Unclaimed Property
PROFESSIONALS ORGANIZATION

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June 18, 2014

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Sent via email: charlie.trost@wallerlaw.com

Re: Project to Revise the Uniform Unclaimed Property Act

Dear Mr. Trost:

The Unclaimed Property Professionals Organization ("UPPO") is a nonprofit organization dedicated to advancing industry best practices for unclaimed property holders and practitioners across a variety of industries. UPPO is an industry leader in unclaimed property professional education and is dedicated to being a leader in unclaimed property compliance and reform. As a representative of a diverse array of companies impacted by unclaimed property, we respectfully submit these recommendations for your initial draft of the proposed revised Uniform Unclaimed Property Act ("UUPA").

Our intent in submitting these comments is to assist in modernizing certain UUPA provisions, expand certain UUPA provisions to address new property types, business models and consumer practices, ensure due process and other constitutional protections to holders and owners, and to advocate for improvements in the UUPA that enhance fairness and balance. To that end, UPPO seeks to clarify ambiguities in the current law concerning holders' compliance obligations, as well as to afford a process by which to preserve holders' constitutional rights in the context of state action. UPPO is concerned that the lack of guidance can and does incentivize states to take aggressive positions with respect to unclaimed property and to view it as a revenue source upon which they have come to rely, thus subverting the consumer-protection public policy that the laws, [as derived from English common law] and as originally administered, were intended to embrace.

Indeed, states often recite this consumer protection principle, stating that they serve "as the custodian, conservator, and trustee of the unclaimed property for the benefit of the original or apparent owner." [1] In reality, however, a number of states rely upon enforcement of their unclaimed property laws to generate substantial and ever-increasing revenues for general

[1] *See e.g.,* New Jersey Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2013, pg. 257.

operational purposes, as contrasted with restricted trust funds with respect to which the states bear a fiduciary duty to their owner-residents.

And the more the states collect from holders, the more they need to collect to avoid "budget shortfalls." For instance, New Jersey transfers 75% of unclaimed property to the General State Fund for unrestricted use.[2] In Delaware,[3] California,[4] and Texas[5] that amount rises to 100%. To the extent the use of unclaimed property as "revenue" is incidental to the goal of reuniting property with owners, it may not be problematic. But some states have come to rely on a constant stream of "revenue" as a result of unclaimed property "enforcement."[6]

The "revenue" amounts are significant. During the fiscal year ended 2013, Delaware took in over $550 million of abandoned property. It returned under $20 million to owners, or less than 3.5%.[7] The remaining 96.5% of the unclaimed property, or over $530 million, constitutes Delaware's third largest source of revenue.[8] Delaware's top private auditor, Kelmar Associates LLC, was paid approximately 10%, or $55 million.[9]

Other states also reap significant benefits. During the fiscal year ending in 2013, Texas received $875 million, approved $177 million in claim payments, and transferred the remaining $697 million to its general fund. It only held $354 million – less than one year's receipts – in trust.[10] New York collected $337 million while repaying $203 million in claims; it variously claims that its abandoned property trust holds $1.7 billion,[11] or that it has $12 billion in "lost money."[12] Illinois took in $187 million in its most recent fiscal year, immediately spent $159 million on general government expenditures, and reported only $112,000 as "transfers-out," presumably payouts

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[2] *Id.*

[3] 2013 Delaware Comprehensive Annual Financial Report, pg. 14

[4] State of California Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2013, pg. 80.

[5] Texas Annual Financial Report for the Year Ended August 31, 2013, pg. 59.

[6] *See* Johnathan Starkey, "Abandoned property: Millions for Markell-linked firms", The News Journal (May 20, 2014) available at: http://www.delawareonline.com/story/news/local/2014/05/17/sunday-preview-markell-supporters-reap-millions-state-work/9218179/.

[7] However, Delaware reported it returned $83 million to owners in the next year. See Nichole Dobo, "State returns $83 million in unclaimed property, report says," *The News Journal*, May 5, 2014, http://www.delawareonline.com/story/firststatepolitics/2014/05/19/delaware-taxes/9279693.

[8] Jonathan Starkey, "Delaware Taxes: Top 5 Sources of State Revenue," *The News Journal*, May 5, 2014, http://www.delawareonline.com/story/firststatepolitics/2014/05/19/delaware-taxes/9279693.

[9] http://checkbook.delaware.gov.

[10] *See* Texas, *supra*.

[11] State of New York Comprehensive Annual Financial Report for the Fiscal Year ended March 31, 2013, Pg. 161.

[12] New York State Office of the Comptroller, Office of Unclaimed Funds, http://www.osc.state.ny.us/ouf/index.htm.

from its unclaimed property trust fund. Given Illinois' high level of spending, the fund only held $140 million in unspent revenue.[13]

Perhaps the only state not currently amassing wealth through unclaimed property is California. During the same period, it returned more unclaimed property than it took in, returning $238 million for $173 million in receipts.[14] By running a negative balance for the year, it also reduced its unclaimed property fund to $853 million.[15] This diligence might be motivated in part by a long-running lawsuit alleging that California was doing so little to find the owner that its conduct violated the owners' constitutional rights. In 2007, the lawsuit, then styled *Taylor v. Westly*,[16] temporarily shut down the state's unclaimed property office until the state made legal reforms.[17] Today, those state duties to owners are still being litigated in federal court as *Taylor v. Chiang*.[18]

Thus, though a number of state administrators continue to state that consumers and owners are at the heart of unclaimed property laws, it is apparent that these laws are being applied to generate funds that will never be—indeed, in many cases can never be—returned to any private owner. Yet, because of its purportedly custodial purpose, the states' unclaimed property function has not been subjected to the same constitutional safeguards as other revenue-raising government functions, most notably their taxation powers.[19] To the contrary, many states have outsourced "enforcement" of their unclaimed property laws to private consulting firms, paid on a contingency-fee basis, to raise audit "income" for the states. The U.S. Chamber of Legal Reform has raised serious concerns about the financial incentive for such private companies to utilize aggressive tactics to inflate audit findings. In particular, the arrangement can lead to aggressive and novel interpretations of the law, intrusive and burdensome examinations (which often extend over several or more years and require the audit target to hire additional personnel), and liberal (arguably unjustifiable) impositions of interest and penalties.[20]

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[13] State of Illinois Comprehensive Annual Financial Report for Fiscal Year ended June 30, 2013, pg. 183.

[14] California, *supra*, pg. 241.

[15] *Id.* pg. 31.

[16] 488 F.3d 1197 (9th Cir. 2007).

[17] Barganier and Associates, "California Under Fire for Unclaimed Property Notification Practices," Jun. 4. 2012, http://www.barganier.net/news/california-under-fire-unclaimed-property-notification-practices.

[18] 01-CV-02407 (E.D. California), no ruling yet. The issues include whether the California Controller needs to query multiple databases to find owners' addresses; staff or fund his operation to some minimum level; and the legality of the Comptroller's use of a contractor to design an automated notice system.

[19] *See* Chris Hopkins and Matthew Hedstrom, "Unclaimed Property Laws: Custodial Safekeeping or Disguised Tax?" Journal of Multistate Taxation and Incentives, Jan. 2012.

[20] *See* Maeve O'Conner, "Unclaimed Property – Best Practices for State Administrators and the Use of Private Audit Firms," U.S. Chamber Institute for Legal Reform, Apr. 15, 2014, http://www.instituteforlegalreform.com/resource/unclaimed-property---best-practices-for-state-administrators-and-the-use-of-private-audit-firms.

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It is within this challenging framework that UPPO's membership – holders, consulting firms, and law firms – must endeavor to attain compliance on a multistate basis and then to defend their compliance programs under examination. While UPPO routinely interacts with state representative organizations such as NAUPA in an attempt to define common ground on technical and procedural aspects of state unclaimed property law, its members report that in many instances (e.g., escalation of audit-related legal questions; requests for rulings or other guidance in areas where published guidance does not exist) the state administrators either delegate policy-making and legal interpretations to their contract audit firms or decline to provide the requested guidance. In the absence of the ability to secure such guidance directly from the states that are responsible for administering their laws, UPPO feels it is critically important that the Uniform Law Commission ("ULC") assume the mantle of authority in this regard and at this time.

Consequently, we urge the ULC to more clearly define the scope and reach of unclaimed property laws. The clarity we advocate is based on settled principles of law, which are discussed in detail below. UPPO's proposed UUPA provisions and amendatory language presented herein would benefit holders as well as the states and their residents by effectuating increased compliance and economic growth. Our comments are presented with these goals in mind.

We thank you for giving us the opportunity to share our recommendations on this very important project with the Drafting Committee of the Uniform Law Commission ("ULC"). Please do not hesitate to contact me with any questions, which I will pass along to the UPPO Board.

Sincerely,

Toni J. Nuernberg

Toni J. Nuernberg, CAE, CBA, CGA
Executive Director
Unclaimed Property Professionals Organization

cc: Katie Robinson, Staff Liason, Uniform Law Commission (with enclosure)

Table of Contents

I. DEFINITIONS

UPPO recommends various changes to the Definitions section of the new UUPA throughout this document. In particular, we recommend the following be added or changed in the Definitions section.

A. Holder

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*[21] (as opposed to a separate entity who may be in possession of the funds).

Both of these clarifications would facilitate compliance and foster economic development. By removing the uncertainty as to who is responsible for reporting, companies could more easily undertake creative multi-party business arrangements. Moreover, the changes would be consistent with the U.S. Supreme Court's direction that unclaimed property is born of a creditor/debtor relationship. Thus, it is wholly intertwined with a complex body of law identifying the underlying obligations and rights of the parties to define and transfer such obligations.

B. Property

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":

Proposed Language:[22]

<u>(14) The term "property" does not include:</u>

<u>(i) ERISA plans;</u> [see discussion in Section 2.c.iv.A below]

<u>(ii) 529 plans;</u> [see discussion in Section 2.c.iv.E below]

<u>(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;</u> [see discussion in Section 2.c.iv.I below]

<u>(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;</u> [see discussion in Section 2.c.iv.I below]

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[21] 507 U.S. 490 (1993).

[22] Throughout this document, additions to text are underlined and deletions are crossed out.

(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 Section 2.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.

C. Non-Transferable Securities

UPPO proposes changes to expressly exempt stock which cannot be sold or transferred, including restricted securities. This is because there is no benefit provided either to the owner or to the state as a result of transferring custody of the securities to the state. To the contrary, requiring escheat of such securities would burden states, which are not equipped to track and maintain information concerning ownership of such stock.

Amend the definition of "Property" to add the following clarifications:

Proposed Language:

"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.

D. Reasonable Estimate

UPPO proposes that states define the scope and availability of estimations in order to protect against distortions of the unclaimed property law. A more in depth discussion of audit procedures is included in Section 3(a) below. In particular, UPPO recommends that estimations be tied to record retention and that reasonable estimate be defined. In particular, UPPO recommends the following changes to the definitions section:

> "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.

II. FOREIGN PROPERTY

UPPO respectfully submits that neither the holder's state of domicile, nor any other U.S. state, should be entitled to escheat foreign-owned property and thus it should be excluded from the definition of "unclaimed property" in the revised Act. Our reasoning is based on the Supremacy Clause, the Due Process Clause, and the Foreign Commerce Clause of the U.S. Constitution.

A. Grounds for Exclusion

First, the U.S. Supreme Court, which promulgated the federal priority rules governing which states have rights to escheat unclaimed property, has never given any indication that such rules were meant to extend to owners residing in foreign countries. Indeed, the Supreme Court has clearly indicated that it intended the rules to be exclusive of all other possible rules. The Court has repeatedly rejected attempts by states to "extend" the two rules articulated by the Court in *Texas v. New Jersey*.[23] Nevertheless, the Official Commentary to both the 1981 and 1995 UUPA state that the ULC considered allowing the state of domicile to claim custody of foreign owned property to be "…a rational extension of (the Court's) ruling."

This extension of states' rights to demand custody of intangible property beyond the rules established by the U. S. Supreme Court is severely problematic. First, a State's attempt to extend

[23] *See Pennsylvania v. New York*, 407 U.S. 206 (1972); *Delaware v. New York*, 507 U.S. 490 (1993).

its unclaimed property laws to foreign-owned property would violate the Supremacy Clause of the U. S. Constitution because it would conflict with federal common law.[24]

Second, there is insufficient nexus or connection between foreign-owned property and the holder's state of domicile to justify, either on an equitable basis or as a constitutional matter, the state of domicile asserting a right to custody of such property. By asserting jurisdiction over the property owned by persons with whom the State lacks even minimum contacts and connections, a State's attempt to extend its unclaimed property laws to foreign-owned property would violate the Due Process Clause of the U. S. Constitution.[25]

Third, a critical underlying purpose of unclaimed property laws is to help reunite missing owners with their property. A foreign owner is not likely to be reunited with his or her property via delivery of custody of such property to any state, particularly to the state of incorporation of the holder. It is highly unlikely that the state of incorporation of the holder will even be known to any owner, and particularly a foreign owner who will very likely have no connection whatsoever with that State.

Fourth, application of state unclaimed property laws to foreign-owned property is likely to subject holders to multiple conflicting claims for the same property in violation of the United States Constitution. In the past several decades, a number of foreign countries have implemented unclaimed property laws,[26] many others are currently considering doing so, and it is likely that such trend will continue for the foreseeable future. The Supreme Court long ago held that the Due Process clause protects a holder against multiple escheat claims for the same property. In *Western Union Telegraph and Telephone Company v. Pennsylvania*,[27] the Supreme Court rejected Pennsylvania's claim to property as violating the Due Process rights of the holder under circumstances where the state asserting the claim to escheat was unable to provide protection to the holder against conflicting claims by other states. As neither the courts of any state asserting a claim for foreign-owned property, nor even the United States Supreme Court, could protect a holder against a subsequent claim that might be asserted for the property by the country of residence of the owner, or the country of citizenship of the owner, or some other foreign jurisdiction that might have a basis to assert such a claim, Due Process precludes *any* U. S. State, including the holder's state of domicile, from claiming such property.

Finally, under the most recent Supreme Court precedent involving state taxation of foreign-owned property, 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." [28]

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[24] U.S. Const. Art. VI, cl. 2; *See New Jersey Retail Merchants v. Sidamon-Eristoff*, 669 F.3d 374, 392 (3d Cir. 2012).

[25] *See e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977) (stock ownership in Delaware-incorporated entity insufficient for jurisdiction over stockholder).

[26] For example, Australia, Alberta, British Columbia, France, Germany, Kenya, New Zealand, the United Kingdom, and Quebec have all adopted unclaimed property laws.

[27] *See Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961).

[28] U. S. Const. Art. I, Sec. 8 Cl. 3.

In *Japan Line, Ltd. v. County of Los Angeles,*[29] 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, supra*, is likewise prohibited by the Constitution.

Moreover, the Court in *Japan Lines* noted that the imposition by a State of any tax on a foreign-owned instrumentality of commerce would "impair federal uniformity in an area where federal uniformity is essential." In *Michelin Tire Corp. v. Wages,*[30] the Court noted the overriding concern of the framers of the Constitution that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." In *Japan Lines*, the Court said:

> [A] state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned [property] present in their jurisdictions. Such retaliation, of necessity, would be directed at American [property] in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of foreign commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce.[31]

For these reasons – because the tax claim asserted by Los Angeles subjected foreign-owned property to a risk of multiple taxation not borne by property owned by a U.S. person, and

[29] 441 U.S. 444 (1979).
[30] 423 U.S. 276 (1976).
[31] 441 U.S. 450 [Citations omitted]. *Accord, America Insurance Association, et al., v. Garamendi*, 539 U.S. 396 (2003).

because the tax as applied to foreign-owned property "prevents the Federal Government from 'speaking with one voice' in international trade . . . [w]e hold the tax, as applied [to foreign-owned property], unconstitutional under the Commerce Clause."[32]

Likewise, because foreign nations clearly have the power and authority to claim unclaimed or abandoned property owed to their citizens or residents – which power and authority foreign nations are increasingly now exercising – allowing any U.S. State to demand custody of foreign-owned property held by a U.S. holder would (1) subject that holder to a risk of multiple claims for the same property and (2) risk retaliatory claims by foreign countries to custody of property owned by their citizens to U.S. owners, thereby preventing the U.S. from speaking with one voice in commercial dealings with such foreign countries.

Accordingly, UPPO believes that neither the state of domicile, nor any other U.S. state, can constitutionally demand custody of foreign-owned property. We urge the ULC to make a clear statement to that effect in the jurisdictional rules of the revised Uniform Unclaimed Property Act.

While the escheat of foreign-owned property cannot be compelled, UPPO would like to reserve the right for holders to voluntary report and escheat foreign-owned property that would otherwise not be reportable pursuant to these amendments. Such holders would enjoy the same liability protections afforded to other holders under this Act from potential legal actions from owners.

Proposed Language

1. *Section 1 of the Uniform Unclaimed Property Act of 1995 is amended to include the following language:*

<u>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.</u>

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) <u>at the option of the holder, where the holder voluntarily remits property for which</u> 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

[32] 441 U.S. at 453-454.

State or is a government or governmental subdivision, agency, or instrumentality of 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.

III. PRESUMPTIONS OF ABANDONMENT

To determine the current law regarding presumption of abandonment, research was conducted in fifty-five jurisdictions for the following property types:

- General property;
- Traveler's Checks;
- Money Order or Similar Instrument, Other Than Third-Party Bank Check;
- Cashier's Check, Certified Check or Other Similar Instrument;
- Demand, Savings, Matured Time Deposit, Including Automatically Renewable, Other Intangible Interest;
- Life or Endowment Insurance Policies, Annuity Contracts – Matured or Terminated;
- Demutualization or Reorganization;
- Utility Deposit;
- Court or Administrative Agency Ordered Refund;
- Stock and Other Equity Interests;
- Unmatured or Unredeemed Debt Other than Bearer Bond or Original Issue Discount Bond;
- Matured or Unredeemed Debt;
- Property Held in Course of Dissolution;
- Fiduciary Property;
- Individual Retirement Account, Self-employed Individuals Plan (e.g., KEOGH), or Similar Account or Plan;
- Gift Certificate or Credit Memo;
- Money or Credit Owed to a Retail Customer;

- Wage; and
- Safe Deposit Box or Other Safekeeping Repository,

as well as what is deemed contact (indication of interest) for each property type to restart the dormancy period if addressed in the state law. Generally, property types not included in the list above are not specifically addressed by the states' laws.

Not surprisingly, generally the presumption of abandonment and contact rule for each state is based on the version of the UUPA enacted by the state. See the below chart outlining the presumption of abandonment and contact rules pursuant to the 1981 UUPA (1981 Act) and the 1995 UUPA (1995 Act).

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.

1. *Uniform Acts*

Both the 1981 Act and the 1995 Act contain language pertaining to when specific property and property generally will be presumed abandoned. Additionally, in certain circumstances, contact that restarts the dormancy period is also defined.

Section 2(a) of the 1981 Act provides that "all intangible property, including any income or increment derived therefrom, … held, issued, or owing in the **ordinary course** of a holder's business and has remained unclaimed … **after it became payable or distributable** is presumed abandoned," unless provided otherwise.

Section 2 of the 1995 Act provides that all property other than the specific property addressed, is presumed abandoned "after the owner's **right to demand** the property or after the **obligation to pay or distribute** the property arises, whichever first occurs." §2(a)(15).

