



May 15, 2015

By Email

Charlie Trost, Reporter
Committee, Revise the Uniform Unclaimed Property Act
Uniform Law Commission

Dear Mr. Trost,

It was a pleasure to meet you at the Feb. 27-28 UUPA Drafting Committee meeting. As you finalize the next draft for the July meeting, the Entertainment Software Association wanted to provide additional perspective on the proposed treatment of “gift cards” and “property” as they relate to the video game industry.

We recognize that the Committee has received substantial feedback on gift cards. However, there are some unique impacts to the video game industry that merit consideration as you evaluate targeted exceptions.

Our key points are these:

1. The primary focus of our discussion is on game-related digital content that appears in video games and on video game platforms. By game-related digital content, we refer to virtual items such as digital content (e.g., clothing for an avatar) that are licensed elements of a game or game platform. We also use the term to refer to in-game play currencies (e.g., “gems,” “tokens,” “points,” “gold,” etc.) (hereinafter, collectively “points”). The term game-related digital content also refers to digital codes that can be redeemed for items or points. While we do not believe that the ULC intends to encompass these virtual items, points or codes within the scope of escheatable property, we seek a favorable clarification.
2. Game-related digital content is different from the property typically subject to escheatment and should not be deemed “property” for purposes of the revised model act. This digital content is part of the licensed game experience. Critically, the consumer isn’t the “owner” of the licensed digital content, and the game publisher isn’t the “holder” of the consumer’s property. Once a game publisher allows access to the purchased digital item for use within a game or game platform (such as a virtual car for a racing game), the consumer has obtained the full value of that item. Taken together, these considerations merit excluding game-related digital content from the definition of “property.”
3. Game-related digital content also should be excluded from the definition of “gift card” for similar reasons. In-game virtual items and points are not owned by the consumer, and hold no value outside of the platform or game. In-game virtual items and points are the end products of a completed purchase using U.S. dollars or dollar-denominated purchase methods, such as virtual wallets. While we do not think that

the definitions of “gift card” or “property” are intended to reach these end products of completed transactions, an express exclusion from both definitions would help clarify their treatment.

4. Some game distribution services allow consumers to fund virtual wallets denominated in U.S. dollars. Once funds have been added to the virtual wallet, those funds cannot be removed or used outside of the game distribution service or platform. They may be used to purchase a limited range of games, in-game virtual items, points, or other digital content or services available within that game or platform. In these respects, the dollar-denominated virtual wallets are similar to a closed-loop gift card. Any general exclusion for gift cards, or exclusion for gift cards which do not impose dormancy fees or have an expiration date, should likewise apply to dollar-denominated virtual wallets that have similar limits. Furthermore, the Drafting Committee should distinguish between virtual wallets and points.
5. Any definition of “gift cards” and related exclusions also should exclude “digital codes” from that definition. This addition would help future-proof the uniform act by clarifying that any “gift card” exclusion is not limited to physical instruments but applies to digital representations as well.

Below we further explain our rationale and have provided edits to the definitions of “Gift Card” and “Property” at the end of this letter. The “gift card” exclusion language differs slightly from the language proposed at the February meeting.

Finally, we support additional changes: (i) defining “address” to be something more substantial than a mere zip code; (ii) an exemption for business-to-business transactions below a certain dollar amount; and (iii) efforts to develop auditing standards.

I. Background & Introduction

A. Introduction

The Entertainment Software Association¹ attended the Feb. 27-28th Drafting Committee meeting, at which we urged an exclusion for gift cards along the lines outlined above. Commissioners invited ESA to submit comments after the meeting.

