






LINKING ASSETS INC.

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Linking Assets Inc. UPdate periodically provides articles and information regarding legislation, regulatory, compliance, and associated developments. Keeping you informed about unclaimed property, search and location, owner outreach, and related areas of interest.

Common Unclaimed Property Challenges and Strategies to Address Them

By Christa DeOliveira, CIA, CCEP

In spite of the increased awareness of businesses and the general public, there is no lack of unclaimed property. Business transactions, changes, and pressures can result in the unintended generation of unclaimed property. This article covers a few of the root causes, strategies, and methods to deal with them; each company has its own specific situation and not all

of these examples necessarily apply to all businesses and could require customized solutions.

Consolidation

Consolidation in the form of mergers and acquisitions is commonplace in many different industry segments. Ranging from financial institutions to pharmacy chains to oil and gas companies, we have seen intensive consolidation in the last several decades. For instance, we have seen many large banks acquire smaller banks, as well as midsize and larger banks merging with one another, as permitted by regulators.

An expansive discussion on M&A is beyond the scope of this article, instead this addresses unclaimed property M&A strategies on a high level. Preferably full and thorough business due diligence is performed to ascertain unclaimed property risk pre-merger and determine if cleanup is needed. Also, M&A deals can be structured to protect against potential and currently unknown unclaimed property liabilities and ensure any exist. With a full pre-assessment any identified underreporting can be captured in purchase pricing.

In the event business due diligence on unclaimed property liabilities was not thoroughly performed; post-merger risk assessment and any necessary cleanup can be performed. As part of this assessment, any compliance gaps can be determined. Catch up reporting can be done, often taking advantage of voluntary disclosure agreements to lessen interest and/or penalty charges, where possible.

Downsizing and Turnover

In recent years we have witnessed a steady increase in productivity, largely due to significant advancements in technology and automation. Generally increased productivity has notable benefits; however, it can also come at a cost. If less staff is needed and there is either

active downsizing or downsizing through attrition leads, there can be a loss of institutional memory or knowledge. The same loss of institutional knowledge can occur with turnover.

As part of these mergers, a financial institution can be acquiring another institution that has many predecessor and subsidiary entities due to a string of M&A activity. A key challenge in a situation with acquisitions upon acquisitions is: 1) Knowing which organization is responsible to report the unclaimed property, for example there can be different requirements based on the structure of a purchase or merger. 2) Having the data needed to assess and determine if any unclaimed property is due. 3) Having funds accrued to cover unclaimed property liability (or the amounts compounded into the purchase price).

In May 2019, the National Association of State Treasurers' (NAST) held its Annual Treasury Management Training Symposium. The National Association of Unclaimed Property Administrators (NAUPA) is affiliated with NAST and led the unclaimed property track of educational workshops and sessions. During this symposium it was noted there have been patterns in discovering and pursuing compliance gaps. A current area of concern with common underreporting compliance gaps are in the mergers and acquisitions arena.

Challenges with mergers and acquisitions were raised and include the availability of premerger records and the timing in relation to closing of the deal. The session endorsed the prospect of devising efficient methods to capture the material past due unclaimed property prior to or even contemporaneously with deal closings. States continue to collect and analyze data from annual reporting, audits, and compliance initiatives to target areas with known historic gaps whilst look for new emerging patterns.¹

Strategies to address downsizing and turnover challenges: It is important to have both documented policies and procedures and cross-training to offset the exposure of knowledge loss. It is helpful if policies and procedures also include an unclaimed property project

plan or workflow chart documenting the necessary compliance steps and tracking status of completion.

Outsourcing unclaimed property compliance can be pursued to gain expertise and address the numerous challenges downsizing can cause. Another option is to enlist internal audit to assist with coordination between unclaimed property compliance and the upstream operations that feed them.

Management and Employee Lack of Awareness

Unclaimed property is rarely, if ever mentioned in college business schools or law courses. The uniformed can easily overestimate accounting software's ability to detect potential issues that could result in unclaimed property. Many are not aware the extent of duplicate payments, lack of voids, uncleared checks or payments, data entry errors, and other flaws and errors; whilst underestimating the resource required to comply appropriately. Unfortunately, the resources and time needed to fully comply with unclaimed property requirements are often grossly underestimated, as well as the lead time to perform the necessary pre-steps required before unclaimed property reports can be filed.

Training and communication are methods to counteract a lack of awareness.

