



# SALT Alert!



## SALT Alert! 2017-04: Delaware Governor Signs Significant Unclaimed Property Reforms Into Law

On February 2, 2017, Delaware Governor Carney signed Senate Bill (SB 13) into law. The new law, which became effective upon being signed, makes sweeping reforms to Delaware's unclaimed property statutes. These changes follow years of criticism of the state's unclaimed property practices, 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."<sup>[1]</sup> Further, the law incorporates select provisions from the 2016 Revised Uniform Unclaimed Property Act (RUUPA).<sup>[2]</sup>

The changes affect the compliance obligations of businesses, as well as how the state enforces its unclaimed property law via audits and through participation in its voluntary disclosure agreement (VDA) program. Significant provisions of the law are highlighted below.

### Due Diligence and Reporting

*Due Diligence:* The new law includes a notice mailing requirement for all property types for items valued at \$50 or more. The letter must be sent to the owner by first class mail within 60 to 120 days prior to filing a report of property presumed to be abandoned, required to be filed annually by holders with property owing to the state.<sup>[3]</sup>

*Jurisdiction and Last Known Address:* Pursuant to the rule established by the U.S. Supreme Court, the state of the last known address of the property owner dictates the jurisdiction that may take possession of unclaimed property. Delaware also incorporates aspects of the RUUPA provision permitting an owner's last known address to be determined by a "description, code, or other indication of the location of the owner on the holder's book and

<sup>[1]</sup> 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.

<sup>[2]</sup> 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=Revise%20the%20Uniform%20Unclaimed%20Property%20Act>>.

<sup>[3]</sup> SB, 13, § 1148

records which identifies the state of the last known address of the owner.”<sup>[4]</sup> This is a departure from the “address sufficient for delivery of mail” standard that was previously employed by Delaware. SB 13 also includes a new provision indicating that unclaimed property of an owner with an address in a foreign country is escheatable to Delaware if the holder is domiciled in Delaware.<sup>[5]</sup>

*New Reporting Method:* Beginning March 1, 2018, all reports must be in a “web-based record.”<sup>[6]</sup> This likely will require that reports be uploaded to an internal portal established by the state, but the exact method required will presumably be determined by the State Escheator.

*Electronic Contact:* The law adopts two RUUPA provisions that together allow electronic communication between the owner of the property and the holder (or the holder’s agent) regarding the property to constitute “owner contact” that forestalls the presumption of abandonment.<sup>[7]</sup>

*Gift Cards and Loyalty Programs:* Gift cards continue to be subject to the state’s unclaimed property reporting and remittance requirements, but loyalty cards are excluded from the definition of “property” subject to reporting.<sup>[8]</sup>

## Record Retention and Statute of Limitations

*Record Retention:* The new law establishes a 10-year record retention requirement, running from the date a report is filed.<sup>[9]</sup> The absence of a specific retention period in Delaware’s prior statutes was a specific concern of the court in the *Temple-Inland* case.

*Statute of Limitations:* The State Escheator is barred from commencing an enforcement action more than 10 years after the duty to report, pay, or deliver property arises. This period is suspended with the delivery of an audit notice or for willful or fraudulent reporting.<sup>[10]</sup>

## Audits, VDAs, Compliance Reviews and Penalties / Interest

*Audit Look-back Periods:* In reaction to the *Temple-Inland* decision, the look-back period (i.e., the period open for examination under an audit by the state) is reduced to 10 years for both audit examinations and the VDA program.<sup>[11]</sup> The reduced look-back period does not apply to reports containing fraudulent or willful misrepresentations.<sup>[12]</sup> The look-back period runs from the report due in the calendar year in which the audit notification letter was mailed or participation in the VDA program was requested by the holder.

*Records Requests:* With respect to traditional unclaimed property audits, the State Escheator is authorized to issue administrative subpoenas to require production of records by the holder

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<sup>[4]</sup> SB 13, § 1139(a).

