UNCLAIMED PROPERTY
PROFESSIONALS ORGANIZATION

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Friday, July 1, 2016

Charles A. Trost, Esquire
Waller Lansden Dortch & Davis LLP
Nashville City Center
511 Union St, Suite 2700
Nashville, TN 37219-1760

Sent via email: charlie.trost@wallerlaw.com

Re: UPPO Submission Regarding the 1995 Uniform Unclaimed Property Act Revision

Dear Mr. Trost:

In continuing our effort to support the Uniform Law Commission Drafting Committee to Revise the Uniform Unclaimed Property Act (Drafting Committee), UPPO has prepared comments on two sets of issues associated with the May 26, 2016 version of the Uniform Unclaimed Property Act (Act) that are critical to the holder community and in need of further consideration by the Drafting Committee. Our submission first identifies issues with respect to which we seek clarification or offer technical corrections, and secondly, a set of substantive issues which UPPO believes compromise the clarity, consistency and fairness of the Act and thus require corrective action by the Drafting Committee.

We appreciate this opportunity to share UPPO's recommendations on these very specific and important issues, and thank you in advance for the continued consideration you and the Drafting Committee give to our input. For the commissioners' convenience, we have compiled drafted amendments supporting the substantive issues and those documents can be accessed in the appendix. In addition, UPPO representatives will be available at the Annual Meeting in Stowe, Vt., with printed copies of the amendments; their photos and contact information are located in the appendix.

Please do not hesitate to contact me with any questions.

Sincerely,

Toni J. Nuernberg, CAE, CBA, CGA
Executive Director, Unclaimed Property Professionals Organization
763-253-4344, toni@uppo.org

cc: Commissioner Blackburn and Commissioner Houghton, Uniform Law Commission
Katie Robinson, Staff Liaison, Uniform Law Commission
Unclaimed Property Professionals Organization Board of Directors

Clarity Issues Section

Below is a list of issues we pose to the Drafting Committee for the purpose of receiving clarification. These areas may be subject to misinterpretation by the Act's stakeholders.

Tax Deferred Accounts and 529 Plan Accounts

Section 202(b) (Page 13, line 28)

UPPO encourages the Drafting Committee to include a note in the final draft of the Act stating that the intention of 202(b) is **not** to require holders to conduct a Death Master File (DMF) search or to seek notice 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, the intention of this section should be reinforced in a formal comment to underscore its clear meaning and prevent any effort to interpret it more broadly as imposing an affirmative search/verification requirement on holders.

We proposed the "in the ordinary course of business" language not only to prevent holders from having to perform DMF matches themselves but also to prevent contract auditors from being able to request social security numbers and other personally identifiable information of account owners in order to do their own DMF searches as part of an audit – the argument being that any notice produced by such third party searches would not be received by the holders in the ordinary course of their business and thus would not trigger any obligation on the part of the holder to attempt to verify any deaths that the auditors may identify.

Content of Annual Report

Section 402(a)(8) (Page 28, lines 18 – 19)

This provision requires a report to include the "commencement date for determining abandonment." This requirement must be clear and consistent with the Act's dormancy standards and triggers.

UPPO therefore requests that the Act include a comment that clarifies "commencement date for determining abandonment" as meaning the so-called "trigger date" to start the running of the statutory dormancy period. The comment should include language for example, evidencing that the trigger date could be any of the following: 1) the date on which the property became payable, demandable or returnable, 2) the date of the last transaction with the apparent owner, 3) the date of return mail received, or, 4) any other relevant dormancy trigger.

Notice to Apparent Owner by Holder

Section 501(b) (Page 31, line 9)

Section 501(b) states *"If an apparent owner has consented to receive electronic –mail delivery from the holder, the holder shall send the notice described in subsection (a) by first-class United States mail to the apparent owner's last-known mailing address **and** by electronic mail…"*

We seek clarification that the intention is to require the holder to contact the owner by U.S. mail **AND** electronic mail, rather than by one method or the other. Requiring holders to contact the

owner by one method is consistent with Section 503(b)(1) which grants the administrator the option to contact an owner by electronic mail or U.S. mail. UPPO further supports a requirement that places an equivalent burden of due diligence upon both state administrators and holders.

Administrator's Options as to Custody

Section 608(a) (Page 38, lines 21 – 23)

This provision allows the administrator to decline to take custody of property, but no guidance is provided as to what holders are required to do with the declined property. The Act should state whether the declined property is therefore exempt from future reporting or if the declined property needs to be monitored for value and reconsidered for reporting eligibility if/when a greater value is established.

When Administrator Must Honor Claim for Property

Section 904(b)(2) (Page 47, line 20)

We offer the following technical correction, as Section 907 does not exist within the Act: *"the claimant may file an amended claim with the administrator or commence an action under Section ~~907~~ 906; and"*

Rules and Procedures for Conducting Examination

Section 1003(c)(3) (Page 51, line 19)

To improve clarity, UPPO recommends that the Act define "good faith" in the context of this section.

