SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*, v. ARKANSAS, *et al.*, *Defendants*.	Nos. 22O145 & 22O146 (Consolidated)

DEFENDANT STATES' OPPOSITION TO DELAWARE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress adopted the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA) to ensure that the unclaimed proceeds from the sale of money orders, traveler's checks, and similar instruments for transmitting money are equitably distributed to the States where the instruments were purchased, rather than to the State in which the company selling or issuing them happens to be incorporated. As explained in the Defendant States' motion for summary judgment, the FDA's plain language, history, and purpose all demonstrate that this is precisely the type of case where the statute applies.

Delaware's contrary arguments rest in substantial part on its contention that MoneyGram Official Checks differ in certain respects from the products that MoneyGram markets as "Money Orders." But the alleged differences are both legally irrelevant and contrary to the undisputed facts in the record. The legal question before the Court is whether MoneyGram Official Checks are "money order[s], traveler's check[s], or other similar instrument[s]" within the meaning of the FDA. The answer to that question does not depend on whether MoneyGram Official Checks are similar to a product that MoneyGram chooses to label a "Money Order." In any event, the undisputed facts show that MoneyGram Agent Checks and Teller's Checks—which are currently being improperly escheated to Delaware—are functionally equivalent to MoneyGram Retail Money Orders and Agent Check Money Orders, which no party disputes are subject to the FDA. Like Retail Money Orders and Agent Check Money Orders, Agent Checks and Teller's Checks are prepaid drafts; MoneyGram collects no address information for buyers of any of these instruments; and MoneyGram holds the prepaid funds for all these instruments in the same commingled accounts until the payee cashes the instrument or MoneyGram remits the unclaimed proceeds to the escheating State. The record is undisputed, moreover, that MoneyGram "Official Checks" are not a separately defined category of instruments in the Uniform Commercial Code, state money transmitting law, or any other state or federal regulation. "Official Check" is a proprietary and marketing label that MoneyGram uses to market products that are functionally money orders or that are, at the very least, "similar" to money orders in all respects relevant to this case.

Delaware also errs in arguing that no business or banking association is directly liable on MoneyGram Official Checks. Delaware asks the Special Master to look to liability concepts in the U.C.C. to define the statutory term "directly liable," because, in its view, there are no

contemporaneous sources that cast light on Congress's intent. But as explained in the Defendant States' motion for summary judgment, there are such contemporaneous sources, and they all make clear that Congress intended the term to refer to the entity ultimately responsible for payment. There is thus no basis to turn to sources like the U.C.C. to interpret the term "directly liable"—particularly because the U.C.C. itself does not even use the term and the U.C.C.'s general liability scheme has nothing to do with unclaimed property or Congress's purpose in adopting the FDA. The undisputed facts here show that MoneyGram is ultimately responsible for payment on Official Checks and that MoneyGram is a "business association" as defined in the FDA. Delaware thus cannot establish for the purpose of its motion for summary judgment that Official Checks are exempt from the escheatment rules of the FDA.

Finally, Delaware asserts that the meaning of "third party bank checks" is "obscure" and weakly suggests that MoneyGram "Official Checks" qualify as such checks, a suggestion that even its own expert witness did not find convincing. Its reading of the statutory phrase, however, finds no support in the purpose or context of the FDA and would exempt large classes of prepaid instruments from the FDA—a result that Congress did not intend.

Delaware has not established that MoneyGram Official Checks fall outside the escheatment rules of the FDA. The Special Master should recommend that the Court deny Delaware's motion for summary judgment and grant the Defendant States' concurrently filed motion.

ARGUMENT

I. MoneyGram's "Official Check" Products Are Money Orders Under the FDA.

A. "Money Orders" Under the FDA Are Prepaid Instruments Used to Transmit Funds to a Named Payee, and No Party Disputes that Official Checks Have Such Characteristics.

All products sold as part of the MoneyGram Official Check program are "money order[s]" within the meaning of the FDA. As explained in the Defendant States' opening summary judgment brief, at the time the FDA was enacted the term "money order" was ordinarily understood to mean a prepaid draft issued by a post office, bank, or some other entity that is used by a purchaser to transmit money to a named payee. *See, e.g.*, *Money Order*,

Black's Law Dictionary (4th ed. rev. 1968) (describing postal money orders); *Money Order*, Webster's New Collegiate Dictionary (7th ed. 1967); *see also* Def. States' Br. In Supp. of Summ. J., Doc. No. 89, 21–25; Del.'s Br. in Supp. of Summ. J., Doc. No. 79, 17 (agreeing that money orders are "at a minimum pre-paid instruments"). None of these sources, including Delaware's only citation to a contemporaneous treatise, requires that a "money order" contain specific labels, conditions, or additional charges. *See* F.L. Garcia, *Munn's Encyclopedia of Banking & Finance* 458 (6th ed. 1962) (describing the form of a money order as a "credit instrument calling for the payment of money to the named payee").

The reason that no source defines "money order" by reference to any additional technical features is that the term encompasses a broad category of prepaid instruments, rather than an instrument with a single form and set of narrowly defined characteristics. For example, the comments to the current version of the U.C.C. state that money orders "vary in form and their form determines how they are treated in Article 3." U.C.C. § 3-104, cmt. 4. The comments clarify that a money order can be anything from a check sold by a bank with the value "machine impressed" to a "teller's check," which is an instrument that is separately defined in U.C.C. § 3-104(h). U.C.C. § 3-104, cmt. 4; *see also* App 881 (Gillette Rep. ¶¶ 11–12). Thus, when Congress used the term "money order" in the FDA, it swept within the FDA a broad category of prepaid instruments.

The Official Checks sold by MoneyGram fit within this category of instruments. MoneyGram handles the unclaimed property reporting for three types of instruments it sells through its client financial institutions under the Official Check marketing label: Agent Check Money Orders, Agent Checks, and Teller's Checks. App. 1074 (Yingst Dep. 36:15–21); *see also* Def. States' Br. 11–16 (describing MoneyGram's Official Check program). Delaware concedes that Agent Check Money Orders are "money order[s]" subject to the FDA. Del.'s Br. 22.

Agent Checks and Teller's Checks are likewise "money order[s]" under the statute. The evidence demonstrates, and Delaware does not dispute, that both of these products are prepaid drafts used to transmit money to a named payee. *See* Def. States' Br. 23–25. That is sufficient to establish that these instruments are "money orders" as the term is used in the FDA. *See id.*

B. Delaware's Claimed Distinctions Between Official Checks and MoneyGram Money Orders Are Legally Irrelevant and Unsupported by the Record.

Delaware contends that Official Checks are not "money orders" because they lack all the characteristics of a MoneyGram Retail Money Order. Del.'s Br. 16–22. As an initial matter, Delaware's description of MoneyGram's products obscures the issue. The term "Official Check" is simply a marketing label for instruments sold through one of MoneyGram's processing platforms; it is not a specific type of instrument. App. 1122 (Yingst Dep. 101:2–14). Delaware, moreover, agrees that one of MoneyGram's "Official Check" products, the Agent Check Money Order, is a money order for purposes of the FDA, and MoneyGram escheats unclaimed proceeds from those checks to the State of purchase. App. 1074 (Yingst Dep. 36:15–21); Del.'s Br. 22; Def. States' Br. 11–15 (discussing features of each of the Official Check instruments). Therefore, Delaware's discussion of "Official Checks" must refer not to Agent Check Money Orders but only to MoneyGram Agent Checks and Teller's Checks, which MoneyGram has escheated to Delaware.

