

PUBLICATION

Spotlight on Unclaimed Property: Trends to Follow

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As state fiscal problems continue, and deepen in some states, tax collections remain below pre-recession levels, federal stimulus dollars dry up and states are stressed to exploit other revenue sources. For example, as the federal government may find it necessary to address its own fiscal and monetary predicament, the Build America Bond program was not renewed. Further, while states have received \$189 billion of federal stimulus since 2009, they stand to receive only \$23 billion for fiscal 2012, that begins July 1, 2011, and \$14 billion for fiscal 2013.

Unclaimed property is a leading source of other potential revenue for states. State treasuries currently hold over \$32 billion of unclaimed property. While technically not their revenue, states have use of the funds and the interest earned thereon. As a result, companies in particular should pay attention to trends in state unclaimed property administration and enforcement.

New Property Types

While unclaimed property is traditionally represented by unclaimed wages, bank account deposits, credit balances, dividends and uncashed vendor payments, states are enacting new statutes to target specific types of new property or simply interpreting "catch-all" provisions in existing statutes. For example, the following are just some of the new unclaimed property types coming on the scene:

Stored value cards are the leading new property type that a number of states are now treating (or attempting on audit to treat) as unclaimed property. Stored value cards range from gift cards to prepaid calling cards, transit system fare cards, incentive cards and HSA cards to name just a few examples. New Jersey and Texas (for cards having expiration dates) are examples of states treating stored value cards as unclaimed property if unredeemed within the dormancy period. The District of Columbia brought suit against AT&T with respect to unused minutes on prepaid calling cards.

Consumer rebate checks were the focus of a recent settlement between Iowa and Sprint from its sponsorship of rebate programs. Another 36 states signed on to the settlement. The Iowa Attorney General's press release indicated the settlement totaled \$22 million. Previously, settlements were reached with T-Mobile USA and Walgreen Co. Clearly, states are aware of the uncashed rebate check issue and will focus on it during audit. Arkansas has pursued similar actions.

Class action settlement proceeds are becoming a focus of some states when class action settlement checks go uncashed by class members, regardless of the provisions of a settlement agreement based on anti-limitations and "no private escheat" features of many state unclaimed property laws.

Digital property is an area presenting fascinating and, to date, unclear answers as to the application of state unclaimed property laws. For example, online accounts with social media sites, promotional codes redeemable for digital content or merchandise, and points or awards systems enabling the purchase of merchandise or downloadable digital content are some of the digital property types that states have started considering as potentially unclaimed property.

Assurance contracts or provision point mechanisms (i.e., group discount programs) create a number of unclaimed property questions. An assurance contract enables members of a group to pledge to perform an action, such as purchase a good or service, if a given contribution level is reached in exchange for a discount on the good or service. The contribution level can be a monetary threshold or a participant quorum threshold. Who is the holder of any resulting unclaimed property, the goods or services provider and/or the program provider? How are unclaimed participant credits or rebates to be handled? What if a monetary threshold is not reached and participant refund checks are not cashed?

Changes in Administration, Reporting and Enforcement

In conjunction with statutory or audit selection of new unclaimed property types, states are changing their administration, reporting and enforcement as another means to expand their collection of unclaimed property. The most prevalent changes used by some states are as follows:

Shortened dormancy periods are a favorite method by certain states to determine when an item of property becomes unclaimed. The shorter the dormancy period, the quicker property becomes unclaimed. For example, Missouri recently shortened its dormancy period for unclaimed wages from five years to one year. Michigan shortened its dormancy periods for a range of property from five years to three years (and for travelers checks and money orders from 15 years and seven years, respectively, to three years). Likewise, New York has reduced its dormancy period for property paid for services not rendered or goods not delivered from five years to three years.

Third party contract auditors also represent a continuing enforcement mechanism. State employment of such auditors, which are typically compensated on a contingent fee basis for unclaimed property they recover for a state, are increasingly being used by states to enforce their unclaimed property laws.

Changes to reporting rules are another method that states may attempt to use to favor a market or transaction-based orientation away from a domicile basis of reporting unclaimed property. Under current case law, a holder of unclaimed property reports such property to the owner's state of last known address. If the holder's records do not contain a name or last known address for the owner, then the property is reported to the holder's state of incorporation. Recently enacted New Jersey legislation attempted to require a holder to report unredeemed balances on gift cards and other stored value cards to the place of transaction or purchase. The Federal District Court for the District of New Jersey has enjoined New Jersey from enforcing this new reporting provision pending further consideration. If more states follow New Jersey's example, holders will be placed in the middle of disputes between market states and domicile states, primarily Delaware, a preferred domicile state of incorporation.

If you would like to discuss the matters addressed above or other issues related to state unclaimed property laws, please contact any attorney in our Tax Department.