<sup>[5]</sup> SB 13, § 1141(a)(3).

<sup>[6]</sup> SB 13, § 1142 (a)

<sup>[7]</sup> SB 13, § 1130 (19) “record” and § 1136. The owner is also required to contemporaneously make and preserve a record of the fact of the owner’s communication.

<sup>[8]</sup> SB 13 § 1130 (18). Loyalty card is defined in § 1130 (11) 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.”

<sup>[9]</sup> SB 13, § 1145.

<sup>[10]</sup> SB 13, § 1156(b).

<sup>[11]</sup> SB 13, §§ 1172(h) and 1173(c)(2).

<sup>[12]</sup> SB 13, § 1172(h).

and bring actions in the Court of Chancery to seek enforcement of an administrative subpoena.<sup>[13]</sup>

*Estimation:* The use of extrapolation and statistical sampling in an audit when a holder does not retain records is now expressly authorized in Delaware law as a result of SB 13.<sup>[14]</sup> The new provisions also require coordination between the Secretary of State and Secretary of Finance to devise estimation methodology regulations by July 1, 2017 that can be applied consistently between the audit and voluntary disclosure programs.<sup>[15]</sup> Interestingly, the new law requires that aging criteria be established for disbursement checks, but not for other property types such as accounts receivable credit balances.

*Expedited Audit:* Holders now have the ability to “expedite” any audit authorized prior to February 2, 2017 by providing a written request to the Escheator within 60 days from the adoption of the new estimation regulations referenced above. Under an expedited audit, the Escheator must issue an audit examination report within *two years* from receipt of the holder’s written request to expedite the audit and must abate any penalties and interest due, provided all requested records, testimony, and information are provided by the holder within the time frames and in the manner established by the Escheator.<sup>[16]</sup>

*Audit to VDA Conversion:* Businesses that are currently undergoing an audit commenced on or before July 22, 2015, are permitted to convert the audit into a VDA program review by notifying both the State Escheator and the Secretary of State of their intent to enter into the VDA program by July 1, 2017. Further, the bill provides that holders may not convert their audits into VDA reviews if such notice “is not received within 60 days of the adoption” of estimation regulations. Based on this guidance, the amount of time allowed for holders to make a decision on whether to elect the VDA conversion option appears to be dependent on the date the estimation regulations are promulgated by the state. It will be important to review the proposed estimation methodology in deciding to possibly convert to a VDA. 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.”<sup>[17]</sup>

*VDA Invitations:* The new law retains a requirement from prior law that holders be notified of their ability to participate in the VDA program prior to the initiation of an audit.<sup>[18]</sup> However, this requirement *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.<sup>[19]</sup>

*Compliance Reviews:* The new law 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.<sup>[20]</sup> However, the law goes further than RUUPA by granting the Escheator the right to also conduct a “compliance review” if the Escheator believes a business has filed an inaccurate, incomplete, or false report. A compliance review does *not* preclude the holder from participation in the VDA program.<sup>[21]</sup>

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<sup>[13]</sup> SB 13, § 1171 (3).

<sup>[14]</sup> SB 13, § 1176(a).

<sup>[15]</sup> SB 13, § 1176(b).

<sup>[16]</sup> SB 13, § 1172(c)(2)

<sup>[17]</sup> SB 13, § 1172(b).

<sup>[18]</sup> SB 13, § 1172(a).

<sup>[19]</sup> SB 13, § 1172(d)(1)-(2). The False Claims Act is in Del. Code, Title 6, § 1201 et seq.

<sup>[20]</sup> SB 13 § 1170(b).

<sup>[21]</sup> *Id.*

*Interest & Penalties:* A comprehensive, new interest and penalty regime became part of the Delaware unclaimed property law through the passing of SB 13 and is detailed in the table below.

