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September 18, 2015

Charles A. Trost, Esquire
Waller Lansden Dortch & Davis, LLP
Nashville City Center
511 Union St, Suite 2700
Nashville, TN 37219-1760

Sent via email: charlie.trost@wallerlaw.com

Re: UPPO Issue Refinement – 1995 Uniform Unclaimed Property Act Revision

Dear Mr. Trost:

In our continuing effort to support you and your colleagues on the Uniform Law Commission Drafting Committee to Revise the Uniform Unclaimed Property Act (Drafting Committee), UPPO has compiled this brief summary on the issues most critical to the holder community at this time, based upon the draft Revised Uniform Unclaimed Property Act (RUUPA) dated June 8, 2015.

UPPO is gratified that the Drafting Committee's dedicated efforts to collaborate with the holder community have resulted in growing consensus on a variety of complicated unclaimed property compliance issues as reflected in the June 8 draft. We applaud those efforts and offer this summary as a mechanism to identify the refinements still needed to maximize clarity, consistency and fairness for all stakeholders in this process.

We appreciate this opportunity to share our additional recommendations on these very specific and important issues and thank you in advance for the consideration you and the Drafting Committee give to our input in advance of the October 9 - 10 live meetings.

Please do not hesitate to contact me with any questions, which I will pass along to the UPPO Board of Directors.

Sincerely,



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

cc: Commissioner Blackburn and Commissioner Houghton, Uniform Law Commission
Katie Robinson, staff liaison, Uniform Law Commission
Unclaimed Property Professionals Organization Board of Directors

Securities Definition

Section 2

Summary:

To enhance comprehensiveness and clarity, a draft definition of “securities” is provided below which can be further developed as needed in the drafting process. UPPO worked with key industry stakeholders in drafting this definition. Our hope is that the Drafting Committee will consider this draft definition in advance of the October 9 -10 meetings.

Proposed language:

Securities means an instrument, whether certificated or uncertificated, that represents an ownership position or rights to ownership in a corporation, trust, plan, or other legal entity, any customer security account held by a broker-dealer, and any interest in an investment company under the Investment Company Act of 1940.

Derivative Rights Doctrine

Sections 2(22)(a)(ii), 3(g), 19(a)

Summary:

The revised UUPA should reflect the fundamental principle of unclaimed property law that has become known as the “derivative rights doctrine.” This doctrine provides that, because the state takes custody of unclaimed property on behalf of the owner, the state’s right to claim unclaimed property is derived from and limited by the owner’s right to the property. As a result, the state should, as a general matter, have no greater right to the property than the owner.

ERISA Exemption

Section 2(22)

Summary:

UPPO supports the November 2014 vote of the Drafting Committee that ERISA-protected assets should be exempt from unclaimed property reporting requirements. Exemption is consistent with the U.S. Department of Labor advisory opinions and various lower-federal courts’ decisions, that ERISA preempts the state unclaimed property laws. Including specific ERISA exemption language in the RUUPA will provide clarity, simplify compliance challenges, and protect unsophisticated owners from unwarranted escheatment that may result in loss of value.

Proposed language:

Add to the end of the existing Section 2(22)(b) the following sentence: *The term does not include ERISA plans.*

This change will require renumbering the current bracketed RUUPA Section 2(22)(b) to (c).

Tax Deferred and Custodial Accounts

Section 3(a)(14)(a) and (b)

Summary:

As discussed at the Drafting Committee meetings, the 1995 Act language is problematic for several reasons, including that (1) there is ambiguity as to whether a distribution or attempted distribution from the IRA constitutes a trigger event for the remaining (undistributed) property in the IRA; (2) by definition IRA property would never escheat absent proof of death (i.e., because an owner may have multiple IRAs with multiple holders and therefore any singular holder would never have constructive knowledge if there is in fact a mandatory distribution required from any particular IRA); and (3) the standard does not apply to Roth IRAs, which have no mandatory distributions, until death presumably. The proposed language below addresses all of these concerns in addition to those regarding the death of an owner as this may result in different mandatory distribution requirements under the rules of the Internal Revenue Code.

