UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION

January 13, 2020

Sent Via email to

David Damschen, Treasurer ddamschen@utah.gov
Dennis Johnston, Administrator dljohnston@utah.gov
Utah State Treasurer
PO Box 140530
Salt Lake City, UT 84114-0530

Re: Comments on Proposed Regulations R966-1 Unclaimed Property Act Rules

Dear Treasurer Damschen and Mr. Johnston:

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 1,450 unclaimed property professionals of diverse industries and employer size. UPPO advocates for consumer and compliance friendly unclaimed property laws and regulations.

As an initial matter, we respectfully request that the comment period for the Proposed Regulations be extended to give UPPO and other stakeholders additional time to provide comments. It appears that Proposed Regulations R966-1 is almost a verbatim adoption of the Illinois Unclaimed Property Regulations (the "Illinois Regulations") which is not appropriate because the Illinois Revised Unclaimed Property Act (the "Illinois Act") contains provisions that are vastly different from the provisions of the Utah Revised Uniform Unclaimed Property Act, Utah Code 67-4a-101 *et seq*. (the "Act"). For example, as discussed more fully below, the Illinois Act has a 10 year statute of limitations whereas the Act has a 5 year statute of limitations. Adoption of this and other provisions of the Illinois Regulations will result in the Proposed Regulations being inconsistent with the Act causing unnecessary confusion and compliance challenges for holders and the state.

Due to the limited period of time to provide comments on the Proposed Regulations, UPPO only focused in this letter on some of the key issues raised by the Proposed Regulations as follows:

1. **R966-1-4: Tax-Deferred Accounts.** R966-1-4(6) provides that, under the Act, "an IRA is considered dormant three years after failed delivery of communications. If an IRA falls within this provision but the owner is under age 59.5, Utah Treasury asks that a due diligence mailing be made but that the property not be reported and remitted unless the owner's IRA remains in the same dormant status when he or she reaches age 59.5. This is to address the issue of a potential penalty associated with early IRA distributions." R966-1-4(7) then provides that "an IRA is considered dormant and subject to due diligence on the earlier of (i) attained age of 70.5 or (ii) two years after death. If either of triggers (i) or

(ii) are met, the property is subject to due diligence. There is no additional returned mail requirement under these circumstances and returned mail on the customer IRA, or the lack thereof is not a factor in the dormancy analysis under section 1(b). Because of the 'or' operator between subsection 1(a) and 1(b), if either of the dormancy triggers in 1(a) or 1(b) are met, due diligence is required, and if no response is received, the property must be reported and remitted."

COMMENT: UPPO recommends that R966-1-4 be revised, consistently with the Act, to provide that the dormancy period begins three years after "the later of" the dates set forth in the Act. The Proposed Regulations are also inconsistent with the Act insofar as R966-1-4(6) incorrectly references two years after the owner's **death** as a potential trigger.

Specifically, section 67-4a-202 of the Act provides that the dormancy period for property held in a retirement account runs three years after (1) the returned mail date (see subsection (1)(a)) or (2) "the earlier of the following dates: (i) the date the apparent owner becomes 70.5 years of age, if determinable by the holder; or (ii) if the Internal Revenue Code, Sec. 1 et seq., requires distribution to avoid a tax penalty, two years after the date the holder: (A) receives confirmation of the death of the apparent owner in the ordinary course of the holder's business; or (B) confirms the death of the apparent owner under Subsection (2)." (see subsection (1)(b)) The Act was modeled after the Revised Uniform Unclaimed Property Act, which made clear that the dormancy period runs three years after "the later of" (1) the returned mail date or (2) the earlier of the date the owner turns 70.5 or the date of confirmation of death of the owner. The Act's failure to include the "later of" language clearly appears to be a drafting error. After all, as the Proposed Regulations acknowledge, not applying a "later of" modifier would have the untenable result that property held in an IRA would be reportable if there is returned mail even if the owner is under age 59.5, resulting in a tax penalty to the owner from the early distribution. Surely, the legislature would not have intended such a result. The likelihood that this was a drafting error is made even clearer by the fact that the Act does retain the "the later of" language: it just mistakenly includes it at the beginning of subsection (1)(a) rather than in the lead-in to that subsection, as in the Uniform Act. Compare:

