NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS ®

To: Uniform Law Commission, Revise the Uniform Unclaimed Property Act Drafting Committee

From: National Association of Unclaimed Property Administrators (NAUPA)

Re: Updated Recommended Revisions to the Uniform Unclaimed Property Act (1995)

Date: December 29, 2014

Contents **Page**

Issue #1: Should there be a definition of "address" under Section 1 of the Act? 5

Issue #2: Should the definition of "money order" under §1(10) be revised to prevent holders from taking advantage of the seven year dormancy period? 6

Issue #3: The definition of property under § 1(13) 7

Issue #4: Life Insurance Proceeds 8

Issue #5: The definition of holder in Section 1 (6) 10

Issue #6: Definition of Domicile in Section 1(4) 11

Issue #7: Nonvirtual New property (section 1) 12

Issue #8: Derivative Rights Doctrine 13

Issue #9: Bonds under Section 2 of the Act 16

Issue #10: Gift Cards under Section 2 17

Issue #11: Should verifiable electronic contact be added to Section 2 of the Act as constituting an indication of the owner's continuing interest in the property? 19

Issue #12: The Presumption of Abandonment 20

Issue #13: Should Section 2(a) be revised to cover the situation where particular property has been claimed by someone other than the "apparent owner" and is no longer in the hands of the former "holder?" 21

Issue #14: The dormancy Period under Section 2 21

Issue #15: Triggering Events in Section 2 24

Issue #16: Payroll Cards under Section 2..... 26

Issue #17: With respect to the value held or represented in a payroll Card, should the Act be revised to address whether the "holder" is the employer, the card issuer, or account servicer? .. 27

Issue #18: The amount presumed to be abandoned with respect to SVC's 27

Issue #19: Should instruments of value such as SVC's and gift certificates be subject to escheat at all under the derivative rights doctrine if they are only redeemable for tangible property or services, and not cash?..... 28

Issue #20: Should SVC's and gift certificates be treated the same or as equivalents for unclaimed property purposes, and if not, how should they be treated differently and why? 29

Issue #21: Dormancy Period with Respect to SVC Cards 30

Issue #22: Bitcoins..... 31

Issue #23: Abandonment of Securities under Section 2 32

Issue #24: The business to business exemption..... 36

Issue #25: Presumption of Abandonment for electronic accounts under Section 2 41

Issue #26: Presumption for Holders of Intangible Property 43

Issue #27: Addressing the Third Priority Rule in Section 4 44

Issue #28: More Precise Definition of "Address Sufficiency" 47

Issue #29: Under the Uniform Act, a state may claim title to foreign addressed unclaimed property held by an in-state corporation. 48

Issue #30: Should the address presumption for beneficiaries included in the 1981 Uniform Act at § 7(b) be incorporated into the revised Act?..... 49

Issue #31: Amount Deducted by Holder..... 50

Issue #32: Owner-Modification of Burden of Proof..... 51

Issue #33: Uniform Method of Reporting under Section 7 of the Act..... 54

Issue #34: Uniform Method of Notifying Apparent Owners Under Section 7 of the Act 55

Issue #35: Minimum Value of Remitted Property 55

Issue #36: Voluntary Escheatment Prior to Dormancy..... 56

Issue #37: Aggregate Reporting-More detailed for Amounts less than $50..... 57

Issue #38: Worthless or non-transferable securities 57
Issue #39: Notice by Newspaper publication-expansion 59
Issue #40: Provisions to incentivize Administrators to Return Property 61
Issue #41: Due Diligence 62
Issue #42: Record Retention by State 62
Issue #43: Military Decorations and Medals 65
Issue #44: Notice of Sale of Abandoned Property 66
Issue #45: Internet Sale of Abandoned Property 66
Issue #46: State Treasury Management of Funds 67
Issue #47: Mutual Duty of States to Exchange/Turn Over Property 67
Issue #48: Limitation on Number of Owners' Claims for Same Property 68
Issue #49: Limitations of Time 68
Issue #50: Attorney's Fees 69
Issue #51: Holder Action for Judicial Determination of Administrator's Determination of Liability 69
Issue #52: Holder Action for Judicial Determination of Administrator's Determination of Failure to Report and Turn Over Property 70
Issue #53: Holder Action For Judicial Determination of Administrator's Determination of Liability for Interest and Penalties for Failure to Turn Over Property During The Period in Which the Claim Is Contested 71
Issue #54: Administrative Appeals Process 72
Issue #55: Holder Turn Over of Property to State After Due Diligence 74
Issue #56: Authorization for Administrator to Disclaim Property 74
Issue #57: Statute of Repose 75
Issue #58: Limitations Period: Commencement/Tollability 76
Issue #59: Exemption from Expiration of Statute of Limitations Application When Holder Not Attempting to Evade Unclaimed Property Reporting 77
Issue #60: Contract/Independent Auditors 78
Issue #61: Records Retention After Reporting/Turn Over 79
Issue #62: Period of Record Retention (Duration) 80
Issue #63: Period of Record Retention (Various Types of Property) 81
Issue #64: Estimations of Liability of Putative Holder 81

Issue #65: Estimations Based on Statistical Sampling 82
Issue #66: Recovery of Litigation Expenses: Prevailing Party 84
Issue #67: Cap on Fees 84
Issue #68: How is "Prevailing Party" Defined 85
Issue #69: Conditions Precedent to Administrator's Enforcement 86
Issue #70: Limit on Time to File 87
Issue #71: Allow Holder/Putative Holder to Bring Action Against Administrator 87
Issue #72: Savings Bonds (Authorization for State Action Against Federal Government) 88
Issue #73: Relax Formalities of Interstate Cooperatives 89
Issue #74: Amount of Interest – Unreported Property 90
Issue #75: Penalties for Intentional Noncompliance 91
Issue #76: New Section? Confidentiality of Business Records 92
Issue *: Prefatory Note 93
Additional Issues 96
Section 25 Issues: Locators 96
Section 32: Effective date; ABA Recommendations. 97

Issue #1: Should there be a definition of "address" under Section 1 of the Act?

November 2014 Meeting Action: At the meeting, the Drafting Committee changed the issue from "uncontested" to "contested substantive" but the issue was not discussed further.

NAUPA's Recommendation: **NAUPA recommends including in the Uniform Act a definition of "address" premised on the state of last known address of the owner, regardless of whether the record of the address in the holder's records represents a complete mailing address.**

While there is a general consensus among stakeholders that there is a need to define "address," there is disagreement as to what the definition should be. NAUPA concurs with the position taken by ULC in its drafting the 1995 Uniform Act, which concluded that *Texas v. New Jersey* did not limit the claim of the creditor state to property reflecting an address "sufficient for the purpose of the delivery of mail" (see Section 1, Commissioners' Comment). In contrast, the ABA asserts that the U.S. Supreme Court "intended the common or ordinary meaning of [last known address] to apply" and thus adoption of a "mailable address" standard is mandated. To support its position, the ABA argues that a "mailable address" standard raises "no legal issues" and is "not factually complex." While these points may be correct, NAUPA believes that the "mailable address" standard is unnecessarily narrow. With respect to the potential legal issues that might arise from a broader definition of "address," it should be reiterated that the Supreme Court has not specifically defined an "address" as a "mailable address." What the Court has stated, in the *Delaware v. New York* decision, is that there are conceivably any number of "proper mechanisms" for determining the state of last known address of an owner of unclaimed property which would be acceptable provided that they were based on "the debtor's records" and not the "use of a statistical surrogate." With respect to the issue of "factual complexity," NAUPA's proposed definition is based on a standard of "sufficient identification" of the state of last known address of the owner. If for instance a holder had utilized a code designating the state of last known address of an owner, the state of last known address would be readily determinable. In comparison, whether or not a record constitutes a "complete mailing address"—the standard proposed by the ABA—requires a factual evaluation (depending upon the geographical location, the USPS might or might not successfully deliver mail to the owner without a street address, without a zip code, etc.). Where the state of last known address is clearly identifiable—as provided for in NAUPA's proposed definition—there is actually less "factual complexity" in applying the standard than the alternative proposed by the ABA.

The ABA has additionally commented that a "mailable address" definition is "consistent with the general purpose of state unclaimed property laws to return missing property to the rightful owner, as a complete mailing address is certainly helpful, if not necessary, to accomplish this purpose." This comment misses the point. The idea of providing a definition for "address," and making it broad enough to encompass any sufficient indication of a state of last known address, is not to encourage holders to minimize the amount of owner information that is captured and maintained. The Uniform Act does not dictate the types of records or level of detail that a holder creates; rather, it simply requires the maintenance of any record that was in fact created. For those holders which did not capture a "complete mailing address" in the first instance, but are able to identify the state of last known address of the owner, the NAUPA definition (which merely embodies the

concepts of Section 4 of the 1995 Uniform Act) is designed to result in the property being delivered to the state in which the apparent owner was last known to reside. Furthermore, this result is entirely consistent with the intent of the Supreme Court.

NAUPA previously proposed legislation: Definition of Address

> *"Address" means any description, code or indication of the location of the apparent owner that sufficiently identifies the state of last known address of the owner, regardless of whether such description, code or indication of location is sufficient to direct the delivery of mail.*

NAUPA Submitted Documents: See Pages 4 & 10 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #28.

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Issue #2: Should the definition of "money order" under §1(10) be revised to prevent holders from taking advantage of the seven year dormancy period?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **NAUPA recommends clarifying the definition of a "money order."**

The original purpose of the lengthened dormancy period was to make money orders an affordable payment instrument for the unbanked. It was not intended for holders to take advantage of the longer seven year abandonment period from the 1995 Uniform Act as many holders now make general disbursements through instruments treated as money orders. The Reporter's compilation accounts for this recommendation which is also restated below.

NAUPA previously proposed legislation: Money Orders

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

NAUPA Submitted Documents: See Pages 6 & 10 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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

(A) What should the definition of property include?

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

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **For subsection (A), NAUPA recommends retaining the definition of property from the 1995 Act, but also believes that the examples of property listed within the definition could be expanded. For subsection (B), NAUPA supports the allowance for offsets of owner debts in the state and a mechanism for owner's to claim escheated savings bonds from the state. NAUPA is not seeking a provision for an enforcement mechanism against the U.S. Treasury and will await the outcome of *Estes v. United States*, Docket No. 1:13-cv-01011 (Fed. Cl. Dec 20, 2013).**

For subsection (A), intangible property is defined as a fixed and certain interest in the property. NAUPA believes that this definition is sufficient to identify what property is subject to the Uniform Act. In addition, NAUPA recommends retaining and adding to the examples listed within the definition as long as the items remain examples rather than a conclusive list. NAUPA's suggestions for additional examples are listed under their applicable Issues.

For subsection (B), NAUPA has recommended a process by which an owner can claim funds from a savings bond that has been escheated to a state. Also, NAUPA has recommended that the Drafting Committee formally recognize the standing of a state or local government entity to collect an amount owed by an owner against unclaimed property held for that owner. NAUPA's recommended language for the two sub-issues is listed below.

<u>NAUPA previously proposed legislation: Allow for Claims to Escheated Savings Bonds</u>

Section 15(new subsection) *Not withstanding any provision of this Act to the contrary, any person making a claim for the United States savings bonds escheated to the State under Section [TBD] or for the proceeds from such bonds, may file a claim with the administrator. Upon providing sufficient proof the validity of such person's claim, the administrator may pay such claim.*

<u>NAUPA previously proposed legislation: Allowance for Offsets of Certain Owner Debts</u>

Section 15(new subsection) *Upon receiving notice from a governmental entity that an apparent owner owes a past-due legally enforceable debt, the administrator shall, following confirmation of the apparent owner's entitlement to the property, offset the property, in whole or in part, to satisfy the debt or delinquent child support. For purposes of this subsection, "past due-legally enforceable debt" shall include:*

(1) current child support, child support debt, retroactive child support, child support arrearages, child support costs, or child support when combined with maintenance;
(2) court fines, fees, costs, surcharges, or restitution; or
(3) state taxes, penalties or interest.

NAUPA Submitted Documents: See Pages 96-98 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #4: Life Insurance Proceeds
Section 1(13)(vi) includes within the definition of "property" amounts due and payable under the terms of an insurance policy.

(a) Should the provisions of the 1981 Act relating to unclaimed proceeds of life insurance policies be reinstated?
(b) If so, should there be a requirement that "proof of death" be redefined to include identification of policy holders and insured lives within the Social Security Administrators "death master file" ("DMF") or similar database?
(c) If so, should there be a new duty imposed on the life insurer to perform DMF matching on a regular basis and, if so, how often?
(d) If these changes are made, should the salient provisions of the NCOIL Model Act be incorporated into this revised act?

November 2014 Meeting Action: At the meeting, a motion by the Drafting Committee to "dovetail" language in a new Uniform Act to the NCOIL Model Act failed. Rather, a decision was made to put together a "working group" on the issue that will be chaired by Commissioner Swibel.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. Additionally, NAUPA continues to recommend that the Uniform Act be amended, as set forth in its May 9, 2014 submission, to clarify that the dormancy period for benefits that mature upon death begins to run on the date of death of the insured, that the "limiting age" should only be used to calculate the dormancy period for death benefits as a fall-back option when the insurer does not know if the insured is deceased, and that a new section be added calling for insurers to perform periodic checks of their records against the United States Social Security Administration's Death Master File.**

Subsequent to NAUPA's May 9, 2014 submission, the ACLI sent a letter to the Drafting Committee opposing NAUPA's proposed revisions. In support of its position, the ACLI attached a whitepaper entitled, *Life Insurance, Unclaimed Property and the Death Master File*. In its paper, the ACLI effectively disregards the problem of unclaimed death benefits in the life insurance industry, stating that "when policy benefits go unclaimed, life insurers report the

proceeds to the various states according to unclaimed life insurance laws." ACLI White Paper at 3. However, the results of unclaimed property audits conducted over the past several years have demonstrated the existence of a serious problem that has resulted in billions of dollars benefits owed to beneficiaries who were not aware of their entitlement to the proceeds going unclaimed, unpaid, and unescheated.

Nevertheless, the ACLI contends that escheatment prior to the limiting age absent "receipt of a claim and due proof of death" will "***short change the beneficiary's rights to make a claim*** in an attempt to have the life insurance proceeds reported to the states on an accelerated basis." ACLI White Paper at 17 (emphasis added). Contrary to the ACLI's suggestion, three to five years is significantly longer than the average time by which a beneficiary will come forward to file a claim. Therefore, once an insurance company knows that an insured is deceased, if no claim has been filed for three or five years after the death, turning the proceeds over to the state increases the likelihood that beneficiaries will be reunited with their property and there is no purpose in requiring satisfaction of contractual conditions prior to escheating the benefits (except allowing insurance companies to retain the money themselves). This is expressly noted in a comment to both the 1981 and 1995 Uniform Unclaimed Property Acts, which states: "Since the holder is indemnified against any loss resulting from the delivery of the property to the administrator, no possible harm can result in requiring that holders turn over property, even though the owner has not presented proof of death."

Additionally, contrary to the ACLI's suggestion (*see* ACLI Whitepaper at 7), the limiting age is not, and should not be, the primary or standard dormancy trigger. This is the case both because policies that have been subjected to "nonforfeiture" clauses after the death of the insured will have expired long before the limiting age is reached (or if they still remain in force, their value may have been significantly reduced after the death of the insured), and by that time the beneficiaries are also likely to be deceased, thereby significantly reducing the possibility of reuniting the property with the owner. Accordingly, the limiting age should be a backstop that ensures that unclaimed benefits are escheated when an insurer otherwise is unaware that the insured is deceased and the policy remains in-force at the time the insured would have attained the age of 100 (or in some cases 121). NAUPA notes that the Illinois Department of Insurance's October 22, 2014 submission to the Drafting Committee supports calculating the dormancy period for unclaimed death benefits from the date of death of the insured.

For the foregoing reasons, NAUPA believes that the Drafting Committee should adopt the revisions set forth in NAUPA's May 9, 2014 regarding unclaimed death benefits. These revisions will serve to protect the interests of insureds who have paid for years to have their loved ones provided for after their deaths, as well as the beneficiaries who have not come forward to claim the proceeds because they do not know, or have forgotten, about their entitlement to the funds. NAUPA is prepared to discuss these important issues further with the working group and the Drafting Committee as the process moves forward.

NAUPA Submitted Documents: See "NAUPA Life insurance Recommendations Whitepaper" (submitted May 9, 2014); *See also* Pages 17, 20, 27-28 & 174-178 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #5: The definition of holder in Section 1 (6)

(a) Because of the broad definition of a "holder" of unclaimed property who is obliged to report that property, in some situations where multiple parties are arguably holders, it is unclear who is obligated to report certain property. This is particularly true in the areas of securities and rebate programs. Should the term "holder" be defined less broadly or more specifically so as to avoid there being more than one person deemed the "holder" of the same property? See Memorandum § II.B.8.

(b) Should there be limitations or conditions placed on the ability of a holder of unclaimed property to avoid liability by assigning the property or liability to a third party?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **For subsection (a), NAUPA recommends retaining the definition of holder from the 1995 Uniform Act. For subsection (b), NAUPA supports a holder's right to delegate its unclaimed property reporting function but opposes language that permits a holder to assign liabilities and attempt to relieve itself of that liability.**

For subsection (a), the definition of holder from the 1995 Uniform Act accurately portrays the states' view that the holder is the person indebted to another on an obligation. This straightforward "debtor-creditor" analysis is consistent with U.S. Supreme Court decisions concerning unclaimed property. See *Texas v. New Jersey*, 379 U.S. 674 (1965) and *Delaware v. New York*, 507 U.S. 490 (1993). Both the ICI and SIFMA proposed definitions of holder incorporate complex tax definitions and create unnecessary complexity in the determination of the holder. The proposal by UPPO that the definition include a clarification that there can only be one holder is unnecessary. In summary, the current definition of holder is sufficient and while fact disputes sometimes arise with the current definition, the proposed revisions by the ICI, SIFMA and UPPO would lead to more confusion on the issue, not less.

For subsection (b), NAUPA recognizes that holders utilize third parties to perform unclaimed property compliance and the states have no issue with the outsourcing of this function; however, the holder must remain responsible and accountable for the third party's performance. The state should be able to look to the holder and not be relegated to the holder's agent when a compliance issue arises. NAUPA has previously proposed draft legislation on the ability of a holder to delegate or assign unclaimed property liabilities. The proposed language does not prevent a holder from contracting with a service company to prepare reports of unclaimed property but rather expressly recognizes the right of a holder to do so. However, responsibility for the reporting being performed correctly remains the duty of the holder.

NAUPA also recognizes that there may be legitimate business reasons for a holder to transfer unclaimed property liabilities on an inter-company basis and, as such, the draft legislation also permits this transfer. This inter-company transfer should not alter the priority of state claims to property or shift liability to a different jurisdiction. Accordingly, the draft legislation provides that for reporting purposes, the original obligor shall be treated as the holder.

NAUPA requests that the Reporter note NAUPA's update to its proposed legislation. This update was included within NAUPA's May 9, 2014 Delegation of Holder Reporting Obligations Whitepaper.

NAUPA previously proposed legislation: Limitations on Assignment or Transfer of Liability

> *(a) A holder may not assign or otherwise transfer its obligation to pay or deliver property or to comply with the duties of this Act, other than to a parent, subsidiary, or affiliate of the holder. The assignor or transferor shall remain the holder for purposes of the application of Section 4 of the Act.*
> *(b) A holder's successor by merger or consolidation or person or entity that acquires all or substantially all of a holder's capital stock or assets shall be responsible for the payment or deliver of property or to comply with the duties of this Act with respect to property held and owing by the predecessor entity.*
> *(c) Nothing in this section shall prohibit a holder from contracting with a third party for the physical act of reporting of unclaimed property, provided that a holder shall remain responsible to the administrator for the complete, accurate and timely reporting and delivery of property, and liable to the administrator for any failure on the part of the third party to report and deliver the property.*

NAUPA Submitted Documents: See "NAUPA Delegation of Holder Reporting Obligations Whitepaper" (submitted May 9, 2014); *See also* Page 169 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #6: Definition of Domicile in Section 1(4)

> **(a) Should the definitions of "domicile" in (4) be expanded to include other forms of business entities such as partnerships and limited liability companies?**
> **(b) Should the definition of "domicile" address the effects of mergers, acquisitions, consolidations, and liquidations?**

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **For subsections (a) and (b), NAUPA supports revising the definition of domicile.**

For subsection (a), NAUPA has previously proposed language to provide greater clarify as to a holder's state of domicile, particularly with respect to forms of legal entities not widely utilized when the 1995 Uniform Act was drafted. Based on a review of UPPO's submission, UPPO agrees with this clarifying language. While other stakeholders may object to the recommended definitions proposed independently by NAUPA and UPPO, NAUPA stresses the need for *some* comprehensive set of corporate entity definitions, so that a holder has no doubt as to its state of domicile for unclaimed property reporting purposes.

For subsection (b), NAUPA has previously proposed language to provide clarity when the state of incorporation of a holder changes prior to the running of the abandonment period. Based on a review of UPPO's submission, UPPO agrees with this clarifying language. NAUPA also believes that its proposal has been used in practice by states and holders alike.

NAUPA previously proposed legislation: Domicile

> *"Domicile" means the State of incorporation of a corporation; the State of formation of a limited partnership, limited liability company, trust, or other entity created by State statute; the State of home office of a federally-chartered entity; and except as otherwise provided the State of principal place of business for a sole proprietorship or other unincorporated entity. Where the state of domicile of a holder changes subsequent to the date on which property became payable or distributable, the holder's state of domicile for unclaimed property purposes shall be the State where the holder is domiciled at such time as the property is deemed abandoned.*

NAUPA Submitted Documents: See "NAUPA Delegation of Holder Reporting Obligations Whitepaper" (submitted May 9, 2014); *See also* Pages 4-5 & 10 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #7: Nonvirtual New property (section 1)

New Types of Unclaimed Property: Several types of property have emerged since the passage of the 1995 Act with respect to which there is no clear guidance as to their status as unclaimed property. These include stored value/gift cards, payroll cards/virtual currency such as Facebook Credits, Bitcoin, and the like, unused subscriptions and Software-as-a-Service (SaaS), including 'cloud"-based products, unused tickets/licenses, unclaimed class action distributions, promotional programs, Health Savings Accounts and 529 Plans, insurance benefits, and business inventory. Each type of emergent property has its own unique characteristics which merit discussion as to whether it constitutes unclaimed property and warrants separate definition. *See* Memorandum § II.C.1.

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed various options for 529 Plans and Health Savings Accounts regarding the presumption of abandonment under Issue #15. The Drafting Committee did not address other property types listed within the

summary of Issue #7 besides stored value/gift card and payroll cards. Stored value, gift and payroll cards will be addressed under other Issue numbers.

NAUPA's Recommendation: **As property is defined as a fixed and certain interest in intangible property, NAUPA does not believe that any types of property need to be separately defined. The examples given under the definition of property are sufficient, but not a conclusive list. Regarding the presumption of abandonment/"trigger events" for property, NAUPA has provided detailed commentary under Issue #15.**

As noted in the "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders," UPPO has recommended the exclusion of ERISA plans from a definition of "property." The "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders" notes the same exemption as proposed by the ABA under Issue #8. NAUPA has addressed the proposed exemption of employee plans subject to ERISA under issue #8 of this compilation.

NAUPA Submitted Documents: See Page 7 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #15.