Subsection 3(a)(14)(b) is intended to apply to any tax deferred accounts other than IRAs or retirement HSAs, and therefore we did not name 529s, ABLE accounts or other types of tax deferred accounts specifically. This way, the provision is sufficiently broad to include other similar types of accounts that may be created in the future.

Proposed language:

(14) notwithstanding any other provision of the [Act], property held in an account or plan which is qualified for tax deferral under the income tax laws of the United States, as well as property held in custodial accounts for the benefit of minors such as those created pursuant to the Uniform Gifts for Minors Act and Uniform Transfers to Minors Act, as follows:

(a) property in any individual retirement account or any retirement health saving account, three years after (i) the date the owner has attained the age of 70.5, if determinable by the holder, or two years after the date the holder has received proof of death of the owner in the form of a claimant's presentation of a certified death certificate, but only if the death of the owner results in a mandatory distribution under the Internal Revenue Code; and (ii) the date of a second consecutive first class mailing to the owner was returned thereafter as undeliverable by the U.S. Post Office (unless a subsequent first class mailing to the owner was not returned as undeliverable); provided, however, that this section shall not be construed to require the holder to solicit such a death certificate or otherwise attempt to confirm whether the owner is deceased.

(b) property in any other such account or plan, three years after (i) thirty (30) years have elapsed from the date the account was opened; and (ii) the date that a second consecutive first class mailing to the owner was returned thereafter as undeliverable by the U.S. Post Office (unless a subsequent first class mailing to the owner was not returned as undeliverable).

Business to Business Transactions

Section 3(c)

Summary:

UPPO supports the inclusion of specific language in the RUUPA exempting business to business transactions from the Act. Often amounts reflected as debts to other businesses are merely accounting

errors that are later reconciled in some manner (e.g., settlements). Even if amounts are owed, businesses may make affirmative decisions not to pursue debts because the amounts owed are immaterial or for other important business reasons. Unlike individuals, businesses are in a better position to determine whether amounts are owed to them and have access to varied resources to collect true debts. UPPO recommends that Alternative B be incorporated into the Act (unbracketed) and not be provided as an option for individual states to adopt for ease of administration and uniformity. UPPO also recommends that Alternative A be deleted from the RUUPA as an unworkable option that would be difficult to implement, as well as time consuming thereby adding unneeded challenges to compliance.

Proposed change:

Delete Section 3. Presumptions of Abandonment Alternative A (c) and adopt Alternative B (c) in the RUUPA by removing the brackets.

Indication of Owner's Interest (Contact)

Section 3(e)(i - viii)

Summary:

UPPO supports the comprehensive list of activities that constitute indications of interest by an owner which have been embedded in the RUUPA. In addition, UPPO supports the affirmative inclusion of the provisions concerning automatic transactions without brackets, as automatic transactions are now a common method that owners use to manage their financial assets.

States are beginning to recognize that automatic transactions pre-authorized by owners are more prevalent. As an example, note that on June 20, 2015 the state of Louisiana enacted H.B. 692. This action amended the Louisiana UUPA so that for bank accounts an indication of owner interest includes "one-time or recurring automatic clearing house" transactions or "any other electronic transaction that is owner-directed or otherwise authorized by the account owner". Further the enacted amendment added that an indication of interest includes "accessing of a deposit account by the owner through the website or other restricted electronic access point of the banking or financial institution".

Also, note that effective in February 2015, pursuant to H.B. 278, the Pennsylvania unclaimed property law was amended to redefine "indication of interest" to include secure or password-protected electronic contact, communication or transaction.

