

# Before we begin

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# UNCLAIMED PROPERTY FOR LAWYERS

What is it and Why should you care?

October 6, 2022

# Presenters



**Ezra D. Church**



**Catherine N. Hounfodji**



**Joe Carr**



**Michael Kenehan**

# Agenda



**Introduction and Agenda**



**Legal Framework & Obligations**



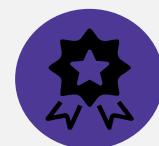
**Unclaimed Property Overview**



**Risk Mitigation & Best Practices**



**Calculation and Assessment Methods**



**Ethics Scenarios**



**Enforcement**



**Questions and Bios**

# Unclaimed Property Overview



# Unclaimed Property Types

- Generally, intangible personal property for which there has been no owner activity for a specified period of time (“dormancy period”)
- All 50 states and the District of Columbia have enacted unclaimed property laws
- The purpose of unclaimed property laws is to ensure the protection of abandoned property until the rightful owner is located
  - Moreover, states use any derivative funds earned on such property for the public good

State	Wages (years)	A/R Credits (years)	Third Party Dividends (years)	Gift Cards (years)	A/P Checks (years)	All other property (years)	B2B	Amnesty/ VDA Program
DE	5	5	5	5	5	5	No	Yes
NJ	1	3	3	5	3	3	No	Yes
NY	3	3	3	5	3	3	No	Yes
CA	1	3	3	3	3	3	No	TBD

# Look-Back Period and Record Retention

State	Audit Look-Back*	Record Retention	Citation
CA	10 + Dormancy (13 years)	7 + Dormancy	2 CCR § 1175 (record retention applies to years after such property is reported, or would have been reported, <b>No match scenario thus potential outside legal counsel review warranted</b> )
DE	10 + Dormancy (15 years)	10 + Dormancy	12 Del. C. § 1145
NY	10 + Dormancy (13 years)	5 + Dormancy	Broker/Dealers must retain records for 10 years after filing APL § 1412-a (organizations) APL § 513-a (brokers only)
NJ	10 + Dormancy (13 years)	5 + Dormancy	Electronic media should be retained for 2 years after property is filed Holder Reporting Guide – June 2022 N.J.S.A. 46:30B-95

\*From 2021 audit letters / recent auditor workpapers

# Unclaimed Property Types

## COMMON EXAMPLES OF UNCLAIMED PROPERTY INCLUDE THE FOLLOWING:

- 1 Uncashed/voided payroll or commission checks
- 2 Uncashed/voided accounts payable/vendor checks
- 3 Gift certificates/gift cards
- 4 Customer merchandise credits, layaways, deposits, refunds or rebates
- 5 Accounts receivable credits, unapplied cash, or unidentified remittances
- 6 Credits written off to income or bad debt expense accounts
- 7 Contractual Allowances credits
- 8 Uncashed royalty disbursements and royalties held in suspense
- 9 Stocks and uncashed dividends
- 10 Uncashed benefits or insurance payments (non-ERISA)



# Priority Rules

- **The U.S. Supreme Court in *Texas v. New Jersey*, established the following unclaimed property jurisdictional priority rules:**
  - First, to the state of the rightful owner’s last known address, if known, or
  - Second, to the state of the holder’s corporate domicile (i.e., the state of incorporation for incorporated entities and state of formation/principal place of business for unincorporated entities).
    - State of Inc. will claim property addressed in that state in addition to foreign, unknown, and possibly insufficient addressed property.
    - State of Inc. may also perform an estimation of unclaimed property for periods where complete records are not available

