

December 17, 2018

The Honorable Jack Evans  
Council of the District of Columbia  
1350 Pennsylvania Avenue NW, Suite 106  
Washington DC, 20004

via e-mail: [jevans@dccouncil.us](mailto:jevans@dccouncil.us)

RE: Uniform Unclaimed Property Act Revision Act of 2018 – Bill 22-0654

Dear Councilman Evans:

The Unclaimed Property Professionals Organization (UPPO) is the national trade association of unclaimed property holders and service providers. We represent more than 425 unclaimed property holders and service providers and 1,500 unclaimed property professionals of diverse industries and employer size. UPPO advocates for fairness in unclaimed property laws and regulations, and consistent with this mission, UPPO actively participated in and submitted several whitepapers to the Uniform Law Commission's (ULC) Drafting Committee for consideration in its rewrite of the Revised Uniform Unclaimed Property Act (RUUPA) which was ultimately passed and endorsed by the ULC in July 2016.

UPPO respectfully submits our concerns with the District of Columbia's Bill 22-0654, which appears to (1) deviate from a number of the provisions in the RUUPA as adopted; and (2) include certain RUUPA provisions that are constitutionally problematic. Our submission is formatted to provide our comments regarding specific provisions, followed by an Appendix containing 22-0654 proposed language with our proposed changes.

UPPO strongly recommends the Council consider the consequences outlined below, and amend Bill 22-0654 to incorporate UPPO's proposed changes. Doing so would ensure that owners and holders are adequately protected.

We appreciate your consideration and thank you for your willingness to consider industry input. Please contact me with any questions or comments regarding the content of this letter.

Respectfully,

Toni J. Nuernberg, CAE, CBF CGA  
Executive Director

**UPPO SUMMARY DOCUMENT**  
**DC B22-0654 Proposed RUUPA Legislation**

**UPPO'S POSITION REGARDING DERIVATIVE RIGHTS:**

A custodial unclaimed property statute permits a state to take custody of the property that is abandoned by its owner. For that reason, it is important to limit the state's taking to that to which the actual owner is entitled, as well as to consider the relationship between that owner and the holder of the property. Otherwise, the state may take property that is, under law, owned by the purported holder. This consideration is well-established in the law, captured in what is known as the Derivative Rights Doctrine. The U. S. Supreme Court reaffirmed the doctrine in *Delaware v. New York* [507 U.S. 490, 503 (1993)], holding that "[i]n framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights....". The Court directed that, for that purpose, it is necessary to first "determine the precise debtor-creditor relationship as defined by the law that creates the property at issue." (*Id.* at 499). The Court went on to specifically state that the holder has legal obligations that define the escheatable property at issue.

The Derivative Rights Doctrine has been recognized in lower courts several times as well. Cases such as *Insurance Co. of N. Am. v. Knight*, 291 N.E.2d 40, 44 (Ill. App. 1972), *appeal dismissed*, 414 U.S. 804 (1973); *Cole v. National Life Ins. Co.* 549 So. 2d 1301, 1303-04 (Miss. 1989); and *State v. United States Steel Corp.*, 126 A.2d 168, 173 (N.J. 1956) represent just a few examples.

In short, the Doctrine establishes that the state's right and obligation to safeguard the interests of the owner are equal to, but not greater than, the rights and obligations that the owner's relationship with the holder creates. With that in mind, some provisions of the Revised Uniform Unclaimed Property Act under consideration in DC Bill 22-0654 raise some concerns:

- **Sections 102(26) and (32):** This bill would require the escheat of gift cards and stored-value cards that owners can only redeem for goods and services under their agreement with the issuer. The Act would require that those cards be monetized, closed, and remitted to the District allowing the presumed owners to claim a cash equivalent that they were not otherwise entitled to under the terms of purchase. This broad approach expands the rights of purchasers and threatens to convert the issuers' earned profit to the state. For example, a \$100 sweater may only cost the issuer \$50 to produce, such that a \$100 gift card incorporates a \$50 profit to the retailer. Further, the provision does not protect residents, as it renders redemption on the cards more difficult than presenting the card at the issuer. Over thirty states have some form of exemption for stored value cards in their laws. The problems with this provision could affect store credits, online account balances, prepaid goods/services, and other like properties. For that reason, UPPO proposes language to clarify that escheatable property only includes property that is redeemable for cash by the owner.
- **Section 610(a):** This provision is inconsistent with the derivative rights doctrine for numerous reasons. For example, it fails to address those instances in which an owner only purchased a time-limited property right, such as a right of access or a right to services for a limited period of time. By contract, the owner purchased a time-sensitive instrument that provides no property rights for the period after expiration. It also invalidates legal agreements between businesses limiting refund requests for overpayments. Such provisions are typically negotiated to avoid business and cash flow

disruption and are typically in return for contractual concessions. Negating such provisions provides a windfall to one side of the transaction. This provision would invalidate such agreements and allow an owner to claim property to which they are contractually no longer entitled. A final example is that some state statutes limit an owner's right to recover property and this provision negates such legislation.

