulatory environment for insurers.

Thus far insurance officials have deferred substantially to their colleague treasury officials in explaining the new expectations that insurers will use the Death Master File for new, extra-contractual duties. The new laws naturally and property rely upon the expert insurance benefits in circumstances where a claim is not filed but a Death Master File match occurs. Should treasury official now request new Death Master File requirements be amended into the *Uniform Unclaimed Property Act*, however, it will create an adversarial relationship among state officials as the treasurers attempt to expand the classification of insurance benefits for purposes of escheatment, hence diminishing the insurance commissioner's role as the preeminent regulator of the business of insurance.

The likelihood of creation of adversarial relationships among state unclaimed property and insurance authorities is displayed in the

Corrected Fiscal Note to Tennessee HB 2427 – SB 2516 (February 25, 2014). The *Corrected Fiscal Note* is appended to this letter in its entirety. The document displays how the legislature, in contemplating a modernization of the administration of unclaimed life insurance benefits, disappoints state treasury expectations "based on an estimate of the total number of policies written in Tennessee and the percentage of policies that have been reported" regarding "an additional $64 million of unclaimed property in the form of proceeds and annuities where the policy owners are deceased." The legislation, based on the NCOIL Model Act, defers to insurance regulatory preeminence over insurance contract administration and, hence, "There will be an *increase in foregone revenue* (sic) to the [Unclaimed Property] Division, beginning in FY15-16, of $41 million."

Inclusion of a Death Master File requirement will diminish uniform adoption of a revised *Uniform Unclaimed Property Act*.

The American Council of Life Insurers represents approximately 300 member companies operating in the United States and abroad. The ACLI advocates in federal, state and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. The ACLI is actively opposing current legislative proposals to enact treasury official authority to compel use of the Death Master File for the purpose of inventing property to escheat for revenue. For these reasons, the ACLI opposes amendment of the *Uniform Unclaimed Property Act* to the same end. The ACLI hopes to be able to continue to support and contribute to the development of the revision undertaken by the Uniform Law Commissioners. Such an effort must respect ancient principles of government duty, well-established American precedent of the proper scope of government, the complementary roles of different government officials, and the essential value of sustaining the business of life insurance.

The provisions of the 1981 Act relating to unclaimed proceeds of life insurance policies are as follows:

§ 7. [Funds Owing Under Life Insurance Policies]. [1981 Act]

(a) Funds held or owing under any life or endowment insurance policy or annuity contract that has matured or terminated are

presumed abandoned if unclaimed for more than 5 years after the funds became due and payable as established from the records of the insurance company holding or owing the funds, but property described in subsection (c)(2) is presumed abandoned if unclaimed for more than 2 years.

(b) If a person other than the insured or annuitant is entitled to the funds and an address of the person is not known to the company or it is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the company.

(c) For purposes of this Act, a life or endowment insurance policy or annuity contract not matured by actual proof of the death of the insured or annuitant according to the records of the company is matured and the proceeds due and payable if:

(1) the company knows that the insured or annuitant has died; or

(2) (i) the insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;

(ii) the policy was in force at the time the insured attained, or would have attained, the limiting age specified in subparagraph (i); and

(iii) neither the insured nor any other person appearing to have an interest in the policy within the preceding 2 years, according to the records of the company, has assigned, readjusted, or paid premiums on the policy, subjected the policy to a loan, correspond in writing with the company concerning the policy, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the company.

(d) For purposes of this Act, the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from being matured or terminated under subsection (a) if the insured has died or the insured or the beneficiary of the policy otherwise has become entitled to the proceeds thereof before the depletion of the cash surrender value of a policy by the application of those provisions.

(e) If the laws of this State or the terms of this State or the terms of the life insurance policy require the company to give notice to the

insured or owner that an automatic premium loan provision or other nonforfeiture provision has been exercised and the notice, given to an insured or owner whose last known address according to the records of the company is in this State, is undeliverable, the company shall make a reasonable search to ascertain the policyholder's correct address to which the notice must be mailed.

(f) Notwithstanding any other provision of law, if the company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within 4 months after the death, the company shall take reasonable steps to pay the proceeds to the beneficiary.

(g) Commencing 2 years after the effective date of this Act, every change of beneficiary form issued by an insurance company under any live or endowment insurance policy or annuity contract to an insured or owner who is a resident of this State must request the following information.

(1) the name of each beneficiary, or if a class of beneficiaries is named, the name of each current beneficiary in the class;

(2)) the address of each beneficiary; and insured.

(3) the relationship of each beneficiary to the

NAUPA recommends that the 1981 provisions be incorporated into the revisions to the 1995 Act and that the Revised Act redefine "proof of death" to include identification of an insured [NAUPA says "policyholder" who may be different from the named insured] within the Social Security Administration's "Death Master File" ("DMF"), or similar database, and incorporate into the revised Act the NCOIL Model Act provisions that create an affirmative duty on the part of the life insurer to perform DMF matching [every 6 months]. NCOIL resists this recommendation. A few years ago, stimulated by a series of class actions against life insurers seeking to recover life insurance proceeds being held on policies where the named insured had died while the policy was in force but no claim or proof of death had been submitted by a beneficiary, unclaimed property auditors began auditing life insurance companies for money being

held under such circumstances. It appeared that annuity companies regularly reviewed the DMF to determine if an annuitant had died in order to stop paying out annuity payments which terminated at the annuitant's death. But it seems that life insurance companies (often the same or affiliated annuity companies) did not also review the DMF to determine when a named insured (often the same person) had died, but no claim or proof of death had been submitted.

In 2001, NCOIL created the Model Unclaimed Life Insurance Benefits Act (the "Model Act") and its adoption by the states was fully supported by NAUPA because it placed an affirmative requirement on insurance companies to perform regular comparisons of their "in-force" life insurance policies against the DMF in order to identify situations where an insured is deceased but a beneficiary has not filed a claim. Since then, however, NCOIL has suggested amendments to the Model Act so that it would only apply to life policies issued some date after the enactment of the Model Act by a particular state, thus exempting from the requirement the vast bulk of presently in-force policies, as well as certain specific kinds of death benefits. NAUPA is opposed to the proposed amendment.

The implication of this legislation is huge. As an example, according to a Corrected Fiscal Note attached to a bill introduced in Tennessee in February 2014, the Tennessee Unclaimed Property Administrator estimated an adverse fiscal impact to the Sate of $41,000,000, beginning in 2015-16 and extending indefinitely, were this amendment to be enacted.

For these reasons, NAUPA argues that it is imperative that the Model Act continue to apply to all in-force policies issued by life insurers.

NAUPA has been part of a Task Force working with NCOIL considering possible amendments. NAUPA references the work of the ULC and seeks to "dovetail" the Model Act and the UUPA on issues related to use of the DMF to identify deceased insureds and unclaimed death

benefits. [Letter dated 4/4/2014 from Don Stenberg, Nebraska State Treasurer.] To that end, NAUPA has proposed a series of proposed Amendments to the Model Act, a copy of which is posted on the website.

U.S. Chamber Institute for Legal Reform:

Opposes the requirement imposed by audit firms that life insurers should cross-reference their records with the DMF and in support of that position point to several court rulings, including *Feingold v. John Hancock Life Ins. Co. (USA)*, No. 13-2151, 2014 WL 2186595 9 (1st Cir. May 27, 2014) (holding that insurers' practice requiring "proof-of-death notice . . . complies with Illinois law").

In its submission discussing the U.S Chamber's position, NAUPA asserted that state contract auditors do not "require" that life insurers are required to match their policy records to the DMF; rather, the state contract auditors actually undertake the matching procedure. It is the position of NAUPA that states may utilize the DFM in performing compliance examinations of holders, including life insurance companies.

Issue #5:

The definition of holder in Section 1 (6)

(a) Because of the broad definition of a "holder" of unclaimed property who is obliged 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?

This issue represents two distinct but related issues. The 1995 Act broadly defines "holder" to mean "a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this Act." It differs from the 1981 Act which provides that a "holder" means a person, wherever organized or domiciled, who is: (i) in possession of property belonging to another, (ii) a trustee, or (iii) indebted to another on an obligation." This language was considered by the 1995 drafting committee as too sweeping. The 1992 Supreme Court decision in *Delaware v. Texas* defined "holder" as a person, obligated to hold property for the account of another.

However, in some situations it is not clear who the holder is, or who is obligated to whom, especially in the case of mutual funds where there are multiple potential layers of "holders." This problem has prompted ICI to recommend that for purposes of accounts having intangible securities there be only one "legal" holder of the account, and such person be the person that is either (1) required by § 6042 I.R.C. (or the rules thereunder) to file a tax return with the US Treasury, or (2) legally responsible, pursuant to agreement or otherwise, to make such return on behalf of the person who is required by law to file the return. The comment to the ICI recommendation says that with respect to 529 College Savings Plans, this definition would make

the State the legal holder. However, the State could delegate its tax reporting duty to the plan's transfer agent, who would then be considered the "holder."

A recent case, *Costco Wholesale v. Dept. of Rev.* (Wash. 2013) deals with a tax reporting obligation created by contracts. [Lyndon Lyman agreed to provide a copy of the order of the court for our review.]

With regard to Part (b) of Issue #5, NAUPA recommends that a new section be added to the Revised Act limiting the assignment of holder liability to a third party. This would prevent holders from circumventing their reporting obligations through contractual assignment of that liability (or duty) the third parties outside of the "obligor" relationship giving rise to the obligation. However, it allows a successor-in-interest to a holder to assume his predecessor's obligations.

UPPO supports the following changes to the definition of the word "holder" in the UUPA:

(1) the UUPA definition should be clarified to indicate that there can be only one "holder" of unclaimed property who is responsible for reporting to the state; and (2) the holder is the party legally obligated to the owner pursuant to Delaware v. New York (as opposed to a separate entity who may be in possession of the funds).

NAUPA recommends inclusion in the Revised Act of a new Section as follows:

Section : Limitations on Assignment or Transfer of Liability

(a)*A holder may not assign or otherwise transfer its obligation to hold for or pay or deliver property or to comply with the duties of this Act, other than to a parent, subsidiary, or affiliate of the holder or to the holder's successor by merger or consolidation, or to any*

person or entity that acquires all or substantially all of the holder's capital stock or assets.

(b)*Nothing in this section shall prohibit a holder from contracting with a third party for the reporting of unclaimed property, provided however that a holder shall remain responsible to the administrator for the complete, accurate and timely reporting of the property.*

ICI recommends the following additions to the definitions of "holder" and "owner" and proposes a new subsection in Section 1 of the Act:

(6) "Holder" means the ~~a~~ person **SIFMA's Recommendations**

The Model Act should better define the concept of "holder," specifically by more fully describing who is "obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act]. The person that shall be deemed the holder of property held by a financial services firm for the benefit of an owner shall be the person that, with respect to the property, is either:]" by listing examples and providing more definitional granularity. In the context of broker dealers, the holder should be defined as the entity delegated the responsibility under the SEC's customer protection rules as they relate to the safekeeping and segregation of customer assets.

(i)required by Section 6042 of the Internal Revenue Code and the rules thereunder to make a return according to the forms or regulation prescribed by the U.S. Secretary of the Treasury; or

(ii)has agreed to be legally responsible, pursuant to an agreement or otherwise, for making a return according to the forms or regulation prescribed by the U.S. Secretary of the Treasury on behalf of the person required by Section 6042 of the Internal Revenue Code to make such return.

. . .

(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:

(i) 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; and

(ii)any beneficiary of an account held at a financial services firm upon such firm being provided official documentation that the previous owner of the account is deceased.

NEW Subsection in Section 1:

(##) "Financial services firm" means a person that is registered:

(i) with the U.S. Securities and Exchange Commission as a broker-dealer or transfer agent under the Securities Exchange Act of 1934;

(ii) with the U.S. Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940; or

(iii) as a broker-dealer or investment adviser under a State act or law governing the regulation and regulation of broker-dealers and investment advisers.

Comments: The revisions to this section are intended to implement the following recommendation of the ICI:

(1) **"Holder"** – The revisions to the definition of "holder" and the addition of a new subsection in Section 1 are intended to implement ICI Recommendation 3, relating to resolving the uncertainty that arises regarding which entity is the "holder" with respect to intermediated mutual fund accounts (*e.g.,* when an owner purchases shares of Mutual Fund X though Broker-Dealer A and both X and A have information on their books and records regarding the owner). New subdivision (i) clarifies that the person that shall be treated as the "holder" under the Act shall be the person required by Federal tax law to provide a tax form to the owner of the account. However, because it is standard business practice for this responsibility to be delegated on occasion, new subdivision (ii) has been added to accommodate such situations. To avoid our amendments to "holder" having any unintended consequences beyond Federally or State registered broker-dealers, investment advisers, or investment companies (*i.e.,* mutual funds), we have limited the scope of these amendments to property held at a "financial services firm" and added a definition of "financial services firm" to Section 1.

(2) **"Owner"** – The definition of "owner" has been revised to implement ICI Recommendation 10, relating to the treatment of beneficiaries under the Act. As revised, the definition will clarify that, when a holder has been provided official documentation of the death of an owner, the beneficiary of such property shall be deemed the property's new owner. This provision is particularly important for mutual fund accounts and other accounts held at financial institutions wherein the owners are requested to designate account beneficiaries.

In its October 29th submission, NAUPA supported the current definition of holder and owner and believes that the proposed definition of holder incorporates relatively complex tax definitions and creates unnecessary complexity in the determination of the holder. Specifically the proposed

definition conflicts with the 1995 Uniform Unclaimed Property Act and its treatment of agents, such as transfer agents and dividend disbursing agents. With respect to the ICI's definition of , "owner, " NAUPA's position is that this further limits the State's ability to protect consumers by requesting that "official documentation" (an undefined term) be provided to a holder.

NAUPA recommends inclusion in the Revised Act of a new Section as follows:

Section : Limitations on Assignment or Transfer of Liability

(a) A holder may not assign or otherwise transfer its obligation to hold for or pay or deliver property or to comply with the duties of this Act, other than to a parent, subsidiary, or affiliate of the holder or to the holder's successor by merger or consolidation, or to any person or entity that acquires all or substantially all of the holder's capital stock or assets.

(b) Nothing in this section shall prohibit a holder from contracting with a third party for the reporting of unclaimed property, provided however that a holder shall remain responsible to the administrator for the complete, accurate and timely reporting of the property.

In considering these issues it is important to note that issue #5 is closely related to 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 #6:
Definition of Domicile in Section 1(4)

(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?

(a) Under the 1995 Act, when the state of residence of the owner is not known, the holder is obligated to report the property to its state of "domicile." Domicile was not defined in any Uniform Act prior to the 1981 Act which included the same definition that is now subsection 4 of Section 1 of the 1995 Act, and provides that "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." This definition was taken from the 1965 decision of the United States Supreme Court in *Texas v. New Jersey* which held that if the address of the owner does not appear from the books and records of the holder, or that state does not provide for escheat of intangibles, the holder is to report to the state of incorporation, or if the holder is not an incorporated person, then to the state of the holder's principle place of business.

In 1965, when *Texas v. New Jersey* was decided, limited liability companies were not known[1] and limited partnerships and statutory business trusts were not widely used for operating businesses, and incorporation was by far the dominant form of doing business.

When the 1981 UUPA was drafted, only Wyoming had an LLC act, so it is not likely that this form of doing business was considered then an additional place of domicile. LLCs were not included in the definition of "business association" in the 1981 Act, but were in the 1996

[1]Wyoming enacted the first limited liability company ("LLC") act in 1977. Florida became the second state to do so in 1982. No other state did so until after 1988 when the IRS issued a revenue ruling advising that LLC's would be treated as partnerships for federal tax purposes. By 1996 (the year the ULC approved the Uniform Limited Liability Company Act), nearly every state had enacted a Wyoming-style limited liability company act.

Act after they had come into widespread use. The comment to Section 1 in the 1996 Act does not indicate whether including in the definition of "domicile" the place of organization of an LLC was considered and rejected by the drafting committee, or not considered at all.

NAUPA recommends that the Act be revised to include the state of formation of other business forms in the definition of "domicile" and suggests the following language:

> *"Domicile" means the State of incorporation of a corporation; the State of formation of a limited partnership, limited liability company, trust, or other entity created by State statute; the State of home office of a federally-chartered entity; and except as otherwise provided the State of principal place of business for a sole proprietorship or other unincorporated entity.*

Should the Committee decide to adopt this recommendation, it also will need to consider whether the suggested revision should include other more recently created business forms such as limited liability limited partnerships or accept the catch-all "other entities created by State statute."

Although not expressly addressed in their written submission at the first meeting, representatives of the ABA expressed disagreement with the suggestion that the definition of domicile should be changed, so the committee can expect to hear further debate on the issue.

NAUPA also recommends that the definition of "domicile" be further revised to address the effect of mergers and reincorporations and suggests the following language be added to the text of the 1995 Act:

> *Where the state of domicile of a holder changes subsequent to the date on which property became payable or distributable, the holder's state of domicile for unclaimed property purposes shall be the State where the holder is domiciled at such time as the property is deemed abandoned.*

A question remains: if instead of a merger, the "holder" undergoes a divisive

reorganization (split-up/split-off), where should the unclaimed property be considered to be domiciled after the division? A subset of this issue is what should be the effect on domicile of a holder if the definition is not expanded to include other forms of business organizations and a corporate holder drops assets into one or more LLC's.

UPPO's Recommendations with regard to the definition of domicile

In Texas v. New Jersey, 379 U.S. 674, 677 (1965), the U.S. Supreme Court established two rules to "settle the question" of which state has the right to escheat unclaimed property and thereby resolve this Due Process issue. The Court established as the "primary rule" that "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." Id. at 680-81. The Court established as a "secondary rule" that, if the primary rule failed, then "the State of corporate domicile" has the right to escheat the debt. Id. at 682. The Court construed a corporation's "domicile" to mean its state of incorporation. These rules constitute federal common law which must be followed by all states. Illinois v. City of Milwaukee, 406 U.S. 91, 105-06 (1972); N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 391-93 (3d Cir. 2012).

However, the Supreme Court has not specifically addressed what is the "domicile" of an LLC or other unincorporated entity for purposes of applying the secondary rule. In the absence of this guidance, more than one State may attempt to escheat the same property. This is a very real risk, as the states have construed the federal common law rules differently as applied to unincorporated entities such as limited liability companies ("LLCs").

UPPO believes that defining the "domicile" of LLCs and other unincorporated entities that exist only when organized pursuant to the statutory provisions of a specific state's laws as the State in which the principal place of business of such entities is located, rather than the State under whose laws the entity is organized, is inconsistent with the clearly expressed intention

of the Supreme Court to adopt custody rules that are easy to apply and do not require holders, states or courts to make complex determinations that turn on an analysis of the particular facts of each case. UPPO believes that the Uniform Unclaimed Property Act should likewise define the "domicile" of unincorporated entities that exist by virtue of state statutes to be the state under the laws of which such unincorporated entities are created and exist.

UPPO also believe the definition of domicile should be revised to address mergers and reincorporations.