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Issue #8: Derivative Rights Doctrine

Although the derivative rights doctrine is not expressly mentioned in the Uniform Act, many courts have concluded and commentators have suggested that it serves as the basis for unclaimed property laws. The derivative rights doctrine maintains that a state's interest in unclaimed property can be no greater than the owner's rights to the same property. Recently, however, some courts have opined that other bases for unclaimed property statutes may exist that are independent of the derivative rights doctrine. Because the derivative rights doctrine has served as a basis for much of the conceptual framework of the limits of unclaimed property laws, any conclusion that it is not a fundamental underpinning of unclaimed property laws could have a material impact on the interpretation of state unclaimed property laws. *See* Memorandum § II.A.

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. At the February 2014 meeting, the Committee had indicated no interest in adopting a strict derivative rights concept which would undermine anti-limitation provisions and unclaimed property in general.

NAUPA's Recommendation: **Maintain the important consumer protections embodied throughout the Uniform Act, including in Sections 2(e) and 19(a), and prevent holders from effectuating the private escheat of unclaimed assets through an unsupported interpretation**

of the derivative rights doctrine that would unduly limit the rights of the states in all regards to the rights of the owners.

As set forth in NAUPA's Derivative Rights Doctrine Whitepaper (submitted to the Drafting Committee as an attachment to NAUPA's May 9, 2014 submission), although the states' rights to take custody of abandoned property are derivative of the rights of the absent owners, they are not identical, and, in a number of regards, the rights of the states are greater than the rights of the owners. As recognized by well-established precedent, the states are provided these greater rights under the unclaimed property laws in order to ensure that the states are able to protect missing owners from having their property forfeited or confiscated by a holder, and to ensure that any benefit derived from being in possession of the property until the owner can be located inures to the benefit of the general public.

These principals were expressly recognized by the United States Supreme Court in the seminal case, *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 546 (1948), where the Court held that notwithstanding the fact that contractual conditions the owner would otherwise have to satisfy to obtain payment had not been fulfilled, "[t]he state may more properly be custodian and beneficiary of abandoned property than any person." As the Court explained, "[w]hen the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties. The state is acting as conservator, not as a party to a contract." *Id*. at 547. These holdings of *Connecticut Mutual* have been followed by numerous courts and are expressly referenced in the comments to both the 1981 Uniform Act and the 1995 Uniform Act. Moreover, they are embodied throughout the Uniform Act, including, among other things, provisions: (i) making property due and payable notwithstanding the owner's failure to make a demand or present necessary documentation; (ii) establishing dormancy triggers; (iii) limiting the ability of holders to charge fees on abandoned property; and (iv) making the expiration of any contractual or statutory period of limitations on the right of the owner to receive or recover property inapplicable to the state.

In short, it is well-settled that the states, when seeking to protect and preserve unclaimed property, have greater rights in certain regards than those of the missing owners. The suggestion that the derivative rights doctrine should be interpreted to strictly limit the rights of the states to the rights of the owners in all instances is entirely unfounded and would set the stage for holders to effect the forfeiture/private escheat of unclaimed property that, although may be in their possession, does not belong to them. Such an interpretation is antithetical to the underlying purpose and operation of the unclaimed property laws that have been in effect for over 60 years and should be soundly rejected by the Drafting Committee.

NAUPA Submitted Documents: See "NAUPA Derivative Rights Doctrine Whitepaper" (submitted May 9, 2014); *See also* "Delegation of Holder Obligations Whitepaper w/Attach" (submitted May 9, 2014); *See also* Pages 111-112 & 166 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

NAUPA's Supplemental Response: The "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders" included two additional issues which had not been previously raised and thus had not been previously commented on by NAUPA. NAUPA responds to these two issues below.

(1) Exemption of employee benefit plans as covered by ERISA (proposed by the ABA).
In drafting the 1995 Uniform Act, the ULC determined that with one specific exception (the final distribution of assets of a terminated plan), state unclaimed property laws were not pre-empted by ERISA (see Section 2, Commissioners' Comment).

The ABA proposes that the Uniform Act "be amended to clarify that employee benefit plans covered by the Employee Retirement Income Security Act of 1974...are not subject to state unclaimed property laws." This is consistent with the ABA's proposal for a preamble to the Act (see Issue 4(A) above) which would, in part, provide that "this Act shall be preempted to the extent that it conflicts with any federal law."

The ABA's proposal is in direct opposition to the determination made by the ULC in drafting the 1995 Uniform Act that "[b]ecause the unclaimed property laws are matters of traditional state powers, are laws of general application, and have only a tenuous, remote and peripheral impact on ERISA plans, it has been held that they are not pre-empted by federal law." Section 2, Commissioners' Comment. Therefore, the ULC determined that with one specific exception (the final distribution of assets of a terminated defined benefit plan), "the Act presumes that it is not preempted by ERISA." *Id*. NAUPA believes that there is no basis to change this position and the ABA's proposal should be rejected.

Supporting its position, NAUPA notes that although the Supreme Court has never addressed the issue of state unclaimed property laws and ERISA, since 1995, the Court has issued several decisions narrowing the preemptive scope of ERISA. *See, e.g., De Buono v. New York Commissioner of Health*, 520 U.S. 806, 813 (1997) (explaining that the Court has "unequivocally concluded" that the preemptive scope of Section 514(a) of ERISA was not "intended to modify 'the starting presumption that Congress does not intend to supplant state law'" (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)). Additionally, the Department of Labor does not currently have a mandated standard for how to deal with lost participants of active plans, and so there is no federal process with which the unclaimed property laws would conflict. Significantly, however, the DOL has determined that a fiduciary may transfer property to a state unclaimed property program where the plan has terminated (which the DOL reiterated in a Field Assistance Bulletin issued as recently as August 14, 2014). Moreover, in the context of retirement plans, every required minimum distribution not issued from the plan because a participant is missing is subject to a 50% penalty by the IRS. Thus, the ability of the states to assume custody of this type of abandoned property on behalf of the missing participant serves to protect these lost owners from having the value of their property significantly diminished.

Rejecting the ABA's proposal to include a blanket exemption from the unclaimed property laws for all employee benefit plans subject to ERISA does not prevent a holder from taking the position that ERISA preempts state unclaimed property laws in appropriate factual

circumstances. However, asking the states to forego the capacity to assume custody of significant amounts of abandoned property would be harmful to the interests of lost owners and the states. For these reasons, NAUPA strongly recommends that the position of the ULC that was developed in conjunction with the adoption of the 1995 Uniform Act should be retained.

(2) The UCC and uncashed checks.
A question has been raised as to whether the UCC would prevent equating unclaimed property with the underlying obligation (as proposed by both NAUPA and the ABA). The concern revolves around the wording of UCC 3-310 that the underlying obligation is discharged or suspended upon the payee's acceptance of a check. NAUPA does not believe that UCC 3-310 is generally applicable to uncashed checks.

This issue arose in case of *Costco Wholesale Corporation v. State of Washington*. Copies of the pleadings in this case were provided to the ULC along with the Delegation of Holder Obligations white paper, submitted May 9, 2014. Costco argued that UCC 3-310, as adopted by Washington, defeated the State's claim to uncashed Costco rebate checks. In response, the State asserted:

> First, that provision only applies if a "check" is taken for the underlying obligation, which is usually demonstrated by the obligee's depositing of or negotiating the check. The mere mailing and/or delivery of a check to the obligee "does not trigger the application of this section." 6B Anderson on the Uniform Commercial Code, §3-310:7 (rev. 2012). Second, the UCC addresses negotiable instruments generally and does not consider the disposition of property or obligations presumed abandoned. In contrast, the [unclaimed property law] specifically addresses all species of intangible property.

See Defendant's/Counter-Claimant's Motion for Partial Summary Judgment, p.22. The court ultimately rejected Costco's UCC and other arguments and found that as a matter of law, Costco was liable for reporting as unclaimed property the uncashed rebate checks.

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Issue #9: Bonds under Section 2 of the Act

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

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

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **For subsection (a), NAUPA proposes that the 1995 Uniform Act provision for corporate bonds be retained. For subsection (b), NAUPA recommends that the presumption of abandonment for municipal bonds be expressly addressed.**

For subsection (a), NAUPA has withdrawn its proposed revisions to redefine the abandonment of unclaimed corporate bonds as currently set forth in Section 2(a)(4) of the 1995 Uniform Act, other than to reduce the dormancy period from five to three years. NAUPA does not believe such a redefinition is necessary.

For subsection (b), NAUPA has proposed that Section 2(a)(11) of the 1995 Uniform Act be revised to expressly include "municipal bond interest and principal under the administration of a paying agent or indenture trustee." NAUPA believes that such a revision is consistent with general industry practice and the holding of the New Jersey Supreme Court in *Clymer v. Summit Bancorp*, 792 A.2d 396 (NJ 2002)

NAUPA previously proposed legislation: Presumption of Abandonment for Municipal Bonds

> (11) property held by a court, government, governmental subdivision, agency, or instrumentality, *including municipal bond interest and principal under the administration of a paying agent or indenture trustee,* one year after the property becomes distributable;

NAUPA Submitted Documents: See Page 57 of "NAUPA Annotated Reporter Compilation of Comments" (submitted October 29, 2014); *See also* Pages 18 & 28-29 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #10: Gift Cards under Section 2

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

(b) Should the determination of abandonment of a gift card be revised to take into account the date of the owner's last use of the card and to reconcile with the federal regulatory guidelines of preemption?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to add stored value cards as a category of unclaimed property. The Drafting Committee also will put together a "working group" chaired by Commissioner Lebrun to determine specifics regarding the different types of cards and a profit/cost split if any.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. For subsection (a), NAUPA recommends that gift cards and gift certificates not be defined separately. For subsection (b), NAUPA recommends that the presumption of abandonment be revised to account for the owner's last use of the card.**

For subsection (a), NAUPA does not believe separate definitions are necessary for gift cards and gift certificates as obligations, such as gift cards and gift certificates, are sufficiently covered by the current Uniform Act definition of property. An attempt to specifically define these obligations would be futile.

For subsection (b) and as the Reporter's compilation notes, NAUPA has previously proposed a revised presumption of abandonment for gift instruments. NAUPA recognizes the layered questions involving gift cards. There are also related questions that impact the gift card instrument such as the general concept of stored value cards, the underlying obligation, and the impact of the Consumer Financial Protection Bureau ("CFPB").

For gift instruments and stored value cards, NAUPA's objective is revise the determination of abandonment to account for the date of the owner's last use of the card and reconcile with the CFPB that a state cannot claim an unused balance less than three years from the date of sale, unless the issuer is required by the state to continue to honor any such reported gift card balances.

Regarding the impact of stored value cards, the underlying obligation and the CFPB, NAUPA has previously proposed draft legislation to account for these issues. For these issues, NAUPA's objective is to define abandonment parameters for funds maintained on stored value cards, other electronic mediums, general purpose cash cards and unactivated cards. Lastly, NAUPA suggests eliminating the ambiguity that currently exists between payment mediums and the nature of the liability. This will prevent abuse of utilizing certain payment mediums that were never intended to supersede specific types of obligations, such as payroll.

<u>NAUPA previously proposed legislation: Presumption of Abandonment for Gift Instruments</u>

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

<u>NAUPA previously proposed legislation: Presumption of Abandonment for non-activated mediums</u>

> Section 2(a)(new subsection) *funds represented by a non-activated stored value card or other non-activated electronic payment medium that require activation for use, one year after the funds would have otherwise first been available to the owner;*

<u>NAUPA previously proposed legislation: Presumption of Abandonment when ambiguity between underlying obligation and form of payment</u>

> Section 2(b) *Where there is an ambiguity or conflict under this section as to the applicable period giving rise to a presumption of abandonment, the nature of the underlying obligation, regardless of the form of payment or account, shall take precedence and dictate the corresponding abandonment period.*

NAUPA Submitted Documents: See <u>Pages 17-18, 20-21, 24-25, 27 & 29-30</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #18, #19, #20 and #21.

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Issue #11: Should verifiable electronic contact be added to Section 2 of the Act as constituting an indication of the owner's continuing interest in the property?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not make a motion on this issue. Various stakeholders have agreed that updating the contact standards would be beneficial.

NAUPA's Recommendation: **NAUPA supports expanding the standards of contact as long as the actions are traceable and verifiable.**

While various stakeholders agree that the standards of contact should be updated to reflect electronic communications, NAUPA believes that certain stakeholder supported actions should not constitute contact as the actions are not traceable or verifiable. NAUPA requests that the Reporter note NAUPA's update to its proposed legislation. This update was included within Appendix A-1 of NAUPA's October 29, 2014 unclaimed securities proposal.

The owner contact must be verifiable in order to evidence that the owner is aware of their property. For example, authorization cookies do not confirm the identity of the individual making the inquiry as there is no evidence that the person logged into the account. Similarly, an automated withdrawal or payment can continue long after an owner is lost or even deceased. This situation allows a holder to make the assumption that another party is maintaining contact with the owner. The counterparty making the deposit or receiving the withdrawal may be contemporaneously considering the automated withdrawal or payment as contact and thus multiple accounts are incorrectly considered active.

<u>NAUPA previously proposed legislation: Indication of Owner Interest of Property</u>

> *(d)* An indication of an owner's interest in property *shall mean any contact, communication or transaction related to the property from the owner, or involving some affirmative action by the owner with respect to the property, which is documented in a contemporaneous record prepared by or on behalf of the holder or in the possession of the holder. An indication of an owner's interest in property* includes:
>
> (i) the presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;
>
> (ii) owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease, or change the amount or type of property held in the account;
>
> *(iii) a verbal contact, communication or transaction, in which the holder takes reasonable action to verify the identity of the owner;*
>
> *(iv)* the making of a deposit to or withdrawal from a bank account *(other than an automated deposit or withdrawal);*

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

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

(vii) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.

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

NAUPA Submitted Documents: See Appendix A-1 of "NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities" (submitted October 29, 2014); *See also* Page 26 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #25.

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Issue #12: The Presumption of Abandonment

Presently, the 1995 Uniform Act provides that a record of the issuance of a check, draft, or similar instrument is *prima facie* evidence of an obligation. There is thus a presumption of abandonment which must be rebutted by a holder, although what is needed to rebut such a presumption is often ill-defined. Should the Act better and more clearly address when the presumption is triggered and when (and how) a Holder can rebut the presumption? *See* Memorandum § II.B.6.

November 2014 Meeting Action: At the meeting, the Drafting Committee addressed the "burden of proof" question under Issue #32. The Drafting Committee's original focus for Issue #12 did not address burden of proof but rather, presumptions of abandonment. No discussion of presumption of abandonment occurred under this issue.

NAUPA's Recommendation: **The burden of proof/prima facie evidence question was addressed under Issue #32. As such, NAUPA has no comment on Issue #12 and will address burden of proof under Issue #32.**

In addition, please note that the Reporter's compilation includes NAUPA's recommendations for Section 2 of the 1995 Uniform Act and Issue #12 as it was originally drafted.

Corresponding Issues: #14 and #32.

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Issue #13: Should Section 2(a) be revised to cover the situation where particular property has been claimed by someone other than the "apparent owner" and is no longer in the hands of the former "holder?"

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.

NAUPA's Recommendation: **NAUPA supports the determination that revised language is unnecessary and has no additional comment at this time.**

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Issue #14: The dormancy Period under Section 2
The period of dormancy, after which property is presumed abandoned, has been consistently shortened over the years. Considering that states have developed non-uniform dormancy periods, should any of the time periods set forth for presumed abandonment be changed – either increased or decreased in light of what some states have done?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **NAUPA supports shortening the dormancy period after the presumed abandoned triggering event has occurred. NAUPA has included below a chart from David J. Epstein, <u>Unclaimed Property Law & Reporting Forms</u> (Matthew Bender, 1984) exhibiting that states have consistently shortened the dormancy period for accounts payable, wages and dividends. In all cases for the states, the dividends dormancy period is not shorter than for securities and in many instances the dormancy period is the same.**

This issue is substantially similar in nature to the original Issue #12 where the Reporter's compilation includes NAUPA's recommendations for a reduction in abandonment periods; the

acceleration of abandonment periods where inactivity or dormancy fees are assessed; the reduction in abandonment periods upon death of an owner, and expanding coverage for class action proceeds. Regarding stakeholder comments that broker-dealers should be able to "cross-reference" multiple accounts so as to rebut the presumption of abandonment; this allowance was previously made by the ULC for banks. However, the concept is counter-intuitive as an owner's awareness of one account in no way reflects knowledge of another account. Holders should be required to perform due diligence in such circumstances so as to ensure that an owner is aware of all assets.

NAUPA's recommendations call for specifically accelerating the abandonment period where the holder has ostensible knowledge of the death of an owner. Where there is knowledge of death, and there has been no contact with the owner's estate or beneficiaries, there is no public interest served in the holder continuing to maintain custody of an asset until it would otherwise be presumed abandoned. Conversely, the sooner that the state may undertake a search for the successors in interest to the deceased owner, the more likely that the property will be timely returned to the rightful owner. This is not an issue that is limited to life insurance; it impacts all types of unclaimed property. **NAUPA considers the issue of the death of an owner and how this should impact presumptions of abandonment to represent a significant policy matter, and NAUPA recommends that the Drafting Committee make time to explore and discuss this issue.**

<u>NAUPA previously proposed legislation: Presumption of Abandonment Accelerants</u>

> Section 2(a)(New subsection 16) *if the holder has imposed a charge against property for reason of owner inactivity or the failure of the owner to claim the property within a specified period of time, and the abandonment period for the property as specified in this section is greater than two years, the property shall instead be presumed abandoned two years from the date of the owner's last indication of interest in the property.*
>
> Section2(a)(New subsection 17) *if the holder has reason to believe that the owner is deceased, and the abandonment period for the owner's property as specified in this section is greater than two years, the property shall instead be presumed abandoned two years from the date of the owner's last indication of interest in the property. If the owner's property is subject to subsection (14) of this section, the two year presumption of abandonment shall run from the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, 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.*

NAUPA Submitted Documents: See "State UP Program Claims Paid 3 vs 5 Year Dormancy" (submitted May 9, 2014); *See also* <u>Pages 20 & 26-27</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #12.

Consolidated Quick Reference Table (for Non-Insurance Companies)

State	Period Ending	Due Date	Accounts Payable	Wages	Dividends	Aggregate Amount(<)
ALABAMA	30-Jun	1-Nov	3	1	3	$50.00
ALASKA	30-Jun	1-Nov	3	1	5	$100.00
ALBERTA (Canada)	31-Dec	1-May	5	1	5	$–
ARIZONA	30-Jun	31-0ct	3	1	3	$50.00
ARKANSAS	30-Jun	1-Nov	5	1	5	$50.00
CALIFORNIA	30-Jun	31-0ct	3	1	3	$25.00
COLORADO	30-Jun	1-Nov	5	1	5	$25.00
CONNECTICUT	31-Dec	1-Apr	3	1	3	$50.00
DELAWARE	31-Dec	1-Mar	5	5	3	$50.00
D.C.	30-Jun	1-Nov	3	1	3	$50.00
FLORIDA	31-Dec	30-Apr	5	1	3	$50.00
GEORGIA	30-Jun	1-Nov	5	1	5	$50.00
HAWAII	30-Jun	1-Nov	5	1	5	$50.00
IDAHO	30-Jun	1-Nov	5	1	5	*
ILLINOIS	31-Dec	1-May	5	1	5	$5.00
INDIANA	30-Jun	1-Nov	3	1	3	$50.00
IOWA	30-Jun	1-Nov	3	1	3	$50.00
KANSAS	30-Jun	1-Nov	5	1	5	$100.00
KENTUCKY	30-Jun	1-Nov	3	3	3	$100.00
LOUISIANA	30-Jun	1-Nov	5	1	3	$50.00
MAINE	30-Jun	1-Nov	3	1	3	$50.00
MARYLAND	30-Jun	31-0ct	3	3	3	$100.00
MASSACHUSETTS	30-Jun	1-Nov	3	3	3	$100.00
MICHIGAN	31-Mar	1-Jul	3	1	3	$50.00
MINNESOTA	30-Jun	1-Nov	3	1	3	$100.00
MISSISSIPPI**	30-Jun	1-Nov	5	5	5	$100.00
MISSOURI	30-Jun	1-Nov	5	5	5	$50.00
MONTANA	30-Jun	1-Nov	5	1	5	$50.00
NEBRASKA	30-Jun	1-Nov	5	1	5	$25.00
NEVADA	30-Jun	31-0ct	3	1	3	$50.00
NEW HAMPSHIRE	30-Jun	1-Nov	5	1	3	$50.00
NEW JERSEY	30-Jun	1-Nov	3	1	3	$50.00
NEW MEXICO	30-Jun	1-Nov	5	1	5	$50.00
NEW YORK***	31-Dec	10-Mar	3	3	3	$20.00
NORTH CAROLINA	30-Jun	1-Nov	5	1	3	$50.00
NORTH DAKOTA	30-Jun	l-Nov	2	2	2	$50.00
OHIO	30-Jun	1-Nov	1	1	5	$50.00
OKLAHOMA	30-Jun	1-Nov	5	1	3	$50.00
OREGON	30-Jun	1-Nov	3	3	3	$50.00
PENNSYLVANIA	31-Dec	15-Apr	5	2	5	$50.00
PUERTO RICO	30-Jun	10-Aug	5	5	5	$1.00
QUEBEC (Canada)	Variable	Variable	3	-	3	$–
RHODE ISLAND	30-Jun	1-Nov	3	1	3	$50.00
SOUTH CAROLINA	30-Jun	1-Nov	5	1	5	$50.00
SOUTH DAKOTA	30-Jun	1-Nov	3	1	3	$50.00
TENNESSEE	31-Dec	1-May	5	1	3	$50.00
TEXAS	1-Mar	1-Jul	3	1	3	$50.00
UTAH	30-Jun	l-Nov	3	1	3	$50.00

VERMONT	31-Dec	1-May	3	1	3	$25.00
VIRGIN ISLANDS	30-Jun	1-Nov	5	1	5	$50.00
VIRGINIA	30-Jun	1-Nov	5	1	5	$100.00
WASHINGTON	30-Jun	1-Nov	3	1	3	$50.00
WEST VIRGINIA	30-Jun	1-Nov	5	1	5	$50.00
WISCONSIN	30-Jun	1-Nov	5	1	3	$50.00
WYOMING	30-Jun	1-Nov	5	1	3	$50.00

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Issue #15: Triggering Events in Section 2
Are the "triggering events" overly broad? Do they need reconsideration, particularly with respect to accounts usually held for the benefit of a minor such as 529 Plans, and accounts such as Roth Retirement accounts and Health Savings accounts, which are usually held for a very long time and invested in growth or income earning accounts?

November 2014 Meeting Action At the meeting, the Drafting Committee discussed various options for 529 Plans and Health Savings Accounts. For IRAs a motion passed to utilize a 70.5 age requirement combined with a return mail standard. For 529 plans, no vote was taken; rather the Drafting Committee requested that the Reporter draft several proposals. No motion was made and the Commissioners are seeking further input from the stakeholders. UGMA/UTMA accounts were not discussed.

