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Unclaimed Property ADVISORY ■

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UP Front: A 2021 Sightline for Unclaimed Property Professionals

Unclaimed property professionals who run holder compliance programs, as well as the community of external holder advisors, should buckle themselves in for what portends to be a 2021 "perfect storm" of legislative, enforcement, and litigation contests between state unclaimed property administrators, third-party contract auditors / voluntary disclosure agreement (VDA) program supervisors, and holders and their advisors.

Legislation

We are monitoring (and/or otherwise anticipating the introduction of) federal bills further impacting retirement accounts, following the two momentous pieces of legislation in late 2019 and early 2020 – the Setting Every Community Up for Retirement Enhancement (SECURE) Act and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Of particular note is H.R. 8696, which would again increase the required beginning date for IRAs to April 1 of the year following the year the owner turned age 75. This is in addition to the expected flurry of state bills that (1) continue the adoption of the Revised Uniform Unclaimed Property Act (RUUPA); (2) continue focus on Interest on Lawyer Trust Accounts, treasury bonds, and other issues for which we see NAUPA promoting certain positions; and (3) are informed by a desire to accelerate reporting of unclaimed property or to expand the scope of property interests that are deemed subject to escheat.

Indeed, the volume of unclaimed-property-related legislation introduced in 2021 may eclipse prior years given that many state legislative sessions were cut short in 2020 due to the pandemic, not to mention the fact that the pandemic has had a substantial negative impact on state budgets. For example, within the first week of 2021, new RUUPA bills have been filed in Indiana and North Dakota; Indiana's bill in particular breaks with the state's long-standing exemption for gift certificates and gift cards by expressly subjecting "gift cards" and "stored value cards" to escheat. The Indiana legislation also sheds the state's long-standing business-to-business (B2B) exemption. And, per RUUPA's standard "transitional" provision, gift cards and B2B property would be required to be reported to Indiana going back 10 years, raising a number of serious constitutional concerns. No doubt this aggressive reversal is motivated by revenue-raising considerations. Nevada has also introduced legislation for 2021 that would clarify the escheatment of "virtual currency" – which will presumably be a new area of focus for states in 2021 and beyond – and grant the state administrator significantly more power in enforcing the unclaimed property laws.

While there will be plenty to keep holders and their representatives and trade associations busy on the legislative front, one glaring absence from the 2021 landscape was created when the California State Controller's Office (SCO) summarily rejected the prospect of an unclaimed property amnesty program in 2020. Legislation in 2019 directed the SCO to submit a report on plans for an amnesty program or "other options to increase compliance." That report, which was published in March 2020 at the outset of the pandemic, concluded that amnesty programs would likely not increase holder compliance. In addition, perhaps more disappointingly, the SCO's report did not mention a VDA program or other formal alternative to amnesty despite the legislature's edict. Thus, what once represented promising momentum toward a California compliance program now appears to be dead in its tracks, at least for now. It remains to be seen whether the SCO will continue to default to its long-standing position that a stick (i.e., the automatic issuance of interest assessments on past-due property) is an effective form of "incentive" to holders that were previously unaware of their unclaimed property reporting obligations, or that failed to report all items of property, in the absence of a VDA or amnesty program.

State Compliance and Enforcement Programs (Audits and VDAs)

Several developments in the second half of 2020 presage further state-driven efforts to enforce these "consumer protection" laws – and generate revenue – as broadly and to the greatest extent possible.

The Delaware Department of Finance has a new audit "sheriff" in town, Brian Wishnow, who oversees the state's audit program. Wishnow has already begun making welcome outreach to audited companies. On the other side of the Delaware unclaimed property balance sheet, Delaware audits are statutorily required to be preceded by VDA invitations, and waves of those invitations are being released each quarter or so. Holders should continue to be diligent in monitoring correspondence for a VDA invitation because the VDA program still represents a strong alternative to audit despite the arrival of Wishnow to the scene.

At least two other states (Nevada and Washington) are employing contract firms to run their VDA programs or review holder self-audit questionnaires. It would appear that "audit-by-VDA" is the newest trend, and in light of this holders should be mindful that the same due process concerns with the compliance arbiter's financial motivation can exist when a VDA program administrator is compensated on a contingent fee basis as when audit services firms are compensated in this fashion. See the Delaware Court of Chancery's recent decision in *AT&T*, admonishing third-party auditor firms for having a "potentially … pernicious incentive" for issuing broad information requests and engaging in expansive audits.[1]

Finally, we expect to see no slowdown in states' initiation of new multistate audits in 2021, and there are no shortage of third-party firms vying for this work. Industries such as health care, payment processing, and financial services and products would appear to be the primary targets of these audits, at least based on 2020 trends.