Issue #7:

Nonvirtual New property (section 1)

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 status 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.

This issue rolls into one place multiple types of "property" that should be broken into smaller groups for discussion, as follows:

- Stored value cards and gift cards

NAUPA provides suggested provisions to be included in Section 2(a) Presumptions of Abandonment as follows:

> (12)*wages or other compensation for personal services, including wages or other compensation represented by a non-activated stored value card or other electronic payment medium, one year after the compensation becomes payable;*
>
> *(new subsection) funds represented by a non-activated stored value card or other non-activated electronic payment medium, one year after the funds would have otherwise first been available to the owner;*
>
> NAUPA suggests the definition of a gift card be revised to take into account the date of an owner's last use of the card, and reconcile with federal regulatory guidelines on preemption.
>
> Objective: update property classifications; codify the determination of the Consumer Financial Protection Bureau that an unclaimed gift card balance cannot be claimed by a state as unclaimed property less than three years from the date of sale, unless the issuer is required by the state to continue to honor any such reported gift card balances (see Docket No. CFPB-2012-0036, August 16, 2012).

- Virtual Currency

NAUPA recommends expanding the definition of "property" to expressly cover

"virtual currency with the following suggested language:

> *"Property" means… (i) money, electronic or virtual currency, a check, draft, deposit, interest or dividend;*

- Certain Tax-Advantaged Property Including College Savings Plans and Coverdale IRAs.

NAUPA proposes the following legislation:

-property in a Coverdell Education Savings Account established under section 530 of the Internal Revenue Code of the United States , three years from the date of last indication of interest of the owner, provided that the beneficiary has reached, as of three years from the date of last indication of interest of the owner, the *age of 33 years. If the beneficiary has not yet reached, as of three years from the date of last indication of interest by the owner the age of 33 years, the property is not presumed abandoned until such time as the beneficiary reaches the age of 33 years.*

-property in a college savings plan or prepaid plan established under section 529 of the Internal Revenue Code of the United States, five years from the date of last indication of interest by the owner, provided that the beneficiary has reached, as of five years from the date of last indication of interest by the owner, the age of 26 years. If the beneficiary has not yet reached as of five years from the date of last indication of interest by the owner the age of 26 years, the property is not presumed abandoned until such time as the beneficiary reaches the age of 26 years.

NAUPA also proposes revising the definition of "property" to provide for express coverage of unclaimed preneed funeral contracts, and for excess proceeds from sale of goods and storage.

- Others

UPPO recommends renumbering § subsections 14-16 to account for a new subsection 14 with suggested language as follows:

(14) The term "property" does not include:

(i)*ERISA plans; [see discussion in Section 2.c.iv.A below] (ii) 529 plans; [see discussion in Section 2.c.iv.E below] (iii) Any property due or owing from a business association*

to another business association in the ordinary course of business, including but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates; [see discussion in Section 2.c.iv.I below]

(iv) Wholesale credits due or owing from a business association to another business association in the ordinary y course of business, including but not limited to, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates; [see discussion in Section 2.c.iv.I below]

(v) Uninvoiced payables. "Uninvoiced payables" are amounts due between business associations, from a holder who is a buyer to a creditor who is the seller of goods ordered by a holder in the ordinary course of business when the goods were received and accepted by the holder, but which for any reason were never invoiced by the seller; [see discussion in Section2.c.iv.K below]

(vi) *Promotional Programs not redeemable for cash or for which no monetary consideration was provided; [see discussion in Section 2.c.iv.L below]*

(vii) *Unused subscriptions not redeemable for cash. [see discussion in Section 2.c.iv.M below]*

This section of the Revised Act is effective immediately and also applies to amounts that, on the effective date, are in the possession, custody or control of the holder.

UPPO recommends other additions to Section 1 Definitions as follows:

"Stock" does not include:

(a)*securities which are unpriced and which cannot be delivered to the state via The Depository Trust & Clearing Corporation or a similar custodian;*

(b)*securities which are unpriced and for which there is no agent to effect transfer;*

or

(c)*restricted stock.*

"Restricted stock" refers to stock of a company that is not

transferrable until certain conditions have been met; the owner's rights are not yet vested. Restricted stock is not subject to escheat unless and until the conditions for applying the restrictions have been satisfied and such stock is available to be transferred. Documentation of restrictions must be maintained by the issuer.

"The Depository Trust & Clearing Corporation" is a United States based central custodian of securities, providing post-trade, clearing and settlement services to the financial markets.

UPPO proposes that the scope and availability of estimations of liability for unclaimed property be defined and suggests the following additions to Section 1 – Definitions:

"Record" means information that is (i) inscribed on a tangible medium of the holder or stored in an electronic or other medium by the holder in the ordinary course of the holder's business and (ii) retrievable in perceivable form and (iii) necessary to prepare a report pursuant to Section 7 of this Act.

"Sufficient records" means at least 80% of the record(s) necessary to identify dormant unclaimed property reportable pursuant to Section 7 of this Act. The determination of sufficient records shall not be made solely as a percentage of the total overall records to be examined, but also on the materiality level of value of the records and may also be made by type of reportable property.

"Reasonable Estimation" means any method of estimation that is calculated to lead to the discovery of escheatable property to [STATE] and is performed in accordance with the American Institute of CPAs (AICPA) Statements on Auditing Standards (SAS) No. 39, including, but not limited to, statistical and non-statistical sampling based on periods of time and transactions as bases. If the administrator deviates from the standards provided for in SAS No. 39, the administrator has the burden of demonstrating the reasonableness of the method chosen to estimate reportable property.

UPPO also suggests that Section20(f) be revised with regard to when the state may estimate a holder's liability and that Section 21(a) be revised to only allow the use of estimation when a holder has failed to comply with the rules regarding record retention. [See discussion regarding Issue # , on page .]

****In Considering these issues it is important to note that issue #7 is closely**

related to 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?)**

This concludes discussion of Section 1 of the 1995 Act. We now move on to Section 2.

SECTION 2. PRESUMPTIONS OF ABANDOMNENT.

(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 any 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 #8:
Derivative Rights Doctrine

Although the derivative rights doctrine is not expressly mentioned in the Uniform Act, many courts have concluded and commentators have suggested 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 property. Recently, however, some courts have opined that other bases for unclaimed property statutes may exist that are independent of the derivative rights doctrine. Because the derivative rights doctrine has served as a basis for much of the conceptual framework of the limits of unclaimed property laws, any conclusion 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.

The ABA recommends that the revised UUPA recognize and incorporate into unclaimed property law what has come to be known as the "derivative rights doctrine," which provides that the state's right to take unclaimed property into its custody is derived from the owner's right to the property – in other words, that the state's rights in unclaimed property is coextensive with the rights of the owner in whose shoes the state now stands as custodian for the owner. In support of its position, the ABA cites the U.S. Supreme Court holding in *Delaware vs. New York* in which the Court held that "[I]n framing the State's power to escheat, we must first look to the law that creates property and binds persons to honor property rights." The Court then set forth the "debtor-creditor" relationship as the test of the states' power to escheat and acknowledged that the "holder's legal obligations" define the escheatable property at issue. The Court found that the "holder" of unclaimed property is the "debtor" or "obligor," and conversely, if a person is not a legal debtor, then it is not a "holder" and has no obligation to report or remit the property to the state.

These recommendations would impact a number of provisions in the 1995 Act:

§ 2(a)(7) currently requires that the value of a gift certificate redeemable only for merchandise is 60% of its face value. The recommendation of the ABA is that Section 1(13) of

the 1995 Act be amended to clarify that it does not include any prepaid obligation that is not redeemable in cash.

The ABA recommends that § 5 of the 1995 Act be deleted and that the language from the 1981 Act which permits a deduction for any "lawful charges" be reinstated.

The ABA also recommends the deletion of § 19(a) of the 1995 Act which provides that a limitation or enforcement is not enforceable against the state for unclaimed property purposes even if enforceable against the owner of the property. However, if not deleted, ABA recommends that if there is an override of the statute of limitations, it be for a relatively short, definite period. ABA suggests that in any event the state should be obligated to relinquish such property to the owner, and not be allowed to keep the property for itself.

ABA points out that the derivative rights doctrine implicates other provisions of the Act including the use of estimation, life insurance proceeds, and burden of proof provisions.

The ABA also makes a series of recommendations concerning exemption of ERISA Plans as follows:

- Section 2 (ERISA) – the ABA recommends that the Act be amended to clarify that employee benefit plans covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are not subject to state unclaimed property laws. Section 1(13) of the 1995 UUPA currently defines "property" subject to the UUPA to include "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," and Section 2(a)14) of the 1995 UUPA generally provides a three-year dormancy period for property in a "defined benefit plan, or other account or plan that is qualified for tax deferral…." Furthermore, a comment to Section 2 of the 1995 UUPA states in pertinent part: "Because the unclaimed property laws are matters of traditional state powers, and are laws of general application, and have only tenuous, remote and peripheral impacts on ERISA plans, it has been held that they are not pre-empted by federal law." However, since the 1995 UUPA was adopted, the U.S. Court of Appeals for the Seventh Circuit **[CITE]** has held that ERISA generally does pre-empt state unclaimed property laws, and other courts and authorities, including the U.S. Department of Labor (which is responsible

for administering ERISA), have reached the same conclusion. Accordingly, ABA recommends that a new Subsection be added at the end of Section 2 (Presumptions of Abandonment) of the UUPA to state as follows: "Notwithstanding any provision of the [Act] to the contrary, any unclaimed property held or owed by an employee benefit plan subject to or covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, shall be exempt from the provisions of this [Act]. As used herein, the term 'employee benefit plan' shall include both 'employee welfare benefit plans' and 'employee pension benefit plans,' as such terms are defined in ERISA, Sections 3(1) and 3(2), respectively. This exemption shall also apply to any unclaimed property held by a third party administrator, claim administrator or other third party acting on behalf of an employee benefit plan, but shall not apply to an insurance company that has contracted with an employee benefit plan to be the 'holder' of the unclaimed property, if the insurance company is entitled under its arrangement with the plan to retain any unclaimed property associated with the plan."

- Section 2(e) – The ABA recommends that this provision be deleted. This provision has resulted in significant confusion between states and holders, and may be inconsistent with the derivative rights doctrine if applied broadly. In addition, the primary situation in which this provision is applied is based on a misunderstanding of unclaimed property law. Specifically, this provision is generally relied upon to support the proposition that an unpresented check may constitute unclaimed property even though the condition of presentment has not been satisfied. <u>As discussed above, the "unclaimed property" is not the uncashed check but rather the underlying obligation with respect to which the check was written. The underlying obligation continues to be owed, and thus may constitute unclaimed property, even if the check is not presented for payment. This provision is therefore unnecessary from that perspective</u>.

<u>Important Points for Consideration Regarding Uncashed Checks</u>

Any revisions made to the Unclaimed Property Act must be consistent with Articles 3–4 of the UCC. It is important to note, that under UCC 3-310, the underlying obligation is either discharged or suspended at the moment the payee accepts the check. Thus, one must be careful not to equate unclaimed property with the underlying obligation. In order for a state to escheat property, the property must exist in some form. If the obligation is discharged, the obligation no longer exists. If the obligation is suspended, it does not exist until it is revived by a triggering event (under the UCC the dishonor of the check).

UCC 3-310 states as follows:

(a) Unless otherwise agreed, <u>if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation.</u> Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a), <u>if a note or an</u>

uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) is taken for an obligation, the effect is (i) that stated in subsection (a) if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) in any other case.

UCC 4-404 is also relevant to uncashed checks:

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

NAUPA in its May 9th submission stated that the UUPA should retain in full force and effect prohibitions on conditions precedent and anti-limitations concepts. NAUPA additionally provided the ULC with a comprehensive position paper on the issue of anti-limitations (and the fiction of the "derivative rights

doctrine), and provided a series of obligations that would be emasculated if anti-limitations was abrogated.

Citations: 1995 Uniform Act Sections 2(e) (conditions precedent) and 19 (anti- limitations).

Objective: maintain the important consumer protection aspects of the Act and prevent holders from effectuating private escheat of unclaimed assets.

NAUPA research: position paper completed. See memo on Derivative Rights Doctrine.

NAUPA's MAY 9th submission further proposed to expand Section 2(e) as follows:

> Property is payable or distributable for purposes of this [Act] notwithstanding the owner's failure to make demand or present an instrument or document, including, without limitation, a death certificate, insurance policy, savings account passbook, gift certificate, winning racing ticket, or other memorandum of ownership, otherwise required to obtain payment.

Issue #9
Bonds under Section 2 of the Act

(a) Should the abandonment of unclaimed corporate bonds be defined differently?

- NAUPA suggests a redefining the abandonment of **unclaimed bonds**, and expressly address the abandonment period for a municipal bond. This is also more thoroughly discussed in Issue 12.

(b) Should the abandonment period of municipal bonds be expressly addressed?

Section 2(4) provides that debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, be presumed abandoned five years after the most recent interest payment unclaimed by the apparent owner. The question comes to mind, are they abandoned prior to being called or maturing on schedule. There is no abandonment period specified for municipal bonds. Presumably, the would fall under the catch-all provision in Subsection 2(a)(15) which provides a presumed abandonment 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. Should there be different presumptions for corporate bonds and municipal bonds.

NAUPA questions the presumption. If the liability is of a government entity, wouldn't that section (2(a)(11)apply? Indeed, the New Jersey Supreme Court concluded in the Summit Bancorp case that this was not miscellaneous intangible property. The proposes NAUPA revision simply codifies the Summit Bancorp case. Corporate trust agents are already using the abandonment period for governments.

The stakeholders have provided no guidance or suggestions relating to this issue.

Issue #10
Gift Cards under Section 2

(a) Should gift cards and gift certificates be defined?

(b) 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?

Suggestions have been made that gift cards and gift certificates should be exempt from escheatment universally as they are in 34 states already. There are currently no definitions of either in the Act. Should they be defined? Subsection 2(a)(7) provides that gift certificates are presumed abandoned three years after December 31 of the year in which they were sold, and further provides that if the certificate is redeemable only in merchandise [services?], the amount abandoned is deemed to be 60% [in brackets] of the face value.

There are definitions in the Federal Card Act. Now, not only are there few paper certificates being issued, "cards" may no longer be plastic or even tangible, but may exist only electronically in the "cloud" somewhere in cyberspace.

In connection with its discussion of the Derivative Rights Doctrine (*see* issues 8, 19, 31) the ABA makes the following observations about the Act regarding gift cards:

> Section 2(a)(7) of the 1995 version of the UUPA (the "1995 UUPA") currently requires the escheat of 60% of the value of a "gift certificate" that is redeemable in merchandise only. However, the owner of a gift certificate that is redeemable in merchandise only is not entitled to cash equal to 60% of the certificate's face value. Thus, this provision is inconsistent with the derivative rights doctrine insofar as it provides the state with a right that is different than the rights of the owner. We would therefore recommend that the UUPA be amended to provide that only gift certificates that are redeemable in case are escheatable. We would also recommend that the term "gift certificate" be replaced with a broader term, such as "prepaid obligation" to take into account the many different kinds of prepaid instruments that have been developed since the 1995 UUPA was drafted. For the same reasons as noted above, we would

also recommend that the definition of "property" in Section 1(13) of the UUPA be amended to clarify that it does not include any prepaid obligation that is not redeemable for cash.

On the other hand, NAUPA recommends that the definition of "gift card" be expanded by revising the determination of abandonment to take into account the date of the owner's last use of the cards, and reconcile with federal guidelines on preemption.

NAUPA provides the following suggested language:

Section 2(a)(7) balance of a gift card, including virtual gift card and other form of gift instrument, three years following the latter of the date of sale or the owner's last use of the card.

Section (10)(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. In the case of a gift card or other gift instrument including a virtual gift card balance that has been transferred to the administrator, the holder shall be required to honor the gift card upon presentment by the owner. 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).

Issue #11:

Should verifiable electronic contact be added to Section 2 of the Act as constituting an indication of the owner's continuing interest in the property?

NAUPA recommends that verifiable electronic contact with an owner of unclaimed property constitutes an indication of the owner's interest in the property.

NAUPA suggests revising Section 2(c) and (d) of the 1995 Act as follows:

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

(iv) an account balance or similar owner-initiated account inquiry, including an account inquiry made electronically where the owner has contemporaneously authenticated his or her identity.

[Renumber existing subsection (iv) as (v).]

The comment should cl arify that this definition of an owner's indication is limited to situations where an owner logs into an account, and it does not extend to authentication cookies, because authentication cookies do not confirm the identity of the individual making the inquiry.

The ABA also endorses having electronic contact constitute an indication of the owner's continued interest in the property and specifically suggests the following language be added to the 1999 Act:

"An indication of an owner's interest in property includes:

(i) any written communication, including any electronic communication, by the owner to the holder concerning the property or the account in which the property is held;

(ii) any oral communication by the owner to the holder concerning the property or the account in which the property is held, if the holder makes a contemporaneous record of the owner's communication;

(iii) the presentment of a check or other instrument of payment of a dividend, interest payment or other distribution made with respect to an account or underlying stock, debt 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;

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

(v) the making of a deposit or withdrawal from an account in which the property is held, including automatic deposits or withdrawals previously authorized by the owner;

(vi) 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; and

(vii) any other action by the owner that demonstrates that the owner is aware that the property exists.

NAUPA recommends that Section 2(e) dealing with conditions precedent be retained in full force in order to maintain the important consumer protection aspects of the 1995 Act and prevent holders from effectuating private escheat of unclaimed assets.

NAUPA recommends that the Section 2(13)(ii) definitions of unclaimed property be refined to expressly include promotional incentives and loyalty programs in order to remove any ambiguity concerning whether direct monetary consideration is necessary for a liability to constitute unclaimed property.

NAUPA also recommends that the methods of contact be modernized and reflect owner-generated activity:

(d) An indication of an owner's interest in property shall mean any contact, communication or transaction related to the property from the owner, or involving some affirmative action by the owner with respect to the property, which is documented in a contemporaneous record prepared by or on behalf of the holder or in the possession of the holder. 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) a verbal contact, communication or transaction, in which the holder takes reasonable action to verify the identity of the owner;

(iv) the making of a deposit to or withdrawal from a bank account (other than an automated deposit or withdrawal);

(v) an account balance or similar owner-initiated account inquiry, including an account inquiry made electronically where the owner has contemporaneously authenticated his or her identity; and

(vi) a contact, communication or transaction, which is evidenced by other criteria as provided by the [Administrator].

(vii) 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) Actions that do not constitute an owner’s indication of interest are those which are not shareholder directed activity including automated payments, transfers and dividend reinvestments, postings to accounts, computer system conversions, securities resulting from mergers or acquisitions where an owner has not executed a letter of transmittal or exchanged shares in order to receive the corporate action entitlement, the non-return of mail, and other actions that are not owner initiated or do not require a direct owner response.

Issue #12:
The presumption of Abandonment

****Note that Issue 12 is closely related to issue 23 (discussing abandonment with respect to securities) and issue 25 (discussing abandonment with respect to electronic accounts****

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.

