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Nicole L. Johnson and Scott M. Reiber, Co-Editors Spring 2011

State & Local Tax Insights

Honey, I Shrunk the Dormancy Periods!

By Hollis L. Hyans and Amy F. Nogid[1]

Dormancy periods — the periods after which a state presumes that property has been abandoned by its owner and requires that the property be turned over to the state — have become incredibly short. These periods, once characterized as "long lapses of time,"[2] are now as short as three years for many of the most common property types. Owners are routinely caught unaware that states will seize — or have seized — their property. Property that owners believe is safe, sound and protected, earning interest and appreciating in value, often becomes lost or untraceable, its income-generating capacity stripped. The effect of the premature takings is often dire. In this article we will focus on some of the practical and legal implications of shrinking dormancy periods in unclaimed property statutes.

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Dormancy Periods

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Historical Background

In the early years of unclaimed property law, statutory distinctions in dormancy periods for different types of property were common, based on the realistic understanding that some property was intended by owners to sit untouched and that no presumption of abandonment should arise prematurely. For example, in 1942 Kentucky set its dormancy period at 10 years for bank demand deposits, but at 25 years for bank time deposits.[3] Likewise, state courts recognized the wisdom in long dormancy periods for some types of property. In New York the courts had recognized that the length of time before lapsing and the nature of the property were relevant to a constitutional analysis, and that a 30-year dormancy period for bank deposits might well be proper since such deposits are "ordinarily made to remain for a long period of time."[4] Similarly, in declaring unconstitutional Ohio's Unknown Depositors Law, which defined unknown depositors as those whose bank accounts have gone untouched for seven years, Ohio's Court of Appeals concluded that it was not a "fanciful notion" for a party to "provide a sum for his future needs...intending to leave it there, to forget it...until some time in the future."[5]

However, any statutory presumption of abandonment, even after as long as 30 years, is at best highly questionable. Pennsylvania was the first state — in 1872 — to provide for the escheat of dormant bank deposits, and it initially provided for a 30-year dormancy period.[6] In a case upholding the constitutionality of the 1872 Pennsylvania provision, the court noted that half of the depositors accessed their accounts *after* the termination of the 30-year period.[7] Nonetheless, the court upheld the constitutionality on the basis that the "sovereign State has jurisdiction to take charge of apparently abandoned or unclaimed property."[8]

Over time, the distinctions in dormancy periods among property types have decreased along with the dormancy periods themselves, with a drastic downward dormancy spiral evident in most, if not all, states. For example, Massachusetts has decreased its dormancy period tenfold for bank accounts from 30 years in 1907 to three years in 1992.[9] Delaware reduced the dormancy period for property held by banking organizations from 25 years to seven years in 1985,[10] and to five years in 1988.[11] New Jersey recently reduced the abandonment period for traveler's checks from 15 years to three years and for money orders from seven to three years,[12] and those reductions are the subjects of litigation pending in the Third Circuit.[13] New Jersey reduced the period for demand, savings and time deposits from 10 years to three years in 2002.[14]

California has steadily reduced the dormancy periods for bank accounts from 20 years in 1913,[15] 15 years in 1959, seven years in 1977, five years in 1989 and finally to three years in 1990.[16] Even the Legislative Director of the California State Controller's Office had acknowledged that the office is looking at lengthening the escheatment period: "three years appears quite low and we're looking at what should be the appropriate period before property escheats."[17] In 2007, legislation was proposed in California to increase the dormancy period from three to five years for most property; the legislation was not enacted.[18]

Just last month, New York's Governor Cuomo proposed shortening various dormancy periods on various property types from five or six to three years.[19] The Memorandum in Support and the Executive Budget Briefing Book leave no question that the reduction is a "revenue action" motivated by the State's need to balance its budget without raising taxes.[20]

The National Conference of Commissioners on Uniform State Laws (NCCUSL), also known as the Uniform Law Commission (USL), an association of state tax commissioners on uniform laws, has drafted several model statutes dealing with unclaimed property. The first, the Uniform Disposition of Unclaimed Property Act (UDUPA) issued in 1954, adopted a uniform seven-year presumption of abandonment for all types of property. In their comments to the 1954 UDUPA, the Commissioners said that differing business practices might dictate that other dormancy periods were more appropriate. Savings bank accounts were mentioned as a property type for which a longer period of dormancy might be desirable. In the 1966 revision to the UDUPA, the seven-year presumption was retained for all property types, with the exception of 15 years for traveler's checks. When NCCUSL overhauled the model act in 1981 to address the ruling by the U.S. Supreme Court in *Texas v. New Jersey*,[21] which dealt with states' priority rules for laying claim to unclaimed property, the 1981 Uniform Unclaimed Property Act (UUPA) lowered the general seven-year presumption of abandonment to five years, consistent with the "tendency of state legislatures in recent years to reduce dormancy periods." As the comments to the 1981 UUPA acknowledged, "states have become increasingly aware of the opportunities for collecting...unclaimed money and using the 'windfall' unreturned funds as general fund receipts...." The rationale provided for lowering the general dormancy period was that the "current high rate of inflation exacts a severe penalty from one who holds money or its equivalent for extended periods; an inference of loss or abandonment may be drawn more quickly than in 1966 when the value of money was more stable." In the comments to NCCUSL's most recent iteration, its 1995 UUPA, the Commissioners

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Upcoming 2011 Speaking Engagements

April 12

Annual State & Local Tax Update: East Coast

New York, New York

Eric J. Coffill
Craig B. Fields
Paul H. Frankel
Hollis L. Hyans
Mitchell A. Newmark
Carley A. Roberts
R. Gregory Roberts
Irwin M. Slomka
Thomas H. Steele

April 27

New York State Bar Association New York State & New York City Tax Institute

New York, New York

Hollis L. Hyans
Irwin M. Slomka

April 29

Tax Executives Institute (TEI) Oregon Chapter SALT Meeting

Portland, Oregon

Eric J. Coffill
Jenny Kim

May 2

Tax Executives Institute (TEI) – Houston Chapter 23rd Annual Tax School

Houston, Texas

Paul H. Frankel

May 5

Council on State Taxation (COST) 2011 Intermediate — Advanced Income & Sales Tax Schools

Atlanta, Georgia

Paul H. Frankel

May 9

Council on State Taxation (COST) Regional Meeting

Chicago, Illinois

Eric J. Coffill
Hollis L. Hyans
Mitchell A. Newmark
R. Gregory Roberts

May 9

Tax Foundation's State Tax Day

Washington, D.C.

Paul H. Frankel

May 13

Tax Executives Institute (TEI) New England TEI State Tax Day

Boston, Massachusetts

Paul H. Frankel

May 16

Energy Tax Association 21st Annual Meeting

San Antonio, Texas

Craig B. Fields
Mitchell A. Newmark

May 18 - 19

Georgetown University Law Center Annual Advanced State and Local Tax Institute

Washington, D.C.

Craig B. Fields
Paul H. Frankel

May 22 - 24

Council on State Taxation (COST) 2011 Spring Audit Session/Income Tax Conference

Santa Ana Pueblo, New Mexico

Paul H. Frankel
Carley A. Roberts

May 25 - 26

Telestrategies Communications Taxation 2011 (Taxation of Digital Products)

New Orleans, Louisiana

James P. Kratochvill
Thomas H. Steele
Kirsten Wolff

May 26

California Source Income, California CPA Society

Sacramento, California

Carley A. Roberts

June 8

Council on State Taxation (COST) Houston Regional Program

Houston, Texas

Craig B. Fields
Mitchell A. Newmark
Carley A. Roberts
R. Gregory Roberts
Thomas H. Steele

June 9

The 15th Annual Multistate Tax Institute

Milwaukee, Wisconsin

Paul H. Frankel

June 14

Federation of Tax Administrators (FTA) Annual Conference

Omaha, Nebraska

Paul H. Frankel

June 22

Tax Executives Institute (TEI)

Valley Forge, Pennsylvania

Hollis L. Hyans

June 28

Southeastern Association of Tax Administrators Annual Conference

Louisville, Kentucky

Paul H. Frankel

June 28

Institute for Professionals in Taxation (IPT)

San Antonio, Texas

Hollis L. Hyans

October 20

Council on State Taxation (COST) COST Annual Meeting

New Orleans, Louisiana

Paul H. Frankel

October 26

Hartman State and Local Tax Institute

Nashville, Tennessee

Craig B. Fields
Paul H. Frankel
Hollis L. Hyans

November 4

California Tax Policy Conference

San Jose, California

Carley A. Roberts

November 9

Chicago Tax Club

Chicago, Illinois

Paul H. Frankel

November 10

Michigan Tax Conference

Detroit, Michigan

Paul H. Frankel

November 10

Council on State Taxation (COST) New Jersey Regional Program

Basking Ridge, New Jersey

Hollis L. Hyans
Mitchell A. Newmark
Carley A. Roberts
R. Gregory Roberts
Irwin M. Slomka

November 12

Bergen County CPA Tax Conference

Paramus, New Jersey

Paul H. Frankel

November 29

New Jersey CPA State Tax Day

Edison, New Jersey

Paul H. Frankel

December 1

Council on State Taxation (COST) Seattle Regional Program

Seattle, Washington

Eric J. Coffill
Craig B. Fields
Mitchell A. Newmark
Carley A. Roberts
Thomas H. Steele
Andres Vallejo

December 12 - 13

New York University's 30th Institute on State and Local Taxation

New York, New York

Craig B. Fields
Paul H. Frankel
Hollis L. Hyans

Dormancy Periods

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noted that "statistical evidence indicates that a period of 15 years continues to be appropriate in the case of traveler's checks, and seven years in the case of personal money orders issued by express companies."