Records Obtained in Examination

Section 1004 (Page 52, Comment)

The comment in this section stating that documents obtained during an audit are not subject to subpoena in litigation unrelated to the audit of the holder is a welcomed clarification. UPPO sees this point as critical and therefore encourages the Drafting Committee to consider inserting this language within the actual text of Section 1004.

Complaint to Administrator about Conduct of Person Conducting Examination

Section 1008(b) (Page 55, line 7)

To ensure there is appropriate preparation time for both the administrator and holder, but not too much time to unnecessarily extend the process, UPPO proposes the following clarifying change *"…within ~~a reasonable time~~ 30 days after receiving the request."*

Informal Conference

Section 1101 (Pages 58 – 60)

UPPO seeks clarity on whether or not interest on the holder's purported liability continues to accrue during the pendency of an informal conference requested by either party.

Action Involving Another State or Foreign Country
Attorney Compensation
Section 1203(e) (Page 65, lines 1 – 4)

Both sections 1009(e)(1) and 1203(e) provide allowable bases on which the enacting State may compensate private advisors. Section 1009(e)(1) addresses compensation for conducting audits and Section 1203(e) addresses compensation for collection actions. Only Section 1009(e)(1) mentions fixed fee or hourly fee options. In order to avoid section 1203(e) from being interpreted to forbid fixed or hourly based fees because such fees were specifically included elsewhere, the proposed language adds these other fee systems to the collection provision.
"The administrator may retain a private attorney in this state or another state or foreign country to commence an action to recover property on behalf of the administrator and may agree to pay attorney's fees based in whole or in part on a fixed fee, hourly fee, or a percentage of the amount or value of property recovered in the action."

Substantive Issues Section

(Access the individual draft amendments in the appendix or see the UPPO representatives attending the ULC Annual Meeting.)

Definition of "Holder"

Section 102(12) (Page 3, lines 15 – 16)

Proposed language: *"'Holder' means ~~a~~ the person primarily obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to this [act]."*

Rationale: There was consensus among all stakeholders and agreement by the Drafting Committee that the definition of "holder" should make it clear that there can be only one "holder" of any item of unclaimed property, and the definition of "holder" should be revised to make that clear. In addition, UPPO believes this definitional section should be accompanied by a comment that affirms that where one party has a direct legal obligation to the owner of the property, and another party has possession of the property and an obligation to pay or deliver it to the owner solely by virtue of a contractual relationship with the party who is directly obligated to the owner, it is the party who is directly obligated to the owner who is "primarily" obligated and hence is the holder for purposes of the act. Thus, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would be the "holder" of the obligation and any unclaimed dividends on the stock or interest on the bonds. *See, e.g., Clymer v. Summit Bancorp,* 792 A.2d 396 (NJ 2002).

Definition of "Security"

Section 102(27) (Page 7, lines 6 – 7)

Proposed language: *"'Security' means a security or security entitlement as defined in [cite to appropriate sections of Article 8 of the Uniform Commercial Code] and includes a customer security account held by a registered broker-dealer."*

Rationale: UPPO believes that the definition of "security" in the Act must include a specific reference to an owner's interest in a brokerage account held by a broker-dealer. This was discussed at length before the Drafting Committee at the February 26 - 28 Drafting Committee meeting. The Drafting Committee voted unanimously to include such a reference in the definition of "security." NAUPA did not object to this decision (at least at the public forum), nor did any other stakeholder -- this was a decision on which there was total consensus. Nonetheless, somehow, without any further discussion or vote by the Drafting Committee (at least in a public forum), that reference was not included in the current draft of the Act. You have indicated that the Drafting Committee (or at least certain of its members) believes that customer accounts held by a broker-dealer are included in the definition of "security" in the current draft through the inclusion in that definition of a "securities entitlement" within the meaning of Article 8 of the Uniform Commercial Code. We agree that should be the case. However, in the real world in which holders – the constituency we represent – live, it is a fact that states and their contract auditors – specifically, Kelmar Associates – are today actively contending in audits that an ownership interest in a broker-dealer account is not governed by the dormancy triggers applicable to securities, but rather constitutes "miscellaneous intangible property" governed solely by an owner-contact trigger. This is wrong, and unacceptable to

UPPO and our holder constituents. In order to avoid such disputes and provide clarity on this issue both for holders who must comply with the Act and administrators who must apply and enforce it, we ask that the Drafting Committee include an express reference to customer accounts held by broker-dealers in the definition of "security" as unanimously approved at the February 26 - 28 meeting: *"'Security' means a security or security entitlement as defined in [cite to appropriate sections of Article 8 of the Uniform Commercial Code] and includes a customer security account held by a registered broker-dealer."* Additionally, we request that the Official Comment expressly note that the inclusion of the italicized language is intended to clarify that such interests are encompassed with "security entitlements" in light of disputes that have arisen in which some states have contended that ownership interests in broker-dealer accounts should be treated as "miscellaneous intangible property" rather than as interests in securities.