Proposed language:

In section 3 (e)(v) remove the brackets so that the provision reads, *(v) making a deposit or withdrawal from an account in which the property is held, including automatic deposits or withdrawals previously authorized by the owner and any automatic reinvestment of dividends or interest.*

Life Insurance Proof of Death & Death Master File Search Requirement

Section 3(a)(8) and (h)

Summary:

UPPO submits that a purported "match" of owner information with the Social Security Death Master File should not be equated with "actual proof of death" sufficient to trigger the running of a dormancy

period. The traditional standard of “actual proof of the death of the insured or annuitant”, as stated in Section 7 of the 1981 Uniform Unclaimed Property Act, is appropriate in terms of this regulatory framework. The period of abandonment should only be triggered when the proceeds of the policy are indeed due and payable as prescribed by law and the policy terms.

Report of Abandoned Property

Section 8(a) and (b)

Summary:

While we believe this is an inadvertent oversight by the Drafting Committee, it would be impossible to exclude Non-Public Personal Information (NPPI) from unclaimed property reports as social security and account number detail is required and essential to the return of such property to the rightful owners. UPPO encourages a revision that would allow NPPI in unclaimed property reports so long as all report transmissions are electronic and secure or encrypted (or at the very least password protected), and paper reports are eliminated.

Proposed language:

(a) A holder of property presumed abandoned shall make a report in a record to the administrator concerning the property by a means and in an electronic, encrypted or password protected format approved by the administrator. The format must be designed to protect the confidentiality of the owner’s information contained in the report, to the extent it is required to be protected under Section 27. No holder shall be required to submit a paper report to the administrator.

(b) The report under subsection (a) must be signed by the holder under the penalties of perjury or verified by the holder as to its completeness and accuracy. The administrator may accept an electronic signature or waive verification. The report may ~~not~~ include any sensitive NPPI of the owner or the owner’s property 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 with a value of \$50 or more;*
- (3) an aggregated amount of items valued less than \$50 each;*
- (4) in the case of an amount 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;*
- (7) a statement that the holder has complied with the owner notification requirements of subsection (e) of this section, and of Section ~~9~~ 10;*
- (8) other information that the administrator by rule prescribes as necessary for the administration of this [act]; and*
- (9) an indication that the property is not freely transferable, if applicable under Section 2.*

Owner Notification by Holders and Administrator (Due Diligence) – Clarification

Old Section 8(f), (g), (h), and 10(b); NEW Section 10(a)

Summary:

The owner notification provisions are embedded in Section 8 entitled “Contents of Report of Abandoned Property”. This placement creates an abundance of confusion for holder personnel who are tasked with annual reporting compliance. Technically, the holder’s obligation to send notice to owners of property that is presumed abandoned must be completed well in advance of any report of abandoned property being made to the state. Holder personnel, who are new to reporting, may miss this notice requirement if it were to remain in Section 8, as that section is specific to the report, as opposed to moving it to Section 10 which is specific to owner notifications. Therefore, UPPO advocates that these provisions be extracted from Section 8, moved and integrated into Section 10(a).

Accordingly, UPPO offers the modified language below integrating these provisions, thus ensuring consistency and clarity in the RUUPA. Further, the intent of the language in 10(a)(5) is to embody the agreement reached between representatives from NAUPA, UPPO and various securities industry groups to provide for earlier owner outreach with respect to securities accounts whose owners have elected to receive electronic communication in lieu of U.S. mail, in order to evidence owner contact. UPPO respectfully submits that clarification is needed here to ensure that the three (3) year dormancy period for securities remains intact. The early outreach on electronic accounts is intended only to serve as a means to obtain affirmative evidence of contact and should not be considered to institute a two (2) year dormancy period for securities accounts coded for electronic mail.

The recommended deletion in section 10(b) is to clarify that owners of securities held in either physical certificate form or in book entry (electronic) form may receive the notice required by 10(b) from the Administrator electronically if the owner has consented to such notification in lieu of U.S. mail, if the Administrator has an electronic address for the securities owner.