B. Factual Background

In recent years, two major trends have occurred within the video game industry that affect how “digital codes” and in-game items or points are used. First, games are now often delivered online. In many cases, gamers can now purchase, download, and play digital games directly from their mobile phone, tablet, personal computer, or dedicated game console. Second, some game companies offer “free-to-play” games. These are games that have no upfront cost to the consumer but may offer gamers the opportunity to purchase digital game expansions, in-game virtual items,

¹ The Entertainment Software Association (“ESA”) represents all of the major game platform providers and nearly all of the major video game publishers in the United States. It is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet.

or points that will enhance their game play experience (e.g., additional levels to a game or higher end cars for use in a racing game). While these trends, as well as the general dynamism of the game industry, have created a wide a variety of use scenarios, most of them can be grouped into the following four categories:

- ***Gift cards denominated in dollars, which contain a code that is activated at the point-of-sale.*** These are (physical or digital) cards that contain a code that is activated at the point-of-sale, allowing the consumer to enter the code onto the gaming platform or game distribution service and fund the consumer’s virtual wallet used to purchase digital games, in-game virtual items, or points.
- ***Subscription codes, activated at the point-of-sale, usable for a subscription for a specified time.*** These are similar to the gift cards described above where a code is activated at point-of-sale; however, in this scenario, instead of funding a virtual wallet used to purchase digital games, in-game virtual items, or points, the code is redeemed for a subscription to a game or game distribution service for a specified period of time.
- ***Content codes that allow a gamer access to a full game or in-game content.*** These codes are redeemable for specific digital games, points or in-game virtual items (e.g., new levels, new characters, new abilities, or new uniforms).
- ***Promotional codes.*** These are similar to the codes described previously, but they are distributed for free to promote a particular game or game service. These codes may include any of the products described above: virtual wallet credits, games, in-game virtual items, or points. Sometimes these are used for specific in-game virtual items, such as a new uniform within a basketball game.

C. Questions Posed to ESA at February Drafting Committee Meeting

At the meeting, Committee members requested that ESA address the following questions in our later submission:

1. As used in the game industry, are gift cards broader than just a single virtual currency? Can they be redeemed for a variety of currencies in different games?

Typically, cards/codes for specific video games are redeemable only for content and services associated with that particular game. For example, the card/code may entitle the user to a certain amount of points for use within the game’s play economy. Or, it could be a card or code that is redeemable for a specific in-game virtual item, such as an additional level to a game. In subscription-based games, the card/code could entitle the user to a block of time for online game play. In-game virtual items and points are typically non-transferable across games.

Game distribution platforms also have cards/codes for use within their closed systems. These provide consumers a convenient entry point into an online marketplace for content and services offered by a variety of game publishers operating on that platform. For example, a game console maker may sell a \$25 card/code that can be redeemed to the gamer’s virtual wallet. Once the funds are in the virtual wallet, the gamer can use that money to buy a variety of digital games, in-game virtual items or points (e.g. “gems” in one game, “coins” in another, a virtual pet in a third), or other digital services such as downloaded movies.

2. Are virtual wallets denominated only in virtual currencies, U.S. dollars, or both?

Generally, the game industry uses the term “virtual wallets” to refer to dollar-denominated online accounts. Most game distribution services or platforms have virtual wallets denominated in U.S. dollars.

Virtual wallets may be used to directly purchase in-game virtual items. For example, a gamer might use the U.S. dollars in the virtual wallet to pay for high-grade virtual body armor to be used by his or her avatar in an upcoming dungeon raid. Other games may have a separate play currency and use a two-step system to purchase in-game virtual items. Under this scenario, a gamer would buy a card/code that, once entered into the virtual wallet, loads that wallet with a specific amount of U.S. dollars. The gamer could then use those funds to buy game-specific “points” that will be associated with the avatar’s inventory of in-game items. Then, the gamer could exchange those points within the play economy of the game for various virtual items that may be useful during game play (e.g., an invisibility cloak, a health potion, or lock pick tools). The “points” are the end product of the purchase through the virtual wallet. Once the “points” are purchased, the gamer has fully redeemed the U.S. dollar funds in his/her virtual wallet.

D. Concerns with the current RUUPA draft

Several definitions in the draft Revised Uniform Unclaimed Property Act (and its predecessors) are broad and could benefit from further refinement to avoid unintended consequences with respect to video games and other applications. Specifically, the definitions of “property” and “gift card” should be carefully considered.