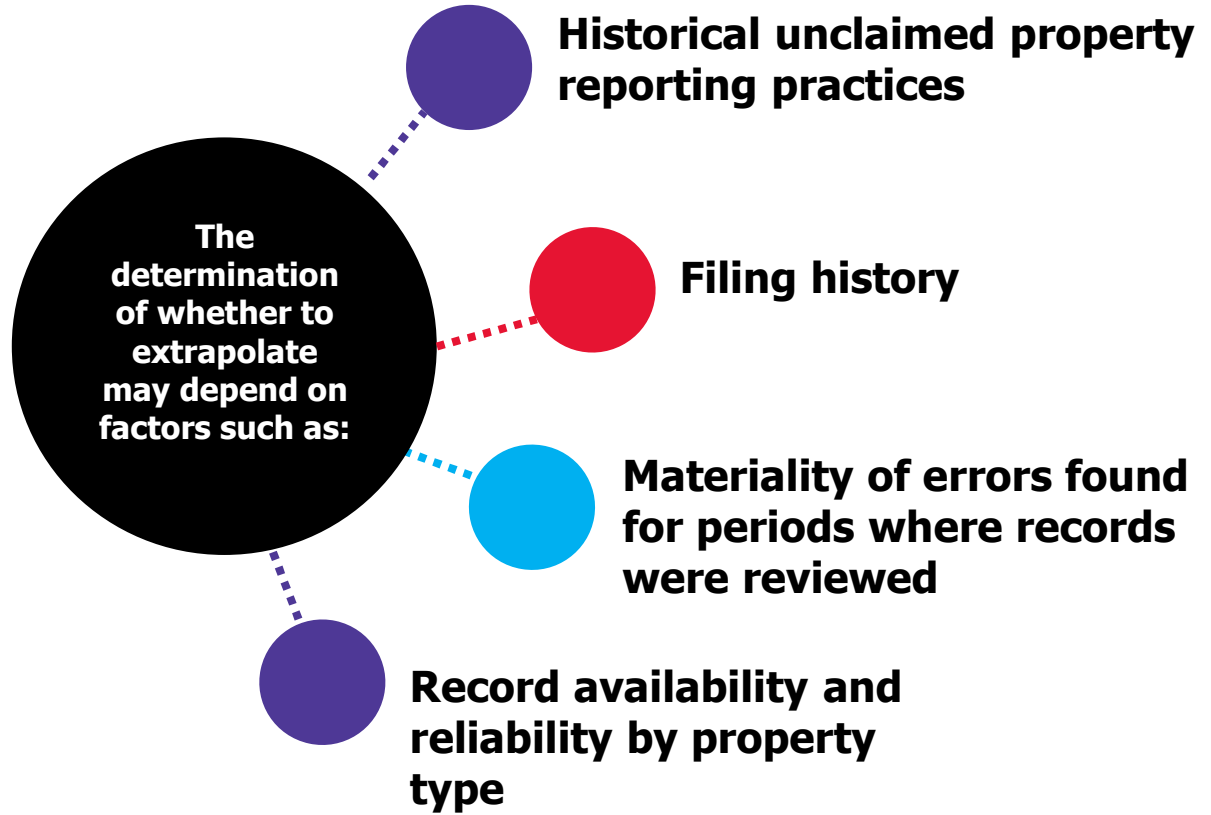


# Calculation & Assessment Methods



# Extrapolation

Many states use extrapolation techniques to establish a historic liability, at times dating back to original date of incorporation, in the event all records requested are not available and/or complete.



# Exposure Quantification

In the absence of actual accounting records to determine a Company's unclaimed property exposure, many states will employ estimation techniques to quantify potential liabilities owed the state(s).

**The following is a calculation commonly used.**

<b>BASE PERIOD</b>	<b>Total Unclaimed Property Liability (ALL STATES)</b> for Base Period (a)	=	<b>Escheat Percentage (c)</b> (Unclaimed Property Liability(a)/Total Sales (b))
	<b>Total Sales (1120)</b> for Base Period (b)		
<b>PROJECTION YEARS</b>	Escheat Percentage(c) * <b>Total Sales in Non-Base Period(d)</b>	=	<b>Total Projected Liability(e)</b>
	Total Projected Liability(e) + <b>Address Property(f)</b>		

# Understanding Estimation

## EXAMPLE OF "GROSS" ESTIMATION

Year	Company Sales	Total Unremediated Unclaimed Property - All States	Unremediated Unclaimed Property w/ Delaware Address	Extrapolated Liability Sourced to Delaware	Total Delaware Assessment
2016	\$ 750,000,000.00	\$ 250,000.00	\$ 12,500.00	Use Actual Data	\$ 12,500.00
2015	\$ 700,000,000.00	\$ 650,000.00	\$ 5,500.00		\$ 5,500.00
2014	\$ 680,000,000.00	\$ 320,000.00	\$ 11,200.00		\$ 11,200.00
2013	\$ 675,000,000.00	\$ 90,000.00	\$ 8,300.00		\$ 8,300.00
2012	\$ 665,000,000.00	\$ 110,000.00	\$ 4,500.00		\$ 4,500.00
2011	\$ 550,000,000.00	Documents Unavailable	Documents Unavailable	\$ 225,072.00	\$ 225,072.00
2010	\$ 625,000,000.00			\$ 255,764.00	\$ 255,764.00
2009	\$ 600,000,000.00			\$ 245,533.00	\$ 245,533.00
2008	\$ 550,000,000.00			\$ 225,072.00	\$ 225,072.00
2007	\$ 540,000,000.00			\$ 220,980.00	\$ 220,980.00
2006	\$ 525,000,000.00			\$ 214,841.00	\$ 214,841.00
2005	\$ 510,000,000.00			\$ 208,703.00	\$ 208,703.00
2004	\$ 495,000,000.00			\$ 202,565.00	\$ 202,565.00
2003	\$ 475,000,000.00			\$ 194,380.00	\$ 194,380.00
2002	\$ 460,000,000.00			\$ 188,242.00	\$ 188,242.00
<u>Actuals</u>	\$ 8,800,000,000.00	\$ 1,420,000.00	\$ 42,000.00	\$ 2,181,152.00	\$ 2,223,152.00
<u>Error Rate</u>		0.04%			
<u>Application of Penalties and Interest</u>					1,116,576
<u>Total Delaware Assessment</u>					<u>3,339,728</u>

