PART 1

NRF's Proposed Stand-Alone Gift Card Provision in Revised Uniform Unclaimed Property Act

The National Retail Federation submits these comments to address the suggestion at the October meeting of the Drafting Committee that the provisions regarding gift cards should be placed in a single, stand-alone section to prevent confusion resulting from the optional nature of the proposed exemption. As noted at this meeting, NRF supports this position and offers the proposed language below, consolidating the gift card provisions that were previously located in Section 2(10), (22)(A)(ii), (26); Section 3(7), 3(7)(C). Except where provided in the margin notes to the language, NRF does not believe that this proposed language changes the substance of the September 29, 2015 draft of the RUUPA.

NRF also proposes that the Drafting Committee specifically note that a gift card need not actually be a physical "card." While the definition currently proposed by the Drafting Committee should include any form that a gift card may take because the provision defines a gift card as "a record," it has been suggested that the definition should clarify the form is not determinative because the word "card" is used in the term being defined. Such a clarification allows the form that the instrument takes in the future resulting from changes in technology or business models to be irrelevant.[1]

For the convenience of the Drafting Committee, NRF has also provided a redlined version of the sections for which reference to gift cards should be deleted if a separate, stand-alone provision is adopted.

NRF is also submitting comments and proposed language regarding merchandise credits as a result of comments made during the October meeting. Those comments should be read as a subset of the proposed language below and the language proposed in those comments is included in the proposal below.

Finally, in in deference to Commissioner Houghton's comments at the October meeting and in respect for the Drafting Committee's responsibilities, NRF is not proposing changes or additions to the Reporter's Comments regarding gift cards. NRF respectfully requests that once the Commission as a whole has adopted the RUUPA, that NRF be given the opportunity to provide input to the Reporter and the Co-Chairs in the drafting of the final Comments to the Act.

I. PLACEMENT OF PROVISION

NRF has no strong opinion regarding the placement of the stand-alone provision regarding the treatment of gift cards. A review of the September 29, 2015 draft suggests that a practical location would be after Section 4. Contents of Safe Deposit Box. Section 4 is another stand-alone provision dealing with a unique property type.

[1] *See e.g.* Office of the Attorney General, State of Colorado, Formal Opinion No. 05-01 (April 13, 2015) (statutory exemption for gift certificates not applicable to gift cards).

II. PROPOSED CONSOLIDATED GIFT CARD PROVISION

SECTION [X]. [GIFT CARDS,] MERCHANDISE CREDITS [,] AND SIMILAR INSTRUMENTS

(1) Notwithstanding any other provision of this [Act], the following sections shall apply to gift cards, merchandise credits, and similar instruments.

(2) Definitions

(a) "Gift card" means a record containing a stated monetary value that may be redeemed only to its stated value for merchandise, goods, or services; the value of which may not be decreased other than by the value of merchandise, goods; or services for which it has been redeemed, the obligation for which does not expire, and which may not be redeemed for money or monetized by the issuer in any other way, unless required by law. The term includes merchandise credits not otherwise exempted under the [Act] and prepaid commercial mobile radio services, as defined in 47 CFR 20.3, but does not include game-related digital content, or loyalty cards. The form in which the gift card is issued, such as a digital code or through an app, is not relevant to the definition. Gift cards are not "property" as defined in Section 2(22) and are not subject to the provisions of Section 3.

(b) "Merchandise credit" means a representation of the value of returned or exchanged merchandise as calculated by the issuer and/or its affiliates at the time of the return or exchange wherein such credits may only be used to acquire goods or services from a given retailer and/or its affiliates. The form in which the merchandise credit is issued, such as a digital code, gift card or physical certificate, is not relevant to the definition. Merchandise credits are not "property" as defined in Section 2(22) and are not subject to the provisions of Section 3.

[(3) Presumptions of Abandonment

(a) A gift card is presumed abandoned and subject to Section 5. Rules for Taking Custody if it is unclaimed by the apparent owner the latest of three years after

(i) December 31 of the year in which the card was issued, or additional funds were deposited into it;

Comment [DS1]: New suggestions – see comments.

Comment [DS2]: New suggestions

Comment [DS3]: New suggestion

Comment [DS4]: New suggestion

Comment [DS5]: Change in language, but not intent from October draft – see inclusion of optional Part 3 below].