At the meeting to discuss Issues the consensus was that this could be better defined and that the State should have the burden of proof in this situation based on language in *Delaware v. New York* to the effect that under debtor/creditor law the creditor has the burden of proof to establish the debt.

NAUPA proposes expanding a holder's burden of proof to encompass all records of unclaimed property, not merely unpresented negotiable instruments.

holders are in the best position to explain why records reflecting an outstanding liability do no in fact represent unclaimed property.

Additional Issues Raised by
the ABA with Respect to
Section 2 – Presumption of Abandonment

- Section 2(a) (General) – the ABA recommends that this entire Section be reconsidered, both to see if it can be simplified (*i.e.*, by including most categories of property in the "catch-all" provision) and also whether the dormancy periods for any or all types of property should be adjusted. In general, the ABA believes that the dormancy period should bear some reasonable relationship to the average time during which it would be expected that the property would be actually abandoned by the owner. The ABA also suggests that the Drafting Committee consider a much longer dormancy period for high-value property (*e.g.*, property with a value of $10,000 or greater). The ABA advises that it will subsequently provide specific recommendations regarding the dormancy period for securities property.

- Section 2 (*De Minimis*) – The ABA recommends the adoption of an exemption for *de minimis* property, such as that adopted by Idaho and a few other states. Such exemption would take into account the practical reality that the expenses incurred, both by holders and states, in escheating and returning *de minimis* property to the rightful owner may outweigh the value of the property itself. The ABA recommends that the amount of the *de minimis* exemption be initially established at between $25 to $50, with an automatic adjustment for future inflation. Accordingly, the ABA recommends that a new Subsection be added at the end of Section 2 (Presumptions of Abandonment) state as follows: "Notwithstanding any provision of the Act to the contrary, any unclaimed property that has a value of [$25 to $50] or less shall not be required to be reported and remitted to the state."

NAUPA takes issue with the ABA on these proposals.

UPPO Makes a number of recommendations regarding Section 2 –

Presumptions of Abandonment. as follows:

> The Revised Act should provide that Traditional IRAs are presumed abandoned based on the mandatory distribution age and the system coding as "RPO". This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.
>
> Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to provide that Traditional IRAs are presumed abandoned based on mandatory distribution age and being coded "RPO".
>
> Renumber Section 2: PRESUMPTION
>
> Certain property types, such as plans covered by ERISA,

Traditional Individual Retirement Accounts, gift certificates, and security interests are specifically addressed in the 1995 Act but further clarification is needed as to when these property types should, if at all, be presumed abandoned.

Additionally, other property types that are not specifically addressed in the 1995 Act and should be addressed to simplify compliance include:

- Tax Advantaged Plans (other than IRAs) including Roth IRAs, Coverdell Education Savings Accounts, 529 College Savings Plans, and Health Savings Accounts;
- Non-Dividend Paying Securities;
- Mutual Funds;
- Dividend Reinvestment Plans;
- Uniform Gift to Minors Act (UGMA) and Uniform Transfers to Minors Act (UTMA);
- Business-to-Business Transactions;
- Unidentified Remittances;
- Uninvoiced Payables;
- Promotional Programs;
- Unused Subscriptions; and
- Mineral Proceeds.

Finally, the term "contact" should be revised to include various forms for demonstrating interest in property in addition to regular mail.

NAUPA recommends that presumed abandonment periods be reduced and that there be provisions for acceleration of the presumption of abandonment when the owner is deceased or where a dormancy change has been imposed.

NAUPA's specific recommendations in this regard with respect to Section 2 are:

- Reduce matured life insurance policies (including polices where the insured has reached the limiting age) from three years to two years;

- *Add the following new subsections:*

(16)*if the holder has imposed a charge against property for reason of owner inactivity or the failure of the owner to claim the property within a specified period of time, and the abandonment period for the property as specified in this section is greater than two years, the property shall instead be presumed abandoned two years from the date of the owner's last indication of interest in the property.*

(17)*if the holder has reason to believe that the owner is deceased, and the abandonment period for the owner's property as specified in this section is greater than two years, the property shall instead be presumed abandoned two years from the date of the owner's last indication of interest in the property. If the owner's property is subject to subsection (14) of this section, the two year presumption of abandonment shall run from 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, of 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.*

NAUPA additionally recommended a reduction in abandonment periods, from 5 years to 3 years, for the following property types: securities (2(a)(3), debt (a)(4), deposit accounts (a)(5), and miscellaneous intangible property (a)(15).

NOTE: there is not a proposal to reduce traveler's checks or money orders from their current abandonment periods of 15 years and 7 years, respectively; however, under new subsection (16), an issuer of a negotiable check would be required to report an unpresented item after two years, if inactivity or dormancy fees were imposed.

Thus, issuers of these types of payments would have a choice: either generate revenue from float, or from dormancy fees, but not both.

- Redefine the abandonment of **unclaimed bonds**, and expressly address the abandonment period for a municipal bond. This ties into issue #9.

Objective: eliminate the concept of "underlying bonds" which have in fact not been reported by corporate trust agents; resolve ongoing disputes as to when municipal bond interest/principal is reportable.

- Expand coverage for unclaimed **class action** and other settlement proceeds.

Objective: improve upon the existing provision of the Act, which merely speaks to undistributed property received by court. The existing provision is ambiguous and current compliance is low.

Citation: 1995 Uniform Act Section 2(10).

NAUPA proposed legislation: *property distributable pursuant to a judgment or settlement in a class action, litigation, other dispute between a judicial or administrative body, one year after the property became distributable.*

- Reconfigure existing abandonment parameters for **Unclaimed securities.**

Objective, update the Act to take into account the increasing level of electronic-only communications with shareholders, and dovetail statute to complement Securities and Exchange Commission lost shareholder search requirements.

Citation: 1995 Uniform Act Section 2(3).

NAUPA:

(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], three years after the owner's last indication of interest in the property.

NAUPA also suggests that new sections be drafted as additional subsections to Section 2 for each tax advantaged asset, addressing each individually.

Issue #13:

Should (a) 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?"

At the Issues meeting the consensus was that it is not necessary to address this issue.

Issue #14:
The dormancy Period under Section 2

****It is Important to note that issue 14 ties in with issue 16 (discussing the dormancy period for payroll cards)****

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?

SIFMA's recommendations

The Model Act should define a minimum base dormancy period of 5 years to promote efficiency, reduce the unnecessary burden on individuals who have their property needlessly escheated, and reduce the cost to and administrative burden on the states and businesses. Section 2 of the Model Act should explicitly state that where the same beneficial owner has multiple accounts with a holder, such as a clearing firm, through multiple broker dealers, if the Holder can reasonably cross reference across accounts of the same beneficial owner, the dormancy should be measured by the date of most recent qualifying activity in any account.

WI Commissioner of Insurance (in regards to life insurance).

Changing the definition of when the dormancy period begins to be the date of death of the insured would harm beneficiaries under the policy. Illinois Commissioner of Insurance does not agree.

The ABA's recommendations

In general, the ABA believes that the dormancy period should bear some reasonable relationship to the average time during which it would be expected that the property would be actually abandoned by the owner. The ABA also suggests that the Drafting Committee consider a much longer dormancy period for high-value property (*e.g.*, property with a value of $10,000 or greater). The ABA advises that it will subsequently provide specific recommendations regarding the dormancy period for securities property. See discussions under Additional Issues Raised by the ABA with Respect to Section 2 *supra*.

NAUPA suggests decreasing the abandonment periods and does not believe that a unique dormancy trigger for mutual funds is necessary.

Dormancy Period Trigger for Mutual Fund Shareholder Accounts

ICI recommends that:

- The dormancy clock trigger for mutual fund accounts be identical to the returned postage ("RPO") standard found in the lost securityholder rule of the U.S. Securities and Exchange Commission ("SEC") (Rule 17Ad-17 under the Securities Exchange Act of 1934).

- If states elect to use a "no contact" standard as their trigger, contact shall be defined broadly to include: the mailing to the owner of any federally-required tax form that is not returned to the holder as undeliverable (*i.e.*, an RPO standard for tax forms) or any written, electronic, or personal contact between an owner or the owner's authorized representative and a holder that can be documented and that reflects an owner's awareness of the existence of the property including but not limited to: written correspondence; facsimile transmission; telephonic contact; a completed transaction via Automated Clearing House ("ACH") or similar electronic funds processing method; change to the account information; purchase or sale of shares, including through

automatic means; deposit of any interest, dividends, or uncashed checks; the voting of a proxy; or any account inquiry or action accomplished via the internet or other electronic means when made via the use of the owner' unique personal identification information.

- If the owner of the account fails to cash an instrument (*e.g.*, check) drawn on the account or representing proceeds of the account and such instrument is not re-deposited into the account pursuant to the instructions or agreement of the owner, the dormancy clock shall only begin running with respect to the uncashed check or instrument and not with respect to the owner's mutual fund account.

Length of the Period of Dormancy (between the shareholder becoming lost and the property escheating)

With respect to mutual fund accounts, ICI recommends that the dormancy period between the time a shareholder becomes lost (or is deemed to have abandoned the ***[copy cuts off here]***

See also ABA and UPPO suggestions in Additional Issues section following Section 2.

Issue #15:
Triggering Events in Section 2

Are the "triggering events" overly broad? Do they need reconsideration, particularly with respect to accounts usually held for the benefit of a minor such as 529 Plans, and accounts such as Roth Retirement accounts and Health Savings accounts, which are usually held for a very long time and invested in growth or income earning accounts?

ICI makes a number of suggestions regarding the "triggering" events which start the dormancy period, as follows:

- **Dormancy Period Trigger for 529 Education Savings Plan Accounts**

ICI recommends that, with respect to 529 college savings plan accounts and other tax-advantaged education savings accounts, the dormancy period begin to run the later of (1) the date by which distributions must be taken out of the account (*e.g.*, age 30 for Coverdell accounts) or (2) 30 years from the date the account was opened or transferred to the current beneficiary, whichever is later.

UPPO notes that 529 plans are governed at three separate legislative/regulatory levels: (1) Federal legislation (26 U.S.C. §529); (2) state legislation; and (3) the rules or regulations of the state governmental agencies that actually administer the 529 plans. UPPO suggests that The Revised Act should specifically exempt 529 Plans from escheatment.

- **Dormancy Period Trigger for Tax-Advantaged Retirement Accounts**

ICI recommends that:

  - The Act expressly recognize ERISA's preemption over state abandoned property laws; and
  - The dormancy period begin to run on all tax-advantaged retirement accounts the later of: (1) the date by which distributions must be taken out of the account or (2) when the accountholder reaches the age of 70 ½.

- **Dormancy Period Trigger for UGMA/UTMA Accounts**

ICI recommends that, with respect to UGMA and UTMA accounts,

which are governed by laws that differ from state-to-state, the dormancy period begin to run the later of: (1) the date by which the beneficiary turns age 30, if known, or (2) 30 years after the account is established.

- **Dormancy Period Trigger for Mutual Fund Shareholder Accounts**

ICI recommends that:

- The dormancy clock trigger for mutual fund accounts be identical to the returned postage ("RPO") standard found in the lost security holder rule of the U.S. Securities and Exchange Commission ("SEC") (Rule 17Ad-17 under the Securities Exchange Act of 1934).

- If states elect to use a "no contact" standard as their trigger, contact shall be defined broadly to include: the mailing to the owner of any federally-required tax form that is not returned to the holder as undeliverable (*i.e.*, an RPO Standard for tax forms) or any written, electronic, or personal contact between an owner or the owner's authorized representative and a holder that can be documented and that reflects an owner's awareness of the existence of the property including but not limited to: written correspondence; facsimile transmission; telephonic contact; a completed transaction via Automated Clearing House ("ACH") or similar electronic funds processing method; change to the account information; purchase or sale of shares, including through automatic means; deposit of any interest, dividends, or uncashed checks; the voting of a proxy; or any account inquiry or action accomplished via the internet or other electronic means when made via the use of the owner's unique personal identification information.

- If the owner of the account fails to cash an instrument (*e.g.*, check) drawn on the account or representing proceeds of the account and such instrument is no re- deposited into the account pursuant to the instructions or agreement of the owner, the dormancy clock shall only begin running with respect to the uncashed check or instrument and not with respect to the owner's mutual fund account.

- Length of the Period of Dormancy (between the shareholder becoming lost and the property escheating)

With respect to mutual fund accounts, ICI recommends that the dormancy period between the time a shareholder becomes lost (or is deemed to have abandoned the [***copy cuts off here***]

NAUPA proposes the following revisions to Section 2(a):

(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, or the owner reaching he age of 70 ½ years;

(new subsection) property in a college savings plan or prepaid plan established under section 529 of the Internal Revenue Code of the United States, five years from the date of last indication of interest by the owner, provided that the beneficiary has reached, as of five years from the date of last indication of interest by the owner, the age of 26 years. If the beneficiary has not yet reached, as of five years from the date of last indication of interest by the owner, the age of 26 years, the property is not presumed abandoned until such time as the beneficiary reaches the age of 26 years.

(new subsection) property in a Coverdell Education Savings Account established under section 530 of the Internal Revenue Code of the United States, three years from the date of last indication of interest of the owner, provided that the beneficiary has reached, as of three years from the date of last indication of interest of the owner, the age of 33 years. If the beneficiary has not yet reached, as of three years from the date of last indication of interest by the owner the age of 33 years, the property is not presumed abandoned until such time as the beneficiary reaches the age of 33 years.

NAUPA disagrees with the ICI position that UGMA/UTMA accounts warrant differential treatment.

Issue #16:
Payroll Cards under Section 2.

****This issue ties in with issue #14 (discussing the dormancy period)****

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?

See Issue #7. NAUPA suggests that non-activated SVCs or other electronic payment medium be presumed abandoned one year after the compensation becomes payable.

*Note that in considering whether payroll cards should be classified as unpaid wages or deposit accounts Articles 3 and 4 of the UCC may provide guidance

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?

At the meeting to discuss issues the decision was to have a subcommittee investigate and recommend with respect to this issue.

Issue #18:

The amount presumed to be abandoned with respect to SVC's

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?

See discussion under § 10. NAUPA recommends that it be the balance remaining 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?

See discussion under § 8 – Derivative Rights Doctrine.

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?

NAUPA suggests that they be treated the same. See discussion under Issue #10.

UPPO Recommendation:

The Revised Act should specifically exempt Stored Value Cards redeemable in merchandise and services only. With this revision, the Revised Act will be consistent with the law in a majority of the states. Additionally, the revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Proposed Language:

Section 2: (a)(7) gift certificate, except gift certificates redeemable for merchandise or services only, three years after December 31 of the year in which the certificate was sold. Gift certificates redeemable for merchandise or services only are exempt from this Act. ,~~but if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate's face value~~;

Section 1: (5) "Gift Certificate" means a record evidencing a promise, made for consideration, by the seller or issuer of the record that goods or services will be provided to the owner of the record to the value shown in the record and includes, but is not limited to, a record that contains a microprocessor chip, magnetic stripe or other means for the storage of information that is prefunded and for which the value is decremented upon each use, gift card, an electronic gift card, stored value card or certificate, a store card, or similar record or card.

Issue #21:
Dormancy Period with Respect to SVC Cards

****Note that this issue ties in with Issue #14 (discussing the dormancy period)****

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, for from the last date the SVC was recharged or uploaded in value?

NAUPA suggests that the dormancy period be three years from the latter of the date of sale or the owner's last use of the card.

Issue #22:
Bitcoins

Should the other forms of value recently evolved such as Bitcoin and other electronic stores of value be made subject to unclaimed property rules, and if so, under what rules?

See discussion under Issue #7 where recommendations regarding Bitcoin and other electronic "currency" are presented. The issue is subject to research being conducted by or under the direction of Commissioner Ramasastry.

Issue #23:
Abandonment of Securities under Section 2

****Note that Issue 23 is closely related to issue 12 (discussing the presumption of abandonment)****

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.

UPPO's Recommendations

Harmonize with Federal Securities Law

Securities and Exchange Commission (SEC) Rule 17Ad-17 (SEC Rule) considers a security holder lost after two pieces of return mail (RPO) have been received on the account.

Specifically, §17Ad-17(b)(2) provides:

Lost security holder means a security holder:

(i) To whom an item of correspondence that was sent to the security holder at the address contained in the transfer agent's master security holder file or customer security account records of the broker or dealer has been returned as undeliverable; provided, however, that if such item is re-sent within one month to the lost security holder, the transfer agent, broker, or dealer may deem the security holder to be a lost security holder as of the day the resent item is returned as undeliverable; and

(ii) For whom the transfer agent, broker, or dealer has not received information regarding the security holder's new address. See 17 CFR 240.17AD-17(b)(2).

Additionally, the SEC Rule requires transfer agents to perform two database searches in an effort to locate the lost security holder's new address. To harmonize the state escheat laws and the SEC Rule, UPPO recommends that Coverdell ESA accounts should only be subject to escheatment after two RPOs are noted on the account.

See suggestions of ICI discussed at Issue 15.

ABA's Recommendations with respect to Securities

The ABA makes seven recommendations with respect to securities. The ABA recommends that the treatment of securities under the UUPA be substantially revised to more properly protect the interests of owners.

Specifically, the ABA recommend that *Section 2(a)(3) of the UUPA be revised to provide the general rule that securities shall not become presumed abandoned until ten (10) years have passed from the later of (1) the date a second mailing to the owner was returned as undeliverable (unless a subsequent mailing to the owner was not returned as undeliverable); and (2) the date of last contact by the owner with respect to the securities.*

This proposed rule is similar to the 1995 Act rule, insofar as both rules generally apply a "returned mail" test for triggering the dormancy period. A returned mail test is also consistent with the standard applied under federal securities laws for searching for lost shareholders. However, this proposed rule differs from the 1995 Act rule in two primary ways: (1) first, it includes a longer dormancy period, which reflects the fact that securities are often long-term investments (and therefore it may not be proper to "presume" the securities to be abandoned only after three or five years); and (2) second, it eliminates the provision in the 1995
Act that would allow the dormancy trigger for securities to start running based on the failure of the owner to cash a dividend check or other distribution. In the experience of our members, many owners of securities are well aware of their investments, but still may not cash dividend checks (or other distributions) because the amounts are immaterial, the check is lost or for other reasons.

Second, ABA would recommend that *Section 2(a)(14) of the UUPA be revised to provide that securities in a traditional IRA similarly become presumed abandoned ten (10) years from the later of (1) the date a mailing to the owner was returned by the U.S. Post Office as undeliverable*

(unless a subsequent mailing to the owner was not returned as undeliverable); (2) the date of last contact by the owner with respect to the securities; and (3) the date, if determinable by the holder, that the owner of the account reaches age 70½.

