TREASURY DEPARTMENT
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG, PA 17120

TIMOTHY A. REESE
THE STATE TREASURER

July 1, 2016

Via Email Transmission

Mr. Rex Blackburn, Co-Chair
Mr. Michael Houghton, Co-Chair
Drafting Committee to Revise the Uniform Unclaimed Property Act
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, Illinois 60602

Re: Formal Comments of Commonwealth of Pennsylvania, Treasury Department

Dear Commissioners Blackburn & Houghton:

Attached for the consideration of the members of the Drafting Committee to Revise the Uniform Unclaimed Property Act, are the formal comments of the Commonwealth of Pennsylvania, Treasury Department. As State Treasurer, I am statutorily charged with the enforcement of the Commonwealth's Disposition of Abandoned and Unclaimed Property Act. Accordingly, I am compelled to share with the members of the Drafting Committee comments intended to highlight several provisions of the draft that are inconsistent with the consumer protection function of unclaimed property law.

At its core, unclaimed property law is a form of consumer protection – guarding the rights of consumers who are currently dispossessed of property that they own. Unclaimed property administrators, such as the Pennsylvania Treasury Department, strive to avoid such unjust enrichment by establishing procedures designed to reunite lost property with its rightful owner.

Unfortunately, there are several provisions that appear in the current draft of the Uniform Act that, if enacted, would be contrary to the interests of consumers and undermine the ability of most state unclaimed property administrators to effectively enforce the provisions of unclaimed property law. Such provisions include: (1) state indemnification requirements; (2) limitation of recovery of financial securities; (3) the use of reasonable estimations; (4) the knowledge of death of customers; (5) curtailing the use of auditor / agents; and (6) arbitrarily imposed limits on owner property rights.

It is my hope that the members of the Drafting Committee would benefit from the perspective of an administrator of state unclaimed property laws. Please find Pennsylvania's

comments attached for your consideration. Should you have any questions or concerns you may direct them to Treasury's Chief Counsel, Christopher Craig (ccraig@patreasury.gov or 717.787.2465).

Sincerely,

Timothy A. Reese
State Treasurer

COMMONWEALTH OF PENNSYLVANIA

TREASURY DEPARTMENT

Comments to the Proposed Revised Uniform Unclaimed Property Act (version 5/26/16)[1]

The Pennsylvania Treasury Department submits these comments to the proposed draft of the Revised Uniform Unclaimed Property Act in order to provide the Committee with the perspective of a leading state unclaimed property administrator. In 1872, Pennsylvania became one of the first states in the nation to require the reporting and payment of bank deposits to the state based on inactivity. Since its advent, unclaimed property law has been deeply rooted in consumer protection. *See Am. Express Travel Related Services v. Sidamon – Eristoff,* 755 F. Supp.2d 556, 581 (D.N.J. 2010) (unclaimed property law is rooted in consumer protection). Its explicit goal is to prevent the unjust enrichment by holders of property to which they are not legally entitled and establish a process through which lost property may be reunited with its lawful owner. *Standard Oil v. New Jersey,* 341 U.S. 428, 435-36 (1951). Unclaimed property laws, such as Pennsylvania's, are intended to satisfy three important public policy objectives: (1) locate and reunite lost property with its rightful owner; (2) relieve holders of unclaimed or abandoned property from liability upon its return; and (3) permit states the beneficial public use of unclaimed property until such time as it is returned. *See State by Lord v. First National Bank,* 313 N.W.2d 390, 393 (Minn. 1981); William H. Danne, Jr., *Validity, Construction, and Application of State Statutes Implementing the Uniform Unclaimed Property Act or its Predecessor -- Modern Status*, 29 A.L.R.6th 507 (2007).

[1] The comments of Pennsylvania Treasury reference the version of the proposed draft of the Revised Uniform Unclaimed Property Act, dated May 26, 2016. All page and line number references contained herein correspond to the draft as it appears at:
http://www.uniformlaws.org/shared/docs/Unclaimed%20Property/2016AM_RevisedUnclaimedProperty_Draft.pdf

Pennsylvania Treasury's experience with unclaimed property is extensive. Over the past three fiscal years, Pennsylvania Treasury's Bureau of Unclaimed Property has collected approximately $1.35 billion in abandoned and unclaimed value from holders, returning approximately 26% to owners during the same period. The Bureau's efforts to locate and contact owners of unclaimed property are extensive, spending over $1 million in advertising to solicit property claims during each of the past three fiscal years.