1. *Definition of “Property”*

The current definition of “property” should be revisited in light of the emergence of new forms of digital content since 1995, when the Act was last revised. Currently, the revised draft leaves the general definition of unclaimed property essentially unchanged from the 1995 Act. Property is defined to mean “a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder’s business . . .” Section 2(19). If something is defined as “property,” it is subject to remittance to a state if unclaimed unless a specific exemption or exclusion is provided by the Act.

We presume that in-game virtual items and points that are acquired through game play or are part of the background setting of the game would not be considered consumers’ “property” for purposes of the RUUPA. The consumer has not paid separately for this content which is provided to the consumer under specific license terms. In our comments below, we address a different but related category: in-game virtual items and points that the consumer has purchased (e.g., a digital code for a virtual Lamborghini in a racing game). We don’t think these items should be considered consumer “property” either, for the reasons explained below.

As a result of growth and changes in the video game industry and the increased economic importance of digital products as a whole, leaving the definition of “property” unchanged creates significant ambiguity surrounding the property that game publishers own and provide. While certain types of game-related digital products existed before the 1995 Act, such products were not as prevalent in the economy as a whole as they are now and were not specifically considered in arriving at the 1995 definition. The 1995 definition may have been completely appropriate for the

20th century, but as a result of the ubiquity of digital transactions and content, the definition should be updated. Minor revisions to the definition of property would provide clarity to the video game industry.

Current industry practice and federal tax requirements support a conclusion that game-related items should not be considered property; if, however, they are considered property, they should not be escheatable because administration would be difficult due to tracking and valuation problems.

Nearly all game publishers provide an end user license agreement (EULA) and/or terms of service (TOS) to which a user must agree. The EULA and/or TOS typically provides that the gamer does not have any ownership rights in the game-related digital content, including points, and that his or her rights are limited to temporary use in the context of the entertainment experience for which he or she has paid. The EULA and/or TOS does not provide a contractual limitations period but rather defines the parties' ownership interests in the first place. In short, the game-related digital content never becomes the property of the gamer but at all times remains the property of the publisher.

This is a crucial distinction between digital property and other types of goods. And this distinction is entirely consistent with the prohibition against private escheat.² In the typical private escheat scenario, the holder's terms assert that the consumer's property reverts to the holder if abandoned. That is not what is going on here. Rather, game publishers are stating that *at all times* the publisher owns all of the pieces to the game and has granted the gamer a temporary right to use those pieces subject to the applicable license.

The traditional notions of "holders" and "owners" should not apply in this context. Once the game publisher has delivered the code for the virtual content to the consumer, the holder has no other obligation. Also, the publisher isn't the "holder" of the consumer's property. The publisher has fulfilled its delivery obligation, and the owner now has access to the licensed content.

If state unclaimed property administrators (or their third-party auditors) were to take the position that in-game virtual items are the consumer's "property," accurate valuation on a massive scale would be enormously complicated. A lot can change within the game over the course of a 3-4 year dormancy period. The publisher may have retired significant portions of the game (e.g., stopped online services) or no longer support the game at all. Alternatively, the publisher may have modified the game in some way that renders certain content irrelevant or unusable (e.g., in a Western-themed strategy game, the opening of a new virtual railroad connecting two territories kills demand for riverboats to deliver goods by a more circuitous route). The value of the property is determined by its value within the game; because the game can change significantly, the customer does not have any fixed or determinable right to such items or points.³

² Draft RUUPA Section 19 ("the expiration, before or after the effective date of this Act, of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute, or court order, does not preclude the property from being presumed abandoned . . .").

³ The problems aren't confined to in-game content. Unredeemed codes for digital games also present issues with respect to valuation. Typically, the retail value of a game will be substantially less several years after its release, given the nature of the game publishing industry. A game that retails for \$60 upon release could sell for but a few dollars years later. By requiring a company to escheat the full consideration paid for a game years later, the state would be receiving a windfall.

