



Unclaimed Property ALERT ■

MARCH 10, 2014

Uniform Unclaimed Property Act May Literally Be “Reformed” if Drafting Effort Is Successful

On February 21-22, 2014, the Uniform Law Commission’s (ULC) Drafting Committee assigned to engage in a rewrite of the 1995 Uniform Unclaimed Property Act (UUPA) held its first working meeting for that purpose in Washington, D.C. This advisory provides a summary of the meeting, with a focus on:

- the ULC process that will be followed, and the critical importance for holders to voice their positions on issues of importance to them through the submission of written position papers and supporting documentation;
- the “tone” of the meeting—who attended, the “politics” of the ULC and this Drafting Committee and the tenor of interactions between various stakeholders;
- the most significant/important issues that were discussed, and issues that appear to be open to potential consensus between holders and states;
- which issues will remain the most controversial and potentially least likely to be subject to consensus view; and
- next steps in the drafting process.

Participants at the Meeting

The ULC is comprised of two commissioners from each state who are appointed by the governor or legislature. Commissioners are lawyers who come from private practice, government, industry and academia. Commissioners serve without compensation. The ULC does its work on uniform acts through drafting committees composed of commissioners who have expressed an interest in working on the particular subject. The Drafting Committee to Revise the Uniform Unclaimed Property Act (hereafter, the “UUPA Drafting Committee” or just the “Drafting Committee”) is co-chaired by Commissioner Rex Blackburn of Idaho and Commissioner Michael Houghton of Delaware. Commissioner Blackburn’s travel to D.C. for the meeting was disrupted by weather and he was unable to attend, so the meeting (hereafter referred to as “Meeting 1”), which will be one of several that will precede the ultimate consideration of revisions to the UUPA

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by the full ULC, was chaired by Co-Chair Houghton. Commissioner Charles A. Trost, from Nashville, is serving as the reporter for the Drafting Committee. Like Co-Chairs Houghton and Blackburn, Commissioner Trost is a longtime commissioner and currently serves as the treasurer of the ULC.

In addition to Co-Chairs Blackburn and Houghton and Reporter Trost, the Drafting Committee consists of ten additional commissioners from around the country. Six of the 10 are engaged in (or retired or semi-retired from) the private practice of law. Three are government lawyers, and one is a professor at the University of Washington School of Law.

Also seated at the table were Ethan Millar, partner of Alston & Bird, who is the official American Bar Association advisor to the Drafting Committee, and two other representatives of the ABA Business Law Section. Across the table from them were Beth Pearce, treasurer of Vermont, and Carolyn Atkinson, deputy treasurer of West Virginia, both of whom serve as official advisors to the Drafting Committee on behalf of the National Association of Unclaimed Property Administrators (NAUPA). Accompanying them were Walter Graham, bureau chief of the Florida Bureau of Unclaimed Property and current NAUPA president; David Milby, NAUPA's executive director; and Lynden Lyman, NAUPA's legal counsel.

Official Observers (who are encouraged to participate actively in the proceedings) included Alston & Bird's Kendall Houghton, who is serving as the official representative of the Unclaimed Property Professionals Organization (UPPO), along with UPPO officers and board members Karen Anderson and Debbie Zumoff; representatives from the National Association of State Treasurers, the National Association of Attorneys General, the National Conference of Insurance Legislators, the American Council of Life Insurers (ACLI), the Council On State Taxation (COST), the American Bankers Association, the Investment Company Institute (ICI) and others, including Alston & Bird's John Coalson.

UUPA Drafting Committee's Unique Process

Reporter Trost explained that the normal process for a rewrite of a uniform act begins at Meeting 1 with the reporter's presentation of a new "straw man" draft act, and then the rest of the Drafting Committee's working meetings are devoted to pulling it apart/reshaping/adding, etc. However, Reporter Trost and Co-Chair Houghton decided jointly not to utilize that process with respect to the UUPA rewrite, but instead to use Meeting 1 to surface the issues that all stakeholders want to tackle, then to compile materials and position papers on all such issues, and then to draft the straw man act for discussion at the subsequent working meeting and thereafter.

Our view is that this approach is preferable to the normal process and quite strategic on the part of Co-Chair Houghton and Reporter Trost, since this particular rewrite will involve many contentious and divisive issues, and many stakeholders with sharply differing points of view that would clamor to be heard and considered.