Outlined below is the presumption of abandonment for specific property types under the 1981 Act and the 1995 Act, as well as the activity deemed to be contact:

Property	1981 Act Presumption	Contact	1995 Act Presumption
Traveler's Checks	15 years **after issuance**	Communicated in writing or otherwise indicated an interest	15 years **after issuance**
Money Order	7 years **after issuance**	Same as above	7 years **after issuance**
Cashier's Checks, Certified Check and Similar Instruments	5 years after it was **payable or issuance**	Same as above	5 years after **payable or issuance** if payable on demand
Demand, Savings, or Time Deposit, Including Automatically Renewable	5 years after (1) the last **date of indication of interest**; or (2) **communication regarding other property**	Changed the amount, communicated in writing, otherwise indicated an interest, or had another relationship	5 years after **maturity or date of last indication of interest**
Life or Endowment Insurance Policy or an Annuity that has Matured or Terminated	5 years after **becoming due and payable** or if not matured by actual proof of death, **2 years after the insured attained or would have attained the limiting age**	Assignment, readjustment, paid premiums, subjected policy to a loan, corresponded in writing or otherwise indicated an interest	3 years after **the obligation to pay** or if **payable upon the proof of death**, after the insured attained or would have attained the limiting age
Demutualization or Reorganization	Not addressed		Not addressed
Utility Deposit or Refund	1 year after **termination of service**	None provided	1 year after **becoming payable**
Proceeds of Class Action	1 year after **becoming payable**	None provided	1 year after **distribution date**
Stock or Other Equity Interest	7 years after a **dividend, distribution or other sum remains unclaimed**	Communication in writing or otherwise and 7 or more dividends, distributions or other sums paid are not cashed	5 years after (1) **the most recent unclaimed dividend**, stock split or other distribution; or (2) date of **second mailing** of a statement or other notification or communication returned as undeliverable or after **holder discontinues mailings**

Property	1981 Act Presumption	Contact	1995 Act Presumption
Debt Other Than Bearer Bond or Original Issue Discount Bond	Not specifically addressed		5 years after the **most recent unclaimed interest payment**
Course of Dissolution	1 year after the **date specified for final distribution**	None provided	1 year after **becoming distributable**
Fiduciary Property	5 years after **payable or distributable**	Increased or decreased the principal, accepted payment, communicated or otherwise indicated an interest	Not addressed
Individual Retirement Account, Defined Benefit Plan or Other Qualified Tax Deferral Plan	5 years after the **distribution becomes mandatory**	Increased or decreased the principal, accepted payment of principal or income, communicated or otherwise indicated an interest evidenced by a memorandum or other record	3 years after (1) **date of distribution**; (2) date of **required distribution as stated in plan** or trust agreement; or (3) **date specified in the Internal Revenue Code**.
Gift Certificate (1981 Act includes Credit Memo)	5 years after **becoming payable or distributable**	None provided	3 years after **December 31st in the year sold**
Money or Credits Owed to a Retail Customer	Not specifically addressed		3 years after the **obligation accrued**
Wages or Other Compensation for Personal Services	1 year after **becoming payable**	None provided	1 year after **becoming payable**
Safe Deposit Box Other Safekeeping	5 years **after the lease or rental period expires**	None provided	Not specifically addressed

“None provided” means only passage of time is required. A comment to the 1981 Act provides that there is no possible advantage to the owner for leaving property unclaimed, so failure to claim is strong evidence the property has been abandoned. This comment is flawed because many property types are acquired by the owner with the intent to hold as long term investments and no activity is conducted or expected for several years.

For the 1995 Act, contact for all property types is addressed in 2 sections of the act. Specifically, Section 2(c) provides that property is presumed abandoned if during the dormancy period:

"the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account … 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."

An indication of interest in the property by the owner includes:

1. Presentment of a check or other instrument for payment of a dividend or other distribution and for a distribution made by electronic or similar means, evidence that the distribution was received;
2. Owner directed activity in the account, including direction to increase, decrease or change the amount or type of property held in the account;
3. Making a deposit or withdrawal from the account; and
4. Payment of a premium but not the automatic application of a premium loan or other non-forfeiture provision if the insured died or the beneficiary or insured has otherwise become entitled to the proceeds before the depletion of the cash surrender value. See §2(d).

2. *Recommended Revisions/Modifications for Contact Generally*

In the 1995 Act,[33] all activities deemed contact are consolidated in two sections – Section 2(c) and (d), not by property type as was done in the 1981 Act. The consolidation and the limited types of activities that are deemed contact in the 1995 Act lead to confusion and unnecessary compliance challenges. For example, it would appear that an investment purchased by an owner with the intent to hold as a long term investment would be deemed dormant after 5 years, pursuant to the 1995 Act, because the owner did not (even though it is not expected or necessary) communicate in writing, present a check, conduct any account activity or make a deposit or withdrawal. This could result in the inappropriate escheatment of the owner's property which may result in loss of value, if the investment is converted to cash.

As such, to ease the compliance burdens and to minimize the potential for inappropriate escheatment, we recommend that the 1995 Act be revised to include activities that will prevent

[33] The 1995 Act has been enacted by Alabama, Arizona, Arkansas, Hawaii, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nevada, New Mexico, North Carolina, Virgin Islands, Vermont, West Virginia and has been introduced in Minnesota. The 1981 Act has been adopted in Alaska, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin and Wyoming. However, some of these states have enacted the Acts with modifications. Additionally, other states not listed above have either enacted the 1954 Uniform Unclaimed Property Act or have not enacted any version of the Acts which further adds to the complexity of compliance. Therefore, a quest for uniformity is desired and necessary to reduce the compliance burdens and costs for holders and protect the rights of owners. The states would also benefit from an increase in compliance.

triggering the presumption of abandonment for specific property types, as well as provide a broader definition of contact/indication of interest. The property types for which we recommend including specific activities which will prevent the premature triggering of the presumption of abandonment are discussed below.

With regards to the definition of contact/indication of interest generally, we recommend including the following examples as activities, if conducted by the owner or an authorized representative, which will prevent the triggering of the presumption of abandonment, as long as contemporaneous documentation is maintained:

- Non-return of mail, including federal forms;
- All communications, irrespective of the mode, including written contact (e.g., USPS mail, facsimile, text, email, etc.); phone contact (e.g., interactive verification response (IVR)), electronic communications, and in-person contact (e.g., walk-in to branch location);
- Account access with verification, including internet access;
- Cashing a check;
- ACH and Fedwire transactions not returned;
- Account changes including, purchases, redemptions, transfers, exchanges, consolidation and maintenance;
- Opening a new account;
- Linked account activity; and
- Proxy vote, whether by mail, IVR, internet or some other method.

3. *Recommended Revisions/Modifications for Specific Property Types*

Below, by property type, is a discussion of the concerns/issues related to the presumption of abandonment and contact sections of the 1995 Act that should be specifically addressed in the Revised UUPA (Revised Act) and our recommended approach for addressing these concerns/issues, including where applicable, draft statutory language.

For ease of reference, below is a chart for the specific property types addressed along with the suggested trigger for presumption of abandonment:

Property	Revised Act Presumption or Exemption[34]
ERISA Plans	Exempt
Traditional IRA	Mandatory distribution age plus coded as RPO
Roth IRA	Age 70.5 plus coded as RPO
Coverdell ESA	Mandatory distribution age plus 2 RPOs
529 College Savings Plans	Exempt; Alternatively, age 30 plus 2 RPOs
HSAs	Age 70.5 plus 2 RPOs
Securities	2 RPOs
UGMA and UTMA	Age of majority plus 2 RPOs
Business-to-Business or alternatively, Wholesale Credits, including Unidentified Remittances	Exempt
Stored Value Cards – Redeemable for Merchandise or Services only	Exempt
Uninvoiced Inventory	Exempt
Promotional Programs	Exempt
Unused Subscriptions	Exempt
Mineral Proceeds	Payable or distributable

(A) Plans Covered by ERISA

(1) Overview

Congress enacted the Employee Retirement Income Security Act of 1974, as amended (ERISA), to set minimum standards for retirement plans in private industry. The purpose of ERISA was to establish a uniform set of rules for specified types of employers and employee benefit plans. In enacting ERISA, Congress wanted to encourage employers to provide retirement benefits to employees, and to create and protect certain participant rights. At the same time, Congress wanted to avoid the burden, expense and inconsistent results which could occur for both employers and employees if different state laws applied from one jurisdiction to the next. ERISA thus prohibits the application of "any and all State laws insofar as they now or hereafter relate to any employee benefit plan…." The term commonly used for this broad prohibition against state involvement in covered employee benefit plans is "ERISA preemption." There are, however, very narrow exceptions to the ERISA preemption and they primarily relate to enforcement of insurance, banking and securities laws of general application. Thus, for example, a state may not be able to regulate a benefit plan directly, but within limits it can regulate an insurance company that insures plan benefits.

[34] Note that the abbreviation "RPO" stands for Returned Post Office, signifying correspondence that has been returned to sender as undeliverable.

ERISA covers the following types of plans (ERISA Plans):

a) Pension benefit plans;
b) 401(k), defined benefit, profit sharing, money purchase, credit balance, and pension equity plans and ESOPs (Employee Stock Ownership Plan);
c) Welfare benefit plans; and
d) Medical (including health Flexible Savings Accounts), dental, life, accidental death or dismemberment, and long-term disability insurance plans, severance payment plans, and VEBAs (Voluntary Employee Beneficiary Association).

(2) U.S. Department of Labor's Position on ERISA Preemption of State Unclaimed Property Laws

The U.S. Department of Labor (DOL), the agency responsible for enforcing ERISA, has taken the position that state abandoned property laws are preempted by ERISA. See for example: (1) *DOL Information Letter to Willis E. Sullivan* (Mar. 3, 1995) (ERISA will preempt application of 1995 Uniform Act to employee benefit plan payments or distributions); (2) *ERISA Opinion Letter 94-41A* (Dec. 7, 1994) (Texas abandoned property law was preempted by ERISA as it applied to an employer's profit sharing and retirement trust); (3) *ERISA Opinion Letter 79-30A* (May 14, 1979) (California abandoned property law that expressly referred to employee benefit trust distributions was preempted by ERISA); and (4) *ERISA Opinion Letter 78-32A* (Dec. 22, 1978) (Illinois abandoned property law was preempted as it applied to employee benefit plans).

The DOL provided the following rationales for ERISA preemption of state abandoned property laws:

1. State abandoned property laws interfere with the administration of claims, which would frustrate ERISA's goals of containing costs and providing uniform administration of claims;
2. Escheating unclaimed employee benefits in funded plans would leave fewer assets in the plan for payment of benefits to other plan participants; and
3. Escheating unclaimed employee benefits in funded plans would conflict with an ERISA fiduciary's duty to retain and use plan assets for the purposes described in ERISA.

(3) Case Law Addressing ERISA Preemption of State Abandoned Property Laws

The U.S. Supreme Court (the Court) has not addressed the issue of whether ERISA preempts state unclaimed property laws. The Court has addressed whether ERISA preempts other state laws; however, it is unclear from these decisions whether the court would or would not hold that ERISA preempts state unclaimed property laws.[35]

Lower federal courts have addressed the issue of whether ERISA preempts state unclaimed property laws and have held in most of these cases that ERISA does preempt state unclaimed property laws.[36] However, one federal court did rule that ERISA does not preempt state unclaimed property laws.[37]

Many state courts have not addressed the preemption issue as it relates to unclaimed property (The Michigan Court of Appeals did address the preemption issue in 1988 and held that ERISA did not preempt the state unclaimed property laws) and we are aware that many states are not pursuing ERISA plans on audit. Accordingly, we recommend that the new act include a clear exclusion of ERISA plans from the Uniform Unclaimed Property Act.

(4) Recommended Language

Section 2. PRESUMPTION OF ABANDONMENT and Section 1. DEFINITIONS

UPPO Recommendation:

The Revised Act should specifically exclude ERISA plans. With this revision, the Revised Act will be consistent with a majority of the federal courts' holding on this issue and most states' position on audit.

Additionally, the revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to exclude any reference to ERISA plans.

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[35] *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Mackey v. Lanier Collection Agency and Services, Inc*., 486 U.S. 825 (1988); and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995).

[36] *See Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999) (Illinois' claiming of the uncashed benefit checks improperly involved the state in a plan administration function, thereby impairing the uniform administration of claims of plan participants and is therefore preempted.); and *Manufacturers Life Insurance Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (N.D. Cal. 1999) (adopting the "plan asset" analysis of the Commonwealth Edison decision, the federal district court held that California was attempting to confiscate "plan assets," which interfered with the uniform administration of the ERISA retirement plan and deprived the plan of assets (i.e., the premium refund) that could be utilized to pay benefits to other plan participants) and is therefore preempted).

[37] *See Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989) (ERISA does not preempt Connecticut's claim to uncashed benefit checks).

- 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 ERISA Plans from the Act.

Proposed Language:

See changes to the definition of the word “property” to exclude ERISA plans, in Section 1.c above.

(B) Traditional Individual Retirement Accounts

(1) Overview

Section 2(14) of the 1995 Act provides that:

> property in an individual retirement account, defined benefit plan, or other account or plan that is qualified 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.

To simplify compliance, and consistent with similar property types (see discussion *infra*), we recommend that the new act provide that a Traditional Individual Retirement Account (Traditional IRA) is presumed abandoned when the mandatory distribution age is attained and the location of the owner is unknown.

(2) Recommended Language

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

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.

Required Action:

- 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 OF ABANDONMENT subsection (a)(14) to subsection (a)(14)(i).

Proposed Language:

> <u>(a)(14)(i) property in an individual retirement account that is qualified under the income tax laws of the United States, is presumed abandoned 3 years after the owner attained the mandatory distribution age and the location of the owner is unknown. The location of the owner is presumed to be unknown if the account is coded "RPO" because 2 pieces of correspondence are returned as undeliverable as noted on the owner's account.</u>
>
> <u>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.</u>

(C) Roth IRA

(1) Overview

A Roth IRA is an individual retirement plan that can be either an account or an annuity. To be a Roth IRA, the account or annuity must be designated as a Roth IRA when it is opened. Unlike a traditional IRA, contributions to a Roth IRA are not deductible. However, if certain requirements are satisfied, qualified distributions from the Roth IRA are tax-free. Contributions can be made to a Roth IRA even after age 70.5 and there are no mandatory distribution requirements while the owner is alive. That is, the minimum distribution rules that apply to traditional IRAs do not apply to Roth IRAs while the owner is alive. However, after the death of a Roth IRA owner, certain of the minimum distribution rules that apply to traditional IRAs also apply to Roth IRAs.

(2) Current Unclaimed Property Laws and the Roth IRA

Many states' unclaimed property laws address the escheatment of traditional IRAs. Generally, the statutory language provides that:

> Property in any individual retirement account, defined benefit plan or other account or plan that qualifies for tax deferral under the income tax laws of the United States is presumed abandoned three years after any of the following, whichever occurs first:
>
> (a) The date of the distribution or attempted distribution of the property;
> (b) The date of the required distribution as stated in the plan or trust agreement that governs the plan; or
> (c) If determinable by the holder, the date 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.

Because Roth IRAs do not have a mandatory distribution date, the above language is not applicable and therefore IRAs are not reportable pursuant to this provision. It could be argued that the "catch-all" provision found in each state's law captures Roth IRAs, but, once again, these provisions typically require escheatment after the property becomes payable.

Recognizing this issue, two states have enacted legislation specifically addressing Roth IRAs: California and New Jersey. California's provision became effective on January 1, 2012. Section 1518(a)(1) of California's unclaimed property law provides that all intangible personal property, including the income from such property, held in a fiduciary capacity for the benefit of another, is escheatable to the state if the owner of the property has not conducted certain activities related to the property within three years after the property "becomes payable or distributable." The law further provides that:

> (b) Funds in an individual retirement account or a retirement plan for self-employed individuals or similar account or plan established pursuant to the internal revenue laws of the United States or of this state are not payable or distributable within the meaning of subdivision (a) unless either of the following is true:
>
> (1) Under the terms of the account or plan, distribution of all or part of the funds would then be mandatory.
> (2) <u>For an account or plan not subject to mandatory distribution requirement under the internal revenue laws of the United States or the laws of this state, the owner has attained 70 ½ years of age.</u> §1518(b)

Similarly, New Jersey enacted legislation on July 1, 2002 specifically addressing Roth IRAs. Section 46:30B-38.1 provides:

> Property in individual retirement accounts for which <u>no distribution is required</u> under the income tax laws of the United States becomes abandoned three years after 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 to the apparent owner, whichever is earlier.

Additionally, four states have addressed the escheatment of Roth IRAs administratively (there is no statutory or regulatory guidance) on their websites in an attempt to provide guidance to holders. A review of these states' guidance related to Roth IRAs clearly indicates that there is no consensus regarding the escheatment of this property type. Outlined below is the guidance provided by the four states:

Washington State:

The first payout without penalty is when the account holder is 59.5. Report the property if there is no positive owner contact and the owner is at least 62.5.[38]

[38] Washington State Department of Revenue, Unclaimed Property Guide for the Insurance Industry, available at dor.wa.gov/docs/pubs/ucp/InsurInd.pdf (last visited May 1, 2014).

Texas:

Roth IRAs are usually not reportable, since the owners are never required to take mandatory distributions at any age during their lifetime. However, if an owner fails to cash a distribution, the three-year abandonment period would begin on the date the amount was payable. If the owner of a Roth IRA is deceased, federal tax laws generally require that the funds be distributed to the beneficiaries no later than the end of the fifth year following the owner's death. If the whereabouts of any beneficiaries is unknown to you, commence the abandonment period from the date of the owner's death. [39]

New York:

> "We recognize that while the Roth IRA is not subject to mandatory distribution rules during the original owner's lifetime, confusion may exist among both the public and the holder community as to the treatment of this product with respect to the Abandoned Property Law. Accordingly, for the purpose of consistency, OUF has as a matter of policy determined not to penalize reporting organizations for treating the Roth IRA in the same manner as the traditional IRA and reporting them in the year the owner reaches the age of 70.5."[40]

Oregon:

Roth IRAs: If there is evidence that "the owner is deceased, and there is no contact with heirs or the personal representative of the estate, the account is reportable after two years. Other than the situation of a deceased owner, Roth IRAs are not reportable as unclaimed property at this time, because they do not contain a mandatory payout provision."[41]

Considering the above, we recommend California's presumption of abandonment language for Roth IRAs be enacted for the new act. Specifically, dormancy is triggered when the owner reaches age 70.5 and the location of the owner is unknown.

(3) Recommended Changes

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically address Roth IRAs. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

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[39] *See* Texas Comptroller of Public Accounts, Unclaimed Property Reporting Instructions (2013) at 15.
[40] New York Office of Unclaimed Funds Unclaimed Property Handbook Relating to General Corporations, available online at: www.osc.state.ny.us/ouf/handbook_online/general.pdf (last visited May 1, 2014).
[41] *See* http://www.oregon.gov/dsl/UP/pages/finance_reporting_guide_09.aspx (last visited May 1, 2014).

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to specifically address Roth IRAs.

- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to subsection (a)(14)(i).

- Revise Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to add a subsection (a)(14)(ii).

Proposed Language:

> <u>(a)(14)(ii) Property in a Roth IRA, HSA</u> [see section on Health Savings Accounts] <u>or similar account not subject to a mandatory distribution requirement pursuant to the Internal Revenue laws of the United States, is presumed abandoned 3 years after the owner has attained age 70.5 and the location of the owner is unknown. The location of the owner is presumed to be unknown if the account is coded "RPO" because 2 pieces of correspondence are returned as undeliverable as noted on the owner's account. 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.</u>

(D) Coverdell Education Savings Account

(1) Overview

In 2002, the Coverdell IRA was re-named the Coverdell Education Savings Account (Coverdell ESA). The Coverdell ESA is a college savings account that is established to pay qualified education expenses of a designated beneficiary. The accounts are trust or custodial accounts which can be established at any bank or other IRS-approved entity such as a mutual fund.