NAUPA's Recommendation: **NAUPA has previously proposed some revisions to the presumptions of abandonment under Section 2. In general, NAUPA does not believe the current triggers are overly broad. For securities and tax-advantaged assets, NAUPA believes that the presumptions of abandonment must be modernized. For 529 Plans and tax-advantaged assets, NAUPA has provided revised recommendations below.**

<u>529 Plans</u>
For Education Savings Accounts under Section 529 of the I.R.C., the withdrawal of earnings is tax free if the earnings are used for the beneficiary's qualified higher education expenses. UPPO has proposed that plans under Section 529 of the I.R.C. be exempt. The ICI has proposed that the dormancy period for 529 accounts should be either the limiting age established by the plan or 30 years after the account was either opened or the beneficiary was changed on the account. NAUPA has previously proposed that the dormancy period for 529 plans be tolled until the beneficiary reaches 26 years of age and there has been no activity by the account owner.

NAUPA does not concede its position that an activity standard is more beneficial to the owner than a RPO standard. In addition, NAUPA maintains that a tolling period based on the age of the beneficiary is more appropriate than the age of the account owner or the length of time that the account has been opened. One argument put forth by the ABA and ICI is that the account owner can always change the beneficiary. It is important to note that a change of beneficiary would be considered activity in the account and would toll the running of the dormancy period under NAUPA's proposal below.

It is NAUPA's position that most account owners know if a beneficiary will have qualified higher education expenses by the time the beneficiary reaches 26 years of age and will either take a non-qualified withdrawal or change the beneficiary. Otherwise, there is a strong presumption that the owner has no knowledge of the asset and has lost track of it.

NAUPA Revised Proposal: Presumption of Abandonment for 529 Plans

> *(new subsection) property in a college savings plan or prepaid plan established under section 529 of the Internal Revenue Code of the United States, five years after (i) the return of mail as undeliverable for owners who receive communications from the holder by United States mail, or (ii) the date of last activity for owners who do not receive communications from the holder by United States mail; provided that at the conclusion of five years the beneficiary has reached the age of 26 years or if the age of the beneficiary is unknown, the account has been opened for 26 years or it has been 26 years since the account owner has changed the beneficiary.*

Health Savings Accounts and other Property without a Limiting Age

One major issue with Section 2(a)(14) of the 1995 Uniform Act is that there is no trigger for items that have no limiting age unless there is a failed distribution. Unlike IRAs and 529 Plans, there is no expectation for when an attentive account owner would utilize their property on an account with no limiting age. For example, Health Savings Accounts are tax deferred items with no limiting age and can be used for the medical expenses of an account owner or their qualified dependents at any time.

For all tax deferred items other than 529 Plans, the ICI has proposed that account owners must reach the age of 70½. The ABA has proposed tolling the reporting of all tax deferred items without a limiting age until 10 years after the account owner reaches 85 years of age and there has been both RPO and no activity. The ABA's rationale for tolling the reporting of these items is to avoid any possibility of a tax consequence for the account owner.

NAUPA believes that attempting to avoid a tax penalty for the account owner is an appropriate goal. However tying the tolling period to the account owner's age has nothing to do with the expectation for when the account owner would have penalty free withdrawals because they incurred qualified expenses. Utilizing 85 years of age plus 10 as the de facto limiting age for all tax deferred items without an expressed limiting age enriches holders with an exceptionally long holding period based solely on the ABA's best guess or hope that all tax penalties would avoided.

As a result, NAUPA proposes a dormancy period of 10 years for tax deferred items without a limiting age (Per NAUPA's previous submission regarding RSA's, the following protocol would not be applicable to RSAs that cannot be accessed by the owner prior to retirement without penalty). This balances the concerns of avoiding tax consequences for the account owner with the consumer protection goal of reuniting owners with their lost property. It is NAUPA's experience that longer dormancy periods or tolling provisions make it harder to find lost account owners. The proposal below applies to any tax deferred item without a limiting age in order to remain flexible as to other potential creations of Congress that might be utilized in the future:

NAUPA Revised Proposal: Presumption of Abandonment for Tax Deferred Assets

> Section 2(a)(14): …For any *asset* that is qualified for tax deferral under the income tax laws of the United States *and does not have a mandatory date of distribution or is not otherwise expressly covered by this [Act], ten years after (i) the return of mail as undeliverable for owners who receive communications from the holder by United States mail, or (ii) the owner's last indication of interest in the property for owners who do not receive communications by United States mail;*

Additional NAUPA Response: as noted in the "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders," the ICI has recommended the exclusion of ERISA plans from a definition of "property." The "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders" notes the same exemption as proposed by the ABA under Issue #8. NAUPA has addressed the proposed exemption of employee plans subject to ERISA under Issue #8 of this compilation.

NAUPA Submitted Documents: See Pages 16-30 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #7.

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Issue #16: Payroll Cards under Section 2.
Should Payroll Cards be classified as "unpaid wages" subject to a one-year dormancy period, as a deposit account subject to a longer dormancy period, or as general intangible property?

November 2014 Meeting Action: At the meeting, the Drafting Committee made no motion on this issue and there was minimal discussion.

NAUPA's Recommendation: **NAUPA recommends that wages placed on a stored value card remain wages. This recommendation is noted in the Reporter's compilation.**

NAUPA previously proposed legislation: Presumption of Abandonment for Wages

> Section 2(a)(12) *wages or other compensation for personal services, one year after the compensation becomes payable without regard to the medium of payment;*

NAUPA previously proposed legislation: Presumption of Abandonment when Ambiguity between Underlying Obligation and Form of Payment

> Section 2(b) *Where there is an ambiguity or conflict under this section as to the applicable period giving rise to a presumption of abandonment, the nature of the underlying obligation, regardless of the form of payment or account, shall take precedence and dictate the corresponding abandonment period.*

NAUPA Submitted Documents: See Pages 18, 20-21 & 24-25 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #17.

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Issue #17: With respect to the value held or represented in a payroll Card, should the Act be revised to address whether the "holder" is the employer, the card issuer, or account servicer? Who has the more up to date and reliable records and who has to maintain those records?

November 2014 Meeting Action: At the meeting, the Drafting Committee made no motion on this issue and there was minimal discussion. The Reporter's compilation states that "the decision was made to have a subcommittee investigate and recommend with respect to this issue."

NAUPA's Recommendation: **NAUPA supports retaining the current definition of holder as it sufficiently identifies the obligor and resolves this Issue.**

NAUPA Submitted Documents: See "NAUPA Delegation of Holder Reporting Obligations Whitepaper" (submitted May 9, 2014); *See also* Page 169 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #16.

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Issue #18: The amount presumed to be abandoned with respect to SVC's
With respect to SVC's, is the amount presumed to have been abandoned the initial "face value" of the SVC, or the value remaining on the card at the time of presumed abandonment?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to add stored value cards as a category of unclaimed property. The Drafting Committee also will put together a "working group" chaired by Commissioner Lebrun to determine specifics regarding the different types of cards and a profit/cost split if any.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. NAUPA supports clarifying that the balance of the card after the owner has utilized funds rather than the face value is subject to escheat.**

NAUPA also notes that service charges may impact the balance of the card and requests that the Drafting Committee consider the previously proposed legislation below on service charges which prohibits excessive charges and the "stacking" of multiple service charges.

NAUPA previously proposed legislation: Presumption of Abandonment for Gift Instruments

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

NAUPA previously proposed legislation: Presumption of Abandonment for non-activated mediums

> Section 2(a)(new subsection) *funds represented by a non-activated stored value card or other non-activated electronic payment medium that require activation for use, one year after the funds would have otherwise first been available to the owner;*

NAUPA previously proposed legislation: Service Charges

> Section 5*(a) Except as otherwise provided in (b),* a holder may deduct from property presumed abandoned a charge imposed by reason of the owner's failure to claim the property within a specified time if there is a valid enforceable written contract between the holder and the owner under which the holder may impose the charge and the holder regularly imposes the charge, which is not regularly reversed or otherwise cancelled. ~~The amount of the deduction is limited to an amount that is not unconscionable.~~
>
> *(b) A holder may not deduct from property presumed abandoned a charge:*
>
> > *(1) for the holder's reporting of the property as abandoned, or for the holder's performance of other duties under this Act;*
> >
> > *(2) that is unconscionable, in consideration of the marginal transactional costs incurred by the holder in its maintenance of the owner's property, and the services received by the owner; or*
> >
> > *(3) specifically for reason of the owner's failure to claim the property within a specified time if the holder is contemporaneously imposing another type of service charge against the property.*

NAUPA Submitted Documents: See Pages 17-18, 20-21, 24-25, 27, 29-30 & 46-47 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #10, #19, #20 and #21.

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Issue #19: Should instruments of value such as SVC's and gift certificates be subject to escheat at all under the derivative rights doctrine if they are only redeemable for tangible property or services, and not cash? If so, is the limitation of 60% of face value the correct amount?

November 2014 Meeting Action: At the meeting, the Drafting Committee failed to support a motion requested by the ABA to omit gift cards only redeemable for merchandise from the proposed Uniform Act. The Drafting Committee passed a motion to add stored value cards as a category of unclaimed property. The Drafting Committee also will put together a "working group" chaired by Commissioner Lebrun to determine specifics regarding the different types of cards, and a profit/cost split if any.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. As NAUPA does not recognize the legal fiction of the "derivative rights" doctrine as stated above, NAUPA recommends that no exemption be created for stored value or gift cards redeemable for tangible property or merchandise.**

NAUPA has previously proposed legislation regarding the balance of the card being subject to escheat rather than a percentage value. NAUPA believes that the 60% balance currently utilized by the 1995 Uniform Act accounts for a "profit margin" significantly greater than most industries recognize on merchandise or services.

NAUPA Submitted Documents: See "NAUPA Derivative Rights Doctrine Whitepaper" (submitted May 9, 2014); *See also* Pages 17-18, 20-21, 24-25, 27 & 29-30 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #10, #18, #20 and #21

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Issue #20: Should SVC's and gift certificates be treated the same or as equivalents for unclaimed property purposes, and if not, how should they be treated differently and why?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to add stored value cards as a category of unclaimed property. The Drafting Committee also will put together a "working group" chaired by Commissioner Lebrun to determine specifics regarding the different types of cards and a profit/cost split if any.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. NAUPA recommends differing treatment of stored value cards and gift cards within the revised Uniform Act based on whether the instrument has been used by the owner.**

NAUPA proposes to differentiate between stored value cards which require activation and gift cards. Also, consideration must be given to other payment obligations, such as payroll, which may be paid via an instrument similar to a stored value card. NAUPA has previously proposed legislation on this topic below.

NAUPA previously proposed legislation: Presumption of Abandonment for Gift Instruments

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

NAUPA previously proposed legislation: Presumption of Abandonment for non-activated mediums

Section 2(a)(new subsection) *funds represented by a non-activated stored value card or other non-activated electronic payment medium that require activation for use, one year after the funds would have otherwise first been available to the owner;*

NAUPA previously proposed legislation: Presumption of Abandonment for Wages

Section 2(a)(12) *wages or other compensation for personal services, one year after the compensation becomes payable without regard to the medium of payment;*

NAUPA Submitted Documents: See Pages 17-18, 20-21, 24-25, 27 & 29-30 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #10, #18, #19 and #21.

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Issue #21: Dormancy Period with Respect to SVC Cards
Should the dormancy period with respect to SVC's run from the date of first purchase, or from the date of last use or withdrawal, for from the last date the SVC was recharged or uploaded in value?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not specifically address this issue. The Drafting Committee also will put together a "working group" chaired by Commissioner Lebrun to determine specifics regarding the different types of cards, a profit/cost split if any, and the possibility of harmonizing the provision with federal law.

NAUPA's Recommendation: **NAUPA requests that it be appointed as an advisory member of the working group that the Drafting Committee has moved to establish. NAUPA supports clarifying that the dormancy period runs from the latter of the date of sale or the date of the owner's last use of the card.**

NAUPA believes that the last use of the card is accurate as the owner has exhibited an interest in the property which should be reflected when considering the abandonment trigger. NAUPA has previously proposed legislation on this issue below.

NAUPA previously proposed legislation: Presumption of Abandonment for Gift Instruments

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

NAUPA previously proposed legislation: Presumption of Abandonment for non-activated mediums

Section 2(a)(new subsection) *funds represented by a non-activated stored value card or other non-activated electronic payment medium that require activation for use, one year after the funds would have otherwise first been available to the owner;*

NAUPA Submitted Documents: See Pages 17-18, 20-21, 24-25, 27 & 29-30 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #10, #18, #19 and #20.

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Issue #22: Bitcoins
Should the other forms of value recently evolved such as Bitcoin and other electronic stores of value be made subject to unclaimed property rules, and if so, under what rules?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. The Reporter's compilation states that "[t]he issue is subject to research being conducted by or under the direction of Commissioner Ramasastry."

NAUPA's Recommendation: **NAUPA has previously proposed an update to Section 2 of the Uniform Act to specifically include payments made through mediums of exchange other than money, such as virtual currency including Bitcoin, as an example of property.**

NAUPA previously proposed legislation: Property includes Electronic or Virtual Currency

(13) "Property" means tangible property described in Section 3 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom. The term includes property that is referred to as or evidenced by:

(i) money, *electronic or virtual currency*, a check, draft, deposit, interest, or dividend;

NAUPA Submitted Documents: See Pages 7 & 11 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #23: Abandonment of Securities under Section 2
Are the standards under the Act relating to presumed abandonment of securities adequate and realistic, or do other standards need to be applied, particularly with respect to the use of electronic "mailing" and with respect to foreign owners? Is the NCOIL model legislation developed over the last five years – or some other model – an appropriate model to follow in this issue? *See* Memorandum § II.B.10.

Issue #23(a) Abandonment of Securities: Relevance of Returned Mail

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to adopt the SEC return mail standard under 17-Ad-17.

NAUPA's Recommendation: **NAUPA opposes the motion to adopt the SEC return mail standard under 17-Ad-17. As the primary goal of the Drafting Committee is to "modernize" the Uniform Act, NAUPA disagrees that the approved motion satisfies this goal, especially when it creates a standard that relies on a requirement that is even more limiting than the 1995 Uniform Act from twenty years ago. While NAUPA maintains that an activity standard is appropriate, NAUPA has also provided a revised proposal to account for two alternatives regarding the presumption of abandonment.**

The 1995 Uniform Act provides for two alternatives regarding the presumption of abandonment for stock and equity interests. Property is presumed abandoned at the "earlier of (i) the date of the most recent dividend, stock split, or other distribution unclaimed by the apparent owner, or (ii) the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner."

The 1995 Uniform Act recognized that even when mail is not returned as undeliverable, another method must be recognized which is an unclaimed dividend, stock split or other distribution. Under the Drafting Committee's supported motion, this standard is deleted; therefore, unclaimed dividends and distributions may continue in perpetuity as long as any mailing has not been returned as undeliverable.

Furthermore, a mailing standard also does not recognize the goal of modernizing the Uniform Act. The use of mail has significantly decreased since the 1995 Uniform Act and it is only trending in one direction as both holders and transfer agents are attempting to minimize the difficulties and costs associated with mailings. Regarding consistency with the SEC, the SEC has noted that there is no conflict between the SEC standard and state unclaimed property laws. Rather the SEC expressly recognizes the state escheatment process. *See http://www.sec.gov/answers/escheat.htm*, (last accessed December 19, 2014).

Most importantly, NAUPA is not proposing a contact standard to increase the likelihood that property will be escheated. Rather, NAUPA's focus is on ***maintaining*** contact with shareholders so that they do not become lost or unknown, thereby preventing their property from needing to be escheated. A return mail standard does not realize this goal to the extent that a contact standard

does, in view of the fact that security holder communications are increasingly no longer being made via physical mail.

In summary, NAUPA does not believe that adopting the motion requiring the return of mail prior to presuming securities as abandoned was made with the full consideration of all relevant facts, and leaves open the question of the treatment of securities where the owner is not receiving communications from the holder via physical mail.

NAUPA Revised Proposal: Presumption of Abandonment for Stock and Other Equity Interests

> *(3) stock or other equity interest in a business association or financial organization, including a security entitlement under [Article 8 of the Uniform Commercial Code], upon (i) the completion of the mandated SEC 17-Ad-17 searches after an apparent owner is identified as a "lost securityholder" for owners who receive communications from the holder by United States mail provided that not less than three years have elapsed since the owner's last indication of interest in the stock or other equity interest, or (ii) three years after the owner's last indication of interest in the property for owners who do not receive communications from the holder by United States mail,*

NAUPA Submitted Documents: NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities.pdf (submitted October 29, 2014).

Issue #23(b) Abandonment of Securities: Lengthening of Abandonment Periods

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to adopt the SEC return mail standard under 17-Ad-17.

NAUPA's Recommendation: **NAUPA recommends a three year abandonment period rather than a five year period for the reasons stated below, including the ability for owners to be reunited with their property at no cost via the states rather than through the use of locators/heir finders.**

NAUPA supports this recommendation as the shorter abandonment period results in an increase in the successful reunification of owners with their property. Also, states can utilize their additional resources to assist in the reunification**.** It is also important to note that 30 states and the District of Columbia currently utilize a three year period. Of the states that adopted the 1995 Uniform Act, eight states replaced the 5 year period with 3 years.

A compelling reason for a 3 year abandonment period for unclaimed securities is that it facilitates an owner's recovery of property, without being compelled to pay a fee to a locator. Under SEC regulations, it is permissible for an issuer to allow a locator to search for, and charge a missing owner a "finder's fee," provided that the two required SEC 17ad-17 searches have been performed without success. Some locators leverage this "gap" period, between the completion of the SEC-mandated searches and the required unclaimed property reporting date, to attempt to locate lost securityholders, who are frequently required to pay a substantial percentage of the property value (as opposed to a flat fee) to accomplish "recovery." NAUPA's member states feel

that they can be as successful as locators in reuniting owners with their lost securities, but without the significant "recovery fee" charged by locators. As a matter of consumer protection, NAUPA believes that a 3 year abandonment period for unclaimed securities best promotes the public's interests. The SEC requires that the lost securityholder searches be completed within 3 years of an owner being confirmed as lost; however, some transfer agents are able to complete the two searches in much shorter period. While a three year abandonment period does not protect owners to the extent that a shorter abandonment period would, the three year period limits an owner's exposure to unnecessary locator fees much more effectively than a five year period would.

NAUPA Submitted Documents: NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities.pdf (submitted October 29, 2014).

Issue #23(c) Abandonment of Securities: Liquidation of Shares in Possession of State

November 2014 Meeting Action: For the liquidation of shares, the Drafting Committee passed a motion which requires that either the state not liquidate shares or if they are liquidated, the shares must be repurchased upon a claim being made.

NAUPA's Recommendation: **NAUPA has amended its proposal regarding the liquidation of shares to be consistent with the STA and UPPO proposals. NAUPA's proposal is consistent with the 1995 Uniform Act and one year greater than that recommended by the STA.**

NAUPA Revised Proposal: Liquidation of Shares in Possession of the State.

> *If securities are sold by the administrator before the expiration of three years after their delivery to the administrator, a person making a claim under this [Act] before the end of the three-year period is entitled to the proceeds of the sale of the securities or the market value of the securities at the time the claim is made, whichever is greater, plus dividends, interest and other increments thereon up to the time the claim is made, less any deduction for expenses of sale. A person making a claim under this [Act] after the expiration of the three-year period is entitled to receive the securities delivered to the administrator by the holder, if they still remain in the custody of the administrator, or the net proceeds received from the sale, and is not entitled to receive any appreciation in the value of the property occurring after sale by the administrator, except in the case of intentional misconduct or malfeasance by the administrator.*

NAUPA Submitted Documents: NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities.pdf (submitted October 29, 2014).

Issue #23(d) Abandonment of Securities: IRAs

November 2014 Meeting Action: The abandonment of IRAs was not specifically addressed.

NAUPA's Recommendation: **Maintain the current parameters for presumption of abandonment of IRAs and other retirement accounts as set forth in Section 2(a)(14) of the**

1995 Uniform Act other than to reduce the abandonment period from five (5) years to three (3) years, in conformity with the abandonment period currently utilized by the majority of states.

NAUPA has not proposed any change in the treatment of IRAs and other retirement accounts. NAUPA is not aware of any problems created for missing owners through application of the existing abandonment standards, and NAUPA believes that they have proven effective in reuniting lost owners (and their heirs) with unclaimed IRA accounts. NAUPA has not previously provided comments to the ULC on the matter of IRAs.

Other stakeholders, principally the ABA and ICI, have proposed significant changes in presuming the abandonment of IRAs. The proposed changes would significantly delay the reporting of unclaimed IRAs to the state. NAUPA does not support these proposed changes.

Under current law the "trigger" for abandonment of an IRA commences upon the required beginning date for distributions, which is generally April 1 of the year following the calendar year in which the owner reaches the age of 70 ½ years. If the owner has not yet taken a distribution after the running of the abandonment period—generally three to five years later—the holder is required to undertake efforts to locate the owner and, if unsuccessful, the IRA is transferred to the custody of the state. Thus, in most cases, the age of an owner of an unclaimed IRA account that is transferred to the state is typically between 74 and 76 years.

The ABA has proposed to push out the abandonment period for IRAs to no earlier than the owner reaching the age of 80 ½ years. The ABA disfavors utilizing the date of mandatory distribution as an abandonment trigger, because "the holder will never know this date, as the owner may have multiple accounts, and therefore may not be required to take a distribution from any particular account." However, published research produced by the ICI in 2013 indicates that the median number of traditional IRAs per household is one IRA; more specifically, 53% of households owned a single IRA; 33% of households owned two IRAs; and only 14% of households owned three or more IRAs (*see* ICI Research Perspective, Vol. 19, No. 11A, November 2013). The approach promoted by the ABA presupposes that most IRA owners have multiple IRAs, but the data suggests that owners have only a single IRA. Thus, the risk that an owner of an otherwise dormant IRA is taking distributions from an IRA maintained by another entity appears to be exaggerated.

Delaying the reporting of an IRA as unclaimed until the owner reaches the age of 80 ½ years (or later) could prove very costly to the owner of an IRA (or the estate of a deceased IRA owner) who is in fact unaware of the asset. Where the taking of distributions from the IRA is in fact mandatory (i.e., the owner has reached the age of 70 ½ years and has not taken the required distributions from the IRA or some other retirement asset), the IRS imposes a tax penalty. The penalty is equal to 50% of the distribution that was required to have been taken. The penalty is assessable against both owners of IRAs and the estates and beneficiaries of deceased owners. If the state has the ability to undertake a search for a lost IRA sooner rather than later, the penalties for failing to take required distributions can be minimized.

NAUPA additionally finds disconcerting the ABA's proposal to base abandonment on the age of the owner rather than on the date of required distribution, because of the impact that this would have on the IRAs of deceased owners. Under the Internal Revenue Code, the death of an owner triggers mandatory distribution, where the beneficiary is not the owner's spouse. If a holder learns of the death of an IRA owner and the designated beneficiary fails to timely claim the account proceeds, then the IRA should be properly transferred to the custody of the state. However, under the ABA approach, the death of the IRA owner would no longer be deemed a "triggering event," and the holder of the IRA would continue to maintain the account until the owner, if living, had reached the age of 80 ½ years.

Holders of IRAs may learn of the death of an IRA owner through conducting SEC-mandated database searches for updated addresses of lost security holders. Most of the databases utilized for this purpose aggregate information from a number of sources, including the Social Security Administration's Death Master File. NAUPA believes that where the holder of an IRA learns of the death of an IRA owner as a result of lost security holder database matching, abandonment should be triggered and affirmative efforts should be undertaken to locate the owner's beneficiaries. Where beneficiaries cannot be located and, based on the owner's death and designated beneficiaries distribution of the account assets becomes mandatory, the IRA should be transferred to the custody of the state. The ICI, however, has recommended to the ULC the enactment of a provision that would appear to treat a beneficiary as entitled to a deceased IRA owner's account only upon the holder "being provided *official documentation* that the previous owner of the account is deceased" (emphasis added). NAUPA is concerned that the adoption of this provision would allow the holder of an IRA to disregard a death indicator obtained in conjunction with lost security holder database matching.