# Understanding Estimation

## EXAMPLE OF "NET" ESTIMATION

Year	Company Sales	Total Unremediated Unclaimed Property - All States	Unremediated Unclaimed Property w/ Delaware Address	Extrapolated Liability Sourced to Delaware	Total Delaware Assessment
2016	\$ 750,000,000.00	\$ 250,000.00	\$ 12,500.00	Use Actual Data	\$ 12,500.00
2015	\$ 700,000,000.00	\$ 650,000.00	\$ 5,500.00		\$ 5,500.00
2014	\$ 680,000,000.00	\$ 320,000.00	\$ 11,200.00		\$ 11,200.00
2013	\$ 675,000,000.00	\$ 90,000.00	\$ 8,300.00		\$ 8,300.00
2012	\$ 665,000,000.00	\$ 110,000.00	\$ 4,500.00		\$ 4,500.00
2011	\$ 550,000,000.00	Documents Unavailable	Documents Unavailable	\$ 6,657.06	\$ 6,657.06
2010	\$ 625,000,000.00			\$ 7,564.84	\$ 7,564.84
2009	\$ 600,000,000.00			\$ 7,262.25	\$ 7,262.25
2008	\$ 550,000,000.00			\$ 6,657.06	\$ 6,657.06
2007	\$ 540,000,000.00			\$ 6,536.02	\$ 6,536.02
2006	\$ 525,000,000.00			\$ 6,354.47	\$ 6,354.47
2005	\$ 510,000,000.00			\$ 6,172.91	\$ 6,172.91
2004	\$ 495,000,000.00			\$ 5,991.35	\$ 5,991.35
2003	\$ 475,000,000.00			\$ 5,749.28	\$ 5,749.28
2002	\$ 460,000,000.00			\$ 5,567.72	\$ 5,567.72
<u>Actuals</u>	\$ 8,800,000,000.00	\$ 1,420,000.00	\$ 42,000.00	\$ 64,512.97	\$ 106,512.97
<u>Error Rate</u>			0.00121%		
<u>Application of Penalties and Interest</u>					58,256
<u>Total Delaware Assessment</u>					164,769

# Enforcement



# Audits

**What do you do when you get notice of an audit?**

**Lookback periods**

**Scoping**

- Property types to be examined
- Entity/entities to be examined

**Third party audit firms**

**Process of responding to an audit**



# False Claims Act Litigation

- Can arise when an entity understates – or is perceived to understate – an obligation to the government.
  - *i.e.*, escheatment of unclaimed property
- Can be prompted by private parties (relators) or the state AG's office.
  - Even if AG declines to proceed, the private party can proceed in a *qui tam* proceeding.
- State lawsuits typically allege that a company has knowingly and willfully underreported amounts owed to the state.
- Cases filed under seal – holders may not know about them for a long while (during investigation)
- False Claims Act are quasi-fraud statutes → treble damages apply.
  - Actual fraud is not required.
- Identifying Risks – limited records / compliance gaps / accounting gaps

# Legal Framework - Obligations



# State Updates

## 2016 Revised Uniform Unclaimed Property Act (RUUPA)

- Several states are working toward implementing the 2016 revision to the Uniform Unclaimed Property Act, last updated in 1995. RUUPA updates numerous provisions and addresses unclaimed gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods and the use of contract auditors.
- South Dakota SB 208
- South Carolina HB 3849
- Washington SB 5531
- Wisconsin SB 325, 370

## States that have enacted the 2016 RUUPA

- District of Columbia: 24-373 – Enacted 2021
- Indiana: SB 188 – Enacted 2021
- Kentucky: HB 394 – Enacted 2018
- North Dakota: SB 2048 - Enacted 2021
- Tennessee: HB 420 – Enacted 2017
- Utah: SB 175 - Enacted 2017
- Vermont: HB 550 – Enacted 2020

# Other State Updates

## Electronic Contact And Electronic Account Access Related to dormancy

Several states are working toward updating their unclaimed property laws to include online account logins as activity that would prevent escheatment. Some examples include:

### **Iowa SF 2313, SSB 3127:**

Bills provide that certain communication methods, including electronic messaging, may prevent property from being considered abandoned.

### **New York 2NYCRR 125.1, AB7742:**

Provides that electronic contact satisfies the written communication requirements under Abandoned Property Law

### **Massachusetts HB 1508, HD 184:**

Bills would forestall abandonment by electronically logging in or accessing a password protected account.

### **Texas HB 1514 – Passed 5/18/2021:**

Provides that due diligence can be performed utilizing email in lieu of physical mail.

# California AB-466 Overview

## What are the changes made by this new law?

Authorizes the Franchise Tax Board (FTB) to share certain information with State Controller's Office (SCO) related to unclaimed property

Requires unclaimed property filing disclosures on income tax filings

## Why were these changes made?

To increase compliance with unclaimed property laws in the state

## How will this impact my company?

Will require disclosure of prior UP filings on state income tax filings

Likely will be used by state to identify companies for unclaimed property audit

## When does the law come into effect?

Law becomes effective January 1, 2022

## Who is impacted by this change?

Any company filing an income tax return in California

## TAX RETURNS IMPACTED

- **Form 100 - CA Corporation Franchise or Income Tax Return**
- **Form 100S - CA S Corporation Franchise or Income Tax Return**
- **Form 100W - CA Corporation Franchise or Income Tax Return – Water’s Edge Filers**
- **Form 565 - Partnership Return of Income**
- **Form 568 - Limited Liability Company Return of Income**

## Applicable CA Tax Returns & Questions Asked

- CA Assembly Bill 466, which became effective on January 1, 2022, authorizes the FTB to share certain information with the SCO related to unclaimed property. Through this change, the state of California expects to increase awareness of, and compliance with, its Unclaimed Property Laws.