Delaware's effort to distinguish Agent Checks and Teller's Checks from MoneyGram Retail Money Orders is legally irrelevant and factually unsupported. Dispositively, MoneyGram decides what characteristics its own MoneyGram-branded "Money Orders" will have, and its decisions are irrelevant to Congress's definition of "money order" under the FDA. Congress did not define "money order" by reference to *MoneyGram's* Money Order product. *See* 12 U.S.C. § 2503. MoneyGram makes many decisions about how it wants to design and sell its own Retail Money Order products that are company-specific and unrelated to the ordinary meaning of the term "money order" under the FDA.

Besides ignoring the distinction between MoneyGram's proprietary Retail Money Order products and the FDA's term "money order," Delaware never explains the relevance of today's MoneyGram products to a statutory term enacted decades ago. Delaware does not reference the characteristics MoneyGram Retail Money Orders had at the time the FDA was enacted in 1974. Instead, the MoneyGram Retail Money Order samples that Delaware references were issued between 2000 and 2017, at least 26 years after the statute was enacted. *See* App. 16–17 (Dep. Ex. 4). And even within that period, MoneyGram has changed various terms and conditions on its Retail Money Orders. *Id.* Congress could not have intended, and did not intend, the definition of a "money order" to evolve over time to track the changes

one company decides to make to its own products.

Turning to the specific distinctions Delaware attempts to draw between Official Checks and MoneyGram's Retail Money Orders (Del. Br. 19–20), they are all unconnected to any definition of "money order" that existed when the FDA was enacted. None of these purported differences bears on the relevant question of whether the contested Official Checks (Agent Checks and Teller's Checks) are prepaid drafts used to transmit money to a named payee. And none has anything to do with Congress's purposes in subjecting all money orders to the escheatment rules of the FDA.

1. Labeling an instrument a "money order." Delaware's first claimed difference between MoneyGram Retail Money Orders and Official Checks is that the Retail Money Orders have the words "money order" printed on their face. Del.'s Br. 18–19. But none of the authorities cited by Delaware states that an instrument must be labeled as a "money order" to qualify as such. Certainly, that requirement is not set forth in the FDA, nor is it found in any of the treatises or dictionaries cited by the parties. *See* Barkley Clark & Barbara Clark, *Law of Bank Deposits, Collections and Credit Cards* ¶ 24.02[4] (2010); *Money Order*, Black's Law Dictionary (4th ed. rev. 1968); *Money Order*, Webster's New Collegiate Dictionary (7th ed. 1967); F.L. Garcia, *Munn's Encyclopedia of Banking & Finance* 458 (6th ed. 1962).

Elsewhere in its brief, Delaware cites to U.C.C. § 3-104(f) for this proposition, but that section likewise does not require a money order to bear that label on its face. Del.'s Br. 42. Instead, it states in relevant part that "[a]n instrument may be a check even though it is described on its face by another term, such as 'money order.'" It does not require that a money order include a particular label. To the contrary, this reference confirms that money orders "vary in form" and can be any number of prepaid instruments. U.C.C. § 3-104, cmt. 4.

The only other support for Delaware's view that a specific label is required comes from the opinion of its expert, Professor Mann, who states that a money order "could relatively easily be a teller's check or . . . a draft," but only so long as it is "marketed and sold as a money order." App. 992–93 (Mann 84:18–85:17). Professor Mann cites no authority for imposing this as a definitional requirement. Indeed, he admits that the U.C.C.—his primary area of expertise—"doesn't use money order as a way to define liability instruments." App. 992–93 (Mann 84:18–85:8). There is no indication that Congress intended for a company's product-labeling to

defeat the broad priority rules that it established in the FDA. Treating the labeling as dispositive would allow companies to shop for favored escheatment regimes by simply changing the names of the instruments they sell, without changing any of those instruments' fundamental characteristics.

2. Designating an agent on the face of the instrument. Delaware next argues that Agent Checks and Teller's Checks are not "money orders" under the FDA because they "need not indicate the agent status of MoneyGram." Del.'s Br. 17–19. Thus presumably refers to deposition testimony stating that MoneyGram's own Money Order products indicate on their face that they are being sold by an agent of MoneyGram. *See* Del.'s Br. 19 (citing App. 1185 (Yingst Dep. 164:16–24)). As with Delaware's other labeling arguments, however, there is no authority for the proposition that a "money order"—as the term is generically used in the FDA—must either be issued by an agent or disclose an agency relationship on its face.

In any event, Delaware's statement is factually incorrect. The sample instruments that MoneyGram has produced show that MoneyGram Retail Money Orders do *not* necessarily have that language on their face, and that Agent Checks *do* in fact indicate on their face that the selling financial institution is acting as an agent for MoneyGram. App. 18–19 (Dep. Ex. 4 [Ex. A]); App. 343–46 (Dep. Ex. 26 [Exs. A–B]); App. 1185 (Yingst Dep. 164:13–24). Teller's Checks do not list the selling financial institution as an agent, but at least some of MoneyGram's agreements with such financial institutions identify the institution as MoneyGram's agent for purposes of selling Teller's Checks. App. 227 (Dep. Ex. 15 § 5); Def. States' Br. 15. To be sure, regardless of whether Teller's Checks identify the selling financial institution as MoneyGram's agent on their face, that institution's functional role in selling the Teller's Checks is the same as it is for any type of MoneyGram Retail Money Order or Official Check product. Def. States' Br. 14–16.

3. Presence of specified terms, conditions, and service charges. Delaware's third contention is that Official Checks are different from MoneyGram Retail Money Orders because Retail Money Orders have certain "purchaser payee language creating a contract including service charges on the back of the instrument." Del.'s Br. 18. Again, there is no legal authority for the proposition that, to qualify as a "money order," an instrument must include such language. Indeed, the evidence shows that money orders issued by other companies prior to the enactment of the FDA did not include either service charges or any of the other language contained on the back of a MoneyGram Retail Money Order. *See* App. 618–19 (Dep.

Ex. 126). Further, the terms used by MoneyGram are subject to ongoing change, and the specific terms, conditions, and service charges are not consistent even among MoneyGram Retail Money Orders. App. 16–17 (Dep. Ex. 4 ¶ 5). These fluctuating features of MoneyGram's proprietary Money Order products cannot define the scope of the term "money order" under the FDA.

4. Location of sale. Delaware further notes that MoneyGram Retail Money Orders are sold at retail locations, while Official Checks must be purchased at financial institutions. Del.'s Br. 18–19. Delaware cites no authority stating that a "money order" is defined by reference to the locations at which it can be purchased. Indeed, the authority cited by Delaware notes that money orders can be sold at retail stores or banks. *See* F.L. Garcia, *Munn's Encyclopedia of Banking & Finance* 458 (6th ed. 1962). Even in MoneyGram's specific case, financial institutions can and regularly do sell products Delaware concedes are money orders (MoneyGram Money Orders and Agent Check Money Orders). App. 1102–03 (Yingst Dep. 81:17–82:22). There is no legal or factual support for the assertion that an instrument is not a money order if it is sold only through a bank.

5. Cap on value of the instrument. Delaware's fifth supposed distinction is that Official Checks are not money orders because they do not have caps on their value like MoneyGram Retail Money Orders. Del.'s Br. 18–19. But the limitation on a MoneyGram Retail Money Order's value is not inherent in the form of the instrument, nor is the limitation imposed on money orders by law. App. 1097–98 (Yingst Dep. 63:16–64:13). Instead, the limitation is imposed by MoneyGram on its Retail Money Orders for business reasons as part of its risk mitigation strategy. *Id.* And despite the fact that MoneyGram places no limit on the value of Agent Check Money Orders, Delaware concedes that those products are "money orders" for purposes of the FDA. App. 1114–15 (Yingst Dep. 93:24–94:22); Del.'s Br. 22. Whether MoneyGram has decided to place a value cap on a particular Official Check product has no bearing on whether that product is a "money order" under the FDA.

