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Washington, DC

MEMORANDUM

Date: December 29, 2014

To: Uniform Law Commission, Revise the Uniform Unclaimed Property Act Drafting Committee

From: Steve Kranz and Diann L. Smith on behalf of the National Retail Federation

Re: Comments of the National Retail Federation Regarding Gift Certificates, Gift Cards and Stored Value Cards

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The National Retail Federation, on behalf of its member companies, submits these comments regarding the treatment of gift certificates, gift cards and stored value cards in the revision of the Uniform Law Commission's Uniform Unclaimed Property Act. NRF respectfully requests that, for the reasons discussed below, such products be specifically excluded from the type of property subject to reporting and remittance to the states under the revised Act. Such a result would promote uniformity and would decrease the inconvenience experienced by gift card owners under the current structure.

I. National Retail Federation

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

NRF has formulated these comments in direct consultation with its members.

II. Scope of Product Types Addressed in Comments

1. Because gift certificates are rapidly becoming obsolete, these comments are directed at gift cards and stored value cards. However, because the 1995 Uniform Act specifically includes gift certificates as a type of property subject to remittance to a state and because gift certificates are a functional predecessor to gift cards and should not be treated differently than gift cards, these comments should be read to apply equally to gift certificates.

2. The terms "gift cards" and "stored value cards" will be used interchangeably throughout these written comments. For the types of products covered by these comments, the definitional differences these terms may entail are not relevant to the unclaimed property discussion.

3. These comments are directed at products traditionally called gift certificates, gift cards, and stored value cards as well as other types of property similar to or a substitute for gift certificates, gift cards, or stored value cards. Typically, such products are sold or otherwise distributed in return for consideration (cash or otherwise) for purposes of the owner obtaining goods or services from a vendor at a later date.[1]

4. These comments are not intended to include stored value cards not directly related to the purchase of goods or services, such as payroll cards or employee benefit cards. Such instruments have attributes not shared by the stored value cards at issue in these comments and should be addressed separately by the Drafting Committee.

5. These comments, for simplicity's sake, use the term "cards," but this term is intended to include virtual card products, such as the purchase over a website of a "gift card" for which an activation, redemption or bar code is provided rather than a physical card. Other than the lack of a physical object, there is no practical distinction between tangible and virtual gift cards from the perspective of the consumer.

III. Current State of the Law

The majority of states do not require most types of gift cards and stored value cards be remitted as unclaimed property.[2] In fact, thirty-one states currently have some version of an exclusion.[3] In contrast, the 1981 and 1995 Uniform Unclaimed Property Acts each included gift certificates as property subject to remittance.

Comprehensive doctrines such as the derivative rights doctrine, counsel against requiring property which is not a cash equivalent, such as gift cards redeemable solely for goods and services, be remitted for cash to a state.

At the November meeting of the UUPA Drafting Committee, the Committee voted to instruct the Reporter to include "gift cards" and "stored value cards" as property covered by the revised uniform act.

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[1] Items circulated without consideration, such as coupons, while also used to obtain goods and services, are not similar to gift cards and have never been subject to remittance as unclaimed property. Nothing in these comments is intended to suggest that such items should be included within the ambit of gift certificates, gift cards, or stored value cards.

[2] Frequently, the exemption is actually provided for gift certificates because this was the predominant form of the product at the time the legislation was passed. For purposes of discussing the exemption, we use the term gift cards and gift certificates interchangeably.

[3] "The Best and Worst of State Unclaimed Property Laws, COST Scorecard on State Unclaimed Property Statutes," October 2013: AL, AZ, AR, CA, CT, FL, HI, IL, IN, KS, MD, MA, MI, MN, NE, NV, NH (less than $100), NC, OH, PA, RI, SC (by omission), SD, TN, TX, UT, VT (by administrative determination), VA, WA, WI, WY (less than $100). Some of these states only exempt gift certificates if there is no expiration date and no dormancy fees. Because NRF's members typically do not impose such restrictions, this limitation on exemption is not an issue for members. Only one state, New Jersey, in the past fifteen years has passed legislation adding gift cards to the types of property subject to remittance. No state in the past fifteen years has repealed legislation exempting gift cards.