- **Section 1006:** This provision would allow the use of estimation "to determine the value of property due" if the holder does not have records for the property. However, if the District were to employ the unclaimed property law solely to raise revenue, it would violate due process requirements, so UPPO proposes to clarify the language to reflect that estimation is for the purpose of encouraging compliance with record-keeping rules and not a calculation of property actually owed. That is, estimation is not to be used to establish a dollar value for a property with no identified owner and for which no owner can be identified, but rather serves as a punitive action against the holder for the failure to retain records, and to determine the concomitant loss suffered by the District itself.

### **UPPO'S POSITION REGARDING FOREIGN TRANSACTIONS:**

UPPO cannot support the current provisions of the District's RUUPA and objects to any attempt to extend the escheat law to foreign-owned property, for at least four reasons:

- **Language is Not Practical** - Section 304(a) of RUUPA requires the holder to (1) review the laws of a foreign country and (2) ascertain whether that property is or is not subject to custodial taking by the law of the foreign country before the holder knows whether to remit the property to the District. This puts a formidable burden on the holder and their legal counsel, is not practical. In addition, the District bill does not define what is a "foreign transaction."
- **Violates Federal Common Law** - The U.S. Supreme Court (Court) has never permitted the holder's jurisdiction of domicile (such as the District) to escheat property belonging to an owner residing in a foreign country. To the contrary, the Court expressly stated in *Texas v. New Jersey*, 379 U.S. 674, at 682 (1965) that the jurisdiction of domicile has the right to escheat only where either (1) the last known address of the property is unknown, or (2) the owner's "last known address *is in a state* which does not provide for escheat of the property."
- **Raises Significant Concerns of Due Process** - The proposed language may also violate the Due Process Clause by subjecting holders to potential multiple conflicting claims for the same property. The Court has held that the Due Process Clause protects a holder against multiple escheat claims for the same property. See *Western Union Tel. & Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961). Since no court could protect a holder against a subsequent claim that might be asserted for the property by the country of residence or the country of citizenship of the owner, or some other foreign jurisdiction that might have a basis to assert such a claim, the Due Process Clause precludes any U.S. state or similar jurisdiction such as the District of Columbia including the holder's state of domicile, from claiming such property. Moreover, with respect to securities that are escheated, the District is likely to liquidate such securities, thereby depriving the foreign owner – with whom the owner has absolutely no connection – of their ownership of the escheated securities.

- **Inconsistent with Foreign Commerce Clause Jurisprudence** - The escheat of foreign- owned property also conflicts with the Commerce Clause of the U.S. Constitution. The Commerce Clause provides that Congress shall have the power to regulate commerce “with foreign Nations, and among the several states, and with the Indian Tribes.” In *Japan Line, Ltd. v. County of Los Angeles*, the Court held that Los Angeles County was prohibited by the Commerce Clause from imposing a fairly apportioned property tax on shipping containers owned by foreign companies which were physically located within the county. A key intent of the Commerce Clause was to allow the U.S., through Congress, to speak with one voice in commercial dealings with foreign countries. Accordingly, if a U.S. jurisdiction is prohibited from taxing property owned by foreign companies even where such property is physically located within the state or jurisdiction, then it stands to reason that the jurisdiction should have no greater authority to seize and liquidate the property owned by a foreign person who has no physical location in the jurisdiction.

### **UPPO’S POSITION REGARDING RULES FOR TAKING CUSTODY OF PROPERTY PRESUMED ABANDONED**

UPPO cannot support section 3 of the District’s RUUPA because certain provisions are likely unconstitutional as follows:

- **Section 305 should be deleted** - The Third Rule of Escheat is likely unconstitutional and was rejected in two Third Circuit Court Appeals decisions; *Marathon Oil v. State of Delaware and N.J. Retail Merchants Ass’n v. Sidamon-Eristoff*.
- **Section 304(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 or jurisdictions such as the District now have a law “providing for” the custodial taking of property.
- **Section 302(2) should be deleted** - The Supreme Court has stated numerous times that the records of the holder are “the only relevant records” to determine the “last known address” of the true owner of the property. Section 302(2) allows the State or the District 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 303(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 a holder is to determine if addresses reflected on its records for apparent owners are “temporary”, or what a “temporary” address even means.
- **The word “specifically” should be deleted from 304(b)(1) and (2)** - The use of “specifically” allows auditors to try to overrule state or jurisdiction such as the District 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 301(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.

