

NEW AMENDMENTS TO PENNSYLVANIA'S UNCLAIMED PROPERTY LAW (2016)

Date: 27 July 2016

Depository Institutions Alert

By: Raymond P. Pepe

Significant changes affecting all holders of unclaimed property were included in amendments to Pennsylvania's Fiscal Code adopted as part of the state's 2016–17 budget. The amendments establish requirements for the notification of property owners prior to the transfer of unclaimed property to the State Treasury. In addition, the amendments modify presumed abandonment rules for fiduciary and tax-deferred retirement savings accounts, provide for the escheat of matured U.S. savings bonds, and revise rules for the publication of unclaimed property lists by the State Treasury. These changes to the Pennsylvania Unclaimed Property Act take effect on September 10, 2016, and will apply to unclaimed property reports filed in 2017. [1]

REQUIREMENTS TO NOTIFY PROPERTY OWNERS PRIOR TO TRANSFER OF UNCLAIMED PROPERTY TO THE STATE TREASURY

While all states have unclaimed property laws, Pennsylvania and Delaware historically were the only states that did not require notification to be given to property owners prior to the transfer of unclaimed property to the state.

The new amendments to the Pennsylvania Unclaimed Property Act require the holder of property presumed abandoned to send notice to the owner of the property not more than 120 days, nor less 60 days, prior to the date a report concerning the property is required to be submitted to the State Treasurer, stating that the holder is in possession of the property, if:

- the holder has in its records an address for the owner that the holder's records do not disclose to be inaccurate; and
- the value of the property is \$50 or more.

The notice must provide:

- a description of the property;
- a description of the property's ownership;
- the value of the property, if known; and
- any information necessary to contact the holder to prevent the reporting of the property to the State Treasurer.

Pennsylvania law requires unclaimed property reports to be submitted on or before April 15 of the year following the year in which the property was first presumed abandoned, but allows the State Treasurer to grant requests to

delay the due date for the submission of reports for up to six months. [2] As a result, unless a holder is authorized to delay the filing of an unclaimed property report, notices for property to be transferred to the State Treasurer in 2017 must be sent between December 21, 2016 and February 13, 2017.

Notice must be sent by first-class mail, unless the owner has previously agreed to a method of electronic notice that remains valid to contact the owner. Because it may be difficult in many circumstances to determine whether an electronic mail address "remains valid," it may be prudent to send a mail notification that only requires that "the holder's records do not disclose [the address] to be inaccurate."

Holders of unclaimed property are prohibited from imposing any costs or fees upon owners of unclaimed property for the preparation or mailing of these notices.

It is unclear whether the failure to send the required notice exposes a holder to any liability associated with delivery of the property to the State Treasurer. Unlike the laws of many other states, Pennsylvania does not expressly condition the relief from liability for unclaimed property that has been delivered to the state upon good-faith compliance with notification requirements or limit the relief from liability based on a general requirement of good-faith compliance with the unclaimed property law. [3] A property holder must, however, include in the verification of its annual unclaimed property report an affirmation of compliance with these new notification requirements. Under Pennsylvania law, a false statement made in an affirmation in an official proceeding or "intended to mislead a public servant in performing his official function" is subject to prosecution as a second-degree misdemeanor subject to fines of up to \$5,000 and imprisonment of up to two years. [4]

Compliance with these new notification requirements may result in an owner recovering property, or indicating a continuing interest in the property, prior to the date an unclaimed property report is required to be submitted to the State Treasury. When this occurs (either as a result of the new notification requirements or due to other circumstances), Pennsylvania law does not require the property to be remitted to the State Treasury, but requires the holder to "file a verified written explanation of the proof of claim or ... the reason the property is not subject to the custody and control of the Commonwealth." [5] Because Pennsylvania law allows property presumed abandoned to be remitted to the State Treasury after an unclaimed property report is filed, provided the property is remitted on or before April 15 of the year following the year in which the property is first presumed abandoned and unclaimed, such a written explanation may be provided either in an unclaimed property report or separately filed with the State Treasury.

PRESUMED ABANDONMENT RULES FOR FIDUCIARY AND TAX-DEFERRED RETIREMENT SAVINGS ACCOUNTS

Prior to 2014, Pennsylvania law provided that property held in a fiduciary capacity was presumed abandoned unless the owner "within five years after it has or shall become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property or otherwise indicated an interest therein." These rules were based on the original 1954 version of the Uniform Unclaimed Property Act, except that Pennsylvania shortened the period after which presumed abandonment occurs from the seven years provided in the 1954 Uniform Act to five years.

