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Unclaimed Property Professionals Organization * US Chamber Institute for Legal Reform

18 September 2015

Via email

MEMORANDUM TO THE UNIFORM LAW COMMISSION (ULC)

SUBJECT: RECOMMENDATIONS AT A GLANCE FOR REVISING THE *UNIFORM UNCLAIMED PROPERTY ACT*

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The Uniform Law Commission Holders Coalition strongly recommends the following revisions to the 1995 *Uniform Unclaimed Property Act*, and further provides Coalition evaluation of the degree its recommendations are addressed in the draft revision currently exposed by the Uniform Law Commission Drafting Committee.

Administrative Appeals Process - *Updated*. An elective administrative appeals process should be expressly set forth in the Act. The process should provide for an independent, efficient and fair review of the state administrator's determination of unclaimed property liability, coupled with a defined interim audit conference process. The process should not be correlated with state administrative appeals procedures, as these laws often defer substantially to agency discretion. Such reliance on agency discretion is unwarranted in the unclaimed property arena because the administrators often rely upon and delegate excessive authority to contingent-fee auditors. Further, the process should not involve burdensome and costly trial-like procedures, which are inappropriate after lengthy audits have occurred. Traditional state administrative appeals procedures also fail to impose a stay of collection and enforcement during potentially lengthy proceedings. Judicial or administrative review of the elective administrative appeal decision should be *de novo* and

limited to issues raised during the appeal. The following is example of recommended model act text:

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.

Apparent Owner – *New*. The definition of “apparent owner” should be amended to provide that, with respect to gift cards, the apparent owner means the person who owns the gift card at the time it is presumed abandoned. Because a gift card is a bearer instrument, the person entitled to redeem the gift card is the person who possesses the gift card at the time it is presented for redemption. The purchaser of a gift card is rarely the owner of the gift card, as purchasers typically purchase gift cards to give them as a gift to their donee and, further, the original donee may choose to re-gift the card to a subsequent donee (who then becomes the owner). Without this clarification, the purchaser or a previous owner of the gift card could claim property to which they have no right or ownership interest. See Attachment A.

Burden of Proof – *Updated*. The ULC should amend the Burden of Proof requirement of § 6 of the revised Act to follow the U.S. Supreme Court's ruling in *Delaware v. New York*, so that state's burden of proof matches that of the creditor in the creditor-debtor relationship. When a state takes custody of unclaimed property, it does so on behalf of the owner of the property and for the purpose of returning the property to the owner. If a state has a lesser burden than the owner, then the unclaimed property laws will result in the escheatment of property that would not have been required to be paid to the purported creditor if a direct claim were made. State unclaimed property laws were not intended to enlarge creditors' rights in this manner.

Business-to-Business Exemption – *Pending*. Business-to-business transactions should be exempted from unclaimed property reporting requirements, as businesses are in the best position to determine whether another business holds their property. The Act should be amended to include the business-to-business exemption language advanced by the American Bar Association. This language is clear and does not employ the vague “ongoing business relationship” test contained in the Drafting Committee's draft business-to-business exemption.

Contingency Fee Audits – *Updated*. The ULC should prohibit the use of contingency fee arrangements between states and private auditors in contracts to conduct unclaimed property audits. With regard to other auditing and examination arrangements and contracts, standards to increase transparency, oversight and accountability should be legislated to improve all such arrangements and contracts.

Derivative Rights Doctrine – *Updated*. The revised Act 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.

Dormancy Triggers – *Pending*. The 1995 *Uniform Unclaimed Property Act* should be revised to reflect that all securities-related dormancy periods will commence with a triggering event of two pieces of returned first class mail on the account. Additionally, tax deferred accounts should not be considered abandoned until the owner of the property reaches age 70.5 or 30 years have elapsed from the date the account was opened, depending on the type of account.

Early Reporting – *Updated*. The Act should permit holders to remit property (other than securities, interest bearing, or fluctuating value property) prior to the abandonment period upon disclosure to the administrator, and provide indemnification to the holder when the holder so remits. To effect this, the June 2015 draft in § 17 (b), should be revised to exclude from early reporting those types of property that fluctuate in value. Further, the June 2015 draft in § 17 (c) should be revised to include a statement that, upon the holder’s delivery of property under § 17 (b), the holder is relieved of and held harmless by the State from liability for any existing or future claim or claims with respect to the property reported earlier.

Foreign Addressed Property – *Pending*. The 1995 *Uniform Unclaimed Property Act* should be revised to provide that no state may require the reporting and remittance of Foreign Addressed Property, based on the Supremacy Clause, the Due Process Clause and the Foreign Commerce Clause of the U.S. Constitution.