## **UPPO'S POSITION REGARDING DISPOSAL OF SECURITIES**

Section 702 (a) provides that the Administrator may not sell or otherwise liquidate a security until 60 days after the administrator receives the security and gives the apparent owner notice that the Administrator holds the security.

UPPO is certain that this prompt liquidation provision will cause shareholders to lose significant value, since learning about stock escheatment and claiming it back within 60 days is extremely impractical, if not virtually impossible. It is likely to lead to litigation, as liquidations have resulted in court actions across the country. Undoubtedly, this provision will also increase expenses and strain the resources of the District. It is UPPO's position that the owner should always be made whole if the Administrator decides to liquidate and the owner suffers a loss as a result of that decision. We commend the state of New York for adopting that position.

Section 702 of the RUUPA adopted by the ULC prohibits the liquidation of securities unless the Administrator has held the securities for at least three (3) years. Additionally, the Administrator must make the owner whole if the shareholder claims the shares within six (6) years of the escheatment.

During the drafting of RUUPA, NAUPA and UPPO came to the compromised position outlined above in § 702 because the unclaimed property statutes are intended to operate as consumer protection measures, not cause harm to owners who are attempting to save by investing in securities. Of course, we would encourage the District to enact more owner-friendly provisions thereby providing even stronger protections for owners.

## **UPPO'S POSITION REGARDING THE TRANSITIONAL PROVISION**

UPPO's position is that §1503 should be applied prospectively only.

## APPENDIX A

### UPPO'S RECOMMENED CHANGES TO CERTAIN PROVISIONS OF THE PROPOSED ACT

Sections 102 (26) and (32)

Section 610(a)

Section 1006

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#### DERIVATIVE RIGHTS

##### Section 102 Definition

**(26) "Property"** means tangible property described in section 205 or a fixed and certain obligation to pay money, issued, or owed in the course of a holder's business or by a government, governmental subdivision, agency, or instrumentality. The term...:

**(32) "Stored-value card"** means a record evidencing a promise made for consideration by the seller or issuer of the record that goods, services, or money will be provided to the owner of the record to the value or amount shown in the record. The term...:

(B) does not include a loyalty card or game-related digital content; or any card redeemable for merchandise or services only

##### ~~Sec. 610. Periods of limitation and repose~~

~~(a) Expiration, before, on, or after the effective date of this act, of a period of limitation 869 on an owner's right to receive or recover property, whether specified by contract, statute, or court 870 order, does not prevent the property from being presumed abandoned or affect the duty of a holder under this act to file a report or pay or deliver property to the Administrator.~~

##### Sec. 1006. Failure of person examined to retain records.

If a person subject to examination under section 1002 does not retain the records required by section 404, the Administrator may ~~determine the value of property due using a reasonable method of estimation~~ use a reasonable method of estimation to calculate a penalty in the amount of property that should have been but was not reported to the District for the record-retention period set for in this Act, based on all information available to the Administrator, including extrapolation and use of statistical sampling when appropriate and necessary, consistent with examination procedures and standards adopted under section 1003(a) and in accord with section 1003(b).

#### FOREIGN TRANSACTIONS AND RULES FOR TAKING CUSTODY

##### SECTION 301. 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 jurisdiction 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 the District, the District is deemed to be the jurisdiction 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 jurisdiction; and

(3) if the address under paragraph (2) is in a different jurisdiction, the different jurisdiction is deemed to be the jurisdiction 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 302. ADDRESS OF APPARENT OWNER IN THE DISTRICT.**

The administrator may take custody of property that is presumed abandoned, whether located in this District 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 the District; ~~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 the District.~~

### **SECTION 303. IF 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 the District is the state of the most recently recorded address, the District may take custody of property presumed abandoned, whether located in the District 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 the District is the state of the next most recently recorded address that is not a temporary address, the District may take custody of the property presumed abandoned.~~

### **SECTION 304. HOLDER DOMICILED IN THE DISTRICT.**

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 the District, 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 the District, 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 the District.

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

#### **SECTION 305. CUSTODY IF TRANSACTION OCCURRED IN THE DISTRICT.**

~~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~~

~~(3) 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.~~

### **TRANSITIONAL PROVISION**

#### **Sec. 1503. TRANSITIONAL PROVISION.**

~~(a) An initial report filed under this act for property that was not required to be reported before the effective date of this act, but that is required to be reported under this act, must include all items of property that would have been presumed abandoned during the 10-year period preceding the effective date of this act as if this act had been in effect during that period.~~

(b) This act does not relieve a holder of a duty that arose before the effective date of this act to report, pay, or deliver property. Subject to section 610(b) and (c), a holder that did not comply with the law governing unclaimed property before the effective date of this act is subject to applicable provisions for enforcement and penalties in effect before the effective date of this Act.