A wave of new unclaimed property statutes and rules is changing whether and when businesses should escheat gift, payroll, loyalty, and other stored-value cards. Ten states have adopted new statutes or rules in this area over the past three years. A number of other states are already considering similar statutes, so future changes are likely. Escheat of gift cards, in particular, continues to be a disputed issue in audits and litigation involving unclaimed property.

Most of the new gift card laws are part of broader reforms to unclaimed property laws being driven by the 2016 Revised Uniform Unclaimed Property Act (“2016 Uniform Act”), a new model law that seeks to modernize escheat law. More than half a dozen states, including most notably Delaware and most recently Colorado and Maine, have enacted some form of the 2016 Uniform Act. But how each state treats gift cards merits special attention because the ULC was unable to reach consensus on escheat standards for gift and stored-value cards, partly because current state laws in this area vary so significantly. So, although the 2016 Uniform Act includes proposed definitions for gift cards and stored-value cards, the question of whether the cards escheat has been left up to states. As a result, the treatment of gift and stored-value cards has been a key question in each state that considers new escheat legislation.

Key changes for merchant gift cards (closed-loop gift cards)

Most states have maintained consistency in their escheat standards for closed-loop gift cards issued by retailers, restaurants, and others. These are gift cards redeemable for goods and/or services only at a single merchant or affiliated merchants. But two states, Colorado and Kentucky, have made big changes in opposite directions, with Colorado taking a stricter escheat position and Kentucky now exempting most closed-loop gift cards.

Most notably for card issuers, Colorado has significantly changed its law, effective July 2020, to require escheat of 100% of the remaining balances of merchant gift cards after five years. Although gift cards were already reportable, Colorado allowed a $25 deduction for each card, which in practice has allowed issuers to retain unredeemed balances under $25 without delivering funds to the state. A number of gift card issuers had incorporated in Colorado to take advantage of the deduction, and in the wake of the new standards, some gift card issuers are considering redomesticating their businesses to other states.

On the other hand, Kentucky now exempts most gift cards following passage last year of a version of the 2016 Uniform Act. Before the enactment, Kentucky’s unclaimed property statute was silent on gift cards, but the state took an administrative position that gift cards were subject to escheat. The new statute, which affirmatively excludes gift cards from an enumerated list of property subject to escheat, provides an exemption from escheat as long as the cards
do not expire or have post-sale fees.

More guidance on other card products

One helpful trend for card issuers coming out of the new legislation is that the amended statutes and rules provide businesses with significantly more clarity on how they should treat the various types of gift and stored-value card products in the marketplace. Many unclaimed property laws remain antiquated, based on model statutes from the 1980s or 1990s, if not before. For example, the unclaimed property statutes in many states were originally drafted to address “gift certificates,” which were initially associated with paper or other tangible certificates for redemption at a single retailer or closely affiliated group of retailers. State laws have not always reflected the rapid evolution in the market. But, this is changing as states update their statutes and rules.

The 2016 Uniform Act separately defines gift card, stored-value card, payroll card, and loyalty card. As a result, states enacting a version of the new model law are specifying how to treat each such category of cards. Tennessee, for example, enacted the 2016 Uniform Act and specified that closed and open-loop gift cards are exempt, if they meet certain conditions, but that other stored-value cards must be escheated. Ohio (by statute) and New Jersey (by regulation) have also updated their laws to provide more specificity on escheat requirements for a range of card products. New Jersey continues to require escheat of gift cards at 60% of the unredeemed balance, but the new regulations clarify that general purpose reloadable cards escheat at 100% under a five-year dormancy period. In Ohio, the new legislation clarifies the treatment of open-loop gift and other prepaid cards, with explicit exemptions for cards that meet certain criteria.

Also helpful to issuers, particularly in states with some exemptions, is more specificity about what product features are required to qualify for the exemptions—for example, some states, such as Kentucky and Tennessee, exempt only gift cards that do not charge post-sale fees and do not expire.

Payroll cards as a new property type

Many states are now adopting specific standards for payroll cards, which are listed as a new property type in the 2016 Uniform Act. The 2016 Uniform Act defines payroll cards by reference to federal regulations for payroll card accounts and clarifies that payroll cards are a type of stored-value card, issued by a bank or other financial institution and are not “wages” owed by an employer. This classification clarifies the timing of escheat under the 2016 Uniform Act because stored-value cards and payroll cards escheat after three years, whereas unclaimed wages escheat after one year.