Indication of Apparent Owner Interest in Property – Dividend Reinvestments and Non-Return of Federal Tax Forms

Section 210(b)(5) & 210(b)(8) *NEW*

Proposed language: *"201(b)(5): making a deposit into or withdrawal from an account at a financial organization, including an automatic deposit or withdrawal or automatic reinvestments of dividends or interest previously authorized by the apparent owner."*

"210(b)(8)NEW: the non-return of federal tax forms, or other regular tax statements delivered to the owner either via US Mail or through electronic delivery."

Rationale: UPPO proposes that automatic reinvested dividends and the non-return of Federal tax forms or regular tax statements be considered contact. Many states today consider the non-return of a Form 1099 as contact, and automatic dividend reinvestments is a common expectation for owners making investments for the long term and is typical of the way those investors choose to interact with their investment property. (Note that the State of Louisiana modified its unclaimed property law in 2015 (H.B. 692) to provide that "indication of owner interest" for bank accounts includes one–time or recurring automatic clearing house transactions or any other electronic transaction that is owner-directed or otherwise authorized by the owner. In addition, the California legislature is considering a similar measure now on second reading in the California Senate – A.B. 2258.)

Non-Transferable Securities

Section 603(h) (Page 36, lines 6 - 11)

Proposed language: *"The holder is not required to deliver to the administrator a security identified by a holder as a non-freely transferable security. ~~Not later than 10 days after the administrator or holder determines that the security is no longer a non-freely transferable security, the holder must deliver the security to the administrator.~~ Upon determination by the administrator or holder that a security is no longer a non-freely transferable security, the security shall be subsequently remitted on the next regular date prescribed for delivery of securities pursuant to this Act. The holder shall make a determination annually whether a security identified in a report filed under Section 401 as a non-freely transferable security is no longer a non-freely transferable security."*

Rationale: Holders should not be burdened with the prospect of having to potentially effect numerous, small item count, ad hoc, unclaimed property deliveries. For efficiency, holders should be allowed to remit the property within the next regularly-scheduled time frame according to the statute. Doing so will allow the holder to re-confirm account activity, return mail status, and ensure that due diligence mailings previously performed are still compliant with the states' requirements.

Taking Custody of Abandoned Property

Sections 301 – 305

Rationale: These sections present a number of practical questions and concerns to holders, and UPPO recommends the Drafting Committee rewrite these sections significantly for clarity. UPPO is willing to meet with the reporter to discuss our concerns more granularly.

Sections 301-305 of the Act are entitled "Rules for Taking Custody of Abandoned Property" (collectively, "Rules") and generally set forth the criteria that a state adopting the Act must meet in order to assert jurisdiction over unclaimed property held by a holder. From a global perspective, some of the provisions of the Rules likely conflict with the U.S. 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. As such, simply revising the language of the Rules will do little to avert the Rules' apparent conflicts with the *Texas v. New Jersey* decision that would cause the Rules to be preempted by the Supreme Court's decision in that case; however, some revision of the language could lower the degree to which a conflict with *Texas v. New Jersey* is perceived as direct.

The Rules also make multiple references to situations where an apparent owner's last-known address is in a "state that does not provide for the custodial taking of property." This language, which appears in multiple provisions of the Rules, appears to be a holdover from previous drafts of the UUPA that were necessary at times when state unclaimed property laws as we know them today had not been fully developed or adopted by some state legislatures. Indeed, that language derives from the Supreme Court's decision in *Texas v. New Jersey* more than 50 years ago. Today, each of the 50 states, as well as Puerto Rico, Guam, the Northern Mariana Islands and the Virgin Islands, have some form of unclaimed property laws so that every jurisdiction has essentially provided for the custodial taking of property. Consequently, all references in the Rules to situations where a state has not "provided for" the custodial taking of property should be removed.

Moreover, we globally note that the Rules would permit a state to assert jurisdiction over property located in foreign countries if the property arises out of a "domestic transaction." The Rules do not define the term "domestic transaction." We are concerned about the Rules' reference to a domestic transaction in Sections 302 and 304 in light of Section 103 of the Act, which states that the Act generally does not apply to property "held, due and owning in a foreign country if the transaction involving the property was a foreign transaction." Section 103 does not define "foreign transaction." Accordingly, because Sections 103, 302 and 304 could potentially apply to property held in a foreign country, the Act must provide clarity on the difference between a "foreign transaction" and a "domestic transaction" so that holders and apparent owners alike can determine whether property presumed abandoned is subject to custodial taking by a state. The lack of a clear line of demarcation between domestic

transactions and foreign transactions will be a source of confusion for holders that conduct business both in the United States and its territories as well as in foreign countries, as well as for the states.