Given the impracticality of determining the value of in-game virtual items or points outside of the game, a clarification that points and other digital content associated with video games and game platforms are not subject to escheatment would significantly ease the compliance questions and concerns of game publishers.⁴ Regulators evaluating virtual currencies in other contexts have recognized that game currencies may merit exclusion.⁵

Because of the broad scope of the concept of intangible property in the definition and its implications for all types of digital content such as video games, limiting language should be added as set forth at the end of this letter.

E. Gift Cards⁶

1. Treatment of “gift cards” generally:

Some ESA members sell gift cards similar to those issued by retailers. Such gift cards are purchased for a fixed price and allow the owner to purchase a variety of items from the game publisher or platform.⁷ ESA supports the wholesale exclusion of gift cards from property subject to escheatment for the reasons stated in the comments by the National Retail Federation and the Retail Industry Leaders Association. Notwithstanding the retailers’ objections, the Drafting Committee voted to maintain gift cards as escheatable property.

However, the Committee subsequently announced that it would consider including language limiting the types of cards subject to escheat. Several retailers, NRF, and ESA provided possible draft language for such a limitation to the Committee at the meeting. ESA noted to the Drafting Committee that ESA’s support of this draft language was contingent upon its members’ review and revision. ESA has followed up with its members and supports the modified language set forth below. ESA supports: defining escheatable gift cards to exclude gift cards and digital codes that either (i) do not expire and for which no dormancy fee is charged; (ii) are issued as part of a promotional or rewards program; (iii) are sold below face value or donated; or (iv) are associated with entertainment platforms or applications. Item (iv) is addressed below.

2. Treatment of codes within the video game industry:

The definition of gift card in the draft revision could sweep in many of the unique items that video game publishers sell to their customers. ESA does not believe that this is the intent of the drafters or of the unclaimed property law in general. We urge the ULC to include an exclusion for digital codes used to acquire game-related digital content, as outlined below.

⁴ This problem is also evidenced in the definition of “owner.” Section 2(16) which includes a “claimant.” Hypothetically, a person with unused game points or games attributes such as a sword does have a “claim” but that claim is wholly within the context of the game. This is a nuance not adequately addressed by the 1995 Act or the draft revision.

⁵ New York Dept. of Financial Servs. proposed regulation on virtual currencies, 23 NYCRR § 200.12(c); § 200.2(m) (“Virtual Currency shall not be construed to include digital units that are used solely within online gaming platforms with no market or application outside of those gaming platforms”). Volume no. XXXVI, N.Y. Reg. p. 15 (July 23, 2014).

⁶ This comment also applies to the definition of “gift obligation” in Section 2(9) and the definition of “stored-value card” in Section 2(23).

⁷ To the extent that items other than dollar denominated gift cards fall within the Reporter’s draft definition of gift card, those items are addressed in Section I.E.2.

Specifically, the revised draft defines “gift card” to mean “a record evidencing a promise, made for consideration, by the seller or issuer of the record that goods or services will be provided to the owner of the record . . .” (Emphasis added.) As noted above, many of the items purchased for purposes of gaming are delivered in the form of digital codes. Furthermore, many of the items purchased or otherwise obtained within a game are stored by the gamer for use at a future date. Thus, any of these items that are not used immediately could hypothetically be considered a “promise” by the seller to provide goods or services.

However, in each of these cases, ESA and its members believe the consumption occurs at the time the digital code or in-game item is provided to the gamer, not when the code is used or the in-game item activated or utilized. In essence, the gamer has received the anticipated end product once he or she has redeemed cash for a virtual item or points for use within the game or on that platform. The fact that the virtual item can be stored and later exchanged for another item within the game does not change the fact that all of these items are merely intertwined elements of the game and hold no value independent of the game.