Upon review of the proposed draft of the Revised Uniform Unclaimed Property Act, Pennsylvania Treasury has identified several provisions that are contrary to the historical intent and purpose of unclaimed property laws and would frustrate the ability of unclaimed property administrators to administer such laws effectively on behalf of dispossessed property owners. Because the uniform acts developed by the Commission are often used as a starting point for state legislators to consider revisions to their laws, these provisions could be misappropriated by some in an effort to weaken consumer protections and benefits under current state law.

The term "uniform" is a powerful adjective, conveying the suggestion of commonality, standard opinion and general acceptance. Far from generally accepted, each of the provisions identified by Pennsylvania Treasury are controversial and not universally supported by unclaimed property administrators. Without a reasonable claim to commonality or general acceptance among state administrators, attempts to codify limits on owner property rights or to obstruct state administrative enforcement efforts through the inclusion of these provisions within a proposed "uniform" law is both misleading and contrary to the fundamental purpose of unclaimed property laws.

Far from a compendium of standard, generally accepted legal provisions involving unclaimed property law, the proposed "uniform" law contains several changes that undermine

the ability of state unclaimed property administrators to enforce the law. Pennsylvania Treasury is particularly concerned that the inclusion of novel and untested legal theories within a "uniform" law may cause significant confusion and unintended consequences within the unclaimed property field.

With these concerns in mind, Pennsylvania Treasury submits the following comments for the Committee's consideration:

Statutes of Limitation and Repose

(See page 40, lines 11-16)

Section 610 of the Draft imposes a five-year limit on actions and proceedings following the filing of a holder report and a ten-year limit on not only actions and proceedings, but also examinations of a holder following when the duty to report arose. Each of these provisions arbitrarily limit the practical ability of owners to reclaim abandoned property and are contrary to many state statutes.

Unclaimed property should not become a windfall for holders. *In re Monks Club, Inc.* 394 P.2d 804, 806 (Wash. 1964). Holders have no property interest in unclaimed property. *Delaware v. New York,* 507 U.S. 674, 502 (1965). Yet, subsection (b) places a five-year limitation on actions or proceedings to enforce reporting, payment, or delivery requirements when a holder has filed a "non-fraudulent" report (the term "non-fraudulent" is never defined). As a consequence, an administrator's authority and ability to audit incomplete reports to ensure the reporting of all unclaimed and abandoned property would abruptly end after five years. Therefore, if a holder were to underreport or simply fail to include substantial categories of property, an administrator would have no recourse after five years – even under circumstances in

which there is evidence of negligence, concealment, or misconduct that may not rise to the level of actual "fraud." Unless an owner has actual knowledge that the holder was in possession of property to which the owner was entitled, it is unlikely it will ever be claimed if these proposed changes are adopted.

Subsection (c) imposes an absolute bar on all actions, proceedings, and examinations with respect to any holder duty ten years after that duty arose, without a fraud or concealment exception. These limits serve no consumer protection purpose, yet permit a financial windfall to holders that are able to evade state reporting requirements. Many state laws require the retention of unclaimed property records for ten years, or longer. For example, Pennsylvania law provides a fifteen-year audit and enforcement period. 72 P.S. § 1301.16. Though an owner's right to claim property exists in perpetuity, the practical effect of the changes in the Draft would limit the ability of state administrators to review filed reports to five years and to audit holders that fail to file to only ten years– without any exception for evidence of fraud, misconduct, or intentional concealment. No consumer interest is served by the inclusion of these enforcement limitations.

Contracts with Third Parties

(See page 56, lines 1-15)

Section 1009 of the Draft places restrictions on an administrators' ability to contract directly with third-party agents/examiners. These restrictions are vague, arbitrary and serve no identifiable consumer protection purpose. Section (1) requires an administrator to identify and submit a demand to each possible holder sixty days prior to contracting with an examiner; (2) limits any contingency fee contract to 10% of the value of property delivered; and (3) mandates a competitive procurement process for all third-party agent/examiner contracts. Though it is

apparent that such provisions benefit potential non-compliant holders, by imposing restrictions upon an administrator's ability to contract freely with auditors, the proposed restrictions fail to take into consideration the current contracting practices among most administrators.