The UUPA's 1981 premise to support a decrease in the dormancy period — that inflation affects abandonment — is flawed regarding property in interest-bearing accounts, which increases in value despite inflation. Further, if the rate of inflation was truly the justification for reducing dormancy periods, it would follow that when the inflation rate decreases, the dormancy periods would correspondingly increase. Needless to say, with very rare exceptions, the downward spiral in dormancy periods has continued, even in 2009, a deflationary period. Arizona,[22] Indiana,[23] and New Jersey [24] are states that have recently jumped on the shrinking dormancy period bandwagon, deflation aside.

Constitutional and Practical Implications of Short Dormancy Periods

When dormancy periods were long — that is, 15, 20, or 30 years, justification might have existed for state intervention, given the real likelihood that an actual abandonment had occurred. Now, however, with the short periods in vogue — for example, one, two, and three years — there is scant basis to conclude that the property actually has been abandoned, and escheat statutes may run afoul of constitutional protections to property owners and holders.

Due Process Clause

The U.S. Constitution's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." It is based on the notion that there should be fundamental fairness in states' dealings with individuals and is often viewed as having both substantive and procedural components. Early U.S. Supreme Court cases recognized that a short dormancy period could violate the Due Process Clause. In *Cunnius v. Reading School District*,[25] the Court upheld a 1885 provision appointing administrators for the estates of those missing and presumed dead after seven years. And while recognizing that the "right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence belongs to all governments," the Court noted that a presumption of death resulting from the absence from the state of a brief period would violate due process.[26] Similarly, in *Provident Institution for Savings v. Malone*,[27] the Court understood that the evaluation of the constitutionality of unclaimed property laws might well turn on the length of the dormancy period: "if the statute had provided that the money should be paid over to the receiver-general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented."[28]

Takings Clause

The Takings Clause of the Fifth Amendment to the Constitution provides that no state shall take "private property for public use, without just compensation." Generally, unclaimed property statutes have been found not to run afoul of the Takings Clause, and some courts have set the bar very high, requiring that a plaintiff must have a property interest that is constitutionally protected to successfully prevail in a Takings Clause case.[29]

Contract Clause

Article I, section 10, clause 1 of the Constitution provides that states cannot pass laws "impairing the Obligation of Contracts." More than 60 years ago, the Sixth Circuit recognized, regarding the applicability of escheat provisions to national banks, that short limitations periods would negatively affect national banks' ability to contract.[30] Nonetheless, courts have generally sided against holders claiming that short dormancy periods impinge on their right to contract.[31]

However, when it is the holders that modify contractual rights with their customers after states decrease the dormancy period, courts usually void such provisions as impermissible private escheat provisions, finding the corresponding downward revisions to contract terms an unseemly race to the bottom.[32] That seems unfair and contradictory. Parties should remain free to negotiate their contracts without the government's hands in the parties' pockets.

Recent Developments

Most state courts seem to have viewed as virtually unfettered legislators' authority to grab other people's property after short dormancy periods, and do not seem to be too concerned with such minor trivialities as the Constitution.

However, one recent case, from the federal District Court in Kentucky, viewed the legislative impetus in its proper light and refused to sanction the Kentucky legislators' attempt to raise revenue by decreasing the dormancy periods for uncashed traveler's checks from 15 to seven years.[33]

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MoFo Attorney News

Morrison & Foerster's State & Local Tax Group would like to welcome the following new attorneys to the firm:

- **Bee-Seon Keum**
- **Kara M. Kraman**

They both join us as attorneys in the New York office.

The State & Local Tax Group would also like to congratulate Mitchell A. Newmark, who resides in our New York office, on becoming partner and Craig B. Fields on becoming the State & Local Tax Chair and Tax Department Co-Chair.

No Solicitation: Sales Tax Nexus, the Amazon Law, and the Perils of Affiliate Advertising

By Thomas H. Steele, Andres Vallejo, and Kirsten Wolff

"Are we now required to collect sales tax in New York on our Internet sales?" Since 2008, when New York passed its so-called "Amazon Law," virtually every significant Internet retailer has wrestled with this question. Unfortunately, despite widely held expectations that the ongoing *Amazon.com* litigation might soon provide an answer to that question, the New York Supreme Court, Appellate Division's recent decision failed to provide any clear answer, at least when considered against typical real-world Internet arrangements.[1] This article attempts to fill that gap by relating the decision to typical Internet affiliate arrangements and speculating if a couple of types of relationships will trigger a tax collection responsibility.

In this article we first review the background of the Amazon Law and the legal framework of nexus for sales tax purposes in which the law is situated. We then summarize Amazon's challenge to the law. We describe the aspects of the challenge that the New York courts have now resolved (subject to further appeals, of course) and the questions that still remain to be decided. Finally, we investigate the underlying Internet marketing model that sparked the controversy and share our thoughts on the ways in which the Amazon Law, at least as a matter of statutory construction, may ultimately apply to businesses that rely on Internet affiliate marketing.[2]

Background: Attributional Nexus and the Amazon Law

The Amazon laws in New York and other jurisdictions[3] are based on the general principles of nexus, which begin with the U.S. Supreme Court's decision in *Quill*. In that case, the Court established a "bright-line" standard that required that a taxpayer be physically present, that is, to have employees or property beyond a de minimis presence, within the state in order to be subject to a sales and use tax collection obligation in the state.[4]

In order to circumvent this limited basis for nexus, the states developed a theory known as "attributional nexus," whereby a state may impose an obligation to collect its sales and use tax on an out-of-state seller that does not itself have physical presence in the state, based on the physical presence of another party in the state. There are two factors that, taken together, are generally sufficient to justify the assertion of attributional nexus: (1) the in-state entity is acting "on behalf of" the out-of-state seller; and (2) the in-state entity is performing activities in support of the marketing or sales activities of the out-of-state seller.[5]

New York's Amazon Law[6] codifies a type of attributional nexus standard by creating a statutory presumption that an out-of-state seller is "soliciting business" in the state and must collect the state's sales tax if "the seller enters into an agreement with a resident of [New York] under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller."[7] The presumption applies if the seller's aggregate gross receipts from these referrals surpass a de minimis threshold (i.e., $10,000 for the prior four quarters).[8] The presumption may be rebutted by proof that the New York resident party to such agreement "did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States Constitution."[9]

The New York Department of Taxation and Finance (the "Department") has issued two memoranda that provide information on the ways in which sellers may rebut the new presumption.[10] These memoranda describe three avenues for a remote seller to rebut or avoid the presumption. First, the seller may protect itself from the nexus presumption by contractually prohibiting the in-state entities from soliciting sales *and* by obtaining certificates of compliance from each New York representative stating that the representative did not, in fact, solicit sales on behalf of the out-of-state vendor.[11] Second, the Department has stated:

> [It] will deem the presumption rebutted where the seller is able to establish that the *only activity* of its resident representatives in New York State on behalf of the seller *is a link* provided on the representatives' Web sites to the seller's Web site and none of the resident representatives engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.[12]

Finally, the Department has noted that "an agreement to *place an advertisement* does not give rise to the presumption."[13] However, in a statement that is in some tension with the notion that a mere link is insufficient to trigger the statute, the Department elaborates by stating that "placing an advertisement does not include the placement of a link on a Web site that, directly or indirectly, links to the Web site of a seller, where the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link."[14]

Amazon's Challenge to the New Nexus Statute

Two days after New York's governor signed the new nexus statute into law, Amazon.com filed suit seeking a declaration that the statute is unconstitutional and an injunction prohibiting the state from enforcing it. Shortly thereafter, Overstock.com, another Internet retailer, filed a similar suit

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Amazon Laws

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and the cases were consolidated. The trial court dismissed both cases on the grounds that the statutory language "is carefully crafted to ensure that there is a sufficient basis for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out."[15] Accordingly, the court held that "[t]here is nothing infirm about the commission-agreement provision, which contemplates a substantial nexus with New York."[16] The trial court threw out both the companies' facial challenges to the statute as well as their challenges based on the statute's application to the companies' specific circumstances.

