UnclaimedProperty
PROFESSIONALS ORGANIZATION

8441 Wayzata Blvd
Suite 270
Golden Valley, MN 55426
Phone: 763-253-4340
www.uppo.org

Date: December 22, 2014
RE: UPPO Submission to Recorder Trost
Item 3 of 5: Administrative Appeals

Section 16: ACTION TO ESTABLISH CLAIM. An owner 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.

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 (2) 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 60 days from the date such final examination report is issued, pursue a judicial or administrative appeal pursuant to [STATE's administrative procedures law] or, any holder so aggrieved may elect to pursue first an Elective Administrative Appeal as set forth in this Section without waiver of any right to later pursue a judicial or administrative appeal pursuant to [STATE's administrative procedures law].

3) Elective Administrative Appeal by Holder.
   a) Within 60 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 appeal pursuant to this section within 60 days nor elects to pursue its judicial or administrative 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 property types audited, the years audited, and the final amount allegedly due the Administrator.

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

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

5) 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 officer shall be selected by the process described in paragraph (8).
   b) If requested by the holder, the designated hearing examiner shall schedule a hearing, to be conducted within 30 calendar days from the date of the notice 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 30 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 former member of the judiciary or a licensed attorney who is qualified by experience or training to serve and shall not be any current employee of Administrator or agent of Administrator. The designated hearing examiner will be mutually selected by the parties through the following process:
   a) Within 45 calendars days after the request for an Elective Administrative Appeal by the Holder, 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, the parties may, without cause, remove 2 names from the list.
   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

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the remaining names and shall select the designated hearing officer in accordance with such process.

d) The Administrator shall notify the hearing officer of his or her selection within 5 calendar days from the selection.

e) The designated hearing examiner may award reasonable attorney's fees and the costs of the designated hearing examiner 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.

10) Judicial or Administrative Review.

a) Any party adversely affected by the designated hearing examiner's decision is entitled to judicial or administrative 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 laws or administrative procedures act].

b) The review shall be a *de novo* review of the issue (s) in dispute at the time of initiating the judicial or administrative review.

11) Decisions of the designated hearing examiner shall not be considered as precedent.

12) A holder's decision to forego the Elective Administrative Appeal shall not constitute a failure to exhaust administrative remedies, nor shall a holder's decision to request Elective Administrative Appeal preclude the holder from commencing a proceeding with other administrative or judicial remedies with respect to any issue not resolved.

Section 22(B) AUDIT CONFERENCE

1) Upon written request of a holder, third-party auditor, or upon its own motion, the Administrator may 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, 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 initial request for a conference shall be granted. Any additional conference requests may be granted at the discretion of the Administrator upon written request of the holder or third-party auditor.

6) Any guidance provided by the Administrator will apply to the particularities of the audit of the holder requesting the conference only and will not constitute a binding decision or determination subject to any appeal.

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DRAFTER'S COMMENTARY

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.[1] 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.

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. Such an 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)) provides the holder with the right, at least one time during the audit, to direct interaction with the state administrator. However, only one conference must be granted, with any additional conferences permissible at the sole discretion of the administrator. This protects the states from being required to participate in numerous frivolous meetings with holders attempting to delay the audit.

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[2] 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.[3] 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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[1] See Memorandum to Interested Parties dated February 13, 2014 at 7.

[2] *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.

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

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Further, this meaningful and fair review is required by due process.[4] The Constitution guarantees that no person shall be deprived of life, liberty or property, without due process of law.[5] Thus, in reviewing state agency decisions of unclaimed property, an independent appeals tribunal is needed to satisfy the Constitutional requirements for a meaningful review.[6]

In particular, due process requires notice and an opportunity to be heard.[7] 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.[8] 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 Uniform Law Commission 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.

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[4] 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).

[5] U.S. Const. Amends. V, XIV.

[6] 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.

[7] *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).

[8] *Klco v. Dynamic Training Corp.*, 192 Mich. App. 39, 42 (1991).