

April 12, 2017

Representative Gerald McCormick
Representative Kevin Brooks
Representative Karen Camper
Representative Jim Coley
Representative Craig Fitzhugh
Representative David Hawk
Representative Patsy Hazlewood
Representative Gary Hicks
Representative Harold M. Love, Jr.
Representative Steve McDaniel
Representative Charles Sargent
Representative Ryan Williams
Representative Andrew Farmer
Senator Doug Overbey

Cc: Charlie Trost, reporter of Uniform Law Commission Drafting Committee to Revise the Uniform Unclaimed Property Act

RE: The Unclaimed Property Professionals Organization's comments regarding H.B. 420 and S.B. 371

Dear House Finance, Ways, and Means Subcommittee:

The Unclaimed Property Professionals Organization (UPPO) is the national trade association of unclaimed property holders and service providers. We represent over 400 unclaimed property holders and service providers and 1,300 unclaimed property professionals of diverse industries and employer size. UPPO served as an observer to the Uniform Law Commission's Drafting Committee to Revise the Uniform Unclaimed Property Act, and advocates for fairness in unclaimed property laws and regulations, and respectfully submits our concerns with H.B. 420 and S.B. 371 (the bills) which enacts a version of the Revised Uniform Unclaimed Property Act (RUUPA).

Section 66-29-102(10) – Definition of holder

Comment: The definition of "holder" should (1) make it clear that there can be only one holder having an obligation to report/remit any particular item of unclaimed property, and (2) provide the basis for determining which among all possible persons is the applicable holder of any obligation for unclaimed property purposes. Under the definition of "holder" as proposed in the bills, there could be many

situations in which more than one person or entity could be considered a holder with respect to a single item of unclaimed property.

UPPO believes that the definition of “holder” should make clear that the applicable holder responsible for complying with unclaimed property laws is the party who is *directly and primarily* obligated to the owner with respect to the obligation.

Proposed alternative language: “‘Holder’ means the person directly and primarily obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to this [act].”

Section 66-29-102(24) – Definition of property

H.B. 420/S.B. 371 language: Does not include exemption of 529A plans in definition of property

Comment: We respectfully ask that the Bills be amended to specifically exclude 529A plans from the definition of property. RUUPA provides, *“‘Property’...(C) does not include: (i) property held in a plan described in Section 529A of the Internal Revenue Code[, as amended], 26 U.S.C. Section 529A.”* This exclusion was intended to create an exemption because these plans are designed to allow people with disabilities to save money and also qualify for government benefits. UPPO recommends that Tennessee amend the bills to include an exemption from the definition of property for 529A plans as described by the Internal Revenue Code and heed the advice of the ULC.

Sections 66-29-103 – Foreign owned property

Comment: UPPO firmly believes foreign-addressed property should not be included under Tennessee’s unclaimed property law. Requiring the escheatment of foreign-address property violates federal law concerning state jurisdiction and intrusion into foreign affairs, the Due Process Clause, and the Commerce Clause of the U.S. Constitution. In addition, the language of Section 3 puts a formidable burden on holders and their legal counsel, to review and construe the laws of a foreign country knowing whether or not to remit the property to Tennessee; UPPO recommends that L.B. 141 be altered to include an exemption of foreign addressed property. UPPO recommends that Tennessee affirmatively exclude foreign-owned property from the bills, or, at a minimum, remain silent on the issue.

Section 66-29-105(14)(b) - When tax-deferred accounts are presumed abandoned

H.B. 420/S.B. 371 language: *“Notwithstanding § 66-29-113, property, other than property specified in § 66-29-106, whose owner is known to the holder to have died and left no one to take the property by will and no one to take the property by intestate succession, is presumed abandoned without regard to any activity or inactivity within specified abandonment periods.”*

Comment: In the RUUPA, there is no expressed requirement for holders to complete a Death Master File search. UPPO supports the decision to omit such a requirement as life statuses is not an automatic trigger for property to become payable without verified (certified death certificate) proof of death. Most holders do not employ a regular process to research or verify death in the ordinary course of their business, in the absence of receipt of an apparent notice of death and the language of this section mirrors that reality. Therefore, holders don’t have a way to know if the owner *“...left no one to take the*

property by will and no one to take the property by intestate succession...” therefore it is more appropriate to apply the presumption of abandonment periods to such accounts/property to allow for the heirs/rightful owner to come forward. UPPO strongly opposes the notion of escheating all property based on the death of the owner without a specified period of presumption of abandonment.