Amazon and Overstock appealed the adverse decisions. The appellate division (New York's first level court of appeal) agreed with the trial court that the statute was facially constitutional under the strict *Salerno* standard (i.e., that "[a] plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications"), but concluded that the record was inadequate to determine whether the statute also passed constitutional muster as applied to Amazon's and Overstock's particular facts.[17]

The court rejected the facial challenge under the Commerce Clause because the statute "does not target the out-of-state vendor's sales through agents who are not New York residents," and because "there must be solicitation, not passive advertising," in order for the statutory presumption to apply.[18] Thus, the court concluded:

> [T]here is a set of circumstances under which the statute would be valid, i.e., when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test.[19]

The court also rejected the facial challenges based on the Due Process Clause. First, the court observed that the statutory presumption was not "irrational" in that it assumes that "in-state solicitation occurs when an in-state representative is paid a commission on a per sale basis, after a New York purchaser accesses its Web site and 'clicks' through to make a purchase at the out-of-state vendor's Web site."[20]

Second, the court held that the statutory terms were not unconstitutionally vague. As described above, throughout the opinion, the court distinguished between "passive advertising" (which does not trigger the statutory presumption of nexus) and "solicitation" (which does). When confronted with the question of whether "solicitation" is unconstitutionally vague, the court dismissed the idea that the Internet has created "a brave new world requiring its own definitions of terms that previously had a clear meaning."[21] Without defining the term, the court provided examples of conduct that, seemingly, would constitute solicitation and conduct that would not: "An advertisement in a newspaper is clearly not solicitation,...[l]ikewise, the maintenance of a Web site which the visitor must reach on his or her own initiative is not...solicitation."[22] However, "the targeting of a potential customer by the transmission of an e-mail is no different from a direct telephone call or a mailing to a customer," and therefore, apparently, meets the definition of solicitation.[23] In light of its conclusion that the term "solicitation" has a "clear meaning," the court held that the statute was not unconstitutionally vague.

In examining the companies' challenges to the statutes as applied to Amazon and Overstock, the court withheld any determination regarding whether the companies' in-state representatives "are soliciting business or merely advertising on their behalf," and whether "the in-state representatives are engaged in activities which are 'significantly associated' with the out-of-state retailer's ability to do business in the state."[24] Accordingly, the court remanded the cases to the trial court for discovery and adjudication on the facts.

Finally, the court rejected Amazon's contention that New York's statute violated the Equal Protection Clause because it exclusively targeted Amazon.[25] On this point, the court was correct: Many, many companies engage in affiliate marketing that may trigger nexus under the New York statute. The statute may well have been targeted at Amazon in the first instance, but now that it is law, it affects potentially thousands of advertisers.[26]

The following section examines the affiliate marketing model in order to gain some insight into the landscape that tribunals in New York, and elsewhere, will face in determining whether the Internet affiliates are conducting in-state activities that provide sufficient justification for the imposition of nexus over the out-of-state sellers (i.e., are the affiliates soliciting or merely advertising?).

Affiliate Marketing: What It Is and How It Works

The Internet affiliate marketing model is a widespread movement that pairs retailers with website publishers positioned to market the retailers' products to the websites' visitors. A retailer, also referred to as an advertiser, provides the marketing content to a publisher, also known as an affiliate. The publisher posts the marketing content on its website, which can range from a blog to a news or product review site. The advertiser compensates the publisher for this service by paying it a fee that is based on the performance of the marketing material.

Performance is measured by several different criteria, including: (1) a "click-through," which means that the visitor to the publisher's website simply clicks on the marketing material; (2) a lead generation, which means that the visitor to the publisher's website navigates to the advertiser's site and takes an action such as registering with the site, filling out a form, or signing up as a free subscriber, but does not make a purchase; and (3) a purchase, which means that the visitor to the publisher's site navigates to the advertiser's site and makes a purchase there. Although Amazon's program compensates affiliates based on a percentage of the

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California Adopts Regulation Prescribing Sales and Use Tax Audit Procedures

By Jenny Kim

After more than a year in the making, the five-member board of the California State Board of Equalization (the "Board") adopted California Sales and Use Tax Regulation ("Regulation") 1698.5 by a 3-2 vote on May 25, 2010.[1] The new regulation, which went into effect on August 18, 2010, is the first attempt by the Board to formalize its sales and use tax audit procedures.

Regulation 1698.5 implements and interprets California Revenue and Taxation Code ("Code") section 7053, which requires sellers, retailers, and consumers to maintain sales and use tax records, and Code section 7054, which authorizes the Board to examine records, property, and persons and conduct investigations to accurately ascertain sales and use tax liability. Previously, the Board relied on the Sales and Use Tax Department Audit Manual ("Audit Manual"), which incorporates procedures and techniques that have evolved over the years, as a guide in conducting sales and use tax audits. In 2009, the Board expressed a need for a formalized regulation to act as a clear guide for the Board staff and taxpayers alike because the Audit Manual, while available to the public, was primarily an advisory guide for the Board staff, not taxpayers.[2] The Board intended that the regulation would provide consistent definitions and procedures, allowing the Board staff to facilitate efficient and timely completion of an audit, help taxpayers navigate through the complex audit process, and ensure fair and consistent application of the Sales and Use Tax Laws.[3] In January 2011, the Board issued a Special Notice reminding taxpayers about the formal audit procedures and highlighting the key provisions in the new regulation.[4]

Provisions of Regulation 1698.5

Regulation 1698.5 is organized according to the following subsections: (a) definitions; (b) general provisions; and (c) audits. Each subsection of the regulation is discussed below.

Definitions

Subsection (a) sets forth the definition of the common terms found in the sales and use audit process, such as "Board," "Audit Engagement Letter," "Pre-Audit Conference," "Opening Conference," "Status Conferences," "Exit Conference," "Information/Document Request (IDR)," "Audit Findings Presentation Sheet (AFPS)," "Records," and "Day."[5]

General Provisions

Subsection (b) provides that the "purpose of an audit is to efficiently determine whether or not the amount of tax has been reported correctly" and proclaims it is the "duty and... obligation" of the Board to "utilize its audit resources in the most effective and efficient manner possible."[6] Subsection (b) explains the timeframes for an audit, as well as the duties of the Board staff and taxpayers during the audit process. Each element is discussed below.

Timeframes for an Audit

Consistent with the Board's duty and purpose, subsection (b) explains that an audit of a taxpayer's records "shall be completed in sufficient time" for the Board to issue a Notice of Determination or Notice of Refund within "the applicable statute of limitations."[7] However, an auditor is required to request a waiver of the statute of limitations when there is "sufficient information to indicate that an understatement or overstatement exists, but there is insufficient time to complete the audit before the expiration of the statute of limitations."[8] Notably, the regulation does not explain what constitutes "sufficient information" or how much time is "insufficient." "If the taxpayer declines to sign a waiver, the Board may issue a determination for the expiring period(s)."[9]

However, Regulation 1698.5 provides some protections for the taxpayer. While subsection (c) establishes the standard response times for document requests, discussed below, subsection (b) makes clear the timeframes provided in the regulation are only "intended to provide for an orderly process [for]...a timely conclusion of an audit and are not to be used to prevent or limit a taxpayer's right to provide information."[10] Accordingly, the regulation requires the auditor to consider late responses to IDRs and AFPSs, subject to certain limitations, and gives the auditor discretion to adjust the timeframes as warranted.[11]

Duties of the Board Staff

Subsection (b) enumerates a list of duties of the Board staff. Specifically, the staff is required to (1) "[a]pply and administer the relevant statutes and regulations fairly and consistently regardless of whether the audit results in a deficiency or refund of tax"; (2) "[c]onsider the materiality of an area being audited"; (3) "[m]ake information requests for the areas under audit as provided in Regulation 1698"; (4) "not directly access the taxpayer's computer system if the taxpayer objects to such access"; (5) "[p]rovide an audit plan to the taxpayer"; (6) "[a]dhere to the timelines set forth in the original [or amended audit plan]"; (7) "[k]eep the taxpayer apprised of the status of the audit through status conferences and AFPSs"; (8) "[i]nform the taxpayer of the audit findings at the exit conference"; (9) "[c]opy taxpayers...on all Board correspondence related to the audit when the taxpayer has authorized

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Audit Procedures

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another party to represent them"; (10) "[s]afeguard taxpayer's records while examining them"; and (11) "[i]nform the taxpayer of the audit process, the taxpayer's rights, and appeal rights at the beginning of the audit."[12]

Notably, the materiality element attempts to place a needed restraint on an auditor. Previously, the auditors had the authority to decide on the materiality of an audit area.[13] Regulation 1698.5 now instructs the auditor to assess the materiality of an audit area by balancing the "potential adjustment...against the time required to audit the area and the duty to determine whether the correct amount of tax has been reported."[14]

Duties of the Taxpayers

Regulation 1698.5 also provides rules pertaining to the taxpayer's duty to maintain records. In general, taxpayers have a duty to maintain records and documents, provide the records requested by the Board, and make records available for photocopying or scanning.[15]

Audits

Subsection (c) establishes guidelines for audit procedures, including: (1) location and time of the audit; (2) pre-audit conference, opening conference, audit plan, and status conferences; (3) record requests; and (4) AFPSs and exit conferences. Each element is discussed below.