This proposed rule is intended to be consistent with both the general practice by holders and what we understand to be the states' positions on this issue, which are both generally tied to the required minimum distribution date for traditional IRAs. At the same time, this proposed rule clarifies significant ambiguities with the 1995 Act rule for IRAs, insofar as that rule (1) generally bases the dormancy period on the date, if determinable by the holder, "by which distribution of the property must begin in order to avoid a tax penalty" (in the experience of our members, the holder will never know this date, as the owner may have multiple accounts, and therefore may not be required to take a distribution from any particular account); (2) arguably requires the dormancy period with respect to the account to start running based on "the date of distribution or attempted distribution of the property" (for the reasons discussed above, the distribution or attempted distribution of property from an account should not result in the escheat of the underlying account; moreover, in the case of an IRA, it may be more reasonable to presume that, if a distribution was requested but not cashed, the owner may have intended the amount of the distribution to remain in the account); and (3) does not technically reference the "returned mail" test for securities, leading to confusion by some states and holders as to how to apply the dormancy rules when the property that is held in the IRA is securities (in such case, it would seem reasonable to apply both the rule for securities and the rule for IRAs, but the 1995 Act is not explicit on that point). A similar rule could be applied to Roth IRAs, 529s, HSAs and other tax-advantaged accounts, though there is less justification for using the date that the owner reaches age 70½ as a potential trigger date because none of these other types of accounts requires a

minimum distribution upon attaining age 70½ (or, technically, April 1 of the year following the year in which the owner attained such age).

Accordingly, for securities in these other types of accounts, ABA would recommend that the securities become presumed abandoned ten (10) years from the later of (1) the date a mailing to the owner was returned by the U.S. Post Office as undeliverable (unless a subsequent mailing to the owner was not returned as undeliverable); (2) the date of last contact by the owner with respect to the securities; and (3) the date, if determinable by the holder, that the owner of the account reaches age 85. ABA believes that such a rule will preserve the rights of owners by reducing the number of instances in which owners may be adversely affected by the escheat process, either through tax penalties or otherwise.

Third, ABA would recommend that Section 12 of the UUPA be revised to provide that a state shall have the right to elect whether to hold the securities on behalf of the owner or sell the securities for their current fair market value; provided, however, that no state should be permitted to sell securities once a claim has been made, unless and until such time that the claim is determined to be without merit, and all opportunities for appeal by the claimant have expired. However, if the state elects to sell the securities within ten (10) years after the shares are escheated, then the owner should have the right to recover the securities that were sold and the state should be obligated to repurchase the securities at their then market value or, if no public market exists for the securities, the state shall reimburse the owner for the approximate value of the securities (as of the date the owner's claim was made). Thus, regardless of whether the securities have appreciated or depreciated in value since they were sold, the owner is returned to the same approximate position he would have been in if the securities had not been sold. This change is intended to further the primary purpose of state unclaimed property laws, which is to preserve the

property of the owner, by providing a lengthier period of time during which the owner's interests must be preserved (or the owner must be made whole). The 1995 Act contains a similar provision, but allows the owner to benefit at the expense of the state (by putting the burden of any depreciation on the state) if the securities are sold by the state within three years, and allows the state to benefit at the expense of the owner (by depriving the owner of any appreciation with respect to the securities) if the securities are sold after that date.

Fourth, ABA would recommend that Section 17 of the UUPA be revised to provide that the state can decline to accept securities property from any holder by providing notice to the holder of such election. ABA believes that such a provision is reasonable in light of the fact that securities can change significantly in value, and the carrying cost of holding the securities may be significant.

Fifth, ABA would recommend that early reporting of securities be prohibited, except where the holder can demonstrate a compelling need to escheat early (such as where the holder is liquidating its business). This change would further preserve the rights of owners.

Sixth, ABA would recommend that a provision be added to the UUPA that expressly grants an owner of securities the right to elect, via contract with the holder, that his or her securities will never be escheated to any state, regardless of the period of inactivity or whether mailings were returned as undeliverable. ABA believes this change is reasonable due to the nature of securities as an interest in a business rather than as an obligation to pay money, and the fact that (unlike with traditional types of unclaimed property) the state is generally not in a better position than the holder to preserve the property for the owner. In the event that states are concerned that holders may use such a provision to take advantage of owners, language could be added to the UUPA to make clear that owners would need to specifically "opt in" to

such a provision, after full disclosure by the holder.

Seventh, ABA would recommend that Section 2 of the UUPA be revised to expressly exempt privately-held and restricted (i.e., not freely transferable) securities from the UUPA. Given that there is no liquid market for these securities, we do not believe that it makes practical sense to escheat them.

Carson, Carson & Associates

Disagrees with increasing the dormancy period with respect to securities, but agrees with the recommendation that Section 12 be revised to provide that a state shall have the right to elect whether to hold the securities on behalf of the owner or to sell the securities based on fair market value, with a recommendation that a state allow an owner to claim the value of stock held on her behalf or redeem the same number of shares of stock.

Carson believes that an owner's interest would not be best served with the ABA's recommended provision that "the state can decline to accept securities property from any holder." Also disagrees with the following recommendations from the ABA: that the early reporting of securities be prohibited, that a provision be added to the Act that would allow the owner of securities to elect via contract that her shares will never escheat to the State, that Section 2 of the Act be revised to exempt privately held and restricted securities.

Carson notes that Florida law is a model that should be adopted in the UUPA, as it allows for the highest return of property back to the owner (top 3 in the nation).

SIFMA's Recommendations

The Model Act should include a dormancy period of no less than 5 years for securities to help drive a workable uniform dormancy period for securities throughout the United States.

States with dormancy periods below 5 years (when controlling for the size of those State's economies) generally collect no additional unclaimed property, and, importantly, the shorter dormancy periods result in materially greater costs due to the states returning higher percentages of reported property to rightful owners.

NAUPA Recommendations

The states encourage broadening the definition of an owner's indication of interest in the property from those included in the 1995 Uniform Unclaimed Property Act to recognize as contact any and all *documented* owner-generated actions which reflect an awareness of the existence of the asset. With respect to the small percentage of security holders who do not undertake some type of activity during the period of presumptive abandonment, the states believe that issuers should take affirmative steps to alert owners about the status of their asset and obtain confirmation of the security holder's awareness of ownership. Such acknowledgement should be required regardless of the type of security held (equity, debt, non-dividend paying, dividend reinvestment, etc.) or whether previous mailings to the security holders were undeliverable.

NAUPA's recommendation for defining when securities should be deemed unclaimed is straightforward. In the absence of a security holder taking some action with respect to that asset during a three year period, the asset is presumptively abandoned. An issuer or its transfer agent would then undertake efforts to establish contact with the security holder to rebut the presumption of abandonment through due diligence and owner outreach.

In view of the current and future securities recordkeeping and communications environment which has increasingly moved away from the physical mailing of investor materials to shareholders, NAUPA proposes a revision to Section 2(a)(3) of the 1995 Uniform Act incorporating an inactivity standard for the presumption of abandonment. At the time the 1995

Uniform Unclaimed Property Act was drafted, physical mail was the primary manner in which holders communicated with financial investors. It was commonplace for stock certificates to be securely mailed to shareholders and for the status of an undeliverable stock certificate to be tracked and coded within a transfer agent's system. With the dematerialization of securities, the mailing of physical stock certificates is practically nonexistent. As much as record keeping and communications have evolved over the last nineteen years, the manner in which shareholders transact on their accounts has changed dramatically with the increased use of the internet and other advancements in technology.

Although the 1995 Uniform Act provided for a five year abandonment period for unclaimed securities, a majority of states (30 of the 50 states and the District of Columbia) currently utilize a three year abandonment period. Of the thirty states with a three year abandonment period, eight had adopted the 1995 Uniform Unclaimed Property Act and substituted the Act's five year abandonment period with a three year parameter.

Issue #24:
The business to business exemption

****Note that issue 24 is related to Issue 31: Amount deducted by holder****

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.

COST reports that businesses are in the best position to determine whether another business holds their property, and do not need the assistance of government in making such determinations. They suggest that the Illinois statute **[CITE]** is often cited as model for a business-to-business exemption.

The ABA recommends that § 2 of the 1995 Act be amended to add the following provision:

> *"Notwithstanding any other provision of this [Act], any property due or owing from a business association to another business association, including, but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates, shall not constitute unclaimed property under this [Act]. This section also applies to all amounts due or owing from a business association to another business association that, on the effective date of this section, are in the possession, custody, or control of a business association."*

NAUPA recommends retaining as reportable unclaimed property funds arising from transactions between business entities in order that businesses (particularly small businesses) continue to recover substantial amounts of unclaimed property.

UPPO recommends that the revised act should specifically exempt business to

business transactions, pointing out that 13 states have such an exemption.
UPPO Recommendation:

Revise Section 1: DEFINITIONS (14) to include an exemption for transactions between two or more business associations. In the alternative, the Revised Act should include an exemption for Wholesale Credits, including Unidentified Remittances.

Revise Section 1: DEFINITIONS to renumber subsections (14), (15) and (16) as follows:

- *Renumber subsection (14) "Record" to subsection (15); renumber subsection (15) "State" to subsection (16); and renumber subsection (16) "Utility" to subsection (17).*
- *Revise Section 1: DEFINITIONS to add new language related to the exclusion of business-to-business transactions from the Act or in the alternative Wholesale Credits, including Unidentified Remittances.*

Proposed Language:

The definition of the word "property" in Section 1 of the Act should exclude business-to-business transactions.

As an alternative UPPO recommends that wholesale credits, including Unidentified Remittances, be exempt. An alternative to blanket exemption of business to business transactions would be a provision acknowledging that the parties to business to business transactions may contractually agree to waive any unclaimed property being deemed abandoned for purposes of escheat.

A similar provision has been advanced by ICI that expressly provides that an owner

of securities would have the right to waive, with respect to any or all accounts of the owner held by the holder, the holder's obligation to comply with the abandoned property laws, of the state where the holder is domiciled or where the property would otherwise be subject to reporting and escheatment.

NAUPA asserts that a "unclaimed property waiver" does not serve the public interest. NAUPA suggests at the time of investment, account holders do not contemplate that they or their heirs could someday be separated from their assets. The states believe that a prospectus and other shareholder literature that discusses how property can become unclaimed and recommends steps that an investor can take to prevent assets from being transferred to the state is helpful. However, it is unclear how a holder might, in an even-handed manner, go about suggesting to investors that they waive protections afforded by the unclaimed property law. Regardless of how the waivers are presented, the ICI proposal would result in the forfeiture of a significant consumer protection right. As a result, the property would remain on the books and records of the holder in perpetuity with no ongoing obligation on the part of the holder to find the owner or his or her heirs. Consequently, owners are unlikely to be reunited with their property. This proposal fundamentally contradicts the intent and spirit of the public policy underlying unclaimed property law as a consumer protection. It should be noted that such circumvention would also permit holders, such as mutual funds, to continue to indefinitely generate fee revenue from "administering" the asset, while having no ongoing duty to locate a missing owner.

Issue #25:

Presumption of Abandonment for electronic accounts under Section 2

****Note that issue 25 is related to issue 12 (discussing the presumption of abandonment)****

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 or protected access to the accounts at a specified frequency.

[?]

This concludes discussion of Section 2 of the Act

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:

Presumption for Holders of Intangible Property-Extend There are two related issues:

(a) should Section 3 be extended to contents of other storage facilities such as airport lockers and storage warehouses, and

*Note that any changes made with respect to storage warehouses should be consistent with Article 7 of the UCC, which deals with documents of title.

This section of the 1995 UUPA Transcript is relevant:

COMMISSIONER PERLMAN: Why do we require in Lines 24 through 26 what would seem to me a normal provision, a description of the property and so forth, for tangible property, but only if it's held in a safety deposit box. If it's held in a warehouse and no one has done anything for five years, then they don't have to report anything.

COMMISSIONER SULLIVAN: . . . [T]he only actual tangible property under this act dealt [with] is a safety deposit box. The property held in a warehouse is dealt with under other . . . statutes. If I have a car in a warehouse, it's going to be dealt with not under this act. Transcript page 109–10.

NAUPA proposes to expressly cover liquidation proceeds from the sale of contents of self-storage facilities.

(b) who should be responsible for converting tangible property to cash – the holder or the State?

- Section 3 – The ABA recommends that this section be amended to clarify that it applies only to property held by banks or financial institutions, as set forth in the comment to the UUPA. This Section also recommends that the term "safekeeping depository" be deleted or specifically defined.

This concludes discussion of section 3 of the Act.

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 a 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'srecords 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:
Addressing the Third Priority Rule in Section 4

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?

Traditionally, the state with first priority to hold unclaimed property is the state of the owner's residence. When there is insufficient information to determine what that state is (and there can be multiple states claiming to be the owner's residence – see discussion under Issue #1 and Issue #28 – the second or default priority falls to the domicile (state of incorporation or principal place of business) of the holder.

Section 4(6) of the 1995 Act provides for a third priority which is that if the last known address of the owner is not known and the holder is domiciled in a state that does not provide for the custodial taking of the particular property, as a third priority, the state where the transaction occurred is entitled to hold the unclaimed property.

This so-called "third priority rule" has been criticized by commentators as being inconsistent with the holding of the U.S. Supreme Court in *Texas v. New Jersey* in which the first and second priority rules were established.

ABA recommends that Section 4(6) of the 1995 Act be deleted on the basis that the third priority rule is an obstacle to the objectives of the Supreme Court when it created the priority rules in *Texas v. New Jersey* and is thus preempted under the federal rules and makes the following

observations:

- First, in *Texas v. New Jersey*, the Court was primarily concerned with crafting priority rules that would "unambiguously and definitely resolve disputes among states regarding the right to escheat abandoned property." In other words, the Court intended the first- and second-priority rules that it created in that decision to be the sole bases under which states may take custody of unclaimed property. If a state were permitted to adopt a third priority rule, then different states could easily adopt conflicting third-priority rules. This would ultimately result in an inter-state dispute of the sort the Court expressly sought to avoid. The possibility of such additional rules would also undermine the Supreme Court's focus on ease of administration which, ad discussed below, was another important objective of the Court in creating the priority rules.

- Second, in crafting the priority rules, the Court stated that it wanted to avoid "[t]he uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." On this basis, the *Texas* Court then specifically rejected a transaction-based custody rule, like that in the 1995 UUPA, that would allow a state to take custody of unclaimed property based on where the transaction giving rise to the property occurred. Subsequently, in *Pennsylvania v. New York*, the Court again rejected a transaction-based custody rule proposed by Pennsylvania with respect to unclaimed money orders.

- Third, in *Delaware v. New York*, the Court recognized that a state's power to escheat is derived from the principle of sovereignty. However, if the third-priority rule were enforceable, it would allow the third-priority state to infringe on the sovereign authority of other states. Specifically, the third-priority rule would force a holder that is incorporated in a state that does not escheat the property at issue to turn over such property to the third-priority state, which "would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat." The "ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."

While recognizing that this issue has not been expressly ruled on by the U.S.

Supreme Court, ABA points out that:

> the U.S. Court of Appeals for the Third Circuit specifically concluded that the third-priority rule "would stand as an obstacle to executing the purposes of the federal law" and thus, that the plaintiffs had satisfied their burden of showing that the third priority rule was "likely preempted under *Texas*, *Pennsylvania*, and *Delaware*." The Third Circuit's decision affirmed the lower district court's opinion, which similarly concluded that, under the federal priority rules, "there is no room for a third priority position." "If the secondary-rule state does not escheat," the court held, "the buck stops there." Although these are the only two courts that have expressly considered the preemption of the third-priority rule, other court decisions also support this same conclusion. Most significantly, in *American Petrofina Co. v. Nance*, the U.S. Court of Appeals for the Tenth Circuit held that the *Texas* priority rules preempted an Oklahoma law that would have permitted the state to take custody of unclaimed property on a basis other than as set forth by the Supreme Court in *Texas v. New Jersey*.
>
> The ABA also recommends that Section 4 of the UUPA be clarified to provide that the state of domicile of the holder of unclaimed property is not entitled to escheat property exempted from escheat by the state in which the last known address of the owner of the property is located.
>
> Section 4(4) of the UUPA requires a holder to escheat property to its domiciliary state if the last known address of the owner of such property is in a state that "does not provide for the escheat or custodial taking of the property." This language is intended to embody the second-priority rule articulated by the Supreme Court in *Texas v. New Jersey*, which requires a holder to escheat to its state of domicile "where the State of the last known address does not, at the time in question, provide for escheat of the property."
>
> Although the language in Section 4(4) is somewhat vague, this provision apparently permits a holder's state of domicile to assert unclaimed property jurisdiction over property for which the state of the owner's last known address has not adopted comprehensive unclaimed property legislation or legislation covering the specific type of property in question. In addition, Section 4(4) could potentially be construed to also permit a holder's state of domicile to claim property when the first-priority state had considered the property type and made an explicit determination in its statutes to exempt such property type from escheat. Under such a construction, a state that affirmatively exempts certain transactions, such as business-to-business transactions, from escheat would be treated as "not providing' for the escheat of this type of property,

thus allowing the holder's state of domicile (that had not enacted the same

> exemption) to claim the property. Such a reading undermines the sovereign authority of the first-priority state to determine not to exercise its right to escheat the property, an authority long recognized by the Supreme Court, and leads to disputes among the states regarding the proper exercise of the power to escheat. This construction is also inconsistent with later U.S. Supreme Court precedent, which held that the second-priority rule applies if the first-priority state "does not provide for escheat of intangibles" or "does not provide for escheat at all. These subsequent articulations of the second-priority rule suggest that the Court's intent was to allow the holder's state of domicile to escheat the property if the first-priority state has not adopted an escheat law applicable to intangible property in general, and not that the Court was intending to allow the holder's state of domicile to escheat property exempted by the first-priority state.
>
> The U.S. Court of Appeals for the Third Circuit in *N.J. Retail Merchs. Ass'n*, 669 F.3d at 395, citing Supreme Court precedent, specifically recognized that a state, in exercising its sovereign power, has the right to decide not to escheat, noting that "[v]arious considerations might motivate states not to exercise custodial escheat[,]" including incentivizing companies that "might find the absence of state custodial escheat attractive." The Third Circuit has recognized that, "[w]hen fashioning the priority rules, the Supreme Court did not intend [to]. . . give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."
>
> In addition, the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV sec. 1, would also apparently require the second-priority state to give full recognition to the first-priority state's sovereign right not to escheat the exempted property. The Full Faith and Credit Clause expresses a "unifying principle . . . looking toward maximum enforcement in each state of the obligations and rights created or recognized by the statutes of sister states," and "preserve[s] rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others."
>
> In order to carry out its recommendations, the ABA suggests that § 4(4) of the 1995

Act be modified as follows:

"(4) the holder of the property is domiciled in this State and the last known address of the apparent owner of the property, as set forth on the records of the holder, is located in a State or other jurisdiction that has no unclaimed property law applicable to theproperty. For the purpose of this subsection (4), a State or other jurisdiction shall be considered as having an unclaimed property law that is applicable to the property if the State or other jurisdiction has a rule that applies to the property, regardless of whether the rule permits the State or other jurisdiction to take custody of the property, affirmatively exempts the property from escheat or provides for some other treatment of the property. If the State or other jurisdiction of the apparent owner's last known address subsequently adopts an unclaimed property law applicable to the property, then the State that previously claimed the property shall be required to remit it to the Sate or other jurisdiction adopting such law, if the law requires the escheat of such property, or to the holder, if the State or other jurisdiction exempts such property from escheat."