It is not in anyone's best interests—the states' included—for an IRA to prematurely or incorrectly be transferred to the state as unclaimed property. At the same time, there is concern that the recommendations being made by other stakeholders concerning presuming the abandonment of an IRA will result in owners not being reunited timely (if at all) with their assets. The states believe that the current law facilitates the location of lost IRA owners and their heirs.

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Issue #24: The business to business exemption

Since 1998, at least fourteen states have adopted a business-to-business exemption, which exempts certain property from escheat connected to transactions between two or more business associations. The underlying basis is that such transactions do not generate "unclaimed property" which a state has an interest in protecting. States have varied, however, in the precise details of what constitutes an exempt transaction and whether a certain entity qualifies as a business association. Should this revision of the Uniform Act attempt to balance the trend in favor of business-to-business exemptions and the interests of states in all forms of unclaimed property? *See* Memorandum § II.C.3.

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to draft multiple proposals for a business to business exemption. The Reporter will start with the Tennessee business to business exemption as he was the drafter of the provision.

NAUPA's Recommendation: NAUPA initially recommended, and still contends, that the revisions to the Uniform Act should retain as reportable unclaimed property arising from a transaction between business entities ("business-to-business" or "B2B" property). Some stakeholders assert that businesses have constant exchanges that leave vague, questionable liabilities and there is no "true" unclaimed property. This statement is inaccurate as evidenced below.

A business-to-business exemption violates a fundamental principle of unclaimed property law. The basic principle underlying unclaimed property law is that if the owner of property cannot be found, it is in the public interest that the property be delivered to the state to be used for the public good instead of being a windfall to the holder. A business-to-business exemption violates this fundamental principle of unclaimed property law by giving a windfall to the holder and preventing the use of the property for the public good.

NAUPA supports unclaimed property reporting and return for both businesses and individuals. As stated in NAUPA's memorandum dated May 8, 2014, "States want to protect all constituencies and prevent forfeitures…The alternative to an unclaimed property law is to allow the holder to confiscate the money, to forfeit the money, and one great principle of equity in the law is that the law abhors forfeiture. Keep in mind that this money does not belong to the corporation holding it; does not belong to the bank in which it is deposited; does not belong to the department store that issued the gift certificate; and does not belong to American Express because they issued a traveler's check. That money belongs to a citizen, whether that citizen is a private individual, an incorporated individual or some other kind of business entity."[1] (citing Robert Krenkowitz).

Even if an exemption is included in the Uniform Act, a majority of states will be unlikely to enact that provision. As a practical matter, states will be reluctant to forego receipt and return of large amounts of property. The amount of money currently being reported to and returned by states from business-related transactions is significant. For fiscal year 2011 alone, as NAUPA's memo estimates, "nationwide, unclaimed property reported in the name of a business was approximately $1.26 billion, and approximately $370 million was paid to businesses by States in the form of approved claims." It seems unlikely that states would be willing to eliminate that amount of unclaimed property by enacting an exemption for B2B property, especially for those 34 states which currently do not have an exemption.

Further, exempting property held by a business in the name of a business, would likely have unintended consequences An analysis of property reported in the name of businesses for fiscal year 2014 (for the state of West Virginia, used here by way of illustration) shows that many properties which might have been deemed exempt from unclaimed property reporting if West Virginia had a broad B2B exemption, do not fit into the construct of the ABA and COST proposals. States are receiving fixed and certain liabilities by escheat. These items are not

[1] Hearing on S.B. 355 before the Senate Comm. on Judiciary, 2013 Leg., 77th Sess. 52 (Nev. 2013).

unquantifiable exchanges but actual obligations. Attached as Exhibit A, West Virginia has provided their data on property that was escheated where the property owner is presumed to be a business. This data supports the fact that unclaimed property owing to businesses is real, relevant and material and that the amount of property that remains owing between businesses is not de minimis. Also, bank accounts, insurance policy payments, and securities owned in the name of a business, do not fall into the same category of having regular ongoing transactions that result in reciprocal credits and debits between businesses. Exempting those items would not even purport to serve the policy asserted by COST.

Finally, the greatest number of businesses in the US are small businesses. According to the Small Business Association's ('SBA') latest United States Small Business Profile published in June 2014:

- The US has 28,157,833 Small Businesses: 5,666,753 with employees (20%), 22,491,080 without (80%).
- US small businesses employed 55 million (49%) of the nation's private workforce in 2011.
- Almost all firms with employees are small, making up 99.7% of all employers nationally.

The average small business has 1.95 employees (meaning less than 1, plus the owner). Because of this, the idea that businesses take care of themselves is misleading. Even distinguishing between a "business" and an individual as an owner at this level is an artificial construct. With regard to, for example, an account with the phone company, the effect of B2B is, that an individual who is also a sole proprietor, is protected for unpaid credits with the phone company individually, but that same person with respect to their 'business' phone is not protected.

Why would the concept of "ongoing business relationship" in a B2B exemption, such as Tennessee's, not serve as a "proxy" for ensuring proper accounting between businesses? First, the Tennessee B2B exemption covers transactions of a small business, just as much as it does two business titans "slugging it out." Second, the Tennessee B2B talks about "ongoing business" but does not discuss "active" credits. If they are shown on monthly/billing statements then they are "openly displayed". In fact, because they are part of an ongoing bilateral conversation they would not even be considered dormant. They are not removed from the books and records of the company, they are "still in the stream of commerce", they are part of a bilateral conversation, they are not dormant, and they therefore CANNOT be exempted because they aren't due. If, on the other hand, the credits owed are NOT shown on the monthly/billing statements then the company is engaging in "silent enrichment" by removing the credits from the "ongoing business" relationship

For the reasons stated above, NAUPA initially recommended, and still contends, that the revisions to the Uniform Act should retain as reportable unclaimed property arising from a transaction between business entities.

Exhibit A

Summary of properties with a business listed as the apparent owner, by property type, reported to the State of West Virginia in fiscal year 2014.

AC01-checking account	**$280,281.97**
AC02-savings	**$100,098.71**
AC03-mature CD	**$19,684.08**
AC06-security deposit	**$14,440.69**
AC07-unident. Deposit	**$695.91**
AC08-suspense account	**$3,152.01**
AC11-nonint. Bearing checking	**$23.69**
AC99-aggregate account	**$65.85**
CK01-cashiers check	**$77,079.50**
CK02-certified check	**$145.88**
CK04-treasurers checks	**$1,713,325.40**
CK05-drafts	**$738.22**
CK06-warrants	**$2,354.10**
CK07-money orders	**$14,739.92**
CK10-expense checks	**$67,030.64**
CK12-credit checks or memos	**$3,540.14**
CK13-vendor checks	**$116,360.11**
CK15-other outstanding checks	**$17,701.71**
CK16-CD interest checks	**$3,203.49**
CK99-aggregate uncashed checks	**$8,052.00**
CT01-escrow funds	**$250.00**
CT05-other court deposits	**$7,092.15**
CT09-court-ordered restitution	**$1,879.05**
IN01-individual policy payments	**$242,354.14**
IN02-group policy benefits	**$154,691.20**
IN03-amounts due beneficiaries	**$148,940.72**
IN04-amounts from matured policies	**$13,063.19**
IN05-premium refunds	**$127,679.07**
IN06-unidentified remittances	**$4,347.30**
IN07-other amounts due under policy	**$32,110.44**
IN08-agent credit balances	**$24,264.48**
IN99-aggregate insurance	**$684.23**
IR01-traditional IRA	**$277.87**

MI02-royalties	**$84,276.48**
MI05-working interest	**$0.32**
MI07-delay rentals	**$1,927.78**
MS01-wages, payroll	**$4,626.59**
MS02-commissions	**$158,597.16**
MS03-workers compensation	**$5,542.39**
MS04-payment for goods and services	**$34,770.78**
MS05-customer overpayments	**$16,069.72**
MS06-unidentified remittances	**$2,253.30**
MS08-accounts payable	**$147,622.80**
MS09-credit balances	**$188,216.61**
MS10-discounts due	**$274.99**
MS11-refunds due	**$108,349.57**
MS12-gift certificates	**$1,208.37**
MS15-dissolution or liquidation funds	**$1,633.58**
MS16-misc. outstanding checks	**$64,320.40**
MS17-misc. intangible property	**$10,401.13**
MS99-aggregate misc.	**$1,416.85**
SC01-dividends	**$159,956.25**
SC02-interest	**$27.13**
SC04-equity payment	**$559.12**
SC07-funds for stock	**$430.62**
SC08-stock shares	**$0.00**
SC09-cash for fractional shares	**$447.35**
SC13-funds for liquidated stock	**$42,756.78**
SC20-credit balances	**$597.41**
TR03-funds in fiduciary capacity	**$3,400.24**
TR04-escrow account	**$3,141.19**
TR05-trust vouchers	**$172.23**
UT01-utility deposits	**$1,225.99**
UT03-refunds or rebates	**$12,826.66**
UT04-capital credit distributions	**$1,732.67**
UT99-aggregate utility	**$4.02**
Reported FY 2014	**$4,259,134.34**

In reviewing these categories of "business-to-business" property that was reported, one is struck by how pedestrian they are. The most significant amount reported were for "basic" banking products: deposit accounts and official checks. Other large values came from insurers, and issuers of securities. A relatively small amount of property was associated with credit balances

and accounts payable. Thus, rather than "business-to-business" property being principally composed of large volumes of esoteric, ambiguous, specialized "standard of practice" suspended amounts, at least the case of West Virginia the vast bulk of "business to business" property is represented by black and white, fixed and certain obligations. The only thing that makes this particular property different from other property is that the owner is a business.

It has been suggested by some members of the Drafting Committee that because the Uniform Unclaimed Property Act was designed to protect the interests of consumers, and was not intended to protect businesses, this fact alone warrants exemption of business-to-business property. However, even if it is determined that businesses should not receive the salutary benefits of the Act, this is not a sufficient basis for exemption of business-to-business property. The Act was originally created for two purposes. In addition to protecting the interests of consumers, the Act was also designed to prevent holders from receiving the benefit of unclaimed property; unclaimed amounts were directed to the state for public use. Removing business-to-business property from the Act would be inconsistent with the underlying policy abhorring private escheat. In the case of West Virginia, wholesale exemption of business-to-business property would have a very significant fiscal impact.

NAUPA Submitted Documents: See "NAUPA Business-to-Business Transactions Whitepaper" (submitted May 9, 2014).

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Issue #25: Presumption of Abandonment for electronic accounts under Section 2
With respect to presumption of abandonment for electronic accounts, should a revised Act clarify "sufficient contact" so as to avoid improperly triggering the dormancy period? Perhaps a revision could contemplate password or protected access to the accounts at a specified frequency.

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. However, this issue is similar to Issue #11. On Issue #11, the Drafting Committee did not make a motion but various stakeholders agreed that updating the contact standards would be beneficial.

NAUPA's Recommendation: **NAUPA supports expanding the standards of contact as long as the actions are traceable and verifiable. Below NAUPA also includes its proposal regarding ambiguity between the payment medium and property type. Lastly, NAUPA strongly opposes the deletion of subsection (e) regarding conditions precedent.**

NAUPA incorporates by reference its Recommendation to Issue #11 here. In addition, NAUPA has previously proposed a new subsection to Section 2, which provides that when there is ambiguity between the abandonment period for the payment medium and the property type, the property type is controlling.

NAUPA previously proposed legislation: Presumption of Abandonment when ambiguity between underlying obligation and form of payment

> Section 2(b) *Where there is an ambiguity or conflict under this section as to the applicable period giving rise to a presumption of abandonment, the nature of the underlying obligation, regardless of the form of payment or account, shall take precedence and dictate the corresponding abandonment period.*

NAUPA vigorously rejects the ABA recommendation (and the validity of the purported derivative rights doctrine) because it would all but eliminate unclaimed property (i.e., a holder could always find a way to cut-off the rights of owners, and thus eliminate the state's claim to unclaimed property).

Regarding its support of the purported doctrine, the ABA recommends the elimination of Section 2(e) of the 1995 Uniform Act, which states "property is payable or distributable for purposes of this Act notwithstanding the owner's failure to make demand or present an instrument of document otherwise required to obtain payment." The ABA argues that if the Uniform Act recognizes that it is the underlying obligation and not the means of payment or evidence of ownership that defines the existence of unclaimed property (see Issue 4(B), above), Section 2(e) becomes unnecessary.

The reality is that holders will argue that presentment (not only of a check, but a life insurance policy, passbook, security, or other document) is the act that creates an obligation, and in the absence of presentment no obligation (and thus no unclaimed property exists. Addressing "the underlying obligation" is a limiting concept where a holder asserts that in the absence of presentment (or other condition precedent) is a prerequisite to establishing a liability.

The waiver of conditions precedent as against the state--which courts, including the U.S. Supreme Court have recognized as necessary against the states--is of critical importance to NAUPA. NAUPA addressed this issue at length in its white paper on "derivative rights." NAUPA has not only recommended to the ULC retention of the waiver of conditions precedent as contained in Section 2(e) of the 1995 Uniform Act, it has previously proposed to expand it as follows:

NAUPA previously proposed legislation: Expansion of Conditions Precedent

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

NAUPA Submitted Documents: See "NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities" (submitted October 29, 2014); *See also* "NAUPA Derivative Rights Doctrine Whitepaper" (submitted May 9, 2014); *See also* Pages 20-25 & 26 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #11.

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Issue #26: Presumption for Holders of Intangible Property- There are two related issues:

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

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

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **NAUPA recommends that the tangible property provision be expanded and believes that this issue warrants further discussion.**

The Reporter's compilation notes NAUPA's proposal to extend the definition of unclaimed property to include proceeds from the sale of contents of storage lockers and facilities. The ABA's proposal limits the reporting of tangible property to banks and other financial institutions. This calls into question the manner in which certain other types of tangible property of substantial value that has been placed in safekeeping with non-bank entities would be handled.

NAUPA understands that Section 3 may not be the appropriate section of the Uniform Act to address "safe deposit-like" arrangements such as jewelry left for repair or storage; tangible assets held for a client by an attorney; valuables left in a hotel safe; bullion placed with a precious metals dealer who is not licensed as a depository and other similar situations. While it may make sense to address non-bank situations in other legislative acts, this leaves open the question of whether these non-bank situations will in fact be addressed and addressed in a fashion that insures that any "windfall" from the liquidation of tangible property is ultimately reported under the Uniform Act.

<u>NAUPA previously proposed legislation: Definition of Property</u>

(13) "Property" means tangible property described in Section 3 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom. The term includes property that is referred to as or evidenced by:

(ix) the proceeds of sale, less any lawful charges, from the liquidation of the contents of a self-storage or similar leased storage unit or space.

NAUPA Submitted Documents: See <u>Pages 7-8 & 11</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #27: Addressing the Third Priority Rule in Section 4
Thirty-six states have incorporated "third-priority" rules of escheatment, which instructs that when a holder is not domiciled in a state providing for the escheatment of a particular type of property, priority is afforded to the state in which the transaction occurred. Commentators have argued that this rule violates the Supreme Court's holding in *Texas v. New Jersey*, which, they argue, contemplates escheat first to the state in which the owner is domiciled, and second to the state in which the holder is located. They maintain that if there is no escheat under these rules, the property simply is not escheatable. *See* Memorandum § II.C.2. Is subsection (6) which provides a third alternative consistent with a violation of the holding of the U.S. Supreme Court in *Texas v. New Jersey*? Can the section be revised to fairly allocate the unclaimed property and avoid the holder receiving an inappropriate windfall?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **retain the "Rules for Taking Custody" as incorporated in the 1981 and 1995 Uniform Acts.**

The ULC has recognized is the right of a state to claim property based on "place of transaction," if there is no state with a superior claim. The apparent view of the ULC, which is shared by the states, is that a holder has no right to assume ownership of unclaimed property, and the holding in *Texas v. New Jersey* is limited to determining which state may claim property, given a specific set of underlying facts. Not all possible state claim scenarios were before the Court in *Texas v. New Jersey*, as evidenced by subsequent disputes resulting in the *Pennsylvania v. New York* and *Delaware v. New York* decisions.

The "third priority rule" in contained within Section 4 of the 1995 Uniform Act. The provisions of Section 4 are substantially identical to those of Sections 3 (general rules) and 4(d) (travelers checks) of the 1981 Uniform Act. The co-reporters of the 1981 Uniform Act were David Epstein and Andrew McThenia, Jr. (hereafter, "Epstein-McThenia"; Mr. Epstein was also an Advisor to the 1995 Uniform Act). In 1983, Epstein-McThenia authored "Issues of Sovereignty In Escheat And The Uniform Unclaimed Property Act," an article published by the Washington and Lee Law Review.

In their article, Epstein-McThenia explained the basis for the general rules for claiming property as contained in Section 3 of the 1981 Uniform Act, and explained why these rules were consistent with *Texas v. New Jersey* and subsequent unclaimed property decisions of the Supreme Court, as well as various state courts. Epstein-McThenia felt that in *Texas v. New Jersey*, the Supreme Court "merely provided a mechanism for the resolution of valid but conflicting claims to the same property and awarded priority to the state of the creditor." The authors did not agree with the argument that the decision "limited the power to claim to two states, the state of last known address of the creditor and the state of the corporate domicile," instead concluding that state have the inherent power to legislate, or exercise sovereignty "in conflict with competing state claims."

They noted that the Supreme Court in *Texas v. New Jersey* had remarked that "the power to claim abandoned property is a state legislative function, as is jurisdiction, and need not be exclusive. In other words, several states may claim the same abandoned property [and if] a dispute arises, the Supreme Court as ultimate arbitrator of disputes between the states, must resolve the various claims." While acknowledging the paramount right of the state of the creditor to claim property, with a secondary claim possessed by a holder's state of incorporation, Epstein-McThenia read the Supreme Court in *Texas v. New Jersey* as leaving "for ultimate resolution to the states themselves" matters not expressly considered in the case: "The Court….did not attempt, wisely, we believe to establish the limit of state power to assert custody over intangible property. To establish that limitation may well be an impossible task. Instead, the Court did the next best thing by establishing an initial system of priorities for resolving conflicting state claims" (emphasis added).

Epstein-McThenia saw Section 3 of the 1981 Uniform Act as building "on the initial system of priorities established by the Court in *Texas v. New Jersey*," without attempting "to define the limits of state power." There was no concern that the "third priority rule" was inconsistent with *Texas v. New Jersey* because where neither the creditor state nor the holder's state of incorporation could presently claim the property, the third priority state merely "holds subject to defeasance." The Uniform Act thus "provided a comprehensive scheme for the assertion of claims to abandoned property" in a manner "structured to eliminate competing claims of sovereignty among states" and to "insure that the chance possessor of unclaimed property does not become the ultimate beneficiary."

A recent decision in the Third Circuit involving New Jersey's claim to gift cards issued in that state by a holder whose state of domicile exempted gift cards from its unclaimed property law took an opposing view to Epstein-McThenia. In *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, the Court concluded that the states could not adopt claiming priorities that supplemented those expressly approved by the U.S. Supreme Court. In examining the New Jersey protocols relating to gift cards where no owner address had been captured by the card issuer, the Court determined that New Jersey could not claim the gift card balances on the basis that the gift card had been sold in New Jersey, even if the state of incorporation of the card issuer was not asserting a claim to the property.

The ABA has asserted that if a state with the priority claim to abandoned property has exempted abandoned property from the coverage of its unclaimed property law, then as a matter of "sovereignty" other states should recognize the exemption and not seek to claim the property under some alternative theory (e.g., place of transaction). The ABA position is consistent with the Third Circuit's view, that "the ability to escheat necessarily entails the ability not to escheat" and that to conclude otherwise "could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."

This specific concept of "sovereignty" is subject to question. It presumes that state legislatures enact exemptions to unclaimed property laws for the purpose of not only relieving holders from the responsibility to report property to their own state, but to any other state as well. It also presumes that a state's exercise of sovereignty cannot possibly be in conflict with the sovereignty of another state. There is substantial case law that stands for the proposition that holders have no

legal or moral right to retain unclaimed property. Implicit in this precept is that the claim of any state to abandoned property is greater than that of a holder. That one state would violate the sovereignty of another state, simply because the state with the better claim passes up on its opportunity to exercise jurisdiction over the property and another state with a lesser claim steps in is certainly subject to debate. NAUPA is unaware of any of the states where gift card issuers are primarily domiciled having intervened in the New Jersey gift card litigation, protesting that New Jersey was threatening their sovereignty through efforts to collect the balances of gift cards sold within New Jersey's borders.

The ABA (and the Third Circuit) differentiates between a situation where a state never enacts unclaimed property legislation, from where a state expressly legislates that certain unclaimed property should be exempt from reporting; this is not a distinction made in *Texas v. New Jersey* and the conclusion is by no means mandated. That the state of incorporation has a "superior right" to the property is a protocol created by the U.S. Supreme Court, which deemed a set of rules were necessary only to prevent conflicts amongst the states for "ease of administration" of unclaimed property reporting requirements. If all states embrace the "third priority rule" by statute and provide for an alternative basis for claim, then there is neither the possibility for conflict between the states nor a "violation of sovereignty," because the states have deemed this approach to be acceptable. Note that the states essentially did this when they approached Congress and obtained the enactment of special protocols with respect to the reporting of unclaimed traveler's checks, money orders, and similar written instruments. Is an Act of Congress required for the states to mutually agree as to the disposition of property where the federal common law rules are not comprehensive? One would think not.

While the gift card industry successfully defeated the "third priority rule" in the New Jersey litigation, there is no guarantee that another state, outside of the U.S. Court of Appeals for the Third Circuit, would fail in its efforts to defend a "place of transaction" claim. With respect to unclaimed gift cards alone, there are billions of dollars in unclaimed gift card balances at stake, and the gift card industry desperately wants to foreclose the state from pursuing them. However, enactment of the ABA recommendation would similarly foreclose states from pursuing any type of unclaimed property (both currently in existence, or yet to be created) where the address of the owner is not recorded, and the state of incorporation of the issuer exempts the property.

NAUPA supports the proposition that every holder should have clarity as to which state has, given a particular set of factual and legal circumstances, the priority claim to abandoned property. However, this is not to say that where the circumstances are different from those expressly discussed by the Supreme Court, that the claim of a state should fail and the holder should be entitled to keep the unclaimed property for its own use. The Uniform Unclaimed Property Act already provides a framework to provide the required clarity as to which state is entitled to claim property where another state with the penultimate claim fails to assert its claim. The ruling of the Third Circuit notwithstanding, NAUPA believes that the rules for claiming property as set forth in Section 4 of the 1995 Uniform Act (as based on Section 3 of the 1981 Uniform Act) remain legitimate and should be retained.

In response to the ABA's companion recommendation that Section 4 of the 1995 Uniform Act be revised to prohibit a holder's state of incorporation from claiming property which has been

exempted from the unclaimed property law of the creditor state, NAUPA likewise opposes the change. The basis for NAUPA's position on this issue is the same as outlined above.

