

HOLDERS COALITION

November 12, 2018

Sara Meek
Deputy Director of Legislative Affairs
Illinois State Treasurer
219 State House
Springfield IL 62706

Sent via email: SMeek@illinoistreasurer.gov

Dear Ms. Meek:

The Holders Coalition is pleased to have the opportunity to comment on the proposed rules seeking to implement the Illinois Revised Uniform Unclaimed Property Act (765 ILCS 1026) as adopted by the General Assembly through Public Acts 100-22 and 100-566. Our comments are as follows:

SUBPART A: DEFINITIONS

Section 760.100 Definitions

"Merchandise Credit" means in-store credit for returned merchandise redeemable for merchandise, goods or services upon presentation at a single merchant or an affiliated group of merchants.

COMMENT:

"Affiliated group of merchants" needs to be defined.

SUBPART B: PRESUMPTION OF ABANDONMENT

Section 760.200 Tax-Deferred Accounts

Paragraph b) A retirement account that is tax advantaged under the income tax laws of the United States will generally be considered tax deferred under the Act. A Roth IRA is-considered tax deferred under the Act and the rules under Section 15-202 apply to a Roth IRA

COMMENT:

This rule appears to consider a Roth IRA as tax deferred. It is recommended that "should be" be replaced with "is" to provide clarity. Any other types of tax deferred accounts considered by the State to be tax deferred should also be listed and described.

Section 760.210 Safe Deposit Boxes

Paragraph e) Reimbursement of Holder

Sub-paragraph 2) Holders may only be reimbursed for any costs and charges that were included in the Annual Report listing the contents of the safe deposit box whose owner owes the costs and charges to the holder.

COMMENT:

This section seems to deviate from the statute which appears to permit employee wages and time to be included in the costs related to safe deposit box remittance. This proposed rule does not appear to permit the reimbursement of these costs and should be amended to reflect the statute.

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Section 760.250 Merchandise Credits

Paragraph b) This exemption includes, but is not limited to, a stored value card that is given as in-store credit for returned merchandise.

COMMENT:

This raises the question about credits issued for returned merchandise where there is no physical, brick and mortar presence (online sales). It is recommended these scenarios be considered and the apparent requirement for a physical location be clarified.

COMMENT:

Proposed New Subparagraph d) - There are state and federal requirements requiring cash payments that should be addressed in this section.

Section 760.440 Extensions

Paragraph b) The request must include a reasonable cause for an extension.

- 1) Reasonable cause includes, without limitation, natural disaster, criminal activity related to the holder's books and records, recent changes in the form of ownership of the holder, etc.
- 2) Providing due diligence notices to apparent owners and other holder actions required by the Act does not constitute reasonable cause.

COMMENT:

This section requires additional definition of "reasonable cause". We assert that a request for extension should be automatically granted for the first extension request, especially for the earlier years while adapting to the new statutory requirements.

Section 760.460 Due Diligence Notice by Holder

Paragraph d) If the holder has in its records an e-mail address for an apparent owner and the apparent owner has consented to receive e-mail from the holder, then unless the holder reasonably believes the e-mail address is invalid, the holder shall send a due diligence notice by e-mail to the apparent owner in addition to any other due diligence notice required by the Act (see 765 ILCS 1026/15-501(b)).

COMMENT:

The term "reasonably believes the e-mail address is invalid..." should be clarified with examples of circumstances that would cause a holder to "reasonably believe the e-mail address is invalid". Clarification is also requested concerning "...has consented to receive e-mail from the holder...". Does this mean any email including statements, tax forms, etc.?

Section 760.750 Entrance Conference

Paragraph b, Subparagraphs 7) requested records and materials necessary to proceed with the next steps of the examination;

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COMMENT:

An appeals process should be identified in the event there is any disagreement about the scope and time frames for record requests.

Paragraph b, Subparagraphs 9) explain that, unless otherwise agreed to in writing by the administrator, the person subject to examination *shall remit to the auditor* any unclaimed property identified during the examination that is owed to the State of Illinois.

COMMENT:

Holders should not be required to remit property directly to the auditor unless they are provided state indemnification and release of liability for mishandling, fraud, or misappropriation of the property by the auditor. Further, if the property involved is a security, how would a direct payment to the auditor work?

Section 760.760 Estimation Guidelines

Paragraph d) The auditor shall properly document the examination and make the working papers gathered during the unclaimed property examination available for review by the administrator. The working papers shall include planning information and all related calculations, statistical analyses, and summarizations.

COMMENT:

When and what level of documentation detail will be provided to the holder?

Section 760.770 Confidentiality Agreement

Paragraph b) If a person subject to examination and the auditor are unable to enter into a confidentiality agreement within 60 calendar days from the date of an agreement reasonably satisfactory to the administrator was first presented to the person subject to the examination by the auditor or the administrator, the examination may commence without a confidentiality agreement in place and the parties shall rely on the confidentiality provisions of Article 14 of the Act.