- The Uniform Act reads: "property held in a pension account, retirement account, or 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 apparent owner three years after ***the later of***: (1) 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, but 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; or (2) the earlier of: (A) the date the apparent owner becomes 70.5 years of age, if determinable by the holder; or (B) if the

Internal Revenue Code[, as amended], 26 U.S.C. Section 1 et seq., requires distribution, two years after the date the holder in the ordinary course of its business receives confirmation of the death of the apparent owner."

- The Act reads: "property held in a pension account or retirement account that qualifies for tax deferral under the income tax laws of the United States is presumed abandoned if the property is unclaimed by the apparent owner three years after: (a) ***the later of*** the following dates: (i) except as in Subsection (1)(a)(ii), the date a 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 (ii) if a communication under Subsection (1)(a)(i) is re-sent within 30 days after the date the first communication is returned undelivered, the date the second communication was returned undelivered by the United States Postal Service; or (b) the earlier of the following dates: (i) the date the apparent owner becomes 70.5 years of age, if determinable by the holder; or (ii) if the Internal Revenue Code, Sec. 1 et seq., requires distribution to avoid a tax penalty, two years after the date the holder: (A) receives confirmation of the death of the apparent owner in the ordinary course of the holder's business; or (B) confirms the death of the apparent owner under Subsection (2)."

Thus, the language of the two sections is virtually identical except for the placement of the "the later of" language. But it makes no sense to include "the later of" language at the beginning of subsection (1)(a) of the Act, as the language would have no operative effect. In particular, subsection (1)(a)(i) already states that the dormancy period begins on the date the communication is returned undeliverable "except as in Subsection (1)(a)(ii)." Subsection (1)(a)(ii) states the second date of returned mail will apply instead if the first communication was resent within 30 days. Adding "the later of" language to the beginning of subsection (1)(a) is therefore entirely superfluous, given the exception clause in subsection (1)(a)(i) already makes clear that subsection (1)(a)(ii) trumps subsection (1)(a)(i). It is an axiom of statutory construction that statutes are not to be construed in a manner that renders any statutory language superfluous. This makes it apparent that it was an error to place "the later of" language immediately after the beginning of subsection (1)(a) rather than immediately before it. Moreover, the initial date of returned mail (in subsection (1)(a)(i)) will ***never*** be "later" than the second date of returned mail (in subsection (1)(a)(ii)), which further demonstrates that putting "the later of" language in subsection (1)(a) is nonsensical.

The Proposed Regulation attempts to address this problem by introducing a new rule that is found nowhere in the Act, which provides that the property need not be reported until the owner reaches age 59.5. However, rather than inventing a new rule out of whole cloth to address this problem, we would recommend that R966-1-4 be revised to construe the Act to mean that the dormancy period begins three years after "the later of" the dates set

forth in subsections (1)(a) and (1)(b) of Section 67-4a-202, to be consistent with the presumed legislative intent. Such a revision would also be consistent with the securities provisions found in Section 67-4a-206 of the Act, which make clear that returned mail is a prerequisite for escheatment of securities. There is no basis to treat securities held in an IRA less favorably than securities held in a non-fiduciary capacity. Furthermore, the returned mail requirement preserves and protects the owner's interests in his or her securities, and recognizes that securities are passive investments for which regular contact is often not common. It is therefore generally reasonable to assume that if the owner is receiving regular mailings with respect to the securities, the owner has not abandoned his or her property. A returned mail requirement is also consistent with federal securities laws, which require due diligence to be performed to attempt to locate the shareholder if mail sent to the shareholder is returned as undeliverable. These laws were intended to prevent the escheat of securities. If securities are escheated even though no mail has been returned as undeliverable, then the federal securities due diligence provisions will not have been triggered and thus their purpose in avoiding escheat of securities will not be realized.