Location and Time of the Audit

Subsection (c) provides that "[a]udits [will] generally take place at the location where the taxpayer's original books, records, and source documents relevant to the audit are maintained, which is usually the taxpayer's principal place of business."[16] However, a taxpayer can request a change in the audit location and such request "will be granted unless...[the] staff determines the move will significantly delay the start or completion of the audit, or the Board does not have adequate resources to conduct the audit at the requested location."[17] Any subsequent requests for location changes in the same audit period will be considered on a "case-by-case basis."[18] Notably, "[i]f the taxpayer operates out of a private residence, or has a small office or work environment that will not accommodate the auditor(s), Board staff may require that the records be brought to a Board office or taxpayer's representative's office."[19] "Some interested parties expressed concern that the provisions are a step backward from the [prior] practice which allow[ed] taxpayers to determine the location of an audit if adequate books and records are provided to Board staff at that location."[20] They argued that "[these] provisions give too much discretion to Board staff to deny taxpayers the ability to undergo an audit at the taxpayer's most convenient location."[21]

Further, subsection (c) also provides that the Board will not hold an audit in abeyance pending conclusion of a prior audit or an appeal of a prior audit.[22] If a prior audit is under appeal, the Board will "begin the current audit by examining areas that are not affected by the outcome of the appeal."[23] On this issue, some interested parties noted that "it is unreasonable to conduct an audit when a significant amount of time and effort might be saved [by] the outcome of an appeal or an audit in progress."[24] They raised the issue that many times, "when an older audit is concluded, the taxpayer and the auditor will agree to apply the results of the audit to future periods," saving resources for both the taxpayer and the state.[25]

Pre-audit Conference, Opening Conference, Audit Plan, and Status Conferences

A pre-audit conference is a meeting between the taxpayer and the Board staff to discuss the availability and production of records.[26] An opening conference is the first meeting between the taxpayer and the Board staff to discuss, among other things, the audit plan.[27] "The audit plan documents the areas under audit, the audit procedures, and the estimated timeframes to complete the audit."[28] While the audit plan may be amended throughout the audit process, the regulation encourages the taxpayer and the auditor to sign the audit plan as an indication of their "commitment" to the plan.[29] Interested parties have argued that it should be "clear that the audit plan is not binding and the taxpayer is not compelled to agree with it"; signatures should indicate only that the taxpayer has read and understood the plan.[30] Notably, the interested parties argued the "use of the word 'commitment' causes concern that the audit plan may be used to force a taxpayer into an unfavorable audit methodology."[31]

Further, under subsection (c), the Board announced its goal to complete an audit within a two-year timeframe.[32] Accordingly, Regulation 1698.5 directs the Board staff to "develop an audit plan that strives for the completion of the audit within a two-year timeframe commencing with the date of the opening conference."[33] While Regulation 1698.5 provides that the audit is not limited to two years "when a longer timeframe is warranted," it does not clarify what circumstances would warrant a longer audit.[34] Some interested parties have noted that "it is unreasonable to expect large audits to be completed in two years" because it would require an "exorbitant amount of state and taxpayer resources."[35] They argued that these "costs would outweigh any benefit from an expedited audit."[36] Further, they raised concerns that "auditors trying to meet the two-year timeframe probably would not allow taxpayers additional time to provide records to resolve audit issues in the field and as a result, there will likely be an increase in audit appeals."[37]

Subsection (c) also outlines status conferences, which are meetings held between the taxpayer and the Board staff throughout the audit to discuss audit issues and the progress of the audit.[38] According to the regulation, status conferences are necessary to ensure the audit is on track for completion within the estimated timeframes.

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Dormancy Periods

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The court held that shortening the dormancy period, without any evidence that the traveler's checks are actually abandoned after that time, violated the Due Process, Takings, and Contracts Clauses. The court rejected the state's purported "boundless authority," noting that:

> Here, there is clear evidence that the state legislature enacted the abandoned property law as an effort to raise revenue. "Complete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's self-interest is at stake. A government entity can always find a use for extra money, especially when taxes do not have to be raised."[34]

The shortening was found to impair the certainty in private contracting that underlies the Contract Clause.[35] The lower court rightfully noted that the reduction in the dormancy period was a taking — "a forced contribution to governmental revenues."[36] That the revenue generated from unclaimed property is earmarked for noble causes,[37] moreover, does not make the taking any less egregious.

However, the New Jersey federal District Court chose not to follow the Kentucky federal court's well-thought-out decision, the New Jersey court refused to issue preliminary injunctions in cases challenging the reductions of the traveler's check and money order dormancy period.[38] Regarding traveler's checks, despite acknowledging that most states have a 15-year dormancy period and that "it appears that a primary aim of Chapter 25 was to increase the State's coffers," the New Jersey court held that the holder was not likely to succeed on the merits of its substantive Due Process, Contracts Clause, or Takings Clause claims.

The holder raised what appear to be valid arguments in support of its position that no legitimate state interest warranted the state's reduction in the dormancy period with the resulting loss to the holder of its right to earn income from investing the proceeds from sales of the traveler's checks: (a) there is no evidence that a three-year dormancy period bears a rational relationship to the actual abandonment; and (b) the state's revenue-raising purpose was primary and "does not pass constitutional muster" because it is not a rational purpose. The court cited several purported purposes for the legislation — "'to protect New Jersey consumers from the commercial dormancy fee practices and to modernize [New Jersey's] unclaimed property laws,'" and to protect property owners in case the holder declares bankruptcy — and held that the statute would likely survive the substantive due process challenge given the "great deference and the presumption of validity under the rational basis review" afforded the state. The court distinguished *Hollenbach* on the basis that there the "only reason" for the Kentucky General Assembly to reduce the dormancy period was revenue, while in New Jersey raising revenue was "not the only conceivable basis," and the property could be used for public good.

As readily acknowledged by New Jersey's Treasurer, who is responsible for administering New Jersey's Unclaimed Property Law, "Unclaimed Property is not a tax or an additional liability to businesses. The goal of the Unclaimed Property Office is to recover, record and reunite the property with the rightful owner and/or heirs."[39] However, since the fundamental underlying purpose of the unclaimed property act is to reunite owners with their property, a legislature's revenue-raising goal is inherently suspect and *should* be subject to heightened scrutiny, particularly when, as in this case, the decrease in dormancy period negatively affects the contractual rights of the holder. Further, under the court's reasoning, any action that raises revenue for the public good would be rational.

Despite the evidence that 90 percent of the traveler's checks that are sold in the state and are uncashed after three years of sale are ultimately cashed, the court focused on the large percentage of traveler's checks cashed within a year of purchase, 96 percent, and concluded that "it would not be irrational for the Legislature to have determined that the small percentage of the unclaimed three-year old travelers checks are presumed abandoned." However, once it is established that the 90 percent of the property that would be deemed abandoned under Chapter 25 is not actually abandoned, even under a deferential, rational basis standard, the primary purpose of the *abandoned* property law is thwarted, and deeming un-abandoned property to be abandoned purely to raise revenue cannot be rational. The percentage of traveler's checks redeemed within one year is simply not a relevant inquiry to determine whether checks not cashed within three years have been abandoned. Taking the court's premise to its absurd conclusion, if 99 percent of payroll checks are redeemed within a week, a dormancy period of three weeks would be rational, even if *all* the checks are cashed within a month.

Protecting owners from traveler's checks issuers in the event that they declare bankruptcy — another purported purpose asserted by New Jersey to justify the shortened dormancy period — is also a suspect rationale. Taken to its logical extreme, since all businesses can go bankrupt, perhaps all proceeds from the issuance of traveler's checks (and money orders, SVCs, and so on) should simply be given to the government upon receipt "for protection." But, although there may be de minimis aspects of consumer protection inherent in unclaimed property law, consumer protection and bankruptcy laws are the proper places to so legislate. Further, given the dire financial straits many states are in, and the talks of late of having Congress provide a mechanism that would allow states to seek bankruptcy protection,[40] the protectionist rationale is particularly dubious. Owners may be safer

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Dormancy Periods

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with their property in the keeping of holders rather than states.

The claim that the shrinking dormancy period violated the traveler's check issuer's contract rights was also rejected on the basis that the issuer did not have a contractual right to invest the proceeds. However, the parties *did* agree that the issuer would pay upon presentation and, conversely, the issuer had a right to retain and invest the proceeds on checks not yet presented. By shortening the dormancy period the state *does* affect the issuer's contractual rights.

The court also rejected the holder's claim that by shortening the dormancy period New Jersey divested it of a property right, that is, the right to invest the proceeds from traveler's check sales until claimed by the purchasers. The court reasoned that because the purchaser was the owner, the holder did not have a property interest in the profits derived from investing the funds until the purchasers used the checks. However, the court's reasoning is flawed. Under the court's narrow view, a leasehold interest held by a person other than the owner of the underlying realty would not have a property interest. Money is property, and an income interest in property *is* therefore also property. It is also noteworthy that the state itself considers the right to use the abandoned funds "for the common good until claimed by its owner" as a valuable right.[41]

The federal District Court ruled similarly regarding the shortening of the dormancy period for money orders. All five related cases challenging Chapter 25 are on appeal to the Third Circuit. Significantly, the Third Circuit granted the motions for injunctive relief filed by the traveler's check and money order issuers, apparently finding that there is a likelihood of success on the merits of the claims made by the issuers challenging the reduction in the dormancy periods. Eventually, the Third Circuit (and perhaps the U.S. Supreme Court) may provide additional guidance on the scope of the Contract and Takings Clauses, and what constitutes a failure to provide substantive due process in the context of shortened dormancy periods. Holders of property should hope that the Third Circuit will follow *Hollenbach*, will not allow New Jersey's revenue needs to pervert unclaimed property laws and the Constitution, and will not allow the state to impose an additional liability or tax on businesses — precisely what the Treasurer stated the law is not intended to do — under the flimsy guise of modernization.