A Coverdell ESA account can be established for a beneficiary who is under the age of 18, at the time the account is created, or any time if the beneficiary is a special-needs individual. The maximum annual contribution for each beneficiary is $2,000. Similar to a Roth IRA, contributions to a Coverdell ESA are non-deductible but the earnings in the account are not subject to federal income taxes. Withdrawals from the account that are used for qualified education expenses are not subject to federal income taxes.

Mandatory distribution is required to be made within 30 days of the following events, whichever is earlier:

1. The beneficiary reaches age 30 (unless the account is for a special-needs beneficiary); or
2. The beneficiary's death.

Amounts remaining in the account which cannot be used for qualified education expenses before the beneficiary attains age 30, may be rolled over to another Coverdell ESA for the benefit of a family member (including the beneficiary's spouse) so long as the new beneficiary is under age 30 or is a special-needs beneficiary. The transfer is considered a qualified roll over if it occurs within 60 days of the date of distribution. Qualifying transfers can also include transfers pursuant to divorce.

Distributions from a Coverdell ESA account are reported on IRS Form 1099-Q.

A typical Coverdell ESA account registration is as follows:

> Trustee name Coverdell ESA
> Jane Doe (Responsible Individual)
> Beneficiary (Student)
> Address

(2) 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, we recommend that Coverdell ESA accounts should only be subject to escheatment after two RPOs are noted on the account.

(3) Harmonize with Roth IRAs

Coverdell ESA accounts are similar to Roth IRA accounts with respect to the federal tax treatment. The primary difference between these products is that Roth IRAs do not have a mandatory distribution age while the owner is alive but the Coverdell ESA accounts do with some exceptions.

UPPO has recommended that Roth IRA accounts be treated in the similar manner as traditional IRA accounts are currently treated under the 1995 Act. That is, the dormancy period will trigger once the owner reaches a designated age (70.5) and the account has two RPOs noted.

For the reasons stated above, we recommend that a Coverdell ESA account should only be subject to escheatment after the beneficiary reaches age 30 and two RPOs are noted on the account.

(4) Recommended Changes

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically address Coverdell ESAs. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to specifically address Coverdell ESAs.
- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to subsection (a)(14)(i).
- Revise Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to add a subsection (a)(14)(iii).

Proposed Language:

> <u>(a)(14)(iii) property in a Coverdell ESA is presumed abandoned 3 years after the mandatory distribution date, if the location of the owner is unknown. The location of the owner is presumed to be unknown if 2 pieces of correspondence are returned as undeliverable as noted on the owner's account.</u>
>
> <u>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.</u>

(E) 529 College Savings Plans

(1) Overview

A 529 College Savings Plan (529 plan) is a US tax-advantaged (26 USC §529) investment account created to stimulate saving for future college/university expenses of a designated beneficiary. 529 plans – also known as qualified tuition programs (QTPs) – 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.

As provided by the IRS, a 529 Plan or QTP is a program set up to allow plans that are either based on a prepayment or contribution to an account established for paying a student's qualified education expenses at an eligible educational institution. 529 Plans can be established and maintained by states (or agencies or instrumentalities of a state) and eligible educational institutions. The program must meet certain requirements.

529 Plans are administered at the state level and all states currently offer 529 Plans. There are two types of 529 plans: (1) plans that allow participants to purchase tuition credits at current rates for future use; and (2) savings and investment plans where contributions can be allocated among a variety of investment choices, including savings accounts, money market funds, certificates of deposit, and mutual funds. 529 savings plans are considered municipal securities and fall under the jurisdiction of the Municipal Securities Rulemaking Board.

While the states are ultimately liable for the administration of 529 Plans, most states contract with investment companies to provide plan participants with a choice of investment portfolios. Administration of the 529 Plan may also be outsourced to the investment companies as well.
The most widely-recognized clearinghouse for information about 529 Plans is the College Savings Plans Network (CSPN), an affiliate of the National Association of State Treasurers (NAST).

In the event that a beneficiary decides not to go to college or dies, assets in a 529 Plan may be rolled over for the benefit of another family member. Eligible family members include other natural or legally adopted children, parents, grandparents and other ascendants, siblings or stepsiblings, stepchildren, stepparents, first cousins, nieces, nephews, aunts, and uncles. However, the rule may vary in certain respects based on the state. For example, in Florida, a 529 Plan may not be rolled over for the benefit of a family member who is more than 3 years older than the current plan beneficiary. The designated beneficiary can be changed without transferring accounts.

Generally, there are no restrictions as to the age at which plan beneficiaries must begin receiving distributions. Furthermore, there is no mandatory distribution requirement for 529 Plans and they are transferable, with no limit, as to when the assets need to be applied to educational expenses.

(2) Current Unclaimed Property Laws and the 529 Plan

Only one state has extended its unclaimed property law to specifically apply to 529 Plans. Louisiana Uniform Unclaimed Property Act was amended in 2003 to provide for escheatment of 529 Plan assets five years after the beneficiary's 35th birthday if the beneficiary: (1) has not communicated in writing or other means regarding the plan as reflected in the administrator's records; and (2) has not requested the disbursement of part or all of the funds or otherwise expressed an interest in the plan. See LA. Rev. Stat. § 9:154(A)(15) and (C)(2).

No other state has statutory or regulatory provisions specifically requiring the escheatment of 529 Plan assets.

It is arguable that the escheatment of 529 Plans fall under the catch-all as well as the fiduciary provisions of the unclaimed property laws. However, this raises the question of what is the appropriate trigger to start the dormancy period in each jurisdiction. Because 529 Plans do not have an Internal Revenue age limit or mandatory distribution date, this creates significant compliance challenges.

Beyond the unclaimed property laws, to determine the applicable language impacting the issue of unclaimed 529 Plan assets and particularly how a state treats unused and abandoned assets, a review of the 529 plan documents for each state as well as the accompanying trust terms and conditions would be required. Under some circumstances, assets can revert back to the 529 Plan itself. Also, it is worth noting that the State of Ohio Tuition Trust Authority takes the formal position that assets in Ohio's College Advantage 529 Savings Plans should not escheat because doing so would contravene Ohio law, tax law, contract law and the laws governing trustees and fiduciaries. In addition, personnel from Connecticut's Office of the Treasurer recently took the position that Connecticut does not allow 529 Plans to be escheated. In fact, they have advised that escheated 529 Plans would be returned if reported to the state.

As noted above, two states have concluded that 529 Plan assets are not escheatable. Although a fifty-five state survey has not been conducted, it is possible that other states may not expect/require 529 Plans to be escheated. Furthermore, because 529 Plans can easily be transferred between family members, it may be virtually impossible to identify the trigger date for escheatment. Accordingly, we recommend that 529 Plans be specifically exempted from the new act. However, in the alternative, if exemption is not feasible, 529 Plans should only be escheatable after the beneficiary attains age 30 and the beneficiary's location is unknown.

(3) Recommended Changes

Section 1. DEFINITIONS or Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically exempt 529 Plans from escheatment. If exemption is not feasible, the Revised Act should specifically address the presumption of abandonment for 529 Plans. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 1. DEFINITIONS (14) to specifically exclude 529 Plans from the definition of "property."

- 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 529 Plans from the Act.

- In the alternative, Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to specifically address 529 Plans.

- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to subsection (a)(14)(i).

- Revise Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to add subsection (a)(14)(iii).

Proposed Language:

<u>Section 1. DEFINITIONS (14): The term "property" does not include 529 plans. Alternatively, Section 2. PRESUMPTION OF ABANDONMENT (a)(14)(iii) A 529 Plan is presumed abandoned 3 years after the owner has attained age 30 and the location of the owner is unknown. The location of the owner is presumed to be unknown if 2 pieces of correspondence are returned as undeliverable as noted on the owner's account.</u>

<u>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.</u>

(F) Health Savings Accounts

(1) Overview

Health Savings Accounts (HSAs) are tax-advantaged medical savings accounts available to U.S. taxpayers. They are fairly new instruments, having been created as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. According to research conducted at the end of 2013, there was approximately $19.3 billion held in 10.7 million HSA accounts nationwide.[42]

Contributions to HSAs are income-tax free and roll over and accumulate year after year. They are individual-owned, thereby differentiating them from company-owned health reimbursement arrangements. The funds held in an HSA can be used to pay for qualified medical expenses at any time without any federal tax liability or penalty. Funds utilized for non-qualified medical expenses will incur tax penalties.

[42] 2013 Devenir HAS Research Report Executive Summary at 2.

HSA funds may be contributed by employees, employers, or any other person. Congress establishes annual statutory contribution limits. For 2014, individuals may contribute up to $3,300 and families may contribute up to $6,550. Regardless of the source of the deposit, funds are the property of the account owner. If a policyholder terminates HSA-eligible insurance coverage, his/her ability to make contributions will also be terminated, but funds already in the HSA belong to the account owner.

Pursuant to law signed in 2006 (the Tax Relief and Health Care Act of 2006) an HSA account holder is allowed to use a one-time rollover of IRA assets to fund up to one year's HSA contribution.

(2) Investments

One of the unique aspects of HSAs is that property held in the accounts can be invested (similar to an IRA). The investment earnings are free from taxation until withdrawn. However, many HSA Plans only allow funds to be withdrawn on a "cash out" basis.

HSA funds can be withdrawn through debit card, checks, or through a reimbursement process (or a combination thereof). Funds withdrawn that are not used for qualified medical expenses are subject to income taxes and a 20% penalty. The 20% penalty is waived if the owner is 65 or older or is disabled at the time of withdrawal. Upon death, the HSA funds can be transferred to a beneficiary named on the account. If the beneficiary is a surviving spouse, the transfer is tax-free.

(3) Current Unclaimed Property Laws and HSA Plans

States' current treatment of HSA Plans is inconsistent. NAUPA has adopted the following property type codes for HSA Plans: (1) HS01 for principal; (2) HS02 for investment; and (3) HS03 has been reserved, indicating that these property types are escheatable. However, many states have not adopted the standard HS codes and have indicated escheatment of HSA Plan assets is required in various forms. For those states that have not adopted the HS codes, tremendous variance in the escheatment of investment and cash positions is emerging.

Like many of the new tax advantaged property types, HSA Plans do not have mandatory distribution requirements; therefore, many of the state laws that apply to tax advantaged accounts do not clearly apply to this property type. Some guidance provided by NAUPA indicates that HSA Plans should be treated as miscellaneous intangibles under the 1995 Act and as intangible personal property held in fiduciary capacity under the 1981 Act. Informal surveys of various states conducted by UPRR indicate that most states consider HSA Plan property within the scope of their unclaimed property statutes and are assigning dormancy periods based on various provisions.

To provide guidance, some states have addressed the treatment of HSA Plans in their holder handbooks or other forms. For example, Washington State and Oregon have indicated that HSA property is reportable if "there is no positive owner contact on this or any related account after three years."[43] However, other states have not published written guidance.

Based on the above, we recommend that a long dormancy (i.e., age 70.5) should be adopted for HSA Plans and these accounts should only be escheatable if 2 RPOs are noted on the owner's account.

(4) Recommended Changes

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically address HSA Plans. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(14) to specifically address HSA Plans.

- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to subsection (a)(14)(i).

- Revise Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(14) to add a subsection (a)(14)(ii).

Proposed Language:

> <u>(a)(14)(ii) Property in a Roth IRA, HSA Plan or similar account not subject to a mandatory distribution requirement pursuant to the Internal Revenue laws of the United States, is presumed abandoned 3 years after the owner has attained age 70.5 and the location of the owner is unknown. The location of the owner is presumed to be unknown if 2 pieces of correspondence are returned as undeliverable as noted on the owner's account.</u>
>
> <u>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.</u>

[43] *See* Washington State Unclaimed Property Financial Institutions Guide, pg. 5, available at dor.wa.gov/docs/pubs/ucp/fininstut.pdf; Oregon Financial Institutions Reporting Guide, available at http://www.oregon.gov/dsl/UP/pages/finance_reporting_guide_09.aspx.

(G) Securities

(1) Overview

Securities, whether dividend paying, non-dividend paying or reinvested through a dividend reinvestment option or plan (DR) and mutual funds (collectively referred to as investments), present unclaimed property compliance challenges for holders.

The 1995 Act provides that:

> stock or other equity interest … [is presumed abandoned] five years after the earlier of (i) the date of the most recent dividend, stock split, or other distribution unclaimed by the 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. §2(a)(3).

Many investments are acquired by owners for long term investment strategy purposes. As such, no activity is transacted nor is expected to be transacted on the account. Therefore, the mere passage of time and lack of activity are generally not sufficient indicators that the owner is lost or has forgotten about or abandoned the property.

(2) Federal Law

The Securities and Exchange Commission (SEC) pursuant to SEC Rule 17Ad-17 requires issuers/transfer agents and broker dealers to make two attempts to locate security holders coded as lost. A security holder is lost, generally speaking, if correspondence sent to the mailing address is returned as undeliverable.[44]

To simplify the compliance process and for consistency, we recommend that the new act takes into consideration SEC Rule 17Ad-17.

(3) Recommended Changes

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should provide the conditions under which the presumption of abandonment will be triggered for securities. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT to address the triggers for the presumption of abandonment for securities.

- Revise Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(3).

[44] Specific language from SEC Rule 17Ad-17 is included above at Section 3.3(D)(2).

Proposed Language:

> (a)(3) A security is presumed abandoned after 2 pieces of correspondence sent to the owner are returned as undeliverable as noted on the owner's account. ~~stock or other equity interest in a business association of 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) of 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;~~
>
> 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.

(H) Uniform Gift to Minors Act and Uniform Transfers to Minors Act

(1) Overview

The Uniform Gift to Minors Act (UGMA) is a mechanism whereby a minor can directly own securities in his/her name without a guardian or trustee. However, a fiduciary, either the donor or another person, must be appointed as a custodian of the minor's account. The minor is not allowed access to the account until he/she reaches the age of majority (18 or 21 depending on the state). The Uniform Transfers to Minors Act (UTMA) is similar to the UGMA and allows minors to receive transfers such as patents, royalties, real estate, etc. Minors are not allowed access to the UTMA until the age of majority.

UGMAs and UTMAs are not specifically addressed in the 1995 Act; therefore holders have to determine how to apply the "catch-all" language of the act. Furthermore, the treatment of UGMAs and UTMAs is not clear in many states, and this results in inconsistent treatment and application. Moreover, the mere passage of time is not indicative of an owner being lost because the minor cannot access the account until after he/she attains majority.

For the reasons stated above we recommend that the new act provide that the dormancy period does not begin to run until after the minor attains majority and there are 2 pieces of returned mail as noted on the account.

(2) Recommended Changes

Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically address UGMA and UTMA. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a) to specifically address UGMA and UTMA.
- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(15) to subsection (a)(16).
- Add new Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(15).

Proposed Language:

> (a)(15) UGMA and UTMA are presumed abandoned after the minor has attained the age of majority and the location of the owner is unknown. The location of the owner is presumed to be unknown if 2 pieces of correspondence are returned as undeliverable as noted on the owner's account.
>
> 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.

(I) Business-to-Business Transactions

(1) Overview

The primary purpose of the unclaimed property laws is to protect individuals because, unlike business associations, individuals may not have the resources to effectively track and manage their property. Business associations typically do have the resources to track and manage their property and do not need the protection of the states in regulating transactions with other business associations – both from a holder and an owner perspective. Most amounts reflected on holders' books and records as being owed to other business associations are generally not reflected as receivables on the books of the business owners because often these amounts are errors or are settled in later transactions.

As such, we recommend that the new act include a business-to-business transaction exemption. In the alternative, if a general business-to-business transaction exemption is not feasible, then an exemption for Wholesale Credits,[45] including Unidentified Remittances, should be included in the new act.

(2) Recommended Changes

Section 1. DEFINITIONS

UPPO Recommendation:

The Revised Act should specifically exempt business-to-business transactions. Thirteen states have enacted statutory business-to-business exemptions and other states have administrative business- to-business exemptions. In the alternative, if a general exemption is not feasible, the Revised Act should specifically exempt Wholesale Credits, including Unidentified Remittances. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- 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:

See changes to the definition of the word "property" to exclude business-to-business transactions, in Section 1.c above.

(J) Stored Value Cards

(1) Overview

Stored value cards, for unclaimed property purposes, are generally defined to include various types of instruments, including gift certificates, and some are redeemable for merchandise or services only. The merchandise or service stored value cards are generally not redeemable for cash. Approximately, 34 states have some form of exemption for gift certificates and similar

[45] Generally, a wholesale credit is a credit due from one business association to another business association in the ordinary course of business.

instruments. However, other states either require the holder to escheat, in cash, either: (1) the unredeemed amount paid for the gift certificate; or (2) a percentage of the unredeemed balance (e.g., 60 percent).

Pursuant to the "derivative rights doctrine,"[46] the state steps into the shoes of the missing owner for escheatment purposes. That is, the state may claim what the missing owner could have claimed. By requiring holders to escheat cash when the missing owner could not have claimed cash, states are violating the derivative rights doctrine.

Based on the above, we recommend that the new act include an exemption for stored value cards redeemable for merchandise and services only. Additionally, the new act should include a definition of gift certificates to include stored value cards.

(2) Recommended Changes

Section 1. DEFINITIONS and Section 2. PRESUMPTION OF ABANDONMENT

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.

Required Action:

- Revise Section 2: PRESUMPTION OF ABANDONMENT (a)(7) to exclude gift certificates and Section 1: DEFINITIONS.

- Revise Section 1: DEFINITIONS to renumber subsections (5) through (16) as follows, definition for "Financial organization" would be subsection (6); "Holder" would be subsection (7) and so on.

- Revise Section 1: DEFINITIONS to add definition of "Gift certificate" as subsection (5).

Proposed Language:

> Section 2: (a)(7) gift certificate, <u>except gift certificates redeemable for merchandise or services only,</u> three years after December 31 of the year in which the certificate was sold<u>. Gift certificates redeemable for merchandise or services</u>

[46] For a discussion of authority for the derivative rights doctrine, see the ABA Comments to the Uniform Law Commission

only are exempt from this Act. ~~,but if redeemable in merchandise only, the amount abandoned is deemed to be [60]p ercent 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.

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.

(K) Uninvoiced Payables

(1) Overview

The concept of the "Uninvoiced Payable" or "Goods Received/No Invoice Received"[47] (Uninvoiced Payables) rose to prominence approximately 5 years ago when the findings of an audit conducted by one of Delaware's contract auditors was disputed, and ultimately litigated, in the Delaware Chancery Court. In 2009, the McKesson Corporation challenged Delaware's assessment of the company's liability associated with inventory mismatches, overages, and unbilled inventory on full shipments from the company's vendors. At the time, Delaware's position was that this was a type of unjust enrichment inuring to the benefit of the holder, and thus a potential source of unclaimed property that must be reported to the state.

