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New Jersey Extends Time for Unclaimed Property Data Collection

As we noted in our July 7, 2010, [Legal Alert](#), New Jersey recently enacted significant changes to its unclaimed property laws related to stored value cards (which include gift cards). The New Jersey Treasury Department has once again delayed the compliance date mandating the collection of consumer information associated with stored value cards until October 1, 2010.

Background

While many of the provisions of the new law are problematic (See July 7, 2010, [Legal Alert](#)), section 5(c) requires a change in business practice of a card issuer or vendor—they must obtain the name and address of the purchaser or owner of each card issued or sold and, at a minimum, maintain a record of the Zip Code of the owner or purchaser. On July 1 (the initial effective date), the New Jersey Treasurer released its first announcement stating that issuers were exempted from the requirements of section 5(c) until September 1, 2010. On August 26, the Department released Treasury Announcement FY 2011-02, further extending the exemption from compliance with section 5(c) through October 1, 2010. The Treasury Department indicated that it needs to review current processes, technologies and reporting practices, and develop specific industry guidance.

Sutherland Observation

Issuers and vendors have been scrambling to determine how to comply with New Jersey's new name and address collection requirement on sales of stored value cards. No other states require this type of unclaimed property procedure. While affected companies surely welcome the second reprieve provided by the State Treasurer, New Jersey should reconsider these requirements. Multiple, fire-drill compliance efforts will not benefit the State or its businesses.

Of equal, if not greater importance, to the immediate compliance issue is the reason behind the requirement to collect the name and address and whether a challenge to New Jersey's new law is (or should be) imminent. Part of New Jersey's new law provides for a supercharged "transaction test." The "transaction test" is part of the rules of priority to determine which state may take possession of unclaimed property. Property must first go to the state of the owner's last known address. If the holder does not have the address information, the property is to be remitted to the state of the holder's incorporation. Under the 1995 Uniform Unclaimed Property Act and many state unclaimed property statutes, if the holder is incorporated in a state that does not provide for escheatment of such property, the "transaction test" applies and the property should be remitted to the state in which the transaction creating the property occurred. There is much debate in unclaimed property circles as to whether the transaction test is a valid exercise of a state's power, and if so, to what extent. New Jersey's new legislation cleverly, or perhaps too cleverly, tries to both avoid the transaction test issue entirely while still receiving the funds and, failing that, escalates the transaction test to trump the state of incorporation rule.

New Jersey attempts to avoid the transaction test through the name and address collection requirement and the Zip Code maintenance law. As long as the holder has a sufficient last known address of an owner, the state of the address will get the property and no subsequent priority rules will be necessary. By requiring the address collection and maintenance, New Jersey is trying to prevent any rule, such as state of incorporation, from being relevant.

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Secondly, New Jersey’s law states that if the holder does not have sufficient information to determine the owner’s last known address, the address *shall be considered to be the address of the New Jersey business where the stored value card was purchased or issued*. New Jersey is attempting to avoid any other rule from applying by “deeming” the last known address to be where the transaction occurred. Thus, New Jersey is not simply in effect adopting the controversial transaction rule; it is actually placing the rule before the state of incorporation rule. This may very well violate the U.S. Supreme Court cases determining the priority rules. It certainly sets up a conflict with Delaware—the state of many vendors’ incorporation—because it seems unlikely that Delaware will recognize the “deemed” address as sufficient to meet the last known address requirement.

For issuers that have been assessed or have entered into voluntary disclosure agreements with Delaware and other states based on a historical sampling of unremitted unclaimed stored value cards, New Jersey’s “deemed” address law creates even more compliance problems because New Jersey’s law is retroactive. Will New Jersey go after other states and ask for the state to turn over property remitted by a holder to the state under the state of incorporation rule if New Jersey determines that some of that property should have been deemed to have an address in New Jersey? Since New Jersey does not allow for any percentage profit on the stored value cards to be retained by the holder, will New Jersey require that holders that had previously remitted funds to a state of incorporation that allowed such a holdback now turn over the remaining funds to New Jersey?

Various groups and holders are discussing the possibility of bringing a court challenge, possibly through an injunction, to various elements of the new law. However, no litigation has begun yet, and the November 1 annual reporting deadline for New Jersey is rapidly approaching. It is also possible that Delaware could challenge New Jersey’s deemed address rule. Such a challenge could be brought immediately in the U.S. Supreme Court and could resolve the general validity of the transaction test as well.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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