A useful analogy can be found in sales tax law. Most, if not all, states that impose sales tax on these types of transactions impose it at the point of purchase of the code, not the redemption of the code.⁸ This treatment can be distinguished from gift cards in which no sales tax is due when the card is purchased but instead is imposed when the card is redeemed for a taxable item.

a. Digital codes to acquire full games

Digital codes redeemable for digital versions of games should be excluded. These codes are even more restrictive than closed-loop gift cards. Digital codes that enable download of a game only allow a customer to obtain a specific product. The code cannot typically be exchanged for cash or other products. In short, a digital code to acquire a game is the end product; it’s what the consumer paid for, a proxy for a specific item.

Treating these codes as escheatable property raises a number of complicated compliance challenges. For example, the retail price of a game declines over time as its freshness within the hit-driven marketplace wanes. It would thus be difficult to determine the escheatable value of the code, as the seller would never provide cash in exchange for the code. Each code that a publisher issues is linked to a specific license to download and play the game; when the customer acquires the code, they are acquiring that license to play the game. Essentially, once the customer receives the code, the customer has already acquired the desired end product and nothing remains unclaimed.

b. Digital codes to acquire in-game virtual items or points

Digital codes for in-game virtual items and points also should be excluded. As discussed above, in-game virtual items and points are usable only within the confines of a specific game. Codes for these in-game virtual items and points are frequently given away as pre-order or promotional bonuses, but also can be purchased with cash. These codes should be excluded for a number of reasons. The code itself is the end-product of the purchase and represents money already spent by the player. The digital code, like the underlying item, has no value outside of the

⁸ Many states provide by statute that a digital code is taxable if it is redeemable for products that are taxable (if it is redeemable for products that have differing types of taxability, then the tax is usually imposed when the code is redeemed for a taxable product). *See, e.g.*, Ind. Code § 6-2.5-4-16.4(c); Ky. Rev. Stat. § 139.010; Minn. Stat. § 297A.61, Subd. 52; N.J. Rev. Stat. § 54:32B-2(zz); Wash. Rev. Code § 82.04.192(5).

game. Furthermore, as discussed above, the in-game virtual item itself is not property independent of the game but is licensed content. Therefore, it should not be subject to escheat.

Whether the gamer uses the code to upgrade an avatar's wardrobe or expand her collection of virtual armaments, the code is a proxy for the in-game virtual item. With the purchase of the code, the transaction is complete. The gamer has the goods for which he or she obtained a license.

Like digital codes for full game downloads, digital codes for in-game content create complex valuation issues over the dormancy periods involved with escheatable property. The publisher may no longer support the game or might support the game but has modified it in some respects that render certain classes of virtual items no longer relevant or usable. In short, there may be no easy way to determine the value of the virtual item, or it may have no remaining value whatsoever.

c. Digital codes to fund a dollar-based virtual wallet

With respect to the video game industry, dollar balances in a virtual wallet also should be excluded. As discussed above, virtual wallets are online accounts that can be funded and subsequently used to purchase digital games, digital services, or in-game virtual items and points.

The account balances in these virtual wallets are similar to stored value closed-loop cards, and should be excluded for all of the reasons discussed above and in the comments filed by NRF and RILA. However, even if gift cards and stored value cards are included in the draft as property required to be remitted as unclaimed property, virtual wallets should still be excluded. First, virtual wallets do not exist in physical form and are always tied to online accounts that are accessible by the owner. As such, the owner is always able to access the funds if he or she so chooses, and thus they cannot be unclaimed or abandoned. Second, even if viewed as potentially escheatable property, funds in a virtual wallet should not be escheatable if they impose no dormancy fee or expiration date.⁹

F. Virtual Currency

At the beginning of the drafting process, one of the potential issues raised by the Reporter was how to treat virtual currency. It appears from the draft revised Act and the discussion at the February 2015 Committee meeting that the Committee will not be specifically addressing this issue. ESA supports this decision. However, if the Committee or the Commission as a whole decides that virtual currency should be considered, ESA would like the opportunity to work with the Committee on this issue.