Generally, uninvoiced payables are treated as imputed vendor credits, arising when there is a quantity difference between goods received from a vendor and the amount billed on the corresponding invoice. Put in simpler terms, a purchaser receives more goods than it ordered. These types of overages are typically tracked by the receiver in a general ledger clearing or suspense account. The problem with the states' treating this type of discrepancy as unclaimed property however, is that such an extra shipment is likely to be the vendor's original intention from the beginning. As one commentator notes, "[f]or example, a vendor may ship an extra widget in addition to the amount ordered (e.g., baker's dozen), to avoid having to reship if goods are damaged in transit. An entry would be made to account for 13 widgets posted to inventory, with a subsequent entry for 12 widgets credited to payables. This difference may give the appearance of one unbilled widget, when in fact providing the additional widget was the vendor's initial intention all along. GR/IR can also arise in situations where merchandise is returned, promotional inventory is received, or accounting errors from either inventory or accounts payable."[48]

[47] While we recognize that there are fine differences in the accounting concepts represented by these differing terms, this paper will utilize the term "Uninvoiced Payable" throughout for purposes of consistency.
[48] "The Facts About Unbilled Payables", Christopher S. Jensen, *Paytech*, Jan. 2013, http://bit.ly/1kAsd9q.

(2) Current Unclaimed Property Laws and Uninvoiced Payables

We are not aware of any state taking the position that uninvoiced payables were a type of unclaimed property, even under the so-called "catch-all" statutory provision, until around 2006. Hence, it is highly unlikely that this issue was considered in any of the Unclaimed Property Acts. Most states that have adopted one of the Uniform Unclaimed Property Acts (or parts thereof) do have the catch-all/default language, yet this position was not previously advanced by the states. Interestingly, the issue was first taken forward by Delaware, a state that has long resisted the adoption of any the Uniform Unclaimed Property Acts.

McKesson argued, among other arguments, that uninvoiced payables were not a type of property covered under the Delaware Escheat laws. The case ultimately settled, without this issue being decided by the court. Most telling, however, was Delaware's legislative action following the case. In July 2010, Delaware enacted Senate Bill 272. The new law[49] expressly excluded "uninvoiced payables" from the definition of unclaimed property, thereby rendering this property type exempt in Delaware.

However, other states are still free to interpret their own laws in a manner which might view uninvoiced payables as subject to escheatment. There is anecdotal evidence to indicate that some states may view shipments that are entirely unbilled as unclaimed property, but small shipment overages for which the majority of goods are invoiced would not constitute unclaimed property.

There is a need for further clarity and uniformity on this issue. Accordingly, we recommend that the new act include a specific exemption for and a definition of uninvoiced payables.

(3) Recommended Changes

Section 1. DEFINITIONS

UPPO Recommendation:

The Revised Act should specifically exempt Uninvoiced Payables. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 1: DEFINITIONS (14) to include an exemption for Uninvoiced Payables.

Proposed Language:

See changes to the definition of the word "property" to exclude uninvoiced payables, in Section 1.c above.

[49] TIT. 12, DEL. CODE. §1211.

(L) Promotional Programs

(1) Overview

Promotional programs generally include terms like “promotion”, “reward”, and “loyalty” and are primarily offered by retailers. These programs have been in existence for many years. One of the earliest forms of a retail loyalty program in the United States was the S&H Green Stamp. These stamps were given as a bonus to shoppers based solely on the dollar amount of a purchase. Shoppers could fill up their book of stamps and eventually earn items from either the Green Stamps store or catalog.

Today, many marketing departments offer these programs to encourage customer loyalty, promote their brand, and increase company sales. Some popular types of programs include:

- Promotional Points/Miles: These programs are most often thought of as frequent flyer programs, hotel points programs, etc., but can apply to any type of point-based promotional program. These programs were started to reward a customer with miles or points based on their use of a particular product or service. In general, a customer must stay in a hotel or fly with an airline in order to earn the points/miles. In recent years these programs have broadened the customer’s earning ability, allowing the purchase of points/miles, as well as obtaining points through various other partner programs. The redemption of these miles/points is typically restricted to the company offering the program.
- Reward Card: These programs are typically seen in the services industry. A common example would be an advertisement stating “sign up for (Service Provider X) and receive a $50.00 reward card”. In order for the customer to receive the reward they have to typically sign a contract with the service provider to use their service for a specific period of time.
- Loyalty Program/Card: These programs span many different industries but the idea behind these programs is that when a customer spends money with a certain company, that customer will receive incentives/discounts either at the time of purchase or for future purchases. These programs include supermarket loyalty cards as well as restaurant “punch” cards.

(2) Current Unclaimed Property Laws and Promotional Programs

Promotional programs are not specifically addressed in many states’ unclaimed property statutes or Uniform Unclaimed Property Acts. For example the 1995 Uniform Unclaimed Property Act states that property includes: “credit balance, customer overpayment, gift certificate, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds, or unidentified remittance”.[50] There is no reference to promotional programs. Therefore, states

[50] Uniform Unclaimed Property Act (1995) Section 1 (13)(ii)

which have not enacted specific statutory provisions would need to rely on the "catch-all" language to argue that promotional programs are subject to escheatment.

However, many of today's programs have specific contractual terms and conditions which should limit the states' ability to claim cash. For example, many programs include the following terms and conditions:

- Redeemable for goods/services only (i.e., not redeemable for cash)
- No cash value
- Actionable conditions must be met by the customer before instrument is used

Clearly, these programs were never intended for the consumer to obtain cash, nor are they usable before certain conditions are met. If a consumer fails to satisfy the necessary conditions, the state's claim to the property should also be extinguished.

Additionally, there is also an issue regarding how to value these points/miles. This may be an onerous and overly burdensome task, and in some cases may be impossible, and this should be taken into consideration when contemplating a truly "uniform" Revised Act.

Some states have recognized some of these challenges and have specifically exempted these types of programs from escheatment:

- Arizona: "Certificates evidencing property denominated in value other than a currency including … frequent flyer miles, … merchandise points" are not considered property subject to the unclaimed property statutes.[51]
- Texas: Cards issued "to a person under an awards, rewards, loyalty, incentive, rebate or promotional program not issued or reloaded in exchange for money tendered by the card holder" are not reportable.[52]
- Other states with similar language include: Michigan, California and Louisiana (not a comprehensive list)

Another important factor in the analysis is whether consideration was given to receive the promotion. Specifically, if there is no consideration given to obtain the promotion, then under the derivative rights doctrine there would presumably be no legal obligation to escheat.

(3) Other Laws

The Federal Credit Card Accountability Responsibility and Disclosure Act of 2009 provides an exemption for cards issued under promotional and loyalty programs from the limitation on expiration dates and dormancy fees recognizing that these cards require different treatment.[53]

[51] Arizona Revised Statute Annotated §44-301(15)
[52] Texas Property Code Annotated §72.1016(a)(1); Texas Bus. & Com. Code Annotated §604.002(3).
[53] Federal Credit Card Accountability Responsibility and Disclosure Act of 2009, P.L. 111-24, May 22, 2009, Tit. IV, §915 (4).

Based on the above, we recommend that the new act exempt promotional programs which are not redeemable in cash or for which no monetary consideration was provided.

(4) Recommended Changes

Section 1. DEFINITIONS

UPPO Recommendation:

The Revised Act should specifically exempt Promotional Programs not redeemable in cash or for which no consideration was provided. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 1: DEFINITIONS (14) to include an exemption for Promotional Programs.

Proposed Language:

See changes to the definition of the word "property" to exclude Promotional Programs, in Section 1.c above.

(M) Unused Subscriptions

(1) Overview

Subscriptions for magazines, newspapers, book clubs, and other various "by-the-month" clubs for which consumers pay a fee to receive something tangible from a supplier have been in existence for years. To add to these types of monthly/yearly/even life-long subscriptions, there are now online subscriptions to myriad number of services and organizations. Examples of subscription services that can now be downloaded to electronic devices and/or computers are: Skype video-chat service, online technical service, magazines and newspapers, online database access services, daily advice columns, self-help or entertainment updates, just to name a few.

Consumers can pay for a month-long subscription for something physically delivered to their homes on a daily, weekly or monthly, basis, or something delivered to an e-mail address or electronic device with similar frequencies. What happens however, to the remaining time frame of service that the consumer paid to receive should a decision be made to cancel? Are you able to have a pro-rated refund back to your credit card, receive a refund check in the mail, have a credit with the subscribing company, or are those funds lost forever? It may be argued that these cancellations could potentially provide unjust enrichment to the companies offering subscription services if they do not offer refunds for cancelled services.

The cancellation/termination of a subscription service is typically addressed in the provider's 'terms of service' information found in a purchase agreement. What happens to the unused portion of a prepaid service varies by company and many agreements indicate that refunds are issued at the discretion of the company providing the service. Other options typically offered range from: a pro-rated refund for the remaining service after cancellation date; refunds only if contract cancelled within a given time frame; credit with the company; ability to access the online information for the remainder of the paid time (e.g., a monthly subscription canceled 15 days after the start of the month, will continue to have access for the remainder of the 30 day contract and service will end after that prepaid time).

(2) Current Unclaimed Property Laws and Unused Subscriptions

Neither the 1995 Act nor any state unclaimed property law specifically address unused subscription values. However, the Council on State Taxation (COST) has analyzed this issue and has adopted a position regarding magazine subscriptions, stating that these "…are typically redeemable in merchandise only. The State should not have the right to require publishers to render cash with respect to an undelivered magazine subscription when the magazine subscriber could not redeem it for cash."[54]

The subscriber's right to a refund should be dependent upon the terms of the purchase agreement. If the subscriber is entitled to a cash refund, then pursuant to the derivative rights doctrine, the state should be able to require escheatment of cash. If the subscriber is not entitled to a cash refund, then the state should not be able to require escheatment in cash.

Accordingly, we recommend that the new act exempt subscription refunds not payable in cash.

(3) Recommended Changes

Section 1. DEFINITIONS

UPPO Recommendation:

The Revised Act should specifically exempt Unused Subscriptions not redeemable in cash. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 1: DEFINITIONS (14) to include an exemption for Unused Subscriptions.

Proposed Language:

See changes to the definition of the word "property" to exclude Unused Subscriptions, in Section 1.c above.

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[54] Council on State Taxation, Unclaimed Property Policy Position Paper, at 2; *available at http://www.cost.org/uploadedFiles/About_COST/Policy_Statement/Unclaimed%20Property.pdf* (2014).

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.

(N) Mineral Proceeds

(1) Overview

The term "mineral proceeds" is defined in the 1995 Act (the term was not defined in the 1981 Act) as amounts payable for the "extraction, production or sale of minerals." "Mineral" is defined to include oil, gas, shale, etc. However, the presumption of abandonment for mineral proceeds is not specifically addressed in the 1995 Act. As such, holders of mineral proceeds must look to the "catch-all" provision of the 1995 Act to determine their unclaimed property compliance obligations.

Application of the catch-all provision creates compliance challenges for mineral holders. For example, it is not clear from the 1995 Act if or when mineral proceeds held in suspense are deemed abandoned property. Mineral proceeds can be suspended for many reasons including title disputes or pending litigation. Although some states, such as Texas and Oklahoma, have enacted specific unclaimed property statutory language applicable to mineral proceeds, many states have not enacted such language. Furthermore, there is inconsistency among the states which have enacted specific statutory language. For example, some states have enacted "current pay" rules while other states have not. The current pay rule provides that once mineral proceeds payments are deemed abandoned, all subsequent payments for that account are deemed abandoned and are reportable annually to the state.

Based on the above, we recommend that the new act include specific language regarding the presumption of abandonment for mineral proceeds. Additionally, the new act should include a revised definition for "mineral proceeds."

Proposed Changes

Section 1. DEFINITIONS and Section 2. PRESUMPTION OF ABANDONMENT

UPPO Recommendation:

The Revised Act should specifically address the presumption of abandonment for mineral proceeds. This revision will provide needed clarity, reduce compliance challenges, and protect the rights of owners.

Required Action:

- Revise Section 1: DEFINITIONS (9) and Section 2: PRESUMPTION OF ABANDONMENT (a) to specifically address Mineral Proceeds.

- Renumber Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(15) to subsection (a)(17).
- Add new Section 2: PRESUMPTION OF ABANDONMENT subsection (a)(16).

Proposed Language:

Section 1: (9) "Mineral proceeds" means amounts payable or distributable for extraction, production, or sale of minerals, or, upon abandonment of those amounts, all amounts that become payable thereafter. The term includes amounts ~~payable~~ related to:

i. ~~for the a~~Acquisition and retention of a mineral lease (e.g., bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties and delay rentals)
ii. ~~for the e~~Extraction, production, or sale of minerals (e.g., net revenue interests, royalties, overriding royalties, extraction payments, and production payments). ~~and~~
iii. ~~under an a~~Agreement or option (e.g., joint operating agreement, unit agreement, pooling agreement, and farm-out agreement).

Section 2:

(a)(16)(i) mineral proceeds, five years after the property becomes payable or distributable if the location of the owner is unknown or the owner has not done any of the following:

a. Communicated in writing with the holder or
b. Otherwise indicated an interest in any property owing to the owner as evidenced by a memorandum or other contemporaneous record prepared by the holder.

ii. For purposes of this section:

a. Mineral proceeds are not considered payable or distributable if a dispute (e.g., legal or title issues) is ongoing regarding the owner's right to receive the proceeds. Documentation of the ongoing dispute must be maintained by the holder to rebut the presumption of abandonment.
b. Any mineral proceeds subject to escheat under this chapter may be reduced or offset by amounts due to the holder pursuant to the agreement between the holder and mineral interest owner.
c. At the time mineral interest proceeds are presumed abandoned, if the amount the owner owes the holder exceeds the amount due to the owner, the holder shall have no obligation to report negative values.

iii. No additional notice or due diligence is required for mineral proceeds that are reportable as a result of prior mineral proceeds being presumed abandoned in the same interest for the same owner.

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.

IV. REPORTING

A. Aggregate Reporting

Proposed Language:

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

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, 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 the apparent owner or the holder has changed its name while holding the property, the holder shall file with the report its former names, if any, and the known names and addresses of all previous holders of the property.
(d) The report must be filed before November 1 of each year and cover the 12 months next preceding July 1 of that year, but a report with respect to a life

insurance company must be filed before May 1 of each year for the calendar year next preceding.

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

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

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

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

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

(g) The holder of property presumed abandoned shall file with the report an affidavit stating that the holder has complied with subsection (e).

<u>(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.</u>

B. <u>Due Diligence</u>

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 ranges 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/states/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*

Based on the survey results and associated commentary provided by the holders, UPPO recommends that the following positions be taken into consideration for inclusion in the new uniform law draft:

(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 9(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.[55]

[55] Cal. Code Civ. Pro., Part 3, Title 10, Ch. 7 at §§ 1513 and 1513.5.

(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,[56] 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 and 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.

[56] Colo. Rev. Stat. § 38-13-120(2); Ariz. Rev. Stat. Ann § 44-319(B); Utah Code Ann. § 67-4a-302(4).

V. POST ESCHEAT

A. Estimation and Record Retention

The use of estimation to determine a holder's unclaimed property liability is a highly controversial topic. Some holders and practitioners contend that under no circumstance should estimation be used to quantify an unclaimed property liability. This view equates estimation – particularly when used by certain states and contract firms to generate large proposed assessments – to a disguised tax. Notwithstanding, prohibiting the application of estimation in any situation could encourage lax owner recordkeeping practices on the part of holders, contravening the primary purpose of unclaimed property laws. In order to balance exploitation by states and contract audit firms with potential recordkeeping abuses by holders, our view is that estimation should be used infrequently and applied judiciously, and only when states have established clear regulations and guidelines.

Where estimation is applied, it should be "reasonable" and tailored to the specific circumstances of the industry, property types, and holder. As such, we have declined to provide anything more specific than general guidance for what constitutes an appropriate and reasonable estimation methodology.

1. *Previous Uniform Disposition of Unclaimed Property Acts*

Both the 1981 and 1995 UUPAs contemplate that an unclaimed property liability may be subject to estimation by a state.[57]

For example, the 1981 Act permits estimation only where "a holder fails…to maintain the records required by Section 31 and the records of the holder available for the periods subject to this Act are insufficient to permit the preparation of a report."[58] Section 31 requires holders to maintain owner name and address for 10 years after the property becomes reportable. [59] The 1995 Act permits estimation in similar circumstances, but notably allows the administrator broader latitude in its method of estimation. In particular, the 1995 Act permits an administrator to conduct such estimation "by any other reasonable method of estimation".[60]

The ULC Commentary to Section 20(f) states that the Act "permits the use of estimates" where (1) the holder has failed to report and deliver property that is abandoned *and* (2) no longer has reasonably accessible records sufficient to prepare a specific report. Thus, estimation acts as

[57]A number of significant domicile states for business entities – most notably, Delaware, but also New York, California and Texas – have not adopted any of the Uniform Acts and therefore have enacted or administratively implemented their own distinct provisions governing the estimation of an unclaimed property liability. We have attached a description of the practices of these states with respect to estimation at Appendix C for reference.

[58] Uniform Act of 1981 at 30(e).

[59] This record retention requirement applies only to the extent that a holder collected such data; in other words, it does not create a requirement to collect such data in the first place. Affirmative and specific data collection and maintenance requirements are not established by the Uniform Acts, except in regards to traveler's checks, money orders and similar instruments. *See* 1981 Act Section 31(b) and ULC commentary thereto; 1995 Act Section 21(b) and ULC commentary thereto.

[60] Uniform Act of 1995 at Section 20(f).

both a penalty for non-compliance and a way for a liability to be determined. Further, the Commentary expressly allows means other than the holder's own books and records as a basis for such estimation. Thus, the State may use estimating techniques -- where a holder has not maintained records as required by statute -- based on industry averages, and may rely on inferences that may be based on statistics drawn from a broader basis than that of the holder in question who has failed to keep records.

While the 1995 Act does not explicitly require the resulting estimated *liability* to be reasonable in such circumstances, that requirement is read into both the 1981 and 1995 Acts by holders and is generally understood to be a requirement by the states as well. This is appropriate given the fact that estimation, if not "reasonable," could effectuate a taking of the holder's own property in violation of the Due Process/ Takings Clauses of the U.S. Constitution.[61]

2. *State Guidance*

Although several states have enacted statutes authorizing the use of estimation, only one state – Michigan – has enacted statutory or administrative rules or provided other informal guidance regarding any details of how estimation shall be applied during an audit. As such, application of estimation practices may vary among holders, even when holders are under audit by the same state.[62] Often the estimation practices employed by the contract audit firms,[63] which practices have no force of law, become the only consistent guidance regarding the use of estimation available to unclaimed property practitioners.

Michigan recently enacted House Bill 4289, which requires certain specific standards relating to audit techniques and provides guidelines for the use of estimates during unclaimed property audits. Specifically, Michigan now requires that "any examination performed by the administrator or his or her duly authorized agents must be performed in accordance with the generally accepted auditing standards to the extent applicable to unclaimed property examinations."[64] Holders shall receive "a complete copy in printed or electronic format of the audit report, which shall identify in detail the work performed, the property types reviewed, any estimation techniques employed, calculations showing the potential amount of property due, and a statement of findings as well as all other correspondence and documentation which formed a basis for the findings."[65]

When a holder lacks "substantially complete records," then a "reasonable method of estimation" may be used and must be consistent with generally accepted auditing standards. Michigan now also defines what constitute "substantially complete records," which is often a point of contention between holders under audit and states or their contract audit firms in determining whether estimation may be used. "Substantially complete records" is defined as:

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[61] *See e.g., Service Merchandise Co. Inc. v. Adams*, 2001 WL 34384462 (Tenn. C. 2001) (holding that requiring holder to remit more than the value of the property owed could violate Takings Clause of U.S. Constitution).
[62] For an overview of current audit practices, see Exhibit C.
[63] For a description of an estimation methodology commonly employed by auditors, see Exhibit D.
[64] Mich. Comp. Laws § 567.251 (effective October 29, 2013).
[65] *Id.* at subpara. (4).