NAUPA asserts that the rules for claiming as set forth in the 1995 Uniform Act should be retained.

With respect to Sections 4(2) and 4(3) of the 1995 Act, the ABA suggests that Section 4(2) and Section 4(3)(i) be deleted, and makes the following argument:

> Those provisions permit the state to escheat property if the records of the holder do not reflect the identity or last known address of the owner, but it is "established" that the last known address of the owner is in the state. However, the U.S. Supreme Court held in *Texas v. New Jersey* that "each item of property . . . is subject to escheat only by the State of the last known address of the creditor, *as shown by the debtor's books and records.*" The Court further elaborated that "since our inquiry here is not concerned with the technical domicile of the creditor, and since ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should the only relevant last-known address." Based on these statements, it appears clear that the Court intended the first-priority rule to apply only if the holder has a record of the owner's address. For the reasons discussed above, any jurisdictional priority rule that allows a state to take custody of property on a basis other than that expressly permitted by the U.S. Supreme Court is contrary to federal common law and should be preempted.

Important Case law to consider with regard to the third priority rule

It is important to consider Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

The case involved a form of intangible property, a money order. Both Pennsylvania and New York escheated a part of the funds. This case raises several questions as to whether state courts can have jurisdiction to hear unclaimed property cases involving intangible property such as checks and money orders that are seized from companies that conduct business in multiple states.

The Court found that Pennsylvania did not have Jurisdiction to hear the case:

"The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the States and persons whose rights will be adversely affected by escheats. This makes it imperative that controversies between different States over their right to escheat intangibles be settled in a forum where all the States that want to do so can present their claims for consideration and final authoritative determination. Our Court has jurisdiction to do that." Id. at 203-04.

Issue #28:
More Precise Definition of "Address Sufficiency"

****Note that issue #28 is related to Issue #26: Presumption for Holders of Intangible Property-Extend and Issues 29 and 30****

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.

See discussion under § 1 – Definition of "address" with regard to sufficiency of an address for purposes of delivery of mail and to determine priority of states.

The second issue is more intractable. Frequently, people (usually retirees) have more than one address – their usual home in Chicago and their "winter" home in Naples, Florida. Where the holder has both addresses in the system, there needs to be a means by which the priority between Illinois and Florida can be established. It gets even more complicated if the second "home" (or even third home) is in a foreign country, particularly if property of owners with a foreign address is determined to be exempt as has been suggested with regard to Issue # 29.

Issue #29:

Under the Uniform Act, 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.

UPPO recommends that Section 1 be amended to expressly exclude assets whose owner has a foreign address from the definition of "property" subject to escheat, and proposes the following language:

> 1. *Section 1 of the Uniform Unclaimed Property Act of 1995 is amended to include the following language:*
>
> *For Purposes of the Act, the term "Property," however, shall not be defined to include any tangible or intangible property described above that is owed to a person whose last known address as shown on the records of the holder is in a foreign country or location outside of the U.S., or is an Air/Army or Fleet Post Office (APO/FPO), except where the holder voluntarily remits such property to the custody of the state pursuant to Section 4(5) of this Act.*
>
> 2. *Section 4 of the Uniform Unclaimed Property Act of 1995 is amended to read as follows:*
>
> *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:*
>
> *(5) at the option of the holder, where the holder voluntarily remits property for which 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 in this State;*
>
> 3. *Section 26 of the Uniform Unclaimed Property Act of 1995 shall be amended as follows:*
>
> *(i) ~~This~~ The provisions of this Act do~~es~~ not apply to property that is: held, due, ~~and~~ or owing to a person with a last known address in a foreign country. In addition, the provisions of this Act do not apply to property ~~and~~ arising out of a foreign transaction, where the property is held in a foreign country or location outside of the U.S.*

(ii)Notwithstanding this provision, or any other provision related to foreign-owned property, a holder may, at its sole discretion, report and remit property owed to a person whose last known address as shown on the records of the holder is in a foreign country or location outside of the U.S., to the state pursuant to this Act, to be held by the state on behalf of the owner.

Possible Commerce Clause Implications of Extending the Act to Foreign Addressed Property

UPPO notes that a demand for custody of foreign-owned property by any state, including the holder's state of domicile, would violate the Foreign Commerce Clause of the Constitution. The Commerce Clause of the Constitution provides that Congress shall have the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes." In *Japan Line, Ltd. v. County of Los Angeles*, the Supreme Court recognized that special considerations beyond those that govern the taxation of property owned by U.S. citizens come into play when states seek to tax property owned by foreign citizens, even when that property is physically used in the U.S. and is subject to the State's Due Process jurisdiction to tax. In *Japan Line,* at issue was an attempt by Los Angeles County to impose a fairly apportioned property tax on shipping containers physically located at the port of Los Angeles on tax day. Although the Court found that such taxation would have been permitted if the containers were owned by U.S. persons, the fact that they were instead owned by foreign companies precluded their taxation by any U.S. jurisdiction, the Court concluded. The analysis by which the Court reached that conclusion is equally applicable to a state's attempt to take custody of foreign owned property under its unclaimed or abandoned property laws.

Specifically, the Court noted that because foreign-owned instrumentalities of commerce are clearly subject to taxation in their home countries, if a U.S. state were permitted to tax such property, no court, including the Supreme Court, could protect that foreign-owned property

against a risk of multiple taxation that the Commerce Clause prohibits. Likewise, because it is equally clear that foreign-owned intangible property may (and often is) subject to unclaimed property laws in the country where the property's owner resides, no court, including the U.S. Supreme Court, would have the power to protect such foreign-owned property against multiple claims of escheat, which the Court held in *Western Union Tel. & Tel. Co. v. Pennsylvania*, is likewise prohibited by the Constitution.

Issue #30:

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

§ 7(b) of the 1981 Uniform Act provided as follows:

"If a person other than the insured or annuitant is entitled to the funds [insurance or annuity proceeds] and an address of the person is not known to the company or is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the company."

NAUPA agrees and suggests incorporation of the following language:

4(8) If the last known address of a person other than the apparent owner, insured or annuitant who becomes entitled to property through the death of the apparent owner, insured or annuitant is not known to the holder, it is presumed that the last known address of the person entitled to the property is the same as the last known address of the apparent owner, insured or annuitant according to the record of the holder.

****This concludes discussion on Section 4 of the 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:
Amount Deducted by Holder

****Note that Issue 31 relates to Issue 24 the Business to Business Exemption****

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?

ABA Comments:

Section 5 of the 1995 UUPA provides that a holder may deduct a dormancy fee from property presumed abandoned only if certain requirements are met, including that the amount of the fee is not unconscionable and that the fee is not regularly reversed or otherwise canceled. This provision is inconsistent with the derivative rights doctrine because a fee may still be legally enforceable as against the owner of property even if it is regularly reversed or waived. This provision is also unnecessary, as the enforceability of such fees is already subject to regulation under a state's consumer protection laws, including laws prohibiting deceptive or unfair trade practices.[2] The purpose of the UUPA is simply to return unclaimed property to the rightful owner and not to be used as a "back door" to impose additional substantive regulations that may impact the debtor's obligations to a creditor. Accordingly, we would recommend that this provision be deleted and •that the language from the 1981 version of the UUPA (the "1981 UUPA"), which imply permits a deduction for "any lawful charges", be reinstated, as that prior language more appropriately defers to the underlying applicable substantive law. State consumer protection laws vary significantly from state to state. For example, some states may prohibit the use of dormancy fees entirely on gift cards, while other states may permit them after a certain period of inactivity or if certain disclosures are made:

NAUPA Comments:

[2]State consumer protection laws significantly from state to state. For example, some states may prohibit the use of dormancy fees entirely on gift cards, while other states may permit them after a certain period of inactivity or if certain disclosures are made.

20. Provide guidance with respect to **dormancy charges** and prohibit excessive charges; prohibit "stacking" of multiple service charges.

Objective: prevent dormancy charges from being used by holders as de facto private escheat through defining what constitutes an "unconscionable" dormancy charge.

Citation: 1995 Uniform Act Section 5

NAUPA research: April 26, 2013 committee discussion

NAUPA proposed legislation: *(a) Except as otherwise provided in (b), 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 if there is a valid 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 cancelled.*

(b) A holder may not deduct from property presumed abandoned a charge:

(1) for the holder's reporting of the property as abandoned, or for the holder's performance of other duties under this Act;

(2) that is unconscionable, in consideration of the marginal transaction costs incurred by
the holder in in its maintenance of the owner's property and the services received by the owner; or

(3) specifically for reason of the owner's failure to claim the property within a specified time if the holder is contemporaneously imposing another type of service charge against the property.

Additional comments from meeting:

1)*Preferable to return to language of '81 Act*

2)*No justification/rationale for "unconscionable"*

This concludes discussion of Section 5 of the Act.

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:
Owner-Modification of Burden of Proof

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?

NAUPA's Comments:

39. Expand a holder's **burden of proof** to encompass all records of unclaimed property, not merely unpresented negotiable instruments.

Objective: holders are in the best position to explain why records reflecting an outstanding liability do not in fact represent unclaimed property; it is substantially more difficult, if not in many instances impossible for a state to document that an outstanding liability does in fact reflect unclaimed property. Shifting the burden of proof to a holder, which actually created the accounting record, places responsibility on the proper party.

Citation: 1995 Uniform Act Section 6

NAUPA research: none

NAUPA suggested legislation:

A record of a liability in a holder's books or records 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.

Other comments from meeting:

1) ABA questioned whether there is a higher evidentiary standard for a revised/changed entry in context of audit.

2) ABA suggests a standard is needed. What is prima facie evidence? Why is a correction not prima facie evidence?

****This concludes discussion of Section 6 of the Act****

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 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 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 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 [has?] has complied with subsection (e).

Issue # 33:

Uniform Method of Reporting under Section 7 of the Act

(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 state 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 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?

ICI made the following suggestion for Section 7 which address several issues:

> (a) A holder of property presumed abandoned shall make a report to the administrator concerning the property. Such report shall be provided to the administrator through a process that is reasonably designed to protect the confidentiality of information contained on such report.
>
> (b) The report, which is not required to be notarized, must be verified by a written or electronic signature of an authorized representative of the holder and must contain:
>
> *****
>
> (e) Except as otherwise provided in this subsection, the ~~The~~ holder of property presumed abandoned shall send written notice by first class U.S. mail to the apparent owner no 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.
>
> Such notice shall not include any sensitive or non-public personal information concerning the owner, the owner's property, or the value of the owner's property. In the event the owner has previously consented to electronic

delivery of information from the holder, the notice required by this section may be sent via electronic delivery in lieu of first class U.S. mail so long as the holder reasonably believes that the owner's electronic mail address is valid. In the event the holder sends the required notice to the owner electronically and receives information indicating that the owner's electronic addressis no longer valid, the holder shall send the required notice by first class US. mail to the owner's last known physical address. A holder is not required to send any notice required under this section to any address that the holder has reason to believe is not a valid address for the owner.

*****

(h) The administrator shall protect from public disclosure any non-public personal information relating to the owner of property or the property that the administrator obtains under this [Act]. As used in this section, the term "non-public personal information" shall not include the name of the owner of such property.

Comments: The amendments to Section 7 implement the following ICI recommendations:

1. Subsections (a) and (h) have been revised to implement ICI Recommendation 15 relating to ensuring that state Administrators (and their representatives) maintain the confidentiality of any non-public personal information concerning the owner of abandoned property reported to the Administrator. As discussed in ICI's recommendation, under Federal law, mutual funds are required to maintain the confidentiality of all shareholders' non-public personal information. ICI's recommendation is intended to ensure that when the holder reports property to the Administrator, the Administrator similarly protects the confidentiality of such information. The proposed revisions would clarify that the term "non-public personal information" does not include the name of the owner of property.

2. Subsection (b) has been revised to implement the portion of ICI Recommendation 13 relating to: (i) eliminating the requirement that reports provided to an Administrator by a holder be notarized (since notarization appears to serve no public purpose); and (ii) permitting the use of electronic signatures in lieu of hardcopy written signatures.

3. Subsection (e) has been revised to implement the portion of ICI Recommendation 13 relating to enabling holders to send required

notices to owners via first class U.S. mail or electronically. The current Act is silent on how the written notice is sent and, consequently, has resulted in some states requiring the notices to be sent via overnight delivery or certified/registered mail. Also, the current Act does not recognize electronic delivery of notices for those owners who have agreed to receive account information electronically. As proposed by ICI, in the event the required notice is sent to an owner electronically and the holder receives a "bounce back" on the email, the holder would be required to send the notice via first class U.S. mail.

NAUPA proposes eliminating the option of holders not to report owner social security numbers**.**

Objective: because an owner's social security number is the primary means of locating an owner and verifying the owner's entitlement, reporting the owner's social security number should be a core requirement, not merely permissive "if readily ascertainable."

Issue #34:

Uniform Method of Notifying Apparent Owners Under Section 7 of the Act

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:

Minimum Value of Remitted Property

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:

Voluntary Escheatment Prior to Dormancy.

This issue also relates to Issue #55

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:

Aggregate Reporting-More detailed for Amounts less than $50

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?

ABA comments:

Section 7(b) – The ABA recommends that the aggregation provision be modified such that the holder is required to report owner information for all property (subject to the *de minimis* exemption discussed above), unless the holder can demonstrate that reporting such information would result in a hardship to the holder. Modifying the aggregation provision in this manner will generally serve the purpose of returning property to the rightful owner, and given developments in electronic recordkeeping, should normally not be a burden to holders.

NAUPA takes the position that the aggregation of property with a value of $50 or less should be at the discretion of the holder.

Section 7(e) – The ABA recommends that holders be permitted to conduct due diligence prior to the periods currently set forth in this Section, and that such early voluntary due diligence will eliminate the holder's obligation to perform further due diligence at a subsequent date.

NAUPA takes the same position on due diligence as that proposed by the ABA.

NAUPA comments:

[Amend Section 7(e) to reflect transfer of holder due diligence requirement to Section 9].

19. Mandate **standardized reporting formats;** allow for alternative approaches to a written signature for **holder report verification.**

Objective: insure ease of data conversion and uniform reporting through requiring holder use of state-specified reporting formats and mediums; provide flexibility for

utilization of emerging technologies such as electronic signature in the verification of report submissions by holders.

Citation: 1995 Uniform Act Section 7(a), (b)

NAUPA research: April 25, 2013 committee discussion.

NAUPA legislation:

(a)*a holder of property presumed abandoned shall make a report to the administrator concerning the property. The report must be filed in a format that is approved by the administrator.*

(b)*The report must contain:*

(7) A verification of attestation of the holder as to the completeness and accuracy of the report. The administrator, in its or her discretion, may (i) accept an electronic signature or other alternative evidence of verification or attestation or (ii) waive the requirement of verification or attestation; and

[Renumber existing subsection (7) as subsection (8); omit "and" at the end of existing subsection (6)].

UPPO comments:

IV. REPORTING

A. Aggregate Reporting

Proposed Language:

UPPO Recommends the following changes to the new UUPA's section on Aggregate Reporting.

Section u: 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 the property ~~of the value of $50 or more~~.

(3)*an aggregated amount of items valued under $40 each, however, a holder may choose to report the name and last known address of the apparent owner of property valued under $50;*

(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 that 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 pervious 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 (3).*

(h) *If a holder chooses to report items valued under $50 in the aggregate as permitted in paragraph (b) above, the administrator shall not request or demand that the holder provide the name and address of an apparent owner of such items so reported unless the information is necessary to verify or process an owner claim.*

****This concludes discussion on Section 7 of the Act****

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 for 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:
Worthless or non-transferable securities

****Note issue 38 also relates to Issue 23 (presumed abandonment of securities) and issue 25 (presumed abandonment of electronic accounts)****

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 or unclaimed securities and interest in mutual funds be broadened or expanded? If so, how?

NAUPA Comments:

> 25. Address **worthless and non-transferable securities**; review the need for modification of the 1995 Uniform Act to take into account **dematerialization of securities**; broaden the level of discretion of states in enacting protocols governing the delivery and transfer of **unclaimed securities and mutual funds**.
>
> *Objective: update the Act to reflect current operations procedures for securities; make states better able to administer unclaimed securities portfolios in an effective and cost efficient manner.*

NAUPA agrees that the transfer of valueless, nontransferable stock to state unclaimed property programs can be challenging. However, "nontransferable" does not necessarily mean "valueless."NAUPA believes that only securities that are nontransferable due to issuer insolvency should be exempted. NAUPA also questions the practicality of a holder periodically re-evaluating whether the shares could be transferred and report them as necessary.

ABA comments

Section 8(a) - The ABA recommends that the provision extending the time to pay or deliver property where a penalty or forfeiture may result be modified to apply to all property types, rather than only automatically renewable deposits, and to all types of forfeitures, rather than only interest. Accordingly, we would recommend that the first sentence of this Section be restated as follows:

> "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; provided, however, that if the holder reasonably believes a penalty or forfeiture may result to the owner as a result of payment or delivery of the property to the state, the time for compliance is extended until a penalty or forfeiture may no longer result."
>
> This change will benefit owners by reducing the likelihood that owners will be subject to penalties or forfeiture of their property in connection with the escheat process."

UPPO Comments:

(B) Section 8. Payment or Delivery of Abandoned Property

(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 endorsement, 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].

If the security issuer is not in the custom of issuing physical securities, the administrator will accept a book entry into the administrator's custody account which reflects that the administrator is now the custodian of the shares, notwithstanding that there is no physical security transferred to or endorsed by the administrator.

(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.

Other issues raised:

(1) Replacement certificate is obsolete language

(2) Distinction between physical and electronic certificates

(3)) Confusion between how '81 and '95 Acts address securities

ICI proposed the following changes to Section 8:

Except <u>as otherwise provided in this section,</u> for property held in a safe deposit box or other safekeeping depository, upon filing the report required by Section 7, the holder of the 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 not 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. <u>The payment or delivery of unclaimed property to the administrator pursuant to this section shall occur</u>

through a process that is reasonably designed to protect the confidentiality of information concerning the property and its owner.

(b) The provisions of subsection (a) shall not apply to:

(1) Property held in a safe deposit box or other safe keeping depository, which 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; and

(2) Shares of an investment company that is registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940. Upon request of the administrator, such shares shall be transferred on the holder's books and records from the name of the owner to the name of the State as trustee for the owner and maintained in such form.

SIFMA's Recommendations

Section 8(b) of the Model Act should include the concept of "freely transferable". The Model Act should include that "securities that are not freely transferable to the state such as restricted, chilled, worthless, or lack a transfer agent, shall not be subject to state reporting until such a time the securities may become freely transferable."