6. Target customer group. Next, Delaware contends that MoneyGram Retail Money Orders are "marketed to the public and used predominantly by unbanked individuals while Official Checks are exclusively sold through financial institutions predominately to their own bank customers." Del.'s Br. 19–20. This comparison is irrelevant because money orders are not defined by the demographics of their most frequent users. While the *Munn's Encyclopedia of Banking & Finance* description

of "money order" refers to money orders' use by individuals without checking accounts, it also discusses the dramatically higher fees associated with money orders—a likely explanation for why individuals with checking accounts would choose not to use money orders. *See Munn's Encyclopedia of Banking & Finance*, *supra*, at 458. *Munn's* describes how money orders are typically used; it does not suggest that they can *only* be used by a particular demographic.

Here, as a factual matter, the uncontroverted evidence shows that MoneyGram Retail Money Orders are not exclusively sold to individuals without checking accounts. App. 1111 (Yingst Dep. 90:5–22); App. 64 (Dep. Ex. 12 at MG002712) (target markets for MoneyGram Retail Money Orders also include customers seeking "an alternative to electronic payments or a more trusted alternative to personal checks"). Nor does MoneyGram limit the sale of its Official Checks to customers with bank accounts. App. 1256 (Yingst Dep. 272:1–21). To the extent money orders are often used by customers without bank accounts, this is a descriptive rather than a definitional characteristic.

7. FinCEN ruling. Finally, Delaware's citation to a 2012 ruling by the Department of the Treasury sheds no light on the meaning of the term "money order" as used in the FDA. Del.'s Br. 21–22. That ruling addresses whether an anonymous company qualified as a "money services business" under a 2011 regulation promulgated by the Financial Crimes Enforcement Network (FinCEN). Dep't of Treasury FinCEN Ruling FIN-2012-R001, at 1 (May 23, 2012) (citing 31 C.F.R. § 1010.100(ff)).[1] FinCEN is a bureau of the Treasury Department tasked with ensuring that certain institutions maintain records that can be used in "criminal, tax, or regulatory investigations or proceedings." Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43585-01 (July 21, 2011). Under that regulation, a company that issues money orders qualifies as a money services business, and is subject to the reporting requirements imposed by FinCEN. 31 C.F.R. § 1010.100(ff). The regulation does not define what a money order is. *See id.*

The specific question posed by the unidentified company was whether its self-described "Official Checks" constituted money orders under the meaning of this regulation. Dep't of the Treasury FinCEN Ruling

[1] This ruling is available at https://www.fincen.gov/resources/statutes-regulations/administrative-rulings/application-money-services-business-rule-bank.

FIN-2012-R001, at 2. Previously, the company had obtained approval to sell both money orders and these "Official Checks" from the Federal Reserve Board, and as part of that application represented that its money orders would be limited to $10,000 in value, while its "Official Checks" could be issued in any amount. *Id.* at 1. Apparently, the company never actually sold the money orders, and thus did not qualify as a money services business on that basis. Citing the company's internal distinctions between these product categories and noting that money orders "traditionally" had a maximum face value, FinCEN concluded that these "Official Checks" were not money orders. *Id.* at 2–3.

The ruling is both inapplicable and unhelpful here. First, neither the statutes nor regulations at issue there have anything to do with the FDA or unclaimed property law. The ruling and the relevant regulation both post-date the FDA by decades, and thus shed no light on what Congress intended when it used the term "money order" in the FDA.

Second, the only basis FinCEN used to distinguish the company's "Official Checks" and money orders is that the latter had a $10,000 cap on their value. The fact that money orders may have "traditionally" had a limit on their value does not mean that the presence of such a limit is a definitional requirement. Certainly, that requirement is not evidenced by any of the dictionary definitions of "money order" that have been cited by the parties.

FinCEN's focus on the $10,000 limit must also be viewed in the context of the federal government's regulation of banks and financial institutions. The only authority the FinCEN ruling cites for the importance of the value cap is a Federal Reserve Board bulletin that focuses on whether a bank was maintaining adequate reserve funds to satisfy its outstanding obligations. Dep't of Treasury FinCEN Ruling FIN-2012-R001, at 3 n.8 (citing *Orders Issued Under Section 4 of the Bank Holding Company Act Wells Fargo & Co.*, 72 Fed. Res. Bull. 148, 148, 1986 WL 79492 (Feb. 1986)). Whether an entity is limiting the value of its prepaid financial instruments may be an important consideration in ensuring that entity is maintaining adequate reserves, but it does not affect the different question of whether an instrument is covered by the FDA. *See* 12 U.S.C. § 2501 (listing Congressional concerns that motivated FDA, none of which relate to adequacy of banks' reserve funds).

FinCEN's priorities were also highlighted by its notation that these "Official Checks" were sold through the company's banking affiliate, and were therefore subject to the "full range" of Bank Secrecy Act requirements and anti-money laundering laws and regulations. Dep't of Treasury

FinCEN Ruling FIN-2012-R001, at 3. Given FinCEN's purpose of requiring that institutions maintain records for investigatory purposes, the company's representation that the issuance of these "Official Checks" would be well-documented would have helped satisfy FinCEN's concerns. But again, this is totally unrelated to the public policy concerns that motivated the enactment of the FDA.

Overall, there is no reason to think that Congress intended for any of these seven purported technical differences between MoneyGram's Retail Money Order and Official Check products to determine which would fall within the scope of the FDA. In drafting the statute, Congress chose to use broad terminology encompassing a wide class of prepaid financial instruments to accomplish its goal of remedying the inequity of a single State, like Delaware, escheating unclaimed proceeds that have no connection with that State. *See* 12 U.S.C. § 2501. Accepting Delaware's invitation to impose a new, atextual set of technical requirements—related to labeling, limitations on value, and the like—would do nothing to further the statute's purpose. To the contrary, it would encourage the perpetuation of the exact type of inequity in this case, which the FDA was explicitly designed to prevent. Further, it would allow companies to manipulate whether their products fell within the statute by making certain cosmetic changes to those products, choosing to market them in specific ways, or by making other business decisions that do not change the products' fundamental character.

For all these reasons, Delaware's supposed distinctions between MoneyGram's Retail Money Order and Official Check products are irrelevant, and do not bear on the meaning of the term "money order" as used in the FDA.

II. Alternatively, Official Checks Are "Similar" to Money Orders and Traveler's Checks.

Even if the Special Master concludes that the MoneyGram Official Checks at issue are not "money order[s]," they still fall within the scope of the FDA. The FDA applies to sums "payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. As set forth in the Defendant States' opening brief, MoneyGram's Official Checks satisfy all of the requirements of the FDA's catchall phrase applicable to "other similar written instrument[s]." First, the Official Checks are "similar" to money orders and traveler's checks in that the Official Checks possess the essential

characteristics shared by money orders and traveler's checks. Second, MoneyGram is both a business association and "directly liable" on the Official Checks as the party ultimately liable for paying those instruments. And third, Official Checks are not "third party bank check[s]" under the statute.

As a preliminary matter, Delaware suggests that, if the Special Master were to deny its motion for summary judgment on the issue of whether the Official Checks are "similar" to money orders and traveler's checks, "the case must be set for resolution as a matter of fact" unless the "issue of similarity can be resolved as a matter of law." Del.'s Br. 40–41. There are no factual disputes that would warrant a trial or an evidentiary proceeding. All the relevant facts here were provided by MoneyGram, a third party. To the extent the parties disagree about the appropriate interpretation of those facts, the matter can be resolved as a matter of law by reference to the materials submitted by the parties to the Special Master. Moreover, the key issue—the meaning of the word "similar," including which characteristics of "money orders" and "traveler's checks" are relevant to determining whether another written instrument is "similar" to them—is a purely legal issue well-suited for resolution on a motion for summary judgment.

A. As Prepaid Instruments Used to Safely Transmit Money to a Named Payee, Official Checks Are "Similar" to Money Orders and Traveler's Checks.