Interest or Penalty	Infraction	New Law	Prior Law
<b>1. Interest</b>	Failing to pay property in a timely manner	0.5% per month up to 50% of the amount to be paid applicable to property reported and remitted after July 1, 2017. Interest may be waived by the Secretary of State for participants in the VDA program or by the Department of Finance for participants in an expedited audit as long as the participants acted in good faith to complete the expedited audits. <sup>[22]</sup>	Limited the maximum accumulation to 25%
<b>2. Penalty</b>	Failing to timely file an unclaimed property report	Equal to the lesser of 5% per month of the amount shown on the report not to exceed 50% in the aggregate or \$100 for each day the report is late, but not more than \$5,000. <sup>[23]</sup>	Same
<b>3. Penalty</b>	Failure to pay the amount of unclaimed property shown on a report by the report due date	An additional <i>penalty</i> equal to 0.5% per month of the amount not paid, not to exceed 25 percent in the aggregate. <sup>[24]</sup>	Same
<b>4. Penalty</b>	Fraud or willful misrepresentation related to an unclaimed property deficiency	A <i>fraud penalty</i> of 75% of the fraudulent portion will be assessed. <sup>[25]</sup>	Same
<b>5. Penalty</b>	An <i>additional civil penalty</i> may be assessed 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”	An amount equal to \$1,000 per day not to exceed \$25,000 in the aggregate plus 25% 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.” <sup>[26]</sup>	New penalty not in prior law
<b>6. Waiver of Interest</b>	All above	The State Escheator may, for good cause, waive any of the penalties listed in items (2)	

<sup>[22]</sup> SB 13, § 1183(a).

<sup>[23]</sup> SB 13, § 1183(b).

<sup>[24]</sup> SB 13, § 1183(c).

<sup>[25]</sup> SB 13, § 1183(d).

<sup>[26]</sup> SB 13, § 1184.

**and/or  
Penalties**

through (5) above and may, for good cause, waive 50% of the interest calculated under (1) above.<sup>[27]</sup>

This is not an exhaustive list of changes to Delaware law as a result of the passage of SB 13, and several changes not covered above affect holders in specific industries. For additional information, visit [KPMG Unclaimed Property](#) or contact KPMG's Unclaimed Property Team Leaders as noted below.

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## Footnotes

<sup>1</sup> 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.

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<sup>3</sup> SB 13, § 1148.

<sup>4</sup> SB 13, § 1139(a).

<sup>5</sup> SB 13, § 1141(a)(3).

<sup>6</sup> SB 13, § 1142(a).

<sup>7</sup> SB 13, § 1130(19) "record" and § 1136. The owner is also required to contemporaneously make and preserve a record of the fact of the owner's communication.

<sup>8</sup> SB 13, § 1130(18). Loyalty card is defined in § 1130(11) as "a record given without 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."

<sup>9</sup> SB 13, § 1145.

<sup>10</sup> SB 13, § 1156(b).

<sup>11</sup> SB 13, §§ 1172(h), 1173(c)(2).

<sup>12</sup> SB 13, § 1172(h).

<sup>13</sup> SB 13, § 1171(3).

<sup>14</sup> SB 13, § 1176(a).

<sup>15</sup> SB 13, § 1176(b).

<sup>16</sup> SB 13, § 1172(c)(2).

<sup>17</sup> SB 13, § 1172(b).

<sup>18</sup> SB 13, § 1172(a).

<sup>19</sup> SB 13, § 1172(d)(1), (d)(2). The False Claims Act is Del. Code, tit. 6, § 1201 *et seq.*

<sup>20</sup> SB 13 § 1170(b).

<sup>21</sup> *Id.*

<sup>22</sup> SB 13, § 1183(a).

<sup>23</sup> SB 13, § 1183(b).

<sup>[27]</sup> SB 13, § 1185.

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- <sup>24</sup> SB 13, § 1183(c).
  - <sup>25</sup> SB 13, § 1183(d).
  - <sup>26</sup> SB 13, § 1184.
  - <sup>27</sup> SB 13, § 1185.

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