(b)(c) *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* as permitted by this section *of the security or the security entitlement*

in accordance with [Article 8 of the Uniform Commercial Code].*], to the extent transfer of such security is freely transferrable (e.g., restricted, chilled, worthless, no transfer agent).*

> ***Comments:*** The provisions of Section 8 have been revised as follows:
>
> 1. Subsection (a) has been revised to implement ICI Recommendations 13 and 15 relating to protecting the confidentiality of the owners' non-public personal information whenever abandoned property is delivered to the Administrator. In addition, together with the amendments to Subsection (b)(2), discussed below, these revisions would ensure that mutual fund accounts are not liquidated but, instead, maintained for the benefit of the shareholder to ensure that the shareholder is not adversely impacted by a State's abandoned property law.
>
> 2. Subsection (b) has been revised to add a new provision (*i.e.,* Subdivision (b)(2)) that will apply to the "delivery" to the Administrator of abandoned mutual fund accounts. As revised, such delivery will occur by transferring the owner's account on the holder's books and records into the name of the Administrator. Such delivery will both mitigate the adverse consequences to the owner of liquidating the account and enable the holder to preserve the account, along with any growth, interest, or dividends, for the owner. These revisions implement ICI Recommendation 9.

To the extent the cost to the holders to transfer and/or liquidate otherwise reportable securities or foreign currency equals or exceeds the values of such securities or foreign currency, the Model Act should not require a holder to report this property.

This concludes discussion of Section 8 of the Act.

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:

Notice by Newspaper publication-expansion

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:

Provisions to incentivize Administrators to Return Property

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:

Due Diligence

NOTE: Unanimous agreement at this meeting

ABA comments:

> Section 9(3) – The ABA recommends that this Section be expanded to require that the states also publish a notice of the unclaimed property electronically in a database that is searchable by the names of the owners.
>
> NAUPA believes that newspaper publication should be discretionary, and not mandadory.
>
> NAUPA comments:
>
> **18.** Allow holders to perform **due diligence** at an earlier juncture, when the likelihood of successfully contacting the owner is greater; clarify specifics of holder due diligence communications; expand, beyond printed notice, the acceptable approaches available to the state to **apprise owners of the state's receipt of unclaimed property.**
>
> *Objective: improve the effectiveness, efficiency and cost of notifying owners of the existence of unclaimed property.*
>
> *Citation: 1995 Uniform Act Sections 7(e) and 9*
>
> NAUPA research: April 26, 2013 committee discussion
>
> NAUPA legislation: Change Section 9 title to **Owner Notification** from **Notice and Publication of Lists of Abandoned Property**
>
> (a)*A holder of property that has been presumed abandoned or may become abandoned shall send written notice to the apparent owner not less than 60 days before filing the report.*
>
> (1)*The face of the notice shall contain a heading at the top that reads as follows: "THE STATE OF _____ REQUIRES US*

TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US," or substantially similar language. The notice shall specify the date that the property will be turned over to the State, and explain the necessity of filing a claim for the return of the property following receipt by the State; identify the nature and amount of the property that is the subject of the notice; and provide instructions that the apparent owner just follow to prevent eh property from being reported and remitted to the State.

(2)*The holder need not send a notice where the records of the holder indicate the address of the apparent owner is incorrect, or if the total value of property due is less than $50.*

(3)*There shall be no limit as to the number of notices that a holder may send to an apparent owner.*

(b)*The administrator shall establish and conduct a notification program designed to inform owners about the possible existence of unclaimed property received by the State pursuant to this Act. The notification program shall include, but not be limited to:*

(1)*the mailing of a written notice to apparent owners of property presumed abandoned and received by the State. The administrator, in his or her discretion, may elect not to mail written notices to any owner where the administrator determines that such mailing would not be likely to be received by the apparent owner, or would otherwise not be cost effective.*

(2)*publication of notice, every six months in a newspaper of general circulation, of unclaimed property received by the State. Such publication shall include the following information:*

(i)*the total number and value of abandoned accounts received by the State during the preceding six-month period.*

(ii)*the total number and value of claims to abandoned accounts paid by the State during the preceding six-month period.*

(iii)*the address of the unclaimed property website maintained by the administrator.*

(iv)*a telephone number for persons wishing to contact the State for purposes of inquiring about or claiming abandoned property.*

(v)*a statement that anyone interested in searching for unclaimed property may access the Internet at a local public library.*

(3)*the maintenance of an Internet database accessible by the public which sets forth the names of all owners reported to the state in an*

approved electronic format for whom unclaimed property in amount of $10 or more is being held by the State. The Internet database shall include instructions for filing a claim to abandoned property with the administrator, and a form of claim.

The administrator is authorized to undertake additional notification efforts through printed publication, telecommunication or other mediums in an effort to apprise the public of the existence of unclaimed property and the State's unclaimed property program.

(c)*Notwithstanding any provision of law to the contrary, all officers, agencies, boards, commissions, divisions, and departments of the state, including any body politic and corporation created by the State for public purposes, and every political subdivision of the state shall, upon the request of the administrator, make their books and records available and cooperate with the administrator to determine the current whereabouts of an apparent owner of unclaimed property. Neither the administrator nor any employee or agent of the administrator may use or disclose the information or record obtained except as necessary in attempting to locate the apparent owner of unclaimed property.*

(Alternative version of (c): Notwithstanding any other provision of law, upon request of the administrator, all persons and government entities shall provide the administrator from its records the address and any other information which could be used to locate the apparent owner of unclaimed property. Even if the information or record requested by the administrator is deemed confidential under any other law or regulation, that information or record shall be furnished to the administrator. Neither the administrator nor any employee or agent of the administrator may use or disclose the information or record obtained except as necessary in attempting to locate the apparent owner of unclaimed property.

Additionally NAUPA proposes that with respect to stock or other equity interests valued at $1,000 or more, a certified mailing return receipt be required:

ICI comments:

ICI recommends that the Act relieve any holder that has an obligation under federal law to search for a lost security holder from sending a state-mandated notice prior to escheating a mutual fund account to the state. In addition, ICI recommends that: (1) holders not be required to include any sensitive or non-public personal information in any due diligence letter or other notices sent to a property owner; (2) holders not be required to send any due diligence or other notices to an address the holder knows to be no longer valid; (3) states permit the use of electronic signatures on

notices; (4) states eliminate any requirement that reports of abandoned property filed with the state be notarized; (5) states permit notices to be sent via first class mail or, for those property owners who have consented to electronic delivery of account information, via electronic delivery; and (6) states require that any data submitted to the state on an abandoned account be sent via secure means (*e.g.*, via a password protected website or an encrypted compact disk or other similar media).

Comments: As discussed above, SEC Rule 17A-d-17 under the Securities Exchange Act of 1940 imposes very specific responsibilities on federally-registered transfer agents (which includes all mutual fund transfer agents) to search for any lost security holder. Accordingly, by the time the mutual fund has determined that the security holder is lost for purposes of federal law, the mutual fund knows that the address it has on the owner of the account is not valid. As such, there would not appear to be any public interest served by requiring the holder of the mutual fund account to send a notice to a bad address. For this reason, we recommend that the Act recognize the steps already undertaken by federally-registered transfer agents and relieve such transfer agents of an obligation to send a due diligence letter to a bad address. With respect to our remaining recommendations:

- (1) and (2) are intended to better protect owners from potential identity theft consistent with our duty under the federal Identity Theft Protection Programs that all mutual funds are required by law to have;

- (3) would update the law to recognize the increasingly widespread use of electronic signatures;

- (4) would eliminate a vestige of the previous law that would appear to serve no public purpose today, particularly in light of the fact that a notarization does not vouch for the legitimacy or correctness of the information contained in a report but rather for the identity of the person signing the report;

- (5) is to avoid the expense associated with states imposing onerous requirements (*e.g.*, overnight delivery, certified/registered mail) in connection with sending out notices. We note, in support of this recommendation, that the IRS permits tax forms and tax information to be sent via first class mail; and

- (6), like (1) and (2), is intended to protect owners from potential identity theft. In addition, however, we note that under federal law, mutual funds (and all federally-registered financial institutions) have a duty to protect the non-public personal

information of their customers, including shareholders, and are limited in how such information may be shared with third-parties, including states and their third-party auditors. Our recommendation is intended to ensure that, when information is transferred from the fund to the state or the state's auditor, the information is transmitted through secure means.

UPPO Comments:

B. Due Diligence

The due diligence requirements included in the states' unclaimed property statutes provide guidance to holders regarding the minimum outreach efforts required of a holder prior to the transfer of abandoned property to the state(s). While certain statutory similarities are present across large groups of states, there are many variations in these provisions which make it challenging for holders to meet each requirement. Below, we explore the similarities and differences in the various due diligence requirements, highlight the more uncommon provisions contained in certain requirements, and discuss survey results which were posed to the holder community in an effort to develop specific, uniform positions on a variety of topics.

1. *Uncommon (Outlier) Requirements*

UPPO's review of the states' due diligence provisions confirmed that there are no requirements where there exists complete uniformity across all jurisdictions. The requirements which have the least amount of variation among the states include:

- RPO (Bad Address) Account Exclusions;
- Dollar Thresholds;
- Holder's Option to deduct costs (few allow for this).

Specific areas where uniformity is lacking, or where outlier requirements are noted include (but are not limited to):

- Mailing Time Frames – ranging between 30 days and 1 year, with various specified dates and date range in between;
- Required Response Times – various time requirements were observed, including 15, 30, 45, and 60 days; non-specific language such as "adequate time for response" was present in one state; many states don't specify at all.

- Certified mailing requirements – present only in NY, NJ, and OH.

- Publication requirements in limited states pertaining to specific property type/state/industries (*e.g.* banking, insurance)

2. *Construction of UPPO Member Survey*

UPPO determined that guidance would be sought through the creation of an UPPO member survey whereby opinions and comments from the membership pertaining to specific questions would be obtained. The survey focused on specific areas of interest, and was intended to (a) develop consensus positions regarding various areas for consideration in new uniform draft language; and (b) obtain narrative commentary from the membership where survey questions resulted in members providing very specific responses.

UPPO received responses from 229 UPPO members. The survey results are summarized in the attached Exhibit A, and the full survey results are attached as Exhibit B.

3. *Conclusions/Recommendations/Recommended Uniform Provisions*

(A) Due Diligence Mailing Timeframe

Holders should be allowed the flexibility to conduct due diligence at any time provided that the mailings are completed "not less than 60 days" before each state's reporting deadline.

Proposed Language:

Section 9(a): A holder of property that has been presumed abandoned or may become abandoned shall send written notice to the apparent owner not less than 60 days before filing the report. [Note that Section 7(e) must be modified to be consistent with this provision as well.] ~~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:*~~

(B) Dollar (Value) Threshold

A "$50.00 or greater" minimum amount should be employed as a threshold requirement.

Proposed Language:

Section 8(a)(2): The holder need not send a notice where the records of the holder indicate the address of the apparent owner is incorrect, or if the total value of property due the apparent owner is less than $50. ~~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;~~

(C) Certified Mailings

Certified mailings should not be required at all.

Proposed Language:

Section 9(a)(4): For purposes of this Section, due diligence mailings shall refer to paper documents sent to the last known address of the owner by U.S. mail as well as by electronic mail, so long as the owner has consented to electronic notice, and the notice is sent to the electronic address to which communications regarding the property are regularly sent. ~~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.~~

(D) Certified Mailing Costs

If certified mailings are required by a state(s), holder should be allowed the option to deduct the cost from the account holder.

Proposed Language:

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 cancelled~~.~~, except that a holder may deduct charges for any certified mailing sent pursuant to Section 9 of this Act, to the extent such mailing is required, even absent such contract. The amount of the deduction is limited to an amount that is not unconscionable.

(E) Uniform Due Diligence Compliance Affidavit

A uniform document should be implemented which would be part of the Holder Verification Form.

(F) Due Diligence Response Date

While feedback was not provided regarding specific response date options, UPPO recommends that holders uniformly note that responses to due diligence letters must be received within 45 days of the date of the letter. NOTE: This issue is more of a holder related operational issue and may not matter to states. Thus, its inclusion is driven toward standardizing the holders' processes and has little impact on the states' administration of their programs.

(G) Uniform Content Requirements:

UPPO supports a uniform set of requirements for due diligence notices including warning language regarding escheat in absence of response, and steps for recovery of property.

Proposed Language:

Section 9(a)(1): The face of the notice shall contain a heading at the top that reads as follows:

THE STATE OF _____ REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US

or substantially similar language. The notice may include additional information such as the property amount, or, to avoid potential fraud, a dollar range indicated to be inclusive of the property amount, date, and instructions for responding, as well as any other information the holder deems necessary to include. ~~the name of each person appearing to be the owner of the property, as set forth in the report filed by the holder;~~

(H) Electronic due diligence

An option for the emailing of due diligence notifications is recommended for inclusion, so long as the owner's email address is verified by the owner as accurate. By way of example, California permits notice electronically so long as the owner has consented to electronic notice, and the notice is sent to the electronic address to which communications regarding the property are regularly sent.

(I) Owner response options

Other methods recommended for inclusion as valid responses to due diligence letters are:

(1) Call-center activity or other contemporaneous record of verbal communication with owner;

(2) Email of an imaged/executed due diligence letter;

(3) Web-based certification.

Proposed Language:

Amend Section 2(d) by adding the above examples to the list of examples of owner's interest in property set forth in that section.

C. Election to Take Payment Deliver Property Early

States such as Colorado, Arizona, and Utah, for example, permit administrators to take custody of unclaimed property before the dormancy period has run.

Proposed Language:

UPPO recommends including the following provision in the revised uniform act:

A holder may report and deliver property before the property is presumed abandoned, so long as the holder discloses to the state upon reporting delivering the property that the dormancy period has not yet expired. Property delivered under this subsection must be held by the administrator and is not presumed abandoned until such time as it otherwise would be presumed abandoned under this article.

Further, so as to ensure proper protection to the holder, the following indemnification language should be added:

Upon delivering property to the state, the holder shall immediately and thereafter be relieved of and held harmless by the State from any and all liabilities for any claim or claims which exist at the time with reference to the property or which may thereafter be made or may come into existence on account of or in respect to any such property.

****This concludes discussion of Section 9 of the Act****

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 a 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?

ABA Comments:

Section 10(a) – The ABA recommends that this Section be modified to provide that a payment or delivery shall be deemed to have been made in "good faith" if the holder remits the property in response to a demand by a state or agent of the state, or if a state representative has otherwise informed the holder or published guidance that the property is required to be reported. This change will give holders more comfort that they can rely on directives or informal guidance from states regarding the escheatability of property. The ABA also recommends that clauses (2) and (3) of Section 10(a) be deleted, as a holder should be entitled to indemnification from the state if it paid or delivered property in a reasonable attempt to comply with the UUPA. The additional requirements of clause (2) and (3) potentially put holders in a situation where they may remit property to the state in good faith compliance, but still not be entitled to indemnification.

Section 10(c) – The ABA recommends that this Section be modified to also allow a holder to deduct from an amount required to be reported to the state on a subsequent unclaimed property report any amount required to be returned to the holder pursuant to this Section. This change should facilitate return of such property to the holder, and reduce administrative expense.

NAUPA takes issue with the ABA proposal to allow for holder reporting "offsets."

Section 10(f) – The ABA recommends that this Section be modified to make clear that indemnification also applies where a foreign government makes subsequent claim to the property from the holder.

Other comments:

(1) Other bodies of law might provide guidance/authority. If holders are relieved of responsibility, states would seemingly have to keep records in perpetuity.

NAUPA proposes to revise section (b) and (c) as follows:

(b) 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. Upon the 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 and who, prior to reporting, if the holder ’s r ecords contain an address for the appar e nt owner, which the holder’s records do not disclose to be inaccurate, has made reasonable efforts to notify the owner by mail or, if the owner has consented to electronic notice, electronically, in substantial compliance with Section 18 of this Act, is relieved of all liability to the extent of the value of the property so paid or delivered for any 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. In the case of a gift card or other gift instrument including a virtual gift card balance that has been transferred to the administrator, the holder shall be required to honor the gift card upon presentment by the owner

****This concludes discussion of section 10 of the Act****

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].

NAUPA proposes revising this section as follows:

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].~~ Interest on money, including interest on interest bearing property, is not payable to an owner for periods where the property is in the possession of the State.

the ABA recommends that this Section be modified to require the State to match the rate of interest that would have been required to be paid by the holder to the owner. This change will further

protect owners, and thereby serve the purpose of the escheat laws, by making it clear that an owner will not lose or forfeit interest earnings as a result of the escheat process. Conversely, the state should have the right to decline to receive any interest-bearing property, on the basis that it does not wish to assume the holder's obligations to the owner, and instead permit the holder to retain such property without penalty.

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:
Military Decorations and Medals

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:

Notice of Sale of Abandoned Property

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

See Discussion under Issues #39-41 (the rationale is the same).

Issue #45:
Internet Sale of Abandoned Property

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?

NAUPA Comments:

17. Expand the acceptable processes for the sale of tangible property, including electronic/Internet auctions; exempt military decorations from tangible property sales.

Objective: allow for states to utilize any means for the sale of tangible property, so as to maximize efficiency and proceeds of sale; recognize the special status of military decorations.

Citation: 1995 Uniform Act 12(a).

NAUPA research: April 26, 2013 committee discussion.

NAUPA legislation:

(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 a publicly held sale, which may include an Internet auction or any other forum which in the judgment of the administrator will yield the most favorable net proceeds of sale. The administrator may decline the highest bid and re-offer the property for sale if the administrator considers the highest bid to be insufficient. The administrator need not offer the property for sale if the administrator considers the probable cost of sale to be disproportionately excessive given the anticipated proceeds of sale.*

(b)*Medals for military service in the armed forces of the United States shall not be sold by the administrator. In lieu of the administrator holding such medals until the rightful owner is located, the administrator may, in his or her discretion, designate a veterans' organization or other appropriate organization to act as custodian.*

[Renumber existing subsections (b) and (c) as (c) and (d), respectively].

****This concludes a discussion of Section 12****

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:

State Treasury Management of Funds

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?

Claimant Representative Recommendations:

[(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 the amount of claims paid by the administrator two fiscal quarters prior to the current fiscal quarter 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, date of birth, social security number or other personal identified, email address, telephone number9s), the owner's title or interest in the property, 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.]*

(c)*Before making a deposit to the credit of the [general fund], the administrator shall audit holder reports to ensure that all holder report fields contain all owner identification information contained in the records submitted to the administrator by the holder.*

Funds held in trust for the benefit of owners shall not be considered public funds subject to sovereign immunity protection and shall not be barred from garnishment.

Comments

This section increases from $100,000 to the total amount of claims paid by the administrator, based upon the two fiscal quarters prior to the current fiscal quarter, regarding the sum which is recommended to be retained in a trust account for payment of claims. It is contemplated that the amount of the trust fund which is ultimately established will reflect a State's experience in paying owners' claims.

See **case index** (pp. 2-3) in Position paper and the **Section 2** (pp. 4-9) proposal for support that the presumption of abandonment cannot result in forfeiture of a creditor's individual property rights.

Some states do not audit holder reports until a claim is made. Holder reports should be audited by the administrator when received to reduce the probability that owner identifier information is lost due to the passage of time.

This concludes discussion of Section 13 of the Act*

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:

Mutual Duty of States to Exchange/Turn Over Property

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?