Third-party agent auditors/examiners are typically retained after a determination has been made by the administrator that the holder has failed to submit a report, has deviated from past reporting history, or has submitted incomplete reports over a period of time. It often involves multiple state examinations and may focus on a particular industry or line of commerce. Mandating an administrator to issue a demand letter prior to the selection and retention of an auditor would permit a non-compliant holder to submit a past-due report to forestall a compliance audit. Cynically, this provision would allow a non-compliant holder to "game the system" by removing any consequence of avoiding reporting requirements until a pre-audit demand letter is issued. The retention of an auditor neither precludes nor discourages a holder from voluntarily complying with any state's reporting requirement.

A 10% fee limitation is entirely arbitrary and removes contracting flexibility of state administrators. It is unclear why a fee limitation provision is included in a proposed "uniform" law, as matters involving contracting are typically within the sole discretion of the particular government agency. Although Pennsylvania Treasury has successfully negotiated lower contingency fee rates with auditors, removing the flexibility to consider higher rates in exchange for additional services (such as litigation support) or as acknowledgement of highly complex or contentious audits, unnecessarily curtails an administrator's contracting authority to enforce the reporting provisions of unclaimed property law.

Lastly, the requirement that all contracts be awarded pursuant to a competitive bid process appears to be a solution in search of a problem. Unlike a typical contract, in which only

one vendor may provide the particular good or service, multiple auditor contracts may be awarded by an administrator. As a consequence, there is limited benefit to a competitive bidding process that involves a revolving series of examinations and multiple auditor contracts. Additionally, some audit requirements may only be satisfied by a specialized auditor with a particular experience profile, thereby eliminating any financial value that could be provided through a competitive bidding process in which only one bidder may qualify.

Pennsylvania Treasury is well aware of the policy debate that is occurring in some state jurisdictions pertaining to the responsible use of contingency fee based agent auditors and examiners. However, the use of commission or contingency fee based auditor contracts have withstood constitutional challenge. *See, e.g., Tippecanoe County v. Indiana Manufacturer's Association,* 784 N.E. 2d 463, 468 (Ind. 2003) (Indiana Supreme Court rejected constitutional challenge to commission-based personal property audit, concluding that the role of the auditor was not "sufficiently judicial in nature" to render the contingency fee impermissible.). Accordingly, attempts to further the policy perspective of contingency fee critics by imposing unnecessary statutory limitations on their use should not be included in any proposed law characterized as "uniform." Such proposals are more appropriately debated and considered by each state on their own merits – outside of the development of a "uniform" law.

Knowledge of Death

(See pages 20-22, lines 19-23, 1-11)

Section 211 of the Draft describes when an insurance or annuity company is deemed to have knowledge of the death of an insured or an annuitant. Significantly, the Draft does not

require insurance companies to use the Death Master File (DMF), nor does it recognize a DMF match as constituting proof of death. The provisions only recognize a DMF match as proof of death when paired with a company's own validation of the death. Requiring a company's validation rather than accepting the DMF match itself to begin the process, effectively permits an insurance or annuity company to avoid or substantially delay the payment of life insurance benefits to survivors or the report of unclaimed proceeds to state administrators for beneficiaries to claim. This concern was not adequately addressed by the new amendments recently circulated by the Committee on Thursday, June 30, 2016.

Pennsylvania Treasury concurs with the sentiments expressed by the financial and insurance officers from Florida and California on the usefulness of the DMF in returning unclaimed property to owners. Though the draft language "permitting" administrators to conduct a DMF search is a concession to its usefulness, it is clear that insurance and annuity companies are provided the final word. In order to best protect the interests of dispossessed property owners, a model law should require DMF searches, allow a DMF match to constitute proof of death to begin the reporting process, and remove the "company validation" language from the Draft.

It is Pennsylvania Treasury's position that a DMF search should be required and a match constitute sufficient notice of death. However, as with the prior provision limiting the use of contingency fee agreements, this provision attempts to resolve a concurrent policy debate and predict the outcome of pending litigation within the framework of a "uniform" law. Accordingly, it is premature to include a proposed statutory resolution of the appropriate use of and the legal weight provided to DMF matches by insurance or annuity companies as a generally accepted standard.

