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Patrick J. Reynolds

Tax Counsel
(202) 484-5218

preynolds@cost.org

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VIA EMAIL TO: RBlackburn@idahopower.com
MHoughton@MNAT.com

Uniform Law Commission
Drafting Committee to Revise the Uniform Unclaimed Property Act
111 N. Wabash, Suite 1010
Chicago, IL 60602

Re: February 2016 Draft Revised Uniform Unclaimed Property Act
Earns C- on COST Scorecard

Dear Chairman Blackburn, Chairman Houghton, and Committee Members:

On behalf of the Council On State Taxation (COST), I respectfully submit these comments on the latest draft of the Revised Uniform Unclaimed Property Act (RUUPA).

COST has long monitored and commented on the laws governing state unclaimed property administration. Part of that effort has resulted in the publication, *The Best and Worst of State Unclaimed Property Laws, COST Scorecard on State Unclaimed Property Statutes* (Scorecard), which grades each state on key elements of its unclaimed property law. Using the Scorecard criteria and methodology, the latest draft of the RUUPA would receive a C- grade.

COST respectfully suggests you make the RUUPA a better product and serve the purpose of uniformity while recommending policies consistent with the purpose of the unclaimed property laws by incorporating COST's suggestions as outlined in our January 21, 2014, and December 29, 2014, letters. At a minimum, the drafting committee should include options a state can choose in order to better its Scorecard grade. The purpose of a uniform act is eventual adoption by the states. State legislators will appreciate the options provided, which will lead to greater adoption by the states and greater uniformity in these states.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities.

The RUUPA Should Include a Business-to-Business Exemption

Eliminating business-to-business transactions from the definition of unclaimed property is the single most important issue in the Scorecard. Businesses are in the best position to determine whether another business holds their property, and they do not need the assistance of government in making such determinations. When two companies reconcile and settle their accounts, there is no need for a state to re-open those closed books and records years later to determine whether one business holds property that belongs to another business. Furthermore, business-to-business credit balances are frequently not property actually due a creditor, and are so common in commercial transactions that requiring such items to be turned over to the government unnecessarily increases the cost of doing business. COST therefore reiterates its endorsement of the American Bar Association's (ABA) proposal that the RUUPA recognize and incorporate the derivative rights doctrine.

The latest draft of the RUUPA was assessed five points on the Scorecard as there is no business-to-business exemption. COST finds puzzling the fact that the drafting committee has, without any explanation, completely omitted a business-to-business exemption from the RUUPA. Previous drafts included placeholder language.

COST urges you to include in the draft a broad business-to-business exemption that does not require an ongoing business relationship. At a minimum, the draft should include the option for a state to include the exemption.

The RUUPA Should Include a Reasonable Statute of Limitations

The fair and equitable administration of unclaimed property requires reasonable periods of limitation for unclaimed property reporting and liabilities. Reporting requirements should be uniform and correspond with the recordkeeping requirements of the Internal Revenue Code, state tax laws, and normal business practices. In addition, statutes of limitation should run from the time a report is filed in good faith.

The RUUPA has two periods of limitation, a five-year period after the holder specifically identifies the property in an unclaimed property report, and a catch-all 10-year period. By requiring the specific identification of property, the RUUPA renders the five-year limitations period meaningless. If a holder files an unclaimed property report in good faith, that holder has identified and remitted all unclaimed property required to be remitted. As it is currently drafted, the RUUPA was assessed one point for its statute of limitations provisions.

COST suggests you include in the draft the ABA's suggested language including a three-year period for filed reports and seven years in cases of fraud or non-filing. At a minimum, the draft should include an option for a state to adopt the ABA language and remove the "specifically identified" language.

The RUUPA Should Prohibit Contingent-Fee Auditors

Contingent-fee audit arrangements have no place in a fair, balanced, and effective unclaimed property statutory framework as they encourage auditors to be overly aggressive, to interpret

state laws to their own advantage, to “cherry pick” audit targets, and to ignore holder errors that would result in lower assessments. The risk of abuse creates a perception of unfairness coloring holders’ relationships with administrators and an atmosphere of mistrust hindering compliance. As the most recent draft of the RUUPA specifically allows contingent-fee auditors for unclaimed property, it was assessed three points.

COST recommends you include in the draft RUUPA language prohibiting the use of contingent-fee auditors. At a minimum, the draft should include an option with uniform language for a state to prohibit contingent-fee auditors.

The RUUPA Should Include an Exemption for Gift Cards and Gift Certificates

In retail, a sale is consummated when a gift certificate or gift card is purchased. The certificate or card becomes a contract between the customer and the store, with full notice of the consequences of nonperformance. Excluding gift certificates and gift cards from the definition of unclaimed property is therefore consistent with private contract rights. In addition, gift certificates and gift cards are typically redeemable in merchandise only; they are not redeemable for cash. When the state receives cash as part of an unclaimed property report relating to an unredeemed gift certificate or gift card, the state has acquired a right the owner of the gift certificate/gift card did not possess.

The state should never acquire any rights greater than those held by the owners of the property. COST therefore reiterates its endorsement of the ABA’s proposal that the RUUPA recognize and incorporate the derivative rights doctrine. Requiring a retailer to turn over the full face value of gift certificates deprives the retailer of profit on the transaction – profit to which it is entitled and on which it is taxed.

Since it does not explicitly exempt gift cards, the RUUPA was assessed two points. However, we credit the RUUPA for at least giving states the opportunity to exempt gift cards.

The RUUPA Should Include an Independent Administrative Appeal Process for Holders

The opportunity to resolve disputes before an independent tribunal, judicial or non-judicial, dedicated to unclaimed property is a key to ensuring fair and equitable unclaimed property administration. To be truly independent, the tribunal must not be located within or report, directly or indirectly, to the department charged with administering the state’s unclaimed property laws. Independent tribunals are less likely to be driven by concerns over revenue collection or upholding department or contract auditor policies. Since it does not provide for an independent appeals process, the latest draft of the RUUPA was assessed one point.

COST urges you to provide in the RUUPA an independent tribunal for hearing unclaimed property audit appeals. At a minimum, you should include an option allowing a state to establish such a tribunal or move unclaimed property appeals to such a tribunal.

Penalties and Interest

Penalties for failure to pay or failure to file are common in the tax world, where taxpayers typically have a clearer understanding of their filing requirements. Given the uncertainty

surrounding many unclaimed property assessments, the threat of excessive penalties or interest is often used to force holders to settle on otherwise unclear and uncertain audit assessments. Because it has some limitations on penalties, the RUUPA was assessed zero points.

In the unclaimed property context, it makes little sense to require holders to pay interest to the state unless the state also pays interest on the property when it is reclaimed by the rightful owner. The RUUPA imposes interest on holders, but it allows interest only before the instrument reported is converted to money, but not after. This pre-conversion interest limitation assesses the RUUPA one point.

Conclusion

We urge you to make the above-referenced changes to the RUUPA, or at least make such changes options for a state to consider when deciding whether to adopt the RUUPA. We understand the administrator members of NAUPA may not agree with such changes, but COST believes the legislators and states will be better served by making our suggested changes. If you have any questions or would like to discuss further, please do not hesitate to contact me.

Sincerely,



Patrick J. Reynolds
Tax Counsel

CC: Charles A. Trost, via email to: charlie.trost@wallerlaw.com
Lucy Grelle via email to: lgrelle@uniformlaws.org
COST Board of Directors