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Douglas L. Lindholm
President & Executive Director
(202) 484-5212
dlindholm@cost.org

January 21, 2014

Via E-Mail

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

Re: Issues to be addressed by the Drafting Committee

Dear Chairman Blackburn, Chairman Houghton, and Committee Members:

The Council On State Taxation (COST)¹ respectfully submits the following issues for consideration by the Drafting Committee to Revise the Uniform Unclaimed Property Act (UUPA). While these issues are not exhaustive of those areas that the Committee may advocate addressing, they reflect recurring issues of concern to unclaimed property holders. COST recently updated its research² regarding “The Best and Worst of State Unclaimed Property Laws,” noting that “compliance with unclaimed property laws depends upon a system that holders of unclaimed property perceive to be balanced, fair, and effective.” We urge the Committee to incorporate this report, attached, as it considers the following points:

- UUPA should be amended to include an exemption for business-to-business transactions

As provided in the COST report, “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.” The Illinois statute³ is often cited

¹ COST is a nonprofit trade association consisting of more than 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

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>.

³ 765 ILCS 1025/2a(b).

as a model for business-to-business exemptions, and recent scholarship⁴ on this issue could be used as a guide for drafting by the Committee. Incorporation of the derivative rights doctrine and contractual rights and obligations under the Uniform Commercial Code should also be explored.

- UUPA should be amended to reduce the period of limitations for unclaimed property and change the limitations period to commence with the filing of the report rather than commence with the reporting of specific items or categories of property

UUPA currently has an inordinately long, 10-year period of limitations. COST recommends a period of three to five years as reflective of normal business practices and tax laws. A longer period of limitations often results in artificially inflated assessments for property that can never be returned to the rightful owner. The lack of a business-to-business exemption – for example, in Delaware, which serves as domicile state to many holders – exacerbates this result. Further, holders have experienced unfair assertion of an open-ended limitations period as a result of purportedly incomplete reports. The Committee should consider concepts similar to those used in tax statutes of limitation regarding substantial understatement and fraudulent returns.

- The Uniform Law Commission should take this opportunity to address the widespread use of contingent fee audit firms to administer state unclaimed property laws

The use of third-party firms to perform state unclaimed property audits has become pervasive and has driven holder complaints of unfair administration. In particular, 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.

It is widely perceived by holders that contract audit firms exercise far too much influence and control over the audits they conduct on behalf of states, making critical decisions regarding remediation of potentially escheatable items that holders do not believe are actually owed, and also regarding the application of statutory exemptions to holders' business activities, with little or no oversight or control by the states. A bar on contingent fees and required use of other payment structures in lieu of contingent fees is essential to a fair and unbiased system of administration. At a minimum, the Uniform Unclaimed Property Act should recognize explicitly the conflicts of interest inherent in contingent fee audit arrangements and include specific provisions ensuring that contract auditors conduct their audits under the actual control and supervision of state administrators, with state administrators making critical decisions regarding the application of their statutes, and resolving (independently of the contract auditors' influence) issues raised by holders regarding the conduct of the audit or application of specific provisions of the unclaimed property statute to their facts.

⁴ Michael M. Giovannini et al., *Modeling Unclaimed Property Business-to-Business Exemptions: A Blueprint for State Legislatures*, Proceedings of the New York University Institution on State & Local Taxation (2013).

- Uniformity and reform in the audit and appeals process would greatly aid in the perception of fairness of the unclaimed property law and administration

The Committee should consider COST's recommendations regarding independent tribunals for hearing unclaimed property audit appeals. Further, the Committee should consider reforms around conduct of the audit, including the amorphous and frequently abused methods for estimating liability. Michigan recently enacted legislation⁵ providing a potential framework for discussion, such as allowing the use of estimation only if the holder does not have substantially complete records.

While the above issues do not represent all the reform that may, or should, be considered by the Committee as it undertakes its rewrite of UUPA, COST urges the Committee to include these issues in its drafting framework in light of their critical importance to unclaimed property holders that compose the COST membership. Thank you for your consideration of these matters.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Douglas Lindholm', written in a cursive style.

Douglas Lindholm

cc: COST Board of Directors

⁵ 2013 Public Act 148 (H.B. 4289), available at <https://www.legislature.mi.gov/documents/2013-2014/publicact/htm/2013-PA-0148.htm>.