Section 66-29-107 – When other tax-deferred accounts are presumed abandoned

H.B. 420/S.B. 371 – “Except as otherwise provided in § 66-29-113, and except for property described in § 66-29-106, property held in a governmental plan, as that term is defined in 26 U.S.C. § 414, and property held in a program described in Section 529A of the Internal Revenue Code (26 U.S.C. § 529A), property held in an account or plan, including a health savings account, that qualifies for tax deferral under the income tax laws of the United States is presumed abandoned if it is unclaimed by the owner three (3) years after the earlier of:

- (1) The date, if determinable by the holder, specified in the income tax laws and regulations of the United States by which distribution of the property must begin to avoid a tax penalty, with no distribution having been made; or*
- (2) Thirty (30) years after the date the account was opened.”*

Comment: Although RUUPA does not provide for the return mail component of the presumption of abandonment for other tax-deferred accounts, we believe that language in Section 203 of the RUUPA (see below) should also be applied to H.B. 420/S.B. 371 Section 66-29-107.

“(1) the following dates:

- (A) except as in subparagraph (B), the date a second consecutive communication sent by the holder by first-class United States mail to the apparent owner is returned to the holder undelivered by the United States Postal Service; or*
- (B) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered by the United States Postal Service;”*

Section 66-29-108 – When Uniform Transfer To Minor Act (UTMA) accounts are presumed abandoned

H.B. 420/S.B. 371 – “...property held in an account established under title 35, chapter 7, is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened three (3) years after the later of...”

RUUPA language: Section 204 “...property held in an account established under a state’s Uniform Gifts to Minors Act or Uniform Transfers to Minors Act is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened three years after the later of:...”

Comment: RUUPA specifically addresses Uniform Gift to Minors Act (UGMA) and Uniform Transfers to Minors Act (UTMA) accounts. The Tennessee bills address accounts established under title 35, chapter 7 which is a UTMA account. This leaves the presumption of abandonment for UGMA accounts in question. UPPO recommends adopting the exact RUUPA language for this section to ensure holders aren’t confused about UGMA escheatment requirements.

Section 66-29-113 - Indication of interest

H.B. 420/S.B. 371 - Substantially similar to RUUPA.

RUUPA language: Section 210

Comment: UPPO generally agrees and supports Section 66-29-113. It identifies owner contact types which will lift or prevent presumptive abandonment. UPPO would also advocate for the inclusion first-class or superior mailings to owners in the ordinary course of the holder's business as bona fide owner contact as well as the automatic reinvestment of dividends, interest and other cash distributions in a variety of property type contexts, i.e., banking, mutual fund, general securities, broker dealer accounts, etc.

Tennessee currently recognizes the non-return of mail in the ordinary course of business as bona fide owner contact. UPPO encourages this continued practice.

Sections 66-29-116 and 66-29-120 – Taking custody of property

Comment: UPPO respectfully asks that the bills be amended to include the alternative language provided below because the language of these sections are confusing and potentially unconstitutional and likely in conflict with the Supreme Court's decision in *Texas v. New Jersey*, 379 U.S. 674 (1965) as that decision pertains to the conditions necessary for a state to validly assert jurisdiction over property presumed abandoned, specifically:

- **Section 66-29-120 should be deleted** - The Third Rule of Escheat is likely unconstitutional and was rejected as such most recently in the Third Circuit Court Appeals decision in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*.
- **Section 66-29-119(a)(2) should be deleted** - This provision conflicts with the Full Faith & Credit clause of the US Constitution and is simply another variant of the third priority rule, since all states now have a law "providing for" the custodial taking of property.
- **Section 66-29-117(2) should be deleted** - The Supreme Court has stated numerous times that the records of the holder determine the location of the true owner of the property. This provision allows the State administrator to make a unilateral determination of the apparent owner's last-known address without providing any criteria to use in making the determination and using records outside of the holder's control.
- **Section 66-29-119(b) should be deleted** - The Supreme Court has instructed parties to use the "last known address" of a true owner; this language is in direct conflict by introducing the concept of a temporary address, with no guidance on how anyone is to determine if addresses are permanent or temporary.
- **The word "specifically" should be deleted from 66-29-119(b)(1) and (2)** - The use of "specifically" allows auditors to try to overrule state legislatures, who may have decided to exempt property by simply removing the property type from the definition of property subject to the unclaimed funds statute.
- **Section 66-29-116(4) should be deleted** - This language directly conflicts with the choice of law rule promulgated by the Supreme Court by inserting the address of the insured person as a First Rule address when the address of the true owner (the beneficiary) is unknown.