II. ESA's Proposed Changes and Language

A. Definition of "Gift Card":

Section 2 (8) draft replaced with the following: "Gift card" means a certificate, card or similar instrument purchased for monetary consideration, when the certificate, card or similar instrument is redeemable for merchandise or services, or cash if required by applicable law. "Gift card" does not include a certificate, card, digital code, or similar instrument that: (i) does not expire and for which the seller does not charge a fee; (ii) is distributed by the issuer to a person under an

⁹ Ten states have recognized an exception to escheatable property for closed loop gift cards that have no dormancy fee and do not impose an expiration date. An additional 15 or so recognize full exemptions for gift cards.

awards, rewards, loyalty, incentive, rebate, or promotional program; (iii) is sold below face value or donated to an employee of the issuer, a nonprofit or charitable organization or an educational institution for fund-raising purposes; or (iv) redeems for virtual currency, content, or services that are associated with entertainment platforms or applications or is otherwise virtual currency, content, or services used within an entertainment platform or application.

B. Definition of "Property":

Section 2(19) new subsection (ix): It does not mean virtual currency, content, or services that are associated with entertainment platforms or applications, including digital codes redeemable for same.

III. Additional Changes

A. Address:

For purposes of both notice to an owner and for determination of the first priority rule, ESA supports a definition of address that consists of mailing address and not merely zip code data. Generally under current law the rule is determined by mailing address. If zip code data is used for the first priority rule and adopted by some states but not others, this creates significant inconsistency in the first priority rule and complicates the ability of companies to implement escheatment procedures on a nationwide scale. Moreover, some zip codes may overlap state borders.

B. Business-to-Business Exemption:

ESA supports a broad business-to-business exemption for the reasons set forth by COST, UPPO, the ABA, and other holder representatives. ESA notes that no business advocate has supported maintaining property generated through business-to-business transactions as property escheatable to the states.

To the extent that the Drafting Committee is unable to adopt a broad exemption, ESA suggests at the very least that a small dollar business-to-business exception should be included. Such an exemption could alleviate the significant holders' concerns regarding the administrative and financial cost of imposing unclaimed property document retention, remediation, due diligence, and remittance requirements on small dollar balances. A small dollar business-to-business exception balances the administrative and financial burdens of compliance on holders, the obligations of businesses to monitor outstanding balances owed to them, and the interests of states in preventing windfalls to holders.

C. Audit Standards:

ESA also supports the adoption of uniform audit standards and/or best practices. ESA will monitor any discussions of such standards.

IV. Conclusion

Game-related digital content, including play currencies, are elements of the game. They are part of the closed universe created by the game publisher and hold no value outside of it. What the consumer has paid for is licensed content as part of an overall entertainment experience and not ownership rights over individual pieces of the game. Digital codes for play currencies or virtual

items are the end products; once the consumer has paid for the code, the gamer has obtained the end product (a limited right of use to an element of game play). For these reasons, among others, we do not think game-related digital content should be considered “property” or fall within the meaning of “gift card.”

We think that the ULC, in adopting its previous uniform unclaimed property acts, did not intend that the acts would include such items. However, changes in technology and business models have made the application of the statutory language subject to misinterpretation and compliance confusion. Our request today is that the ULC memorialize its intent in the revised act.

Virtual wallets, as used in the game industry, serve a narrow purpose. They permit gamers to acquire a limited range of game and other entertainment-related content, for use within the game or game platform. Any exclusion for gift cards that don’t impose dormancy fees or have an expiration date should likewise apply to virtual wallets that have similar features.

We understand that the Committee has many issues to review, and we appreciate the Committee’s consideration of the issues we have raised. We are available to discuss our concerns and proposed language at your convenience.

Sincerely,



Michael Warnecke, Chief Counsel, Tech Policy
Cory Fox, Senior Policy Counsel
Entertainment Software Association
mwarnecke@theesa.com
202/223-2400 x.136

cc: Stephen Kranz
Diann Smith
Mark Yopp

McDermott Will & Emery
Counsel for ESA