NAUPA comments:

23. Discourage active, ongoing **reciprocal reporting** and address the state's disposition of property belonging to another state.

Objective: to move away from reciprocal reporting and to create a mutual, affirmative obligation for states to exchange property in their possession that is in fact owed to other states.

Citation: 1995 Uniform Act Section 14

NAUPA Research: April 26, 2013 committee discussion

NAUPA legislation:

(a)*If property is received by the administrator and the administrator is aware that the property is subject to the superior claim of another State, the administrator shall either:*

(1)*return the property to the holder so that it may be paid and delivered to the correct State; or*

(2)*report and deliver the property to the correct State. No formal agreement shall be required for the administrator to undertake such transfer to the correct State.*

(b)*Property under the custody of the administrator under this Act is subject to recovery by another State if:*

[Renumber existing subsections (b) and (c) as (c) and (d), respectively.]

NOTE: the committee may have interest in the "Colorado model," which requires that the unclaimed program "proactively" match claims over $600 against various databases identifying delinquent taxpayers, child support payors, etc. This model can be alternatively incorporated in suggested revisions to the Act, should the committee so elect.

ABA comments:

Section 14 – The ABA recommends that this Section be modified consistent with the changes above to Section 4 (Rules for Taking Custody).

****This concludes discussion of Section 14 of the Act****

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.”

NAUPA proposes to allow for the waiver of a claim form in certain limited circumstances.

Objective: facilitate the expedited payment of low value claims in situations where the State believes, or has no reason to doubt, that the State has successfully located and owner for which the State is holding property. While a number of some states have instituted the "fast tracking" of claims, the process could be further streamlined through elimination of the claim form, and some states do not believe that claims fast tracking is authorized under existing language.

Issue #48:

Limitation on Number of Owners' Claims for same Property

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?

COST comments:

- Uniformity and reform in the audit and appeals process would greatly aid in the perception of fairness of the unclaimed property law and administration

The Committee should consider COST's recommendations regarding independent tribunals for hearing unclaimed property audit appeals. Further, the Committee should consider reforms around conduct of the audit, including the amorphous and frequently abused methods for estimating liability. Michigan recently enacted legislation5 providing a potential framework for discussion, such as allowing the use of estimation only if the holder does not have substantially complete records.

While the above issues do not represent all the reform that may, or should, be considered by the Committee as it undertakes its rewrite of UUPA, COST urges the Committee to include these issues in its drafting framework in light of their critical importance to unclaimed property holders that compose the COST membership. Thank you for your consideration of these matters.

ABA Comments:

Section 15 – The ABA recommends that this Section be modified to clarify that it permits holders or purported holders to recover property that was remitted to the state due to mistake of law or fact. As will be discussed in more detail in a subsequent letter to the Drafting Committee, the ABA also recommends that this Section or a new Section provide for a clear mechanism by which holders or purported holders may appeal (either administratively or to court, at the holder's election) state unclaimed property assessments.

Claimant Representative recommendations:

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

(b)*Within 90 days after a claim is filed, the administrator shall review each claim received applying a standard of evidence consistent with the preponderance of evidence standard. Claims shall be reviewed by the administrator to confirm the absence of fraud and to verify that the claimant is more likely than not an owner of the property. The Administrator shall allow or deny the claim and give written notice of the decision to the claimant or claimant's representative. If the claim is denied, the administrator shall inform the claimant or claimant's representative of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant or claimant's representative 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.*

Comments

A person claiming property from the administrator is not limited to the number of times the claim may be filed or refiled prior to commencing an action under Section 16. The administrator's decision on a claim does not operate as collateral estoppel or *res judicata*. A person who has commenced an action under Section 16 may also reassert a claim before the administrator if the action has been dismissed without prejudice. A claim which has become the subject of a final judgment may not thereafter be refiled with the administrator.

The use of the term "shall" in Section 15(b) is mandatory and is not directive. *See Ditzel v. The Florida Department of Financial Services* Mandamus reply.

At the meeting, NAUPA commented that the only time outright denials occur is when clear evidence, such as a different Social Security Number, is presented.

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:

Limitations of Time

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:

Attorney's Fees

****Note that Issue 50 relates to issues 66, 67 and 68****

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:
Holder Action for Judicial Determination of
Administrator's Determination of Liability

Note issue 51 also impacts Issue 52

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:

Holder Action for Judicial Determination of

Administrator's Determination of Failure to Report and Turn Over Property

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?

See Issue 51

Issue #53:

Holder Action For Judicial Determination of Administrator's Determination of Liability for Interest and Penalties for Failure to Turn Over Property During The Period in Which the Claim Is Contested

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?

UPPO makes recommendations which address both administrative relief during audit and also post audit as follows:

> Thus, we propose that the new Uniform Act include mechanisms to balance the interests of both holders and the states, not only once the audit is complete, but also while the audit is ongoing. The audit conference provision (proposed Section 22(B)) affords the holder a mechanism by which to exercise this right to direct interaction with the state administrator. The U.S. Chamber Institute for Legal Reform identifies state oversight of any audit as "critical" and recommends that the unclaimed property administrator "shall at all times retain complete control over the course and manner of any audit…and shall not delegate to private auditors substantive decision-making authority."76 It further explains that "providing a direct line of communication to the unclaimed property administrator's staff will help ensure appropriate oversight and protection of the legal rights of companies subject to an audit."77 Permitting the holder to a conference with the state during the audit helps to ensure such oversight and involvement. It also preserves the states' ability to outsource certain aspects of the audit function.
>
> We are mindful that state administrators have limited resources and should not be required to expend resources where holders are acting with an improper purpose, such as to delay an audit. Thus, the proposed language permits the administrator to decline to hold a conference in circumstances where the holder is acting to delay the audit or is acting with some other improper purpose.
>
> UPPO proposes the following language be added to Section 22 of the 1999 Act:
>
> *(C) Section 22(B) AUDIT CONFERENCE*
>
> 1)*Upon written request of a holder, third-party auditor, or upon its own motion, the Administrator shall convene a conference during*

the course of the audit to resolve disputes concerning the scope and methodology of the audit itself.

2)*The Administrator, as well as a representative of the holder and a representative of the third-party auditor must all be present at the conference.*

3)*All written requests for a conference must state the years audited, property types, the amounts in question (if known), and the reason the conference is necessary.*

4)*The conference may be conducted telephonically or in person at the Administrator's offices.*

5*) A holder's or third-party auditor's request for a conference shall be liberally granted unless obviously interposed for purposes of delay or other improper purpose.*

6)*Any guidance provided by the Administrator will apply to the particular audit for which the conference was requested and will not constitute a binding decision or determination subject to any appeal.*

Practitioners and taxpayers who deal with state tax audits will be familiar with this type of audit conference where an aggrieved taxpayer can in effect go over the head of the auditor to get an issue resolved at a supervisory level. If the auditor is a contract auditor, particularly one whose compensation is contingent on the outcome of his audit findings, it is reasonable that a holder undergoing an audit who has a dispute over an auditing process or auditor's demand for records should be entitled to have the dispute resolved by the administrator before there is a final determination of liability by the auditor.

UPPO also recommends that once an audit for unclaimed property is completed there should be a post-audit appeals process.

Issue #54:
Administrative Appeals Process

This Issue is tied to issues 57-58

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?

> NAUPA proposes creation a uniform audit appeals process for holders disputing findings from an unclaimed property audit and suggests specific language by which such process should be implemented.

Section 16 of the 1995 Act is one of two provisions in the Act that discuss filing suit. It allows a person whose claim as owner to recover funds held by a state had been denied to bring an action in court against the administrator to establish the claim. Section 22 of the 1995 Act allows the administrator to bring an enforcement action.

What is missing from the 1995 Act is any statutory authorization for a putative holder to bring an action to contest an auditor's finding of liability for unclaimed property which has not been turned over.

Issues 51, 52 and 54 all essentially raise the same issue – should a putative holder have a right to seek administrative and judicial relief from a disputed claim of liability to turn over unclaimed property. Issue 53 deals with the tangential issue of how does a holder stop the running of interest.

> With respect to a post-audit appeals process, the drafted language reflects a truly independent review of the state administrator's determination, which is not unfairly weighted toward either the state or the holder. Such an appeals procedure is essential to sound state administrative processes78 as forums independent of, and uninfluenced by, agencies that can render adverse decisions against citizens. Because of their impartiality, independent appeals tribunals

> bring confidence and respect between citizens and state administrators.79 Indeed, a tribunal that reviews state agency decisions must be independent from that agency in order to truly provide an unbiased and fair review of the record.

In order to implement this independent review UPPO has prepared extensive proposed language as a revision to Section 16, which sets out an administrative review process followed by *de novo* review by a court without a jury.

COST makes the point that uniformity and reform in the audit and appeals process would greatly aid in the perception of fairness in the administration of unclaimed property law.

The administrative process set out by UPPO provides that after an administrative hearing before an independent hearing officer, either party may pursue a judicial appeal and receive a *de novo* review by the trial judge without a jury.

Essentially, this means that a holder who is aggrieved by an adverse audit will have to undergo two potentially expensive trials – first before an administrative hearing officer and next before a state trial judge. It only makes sense to give an aggrieved holder the option to elect to bypass the administrative appeal route and take the matter directly into state court before a trial judge.

An alternative procedure similar to the Informal Conference used by the Tennessee Department of Revenue pursuant to T.C.A. § 67-1-1801(c)(3) would provide an easy and inexpensive way to review an auditor's findings at the administrative level at the election of the taxpayer and as an alternative to going directly to the trial court.

Informal Conference With the Administrator

> Within thirty (30) days from the date of a final examination report issued by the State [administrator] and before filing a written appeal [or before suit is filed], the [holder] shall have the right to an informal conference with the [administrator] to discuss the report

and to present such matters as may be relevant to the report, provided, that written request for such conference is made within thirty (30) days from the date of the issuance of the report. If a timely request for a conference is made, the [administrator] shall set a time and place for the conference within twenty (20) days from the date of the request, and shall give the [holder] written notice of the conference. Within ten (10) days after the conference, the [administrator] shall give the [holder] written notification of the [administrator]'s decision. Upon the filing of a timely request for a conference, the thirty-day period for the filing of an appeal shall cease running until ten (10) days after an informal conference decision is issued. No other provision of this section, nor any other action or inaction by the [holder] or the [administrator] shall be construed to extend or toll the running of the thirty-day period for filing an appeal nor shall the [holder] be prejudiced in any other manner by either seeking or failing to seek or pursue an informal conference. The informal conference provided in this subdivision shall not be considered to be an administrative remedy and shall not constitute a contested case subject to the provisions of the Uniform Administrative Procedures Act, compiled in title , chapter . The [administrator] shall not be prejudiced in any manner by failing to act within the time periods prescribed in this section, except that no interest shall accrue on any deficiency during any period in which the [administrator] has not acted within the time limits prescribed in this section, until the earlier of such time as suit is filed by the [holder]. At any time prior to the filing of suit by the [holder], the [administrator], in the [administrator's] discretion, may hold informal conferences with the [holder] without the requirement of timely written request for the conference. [T.C.A. § 67-1-1801(c)(3).] [the statute has been modified to insert "holder" for "taxpayer" and "administrator" for "commissioner."]

ABA Comment:

The ABA recommends including the bracketed language regarding attorney's fees in the UUPA, rather than making it optional, since (a) the language is not mandatory and still gives the court discretion whether to award fees and (b) a similar provision in Section 22 is not bracketed/optional. ABA would also recommend allowing the claimant to seek reimbursement of costs and would further recommend that the provision allowing the court to award attorney's fees and costs apply to fees and costs incurred by the holder in connection with any administrative appeals process, so as to provide added incentive by the state to provide a fair and impartial review process.

Claimant Representative recommendation:

A person aggrieved by a decision of the administrator 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.]

Comments

After property is presumed abandoned and reported to the administrator the administrator must attempt to locate the missing owner. Thereafter, if the property has been delivered to the administrator and the owner or his representative appears, the administrator must pay the claim. The owner's rights are never cut off; under this Act, the owner's rights exist in perpetuity. Although some state administrators have urged legislation that would terminate an owner's right to the property merely by the passage of time, such enactments may be unconstitutional. In *Hamilton v. Brown*, 161 U.S. 256, 275, 16 S. Ct. 585,592, 40 L. Ed. 691, 699, (1896), the Supreme Court held that any procedure by which the State seeks to cut off the owner's title through escheat must include "actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown . . . ." Any lesser procedure appears to fall short of due process. The history of escheat, as compared with modern unclaimed property legislation, is discussed in "Unclaimed Property and Reporting Forms," Epstein, McThenia & Forslund, ch. 1 (Matt. Bend. 1984).

In any judicial action commenced to recover the property from the administrator, the claimant may proceed *de novo*, and the court will not be limited to a mere review of the administrator's decision.

If access to a formal or informal administrative hearing, mediation, or the court is available to the aggrieved party, the aggrieved party shall have the right to select the forum in which it files its action to enhance the likelihood of access to a neutral arbiter.

Important Case law to consider with regard to the Appeals process

It is important to consider Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961), which we also looked at under the third priority rule (issue #27).

The case involved a form of intangible property, a money order. Both Pennsylvania and New York escheated a part of the funds. This case raises several questions as to whether state courts can have

jurisdiction to hear unclaimed property cases involving intangible property such as checks and money orders that are seized from companies that conduct business in multiple states.

The Court found that Pennsylvania did not have Jurisdiction to hear the case:

"The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the States and persons whose rights will be adversely affected by escheats. This makes it imperative that controversies between different States over their right to escheat intangibles be settled in a forum where all the States that want to do so can present their claims for consideration and final authoritative determination. Our Court has jurisdiction to do that." Id. at 203-04.

****This concludes discussion of Section 16 of the Act****

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:
Holder Turn Over of Property to State After Due Diligence

Issue 55 is closely related to issue #36

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?

NAUPA:

The Act should permit holders to report and remit most types of property at any time after due diligence is performed. NAUPA recommends amending Section 17(b) as follows:

> *Property that has not yet been presumed abandoned may be voluntarily reported and delivered by a holder to the administrator and upon receipt by the administrator shall be deemed abandoned under the Act, provided that*
>
> (1)*the holder has attempted to contact the apparent owner of the property as provided for in Section 9(a) of this Act; and*
>
> (2)*the property is not:*
>
> (i)*a stock or equity interest in a business association under Section 2(a)(3) of this Act;*
>
> (ii)*a debt of a business association or financial organization under Section 2(a)(4) of this Act;*
>
> (iii)*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 under Section 2(a)(14) of this Act (unless the plan has been terminated);*
>
> (iv)*other tangible property entitlements that are due or payable to the owner by the holder in a form other than money; or*
>
> (v)*tangible property from a safe deposit box or other safekeeping repository under Section 3 of this Act.*

NAUPA also recommends specific due diligence and abandonment criteria for tax advantaged assets in addition to retirements plans.

Issue #56:

Authorization for Administrator to Disclaim Property

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?

Issue #57:

Statute of Repose

This issue is related to issues 54 and 58

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 and often unfair 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 indirectly recover property form the state that he could not recover directly from the holder.

Investment Company Institute:

Recommends that with respect to holders that are mutual funds, the Act limit states seeking information on owners or accounts of owners whose property has been escheated to the state to a period of 7 years from the date the property escheated to the state. ***Missing language from current Word doc. ICI proposes the following revisions to Section 19:

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 beyond the period for which the holder must maintain records as specified in Section 19 or more than 7 or 10 years depending upon the applicable recordkeeping period for the property pursuant to Section 19 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.

Comments: The revisions to Section 19 are intended to implement ICI Recommendation 14, relating to a seven year statute of limitations for mutual fund accounts. (*See* also comments to Section

21, below.) Seven years is the amount of time that, pursuant to the Federal securities laws, mutual funds must maintain their account records and it seems appropriate to correlate the Act's statute of limitations applicable to mutual fund accounts with the recordkeeping requirements of the Federal securities law. Consistent with the basis for our recommendation, this seven-year period would only apply to mutual fund accounts.

SIFMA's comments

The Model Act should align broker dealer record retention requirements with existing record retention requirements from the primary regulators of broker dealers SEC and SROs.

NAUPA's Comments

NAUPA recommends a ten year records retention provision. IRS recordsretention schedules specify businesses should maintain most record categories for seven years, and since unclaimed property pertains to property belonging to owners, not to businesses, a somewhat longer record retention period would allow owners to be identified is reasonable.

Issue #58:
Limitations Period: Commencement/Tollability

This issue is related to Issues 54 and 57

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?

COST:

UUPA should be amended to reduce the period of limitations and change the limitations period to commence with the filing of the report rather than commence with the reporting of specific items or categories of property. COST recommends a period of 3-5 years as reflective of normal business practices and tax laws. A longer period of limitation often results in inflated assessments for property that can never be returned to their owners.

SIFMA

The Model Act should outline fair penalties for failure to report that are designed to enhance compliance. These penalties should consider mitigating factors such as operational challenges.

NAUPA

NAUPA advocates a Limitations period of ten years, extended to fifteen years in instances where the Holder's report is fraudulent or has materially understated the unclaimed property liability. While not as egregious as a complete lack of reporting or the filing of a fraudulent report, if any individual property type is materially underreported, it raises significant questions about the Holder's controls and compliance that justify expanding the look-back period.

Issue #59:

Exemption from Expiration of Statute of Limitations Application When Holder Not Attempting to Evade Unclaimed Property Reporting (B2B)

This issue is related to Issue 24

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?

Issue #60:
Contract/Independent Auditors

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 condoning by utilization of a system that is seen by some in the holder community as inherently flawed?

NAUPA's position is that the UUPA should maintain the states' ability to utilize contract examiners and compensate them on a pay for performance basis.

COST:

Contingent fee auditors should be banned. UPA should allow state administrators to make decisions regarding the application of their statutes.

Michigan Chamber of Commerce:

The Michigan Chamber of Commerce encourages a ban on the use of contingency fee audit arrangements because such arrangements incentivize the auditor

to inflate a holder's liability rather than seeking to return property to the owner, creating a conflict. The chamber also encourages the development of professional standards of conduct for use in unclaimed property audits, with clear and meaningful relief for instances where such standards are not complied with. See *supra* Issue #54.

U.S. Chamber Institute of Legal Reform:

ILR opposes contingency fee audit arrangements as being bad public policy and leads to over-collection in contravention of unclaimed property laws. ILR suggests more transparency in audit contracts, hourly fees instead of contingency, strong oversight by the state and incentives for holders through voluntary disclosure programs as opposed to aggressive audits resulting from contingency fee incentives. Further, ILR notes that contingency fee arrangement inject a private profit motive and conflict of interest that need to be reformed.

See also *infra* Issue 65

Investment Company Institute:

Recommends the Act prohibit states from engaging third party audit firms on a contingent fee basis. With respect to third party auditors, ICI recommends that: 1) such auditors be prohibited from estimating potential holder liability; 2) there be an independent process available to holders to resolve disputes between the holder and the third party auditor; 3) the law clarify that an auditor cannot require records of a holder beyond those expressly required by the law of the state the auditor is representing in the audit; and 4) such auditors be required by law to maintain the

confidentiality of information obtained from the holder to the same extent as the state would have to under state law. Additionally, the Act should prohibit states from retaining multiple auditors or audit firms to audit a holder for the same period of time.