Proposed language:

NEW Section 10(a) – Notice to Owner

(1) ~~Except as otherwise provided in this section, the holder of property presumed abandoned, or that may become abandoned, shall send notice to the apparent owner, in a record that complies with Section 10(a) in a format acceptable to the administrator, by first class United States Mail to the apparent owner, not more than 120 days nor less than~~ not less than 60 days before filing the report 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;*
- (3) the value of the property is \$50 or more; and,*
- (4) the property does not consist of non-freely transferable securities.*

The holder may also send the notice earlier and as often as it chooses to do so, stating that the holder is in possession of property subject to this [act]. The holder may attempt to obtain better addresses for owners for whom the holder’s records disclose an address which does not appear to be accurate.

(2) The notice shall contain a heading that reads as follows: “THE STATE OF [] REQUIRES US TO NOTIFY YOU THAT YOUR PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US BEFORE [insert date which is thirty (30) days from the date of the letter],” or substantially similar language.

(3) The notice shall specify the date that the property will be turned over to the state, and explain the necessity of filing a claim for the return of the property following receipt by the state; identify the nature and amount, except for securities or assets with fluctuating value, of the property that is the subject of the notice; and that property that is not cash may be liquidated by the state; and provide instructions that the apparent owner must follow to prevent the property from being reported and turned over to the state.

(4) Notwithstanding the foregoing, if the owner has previously consented to electronic delivery of information from the holder, the notice under this section may be sent by electronic delivery in lieu of first class United States Mail if the holder does not have reason to believe that the owner’s electronic mail address is not valid. If the holder sends the required notice to the owner electronically and receives information indicating that the owner’s electronic address is not valid, the holder shall send the required notice by first class United States Mail to the owner’s last known mailing address. ~~A holder is not required to send any notice required by this section to any address that the holder has reason to believe is not a valid address for the owner.~~

(5) For any apparent owner of a security who does not otherwise receive communications from the holder by United States Mail, the holder shall send a communication electronically ~~that complies with Section 10(a)~~ within two years after the owner’s last indication of interest in the property. If the holder receives notification that the electronic communication was not received, or if the owner does not respond to the electronic communication, the holder shall send the owner by first class United States Mail a notice ~~which complies with Section 10(a)~~, unless the owner otherwise indicates an interest in the security after the electronic communication.

(6) The holder of securities shall perform the following owner notification with respect to ~~such~~ property presumed abandoned, or that may later become abandoned:

For any apparent owner of a security who receives communications from the holder by United States Mail, if two consecutive first class mailings to the apparent owner were returned to the holder as undeliverable by the United States Post Office (unless a subsequent first class mailing to the owner was not returned as undeliverable), the value of the property is \$50 or more, and the property is presumed abandoned, the holder shall comply with the requirements set forth above in Sections 10(a)(1) through (4).

~~(A) send by first class United States Mail to the apparent owner a written notice that complies with Section 10(a) within two years after the date the second consecutive first class mailing was returned to the holder as undeliverable;~~

(7) The holder of property presumed abandoned shall file with the report an affidavit or verification under the penalties of perjury that the holder has complied with the requirements of section 10(a).

Section 10(b)(1), proposed revision:

- (1) *The sending of a written notice by first class United States Mail to apparent owners of unclaimed property presumed abandoned and held by the state, and ~~in the case of property in the form of securities held in electronic form~~ by electronic notice if the electronic address of the apparent owner is known to the administrator and has been advised that the apparent owner has consented to receive electronic notification in lieu of notification by mail.*

Payment or Delivery of Abandoned Property

Section 9(d)

Summary:

UPPO recommends a minor adjustment to this section to clarify that the administrator can only dispose of securities property if it is in compliance with the rules set forth in Section 13(f) dealing with the amount of time the administrator must hold the securities before they can be liquidated. Once the “securities” definition is finalized by the Drafting Committee, this section may need to be revisited to ensure consistency.

Proposed language:

(d) 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] and Section 13(f) of this Act.

Election to Take Payment

Section 17(b) and (c)

Summary:

UPPO generally supports this section. However, we recommend that language be added to clearly state that the holder will be indemnified with respect to any and all liabilities for any claims so long as state mandated due diligence is completed in advance of the early report. Early reporting should not be permitted for property with fluctuating value unless there is a guarantee by the state to pay the current market value for claims submitted prior to the running of the full abandonment period.