Holder Planning and Implementation of Compliance and Risk-Management Best Practices

The new year presents a new opportunity for companies and their advisors to kick the tires on existing gift card programs and to optimize other consumer loyalty programs from an unclaimed property compliance standpoint. Although Delaware has recently suggested a softer, less aggressive position in challenging the validity of internal gift card structures, success may be dependent on a holder's proving that the gift card company was established properly and is being maintained as a separate legal entity from the parent(s). In addition, there is currently no case that expressly rules a gift card structure to be invalid for unclaimed property purposes, given the 2020 reversal of

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[1] *State v. AT&T Inc.*, No. 2019-0985-JTL (Del. Ch. Ct. July 10, 2020).

the *Overstock.com* jury verdict.[2] That said, holders should not let down their guard and should strongly consider undertaking refreshed planning, particularly for older gift card structures. Holders should also consider whether their exposure for gift cards and similar instruments lies beyond Delaware to the extent gift card owner address information is available.

Further, in light of the Delaware secretary of state's ongoing VDA program, many holders see 2021 as the year they can conduct a multistate compliance self-review to achieve the broadest possible resolution of long-standing unreported liabilities or heretofore-unidentified exposures.

Holder/State Litigation Perhaps No Longer a "Last Resort"

In the early 2010s, it was rare to see a holder litigate an unclaimed property liability with the assessing state, much less challenge the state's use of enforcement tools, including records subpoenas or even the delegation of audits to third-party contract audit firms. Similarly, it was exceedingly rare to see the use of state False Claims Acts (FCAs) in the unclaimed property arena, as contrasted with the use of FCAs as a state tax enforcement tool. In short, FCAs constitute a tool for whistleblowers to initiate suit on behalf of a state in an effort to punish companies the whistleblower deemed to have knowingly violated state law by failing to remit certain taxes or to escheat certain types of property.

The second half of the 2010s saw a complete paradigm shift on both these scores. First, holders concluded that they must resort to litigation in numerous instances where states evidenced rigidity in their administrative positions and legal interpretations – typically based on the advice of the contract audit firms running their audit programs – and holders asserted that the state's position was incorrect as a matter of law.[3] Second, the use of FCAs as a bludgeon by whistleblowers has arisen in several states and has raised the stakes for holders who, if deemed guilty of an FCA violation, are subjected to treble damages.[4]

Holders entering into multistate audits should review the recent *Univar* ruling (must Delaware employ "walls" between the audit staff conducting its audit and the audit staff conducting the remainder of a multistate audit?) and the Delaware Chancery Court's decision in AT&T (validity of subpoena, vis-à-vis its breadth). It is also possible to bring litigation to force a state to employ its own staff to conduct an audit.[5] Holders that converted audits to VDAs or to expedited audits pursuant to the 2017 Delaware Escheats Law overhaul (which was in response to the *Temple-Inland* ruling) may need to consider options.

Conclusion

Holders should be prepared for an increasingly dynamic landscape, and they must monitor all these sightlines to manage their compliance and risk in this stormy environment.

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2 *Overstock.com Inc. v. State ex rel. French*, 234 A.3d 1175 (Del. 2020).

3 See, e.g., T*emple-Inland Inc. v. Cook*, 192 F. Supp. 3d 527 (D. Del. 2016); *Marathon Petroleum Corp. v. Secretary of Finance for Delaware*, 876 F.3d 481 (3rd Cir. 2017); *Plains All-American Pipeline L.P. v. Cook*, 866 F.3d 534 (3rd Cir. 2017); *Univar Inc. v. Geisenberger*, 409 F. Supp. 3d 273 (D. Del. 2019).

4 See, e.g., *Overstock.com, supra and State of New York, ex rel. Raw Data Analytics LLC v. JP Morgan Chase & Co.*, 65 Misc. 3d 705 (N.Y. Sup. Ct. 2019).

5 See *Yee v. ClubCorp Holdings Inc.*, No. 3:19-cv-03953 (N.D. Cal. 2019) (Alston & Bird is representing ClubCorp in this litigation).

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