



Unclaimed Property ADVISORY ■

APRIL 17, 2019

Colorado's New Revised Uniform Unclaimed Property Act Should Prompt Holder Action

The Colorado legislature has joined the trend of states adopting (or purporting to adopt) the Revised Uniform Unclaimed Property Act of 2016 (RUUPA) through the recent passage of [Senate Bill 19-088](#). In particular, Section 1 of S.B. 19-088 generally enacts RUUPA with some Colorado-specific deviations retained from the state's current unclaimed property framework. The bill was approved by the governor on April 16, 2019, and takes effect on July 1, 2020.

Repeal of the \$25 Reporting Deduction

S.B. 19-088 would repeal Colorado's current \$25 de minimis reporting deduction, which allows holders to deduct and retain 2% of the value or \$25 (whichever is greater) per item of unclaimed property reported and delivered to the state treasurer.¹ Because of this deduction, Colorado was historically a popular state in which to incorporate gift card issuing subsidiaries to avoid application of the so-called "third-priority" rule. That is, while gift cards were not exempt under Colorado law, issuers would only be required to remit to the state the net balance after taking the \$25 deduction from each unredeemed gift card under the second-priority rule. And the state the card was sold in (i.e., the so-called "third-priority" state) would be precluded from arguing that Colorado's laws did not apply to these gift cards, thus preempting the third-priority state's claim to escheat any unredeemed balances.²

Accordingly, any company that has structured its gift card operations such that the gift card issuing entity is domiciled in Colorado should consider redomestication to another state since there will no longer be any advantage to remaining a Colorado entity for unclaimed property purposes. Other companies that have incorporated in Colorado to take advantage of the \$25 deduction more generally should similarly consider redomestication. Colorado corporate law expressly allows a domestic corporation to convert to a foreign corporation.

¹ Note that for certain property types, including demand, savings, or matured time deposits, the deduction is the *lesser* of 2% or \$25.

² The popularity of the "Colorado strategy" decreased significantly in recent years after courts held the third-priority rule to be unconstitutional, in favor of incorporating in states that fully exempt gift cards from escheat.

There is also some question whether Colorado would attempt to enforce the repeal of this \$25 deduction retroactively as a result of the transitional provision in S.B. 19-088 and thus attempt to claw back funds that a holder properly deducted from property it previously reported to the state. This is because, in generally keeping with RUUPA's standard provisions, Section 38-13-1503 of the new bill states:

An initial report filed under this Article 13 for property **that was not required to be reported before July 1, 2020, but that is required to be reported under this Article 13**, must include all items of property that would have been presumed abandoned during the five-year period preceding July 1, 2020, as if this Article 13 had been in effect during that period.

[Emphasis added.]

The five-year retroactivity provision (which is shorter than RUUPA's standard 10-year provision) should undoubtedly concern holders and is of questionable constitutionality; other states that have adopted RUUPA face similar scrutiny. Section 38-13-1503 would on its face require holders to report and remit formerly non-escheatable property going back to July 1, 2015. This could place a heavy financial burden on holders with substantial amounts of previously exempt property.

But we do not believe that Section 38-13-1503 applies to amounts validly deducted from property that was included on previously filed reports, even when the deduction resulted in no money being remitted to the state on an item because it reduced the remittable balance to \$0. Colorado's current statute permits holders to take the deduction only on property that was actually reported to the state. Therefore, a \$25 deduction taken from unclaimed property by holders should not be considered "property that was not required to be reported before July 1, 2020," and the retroactivity provision should not apply on its face. However, if a holder did not report property because its value was less than \$25, the deduction technically may not apply; thus, the state treasurer could theoretically assert that the retroactivity provision requires the escheat of the full value of this property because the holder failed to fully comply with the de minimis deduction requirements, although we feel this would be an exercise of poor policy-making and run counter to the will of the legislature that previously enacted this deduction.

Any holder that has not affirmatively reported items of \$25 or less to the state in the past should consider taking affirmative steps to report these items before the new law will take effect to ensure that the holder will be able to take advantage of the deduction (e.g., through a voluntary disclosure or other clean-up process). Alternatively or in conjunction with this, a holder could redomesticate from Colorado to a state that has an exemption for gift cards *as well as* de minimis balances, such as Michigan (\$25), which would apply to property other than gift cards.

Gift Cards and Gift Certificates – Maintaining the Status Quo

S.B. 19-088 departs from standard RUUPA treatment of gift cards and gift certificates. Under Colorado's current statute, Section 38-13-108.4(3), "gift certificates" issued for food, products, goods, or services—in contrast to gift certificates redeemable in cash—are exempt. And under Section 38-13-108.9, Colorado also exempts "gift cards" but only when the holder's or issuer's annual gross receipts from the sale or issuance of gift cards is \$200,000 or less. While the statute's definition of "gift cards" does not distinguish between gift cards and gift

certificates (and “gift certificate” is not defined), since 2005, [Colorado’s attorney general has oddly interpreted](#) the exemption for “gift certificates” to apply to only paper certificates without any electronic component. Gift cards and stored-value cards, in contrast, are generally subject to reporting and remitting.

S.B. 19-088 would generally codify the attorney general’s opinion and preserve the current statutory framework for these instruments. In particular, gift cards would be presumed abandoned five years after the later of the date of purchase or its most recent use. And the bill retains the exemption for gift cards sold or issued by a holder or issuer that receives annual gross receipts of \$200,000 or less from the sale or issuance of gift cards. In addition, the bill explicitly exempts paper certificates redeemable for goods or services. However, stored-value cards are subject to a three-year dormancy period.

Because S.B. 19-088 does not take effect until July 1, 2020, holders have some time to consider the impact of the provisions on their operations and react accordingly.

You can subscribe to future *Unclaimed Property* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property experience 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.

Click [here](#) for Alston & Bird's Tax Blog

Please direct any questions to the following members of Alston & Bird's Unclaimed Property Group:

| | |
|---|--|
| John L. Coalson, Jr. 404.881.7482 john.coalson@alston.com | Kendall L. Houghton 202.239.3673 kendall.houghton@alston.com |
|---|--|

| | |
|--|--|
| Kathleen S. Cornett 404.881.4445 kathleen.cornett@alston.com | Maryann H. Luongo 202.239.3675 maryann.luongo@alston.com |
|--|--|

| | |
|--|--|
| Michael M. Giovannini 704.444.1189 michael.giovannini@alston.com | Ethan D. Millar 213.293.7258 ethan.millar@alston.com |
|--|--|

| | |
|---|--|
| Matthew P. Hedstrom 212.210.9533 matt.hedstrom@alston.com | Andrew W. Yates 404.881.7677 andy.yates@alston.com |
|---|--|

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2019

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333