ICI proposes the following revisions to Section 20:

> *(b) The administrator, at reasonably 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]. Subject to the limitations in subsection (g) of this section, the ~~The~~ administrator may contract with any other person to conduct the examination on behalf of the administrator.*
>
> * * *
>
> (g)*The administrator may contract with a person to conduct, on behalf of the administrator, any examination authorized by this section subject to each of the following conditions:*
>
> *(1) Payment for such examination shall not be by commission or based directly or indirectly on the amount or value of property recovered for the State or identified as a result of the examination;*
>
> *(2) There is an expeditious procedure established by the administrator by rule or order that is independent of the auditor retained by the administrator and that a holder can use to resolve disputes involving property or records that are the subject of the examination;*
>
> *(3) The authority of any person retained by the administrator to conduct audits is subject to all limitations and restrictions imposed by this [Act] on the administrator including, but not limited to, the records subject to the auditor's review and the confidentiality of any records obtained or reviewed by the auditor; and*
>
> *(4) No auditor shall be authorized to audit a holder or the holder's records for the same period of time that has previously been audited or is currently being audited by the administrator or another person authorized by the administrator to conduct audits under this [Act].*
>
> *Comments: The revisions to Section 20 would implement ICI*

Recommendation 11 relating to Administrators' use of audit firms. While the ICI does not oppose states utilizing third-party audit firms to conduct audits, we believe that the use of such firms should be predicated on each of the following conditions:

(1) A prohibition on third-party auditors being compensated, directly or indirectly, on the amount or value of property recovered for the State or identified as a result of the examination. This condition is to address the very real and significant conflicts of interest that arise in connection with today's contingent fee payments. While states argue that, due to the limited resources, they must rely on third-party auditors, we strongly believe that all such audits should be conducted on an hourly, flat, or similar fee basis without regard to the results of such audits. In addition to addressing our concerns with the conflicts of interest that arise in connection with contingent-fee arrangements, this approach would undoubtedly save the states' a significant amount of revenue. (Note: while states have argued that these contingent-fee auditors do not costs the states any appropriation, the states are paying such third-party audit firms significant fees through revenues that would otherwise flow to the states.)

(2)There should be an expeditious procedure established by the Administrator (by rule or order) that is independent of the auditor and that a holder can use to resolve disputes involving property or records that are the subject of an ongoing audit. This condition is to address concerns with auditors usurping a holder's due process through the use of aggressive audit techniques.

(3) The auditor's authority is limited to the authority of the Administrator. We understand from our members that it is not uncommon for auditors to request documentation and information from a holder when the Administrator lacks lawful authority to make such requests. This provision would address such situations.

(4) There can be no duplicative audits conducted by third-party auditors. We understand from our members that it is not uncommon for more than one third-party auditor to attempt to audit the same holder for the same period of time. This provision would address and prohibit such multiple, duplicative audits.

Issue #61:

Records Retention After Reporting/Turn Over

This issue is related to Issues 62 and 63

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?

Investment Company Institute:

Recommends that the period of time for which holders are required to maintain records be identical to the state's audit period and statute of limitations but, in no event, should a holder be required to maintain records relating to escheated property for more than sever years after the property has been turned over to the state. With respect to the records required to be maintained, they should be limited to those records that: 1) were used by the holder to determine that the dormancy period has been triggered; and 2) evidence that the holder has complied with the state's due diligence, reporting, and property transfer requirements.

Issue #62:

Period of Record Retention (Duration)

This issue is related to Issues 61 and 63

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 7 years for the IRS and most 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?

Investment Company Institute:

The period of time for which holders are required to maintain records should be identical to the state's audit period and statute of limitations, but in no event should a holder be required to maintain records relating to escheated property for more than 7 years after the property has been turned over to the state. With respect to the records required to be maintained, ICI recommends that they be limited to those records that: 1) were used by the holder to determine that the dormancy period has been triggered and 2) evidence that the holder has complied with the state's due diligence, reporting and property transfer requirements

Issue #63:

Period of Record Retention (Various Types of Property)

This issue is related to Issues 61 and 62

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

Investment Company Institute

Recommends that the period of time for which holders are required to maintain records be identical to the state's audit period and statute of limitations but, in no event should a holder be required to maintain records relating to escheated property for more than 7 years after the property has been turned over to the state. Also recommends that the law clarify that the auditor cannot require records beyond those that the holder is required to maintain pursuant to state law. ICI proposes the following revisions to Section 21:

> *Expect as otherwise provided in subsections (b) and (c), 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.*
>
> . . .
>
> *(c) A holder of shares of an investment company that is registered pursuant to the Investment Company Act of 1940 or a holder that is a financial services firm shall maintain for a period of seven (7) years after filing a report under Section 7 all underlying documents, records, owner account information, and other information utilized to determine (i) whether property held by the holder in the owner's name has been presumed abandoned and (ii) the amount of such property presumed abandoned.*
>
> *Comments: Consistent with our recommendation to Section 19, above, our amendments to Section 21 would conform the Act's recordke eping requireme nts with the Act's statute of limitations. In addition, however, a new Subsection (c)*

would be added to Section 21 to provide a seven-year recordkeeping period for mutual fund account records. This period is consistent with the recordkeeping requirements imposed under the Federal securities laws. As revised, a holder of mutual fund shares would be required to maintain for seven years all records necessary to a determination that the owner's property is presumed abandoned and the amount of such property presumed abandoned. These revisions would implement ICI Recommendation 11.

Issue #64:

Estimations of Liability of Putative Holder

This issue is related to Issue 65

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

COST:

Michigan recently enacted legislation providing a potential framework for discussion, such as allowing the use of estimation only if the holder does not have substantially complete records.

Michigan legislation: 2013 Public Act 148 (H.B. 4289), available at http://www.legislature.mi.gov/%28S%281uavj13wefbetmvlbaaw5lbx%29%29/mileg.aspx?page=GetObject&objectname=2013-HB-4289

Issue #65:

Estimations Based on Statistical Sampling

This issue is related to Issue 64

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 in violation of their Due Process rights?

Investment Company Institute:

Recommends prohibiting auditors from estimating liability. A holder should be liable only for property that the auditor can demonstrate has been abandoned.

COST:

Michigan recently enacted legislation providing a potential framework for discussion, such as allowing the use of estimation only if the holder does not have substantially complete records.

Michigan legislation: 2013 Public Act 148 (H.B. 4289), available at http://www.legislature.mi.gov/%28S%281uavj13wefbetmvlbaaw5lbx%29%29/mileg.aspx?page=GetObject&objectname=2013-HB-4289

Michigan Chamber of Commerce:

Encourages alternatives to raw extrapolation of findings when records are unavailable because extrapolation is inconsistent with the intent of the Act since no owner can be tied to extrapolated property.

SIFMA:

The Model Act should address extrapolation models, and stress that auditors and states should not use extrapolation as a form of penalty.

Issue #66:

Recovery of Litigation Expenses: Prevailing Party

This issue is related to issues 50, 67, 68

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

ABA:

Recommends including the bracketed language regarding attorney's fees in section 16 of the UUPA, rather than making it optional because a) the language is not mandatory and still gives the court discretion and b) a similar provision in section 22 is not optional. ABA also recommends allowing the claimant to seek reimbursement costs. The provision allowing the court to award attorney's fees should apply to fees and costs incurred by the holder in connection with any appeals process. However the ABA recommends that section 22 be amended so that the state may seek attorney's fees only if it is the prevailing party and the holder acted with fraud or willful misconduct. This change is to recognize the reality that the state has significantly greater leverage in these actions.

NAUPA disagrees with the ABA position, and questions the proposition that states have "significantly greater leverage" in enforcement actions.

Issue #67:

Cap on Fees

This issue is related to Issues 50, 66, 68

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 is "Prevailing Party" Defined

This issue is related to Issues 50, 66, 67

How does one need to "prevail" in order to be the "prevailing party?"

Issue #69:

Conditions Precedent to Administrator's Enforcement

This issue is related to Issue 70

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?

See infra issue 70.

Issue #70:

Limit on Time to File

This issue is related to Issue 69

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?

NAUPA:

Recommends retaining in full force and effect prohibitions on conditions precedents in section 2(e)

Issue #71:

Allow Holder/Putative Holder to Bring Action Against Administrator

This issue is related to Issue 69

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?

See discussion re: Issues #51 and #52, *infra.*

Issue #72:

Savings Bonds (Authorization for State Action Against Federal Government)

This issue is related to Issue 3. See Also, ABA Proposal re: Revisions to UUPA § 11

In light of the Third Circuit's decision in *Treasurer of New Jersey v. U.S. Dept. of Treasury*, 684 F.3d 382, 406 (3d Cir. 2012) discussed under issue 3, the ABA recommends that a new section (f) be added to Section 2 of the UUPA to provide that the UUPA does not apply to property held by or owing to the United States government.

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

NAUPA:

(a)*Notwithstanding any provision of this Act to the contrary, United States savings bonds that have fully matured and have ceased bearing interest and that are presumed abandoned pursuant to section 2(a)(12) of this Act shall escheat to the State and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the State of [ ].*

(b)*Within 180 days after a United States savings bond has been presumed abandoned, in the absence of a claim having been filed with the administrator for such savings bond, the administrator shall commence a civil action in the district court of [ ] County for a determination that such savings bond shall escheat to the State. The administrator may postpone the bringing of such action until sufficient savings bonds have accumulated in the administrator's custody to justify the expense of such proceedings.*

(c) If no person shall file a claim or appear at the hearing to substantiate a claim or where the court shall determine that a claimant is not entitled to the property claimed by such claimant, then the court, if satisfied by evidence that the administrator has substantially complied with the laws of the state, shall enter a judgment that the subject United States savings bonds have escheated to the state.

(d)*The administrator shall redeem from the Bureau of the Fiscal Service of the United States Treasury such United States savings bonds escheated to the State and the proceeds from such redemption of United States savings bonds shall be deposited in accordance with Section 13 of this Act.*

(e)*Not withstanding any provision of this Act to the Contrary, any*

person making a claim for the United States savings bonds escheated to the State or for the proceeds from such bonds, may file a claim with the administrator. Upon providing sufficient proof of the validity of such person's claim, the administrator may pay such claim.

(f) *upon receiving notice from a governmental entity that an apparent owner owes a past due legally enforceable debt, the administrator shall, following confirmation of the apparent owner's entitlement to the property, offset the property, in whole or in part, to satisfy the debt or delinquent child support. For the purposes of this subsection, "past due-legally enforceable debt" shall include:*

(1)*Current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance;*

(2)*court fines, fees, costs, surcharges, or restitution; or*

(3)*state taxes, penalties or interest.*

NAUPA also recommends expanding legal enforcement to expressly recognize the State's right to bring an action against the federal government with respect to savings bonds; file an action in federal court; and to be named a "necessary party" in all legal actions involving unclaimed property.

NAUPA recommends amending Section 22 of the 1995 Act as follows:

Change section title from "Enforcement" to "Legal Proceedings and Enforcement."

(a)*The administrator may maintain an action to enforce this Act. In a situation where no district court in this State can obtain jurisdiction over the person involved, the administrator may commence such an action in a federal court or state court of another state having jurisdiction over that person. The court may award reasonable attorney's fees to the prevailing party.*

(b)*The administrator, for and on behalf of this State, may commence an action against the United States government or any agency or subdivision thereof for an adjudication that the proceeds of United States savings bonds subject to the provisions of this Act that are payable to the State.*

(c)*The administrator shall be deemed an indispensable party to any judicial or administrative proceedings concerning the disposition*

and handling of unclaimed property that is or may be payable or distributable into the protective custody of the administrator. The administrator shall have a right to intervene and participate in any judicial or administrative proceeding when to do so will be in the best interest of this state, the apparent owner or the unclaimed property or to conserve and safeguard the unclaimed property against dissipation, undue diminishment or adverse discriminatory treatment.

This concludes Section 13

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 #73:

Relax Formalities of Interstate Cooperatives

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?

NAUPA

Proposes Amending Section 14 as follows:

(a)*If property is received by the administrator and the administrator is aware that the property is subject to the superior claim of another State, the administrator shall either:*

(1)*return the property to the holder so that it may be paid and delivered to the correct State; or*

(2)*report and deliver the property to the correct State. No formal agreement shall be required for the administrator to undertake such transfer to the correct State.*

(b)*Property under the custody of the administrator under this Act is subject to recovery by another State if:*

[Renumber existing subsections (b) and (c) as (c) and (d), respectively.]

NAUPA also suggests looking at the "Colorado model" which requires that the unclaimed program "proactively" match claims over $600 against various databases identifying delinquent taxpayers, child support payors, etc.

Issue #74:
Amount of Interest – Unreported Property

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?

NAUPA proposes to expand penalties to address active efforts by holders to circumvent or ignore the Act in order to provide holders with an additional incentive not to avoid compliance through strengthening sanctions, and suggests the following addition Section 24:

> (a) A holder who enters into a contract or arrangement to avoid its responsibilities under the Act, 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.

> NAUPA further proposes a new section limiting the assignment of holder liability to a third party in order to prevent holders circumventing their reporting obligations through contractual assignment of the liability to third parties outside of the creditor- debtor relationship giving rise to the property. It should avoid confusion as to the disposition of unclaimed property in corporate divestitures through requiring that the holder remains liable for all of its unclaimed property obligations, except where the holder undergoes merger or acquisition.

The ABA recommends that the interest rate in Section 24(a) be tied to the Treasury bill rate rather than using a fixed rate. This change should reduce or eliminate the likelihood of excessive interest fines. Also recommends that states be similarly obligated to pay interest to holders if the holder is successful in reclaiming the property that was improperly escheated to the state.

Issue #75:
Penalties for Intentional Noncompliance

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?

The ABA recommends section 24(B) be modified to clarify that penalties are imposed on a holder on an annual basis rather than on a property by property or owner by owner basis. Also recommends that the state be required to apply either a fixed penalty or a penalty based on estimation, but not both.

ABA also recommends that 24(e) be modified to provide that the state "shall" rather than may waive any penalties and interest if the holder acted in good faith. A holder shall be deemed to have acted in good faith if either (a) the holder had a reasonable legal and or factual basis for its position that the property is not subject to escheat or b) the holder relied upon an opinion of legal counsel that the property is not subject to escheat.

NAUPA disagrees with the ABA's approach to calculating penalties, and suggestes that in view of the ABA's approach for a "floating interest" rate, that mandated waiver of interest would be inconsistent with the concept that interest is compensatory, not punitive.

Issue #76: New Section? Confidentiality of Business Records

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?

Investment Company Institute

The ICI recommends that states that receive non-public personal information on any owner of property be required to maintain the confidentiality and security of such information to the same extent as the holder is required by law. The Act should also prohibit any auditor retained by the state from sharing any information obtained from a holder in connection with an audit with any person other than the state on whose behalf the auditor conducted the audit. To the extent an auditor is the subject of a breach that might impact or compromise nonpublic info obtained from a holder the auditor should have a legal duty to notify the holder of such breach. ICI supports the rights of states to share information among themselves as necessary to enable states to reunite owners with their property.

NAUPA Proposal

(new section) "Confidentiality of Information"

(a) *Except as otherwise provided by this section the records of the administrator, the reports of holders, and the information derived by an examination or audit of the records of a person or otherwise obtained by or communicated to the administrator shall be deemed confidential and exempt from public inspection. Any record or information that is confidential under the law of this State or of the United States when in the possession of a person shall continue to be confidential when revealed or delivered to the administrator. Any record or information that is confidential under any law of another state shall continue to be confidential when revealed or delivered by that other State to the administrator.*

(b) *Confidential information concerning any aspect of property presumed abandoned and reported and delivered to the State shall only be disclosed to:*

(1)*an apparent owner, or his or her personal representative, next of kin, attorney at law, or such person entitled to inherit from an apparent owner who is deceased;*

(2)*another department or agency of the State or federal government;*

(3)*the administrator of another state, if that other state accords substantially reciprocal privileges to the administrator.*

(c) the administrator shall include on the Internet database provided for in Section 9(b)(3) of this Act the names of all apparent owners of property presumed abandoned and in custody of the State. The administrator may include additional information concerning an apparent owner's property on the Internet database that, in the discretion of the administrator, will assist in facilitating the identification and claiming of property.

This concludes Section 14.

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.

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.]

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].

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.

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.

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.

NAUPA proposes to update and consolidate provisions related to limitations on audit periods and examination of records with the objective of *centralizing all provisions relating to auditing in a single section; provide clarity as to records to be retained by a holder and revising the period for which a state may conduct an audit of a holder.*

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.

NAUPA proposes to provide greater specificity for records to be retained by a holder following the filing of a report of unclaimed property to *create an affirmative duty on the part of holders to document and retain all records relied on in preparing an unclaimed property filing, so as to facilitate a subsequent audit of the filing and correlate the record retention period with the scope of examinations.*

NAUPA proposes legislation: Except as otherwise provided in subsection (b) or (c), a holder required to file a report under section 7 shall maintain for a period of 10 years after filing the report, all underlying source documents, work papers, records, and other information utilized in determining (i) whether property was unclaimed and (ii) the amount of property reportable.

(b)[unchanged]

(c)The administrator may provide by rule for a shorter record retention period.

SECTION 22. 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.

NAUPA proposes to expand legal enforcement to expressly recognize the State's right to bring an action against the federal government with respect to savings bonds; file an action in federal court; and to be named a "necessary party" in all legal actions involving unclaimed property in order to ensure that the State is duly authorized to enforce all claims to abandoned property, and to ensure that the State receives adequate notice of litigation where the disposition of unclaimed property is at issue.

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.

NAUPA recommends relaxing the formality of requirements for interstate cooperation to *eliminate requirements for formal agreements and rulemaking in interstate cooperation scenarios.*

(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].

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.

NAUPA proposes to add a new subsection (f) as follows:

(f) A holder who fails to report, pay or deliver property payable under a life insurance policy or annuity contract upon death within the time prescribed by Section 2.(a)(8)(i) of this [Act] shall not be required to pay interest under subsection (a) above or be subject to penalties under subsection (b) above if the failure to report, pay or deliver the property was due to lack of knowledge of the death giving rise to the payment obligation. And amend existing subsection (a) to begin "Except as otherwise provided in subsection (f)," and amend subsection (b) to begin "Except as otherwise provided in subsections (c) and (f)."

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.

NAUPA addressed the solicitation or execution or of an agreement to locate property during periods when such an agreement would be void and unenforceable, and proposes that this be treated as an unfair and deceptive trade practice. NAUPA would propose language that would *render agreements that are inconsistent with the unclaimed property not merely unenforceable, but to also provide for sanctions against holders and locators who seek to enter into such contracts with owners.*

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.

Sections 27 et. seq. have purposely been omitted from this document. Those sections are generally known to be standard Uniform Law Commission sections that are not substantively related to this committee's work.