Section 305 is the Act's iteration of the Third or "Transactional" Rule of Jurisdictional Priority, which permits a jurisdiction to assert custody over unclaimed property arising out of transactions within the state if certain criteria are met. We note that the Transactional Rule is likely unconstitutional and was rejected as such most recently in the Third Circuit Court of Appeals decision in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*. *See also, Pennsylvania v. New York*, 407 U.S. 206 (1972), where the Supreme Court itself rejected a transaction based claim by Pennsylvania to escheat uncashed money orders sold in the state as inconsistent with the *Texas v. New Jersey* priority rules. Accordingly, including a provision codifying the Transactional Rule in the Act seems inappropriate. In any event, we believe reference in the Official Comments to the *N.J. Retail Merchants Ass'n* decision and the potential unconstitutionality of any claim of right to escheat property based solely on the fact that the transaction giving rise to the property occurred in the state asserting the claim is essential.

In summary, the problematic issues include:

- **Section 301.** Last known address vs physical or temporary address frustrates the ease of administration mandated by *Texas v. New Jersey*.
- **Section 302.** Unilateral determination of last known address by administrator when holder records show owner address as unknown thwarts the ease of administration emphasized by the Court in articulating and explaining the rationale of the priority rules and proper application of the first and second priority rules as mandated by *Texas v. New Jersey*.
- **Section 303.** Multiple addresses, most recently recorded address versus temporary address, none of which are defined and all of which are vague. Especially troublesome is the "temporary address" concept, which it appears could be ignored without any showing whatsoever that the "next most recently recorded address that is not a temporary address" (however that is to be determined) has any ongoing connection to the owner. This is just adding unnecessary complication and ambiguity to a determination that the Supreme Court intended to be simple and easy to administer.
- **Section 304.** Domestic transaction not defined. Additionally, many circular steps required to determine jurisdiction. All very confusing and lead to fact-intensive case-by-case jurisdictional analysis which thwarts intent of *Texas v. New Jersey*. What is meant by the phrase "and is not obligated to pay or deliver the property to that state" (i.e., the state or foreign country of last-known address) and how does that differ from "the property is specifically exempt from custodial taking under the law of the state of last-known address" in subsection (3)(A)? The former (which we believe was really intended to apply only to foreign countries, and should <u>not</u> apply to a state of last known address) would arguably allow the state of domicile to claim property that is specifically exempt in the first priority state (and hence the holder would "not [be] obligated to pay or deliver the property to that state"), in direct conflict with subsection (3)(A), which precludes a claim by the state of domicile when the property is specifically exempt in the first priority state.
- **Section 305.** In addition to the concerns expressed above that this entire basis for state claims is unconstitutional, the third rule of jurisdictional priority does not apply if the property at issue is "specifically exempt" from custodial taking by both holder's domicile

state and owner's state of last known address. What does "specific" exemption require? What if a state's statute simply doesn't mention the property at issue but the property would not be covered by the state's statute (including the miscellaneous intangibles provision)? What if, for example, as in a number of states such as Oregon and South Carolina, the state's unclaimed property statute previously required the escheat of certain property (e.g., unredeemed gift certificates) but was amended by the state legislator to delete that provision? The clear implication of such action is that such property is not to be considered to be within the scope of the unclaimed property statute. Is such property "specifically exempt" so as to be excluded from a transaction-based claim in another state? It should be, since a state with a higher priority to claim the property has made the decision not to claim it, although the first priority state has no "specific exemption" for such property.

Recovery of Property by Holder from Administrator
Section 605(g) – (j) *NEW*

Proposed language:

"(g) The administrator shall advise the holder whether its claim for reimbursement is approved or denied within 90 days of receipt of the holder's claim.

(h) In the event a holder's claim is denied, a holder may file an appeal of the denial of the claim for reimbursement. The holder must file a petition for Review with the [State Administrative Review and Hearings Division] within 30 days of the date of the administrator's denial.

(1) The holder may attach to the petition the denial of application for refund of unclaimed property along with all supporting information and exhibits.

(2) A hearing may be requested.

(i) The [State Administrative Review and Hearings Division] must send written acknowledgement of the receipt of the petition. An administrative law judge (ALJ) will be assigned and will inform the holder of the time, date, and location of the hearing, if so requested.

(j) The ALJ's review will be conducted in accordance with the [State's Administrative Appeals Process]. A record of the appeal must be created. The ALJ will issue a written order based upon the record. The order is the final agency decision."