Proposed change:

SECTION 66-29-116. ADDRESS OF APPARENT OWNER TO ESTABLISH PRIORITY.

"In this [article]:

(1) the last-known address of an apparent owner is any description, code, or other indication of the location of the apparent owner which clearly identifies the state where the apparent owner resides, regardless of whether the description, code, or indication of location is sufficient to direct the delivery of first-class United States mail to the apparent owner;

(2) if the United States postal zip code associated with the apparent owner is for a post office located in this state, this state is deemed to be the state of the last-known address of the apparent owner unless other records of the holder associated with the apparent owner specifically identify the physical address of the apparent owner to be in a different state; and

(3) if the address under paragraph (2) is in a different state, the different state is deemed to be the state of the last-known address of the apparent owner; ~~and~~

~~(4) the address of the apparent owner of a life or endowment insurance policy or annuity contract or its proceeds is presumed to be the address of the insured or annuitant if a person other than the insured or annuitant is entitled to the amount owed under the policy or contract and the address of the other person is not known by the insurance company and cannot be determined under Section 302.~~

SECTION 66-29-117. ADDRESS OF APPARENT OWNER IN THIS STATE.

The administrator may take custody of property that is presumed abandoned, whether located in this state or another state, or in a foreign country if:

(1) the last-known address of the apparent owner, as shown on the records of the holder, is in this state; ~~or~~

(2) ~~the records of the holder do not reflect the identity or last known address of the apparent owner, but the administrator has determined that the last known address of the apparent owner is in this state.~~

SECTION 66-29-119. WHEN RECORDS SHOW MULTIPLE ADDRESSES OF APPARENT OWNER.

(a) Except as otherwise provided in subsection (b), if records of a holder reflect multiple addresses for an apparent owner and if this state is the state of the most recently recorded address, this state may take custody of property presumed abandoned, whether located in this state or another state.

(b) ~~If it appears from records of the holder that the most recently recorded address of the apparent owner under subsection (a) is a temporary address and if this state is the state of the next most recently recorded address that is not a temporary address, this state may take custody of the property presumed abandoned.~~

SECTION 66-29-119. HOLDER DOMICILED IN THIS STATE.

Except as otherwise provided in subsection (b) or in Section 302 or 303, the administrator may take custody of property presumed abandoned, whether located in this state, another state, or a foreign country, if the holder is domiciled in this state or is the state or a governmental subdivision, agency, or instrumentality of this state, and

(1) another state or foreign country is not entitled to the property because there is no last-known address in the records of the holder of the apparent owner or other person entitled to the property; ~~or~~

~~(2) the state or foreign country of the last known address of the apparent owner or other person entitled to the property does not provide for custodial taking of the property.~~

~~(b) The property is not subject to the custody of the administrator under subsection (a) if:~~

~~(1) the property is specifically exempt from custodial taking under the law of the state or foreign country of the last-known address of the apparent owner; or~~

~~(2) the property is specifically exempt from custodial taking under the law of this state.~~

~~(c) If the holder's state of domicile has changed since the time the property was presumed abandoned, the holder's state of domicile in this section is deemed to be the state where the holder was domiciled at the time the property was first presumed abandoned.~~

~~SECTION 66-29-120. CUSTODY IF TRANSACTION OCCURRED IN THIS STATE.~~

~~Except as otherwise provided in Sections 302, 303, and 304, the administrator may take custody of property presumed abandoned whether located in this or another state if: (1) the transaction involving the property occurred in this state;~~

~~(2) the holder is domiciled in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the holder's domicile, the property is not subject to the custody of the administrator; and~~

~~the last known address of the apparent owner or other person entitled to the property is unknown or in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the last known address, the property is not subject to the custody of the administrator."~~

Section 66-29-142 – Sale of Securities

H.B. 420/S.B. 371(as amended) - Amended S.B. 371 now prescribed the treasurer to "sell or otherwise liquidate a security no sooner than eight (8) months, but no later than one (1) year, after receiving the security and giving the apparent owner notice under Section 66-29-130(b)(1) and (2) that the treasurer holds the security."