NAUPA Submitted Documents: See Andrew J. McThenia, Jr. and David J. Epstein, Issues Of Sovereignty In Escheat And The Uniform Unclaimed Property Act, 40 Wash. & Lee L. Rev. 1429 (1983), a copy of which is included with this compilation.

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Issue #28: More Precise Definition of "Address Sufficiency"
Some state statutes allow for the recording of holder addresses, such as retaining only zip codes, which have been found to be insufficient for the purpose of determining a state's priority, in that the 1981 Uniform Act states that last known address must be "sufficient for the purpose of the delivery of mail." Likewise, where property is in the possession of holders with multiple addresses in different states, tension may exist between states attempting to escheat such property. Does there need to be a more precise definition regarding address sufficiency? *See* Memorandum § II.B.7.

November 2014 Meeting Action: At the meeting, the Drafting Committee changed the issue from "uncontested" to "contested substantive" but the issue was not discussed further.

***NAUPA's Recommendation:* NAUPA recommends including in the Uniform Act a definition of "address" premised on the state of last known address of the owner, regardless of whether the record of the address in the holder's records represents a complete mailing address.**

NAUPA Response: see response included under Issue #1 of this compilation.

<u>NAUPA previously proposed legislation: Definition of Address</u>

> *"Address" means any description, code or indication of the location of the apparent owner that sufficiently identifies the state of last known address of the owner, regardless of whether such description, code or indication of location is sufficient to direct the delivery of mail.*

NAUPA Submitted Documents: See <u>Pages 4 & 10</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #1.

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Issue #29: Under the Uniform Act, a state may claim title to foreign addressed unclaimed property held by an in-state corporation. Should this be revisited? *See* Memorandum § II.B.9.

November 2014 Meeting Action: At the meeting, the Drafting Committee reclassified this issue from "uncontested" to "contested substantive". At the meeting, the Drafting Committee passed a motion to clarify that the UUPA does not cover property located in a foreign country or held by a foreign entity.

***NAUPA's Recommendation*: NAUPA is unclear as to whether the motion passed by the Drafting Committee is intended to amend the UUPA to make clear that property held by a foreign entity in a foreign country is exempted from the Act or if the motion is intended to exclude property held by domestic entities belonging to foreign owners. If it is the former, NAUPA believes that this issue is already addressed in Section 26 of the UUPA. If it is the latter, NAUPA opposes such an exclusion as being unwarranted. Virtually every state's unclaimed property laws provides that the state of incorporation of a holder may take possession of unclaimed property belonging to a foreign owner. NAUPA does not believe that any justification has been offered to warrant a complete reversal of this long standing provision.**

Both the 1981 and 1995 Uniform Acts specifically provide that foreign address property held by a domestic entity is subject to escheat by the state. *See* 1981 Uniform Act Section 3(5) and 1995 Uniform Act Section 4(5). In its submission, UPPO cites several state taxation cases involving foreign owned property to support its position that the states taking of foreign addressed property violates the Foreign Commerce Clause. This reliance on these taxation cases is misplaced since such cases deal with multiple taxation issues involving an actual taking of property. The due process concerns relied on in these cases do not apply to a custodial escheat of property since there is no actual taking of the holder's property by the states. Moreover, UPPO fails to cite the seminal *Standard Oil* case wherein the U.S. Supreme Court stated that the key to the states' ability to take custody of unclaimed property is its jurisdiction over the holder and its obligation to pay the debt. *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 439 (1951). The holder's state of domicile clearly has jurisdiction over the holders that have custody of foreign address property.

Virtually every state's unclaimed property law provides that the state of incorporation of a holder may take possession of unclaimed property belonging to a foreign owner. This is not an arbitrary overreach or drafting mistake. For more than a century, the U.S. Supreme Court has recognized the states' right to regulate the property of lost owners, as an attribute of the states' sovereign power. *Cunnius v. Reading School Dist.*, 198 U.S. 458 (1905). This sovereign power has not been curtailed by either federal common law, or the federal government exercising dominion over foreign address property that has been abandoned. NAUPA does not believe that any meaningful justification has been offered to warrant a complete reversal of the states' long standing practice of assuming the custody of foreign address property—and, each year, paying tens of millions of dollars in claims to foreign-address owners. Furthermore, NAUPA believes that holders should be extended indemnification and held harmless from the claims of third parties as to property that has been transferred into the custody of the state. Provided that the current "good faith reporting" requirements are retained, and the addition of the prerequisite that indemnification is contingent

upon a holder performing the required due diligence (owner notification), NAUPA is not averse to expanding indemnification to the claims of foreign governments.

It should be noted that foreign property was in question in *Texas v. New Jersey*. See *The Report of the Special Master*, No. 13 Original, 16 (1963), "[t]he Company's books presently disclose that unclaimed dividends are owing to persons whose last known addresses are in nineteen States and Canada." This is consistent with the Commissioners' Comment to the 1995 Uniform Act that there is a "rational extension" for the holder's state of domicile to assume custody.

UPPO has suggested that a state's assumption of custody of property where the owner has a last known address in a foreign country "would violate the Foreign Commerce Clause." However, UPPO does not explain how the operation of a state unclaimed property law "regulates" foreign commerce any more than a state unclaimed property law "regulates" interstate commerce. Moreover, UPPO's recommendation that "at the option of a holder" foreign address property may be "voluntarily" reported undermines UPPO's argument that a state assuming custody of unclaimed property is prohibited by the U.S. Constitution. A state either does or does not possess authority to assume custody. A holder's "consent" could not validate an otherwise unconstitutional action. However, the "voluntary reporting" approach does make an important point. If a holder ceases operations, or simply would prefer not to maintain custody of a foreign-addressed asset indefinitely, what options does the holder have if the owner's country of last known address has no capacity to accept the property? As a matter of common sense, in the absence of the federal government expressly asserting sovereignty over foreign address property which becomes unclaimed, the power of the holder's state of incorporation to assume custody of such property should be recognized.

Lastly, the United States Department of Treasury's Office of Foreign Assets Control ("OFAC") recognizes the states' ability to escheat blocked foreign accounts. For example, the State of New York has a license to escheat blocked funds with OFAC approval.

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Issue #30: Should the address presumption for beneficiaries included in the 1981 Uniform Act at § 7(b) be incorporated into the revised Act?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to include an address presumption for beneficiaries.

NAUPA's Recommendation: **NAUPA supports the action taken by the Drafting Committee and recommends that the following provision that it previously proposed be included as new Section 4(8):**

<u>NAUPA previously proposed legislation: Beneficiary Presumption</u>

> *If the last known address of a person other than the apparent owner, insured or annuitant who becomes entitled to property through the death of the apparent owner,*

insured or annuitant is not known to the holder, it is presumed that the last known address of the person entitled to the property is the same as the last known address of the apparent owner, insured or annuitant according to the record of the holder.

NAUPA Submitted Documents: See Pages 39-40 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #31: Amount Deducted by Holder
An amount which is deducted by the holder from presumed abandoned property reduces the amount that the holder must remit to the state. Is the "unconscionable" amount the correct standard, or should there be a "safe harbor" amount expressed as a fixed amount or a percentage? On the other hand, if the amount is established by contract between two competent parties, should the state interfere in that contract unless the owner could have challenged it?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **In order to ensure that holders are not violating the unconscionability standard under the UCC, NAUPA recommends that Section 5 of the Uniform Act be clarified to tie charges to costs in maintaining the property and in services to the owner. NAUPA further recommends that where charges are permitted, the dormancy period be decreased to two years, in order to better preserve the owner's property.**

When the 1995 Uniform Act was written, one of the purposes was to guarantee that the owner's rights in property would be preserved and not written off to income by the holder in a form of "private escheat" as prohibited by various courts (see, for example, *Jefferson Lake Sulphur Company*, 36 NJ 577, 178 A.2d 329 (1962). The 1995 Act attempted to accomplish this by attaching an "unconscionability" standard. Nonetheless, since this standard was undefined, in various (increasing) instances, states are seeing charges of $2.00-$5.00 per month being imposed upon property such as deposit accounts, cashier's checks, money orders, and stored value cards, often retroactively, resulting in subsuming, in instances, the entire value of the property prior to reporting. (At $5.00 per month with a 7 year abandonment period, such as money orders have, any items valued at less than $420 would be completely dissipated prior to reporting). In order to ensure that holders are not violating the unconscionability standard under the UCC, NAUPA recommends that Section 5 of the Uniform Act be clarified to tie charges to costs in maintaining the property and in services to the owner. NAUPA further recommends that where charges are permitted, the dormancy period be decreased to two years, in order to better preserve the owner's property.

NAUPA previously proposed legislation: Presumption of Abandonment Accelerants

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

NAUPA Submitted Documents: See "NAUPA Derivative Rights Doctrine Whitepaper" (submitted May 9, 2014); *See also* Pages 20 & 45-46 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #32: Owner-Modification of Burden of Proof
Normally a person claiming to be the owner of property has the burden of proof to establish that he is the owner. This section gives the state a more limited burden of proof than that placed on the putative owner. While courts have recognized this as a valid exception to the derivative rights doctrine, it remains a point of contention and potential litigation. Does this rule have it right or does it need to be reconsidered? If so should it be expanded to encompass all records of unclaimed property, or should it be further limited?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed this issue for some time. Co-Chair Houghton stated that it was "too late" to remove the current burden of proof on issuance of a check. The Committee left the issue open to further discussion but also stated that the Reporter has enough information for his initial draft.

NAUPA's Recommendation: **NAUPA disagrees with the ABA's application of *Delaware v. New York* in this instance. NAUPA does not think *Delaware* means what the ABA thinks it means. The finding regarding "creation of the debt" does not in any way shift the burden of proof to the state as creditor.**

The ABA has proposed that "Section 6 of the UUPA should be modified to follow the US Supreme Court's ruling in *Delaware v. New York*, which holds that the law that governs the determination of intangible property rights is the law of the state that created the property at issue."

Delaware makes no statement with regard to burden of proof. In fact, nowhere does *Delaware* reference the term "burden of proof." While the ABA has accurately quoted the words from *Delaware*, the rights being addressed in *Delaware* are those of the owner, and by proxy, the state. The debtor has no rights to the creditor's property. *Delaware* stands for the proposition that states safeguard the rights of property owners when states take custody of unclaimed property on behalf of owners. "Deposits are debtor obligations of the bank," and a State may "protect the interests of depositors" as creditors by assuming custody over accounts "inactive so long as to be presumptively abandoned." *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 241, 64 S.Ct. 599, 603, 88 L.Ed. 692 (1944) (emphasis added). Such "disposition of abandoned property is a function of

the state," a sovereign "exercise of a regulatory power" over property and the private legal obligations inherent in property. *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 436, 71 S.Ct. 822, 827, 95 L.Ed. 1078 (1951). *Delaware v. New York*, 507 U.S. 490, 502, 113 S.Ct. 1550, 1558 (U.S. 1993).

Thus, NAUPA does not believe that *Delaware* advances the ABA's position.

The ABA has further asserted that the Uniform Act should be "clarified" to distinguish between the burden of proof and burden of production, as set forth by the US Supreme Court in *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (U.S. 1994).

NAUPA does not believe the ruling in *Greenwich* applies in this instance. *Greenwich* does not require that the burden of proof be upon one party or the other, outside the realm of the statute being interpreted. The case merely construes the intent of Congress in the Federal APA: "This litigation presents the question whether the rule is consistent with § 7(c) of the Administrative Procedure Act (APA), which states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Greenwich at 269, 114 S.Ct. 2253.

Not only does *Greenwich* not require that the burden of proof be placed on the state to provide the existence of unclaimed property; the policies articulated in *Greenwich* would support NAUPA's proposed revision to the Uniform Act, rather than the ABA's proposed revision. The Court in *Greenwich* acknowledged that "In part due to Congress' recognition that claims such as those involved here would be difficult to prove, claimants…benefit from certain statutory presumptions easing their burden." *Id*. at 280, 114 S.Ct. 2251.

Similarly in the case of unclaimed property, the Courts and the Uniform Law Commission have recognized as a matter of policy that unclaimed property claims may be difficult to prove, and have allowed "certain statutory presumptions easing their burden." *Id*.

Section 6 of the 1995 Uniform Act stands for the proposition that when the property is an obligation arising from issuance of a check or similar instrument, the state makes out a prima facie case by showing that the holder has a record of the issuance of the check or similar instrument. The state need not produce the actual check or instrument. This provision is consistent with the provision in Section 2(e) of the 1995 Act that property is deemed payable or distributable even though the owner has not presented an instrument as required by the holder. It recognizes, once again, as has the Supreme Court, that "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between contracting parties." *Connecticut Mt. Life Ins. Co v. Moore*, 333 US 541, 547, 68 S.Ct. 682, 686 (1948).

Placing the burden of proof on the debtor is logical in determining the existence of unclaimed property, as explained by the ULC in its Commissioners' Comment to the burden of proof section. The comment to Section 6 cites to an array of cases where the courts have placed the burden on the holder to assert any affirmative defenses, once a showing has been made that an obligation is shown as outstanding on the books and records of the holder.

The Comment states:

> This provision clarifies the burden of proof in situations where the obligation evidenced by a negotiable instrument is disputed by the holder, and is consistent with cases which have ruled on the matter. *See Insurance Co. of North America v. Knight*, 8 Ill.App.3d 871, 291, 18 N.E.2d 40 (1972), app. dismissed 414 U.S. 804, 38 L.Ed.2d 40, 94 S.Ct. 165 (1973), *Blue Cross of Northern Cal. v. Cory*, 120 Cal. App.3d 723, 174 Cal. Rptr. 901 (1981), and *Revenue Cabinet v. Blue Cross & Blue Shield*, 702 S.W.2d 433, 435 (Ky. 1986). See also *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229 (D.C. App. 1990).It is also consistent with the cases holding that when claiming abandoned property the State steps into the shoes of the owner (see Epstein, McThenia and Forslund, "Unclaimed Property and Reporting Forms," sec. 3.02 (Matt. Bend. 1984), and Article 3-308 of the Uniform Commercial Code. Under U.C.C. Section 3-308(2), "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." The reason for requiring a plaintiff to produce the instrument is "to show that the plaintiff is in fact the holder, and in order to protect the defendant from double liability." 6 *Anderson*, Uniform Commercial Code, sec. 3-307:4, p. 158 (3rd ed., 1993). The administrator, by proving issuance of the instrument, succeeds to all rights of the payee. Because the issuer is relieved of all liability on the instrument by paying the obligation to the State as unclaimed property, and is indemnified by the State, there is no chance that the issuer would be held liable twice, and therefore the administrator is not required to produce the instrument in order to possess the same rights as a holder in due course.

But what if the holder no longer has the records? Should the burden be on the state if the holder has failed to preserve its records? NAUPA believes, and the case law supports, that the answer is "no."

In *Division of Unclaimed Property v. McKay Dee Credit Union*, 958 P.2d 234 (Utah 1998), a case involving outstanding checks issued by a credit union, the Utah Supreme Court ruled that once the state had established the presumption of abandonment, the burden is then upon the holder to rebut the presumption. The destruction of the records needed to rebut the presumption, allowed by another Utah law, did not immunize the holder or somehow modify the holder's burden; the Court stated that by destroying its records, the credit union took the risk that those records might later be needed to rebut the presumption of abandonment.

Similarly, in *Pagano v. United Jersey Bank*, 143 NJ 110, 670 A.2d 509 (1996), a case involving a claim to the proceeds of a twenty-year old passbook savings account where the bank no longer had any record of the account, the New Jersey Supreme Court emphasized that the burden of proving payment (an affirmative defense) is on the party asserting it, and that the lack of records, even if caused by adherence to established record-retention standards, is not evidence of payment.

In deference to the succession of unclaimed property cases cited above, and to the 1995 Uniform Act, NAUPA's position is that not only should the burden of proof be as stated in the 1995 Act,

but that the categories of properties to which the burden applies, be expanded to include the property types included in NAUPA's proposed language, not just outstanding checks.

NAUPA Submitted Documents: *See* "NAUPA Derivative Rights Doctrine Whitepaper" (submitted May 9, 2014); *See also* Pages 49-50 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #12.

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Issue #33: Uniform Method of Reporting under Section 7 of the Act

(a) Should the revised Act create a uniform method of reporting by Holders to the state? *See* Memorandum § II.C.5. There are currently many different reporting forms, times and methodology, with some state requiring inclusion of reports by physical mail and others requiring electronic filings. Rules vary substantially from one state to another. The cost of complying with potentially 53 jurisdictions can impose a needless financial burden on holders which could be mitigated by a single unified and uniform form look like and what should be the preferred method of filing and paying.

(b) Should holders be allowed to perform due diligence in seeking to locate owners at an earlier time if they choose to do so?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **For subsection (a) and consistent with the Drafting Committee's goal to recognize technological advancements, NAUPA recommends updating this provision. For subsection (b), NAUPA agrees that due diligence can be conducted at an earlier time.**

For subsection (a), NAUPA has proposed several updates for the Report of Abandoned Property. It includes mandates for standardized reporting formats, allows for alternative approaches to a written signature for holder report verification and eliminates the holder's option not to report owner social security numbers. The objectives satisfied by these recommendations include: insuring ease of date conversion and uniform reporting; providing flexibility for utilizing emerging technologies and the owner's social security number is the primary means of locating an owner and verifying the owner's entitlement. The social security number should be submitted if they have been maintained by the owner, and not merely if they are readily accessible (this recommendation is included in NAUPA's draft revision).

For subsection (b), NAUPA has suggested moving due diligence from the Report of Abandoned Property (Section 7) to a re-titled Section 9 – Owner Notification. This section would encompass both holder and state attempts to contact the owner. Regarding the timing of due diligence, all

stakeholders appeared to agree that due diligence can be performed at any time, provided that it is not undertaken not less than 60 days prior to the filing of a report and at no cost to the owner. The ICI has suggested that any sensitive or non-public personal information concerning the owner, the owner's property or the value of the owner's property not be included in a due diligence mailing. NAUPA believes that removing key account identifying information for the owner negatively impacts due diligence responses as owners may be wary of providing responses to letters that appear illegitimate. This "generic" due diligence will not sufficiently apprise owners (or heirs at the address of a deceased owner) of the existence of unclaimed property. Secondly, NAUPA fails to understand the inconsistency in including this information when it is often included within an owner's statement of account and other notifications.

NAUPA Submitted Documents: See Pages 53-56 & 64-69 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #34, #39 & #41.

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Issue #34: Uniform Method of Notifying Apparent Owners Under Section 7 of the Act
In addition to a lack of uniform standards for filing reports and transmitting property, the requirements imposed on holders for seeking and notifying apparent owners varies substantially from state to state. Are the time periods for notification set out in this section reasonable and realistic? Should they be changed, and if so, to what periods?

November 2014 Meeting Action: At the meeting, the Drafting Committee stated that this issue is redundant of Issue #33(b).

NAUPA's Recommendation: **NAUPA agrees that due diligence can be conducted at an earlier time.**

NAUPA incorporates by reference its Recommendation to Issue #33(b) here.

NAUPA Submitted Documents: See Pages 53-56 & 64-69 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #33, #39 & #41.

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Issue #35: Minimum Value of Remitted Property
Initially in 1966 the minimum value was set at $3.00, which was raised to $25 in the 1981 Act. The current minimum under the 1995 Act is $50. (a) is that amount the

right amount, or given the cost of compliance should it be increased? Should the minimum amounts and reporting requirements be uniform for all property types?

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.

NAUPA's Recommendation: **NAUPA supports the current 1995 Uniform Act provision on this Issue.**

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Issue #36: Voluntary Escheatment Prior to Dormancy.
Should a revised Act include a provision regarding voluntary escheatment prior to the end of the dormancy period? This may be pertinent considering that several state administrators are considering related statutory amendments and it also implicates the release of holder liability. If this issue is addressed in the revisions, it may be beneficial to exclude stocks and interest bearing accounts from voluntary escheatment to avoid liability issues.

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that there was general consensus on the issue. NAUPA agreed that voluntary escheatment may occur at the holder's discretion. The Drafting Committee determined that voluntary early escheat should not apply to interest-bearing property or property that can fluctuate in value.

NAUPA's Recommendation: **NAUPA agrees that early escheatment can occur after the completion of due diligence and with the written consent of the administrator. NAUPA recognizes that the indemnification provisions, if applicable, will apply upon acceptance of the property**

NAUPA awaits the Reporter's draft before commenting further.

<u>NAUPA previously proposed legislation: Election to Take Early Delivery</u>

> Section 17*(c) A holder, with the written consent of the administrator and upon conditions and terms prescribed by the administrator, may report and deliver property before the property is presumed abandoned. Property so delivered shall be presumed abandoned under this [Act] upon its receipt by the administrator.*

NAUPA Submitted Documents: See <u>Pages 104-105</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #55.

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Issue #37: Aggregate Reporting-More detailed for Amounts less than $50
Should the revised act reconsider aggregate reporting, which typically entails a $50 threshold, especially considering that the securities industry provides for such detailed reporting in amounts less than $50. With advances in technology is detailed reporting for amounts not meeting the threshold as onerous as it once was? If not, what are the implications?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to retain the requirement that property under the aggregate be reported. There was no motion on whether to require owner information for property under $50 or to change the $50 threshold.

NAUPA's Recommendation: **NAUPA supports the current 1995 Uniform Act provision on this Issue.**

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Issue #38: Worthless or non-transferable securities
Should the Act be revised to address worthless or nontransferable securities and take into account dematerialization of securities? Should the states' discretion in enacting protocols governing the delivery and transfer or unclaimed securities and interest in mutual funds be broadened or expanded? If so, how?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not make a motion on this issue. However, substantial discussion took place regarding the reporting of "worthless" securities.

NAUPA's Recommendation: the Uniform Act should be revised to provide the state with flexibility in coordinating the reporting and delivery of securities, including worthless or non-transferable securities.

There is currently no common definition between stakeholders as to worthless and non-transferable securities. A security may not currently be traded, but nonetheless have value. Similarly, a security may not be transferable, but have value. SIMFA's proposed exemption of securities "not freely transferable" would eliminate a reporting requirement for securities not readily deliverable to the state, but would include some securities that were not in fact "worthless." In lieu of creating exemptions that are potentially broad, NAUPA encourages the ULC to revise the Uniform Act to provide the administrator with discretion as to when and how securities are reported.

NAUPA Supplemental Response (1): The "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders" included the issue of "owner forfeiture" which had not been previously commented on by NAUPA. NAUPA responds to this issue below.

The ABA is proposing that the time period for reporting and delivery of any and all property be postponed indefinitely where either a penalty or a forfeiture would result or, more specifically, "if the holder reasonably believes a penalty or forfeiture may result" (emphasis added).

On its face, this provision is overly vague. With respect to a certificate of deposit that is reported as unclaimed property after an investment term has begun but before the term is completed is understood: it is the loss of interest accrued to date for the prior term. There additionally is a “date certain” at which the CD will be reported, if not first claimed by the missing owner. However, with respect to other property types (annuities and IRAs, for instance) it is unclear what the penalty or forfeiture might be, whether it is material, and in whether weighing the equities (delaying the search for a lost owner v. avoiding a loss in value of the unclaimed asset) an extended abandonment period is justified. Moreover, if the holder is only required to "reasonably believe" that a forfeiture or penalty "may" result if the asset is reported as unclaimed property, holders will likely assert a subjective "reasonable belief of possible forfeiture or penalty" to avoid reporting and delivering property. This is obviously different from a certificate of deposit, where the terms of contract most definitely state that premature withdrawal will in fact result in a loss of interest.