While Pennsylvania's law prior to 2014 contained no provisions to modify these rules as applied to tax-deferred retirement savings accounts, the Treasury Department administratively treated such accounts as not payable or

distributable until the distribution of all or part of the funds was required to avoid tax penalties, or the account owner began taking distributions from the account, whichever occurred earlier.

These administrative practices did not address the status of Roth IRAs, which do not require distributions during the life of the owner to avoid tax penalties. As part of legislation reducing five-year dormancy periods to three years and making other significant changes in the state's unclaimed property law, in 2014, Pennsylvania added provisions to its law for tax-deferred accounts "without mandatory distribution requirements." The 2014 amendments provided that tax-deferred retirement savings accounts are presumed abandoned "three years after the owner has (i) attained 70.5 years of age; or (ii) [has last] indicated an interest in the account or plan or in other property of the owner in the possession, custody or control of the holder." [6]

The 2014 amendments defined the phrase "indicated an interest in property" to mean "some affirmative action by the owner, which is documented in a contemporaneous record prepared by or on behalf of the holder or in the possession of the holder, including:

- a written contact, communication or transaction;
- a secure or password-protected electronic contact, communication or transaction;
- a verbal contact, communication or transaction, in which the holder takes reasonable action to verify the identity of the owner; or
- a contact, communication or transaction, which is evidenced by other criteria provided by the State Treasurer." [7]

The 2014 amendments were far from satisfactory because, while tax-deferred retirement accounts such as IRAs and 401(k)s do not contain mandatory distribution requirements during the life of the owner, all such plans (including Roth IRAs) do require distributions following the death of the account owner. In addition, the 2014 amendments made it unclear whether presumed abandonment occurred after either the earlier or later of the time the account owner attained age 70.5 or last indicated in interest in the account or in other property in the possession, custody, or control of the holder. [8] The Treasury Department also did not publish criteria for the recognition of other types of contacts, communications, or transactions.

To address these deficiencies, Pennsylvania has further modified its rules for the presumed abandonment of fiduciary accounts, assets held by agents in fact, and all types of retirement accounts to provide that these accounts are presumed abandoned three years after the holder "has lost contact with the owner," unless within that three year period the owner has:

- increased or decreased the principal in the account;
- commenced receiving distributions; or
- otherwise indicated an interest in the account or plan or in other property of the owner in the possession, custody, or control of the holder.

The legislation provides that a holder has lost contact with the owner if a communication sent to the owner by first-class mail is returned undelivered by the U.S. Postal Service. Following rules similar to SEC Rule 17Ad-17 for brokerage firms, if a second communication sent within 30 days after a prior communication is returned as

undelivered, presumed abandonment is measured from the date that second communication is returned undelivered. If a second communication is not sent within 30 days, however, presumed abandonment is measured from 30 days after the first communication is returned undelivered.

Where holders do not regularly communicate with owners by mail, such as typically occurs when an account owner elects to receive electronic communications, the legislation requires the holder to attempt to confirm the owner's continued interest in the property by communicating electronically with the owner two years after the date of owner's last indication of interest in the property. If an electronic communication is returned undelivered or is not responded to by the owner, the holder is required to send a written notice to the owner by first-class mail. If the mail notice is returned as undelivered, presumed abandonment is measured from the date of the owner's last contact with holder.

These new notification requirements are potentially applicable to all businesses, both domestic and foreign, nonprofit organizations, and governmental organizations, with creditors or customers located in Pennsylvania or which are domiciled in Pennsylvania, regardless of whether an organization otherwise has sufficient contacts with the state to be subject to taxation or regulation by the state. All U.S. unclaimed property laws require the reporting and remittance of unclaimed property based on the last-known address of property owners or, in lieu of a last-known address, to the state of domicile of the holder of unclaimed property. Like most other states, Pennsylvania's unclaimed property law also applies when the last-known address of an owner of unclaimed property is located in a jurisdiction that does not provide for the escheat or custodial taking of the property and the holder is domiciled in Pennsylvania. [9]

OTHER CHANGES TO THE PENNSYLVANIA UNCLAIMED PROPERTY LAW

Other changes to the Pennsylvania Unclaimed Property Law included in the new amendments that do not directly affect most holders of property include the following amendments:

Escheat of Unclaimed U.S. Savings Bonds

In the new amendments, Pennsylvania followed the actions taken by a number of other states seeking to reclaim from the U.S. Treasury the unclaimed proceeds of matured Series E U.S. Savings Bonds.