> at least 90% of the records necessary for unclaimed property examination purposes as defined under the principles of internal controls. The determination of substantially complete records shall not be made solely as a percentage of the total overall individual records to be examined, but also on a materiality level of value of the records. The lack of greater than 10% of records in 1 particular property class to be examined does not result in the extrapolation of error in those areas in which a person has filed all the required reports and has maintained at least 90% of the overall records for that particular property class. Substantially complete records are not meant to be an absolute measurement of all available records.

Although not providing definitive guidance as to how estimation must be applied during an unclaimed property, Michigan's revised statute provides more guidance to date than any other state.

Delaware has recently provided guidance for the use of estimation in its voluntary disclosure program administered by the Secretary of State. These "Implementing Guidelines," however, explicitly "are applicable only to the New VDA Program, and companies who are being audited by the Delaware State Escheator, either currently or in the future, should not rely on these Guidelines." The Implementing Guidelines, although not applicable to audits, provide detailed guidance regarding the use of estimation during a VDA submission, addressing what are appropriate base periods, void periods for checks, and confidence levels for statistical sampling.

3. *Potential for Abuse*

In practice, auditors tend to assign the entire estimated amount to a single state, rather than apportioning the liability among the various states where the holder can demonstrate it conducted business and was likely to have an unclaimed liability to owners in the state. This assignment creates an effective windfall to the domicile state of any holder that is subjected to estimation of unclaimed property liability. [66] As a result, for example, Delaware collects over $550 million annually in "unclaimed property," much of which is attributable to estimated amounts.[67]

The only case in which a court (state or federal) has directly addressed the use of estimation in determining an unclaimed property liability accepted a different approach.[68] In *Chubb*, an estimated liability was based on the number of business locations the holder had in New Jersey

[66] States contend that because estimations are, by their nature, "owner unknown" property, they are attributable to the domiciliary state based on the U.S. Supreme Court priority rules articulated in *Texas v. New Jersey*, 379 U.S. 674 (1965). Yet that case held only that actual property for which the holder did not have record of the owner's last known address would escheat to the holder's state of domicile. This case did not expressly authorize the estimation of property itself for which there was no record. The seminal Supreme Court cases, in fact, expressly rejected the use of estimation in one context – the allocation of actual property that may or may not have had an owner address – among states.

[67] *See* Delaware Economic and Financial Advisory Council (DEFAC) General Fund Revenue Worksheet (April 2014), available at http://finance.delaware.gov/publications/DEFAC.shtml (as of April 29, 2014) (showing actual collections of $566.5MM for FY 2013).

[68] *New Jersey v. The Chubb Corporation, et al.,* 570 A.2d 1313 (N.J. Super. Ch. 1989).

as a percentage of the holder's business locations everywhere. The court inferred that this approach was reasonable.[69]

By contrast, allocating an estimated unclaimed property liability solely on the holder's state of legal domicile can produce erroneous and unreasonable results. It is unreasonable to conclude that a holder's state of legal domicile is entitled an estimated liability of uncashed payroll checks if the holder has never had an employee living or working in that state. It is also unreasonable to conclude that the state in which all a holder's business activities take place cannot make a reasonable estimate of liability if the holder happens to be legally domiciled in another state. No law precludes a state other than the holder's state of legal domicile from using estimation to establish a reasonable approximation of a holder's unclaimed property liability.

To compound this issue, certain states work with private audit firms to collect purportedly unclaimed property on behalf of the state in exchange for a contingency fee based on the total amount of funds collected.[70] These arrangements carry a "significant risk of abuse" by injecting "a private profit motive into the enforcement of state laws."[71]

For all of these reasons, we recommend that the proposed revised uniform act address the underlying purpose of estimation and provide specific parameters around certain key terms.

4. *Recommended Limitations with Respect to Estimations*

(A) Only Where Holder Fails to Comply with Existing Statutory Record Retention Requirements

A state/auditor should only be permitted to require estimation techniques where (1) the state has promulgated a record retention requirement for the specific types of records used to prepare a report of the property type in question, and (2) the holder has failed to comply with such requirement. This is consistent with the historical view of permitting estimation only as a penalty for failure to keep records. As estimation by its nature will not identify any property to reunite with owners, it cannot be justified by that public purpose. Thus, any permissible estimation must be consistent with a goal of encouraging compliance with record retention.[72]

Therefore, we recommend the following revisions to the proposed Revised UUPA.

Proposed Language:

Section 1: Definitions: See Definitions of "Record" and "Sufficient Records" as set forth in Section 1 above.

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[69] *Id.*

[70] Delaware, Illinois, and New York for example, each have contracts that include a contingent-fee component.

[71] U.S. Chamber Institute for Legal Reform, Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms (April 2014) at 3.

[72] To the extent estimation is calculated to raise revenue for the states, it is a tax and should be subject to all of the constitutional limitations of such. *See* Chris Hopkins and Matthew Hedstrom, *Unclaimed Property Laws: Custodial Safekeeping or Disguised Tax?*, JOURNAL OF MULTISTATE TAXATION AND INCENTIVES, Vol. 21, No. 9 (January 2012).

Section 20. Requests for Reports and Examination of Records.

(f) Reasonable Estimation:

(i) ~~If, after the effective date of this [Act],~~ Where a holder does not maintain the records required by STATE pursuant to Section 21 of this Act and the records of the holder available for the periods subject to this ~~[Act]~~ chapter are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay to the ~~administrator~~ STATE, as a penalty, the amount the ~~administrator~~ STATE reasonably estimates, as defined in Section 1(#) of this Act, should have been but was not reported to this state for the record retention period established in Section 21. ~~on the basis of any available records of the holder of by any other reasonable method of estimation, should have been but was not reported.~~

(ii) Where a holder maintains the records required by STATE pursuant to Section 21 of this Act, the administrator may determine outstanding liability based on a reasonable estimation only to the extent a holder requests such reasonable estimation in writing and the parties agree to the scope of and methodology for such estimation.

Section 21: Retention of Records.

~~(a) Except as otherwise provided in subsection (b), a~~ A holder required to file a report under Section 7 shall maintain ~~the~~ sufficient records, as defined in Section 1(#), containing the information required to be included in the report for ~~10~~ 7 years[73] after the holder files the report.~~, unless a shorter period is provided by rule of the administrator.~~ To the extent the holder fails to comply with this provision, STATE may, consistent with Section 20(f) of this Act, estimate the amount of property that would otherwise be escheatable to STATE had the holder so complied.

As a result of these changes, there may be certain industries and property types where estimation would rarely, if ever, be appropriate, assuming that records have been kept in accordance with industry practice. This is particularly the case in the insurance and securities industries where owner name and address and property amounts are kept indefinitely.

Where, however, some portion of a holder's records are available, the next issue to be determined is whether such records are "sufficient" for audit. Holders may have archived paper documents in warehouses off-site (often in different states), or may not have access to the same transactional records in an online system or to the supporting detail (e.g., the available records may not tie out/reconcile at all, or reliably). Whether such records are sufficient will depend on

[73] This is based on the seven-year standard promulgated by the Internal Revenue Service to tax-related documentation. Tying the unclaimed property retention requirements to federal IRS requirements would allow for a more uniform records retention policy within complex organizations, increasing the likelihood that holders could comply. Further, the seven-year period represents a middle ground between the ten years recommended in prior versions of the Act and the shorter periods which have been adopted by some states, such as Ohio and Washington.

the specific facts and circumstances of each situation. We recognize that the term “sufficient” is inherently subjective, and therefore we propose that states follow Michigan’s model of identifying some parameters around that term. However, we have substituted a 90% sufficiency threshold with 80%, to allow some additional protection to holders given the inherent subjectivity of the term.

In recognition of states’ need to review records in order for them to be deemed “sufficient”, we recommend that the definition of “record” in Section 1 of the Act include the term “retrievable” in its definition to clarify that records must be retrievable for the record retention period set forth in the Act. To the extent holders are able to retrieve the records, the state may not estimate without holder permission. However, where holders cannot access such records for the requisite period, the state may estimate.

In some cases, holders and auditors may prefer and actually agree to an estimation methodology where records are available but too numerous to justify the time and expense of a full review. Thus, to the extent that holders would prefer estimation to the burden of retrieving particular records, the statute should provide the parties the ability to agree to an estimation, so long as they are able to agree to the scope and methodology of such estimation.

(B) Only on a Reasonable Basis

The use of valid, representable and consistent statistical sampling criteria and methodologies by states for periods where documentation does not exist allows for a consistent and reasonable approach for estimating unknown periods. Ideally, minimum confidence and accuracy levels should be defined with respect to any statistical analysis used as a basis for estimation. Of course, each estimate must be reasonable given the facts of a given situation and thus too many parameters could be detrimental to some holder. For that reason, we recommend the definition set forth in Section 1 above be added to Section 1 of the new UUPA.

B. Administrative Appeals

The Drafting Committee of the Uniform Law Commission expressly recognized that many states do not provide any official administrative appeals process for holders under audit.[74] Such a process upon the completion of the audit would be beneficial to both holders and administrators alike, allowing them to resolve legitimate questions without the expense and other burdens of formal litigation.

Moreover, as the Uniform Law Commission rightly explained, unclaimed property audits often take years to complete. Especially where a private audit firm is conducting the audit on behalf of the states, aggrieved holders should not be required to acquiesce to what they may perceive as a burdensome and unreasonable process without having any opportunity to be heard by the state administrators responsible for enforcing the law.[75]

[74] See Memorandum to Interested Parties dated February 13, 2014 at 7.
[75] The U.S. Chamber Institute for Legal Reform notes that unclaimed property audits “imposed substantial costs and burdens on companies, often requiring the hiring or redeployment of dozens of employees to meet the private

By way of example, a contingent fee auditor may request a substantial volume of data that would take a holder significant resources to produce. Perhaps the data is stored in paper format, in a warehouse of documents, and without any index or other roadmap to its location. The holder may believe that a review of such documentation could not lead to the discovery of any unclaimed property nor otherwise reflect the holder's level of compliance with the law. The holder should be entitled to an opportunity to present its position directly to the state administrator along with a request that the document demand be stricken from the audit. That opportunity should occur before the holder is required to undertake the burden of producing the records.

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.

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 processes[78] 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.

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auditors' demands." *Unclaimed Property Best Practices for State Administrators and the Use of Private Audit Firms* at 4 (April 2014) available at: http://www.instituteforlegalreform.com/uploads/sites/1/BestPractices.pdf.

[76] *Id.* at 6, 8.

[77] *Id.* at 8.

[78] *See* Council on State Taxation Policy Position on Independent Tax Appeals Tribunals; Tax Executives Institute, Inc. Support for the American Bar Association's Model State Administrative Tax Tribunal Act; *see also* Garland Allen and Craig B. Fields, *The Model State Administrative Tax Tribunal Act: Fairness for All Taxpayers*, The State and Local Tax Lawyer, Vol. 10, 2005, p. 83.

[79] Tax Executives Institute, Inc. Support for the American Bar Association's Model State Administrative Tax Tribunal Act.

Further, this meaningful and fair review is required by due process.[80] The Constitution guarantees that no person shall be deprived of life, liberty or property, without due process of law.[81] Thus, in reviewing state agency decisions of unclaimed property, an independent appeals tribunal is needed to satisfy the Constitutional requirements for a meaningful review.[82]

In particular, the independent process should provide for due process by requiring notice and an opportunity to be heard.[83] For that reason, holders must be permitted the opportunity, proposed in subsection (b), to be heard by state administrators prior to undertaking costly and time-consuming efforts to produce data requested by auditors.

Moreover, courts have recognized that due process requires an impartial decision maker.[84] In the case of unclaimed property, often times it is the holders that will appeal adverse decisions by a state agency. It would be nearly impossible for an appeal to be meaningful and unbiased if holders were required to appeal to a tribunal or a decision-maker whose interests were aligned with the agency charged with administering the state's unclaimed property laws. This is because the holder's interests and the agency's interests necessarily diverge—the state has assessed the liability and the holder disagrees with it. Thus, we have articulated a method by which both parties can equally participate in choosing the decision maker with respect to post audit appeals.

In summary, we respectfully request that the ULC include a meaningful and independent procedural mechanism to allow holders to be heard, both while an audit is conducted as well as after the state's determination has been issued.

Proposed Language:

(A) Section 16: Action to Establish Claim.

> An owner ~~person~~ aggrieved by a decision of the administrator or a person whose claim for property 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 aware the claimant reasonable attorney's fees.]~~

[80] The procedural component of the Due Process Clause requires the state to formulate procedural safeguards and adequate post-deprivation processes sufficient to satisfy the dictates of fundamental fairness and the Due Process Clause. *Zinermon v. Burch*, 494 U.S. 113, 149 (1990).
[81] U.S. Const. Amends. V, XIV.
[82] Holders have due process rights with respect to unclaimed property proceedings, even where the property at issue is owned by a third party. *See, e.g, Standard Oil Co. v. State of New Jersey*, 341 U.S. 428 (1951); *W. Union Tel. Co. v. Com. of Pa.,* 368 U.S. 71, 75 (1961). Indeed, in many instances, the main issue of the appeal is whether the state is taking custody of the holder's own property.
[83] *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).
[84] *Klco v. Dynamic Training Corp.*, 192 Mich. App. 39, 42 (1991).

(B) Section 22(A) Enforcement of Final Determination

1) The administrator may maintain an action in this or another state to enforce this Act after the issuance of a final examination report, as defined in subparagraph (3) below, so long as the administrative appeal rights of the holder have expired. The court may award reasonable attorney's fees to the prevailing party; except that the state may be awarded fees only where it is the prevailing party and the holder acted with fraud or willful misconduct.

2) Any holder aggrieved by a final examination report may, within 30 calendar days from the date such final examination report is issued, pursue a judicial appeal pursuant to [STATE's administrative procedures law] or, in lieu of a direct judicial appeal, any holder so aggrieved may elect, but is not required,[85] to pursue first an administrative appeal as set forth in this Section.

3) Elective Administrative Appeal by Holder.

a) Within 30 calendar days from the date of a final examination report issued by the State administrator, a holder may file a written appeal with the Administrator's Office.
b) If the holder files neither a written administrative appeal pursuant to this Section within 30 calendar days nor elects to pursue its judicial appeal rights in accordance with [STATE's administrative procedures act] the holder will be presumed to have agreed to the final examination report.
c) For purposes of this section a "final examination report" is a report issued by the Administrator and contains findings that specify the entities audited, property types audited, the years audited, and the final amount allegedly due the State.

4) The written appeal must be dated and signed by the holder and contain the following information:

a) The names of all parties involved in the audit at issue;
b) The specific findings the holder is protesting including any amounts in question, property types, and the years audited. The holder is presumed to have agreed to any findings not contested;
c) A clear and concise description of each error that the holder is alleging the Administrator's Office made in its findings;
d) The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in any hearing to the arguments and legal authorities contained and cited in said appeal;
e) The relief requested; and

[85] Failure to pursue an administrative appeal does not constitute failure to exhaust administrative remedies that would preclude the ability of a holder to pursue a judicial remedy.

f) Whether or not the holder is requesting a hearing.

5) The Administrator must acknowledge receipt of the holder's written appeal. Within 10 calendar days from the Administrator's acknowledgement of his or her receipt of the written appeal, the holder must pay the undisputed amount of the audit findings to the Administrator.

6) Hearing.

a) If the holder files a written appeal, a designated hearing examiner shall be selected by the process described in paragraph (9).
b) The designated hearing examiner shall schedule a hearing, to be conducted within 60 calendar days from the date of notification of his or her selection. The Administrator, designated hearing examiner and the holder shall agree upon a date(s) for the hearing which are within the 60 calendar day period.
c) The designated hearing examiner shall issue a Notice of Hearing, notifying the Administrator and holder of the date, time, and place of the hearing.
d) The Notice of Hearing shall notify the Administrator and the holder that:
    i) The Administrator and holder may present witnesses and documents at the hearing.
    ii) Failure to appear for the scheduled hearing without good cause shall be treated as a withdrawal of the Request for Hearing, and the designated hearing examiner will make a final determination based upon the record.
    iii) The designated hearing examiner may reschedule a hearing upon determining that good cause exists.
e) The designated hearing examiner shall have the discretion to allow the Administrator or the holder to provide additional information subsequent to the hearing and will supplement the record accordingly.

7) Final Determination. Within 60 calendar days, after the hearing is held and the record is complete, the designated hearing examiner will issue a written decision (the Final Determination) to the Administrator and holder. The Final Determination will include findings of fact and conclusions of law.

8) Record. The designated hearing examiner shall prepare an official record of the appeal that includes, but is not limited to, a transcript of all testimony and all papers, motions, documents, evidence and records reviewed in the appeal process, and a statement of matters officially noted.

9) Designated Hearing Examiner Selection: The designated hearing examiner shall be a (i) former member of the judiciary or (ii) a licensed attorney who is qualified by experience or training to serve. The designated hearing examiner may not be employed by nor a contractor of any of the parties to the

appeal. The designated hearing examiner will be mutually selected by the parties through the following process:

a) Within 45 calendars days after the written appeal is filed with the Administrator's Office, each party shall provide to the other a list of no more than 5 people who are qualified to be a designated hearing examiner.
b) Within 5 calendar days from receipt of the list, each party may, without cause, submit 2 names for removal from the list provided by the opposing party.
c) Within 5 calendar days from communicating the removal of names, the parties shall agree to a random selection process for choosing the designated hearing examiner from the remaining names and shall select the designated hearing examiner in accordance with such process.
d) The Administrator shall notify the hearing examiner of his or her selection within 5 calendar days from the selection.

10) Judicial Review.

a) Any party adversely affected by the designated hearing examiner's decision is entitled to judicial review and may pursue such review by filing notice within 45 calendar days from the date that the designated hearing examiner's final determination is received by that party, in accordance with [STATE's administrative procedures act]
b) The review shall be conducted by the court without a jury and shall be a *de novo* review of the issue (s) in dispute at the time of initiating the court review.

(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.

C. Post Escheat Sale of Securities

1. *Background*

UPPO respectfully submits that the uniform provisions governing the public sale of abandoned property should be amended to (1) prohibit a state from selling securities that have escheated to the state prior to three years from the date on which the securities were delivered to the state, and (2) to protect shareholders from being impacted negatively by the escheatment, and subsequent sale, of their securities.

The practice of several states, based on the UUPA of 1995, is to sell escheated stocks, mutual funds, bonds and dividends soon after receipt. The state sells the property and deposits the money received into the state's general fund. Owners claiming the property after the sale are entitled only to the proceeds of the sale, which could be substantially lower than market value. For example, in California, the State Controller sells the securities at prevailing prices.[86] A person who claims an interest in the property subsequent to the escheatment and sale may file a claim to the net proceeds from its sale.[87] Under the 1995 UUPA, owners claiming securities from the state are entitled to market value as of the time the claim was filed, but only where the claim was made within three years of escheat.[88]

The above-described practice has proven to be detrimental to owners and holders alike. Consider for example, a holder escheats 100 shares of stock worth $10 each in Year 1 ($1,000 of value). The State sells the stock in Year 4 at $15 per share. The State obtains $1,500, or a gain of $500 on the sale. Now suppose that the market rises significantly in Year 6 and the shares are worth $20 a share. The owner who now goes looking to redeem his shares expects to have $2,000 of value. He receives instead $1,500 minus the State's costs in selling the property. The escheatment process, therefore, cost this hypothetical owner over $500.