### QUESTIONS

- As of January 1, 2022, the FTB will add the following questions to certain business entity tax returns:

**A**

Has this business entity previously filed an unclaimed property Holder Remit Report with the State Controller’s Office?  
[Yes/No]

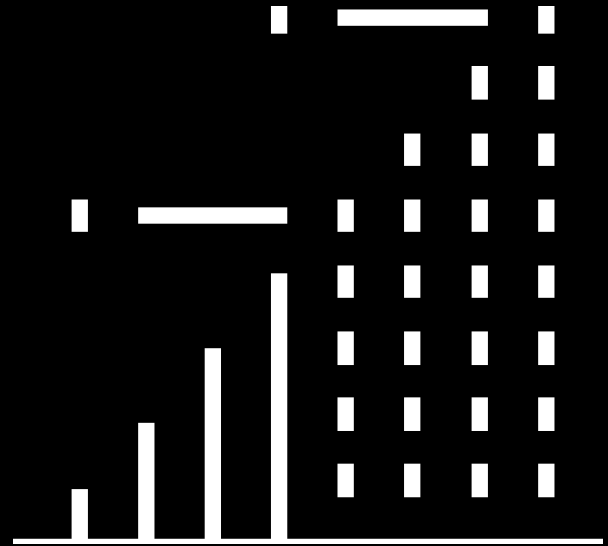
**B**

If “Yes,” when was the last report filed? \_\_\_\_\_

**C**

Amount last remitted? \$ \_\_\_\_\_

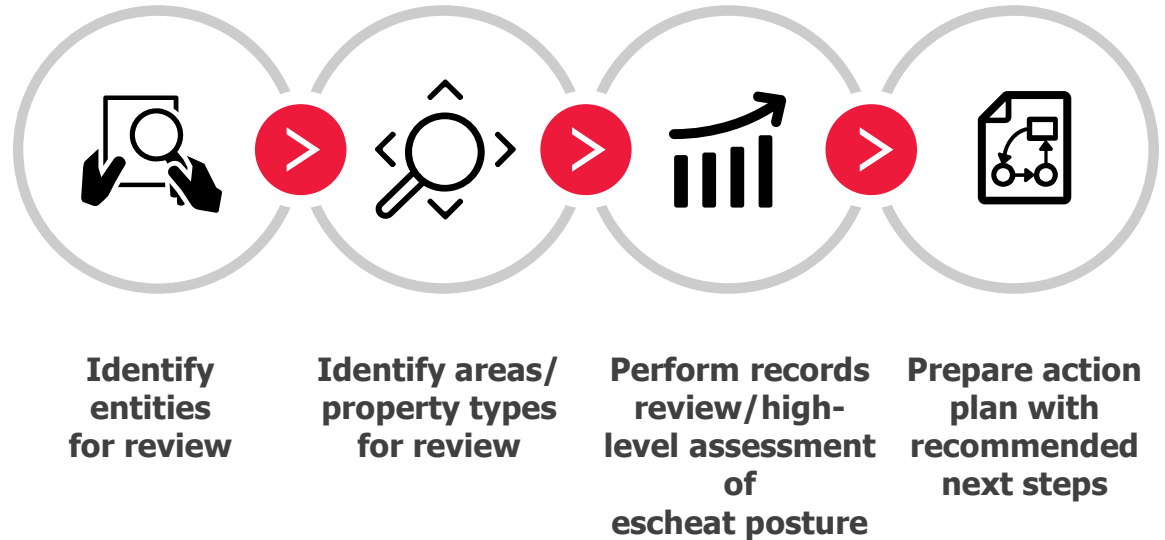
# Best Practices & Risk Mitigation Techniques



# Feasibility Studies

Feasibility studies can help companies understand the scope of their unclaimed property exposure and internal control risks, from accounting systems review to the availability of records and documentation.

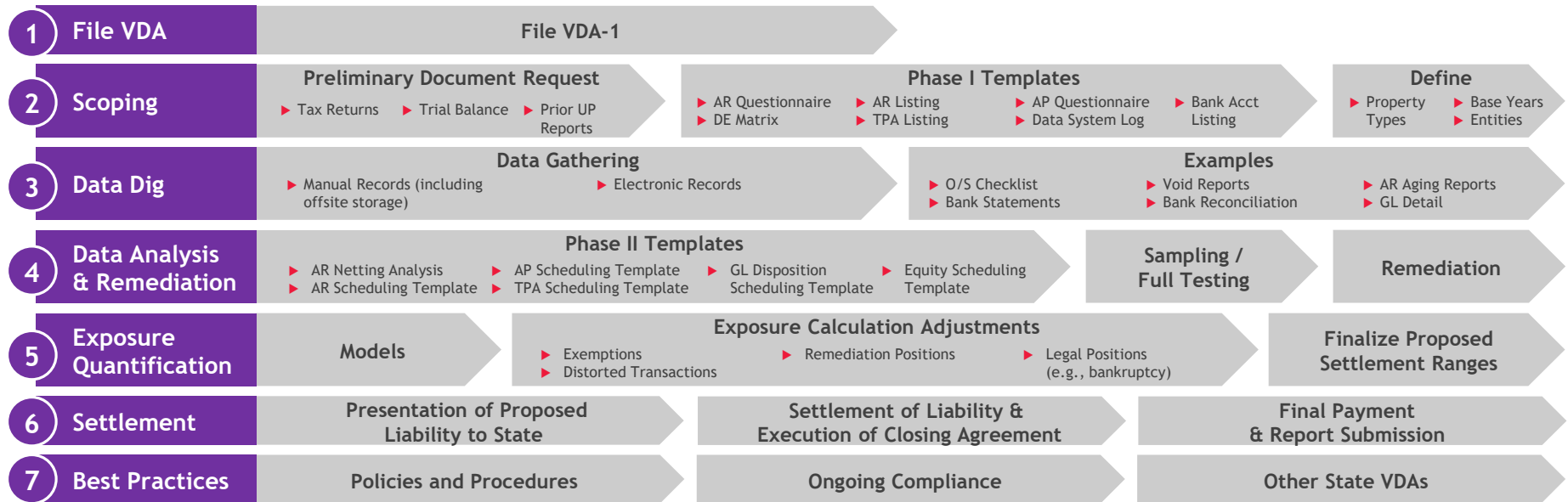
The study can help companies implement an effective unclaimed property strategy that is tailored to their needs. This type of study should be considered for companies that have no reporting history in unclaimed property that are required to also file an income tax return.