1. Official Checks Share the Common Characteristics of Money Orders and Traveler's Checks.

Delaware's motion for summary judgment fails because Agent Checks and Teller's Checks are, at a minimum, "similar" to money orders and traveler's checks. As Delaware acknowledges, "[s]imilarity is not identity, but resemblance between different things." *United States v. Raynor*, 302 U.S. 540, 547 (1938).

The Supreme Court's decision in *Rousey v. Jacoway*, 544 U.S. 320 (2005), is instructive of how the FDA's catchall provision should be applied here. *Rousey* addressed whether two debtors' rights to receive payments from their individual retirement accounts (IRAs) constituted property of their bankruptcy estate under 11 U.S.C. § 522(d)(10)(E). *Rousey*, 544 U.S. at 322. In relevant part, § 522(d)(10)(E) gives debtors the ability to exempt from the estate the right to receive payments "under a stock bonus, pension, profitsharing, annuity, or similar plan or contract." Because the parties agreed that the IRAs did not constitute one of the expressly enumerated

items, the issue was whether the IRAs nevertheless qualified as a "similar plan or contract." *Rousey*, 544 U.S. at 329.

The Court began by noting that, "[t]o be 'similar,' an IRA must be like, but not identical to, the specific plans and contracts" listed in the statute. *Rousey*, 544 U.S. at 329. After reviewing the "ordinary meaning" of the terms listed in § 522(d)(10)(E), the Court found that "[t]he common feature of all of these plans is that they provide income that substitutes for wages earned," consistent with other types of payments debtors can exempt under § 522(d)(10). *Rousey*, 544 U.S. at 331. The Court reviewed the essential features of an IRA—namely its minimum distribution requirements at a certain age, provisions for tax deferral, and early withdrawal penalties—and concluded that income from an IRA also acted as a "substitute[] for wages lost upon retirement." *Id.* at 331–32. Because IRAs shared this essential common characteristic with the enumerated items, the Court concluded that they were "similar" to those items within the meaning of the statute. *Id.* at 331, 334–35.

Here, Official Checks also share the common characteristics of the items enumerated in the FDA. Money orders and traveler's checks are prepaid instruments for transmitting funds to a named payee and are both viewed as good as cash. Def. States' Br. 26; *see also Center Video Indus. Co., Inc. v. Roadway Package Sys., Inc.*, 90 F.3d 185 (7th Cir. 1996) (concluding that payments in the form of "cash, cashier's check, certified check, [or] money order" shared the essential similarities of being checks or check-equivalents where the value to the payee was "not contingent on the payor having sufficient funds" in his account to satisfy the obligation) (internal quotations and citations omitted); S. Rep. No. 93-505, at 2–4, 5 (1973) (letters from Chairman Arthur Burns of the Federal Reserve Board and Edward Schmults, General Counsel of the Treasury) (FDA applies to "money orders, travelers' checks, *and similar instruments for the transmission of money*") (emphasis added); *id.* at 1 ("funds due from the seller on these instruments remain in its hands until the instrument is ultimately presented for payment"); 120 Cong. Rec. 4528 (Feb. 27, 1974) (statement of Sen. Sparkman); 119 Cong. Rec. 17047 (May 29, 1973) (statement of Sen. Scott).

There is no dispute that the particular Official Checks at issue, MoneyGram Agent Checks and Teller's Checks, share these common characteristics of money orders and traveler's checks. MoneyGram Agent Checks and Teller's Checks are prepaid instruments used to transmit money to a named payee. App. 64–65 (Dep. Ex. 12 at 5–6); App. 347–48 (Dep. Ex. 26 [Ex. C]) App. 343–44 (Dep. Ex. 26 [Ex. A]); App. 1158–60 (Yingst

Dep. 137:23–139:13); App. 1191 (Yingst Dep. 170:10–20). The sellers of Agent Checks and Teller's Checks remit the proceeds from their sale to MoneyGram. Once remitted, MoneyGram then holds the proceeds in the same accounts in which it holds the proceeds from the sale of MoneyGram Retail Money Orders. App. 1088–89, 1136–37, 1174, 1253–54 (Yingst Dep. 54:17–55:7, 115:15–116:6, 153:7–16, 269:12–270:4). When Agent Checks and Teller's Checks are ultimately presented to MoneyGram's clearing banks for payment, MoneyGram provides the funds to satisfy them from its commingled accounts. App. 1174 (Yingst Dep. 153:7–16); App. 1185, 1188–92 (Yingst Dep. 164:6–12, 167:23–171:8). And Agent Checks and Teller's Checks are widely accepted by creditors as cash equivalents, just as with money orders and traveler's checks. App. 1219–21, 1227 (Yingst Dep. 198:21–200:3, 206:4–18); App. 64–65 (Dep. Ex. 12 at 5–6); *see also* App. 847–48 (Clark Rep. at 15–16).

Further, MoneyGram's recordkeeping practices are the same as those Congress ascribed to companies that sell money orders and traveler's checks. Consistent with Congress's findings, MoneyGram does not retain information regarding the purchaser of its Retail Money Orders, and its practices are the same with respect to the purchasers of its Official Checks. App. 421 (Dep. Ex. 50). MoneyGram's books and records show the State in which Official Checks are purchased, which allows MoneyGram to remit the proceeds from unclaimed instruments to the States in which the purchasers likely live. App. 1021, 1025 (Petrick Dep. 36:18–20, 68:2–13); 12 U.S.C. §§ 2501(2), 2503(1).

Applying the FDA to MoneyGram's Official Checks would remedy the same inequity and burden on interstate commerce that the FDA was designed to prevent. Here, the evidence shows that "[l]ess than one half of one-percent of all [MoneyGram] official check property escheated to Delaware was actually purchased in Delaware." App. 593 (Dep. Ex. 103); *see* App. 967–68 (Kauffman Dep. 192:15–193:2). There is no reason to think that an Official Check purchased outside Delaware is more likely to belong to a Delaware resident than a prepaid instrument in the form of a money order or traveler's check would be. Thus, the FDA's rationale applies with equal force to all MoneyGram Official Check products.

2. Purported Differences Between Official Checks and MoneyGram Retail Money Orders Do Not Place Official Checks Outside the FDA.

Delaware's contrary position—that Agent Checks and Teller's Checks are not "similar" to money orders and traveler's checks—rests

entirely on the same incorrect premise as its other arguments discussed above. Delaware misperceives the relevant comparison to be between Agent Checks and Teller's Checks and *MoneyGram's* Retail Money Orders. *See, e.g.*, Del.'s Br. 42 (arguing that it is "impossible to conclude that MoneyGram Official Checks and MoneyGram [Retail] Money Orders are 'practically the same'") (citation omitted). As noted above, however, MoneyGram's company-specific decisions about how to design, distribute, market, and administer its Retail Money Order product are not relevant in defining the scope of the FDA. *See supra* at 4–6. By asking the wrong question, Delaware arrives at the wrong answer.

Moreover, none of the purported differences Delaware cites establish that Agent Checks and Teller's Checks are not "similar" to money orders and traveler's checks within the meaning of the FDA. In applying new escheatment rules to instruments that are "similar" to money orders and traveler's checks, Congress swept within the FDA instruments that bear the characteristics that money orders and traveler's checks have in common: prepaid instruments that are treated in the market as safe methods of transmitting money because the funds are being held by a trusted third party institution. *See supra* at 12–13. And Congress was concerned that, with such instruments, the "books and records" of selling institutions "do not, as a matter of business practice, show the last known addresses of purchasers." 12 U.S.C. § 2501(1).