Use of Estimation in Examinations

(See page 51, lines 16-17)

Section 1003 of the Draft proposes rules and procedures governing examinations of unclaimed property holders. These rules give holders who are subject to examination and who have filed and kept their records for the prescribed period, the power to prevent the use of estimation in examinations unless they give explicit consent in a record.

Courts have routinely upheld the use of statistical sampling as a valid auditing tool in the absence of complete financial records. *See, e.g., Balko & Associates, Inc. v. Secretary of Health and Human Services,* 555 F.App. 188, 194 (3rd Cir. 2014) (upholding use of statistical sampling to determine amount of Medicare overpayments); *Del Borrello v. Dept. of Public Welfare,* 508 A.2d 368, 370 (Pa. Cmwlth. 1986) (statistical sampling method was appropriate for determining amount of restitution). Audit estimations are necessary when records prove to be inaccurate, incomplete, or non-existent, particularly in cases in which an examination requires records going back more than a company's internal document retention period. This is not merely a hypothetical, but was recently encountered in *In re Sheriff's Excess Proceeds Litig.* 98 A.3d 706 (Pa. Cmwlth. 2014), where over $30 million in unclaimed property was recovered by Pennsylvania Treasury from the City of Philadelphia Sheriff's Office based on a historical statistical sample. Giving holders authority over how an examination is conducted, failing to include an exception as to which filed reports are determined to be inaccurate, and cutting off the use of estimation entirely after 10 years, serve no public interest other than to hinder the ability of state administrators to recover abandoned property.

Disposition of Securities

(See pages 41-42, lines 8-23, 1-9)

Sections 702 and 703 of the Draft impose holding and payment obligations on administrators with regard to securities. These sections effectively turn unclaimed property administrators into banks – requiring abandoned securities to be held for a minimum of three years and potentially up to six years in order to avoid theoretical additional market risk. The proposed change also imposes a financial liability upon the administrator if liquidated securities increase in value following a sale.

Far from being "uniform," the proposed three-year minimum holding requirement directly conflicts with Pennsylvania law and the law of other state jurisdictions. Recognizing the substantial financial risks associated with attempting to time the selling of financial securities with future market fluctuations, in 2002, the Pennsylvania legislature enacted an amendment to the Commonwealth's Unclaimed Property Law to prohibit attempts at market timing, requiring that securities be sold as they are received into the custody of the Commonwealth. 72 P.S. § 1301.17(e) ("The State Treasurer shall be required to sell all stocks, bonds and other negotiable financial instruments upon receipt of such items."). In contrast, the proposed Draft provides that if an administrator chooses to sell a security between three and six years, and a valid claim is made after the sale, the administrator has two undesirable options: either procure a replacement security or pay the owner the market value of the security at the time the claim is made. This section also requires administrators to pay interest, dividends, and "other increments" to the owner. Unclaimed property administrators are neither banks nor brokers and therefore do not pay out interest, dividends, or "other increments." Recognizing this fact, courts have rejected constitutional challenges to the refusal of state administrators to pay interest to owners during the

time the property was held in custody. *See, e.g., Smolow v. Hafer,* 959 A.2d 298 (Pa. 2008) (Pennsylvania Supreme Court held that failure to pay interest to an owner on property held in custody was not a taking without compensation, noting that custodial care of the property resulted from the owner's abandonment.).

The cumulative effect of these changes is to substantially increase the administrative cost (and financial risk) of receiving abandoned and unclaimed securities, thereby creating a financial disincentive for states to recover securities on behalf of dispossessed owners. Pennsylvania Treasury is concerned that these provisions have been included, under the guise of protecting securities owners, with the objective of limiting the ability of unclaimed property administrators to assume custodial control of abandoned financial securities.

Indemnification and Confidentiality

(See page 74, lines 8-14)

Section 1408 of the Draft requires administrators and their agents to indemnify holders in the event of a breach of confidential information possessed by the administrator or its agent.

Far from a commonly accepted provision, this proposed change is contrary to most states' constitutionally imposed limits pertaining to assumption of liability, indemnification, and waiver of sovereign immunity. Furthermore, the imposition of liability is not limited to instances of negligence or willful misconduct by the administrator. Rather, the administrator is required to indemnify the holder based upon on the simple fact that the administrator possessed the information when it was unlawfully accessed. This section also requires administrators' agents to carry indemnification insurance, which may in turn increase administrators' cost (despite the fact that Section 1009 imposes a cap on commission based fees).