In recent years, owners damaged in this way have instituted litigation against the holder who remitted the property to the state as unclaimed property. They have brought claims for wrongful escheat, breach of fiduciary duty, and other causes of action. This litigation burdens holders who are attempting to comply with complex and often ambiguous laws with substantial risk, such that they may be reluctant to escheat in the absence of certainty. [89] Often the dollars are much more significant than our hypothetical above.

[86] Cal. Code Civ. Proc. §1563(b). This is consistent with the 1995 Act.
[87] *See* Cal. Code Civ. Proc. §1540(a).
[88] 1995 UUPA §12(b).
[89] *See e.g., A.W. Financial Services, S.A. v. Empire Resources, Inc*., 981 A.2d 1114 (Del. 2009) (holding wrongful escheat actions permissible against private parties generally, in case where plaintiff alleged over $870k in damages);

UPPO's proposed amendment to Section 12 of the UUPA provides a reasonable solution to this problem. First, it prevents a state from selling securities for a period of 3 years after escheatment. This gives additional time for owners to locate, and be restored to, their securities prior to a sale of the securities. Second, if a state sells the property and the owner subsequently makes a claim to the property, the state must repurchase the securities and turn over the shares to the property owner or, if the securities cannot be repurchased, refund to the owner the cash market value of the securities on the date of the claim. This language provides an incentive to the state to make wise investment decisions when handling their portfolios and ensures that owners are not disadvantaged by the escheatment and subsequent sale of their property. Rather, owners are put in the same position in which they would have been in had the property not been escheated to the state and was instead allowed to fluctuate with the stock market.

However, the proposal also recognizes that states may not wish to be tasked with the burden or risk inherent in maintaining trading securities portfolios. NAUPA has expressed concern over the burden to states of portfolio management.[90] For that reason, the draft affords the states the option to hold the securities themselves in custody for the owner.[91]

These amendments make sense in light of the primary underlying principle behind unclaimed property laws – that is, to protect unknown owners by preserving their assets, locating them, and restoring their property to them. Therefore, UPPO encourages ULC to adopt its proposed amendments to Section 12 of the UUPA.

Proposed Language:

(A) Section 12. Public Sales 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~~

Azure Ltd. v. I-Flow Corp. 210 P.3d 1110 (Cal. 4th[t]2009) (finding holder not immunized against breach of fiduciary duty claim alleging over $100k in damages).

[90] *See* February 28, 2014 "Joint Issues" Memorandum between UPPO and NAUPA (Issue 16).

[91] In the alternative, the state can "maintain" the shares on the books and records of the holder, as the Investment Company Institute recommends with respect to mutual funds. In particular, the holder would transfer the shares to the state as trustee for the shareholder on its books and records.

~~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.~~The administrator shall not sell or otherwise liquidate securities until at least three years have passed from receipt of the securities. Securities shall not be sold unless and until the administrator has provided the owner with notice of the administrator's possession of the stock. Said notice shall, at a minimum, include at least one publication designed to reach maximum distribution, whether such publication is electronic or in print media. 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.

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 plus dividends, interest and other increments thereon up to the time the claim is made, but ~~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.

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

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(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.

EXHIBIT A

Survey Questions, Compilation of Responses & Analysis of Subjective

Commentary from Holders

In response to **Question 1** relating to whether the state due diligence mailing time frame should be changed to a date certain (e.g. DATE X for Spring Reports or DATE Y for Fall Reports) from a range of time (e.g. "no less than 60 nor more than 120 days" before the filing deadline), 203 of responses supported a date certain deadline while 26 supported a "time frame" approach.

Respondents cited a desire to have more flexibility, and thus not have any specific guidelines at all pertaining to due diligence mailing timeframes. Several responses supported a "not less than 60 days before the filing deadline" uniform provision.

In response to **Question 2** relating to the establishment of Uniform Due Diligence threshold (and a corresponding dollar amount), 218 of responses supported a uniform threshold dollar amount, while 11 supported no dollar threshold at all. Out of the 218 responses that did support a dollar threshold, the responses were divided as to what the appropriate threshold should be, as follows:

- 63 respondents (28%) selected $25 as the threshold;
- 95 respondents (41%) selected $50 as the threshold;
- 48 respondents (21%) selected $100 as the threshold;
- 12 respondents selected "other" as the threshold (ranging from $10, to $250, to no specified amount at all)

In response to **Question 3** relating to whether due diligence letters should be sent via Certified Mailing for amounts in excess of a certain level, 77 of responses supported a Certified Mailing requirement above a certain (dollar) level, while 152 responses did not.

In instances where respondents were in favor of a Certified Mailing requirement, 71 out of 77 respondents specified a dollar level cut-off, and the responses can be generally grouped as follows:

- Less than $1,000 — 11 (as low as $50)
- $1,000 — 41 (58% of respondents)
- More than $1,000 — 19 (as high as $250,000)

Respondents who were not in favor of a Certified Mailing requirement (representing 66% of responses) cited the relative ineffectiveness, when compared with the high costs, and added administrative burden holders face when sending certified mailings.

In response to **Question 4** relating to whether states should allow holders to deduct the costs of Certified Mailings, 206 of responses were in favor of holders being allowed to deduct costs, while 23 were against deducting costs. Respondents generally cited (a) a lack of interest in charging their clients fees to cover the cost of the Certified Mailings, (b) that it is the cost of doing business, or (c) a disinclination to further complicate what is viewed as an unnecessary process (the mailings themselves).

In response to **Question 5** relating to a Uniform Due Diligence Compliance Affidavit requirement that would be included in the State's Verification and Checklist so no separate document would be needed, 209 responses supported the implementation of a uniform Compliance Affidavit, while 20 were against it. Narrative feedback was not requested on this question.

In response to **Question 6,** relating to a required date for Due Diligence Responses (e.g. 60 days before the Report Filing Deadline), 179 of the respondents supported a date certain deadline, while 50 were against a response deadline. Narrative feedback was not requested on this question.

In response to **Question 7** relating to uniform font size requirements for Due Diligence letters, 160 of respondents supported the implementation of a uniform font size requirement, while 69 did not support it.

Respondents who were against the implementation of a uniform font size cited (a) administrative/operational issues pertaining to vendors' usage of varying fonts, (b) the lack of relevance as to content and impact on response rates, and (c) the overall unnecessary level of granularity relating to the concept. DRAFTER's COMMENTS – While the vote was solidly in the category of suggesting that a uniform font size was a good idea, in effect this suggestion imposes a uniform operational process on Holders and is likely less relevant to states. Perhaps the support of this uniform position is not in the best interests of holders, and they are better off simply using whatever font they want to (notwithstanding certain states' pre-existing requirements).

In response to **Question 8** relating to support for uniform content requirements for Due Diligence letters, various requirements were included in the survey and the results for each category are noted below (all out of the 229 responses received):

- 16 respondents did not support any uniform content requirements;
- 186 respondents supported the inclusions of the property amount and date;
- 201 respondents supported an escheat "warning" provision in the absence of a response to the mailing;
- 184 respondents supported the inclusion of steps necessary to recover property;
- 20 respondents provided other suggestions, such as the inclusion of statutory references, the option to provide confirmation that the liability is not owed, and state contact information.

In response to **Question 9** relating to situations in which the holder has a valid Owner email address, and whether the respondent supported the use of electronic means to send due diligence notices to Owners, 207 of respondents supported the option of using email as a means for conducting due diligence, while 22 respondents did not. Respondents cited privacy and identity verification issues, and the burden of yet another operational process. Some respondents advocated that e-mail would be acceptable provided it was not designated as the "only" form of due diligence that could be conducted.

In response to **Question 10** relating to the recognition of alternative types of Owner responses to due diligence (other than the return of a letter via postage or fax), holders considered the following options:

- Call center activity – 134 affirmative responses;
- Email of a signed imaged due diligence response – 211 affirmative responses;
- Web based certification – 176 affirmative responses;
- Other – 15 responses

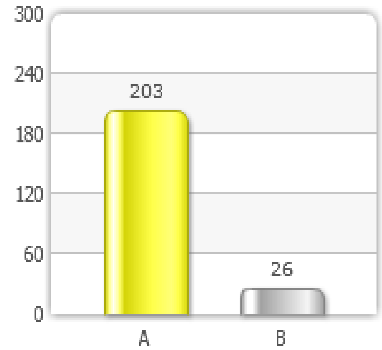
Narrative commentary associated with this question (30 comments) generally supported or rejected the specific choices noted above, with some notes that did not offer any additional tangible additions to this listing.

EXHIBIT B

Question – Support changing deadline to date certain:

1. Do you support changing the state due diligence deadline from a time frame (e.g. no earlier than 120 days or later than 60 days before the report is filed) to a Date Certain such as December X for Spring Reports and July X for Fall Reports?

A. Yes (203 out of 229)
B. No (26 out of 229)



Question – Responded NO to question 1:

1a, If you responded "NO" to the question above, please provide input as to why not.

Answer Text

Debatable. You'd want to consider setting early date in July. As an example: The State of New York requires First Class mailing, with subsequent Certified Mail if over $1000 and no reply to First Class mailing. Then by August 31st if still no reply required to publish legal notice in newspaper for all owners over $50, and the cost of the publication is apportioned amongst owners. So you'd want to try to obtain replies as early as you could to due diligence to avoid publication as cost can be quite high to the clients.
Noticed no input for standardizing property codes used by the states. This should be defined in the code that property codes are consistent to eliminate the need for holders to interpret what each states uses their respective property codes for.
We send out thousands of Due Diligence letters throughout the year; that means that we have thousands of Due Diligence letters to process when we receive them back in the mail. If we send all of our letters in two bulk mailings, our department, as well as the business areas that we forward the letters to, will have a more difficult time processing than if we have the mailings spread out throughout the year.
Prefer more flexibility. For example, if the state specifies a certain date, and after that date, we locate additional properties, the due diligence date would have past.
It allows for holder flexibility in performing due diligence
I think the it should be a flexible date such as "no less than 60 days prior to the reporting deadline"
The time frame allows more flexibility to satisfying the requirement at times more convenient for the holder.

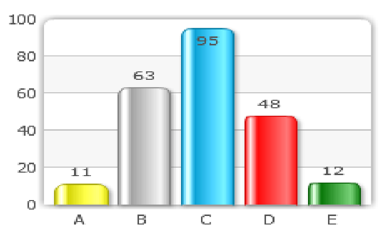
As large as our company is, we could not manage a single due diligence mailing date for all items being reported in Spring or Fall. We mail approx 00K DD letters per year with responses being processed by a very small team, scanned and electronically sent to all applicable business partners for processing. That volume going out in two mailings would cause too many delays in all phases of processing, which would ultimately cause unhappy payees from lengthy turn around.
If you move the spring date to mid-January I might support, however, I report in every state and always allow my recon team to complete their December and June bank recons prior to sending due diligence letters.
I prefer more flexibility
We don't just have spring and fall cycles anymore, so this could get rather complicated. Instead I prefer a number of days before the due date of the report, such as "not less than 60 days before the report is due to the state".
Language should be no later than X date (e.g., 60 days) before the report is due. This provides more flexibility to the holder. This applies to question 6 below as well.
Yes, it would be beneficial for all the states to be standard.
Varying dates allows me to fit duty of producing the letters into my schedule of other responsibilities and will allow returned due diligence letters to be returned at different times of the year. Not all letters coming back during the same month would put a large burden on processing all the letters.
Uniform date concentrates the workload, present system spreads it out somewhat. Recommend at least 90 days in advance (a couple of states are only 60)
The time frame allows me to space it out so I don't have to send a lot of letters at once.

We report in 48 states. My staff person likes the fact that some deadlines are spread out over different parts of the year.
Due to other job responsibilities
Flexibility in providing notices allows us to manage the process better
It is much easier to comply with a time frame than with a specific date.
I would support a change to no later than 60 days before the report is filed. This way it gives the Holder the opportunity to letter the Owner at a time when they feel a response is more likely to happen.
But how will you treat Michigan and Texas? Are they considered Spring or fall states?
Completely open ended due diligence period may result in holders conducting due diligence well before the end of the dormancy period. I prefer a uniform time frame as opposed to a uniform "Date Certain."
Unless all states adhere to the same reporting cycle, this will not work. Examples: PA, MI, TX, CT... etc.
Due to the volume of letters that we mail, we like to be able to stagger the time when we mail them while keeping in compliance with the state deadlines.

Question – Due Diligence threshold:

2. Do you support a Uniform Due Diligence threshold for all states? If so, what amount?

A. No, I do not support a threshold (11 out of 229)
B. Yes, I support a threshold at $25 (63 out of 229)
C. Yes, I support a threshold at $50 (95 out of 229)
D. Yes, I support a threshold at $100 (48 out of 229)
E. Yes, I support a threshold at another amount - please provide the value in the next question (12 out of 229)



Question – Due Diligence threshold other amount:

2a. If you responded above to supporting a due diligence threshold in a different amount, please provide the amount here

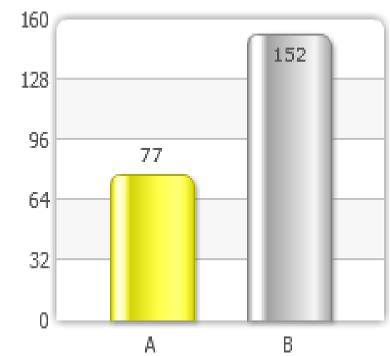
Answer Text
$250
The amount is arbitrary. I believe uniformity should be the goal.
As long as it's consistent, I don't have preference of the amount.
I support a threshold at $10
I think the thresholds should vary, maybe $100 for payroll and $300 for all other types. I'd also like to see UPPO advocate for diminimis reporting thresholds since the burden of processing and reporting small balances is often cost prohibitive.
Start with an appropriate amount and have it be inflation adjusted over time automatically so amendments to the law are not required in the future to have this amount remain appropriate.
Of course if an industry determine that they need to conduct due diligence for a lower amount, they can do that as well.
$10
$10

I support a threshold at any amount. However, we regularly have responses to our due diligence letters in the $25 range, so I hate to make it too high.
$5
My company uses a threshold of $10.00+. We feel like if it was our money that someone was holding, we would want to claim it if it was $10.00 or more.
$10.00

Question – Support certified mail:

3, Do you support requiring Certified Mail for amounts in excess of a certain level?

A. Yes (77 out of 229)
B. No (152 out of 229)



Question – Support certified mail - Yes:

3a. If you responded YES above, please provide the level of value

Answer Text
No. However do see a need to have everyone get address corrections

from the USPS.
$250,000.00
$1,000
$1,000
$10,000.00
$1,000
$500
TBD - large level of value
$250
in excess of $1,000
$1,000
$1,000
$10,000
Anything above $5,000.
$1,000.00
$1,000
$1,000
$10,000
2,000.00
$1,000.00 or more.
$5,000.00
Over $250
over $1,000
$5000 - inflation adjusted over time automatically so amendments to the law are not required in the future to have this amount remain appropriate.
$250
$500.00
I believe a reasonable amount is $1,000.
$1,000.00

$1,000.00
$1,000
$500
I believe Certified Mailings would be appropriate for amounts $25,000 and above.
$100,000
In excess of $1,000
Over $2,500
$1,000
$5,000
$5,000.00
Only to be required when there is not a record of returned mail at the address on file, and then I support 5,000.
$1,000
$1,000
$1,000
I am assuming that this would be for every state?? I am flexible on this but to throw a number out there let's say $1,000
$500
$50.00
$1,000.00 and above
$1,500
$25,000
$500
Certified mail makes sense for a "substantial" amount. E.g. $500 or $1,000 and above.
1,000
$1,000
$15,000

$1,000
$1,000
$1,000
$1,000
$50,000
I would support a value of $1000 and above.
$1,000
$1,000.00
I do not have a huge preference except CONSISTENCY. We try very hard to comply. We file reports in 53 jurisdictions so consistency for us is huge. :) $1000 is the threshold value I support.
$1,000
1,000
I think the certified mail aspect helps find more customers
$10,000
$500.00
500
I believe the should start at 5000.00 and above
$1000.00 for 2015
$1,000
$1,000
$1,000 seems to be a good value. I have noticed these letters receive more attention and are not thrown away as junk mail prior to opening. The reason for the letters is to get the funds to the owners and not forward them to the state as unclaimed. But, I would like to be able to take a deduction to cover the cost of the additional expense of mailing and would like all states to support that deduction.
$1,000

Question – Certified Mail - NO:

3b. If you do not support Certified Mail in excess of a certain level, please explain why not

Answer Text
I'm not sure of the value Certified Mail provides. We received a good number of notices returned due to being uncollected, Meaning not undeliverable because of bad address necessarily, but because the Post Office tried three times as no one was home to accept/sign for delivery and the client had NOT gone to the Post Office to collect the item.
Owners are sometimes afraid of accepting a certified letter and the letter is returned unclaimed, even though the owner is at that address.
First class letters are required and should be enough considering the outreach already completed before the item reaches a "final" last contact letter requirement.
Sending a letter signature required does not automatically mean the payee will respond. It is very time consuming and there are other alternative ways to contact people other than using the USPS. I suggest we start utilizing these other areas of opportunity.
Only if you don't know that you have a bad address should this be required.
It is a lot of work and not too sure if we get the response.
high cost
Not worth the administrative cost and time
Costs, accounting, tracking

Many of the certified letters that are sent are returned as undeliverable. There is a lot of additional cost and extra work to send out letters.
I feel it's unnecessary added expense that holders are forces to incur. We send the state required due diligence letters, adding an additional expense is not justified.
It is an extra cost to the company, not just the cost of postage but also the cost of labor time.
Extra expense and time involved in certified mailings
It's an extra unnecessary expense for mailing things we're not even sure are going to get there.
Certified Mail should be utilized at the holder's discretion, but not as a "requirement".
More individuals aren't at home when letters are received.
It is costly to send Certified at all so I really don't support sending Certified mail. I think First class should be sufficient.
We already make numerous efforts to contact the payee. We may not get return mail, and then we are required by some states to do a certified letter. We do not receive many successful responses to the certified mail. This is costly, time consuming and does not seem to be an efficient method for locating owners.
It's a lot of administrative work, many come back RPO. Paying the extra does no good if they do not return the letter with the appropriate boxes checked.

Certified mail to nowhere is overkill. There will be a pointless and heavy administrative burden incurred relative to sending certified mail to a lost owner for which no response is likely to be forthcoming, i.e., they are lost to begin with (dormancy at 3 to 5 years in most cases) or we wouldn't be searching for them. Why use certified mail if one expects no strong chance of actual receipt thereof to begin with? This makes no sense by its own definition. Someone hasn't been located for 3 years? Send it certified! As if that will change something? Further, beyond not making sense to begin with, allowing diminishment of property relative to the cost of mailing a letter to, in general, nobody is just revenue for the USPS and a detriment to the owner whose interests we are safeguarding relative to the abandoned property. Spending time and money to achieve nothing is contrary to general business concepts. Unless certified mail actually serves to protect some interest of the owner, which is doubtful since the owner is lost, it can only serve something pointless.
Anyone can sign for certified mail, so it is not definite that the true owner is notified. Instead of certified mail, a second first class mailing could be sent.
too costly
We do searches long before the due diligence letters are required and use certified mailings as part of that process. The need for certified mailings is redundant.
Many of these members we don't have good addresses for them.
Too burdensome to administer. Also, encourage updated search requirements to get a higher percentage of contact at updated address vs. certified mail to address of record.
We have not been successful in reaching customers via certified mail. It seems like a waste of time and money. For high value accounts we find various other ways to locate the customer including calling their employer, bank, relatives, etc.