COMMENT:

This provision is problematic for a number of reasons; most notably the fact there could be multiple state confidentiality agreements involved. It is the opinion of industry that the administrator should have the ability to waive the 60 day requirement if the parties are working in good faith toward an agreement.

Section 760.780 Evidence of Unpaid Debt or Undischarged Obligations

Paragraph c, Subparagraph 8C) This defense merely indicates that when a check, draft, or similar instrument is voided quickly, for a valid business reason (i.e., not as a private escheat law), and the reason is indicated in a contemporaneous record, there is sufficient evidence to overcome the prima facie evidence of the existence of a debt or obligation; or

COMMENT:

The term "contemporaneous record" should be defined. This proposed requirement appears to be in conflict with the Statute and with the 2016 Revised Uniform Unclaimed Property Act (RUUPA) that allows for holders to show a "course of dealing".

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Paragraph d) In asserting a defense under this Section, and subject to the records retention requirements of the Act, a putative holder may present evidence of a course of dealing between the putative holder and the apparent owner. [765 ILCS 1026/15- 1005(d)]

COMMENT:

Additional clarification is requested to define valid business reasons.

Section 760.840 Voluntary Disclosure Agreement Program

Paragraph a) Pursuant to the authority of the administrator under Section 15-1206 of the Act to waive, in whole or in part, interest and penalties, the administrator may establish a voluntary disclosure agreement (VDA) program for persons who are not in compliance with the Act.

COMMENT:

This section should be expanded to clarify what would qualify for a VDA, for example, can you do a VDA for a previously filed report?

Paragraph d) Participation in the administrator's VDA program does not waive or otherwise limit the administrator's authority to order and conduct an unclaimed property examination pursuant to Section 15-1002 of the Act.

COMMENT:

This provision should be modified to exclude the Administrator from auditing the scope of a completed VDA.

Section 760.930 Determination of Liability

Paragraph b) The administrator may give notice of any interest and civil penalties at the same time that the notice of a determination of liability is given.

COMMENT:

The word "may" should be replaced with "shall".

Section 760.940 Interest and Penalties

Paragraph b) Civil Penalty for Failure to Act in Timely Manner. The administrator may require a holder that fails to report, pay, or deliver property within the time prescribed by the Act to pay to the administrator, in addition to interest, a civil penalty of \$200 for each day the duty is not performed, up to a cumulative maximum amount of \$5,000. [765 ILCS 1026/15-1204(b)] Thus, unless the administrator determines that the holder acted in good faith and without negligence pursuant to Section 15- 1206(b) of the Act, payment of a penalty for failure to act in a timely manner is a discretionary enforcement action by the administrator.

COMMENT:

The standard(s) that will be used for discretionary action to apply the penalty should be provided.

Paragraph c) Civil Penalty for Willful Failure to Perform a Duty Under the Act. If a holder willfully fails to perform a duty imposed on the holder under the Act, the administrator may require the holder to pay the

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administrator, in addition to interest, a civil penalty of \$1,000 for each day the obligation is evaded or the duty is not performed, up to a cumulative maximum amount of \$25,000, plus 25% of the amount or value of property that should have been but was not reported, paid or delivered as a result of the evasion or failure to perform. [765 ILCS 1026/15- 1205(a)]

COMMENT:

The standard(s) to be used to define "Willful" should be provided.

Paragraph d) Civil Penalty for Filing a Fraudulent Report. If a holder makes a fraudulent report under the Act, the administrator may require the holder to pay to the administrator, in addition to interest, a civil penalty of \$1,000 for each day from the date the report was made until corrected, up to a cumulative maximum of \$25,000, plus 25% of the amount or value of any property that should have been reported but was not included in the report or was underreported. [765 ILCS 1026/15-1205(b)]

COMMENT:

The standard(s) to be used to define "fraudulent" should be provided.

Section 760.980 Periods of Limitation and Repose

Paragraph C, subparagraphs 3 and 4) the total amount of property, excluding any interest or penalties that the administrator could impose under the Act, is less than \$2,500 or is otherwise de minimis as reasonably determined by the administrator; and

4) the administrator determines that the holder acted in good faith and without negligence. [765 ILCS 1026/15-1206(2)]

COMMENT:

This paragraph does not seem appropriate to be included in the administrative rules. At a minimum the term "good faith" should be defined.

Section 760.1100 Transition Provision

Paragraph 4, subparagraph B) If a holder fails to report property in 2018 that should have been reported under subsection (a), but reports that property in 2019, the administrator shall waive any interest or penalties under Section 15-1204 of the Revised Act if the administrator determines that the holder acted in good faith and without negligence.

COMMENT:

It is recommended the words "and without negligence" be removed.

Respectfully submitted,



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Holdings Coalition Members

Because of the breadth of issues being considered by the Holders' Coalition and the collaborative nature of our discussions, not all signatories to this letter are equally impacted by the issues for which we make a collective recommendation. The recommendations of the Holders' Coalition do not necessarily reflect the views of all present or future clients, attorneys, or members of each participant in the Coalition. Signatories to this letter with differing views will advance them separately from the collective recommendations.

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