The ULC has solicited written comments from all interested stakeholders and has requested that such comments be submitted by mid-April of 2014. Based on the discussion at Meeting 1, and written comments that will be submitted, Reporter Trost will be preparing a working draft of a revised UUPA for discussion at the next meeting of the Drafting Committee, which will be held in the fall of 2014. Another draft will be prepared following discussion at that meeting, to be discussed by the Drafting Committee in another meeting to be held in the spring of 2015. It is contemplated that a proposed revised UUPA will be prepared following that meeting and presented to a full meeting of the ULC at its annual meeting in the summer of 2015.

Tone/Atmospherics

Meeting 1 focused on 76 issues for discussion that had been embedded by Reporter Trost into the current version of the UUPA (the “1995 UUPA”), which the ULC distributed prior to the meeting. This annotated document, along with a legal memorandum discussing issues for consideration in the revision of the UUPA, served as the basis for two days of discussion at Meeting 1. Indeed, Meeting 1 covered essentially all of the 76 identified issues.

Day 1 of Meeting 1 involved an in-depth discussion of many of the identified issues (including some new issues that had not been identified by the ULC in advance of the meeting) by participants sitting at the table (i.e., commissioners, Drafting Committee co-chair and reporter, and the advisors from ABA and NAUPA) and in the audience (many holder advocates, owner search firm representatives; state government representatives, including Maryland and Virginia, as well as NAUPA delegates; third-party audit firm representatives; and plenty of trade association and consulting firms representatives). Day 1 also focused on two questions posed by Reporter Trost with respect to each issue identified in the annotated 1995 UUPA: (1) is this issue a real one (or, has it been captured correctly)? And (2) is this an issue capable of being addressed and that should be addressed in the drafting (subset question: is it capable of being reduced to a consensus treatment?)?

Day 2 seemed to focus more on issues that participants felt had *not* been captured in the annotated 1995 UUPA document—as one example, all of the Securities Transfer Association (STA) securities-specific issues (which were received late by the ULC and therefore were not embedded into the reporter’s document) and the underlying question of why unclaimed property laws focus on contact for a broad class of accounts that are not appropriate to escheat on this basis, given the states’ continuing assertions during the course of Meeting 1 that the goal of the states’ enforcement efforts is solely to return property to their rightful owners.

Issues Identified as Priorities by Stakeholders and the Reporter

A common set of issues have already emerged at this early stage, including:

- treatment of business-to-business (B2B) property;
- treatment of “gift cards” and similar items;
- application of contractual anti-limitations provisions;
- audit conduct standards, including remediation burden of proof standards;
- state statutes of limitations on assessment;
- definition of “holder”;
- definition of “last known address”;
- treatment of foreign property; and
- various industry specific concerns.

At Meeting 1, the ABA indicated that it would submit a letter to the ULC by mid-April of 2014 that sets forth the ABA's position on a number of significant topics, including the following:

- derivative rights doctrine;
- definition of "holder";
- definition of "last known address";
- federal preemption authorities with respect to amounts owed to the federal government;
- life insurance proceeds;
- securities;
- B2B exemption;
- foreign-owned property;
- third-priority rule;
- escheat by state of domicile of property exempted by first-priority state;
- whether first- or second-priority state can claim amounts by estimation; and
- statute of limitations.

The ABA is also coordinating with other organizations on several of these topics, including UPPO, NAUPA, the ACLI (on life insurance proceeds) and the ICI (on securities issues). Previously, the ABA had been working on its own "Model" Unclaimed Property Act to address these issues, but agreed to defer work on that Act (at least for the time being) to focus its efforts on the UUPA revision project.

Similarly, UPPO also indicated that it will be submitting five papers that are under development by UPPO working groups. UPPO is also working with NAUPA, the ABA, the STA and other organizations on certain issues. Other organizations (for example, ICI, ACLI and COST) have committed to provide additional material to the Drafting Committee regarding issues that are important to their members. There is significant pressure on all stakeholders to provide written inputs to the Drafting Committee as soon as possible, since the reporter requested that all material be provided **WITHIN 60 DAYS FROM MEETING 1 (I.E., BY APRIL 23, 2014)**.