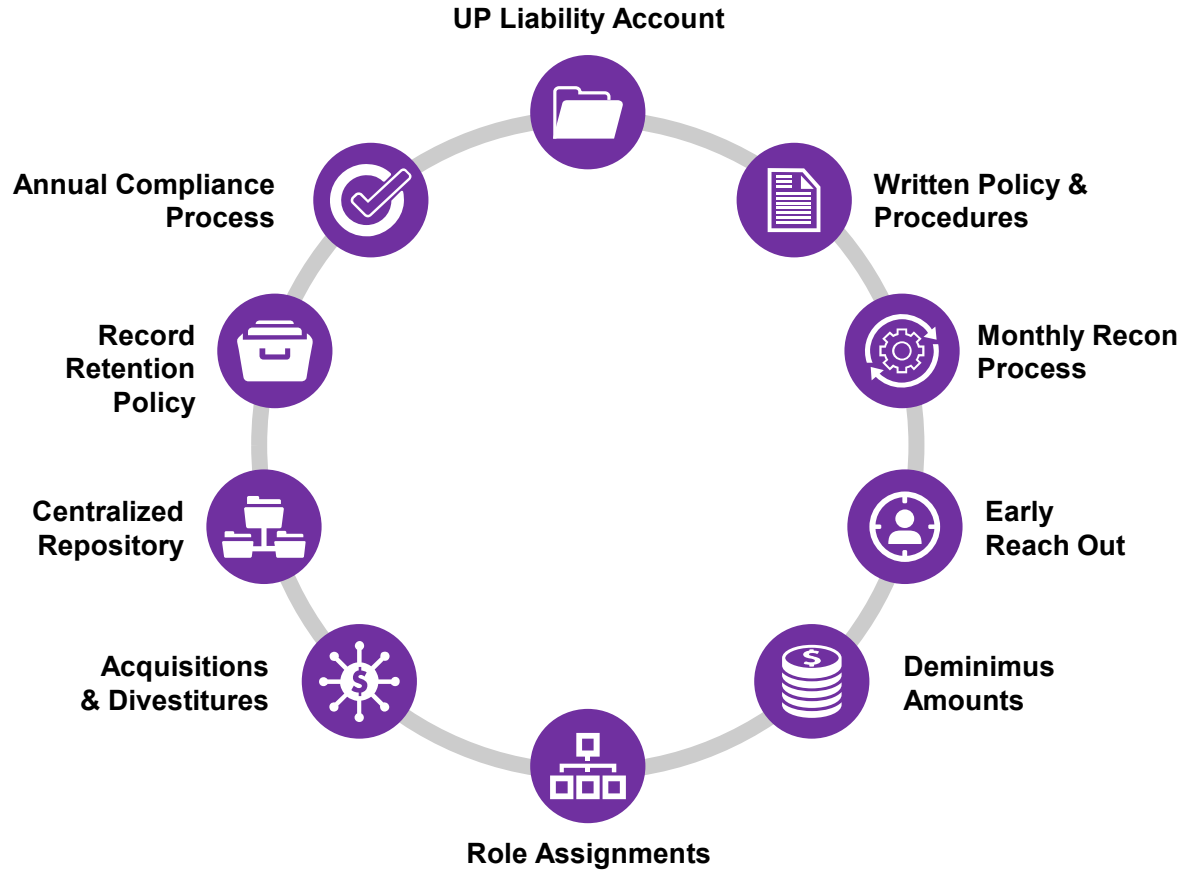


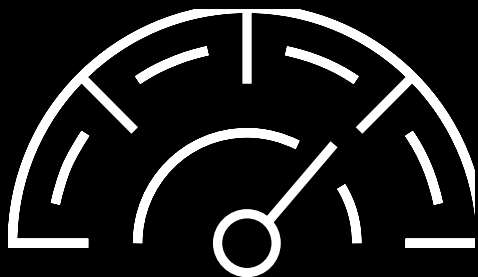
# Voluntary Disclosure Pre-Approved Process

- Voluntary Disclosure Agreements can help mitigate audit risk, interest, and penalty assessments. Typical process is as follows:



# Compliance Best Practices





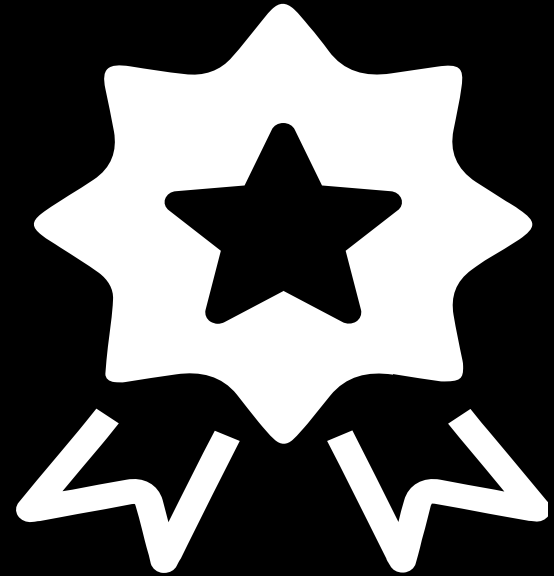
All situations are different, and there is no one-size-fits-all approach.