In the case of an IRA, there is a tax penalty that the owner is subject to if mandatory distributions are not taken by the owner (typically, within the year following the owner reaching the age of 70 1/2 years). The penalty does not actually become payable to the IRS until the owner in fact takes a distribution from an IRA; in the interim period, the penalty operates as a lien against the asset. Could an IRA custodian "reasonably believe" that the penalty for failure to take mandatory distributions becomes payable upon an IRA being reported and delivered to the state as unclaimed property? Even if it were to be concluded that this constitutes a "reasonable belief," the penalty arises not because of the unclaimed property law and instead through operation of the Internal Revenue Code. Whether the IRA is escheated or not, the owner of the property is subject to the penalty for not taking the mandatory distribution. Moreover, each year that the IRA is not escheated and a required RMD is not taken by the lost owner, another penalty would become due, creating the exact opposite result the ABA seeks to achieve. As a result, if the IRA custodian holds on to the IRA until the end of time based on the “reasonable belief” that a tax penalty will be incurred and never makes the state aware of its existence, this will harm the owner or his or her heirs.

Another example is the "escheat fee" that has become increasingly popular with financial institutions. The fee schedule for the bank provides for an "escheat fee," typically of $50. The term is undefined but presumably is imposed when an account or other property type is presumed abandoned and reported to the state. Because the charge is not defined it is probably invalid under the federal Truth-In-Savings Act, and NAUPA has sought to prohibit its imposition (see page 45 of “1995 Act with NAUPA Recommended Revisions to ULC” submitted May 9, 2014). However, for the sake of illustration, presume that such an escheat fee is legally permissible. Since the reporting of the account or other property as unclaimed results in the imposition of the fee, under the ABA approach it would seem that the account would be exempt from reporting, at least until such time as the financial institution did away with escheat fees.

This illustration leads to an even bigger concern. Holders could very well abuse a provision allowing for the extension of the abandonment period until a penalty or forfeiture would no longer result from reporting. If this were to become part of the equation for determining abandonment, then some holders might structure asset and other agreements in such a way that there would always be a penalty or forfeiture that would come into play when property became subject to reporting and delivery, thereby exempting them from escheatment.

There may be some validity to the ABA's recommendation on avoiding forfeitures and penalties, but as written there is no ability to foresee the outcomes of the application of this concept, and it also invites abuse. It would be helpful if the ABA could identify and discuss in detail specific examples of assets and arrangements where forfeitures and penalties come into play when property is transferred to the custody of the state. There may in fact be a desire to expand the "delayed CD reporting approach" but there is a need for much greater information and justification.

NAUPA Supplemental Response (2): The "Reporter's Compilation of Recommendations and Suggestions for Revision Submitted by Stakeholders" did not include a recommendation previously made by NAUPA for the "modernization" of the 1995 Uniform Act with respect to the delivery of securities. Section 8(c) of the 1995 Uniform Act does not address book entry securities, which is now the predominant form of stock issuance. NAUPA proposes updating this subsection.

<u>NAUPA previously proposed legislation: "Modernization" of Securities Delivery</u>

> (c) If the holder of the property reported to the administrator is the issuer of a certificated security, the administrator has a right to obtain a replacement certificate *in physical or book entry* form pursuant to [Section 8-405 of the Uniform Commercial Code], but an indemnity bond is not required.
>
> *(d) The administrator shall adopt by rule procedures for the registration and issuance, method of delivery, transfer, and maintenance of unclaimed securities and security entitlements.*
>
> [Renumber existing subsection (d) as (e).]

NAUPA Submitted Documents: *See* <u>Pages 59-61</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #39: Notice by Newspaper publication-expansion

The notice by newspaper publication provisions of this section are rather antiquated given the advances in media technology since 1995. Nevertheless, newspapers still enjoy wide circulation and are more relied upon by older citizens who are in turn more likely to be owners of abandoned property. Should the notice requirements include notice by electronic means such as searchable databases on the internet? If so, should the notice

provisions also continue to require notice by newspaper publications as a backup or augmentation of electronic means?

November 2014 Meeting Action: At the meeting, the Drafting Committee indicated that the Reporter would draft provisions for review and discussion.

NAUPA's Recommendation: **Consistent with the Drafting Committee's goal to recognize technological advancements, NAUPA recommends updating this provision.**

NAUPA has previously provided legislation on this issue. The goal was to expand beyond printed notice the acceptable approaches available to the state to apprise owners of the state's receipt of unclaimed property.

Section 9(a) of the 1995 Uniform Act provides that the states will publish the names and addresses of owners of unclaimed property "in a newspaper of general circulation." The ABA recommends that the scope of notification be broadened to *add* a requirement that the state *also* "publish a notice of the unclaimed property electronically in a database that is searchable by the names of the owners."

NAUPA concurs that states should maintain Internet accessible, searchable databases of missing owners and indeed, all states already do so. However, NAUPA also believes that newspaper publication of owner names should be discretionary, with each state deciding whether such outreach is effective, economical, and otherwise desirable.

<u>NAUPA previously proposed legislation: Owner Notification by the State</u>

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

> *(1) the mailing of a written notice to apparent owners of property presumed abandoned and received by the State. The administrator, in his or her discretion, may elect not to mail written notices to any owner where the administrator determines that such mailing would not be likely to be received by the apparent owner, or would otherwise not be cost effective.*
>
> *(2) publication of notice, every six months in a newspaper of general circulation, of unclaimed property received by the State. Such publication shall include the following information:*
>
> > *(i) the total number and value of abandoned accounts received by the State during the preceding six-month period.*
> >
> > *(ii) the total number and value of claims to abandoned accounts paid by the State during the preceding six-month period.*
> >
> > *(iii) the address of the unclaimed property website maintained by the administrator.*
> >
> > *(iv) a telephone number for persons wishing to contact the State for purposes of inquiring about or claiming abandoned property.*
> >
> > *(v) a statement that anyone interested in searching for unclaimed property may access the Internet at a local public library.*

(3) the maintenance of an Internet database accessible by the public which sets forth the names of all owners reported to the state in an approved electronic format for whom unclaimed property in amount of $10 or more is being held by the State. The Internet database shall include instructions for filing a claim to abandoned property with the administrator, and a form of claim.

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

NAUPA Submitted Documents: See Pages 64-69 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #33, #34 & #41.

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Issue #40: Provisions to incentivize Administrators to Return Property

While many state unclaimed property administrators will say that it is their primary responsibility to unite owners with their long abandoned property, the economic reality is that in many, if not all jurisdictions, unclaimed property receipts are a significant source of state revenue which is a major augmentation of the tax base as a source of state revenue. Is the duty to diligently search for owners and hand over funds in their custody compromised by the pressure to recover and retain for state purposes the maximum amount of potential revenue available? Should the Act include provisions which incentivize administrators to return more property to the owners such as allowing a fee or percentage of the recovered amount to be retained by the administrator to augment the operating fund of his department, or to create incentives discouraging less than diligent attempts to locate owners, by allowing owners to recover interest on the deposits at least equal to the state's current outside borrowing costs.

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.

NAUPA's Recommendation: **NAUPA recommended that this Issue was unnecessary and as the Drafting Committee is not taking any action on this item, NAUPA has no further comment at this time.**

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Issue #41: Due Diligence

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed this issue but it was unclear if any substantive disagreements existed. No motion was made on this issue.

***NAUPA's Recommendation*: NAUPA recommends updating the due diligence provisions as discussed at the November 2014 meeting.**

NAUPA has suggested moving due diligence from the Report of Abandoned Property (Section 7) to a re-titled Section 9 – Owner Notification. This section would encompass both holder and state attempts to contact the owner. Regarding the timing of due diligence, all stakeholders appeared to agree that due diligence can be performed at any time, provided that it is not undertaken not less than 60 days prior to the filing of a report and at no cost to the owner. The ICI has suggested that any sensitive or non-public personal information concerning the owner, the owner's property or the value of the owner's property not be included in a due diligence mailing. NAUPA believes that removing key account identifying information for the owner negatively impacts due diligence responses as owners may be wary of providing responses to letters that appear illegitimate. Secondly, NAUPA fails to understand the inconsistency in including this information when it is often included within an owner's statement of account and other notifications. Appendix A-3 of NAUPA's securities recommendations proposes a certified mailing requirement to owners of securities with a value of $1,000 or more.

NAUPA Submitted Documents: See Pages 53-56 & 64-69 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014); *See also* Appendix A-3 of "NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities" (submitted October 29, 2014);

Corresponding Issues: #33, #34 & #41.

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Issue #42: Record Retention by State
Should the Act be amended to require states to retain records of property it receives and which it has turned over to owners? If so, for how long and in which form? Should electronic imaging and storage be a permissible means of record storage, and if so what safeguards should be required?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

***NAUPA's Recommendation:* NAUPA recommends clarifying the indemnification of holder provisions and adding a new section on record storage.**

For records storage, NAUPA recommends that the Uniform Act expressly authorize the digital conversion and storage of records, permit the destruction of paper records once imaged and provide for the legal sufficiency of electronic records. Based on this ability to electronically image and store the records, the state can effectively retain records in perpetuity.

For indemnification, NAUPA recommends clarifying the language that provides a holder with relief from liability only to the extent that holders have complied with the due diligence and other requirements of the Uniform Act and clarifies that the release is limited to the value of the property.

NAUPA believes that holders should be indemnified under most circumstances and furthermore, NAUPA agrees with the ABA that indemnification should in fact extend to situations where an agent of the state directs the holder to report and deliver property to the state. However, the ABA's indemnification recommendation provides less restrictive requirements than the 1995 Uniform Act allows for.

The ABA's proposal extends indemnity to a holder which has failed to act responsibly in maintaining records of unclaimed property or in not giving due consideration as to whether transferring property to the state would result in the holder breaching a fiduciary duty. As the holders are in the best position to prevent these scenarios from occurring, the states should not take on greater liability where the holder fails to perform duties which it is legally required to discharge. Most importantly, in the absence of exclusion from indemnification, there is no incentive for the holder to prevent these situations from occurring, let alone provide notice to the state so that the state is at least aware of any potential issues.

<u>NAUPA previously proposed legislation: Custody by State; Recovery by Holder; Defense of holder</u>

> Section 10(b) A holder who pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property. *Upon the payment or delivery of property to the administrator, the State assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the administrator in good faith and who, prior to reporting, if the holder's records contain an address for the apparent owner, which the holder's records do not disclose to be inaccurate, has made reasonable efforts to notify the owner by mail or, if the owner has consented to electronic notice, electronically, in substantial compliance with Section 18 of this Act, is relieved of all liability to the extent of the value of the property so paid or delivered for any liability arising thereafter with respect to the property.*

<u>NAUPA previously proposed legislation: New Section for Electronic Imaging</u>

> *<u>(New section) Imaging and disposing of paper records</u>*
>
> *The administrator shall develop procedures for the storage, retention and disposal of records filed, submitted or otherwise created under this Act. Electronic records shall be maintained in an unalterable readable electronic media in accordance with industry standards, reviewed for accuracy and indexed, and shall have the same force and effect as the original records whether the original records are in existence or not.*

An additional issue that the ABA has raised under Section 10 of the 1995 Uniform Act is that of "holder offsets." The ABA has argued that where the state is obliged to return property to a holder, and the state has not yet returned the property to the holder as of the holder's filing of a succeeding report, the holder should be permitted to exercise an "offset" of funds, recovering what is owed by the state from making a deduction from a report remittance. The ABA believes that this would better facilitate the return of property to holders, and reduce administrative expense.

In theory, NAUPA agrees with the approach. However, NAUPA does have some "practice" concerns. Specifically, there is a concern that holders would exercise the offset without adequately informing the state of the holder's claim. For instance, if the holder had reimbursed an owner whose property had previously been transferred to the state, would it be optimal for the holder to notify the state of this claims payment only contemporaneously with the filing of a new report? Or would it be preferable for the holder to advise the state separately, and in advance of the new report, of the filing? If the holder contemporaneously advises the state of the payment of the claim and exercises the offset, there is a risk that the holder will not provide sufficient documentation. And where the holder has already received its funds back from the state, NAUPA has concerns that the state can subsequently receive supplemental documentation, where necessary and desirable.

The biggest risk, however, is that a claimant will "double-dip." Under current law, holders reimburse owners at their own peril. If the state has already made payment of a claim to property, and then the holder makes payment to a claimant for the same property, the holder cannot obtain reimbursement from the state. The state has already paid out the property and thus, there is no property that the holder can claim. This risk of loss on the part of a holder essentially forces a holder to proceed with caution in paying a claim. A holder is best served in first contacting the state before the holding pays a claim to a reappearing owner, so as to ensure that the holder does not make payment where a claim has already been satisfied by the state. Allowing a holder to exercise an offset eliminates this check and balance. It alternatively shifts the risk of loss to a state, However, due to state internal audit and appropriation controls, the state has no means by which to make up this loss, if both a holder and a state pay a claimant, and then holder then "offsets" its claims payment from a future reporting remittance.

When states receive reports from holders, they are first classified as "balanced" (the reported property and the remitted amount are equal) or "unbalanced" (there is a discrepancy between the reported and remitted amounts). "Balanced" reports are timely loaded to state systems, while "unbalanced" reports are set aside for additional research. In view of the fact that states received over 90 percent of holder reports on or about two dates (typically November 1 and May 1, although some states receive over 90 percent of holder reports on or about a *single* date), the focus of the states is on loading "balanced" reports. "Unbalanced" reports are reviewed when and as time allows. A report where a holder has exercised an offset would not be immediately loaded. This would in turn lead to potential frustration on the part of owners, the reporting holder, and the state.

While the issue of reporting fraud would appear to be primarily a holder concern in this context, it is in fact everyone's concern, and NAUPA can see where the offset approach would more readily allow for fraud where there would be less of a paper trail then is currently the case. Yes, the offset approach could result in holders being made whole more quickly. But it could lead to unintended consequences of much greater import.

NAUPA can conceive of some situations where offsetting amount owed holders from amounts due from holders would serve the interests of all parties, but NAUPA believes that the states should have the ability by administrative rule to fully delineate how such offsets would be permitted and how they would be performed.

NAUPA Submitted Documents: See Pages 72-75 & 170 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #43: Military Decorations and Medals
Should military decorations and medals be exempt from sale of tangible property? If so, what other items of a similar nature (Olympic medals and trophies, for instance) might be exempt from sale?

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.

NAUPA's Recommendation: **NAUPA recommends that military decorations and medals be exempt from sale.**

NAUPA has previously proposed language that would exempt military decorations and medals from sale.

NAUPA previously proposed legislation: Public Sale of Abandoned Property – Military Decorations and Medals

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

NAUPA Submitted Documents: See Pages 82-84 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #44: Notice of Sale of Abandoned Property
In addition to publication of notice or sale of abandoned property in a newspaper, should other means (electronic) be authorized or required?

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.

NAUPA's Recommendation: **Consistent with the goal to modernize the Uniform Act, NAUPA believes there should be flexibility in how it publishes notice of a sale of abandoned property.**

Corresponding Issues: #45.

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Issue #45: Internet Sale of Abandoned Property
Should the Act be amended to authorize sale of abandoned property by the state to be implemented by internet or some other form of electronic auction?

November 2014 Meeting Action: At the meeting, the Drafting Committee determined that this issue was uncontested, and did not engage in any substantive discussion.
NAUPA's Recommendation: **Consistent with the goal to modernize the Uniform Act, NAUPA believes there should be flexibility in how abandoned property is sold.**

NAUPA has previously proposed legislation to modernize the approach for selling tangible property.

NAUPA previously proposed legislation: Public Sale of Abandoned Property – Method of Sale

(a) Except as otherwise provided in this section, the administrator, within three years after the receipt of abandoned property, shall sell it to the highest bidder at *a publicly held sale, which may include an Internet auction or any other forum which in the judgment of the administrator will yield the most favorable net proceeds of sale* ~~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.

NAUPA Submitted Documents: See Pages 82 & 84 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #44.

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Issue #46: State Treasury Management of Funds
Since in theory funds which belong to the owner are merely held by the state as custodian indefinitely and are thus an open-ended liability to the state, why is it appropriate to dictate by statute how the treasurer should handle what is essentially a cash management problem concerning how to budget for an open ended contingent future liability. The state has the use of all the money it holds until and unless it is called upon to pay it over to the owner. Should the separate trust fund requirement be eliminated?

November 2014 Meeting Action: At the meeting, the Drafting Committee briefly discussed this issue. Co-Chair Houghton stated this was a "state-specific" issue and that individual states had already determined what would work for them.

NAUPA's Recommendation: **NAUPA has not previously proposed language for this Issue. Rather, as Treasurer Stenberg articulated at the November 2014 meeting, states "tend to put the money where they want to put the money." Thus the Drafting Committee may consider re-drafting or "bracketing" Section 13.**

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Issue #47: Mutual Duty of States to Exchange/Turn Over Property
Should the Act be amended to impose a mutual affirmative duty on the states to exchange and/or turn over any property which has come into the hands of one state that in fact should have been turned over to another state?

November 2014 Meeting Action: At the meeting, the Drafting Committee considered this issue as uncontested.

NAUPA's Recommendation: **NAUPA recommends that the Uniform Act move away from reciprocal reporting and create a mutual, affirmative obligation for states to exchange property in their possession that is in fact owed to other states.**

NAUPA believes that it misunderstood the discussion of Issue #47. NAUPA had previously proposed an amendment to Claim of Another State to Recover Property – Section 14(a) and maintains its support for this provision.

<u>NAUPA previously proposed legislation: Claim of Another State to Recover Property</u>

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

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

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

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

1995 Uniform Act version: (a) ~~After property has been paid or delivered to the administrator under this [Act], another State may recover the property if:~~

NAUPA Submitted Documents: See Pages 90-92 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #48: Limitation on Number of Owners' Claims for Same Property
The section seems to say and the Comment confirms that there is no limit to the number of times an unsuccessful claimant can file a claim to property. Should the section be revised to establish some outside limit on the number of times a claim can be filed for the same property by the same putative owner?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue and no revision to be drafted based on February 2014 meeting discussion.

NAUPA's Recommendation: **NAUPA supports the current 1995 Uniform Act provision on this Issue as NAUPA does not want to inhibit a rightful owner's claim to their property.**

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Issue #49: Limitations of Time
There does not appear to be any time period by the lapse of which the person aggrieved by the action or inaction of the administrator with respect to a claim may seek judicial review. Should there be a limitation on that time period, and if so what is the appropriate limit?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. The Reporter stated that the issue would be part of the administrative appeals discussion.

NAUPA's Recommendation: **NAUPA does not currently have a recommendation on this Issue and reserves comment until after the Reporter's draft legislation is circulated.**

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Issue #50: Attorney's Fees
This section provides for an award by the court of reasonable attorney's fees to a successful claimant.

(a) Should there be a cap on the amount of fees tied in some way to the amount
(b) Should there also be a discretionary award of reasonable expenses of litigation incurred by a successful claimant?
(c) Should the attorney's fees (and expenses) provision be reciprocal and also allow the administrator who successfully resists the appeal to recover his reasonable attorney's fees and expenses of litigation?
(d) If allowed, should the award include attorney's fees and expenses incurred prior to the commencement of litigation?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed various options for the awarding of attorney's fees. It was then suggested that either the holder or the state could recover attorney's fees. There was also support for no change from the 1995 Uniform Act. The Reporter was directed to draft language based on the English rule; however, Co-Chair Blackburn stated this issue is completely open to discussion.

NAUPA's Recommendation: **Awarding attorney's fees should be left to the discretion of the court which is consistent with the 1995 Uniform Act.**

NAUPA previously proposed legislation: Enforcement & Attorney's Fees

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

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #66, #67 and #68.

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Issue #51: Holder Action for Judicial Determination of Administrator's Determination of Liability
Neither this section, nor any other section of the Act, establishes a specific procedure under which a person who has been determined by or on behalf of the administrator to be a holder of property who is in default of the obligation to report and turn over property to the state, may bring an action in court to obtain a judicial determination or adjudication of whether or not the administrator's determination is valid. While Section 22 gives the

administrator a judicial remedy to enforce his determination, there is no time limit under which the administrator must proceed in court. Such a determination has financial consequences to the putative holder, and may serve as a financial disclosure item which can cause economic harm while it appears as an outstanding contingent liability.

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the need for a more adequate appeals process. The Reporter stated that he has ideas on how the appeals process should operate and will begin drafting based on his ideas.

NAUPA's Recommendation: **As there is no current limitation on a holder's right to file suit, NAUPA suggests that such a provision inhibiting its own ability to obtain a judicial determination unnecessary. In addition, one of NAUPA's stated goals for its administrative appeals proposal is to avoid litigation when disputes exist. As an alternative to NAUPA's drafted appeals legislation, NAUPA proposes that the Uniform Act refer to the state's Administrative Procedures Act, if applicable in that state.**

Regarding the statement that there is a financial disclosure impact for a holder, NAUPA notes that external auditing firms of a holder's financials, even without state examination, may require a holder to identify a contingent liability based upon its review. In situations where the holder has received a final examination report and does not appeal within the allotted timeframe, the liability should not be recognized as contingent but rather fixed. The reason is that the holder did not avail itself of its opportunity to contest the final examination report. If the holder had contested the report, the external auditing firm would determine whether the potential liability requires disclosure on a financial statement.

NAUPA incorporates by reference to Issue #54 its proposal for an administrative appeals process.

NAUPA Submitted Documents: See Pages 167-168 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #52, #53 and #54.

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Issue #52: Holder Action for Judicial Determination of Administrator's Determination of Failure to Report and Turn Over Property
Should there be a statutory right to file suit to determine the validity of a determination by the administrator that a putative holder has failed to report and turn over property that he is holding, and if so in what court, when and under what conditions?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the need for a more adequate appeals process. The Reporter stated that he has ideas on how the appeals process should operate and will begin drafting based on his ideas.

NAUPA's Recommendation: **As there is no current limitation on a holder's right to file suit, NAUPA suggests that such a provision is unnecessary. In addition, one of NAUPA's stated goals for its administrative appeals proposal is to avoid litigation when disputes exist. As an alternative to NAUPA's drafted appeals legislation, NAUPA proposes that the Uniform Act refer to the state's Administrative Procedures Act, if applicable in that state.**

NAUPA incorporates by reference to Issue #54 its proposal for an administrative appeals process.

NAUPA Submitted Documents: See Pages 167-168 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #51, #53 and # 54.

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Issue #53: Holder Action For Judicial Determination of Administrator's Determination of Liability for Interest and Penalties for Failure to Turn Over Property During The Period in Which the Claim Is Contested
Section 24 of the Act provides for interest and penalties which accrue against the putative holder until he turns over the property to the state which the administrator has determined he is holding for another. Should there be a provision which would allow a putative holder to contest the administrator's determination of his liability, in whole or in part, to deposit the disputed portion of the money asserted to be due to be paid to the state and thereby toll the running of liability for penalties and interest during the pendency of his action for adjudications of his liability?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the need for a more adequate appeals process. The Reporter stated that he has ideas on how the appeals process should operate and will begin drafting based on his ideas.

NAUPA's Recommendation: **NAUPA's proposed appeals process includes a requirement that the holder remit payment of the audit findings to the administrator. This effectively tolls the running of interest and penalties. If the holder is successful in their appeal, the proposed appeals process requires the state to return the disputed amount plus interest. As an alternative to NAUPA's drafted appeals legislation, NAUPA proposes that the Uniform Act refer to the state's Administrative Procedures Act, if applicable in that state.**

NAUPA previously proposed legislation: Excerpt from Audit Appeals Process
Section __ Appeal of Examination Findings.

