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Ferdinand S. Hogroian

Senior Tax & Legislative Counsel
(202) 484-5228
fhogroian@cost.org

December 29, 2014

Uniform Law Commission Committee to Revise the Uniform Unclaimed Property Act

Charles A. Trost, Reporter

Attn: Katie Robinson
ULC Deputy Legislative Director / Communications Officer

Via e-mail: katie.robinson@uniformlaws.org
charlie.trost@wallerlaw.com

Re: Dec. 29, 2014 Comment Period to Inform First Draft of UUPA Revisions

Dear Mr. Trost:

On behalf of the Council On State Taxation (COST), I thank you for your work thus far to revise the Uniform Unclaimed Property Act (UUPA). Following the Committee's meeting in Washington, DC on November 7-8, COST has the following comments to supplement our position statement provided at the outset of the Committee's efforts in January 2014.¹ We hope that these comments will help inform your efforts in drafting revisions to UUPA for consideration in February 2015.

Business-to-Business Exemption. I reiterate our support for a business-to-business property exemption as a key feature of a revised UUPA. As noted during oral testimony in November and provided to the Committee in our January 2014 letter, COST's research reflects fifteen states with some form of business-to-business exemption (either statutory or administrative).² Subsequent to the submission of our letter, Missouri enacted a broad business-to-business property exemption (see H.B. 1075, enacted July 9, 2014). Significantly, this proposal became law in large part as a result of the Missouri Chamber of Commerce and Industry's commitment to unclaimed property reform.³ COST intends to continue to work with state chambers and other in-state interests to enact business-to-business exemptions in 2015.

¹ Available at http://www.uniformlaws.org/shared/docs/Unclaimed%20Property/2014jan21_RUUPA_COST%20Letter.pdf.

² Douglas L. Lindholm and Ferdinand S. Hogroian, *The Best and Worst of State Unclaimed Property Laws*, Council On State Taxation (Oct. 2013), available at <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=85349>.

³ More on the Missouri Chamber's advocacy on this issue is available at: <http://mochamber.wordpress.com/tag/unclaimed-property/>.

For the reasons stated in our earlier letter and in our aforementioned research, we believe a broad business-to-business exemption is consistent with the purpose of state unclaimed property laws and remedies many of holders' concerns with current unclaimed property regimes. Businesses are in the best position to determine whether another business holds their property, and they do not need, and should not require, the assistance of government in making such determinations. As such, we expect business-to-business exemptions to continue to be enacted and reach majority status among the states.

Regarding the substance of a business-to-business exemption, we fully endorse the American Bar Association's proposed language:

“Notwithstanding any other provision of this [Act], any property due or owing from a business association to another business association, including, but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates, shall not constitute unclaimed property under this [Act]. This section also applies to all amounts due or owing from a business association to another business association that, on the effective date of this section, are in the possession, custody, or control of a business association.”

I specifically urge you not to use the Tennessee business-to-business exemption statute as a starting point for your drafting, as you indicated during the November meeting. The Tennessee exemption is unduly narrow and vague, for example, regarding its requirement and test for the existence of an “ongoing business relationship.” No observer, to our knowledge, has advocated for the inclusion of the Tennessee statutory language in UUPA, and no support was voiced for the Tennessee exemption at the November meeting. Conversely, the ABA's proposed language espouses sound public policy, enjoys broad support from the holder community, and, we believe, is the appropriate language to include in a revised UUPA.

Derivative Rights Doctrine. COST also endorses the ABA's proposal that the revised UUPA recognize and incorporate the derivative rights doctrine. The derivative rights doctrine provides that the state should not create property rights under the guise of unclaimed property administration. This is especially applicable in the business-to-business context, where parties enter into contractual relationships without the expectation that the terms of their dealings will be amended after the fact by the State. It is also applicable in the area of gift cards discussed below, where, as noted by the ABA, the existing provisions in UUPA requiring the escheatment of 60% of the value of “gift certificates” are inconsistent with the derivative rights doctrine. In these and other areas, UUPA violates the derivative rights doctrine by providing the State with rights different than those of the owner. As demonstrated in the ABA's submission, the derivative rights doctrine was recognized by the U.S. Supreme Court in *Delaware v. New York*, 507 U.S. 490 (1993) and has been widely recognized by lower courts. As noted by the ABA, the derivative rights doctrine impacts other areas of UUPA, and thus the doctrine should be recognized in the revised UUPA and incorporated wherever implicated throughout the Act.