Rationale: The rationale behind this proposal is based on the notion that in order to preserve fairness and constitutional due process, some sort of appeals process should be provided to holders whose claim is initially denied. While we realize that anyone could potentially access the courts to make such an appeal, the institution of an administrative review seems the least onerous on the holder and at the same time does not clog already overburdened courts with potentially small claims. A 90-day window of opportunity to file such a claim also was considered a fair timeframe for holders to research a denied claim further, while balancing the administrator's need for ultimate closure on these matters.

Informal Conference
Clarifying that "administrator's designee" be replaced by "employee designated"
Section 1101(b)(5) – (e) (Page 59, line 8 – page 60, line 7)

Proposed language:

"(5) the conference may be postponed, adjourned, and reconvened as the administrator or the ~~administrator's designee~~ employee designated by the administrator determines appropriate;

(6) the administrator or ~~administrator's designee~~ employee designated by the administrator with the approval of the administrator may modify a determination made under Section 1012 in part or withdraw it in its entirety; and

(7) the administrator or ~~administrator's designee~~ employee designated by the administrator shall issue a decision in a record and provide a copy of the record to the putative holder and examiner not later than [20] days after the conference ends.

(c) A conference under subsection (b) is not an administrative remedy and is not a contested case subject to the [state administrative procedures act]. An oath is not required and rules of evidence do not apply in the conference.

(d) At a conference under subsection (b), the putative holder must be given an opportunity to confer informally with the administrator or an employee designated by the administrator to act on the administrator's behalf and the person who examined the records of the putative holder to:

(1) discuss the determination made under Section 1012; and

(2) present any issue the putative holder raises concerning the validity of the determination.

(e) If the administrator or the ~~administrator's designee~~ employee designated by the administrator fails to act within a period prescribed in subsection (b), the failure does not affect a right of the administrator, except that interest does not accrue on the amount for which the holder was determined to be liable under Section 1012 during the period in which the administrator or ~~administrator's designee~~ employee designated by the administrator failed to act until the earlier of:"

Rationale: The purpose of an informal conference is to allow a holder an opportunity to present their case before an independent party with the potential of having their issues resolved prior to filing a more formal appeal via the state's administrative review statute or by filing a lawsuit. As indicated during several Drafting Committee meetings in the recent past, the informal conference is a way for the parties to speak more freely without the constraints of the rules of evidence or the mandatory recordation of the discussion.
Unfortunately, the use of the term "administrator's designee" in Section 1101 of the draft allows the administrator to appoint any agent, including the 3rd party auditor that conducted the audit, to review the findings and the holder's contentions. This undermines the informal, more open nature of the process and calls into question the independence of the reviewer. Therefore, we propose substituting the term "employee designated by the administrator" for the term "administrator's designee" to clarify that only the administrator, or another employee of the state acting on behalf of the administrator, has the authority to review a holder's determination of liability in an informal appeal.

Other Civil Penalties
Penalty for not performing due diligence only applies if willful
Section 1205(a) (Page 66, lines 6 – 7)

Proposed language: *"If a holder ~~enters into a contract or other arrangement to evade an obligation under this [act] or~~ willfully fails to perform…"*

Rationale: The language deleted is not clear, is subject to extremely broad interpretation, and provides insufficient guidance to the holder community.

Unclaimed Property Professionals Organization Proposed Issue Amendment Appendix

Thank you for your consideration and support of UPPO's proposed amendments. For your convenience, each of the following pages includes one proposed amendment, the amendment's location within the Act, proposed language, and rationale for the change.

If you'd like a printed copy of the proposed amendments, please see one of the following UPPO representatives and they can provide you with a copy.

Karen Anderson
Work phone: 317-577-9530
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Debbie L. Zumoff
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Kendall Houghton
Work phone: 571-278-0520
Cell phone: 571-278-0520
Email: kendall.houghton@alston.com

Definition of "Holder"
Section 102(12) (Page 3, lines 15 – 16)

Proposed language: *"'Holder' means ~~a~~ the person primarily obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to this [act]."*

Rationale: There was consensus among all stakeholders and agreement by the Drafting Committee that the definition of "holder" should make it clear that there can be only one "holder" of any item of unclaimed property, and the definition of "holder" should be revised to make that clear. In addition, UPPO believes this definitional section should be accompanied by a comment that affirms that where one party has a direct legal obligation to the owner of the property, and another party has possession of the property and an obligation to pay or deliver it to the owner solely by virtue of a contractual relationship with the party who is directly obligated to the owner, it is the party who is directly obligated to the owner who is "primarily" obligated and hence is the holder for purposes of the act. Thus, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would be the "holder" of the obligation and any unclaimed dividends on the stock or interest on the bonds. *See, e.g., Clymer v. Summit Bancorp,* 792 A.2d 396 (NJ 2002).