Strategies to Address Management's and Staff's Lack of Awareness Challenges

Training and communication are great vehicles to counteract a lack of awareness. Obviously, the staff executing the compliance steps will require tools and training. However, the awareness training should not stop with front line employees; senior managers need to understand the risks of non-compliance and resource needs and the compliance. Companies should:

- Train unclaimed property reporting personnel,
- Educate management on the pervasive nature of unclaimed property being generated from many areas within their company,

¹ *Mind the Gap: Focusing a State's Compliance Regime on Gaps in Reporting*. May 23, 2019, Moderator: Treasurer Dave Young, Colorado, Panel: Caroline Marshall, GC and COO, Verus Analytics LLC, Geoffrey Sawyer, Partner, Drinker Biddle

& Reath LLP, Janet Gagliano, Partner, PwC, Jeremy Katz, Partner, Audit Services US, National Association of State Treasurer's Management and Training Symposium

- Consider some level of education to all appropriate functional employees about unclaimed property,
- Conduct awareness campaigns, and
- Ensure compliance and legal resources with a sound knowledge and understanding of unclaimed property to monitor developments and guide compliance.

As previously mentioned in the strategies to address downsizing and turnover, both documented policies and procedures and cross-training are also excellent tools for increasing awareness. Including an unclaimed property project plan and/or workflow chart documenting the necessary compliance steps with dates or timelines for tracking status of completion can also be used to increase awareness of the multiple compliance steps throughout the year and be used to establish resource needs.

Naturally, there can be multiple approaches to achieve expanding knowledge, ranging from formal training sessions to communications in an employee newsletter. Getting the word out to frontline personnel can be especially helpful in the event a customer comes into a branch, store, or location with an owner outreach (sometimes referred to as a due diligence) letter, attempting to initiate a claim or reactivate an account. It is always better when an employee has an idea of what the letter is about, rather than thinking it is possible fraud.

General knowledge of how an individual's job ties in with the creation and reporting of unclaimed property can be a powerful tool to help to reduce it. Consider the positive impact of employees being careful to consistently adhere to check voiding procedures or to verify and update contact and address information when they work with a customer. Following appropriate check voiding procedures can avoid accounting errors masquerading as unclaimed property. Likewise, having current and accurate customer information can result in being able to make customers aware of an unused credit on their account, reducing unclaimed property liability, and creating good will along the way.

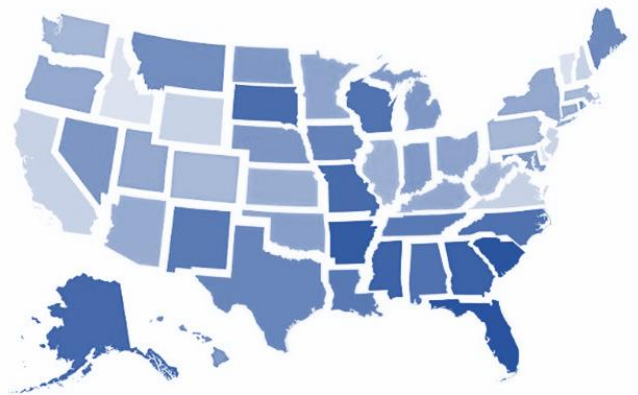
Even though unclaimed property compliance is seen as an encumbrance for most organizations and it is challenging to find a way to generate profits through it;

instead, generally the goal is to avoid costs. It should be acknowledged there are real costs and risks associated with underreported liabilities. Assuredly, there are real costs when unclaimed property liabilities are found during unclaimed property audits. When managers are aware unclaimed property could cause negative disclosures and result in interest and/or penalty charges, then they may be more motivated to address it.

Unclaimed property can be generated through daily operations and business. They can also be increased through the unintended consequences of corporate transactions, changes, systems, and pressures. Knowing some of the root causes and methods to overcome them allows companies to be aware and proactive. Companies seeking additional information on how to address challenges related to their own specific circumstances may contact Linking Assets Inc. Contact information is on the last page of this UPdate.

Legislation Updates

Linking Assets Inc. monitors the progress of legislation relating to unclaimed property. Highlights of enacted and noteworthy pending legislation are provided here.



Linking Assets Inc. is not a law firm and does not render legal services or advice. The information in this UPdate is not intended to be substituted for legal advice, which can only be provided by an attorney.