(1) Within 30 days from the date of the final examination report, a holder may file an appeal of the audit findings with the administrator.

(b) Within five days of filing the appeal, the holder shall secure the payment of the audit findings in their entirety by making payment to the administrator or the administrator's agent. If the holder is successful in the appeal, the disputed amount of the audit findings,

with any interest earned thereon, will be returned to the holder within thirty (30) days of the date of the final determination.

NAUPA Submitted Documents: See Pages 167-168 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #51, #52 and #54.

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Issue #54: Administrative Appeals Process
Some maintain that the lack of a workable, balanced administrative appeals process results in the expending of substantial resources before a decision may be challenged. Should there be an intermediate administrative review of the administrator's determination which must be exhausted prior to commencement of suit? If so, should the appealing suit be a trial de novo or on the administrative record?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the need for a more adequate appeals process. The Reporter stated that he has ideas on how the appeals process should operate and will begin drafting based on his ideas.

NAUPA's Recommendation: **NAUPA supports the inclusion of an audit appeals process with the Uniform Act and has previously proposed legislation. As an alternative to NAUPA's drafted appeals legislation, NAUPA proposes that the Uniform Act refer to the state's Administrative Procedures Act, if applicable in that state.**

NAUPA supports an appeals process as it will provide an administrative forum for holders to challenge audit findings, expedite the finalization of an examination and collection of audit findings and avoid litigation where disputes exist. Below, please find NAUPA's previously proposed legislation on this issue.

NAUPA previously proposed legislation: Audit Appeals Process
Section __ Appeal of Examination Findings.
(1) Within 30 days from the date of the final examination report, a holder may file an appeal of the audit findings with the administrator.
(a) The appeal must be in writing, dated and signed by the holder, and include the following information:
(i) the names of all parties involved in the audit at issue;
(ii) 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
(iii) a clear and concise description of each error that the holder is alleging the administrator made in his or her findings;
(iv) 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;

(v) the relief requested; and

(vi) whether or not the holder is requesting a hearing.

(b) Within five days of filing the appeal, the holder shall secure the payment of the audit findings in their entirety by making payment to the administrator or the administrator's agent. If the holder is successful in the appeal, the disputed amount of the audit findings, with any interest earned thereon, will be returned to the holder within thirty (30) days of the date of the final determination.

(c) If an appeal is not filed within 30 days, the holder will be presumed to have agreed to the final examination report. The holder shall make payment of the audit findings to the administrator or the administrator's agent within 45 days of the date of the final examination report.

(d) For purposes of this section a "final examination report" is a report issued by the administrator or the administrator's agent and contains findings that specify the property types audited, the years audited, and the final amount due the State.

(e) The administrator may in his or her discretion extend the time periods provided for in this section to allow the holder to remediate the findings included in a final examination report.

(2) If the holder requests a hearing, the administrator or designated hearing examiner, appointed at the discretion of the Administrator, shall schedule a hearing, to be conducted within 60 days of the receipt of the holder's written appeal. The administrator or designated hearing examiner shall notify the holder of the date, time, and place of the hearing.

(a) The holder may present witnesses and documents at the hearing.

(b) Failure to appear for the scheduled hearing shall be treated as a withdrawal of the Request for Hearing, and the Administrator or designated hearing examiner will make a final determination based upon the record.

(c) The administrator or designated hearing examiner may reschedule a hearing upon determining that good cause exists.

(3) After the hearing is held or the record is complete, the Administrator or designated hearing examiner will issue a written decision to the holder as soon as practicable. The written decision will include findings of fact and conclusions of law.

(4) The administrator 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 as were before the administrator, all staff memoranda submitted in connection with the case, and a statement of matters officially noted.

Any party adversely affected by the administrator's decision is entitled to judicial review thereof under the provisions of the _____. The review shall be conducted by the court without a jury and shall be upon the record made before the administrator, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

NAUPA Submitted Documents: See Pages 167-168 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #51, #52, and #53.

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Issue #55: Holder Turn Over of Property to State After Due Diligence
Should the act be amended to expand the scope and circumstances under which property may be reported and turned over to the State in order to permit property to be turned over to the State by the holder after the holder has performed its due diligence? If so, should the consent of the Administrators be required?

November 2014 Meeting Action At the meeting, the Drafting Committee determined that there was general consensus on the issue. NAUPA agreed that voluntary escheatment may occur at the holder's discretion. The Drafting Committee determined that voluntary early escheat should not apply to interest-bearing property or property that can fluctuate in value.

NAUPA's Recommendation: **NAUPA agrees that early escheatment can occur after the completion of due diligence and with the written consent of the administrator. NAUPA recognizes that the indemnification provisions, if applicable, will apply upon acceptance of the property**

NAUPA awaits the Reporter's draft before commenting further.

NAUPA previously proposed legislation: Election to Take Early Delivery

> Section 17*(c) A holder, with the written consent of the administrator and upon conditions and terms prescribed by the administrator, may report and deliver property before the property is presumed abandoned. Property so delivered shall be presumed abandoned under this [Act] upon its receipt by the administrator.*

NAUPA Submitted Documents: See Pages 104-105 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #36.

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Issue #56: Authorization for Administrator to Disclaim Property
Should the Act be revised to authorize the Administrator to disclaim property tendered to him or destroy property turned over to him where in his judgment the costs of custody or disposition exceeds the value of the property?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue as there is apparent consensus that revised language is unnecessary.

NAUPA's Recommendation: **NAUPA recommends that the 1995 Uniform Act be updated to include the administrator's right to disclaim property if the value of the property is less than the expense of custody of the property.**

Currently, the state can disclaim property only if the value of the property is less than the expenses of notice and sale of the property.

NAUPA previously proposed legislation: Election to Take Payment or Delivery

> Section 17(a) The administrator may decline to receive property reported under this [Act] which the administrator considers to have a value less than the expenses of *custody or* notice and sale.
>
> *(b) If the Administrator determines after investigation that property delivered under this Act has no substantial commercial value, or the value of the property is less than the expense of the State maintaining custody of the property, the Administrator may destroy or otherwise dispose of the property at any time. An action or proceeding may not be maintained against the State or any officer or against the holder for or on account of an act of the administrator under this section, except for intentional misconduct or malfeasance.*

NAUPA Submitted Documents: See Pages 104-105 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #57: Statute of Repose

Under the 1995 Act, a holder who fails to file a required report and turn over property held for another, or who filed a fraudulent report, has no statute of limitations to bar the state's claims. This puts a putative holder against whom a determination of liability has been made under an enormous and often unfair burden. To the extent that it allows the state to claim money acting for and standing in the shoes of the owner which the owner is precluded from claiming under an applicable statute of limitations, it allows the owner to override his failure to act within the prescribed time and indirectly recover property from the state that he could not recover directly from the holder.

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to draft language similar to the firm deadline used in the 1981 Uniform Act. A motion to adopt a 7 year statute of repose from the date the report was due and thus barring the state from its ability to audit failed. A motion to adopt a 10 year provision passed. The Drafting Committee also passed a motion that would amend the Uniform Act to establish a 5 year look-back period for holders who have filed a non-fraudulent report and a 10 year look-back period for holders who have not filed a report or who have filed a fraudulent report.

NAUPA's Recommendation: **NAUPA strenuously opposes the amended look-back period preliminarily being considered by the Drafting Committee particularly with respect to a holder that has not reported property.**

The 1995 Uniform Act amended the look-back period contained in the 1981 Uniform Act in order to address the problems that states face if holders do not report property or give notice of a dispute over whether property is required to be reported (regardless of whether they have filed a report identifying other property). The motion passed at the November meeting would not only eliminate the language included in the 1995 act to address this problem, but it would also significantly shorten the look-back period provided for in both the 1981 Uniform Act and the 1995 Uniform Act. This would be a dramatic change for a significant majority of the states and would threaten their ability to ensure compliance with their unclaimed property laws.

NAUPA continues to recommend that the look-back period be amended to cover 10 years from when the property should have been reported, unless the holder fails to report an amount that is in excess of 25% of the amount that the holder did report (either in the aggregate or for a distinct property type), in which case the look-back period would be expanded to 15 years. Additionally, NAUPA recommends that the look-back period would be tolled by the filing of knowingly false or fraudulent reports.

NAUPA strongly advocates that the Drafting Committee adopt the following provision originally set forth in NAUPA's May 2014 submission:

<u>NAUPA previously proposed legislation: Property on the Holder's Books and Records</u>

> *…Any action or proceeding maintained by the administrator under this section may include property that first became reportable during the relevant time period as well as any property reflected on the holder's books and records as being held for or owed to an owner at any point during the relevant time period.*

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); *See also* <u>Pages 116-120</u> of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #58.

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Issue #58: Limitations Period: Commencement/Tollability

The 1995 Uniform Act provides for a period of limitations which runs from the date that a report was filed, and which is tollable, while the 1981Uniform Act provides for a period of limitations which runs from the date that property is reportable, and is not tollable, therefore functioning like a statute of repose. See Memorandum § II.B.2. Should there be a statute of limitations or statute of repose which fixes an absolute bar date back to which the

state cannot commence an action against a putative holder? If so, what is the appropriate bar date and what relationship should it have to other periods of limitations?

November 2014 Meeting Action: At the meeting, the Drafting Committee considered this issue in conjunction with Issue # 57. Accordingly, NAUPA incorporates its Recommendation to Issue # 57 here.

NAUPA's Recommendation: **NAUPA strenuously opposes the amended look-back period preliminarily being considered by the Drafting Committee.**

NAUPA incorporates by reference its Recommendation to Issue #57 here.

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); Pages 116-120 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #57.

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Issue #59: Exemption from Expiration of Statute of Limitations Application When Holder Not Attempting to Evade Unclaimed Property Reporting
The Uniform Acts contain provisions prohibiting the expiration of statutes of limitation, whether imposed by statute or contract. Some commentators have maintained that these anti-limitations provisions are interpreted too broadly, and that an exemption is called for where the limitations period is not intended to evade unclaimed property reporting requirements, such as where transactions are between businesses. Should the Act be revised to provide such an exemption?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. A similar issue on drafting a business to business exemption under Issue # 24 was discussed.

NAUPA's Recommendation: **NAUPA recommends that the Act not be revised to provide for such an exemption.**

The purpose of this Issue remains unclear to NAUPA at this time. As such, NAUPA supports retaining the anti-limitation provision from the 1995 Uniform Act and will await further discussion on this Issue before commenting further.

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); *See also* "NAUPA Business-to-Business Transactions Whitepaper" (submitted May 9, 2014); *See also* Pages 111-112 & 164 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #24.

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Issue #60: Contract/Independent Auditors

The last sentence of Section 20(b) authorizes the administrator to "contract with any other person to conduct the examinations on behalf of the administrator." This provision provides the authority under which some administrators enter into contracts with outside independent auditing firms, often on a contingency fee basis, which gives the auditors the authority to examine the books and records of putative holder in order to audit for, and if appropriate determine deficiencies in, required reporting of property held for owners and turning it over to the state. This provision has proven to be one of the most controversial provisions in the Act. Few state administrators maintain staff auditors in the numbers and with the skills necessary to carry out an appropriate number of audits to reasonably secure voluntary compliance with the requirements of the Act. They say taking this tool away from them will seriously compromise their ability to do their job and erode a significant part of the state's revenue base. On the other hand, many in the holder community believe that an auditor whose compensation is determined on a contingency basis in whole or in part and upon whether (and in what amount) his audit results in a determination of a deficiency may compromise the reliability of the auditor's findings. See Memorandum § II.B.3 and Memorandum § II.C.

> **(a) Should the quoted provision in Section 20(b) be eliminated or modified, and, if so in what way or ways?**
>
> **(b) Are there reasonable alternatives that could be made available to state administrators which would enable them to secure an appropriate level of audit expertise and manpower to safeguard the legitimate interests of the state without condoning by utilization of a system that is seen by some in the holder community as inherently flawed?**

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to maintain the status quo for the use of contract auditors. No motion was made by the Drafting Committee to change the method in which the auditors are compensated.

NAUPA's Recommendation: **As the Drafting Committee's decision at the November 2014 meeting reflect NAUPA's position, NAUPA has no further comment at this time.**

NAUPA Submitted Documents: See "NAUPA States Effective Utilization of Private Auditors Whitepaper" (submitted May 9, 2014); *See also* Page 121 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

The ABA has raised an additional issue under Section 20 of the 1995 Uniform Act. The ABA has proposed that subsection (e), providing that the costs of examination can be charged against a non-compliant holder, should be eliminated. The ABA believes that the states "already have

significantly greater leverage than holders in the examination process, as a general matter" and for this reason, requiring that holders cover the costs of a state's compliance examination—even where such costs are capped at the amount of property to be found reportable—"offends traditional notions of equity and fair play." NAUPA does not concur with the ABA on this point. What is "inequitable" is the fact that many holders comply with the law and some don't, and the holders that do not comply often fail to do so because they believe that they will never become subject to an audit by the state. As the Uniform Law Commission has said itself, the Uniform Unclaimed Property Act is premised on voluntary self-reporting. The law must necessarily contain strong incentives for holders to report, and the assessment of audit fees where in fact non-compliance is found is such an incentive.

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Issue #61: Records Retention After Reporting/Turn Over
Should the Act be revised to provide greater specificity regarding the records the holder is required to maintain after filing the report and turning over unclaimed property in his hands?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss what records were required to be maintained by the holder.

NAUPA's Recommendation: **NAUPA recommends that there be greater specificity regarding the records the holder is required to maintain. NAUPA has previously proposed legislation to reflect NAUPA's objective of providing clarity as to the records to be retained by a holder.**

NAUPA believes that state audits could be significantly streamlined if holders maintained more thorough records documenting how previous reports had been compiled. The specific records to be retained by the holder are outlined in NAUPA's proposed legislation. NAUPA believes that the proposal of the ICI, that the only records that a holder should be required to retain would be those showing (with respect to property actually reported) proof that the dormancy period was triggered, and documentation that due diligence was performed, would not permit states to confirm the completeness of reporting in conjunction with the performance of an audit. NAUPA thus opposes the ICI recommendations on this issue.

<u>NAUPA previously proposed legislation: Records to be Retained</u>

> *A holder required to file a report under Section 7 shall maintain for a period of 10 years after the holder files the report, all underlying source documents, work papers, records, and other information utilized in determining (i) whether property was unclaimed and (ii) the amount of property reportable. A business association or financial organization that sells, issues, or provides to others for sale or issue in this State, traveler's checks, money orders, or similar instruments other than third-party bank checks, on which the business association or financial organization is directly liable, shall maintain a record of the*

instruments while they remain outstanding, indicating the State and date of issue, for three years after the holder files the report.

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); *See also* Pages 116-120 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #62 and #63.

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Issue #62: Period of Record Retention (Duration)
The 1995 Uniform Act altered the period for which holders are required to retain records from ten years after unclaimed property is reportable to ten years after unclaimed property is reported. The various record keeping records mandated by the Act differ substantially from one jurisdiction to another and for differing purposes. For example, the record keeping requirements for tax purposes is 7 years for the IRS and most states. Should there be a maximum period for retention of records, beyond which no penalty or adverse consequences could befall the putative holder whose records had not been returned longer than the required period, and if so, what should that period be?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion that the record retention provision should be 10 years from the date the report was due.

NAUPA's Recommendation: **NAUPA opposes the amended record retention period preliminarily being considered by the Drafting Committee and supports retention of the 1995 Uniform Act provision.**

The 1995 Uniform Act amended the record retention period contained in the 1981 Uniform Act in order to address the problems that states face if holders do not retain records, especially after the holder has failed to file a report. The motion passed at the November meeting would eliminate the language included in the 1995 Uniform Act to address this problem. This would be a dramatic change for a significant majority of the states and would threaten their ability to ensure compliance with their unclaimed property laws.

NAUPA previously proposed legislation: Records to be Retained

A holder required to file a report under Section 7 shall maintain for a period of 10 years after the holder files the report, all underlying source documents, work papers, records, and other information utilized in determining (i) whether property was unclaimed and (ii) the amount of property reportable. A business association or financial organization that sells, issues, or provides to others for sale or issue in this State, traveler's checks, money orders, or similar instruments other than third-party bank checks, on which the business association or financial organization is directly liable, shall maintain a record of the

instruments while they remain outstanding, indicating the State and date of issue, for three years after the holder files the report.

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); *See also* Pages 116-120 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #61 and #63.

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Issue #63: Period of Record Retention (Various Types of Property)
There are differing periods with respect to different property and types of property. Should there be one period of retention for all?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue as there does not appear to be any request for change.

NAUPA's Recommendation: **Notwithstanding NAUPA's other recommendations on record retention, NAUPA has no further comment on this Issue at this time.**

NAUPA Submitted Documents: *See* "Limitations and Retention of Records Whitepaper" (submitted May 9, 2014); *See also* Pages 116-120 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #64: Estimations of Liability of Putative Holder
Should estimations of liability be allowed to establish a putative holder's liability to turn over property, and if so, under what circumstances?

November 2014 Meeting Action: At the meeting, the Drafting Committee stated that there is a need for states to utilize estimation techniques when a holder has not maintained records. The Drafting Committee suggested that there is a need for some type of uniform standards or protocols for utilizing estimation and statistical sampling. NAUPA agreed to provide the Reporter with suggested guidelines.

NAUPA's Recommendation: **NAUPA agrees with the Drafting Committee and proposes maintaining Section 20(f) of the 1995 Uniform Act. NAUPA's suggested guidelines for implementing Section 20(f) are addressed in its response to Issue # 65.**

Section 20(f) of the 1995 UUPA already provides a straightforward standard for when estimation may be utilized in an unclaimed property examination. For the periods subject to the Act, subsection (f) requires holders to maintain records sufficient to permit the preparation of a report; otherwise, estimation may be used. NAUPA proposes that the Drafting Committee maintain this standard, as it is objective and easily ascertainable. Both the COST and UPPO proposals suggestion that estimation be prohibited if a holder has maintained "sufficient records," would create an ambiguous standard that would be difficult to evaluate. For example, UPPO's proposal defines sufficient records as "at least 80% of the record(s) necessary to identify property reportable." Furthermore, UPPO proposes that "[T]he 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 property type reportable." COST's proposed definition of "substantially complete records," based on legislation enacted in Michigan, is substantially similar, except that it requires the maintenance of "90% of the records necessary for unclaimed property purposes as defined under the principles of internal controls."

UPPO's and COST's proposed definitions and standards for use of estimation would generate countless issues. For example, there is ambiguity regarding what items these percentages should be applied to (e.g., periods under review, record components for a particular property category, individual items within a property category, etc.). Depending on the item for which this standard is applied, determining a percentage of records which were maintained would require an understanding of what constitutes 100% of the records, which may not be possible if records have been destroyed. Furthermore, a determination based on the "materiality level of value of the records" would be very subjective and contingent on many factors, including a holders business practices. For example, a missing year of records over a ten (10) year period of records may not appear material using an eighty to ninety percent (80% - 90%) standard. However, that year of missing records could be very material if a holder wrote-off a disproportionate amount of accounts receivable credits in that year. In summary, the current requirement that holders maintain records sufficient to permit the preparation of a report in order to avoid an estimation of liability is an objective, unambiguous, and ascertainable standard that should remain unchanged.

NAUPA Submitted Documents: See "NAUPA Utilizing Estimation and Statistical Sampling Whitepaper" (submitted May 9, 2014).

Corresponding Issues: #65.

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Issue #65: Estimations Based on Statistical Sampling
Should auditors be allowed to base their determinations of liability based on statistical sampling methods, and if so, what methods should be allowed and under what circumstances? What safeguards can be put in place to protect putative holders from being deprived of their property in violation of their Due Process rights?

November 2014 Meeting Action: At the meeting, the Drafting Committee stated that there is a need for states to utilize estimation techniques when a holder has not maintained records. The Drafting Committee suggested that there is a need for some type of uniform standards or protocols for utilizing estimation and statistical sampling. NAUPA agreed to provide the Reporter with suggested guidelines.

NAUPA's Recommendation: **NAUPA proposes the attached guidelines for utilizing statistical sampling in an unclaimed property examination, which are based on the Multistate Tax Commission's (MTC) Statistical Sampling Procedures and Sampling Policy & Guideline Manual.**

Statistical sampling is a standard practice across many industries, is recognized by the courts, and has been historically utilized by the states to determine whether various liabilities are due and owing. Where adequate records do not exist to determine a holder's historical unclaimed property compliance and estimation must be utilized, statistical sampling may be used as a tool to increase the efficiency of the process.

While NAUPA agrees that uniform standards and protocols for sampling during an unclaimed property examination should be established, NAUPA opposes the COST and UPPO proposed use of the American Institute of CPAs' (AICPA) Generally Accepted Auditing Standards (GAAS) and Statements on Auditing Standards (SAS) No. 39. Such standards are meant to guide CPAs reviewing public and non-public entities in order to identify material misstatements in financial statements. An audit of an organization for a material misstatement of its financial statements (for a large corporation the threshold for material misstatement of the financial statements may be at the multi-million dollar level) is dramatically different from an audit of an organization's books and records to determine unclaimed property amounts owed to rightful owners, which are typically single transaction low-dollar amounts. An unclaimed property examination is *not* an audit of a holder's financial statements in order to determine if they are presented in accordance with Generally Accepted Accounting Principles (GAAP) or a review of a holder's internal controls in order to assess the risk of material misstatement of the financial statements. Similarly, internal controls designed to ensure that an entity's financial statements are generally in accordance with GAAP are not designed for the purpose of capturing rarely occurring transactions that result in unclaimed property amounts.

The Multi-State Tax Commission (MTC) Guidelines are utilized by the Commission's audit staff when conducting sales and use tax audits on behalf of the member states. As the MTC utilizes statistical sampling in a context very similar to an unclaimed property examination, NAUPA recommends that the guidelines adopted for the use of sampling during unclaimed property examinations be based on the MTC's standards, as opposed to standards promulgated by the AICPA that are not as relevant to an unclaimed property examination.

NAUPA Submitted Documents: See "NAUPA Utilizing Estimation and Statistical Sampling Whitepaper" (submitted May 9, 2014).

Corresponding Issues: #64.

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Issue #66: Recovery of Litigation Expenses: Prevailing Party
In addition to recovery of attorney's fees, should the prevailing party also be entitled to an award of his reasonable expenses of litigation?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed various options for the awarding of attorney's fees. Some believed it would prevent the state from assuming an unreseasonable position. It was then suggested that either the holder or the state could recover attorney's fees. There was also support for no change from the 1995 Uniform Act. The Reporter was directed to draft language based on the English rule; however, Co-Chair Blackburn stated this issue is completely open to discussion.

NAUPA's Recommendation: **Awarding attorney's fees should be left to the discretion of the court which is consistent with the 1995 Uniform Act.**

NAUPA previously proposed legislation: Enforcement & Attorney's Fees

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

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #50, #67 and #68.

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Issue #67: Cap on Fees
Should the award of fees be made subject to a cap based on an absolute number or a percentage of the amount recovered or awarded?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed various options for the awarding of attorney's fees. Some believed it would prevent the state from assuming an unreseasonable position. It was then suggested that either the holder or the state could recover. There was also support for no change from the 1995 Uniform Act. The Reporter was directed to draft language based on the English rule; however, the Co-Chair Blackburn stated this issue is completely open to discussion.