## Responding to Questions on Income Tax Returns

**Responding to questions on tax returns should be done accurately and with the proper level of diligence. This may include but not limited to the following:**

1. Gaining understanding as to historical practices related to unclaimed property
2. Conducting a risk assessment to determine areas of the business that may give rise to unclaimed property
3. Determining property types and potential exposures based on industry
4. Considering adding a statement to your income tax filing to provide context as to historical practices, etc.

# Ethics Scenarios



# Hypothetical 1



**Your corporate controller realizes that the company has minimal compliance with unclaimed property laws.**



**He wants to have a discussion with an accounting firm about their potential liability.**



**Is that a good idea?**

# Hypothetical 1 Answers

Your first ethical obligation is to notify the controller that the conversion with the accounting firm may not be privileged.

- Under Ethics Model Rule 2.1 (Advisor)

Under the holding in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), privilege can extend to accountants who are retained by the lawyer to help render legal advice.

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# Hypothetical 2



**Could a law firm and accounting firm offer a joint service where they analyze and provide recommendations on a flat fee basis?**



# Hypothetical 2 Answers

- No, under Ethics Model Rule 5.4 (Professional Independence of a Lawyer), a lawyer cannot share legal fees in such a situation.

- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
  - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration . . .

Rule 5.4 states, in relevant part:

- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

# Hypothetical 3



**Your corporate controller admits that when she certified and filed unclaimed property reports for the past several years, she knew that the company was underreporting customer credits.**



**She wants to know about her potential personal liability under unclaimed property, false claims act laws, and her obligations to the company.**



**What do you tell her?**

# Hypothetical 3 Answers

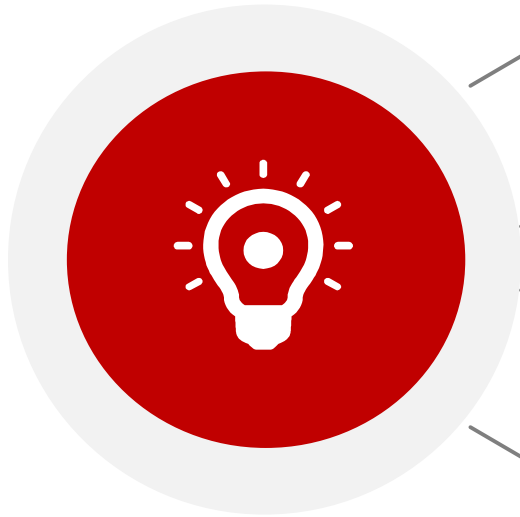
- **Ethics Model Rule 1.13 (Organization as Client)**

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- **Importance of certification for unclaimed property reports**

- **False claims act liability**

# Hypothetical 4



Following on Hypothetical 3 . . .

On further examination, it turns out that there is a good faith rationale for the underreporting—an argument that the company did not have to report.

The company is trying to decide whether to file a voluntary disclosure or take the risk on an audit.

What do you advise?

# Hypothetical 4 Answers

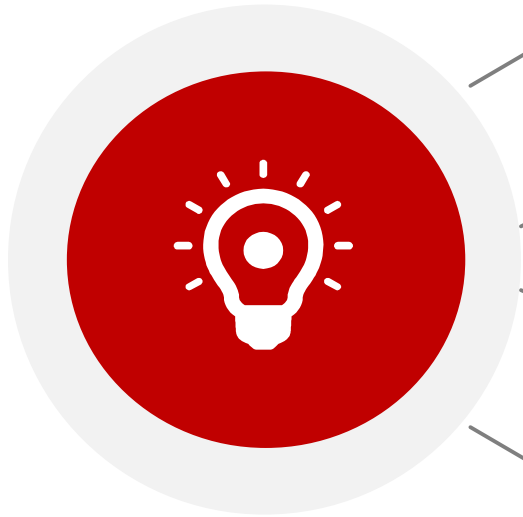
Are the economic factors reasonable for the lawyers to advise on?

- Yes, under Ethics Model Rule 2.1 (Advisor), in addition to addressing legal risks and obligations, a lawyer may refer not only to law but to other considerations “such as moral, economic, social and political factors.”

- Evaluate the pros and cons of voluntary disclosure.

- Discussion would be privileged if under a *Kovel* agreement.

# Hypothetical 5



Continuing with this same example, the company decides to move forward with a VDA.

In connection with the VDA, the business would like to not disclose the underreporting issue.

Their reasoning is that it's the state's job to ask questions, and if the state doesn't probe regarding customer credits and the completeness of prior filings, then that's the state's problem.

Can you as the lawyer disclose anyway?

# Hypothetical 5 Answers

## Under Ethics Model Rule 1.6 (Confidentiality of Information):

- You have a duty of confidentiality to the company.
- **Exception:** You may reveal information to the extent you reasonably believe its necessary (“to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.”).