Further, we suggest that the June 2015 RUUPA draft section 17(c) be taken out of brackets.

Proposed language:

End of section 17(b): *Upon delivering the property, 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 reported early.*

End of section 17(c): *Property that is not fixed and certain but is instead subject to value fluctuation shall not be reported under this section.*

Examination of Records & Interstate Cooperation

Section 20(i) and Section 23(a)

Summary:

UPPO supports the majority of these provisions which make the audit environment more transparent. However, the above sections should be revisited and revised to limit the number of included jurisdictions to those signed on at the commencement of an audit rather than allowing the addition of new states seriatim, and potentially several years into the audit process. Such a practice not only increases the time involved but prevents the holder from devoting appropriate staff and technological resources to the audit.

Further, the sharing of holder documents and papers between states must be strictly controlled to protect not only the holder's confidentiality but the confidentiality of sensitive holder documentation which often contains NPPI for the holder's employees, customers, shareholders, and other individuals. The privacy and security of this data is stringently regulated by both federal and state laws, and the states' handling of holder documents and papers containing such data is subject to such laws. Therefore, the disclosure of such data by an audit state to any other party must be strictly controlled, and in no circumstances should such a disclosure be contemplated or attempted without provision of sufficient advance notice to the holder to enable the holder to consider the potential data privacy and security implications of such disclosure.

In addition, with respect to Section 23, the satisfaction of the conditions precedent that are established therein will be impossible to assess with respect to a foreign jurisdiction (at least those that are not Anglophone countries), and therefore no state should be permitted to disclose holder information to a foreign jurisdiction under this statute.

Proposed language:

Section 20(i)

Documents and working papers obtained or compiled by the administrator, or the administrator's agents, employees, designated representatives or contractors, in the course of conducting an examination are subject to the confidentiality provisions of Section 27, and are not public records. However, the documents and papers may be:

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

(2) used in joint examinations conducted with or pursuant to an agreement with another state, the federal government, ~~[a foreign country or subordinate governmental unit of a foreign country]~~ or any other governmental subdivision, agency, or instrumentality if the other governmental entity is legally bound to maintain the confidentiality of information obtained from persons examined in a manner equivalent to the provisions of Section 27 of this [act];

(3) disclosed to the administrator of another state for that state's use in circumstances equivalent to those described in this subdivision, if but only if each of the following conditions are met: (i) the other state is itself already conducting an examination of the same holder (evidence of which shall be the holder's acknowledgment of receipt of an audit notice from the other state that is to receive the disclosed documents and papers), (ii) information sharing agreement has been executed by the two states that has been publicly disclosed and that specifically

contemplates the sharing of the type of documents and papers at issue, (iii) the holder is given at least 30 days' prior notice of the intended disclosure of its information so that the holder may contest the disclosure (or the manner or scope of disclosure) at its election, and (iv) the other state is legally bound to maintain the confidentiality of information obtained in a manner equivalent to the provision of Section 27 of this [act]; or

(4) produced pursuant to subpoena or court order.

Section 23(a)

The administrator may exchange information with another state ~~for foreign jurisdiction~~ relating to abandoned property or its possible existence, and the administrator may in a record authorize another state ~~for foreign jurisdiction~~, or a person acting on behalf of another state ~~for foreign jurisdiction~~, to examine its records as authorized in Section 20, ~~provided that the other state either has statutory confidentiality requirements comparable to those in Section 27 or agrees in a record to be bound by this state's confidentiality requirements~~ but only if each of the following conditions are met:

(1) an information sharing agreement has been executed by the two states that has been publicly disclosed and that specifically contemplates the sharing of the type of information at issue;

(2) the holder is given at least 30 days' prior notice of the intended disclosure of its information so that the holder may contest the disclosure (or the manner or scope of disclosure) at its election,

(3) the disclosure occurs prior to the commencement of an examination by the other state (if an examination has been commenced by the other state, then Section 20 governs the permissibility of information sharing); and

(4) the other state has statutory confidentiality requirements comparable to those in Section 27 or agrees in a record that is disclosed to the holder at least 30 days in advance of the sharing of information to be bound by this state's confidentiality requirements.