IV. Factual Background Supporting Exemption[4]

NRF's members typically do not impose an expiration date on their gift cards and do not assess dormancy fees against the value of the cards.[5] If (or when) gift cards are required to be remitted to a state as unclaimed property, retailers may need to adjust a card's value to zero or deactivate a card Such an adjustment is a negative experience for customers attempting to redeem a card and can adversely affect the customer's opinion of the retailer.

Historically, retailers have not maintained or been aware of the gift card owner's identity. In some retail segments this may be changing, but retailers still do not typically maintain name and address information related to a gift card owner. For point-of-sale systems, such as the cash register, most retailers specifically do not maintain gift card customer personal information because of the IT and related privacy risks related to maintaining such information. Furthermore, collecting such information at the register would be impractical due to time constraints. Customers may also refuse to provide such information. Requiring such information to be maintained would entail significant and costly system changes to many retailers' data management systems.

Retailers also have historically not maintained gift card owner name and address information because the purpose of a gift card is typically to transfer the gift card to someone other than the original purchaser. Therefore, for many gift cards, it is impossible for the retailer to track the rightful owner and it would be impossible for a state to find the rightful owner (unless the owner finds the state and has sufficient proof of an unused gift card previously remitted to the state).

NRF's members are primarily interested in closed-loop instruments. NRF's members are only concerned with instruments that are redeemable by the merchant for merchandise or services. The cards addressed by these comments include cards that may be reloaded. NRF's members also sell virtual gift cards that can be purchased via websites, mobile apps, or directly through a cell phone.

Many NRF members not only offer gift cards that are paid for by the customer, but also distribute items identified as gift cards for consumer satisfaction purposes,[6] as a vendor promotion or discount for a specific product, for third party warranty providers, and as charitable donations.[7] Many retailers do not record on their books and records why a gift card was issued.

Some retailers also offer promotional gift cards as part of a customer loyalty or incentive program[8] or for employee rewards programs.[9]

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[4] The terms exemption and exclusion are used here interchangeably.

[5] Many states have statutes that prohibit expiration dates and/or fees either in the unclaimed property statutes or in some other code section such as consumer protection.

[6] For example, sometimes a retailer will provide a customer with a gift card instead of a refund when a customer returns merchandise outside of the return period or without a receipt.

[7] Some retailers also sell gift cards at a discount to face value to charities.

[8] For example, a retailer may have a program that if a customer spends $100, the customer will receive a $25 gift certificate to use on the next purchase.

Some retailers sell gift cards in bulk to other businesses. These other businesses may sell the gift cards at face value, use them for promotional purposes, or distribute them for employee incentives. Unique issues are raised when retailers engage in third party bulk sales of gift cards. The retailer typically provides a bulk discount to the third party seller but remains liable to the ultimate customer for the full amount of the card value. Similarly, some retailers sell gift cards through other retailers. Typically, the gift card seller retains a percentage of sales as a sales commission.

NRF members typically consider gift cards an additional product offering for their customers. NRF members spend significant amounts of money and time on advertisements and other marketing efforts to promote gift cards. These expenses are in addition to the typical marketing of the vendor's merchandise and services. Merchants that offer gift cards also incur significant administrative costs to monitor and maintain the gift card program. These costs are over and above the costs for maintaining the merchant's standard inventory. For example, many retailers use a third party administrator to handle gift cards. These administrators typically charge a processing fee based on the value of the gift cards issued. Finally, NRF members issue gift cards not in the hope that a consumer will not redeem it, but in the hope that the consumer will redeem it. Most consumers that redeem a gift card actually purchase goods and services in excess of the value of the gift card. Furthermore, a consumer that visits a store or website for purposes of redeeming the gift card gives the merchant an opportunity to establish or further its relationship with the consumer, turning the consumer into a repeat customer and enhancing profits.

For a significant number of merchants, many gift cards retain small unredeemed balances at the time a state unclaimed property dormancy period expires. These small balances may be the result of an initial small dollar face value or because the gift card was partially redeemed for merchandise or services that totaled less than the face value of the card. NRF members have reported that the cost of complying with state unclaimed property laws, even in states that allow aggregation of small balances, outweighs the value of these cards to the owner, the holder, and the state.