Enacted State Legislation

CA SB 109 enacted on September 27, 2019

As part of the Budget Act of 2019, on or before March 1, 2020, the Controller shall provide the Joint Legislative

Budget Committee and the chairpersons of the fiscal committees in each of the houses of the Legislature with a report. Specifically, the report needs to contain plans for either a one-time unclaimed property amnesty or other options to increase unclaimed property compliance.

IL SB 1614 effective on August 9, 2019

This legislation allows for an heir or agent to provide an affidavit attesting to the heir's or agent's capacity to claim unclaimed property if the decedent's property does not exceed \$100.

TX SB 3598 effective on June 10, 2020

Defines an affiliated group and requires consolidated reporting based on defined level of controlling interest. The comptroller or attorney general may not begin an examination relating to a report, payment, or delivery of property after the seventh anniversary of when the report was filed, with specific exceptions. Adds a continuing reporting requirement- once a holder reports then it must do so each year going forward or certify there is no property to report.

UT SB 70 enacted on March 21, 2019

Defines when an insurance company is deemed to have knowledge of the death of an insured or annuitant related to life or endowment insurance policies or annuity contracts. Delineates rules for certain death master file matches. Additionally, insurance companies must make a good faith effort using other available records and information to validate deaths and document efforts, as required.

RUUPA Legislation

Here is a listing of enacted and pending legislation for state-specific versions of Uniform Law Commission's *2016 Revised Uniform Unclaimed Property Act* (RUUPA) or similar legislation. These include:

- **CO SB 88**, effective July 1, 2020
- **DC B23-0225**, Introduced
- **ME LD 1544**, effective October 1, 2019
- **MN HF 2208**, Introduced
- **NV SB 44**, effective July 1, 2019
- **SC HB 4200/SB 524**, Introduced
- **VT HB 550**, Introduced
- **WA HB 1179**, Introduced

Federal Pending Legislation

Here are highlights of pending federal legislation worthy of watching which will potentially impact retirement savings and any associated unclaimed property:

SECURE, the Setting Every Community Up for Retirement Enhancement Act, HR 1994, passed in the House with a vote of 417 to 3 on May 23, 2019. Initially it seemed likely to promptly pass in the Senate; however, some roadblocks were raised and now its future is uncertain. Relative to RESA, it is legislation designed to expand retirement plans making them more available to a greater number of employees, with a focus on employees of small businesses. Further, required minimum distributions (RMD) will increase from 70 1/2 to age 72 for mandatory distributions from IRAs, 401(k)s, 403(b)s and some other employer-sponsored retirement plans.

RESA, the Retirement Enhancement Savings Act, SB 972, was introduced in the Senate on April 1, 2019. RESA is broader legislation than the SECURE Act. It contains more than 50 different provisions. Fundamentally, RESA is designed to encourage more retirement savings and its provisions to support this. It increases contribution limits for those that have not saved enough; two new federal tax credits to aid smaller companies to offer retirement plans; it expands the savers credit (available to low-income taxpayers); and extends RMDs to age 75.

Both pending federal bills increase the RMD age; enactment of either will result in unclaimed property implications. For a method for states to address this, unclaimed property statutes could be tied to the RMD timing rather than a specific age.

There is measured optimism on the SECURE Act possibly forwarding in the Senate; although, it is unknown whether one of these bills will pass both houses this year. Regardless, we have seen similar bills or elements of the bills in the past and if there is not any enactment this year, it is likely that we will see an iteration of these bills in future sessions.

Legal News

Cases to watch with impending unclaimed property consequences.



State of New York ex rel. Raw Data Analytics LLC v. JP Morgan Chase & Co.

A relator brought a qui tam or whistleblower action against JP Morgan Chase and specified affiliates; alleging JP Morgan Chase violated New York's False Claims Act (FCA) by way of not self-assessing and proactively remitting interest for late reported unclaimed property.

Whereas, the defendants argued it was at the discretion of the Office of the State Comptroller to determine whether to assess interest. Therefore, by not self-assessing and reporting interest it does not rise to the level needed under New York's FCA.

The Supreme Court of the State of New York, County of New York stated the New York abandoned property law is "abundantly clear," requiring for holders altogether failing to report and remit unclaimed property or are late in doing so shall pay interest to New York. JP Morgan Chase has appealed this decision

Joseph M. Torsella, in his official capacity as the Treasurer of the Commonwealth v. PPL

At issue in this case is what exactly constitutes a holder's books and records and how they can or must be provided during an unclaimed property audit. In the seminal *Texas v. New Jersey* (1965) case, the Supreme Court ruled unclaimed property reporting should be based on a holder's books and records.