Estimation and Retention of Records

Section 20(j) and Section 21

Summary:

UPPO recommends that the ULC provide clear procedures and standards for the use of estimation and statistical sampling to provide holders with notice and ensure that administrators are employing fair and consistent methodologies. UPPO previously proposed AICPA sampling standards as the definition of “reasonable estimation,” (see UPPO Comments to the ULC dated June 20, 2014) whereas NAUPA recommended the MTC statistical sampling method because it is “very similar to an unclaimed property examination” (see NAUPA Comment #65 to the ULC dated December 29, 2014). UPPO has commissioned a review of both sampling standards, and statistical sampling experts¹ have advised UPPO

¹ Two statistical sampling experts from two independent organizations were consulted. The first expert's relevant professional background includes leading their organization's audit sampling practice, and is responsible for the design and evaluation of audit sampling methodologies. The second expert performed statistical analysis for the Yale Law Cultural Cognition Project.

that a modified version of the MTC standards for use in connection with unclaimed property audits could provide sufficient levels of discipline, assuming that (1) the AICPA requirement that errors be material to warrant action is applied to unclaimed property as a de minimis exception for audit-based assessments, and (2) the MTC standards are edited to render them specific to and appropriate for use in connection with unclaimed property audits and voluntary disclosures. [For example, for unclaimed property purposes, UPPO’s advisors counsel that “non-statistical” sampling should be used only with the auditor’s and holder’s mutual consent, to assure that the sample selected without statistical rigor is truly representative of the population.] UPPO recommends that the Drafting Committee commission a work group that includes NAUPA and UPPO to review these recommendations and develop specific guidance for inclusion in the RUUPA. The work group should also address record retention requirements and their intersection with the use of estimation – specifically, what types of records should be retained, and when records that have been retained are sufficient for purposes of establishing that the use of estimation is inappropriate.

Proposed language:

Section 1 (24): *“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.*

Section 1(NEW): *“Sufficient records” means at least 80 percent 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.*

Section 21 Retention of Records by Holders

Revise (a)(1), as follows:

The records shall include:

- (1) The date [and nature of] the transaction that, ~~place and nature of the circumstances which~~ gave rise to the property right.*

Determination of Liability for Unreported Reportable Property [Administrative] and Judicial Enforcement

Section 22

Summary:

UPPO recommends that an independent elective administrative appeals process should be expressly included in the RUUPA as an alternative to costly and burdensome litigation. Allowing each state the option to adopt an administrative appeals process does not foster uniformity and is tantamount to maintaining the status quo which is not in the best interest of the states or holders. The state administrative procedures act is not the appropriate venue to address unclaimed property disputes because these laws often defer substantially to agency discretion (which, in the unclaimed property arena, is often themselves heavily reliant upon outsourced, contingent-fee auditors). Holders have a right to an independent arbiter to whom they can present their issues. Alternatives A (conference with administrator) and B (State Administrative Procedures Act) do not adequately address holders’ concerns about a fair and impartial review.

UPPO also recommends that Alternative A, which is another potential avenue to avoid costly and burdensome litigation, be incorporated into RUUPA as another elective dispute resolution avenue available to holders rather than being presented as an alternative for adoption by the states. A holder's right to request and obtain a meeting with an administrator in an attempt to resolve issues should be a standard option available in all states.

Proposed language:

UPPO has updated its December 22, 2014 proposed Administrative Appeals submission to the ULC to reflect the current draft of the RUUPA and to include other refinements; however, the core principals remain the same – elective process, independent arbiter, de novo review of the arbiter's decision, no pay to play and award of attorney fees to the prevailing party. For ease of reference please refer to [Appendix A](#).