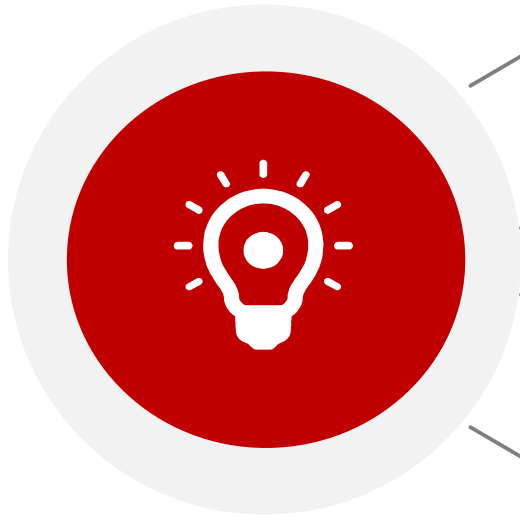
Here, you are probably not obligated to tell, and it’s not even clear if you could tell based on your duty of confidentiality.

But, Ethics Model Rule 4.1 says that a lawyer shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in criminal or fraudulent act by a client.”

There is a certain tension between these two ethical obligations.

May make sense to disclose in any event to get a clean bill on that property type and take the amount off your books.

# Hypothetical 6



ABC Corp. makes the cheapest widgets on the market, and XYZ LLC buys 10,000 widgets from ABC for \$10,000.

ABC invoices XYZ for the widgets. 60 days later, XYZ sends a paper check to ABC at the address provided, but the check is returned as undeliverable – twice. The \$10,000 sit on XYZ’s AP list for 6 years.

You join XYZ as its first ever GC. Soon after you start, the COO eagerly asks for your blessing to clear that \$10,000 off AP and use it to fund a new XYZ project.

As the GC, what do you do?



# Hypothetical 6 Answers

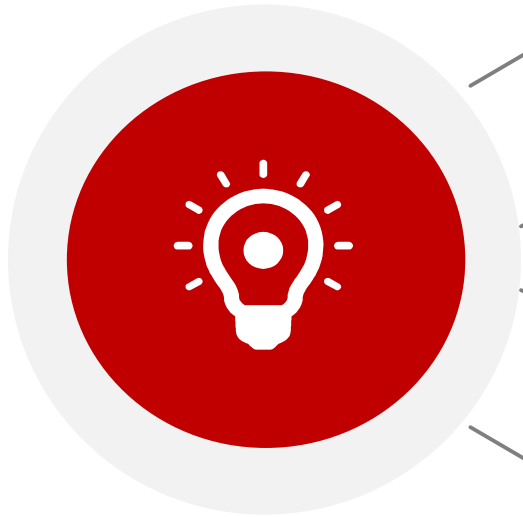
**You first need to determine whether the \$10,000 unclaimed property.**

- The dormancy period has passed.
- No expression of owner interest.
- So, yes this is unclaimed property.

**You now have an ethical duty to ensure that the unclaimed property is handled appropriately.  
(Ethics Model Rule 2.1 – Advisor)**

- You must inform the COO that the funds cannot be used for any purpose.
- You have an obligation to work with XYZ to determine which state is owed the escheated funds.

# Hypothetical 7



Your start-up retail company is expanding and wants to attract more customers by selling gift cards.

Knowing how many gift cards are never redeemed, the CEO also sees this is a great way to increase revenue.

As the only lawyer on the team, the CEO comes to you.

What do you say? What are your ethical obligations?

# Hypothetical 7 Answers

**You must first investigate whether the unused gift cards are unclaimed property**

- **Who is the issuer?**
- **When where the cards last used?**

**If the unused gift cards are unclaimed property, you are obligated to work with the company to escheat the unclaimed property to the appropriate state(s).**

- **Ethics Model Rule 2.1 (Advisor)**

# Key Points



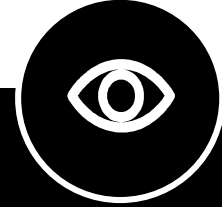
## Conduct a risk assessment

- Especially if unclaimed property has not been top of mind
- What property types are involved in your business
- Review existing policies and procedures



## Ensure processes are in place to:

- Identify property types subject to unclaimed property laws
- Review data for identified property types at a regular cadence
- Conduct due diligence and attempt to locate owners of the property at issue
- Implement integration procedures during mergers and acquisitions
- Address and correct any conflicting document retention policies



## Monitor for ongoing compliance

# Questions?

Please make sure to reach out to one of our speakers:



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Ezra counsels and defends companies in privacy, cybersecurity, and other consumer protection matters. He helps clients manage data security and other crisis incidents and represents them in high-profile privacy and other class actions. Focused particularly on retail, ecommerce, and other consumer-facing firms, his practice is at the forefront of issues such as biometrics, artificial intelligence, location tracking, ad tech, and blockchain.

Ezra is a Certified Information Privacy Professional (CIPP) and co-chair of the firm's class action working group. He has worked with hundreds of companies facing data breaches, counseling them in the critical hours after an incident occurs, helping them understand and investigate the issues, and crafting an effective and appropriate notice program for affected individuals and government regulators. He also works with companies to anticipate and prepare for cybersecurity incidents before they occur, developing breach response plans to help prevent and mitigate future breaches. Ezra is a member of Morgan Lewis's crisis management practice, with a focus on the management of the crises involved in cybersecurity incidents.

