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UNIFORM LAW UPDATE

After a three-year process, the Uniform Law Commission approved the latest revision of the Uniform Unclaimed Property Act (the "Revised Uniform Unclaimed Property Act (2016)") in July of 2016.

While the Commissioners unanimously approved this new model legislation, the Revised Act as adopted, will present numerous new challenges to the states and make it more difficult to protect the interests of rightful owners.

Ultimately, if considered by individual states, program administrators and state legislators should be aware of some of the less consumer friendly aspects of the proposed law.

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Revised Uniform Unclaimed Property Act (2016)
Expanded Area of Focus - Contingency Fees

Contract Auditors – contract auditors have been providing unclaimed property audits to the states for over 30 years. With very few exceptions, audits performed by state-contracted firms have been conducted with very few legitimate issues, and have resulted in the identification and reporting of billions of dollars in unclaimed property to the states (a material percentage of which states have returned to missing owners). Virtually every unclaimed property program retains the services of contract auditors, which has enabled the states to extend the reach of their audit programs nationally with little or no financial risk. For many programs, contract auditors represent the only tool to obtain compliance on an interstate basis.

Revised Act Contract Auditor Provisions – the Revised Act contemplates the states' use of contract auditors, and incorporates provisions supported by NAUPA to improve auditor transparency and holder recourse. The Revised Act also sanctions payment to auditors on a performance (contingency) basis. And while the commentary to the Revised Act acknowledges that the contingency fee model is vital to the states' ability to maintain national audit programs, the legislation also contains a provision that effectively serves as a contract auditor prohibition—effectively impeding an activity which the drafting committee recognized that the states would not accept an outright prohibition against.

As written, the Revised Act provides that prior to assigning the audit of a holder to a contract auditor, the holder must first be given an opportunity to comply (60 days). The specificity with which the state must advise the holder of its non-compliance is not indicated. This is a de facto amnesty program for which there is no need and the success of which is subject to considerable doubt. The awareness of the obligation to report unclaimed property and the significant outreach efforts undertaken by many audit firms over the last 30 years makes it extremely unlikely that holders, particularly the larger companies, are not already aware of the reporting obligation. A 60 day notice period may only serve as an incentive for holders to simply await state notification prior to making any further reports. Moreover, the likelihood that a holder will be able to produce an accurate and complete unclaimed property report, or even materially commence the compliance process within 60 days of receipt of a notice, is highly unlikely. Even when a report is produced, the mechanism for validating its contents is not clear.

Because audit firms are oftentimes the source of compliance gap research that ultimately facilitates the states' collection efforts, preventing audit firms from performing (or inordinately delaying) compliance reviews of recalcitrant holders so identified would have a chilling effect on contract examinations. Firms without a mechanism to receive compensation for the compliance activity they have generated through their efforts will likely be forced to scale back future compliance efforts on behalf of the states.

The Revised Act also recommends that the states adopt a fee structure whereby the maximum contingency fee is 10% of the "amount or value of property paid or delivered as a result of the examination." It is reasonable to question the drafting committee's agenda for setting a maximum level of compensation that is less than the current rate paid to contract auditors. States should be free to set the compensation at a level that they believe is reasonable, and that will produce the best possible results. It is important to note that Utah's enactment of the Revised Act did not include either the 60 day pre-audit holder notice requirement, or the 10% fee cap on contract auditor fees. Similarly, the version of the Revised Act under consideration by Illinois deletes these provisions.

Concluding Thoughts

Even with these and other pro-holder provisions contained in the Revised Act, several business trade groups (including the American Bar Association) have publicly stated that the law does not "go far enough"--and that "alternative uniform acts" will be proposed and advocated. A number of states (particularly larger states) have indicated that they have no intention of adopting the Revised Act, and, as noted above, some states that have recently introduced the legislation have done so after undertaking, numerous and significant changes. These events viewed together suggest that the Revised Act is unlikely to achieve its stated objective of promoting greater uniformity.