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Proposed language: *"'Security' means a security or security entitlement as defined in [cite to appropriate sections of Article 8 of the Uniform Commercial Code] and includes a customer security account held by a registered broker-dealer."*

Rationale: Rationale: UPPO believes that the definition of "security" in the Act must include a specific reference to an owner's interest in a brokerage account held by a broker-dealer. This was discussed at length before the Drafting Committee at the February 26 - 28 Drafting Committee meeting. The Drafting Committee voted unanimously to include such a reference in the definition of "security." NAUPA did not object to this decision (at least at the public forum), nor did any other stakeholder -- this was a decision on which there was total consensus. Nonetheless, somehow, without any further discussion or vote by the Drafting Committee (at least in a public forum), that reference was not included in the current draft of the Act. You have indicated that the Drafting Committee (or at least certain of its members) believes that customer accounts held by a broker-dealer are included in the definition of "security" in the current draft through the inclusion in that definition of a "securities entitlement" within the meaning of Article 8 of the Uniform Commercial Code. We agree that should be the case. However, in the real world in which holders – the constituency we represent – live, it is a fact that states and their contract auditors – specifically, Kelmar Associates – are today actively contending in audits that an ownership interest in a broker-dealer account is not governed by the dormancy triggers applicable to securities, but rather constitutes "miscellaneous intangible property" governed solely by an owner-contact trigger. This is wrong, and unacceptable to UPPO and our holder constituents. In order to avoid such disputes and provide clarity on this issue both for holders who must comply with the Act and administrators who must apply and enforce it, we ask that the Drafting Committee include an express reference to customer accounts held by broker-dealers in the definition of "security" as unanimously approved at the February 26 - 28 meeting: *"'Security' means a security or security entitlement as defined in [cite to appropriate sections of Article 8 of the Uniform Commercial Code] and includes a customer security account held by a registered broker-dealer."* Additionally, we request that the Official Comment expressly note that the inclusion of the italicized language is intended to clarify that such interests are encompassed with "security entitlements" in light of disputes that have arisen in which some states have contended that ownership interests in broker-dealer accounts should be treated as "miscellaneous intangible property" rather than as interests in securities.

Indication of Apparent Owner Interest in Property – Dividend Reinvestments and Non-Return of Federal Tax Forms
Section 210(b)(5) & 210(b)(8) *NEW*

Proposed language: *"201(b)(5): making a deposit into or withdrawal from an account at a financial organization, including an automatic deposit or withdrawal or automatic reinvestments of dividends or interest previously authorized by the apparent owner."*

"210(b)(8)NEW: the non-return of federal tax forms, or other regular tax statements delivered to the owner either via US Mail or through electronic delivery."

Rationale: UPPO proposes that automatic reinvested dividends and the non-return of Federal tax forms or regular tax statements be considered contact. Many states today consider the non-return of a Form 1099 as contact, and automatic dividend reinvestments is a common expectation for owners making investments for the long term and is typical of the way those investors choose to interact with their investment property. (Note that the State of Louisiana modified its unclaimed property law in 2015 (H.B. 692) to provide that "indication of owner interest" for bank accounts includes one–time or recurring automatic clearing house transactions or any other electronic transaction that is owner-directed or otherwise authorized by the owner. In addition, the California legislature is considering a similar measure now on second reading in the California Senate – A.B. 2258.)

Non-Transferable Securities
Section 603(h) (Page 36, lines 6 - 11)

Proposed language: *"The holder is not required to deliver to the administrator a security identified by a holder as a non-freely transferable security. ~~Not later than 10 days after the administrator or holder determines that the security is no longer a non-freely transferable security, the holder must deliver the security to the administrator.~~ Upon determination by the administrator or holder that a security is no longer a non-freely transferable security, the security shall be subsequently remitted on the next regular date prescribed for delivery of securities pursuant to this Act. The holder shall make a determination annually whether a security identified in a report filed under Section 401 as a non-freely transferable security is no longer a non-freely transferable security."*

Rationale: Holders should not be burdened with the prospect of having to potentially effect numerous, small item count, ad hoc, unclaimed property deliveries. For efficiency, holders should be allowed to remit the property within the next regularly-scheduled time frame according to the statute. Doing so will allow the holder to re-confirm account activity, return mail status, and ensure that due diligence mailings previously performed are still compliant with the states' requirements.

Taking Custody of Abandoned Property
Sections 301 – 305

Rationale: These sections present a number of practical questions and concerns to holders, and UPPO recommends the Drafting Committee rewrite these sections significantly for clarity. UPPO is willing to meet with the reporter to discuss our concerns more granularly.

Sections 301-305 of the Act are entitled "Rules for Taking Custody of Abandoned Property" (collectively, "Rules") and generally set forth the criteria that a state adopting the Act must meet in order to assert jurisdiction over unclaimed property held by a holder. From a global perspective, some of the provisions of the Rules likely conflict with the U.S. 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. As such, simply revising the language of the Rules will do little to avert the Rules' apparent conflicts with the *Texas v. New Jersey* decision that would cause the Rules to be preempted by the Supreme Court's decision in that case; however, some revision of the language could lower the degree to which a conflict with *Texas v. New Jersey* is perceived as direct.