Given the unequivocal sole purpose for reducing the dormancy period — revenue — if Governor Cuomo's recent budget proposal is enacted, challenges to the enactment could be forthcoming.

Practical Implications

The Ninth Circuit has also recognized the burdensome practicalities of short dormancy periods and lack of reasonable notice provisions. In addition to the possibility of "permanent deprivation" of their property, property owners need to "constantly monitor their property to avoid escheat, either by devoting significant time to searching the internet themselves, by paying a service to do the same, or by 'churning' their property so that it stays active and avoids escheat."[42]

One New York court addressed a bank's handling of security deposits on commercial premises that had remained on deposit for more than 20 years.[43] Although the bank alleged that the account would have been deemed abandoned after five years, the New York State Comptroller's Division of Abandoned Property had no record of the account having being turned over to the state as unclaimed property. The court posed the common sense question:

> Why would the person who opens a savings account necessarily add or subtract monies to the amount in the account?... People often open savings accounts solely to have money available for themselves or their family at a future date and do so solely so as to earn a fixed rate of interest paid by the bank.[44]

The court refused to conclude that the security deposits were unclaimed property since:

> Common sense leads to the conclusion that savings accounts of all kinds should be excluded from the definition of unclaimed and ultimately abandoned property. To do so defeats one of the purposes for which people open such an account — to save money for a "rainy day" or some other particular purpose.[45]

The court also considered the 20-year common-law presumption of payment, that is, a presumption that "'an unexplained neglect to enforce an alleged right, for a long period, casts suspicion on the right itself.'"[46] Although the court concluded that 20 years had not yet elapsed, it noted the decisions in New Jersey and Utah refusing to apply the doctrine to savings accounts. In the New Jersey case, *Pagano v. United Jersey Bank*, the New Jersey Supreme Court agreed with the Appellate Division that:

> "[T]he depositor of funds into a bank savings-account is ordinarily entitled to believe, and does in fact expect, that the deposit is entirely safe, that the funds will be indefinitely available, and that no demand need be taken to protect the right to obtain those funds at any time the passbook is presented."[47]

It is simply too common for bank and brokerage accounts to remain activity-free for many years, particularly if the money was deposited or the securities purchased for retirement or for funding a child's college education. Owners have enough on their busy plates without having to keep up with the accounts they knowingly maintain for use in the beyond-dormancy-period future. A more reasoned and revenue-dispassionate look is needed to assess and determine abandonment periods that actually make sense based on property type and are consistent with the purported goal of protecting the interests of property owners.

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Dormancy Periods

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Concluding Thoughts

Unclaimed property laws have become legislatures' piggybanks. For most property types, the shortened dormancy periods ignore common sense, and impinge on owners' and holders' Constitutional rights. The tendency of courts to rubber-stamp revenue-enhancing legislative action in tough fiscal times is shortsighted and, as applied to the shrinking dormancy periods under unclaimed property laws, contrary to the fundamental purpose of such laws — to reunite abandoned property with its owners. As Justice Louis Brandeis recognized:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[48] ■

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1 The authors would like to thank Mollie B. Gabrys for her valuable assistance with this article.
2 *Provident Inst. for Sav. v. Malone*, 221 U.S. 660 (1911).
3 1942 Ky. Acts ch. 156; Ky. Rev. Stat. Ann. §§ 393.060 & 393.070 (1942). Kentucky eliminated the distinction between demand and time deposits in 1998. 1998 Ky. Acts ch. 560, § 1. The dormancy period for bank accounts is now three years. 2008 Ky. Acts ch. 132, § 12.
4 *Bklyn. Borough Gas Co. v. Bennett*, 154 Misc. 106, 114 (N.Y. Sup. Ct. Albany County 1935).
5 *Millikan v. Cook*, 180 N.E. 554, 558 (1931), *aff'd*, 180 N.E. 896, *cert. denied*, 287 U.S. 626 (1932).
6 Pub. L. No. 62, April 17, 1872. *See also Provident Inst. for Sav. v. Malone*, 221 U.S. 660 (1911) (30-year dormancy period for bank accounts).
7 *Commonwealth v. Dollar Savings Bank*, 102 A. 569 (1917).
8 *Id.* 102 A. at 571.
9 Mass. Laws 1907; ch. 340 (30 years); St. 1950, ch. 801 (14 years); St. 1975, ch. 608, § 4 (10 years); St. 1980, ch. 130. § 4 (seven years); St. 1981, ch. 351, § 104 (five years); and St. 1992, ch. 133, § 533 (three years).
10 65 Del. Laws Ch. 140 (1985).
11 66 Del. Laws Ch. 379 (1988).
12 Chapter 25 of the Laws of 2010 ("Chapter 25").
13 In response to Chapter 25, New Jersey's 2010 legislation, five complaints were filed in the U.S. District Court, District of New Jersey: *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, Civ. No. 10-4890 (FLW); *New Jersey Retail Merch. Ass'n v. Sidamon-Eristoff*, Civ. No. 10-5059 (FLW); *New Jersey Food Council v. Sidamon-Eristoff*, Civ. No. 10-5123; *Am. Express Prepaid Card Mgmt. Corp. v. Sidamon-Eristoff*, Civ. No. 10-5206 (FLW); and *MEMO Money Order Co. v. Sidamon-Eristoff*, Civ. No. 10-5460 (FLW). An opinion was issued on November 13, 2010, regarding the first four cases (D.N.J. Nov. 13, 2010). A separate decision was issued on November 18, 2010, for the fifth case, which had been filed after the others. The District Court declined to issue preliminary injunctions with respect to the decrease in the traveler's check dormancy period from 15 to three years and the decrease in the money order dormancy period from seven to three years. The court did issue preliminary injunctions on the retroactive subjectivity of non-cash-redeemable stored value cards ("SVCs") and on Chapter 25's adoption of a "third priority" rule, a place of purchase rule, which would require that SVCs sold in New Jersey escheat to New Jersey, despite the U.S. Supreme Court precedent stating that if the address of the owner is unknown the property is to escheat to the state of the issuer's domicile. Notices of appeal were filed in the Third Circuit, which then issued preliminary injunctions on the traveler's check and money order dormancy period provisions of Chapter 25, pending appeal on the merits.
14 P.L. 2002, ch. 35.
15 Cal. Code Civ. Proc. § 1273 (since repealed); *Security Savings Bank v. California*, 263 U.S. 282 (1923) ("long-dormant bank accounts").
16 Cal. Code Civ. Proc. § 1513; Stats 1976 ch.1214; Stats 1988 ch. 286; Stats 1990 ch. 450.
17 Informational Hearing: State Controller's Office and Unclaimed Property (Cal. Senate Governmental Organization, Oct. 22, 2007).
18 A.B. 2221 (Cal. 2007-08 Leg. Sess.).
19 2011-12 Executive Budget, Article VII Revenue Bill, Part A.
20 2011-12 Executive Budget Briefing Book at 69 ("Other Executive Budget General Fund revenue actions that do not result in an increase of tax or fee liability...include reducing dormancy periods on various abandoned property items); at 70 (lists the $55 million of estimated revenue from reduction of the dormancy period under "Other Revenue Actions"). The Memorandum in Support at 4 states that enactment of the provisions reducing the dormancy periods is "necessary to implement the 2011-2012 Executive Budget because it generates $55 million in 2011-12 revenue and $70 million in 2012-13 revenue." Governor Cuomo's Annual Message confirmed his promise to "hold the line on taxes." Governor's Annual Message at 14 (Jan. 5, 2011).
21 379 U.S. 674 (1965).
22 S.B. 1003 (Ariz. 2009) (included reduced dormancy periods for traveler's checks from 15 to three years, money orders from seven to three years, stock or equity interests from three to two years, and demand, savings or time deposits — including a deposit that is automatically renewable — from five to three years).
23 H.B. 2636 (Ind. 2010) (reduced dormancy periods for several property categories from five to three years).
24 A.B. 3002 (N.J. 2010) (included reduced dormancy periods for traveler's checks from 15 to three years, money orders from seven to three years, and created a two-year dormancy period for stored value cards). An entire article can easily be dedicated to the many infirmities of New Jersey's recent legislation.
25 198 U.S. 458 (1905).
26 *Id.* at 469.
27 221 U.S. 660 (1911).
28 *Id.* at 664.
29 *Simon v. Weissmann*, No. 07-3880, 2008 U.S. App. LEXIS 27025 (3d Cir. 2008); *See, e.g.*, *Morris v. Chiang*, 77 Cal. Rptr. 3d 799, 805 (Cal. Ct. App. 4th), *review denied*, S165055 (Cal. 2008); *Rowette v. North Carolina*, 656 S.E.2d 619, 625-626 (N.C. Ct. App.), *review denied*, 666 N.E.2d 487 (N.C. 2008); *Hooks v. Kennedy*, 961 So. 2d 425, 431 (La. Ct. App.), *cert. denied*, 967 So. 2d 507 (La. 2007); *Clark v. Strayhorn*, 184 S.W.2d 906, 913 (Tex. App.), *review denied*, 06-0195 (Tex.), *cert. denied*, 549 U.S. 995 (2006); *Smyth v. Carter*, 845 N.E.2d 219, 224 (Ind. Ct. App.), *transfer denied*, 860 N.E.2d 588 (Ind. 2006), *cert. denied*, 549 U.S. 1181 (2007); *Fong v. Westly*, 12 Cal. Rptr. 3d 76, 83 (Cal. Ct. App. 3d 2004).
30 *Starr v. O'Connor*, 118 F.2d 548, 557 (6th Cir. 1941), *overruled on other grounds; Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944).
31 *See, e.g.*, *Am. Express Travel Related Servs., Inc. v. Hollenbach*, 630 F. Supp. 2d 757 (E.D. Ky. 2009) (*"Hollenbach"*) (although the court held that the reduction in the dormancy period for traveler's checks from 15 to seven years violated due process, it concluded that the "traveler's check funds in dispute do not appear to be the sort of contracts targeted by the Contract Clause"), *motion to alter or amend, or vacate judgment denied*, Civ. Action No. 3:08-58-DCR (E.D. Ky. 2009); *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010) ("State's escheat laws do not relate to the 'validity, construction, and enforcement' of the sales contract of travelers checks, nor do they impair the obligations of preexisting contracts.").
32 *People ex rel. Callahan v. Marshall Field & Co.*, 404 N.E.2d 368 (Ill. App. Ct. 1980) (holders' reduction of 10-year gift certificates to five years following the statutory reduction of the dormancy period to seven years was improper); *New Jersey v. Jefferson Lake Sulfur Co.*, 178 A.2d 329 (N.J. 1962), *cert. denied*, 370 U.S. 158 (1962) (shortly after dormancy period for dividends reduced to three years, company amended the certificate of incorporation to provide that uncashed dividends would revert to company after three years; the court held that "defendants' private escheat law is clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby," *id.* at 338-39).
33 *Hollenbach, supra.*
34 *Id.* at 763, citing *U.S. Trust Co. of New York*, 431 U.S. 1, 25-26 (1977).
35 *Id.*
36 *Am. Express Travel Related Servs. v. Hollenbach*, 597 F. Supp. 2d 717, 728 (E.D. Ky.), *aff'd*, 630 F. Supp. 2d 757 (E.D. Ky.), *motion to alter or amend, or vacate judgment denied*, Civ. Action No. 3:08-58-DCR (E.D. Ky. 2009).
37 *See, e.g.*, *Rowlette v. North Carolina*, 656 S.E.2d 619 (N.C. Ct. App.), *review denied*, 666 S.E.2d 487 (N.C. 2008) (emphasizing that the money raised under North Carolina's Unclaimed Property Act is transferred "'to the State Education Assistance Authority for grants and loans to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State.'")
38 *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, Civ. Action No. 10-4890 (FLW), 2010 U.S. Dist. LEXIS 120153 (D.N.J. Nov. 13, 2010).
39 N.J. Dep't of Treasury, Unclaimed Property – Definition (July 19, 2010), *available at* www.unclaimedproperty.nj.gov/defined.shtml.
40 *See, e.g.*, Mary Williams Walsh, *A Path is Sought for States to Escape Their Debt Burdens*, N.Y. Times, Jan. 20, 2011, http://www.nytimes.com/2011/01/21/business/economy/21bankruptcy.html.
41 Brief in Opposition to Plaintiff's Motion for Injunctive Relief at 19, *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, No. 10-4328 (3d Cir. 2010).
42 *Taylor v. Westly*, 488 F.3d 1197, 1199-1200 (9th Cir. 2007).
43 *D&I Fashions, Inc. v. JP Morgan Chase Bank*, 24 Misc. 3d 694 (N.Y. Civ. Ct. 2009).
44 *Id.* 24 Misc. 3d at 700.
45 *Id.* 24 Misc. 3d at 701-702.
46 *Id.* 24 Misc. 3d at 702.
47 670 A.2d 509, 514 (1995) (quotation omitted).
48 *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Amazon Laws

