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Appeals and Exemptions in Delaware (Maybe), Amnesty in Indiana, and Other Breaking News in Unclaimed Property Legislation

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We have been tracking a number of changes to state unclaimed property laws over the last few months, both big and small. The Delaware General Assembly, for example, recently considered a bill that would, among other things, provide holders an administrative appeals process following an audit. If enacted, the Delaware legislation would also provide a limited exemption for uninvoiced payables—an issue that has been hotly debated around the country. Outside Delaware, many states have been reconsidering the treatment of gift cards and other types of property. These and other recent changes in state unclaimed property laws, including Indiana's amnesty offer, are highlighted below.

Possible Changes on the Horizon in Delaware

A common complaint regarding Delaware's unclaimed property laws is that the state does not provide holders an independent administrative appeals process following an unclaimed property audit. This concern is addressed in S.B. 272, 145th Gen. Assem. (Del. 2010), introduced on May 13, 2010, which would make several significant changes to Delaware's unclaimed property law (Chapter 11, Title 12, of the Delaware Code), including adding a process for appeals.

Section 1 of S.B. 272 would amend Section 1156 of the Delaware unclaimed property laws to include a new administrative review process following an audit.¹ Under the new procedures, a holder would have 30 days from the issuance of a statement of findings to file a written protest with the audit manager setting forth the property types and amounts of abandoned or unclaimed property being protested and the specific grounds of the protest. Any asserted liability that is not being protested would need to be remitted along with the protest. The holder will be permitted to submit additional documentation and written materials for consideration by the audit manager; however, only issues raised in the protest will be considered. This first level of internal reconsideration by the audit manager is intended to expedite the resolution of disputed items.

¹ The review process will be available to audits completed after the date the bill is enacted. S.B. 272, Section 13(a).

The audit manager is expected to issue a written determination on the protest, after which the holder will have 30 days to file a notice of appeal with the Secretary of Finance. The holder's appeal would then be assigned to an "independent reviewer." The independent reviewers (who will be former Delaware judges, former masters of any Delaware court, and qualified Delaware licensed attorneys), although not employed by the Department of Finance, would be appointed by the Secretary of Finance. The proposed legislation provides that appeal to the reviewer will be *de novo* on the record created before the audit manager. The independent reviewer will hold an oral hearing on the appeal and issue a written decision, which the Secretary of Finance may adopt or reject in whole or in part.

Also of note, Section 2 of S.B. 272 would create a limited exemption from the definition of unclaimed property for uninvoiced payables between merchants. The limited exemption would generally cover: (i) amounts due for goods ordered and received by the holder that were never invoiced by the seller; (ii) the value of goods received by a holder where the amount ordered and the amount received do not match; and (iii) unsolicited goods received by a holder. This reporting exemption would not extend to accounts payable, accounts receivable, or any other type of credit due to a creditor. The proposed law does not create a general business-to-business exemption. If enacted, uninvoiced payables exemption would apply to all pending examinations and litigation as of the date of enactment. S.B. 272, Section 13(b). This exemption would help clarify one of the more contentious areas in Delaware's unclaimed property policy.

S.B. 272 would also codify the State Escheator's long-held belief (and current audit practice) that it has "inherent authority" to estimate liability when adequate records do not exist. S.B. 272 would add a new clause to Section 1155 of the Delaware unclaimed property laws indicating that the State Escheator may reasonably estimate the amount due "on the basis of any available records of the holder or by any other reasonable method of estimation." S.B. 272, Sections 3 and 4.

Although it contains some less than ideal provisions, S.B. 272 also adds some helpful and needed provisions. The bill is working its way through the General Assembly and was reported out of the Delaware Senate Banking Committee following a hearing on June 2, 2010. The General Assembly adjourns on June 30, 2010, however, so any action on the bill will need to occur soon.

Indiana Offers Amnesty

Companies with delinquent unclaimed property reporting obligations in Indiana are encouraged to consider the amnesty program being offered by the state. Indiana is offering a one-time amnesty program to allow noncompliant businesses to come into compliance in exchange for the waiver of penalties and interest.² Amnesty is available to any business that meets the following qualifications:

- The business is not currently under examination by the state.

² The Indiana Attorney General announced the program in a public notice available at <http://ucp.indianaunclaimed.com/attorneygeneral/ucp/newsRoom.html> (all web sites herein last visited June 9, 2010).