Comment [DS6]: New suggestion

(ii) the most recent indication by the owner of an interest in the card; or

(iii) any verification or review of the balance by or on behalf of the owner.

The amount abandoned by the owner is [60%] of the value remaining at the time it is presumed abandoned].

III. DELETIONS FROM EXISTING SECTIONS TO REMOVE GIFT CARD REFERENCES

SECTION 2. DEFINITIONS

. . . .

~~(10) "Gift card" means a record containing a state monetary value that may be redeemed only to its stated value for merchandise, goods, or services; the value of which may not be decreased other than by the value of merchandise, goods; or services for which it has been redeemed, the obligation for which does not expire, and which may not be redeemed for money or monetized by the issuer in any other way, unless required by law. The term includes prepaid commercial mobile radio services, as defined in 47 CFR 20.3, but does not include game-related digital content, or loyalty cards.~~

. . . .

(22) "Property" means . . . a fixed and certain interest in intangible property that is held, issued, or owe in the course of a holder's business . . . the term:

(A) includes property referred to as or evidenced by:

(i) . . .

(ii) a credit balance, customer's overpayment, stored value card~~,~~ ~~[other than a gift card]~~, security deposit, refund, credit memorandum, . . . ~~[~~but does not include game-related digital content, [and] loyalty cards[, ~~[~~and~~]~~ ~~[~~virtual currency] ~~[and] [gift cards]~~];

. . . .

(26) Stored-value card" means a record 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 record to the value shown in the record. The term includes a record that contains a microprocessor chip, magnetic strip, or other means for the storage of information, which is prefunded and for which the value is decreased on each use, or may be increased by payment of additional consideration, and includes ~~[gift cards and]~~ payroll cards. The term does not include gift cards, loyalty cards, or game-related digital content.

SECTION 3. PRESUMPTIONS OF ABANDONMENT

. . . .

(7) a stored-value card, ~~[other than a gift card],~~ the latest of . . . .

~~The amount abandoned by the owner is the value remaining at the time it is presume abandoned; except for gift cards with respect to which the amount abandoned is [60%] of the value remaining at the time it is presumed abandoned];~~

PART 2

Merchandise Credits

As a follow-up to the October, 2015 meeting of the Drafting Committee, the National Retail Federation requests that the Revised Uniform Unclaimed Property Act completely exclude "merchandise credits"[2] from the definition of "property" subject to remittance to the states. As more fully explained below, such an exclusion would recognize that these "credits" frequently do not represent actual property owed to another, and are often a form of theft. Furthermore, the exclusion should exist regardless of the form the credit may take. While related to gift cards, for the purpose of the RUUPA we recommend that the merchandise credit exclusion should be independent from the optional gift card exclusion to prevent confusion.

NRF is providing additional comments regarding the draft's gift card provisions in a separate document, but the gift card and merchandise credit comments should be read in tandem. The revised gift card language defines "gift cards" to include "merchandise credits not otherwise exempted under the [Act]." This provision recognizes that some states may not adopt the exclusion for merchandise credits and also acknowledges that historically retailers and most states treated merchandise credits and gift cards similarly.

NRF notes that the Retail Gift Card Association has provided similar comments and NRF supports these comments.

<u>Merchandise Credits – Justification for Exclusion:</u>

Merchandise credits are issued when customers return merchandise, the original receipt is not present, and the retailer cannot positively identify the original purchaser or original method of tender. Merchandise credits represent the then current value of the returned merchandise as calculated by the retailer at the time of the return and may be used to acquire goods or services of equivalent value from the retailer. The issuance of merchandise credits is a method to help prevent forms of theft, whereby people steal merchandise and then attempt to return it to the store in exchange for cash, or of money laundering whereby purchases are made with one form of tender and then returned for credit against another form of tender which may either be untraceable or unassociated with the original tender. Essentially merchandise credits force an even exchange of goods and services within the retailer's environment rather than involving general purpose tenders which may be used universally.

Retailers have estimated that as much as 50% of non-receipted returns are the result of fraudulent activity. This activity is a combination of internal theft and organized retail crime. For one retailer, fraudulent non-receipted returns constitute 22% of its total shortage. It is estimated that return fraud costs the retail industry more than $10 billion a year (this number is increasing).

[2] Also known as "merchandise return credits."