Virtually all states that have adopted a version of the 2016 Uniform Act have followed the model and defined “payroll card” as a type of stored-value card with reference to federal law. That is, payroll cards are not “wages.” But, at the same
time, a few states have elected to set a unique dormancy period for payroll cards; Illinois, for instance, sets the dormancy period for payroll cards at one year.

Uniformity for loyalty cards

States seem to be following a consistent trend for loyalty cards. Every state that has revised or updated its escheat standards since 2016 has included an express exemption for loyalty cards in its statute or rules. Most of the new state laws also include the 2016 Uniform Act’s definition of “loyalty cards,” as “given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate, or promotional program which may be used or redeemed only to obtain goods or services or a discount on goods or services.”\(^\text{10}\) Similarly, the updated escheat standards in New Jersey and Ohio include exemptions for loyalty cards, provided the cardholder did not pay money for the card.\(^\text{11}\)

Conclusion

The rapid pace of change in unclaimed property laws is expected to continue, as many states seek to modernize their laws to take into account a range of card products. While the 2016 Uniform Act aims to attain uniformity among the states, we expect that state escheat standards for gift and stored-value cards will continue to diverge. Businesses that issue, manage, or process gift cards and stored-value cards should stay alert to these developments and continue to seek additional clarity on the state-by-state rules in this area.

\(^{1}\)The 2016 Uniform Act, sometimes referred to as “RUUPA,” is a comprehensive new model law, addressing escheat issues for all industries and promulgated by the Uniform Law Commission (“ULC”) after several years of debate and stakeholder input. The ULC, also known as the National Conference of Commissioners on Uniform State Laws, is a non-profit, state-sponsored organization of state commissions comprised of lawyers serving as practitioners, judges, legislators, and law professors. The ULC studies, reviews, and promotes uniformity among the states within specified areas of the law.

\(^{2}\)States enacting legislation based at least partly on the 2016 Uniform Act include Delaware (2017), Illinois (2017), Tennessee (2017), Utah (2018), Kentucky (2018), Colorado (2019, effective 2020), Nevada (2019), and Maine (2019). Some of these enactments are complete and consistent versions of the 2016 Uniform Act (e.g., Kentucky and Tennessee), whereas other states made significant changes or enacted only portions of the model law (e.g., Delaware and Nevada).

\(^{3}\)The 2016 Uniform Act defines gift cards as “stored-value card[s]: (i) the value of which does not expire; (ii) that may be decreased in value only by redemption for merchandise, goods, or services; and (iii) that, unless required by law, may not be redeemed for or converted into money or otherwise monetized by the issuer.” 2016 Uniform Act § 102(11)(A). The 2016 Uniform Act defines stored-value cards as “record[s] evidencing a promise made for consideration by the seller or issuer of the record that goods, services, or money will be provided to the owner of the record to the value or amount shown in the record.” 2016 Uniform Act § 102(30). Stored-value cards include payroll cards, but not loyalty cards, under the 2016 Uniform Act; the ULC left it open for the states to determine whether gift cards fall within the stored-value card category. See id.

\(^{4}\)See Senate Bill 19-988, § 38-13-207.


\(^{6}\)Tennessee defines gift cards as stored-value cards that do not expire, do not have fees, and are not redeemable for cash. Tenn. Code Ann. § 66-29-102(8). Cards falling within this gift card definition are expressly excluded from property subject to escheat in Tennessee. Tenn. Code Ann. § 66-29-102(24)(C).


\(^{8}\)See Oh. Rev. Code Ann. § 169.01(B)(2) (generally exempting gift and prepaid cards that are not redeemable for cash).

\(^{9}\)See 2016 Uniform Act § 102(22).

\(^{10}\)2016 Uniform Act § 102(14).

\(^{11}\)N.J. Admin. Code § 17:18-3.3(a); Oh. Rev. Code Ann. § 169.01(B)(2)(f) (exempting rewards cards, “provided that no direct money was paid by the cardholder for the rewards card”).
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