
Second Leg of Unclaimed Property Reform Legislation Passed by the Delaware Legislature

On June 16, 2015, [Senate Bill No. 141](#) was introduced in the Delaware State Senate. In the early morning hours of July 1, 2015 (with the Delaware “legislative calendar” still reading June 30, 2015) this legislation, which had already passed the State Senate, passed the Delaware House and awaits Governor Jack Markell’s signature. The speed with which this legislation passed indicates that Delaware is serious about reforming its Unclaimed Property Program.

S.B. 141 proposes what may well be the most important statutory changes ever made to the existing Delaware Unclaimed Property Program. The second of two bills introduced this legislative session, Senate Bill No. 141 incorporates a number of the recommendations of a Legislative Task Force established by the Delaware General Assembly in 2014 to review and make recommendations to improve fairness and foster compliance with Delaware’s Unclaimed Property Program.

Morris Nichols partner Michael Houghton served as a member of the Task Force and has led the charge for significant reform of the Delaware Unclaimed Property Program.

The initial statutory change arising from various recommendations of the Task Force was Delaware Senate Bill No. 11, signed into law on January 29, 2015, which constrains Delaware’s retention and use of unclaimed property contingent fee auditors, amends the Delaware administrative appeal process relating to unclaimed property, and requires the State to promulgate a manual and create standards governing the conduct of unclaimed property examinations by December 31, 2015.

What changes does Senate Bill No. 141 propose?

The Biggest Change – The VDA Program Is Made Permanent – No Company Is Audited Unless It Has First Been Invited Into the VDA Program – and Has Declined to Enter the Program.

Perhaps the most significant change to the Delaware Unclaimed Property Law offered by this bill is that no Delaware company can be audited by the State unless the company has first been notified in writing by the Delaware Secretary of State (“SOS”) that it may enter into a voluntary disclosure program (“VDA”) administered by the SOS. (Section 1). This effectively extends the successful SOS program that has been in place for several years, and allows companies voluntarily to assess their potential liability for review by the State, with shorter “look-back” periods (under the current program, 1993 and 1996), than those employed in audits by the State’s contingent fee contract auditors which typically look-back to 1981.

Under Senate Bill No. 141, if a company does not enter into the SOS VDA program within 60 days after a request to enter has been mailed by the Delaware Secretary of State, the company “will be referred to the State Escheator for examination”. (Section 3)

Also, under this legislation, effective July 1, 2015, the **Delaware Division of Revenue will no longer unilaterally select companies for audit. Rather, only those companies that have received the express written invitation to enter the SOS VDA program, and have had the chance to voluntarily report their unclaimed property liability to Delaware – and declined to participate – will be subject to audit by the State.**

Modifications to VDA Look-Back Period

Under the new legislation, companies who enter the SOS VDA program after September 30, 2014 and prior to December 31, 2016 would receive the benefit of a modified look-back for their unclaimed property liability to 1996. For new entrants into the VDA program, the **look-back is 19 years prior to the date on which the company enters into the program, three years shorter than the new 22 year look-back for audits.** For example, companies entering into the VDA program in 2017 will enjoy a look-back to 1998.

While it is expected that companies in the program will either make payment, or enter into a payment plan, with the State within two years of the date of entry into the program, the legislation would give the Secretary of State discretion to amend the date by which payment must be made to the State. In addition, the legislation makes clear that companies that were previously enrolled in the SOS VDA program, and either formally withdrew or were removed by the SOS for failure to work in good faith to complete the VDA program, cannot re-enter the VDA program. (Section 4)

New and Shorter Audit Look-Backs

For all pending unclaimed property audits, the review or look-back period for which liability may be assessed by the State would be 1986, a full five years shorter than the period currently applies to audits pending as of June 30, 2015. (Section 1) Audits commenced subsequent to July 1, 2015, but on or prior to December 31, 2016 would have an even shorter look-back period - to 1991.

In addition, for audits commenced on or after January 1, 2017, the proposed audit look-back period would be 22 years prior to the calendar year in which a company is provided written notice of the examination. As a result, audits commenced in 2017, would have a shortened 22 year look-back to 1995 – not a 34 year look-back to 1981, as provided under current Delaware law. As a result of this forward “rolling” 22 year look-back, Delaware companies would no longer face the lengthening of the review period with each passing year, since a fixed date – 1981 – is no longer the basis for review.

The proposed modification of the audit look-back is significant as it would allow companies to avoid 12 years of what is almost always “estimated” liability. It is this kind of estimated liability that has inflamed the national corporate community and is the basis for pending litigation challenging the Delaware Unclaimed Property Program brought by holders against the State of Delaware. Moreover, this change begins to move Delaware closer to the more conventional examination review periods found in the various versions of the Uniform Unclaimed Property Act, which forms the basis of the unclaimed property laws of more than 40 states.

Annual “Reminder” from the State Escheator of a Company’s Requirement to File Unclaimed Property Report with Delaware

In an effort to make Delaware’s program more “user friendly”, the legislation provides that the State Escheator shall send a notice, no later than 120 days prior to the State’s March 1 unclaimed property report deadline, to all those who have filed reports in the last five years, notifying them of their “apparent obligation” to file a report, based on their prior filing history. (Section 6). And now, a designated employee of the company who will serve as the contact with the State must be identified in each report and any change in contact, or contact information, must be provided to the State. (Section 6)

Reinstatement of Interest – But with a Reduced Aggregate Cap of 25%

S.B. 141 would reinstate Delaware’s ability to assess interest at a rate of 0.5% per month on outstanding unpaid amounts of unclaimed property, but cap the total interest at 25% of the amount required to be paid – down from the 50% cap that was previously found in the Delaware Code, until eliminated in 2014. (Section 2). The reinstatement of interest – a State

pre-requisite for this legislation to be introduced – should make the SOS VDA program, in which no interest is assessed, even more attractive to the corporate community.

Conclusion

It is expected the Governor will sign S.B. 141 into law in the near future.

While S.B. 141 has been criticized by some as not going far enough, it clearly demonstrates significant progress in rebalancing the Delaware Unclaimed Property Program. S.B. 11 enacted in January 2015 mandates that by December 31, 2015 a detailed audit manual containing procedural guidelines and an update of regulations governing unclaimed property, to ensure greater transparency and predictability for holders in audits, be promulgated by the Delaware Division of Revenue with input from appropriate stakeholders and interested parties. This process offers the next major vehicle for additional unclaimed property reform in Delaware.

► Morris Nichols Unclaimed Property Group



MICHAEL HOUGHTON
PARTNER

(302) 351-9215 T
(302) 425-4675 F
mhoughton@mnat.com



WALTER C. TUTHILL
PARTNER

(302) 351-9204 T
(302) 425-3005 F
wtuthill@mnat.com



DONNA L. CULVER
PARTNER

(302) 351-9208 T
(302) 425-4672 F
dculver@mnat.com

**MORRIS
NICHOLS
ARSHT &
TUNNELL** mnat.com   (302) 658-9200
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899-1347

Copyright © Morris, Nichols, Arsht & Tunnell LLP. These materials have been prepared solely for informational and educational purposes, do not create an attorney-client relationship with the author(s) or Morris, Nichols, Arsht & Tunnell LLP, and should not be used as a substitute for legal counseling in specific situations. These materials reflect only the personal views of the author(s) and are not necessarily the views of Morris, Nichols, Arsht & Tunnell LLP or its clients.