Merchandise credits should be excluded from remittance to the states as unclaimed property because the underlying set of transactions makes it fundamentally impossible to determine "ownership" of the value associated with the credits. Merchandise credits are issued because the original purchaser and tender cannot be positively determined.

Retailers may issue merchandise credits in a variety of forms, including as gift cards, a merchandise credit on the retailer's books and records, a physical certificate, or a special Merchandise Card. As with other forms of unclaimed property, the medium by which the credit is expressed should not govern whether it is considered unclaimed property.

A specific exemption is necessary as there is a risk that under the draft of the RUUPA issued prior to the October meeting (which NRF understands is being substantially revised with respect to the gift card provisions), a state could take the position that a merchandise credit is a type of remittable property.[3] For example, both Illinois and North Carolina specifically address and exempt merchandise credits. Illinois provides an exemption for gift certificates and states that "Gift certificate also includes a credit slip issued by a store to a consumer who returns goods that enables the consumer to receive other goods of similar value in exchange for the returned goods." § 815 ILCS 505/2SS(a). North Carolina provides "A card or certificate, whether paper, electronic, or other forms, issued for a merchandise credit that meets the requirements of subsection (b) of this section is not abandoned property under G.S. 11B-53(c)(7)." N.C. Gen. Stat. §116B-54(g). North Carolina's exclusion was passed in August of 2015, but the Legislature was concerned enough about the inappropriateness of including merchandise credits within the scope of remittable unclaimed property that it specifically made the law retroactive to merchandise credits issued on or after July 1, 2012. Furthermore, the General Assembly made it clear that the new provision was not to affect the interpretation of the law as it existed prior to 2012 (with the result that the new law was not to affect the rights of any retailers in litigation regarding whether merchandise credits were unclaimed property or the ability of any retailers to claim refunds based on the outcome of such litigation). N.C. S.L. 2015-2018, Section 4.5(b).

NRF recommends a definition below that includes the exemption.

Recommended Definition and Placement

NRF recommends that the definition of "Merchandise Credits" be placed in the new, standalone section on gift cards that the Committee decided to draft at the October meeting. Unlike gift cards – for which the exemption will be optional for the enacting states, as noted above the exemption for merchandise credits should not be optional.

Definition

"Merchandise credit" means a representation of the value of returned or exchanged merchandise as calculated by the issuer and/or its affiliates at the time of the return or exchange wherein such accounts may only be used to acquire goods or services from a given retailer and/or

[3] NRF believes that even under the October draft, merchandise credits would not be included within the definition of remittable "property." However, based on past experience, a clear definition and exemption would prevent uncertainty and litigation costs when states take an expansive view.

its affiliates. The form in which the merchandise credit is issued, such as a digital code, gift card or physical certificate, is not relevant to the definition. Merchandise credits are not “property” as defined in Section 2(22).

PART 3

Third priority rule drafting suggestions – Non-policy Related

The National Retail Federation believes that *Pennsylvania v. New York* and *New York v. Delaware* prohibit any third priority rule that would recognize the state of the transaction as a state that may take custody of unclaimed property.

However, if the third priority rule is going to be included, then NRF proposes the following drafting change to clarify the limited scope of the third priority rule. NRF believes that, while it does not appear to be the intent of the Committee, Section 5(6) could be read to apply the exemption limitation only when the state of the last known address has an exemption, not when the state of domicile has an exemption. Thus, NRF proposes to clarify the provision by using the same language that appears in Section 5(5). NRF does not believe that this clarification changes the intent of the Drafting Committee.

REDLINED VERSION

SECTION 5. RULES FOR TAKING CUSTODY

. . . .

(6) the transaction out of which the property arose occurred in this state, the holder is domiciled in a state that does not provide for the custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a state that does not provide for the custodial taking of the property, however, ~~unless the~~ property that is specifically ~~expressly~~ exempt from custodial taking under the laws of ~~that~~ the state of the last known address of the apparent owner, if applicable, or if not, the state of domicile of the holder, is not subject to the custody of any state;

. . . .

CLEAN VERSION

SECTION 5. RULES FOR TAKING CUSTODY

. . . .

(6) the transaction out of which the property arose occurred in this state, the holder is domiciled in a state that does not provide for the custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a state that does not provide for the custodial taking of the property, however property that is specifically exempt from custodial taking under the laws of the state of the last known address of the apparent owner, if applicable, or if not, the state of domicile of the holder, is not subject to the custody of any state;