- The business has not been notified by the state of its intent to conduct an unclaimed property examination of the business's books and records.
- The business or its principals are not presently in arrears in payment of taxes; permit fees; or other statutory, regulatory, or judicially required payments to the state, including the Office of the Attorney General's Unclaimed Property Division.
- The business warrants that it has no current, pending, or outstanding criminal, civil, or enforcement actions initiated by the state.

Indiana's offer extends to businesses that have unreported unclaimed property which should have been reported currently or in prior years and to businesses that have not reported "in full compliance" with the state's unclaimed property laws.³

An eligible business seeking to take advantage of the program has until November 1, 2010, to: (i) download and complete an amnesty agreement;⁴ (ii) audit its books and records and file a report of findings for the prior 10 years (or for as long as the company has been in business if less than 10 years); (iii) file a report for the current year; and (iv) remit (on the forms provided by the state) all funds and shares due to the state.

Gift Cards Remain a Hot Topic

The appropriate treatment of gift cards remains an area of concern for many states. Recently, South Dakota, Indiana, Colorado, and Washington each adopted changes to their unclaimed property or consumer protection laws that impact state treatment of gift cards.

South Dakota, for example, recently amended its unclaimed property laws to exempt certain types of gift cards. South Dakota S.B. 81, 85th Leg. Sess. (S.D. 2010), signed by the Governor on March 29, 2010, amends Chapter 43-41B of the South Dakota Codified Laws to exempt from the state's unclaimed property provisions open-loop prepaid cards if: (i) the cards have no expiration date; and (ii) the issuer's records do not list the card owner's identity. An "open-loop prepaid card" is defined as an electronic payment device that: "(1) [i]s purchased or loaded, or both, on a prepaid basis for the future purchase or delivery of any goods or services, and (2) [c]an be used to purchase goods and services at multiple unaffiliated merchants or service providers." S.B. 81 also exempts any rewards cards issued pursuant to an awards, loyalty, or promotional program for which no money was paid by the cardholder. Notably, S.B. 81 provides that only the card purchaser or owner has rights to an unredeemed open-loop prepaid card or rewards card and that such cards are not subject to any claims made by any state acting on behalf of the purchaser or owner.

Indiana also amended its unclaimed property laws relating to the treatment of gift certificates and gift cards. Unlike the South Dakota amendment, the Indiana amendment merely

³ See Amnesty Program FAQs at <http://ucp.indianaunclaimed.com/attorneygeneral/ucp/amnesty.html#3>.

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<http://ucp.indianaunclaimed.com/attorneygeneral/ucp/files/Unclaimed%20Property%20Amnesty%20Agreement.pdf>.

clarified existing law as it applies to gift cards and gift certificates. H.B. 1083, 116th Gen. Assem., 2nd Reg. Sess. (Ind. 2010), amends Indiana Code § 32-34-1-17 to remove “gift certificates” from the definition of “property.” The amendment removes any inconsistency between the “property” definition and Indiana Code § 32-34-1-1(f), which provides that “[t]his chapter does not apply to gift certificates or gift cards.”

Missouri is also currently considering a bill that would exempt “gift certificates” from the state’s unclaimed property laws. Missouri H.B. 1522, 95th Gen. Assem., 2nd Reg. Sess. (Mo. 2010), would create a new statute, Mo. Rev. Stat. § 407.1175, providing that no “gift certificate” would be considered abandoned for purposes of the state’s unclaimed property law. “Gift certificate” would be generally defined as “any tangible record evidencing a promise by the seller or issuer of the record that goods or services will be provided to the owner of the record to the value shown in the record” and will include a gift card, stored-value card, store card, or similar record or card. “Gift certificate” would not include certificates distributed under an awards, loyalty, or promotional program for no consideration or certain certificates sold below face value at a volume discount to employers or to nonprofit and charitable organizations. The bill would also prohibit gift certificates that are subject to expiration dates or service fees.

While the states mentioned above addressed the treatment of gift cards in their unclaimed property laws, several states also recently addressed the treatment of gift cards and similar property through amendments to the states’ consumer protection and business reporting laws. *See, e.g.*, Colorado S.B. 10-155, 67th Gen. Assem., 2nd Reg. Sess. (Colo. 2010) (amending Colo. Rev. Stat. § 6-1-722); Colorado H.B. 10-1114, 67th Gen. Assem., 2nd Reg. Sess. (Colo. 2010) (amending Colo. Rev. Stat. § 11-102-305); Kentucky S.B. 83, 2010 Reg. Sess. (Ky. 2010) (amending Ky. Rev. Stat. § 367.890); Washington S.B. 6371, 61st Leg., 2010 Reg. Sess. (Wash. 2010) (amending Wash. Rev. Code 19.230).

