



SALT Alert!



SALT Alert! 2017-03R: Proposed Delaware Legislation Introduces Additional Unclaimed Property Reforms; If Passed, Will Create Significant Changes for Corporations

On January 12, 2017, [Senate Bill 13](#) (SB 13) was introduced in the Delaware General Assembly—legislation which, if enacted, will make significant changes to Delaware’s unclaimed property laws. The proposed changes follow several years of criticism of the state’s unclaimed property practices by corporations, courts, and others, including a strongly worded opinion issued last summer in *Temple-Inland v. Cook* where the court characterized parts of the Delaware audit program as “a game of ‘gotcha’ that shock[s] the conscience.”^[1] The proposed legislation also adopts some provisions of the 2016 Revised Uniform Unclaimed Property Act (RUUPA).^[2] Some of the key provisions of the proposed changes are covered below.

Look-back Periods, Record Retention, Estimation, and Statute of Limitations

Look-back Periods: In *Temple-Inland*, the fact that the holder was subject to a look-back period exceeding 20 years was a significant source of concern for the reviewing court. SB 13

^[1] See Memorandum Opinion filed June 28, 2016, *Temple-Inland Inc. v. Cook, et al* (1:14-cv-00654)(D. Del.), p. 33. Note, the case was settled prior to any remedy being prescribed by the judge and before the decision could be appealed.

^[2] The Revised Uniform Unclaimed Property Act (RUUPA) was developed by the Uniform Law Commission and updates its 1995 version of model uniform unclaimed property legislation for states. The revised act is available at <http://www.uniformlaws.org/Committee.aspx?title=Revised%20the%20Uniform%20Unclaimed%20Property%20Act>.

shortens the look-back period to 10 years for both exams and the VDA program.^[3] The reduced look-back period does not apply for reports containing fraudulent or willful misrepresentations.^[4] Further, the look-back period runs from the report due in the calendar year in which the audit notification letter was mailed by the state. Therefore, the look-back period for holders already under audit by Delaware will vary depending on the year in which each holder's audit was initiated.

Record Retention: SB 13 also includes a corresponding 10-year record retention requirement, running from the date a report is filed.^[5] This was another specific concern identified by the *Temple-Inland* court.

Estimation: The proposed legislation expressly authorizes the use of extrapolation and statistical sampling when a holder does not retain records.^[6] The new estimation provisions also require coordination between the Secretary of State and Secretary of Finance to devise regulations for an estimation methodology that can be applied consistently between exams and voluntary disclosure programs.^[7] The regulations, which must be promulgated by July 1, 2017, must specify "permissible base periods, items to be excluded from the estimation calculation, aging criteria for outstanding and voided checks, and the definition of what constitutes complete and researchable records."^[8] Interestingly, the bill requires aging criteria for disbursement check property only and does not speak to other types of property, such as accounts receivable credit balances.

Statute of Limitations: SB 13 adopts a version of the RUUPA 10-year statute of limitations barring the State Escheator from commencing an enforcement action more than 10 years after the duty to report, pay, or deliver property arises. The period of limitation is tolled (i.e., suspended) with the delivery of a notice of examination or for willful or fraudulent reporting.^[9]

Audits, VDAs, and Compliance Reviews

^[3] SB 13, §§ 1176(h) and 1177(c)(2). SB 13 is structured such that it makes one change to Title 12 § 1102 of Delaware law and then repeals Subchapters II, III and IV of Chapter 11, Title 12 in their entirety and replaces them with new single subchapter. For ease of locating the new language, citations to the Bill in this Alert will be to the proposed new section of law as contained in Senate Bill No. 13 as released on January 12, 2017.

^[4] SB 13, § 1176(h).

^[5] SB 13, § 1145.

^[6] SB 13, § 1180(a).

^[7] SB 13, § 1180(b).

^[8] *Id.*

^[9] SB 13, § 1157(b).