These are thus the relevant characteristics in determining whether an instrument is "similar" to money orders and traveler's checks—not if a company publicizes where to purchase the instrument, if a company sells its products through hundreds instead of thousands of entities, or if the selling agent sends money to the issuer by wire or through bank debits. *Compare* Del.'s Br. 52–54. Delaware's citation to these other purported differences between Agent Checks and Teller's Checks on the one hand and MoneyGram Retail Money Orders on the other hand is thus entirely irrelevant. Certainly, Delaware fails to demonstrate how these purported differences render Agent Checks and Teller's Checks dissimilar from money orders and traveler's checks.

For example, Delaware cites to asserted "[f]acial and [c]ontractual differences" between MoneyGram Retail Money Orders and Official Checks. It claims that MoneyGram Retail Money Orders are labeled as money orders, have language on the back of each instrument limiting MoneyGram's liability, and impose service charges. Del.'s Br. 44–46. But there is no definitional requirement that money orders have these features as a general matter. *See* App. 618–19 (Dep. Ex. 126) (sample money order

without this language); *see also supra* at 6–7. And Delaware does not even allege that traveler's checks have these same features, which undermines the idea that an instrument must share these features to be "similar" to money orders and traveler's checks.

Another supposed difference on which Delaware relies is that, unlike MoneyGram Retail Money Orders, MoneyGram Teller's Checks and "some" Agent Checks "have different funds availability requirements under Federal Reserve Regulation CC and reserve requirements under Federal Reserve Regulation D." Del.'s Br. 46–51. No party has cited a definition of "money order" that turns on whether funds transferred by the instrument in question have next-day availability, or whether the sale of that instrument affects a selling institution's reserve requirements. Certainly, Congress did not intend for the FDA to turn on the application of these regulations, as Regulation D was not promulgated until 1980, and the Expedited Funds Availability Act on which Regulation CC is based was not enacted until 1987, well after the FDA was enacted in 1974. 12 U.S.C. § 4001, *et seq.*; 12 C.F.R. § 204.1.

Worse for Delaware's position, the application of Regulation D's reserve requirements here would support the Defendant States' arguments that Official Checks are similar to money orders and traveler's checks. Regulation D recognizes that teller's checks, money orders, and traveler's checks issued by banks or certain financial institutions are all types of demand deposits that trigger Regulation D's reserve requirements. 12 C.F.R. §§ 204.2(b)(1), (e)(1), 204.4. Regulation D applies to all of them when they are issued by certain types of institutions. In other words, Regulation D lumps teller's checks in with money orders and traveler's checks. Therefore, if a MoneyGram Teller's Check qualifies as a "teller's check" under this regulation, that would suggest that the Federal Reserve views Teller's Checks as similar to money orders and traveler's checks.

Finally, Delaware points to what it sees as twelve "marketing and operational differences" between MoneyGram Retail Money Orders and MoneyGram Teller's Checks and Agent Checks. Del.'s Br. 50–55. Delaware does not attempt to explain how a single one of these asserted differences relates to a characteristic shared by money orders and traveler's checks in general, and thus fails to explain how any of them is relevant to the question of whether Official Checks are covered by the FDA.

In any event, Delaware's argument fails on its own terms, because all but one of the alleged distinctions Delaware draws between MoneyGram Retail Money Orders on the one hand and Official Checks on the other hand

could equally be drawn between MoneyGram Retail Money Orders and Agent Check Money Orders. *See* Del.'s Br. 50–54. Agent Check Money Orders (which Delaware concedes are "money orders" under the FDA) are functionally no different than the other types of Official Checks.

Agent Check Money Orders, Agent Checks, and Teller's Checks are all types of instruments sold under the Official Check program. *See, e.g.*, App. 226 (Dep. Ex. 15 § 2.) Agent Check Money Orders are not, as Delaware erroneously contends, "the same product as MoneyGram's other Money Order products." Del.'s Stmt. of Facts, Doc. No. 78, ¶ 42. Agent Check Money Orders and Retail Money Orders are both "money orders" in the sense that the drafts have the same terminology written on them and they function in a similar way, but Agent Check Money Orders are a type of *Official Check* that is sold only by financial institutions and are processed on a different platform than MoneyGram Retail Money Orders. *See, e.g.*, App. 1105–07 (Yingst 84:5–86:15); App. 58–59 (Dep. Ex. 11 at 2–3) (contrasting Agent Check Money Orders and Retail Money Orders sold by financial institutions outside the Official Check program); App. 205 (Dep. Ex. 13) (referring to Agent Check Money Orders as a type of Official Check). Simply stated, Agent Check Money Orders are Official Checks; they are not "MoneyGram Money Orders" as Delaware uses that term.[2]

Moreover, Agent Check Money Orders are practically indistinguishable from the other types of Official Checks. MoneyGram's customers can use them interchangeably, and Teller's Checks are not different in any way that is relevant to the FDA. App. 219–20 (Dep. Ex. 14, § 3); App. 226–27 (Dep. Ex. 15 § 3); *see also* Def. States' Br. 22–25. Each of these three Official Check products has at least the following similarities:

- They are prepaid drafts, App. 64–65 (Dep. Ex. 12);
- They are sold by financial institutions, *id.*;
- The seller collects the proceeds and remits them to MoneyGram by the next day, *id.*;

[2] While MoneyGram's corporate representative testified that an Agent Check Money Order cannot be labeled as an "Official Check" on its face, she was clear that this is merely a restriction on the form of the label on the instrument and that Agent Check Money Orders are only sold through MoneyGram's Official Check program. App. 1114, 1182–84 (Yingst 93:2–23, 161:6–163:6).

- MoneyGram retains the proceeds (in accounts commingled with the proceeds from the sale of MoneyGram Retail Money Orders) until the instruments are presented for payment, App. 1088–89, 1262 (Yingst Dep. 54:5– 55:4, 278:15–22);
- They are processed by MoneyGram using the same Official Check platform, App. 1114 (Yingst 93:2–7);
- MoneyGram handles all the backend processing, reconciliation, and escheatment for the items, App. 1066 (Yingst Dep. 28:6–19); App. 1277–78 (Yingst Dep. 258:14–259:13);
- They are considered cash equivalents in the marketplace, App. 1219–20, 1227 (Yingst Dep. 206:4–18); App. 64–65 (Dep. Ex. 12); *see also* App. 847–48 (Clark Rep. at 15–16);
- MoneyGram collects and maintains the same information about each instrument, including the location of purchase, App. 421 (Dep. Ex. 50); App. 1021, 1025 (Petrick Dep. 36:18–20, 68:2–13), and
- MoneyGram does not collect or maintain information about the purchaser of the instruments or the named payee, App. 1139–42 (Yingst Dep. 118:24–121:12); App. 1150–51 (Yingst Dep. 129:14–131:13).

Each of these three instruments can even be printed on the same check stock, with the only difference being that an Agent Check Money Order will have the words "money order" printed on its face. App. 1266–70 (Supp. Yingst Decl. ¶¶ 2–4 & Exs. A–B).

The FDA applies to money orders, traveler's checks, and other "similar" instruments. Official Checks need not be identical to money orders or traveler's checks to fall within the statute. They need only resemble those instruments. Thus, even if Agent Checks and Teller's Checks differ in minor ways from money orders or traveler's checks, they still are "similar" to those instruments and are subject to the FDA's escheatment rules as a matter of law.

B. MoneyGram Is a Business Association Directly Liable on Its Official Check Products.

The parties agree that, for the FDA's escheatment rules to apply to instruments that are "similar" to money orders and traveler's checks, they must also be instruments "on which a banking or financial organization or

a business association is directly liable." 12 U.S.C. § 2503; Del.'s Br. 23–27. Delaware contends that there was no "contemporaneous 1974 source that defined or used the term 'directly liable,'" and thus asserts that "that the parties ***must*** look to sources addressing various types of liabilities on written instruments," such as the U.C.C., to ascertain what Congress meant when it used that term. Del.'s Br. 34 (emphasis in original); *see also id.* at 28.