NAUPA's Recommendation: **Awarding attorney's fees should be left to the discretion of the court which is consistent with the 1995 Uniform Act.**

NAUPA previously proposed legislation: Enforcement & Attorney's Fees

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

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #50, #66 and #68.

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Issue #68: How is "Prevailing Party" Defined
How does one need to "prevail" in order to be the "prevailing party?"

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed various options for the awarding of attorney's fees. Some believed it would prevent the state from assuming an unreasonable position. It was then suggested that either the holder or the state could recover. There was also support for no change from the 1995 Uniform Act. The Reporter was directed to draft language based on the English rule; however, the Co-Chair Blackburn stated this issue is completely open to discussion.

NAUPA's Recommendation: **Awarding attorney's fees should be left to the discretion of the court which is consistent with the 1995 Uniform Act.**

NAUPA previously proposed legislation: Enforcement & Attorney's Fees

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

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #50, #66 and #67.

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Issue #69: Conditions Precedent to Administrator's Enforcement
Should the administrator's right to bring an enforcement action be conditioned on some precedent event such as a refusal by a putative holder to allow access to his books and records, or to refuse to pay over amounts for which he has been determined by the administrator to be liable or delinquent?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the issue briefly and believes that no redrafting of the Uniform Act is necessary.

NAUPA's Recommendation: **NAUPA has previously recommended a more detailed revision to Section 22 - Enforcement but is amenable to retaining the 1995 Uniform Act provision. Please note that NAUPA has struck its recommendation for subsection (b).**

NAUPA previously proposed legislation: Legal Proceedings and Enforcement

Section 22 *(a) The administrator may maintain an action to enforce this Act. In a situation where no district court in this State can obtain jurisdiction over the person involved, the administrator may commence such an action in a federal court or state court of another state having jurisdiction over that person. The court may award reasonable attorney's fees to the prevailing party.*

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

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

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #70 and #71.

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Issue #70: Limit on Time to File
If there is a condition precedent to the filing of a suit for enforcement, should there be a limit on the time in which such subsequent action for enforcement could be brought? And if so, what is the appropriate limit?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the issue briefly and believes that no redrafting of the Uniform Act is necessary.

NAUPA's Recommendation: **NAUPA has previously recommended a more detailed revision to Section 22 - Enforcement but is amenable to retaining the 1995 Uniform Act provision. Please note that NAUPA has struck its recommendation for subsection (b).**

NAUPA previously proposed legislation: Legal Proceedings and Enforcement

> Section 22 *(a) The administrator may maintain an action to enforce this Act. In a situation where no district court in this State can obtain jurisdiction over the person involved, the administrator may commence such an action in a federal court or state court of another state having jurisdiction over that person. The court may award reasonable attorney's fees to the prevailing party.*
>
> ~~*(b) The administrator, for and on behalf of this State, may commence an action against the United States government or any agency or subdivision thereof for an adjudication that the proceeds of United States savings bonds subject to the provisions of this Act that are payable to the State.*~~
>
> *(c) The administrator shall be deemed an indispensable party to any judicial or administrative proceedings concerning the disposition and handling of unclaimed property that is or may be payable or distributable into the protective custody of the administrator. The administrator shall have a right to intervene and participate in any judicial or administrative proceeding when to do so will be in the best interest of this state, the apparent owner or the unclaimed property or to conserve and safeguard the unclaimed property against dissipation, undue diminishment or adverse discriminatory treatment.*

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #69 and #71.

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Issue #71: Allow Holder/Putative Holder to Bring Action Against Administrator
Should there be a provision under which a holder or putative holder could bring an action against the administrator, and if so under what conditions, if any?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussed the issue briefly and believes that no redrafting of the Uniform Act is necessary.

NAUPA's Recommendation: **NAUPA has previously recommended a more detailed revision to Section 22 - Enforcement but is amenable to retaining the 1995 Uniform Act provision.**

Corresponding Issues: #69 and #70.

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Issue #72: Savings Bonds (Authorization for State Action Against Federal Government) Should this Act provide authorization for the State to bring an action against the federal government to recover abandoned U.S. Savings Bonds?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue. Rather, a discussion on savings bonds occurred under Issue #3.

NAUPA's Recommendation: **As this matter is currently subject to litigation, NAUPA proposes that the Drafting Committee withhold addressing this issue until the matter is resolved. *See Estes v. United States*, Docket No. 1:13-cv-01011 (Fed. Cl. Dec 20, 2013).**

The ABA, in its recommendations to the ULC, has gone beyond the issue of savings bonds and has considered the broader issue of all property held by the federal government. Based on its review, the ABA has proposed that all property held by or owing to the United States government be exempt from reporting under the Uniform Unclaimed Property Act.

In support of its position, the ABA primarily cites *Treasurer of New Jersey v. U.S. Dept. of Treasury*, a 2012 Third Circuit decision striking down state efforts to compel the reporting of unredeemed U.S. Savings Bonds on a theory of custodial escheat. The ABA reads this decision as a complete bar to the states' claiming property in the possession of the federal government. NAUPA does not agree.

Consider unclaimed amounts remaining from the termination of the U.S. Post Office's postal savings system, safe deposit box contents maintained by the Comptroller of the Currency from liquidated national banks, or property subject to administration by the U.S. Bankruptcy Courts. In each of these cases, unclaimed property has been transferred to the states. The Federal Deposit Insurance Corporation is required by law to transfer unclaimed insured deposits in failed institutions to the states (see The Unclaimed Deposit Amendments Act of 1993, 12 USC 1822(e),. The ABA proposal would not only prevent the states from an adversarial proceeding against the federal government to collect unclaimed property, it would also prevent the federal government from either voluntarily transferring unclaimed property or doing so as part of a Congressional mandate.

The states do not see the decision in the *New Jersey* case as whether the Supremacy Clause would, in all instances, preempt the states from claiming property held by the federal government on a contested basis. Note that the federal government is a holder both with respect to its own

obligations (e.g., savings bonds) and property that the federal government has no claim or right to, but merely possesses (e.g., safe deposit box contents from national banks). Several Circuit Court of Appeals decisions, addressing specific *obligations of the United States Government,* should not be used as a basis for arguing that the states may not seek to recover unclaimed property in the possession of the federal government in any and all cases.

The ABA recommendation is not limited to property held by the federal government; it also extends to property *owing* to the federal government. The ABA provides no specific legal basis for exempting from reports a holder files with the states amounts where the apparent owner is the federal government. It should be noted that there is no general federal escheat or unclaimed property law and NAUPA is unaware of the federal government or any agency thereof ever challenging the right of the states to assume custody of unclaimed property in the possession of a private sector, aside from moneys where these is an express statutory reversion (e.g., Medicaid). Indeed, the states regularly pay claims to the U.S. Treasury and other federal agencies, and it is a reasonable assumption that the federal government is grateful to the states for aggregating and identifying this property. Under the ABA proposal, a holder in possession of property owing to the federal government would be required to retain the asset; it could not be delivered to the state. The experience of many holders is that the federal government does not reply to due diligence notices because it is both difficult for a holder to locate a specific department or individual who might determine the government's entitlement, as well as the fact that in many cases the government cannot establish that it is owed the funds (i.e., a cashier's check payable to "Internal Revenue Service" where the remitter is unknown). If the federal government does not make claim (or is unable to claim) property after notification by a holder, the proper treatment of the property would be to transfer it to state custody. This would allow the holder to remove the liability from its books, as well as prevent a chance windfall to a holder, which unclaimed property law is designed to prevent.

NAUPA Submitted Documents: See Pages 128-129 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

Corresponding Issues: #3.

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Issue #73: Relax Formalities of Interstate Cooperatives
Should the Act be revised to relax the formalities of interstate cooperation and allow cooperation between and among the states and the informal exchange of information regarding unclaimed property?

November 2014 Meeting Action: At the meeting, the Drafting Committee discussion focused on Section 14 regarding how a state may recover property delivered to another state. The Committee did not discuss interstate cooperation regarding the exchange of information under Section 23.

NAUPA's Recommendation: **NAUPA recommends that 1995 Uniform Act formalities for interstate cooperation be relaxed.**

In addition, NAUPA would like to clarify that the NAUPA comments listed under Issue #73 in the Reporter's compilation are better associated with Section 14 then Section 23.

NAUPA previously proposed legislation: Interstate Agreements and Cooperation

> Section 23(a) *The administrator may exchange information with another State relating to abandoned property or its existence. The administrator may in writing authorize another State, or a person acting on behalf of another State, to examine records as authorized in Section 20.*
>
> 1995 Uniform Act version: ~~The administrator may enter into an agreement with another State to exchange information relating to abandoned property or its possible existence. The agreement may permit the other State, or another person acting on behalf of a State, to examine records as authorized in Section 20. The administrator by rule may require the reporting of information needed to enable compliance with an agreement made under this section and prescribe the form.~~

Some stakeholders have opposed the ability of the states to freely exchange compliance data. The reasons for this objection should be articulated by these stakeholders, and scrutinized by the Drafting Committee. Compliance with unclaimed property reporting requirements are best achieved through voluntary self-reporting. However, where this does not occur and a state is required to compel compliance (or where a holder is merely reporting to states on a selective basis), this information should be available to other states. The unimpaired reciprocal exchange of compliance information between states will encourage holders to report to all states in the first instance, and ultimately result in a more even playing field for all holders.

NAUPA Submitted Documents: See Pages 132-134 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #74: Amount of Interest – Unreported Property

There is a decided lack of uniformity among the various states as to the amount of interest that should be charged, if any, on property that should have been but was not timely reported and turned over to the appropriate state, what penalties, if any, should be imposed on a delinquent or uncooperative holder, and whether and under what conditions interest and penalties can be waived. Should the drafting committee reexamine this section with a view towards establishing a provision addressing interest and penalties which is more likely to be uniformly accepted and adopted?

November 2014 Meeting Action: At the meeting, the Drafting Committee passed a motion to include a floating rate rather than a fixed rate. The Reporter was directed to draft multiple provisions based on the T-Bill rate or T-Bill +2% at simple interest rather than compound interest.

NAUPA's Recommendation: **NAUPA agrees with the ABA that late reporting interest should be compensatory and not punitive. However, NAUPA believes that the ABA's mandatory waiver of late reporting interest is inconsistent with the ABA's proposition that interest should be compensatory, rather than punitive.**

The purpose of late reporting interest is to require that the holder "disgorge" the benefit that it received through failing to report property as required by the law. Thus, the state is made whole in terms of the income that the state would have received, if it has timely received the property. At least one state's Attorney General (California) has reviewed this issue and determined that for the state to waive late reporting interest in the absence of an actual legal dispute would constitute a gifting of state assets (the interest earned on the unreported property) to the holder.

Lastly, NAUPA has previously proposed language to adjust interest on unclaimed life insurance proceeds where a life insurer learned of a previous death of an insured.

NAUPA previously proposed legislation: Interest Adjustment for Life Insurance Proceeds

> *(f) A holder who fails to report, pay or deliver property payable under a life insurance policy or annuity contract upon death within the time prescribed by Section 2.(a)(8)(i) of this [Act] shall not be required to pay interest under subsection (a) above or be subject to penalties under subsection (b) above if the failure to report, pay or deliver the property was due to lack of knowledge of the death giving rise to the payment obligation.*

NAUPA Submitted Documents: See Pages 137-139 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #75: Penalties for Intentional Noncompliance
Should the penalty provisions of the Act be revised and expanded to address intentional noncompliance with the duties imposed by the Act on holders, or an intentional attempt to circumvent its requirements?

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

NAUPA's Recommendation: **NAUPA recommends clarifying the 1995 Uniform Act on how the penalty is calculated and also updating the provision to include situations where a holder has made arrangements to avoid compliance with the Uniform Act.**

NAUPA believes that the ABA's request for clarification of the basis for making a penalty calculation is reasonable. NAUPA does not believe that the $5,000 maximum penalty was intended to apply to each property or owner, where a past-due report consists of multiple properties or owners. NAUPA would be agreeable to defining the penalty as assessable for each year that a holder has failed to report.

NAUPA Submitted Documents: See Pages 137-139 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue #76: New Section? Confidentiality of Business Records
Should the Act be revised to create a new section dealing with requirements for maintaining the confidentiality of business records similar to those imposed on taxing authorities?

November 2014 Meeting Action: At the meeting, the Drafting Committee found general consensus on the confidentiality of business records provision proposed by NAUPA. There was additional discussion on expanding the language to incorporate powers of attorney. The Reporter will draft a provision.

NAUPA's Recommendation: **Consistent with the Drafting Committee comment, NAUPA recommends creating a confidentiality of business records provision.**

For reference, NAUPA's previously proposed legislation is below.

NAUPA previously proposed legislation: CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

(c)The administrator shall include on the Internet database provided for in Section 9(b)(3) of this Act the names of all apparent owners of property presumed abandoned and in

the custody of the State. The administrator may include additional information concerning an apparent owner's property on the Internet database that, in the discretion of the administrator, will assist in facilitate the identification and claiming of property.

NAUPA Submitted Documents: See Pages 172-173 of "1995 Act with NAUPA Recommended Revisions to ULC" (submitted May 9, 2014).

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Issue *: Prefatory Note

November 2014 Meeting Action: At the meeting, the Drafting Committee did not discuss this issue.

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

Specifically, the ABA proposes that the revised Uniform Unclaimed Property Act include a "statement of purpose that generally sets forth how the UUPA should be applied and construed." The ABA has not specifically identified in what respects the prefatory note prepared by the ULC for the 1995 Uniform Act is deficient. However, the ABA recommends the inclusion of certain "sub-parts," as follows:

1. ABA Draft: The purpose of this [Act] is to facilitate the return of unclaimed property to its rightful owner.

NAUPA comment: return of property to the rightful owner is certainly a key purpose of unclaimed property legislation, along with ensuring that the general citizenry and not a private entity receive the benefits of any "windfall" pending the successful location and payment of the owner.

2. ABA Draft: Under the circumstances described in this [Act], the State may take custody of unclaimed property from a holder on behalf of an the owner.

NAUPA comment: the state in making claim to and assuming custody of unclaimed property should certainly act in accordance with controlling law, but would the inclusion of this statement potentially undermine the application of judicial decisions and common law, which have become so much a part of unclaimed property administration?

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

NAUPA comment: the intent of this provision is unclear. Would this mean that a holder could keep property to which the holder otherwise had no legal or moral claim, simply if an owner could not be identified, or the ability of an owner to prove entitlement could not possibly be fulfilled? To the extent that the ULC reaches a determination that the anti-limitations provision is retained within the Uniform Unclaimed Property Act, is this "sub-part" rendered obsolete? NAUPA would appreciate the ABA providing greater clarification as to the specific types of situations this concept is intended to address.

4. ABA Draft: The State shall hold all unclaimed property on behalf of the owners thereof in perpetuity until the owner reclaims such property.

NAUPA comment: States embrace the concept that an owner or the owner's heirs can make claim to property reported to the state in perpetuity. NAUPA is unclear what the ABA means in requiring that the states "hold all unclaimed property...in perpetuity" (emphasis added). As is commonly known, most states transfer their annual unclaimed property collections to general revenue. Most states, consistent with GASB standards, project a future actuarial liability for the payment of claims. And states have in fact honored claims made to property reported 10, 25, or 50 years or more ago. NAUPA does not think it is good public (or economic) policy to require the states to literally "hold" all unclaimed amounts in trust in perpetuity, because it is an accepted fact that the bulk of the money remaining unclaimed after five years of state custody will remain unclaimed.

5. ABA Draft: This [Act] shall be preempted to the extent it conflicts with any federal law.

NAUPA comment: NAUPA recognizes the Supremacy Clause of the U.S. Constitution and understands that in specific situations, the Uniform Unclaimed Property Act may be preempted by federal law. In other words, NAUPA would agree that the Uniform Unclaimed Property Act is preempted to the extent that it is in fact "preempted." However, NAUPA is concerned about preemption per se when the unclaimed property law simply appears to be inconsistent with or otherwise conflicts with federal law. One example would be the Securities and Exchange Commission lost securityholder requirements, discussed elsewhere. On the surface, the SEC's search requirements may appear inconsistent with state unclaimed property laws. However, the SEC has expressly indicted that the search requirements are not intended to supersede state unclaimed property laws. Should the SEC search requirements nonetheless preempt state unclaimed property laws? And if the SEC had not affirmatively indicated that there was no preemption, then should state unclaimed property laws be preempted? United States Treasury regulations would appear to be inconsistent with state unclaimed property laws on the issue of unclaimed United States Savings Bonds and yet, Treasury and the states have found common ground on the reporting and delivery to the states the proceeds of some unclaimed bonds. Would inclusion of this language in the prefatory note bar the states from attempting to pursue claims before Treasury? Note that the U.S. Supreme Court has repeatedly stated that the disposition of unclaimed property has traditionally been a state, not federal power. This does not render moot the possibility of federal preemption, but the real question is when in fact preemption has in fact occurred. NAUPA believes that in many instances of purported federal preemption, there is in fact on preemption, or the issue of preemption (or the extent of preemption) has in fact been

unresolved (i.e., the National Bank Act, ERISA). State law should not give way simply because there is ambiguity or conflict, particularly where the federal government has virtually no capacity or design to reunite missing owners with property. Where ambiguity or conflict arises, states, holders and federal agencies should work together to attempt to resolve confusion.

Specific to the ICI drafted preamble, NAUPA notes that:

Only duties of the state are discussed. The duties of holders to act in accordance with these same principals should be acknowledged. Indeed, holders are the first line of defense in preventing owners from becoming lost in the first instance, and property is only transferred to the state where the holder is unsuccessful in contacting an owner. This duty on the part of holders should not go unmentioned.

While NAUPA acknowledges the duty to "first do no harm," there is a point in time where it is no longer cost effective for the state to maintain assets in their original form (e.g., securities). The courts have consistently determined that there is no unconstitutional taking when a state undertakes such a conversion. While it is indeed important not to "harm" owners through the unclaimed property process, there should be a point in time where the state need not continue to maintain custody of an asset, collect and post dividends, etc. NAUPA realizes that the liquidation of mutual fund accounts would reduce management fees realized by mutual fund service companies, but this is not a reason to maintain an asset in its original form indefinitely.

The preamble submitted by the ICI is extremely narrow in terms of the Uniform Unclaimed Property Act. There are other important issues that should be noted in a preamble (if there is to be a preamble; see 4 below). It would be important to note in any preamble that there is a dual purpose for state unclaimed property laws: reuniting missing owners with their property, and allowing for the windfall from any property ultimately not claimed to inure to the public good. NAUPA understands that holders do not wish to acknowledge this second purpose, but it is very much a part of the foundation of unclaimed property legislation in the United States. If the focus is merely on property that can potentially be returned, then there is a risk of losing sight of the public policy disfavoring private escheat.

Is there need for a preamble or purpose section? NAUPA believes that the Prefatory Note to the Act and Commissioners' Comments for each section adequately serve the same purpose. However, to the extent that the drafting committee concludes that a prefatory note would be desirable, attention is called to the "statement" of public policy previously drafted by the State of New Jersey in conjunction with the 1989 enactment of the State's current unclaimed property law. This statement was not enacted, but is part of the legislative history of New Jersey's unclaimed property law. The statement provides, in relevant part, that

…It is the public policy of this State that all unclaimed property shall be placed in the protective custody of the State Treasurer after the property has remained unclaimed in the hands of the holder for a specified period of time. The rights of the original party interest shall not be forfeited or extinguished. The State Treasurer serves as the conservator or trustee of the unclaimed property, acting always, with full authority, to safeguard and foster the rights of the original owner or party entitled to the property.

Any public or private provision, contract, agreement, or understanding in any form shall be void as contrary to this public policy, if the purpose or effect of that provision is to evade, avoid, or contradict the custodial taking of unclaimed property by the State Treasurer.

Any person having knowledge or information concerning unclaimed property that is or might be payable or distributable to the State Treasurer shall have a duty to notify the State Treasurer within a reasonable time. If the person having that information is the holder of the unclaimed property, he shall satisfy this duty by presenting a report to the Treasurer as set forth in this act.

Until such time as the unclaimed property is presumed abandoned, reported, and paid or delivered to the State Treasurer, a holder of unclaimed property shall have a continuing duty to take reasonable and prudent action to preserve and safeguard the property and shall not allow the property to be dissipated, transferred, converted, or reduced by any means, other than as permitted by this chapter or by regulation of the State Treasurer.

New Jersey Legislature, Assembly Amendments Proposed by Assemblyman Doyle to Senate Bill No. 888 OCR (AR) of '86.

NAUPA Submitted Documents: See Pages B-3.1 to B-3.2 of Appendix B-3 in "NAUPA's Recommendations for Presuming the Abandonment of Securities and for the Administration of Unclaimed Securities" (submitted October 29, 2014).

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Additional Issues:

Section 25 Issues: Locators

The Reporter's compilation included only a passing reference to NAUPA's proposed revision to Section 25 of the 1995 Uniform Act, providing that a person violating locator/heir finder restrictions commits an unfair and deceptive trade practice. There was no discussion of this issue at the November meeting,

The 1995 Act with NAUPA Recommended Revisions to ULC (submitted May 9, 2014) included the following proposed revision to Section 25:

(a) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property that is presumed abandoned is void and unenforceable if it was entered into during the period commencing on the date the property was presumed abandoned and extending to a time that is 24 months after the date the property is paid or delivered to the administrator. <u>A person who solicits an owner to enter into a contract during this period commits an unfair and deceptive trade practice, regardless of whether the owner executes the agreement.</u>

> This subsection does not apply to an owner's agreement with an attorney to file a claim as to identified property or contest the administrator' denial of a claim.

NAUPA feels the addition of this language is important to as to ensure that the period during which locator contracts are not permitted will be observed. Currently, the only sanction available when an impermissible contract is created is a set-aside of the contract. Locators may feel that they can freely disregard the prohibition, because the only *potential* negative outcome is the loss of a finder's fee. If there is a consensus that there should be a period of time during which the state should be given the opportunity to return property to an owner, without an owner having to pay a recovery fee, then there should likewise be some penalty imposed when this policy is not followed (particularly with respect to holders that have not reported property when it is presumed abandoned).

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Section 32: Effective date; ABA Recommendations.

The ABA has proposed that substantive changes to the 1995 Uniform Act be prospective only, and have no retroactive effect. The Reporter's compilation did not include this issue and there was no discussion at the November meeting.

NAUPA believes that the ABA's recommendation to eliminate the retroactive effect of a revised Uniform Unclaimed Property Act is overreaching. As the ABA notes, the *N.J. Retail Merchs. Ass'n et al v. Sidamon-Eristoff* decision addressed a state's attempts to reinstate a reporting requirement for a type of property that had been previously expressly exempted from the unclaimed property law. As such, the state's effort disturbed a vested right. In comparison, the same court contemporaneously reviewed the issue of whether the same state could, retroactively, reduce the abandonment period for traveler's checks, a type of property that had been consistently covered by the unclaimed property law. The court upheld the retroactive application of the law as to traveler's checks. To the extent that a new Uniform Unclaimed Property Act makes substantive changes impacting types of property that were either previously exempted or not falling under the miscellaneous intangibles provision, then the issue of the constitutionality of retroactive application could be relevant. However, NAUPA is not aware of which proposed changes to the law would fall under this classification.