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Unclaimed Property

On Nov. 8-9, the Uniform Law Commission's Drafting Committee to rewrite the 1995 Uniform Unclaimed Property Act met for a second time in Washington, D.C. to advance its consideration of legal, policy and compliance issues. The ULC process is currently targeted to produce a 2016 Uniform Unclaimed Property Act that would accomplish the goals of modernization and increased uniformity. In this article, Kendall L. Houghton of Alston & Bird discusses the latest developments raised in the meeting.

Update on the Uniform Law Commission's Drafting Committee to Rewrite the 1995 Uniform Unclaimed Property Act



BY KENDALL L. HOUGHTON

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On Nov. 8-9, the Uniform Law Commission's (ULC) Drafting Committee to rewrite the 1995 Uniform Unclaimed Property Act (UUPA) met for a second time in Washington, D.C. to advance its consideration of legal, policy, and compliance issues that have to date generated the submission of more than 1,500 pages of commentary and proposed statutory language from a variety of stakeholders. The ULC process is currently targeted to produce a 2016 Uniform Unclaimed Property Act that would accomplish the goals of modernization (by addressing current business models and the prevalence of e-commerce) and increased uniformity (by introducing a version of UUPA that both states and holders would support as a mechanism to enhance compliance). As this meeting made clear, although the

ULC has spent a year laying the groundwork for this project, it is very much in the early stages and interested parties will need to maintain their attention and involvement. There clearly are many areas about which holders and the states (more than two dozen of which sent representatives to the meeting, along with the National Association of Unclaimed Property Administrators — NAUPA— and at least three of the larger contract audit firms) have articulated very different viewpoints that will need to be resolved as the project moves forward.

Overview

The meeting agenda was dense and focused discussion on issues preliminarily classified by the Drafting Committee and its Reporter, Prof. Charlie Trost, as being appropriate focal points of a rewrite effort. The Reporter and Drafting Committee Co-Chairs tentatively classified such issues into four categories:

- (1) uncontested,
- (2) contested (procedural),
- (3) contested (substantive), and

(4) miscellaneous, with the goal of providing the Reporter guidance that would enable him to draft a revised act for further discussion and review by the Drafting Committee over the upcoming year. Presentations by state, holder, and owner representatives during this meeting highlighted the significant disagreement regarding appropriate ULC policies on issues such as (i) codification of the derivative rights doctrine and its role in interpreting and applying unclaimed property laws, (ii) the states' use of contingent fee compensation arrangements for contract audit firms, (iii) implementation of a business-to-business (B2B) exemption, and (iv) proper dormancy standards for investment assets such as securities and brokerage/retirement accounts.

Due to the active discourse on these and other issues, the Drafting Committee was unable to conclude discussion of all issues listed on its agenda; as a consequence, it directed the Reporter to proceed with drafting the revised act in the absence of specific Drafting Committee directives. The next meeting of the ULC Drafting Committee is scheduled for Feb. 27-28 in Washington, D.C., and the intention is for the Reporter to complete and circulate the draft revised act in advance of that meeting, so that consideration will focus on specific proposed statutory language, rather than general issues/concepts.

Summary of Contentious Issues

The Drafting Committee ran a disciplined meeting, with the Co-Chairs exercising control over the number and length of presentations by state, holder, and owner representatives. Due to the number of issues under consideration, the Drafting Committee directed commentators to assume that their written submissions (if any) had been reviewed by the committee members, and hence to restrict oral comments to policy considerations and other information that was not duplicative of written comments. Nevertheless, numerous commentators addressed the Drafting Committee on behalf of their organizations and/or constituents. The National Association of Unclaimed Property Administrators (NAUPA) had roughly 40 state treasurers and unclaimed property administrators in the audience, and contract audit firm

Kelmar Associates LLC and hired NAUPA legal counsel Lynden Lyman (who also works with contract audit firm Xerox State and Local Solutions, d/b/a Unclaimed Property Clearinghouse), both delivered remarks on behalf of the states. [NAUPA also sat at the Drafting Committee dais, pursuant to its designation as an Advisor to the ULC for this project.] Similarly, the Council On State Taxation (COST) and Unclaimed Property Professionals Organization (UPPO) had designated spokespersons¹ as well as other observers in attendance, and many other trade associations (e.g., Investment Company Institute, SIFMA, STA, Bankers Association, American Council of Life Insurers, etc.) were also present. The American Bar Association (ABA) also had three representatives in attendance and seated at the dais (due to the ABA's Advisor status) who actively contributed to the dialogue on most issues under review.

The Drafting Committee entertained presentations, engaged in Q&A with the presenters, and also conducted Committee-level discourse on many of the agenda issues as a prelude to determining if there was Committee consensus on a specific approach to issues (including the possible presentation of alternative approaches) that the Reporter should take in drafting statutory language. It would probably be fair to say that given the breadth of issues under review, participants walked away from the meeting feeling that the Drafting Committee had “sided” with their view on some issues and rejected their view on other issues, but the Co-Chairs repeatedly noted that the drafting directives being issued by it to Reporter Trost were solely for the purpose of getting a draft revised act into shape and not to indicate that the Drafting Committee—much less the ULC as a whole—had decided its position on any of the substantive and procedural issues that are currently in play.