Delaware is wrong. There *was* a well-established, contemporaneous use of the term in the unclaimed property statutes on which the FDA was based. Def. States' Br. 29–33, 39–40. In the unclaimed property context, the term refers to the party that is ultimately responsible for paying the value of the instrument. In this case, that party is MoneyGram, which is undisputedly a "business association" under the FDA. Instead of applying the well-established meaning of the term, Delaware proposes to equate the term "directly liable" with the concept of unconditional liability described in the U.C.C. But as Delaware admits, the U.C.C. has never used the term "directly liable" to describe this concept, and relying on the concept of unconditional liability here would be inconsistent with the purpose of the FDA. Thus, the Special Master should conclude that MoneyGram's liability on the Official Checks satisfies the "directly liable" element of the FDA.

1. Congress Incorporated the Established Meaning of "Directly Liable" in the Unclaimed Property Context When It Enacted the FDA.

As explained in the Defendant States' opening brief, at the time the FDA was enacted, the term "directly liable" had been used to define the scope of unclaimed property laws for at least twenty years. Def. States' Br. 29–33. This term was previously interpreted to refer to the entity "which is ultimately liable for the payment" of the instrument. *See, e.g.*, *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at *1–2 (Sept. 4, 1947). "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012) ("[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field . . .—it is reasonable to believe that the terminology bears a consistent meaning."). Here, the FDA's text and legislative history demonstrate that

Congress intended to incorporate these prior interpretations of the term "directly liable," and MoneyGram is a business association which is ultimately responsible for the payment of the Official Checks. Thus, MoneyGram's Official Checks satisfy this element of the statute.

To briefly summarize the history of this provision, in 1943 the New York Abandoned Property Law defined presumptively unclaimed property in part as "[a]ny amounts held or owing by a banking organization for the payment of a negotiable instrument or a certified check whether negotiable or not, on which such organization is directly liable." App. 641 (1943 N.Y. Laws 1390); *see also* Def. States' Br. 30–31. In multiple formal opinions, the New York Attorney General clarified that "the word 'directly' was inserted to identify the banking organization ultimately liable for the payment" of the instrument. *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1 (Dec. 23, 1946). For drafts, such as the Official Checks at issue here, "the drawer is the party ultimately liable for its payment." *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at *2; *see also Aband. Prop. Law, § 300, Par. 1, Subd. B*, 1944 N.Y. Op. Atty. Gen. No. 147, 1944 WL 41907, at *1–2 (Apr. 1, 1944) (draft drawn by one bank on another (*i.e.*, a teller's check) is an instrument on which a bank is directly liable). A party could be directly liable even if "certain conditions precedent" would have to be satisfied to hold a party liable for payment of the instrument. *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1.

When the Uniform Law Commission promulgated its Uniform Disposition of Unclaimed Property Act in 1954 and revised it in 1966, it expressly modeled the section defining the scope of these Acts on this New York law, including New York's requirement that a party be "directly liable" on the presumptively abandoned instruments. App. 672 (Unif. Disposition of Unclaimed Prop. Act § 2, cmt. (Unif. Law Comm'n 1954)); App. 692–93 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c), cmt. (Unif. Law Comm'n 1966)); Def. States' Br. 31. These Uniform Acts were influential and widely adopted; 31 states and the District of Columbia enacted either the 1954 or the 1966 version. App. 709 (Uniform Unclaimed Property Act p. 2 (Unif. Law Comm'n 1981)).

Congress enacted the FDA in 1974, and copied much of the relevant language of what became 12 U.S.C. §§ 2502 and 2503 from the prior Uniform Acts. *See* Def. States' Br. 31–32. Of particular importance here, Congress described the bill as "designed to assure a more equitable distribution among the various States of the proceeds of abandoned money

orders, traveler's checks or other similar written instruments on which a banking organization, other financial institution, or other business organization, *is directly liable through its having sold said instrument*." *Disposition of Abandoned Money Orders and Traveler's Checks*, S. Rep. No. 93-505, at 1 (1973) (emphasis added).

Congress's expressed intent is thus fully consistent with the prior New York interpretations: the party that sold the instrument, typically the drawer, is the party that holds the money and is ultimately liable for paying the instrument (or paying it to the State as unclaimed property). *See Disposition of Abandoned Money Orders and Traveler's Checks*, S. Rep. No. 93-505, at 1; *Aband. Prop. Law, Section 300(c)*, 1947 N.Y. Op. Atty. Gen. No. 147, 1947 WL 43482, at *2. Under both laws, the general concept is that the party that is holding the money that was used to purchase the instrument is "directly liable" within the meaning of the unclaimed property laws.

Here, no party disputes that MoneyGram is the drawer or the co-drawer of the Agent Checks and Teller's Checks, and in all cases, MoneyGram holds the money that was used to purchase the instrument. App. 1088–89, 1262 (Yingst Dep. 54:5–55:4, 278:15–22). Indeed, Delaware itself describes MoneyGram as "the debtor holding the funds due and owing on unclaimed Official Checks." Del.'s Br. 58. And Delaware does not dispute that MoneyGram is a business association within the meaning of 12 U.S.C. § 2502. *See* Def. States' Br. 34–35. Thus, a business association is directly liable on the Official Checks within the meaning of the FDA.

2. Delaware's Contention that "Directly Liable" Means "Unconditionally Liable" Lacks Support in the U.C.C. and Is Inconsistent with the FDA's Purpose.

Because the FDA incorporated this established meaning of "direct liability," the Special Master need not look outside the field of unclaimed property law to shed light on the meaning of the term. *See* Del.'s Br. 34 (suggesting the Special Master must do so only because there was allegedly no contemporaneous understanding). But even in the absence of this established meaning, there is no indication that Congress intended "directly liable" to mean unconditionally liable, as Delaware argues here. *See generally* Def. States' Br. 35–40.

Delaware argues that the U.C.C.'s "framework for establishing liabilities" supports its claim that the term "directly liable," as used in the

FDA, refers to an instrument on which a party is unconditionally liable. Del.'s Br. 28–29. There are several problems with Delaware's reliance on the U.C.C.'s liability framework to explain what "directly liable" means within the FDA. *See generally* Def. States' Br. 35–40. Most notably, Delaware admits that the U.C.C. has never used the language "directly liable" or "direct liability" to describe this concept of unconditional liability. Del.'s Br. 29; Def. States' Br. 35. Nor has Delaware's expert witness, Professor Ronald Mann, ever previously used the term in this manner. App. 976–77 (Mann Dep. 35:23–36:17). Instead, at the time the FDA was enacted, the U.C.C. referred to drawers who had conditional liability as "secondary parties," and courts and commentators commonly referred to parties that had unconditional liability as "primarily liable." App. 775 (1972 U.C.C. § 3-102(1)(d)); Henry J. Bailey, *The Law of Bank Checks* 218 (4th ed. 1969); *see* U.C.C. § 3-414, cmt. 2 ("The liability of the drawer of an unaccepted draft [i.e., where the condition to the drawer's liability had been satisfied because the drawee has refused payment] is treated as a primary liability."); *id.*, cmt. 4 (where a drawee accepts a draft, it "becomes primarily liable"); *see also* App. 929–33 (Rebuttal Rep. ¶¶ 3–5); Def. States' Br. 36. Thus, the U.C.C. used entirely different terminology to express the concepts of conditional and unconditional liability. If Congress had intended to incorporate the U.C.C. liability concepts into the FDA, it would have used the actual language of the U.C.C. to do so.