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total sales that the affiliate generates, many advertisers pay their affiliates a flat fee for a specified number of click-throughs or leads generated, whether or not those customer actions ever result in a sale.[27]

Publishers consist of an extremely varied group of websites, including polished and professional blogs, travel blogs, and less polished, personal blogs on every topic from bird-watching to the latest in tech gadgets. These publishers earn money from their blogging efforts (or "monetize" their blogs, in industry parlance) by signing up as affiliates. As described by an industry trade group, the Performance Marketing Alliance, "[t]he revenue stream generated under the performance marketing approach has allowed many small businesses and individuals to accelerate the development of their websites" and has "contributed directly to the more rapid diffusion of free information to the public that is the hallmark of the Internet by giving content providers the financial resources necessary to enhance their offerings."[28]

The publishers post banner ads, text links, and product links on their sites or in email messages and earn a commission each time a visitor to their site or recipient of an email clicks on the ad and takes the required action. In addition, advertisers often provide publishers with widgets — mini-applications within an advertisement that permit a variety of functions, including search boxes, scrolling images of a variety of products, and playable music clips.

Amazon offers a unique widget that allows an individual publisher to create a small Amazon store within the publisher's site, called an "aStore." Each publisher selects various items that are available for purchase at Amazon.com to be displayed in the publisher's aStore. When a visitor to the publisher's site wishes to make a purchase of one of the Amazon products in the site's aStore, that visitor can click on a product to add it to the virtual shopping cart, and then click "check-out" to purchase the item. At this point, the visitor is transferred to Amazon's main site, where the transaction is completed and the visitor purchases the selected item directly from Amazon. Thus, the publisher does not sell the item to the visitor — rather, Amazon does. However, because the visitor began the purchase transaction at the blogger's aStore, the blogger will receive a commission based on that purchase.

Some retailers, including Amazon, run their own affiliate programs. Other advertisers work with third-party affiliate marketing companies, such as Neverblue and Commission Junction, to develop and manage their affiliate relationships. Every affiliate program, whether managed in-house or by a third party, must consummate agreements with publishers, produce marketing content, track each publisher's performance, and pay each publisher on a periodic (often monthly) basis.

When Does an Affiliate Create Nexus for the Out-of-State Seller?

Of course, the question at issue here is: Under what circumstances will an affiliate relationship bring the advertiser-retailer within the ambit of New York's Amazon Law? First, recall that the statutory presumption of nexus is only potentially triggered after a retailer has made a de minimis level of sales related to the affiliate marketing. Second, it is worth keeping in mind that an advertiser-retailer can rebut the statutory presumption if it builds a "no solicitation" provision into its affiliate contracts and obtains annual certificates of compliance from those affiliates. Of course, without a clear understanding of what solicitation is, it is difficult to have a significant level of confidence in the efficacy of these measures to protect the retailer from nexus. Moreover, there are serious practical impediments to this annual compliance regime, given the industry's estimate that there are more than 200,000 website publishers nationwide. Thus, it seems likely that many advertisers will be hard-pressed to protect themselves from the statutory presumption by this method. Instead, the advertiser will likely need to create a program that the advertiser believes does not constitute solicitation, and then require publishers to certify compliance with that program in order to be satisfied that the particular activities undertaken by its affiliates do not trigger a presumption of nexus.

In light of the decision in the *Amazon.com* case and the Department's guidance, the important distinction seems to come down to whether the affiliate is soliciting sales on behalf of the out-of-state retailer or merely passively advertising. In order to understand this distinction, we need to make sense of the term "solicitation." Unfortunately, solicitation is not defined in the statute, the Department's guidance, or the court decisions in the *Amazon.com* case. However, the U.S. Supreme Court's decision in *Wrigley*, involving the definition of that term for purposes of Public Law 86-272, may provide at least a useful starting point for understanding the term. There the Court said: "'Solicitation,' commonly understood, means 'asking' for, or 'enticing' to, something, see Black's Law Dictionary 1393 (6th ed. 1990); Webster's Third New International Dictionary 2169 (1981) ('solicit' means 'to approach with a request or plea (as in selling or begging)')."[29] The Supreme Court went on to state that, in the context of Public Law 86-272, solicitation "includes, not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order," and, even more broadly, "includes not merely the ultimate act of inviting an order but the entire process associated with the invitation."[30] "Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in 'solicitation' even if he does not come right out and ask the retailer to buy some."[31]

In addition, as discussed above, although the New York court in the *Amazon.com* case did not define the term solicitation, it did note that, in its view, sending an email is tantamount to a direct marketing telephone call and therefore constitutes solicitation, but that the maintenance of a passive website with a link should not be considered solicitation.[32]

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Amazon Laws

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Given these authorities, we can draw some boundaries around the meaning of the term "solicitation" for the purposes of applying it to the various activities performed by Internet affiliates. Advertising is, of course, the mere provision of space in a publication or on a website for the retailer to fill with advertising content of its choice. It seems that the key characteristic of solicitation is that a publisher takes some significant affirmative action encouraging a potential customer to buy a product or service beyond merely providing space (cyber or otherwise) for the seller's message. In particular, solicitation appears to involve an affirmative act on the part of the salesperson (here the affiliate) to promote the advertised product of the seller (as opposed to the affiliate's own product). Such a reference point also suggests a continuum: The more actively involved the affiliate marketer is in promoting the sale of the advertiser's product, the more likely that the state will assert that the affiliate's activities will be considered solicitation. Likewise, the closer the affiliate publisher's activities are to traditional advertising in newsprint and similar venues, the less likely that the affiliate's activities will be considered solicitation. Under either point on the continuum, the method of compensating the affiliate publisher is wholly or largely irrelevant. The focus is on the nature of the actions taken by the publisher, and not on the way in which the publisher is compensated.

