
Major Reforms Proposed in Unclaimed Property Legislation Introduced in Delaware Senate

[Senate Bill 13](#), cosponsored by Senator Bryan Townsend and Representative Bryon Short, on January 12, 2017, is a major overhaul of Chapter 11, Title 12 of the Delaware Code, Delaware's unclaimed property statute, and is aimed at both updating Delaware law in light of the 2016 Revised Uniform Unclaimed Property Act ("RUUPA") developed by the Uniform Law Commission¹ and at addressing certain constitutional infirmities raised by the Delaware District Court's recent decision in *Temple-Inland, Inc. v. Cook*, 2016 WL 3536710, at *1 (D. Del. Jun. 28, 2016) ("*Temple-Inland*"). If enacted, S.B. 13 will change the Delaware unclaimed property landscape significantly, requiring close attention from holders. A summary of some of the major proposed amendments is below.

Reduced Lookback Period, Express Record Retention Period, Estimation and Statute of Limitations

Two of the most problematic aspects of Delaware's unclaimed property regime for the *Temple-Inland* Court were the audit lookback period, which, as applied, could go back decades, and the lack of an express record retention period. S.B. 13 addresses these concerns head on, proposing a reduced, ten year lookback period for both audits and the Secretary of State's Voluntary Disclosure Agreement program ("VDA"), and a corresponding ten year holder record retention period, from the date a holder submits a report. Also in response to *Temple-Inland*, the proposed legislation requires that, by July 2017, the State Escheator promulgate regulations defining the proper scope and use of estimation where holder records are lacking. In addition, the proposed legislation incorporates a version of RUUPA's ten year statute of limitations for the state to commence an action or proceeding against a holder. This straightforward ten year period, which begins to run on the date the holder's duty to report arose, replaces the previous less certain provision, which the *Temple-Inland* Court noted could be easily avoided by the state. These would all be positive developments for holders, providing clarity with respect to record retention and the appropriate limitations period, as well as shortening the scope of audits and the VDA program in conformance with the practices of most other states.

Ability to Convert Pending Audits into the VDA Program or on to an Expedited Trajectory

In an apparent effort to move toward resolution of several hundred pending audits that appear stalled as the result of the legal uncertainty arising from the *Temple-Inland* litigation, S.B. 13 permits certain groups of holders to, either convert the audit into the VDA program, or place the audit on an expedited two year track toward final resolution. The conversion into the VDA program is limited to those holders under audit as of July 22, 2015, while the expedited audit is available to all holders currently under audit.

Holders falling into either category should consider these options, as they reflect a willingness on behalf of the state to resolve pending audits on mutually agreeable terms. Holders have until July 1, 2017 to make such elections. Holders

¹ The Uniform Law Commission RUUPA Drafting Committee is Co-Chaired by Morris Nichols Partner and Unclaimed Property Group Practice Leader [Michael Houghton](#)

should note that, in the event they do not choose one of these options, they will remain subject to mandatory interest, 50% of which is waivable at the discretion of the State Escheator.

Provisions Incorporated from RUUPA

a. Definitions

As part of the amendments to Delaware's unclaimed property statute, S.B. 13 adopts a number of RUUPA definitions, including, "business association," "domicile," "electronic," "financial organization," "insurance company," "loyalty card," "mineral," "municipal bond," "net card value," "owner," "record," "worthless security" and "virtual currency." However, S.B. 13 modifies some of these definitions in important ways. For example, S.B. 13 leaves out RUUPA's fourth definition of "domicile" which provides that, for holders such as partnerships, the "domicile" is the principal place of business. In addition, although incorporating RUUPA's definition of "virtual currency," S.B. 13 leaves out some of the exclusions from the definition – namely, "game-related digital content." The exclusion from the definition of unclaimed property for "loyalty card[s]," however, is maintained, an important consideration for holders who employ promotional items such as reward points as part of their business.

b. Judicial Review – Direct Appeal to the Court of Chancery

RUUPA provides a series of options for holders who wish to appeal liability decisions of state unclaimed property administrators. S.B. 13 incorporates the last option, which is a direct appeal to state court – the Court of Chancery – within 90 days of the State Escheator's unclaimed property liability determination. Significantly, the standard of review on appeal provides that findings of fact are reviewed so as to ensure they are "the product of an orderly and logical deductive process rationally supported by substantial, competent evidence on the hearing record." Errors of law are reviewed *de novo*, and such review by the Court of Chancery now specifically includes questions of state and federal constitutional law related to the unclaimed property examination, such as those faced by the *Temple-Inland* Court. Holders should welcome this direct, broad appeal to the Court of Chancery, as it bypasses the current, multi-step regime involving a lengthy administrative appeals process, with limited Court of Chancery review.