The Proposed Regulations are also inconsistent with 67-4a-202 of the Act insofar as R966-1-4(6) incorrectly references two years after the owner's **death** as a potential trigger. However, Section 67-4a-202 makes clear that the potential trigger is two years after the date the holder receives **confirmation of death** of the owner. This is a potentially significant difference, as the holder may not receive confirmation of the owner's death until well after the actual date of death. Accordingly, we would recommend that the Proposed Regulation be revised to conform to the Act in this regard as well.

2. **R966-1-13: Deceased Owner.** R966-1-13(5) provides that "Sections 67-4a-202 and 67-4a-206 of the Act both provide that when a holder, in the ordinary course of its business, receives notice or an indication of the death of an apparent owner, the holder shall attempt not later than 90 days after receipt of the notice or indication to confirm whether the apparent owner is deceased." This subsection further provides that "These provisions are not intended to require a holder to independently confirm the death of the apparent owner when the holder reasonably believes that the apparent owner is deceased….Instead, these provisions establish a 90-day deadline for a holder to conduct any independent investigation or search to confirm the death of the apparent owner….Thus, by way of example and not of limitation, if a holder learns that an apparent owner is listed on the Social Security Administration's Death Master File (DMF) and the holder is satisfied that the presumption of death from such a match is correct, then the holder does not need to independently confirm the death of the apparent owner."

   Furthermore, R966-1-13(2) provides that "If the apparent owner as listed in the records of the holder is deceased and the abandonment period for the owner's property shall be set in accordance with Section 67-4a-201."

COMMENT: UPPO recommends that R966-1-13(5) be revised to remove the reference to Section 67-4a-206. Section 67-4a-206 (involving securities property) does not include any provision requiring the holder to attempt to confirm the death of the owner of the securities (only Section 67-4a-202—involving IRA property—includes this provision).

We are not sure what is intended by R966-1-13(2), which appears to be incomplete (and at best is unclear). However, if the intention is to provide a separate dormancy rule if the owner is deceased, such a rule would be inconsistent with the Act, which includes no such provision.

3. **R966-1-41: Securities Sale and Claims.** R966-1-41(1)(b) provides that "Unless the administrator reasonably determines it would be in the best interests of the owner for the sale to occur sooner, the administrator may not sell or otherwise liquidate a security until 3 years after the administrator receives the security."

   COMMENT: UPPO recommends that the Proposed Regulation be revised to delete the language in R966-1-41(1)(b) that gives the administrator the discretion to sell securities prior to the end of the three-year period required by the Act. Section 67-4a-702 of the Act contains no exception to the three-year prohibition of the sale of securities. This provision is intended to ensure that the owner's interest in his or her securities is preserved for **at least** the three-year period of time following escheat.

4. **R966-1-51: Periods of Limitation and Repose.** R966-1-51(2) states that, under the Act, "an action or proceeding may not be maintained by the administrator to enforce this Act in regard to the reporting, delivery, or payment of property more than 10 years after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property." R966-1-51(3) then provides that: "The 10-year period of limitation is tolled: (a) If the holder did not specifically identify the property in a report filed with the administrator or provide other express notice to the administrator; or (b) By the filing of a report that is fraudulent." R966-1-51(4) further states: "Notwithstanding the tolling of the 10-year period of limitation because of a failure of a holder to specifically identify property in a report filed with the administrator or provide other express notice to the administrator, the administrator will not maintain an action in regard to the reporting, delivery, or payment of property more than 10 years after such property should have been reported and remitted to the administrator if all of the following apply: (a) The holder has filed reports with the administrator for the past 10 years; (b) The holder agrees in writing to file all reports required by the Act, including providing express notice to the administrator of any future disputes concerning the reporting of property; (c) The total amount of property, excluding any interest or penalties which the administrator could impose under the Act, is less than $2,500 or is otherwise de minimis as reasonably determined by the administrator; and the administrator determines that the holder acted in good faith and without negligence."