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Catherine North Hounfodji regularly counsels clients on retail, ecommerce, logistics, and privacy matters, as well as compliance related to COVID-19 restrictions. In addition to her counseling practice, Catherine has more than 10 years of experience litigating commercial disputes.

Before attending law school, Catherine spent 10 years working in the field of education, including five years working with the Knowledge is Power Program (KIPP) and three years teaching high school Physics and Chemistry in Benin (in West Africa) as a Peace Corps Volunteer. Catherine is fluent in French and holds a bachelor's degree in mechanical engineering.

# Joe Carr



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With 25 years of combined experience in state and local taxation, financial statement auditing and operational auditing, Joe Carr has worked with a broad range of BDO's largest clients in the manufacturing, retail, distribution, financial, investment, homebuilder, oil & gas, healthcare, pharma and business services industries. He specializes in state and local tax issues and leads the firm's National Unclaimed Property practice.

Joe has success in mitigating client escheat exposures in VDA and audit settlements before many state escheat divisions. This success is largely attributable to his deep understanding of accounting principles, transaction flow and unclaimed property law. He maintains strong relationships with state escheat administrators and their contract audit firms to assist clients in resolving their unclaimed property issues. He is also deeply involved in coordinating the resolution of legal issues with internal and external counsel to help clients address and mitigate their escheat exposure.



# Michael Kenehan



## Michael Kenehan

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Michael has more than 15 years of combined experience in abandoned and unclaimed property (AUP) and internal audit related matters. He possesses vast experience in handling large unclaimed property audit engagements for the nation's largest contract AUP firm in a variety of industries including healthcare, retail, manufacturing, oil and gas, entertainment, food and beverage, automobile, and hospitality. Mike leverages his extensive knowledge of the audit process, property types, and the rules and regulations associated with AUP to assist clients in mitigating exposure and proactively addressing its escheat issues.

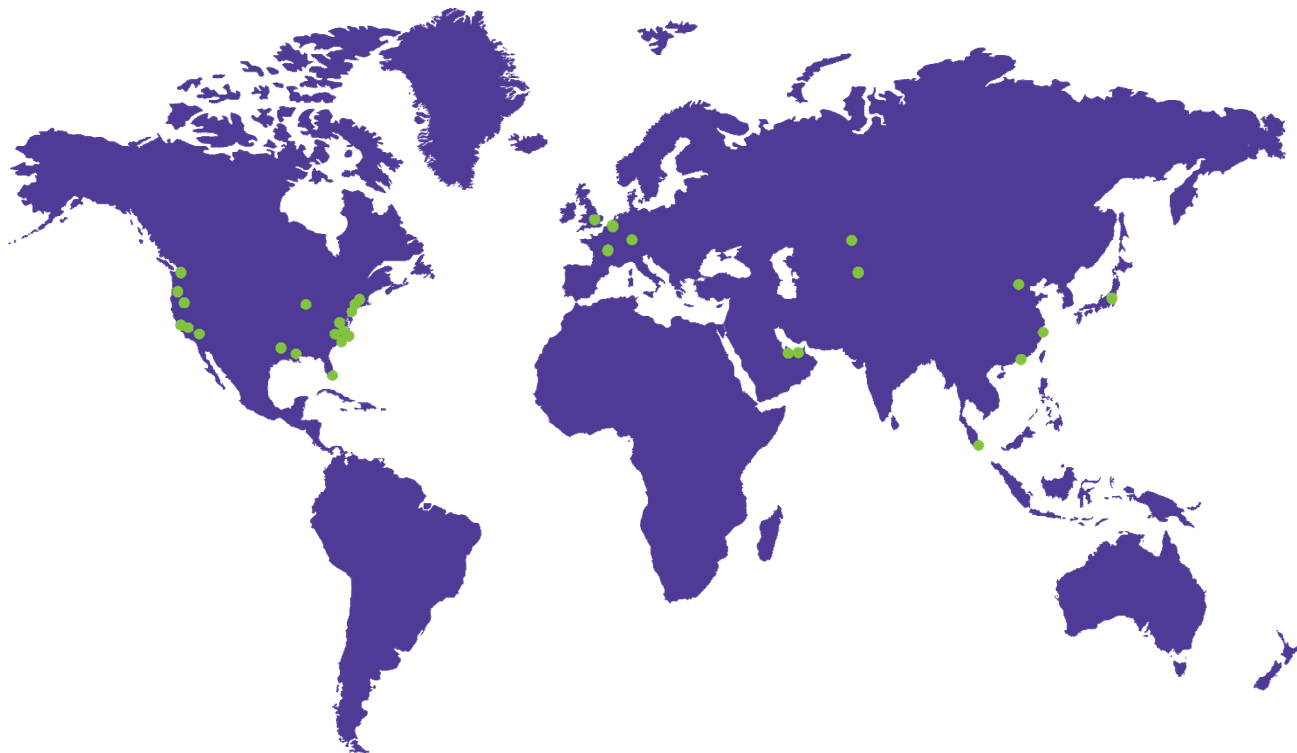
Michael is based out of the Philadelphia office and specializes in audit defense, escheat planning, general consulting, and voluntary disclosure agreements (VDA), etc. He has established professional relationships with many state unclaimed property administrators and offers clients with a unique perspective in dealing with all unclaimed property related matters.

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