The Rules also make multiple references to situations where an apparent owner's last-known address is in a "state that does not provide for the custodial taking of property." This language, which appears in multiple provisions of the Rules, appears to be a holdover from previous drafts of the UUPA that were necessary at times when state unclaimed property laws as we know them today had not been fully developed or adopted by some state legislatures. Indeed, that language derives from the Supreme Court's decision in *Texas v. New Jersey* more than 50 years ago. Today, each of the 50 states, as well as Puerto Rico, Guam, the Northern Mariana Islands and the Virgin Islands, have some form of unclaimed property laws so that every jurisdiction has essentially provided for the custodial taking of property. Consequently, all references in the Rules to situations where a state has not "provided for" the custodial taking of property should be removed.

Moreover, we globally note that the Rules would permit a state to assert jurisdiction over property located in foreign countries if the property arises out of a "domestic transaction." The Rules do not define the term "domestic transaction." We are concerned about the Rules' reference to a domestic transaction in Sections 302 and 304 in light of Section 103 of the Act, which states that the Act generally does not apply to property "held, due and owning in a foreign country if the transaction involving the property was a foreign transaction." Section 103 does not define "foreign transaction." Accordingly, because Sections 103, 302 and 304 could potentially apply to property held in a foreign country, the Act must provide clarity on the difference between a "foreign transaction" and a "domestic transaction" so that holders and apparent owners alike can determine whether property presumed abandoned is subject to custodial taking by a state. The lack of a clear line of demarcation between domestic transactions and foreign transactions will be a source of confusion for holders that conduct business both in the United States and its territories as well as in foreign countries, as well as for the states.

Section 305 is the Act's iteration of the Third or "Transactional" Rule of Jurisdictional Priority, which permits a jurisdiction to assert custody over unclaimed property arising out of transactions within the state if certain criteria are met. We note that the Transactional Rule is

likely unconstitutional and was rejected as such most recently in the Third Circuit Court of Appeals decision in *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*. *See also, Pennsylvania v. New York*, 407 U.S. 206 (1972), where the Supreme Court itself rejected a transaction based claim by Pennsylvania to escheat uncashed money orders sold in the state as inconsistent with the *Texas v. New Jersey* priority rules. Accordingly, including a provision codifying the Transactional Rule in the Act seems inappropriate. In any event, we believe reference in the Official Comments to the *N.J. Retail Merchants Ass'n* decision and the potential unconstitutionality of any claim of right to escheat property based solely on the fact that the transaction giving rise to the property occurred in the state asserting the claim is essential.

In summary, the problematic issues include:

- **Section 301.** Last known address vs physical or temporary address frustrates the ease of administration mandated by *Texas v. New Jersey*.
- **Section 302.** Unilateral determination of last known address by administrator when holder records show owner address as unknown thwarts the ease of administration emphasized by the Court in articulating and explaining the rationale of the priority rules and proper application of the first and second priority rules as mandated by *Texas v. New Jersey*.
- **Section 303.** Multiple addresses, most recently recorded address versus temporary address, none of which are defined and all of which are vague. Especially troublesome is the "temporary address" concept, which it appears could be ignored without any showing whatsoever that the "next most recently recorded address that is not a temporary address" (however that is to be determined) has any ongoing connection to the owner. This is just adding unnecessary complication and ambiguity to a determination that the Supreme Court intended to be simple and easy to administer.
- **Section 304.** Domestic transaction not defined. Additionally, many circular steps required to determine jurisdiction. All very confusing and lead to fact-intensive case-by-case jurisdictional analysis which thwarts intent of *Texas v. New Jersey*. What is meant by the phrase "and is not obligated to pay or deliver the property to that state" (i.e., the state or foreign country of last-known address) and how does that differ from "the property is specifically exempt from custodial taking under the law of the state of last-known address" in subsection (3)(A)? The former (which we believe was really intended to apply only to foreign countries, and should <u>not</u> apply to a state of last known address) would arguably allow the state of domicile to claim property that is specifically exempt in the first priority state (and hence the holder would "not [be] obligated to pay or deliver the property to that state"), in direct conflict with subsection (3)(A), which precludes a claim by the state of domicile when the property is specifically exempt in the first priority state.
- **Section 305.** In addition to the concerns expressed above that this entire basis for state claims is unconstitutional, the third rule of jurisdictional priority does not apply if the property at issue is "specifically exempt" from custodial taking by both holder's domicile state and owner's state of last known address. What does "specific" exemption require? What if a state's statute simply doesn't mention the property at issue but the property would not be covered by the state's statute (including the miscellaneous intangibles provision)? What if, for example, as in a number of states such as Oregon and South Carolina, the state's unclaimed property statute previously required the escheat of certain property (e.g., unredeemed gift certificates) but was amended by the state legislator to delete that provision? The clear implication of such action is that such

property is not to be considered to be within the scope of the unclaimed property statute. Is such property “specifically exempt” so as to be excluded from a transaction-based claim in another state? It should be, since a state with a higher priority to claim the property has made the decision not to claim it, although the first priority state has no “specific exemption” for such property.