We acknowledge that the Department appears to be of the view that compensation based upon successful sales is a key determinant of the distinction between advertisement and solicitation and this conclusion finds some support in the court's opinion.[33] However, most sophisticated advertising is priced at least in part upon its effectiveness in reaching the target audience to produce sales. For example, the high Nielson rating of the Super Bowl undoubtedly sets the pricing level for those ads and the large male audience plays a significant role in the advertisements selected. Advertisers undoubtedly measure the success of such ads primarily upon their effect on sales. Given the close working relationship of the advertiser and the broadcaster in such protected traditional advertising arrangements, conditioning a finding of nexus on the method of compensating the web publisher seems a slender reed on which to hang an important constitutional distinction.

Certainly the industry itself believes that current affiliate marketing models (even if based upon compensation tied to the success of the advertisement) should not, as a general rule, be treated as soliciting for the remote seller: "Affiliates are content providers whose principal mission is to attract users to their own websites to review the information and content that they create and display. *They do not drum up business for Amazon or other companies.*"[34]

We can now apply this standard to a typical example of an affiliate relationship that exists in the market.

Simple Banner Advertisement

Imagine that the website publisher places on its site a colorful banner advertisement designed by the advertiser. When a visitor to the publisher's site clicks on the advertisement, that person is redirected to the advertiser's website. Technically, the banner advertisement works in exactly the same way as a link — it redirects the visitor to another site. As indicated by the court in the *Amazon.com* case, a passive link should not constitute solicitation.[35] The banner is probably more noticeable than a simple link, but seems to be essentially akin to a print advertisement.[36] Should the basis on which the advertiser compensates the publisher for maintaining the link make a difference? That is, should the banner be treated as solicitation if the publisher is paid based on the number of sales generated by clicking through the banner, but treated as a passive advertisement if the publisher is paid based on the number of clicks on the banner, without regard to whether any sale is made? As mentioned above, the New York Department of Taxation and Finance appears to take the position that a link can constitute solicitation or at least trigger the presumption that solicitation is occurring, if the advertiser pays the affiliate for maintaining the link "based on the volume of completed sales generated by the link."[37] However, we are of the view that the basis of the compensation should not matter. If solicitation is defined by the type of activity engaged in by the publisher, then the single activity described here, i.e., posting a banner ad, should not be treated as solicitation. The publisher's activity simply represents providing space for what is functionally nothing more than a dressed-up hyperlink which the publisher has provided to the advertiser.

As described above, there are a number of other examples of the advertisements published by Internet affiliates that may be more difficult to situate on the continuum between solicitation and advertising. Hopefully, the trial court in the *Amazon.com* case on remand will grapple with some of the tough factual issues in order to provide advertisers and affiliates everywhere with additional guidance on how the Amazon Law should be applied to all forms of affiliate advertising.

Conclusion

In light of the New York court's decision that the Amazon Law is facially constitutional, that statute, and perhaps others like it, is probably here to stay. Unfortunately, we do not yet have clear guidance on the types of activities that in-state affiliates may perform without triggering the statutory presumption of nexus, i.e., those activities that constitute mere advertising and do not rise to the level of solicitation. Until the courts address the next phase of the *Amazon.com* case, companies will have to manage their sales tax risks carefully, knowing that the states are likely to apply these statutes aggressively in an effort to bring in additional revenue during these tough economic times. ■

Previously published in substantially similar form in *State Tax Notes,* March 28, 2011.

1 *See Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129 (N.Y. App. Div. 2010).

2 Our function in this article is to explore how the Amazon Law may be construed as a matter of statutory construction applying the key term

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"solicitation." In doing so, we have assumed that the law is constitutional, an issue which has not been finally determined.

3 Specifically, the Governor of Illinois recently signed a bill into law which adopts a nexus standard modeled on New York's statute. Public Act 096-1544, H.B. 3659, 96th Leg. (Ill. 2011) (enacted). Illinois joins Rhode Island and North Carolina which have previously adopted similar Amazon statutes. R.I. Gen. Laws § 44-18-15; N.C. Gen. Stat. § 105-164.8(b)(3). In the current legislative session, Rhode Island proposed new legislation that would repeal its Amazon law. H.B. 5115, 2011 Jan. Sess. (R.I. 2011).
In 2009, California and Hawaii would have passed their own versions of the law, but in each case the governor indicated he would veto the law. A.B. 178, 2009-2010 Reg. Sess. (Cal. 2009); H.B. 1405, 25th Leg., 1st Sess. (Haw. 2009). Nonetheless, both states' legislatures have introduced new Amazon laws in the current session. A.B. 153, 2011-2012 Reg. Sess. (Cal. 2011); H.B. 1183, 26th Leg., 1st Sess. (Haw. 2011).
Amazon laws are also currently pending in the legislatures of Arizona, Connecticut, Massachusetts, Minnesota, New Mexico, Tennessee, Texas, Vermont, and, most recently, Arkansas. H.B. 2551, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.B. 5545, Jan. Sess. (Conn. 2011); H. 01731, 187th Leg., Reg. Sess. (Mass. 2011); S.F. 458, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 95, 50th Leg., 1st Sess. (N.M. 2011); H.B. 1912, Reg. Sess. (Tenn. 2011); S.B. 1489, Reg. Sess. (Tenn. 2011); H.B. 1317, 82nd Leg., Reg. Sess. (Tex. 2011); H. 143, 2011-2012 Leg., Reg. Sess. (Vt. 2011); S.B. 738, 88th Leg., Reg. Sess. (Ark. 2011). The Mississippi legislature also introduced a similar bill at the beginning of the year, but it died shortly thereafter. H.B. 363, 2011 Reg. Sess. (Miss. 2011).
Finally, Colorado has passed a variation on the other states' Amazon laws, which requires out-of-state sellers to report to the state the names of customers from whom they did not collect the state's use tax and to report to the customers the amount of sales made to that customer each year so that the customer can pay the use tax directly. Colo. Rev. Stat. § 39-21-112(3.5); 1 Colo. Code Regs. § 201-1. That law was enjoined by the U.S. District Court for the District of Colorado on the grounds that it discriminated against interstate commerce in imposing onerous reporting provisions that effectively applied only to out-of-state vendors. *The Direct Marketing Association v. Roxy Huber*, No. 10-cv-01546-REB-CBS (D. Colo. Jan. 26, 2011) (order granting motion for preliminary injunction). More recently, the legislature has introduced a bill that would repeal the reporting requirements. S.B. 11-073, 68th Leg., 1st Reg. Sess. (Colo. 2011). The Governor of South Dakota recently signed a bill into law that would require an online retailer that does not collect South Dakota sales tax to place a prominent notice on its website advising South Dakota customers of their obligation to pay South Dakota use tax. S.B. 146, 2011 Reg. Sess. (S.D. 2011) (enacted).
The information in this footnote is current as of March 11, 2011.

4 *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

5 *See Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987); Thomas Steele and Kirsten Wolff, *Reflections on the Current State of "Attributional Nexus": When May a State Use the Presence of an In-State Entity to Claim Jurisdiction Over an Out-of-State Seller*, in University of Southern California Gould School of Law 61st Tax Institute — Major Tax Planning 2009 2-1 ¶ 202, at 2-5 to -6 (Matthew Bender 2009).

6 As indicated above, several other states have passed laws that essentially copy New York's Amazon Law. For the purposes of simplicity, we confine our discussion here to New York's statute. To the extent that the laws in other states are similar (or in some cases, identical), this description and analysis will apply equally to those jurisdictions.

7 N.Y. Tax Law § 1101(b)(8)(vi).

8 *Id.*

9 *Id.*

10 *See* TSB-M-08(3)S, New Presumption Applicable to Definition of Sales Tax Vendor (N.Y. State Dep't of Tax. & Fin. May 8, 2008); TSB-M-08(3.1)S, Additional Information on How Sellers May Rebut the New Presumption Applicable to the Definition of Sales Tax Vendor as Described in TSB-M-08(3)S (N.Y. State Dep't of Tax. & Fin. June 30, 2008).

11 N.Y. TSB-M-08(3.1)S, at 1 (June 30, 2008).

12 N.Y. TSB-M-08(3)S, at 4 (May 8, 2008) (emphasis added).

13 *Id.* at 2 (emphasis added).

14 *Id.*

15 *Amazon.com LLC v. N.Y. Dep't of Taxation & Fin.*, 877 N.Y.S.2d 842, 848 (Sup. Ct. 2009).

16 *Id.*

17 *Amazon.com LLC*, 913 N.Y.S.2d at 136 (citations omitted) (internal quotation marks omitted).

18 *Id.* at 138.

19 *Id.* at 139.

20 *Id.* at 140.

21 *Id.* at 141.

22 *Id.*

23 *Id.*

24 *Id.* at 143.

25 *Id.* at 145.

26 Brief for Performance Marketing Alliance as Amicus Curiae Supporting Plaintiffs-Appellants, *Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin.*, 877 N.Y.S.2d 842 (Sup. Ct. 2009) (No.601247/08) ("PMA Amicus Curiae Brief"), at 9 (noting that the affiliate marketing industry involves at least 15,000 publishers of ads).

