



Unclaimed Property

Policy Position

Position: *State unclaimed property programs should seek to unite owners with their property in the manner that is least burdensome to owners, holders and the State. Toward that end, such programs must:*

- *Provide clear, reasonable and consistent definitions of items included in and excluded from the definition of abandoned or unclaimed property;*
- *Exclude from the definition of abandoned or unclaimed property unidentified remittances, credit balances arising from business to business transactions, merchandise due bills, gift cards and gift certificates;*
- *Exclude items that are accounting or bookkeeping discrepancies, fraudulent transactions, or that do not have a rightful owner other than the holder;*
- *Provide a reasonable statute of limitations for holders; and*
- *Ensure that administration of State unclaimed property statutes is conducted in a fair, even-handed and predictable manner by banning contingent-fee arrangements to compensate outside auditors and by providing holders access to an independent tribunal to appeal the findings or assessment resulting from an unclaimed property audit.*

Explanation: Many State unclaimed property programs have deviated from their true purpose of uniting owners with their property and have instead become alternative revenue sources for states. This conversion has greatly harmed owners who are never reunited with their property and holders who are forced to bear significant administrative costs and may even be required to turn over property which is not truly abandoned. Adopting the provisions recommended by COST will help to return unclaimed property programs to their rightful purpose.

Many states also have overbroad definitions of property types and surprise holders by inventing new types of property they deem as unclaimed—so much so that some states have re-opened old audit periods to search for new property types. These practices cause confusion and impose onerous record-keeping burdens on holders. Moreover, such practices often fail to produce real accounts with real individuals attached to them and instead result in “owner unknown” property. Owner unknown property consists of funds that will never be returned to the rightful owner—assuming there is a rightful owner other than the holder (e.g., as in the case of items deemed abandoned by the State based on statistical sampling of a bookkeeping error).

Unclaimed property statutes must exclude property types that are defined primarily to enhance State revenue rather than a desire to reunite a lost owner with his or her unclaimed property. To that end, the following property types should be excluded from the definition of unclaimed property or limited in their scope:

- Credit balances between business associations – Businesses are in the best position to determine whether another business holds their property, and they do not desire the assistance of the State in making such determinations. When two companies reconcile and settle their accounts, it makes no sense for the State to come in years later and re-open those closed books and records to determine whether one business may hold property that belongs to another business. Credit balances between business associations should be excluded from unclaimed property laws.

- Unidentified remittances – “Unidentified remittances” are payments made to a holder that the holder cannot match up with a corresponding account receivable. However, given that the payor of the remittance undoubtedly believed it owed money to the holder, it is inappropriate for the State to force the holder to turn that money over so the State can attempt to return it to the original payor. When the intent of the original payor is considered, such property is neither abandoned nor unclaimed.
- Gift certificates and gift cards – A retail sale is consummated when a gift certificate is purchased. The gift certificate essentially serves as a contract between the customer and the store, with full notice of the consequences of nonperformance. Including gift certificates and gift cards in the definition of unclaimed property interferes with private contract rights. Moreover, gift certificates and gift cards are typically redeemable in merchandise only; they are not redeemable for cash. The State should never acquire any rights greater than those held by the owners of the property. Finally, requiring retailers to turn over the full face value of gift certificates deprives the retailer of profit on the transaction—profit to which they are entitled.
- Credit memos and merchandise due bills – Credit memos and merchandise due bills are issued when a customer returns merchandise for which they do not have a receipt. In today’s world, the vast majority of such due bills that remain unused result from fraudulent transactions: stolen merchandise presented for a cash return. In an effort to protect against such losses, retailers give merchandise due bills instead of cash in non-receipted return situations. Retailers have implemented procedures to prevent fraudsters from redeeming due bills; thus, the vast majority of unredeemed due bills remain unredeemed because they were issued as a result of a fraudulent transaction. These do not represent legitimate unclaimed property and the State should not benefit from the illegal activities of fraudsters.
- Misshipments or unmatched items – In the normal course of business between manufacturers, wholesalers and consumers, large shipments of many multiple and diverse items occur on a daily basis. Over- and under-shipments are unavoidable. Despite diligent efforts to reconcile shipments records with accounting records, many of these misshipments go undiscovered on a regular basis. When closing accounting periods, over- and under-shipments generally offset each other and thus should not be considered unclaimed property.
- Unfulfilled magazine subscriptions – Magazine subscriptions are typically redeemable in merchandise only. The State should not have the right to require publishers to render cash with respect to an undelivered magazine subscription when the magazine subscriber could not redeem it for cash.
- Tax-advantaged accounts – There is little to no guidance for holders regarding the escheatment of individual retirement accounts (IRAs). States should develop a clear and uniform procedure for identifying, tracking, reporting, and escheating tax-advantaged accounts to States.