If there is a certified mail requirement it should only be for higher value accounts: $10,000 and above.
Certified mailing seems like an unnecessary burden on the holder. I see how it can be beneficial in proving the owner did receive the letter, but a first class mailing seems like sufficient notice.
Cost
It is just a complete hassle and we send out letters by the department were the amount originated and then again out of Tracker.
Most of the due diligence mail is returned. Certified Mail is another expense and hassle to complete. Many individuals do not even pick up the mail at their post office if their mail carrier misses them. So many people today simply do not use US mail any longer.
The only owners of large sums would be businesses. Businesses can take care of their own issues. All B2B transactions should be exempt from unclaimed property anyway.
Only about two states have it now. It seems like an added administrative burden, as well as extra costs.
Certified Mail costs the companies money and it is not any more effective than a normal due diligence letter. Even if an individual signs for the letter, they may not respond. I have seen a husband and wife work for the same company, both receiving certified letters signed for by the husband, and only the letter for the wife was responded to. It is not cost effective.
Certified Mailings are an extra expense. The post office no longer will return the green cards which means that we must go to the website to determine which certified mailings were signed for and who actually signed for them. This is extra cost due to personnel in addition to the cost of the mailing.

Too much of an expense.
It adds yet another facet to the compliance and due diligence process. If an owner does not respond to a letter delivered via standard mail, certified mail, in my opinion will not increase the chances of a response and resolving the item with the owner.
I do not feel that the holder should have to absorb the cost of certified mail for any account no matter the amount. For some holders this could be a small expense but for large companies this could be costly.
Certified mail is expensive and doesn't insure that the actual owner receives the notice.
regular mail should be sufficient
The certified mailing requirement places additional administrative burden and expense on the holder.
We are such a large company, that using certified mail is impractical. However, I would support this if we could deduct the cost. However, I think the minimum for certified mail should be $1000 or greater.
It is not a very effective method of communicating with people and by due diligence time, a large percentage of letters are returned as undeliverable. By the time we sent certified mailings, we have made two prior attempts to contact payees. Responsibility needs to fall on payees to review their mail closely.
Letters will be delivered if the address is correct, whether sent via first class or certified.
I believe the cost outweighs the benefit. It's window dressing. I have not seen any study that shows it increases the response rate.
Too costly

The additional time and cost of manually completing this task.
Certified mail represents an excessive burden on holders, especially given it is in force today for only a handful of states.
The requirement should just be to mail. Why do certain holders get preferential treatment. Does not seem right.
I don't think it provides any more proof that the owner received the letter.
It cost so much and most of the letters come back RPO.
Certified mail is extremely cost prohibitive and I personally do not see the value except in cases where I have to provide proof of mailing, like a tax return.
The holder should be able to determine if they wish to go to that extra expense by sending due diligence certified mail. I don't see that certified is any more responsive. If it is required, the costs should be allowed as a deduction.
Costs of certified mail are expensive and do not ensure the rightful owner will respond to a due diligence letter, even if the owner received the letter. Proof of mailing can be achieved with less expensive means. For example, a Certificate of Mailing (PS Form 3817 for individual letters and PS Form 3877 for three or more letters) indicates that a letter was presented for mailing. The form must be presented to a USPS employee for examination at the time the letter is placed in the mail. The USPS employee examines the form, assures that proper fees are paid (at this writing, $1.30 for an individual letter; .47 each for three or more letters; $7.80 for up to 1000 letters; and .95 per each additional 1000).

I do not support this because regular mail works great~
Certified Mail is administratively difficult and expensive. Also, it requires keeping the cards as proof of filing.
Additional expenses for holders - may not yield additional value.
I think its a given that we are going above and beyond the call of duty as far as Due Diligence is concerned. Especially if you are looking at a high dollar amount being potentially escheated. I really think it's not needed.
I have over 2000 items in unclaimed property, the cost and time required to send certified letters is extremely prohibitive, regardless of the threshold
Time consuming - and brings up issue of 'contact' If a company reports to all 50 states, maybe there is not enough time to prepare certified mailings. I believe just a regular letter should be sent. And if the owner signs for the letter and never returns it - would that be considered contact or not?? Too much to think about...
The expense and the low response rate.
That would require 2 types of letters for every state and double the work in my eyes.
The cost factor and people response and open their mail by regular post as compared to certified. They think there something wrong if they get a certified letter.
Unless using the return receipt as contact, it seems unnecessary.

It seems unnecessary.
We find that the majority of letters get returned as refused and this is a very costly mailing.
I don't know that certified mail achieve the issue of concern, and if it does, a dollar cut off that makes sense for one industry may not make sense for another industry.
We send out several hundred letters, the cost to do so would be quite significant.
Based on our experience it has not been cost effective. As a point of reference we are domiciled in Ohio which has a requirement to send out certified letters on properties greater than $1000.
Extra cost and burden of completing forms will require many more labor hours
It is very difficult for a large company to handle this requirement. It is very time consuming, and a regular due diligence letter should be sufficient.
Certified mail does not increase the response rate, and may be detrimental, sometime goes unclaimed or actually refused
Cost and administrative burden. Owners should share the responsibility for maintaining their property. If regular mail is RPO, the holder can take steps to find the owner. But owners must take some responsibility for updating addresses and monitoring their assets.
Mixed feelings. While $1,000 seems reasonable, requiring certified mailings for every jurisdiction would be not only costly, but administratively burdensome for holders.
An extra expense for the business, and it doesn't mean the customer is going to open or respond to the letter. Certified mail just means it gets there.

Address is often incorrect, but the mail is not returned or a response is still never received despite the certified mail.
Certified mail is very difficult and expensive to administer. Not all holders can offset the cost even for states that allow it.
We send out thousands of due diligence letters and this would add another manual step to our process.
Extra cost and burdensome to holders. Also, with more states changing to EFT requirements, it should become less and less applicable and antiquated in the future.
Determining what about is of value to the owner is impossible. To some of mine it's as low as $100 can be impactful to their circumstances.
It would add costs to our company. It would increase the workload for the company.
CERTIFIED MAILING IS COSTLY AND CUMBERSOME AND IT DOES NOT PROVIDE ANY BETTER RESPONSE RATE TO OUR MAILING THAN A FIRST CLASS MAILING PROVIDES.
Our reports are very large and the time and amount of manual processing required to deliver and process the returned slip would not be very productive. Our company also sends emails and drops multiple messages within our system that would prompt the client to respond and claim their acct, we do not see a significant increase in reuniting the client with their acct by using certified mail.
Cost and complexity, plus some states won't let us deduct the costs.
we send out certified letters for NJ, NY and OH and receive very few responses
We have not experienced an increase in response even with certified.

I believe that the extra cost burden is not worth the certified mailing. Most of the time the address is no longer valid so the certified mailing would not matter
Requiring certified mail for items over a certain dollar amount is an administrative burden as well as costly to the holders. The first class mailing is sufficient to locate the owners of the property regardless of the amount.
I work for a corporation as opposed to a financial institution and I do not believe it is necessary.
Organizations should not be required to spend additional funds to return monies to individuals/entities that have not cashed checks, etc. In many instances, the cost of certified mailing would be a waste, in that the address for the payee is no longer viable.
Wasted time and expense, first class mail gets there fine.
If an owner has property that is of value to a level that would require certified mail, they should be responsible enough not to lose contact with the property.
certified mail preparation is very costly and time consuming
The amount of time and effort that it takes to create certified mailings does not support the amount of claims that are returned.
Cost
Cost/Benefit
Our stats show that the return rate for regular mail is similar to certified mail.

Cost prohibitive
Physical mail is outdated and certifying it does not seem to increase the response rate.
My company performs non-statutorily required "due diligence" early on in the process (ie - when check is 90 days old). I think the added requirement is an inconvenience (and added expense) to the holder who has already attempted to contact the owner several times. I understand not every company performs non-statutorily required "due diligence"; I'm just providing commentary specific to my own company and their internal processes. In addition, if the industry moves to accepting email as an accepted method to perform due diligence; I feel an email would be just as an effective method, if not better, than certified mail to attempt to make contact with the property owner. Record retention guidelines would have to be outlined if/when the industry moves in that direction. My only other comment about certified mail is to perhaps require it only when the property is subject to a change in value (ie - shares of stock).
Adding certified mail as an option does nothing more than increase the cost of due diligence on all levels. We've never seen an increased return from our certified mailings
The due diligence requirements already represent a huge commitment of time for a relatively small positive return. Adding a requirement for special mail handling just increase this time along with cost.
Additional burden
Certified mail is costly and time consuming to companies and are just as likely to go undeliverable.
The cost could be prohibitive, unless the level was very high.

It is an unnecessary exercise, wasting both time and expense.
Additional cost to the holder, with no additional guarantee of response from the owner. Return receipt received should not count as owner originated contact.
No government entity sends mail via Certified Mail; therefore, I do not think that we should be required to use Certified Mail. US mail is the national mail program and should be sufficient.
Additional expense to holders.
cost, need to decipher which states require and for what amounts. US mail is US mail. If the person doesn't live there, neither certified or not will get to them
Unnecessary expense both in terms of postal costs and processing/preparation costs
Unnecessary complication in a process that has too many tiny variables
Once the state cashes the escheated check, and it clears the company's bank statements, that should be enough evidence that the state received the funds. It would be beneficial to receive a receipt from the state, once they receive the check and the report.
Certified mailing are costly to the issuer and are complex in completing and finally time consuming to complete. If the issuer can mail in advance of 120 days, this will give the shareholder a fair amount of time to respond. While certified mailings confirm that a letter was received at an address, it does not give confirmation that the letter was indeed by the addressee.
It is a waste of time and money.

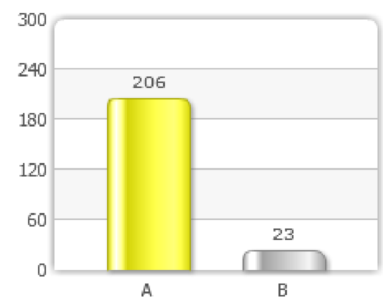
The Certified Mailing process is, administratively, a burden. Also, they only slightly more effective than the regular mail Due Diligence letters (20% response for NY Certified vs 17% response for regular mailed Due Diligence over $1,000). For that close of a response rate, the additional cost of Certified Mailing is not a benefit. We do not deduct the cost of Certified Mailing since that would take away from our member/provider/broker payment.
administrative burden
I do not support certified mailing at a particular dollar level because certified mailing without restricted endorsement does not prove that the item actually reached the intended recipient. All that it requires is that someone sign for the item, and that signer does not necessarily have to be the addressee.
Time consuming, costly.
The responses received from a certified mailing is no greater than that received from a regular mailing exercise but costs incurred are much greater. Responses we have received from the New York certified mailing has been less than 10, if that many. The extra effort and costs required have never been proven to generate a greater return.
Cost, Time, a person with an account value lower than the Certified Amount should be just as important as the person about the Certified Amount and it's up to them to read their mail and respond to first class just like they would respond to a certified mailing.
1. Certified mail creates additional work to separate required letters. 2. It does not increase the chance your address is valid. 3. It does not improve the likelihood of a response from the owner, but using the returned receipt does initiate contact. That could lead to continuous and endless loop of contact without claim, restarting the dorm. period each time.

For companies, such as the one that I work for, that consider the unclaimed property a "part time" job, it is already time consuming enough keeping up with and mailing out letters, answering phone calls, reissuing funds...and the Certified Mail just adds to an already hefty due diligence process.
Current Certified Mailing requirements (in such a small number of states) are true outliers when considered in terms of how few states require the mailings. In terms of uniformity, no certified requirements at all is a more likely achievable goal.
Most addresses on file are no longer valid, it would be a waste of money even though it does, or should be, deducted from the original check amount
This is an additional expense for the holder, manually labor intensive, and I have yet to have one returned to me. It appears that if they do not respond to the initial letter, they do not respond to the certified mail either.
the higher cost of certified mail
It is an excessive cost and a lot of our letters are returned undeliverable.

Question – Certified Mail - Deduct cost:

4. Should states allow holders to deduct the costs of certified mail?

A. Yes (206 out of 229)
B. No (23 out of 229)



Question – Certified Mail - Deduct cost NO:

4a, If you responded NO to deduct costs for certified mail, please explain why not

Answer Text
Should have a statutory deduct amount being the same across all states.
States should not be able to require both first class letters and newspaper advertising. Redundant.
We do not take any deductions, since they are our clients
but still would prefer to NOT send via this method.
Because I don't agree that certified mail should be required. I also don't think the "lost" owner should have to pay for that, ever.
too burdensome to administer, will get it wrong and face penalties down the road.
One of the problems with deducting cost is you must actually determine it and then apply to each policy. It would be better to allow an overall administration fee deduction than a per item deduction.
I don't think there should be a certified mail requirement, however if there is one, the holder should be able to take the deduction for this additional cost enforced on them by the states.
It's the cost of doing business

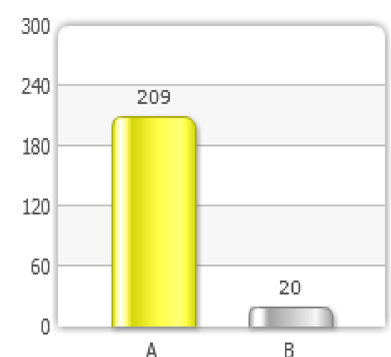
Costs of mailing due diligence letters, certified mail or otherwise, should be deductible.
Regular mail is fine and less cost
Well, if the state is going to require certified mailings, then cost should be deducted if holder wants to go through all that.
It's the cost of doing business.
Cost of business.
That is the cost of doing business. I the original payment was mailed certified, that amount isn't charged to the recipient.
although regardless of any change my company would not deduct the amount from our policy holders so this change would not impact us.
Not all holders can do this even if the state allows for it. By the states not allowing it, it levels out the playing field.
This takes away ultimately from the owner of the funds.
See above. I don't support certified mail.
It would just complicate the process even more.
It's just one more thing for the Holders to track - Certified mailings should NOT be required.
I don't believe certified mailings should be done at all. See my response to question 3b.
Reduces the value of the property owed.
This should be allowed but not required. I think it would be more work/hassle to track the deduction of this cost.

The state should bear the cost of mailing and not deduct it from the owners later claim.
record keeping, and it would reduce the amount the consumers would receive back, In good conscience, I don't think that's right
In 529 Plans, that is not written into the Program Brochure, thus not allowed.
Only if the state is willing to pick up the cost themselves should a company deduct the cost. Deducting the cost from the original payment, takes away from the Owner's benefit.
While I indicated yes, our company does not deduct costs.
It is a cost of doing business
You should always know who and where your customers are. The price is the cost of doing business. You build ill will once you start charging client to get back their own money. That's the perception of the customers.
not applicable
Yes for other holders, but our company would not deduct for the costs. It would be an accounting nightmare.
It is my opinion that we are sending the letters as a courtesy to facilitate distribution of the funds to the rightful owners.

Question – Affidavit Requirement:

5. Do you support a uniform due diligence compliance affidavit requirement that would be included in the state's verification and checklist so no separate document would be needed?

A. Yes (209 out of 229)
B. No (20 out of 229)

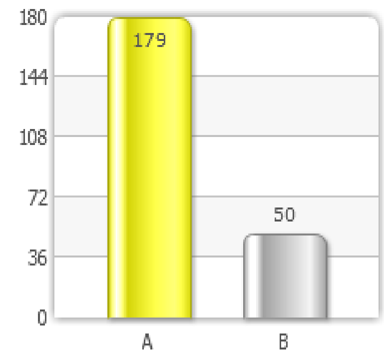


UPPO Recommendations to ULC
on UUPA Rewrite

Question – Date for Due Diligence Responses:

6. Do you support a required date for due diligence responses (e.g. 60 days before the Report Filing Deadline)?

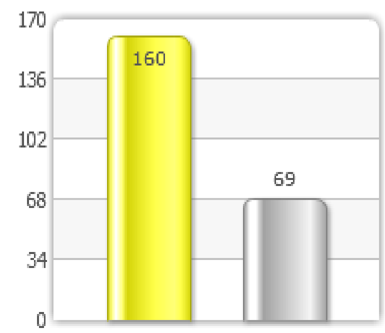
A. Yes (179 out of 229)
B. No (50 out of 229)



Question – Font Size:

7. Do you support uniform font size requirements for due diligence letters?

A. Yes (160 out of 229)
B. No (69 out of 229)



Question – Font size - NO:

7a. If you responded NO to uniform font size, please explain why not

Answer Text
The emphasis the California requirement adds in not a bad thing. It it were uniform across all states would be better though.
This would be difficult to assure that all companies comply. Additional info for 6 above. Would like to see 30 days which would help with Texas' process and deadlines in March.
I'm not too sure if it is necessary and or the purpose.
don't feel it's necessary
Does it matter what size the font is?
I think requiring a font size is too restrictive because if the due diligence letters are outsourced to a 3rd party, they may or may not have the capability to customize their settings for one company (if the font size is different than their standard).

The font size is different for each vendors systems.
Don't see why font size has any bearing on the letter's content.
I agree in theory, but some company initiatives to save money only allow certain fonts to be printed. (Saves paper and printer cartridge cost for fonts that require less ink and space.)
Font size generally follows each company's style as assigned to each type of solicitation or mailing. Forcing holder to a uniform font would cause inconsistencies with similar solicitations or mailings and may also require changes to existing programming.
Each company puts out their own letter & there can be restrictions on the limited amount of space that they may have within the form of the letter.
Holders should be allowed flexibility whenever possible. Escheatment is already a complicated process, so eliminate any requirement that is not absolutely essential to the process.
an acceptable readable font is good, but having special requirements like CA requires different templates to be used, stressing the process.
Not sure
I can't even come up with a reason for why a standard font size would matter. So that is my explanation - I don't why it would matter.
Not every state will conform to this, despite our desires. Also, most businesses use a readable font in their correspondence.
I think it's crazy to expect "everyone" to use the same font size for letters. We have corporate standards that need to be adhered to and we have uniform standards. If we required to use specific fonts, we would have to get authorization each time any change was made to the letters.

It more work and cost to the holder and it does not guarantee different results
I prefer my company's recommendations. Of all the issues that need to be covered, font size is the least of them.
I do not think this is necessary. Some companies have required fonts or their own specific designed font that management requires the company use. A font size minimum may be acceptable, but then you are just creating one more area for the Unclaimed Property Managers to police.
Each abandon property system is different and what we want on the form returned to us. By requiring a certain font, it could cause the letters to go to multiple pages and other issues. If the font is any larger than what we currently utilize it would force the majority of our letters to multiple pages. A letter that is multiple pages causes us to manually stuff them so that would be additional expenses.
It just seems like an additional requirement with little impact on the rate of valid responses.
I don't understand the necessity of this requirement.
I think this is carrying compliance a bit too far. Send letters in the appropriate time frame and report as required. Designating font size is micromanaging.
having certain parts of the letter in a different font call attention to the important elements.
Due to individual company letterheads, envelopes, etc., font formatting should not be a state enforced requirement.
This seems like it would make the due diligence process more complicated and is not necessary.

We have enough to worry about to even begin to worry if our font and format meets the approval of the states. Especially for large companies that escheat to all states. It's an everyday battle trying to comply with all the continues changes.
other than saving money on a smaller font, what is the reason behind this item?
"Uniform font size"? Really? Do we really care what the font size in our due diligence letters are?
I believe there should be flexibility for the holders and this seems restrictive.
I find it more important to fit all the information on one page. The font size can potentially be restrictive to doing that.
Limiting font size can be restrictive to fitting all the pertinent information on the letter.
I prefer for font size to be completely up to the holder with no requirements.
Really? People will either read their mail or not. Large font size is not going to change that.
These should be a business decision.
This becomes a function of micro-managing the due diligence process.
We have customized letters due to internal requirements and font is adjusted accordingly.
As long as the DD letter contains the basic elements (type of transaction, amount, date, verification, etc.), it shouldn't matter if the font is 8, 10, or 12. Some holders may like to send post cards and others letters, so why try to put constraints around that. It really shouldn't matter.
I think each company should be able to determine the fonts that they can use.