Proof of Death – *Pending*. A Social Security Death Master File (DMF) match is insufficient to constitute “proof of death” for making an insurance policy (or other intangible property) “due and payable” and insufficient to trigger dormancy periods toward escheatment of property. “Proof of death” is defined by state law and/or the courts of the states to be an evidentiary standard sufficient to prove that the event actually occurred. Modification of the Act to include DMF Matching as proof of death will create conflicts with existing insurance laws and the standards for proof of death that have been established over decades within each individual state.

Securities: Non-Freely Transferable – *Updated*. Securities which are worthless, unpriced, or not transferable should be reported to the states as unclaimed property if the conditions for escheatment are met, but such securities should not be remitted to the states. Holders may maintain on their books and records certain securities that are non-transferable to escheat to the states. As many of these securities have no value and would otherwise result in a custodial expense to the state, this recommendation is viewed as beneficial to all stakeholders by reducing costs and related operational inefficiencies, without impacting the owners. We urge the ULC to remove the brackets from the current version’s definition of “Non-freely transferrable securities.”

Securities: Restricted– *Updated*. The Act should reflect the fact that some securities are ownership interests which are subject to restrictions that prevent the owner from legally negotiating the interests until such time as the restrictions are removed. In some instances, the restriction is imposed pursuant to federal law, and in others, the restrictions are due to contract where there is no market value unless and until the conditions for vesting have been met. We recommend that restricted securities be included as one of the types of securities which are referenced in the definition of “non-freely transferrable securities,” and that definition of “restricted securities” be included in section 2.

Statute of Limitations – *Pending*. The statute of limitations provision in § 19(b) of the Act should be revised to provide greater certainty and protection to holders of unclaimed property. Specifically, the American Bar Association’s recommendation should be adopted, including a three-year statute for filed reports (with seven years for fraud or failure to file a report). Also critically, there should be no requirement to specifically identify property in a report filed with the administrator for the statute of limitations to apply.

Attachment A re Apparent Owner

Attachment A

DEFINITION OF APPARENT OWNER

Recommendation:

The members of the Holders Coalition recommend that the definition of “apparent owner” be amended to provide that, with respect to gift cards, the apparent owner is the person who owns the gift card at the time it is presumed abandoned. The purchaser of a gift card is rarely the owner of the gift card for more than a brief period of time. Once the purchaser (or subsequent donee) gives the gift card away, that person no longer has any rights with respect to the gift card. The recommended amendment will ensure that purchasers of gift cards – and recipients of gift cards who choose to “re-gift” them – will not be erroneously identified as the party with a right or ownership interest in the card.

Discussion in Support of Recommendation:

The purchaser of a gift card is rarely the owner of the gift card for more than a brief period of time, as purchasers typically purchase gift cards to give them as a gift to their donee (the recipient of the gift). The likelihood of the purchaser being the owner of the gift card is even more remote by the time that a gift card may be presumed abandoned under state unclaimed property laws. As demonstrated by industry experience and consistent with the intended use of gift cards, the purchaser should not be deemed the apparent owner unless it can be established that such purchaser is the person who owns the gift card at the time it is presumed abandoned.

Once the purchaser gives the gift card to his or her donee, the purchaser no longer has any rights with respect to the gift card. A gift card is treated as a bearer instrument. The purchaser relinquishes all rights to the card when gifted, and the holder has a legal obligation to the donee (the bearer of the card). It should be noted that the prevailing model for most retailers is to provide no expiration dates on gift cards. Further, federal law (the CARD Act) both limits gift card expiration to no less than five years and restricts inactivity fees. State laws provide further consumer protections to the owner/bearer of gift cards. The laws of many states prohibit expiration dates on gift cards. Without an expiration date, the issuer’s obligation to the bearer of the gift card is never extinguished.

Without the proposed clarification, the purchaser or a previous owner of the gift card could claim property to which they have no right or ownership interest. The owner of the gift card (*i.e.*, the bearer) has the sole legal right to performance of the obligations provided on the card. While the vast majority of gift cards are redeemed before the expiration of any abandonment period, some card owners attempt to redeem their card after it has been reported to a state. In this situation, the retailer will typically honor the gift card and then seek a refund from the state. Alternatively, the retailer could refuse to honor the card and direct the owner to file a claim with the state. In either situation, however, unless the definition of “apparent owner” is amended, the state could be faced with multiple claims for the same property: one from the purchaser, and one from either the holder or the true owner. This potential for multiple claims is avoided by clarifying who is the “apparent owner” in the case of gift cards.

Recommended Revision:

The definition of "apparent owner" found in Section 2 of the Uniform Unclaimed Property Act should be amended as follows:

SECTION 2. DEFINITIONS: In this [act]:

(3) "Apparent owner" means a person whose name appears on the records of a holder as the person entitled to property held, issued, or owning by the holder. With respect to gift cards, the apparent owner means the person who owns the gift card at the time it is presumed abandoned.