Review: *State Unclaimed Property Laws: Best Practices for Compliance 2009*

By David Libman • Wood & Porter • San Francisco

A corporation writes a check to someone who never cashes it. Who eventually gets the money? If you assume the corporation gets to keep it, read on, because that's probably not the case. The funds may end up escheating to the state under an unclaimed property law (UPL). There's some work involved, too. Applicable UPL may require the corporation to seek out the check recipient, notifying him that he hasn't negotiated it. If the check remains uncashed, the corporation may eventually have to pay over the money to the state.

I recently attended a webinar presented by the American Law Institute and American Bar Association regarding compliance with state UPL. Unclaimed property may well sound like an orphan topic, but there's a good deal of interest in it today.

In fact, given our troubled economy, many states are actively pursuing their UPL enforcement efforts to help generate revenue. That means compliance is becoming an increasing burden for many corporations. It can even come up in the context of M&A transactions.

The webinar's faculty consisted of Kendall L. Houghton (Baker & McKenzie) and Weiyen M. Jonas (Fidelity Investments), so attendees received both law firm and in-house perspectives. Webinar participants received a program booklet that included a program outline, links to various UPL resources and contact information for every state's unclaimed property administrator.

Background on State UPL

All 50 states (and even certain U.S. territories) have enacted some form of UPL. As a body of law, it generally seeks to reunite owners with their unclaimed property, and to prevent a windfall to holders of the unclaimed property. Under various state laws, property unclaimed for a certain period of time will escheat to the state, meaning that legal title to that property passes to the state.

The various states impose rules on holders, generally requiring holders of unclaimed property to notify owners. After a prescribed waiting period, the holder must generally report and transfer unclaimed property to the state. The state then holds it until claimed by its rightful owner. That may mean never.

Unclaimed property can include the value implicit in uncashed checks, gift certificates, customer merchandise, overpayments, various bank accounts, funds, unused and outstanding non-ERISA benefits, *etc.* States that are now strapped for cash have even greater incentive to collect unclaimed property because items that remain unclaimed constitute a source of revenue.

Taxes and Limitations

Even though states collect unclaimed property under statute, these laws are not considered taxes. As a result, nexus laws should not affect a state's ability to reach unclaimed property. It also means holders of unclaimed property do not need to be doing business in a particular state to face scrutiny. Plus, most states have no statutes of limitation regarding the duty to report unclaimed property. That can make problems snowball.

Compliance Issues

A corporation (or other entity or person) should first determine if it is a holder of unclaimed property. If so, the holder must generally conduct due diligence to find and notify owners of unclaimed property. Eventually, the holder must report and transfer to the state property that remains unclaimed.

Although this process may sound relatively straightforward, various state UPL laws differ. It may not be clear which state should receive the property and/or which state's rules take precedence. Noncompliance can get expensive.

Most states have the power to impose penalties and interest for noncompliance. These amounts can sometimes exceed 50 percent of the value of the property due and payable. On the other hand, a holder that properly reports and transmits unclaimed property to the state may be protected from being whipsawed by other states.

The faculty emphasized that state UPL compliance is extremely complex. Indeed, perfect compliance nationwide can be difficult, perhaps impossible. Moreover, unclaimed property can be a GAAP liability to be accrued on a corporation's financial statements. As a result, some larger corporations have employees who devote 100 percent of their time to UPL compliance.

Audit Considerations

The faculty recommended that corporations should have written UPL compliance procedures in place. Such written materials could help a corporation to evidence its compliance efforts in the event of an audit. As states step up their audit enforcement in order to generate revenues, this is becoming increasingly important.

In some instances, multiple states employ third-party auditors who receive contingent fees. Moreover, the various state unclaimed property administrators and third-party auditors often communicate with one another. Hence, it is becoming increasingly difficult for larger companies to remain off the UPL radar screen.

Voluntary Disclosure

For holders that have failed to comply, most states have some form of voluntary disclosure agreement (VDA) program in place. Such VDAs will often include a limited look-back period, which may be a way to alleviate the statute of limitations issue for older unclaimed property. When entering a VDA with a holder, a state may agree to waive penalties and interest. The state may also agree to indemnify the holder against certain claims involving the unclaimed property delivered to the state.

You Can Still Attend

One of the best things about a webinar is that you can attend from the comfort of your desk chair. With ALI-ABA's various webinars, you get the added benefit of being able to purchase and attend after the fact. This UPL webinar originally broadcast on October 20, 2009. Nevertheless, you may find it and attend at any time by clicking on the "Online CLE" link at ALI-ABA's Web site, *www.ali-aba.org*.

ARTICLE SUBMISSION POLICY

THE M&A TAX REPORT welcomes the submission of unsolicited articles. Submissions should be 2,000 words or less and use textual citations, rather than footnotes. All submissions should be made via email attachment in either Microsoft Word or WordPerfect format to Robert W. Wood, Editor-in-Chief, at *wood@woodporter.com.* THE M&A TAX REPORT reserves the right to accept, reject, or edit any submitted materials.

CCH
a Wolters Kluwer business

4025 W. Peterson Ave.
Chicago, IL 60646

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
CCH