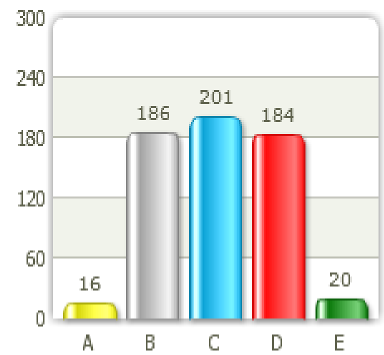
It’s the content of the letter that matters. I don't see the point in requiring certain fonts based on whose decision.
This is not important enough to regulate - surely no holders are sending due diligence letters with font so small that it is unreadable.
Doesn’t seem to effect response rate.
There shouldn't be ANY font requirements. Somewhat ridiculous - once again putting the burden on the Holder community!
makes the process more complicated than it has to be
There is so much information that is already on the letter that we should not be restricted to a font size. We try to keep the letter to one page and if we are restricted to a font size this will cause our letter to break onto multiple pages. This in turn will cost more money to process letters.
Taking the time to discuss and define a uniform font size is overkill.
I want to be able to design my letters to fit my own company's needs. I might want to include far more dialogue and description than another company, so dictating the font size would impact how much information can be contained in a letter.
Companies with various business models may require specialized wording in their due diligence letters which can require varying font sizes. The format of the letter should be decided by the sending company. We find that varying the font size within the document helps pull the reader's attention to specific sections. A uniform font would eliminate this ability.
n/a
Why would you need to?

Unnecessary requirement. We know how to draft letters.
Depending on the technology of the holder, this requirement could cause a hardship. This is an area that I think that the holders who are not acting in the best interest of the owner should have penalties so minimums may need to be established.
Third party auditors might use this to nitpick holders. The content of the letter is far more important than the font size.
why make font size another thing for us to keep track of
Seems like an unnecessary detail
I don't understand why this is an issue. The letter should contain specific information, but font size seems irrelevant
Not sure that is necessary
it just doesn't matter one way or another
Does this really make a difference? People will either read the letter or they won't.
Each holder has a different letter to distribute as notification. The oil and gas industry would have different statements on their due diligence than an insurance company, bank or other business. Therefore, each industry would require more or less space than the other to explain the reason for the notification. We are a group of companies which includes insurance, banking, surety and bond as well as services. Each notification to the owner of outstanding funds is different.
Be very careful with this one. Other industries with font requirements have become subject to class action lawsuits, etc. if they miss or inadvertently change the font. Would this open up violations or problems with an auditor and subject holder to additional liability?

Question – Content requirements:

8. Do you support uniform content requirements for due diligence letters? Please click all that apply

A. No (16 out of 229)
B. Yes - Property date and amount (186 out of 229)
C. Yes - Warning that if don't respond, property will be escheated (201 out of 229)
D. Yes - Steps required for owner to receive property from holder (184 out of 229)
E. Other - please provide below (20 out of 229)



Question – Uniform content requirement OTHER:

8a. If you responded YES - OTHER above, please provide the other type(s) of requirement(s) you recommend

Answer Text
typically avoid amounts on letters to encourage people to respond to find out about the property but include the type of property in question.
Some type of verification from client i.e. last four digits of SSN
Check Number or Credit Memo Number may also be helpful
property date and amount, date certain by which the owner must respond, identifying number for the item

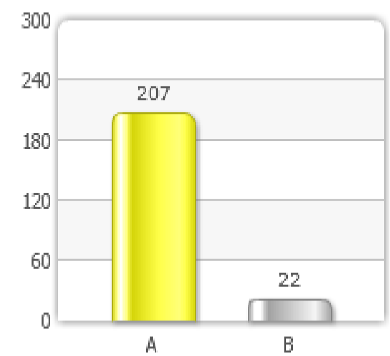
A deadline for owners to respond to due diligence letters that is at least 2 weeks before the filing date.
Contact information for appropriate state, so that if no response by the response deadline, the owner can contact the state for recovery instructions, rather than the holder.
Other - a reference to the UUP law
Property type of check Exact contact information so payee can contact the holder (we have received notices in the past that do not contain this information and it is frustrating to try to reach someone to obtain additional information regarding the check).
A box should be included for the owner to check that the amount is not owed to them.
Information that you can claim these funds from State X if you do not respond to this letter by the deadline.
Options to confirm validity of letter (to aid in preventing against fraud) Potential that further documentation may be required before funds can be paid out
my letters currently contain all the information above and are produced via Tracker software
I would suggest that the law allow the holder to not include the Property date and amount if the holder believes that a security risk would be created
Need flexibility
We ask for last four of SSN to validate against our system to ensure we are returning funds to correct property owner
Proof of identification. Since you are mailing letters out years later, many people try to claim other people’s money.

I would want to be sure that other information we feel is applicable could be added to the letter as well.
Holders need the flexibility to craft due diligence letters in a manner that best fits their need but will still solicit a response from the owner. I do not think we should support the states telling us any specific requirements of the due diligence letter.
The property type and brief explanation such as invoice number or Cr Memo number.
One uniform letter in all parameters, acceptable for all States.
I would add a section/line that asks the "owner" to confirm that they ARE NOT DUE the property, if that's the case. They would need to sign the letter and return to the holder. In such case, this should provide for an adequate audit trail should the holder decide to take that item in to income.
Yes - respond by date
Each letter should be formatted for the industry involved in attempting to locate the owner of the funds in order to make it easier for the recipient of the letter to identify their interest or ownership of said funds.

Question – Electronic due diligence:

9. If a Holder has a valid Owner email address, do you support the use of electronic means to send due diligence notices to Owners ? Examples: an email inviting an email reply; email with attached letter for print and mail response; email containing a web link to facilitate internet response and/or email inviting call to call center or automated voice response system for authenticated phone reply?

A. Yes (207 out of 229)
B. No (22 out of 229)



Question – Electronic due diligence - NO:

9a. If you responded NO to allowing electronic means to send due diligence notices, please explain why not

Answer Text
but would need to establish a process to validate the email address periodically since these generally are not actively refreshed.
too unreliable
We would need to maintain another form of recordkeeping to track due diligence mailings.
As long as HIPPA laws are considered
rather send actual Due Diligence and use e-mail as an alternative
Company restrictions
I do not want a requirement to utilize electronic means at this time. Currently, we do not have the ability to send electronic due diligence letters until the software we use is able to provide them it would not work.

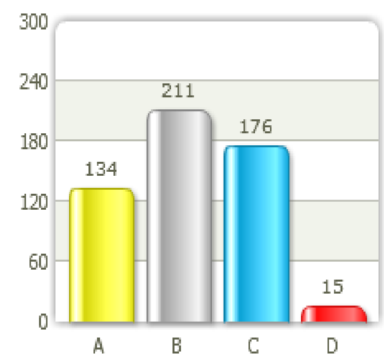
I would only support an email being sent as a secondary way of contacting the owner. I would want a letter to be mailed as well.
There are so many scams on the internet/email that registered letters should be required to give the due diligence letter credibility; for individuals only. In business to business situations, with regular email correspondence being a way of normally conducting business, email would be acceptable.
I don't feel you can positively verify identity this way and the company I work for does not allow me to contact customers by email.
No automated way of doing this; increase risk by causing a privacy event due to sending to an incorrect email address.
Again - too much to keep up with. If a company has the minimum employees working unclaimed property, there probably isn't a good way to keep these types of records regarding owner emails. I believe letters should be sent in the regular mail. It's a better audit trail than emails. However, they can send BACK the letter via email..
Unless we had it set up systematically our current application we send these from would not allow this. It would be a lot of manual work when we have hundreds of letters.
People are already concerned that our letters are a phishing scam. Going to more email will only make people less likely to respond.
concerns of privacy-
email addresses are not maintained at my organization for vendors, etc.
Email is rarely read and is at a high risk of being sent to spam folders. If email is used, it should be in conjunction with standard mail.

Many owners are highly suspicious of due diligence notices to begin with. Delivering due diligence notices via email increases the seemingly fishy nature of the correspondence and could artificially deflate the amount of affirmative responses a Holder would receive.
I am fine with allowing the option, if the customer has indicated e-communications are preferred but do not make it a requirement.
my personal inbox has 500 email at any given time. Too easy to miss an email and then there's the spam/junk box that many auto delete or don't review. I prefer regular US mail
Too difficult to track valid e-mail addresses
With all the owner's information on the letter, it could be placed in some else's hands.
Only if it is an attachment that must be printed and mailed, faxed, or scanned and emailed back. Our letters require a signature that can be used as evidence if necessary, and simple emails do not provide for that.
but a letter should go out after no reply by e-mail.
This would only be acceptable if firms have sufficient controls to verify owner email addresses.

Question – Owner Response:

10. What type of Owner response (other than returning the letter sent via postage or fax) do you believe should be recognized by the states as valid? Click all that apply:

A. Call into holder's call center (134 out of 229)
B. Email of an imaged completed response (211 out of 229)
C. Web based certification of receipt and response (176 out of 229)
D. Other - please provide additional information below (15 out of 229)



Question – Owner Response - OTHER:
10a. If you would like to provide additional suggestions for owner response, please do so here

Answer Text
The concept that everything has to be in writing is antiquated in this digital age.
For mutual fund shares deemed abandoned due to inactivity, any communication from the shareholder should be accepted as a response. This includes accessing the account information through the internet or automated voice response system using a secure login, or by requesting a transaction by any means.
We should be flexible in this electronic age to be able to admit all forms of printed correspondence with signature.
Broker dealer confirmation
Sign in to online account.
Social Media confirmation such as twitter, facebook, etc.
A call into the call center does establish contact and at the very least, should restart the dormancy period if the item does not get resolved with the owner, however a telephone call is difficult to prove to a state. All calls should be followed up with written confirmation of some sort from

the owner of the discussion.
PIN based or password initiated response.
n/a
If during a call the owner could use a unique code, etc. to verify their identity then this should be considered a valid response.
I'm really not informed enough in this area to have an opinion.
walk up to your site of business IVR response
I believe a call into the holder's call center should be sufficient if the payee provides contact information in the event there are questions. The contact information can be documented on the record. Also, on the topic of certified mailings, due to the rising cost of certified mail, it seems unreasonable to require a holder to mail a letter for an item under $10 via certified mail. We generate a courtesy letter when the item comes into our system (has remained outstanding for 180 days). If we receive no response to this letter, the item remains in the escheat system until due diligence is required. Typically we find if the payee did not respond to the courtesy letter, they will not respond to the due diligence letter. In instances such as these, sending a letter certified mail does not increase the likelihood of a response.
If an owner is deceased and we receive contact from heirs. We are able to transfer interest with supporting documentation.

Any other electronic means whereby the owner response can be verified and confirmed as being sent by the owner (use of a PIN or other identification such as last four digits of Social Security #)
Proxy vote subsequent to the due diligence mailing.
Any method that is available where there is some type of certification that it is the owner responding, such as signature, PIN, short questionnaire that established speaking with the owner- any method that achieves this should be allowable. I would like to keep options open for future technological developments.
Call into holders call center as long as calls are recorded and retrievable at a later date
Email response in the body of an email (no image or attachment)
Email - send receipt that is retained by the holder (that may be a duplicate of the above). Call in the holder's call center must be documented and retained in the system.
Email of due diligence letter or letter from state controller, which may not be signed by owner, but that email proves intent to claim.
Address changes or account maintenance that was completed in person at a branch, teller transactions completed with cash, Online banking log in
I think all states should allow aggregate reporting, at least down to $5 and preferably $10 (but still keep a due diligence threshold of at least $25 and preferably $50). It is extraordinarily time consuming to ensure proper name format and company vs individual indicator for penny and small dollar properties. I would think the taxpayers would be very unhappy to know their tax dollars are being used to pay the salaries of state

employees to keep track of something so insignificant.
I'm using this space to comment on the due diligence process in place with California. The due diligence notice they send after receiving the preliminary report only serves to raise awareness of funds availability, but does not provide a means of actually claiming the funds. The CA letter should include a signature line, indicate that ID is required to claim. This would eliminate a company sending another form to obtain these items. The CA letter just generates unsubstantiated inquires which require double handling.
We have them call in to a contact who then makes sure that the payroll check is replaced.
any correspondence from owner...call..email..fax..etc...we're trying to get the funds to the owner so why would the state say if the way we got that response isn't according to their rules that they should get the funds to sit on. I have come across several owner who do not have email or smart phones...just a telephone...that should be sufficient. We are re-issuing them the check after all
If 'Call into holder's call center' covers both IVR and Call Center rep - GREAT! If the option does 'not' include IVR, I think Call into 'holder/Transfer Agents' IVR should be acceptable 'after' appropriate validation and issuer selection. (Selection of the 'issuer' that they are calling in regards too).

I don't agree with allowing the response to be faxed. It's too easy for anyone to sign the response and send to the holder via fax using an all-in-one printer from any location. Using an email address also introduces risk, but a holder should receive the response from the same email they have on file or have used to communicate with the property owner. If the same email is not being used to respond, then the response would be suspect for fraud.
Newspaper publications are not worth the time and effort with today's internet system. We get phone calls regarding other bank's publications, due to the fact, the public does not know how to look through the newsUpppaper properly.
Fax of an imaged completed response
Any type of response where a signature is provided would be acceptable. I would prefer a signature be on file prior to reissuing funds or in the event the recipient declines the reissue.

EXHIBIT C

ESTIMATION PRACTICES OF NON-UNIFORM ACT STATES

Delaware: Delaware enacted a statute in 2010[92] that explicitly authorizes the state's use of estimation techniques, albeit such techniques have long been used by Delaware's audit staff and contract audit firms. Section 1155 of the Abandoned and Unclaimed Property Law states: "Where the records of the holder available for the periods subject to this chapter are insufficient to permit the preparation of a report, the State Escheator may require the holder to report and pay to the State the amount of abandoned or unclaimed property that should have been but was not reported that the State Escheator reasonably estimates to be due and owing on the basis of any available records of the holder or by any other reasonable method of estimation." The specific estimation methodologies and practices that private contract auditors often perform on behalf of Delaware are discussed in greater detail in Exhibit D.

New York: New York's administrative practice[93] is to review all records for years in which records are available for holders domiciled in the state, but to use the earliest available records year to establish property-specific error rates for purposes of estimating liability with respect to years included in the audit period. The audit period is typically 1992-current year.

Texas: Like California and New York, while Texas could theoretically utilize estimation with respect to Texas-domiciled companies (or any holder, whether or not domiciled in Texas), the fact that Texas offers a business-to-business deferral pursuant to administrative practice has generally meant that estimations are not routinely undertaken.

California: Similar to Texas and New York, California has no statutory provision specifically addressing the estimation of an unclaimed property liability. The California Holder Handbook (Sep. 2013 edition) likewise does not address the use of estimation by holders. However, California has employed private contract auditors to conduct unclaimed property examinations and those auditors may sample or estimate in performing the audit. The 'Policies & Procedures Applicable to State-Authorized Unclaimed Property Examinations Conducted by Contractors' guidelines indicate that the holder will not be subject to estimation if a fully reliable set of records are kept for the examination period. "If the records do exist but are not electronically accessible and are too voluminous to have the contractor manually keypunch or analyze them in a cost effective manner, then the contractor may similarly determine to perform an estimation by means of sampling."

[92] 12 Del. C. §1155.

[93] New York has no statutory provision for estimating a liability.

EXHIBIT D

AUDITOR PRACTICES IN THE ESTIMATION OF HOLDER LIABILITIES[94]

The general practice of the contract auditor may include:

a. The contract auditors obtain audit approval from contract states and provide audit notices/non-disclosure agreements to audit target companies.
b. The contract auditors require the target company to provide extensive and detailed company records and documentation.
c. The contract auditors identify, select, and test potential liabilities from the target company's General Ledger Trial Balance. The auditors refine the scope by property type (Accounts Payable, Accounts Receivable, Payroll, etc.).
d. The contract auditors determine the base period for review and select the population of items for review by property type within the selected period.
e. The contract auditors test liabilities identified by transaction type from the selected period for final disposition.
f. The contract auditors review and validate/reject final disposition of the documentation provided by the target company to determine if liabilities are owed or not owed.
g. The contract auditors assess on any liabilities by property type for unresolved items selected for review which are deemed owed and unresolved to the target company.
h. The contract auditors prepare an assessment that includes an estimation calculation for liabilities for periods in which records do not exist and a separate assessment for name and address records identified in the review for participating states.
i. The contract auditors deliver a demand for payment for each of the respective contract states.

The aforementioned methodology raises a number of questions and potential concerns, such as:

- The contract auditors determine the periods selected in the audit that name and address records are available for review.

Although this step might appear to be non-controversial, there are often disputes over the extent to which a holder's records are "complete" and "researchable," such that the years in which they were created can be included in the base period which is used to construct an "error rate" that

[94] This description is based on general member experience collected by the working group and is not necessarily reflective of all audits.

will be applied to earlier, non-complete-records years to estimate an unclaimed property liability for those years.

- The contract auditors select the population of items for review by property type within the selected period.

The population is built based upon identification of items within specific General Ledger accounts that appear to reflect outstanding obligations on the part of the holder. Controversy may arise based upon the determination that a certain type of account contains intangible property subject to state unclaimed property laws – for example, accounts that contain only intercompany credits, or items that are subject to federal regulation and therefore arguably exempt from state regulation. Further, the practice of netting credits and debits on a single account often generates controversy, for example where a holder views netting as appropriate for a business with multiple accounts (e.g., for each geographical location served) or where holder identification systems do not readily indicate the unity of ownership across multiple accounts.

- The contract auditors test liabilities identified by transaction type from the selected period for final disposition.

This process is referred to as "sampling." The sampling methodology used to extract of a population of items is a subject of frequent dispute, focused on issues such as (1) the strata utilized to sample a population, (2) the inclusion/exclusion of large-dollar and immaterial-value items in the sample, (3) the randomness of selection of sample items, and (4) the number of items required to enable reliance on the result, given the size of the population from which the sample was drawn.

- The contract auditors review and validate/reject final disposition of the documentation provided by the target company to determine if liabilities are owed or not owed.

When a holder is directed to provide documentation for each sample item, the goal is to establish either that the item was recorded in error, or that the obligation was satisfied or the property is not dormant. A holder could demonstrate that the obligation recorded on its books was in fact never fixed and certain, or the property was never due and payable – for instance, in cases where a condition precedent was not satisfied by the apparent owner although the obligation was recorded by the holder in anticipation of same. Similarly, a holder could demonstrate that the recorded obligation has been satisfied or the property was not or is no longer dormant – for example, the check cleared, the account evidences activity by the owner thereof, or the credit has been applied or waived.

This has been an area of particular concern to holders, given that several contract audit firms utilize a standard of remediation that approximates a criminal proof standard – that is to say, documentation is often rejected by the audit firm unless the firm determines, in its sole discretion, that such documentation rebuts the presumption of an obligation "beyond a reasonable doubt." Pursuant to this standard of remediation, audit firms arguably ignore established business practices, including in certain instances industry-wide norms that industry trade associations or federal agencies have developed/approved and that every industry member has adopted.