



Unclaimed Property ADVISORY ■

JULY 18, 2017

Delaware Reworks Its Recent Unclaimed Property Overhaul Legislation

On June 29, 2017, Delaware Governor John Carney signed into law [Senate Substitute 1 for Senate Bill 79](#), which revises parts of [Senate Bill 13](#), the major unclaimed property legislation passed earlier this year.

Perhaps most significantly, SS1/SB 79 gives the Secretary of Finance a five-month extension, to December 1, 2017, to publish the required estimation methodology regulations for audits and voluntary disclosure agreements (VDAs). This was in response to the proposed regulations issued in April from the Department of Finance, which did not correspond to those proposed by the Department of State. The Department of Finance has not published revised proposed regulations in response to numerous written comments that it received in response to the April proposed regulations, and it remains to be seen whether a second set of proposed regulations will be published by the department. From what we understand, it is likely that these regulations will be finalized sometime before December 1. The deadline for a holder to convert an audit to a VDA or to an expedited audit remains 60 days following publication of the regulations.

The new law also includes several holder-friendly updates to Delaware's unclaimed property law. First, it extends the effective date of the due diligence requirements enacted by SB 13 to July 1, 2017. Delaware requires holders to send notice to the owner by first-class mail not more than 120 days nor less than 60 days before filing the annual report if the holder has an address for the owner that its records do not show to be invalid and the value of the property is at least \$50, though there is no minimum value required for securities. Although the time for performing due diligence for a holder's 2017 report has long since expired (assuming no extension), the practical effect of this provision will be to shelter a holder from a penalty to the extent it did not in fact perform due diligence this year. Second, it is clear that the deadline to convert an audit to a VDA is 60 days following final adoption of the Department of Finance's estimation regulations (the wording of SB 13 was confusing in this regard). The law also clarifies that Delaware will indemnify and defend a holder against a foreign jurisdiction's claims for property paid or delivered in good faith to Delaware.

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Additionally, SS1/SB 79 expands the State Escheator's authority to waive interest. Under SB 13, the State Escheator could only waive, for good cause, up to 50% of the calculable interest (outside of the expedited audit process). Among other changes, the State Escheator may now waive the entire amount of calculable interest for any property remitted to Delaware as part of a holder's annual filing.

Secretary of State Estimation Methodology Regulations

Despite the General Assembly providing an extra five months for the Department of Finance to adopt estimation methodology regulations through SS1/SB 79, the Department of State has issued its own set of final regulations, effective July 11, 2017, governing estimation for the VDA program. A few observations about the Department of State's final regulations:

- The Department of State's regulations do not mandate a specific estimation methodology; instead, the Department of State and holder must agree on the sampling, projection, and estimation techniques used by the holder.
- As a result of SB 13, Delaware requires holders to retain records for 10 years plus the dormancy period. If the holder does not have sufficient records for these years, the Department of State and the holder must agree on the records to be used for the base period, which is the time period for which the holder has complete and researchable records.
- The base period must include at least the two oldest continuous years for which the holder has complete and researchable records outside the dormancy period. The holder and Department of State may agree to include nondormant periods based on the holder's specific circumstances. The Department of State expects the holder to have complete and researchable records for at least the seven to eight years before the holder enrolled in the VDA program.
- The regulations specifically exclude some property from the estimation population:
 - Items payable to a U.S. department or agency.
 - Funds returned in the normal course of business before enrolling in the VDA program.
 - Checks that are outstanding or voided less than 90 days after issuance.
- Notably, the regulations do not exclude property that has historically been included in Delaware's estimation methodology, such as amounts owed to payees in states other than Delaware, which partially formed the basis for the district court's conclusion in *Temple-Inland* that this historical methodology was unconstitutional.
- In a change from its proposed regulations, the Department of State's final regulations explicitly permit holders to use statistical sampling for aging accounts receivable credits if the population of identified credits is large enough.
- Finally, the new regulations permit a holder to determine the scope of entities and property types included in the VDA, but after it establishes the entity scope, the holder needs the Department of State's consent to add additional entities.

The regulations apply to all ongoing Department of State voluntary disclosures, but the failure of the department to conform to the regulations before July 11 will not invalidate a previously settled VDA. It also remains to be seen whether the VDA regulations will align with the forthcoming final audit regulations.

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