Foreign Transactions/Property

Section 23 and Section 26

Summary:

UPPO urges the ULC to remove the brackets from Section 26 and to exclude all foreign address property from the RUUPA as supported by principles of comity and the Supremacy Clause, the Due Process Clause, and the Foreign Commerce Clause of the U.S. Constitution. UPPO further urges the ULC to restore the prior phrasing of Section 26 which did not premise such exclusion on the foreign country or non-US location having "laws which entitle it to take and hold unclaimed property of its citizens." Whether the foreign country has chosen to enact legislation similar to U.S. custodial unclaimed property laws does not control the constitutional power (or lack thereof) of U.S. states to demand custody of property belonging to foreign owners with whom the state of domicile of a holder lacks even the minimum level of contact demanded by Due Process. Nor is the foreign jurisdiction's actual implementation of custodial escheat laws necessary to implicate the risks against which the Foreign Commerce Clause is designed to protect. The state of domicile of the holder of foreign-owned property simply lacks the constitutional power to take control of intangible property owned by a resident of a foreign country where it has no connection to the owner—as opposed to the holder, which is simply a debtor of the foreign owner – without regard to whether the owner's country of residence has chosen to do so. Hence, the comment to Section 23 should be revised to ensure consistency with Section 26 as revised.

Proposed language:

{Section 26. Foreign Transactions

(a) Except as provided in subsection (b), this [act] does not apply to property held, due, and owing to a person whose last known address is in a foreign country or to property arising out of a foreign transaction, ~~if the foreign country, or a subordinate governmental unit of the foreign country, has laws which entitle it to take and hold unclaimed property of its citizens and residents which are comparable to the laws of this state.~~

(b) Property defined in subsection (a) above may be voluntarily turned over to this state, but only under the following circumstances: (i) the holder is in the process of liquidating its business, or (ii) other circumstances render the holder's continued maintenance of the property infeasible, in the view of the

holder, such that escheatment would serve the interests of preserving the property for eventual owner claims. If the property has been voluntarily turned over to this state by the holder pursuant to Section 5(4), the administrator in whose custody the property has been placed may deliver the property to the foreign country or subordinate government unit of the foreign country on receipt of a record from the other country or unit requesting its payment or delivery.}

Appendix A

(Note, the below proposed language will require renumbering of RUUPA Sections 22(c) (9) and (10) to (20) and (21) respectively.)

(c)(9) may elect to pursue an Elective Administrative Appeal as set forth in this Section without waiver of any right to later pursue a judicial or administrative appeal.

(10) Elective Administrative Appeal by Putative Holder.

a) Within 90 days from the date of a putative holder's receipt of the written examination report issued by the state administrator pursuant to Section 20(j)(3) of this Act, a putative holder may file a written appeal with the Administrator's Office.

b) If the putative holder files neither a written appeal pursuant to this section within 90 days nor elects to pursue its judicial or administrative appeal rights in accordance with [STATE's administrative procedures act] the putative holder will be presumed to have agreed to the final examination report.

(11) The written appeal must contain the following information:

a) The names of all parties involved in the audit at issue;

b) The specific findings the putative holder is protesting including any amounts in question, property types, and the years audited. The putative holder is presumed to have agreed to any findings not contested;

c) A clear and concise description of each error that the putative 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

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

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

(13) Hearing.

a) If the putative holder files a written appeal, a designated hearing officer shall be selected by the process described in paragraph (16).

b) If requested by the putative 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 putative 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 putative holder of the date, time, and place of the hearing.

d) The Notice of Hearing shall notify the Administrator and the putative holder that:

i) The Administrator and putative holder may present witnesses and documents at the hearing.

ii) Failure by the putative holder or its representative 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 putative holder to provide additional information subsequent to the hearing and will supplement the record accordingly.

(14) 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 putative holder. The Final Determination will include findings of fact and conclusions of law.

(15) 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.

(16) 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 the Administrator or the state or agent of the Administrator or the state. 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 Putative 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 provided to them by the other 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 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 putative holder acted with fraud or willful misconduct.

(17) 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 standard of review shall be de novo and shall be limited to issues raised during the appeal.

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

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