Expedited Audit: Holders will have the ability to “expedite” any audit authorized prior to the effective date of SB 13 by providing written notice of such request to the State Escheator by July 1, 2017. Under an expedited audit, the Escheator must issue an examination report within *two years* from receipt of the holder’s election for an expedited review. In an expedited audit, the state must abate any penalties and interest that might be due under law, provided that all records requests, testimony, and information are provided within the time frames and in the manner established by the State Escheator.^[10]

VDA Invitations: SB 13 retains a requirement in current law that holders be notified by the Secretary of State of their option to participate in the voluntary disclosure program prior to the commencement of an examination.^[11] However, this limitation *does not apply if Delaware participates in joint examinations initiated by other states at the election of the State Escheator in consultation with the Secretary of State*, or if information is received under Delaware’s False Claims Act.^[12]

Audit Conversion: The bill proposes to allow any holder that is currently subject to an audit by Delaware that was commenced on or before July 22, 2015 to notify the Secretary of State of its intent to enter into the Secretary of State VDA program by July 1, 2017. The look-back period for an audit that is converted to a VDA will be “10 years prior to when the property is presumed abandoned from the calendar year in which the State Escheator provided the original notice of examination.” For example, a holder whose audit notice from the State Escheator was issued in 2009 will have a look-back starting with property issued in 1995 (i.e., 10 years plus the five-year abandonment period), while a holder whose audit notice was issued in 2012 will have a look-back starting with property issued in 1998. However, the option to convert an audit to the VDA program is *not* available for any “securities examinations in which estimation is not required.”^[13]

Compliance Reviews: SB 13 adopts RUUPA § 1001 which permits the State Escheator to request the holder to file a verified report when it believes the holder may have filed an inaccurate, incomplete or false report.^[14] The bill also goes beyond this by granting the Escheator the right to conduct a “compliance review” if the Escheator believes a person has filed an inaccurate, incomplete, or false report. The compliance review is limited to the contents of the report and supporting documentation, and the Escheator must notify the holder within one year of the review of any deficiency owed. A compliance review does *not* preclude participation in the Secretary of State’s VDA program.^[15]

^[10] SB 13, § 1176(c)(1.)

^[11] SB 13, § 1176(a).

^[12] SB 13, § 1176(d)(1)-(2).

^[13] SB 13, § 1176(b).

^[14] SB 13 § 1174(b).

^[15] *Id.*

Records Requests: With respect to traditional unclaimed property audits, SB 13 authorizes the State Escheator to issue administrative subpoenas to require production of records and bring actions in the Court of Chancery to seek enforcement of an administrative subpoena issued.^[16]

Interest & Penalties: SB 13 sets forth a comprehensive, new interest and penalty regime as follows:

- 1) *Interest* will be assessed on any amounts not paid over to the state in a timely manner at the rate of 0.5 percent per month, not to exceed 50 percent of the amount required to be paid, applicable to any property that is reported and remitted after July 1, 2017.^[17] [Current law limits the maximum accumulation to 25 percent.] The interest may be waived by the Secretary of State for a participant in the VDA program as well as for any holder that requests an expedited examination prior to July 1, 2017 (as discussed above) and that acts in good faith to complete the expedited examination.^[18]
- 2) Failure to timely file an unclaimed property report, unless the failure to file is shown to be due to reasonable cause and not willful neglect, will result in a *penalty* equal to the lesser of five percent per month of the amount shown on the report not to exceed 50 percent in the aggregate or \$100 for each day the report is late, but not more than \$5,000.^[19] [This is consistent with current law.]
- 3) Failure to pay the amount of unclaimed property shown on a report by the due date of the report, unless it is shown that the failure is due to reasonable cause and not willful neglect, will result in an additional *penalty* equal to 0.5 percent per month of the amount not paid, not to exceed 25 percent in the aggregate.^[20] [This is consistent with current law.]
- 4) If the State Escheator determines that any portion of an unclaimed property deficiency is due to fraud or willful misrepresentation, a *fraud penalty* of 75 percent of the fraudulent portion will be assessed.^[21] [This is consistent with current law.]
- 5) The State Escheator may assess an *additional civil penalty* against a holder that enters into a contract or arrangement “for the purpose of evading an obligation under the law or otherwise willfully fails to perform a duty imposed under the law in an amount equal to \$1,000 per day not to exceed \$25,000 in the aggregate plus 25 percent of the value of any property that should have been but was not reported or paid as a result of the evasion or failure to perform.”^[22] [This is a new penalty authorized in SB 13.]

The State Escheator may, for good cause, waive any of the penalties listed in items (2) through (5) above and may, for good cause, waive 50 percent of the interest calculated under (1) above.^[23]

^[16] SB 13, § 1175.

^[17] SB 13, § 1187(a).

^[18] *Id.*

^[19] SB 13, § 1187(b).

^[20] SB 13, § 1187(c).

^[21] SB 13, § 1187(d).

^[22] SB 13, § 1188.

^[23] SB 13, § 1189.