Statutes of Limitations – A major challenge for holders is that, unlike in every other area of law, few states have a statute of limitations for unclaimed property. This creates a tremendous recordkeeping and asset uncertainty burden on holders. States should enact a statute of limitations that protects the rights of property owners, recognizes the purpose of unclaimed property laws, and takes into consideration the significant administrative burdens such laws place on holders. An appropriate statute of limitations should correspond with the record-keeping requirements of the Internal Revenue Code, State tax laws and normal business practices. Statutes of limitations should run from the time an unclaimed property report

is filed in good faith with a longer period applicable (e.g., ten years) where no report is filed. A statute of limitations should include two essential elements. First, an administrator must commence an action against a holder within three years after the holder filed a report with the administrator. Even if no report or notice is provided by the holder to the administrator, no action may be commenced after ten years from the date the property becomes abandoned. This provision would not affect owners' right to recover their property directly from holders. Second, any period of limitations would be tolled by the filing of a report that is fraudulent.

Contingent-Fee Audits – Contingent-fee arrangements encourage auditors to be overly aggressive; to interpret State laws to their own advantage rather than in society's best interest; 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 that colors holders' relationships with administrators and creates an atmosphere of mistrust that hinders compliance. Equally important, excessive payments to contingent fee auditors significantly reduce funds that would otherwise be available for the owners of the property or for the general revenue of the State.

Some states have expressed concerns over their inability to hire skilled staff auditors who could adequately enforce State unclaimed property laws. The inability to hire skilled unclaimed property auditors at salaries commensurate with other, similar State positions (such as tax auditors) is undoubtedly related to the fact that states are currently willing to pay such auditors fees well in excess of anything a State employee could expect to earn. In other words, the states have created an artificial market and could eliminate that market as easily as it was created. Nevertheless, a potential solution that addresses States' staffing concerns and avoids the contingent fee issue is to continue to compensate third-party auditors from funds collected through audits, but to compensate them on a reasonable hourly basis for services rendered. Such an arrangement would reduce or eliminate the incentive for abuse that currently exists. It would also allow states to redirect the focus of the audit towards improvements in recordkeeping and tracking systems designed to improve future compliance rates, which will ultimately benefit owners, holders and States. However, hiring a third-party, even on an hourly basis, still reduces the incentive to settle cases, as well as the objectivity of the third-party, since anything that reduces the time period required to resolve the issue will reduce the amount of money earned by the third-party.

Independent Appeals System – Only a handful of states provide an independent administrative appeals forum to holders of unclaimed property. In most States, holders' only recourse to appeal an audit finding is to sue the State agency in court. The ability to reach an independent tribunal—non-judicial or judicial—which allows holders and the State adequate opportunity to meet and discuss disputes and settlement opportunities before incurring the hazards and costs of litigation is a key component of an 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, or to any subordinate executive agency. Without independence, the appearance of objectivity is simply not present. That perception, regardless of its accuracy, necessarily detracts from even exemplary personnel and work product of the adjudicative body. Independent tribunals are less likely to be driven by concerns over revenue collection, upholding department policies, or offending departmental decision-makers.