Statute of Limitations and Recordkeeping Requirements. COST endorses the ABA's recommended language concerning statute of limitations, including a three-year period for filed

reports and seven years in cases of fraud or non-filing. Understanding that the Committee voted to endorse a 5/10 year statute of limitations as a starting point for drafting purposes, the three-year statute better aligns with general recordkeeping practices when accounting for the dormancy period. Beyond the length of this period, however, COST urges you to include the ABA's proposed language regarding the filing of a "zero" or negative report and to exclude the current UUPA language requiring a holder to "specifically identif[y]" property in order for the statute to run. Regarding this latter point, COST and other stakeholders objected to Washington Department of Revenue draft request legislation for the 2015 session that would have adopted the 1995 UUPA language. In a response letter to stakeholders earlier this month, the DOR agreed to remove the "specifically identified" requirement from its legislative proposal. This is one example of how this language is an impediment to the adoption of UUPA that should be removed.

COST surveyed its members regarding the initial decision to include a 10-year recordkeeping requirement in the first draft of the revised UUPA. Our members believe that a 10-year recordkeeping period is too long and not reflective of prevailing industry practices. Further, the 10-year period fails to account for the dormancy period, which depending on the records required to be maintained could make the retention period much longer. Thus, COST endorses the Investment Company Institute's recommendation "that the period of time for which holders are required to maintain records be identical to the state's audit period and statute of limitations but, in no event, should a holder be required to maintain records relating to escheated property for more than seven (7) years after the property has been turned over to the state."

Contingent Fee Auditors. As we stated in our January letter to the Committee, "the use of third-party contingent fee auditors has the appearance of impropriety, likely violates due process rights, and creates the incentive to maximize assessments rather than ensure that the correct amount of property is remitted to the state. Failure to address this issue threatens to severely blunt the impact of reforms this Committee might choose to endorse." COST has consistently advocated for a statutory bar on the use of contingency fees in the audit context, both for tax and for unclaimed property. The emphasis during the Committee's discussions in November on whether contingent fee arrangements led to specific incidents of audit abuse entirely misses the point of the *incentives* that such arrangements create. The incentive for the audit firm is to artificially inflate the assessment, and the incentive for the State is to exercise lax oversight over its contractors. There is no economic reason that a State should not be able to replicate, through a rates-and-hours contract, the same cost structure as under a contingent fee contract, *unless* the current contingent fee structure is leading to abusive audits that pressure holders into unjust settlements.

The revised UUPA should include a ban on contingent fee audits based on the North Carolina law adopted in 2012 (H.B. 462): "If the Treasurer contracts with any other person to conduct an audit under [this Chapter], the audit shall not be performed on a contingent fee basis or any other similar method that may impair an auditor's independence or the perception of the auditor's independence by the public."

Gift Cards and Other Stored Value Cards. The Committee made an initial determination to define gift cards and other "stored value cards," but did not provide guidance regarding the rules

governing the escheatment of such property. COST strongly urges that the initial draft revisions to UUPA contain an exemption for stored value cards, consistent with the existing practice in the majority of states. COST's research cited in footnote 2 of this letter describes the current state exemptions for gift certificates and gift cards. While states vary in the breadth of their exemptions (for example, limiting the exemption to cards without expiration dates), COST believes the revised UUPA should contain a broad gift card and other stored value card exemption. In addition to the sound policy reasons for exempting gift cards and other stored value cards from escheatment, the Committee should not entertain any rule concerning stored value cards that would run contrary to the majority practice among the states.

Thank you for the opportunity to provide additional comments to inform the first draft of revisions to UUPA. I look forward to continuing participation on behalf of COST at the meeting in February, and welcome any questions you may have in the interim.

Sincerely,

A handwritten signature in black ink, appearing to read 'F. Hogroian', with a stylized flourish extending to the right.

Ferdinand Hogroian

Cc: COST Board of Directors