c. Indication of Owner Interest in Property

S.B. 13 adopts a slightly edited version of RUUPA Section 210, which provides a specific list of owner activities that indicate an owner's interest in property, and prevent the running of the dormancy period. Such activities include written or oral communication concerning the property, accessing account information, and presentment of a check representing the owner's interest in the property. Noticeably absent from S.B. 13 is RUUPA's catchall indication of ownership interest, defined as "any other action by the apparent owner which reasonably demonstrates to the holder that the apparent owner knows the property exists."

d. Owner Address and Priority Rules

RUUPA's priority rule scheme and the related provision establishing the determination an owner's last-known address have been incorporated into S.B. 13 with some variation. Delaware's current statute does not expressly spell out when the State Escheator may take custody of property. Although Delaware has always purported to operate under the priority rules established by the U.S. Supreme Court in the *Texas v. New Jersey* line of cases, the inclusion of RUUPA's priority rule provisions clears up certain contested issues, such as prohibiting Delaware, as the second priority rule state, from taking possession of property where another state's statute expressly exempts the property in question. The incorporation of RUUPA's determination of owner address provision also provides clarity, however, S.B. 13 excludes certain language permitting the use of zip codes to establish the state of an owner's last known address.

e. Verified Holder Report and Compliance Review

S.B. 13 adopts RUUPA Section 1001, which provides state administrators with the ability to require holders to submit a verified unclaimed property report, where the holder has, either not submitted a report, or the administrator believes that the report that was filed is inaccurate, incomplete or false. However, the proposed legislation alters this RUUPA provision, by creating an option for the State Escheator to conduct what is termed a “compliance review.” Under the compliance review, the State Escheator is authorized to request up to two subsequent reports filed by the holder, and to review the books, papers and other records of the holder and any agent, representative, subsidiary or affiliate of the holder. This is an entirely new concept and it remains to be seen how such compliance reviews will operate in practice.

f. Disposal of Securities

Although incorporating portions of RUUPA Section 702, which deals with the disposal of securities delivered to state administrators, S.B. 13 has deleted the provision which provides a three year waiting period, before the State Escheator may sell such securities. In its place, S.B. 13 provides an eighteen month period during which the state shall compensate the owner of a sold security with, either a replacement security, or the market value of the security at the time the claim was filed.

g. Life Insurance Proceeds – Knowledge of Death

Although not incorporating the full extent and detail of RUUPA Section 211, S.B. 13 adopts the overarching concept of “knowledge of death,” with respect to the dormancy trigger for life insurance proceeds. Specifically, S.B. 13 provides that “knowledge of death” may be identified “through any source,” and provides the examples of a “declaration of death,” “a death certificate” and the comparison of the holder’s records against the Social Security Death Master File.

h. Confidentiality of Information

Starting on March 1, 2018, S.B. 13 would require that all unclaimed property reports be submitted solely via electronic, web-based means. Missing from S.B. 13 is Article 14 of RUUPA, which concerns the protection of confidential information submitted as part of holder reporting and remitting obligations. Protections afforded under Article 14 to holders, owners, and other persons whose confidential information may be contained in such reports, include the requirement that state administrators take steps to prevent data breaches, and, in the event a breach does occur, provide prompt notice of any data breaches, and to indemnify the holder for any such breach.

Material Provisions Retained from Current Delaware Statute

a. Cost of Merchandise, Goods or Services Exemption

Under S.B. 13, holders who are issuers of gift cards maintain the ability to subtract the maximum cost of merchandise – and now, goods or services – when reporting and remitting unredeemed gift card funds. This is a slight change from the current statute. The ability to subtract the cost of merchandise (and now, goods or services) is a unique feature of the current Delaware statute and does not have an analogue in RUUPA.

b. Anti-Limitations Provisions

Like the current Delaware statute, RUUPA, and most other states’ unclaimed property statutes, S.B. 13 contains a provision expressly preventing contracts from impacting holder reporting obligations. This “anti-limitations” provision operates such that, although a contract may terminate the owner’s right to property and, thus, the holder’s obligation to the owner, the owner must still report any unclaimed property arising under the contract to the state.

Looking Forward

Significant changes to Delaware's unclaimed property practices will result, when S.B. 13 is enacted. There are many potential benefits to holders arising from this proposed legislation, as well as areas of uncertainty. Holders should make sure they are in the best position to take advantage of and meet these changes, if and when they do come.

Please contact Morris Nichols attorneys in the Unclaimed Property Counseling Group if you would like a more detailed discussion of S.B. 13 or to discuss the implications of these amendments.

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