



## Unclaimed Property ADVISORY ■

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### Nevada Gambles on a Limited-Scope B2B Exemption

On June 9, 2015, Nevada Governor Brian Sandoval signed into law Senate Bill 348, which adds a provision to the Nevada Uniform Unclaimed Property Act specifically addressing business-to-business (or “B2B”) transactions. Other than Nevada, only 15 other state unclaimed property laws include a B2B provision. This is a common trap for the unwary, as many holders (including sophisticated businesses) presume that state unclaimed property laws do not apply to commercial transactions.

Although state B2B provisions differ in many ways, they generally provide that certain obligations owed by one business to another business are not required to be reported to the state as unclaimed property, either permanently or so long as the businesses maintain an ongoing business relationship (i.e., reporting is deferred during the course of this relationship). These provisions are commonly referred to as B2B exemptions and are consistent with the purpose of state unclaimed property laws, which were originally implemented as a form of consumer protection.

#### **SB 348 Defers but Does Not Exempt the Reporting Obligation**

In particular, SB 348 provides that:

Except as otherwise provided in this subsection, any credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates due or owing from a holder that is a business association to another business association shall not be presumed abandoned if the holder and such business association have an ongoing business relationship. The provisions of this subsection do not apply to outstanding checks, drafts or other similar instruments.

Thus, SB 348 is technically a B2B deferral rather than a true B2B exemption, given that it requires the holder and the owner to maintain an “ongoing business relationship.” This language is generally quite similar to the B2B provisions of both Missouri and Tennessee. Arizona and Texas are also considered to have B2B deferrals rather than true exemptions. In contrast, other state B2B provisions do not require the holder and owner to maintain a business relationship. For example, Illinois’s statute provides that “any property due or owed by a business association to or for the benefit of another business association resulting from a transaction occurring in the normal and ordinary course of business shall be exempt from the provisions of” the Illinois unclaimed property act.

SB 348 makes clear that “an ongoing business relationship shall be deemed to exist if the holder has engaged in at least one commercial, business or professional transaction involving the sale, lease, license or purchase of goods or services

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with the business association or a predecessor-in-interest of the business association within each 3-year period that follows the date of the transaction giving rise” to the B2B obligation.

This specific language departs in some respect from Missouri’s and Tennessee’s statutes, which provide that an ongoing business relationship shall be deemed to exist if the holder and the owner have engaged in one transaction “within the dormancy period immediately following the date of the check, draft, credit balance, customer’s overpayment, or unidentified remittance giving rise to the unclaimed property interest.”

It would appear that according to the Missouri and Tennessee statutory language, the ongoing business relationship is forever satisfied if there is one transaction between the holder and owner in the dormancy period that follows the transaction in question; this interpretation effectively renders the deferral an exemption. In contrast, SB 348 is clear that the B2B obligation is reportable once the business relationship ends, and the holder must take a fresh look at whether the relationship still exists every three years.

### **SB 348 Excludes Uncashed Checks**

Moreover, SB 348 is explicit that obligations that have been reduced to check are not covered by the deferral. Only one other state—Michigan—likewise explicitly excludes checks in its statute (and Massachusetts has interpreted its B2B exemption to not apply to accounts payable checks). It is unclear why these states would draw a distinction between credit balances that have been reduced to check and those that have not. These provisions suggest that if a business makes an overpayment to another business, the overpayment is not itself unclaimed property, but if the overpaid business tries to return the overpayment by sending a check and the check is not cashed, then that does constitute unclaimed property. Arguably, these states could be viewing the issuance of a check as the affirmative admission of an obligation by the issuing business to the payee coupled with an intent to satisfy that obligation, and therefore it is appropriate to apply the unclaimed property laws if the check is not cashed. However, regardless of the justification, it is worth noting that such language may ultimately discourage businesses from trying to refund overpayments or other items to their business customers or vendors.

### **Practical Considerations**

SB 348 is effective on July 1, 2015, which means the deferral should apply to any B2B obligation that was scheduled to be reported by a holder on its November 2015 unclaimed property report. Such obligation would relate to a transaction arising on or after July 1, 2011. Thus, if the holder had at least one additional transaction with the owner since July 1, 2011, the holder may defer reporting of that B2B obligation. The holder must, however, examine the status of its relationship with the owner each year to determine whether it can still be considered “ongoing,” per SB 348’s three-year test.

This legislation reminds holders that it is not easy to determine whether a particular state B2B provision is applicable to a credit balance or check owed to another business. A holder must first make the threshold determination whether the state of the owner’s last known address has enacted such a B2B provision in the first place. If so, the holder must then ascertain whether the provision includes an explicit carve-out for checks or similar instruments, as well as any other potentially applicable exclusions (e.g., for amounts owed to vendors as opposed to customers). Finally, the holder must carefully study the provision’s language to determine whether there is an ongoing business relationship requirement or some other requirement that limits the applicability of the provision. If a B2B provision is merely a deferral rather than an exemption, such as in Nevada, the holder must also monitor its relationship with the business counterparty in perpetuity.

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