For some important issues, there already appears to be a consensus, at least to some extent. In particular, all sides appeared to agree that the revised UUPA should include an administrative appeals process, as well as a statute of limitations on the states' rights to assess holders (though the exact terms of any statute of limitations are still being debated). There also did not appear to be much division on certain other significant issues, such as the definition of "domicile" for purposes of the second-priority rule and the elimination of aggregation rules, to name a few.

Most Consensus-Resistant Issues

Of the above-mentioned issues, certain issues quickly emerged as "controversial" issues that, as expected, may be resistant to general consensus. The following are examples of those issues and a brief summary of the competing views:

- **B2B” exemptions:** B2B exemptions generally exclude property resulting from business relationships. B2B exemptions recognize that state unclaimed property laws were not intended to safeguard the property of businesses, which are typically much better able than consumers (as well as states) to track and claim any outstanding amounts owed to them. Currently, however, only 15 states have adopted or recognize some type of B2B exemption, and a B2B exemption provision is not contained in any version of the UUPA. Moreover, even in those states that provide for a B2B exemption, the exemptions vary significantly in scope and application and thus may not apply to all obligations owed between businesses. The holder community will seek the adoption of a uniform and comprehensive B2B exemption in the revised UUPA that applies checks as well as credit balances. States, on the other hand, will likely seek to exclude a B2B exemption entirely or adopt a more limited B2B exemption—for example, one that only applies to credit balances.
- **Foreign-address property:** Considerable debate has taken place as to whether a holder’s state of domicile can escheat foreign-address property. The legal considerations associated with this issue are complex, but the question is essentially whether the escheat of foreign-address property is sanctioned by the jurisdictional priority rules set forth in *Texas v. New Jersey* and its progeny, and whether it is constitutionally permissible. Holders will likely want to see a revised UUPA that explicitly prohibits the escheat of foreign-address property, while states, and most notably Delaware, will advocate for a revised UUPA that explicitly sanctions it.
- **Derivative rights doctrine:** The derivative rights doctrine is the principle underpinning all custodial unclaimed property laws that treats the state, through the operation of its unclaimed property law, as “standing in the shoes” of the missing owner of the property. The holder community will likely advocate for the recognition of that doctrine through the revised UUPA. The states, on the other hand, will likely want to keep the UUPA drafted as it currently is, which arguably is inconsistent with the derivative rights doctrine in some respects. For example, the 1995 UUPA requires the escheat in cash of unredeemed balances on gift certificates that are by their terms redeemable solely for merchandise or services. The 1995 Act also includes an “anti-limitation” provision that permits states to claim property that the owner could not, as a result of the expiration of a contractual or statutory limitations period.
- **Contingent fee auditors:** A source of frustration for holders is the use of contingent fee auditors. Holders will likely seek to limit or curtail the use of these third-party auditors by states. States will likely resist any limitation on their right to use third-party auditors since they view them as vital to the administration of their laws.
- **Estimation techniques:** The use of estimation to determine a holder’s unclaimed property liability is a highly controversial topic. Some holders and practitioners contend that under no circumstance should estimation be used to quantify an unclaimed property liability, and equate estimation—particularly when used by certain states and contract firms to generate large proposed assessments—to a disguised tax. On the other hand, prohibiting the application of estimation in any situation could encourage lax owner recordkeeping practices on the part of holders, contravening the primary purpose of unclaimed property laws; hence, states view estimation as appropriate either to generate an unclaimed property liability or potentially as a penalty for a holder’s failure to keep records that are required by law to be maintained. Where estimation is conceded to be appropriate, holders take the position that estimation should be used infrequently and only when states have established clear regulations and guidelines, such that estimations are “reasonable” and tailored to the specific circumstances of the industry, property types and holder.

Given the fact that Reporter Trost is charged with drafting a revised UUPA regardless of the division of views on the above-enumerated issues, it seems likely that each side will have some “winner” and some “loser” issues embedded in the resulting act.

What's Next

As noted above, the Drafting Committee has solicited written comments from all interested stakeholders and has requested that such comments be submitted by mid-April. Reporter Trost will then prepare a working draft of a revised UUPA for discussion at the next meeting of the Drafting Committee, which will be held in the fall of 2014 (probably in early October, according to committee members, but the exact date has yet to be set).

If any of the above-referenced issues are of particular interest to you, we encourage you to contact Alston & Bird to discuss them and to become involved with the organizations that have committed to address them, as work is already underway to prepare the written feedback that the Drafting Committee has requested.

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