Recovery of Property by Holder from Administrator
Section 605(g) – (j) *NEW*

Proposed language:

"(g) The administrator shall advise the holder whether its claim for reimbursement is approved or denied within 90 days of receipt of the holder's claim.

(h) In the event a holder's claim is denied, a holder may file an appeal of the denial of the claim for reimbursement. The holder must file a petition for Review with the [State Administrative Review and Hearings Division] within 30 days of the date of the administrator's denial.

(1) The holder may attach to the petition the denial of application for refund of unclaimed property along with all supporting information and exhibits.

(2) A hearing may be requested.

(i) The [State Administrative Review and Hearings Division] must send written acknowledgement of the receipt of the petition. An administrative law judge (ALJ) will be assigned and will inform the holder of the time, date, and location of the hearing, if so requested.

(j) The ALJ's review will be conducted in accordance with the [State's Administrative Appeals Process]. A record of the appeal must be created. The ALJ will issue a written order based upon the record. The order is the final agency decision."

Rationale: The rationale behind this proposal is based on the notion that in order to preserve fairness and constitutional due process, some sort of appeals process should be provided to holders whose claim is initially denied. While we realize that anyone could potentially access the courts to make such an appeal, the institution of an administrative review seems the least onerous on the holder and at the same time does not clog already overburdened courts with potentially small claims. A 90-day window of opportunity to file such a claim also was considered a fair timeframe for holders to research a denied claim further, while balancing the administrator's need for ultimate closure on these matters.

Informal Conference

Clarifying that "administrator's designee" be replaced by "employee designated"
Section 1101(b)(5) – (e) (Page 59, line 8 – page 60, line 7)

Proposed language:

"*(5) the conference may be postponed, adjourned, and reconvened as the administrator or the ~~administrator's designee~~ employee designated by the administrator determines appropriate;*

(6) the administrator or ~~administrator's designee~~ employee designated by the administrator with the approval of the administrator may modify a determination made under Section 1012 in part or withdraw it in its entirety; and

(7) the administrator or ~~administrator's designee~~ employee designated by the administrator shall issue a decision in a record and provide a copy of the record to the putative holder and examiner not later than [20] days after the conference ends.

(c) A conference under subsection (b) is not an administrative remedy and is not a contested case subject to the [state administrative procedures act]. An oath is not required and rules of evidence do not apply in the conference.

(d) At a conference under subsection (b), the putative holder must be given an opportunity to confer informally with the administrator or an employee designated by the administrator to act on the administrator's behalf and the person who examined the records of the putative holder to:

(1) discuss the determination made under Section 1012; and

(2) present any issue the putative holder raises concerning the validity of the determination.

(e) If the administrator or the ~~administrator's designee~~ employee designated by the administrator fails to act within a period prescribed in subsection (b), the failure does not affect a right of the administrator, except that interest does not accrue on the amount for which the holder was determined to be liable under Section 1012 during the period in which the administrator or ~~administrator's designee~~ employee designated by the administrator failed to act until the earlier of:"

Rationale: The purpose of an informal conference is to allow a holder an opportunity to present their case before an independent party with the potential of having their issues resolved prior to filing a more formal appeal via the state's administrative review statute or by filing a lawsuit. As indicated during several Drafting Committee meetings in the recent past, the informal conference is a way for the parties to speak more freely without the constraints of the rules of evidence or the mandatory recordation of the discussion.

Unfortunately, the use of the term "administrator's designee" in Section 1101 of the draft allows the administrator to appoint any agent, including the 3rd party auditor that conducted the audit, to review the findings and the holder's contentions. This undermines the informal, more open nature of the process and calls into question the independence of the reviewer. Therefore, we propose substituting the term "employee designated by the administrator" for the term "administrator's designee" to clarify that only the administrator, or another employee of the state acting on behalf of the administrator, has the authority to review a holder's determination of liability in an informal appeal.

Other Civil Penalties
Penalty for not performing due diligence only applies if willful
Section 1205(a) (Page 66, lines 6 – 7)

Proposed language: *"If a holder ~~enters into a contract or other arrangement to evade an obligation under this [act] or~~ willfully fails to perform…"*

Rationale: The language deleted is not clear, is subject to extremely broad interpretation, and provides insufficient guidance to the holder community.