Gift cards and stored value cards are subject to numerous regulatory laws and government agency oversight outside of the unclaimed property arena, including state consumer protection statutes, the federal CARD Act, and pronouncements by the federal Consumer Financial Protection Bureau.

V. NRF's Proposal

NRF requests that the Drafting Committee specifically exclude all gift certificates, gift cards, and stored value cards[10] from the definition of property subject to remittance to the states as unclaimed property. It may also be appropriate to limit this exclusion to cards that do not expire and for which no dormancy charges are imposed.

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[9] Even though something is called a "gift card," if no cash consideration is received by the vendor, the item may be more akin to a coupon rather than a true gift card.

[10] Except, as noted above, payroll and benefits cards or cards redeemable for cash.

Thus, NRF supports the ABA's proposal to exclude from the definition of "property" property that does not include any prepaid obligation redeemable for cash. NRF also supports NAUPA's proposed exclusion.

NRF also supports a general exemption for all types of property with small balances. NRF suggests that a reasonable threshold for such a small balance exception would be $100.

Once a determination has been made by this Committee to exclude gift cards from remittance, NRF will work with the Drafting Committee and the Gift Card working group to craft an appropriate definition of the types of certificates and cards subject to this exclusion. A review of the language of existing state exclusions would probably be appropriate in this endeavor.

VI. Support for Proposal

The Drafting Committee should adopt NRF's proposal because (i) it is the only approach that upholds and furthers the ULC's uniformity mission; (2) it is consistent with sound public policy, existing law and business practice; (3) it is consistent with historic unclaimed property theories.

A. *Promotion of Uniformity*

Because the majority of states currently exclude gift certificates and related products, the only way this Drafting Committee can uphold the ULC's purpose is by excluding gift certificates, gift cards, and stored value cards in the revised UUPA. The ULC's purpose, as stated in section 1.2 of its Constitution, is "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable." Commissioners are required "to seek introduction and enactment of Uniform Acts promulgated by the Conference that are appropriate for their State." ULC Constitution Section 6.1, "Duties of Commissioners."

State legislatures have spoken. The current and trending upward policy choice of legislators is that gift cards should be excluded from unclaimed property remittance requirements. The only voice advocating to continue including gift certificates and to additionally include gift cards and stored value cards as property subject to remittance comes from state unclaimed property administrators and their third party auditors. Neither of these groups is, or should be, vested with policy choices regarding property rights and revenue raising issues. Thus, if the Drafting Committee continues the path of including these items in the definition of property subject to remittance, the Committee is ignoring the very legislatures that will later be asked to adopt the Committee's ultimate product and endangering the ULC's uniformity mandate with regard to its UUPA.

B. *Consistent with Sound Public Policy, Existing Law and Business Practice*

Excluding gift cards from the definition of property subject to remittance to the states respects the contract rights of the parties as well as upholds the concept that the state should not obtain rights greater than the property owner. There is no prohibition on retailers requiring that

gift cards be redeemed for merchandise or services rather than cash.[11] It is thus completely contrary to the historic concepts of property rights and respect for contracts to nevertheless require these same retailers that do not give the owners cash, give the cash to the state.

Much has been written about the derivative rights doctrine and NRF strongly supports organizations such as the ABA in their position that the derivative rights doctrine should prohibit application of state escheat laws contrary to the intent of the private parties and the express terms of their contract. The states, including NAUPA in its comments to the ULC Drafting Commission, typically respond that contracts entered into after the state has adopted an unclaimed property act are specifically constrained by that Act. Thus, under this approach, if a state unclaimed property act prohibits private escheat, a contract that includes a rights enforcement provision specifically intended to contravene state unclaimed property dormancy periods may not be valid. However, this is not the issue for whether gift cards redeemable solely for merchandise or services should be escheatable to the state as cash. State unclaimed property laws should not dictate the redemption method of a gift card any more than such laws should dictate whether a retailer must accept the return of an ugly Christmas sweater on January 15th for the full retail value paid.