Delaware also devotes a lengthy footnote to citing other authorities in an attempt to show that "directly liable" was commonly understood to mean unconditionally liable when the FDA was enacted. Del.'s Br. 31 n.7. But only one of these cited sources both used the term "directly liable" and pre-dated the FDA. Del.'s Br. 31 n.7 (citing Barkley Clark & Alphonse M. Squillante, *The Law of Bank Deposits, Collections and Credit Cards* 61 (1970)).[3] This is not sufficient to demonstrate that the term was a well-established term of art in the field of commercial law in 1974.

Further, Delaware's proposed interpretation of "directly liable" in this case would dramatically limit the number of "similar" instruments to which the FDA applies. *See* Def. States' Br. 37–38. Delaware provides no reason why Congress would have wanted the term to limit the FDA's scope

[3] One of the cited cases supports the Defendant States' position, as it states that even an ordinary "draft" may be an instrument on which an entity is "directly liable," which contradicts Delaware's proposed interpretation of the term. *See Louisiana Health Serv. & Indem. Co. v. Tarver*, 635 So. 2d 1090, 1095 (La. 1994); *see also* Def. States' Br. 38–39; *infra* at 23–24.

in this way. Such a limiting interpretation of the FDA is inconsistent with Congress's intent to correct an inequity that was leading to certain States receiving a windfall in situations in which the company holding funds from a prepaid instrument did not have records showing the purchaser's address. 12 U.S.C. § 2501(2)–(3). Congress wanted those proceeds to be distributed to the States where the purchaser was likely to live. That objective is consistent with the central purpose of unclaimed property law, which is to allow such property, when it cannot be reunited with its owner, to benefit the general good rather than any particular business organization. *See, e.g.*, *Standard Oil Co. v. State of N.J., by Parsons*, 341 U.S. 428, 436 (1951) (noting that unclaimed property laws allow such property to be "used for the general good rather than for the chance enrichment of particular individuals or organizations"). Delaware lists only four instruments on which a party could conceivably be unconditionally liable: cashier's checks, certified checks, bills of exchange, and banker's acceptances. Del.'s Br. 29. If "directly liable" meant unconditionally liable, Congress could have simply added those four instruments to the list of covered instruments (along with money orders and traveler's checks) in the FDA. This would have allowed Congress to do away with the directly liable language as well as the "third party bank check" exclusion. Instead, Congress opted to use much more flexible and open-ended language to sweep within the statute's scope any instruments that are "similar" to money orders and traveler's checks on which a business association or bank is directly liable. 12 U.S.C. § 2503.

Delaware's analysis also ignores the fact that, as explained in the Defendant States' opening brief and above, "directly liable" was used and had well-defined meaning in the unclaimed property context years before the U.C.C. even existed. *See* Def. States' Br. 35; *supra* at 19–21. In fact, the New York Attorney General rejected the exact same argument Delaware raises here in interpreting the New York Abandoned Property Law's use of "directly liable." *Aband. Prop. Law, § 300, Subd. 1, Par. (c) & § 301*, 1946 N.Y. Op. Atty. Gen. No. 141, 1946 WL 49892, at *1; *see also Aband. Prop. Law, § 300, Par. 1, Subd. B,* 1944 N.Y. Op. Atty. Gen. No. 147, 1944 WL 41907, at *1–2 (determining that a teller's check was an instrument on which an entity was directly liable); Def. States' Br. 39–40. Contrary to Delaware's claim that there is "simply no basis" for concluding that an entity can be directly liable on money orders and traveler's checks, Del.'s Br. 25, those Uniform Acts expressly included money orders and traveler's checks among the examples of direct liability instruments. App. 692 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c)); App. 671 (Unif. Disposition of Unclaimed Prop. Act § 2(c)).

This understanding carried over to the Uniform Disposition of Unclaimed Property Act and its successors. *See* Def. States' Br. 38–39. Those Uniform Acts noted that direct liability instruments included, "by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks." App. 692 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c)); App. 671 (Unif. Disposition of Unclaimed Prop. Act § 2(c)). Thus, these Uniform Acts demonstrate that Delaware is wrong when it claims that there is "simply no basis" for concluding that money orders and traveler's checks had this characteristic. Del.'s Br. 25.

Not only were money orders and traveler's checks understood to be instruments on which an entity was directly liable, but so were "drafts" more broadly. App. 692 (Rev. Unif. Disposition of Unclaimed Prop. Act § 2(c)); App. 671 (Unif. Disposition of Unclaimed Prop. Act § 2(c)). A "draft" is simply "a direction to pay" someone that "must identify the person to pay with reasonable certainty." App. 774–75, 778 (U.C.C. §§ 3-102(1)(b) & 3-104(2)(a) (Am. Law Inst. & Unif. Law Comm'n 1972). For example, an ordinary personal check is a type of draft. There is no dispute here that MoneyGram's Official Checks are also drafts, and thus they would have commonly been understood to be instruments on which a party is directly liable under most States' unclaimed property laws in 1974. *See also* Def. States' Br. 38–39 (citing additional authorities).

Delaware nevertheless contends, without any explanation, that "any reasonable interpretation of 'directly liable' cannot be so broad as to encompass a form of conditional liability, like the undisputed conditional liability on MoneyGram's Official Checks." Del.'s Br. 36. But Delaware provides no reason why Congress would have wanted the question of which State escheats unclaimed property to turn on these notions of unconditional or conditional liability. If Congress had meant to invoke the concept of unconditional liability, it would have used that phrase instead of "directly liable." The FDA is a remedial statute designed to prevent the exact scenario that is occurring here, where a single State is exclusively taking custody of unclaimed property purchased almost entirely outside its borders, in the form of prepaid instruments used to transmit money to a named payee. *See* 12 U.S.C. § 2501(2)–(3); App. 593 (Dep. Ex. 103); *see* App. 967–68 (Kauffman Dep. 192:16–193:2).

The Special Master should hold that MoneyGram is directly liable on its Official Checks.

C. MoneyGram's Official Checks Are Not "Third Party Bank Checks."

Because Official Checks are, at minimum, instruments "similar" to money orders and traveler's checks on which MoneyGram is directly liable, to succeed Delaware must demonstrate that the Official Checks are a type of "third party bank check" that is specifically excluded from the FDA's catchall provision. *See* 12 U.S.C. § 2503. Delaware argues the term is "obscure," but suggests that it means either "a bank check offered through a third party," or a "bill payment check[] that banks issue on behalf of their customers." Del.'s Br. 37–39. These proposed interpretations are either divorced from the term's plain language and contemporaneous use, or do not cover the Official Checks in dispute. *See* Def. States' Br. 40–47. Indeed, Delaware's own expert admits that none of the MoneyGram Official Checks struck him "as fitting with any ordinary sense of what [third party bank check] should mean." App. 1010 (Mann Dep. 155:18–25).

Delaware's primary contention is that "third party bank check" refers to a "bank check[] offered through a third party." Del.'s Br. 38. Delaware asserts that "MoneyGram's Official Check program is a means for banks to outsource their bank check offerings to a third party," and thus that the instruments sold under that program are third party bank checks. *Id.* at 37–38.

Delaware's argument is supported by no authority apart from Delaware's own assertion that this is a "more than reasonable interpretation of the FDA." Del.'s Br. 37–38. There is no support in the text of the FDA or its legislative history to suggest that Congress was concerned about excluding bank checks that would otherwise be subject to the FDA simply because the selling institution outsourced various functions relating to those checks (such as inventory management, reconciliation, etc.) to another party. To the contrary, the legislative history indicates Congress's intent to *include* instruments sold by banks where the processing of the instrument is handled by a third party. *See* Sen. Rep. No. 93-505, at 3–4 (1973) (letter from Federal Reserve Board recommending change in bill's language to ensure that checks sold by banks but issued by other company are covered by bill's priority rules); 12 U.S.C. § 2503(1) (reflecting proposed change). Nor is there any indication that this term has ever been commonly used to describe this arrangement. Further, exempting such instruments would not comport with Congress's declared purpose and findings; there is no reason to think that outsourced bank checks are any less likely to be bought where purchasers live than any other covered instrument. *See* 12 U.S.C. §§ 2501(2)–(3).

