STA Newsletter

July 2017

The Securities Transfer Association, Inc.

A PUBLICATION OF THE SECURITIES TRANSFER INDUSTRY

Established 1911

The Road to Reform: New Laws Prompt Advocacy Efforts

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In recent years, there have been sweeping revisions in unclaimed property law. These changes have created a significant need for advocacy on behalf of behalf of shareholders, issuers and transfer agents.

In July of 2016, the Uniform Law Commission ("ULC") enacted the Revised Uniform Unclaimed Property Act ("RUUPA") with securities-related provisions that recognized the federal regulatory structure mandated by SEC Rule 17Ad-17.

After significant input from the STA, the ULC noted that 17Ad-17 prevented investments from being escheated unless they were truly abandoned. Rejecting the inactivity standard, the ULC acknowledged that investment theory typically dictates that shareholders buy and hold securities for extensive periods of time with no expectation of active contact with the holder. As such, the RUUPA utilizes the "lost" or "RPO" standard.

A further benefit for shareholders is the RUUPA prohibits the liquidation of securities for at least three years after the state receives the property. Additionally, if shareholders claim their property from the state within six years of escheatment, the state is required to make the shareholder whole.

Based on these improvements in the escheat of securities, the industry eagerly awaited the states' enactment of the RUUPA. However, this anticipation quickly soured, as several states introduced legislation masked as the RUUPA, but with provisions that deviated considerably from the RUUPA's securities sections. In response, the STA once again partnered with the Shareholder Services Association ("SSA") to work with the states on issues of importance to our constituencies.

First up was Utah, which introduced SB 175 as the state's RUUPA. Unfortunately, unlike the ULC's RUUPA, Utah SB 175 utilized an inactivity standard to create the presumption of abandonment, thus circumventing the language used in the ULC's RUUPA and in Rule 17Ad-17. Further, the bill called for liquidation of securities upon receipt; did not make owners whole; required due diligence by costly certified mail; and required the escheatment of securities upon the owner's death.

The STA-SSA team communicated its concerns to the legislature, and secured calls with stakeholders. Ultimately the team was joined by the Investment Company Institute to discuss these issues with Utah Treasurer David Damschen and his staff. The team worked on amendments to SB 175 which preserved the important protections of the ULC RUUPA in the Utah statute. The result was the enactment of a Utah statute[1] which adopted the RPO standard, prohibits prompt liquidation of securities and removes the requirements for certified mailings and escheatment based upon death.

Almost simultaneous to Utah's actions, Arkansas introduced HB 1142 which would require holders to liquidate securities prior to escheatment and remit only cash to the states. The STA and SSA collaborated to provide the Arkansas legislators with background on federal cases which established that liquidation without notice would violate due process; further, it explained the basis for 17Ad-17 and how its intent would be circumvented by HB 1142. They also introduced the practical concern that holders do not have the authority to liquidate without the owners' consent, which would make compliance impossible. Finally, it was noted that

[1] Utah Code Ann. §67-4a-208.

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liquidation would create irreversible tax consequences for shareholders. Ultimately, the efforts were successful in Arkansas. When the bill was signed into law in March, the provisions requiring liquidation prior to escheatment had been eliminated.[2]

Next up was South Dakota with SB 34. This bill required the liquidation of securities within 90 days of receipt by the State Treasurer. The STA and SSA secured discussions with multiple stakeholders, including counsel for Governor Dennis Daugaard. While the version signed into law in March 2017 still provides for the liquidation of securities within 90 days of receipt by the State Treasurer,[3] based on the team's input to state officials, there is now an administrative requirement that the state will provide notice to all shareholders prior to liquidation.

Presumably those notices have been mailed since the enactment of the statute, and the liquidations will occur shortly. While the STA-SSA team was unable to delay significantly the liquidations mandated by statute, at least the owners will receive notice of the pending sales and will have the opportunity to preserve their investments.

In April, the STA and SSA provided comments to the regulations proposed in Delaware pursuant to SB 13, Delaware's version of the RUUPA. Via letter to state officials, the team expressed concerns regarding the indemnification provided to holders who escheat securities to Delaware in good faith but are later sued, as well as the appropriate indicators of interest in securities property.

In particular, the wording of the proposed regulation implied that the non-return of 1099 forms and the execution of W-8 BEN forms within the dormancy period are only valid as indications of owner interest for ACH and DRP accounts.[4] Delaware was urged to clarify that such activity demonstrates an interest in all securities accounts, whether or not enrolled in a DRP or ACH.

On May 5th, Delaware introduced SB 79, extending the indemnification provisions as the STA-SSA team requested. Further, Delaware officials have stated that new regulations will be issued which address many of the concerns raised by stakeholders, including the STA and SSA, during the public comment period. As such, the STA-SSA team awaits the next version of the regulations and will work with the state to ensure that securities issues are addressed. Finally, Illinois proposed its version of the RUUPA with HB 2603. This bill deviates from the RUUPA significantly in that it has a trifurcated system for triggering escheatment. Under HB 2603, securities would be escheatable either three years after the owner's account is coded as RPO; or, five years after inactivity; or, two years after death. Further, the bill is written in such a way that many of its provisions would be applicable retroactively, thus impermissibly subjecting issuers and transfer agents to significant interest and penalties.

The team worked with Illinois legislators and other stakeholders to point out the unconstitutional provisions of the bill, as well as practical issues in implementation and public policy concerns. HB 2603 sat in the Rules Committee without action for months. With just hours left in the legislative session, late on June 29th the bill was inserted into a budget amendment. As of this publication, there is a significant chance of its passage, without ever having a public hearing.

The STA and SSA have each long worked with the SEC to advance their members' interests. The proliferation of unclaimed property issues over the last few years has provided the opportunity for frequent collaboration of the groups before courts, legislatures and state agencies. The next legislative cycle is sure to produce many additional opportunities for joint advocacy as cash-strapped states seek revenue generators, such as "inactive" shares or shares that can be quickly liquidated. And with that comes the need for another wave of increased advocacy to protect shareholders, issuers and transfer agents from bills that deviate significantly from the protections that the STA and SSA worked so diligently to include in the RUUPA.

Jennifer Borden of Borden Consulting Group represented the STA and SSA in the efforts described in this article, with invaluable support from the STA's Unclaimed Property Committee. ■

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[2] Ark. Code Ann. § 18-28-202.
[3] *S.D. Codified Laws § 43-41B-23(b).*
[4] Del. Dept. of Finance, R. 2.5.2 (proposed April 1, 2017).