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Unclaimed Property ADVISORY ■

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New York Changes Its Administrative Position on B2B Transactions

B2B Exemptions Generally

Unclaimed property laws do not apply to all holders and property types in a uniform way, despite the Uniform Law Commission's sustained efforts to promulgate a uniform unclaimed property act (past efforts include the 1954, 1966, 1981 and 1995 Uniform Unclaimed Property Acts; and currently, as described in a recent advisory, the ULC is in the process of revising the Uniform Act). One striking example of an issue with respect to which the states have failed to embrace a uniform approach is the recognition of an exemption for property owed by one business to another—i.e., a business-to-business (B2B) exemption. While a number of states have enacted or recognize some form of B2B exemption, a majority of states have not.[1] Moreover, the B2B exemptions that do exist vary significantly in scope and often lead to different results depending on the state in question; and in our experience, many holders have a limited understanding of such exemptions.

Although New York has not enacted a statutory B2B exemption and does not otherwise recognize the existence of such an exemption, historically, the New York Office of Unclaimed Funds (NYOUF) has applied a B2B "deferral" policy, which provides that certain amounts owed by a holder to another business association are not required to be reported as unclaimed property so long as the holder has a current relationship with the other business. Thus, effectively, New York has administratively agreed to "defer" the reporting of property derived from certain commercial transactions and relationships to a point in time where the holder is no longer engaged in a current relationship with the other business owner, rather than exempt such property from reporting altogether.

However, it has recently come to our attention that the NYOUF has reversed its administrative B2B deferral policy. This advisory presents our understanding of the state's new policy for B2B transactions and its potential impact on holders that engage in business with New York-resident businesses.

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[1] The following states have enacted a B2B exemption: Arizona, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, North Carolina, Ohio, Tennessee, Virginia and Wisconsin. Texas administratively takes the position that certain amounts owed by a holder to another business association are not required to be reported as unclaimed property as long as the holder has a current relationship with the other business.

New York State's Historical B2B "Deferral" Policy

As indicated above, holders will not find a New York statutory provision, or other formal published guidance, setting forth New York's B2B deferral position. However, the holder community has generally understood—and the NYOUF has previously confirmed to us in writing—that New York has "for quite some time" in the past agreed to defer the period of presumed abandonment for credit balances and accounts payable owed by one business association to another, as long as those businesses have an ongoing business relationship.[2] Under this policy, such a B2B credit or an account payable obligation that had not been paid by issuance of a check became escheatable only once the holder's ongoing business relationship with the other business association was terminated.[3] Under its prior administrative practice, NYOUF would look to the most recent transaction between the holder and the business association, and if no transaction had occurred within the statutory dormancy period, then the relationship would be considered terminated and the property escheatable.[4]

The New Policy – Reversal of B2B Deferral

The NYOUF recently issued a new policy statement regarding B2B transactions that essentially reverses the previous administrative position on B2B deferrals. The statement provides as follows:

> **Section 1315 of the APL – Policy Statement on Business to Business Transactions**
> New York State's Abandoned Property Law (APL), does not provide an exemption for business to business transactions. Therefore, under APL S1315, credit balances, as well as checks representing the refund of credit balances, whether payable to a business or an individual, are deemed abandoned if unclaimed for three years. However, such property is not reportable to this Office if the holder is able to demonstrate that the customer has either: (i) used the credit balance, (ii) disclaimed entitlement to the credit balance, or (iii) is aware of the credit balance.
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> Accordingly, prior to the time that a credit balance would be outstanding for three years, the holder must contact the customer in writing advising the customer of the credit. The customer may: (i) request that the credit be applied to an open invoice or request payment of the credit in the form of a check, (ii) disclaim entitlement to the credit in writing, or (iii) acknowledge existence of the credit, but let the credit remain outstanding. Please be advised that a holder cannot write off open customer credit balances in the absence of written documentation evidencing that the credit was issued in error, or properly applied, or a specific written disclaimer from the customer.
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> The three year dormancy period on credit balances commences at the time the credit is issued. However, if there is written communication from the customer acknowledging the existence of the credit, or activity

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2 The NYOUF has stated that the deferral only applies to credits (i.e., obligations not yet reduced to checks).

3 New York's prior position was thus similar to Texas' current administrative position. *See, e.g.*, Tex. Unclaimed Property Reporting Instructions (2010) (providing that "balances owed to current vendors" should not be reported, but a holder should report amounts owed to those vendors with which it has had no contact for three years).

4 NYOUF previously indicated that even if the transaction producing a credit owed to another business occurred more than three years previously, if the unused credit balance continued to be shown on monthly or quarterly statements sent to the business who was the owner of the credit balance, thus affirmatively disclosing to the owner the availability of the credit balance, the requirement to report the unused credit as abandoned property would continue to be deferred.

with respect to the customer account affecting the amount of the credit balance (partial use of the credit), the three year dormancy begins from the time of the written communication or activity.

With respect to business to business credit balances that are subsequently converted into a check, the three year dormancy commences from the original date the credit was issued (or the date the customer last acknowledged or used the credit balance) unless the holder was instructed in writing by the customer to issue a check for the credit balance. If a check for the credit balance was issued upon the written request of the customer, the issue date of the check would commence the dormancy period.

Credit balances are reportable to the State of last known address of the customer, as reflected in the books and records of the holder.

Note:
The above applies specifically to business to business credit balances. In order to exclude a vendor check from being reported as abandoned property we require that the holder document that the obligation was otherwise satisfied or provide a signed confirmation from the payee acknowledging that the specific check (issue date and amount) is not owed.

We interpret this policy statement as clearly reversing the NYOUF's prior B2B deferral policy by explicitly noting that property "under APL § 1315…. *whether payable to a business or individual*" is deemed abandoned if unclaimed for the relevant dormancy period. The statement makes no mention of the concept that the reporting of B2B property may be deferred while the holder has a current business relationship with the owner. Rather, the NYOUF states that this policy "applies specifically to *business-to-business credit balances*." Accordingly, we believe that holders may no longer rely on the NYOUF's previously articulated B2B deferral policy.

Notably, this policy statement is contained on a single page, is not signed or otherwise labeled to indicate its origin or authority for issuance. We have been informed, however, that the policy indeed represents the NYOUF's current administrative position regarding B2B obligations and will be applied to holders on a prospective basis.

Considerations

Businesses currently undergoing audits and preparing New York Voluntary Compliance Agreements (VCAs) will need to consider the impact of the reversal of the NYOUF's B2B deferral policy. Many companies that may not have been reporting property under the prior B2B deferral scheme, or that completed audits or VCAs in the past, will now have to determine whether they currently have or will have additional unclaimed property to report to the state that previously qualified for deferral and therefore went unreported. We have learned that, to the extent that a credit has been held back by a holder, based on the application of New York's historic position (i.e., an ongoing relationship with the business owner and no other communications between owner and holder on the specific credit item), then the credit must be reported on the *next* New York abandoned property report. Depending upon a holder's business profile, this impact may not be immaterial. In addition, on a prospective basis, companies will need to carefully examine their records to determine if they have the correct information for all businesses they engage with and, furthermore, will need to implement and apply proper record-keeping policies to ensure compliance with the new policy.

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Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property expertise together have more than 85 years of experience advising major corporations on unclaimed property matters. We assist our clients in analyzing complex legal issues, obtaining legal opinions, conducting multistate/multi-entity internal compliance reviews, designing corporate compliance policies, advising clients on planning and related restructurings, negotiating voluntary disclosure agreements, defending single-state and multistate audits, litigating unclaimed property issues and influencing unclaimed property policy and administration.

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