27 *See, e.g.*, PMA Amicus Curiae Brief at 3-5, 23.

28 PMA Amicus Curiae Brief, at 2.

29 *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992).

30 *Id.* at 223, 225.

31 *Id.* at 223.

32 *Amazon.com LLC*, 913 N.Y.S.2d at 141.

33 *Id.* at 139.

34 PMA Amicus Curiae Brief, at 17 (emphasis added).

35 *Amazon.com LLC*, 913 N.Y.S.2d at 141.

36 *See* PMA Amicus Curiae Brief, at 17-18.

37 N.Y. TSB-M-08(3)S, at 2 (May 8, 2008).

Audit Procedures

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Record Requests

Regulation 1698.5 also sets forth a standard procedure for requesting records, including verbal requests, IDRs, and Formal Notice and Demand Letters, and establishes standard response times for such requests. While the auditor must initially make a verbal request for records, if the taxpayer fails to respond or the auditor cannot establish verbal contact with a taxpayer, the auditor may utilize the IDR process to obtain the necessary information.[39] Taxpayers are generally allowed 30 days to respond to an initial IDR and 15 days to respond to a follow-up IDR requesting the same records as the initial IDR.[40] If the taxpayer fails to furnish the requested records in response to the follow-up IDR, the auditor will issue a formal notice and demand to furnish information.[41] If the taxpayer fails to provide records in response to the notice and demand within 15 days, the auditor may "issue a subpoena for those records or issue a determination based on an estimate."[42]

Some interested parties have noted that the "30-day response time for an IDR is not reasonable" because "much of the audit fieldwork is centered on reviewing thousands of transactions."[43] They argued that the IDR process "ignores the detailed nature of a sales and use tax audit."[44] While Regulation 1698.5 provides that timeframes cannot be used to prevent or limit a taxpayer's right to provide information and requires the auditor to consider late responses,[45] unless facing an expiring statute, it remains to be seen whether this provision will facilitate a cooperative environment between the auditor and the taxpayer to allow the taxpayer sufficient time to provide the requested records.

AFPSs and Exit Conferences

Subsection (c) also explains that an AFPS should be "used during the course of an audit as soon as each area of the audit is

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completed."[46] Taxpayers do not know what the final determination by the auditor will be prior to the issuance and receipt of the Notice of Determination or Notice of Refund, and AFPSs may remedy this problem and encourage resolution of more issues at the audit level. Generally, "[t]axpayers will be asked to indicate whether they agree or disagree with the proposed findings...[and] will be given an opportunity to...rebut the audit findings."[47] "Agreement to the audit findings does not preclude the taxpayer from appealing the issue(s) at a later date."[48] However, some interested parties have noted that the "AFPS provision seems to require the taxpayer to formulate a defense during the course of the audit" and does not provide sufficient time for taxpayers to "consult with legal counsel and gather necessary information before formulating a position on certain portions of the audit."[49]

Finally, at the conclusion of an audit, an exit conference is held between the taxpayer and the Board staff to discuss the audit findings.[50] If the taxpayer disagrees with the audit findings, the taxpayer has an opportunity to provide additional information within 30 days following the exit conference. The auditor then has the discretion to adjust the findings, if warranted.[51]

Franchise Tax Board Regulation 19032

The Board's new audit regulation closely mirrors the Franchise Tax Board's (the "FTB") audit procedures outlined under FTB Regulation 19032.[52] Like the Board, the FTB uses the audit plan, conferences, IDRs, and Audit Issue Presentation Sheets throughout the audit and similarly instructs its auditors to take into account the materiality of an issue being audited.[53] With the exception of limited circumstances, the FTB also seeks to complete an audit within a two-year timeframe.[54] However, there are notable differences. For example, an FTB auditor has the option to determine whether to conduct a "desk audit" in lieu of a "field audit."[55] "A 'desk audit' is an audit conducted primarily through mailed correspondence," while a "'field audit' is an audit that takes place at the taxpayer's residence, place of business or some other location that is not an office of the Franchise Tax Board."[56] FTB auditors can also impose a failure-to-furnish-information penalty if a taxpayer fails to comply with an initial request and second request for any item of information.[57] Just as the Board faced staunch criticisms from various interested parties on its proposed regulation, the FTB faced similar criticisms more than 10 years ago when it proposed and ultimately promulgated its audit procedures regulation.[58]

Conclusion

Through Regulation 1698.5, the Board hopes to improve transparency of the sales and use audit process, promote communication between the Board staff and taxpayers, and facilitate a timelier resolution of audits. While some taxpayers may welcome the guidance and transparency, critics abound. As discussed above, interested parties raised various objections to Regulation 1698.5 throughout the interested-parties meetings held in 2009. Notably, they disapproved of what they viewed as vague language, voicing concerns that an imprecise regulation will only lead to disputes with taxpayers over interpretation, ultimately resulting in litigation. While taxpayers undergoing a sales and use tax audit with the Board have reason to be cautiously optimistic, it still remains to be seen whether the concerns raised by some will impede the successful administration of the new regulation. ■

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1 The Board staff held numerous interested-parties meetings throughout 2009 to discuss the proposed regulation. The meetings were held on February 3, 2009, February 5, 2009, February 10, 2009, June 2, 2009, August 4, 2009, and August 6, 2009. (The Board Formal Issue Paper Number 09-005, http://www.boe.ca.gov/meetings/pdf/Combined_1698.5.pdf.) The May 25, 2010 Board Meeting Minutes are available at http://www.boe.ca.gov/meetings/pdf/052510-052610M.pdf.
2 The Board Formal Issue Paper Number 09-005, *supra* note 1.
3 *See id.*
4 Special Notice, New Regulation: Audit Procedures, http://www.boe.ca.gov/news/pdf/l270.pdf.
5 Cal. Code Regs. tit. 18, § 1698.5(a).
6 *Id.* § 1698.5(b).
7 *Id.* § 1698.5(b)(2).
8 *Id.* § 1698.5(b)(3).
9 *Id.*
10 *Id.* § 1698.5(b)(6).
11 Specifically, subsection (b)(6)(A) states: "Some AFPSs can be responded to in less than or more than the timeframe specified in this regulation. The auditor has discretion to adjust this timeframe as warranted." *Id.* § 1698.5(b)(6)(A). Subsection (b)(6)(B) states: "Due dates for responses to IDRs and AFPSs shall be within the statute of limitations applicable to the audit. Auditors *will consider* late responses to IDRs and AFPSs, provided a period of the audit will not expire due to the statute of limitations." *Id.* § 1698.5(b)(6)(B) (emphasis added).
12 Cal. Code Regs. tit. 18, § 1698.5(b)(4).
13 The Board Formal Issue Paper Number 09-005, *supra* note 1.
14 Cal. Code Regs. tit. 18, § 1698.5(b)(4)(B).
15 *See id.* § 1698.5(b)(5).
16 *Id.* § 1698.5(c)(1).
17 *Id.*
18 *Id.* § 1698.5(c)(2).
19 *Id.* § 1698.5(c)(1).
20 The Board Formal Issue Paper Number 09-005, *supra* note 1.
21 *Id.*
22 *See* Cal. Code Regs. tit. 18, § 1698.5(c)(4).
23 *Id.*
24 The Board Formal Issue Paper Number 09-005, *supra* note 1.
25 *Id.*
26 Cal. Code Regs. tit. 18, §§ 1698.5(a)(3), (c)(5).
27 *See id.* §§ 1698.5(a)(4), (c)(6).
28 *Id.* § 1698.5(c)(7).
29 *Id.*
30 The Board Formal Issue Paper Number 09-005, *supra* note 1.
31 *Id.*
32 *See* Cal. Code Regs. tit. 18, § 1698.5(c)(7).
33 *Id.*
34 *See id.*
35 The Board Formal Issue Paper Number 09-005, *supra* note 1.
36 *Id.*
37 *Id.*
38 *See* Cal. Code Regs. tit. 18, § 1698.5(a)(5), (c)(8).
39 *See id.* § 1698.5(c)(9)(A).
40 *See id.* § 1698.5(c)(9)(B).
41 *See id.*
42 *Id.* § 1698.5(c)(9)(B)(4).
43 The Board Formal Issue Paper Number 09-005, *supra* note 1.
44 *Id.*
45 Cal. Code Regs. tit. 18, § 1698.5(b)(6).
46 *Id.* § 1698.5(c)(10).
47 *Id.*
48 *Id.*
49 The Board Formal Issue Paper Number 09-005, *supra* note 1.
50 Cal. Code Regs. tit. 18, §§ 1698.5(a)(6), (c)(11).
51 *See id.* § 1698.5(c)(11).
52 Cal. Code Regs. tit. 18, § 19032.
53 *See id.*
54 *See id.* § 19032(a)(2).
55 *See id.* § 19032(b).
56 *Id.* §§ 19032(b)(2)(A), (b)(3).
57 *See id.* § 19032(b)(5)(C).
58 *See* Eric J. Coffill & Carley A. Roberts, *A Status Report on the California FTB's Proposed Audit Regulations*, 21 State Tax Notes 965 (Sept. 24, 2001).

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