Skadden

Skadden, Arps, Slate, Meagher & Flom LLP
& Affiliates

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Jonathan Frank
New York
212.735.3386
jonathan.frank@skadden.com

Rachel J. Barnett
New York
212.735.3458
rachel.barnett@skadden.com

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Four Times Square, New York, NY 10036
Telephone: 212.735.3000
WWW.SKADDEN.COM

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Unclaimed Property Can Lead to Unexpected and Substantial Liabilities

An article in yesterday's *Wall Street Journal*, entitled "Delaware Targets Unclaimed Property," discusses Delaware's significant interest in pursuing unclaimed property compliance. As the article notes, Delaware's unclaimed property program has brought in $1.24 billion over the past three years alone, making it the "third largest revenue source behind income and franchise taxes over that time."

But it is not just Delaware that is ramping up its unclaimed property programs. For example, New York reported that it estimates collecting $785 million in the year of 2012 and California states on its website that it is currently in possession of more than $6.1 billion in unclaimed property. States around the country are increasing their efforts to probe into companies' policies and practices in handling all different types of unclaimed property. Furthermore, because the unclaimed property laws of each individual state may be implicated by any company's ordinary business activities, compliance with each state's laws becomes complex.

Among the areas of interest we have observed are whether companies have reported and escheated inactive securities accounts, unpaid dividends, unclaimed life insurance benefits and annuities, unused gift cards, and unclaimed customer overpayments or rebates. Moreover, like any other liability, unclaimed property liability can be transferred through business combinations and the states' efforts to discover and collect such property has increased. Because of the long look-back periods provided in unclaimed property statutes and the absence of applicable statutes of limitation, these liabilities can be hidden and significant. Skadden has advised numerous clients with respect to these issues.

Many states use third-party unclaimed property auditors, whose remuneration is based on a percentage of the value of the property escheated by corporate holders of the targeted property. Often these audits are undertaken by representatives of many states simultaneously. But state actions have not been limited to third-party audits. For instance, with respect to the insurance industry, states such as New York have issued broad subpoenas to companies to examine unclaimed property compliance. Other states, such as California and Pennsylvania, have joined together and sought information from companies in connection with multi-state market conduct examinations into potential unclaimed property liabilities. West Virginia recently filed lawsuits to collect on unclaimed property.

Skadden's unclaimed property practice continues to advise in this area of the law and monitor its development in order to assist clients in navigating the complex unclaimed property laws of various states. This has included providing advice to companies on ongoing compliance; audit letter (or multiple audit letter) response(s) and continuing advice through the course of an investigation; settlement negotiation; litigation options; and conducting due diligence and advising on unclaimed property exposure in a merger or acquisition. In short, unclaimed property exposure can result in unexpected and substantial liabilities for many companies, and having a better understanding of this area of law, and timely advice, is a necessary step to dealing with existing problems and preventing other ones in the future.