What is not clear in *Texas v. New Jersey* is when a holder is under an unclaimed property audit, how the books and required must be conveyed. Is it required that records must be supplied electronically? Pennsylvania law allows for books and records to be examined; however, it does not specify records must be produced or transferred, neither does it specify any type of format, such as a requirement to provide records electronically.² Additionally, it is under dispute whether all records need to be included or just records related to the state or states that are being audited.

PPL has offered onsite review of unredacted records on a local computer. However, Pennsylvania Treasury office has rejected solution. Instead, asserting this would hamstring the auditors review and analysis of the records and undermine the audit.

Lastly, there are real concerns surrounding data privacy laws and risks to turning over electronic data, in particular electronic data that is not redacted to withholding personally identifiable information. In addition to any risks with security breaches and privacy, there are now risks associated with CCPA³ GDPR⁴, and other state and federal privacy laws. Further, not all states have restrictions on what records can be release in a FOIA request.



² 72 P.S. § 1301.23

³ California Consumer Protection Act, effective May 25, 2018

⁴ Global Data Privacy Act, effective January 1, 2020, European Union

Univar

There have been a series of cases related to Univar⁵ relating to an audit notice which was originally sent in 2015. Records back to 1991 were requested by third-party contingency fee audit firm. Univar has repeatedly refused to comply as its requests for defined responsibilities and restrictions related to concerns over privacy and confidentiality of its records.

In a complaint filed in December 2018 in U.S. District Court for the District of Delaware to enjoin Delaware from having its third-party audit firm, Kelmar, conduct the audit. Multiple constitutional violations were claimed including: The method of paying the third-party auditor on a contingent fee basis; citing Kelmar being a self-interested third party.⁶ The retroactive use of the subpoena power. The estimation process violates Univar's substantive due process rights by relying on prior unclaimed property filings in states not participating in the audit, which subjects Univar to multiple liabilities for the same unclaimed property. Estimations are being sought to be applied retroactively, after the law allowing them was enacted. The estimation process itself amounts to an unconstitutional taking of Univar's property for public use without just compensation. This is due to taking Univar's property and not a transfer of transfer of owners' property to be held in the custody of Delaware. The methodology of the third-party auditor.⁷ Univar also maintained that the multi-state audit potentially exposed its confidential information to other states because of the states' public disclosure laws. Another argument is that the states are violating the equal protection clause. This is based on audit selection focusing on wealthy companies.

Some of the premise of Univar's arguments include the law granting Delaware this subpoena power did not go into effect until 2017 and is being retroactively applied to periods before that. Univar has requested details of the audit methodology or the states' audit manuals. Kelmar the third-party audit firm for this audit rejects this request based on protecting proprietary data.

It will be interesting to monitor the future developments these and other cases germane to unclaimed property.

Cybersecurity Corner

By Ari Mizrahi, CIA, CCEP

During National Security Awareness month and every month, Linking Assets is serious about data we hold on our systems. We leverage cutting edge and proven technologies to secure information and audit all access activity.



We stay current on the latest security threats by collecting and monitoring security feeds, correlating internal monitoring systems, and integrating known information into our security monitoring tools. Our personnel with years of experience in information security, covers multiple categories ranging from offensive operations to defensive operations, code contributions to public projects.

Our systems leverage modern cloud technologies, zero trust networks, live security monitoring and an in-house developed system to securely store and process client and partner data, designed to be fast, secure, and stable. We want to ensure our clients and partners their data is safe and managed properly, accessed by approved individuals, and feel confident we are here to provide a service that is unparalleled and unmatched in our industry.

Go to
<http://linkingassets.com/news/> for
more unclaimed property news.

To subscribe, send an email to
UPdate@linkingassets.com.

⁵ Including: *Univar Inc. v. Richard J. Geisenberger, et al, State of Delaware, Dept. of Finance v. Univar, Inc.*

⁶ "Kelmar's financial incentive to claim as much escheatable property as possible taints the entire process with an appearance of self-interested

overreaching." *Marathon Petroleum Corporation; Speedway LLC; Marathon Prepaid Card LLC; Speedway Prepaid Card LLC, Appellants v. Secretary of Finance For Delaware, et al*

⁷ See also *Temple-Inland Inc. v. Cook*, No. 1:14-cv-00654

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