COMMENT: UPPO recommends that the Proposed Regulations be revised to be consistent with the Act. Each of the provisions above is inconsistent with the Act:

- Section 67-4a-610(2) of the Act provides that the statute of limitations is **five years**, not ten years, after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property. We would therefore recommend that R966-1-51(2) and (3) be revised to reference the five-year period in the Act.

- Section 67-4a-610(4) of the Act provides: "The administrator may not commence an action, proceeding, or examination regarding the duty of a holder under this chapter on a day that is more than 10 years after the day on which the duty arises." The Act does not include any of the conditions set forth in R966-1-51(4). Thus, there is no statutory authorization for any (much less all) of these conditions and we would therefore recommend that R966-1-51(4) be revised to delete these conditions to conform to Section 67-4a-610(4) of the Act.

5. **R966-1-23: Retention of Records by Holder.** R966-1-23(4) states that, "Both the records retention period of Section 67-4a-404 of the Act and the statute of limitations in Section 67-4a-610(2) of the Act are 10 years. However, the statute of limitations only applies after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property. If the statute of limitations has been tolled because the holder failed to either report property or provide express notice to the administrator and the holder fails to maintain sufficient records of items which were not reported as unclaimed, to allow examination to determine whether the holder has complied with the Act, then the administrator may use estimation in an examination of such holder pursuant to Section 67-4a-1006 of the Act." R966-1-23(2)(e) states that "The records must contain: … (e) Sufficient records of items which were not reported as unclaimed, to allow examination to determine whether the holder has complied with the Act."

   COMMENT: UPPO recommends that the Proposed Regulations be revised to be consistent with the Act. Each of the provisions above is inconsistent with the Act:

   - Sections 67-4a-404(1) and 67-4a-610(2) of the Act provides that the record retention period and the statute of limitations are both **five years**, not ten years. We would therefore recommend that R966-1-23(4) be revised to reference the five-year period in the Act.

- Section 67-4a-404(3) of the Act provides: "The records shall contain:

  (a) the information required to be included in the report;

  (b) the date, place, and nature of the circumstances that gave rise to the property right;

  (c) the amount or value of the property;

  (d) the last address of the apparent owner, if known to the holder; and

  (e) if the holder sells, issues, or provides to others for sale or issue in this state traveler's checks, money orders, or similar instruments, other than third-party bank checks, on which the holder is directly liable, a record of the instruments while they remain outstanding indicating the state and date of issue."

  The Act does not include any requirement that records of items not reported should be maintained. Thus, there is no statutory authorization for R966-1-23(2)(e) and we would therefore recommend that this section be deleted to conform to Section 67-4a-404(3) of the Act.

- Section 67-4a-1006(3) of the Act provides that "If a person subject to examination under Section 67-4a-1002 does not retain the records required by Section 67-4a-404, the administrator may determine the value of property due using a reasonable method of estimation." As stated above, the Act does not require records to be maintained for property not reported therefore the use of estimation in an examination for property not reported is not authorized by the Act. Therefore, we recommend that this section be deleted to conform to Section 67-4a-1006(3) of the Act.

6. Examples of Other Provisions of Concern

- **R966-1-4. Tax-Deferred Accounts.**
  - Incorrect use of the terms "tax advantaged" and "tax deferred".
- **R966-1-17. Report Contents.**
  - Aggregation limit of $5 is inconsistent with the Act's limit of $50.
- **R966-1-22. Due Diligence Notice by Holder.**
  - Notice period of 60 days to a year is inconsistent with the 60 to 180 days provided in the Act.

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- Requiring notice be sent via certified mail for securities valued at $1,000 or more is not provided for in the Act.

Considering the publication date of the Proposed Regulations, December 15, 2019, we again urge you to extend the comment period to allow interested parties a reasonable period of time to provide comments. Doing so would ensure that provisions affecting owners and holders are adequately addressed.

Thank you for your consideration of our comments. Please let me know if you have any questions or if we can be of further assistance.

Sincerely,

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cc: Lyle Hillard, Senator, via email: lhillyard@le.utah.gov