The recent legislative activity relating to gift and rewards cards shows states taking a more sophisticated approach to this type of property by distinguishing between types of cards and the manner in which the cards are issued. You can expect to see more states refine their treatment of gift cards in this manner, which could have ramifications for unclaimed property reporting in the future. We may also see a continued push for federal rules on gift cards. *See, e.g.*, Connecticut Senate Joint Res. No. 4 (2010) (calling on Congress to pass federal legislation specifically authorizing states to impose consumer protection laws on gift cards issued through national banks).

Other Notable Items

Arizona 2009 Supplemental Report: In November 2009, the Governor of Arizona signed a bill (S.B. 1003, 49th Leg., 4th Spec. Sess. (Ariz. 2010)) significantly reducing dormancy periods for 15 property types. In conjunction with these amendments, Arizona required that holders file a supplemental 2009 report that included property reportable as of June 30, 2009 under the new law. The required report was due on or before June 1, 2010. Companies that missed the June 1st deadline should complete the required due diligence and file the supplemental report as soon as possible. While the Arizona Unclaimed Property unit is not permitted to grant extensions to the June 1 due date, we have been informed that Arizona does

not intend to impose penalties or interest on delinquent June 1 reports. The regular annual reports are due November 1 as always.

Arizona Increases Dormancy Periods: Reversing 2009 legislation that reduced the dormancy periods for several property types, Arizona has again amended Arizona Revised Statutes § 44-302. H.B. 2111, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), effective July 29, 2010, increases the dormancy period for traveler's checks to 15 years, reversing the 2009 amendment that reduced the dormancy period to just three years. H.B. 2453, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), also effective July 29, 2010, raises the dormancy periods from two years to three years on (i) stocks; (ii) the principal and interest on most business debt; and (iii) any dividend, profit, distribution, interest, redemption, payment on principal, or other sum owed to shareholders, certificate holders, members, bondholders, or other security holders.

Indiana Reduces Dormancy Periods: H.B. 1083, 116th Gen. Assem., 2nd Reg. Sess. (Ind. 2010), amends Indiana Code § 32-34-1-20 to decrease the dormancy period from five years to three years for the following property types: (i) demand, savings, or matured time deposits; (ii) property payable as a result of the demutualization, rehabilitation, or related reorganization of a mutual insurance company; and (iii) all other property types not specifically listed in Section 32-34-1-20. The amendments are effective July 1, 2010.

Oregon Requires Separate Delivery of Funds in Lawyer Trust Accounts: A new provision in Oregon's reporting rules effective January 1, 2010, requires amounts identified as lawyer trust account funds in a holder's abandoned property report to be delivered by the holder to the Oregon State Bar along with a copy of the report. Or. Rev. Stat. § 98.386(2). The State Bar is authorized to use the funds to fund the state's Legal Services Program, which provides legal services to the poor, and to pay property owner claims. Or. Rev. Stat. §§ 9.572, 98.386(2). Claims filed by owners of lawyer trust account funds will be forwarded by the Department of State Lands to the Oregon State Bar for review and payment. Or. Rev. Stat. § 98.392(2).

Florida Incorporates Its Reporting Manual Into the State's Regulations: The Florida Department of Financial Services has incorporated its 57-page unclaimed property reporting instruction manual into the state's administrative rules. Fla. Admin. Code § 69I-20.041 requires holders to follow the procedures in the Florida Unclaimed Property Reporting Instructions Manual, effective May 3, 2010. The manual is available at <http://www.fltreasurehunt.org/Reporting-Instructions.jsp>.

Idaho Transfers Administration Duties: Effective July 1, 2010, Idaho has transferred the responsibility for administering its unclaimed property laws from the State Tax Commission to the State Treasurer. H.B. 680, 60th Leg., 2nd Reg. Sess. (Idaho 2010). Idaho has also passed a bill requiring electronic reporting for 10 or more items of unclaimed property and authorizing the waiver of interest and penalties for holders who report in good faith. H.B. 385, 60th Leg., 2nd Reg. Sess. (Idaho 2010).



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