Further, MoneyGram's Official Checks are not actually bank checks. *See* Def. States' Br. 43–44. A "bank check" is a check drawn by a bank on a bank. App. 902 (Gillette Rep. ¶ 50); App. 815 (Mann Rep. ¶ 63). MoneyGram, which is not a bank, is the drawer on its Agent Checks, and the co-drawer or issuer on its Teller's Checks. App. 343–44 (Dep. Ex. 26 [Ex. A]); App. 347–48 (Dep. Ex. 26 [Ex. C]). Thus, the Official Checks are not drawn by a bank, and do not qualify as any type of bank check.

Delaware's second argument is that the FDA's use of "third party bank check" is "a reference to bill payment checks that banks issue on behalf of their customers." Del.'s Br. 39. But Delaware itself argues that Official Checks are used for major purchases, *not* to pay ordinary bills. Del.'s Br. 51. In addition, Delaware never explains what exactly it thinks a "bill payment check" is, or explains why MoneyGram's Official Checks would qualify. *See id.* at 39–40. Professor Mann's report states that any bill payment check issued by a bank at the time the FDA was enacted would likely have been in the form of a cashier's check or teller's check. App. 817 (Mann Rep. ¶ 70). But if Congress intended to exempt those well-known types of instruments, it would have named them specifically. *See* Def. States' Br. 45. Thus, "third party bank check" cannot be reasonably read to generally refer to bill payment services offered by a bank.

Delaware also erroneously contends that the Defendant States' expert witness did not offer any alternative definitions of the term "third party bank check." Del.'s Br. 38. On the contrary, Professor Gillette explained that the most natural way to read the phrase is to mean a "bank check . . . that has been indorsed by the original payee to a new indorsee." App. 902 (Gillette Rep. ¶ 49). Professors Gillette and Mann both agree that the phrase "third party check" generally refers to a check that has been signed over, or indorsed, by the original payee to a new payee. *Id.*; App. 1281–82 (Mann Dep. 23:8-24:4). The only court to have substantively discussed what a "third party bank check" means agreed that such a check was simply a bank check that had been indorsed to a new payee. *See United States v. Thwaites Place Assocs.*, 548 F. Supp. 94 (S.D.N.Y. 1982); Def. States' Br. 41–42. No party argues that MoneyGram's Official Checks are bank checks that have been indorsed in this way.

Alternatively, both Professors Gillette and Clark agree that "third party bank check" could simply mean a check drawn on an ordinary checking account. App. 904 (Gillette Rep. ¶ 55); App. 862 (Clark Rep. at 30). This reading is supported by the common contemporaneous usage of a similar term, third party payment services, to refer to those types of ordinary checks. Def. States' Br. 42–43. Again, no party contends that

MoneyGram's Official Checks are ordinary checks drawn on a checking account. *Id.* at 43–45.

For all of these reasons, MoneyGram's Official Checks are not "third party bank check[s]" as that term is used in the FDA.

III. All the Defendant States' Laws Permit the Escheatment of MoneyGram Official Checks.

Delaware does not appear to dispute that most of the Defendant States have state laws authorizing the escheatment of Official Checks. Del. Br. 55–58. It argues that ten States lack such laws, but its arguments are wrong.

Under 12 U.S.C. § 2503, a State is entitled to take custody of instruments subject to the FDA "to the extent of that State's power under its own laws to escheat or take custody of such sum." There is no dispute that all the Defendant States' laws empower them to escheat money orders and traveler's checks. But Delaware argues that ten Defendant States "do not have state laws that empower them to escheat 'similar written instruments' because these States' laws do not mention any negotiable instruments other than money orders or traveler's checks in their empowering statutes." Del.'s Br. 57. Delaware is incorrect. While the state laws at issue do not use the specific term "similar written instruments," each includes provisions that empower the State to take custody of such instruments.

Most of the ten Defendant States identified in Delaware's brief adopted the 1995 version of Uniform Unclaimed Property Act.[4] The 1995 Act broadly defines "property" as a "fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business." Unif. Unclaimed Prop. Act § 1(13) (Unif. Law Comm'n 1995). Notably, "property" includes "draft[s]," among other items. *Id*. § 1(13)(i). And the 1995 Act includes a

[4] The relevant unclaimed property laws of the identified States either adopted the 1995 Uniform Unclaimed Property Act or their laws are substantially similar to the 1995 Act. *See* Code of Alabama §§ 35-12-71(11), 35-12-72(18), 35-12-74(7); Arizona Revised Statutes §§ 44-301(15), 44-302(15), 44-304(7); Arkansas Code §§ 18-28-201(13)(A), 18-28-202(a)(14), 18-28-204(7); Indiana Code §§ 32-34-1-17(b), 32-34-1-20(c)(15), 32-34-1-21(7); Iowa Code §§ 556.1(12)(a)., 556.2A; Kansas Statutes §§ 58-3934(o), 58-3935(a)(16), 58-3936(g); Montana Code §§ 70-9-802(14), 70-9-803(1)(q), 70-9-805(7); Nevada Revised Statutes §§ 120A.113, 120A.500(1)(n), 120A.530(7); Texas Property Code §§ 72.101(a), 72.102; West Virginia Code §§ 36-8-1(13), 36-8-2(a)(17), 36-8-4(7).

provision under which "[a]ll other property" is presumed abandoned if it is unclaimed by the apparent owner after a specified period. *Id*. § 2(15). The Uniform Law Commission's comments confirm the board scope of the 1995 Act, which "continues the general proposition that all intangible property is within the coverage of the Act." *Id*. § 2, cmt.

The 1995 Act also includes rules for taking custody, which provide that property is subject to the custody of the State if "the property is a traveler's check or money order purchased in this state." Unif. Unclaimed Prop. Act § 4(7) (Unif. Law Comm'n 1995). The Uniform Law Commission's comments indicate that this section "states the rule adopted by Congress in 12 U.S.C. sections 2501 *et seq.*" which incorporates "similar written instruments." Unif. Unclaimed Prop. Act § 4, cmt. (Unif. Law Comm'n 1995). This section of the 1981 version of the Uniform Unclaimed Property Act, which was also expressly based on the FDA, included "similar written instrument[s]." App. 728–29. While this language was omitted from the 1995 version of the Uniform Act, the Commission's comments along with the comprehensive definition of "property" show that the Commission intended to include "similar written instruments" within the scope of the Uniform Act.

The ten identified States have unclaimed property laws that empower them to take custody of abandoned MoneyGram Official Checks, whether they are money orders or "similar written instruments." While the States' laws do not specifically mention "similar written instruments," such instruments easily fit within the broad definition of "property" included in each statute. Delaware does not—and cannot—dispute that Official Checks are drafts, and therefore "property" within the meanings of these statutes.

Further, Delaware has provided no support for its argument that a State cannot take custody of "similar written instruments" unless a specific provision for that type of instrument appears in its empowering statute. The provisions allowing these States to escheat money orders and traveler's checks are based on the 1995 Uniform Act, which states the rule in the FDA. It makes no sense to exclude "similar written instruments" from the scope of the States' laws when those law are intended to include "all intangible property." The identified State laws thus provide ample basis for the States to escheat unclaimed Official Checks.

CONCLUSION

The Special Master should recommend that the Court deny Delaware's motion for summary judgment and grant the Defendant States' concurrently filed motion.

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CERTIFICATE OF SERVICE

Counsel of record for Defendant States in Case Nos. 22O145 and 22O146 (consolidated) certifies that on March 8, 2019, this document was served, as required by Case Management Order No. 5, on the following counsel:

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