RUUPA language: Section 701

"(a) Subject to Section 702, not earlier than [three] years after receipt of property presumed abandoned, the administrator may sell the property.

(b) Before selling property under subsection (a), the administrator shall give notice to the public of:

(1) the date of the sale; and

(2) a reasonable description of the property.

(c) A sale under subsection (a) must be to the highest bidder:

(1) at public sale at a location in this state which the administrator determines to be the most favorable market for the property;

(2) on the Internet; or

(3) on another forum the administrator determines is likely to yield the highest net proceeds of sale.

(d) The administrator may decline the highest bid at a sale under this section and reoffer the property for sale if the administrator determines the highest bid is insufficient.

(e) If a sale held under this section is to be conducted other than on the Internet, the administrator must publish at least one notice of the sale, at least [three] weeks but not more than [five] weeks before the sale, in a newspaper of general circulation in the [county] in which the property is sold.”

Comment: UPPO believes that the amended language and requirement of the treasurer to sell/liquidate securities between eight and 12 months from receipt would be detrimental to owners of securities who purchased the shares with the intent of long-term growth. UPPO requests that the amended language be removed and revert to the original language in H.B. 420/S.B. 371 (same as RUUPA language).

Section 66-29-143 – Recovery of Securities or Value by Owner

H.B. 420/S.B. 371(as amended) - Amended S.B. 371 has deleted the previous language.

RUUPA language: Section 703

“(a) If the administrator sells a security before the expiration of six years after delivery of the security to the administrator, an apparent owner that files a valid claim under this [act] of ownership of the security before the six-year period expires is entitled, at the option of the administrator, to receive:

(1) replacement of the security; or

(2) the market value of the security at the time the claim is filed, plus dividends, interest, and other increments on the security up to the time the claim is paid.

(b) Replacement of the security or calculation of market value under subsection (a) must take into account a stock split, reverse stock split, stock dividend, or similar corporate action.

(c) A person that makes a valid claim under this [act] of ownership of a security after expiration of six years after delivery of the security to the administrator is entitled to receive:

(1) the security the holder delivered to the administrator, if it is in the custody of the administrator, plus dividends, interest, and other increments on the security up to the time the administrator delivers the security to the person; or

(2) the net proceeds of the sale of the security, plus dividends, interest, and other increments on the security up to the time the security was sold.”

Comment: UPPO encourages the replacement of language in H.B. 420/S.B. 371 as originally drafted. The lack of such language addressing a fair expectation for owners to recover escheated securities or a comparable value creates a great deal of ambiguity and does not provide the owner appropriate protection.

Business to business property exemption

H.B. 420/S.B. 371: Business to business property exemption not included in the bills.

Comment: UPPO asks that the business to business exemption that currently exists in the Tennessee Unclaimed Property Act at 66-29-105(c)(1) be added to the bills so that it remain in effect. Most credits, overpayments, uncashed checks and rebates (collectively, Credits) listed on the records of business associations may not represent actual property owed to another business. Even if amounts are owed, business may make affirmative decisions not to pursue debts because the amounts owed are immaterial or for other important business reasons. As such, UPPO respectfully asks that the current business to business exemption found in Sec. 66-29-105(c)(1) remain.

Sections 66-29-163, 167-169 - Administrative appeals process

Comment: UPPO respectfully requests that Tennessee amend the bills to leave the current statute 69-29-125 in place regarding administrative appeals process. UPPO feels that the current statutory language found in Sec. 69-29-125 is a more comprehensive appeals process than the current version of the bills. Thus, UPPO respectfully asks that the current language found in Sec. 69-29-125 remain.

UPPO strongly recommends that the review UPPO's comments and consider tracking RUUPA more closely in an effort to assure clear and concise guidance for holders. Doing so would ensure that holders and owners are adequately protected.

We appreciate your consideration, and thank you for your willingness to modernize Tennessee's unclaimed property statute. Please contact me with any questions or comments regarding the content of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Toni Nuernberg".

Toni Nuernberg
Executive Director, Unclaimed Property Professionals Organization
763-253-4344 | toni@uppo.org