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February 23, 2016

VIA EMAIL

Uniform Law Commission  
Drafting Committee -- Revise the Uniform Unclaimed Property Act  
111 N. Wabash Avenue Suite 1010  
Chicago, IL 60602

Re: National Retail Federation Comments to RUUPA Draft (2/17/2016)

Dear Commissioners:

The National Retail Federation is deeply concerned about a new, material change in the February 2016 draft of the Revised Unclaimed Property Act. Specifically, the latest draft removes the recognition that states are not entitled to retain the profit part of a gift card as that belongs to the retailer and is not abandoned property. The latest draft removes the provision specifying that the “amount abandoned by the owner is the value remaining at the time it is presumed abandoned; [except for gift cards with respect to which the amount abandoned is [60%] of the value remaining at the time it is presumed abandoned].” Oct. 2015 Draft, Sec. 3(a)(7)(C). This provision continued the rule adopted in the 1995 Act: “gift certificates . . . if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate’s face value.” 1995 Act, Sec. 2(7). NRF strongly opposes this change as well as the procedure by which it was made.

NRF has been actively participating in the discussion regarding the revision of the 1995 Uniform Unclaimed Property Act. NRF staff, representatives of member companies, and outside counsel have been in attendance at every meeting and have submitted written comments to the Committee on several occasions. At no point has the issue of the profit provision ever been part of the discussion among Committee members at public meetings. Most disturbing, this change comes after 2 years of discussions, four meetings (including one annual meeting of the full Commission at which a draft of the RUUPA was read), and as many drafts. The most recent draft, issued a mere 17 days before the final Drafting Committee meeting, completely reverses the Committee’s previous position, as well as the position of the Commission as a whole in 1995. As has been repeatedly noted at Committee meetings by the Chairs, the 1995 Act was not to be changed unless the Committee members deem a change necessary. There has been no public vote of the Committee members on this issue and no discussion with the most active interested holder group on this issue. This lack of a transparent process seems to be a departure from how other changes have been accomplished.

It is NRF's understanding that the change was made in order to allow states to choose what approach to take. To the extent that is the intent of the Committee, NRF suggests that the complete removal of the profit rule does not achieve this result. By offering no provision regarding the profit element, the Draft creates an impression that the Commission has reversed its previous recognition of the retailer's right to retain its profit. NRF respectfully requests that the profit element be restored as an optional provision to be adopted by those states that choose not to exempt gift cards entirely.

While the removal of the profit provision is the most critical issue to NRF at this point, NRF has three other comments to the Committee, primarily for clarification purposes.

First, the provisions in Sections 303 and 305 need to be cleaned up and clarified. There is no stand-alone section discussing the custody rules in situations for which no last-known address is determinable. Pursuant to its title, Section 303 applies only if the address of the apparent owner is in the adopting state. However, subsections 303(3)(B), (4), & (5) provide rules if the holder's records do not reflect the last-known address of the owner. Section 303 should probably be split into two sections – one addressing situations in which an address is determinable and one addressing situations in which it is not.

Furthermore, the placement and language of the provisions in § 303(5)<sup>1</sup> and 305(3)<sup>2</sup> prohibiting custody by a lower priority state when a higher priority state provides an exemption for a property type are confusing. NRF suggests that to remedy this problem, the problematic language be eliminated and the following language be added to Section 301:

Notwithstanding the other provisions of this Article, the State shall not take custody of property for which a State with a higher priority under this Article provides an exemption or otherwise excludes.

If Section 303 is not split and the priority rules' application to exemptions is not placed in Section 301, the language of 303(5) and 305(3) needs to be fixed internally. § 303(5) is internally inconsistent because the difference between “does not provide for the custodial taking” and “specifically exempt” is not clear. As NRF is not aware of any state that does not provide for the custodial taking of the property except through a specific exemption or deliberate exclusion from the scope of remittable property, these two provisions seem to mean the same thing but result in different conclusions.<sup>3</sup> Some type of clarification needs to be made here. The

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<sup>1</sup> “. . . if the property is specifically exempt from custodial taking under the law of the state of the last-known address of the apparent owner, or if not, the state of domicile of the holder, the property is not subject to the custody of this state.”

<sup>2</sup> “. . . unless the property is exempt from custodial taking under the law of the other state.”

<sup>3</sup> Because pursuant to the Act, non-remittable items can either be addressed through an exemption from otherwise applicable remittance rules or as an exclusion from the definition of remittable property, NRF also suggests that the concept of “specific exemption” be widened to encompass both concepts.

structure of § 305(3) has a similar, but worse problem.<sup>4</sup> Including the limitation provision at the end of subsection 305(3) implies that the limitation only applies to exemptions in the state of last known-address, not exemptions in the state of domicile. Based on previous drafts and the similar provision in § 303(5) discussed above, NRF does not believe this is the intent of the Drafting Committee. Thus, the last clause of §305(3) should be changed to “unless the property is specifically exempt or otherwise excluded from custodial taking under the law of the state of the last-known address of the apparent owner or the state of domicile of the holder.”<sup>5</sup>

Second, NRF acknowledges the Committee has removed merchandise credits from the definition of property and appreciates this development. NRF asks the Committee to adopt three clarifying changes. The Act should be clear that the form in which the merchandise credits are issued is immaterial to the exclusion. Currently, the provision refers to “in store credits.” It is not clear from this language whether this includes merchandise credits that are issued in a physical form, such as a gift card. Additionally, because many retailers have both physical and on-line stores, NRF suggests that the qualifier “in store” be removed.

Finally, the definition of gift card has been slightly altered to specifically refer to the definition of stored value card. NRF notes that a stored value card is defined as “a record” and interprets this to mean that an item functioning as a gift card, regardless of form, will be within the gift card definition. Thus, a digital code or an app will be a record and thus come within the definition of gift card.

NRF will be at the February meeting in Dallas and respectfully requests the Commissioners to reach out to its representatives regarding the profit provision.

Sincerely,

Diann L. Smith



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<sup>4</sup> As always, NRF does not recognize the validity of a place of transaction priority rule as being consistent with U.S. Supreme Court common law in any circumstance. However, for purposes of cooperation, NRF offers these clarifying comments notwithstanding this overarching objection.

<sup>5</sup> Or, even better, the last clause of § 305(3) should be removed and a new §305(4) should be added with the intended qualification.