SUTHERLAND

LEGAL ALERT

July 7, 2010

New York and New Jersey Propose Significant Unclaimed Property Amendments

Struggling to balance their budgets in these economic times, New York and New Jersey are poised to enact significant unclaimed property changes. The New York bill reduces some dormancy periods and is pending in the Rules Committee. The New Jersey bill relates to stored value cards and was signed by the governor on June 30. A bill amending the New Jersey bill was introduced on July 1.

New York

The New York bill, S06610, is part of a growing trend to reduce the dormancy period of unclaimed property resulting in faster reporting (and paying over) unclaimed property to states. The bill seeks to reduce the dormancy period from five years to three years for property paid for services that were not rendered or for goods that were not delivered.

Sutherland Observation: This legislative change, if enacted, will help close the state budget gap for the next two years. The reduction in the dormancy period only applies to property that is already subject to the state's existing unclaimed property laws so the change will accelerate remittances to the state in 2010 and 2011 (but "cost" the state in subsequent years).

New Jersey

The New Jersey bill, A3002, not only expands the types of property that are subject to escheat, but it also changes the assumptions used to determine the address of the property holder. Further, the bill requires an issuer to obtain a name and address for every stored value card (e.g., gift cards, rebate cards, and paper gift certificates) sold, and completely prohibits dormancy fees.

A New Jersey court decision held that unclaimed gift certificate balances were not subject to escheat.[1] The new law undermines this decision by making "stored value cards" subject to escheat and also by broadly defining "stored value cards" to include unclaimed gift certificates, gift card balances, and rebate cards. In addition, the full value of a "stored value card" must be remitted to the state.

Sutherland Observation: New Jersey's requirement that the entire value of the card must be remitted is in stark contrast to other states and model laws. Many other states provide for an allowance of "profit," similar to the provisions of the 1995 Model Act, which only requires an issuer to remit 60% of the face value.

The most controversial provision, which <u>holders will have to very quickly decide how to account for</u>, is a change in the determination of a purchaser or owner's address. Under traditional rules derived from U.S.

[1] Matter of November 8, 1996, Determination of State, Dept. of Treasury, Unclaimed Property Office, 309 N.J.Super. 272, 706 A.2d 1177 (March 10, 1998).

Supreme Court decisions, if the issuer of property does not have the address of the purchaser or owner, then the property escheats to the state of incorporation of the issuer. Under the New Jersey bill, if the issuer does not have the actual address of the purchaser or owner of an unredeemed stored value card, then the address of the owner will be *assumed* to be the address of the place where the card was purchased or issued. Thus, New Jersey is attempting to circumvent the widely applicable state of incorporation rule by operation of law, which will create a conflict with other states' rules. The Bill Statement provides that the "provisions are designed to modernize the State's unclaimed property processes relative to other states and enhance New Jersey's capacity to protect its residents' stored value cards from being subject to the escheatment processes of other states."

Sutherland Observation: For retailers and others incorporated in Delaware, the New Jersey bill sets up an almost inevitable conflict. It is likely that Delaware will not recognize the validity of the "assumed" address location and may assert that if an issuer is incorporated in Delaware, then under the U.S. Supreme Court decisions the property escheats to the state of incorporation if no address is known. Thus, issuers should be mindful of how they comply with New Jersey's rules and what is sufficient "good faith" compliance so that the issuer is covered by statutory indemnification rules.

The new law is retroactive, and applies to all stored value cards issued before July 1, 2010 (as well as all cards issued in the future), and applies to property outstanding on and after July 1, 2010. Companies that incorporated a gift card issuing company in a state other than New Jersey may now have to escheat cards sold in New Jersey to New Jersey. Determining how to do comply for cards sold prior to the effective date will present a conundrum for issuers.

Sutherland Observation: The bill presents specific problems for companies that have incorporated a gift card company in New Jersey and have not been escheating gift certificates or gift cards in reliance on the 1998 Appellate Division decision and informal guidance from the state. Complying with the law as written could result in liability related to multiple years of issuing gift certificates that were not escheated.

Under section 5(c) of the New Jersey bill, issuers or sellers are required to obtain a name and address for every card sold. For issuers that sell cards to third parties for resale, compliance problems could arise. For example, an issuer may sell a card to a drugstore or pharmacy for resale, but the issuer has no way of obtaining the name and address information for people who purchase the cards from the drugstore. A laundry list of compliance problems could be generated: the existing contract between the issuer and the reseller does not require a name and address and would have to be amended; the reseller's system may not be able to record and transmit name and address information; purchasers may be unwilling to give their names and addresses, or the name and address of the recipient of the gift certificate. The bill allows for the Treasurer to grant exceptions to this requirement, but the issuer would have to apply for the exception and make a case as to why it was needed. On July 1, the Office of the State Treasurer of New Jersey released an announcement stating that issuers are exempted from the requirements of section 5(c) until September 1, 2010.

The New Jersey bill also completely eliminates dormancy fees, and creates a dormancy period of two years for the new "stored value card" type of property. This short dormancy period, and reductions in the dormancy period (like the one proposed in New York as described above), may present issues stemming from the difference between the dormancy periods and the federal restrictions on expiration under the Credit Card Act of 2009. Under the Credit Card Act, gift cards may not expire until at least five years from the date of issue. Under these reduced dormancy periods, issuers are required to escheat gift cards to a state before the card has expired. For customers who use the card after the escheatment (*i.e.*, two years) but before the expiration (*e.g.*, five years), issuers will have to seek a reimbursement of the card amounts from the state. This process will create a significant compliance burden.

New Jersey – Amendment

On July 1, bill A3091 was introduced in the Assembly, and referred to the Budget Committee. The bill changes the dormancy period for stored value cards from two years to five years. The bill also exempts stored value cards "useable solely for telephone services" from the operation of New Jersey's unclaimed property laws. Exempting stored value cards that can only be used for telephone services conforms to the federal Gift Card Act of 2009, which also exempted these types of cards from the operations of that act.

■ ■ ■

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.

Michele Borens	202.383.0936	michele.borens@sutherland.com
Jeffrey A. Friedman	202.383.0718	jeff.friedman@sutherland.com
Stephen P. Kranz	202.383.0267	steve.kranz@sutherland.com
Marc A. Simonetti	212.389.5015	marc.simonetti@sutherland.com
Eric S. Tresh	404.853.8579	eric.tresh@sutherland.com
W. Scott Wright	404.853.8374	scott.wright@sutherland.com
Diann L. Smith	212.389.5016	diann.smith@sutherland.com
Zachary T. Atkins	404.853.8312	zachary.atkins@sutherland.com
Michael L. Colavito	202.383.0870	mike.colavito@sutherland.com
Miranda K. Davis	404.853.8242	miranda.davis@sutherland.com
Jonathan A. Feldman	404.853.8189	jonathan.feldman@sutherland.com
Lisbeth A. Freeman	202.383.0251	beth.freeman@sutherland.com
Natanyah Ganz	202.383.0275	natanyah.ganz@sutherland.com
Charles C. Kearns	202.383.0864	charlie.kearns@sutherland.com
Jessica L. Kerner	212.389.5009	jessica.kerner@sutherland.com
Pilar Mata	202.383.0116	pilar.mata@sutherland.com
Lindsey L. Napier	404.853.8304	lindsey.napier@sutherland.com
J. Page Scully	202.383.0224	page.scully@sutherland.com
Melissa J. Smith	202.383.0840	melissa.smith@sutherland.com
Maria M. Todorova	404.853.8214	maria.todorova@sutherland.com
Mark W. Yopp	212.389.5028	mark.yopp@sutherland.com