In 2012, the U.S. Court of Appeals for the Third Circuit upheld a decision of the U.S. District Court for the District of New Jersey that dismissed claims filed by New Jersey, Kentucky, Montana, Oklahoma, Missouri, and Pennsylvania seeking to recover from the U.S. Treasury the proceeds of matured Series E U.S. Savings Bonds under state unclaimed property laws. [10] After the claims were initially transferred to the U.S. Court for Federal Claims by the District Court and were dismissed as lacking jurisdiction by the Claims Court and the Court of Appeals for the Federal Circuit, [11] the District Court dismissed the states' claims on grounds of intergovernmental immunity and federal preemption. [12]

Subsequent to the Third Circuit's decision, several states attempted to reframe the issue by amending their state unclaimed property laws to allow their unclaimed property administrators to take title to the proceeds of matured savings bonds, rather than only engaging in a custodial taking of the bond proceeds to protect the rights of bond owners. In 2015, in a proceeding initiated by the Treasurer of the State of Kansas, the Federal Claims Court rejected a motion filed by the U.S. Treasury seeking to dismiss the proceeding for lack of jurisdiction. [13] As a

result, the claims asserted against the U.S. Treasury remain active and have yet to be resolved by the Federal Claims Court.

The new amendments to the Pennsylvania Unclaimed Property Law are similar to laws in Kansas and approximately 20 other states that are pursuing claims against the U.S. Treasury to take title to the proceeds of matured U.S. savings bonds. While the Pennsylvania law (like the laws adopted by most other states) characterizes the taking of matured savings bonds as an "escheat" to distinguish it from a custodial taking of the type addressed in the Third Circuit decision, the Pennsylvania law (like the laws of most other states) continues to allow bond owners to recover the bond proceeds even after title has been transferred to the state.

The effectiveness of this legislation may be affected by new regulations proposed by the U.S. Treasury that would limit the transfer of title of matured savings bonds only to those in the possession of state unclaimed property administrators and for which the owner is deceased and without heirs. [14] If finally adopted, these rules may significantly limit the scope of claim that may be asserted by states.

Publication of Lists of Owners of Unclaimed Property

Within 12 months from the annual filing of unclaimed property reports, Pennsylvania requires the State Treasurer to publish in newspapers of general circulation and in county legal journals or newspapers a list the names of owners presumed abandoned in the most recent reports and the last-known addresses of property owners. The Pennsylvania Newspaper Advertising Act generally requires state and local agencies to pay newspapers for legal advertising according to uniform published rate schedules or, in the absence of published rate schedules, at the same rates "usually charged ... for commercial, general, or other advertising." [15]

The new amendments to the Pennsylvania Unclaimed Property Law eliminate the requirement to publish the last-known address of property owners and authorizes the State Treasury to determine rates paid for advertising in a manner that is "based on the best available commercial rates and subject to available appropriations."

Notes:

[1] The amendments are included in House Bill 1605, Printer's No. 3730, signed into law on July 13, 2016, as Act 85 of 2106. The full text of the amendments can be found on pages 24 to 34 of the legislation available at <http://www.legis.pa.us> (enter HB 1605 in the Quick Legislative Search button on the upper right-hand corner of the webpage and open "PN 3730").

[2] 72 P.S. § 1301.11(d). Other than Pennsylvania, only five other states require unclaimed property reports to be submitted prior to July 1 of the year following presumed abandon. Reports must be submitted to Delaware by March 1, to Connecticut by March 31, to Vermont by April 30, and to Illinois and Tennessee by May 1.

[3] 72 P.S. § 1301.14 ("Any person who pays or delivers property to the State Treasurer under [the PA Unclaimed Property Act] is relieved of all liability with respect to the safekeeping of such property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to such property.").

[4] 18 Pa.C.S. §§ 1101, 1104, 4903.

[5] 72 P.S. § 1301.13.

[6] See 72 P.S. § 1301.8 as amended by the act of July 10, 2014 (P.L.1053, No.126).

[7] 72 P.S. § 1301.1.

[8] After initially interpreting the 2014 amendments to measure presumed abandonment from the earlier of age 70.5 or the last indication of an owner's interest in property, the Treasury Department agreed to measure presumed abandonment from the later date, provided the law was further amended at the next available opportunity to clarify its correct interpretation.

[9] 72 P.S. § 1301.2.

[10] *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382 (3rd Cir. 2012).

[11] *McCormac v. U.S. Dep't of Treasury*, 185 Fed App'x. 954 (Fed. Cir. 2006).

[12] *Rosseau v. U.S. Dep't of Treasury*, Memorandum Op., U.S. Dist. Ct. for N.J., Civil Action No. 04-4368 (February 5, 2010).

[13] *Estes v. United States*, 123 Fed. Cl. 74 (2015).

[14] 80 Fed. Reg. 37559–62 (July 1, 2015).

[15] 45 Pa.C.S. § 303, 304.

KEY CONTACTS



RAYMOND P. PEPE
OF COUNSEL
HARRISBURG
+1.717.231.5988
RAYMOND.PEPE@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.