Jurisdiction and Priority Rules

Last Known Address: The state of the last known address of the property owner is determinative of the state considered to have a claim to property that is considered to be abandoned and escheatable. SB 13 changes current Delaware law and incorporates aspects of the RUUPA determinations of an owner's last known address by indicating that it is the "description, code, or other indication of the location of the owner on the holder's book and records which identifies the state of the last known address of the owner."^[24] This is a slight departure from the "address sufficient for delivery of mail" standard that has been used by Delaware for years; the change may create an issue for holders undergoing multi-state examinations where competing definitions of "last known address" may exist among participating jurisdictions.

Foreign Property: SB 13 includes a new provision indicating that unclaimed property with an owner having an address in a foreign country is escheatable to Delaware if the holder is domiciled in Delaware.^[25]

Property Types and Presumptions of Abandonment

Gift Cards, Loyalty Programs, and Virtual Currencies: While the proposed law continues to make gift cards subject to the unclaimed property procedures, loyalty cards are excluded from the definition of "property" subject to reporting. A loyalty card is defined as "a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program that may be used or redeemed only to obtain goods or services or a discount on goods or services. The term does not include a record that may be redeemed for money or otherwise monetized by the issuer." The legislation also adopts a RUUPA provision including virtual currencies in the operative definition of "property," but does not exclude from that definition certain types of "game-related digital content."^[26]

Presumption of Abandonment: SB 13 adopts in part the list of activities in RUPPA which constitute an owner's indication of interest in property which tolls the abandonment period from running.^[27] SB 13 stops short, however, of adopting the "catch all" indication of interest section in RUPPA providing that "any other action by the apparent owner which reasonably demonstrates to the holder that the apparent owner knows the property exists." There are additional, specific presumption of abandonment considerations for financial services firms and insurers.

^[24] SB 13, § 1139(a).

^[25] SB 13, § 1141(a)(3).

^[26] Under the 2016 RUUPA, "game-related digital content" includes digital content that only exists in an electronic game or electronic-gaming platform. It includes game-play currency, denominations of points (i.e., gems, tokens, etc.), and digital codes that can be used or are redeemable only within a game or platform. The RUUPA excludes these items from the definition of "property". See 2016 RUUPA § 102 (24)(C)(ii).

^[27] SB 13, § 1136.

Although SB 13 has sought to incorporate several aspects of the 2016 RUUPA, there are some notable RUUPA provisions which have not made it into the proposed legislation as well as areas where SB13 diverges from RUPPA. Among them:

- The RUUPA the definition of “property” excludes ABLE accounts (529A) and game-related digital content while giving states the option to exclude “in-store merchandise credits” from the definition.^[28] SB 13 does not exclude any of these items from the definition of property, meaning this type of property could be considered as unclaimed property under the legislation.
- The RUUPA defines “knowledge of death” with respect to life insurance, endowment insurance or annuity contracts. SB 13 defines the phrase without reference to a particular property type,^[29] and specifically applies a “knowledge of death” standard to certain life insurance and annuities as well as individual retirement arrangements.^[30]
- SB 13 does not specifically address certain property types such as Health Savings Accounts, UGMA/UTMA accounts or other tax deferred vehicles that are addressed specifically in RUUPA.^[31] The lack of statutory guidance pertaining to these property types may perpetuate holder confusion and cause premature loss of an owner’s property value.

This is not an exhaustive list of potential changes to Delaware law under SB 13, and several changes not reviewed here affect holders in specific industries (e.g., banks, broker/dealers, securities issuers, and retailers). Companies and practioners should stay tuned as KPMG continues to highlight specific industry impacts as well as the progress and any amendments to SB 13 as it moves through the legislative process. For additional information, visit [KPMG Unclaimed Property](#) or contact one of our dedicated unclaimed property professionals listed below.

Contacts

For more information, please contact:

Name	Office	Phone
Dennis Prestia	New York	(212) 872-6891
Angela Gholson	New York	(212) 872-7910
Samantha Petersen	Denver	(303) 382-7220
Nina Renda	Short Hills	(973) 912-6528
Will King	Dallas	(214) 840-6107

^[28] RUUPA § 102 (24)(C)(i), (ii), and (iv)

^[29] RUUPA § 211, SB 13 § 1137.

^[30] SB 13, §§ 1133(7) and 1133(15).

^[31] RUUPA §§ 203 and 204.



Chris Sray	Pittsburgh	(412) 232-1565
Karen Anderson	Indianapolis	(317) 577-9530
Jenna Fenelli	Short Hills	(973) 912-4546

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