A summary of Drafting Committee directives regarding certain of the more substantive and/or disputed issues follows:

FOREIGN ADDRESS PROPERTY: The Drafting Committee has directed the Reporter to make clear that the UUPA does not cover property owned by foreign residents or located outside the U.S.

GIFT AND STORED VALUE CARDS: The Drafting Committee directed the Reporter to clarify that “intangible property” includes gift cards and stored value cards (absent a state's election to exempt such property, as some 35 states currently provide). In addition, the Drafting Committee has formed a special working group to address the complex issues associated with these instruments and to address the implications of the derivative rights doctrine for this type of property (e.g., what is the effect of a gift card being redeemable solely for goods or services, and not for cash, in terms of what the state may exercise its custodial jurisdiction over?). The states' viewpoint on this issue — articulated by Lynden Lyman on behalf of NAUPA — is that a state is free to “monetize” the unredeemed value on any form of stored value card or other prepaid property, including those redeemable solely for merchandise or services, and require the reporting and remittance of the unredeemed

¹ By way of disclosure, this author served as the designated spokesperson for UPPO in her role as a co-chair of UPPO's Government Relations and Advocacy Committee. However, the comments presented herein represent the views of the author and are not attributable to UPPO.

value in cash. The ABA responded that they had very serious constitutional concerns with such an approach and argued that states could not constitutionally eschew cash with respect to gift cards and stored value cards that are redeemable by their owners only for merchandise or services. The ABA also cited numerous authorities in support of this position. No industry representatives were present to comment on this issue.

RECORD RETENTION/STATUTE OF LIMITATIONS (REPOSE): The Drafting Committee has directed the Reporter to (1) include a 10-year record retention requirement (though the scope of records to be retained is yet to be established and may be the subject of an NAUPA/ABA joint recommendation), and (2) to draft an equivalent statute of repose that would prevent a state from auditing a holder more than 5 years after a return was filed and more than 10 years after the duty (to file/pay property) arose in the absence of a return or in the event of a fraudulent return.

B2B EXEMPTION: The Drafting Committee directed the Reporter to draft alternative placeholder business-to-business exemption provisions for review at the next meeting, whereby the term “business” is defined (narrowly to broadly) and a range of property types is considered; a potential carve-out of business property subject to contractual agreement between businesses is also under review. The Drafting Committee has requested additional information from/regarding those states that currently have B2B exemptions.

DUE DILIGENCE: The Drafting Committee directed the Reporter to draft holder due diligence (i.e., owner outreach) provisions that “notionally” follow NAUPA’s proposed due diligence guidelines.

CONTINGENT FEE AUDITS: The Drafting Committee entertained the questions whether (1) a state should be prohibited from delegating its audit function to contract firms; (2) whether contingent fee compensation arrangements should be prohibited for such contracts, and (3) whether certain audit controls (e.g., limits on the length of contracts, requiring disclosure of contingent fee compensation arrangements, holder access to state representatives overseeing the audit, and other audit controls) should be included in the draft act. The Drafting Committee tentatively answered the first two questions in the negative and will continue discussions of the third question at the next meeting.

LIFE INSURANCE PROCEEDS: A variety of issues were posed by the Drafting Committee relating to the topic of life insurance, with the overarching question being whether the ULC should defer to state insurance law for the policy determination of whether/how the Social Security Death Master File is relevant to such a determination of dormancy of insurance proceeds. After lengthy presentations by NAUPA, state unclaimed

property and insurance regulators, and insurance industry representatives, the Drafting Committee decided to form a special working group and invited further submissions on this topic.

SECURITIES: The securities industry presented a recommendation that the dormancy standard for securities (generally discussed as encompassing brokerage accounts and mutual funds) be conformed to the SEC “lost securityholder” standard, which would premise the running of a dormancy period on receipt of two undelivered-mail notices; the ABA likewise addressed numerous concerns with the unclaimed property treatment of securities and investment assets. The Drafting Committee directed the Reporter to:

(1) adopt this dormancy standard;

(2) establish dormancy standards for traditional IRA and Roth IRA accounts that are premised on the later of the owner reaching the age of 70.5 years/85 years, respectively, or the holder’s receipt of an undelivered-mail notice;

(3) require states to maintain investment assets in the form in which they were remitted by the holder or to restore the owner’s property upon receipt of an owner claim thereto;

(4) establish exemptions for restricted (and possibly privately held) securities; and

(5)

address “worthless” securities (with alternative proposals to permit holders to make this determination, or to accord discretion to the state administrator).

ADMINISTRATIVE APPEALS: The Drafting Committee invited the ABA to submit a [mostly completed] proposal for an administrative appeals process to be incorporated into the draft act.

BURDEN OF PROOF: Given the existence of disagreement over the appropriate standard for the burden of proof, the Drafting Committee directed the ABA to produce written recommendations on the issue and deferred further discussion on the issue until the next meeting.

Conclusion

The next meeting is now scheduled for Feb. 27-28, again in Washington, D.C., where the new first-draft 2016 Uniform Act will presumably be unveiled and dissected by the Drafting Committee. There will be much more focused presentations at that meeting by both the Advisors (ABA and NAUPA) and the many registered Observers, including on those issues where the draft Uniform Act will contain Reporter Trost’s recommended approach in the absence of input from the full Drafting Committee.