C. *Consistent with Historic Unclaimed Property Theory*

Historically, several reasons have been espoused for the validity and continued relevance of state unclaimed property laws. These theories have included (i) states are in a better position than holders to reunite lost owners with their property and (ii) holders should not receive a windfall[12] when property in their possession remains unclaimed and it is a better public policy to let the state use such property for the benefit of all of its citizens. The application of these theories to gift cards supports NRF's proposed exclusion.

First, states are not in a better position to protect consumers with regard to gift cards. Common sense provides that a consumer that finds an old gift card in the bottom of her laptop bag with a remaining value of $5 will be more likely to obtain relief from the merchant than from the state. If the consumer takes the old card into the merchant, NRF members confirm that the card can be immediately used to purchase merchandise or services. For cards issued by large, national merchants, the consumer could use her card anywhere. Thus, the fact that she has moved since she received the card or is travelling when she finds the card does not affect her ability to use the card. However, if the card value has been remitted to the state and the consumer must go to the state to get relief, the consumer must (a) determine what the state of incorporation of the issuer is[13]; (b) jump through the documentation hoops of the custody state; and (c) wait for the $5 to arrive by mail. It seems clear which of these scenarios best protects the consumer.

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[11] A small number of states require that very small remaining balances on gift cards be redeemed in cash.

[12] While some courts and most state administrators have posited that a secondary reason for state unclaimed property laws is to prevent a windfall to the holder, this is not a universally accepted reason for the existence of state unclaimed property laws.

[13] Because issuers of gift cards almost never have the name and address of the owner of the gift card, the second priority rule usually applies. The process may become even more complicated as some retailers begin maintaining names and addresses for certain types of gift cards, such as those purchased online.

Many retailers, even after remitting the value of the card to the state, do accept card redemptions by the consumer. Retailers frequently do this for customer service reasons. This practice, beneficial and protective of the consumer, creates additional administrative costs for both the retailer and the state that are unnecessary. First, there is the administrative redundancy and related excess costs incurred when a retailer redeems the customer's dormant card and then files for a refund from the state. For many retailers, the hassle of requesting a refund from the state is not worth the value of the refund, in which case the state has received the windfall. Retailers may also feel compelled to honor dormant cards for legal reasons. Some retailers are concerned that if they do not honor cards they risk getting sued, possibly in a class action, under contract and consumer protection statutes for advertising no expiration date. Requiring remittance of dormant gift cards thus puts retailers in a difficult customer service and legal position regarding honoring cards considered dormant by the state.

Second, there is no dispositive evidence that retailers that retain the value of unredeemed gift cards are receiving a windfall. The concept of windfall assumes that businesses do not consider their overall revenue stream when setting prices. An increase in unredeemed gift card balances may results in the company decreasing the price of its toasters or cleaning services. Thus, the windfall could really be routinely passed along to other consumers. Or perhaps the company increases its charitable donations. A serious economic analysis of this so-called windfall should be required by state supporters of the inclusion of gift cards before the Uniform Act continues to include such items as property.[14]

The absence of any windfall to the retailer from unredeemed gift card balances is particularly true for small balances. Frequently, the cost of maintaining the balance on the companies' books and records exceeds the balance retained but the cost of reporting and remitting the balance to the state also exceeds the value. Accepting the costs of maintaining the records associated with small balances is a cost of doing business that gift card issuers have accepted. Such balances, given the associated administrative costs, can in no way be considered a windfall to the company that needs to be remedied through state unclaimed property laws.

Finally, even if there were some type of minor "windfall" it is not clear why gift cards that are not a cash equivalent should be singled out from the numerous types of possible windfalls that exist in everyday life.

Conclusion

The Uniform Law Commission has the opportunity to update its Uniform Unclaimed Property Act with regard to the treatment of stored value items, such as gift cards, to match the laws in the majority of states and to promote additional uniformity in the outlying states. For all of the reasons listed above, NRF respectfully requests that gift certificates, gift cards and stored value cards s be specifically excluded from the type of property subject to reporting and remittance to the states under the revised Act.

[14] If anything, the windfall is to the state of incorporation whose citizens have done very little to contribute to the creation of the property in the first place.

NRF is available to work with the Drafting Committee on appropriate language for this exclusion and to answer any questions this Committee or its members may have regarding NRF's proposal.