

## Major Changes to Delaware's Unclaimed Property Practices Underway, as Governor Signs Senate Bill 13 into Law

On February 2nd, 2017, Governor John Carney signed into law [Senate Bill 13](#) ("S.B. 13") which rapidly passed through both the Delaware Senate on January 19th, and the Delaware General Assembly on January 26th. S.B. 13, which is a major overhaul of Delaware's unclaimed property statute, remains largely unchanged from the version that was introduced in the Senate, retaining the dual aims of updating Delaware law in light of the 2016 Revised Uniform Unclaimed Property Act ("RUUPA") developed by the Uniform Law Commission<sup>1</sup> and of 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*"). The sole introduced and passed amendment, [Senate Amendment 1](#) ("S.A. 1"), makes mostly technical changes, however, some of the changes are more substantive and of note, such as the removal of "virtual currency" from the definition of "property" as well as alterations to certain owner indication of interest provisions. Now enacted, S.B. 13 alters the Delaware unclaimed property landscape significantly, and holders should make sure to give it a close review. A summary of the changes made to S.B. 13 by S.A. 1 is below, as well as highlights of certain key provisions of S.B. 13.

### A. Reduced Lookback Period, Record Retention, Estimation, and Statute of Limitations

S.B. 13 contains a string of newly added provisions, left intact by S.A. 1, that constitute positive developments for holders, providing clarity with respect to record retention obligations and the appropriate limitations period on when a state can bring an action, as well as shortening the scope of audits and the Secretary of State's Voluntary Disclosure Agreement program ("VDA") in conformance with the practices of most other states. Specifically, S.B. 13 includes: (1) a reduced ten year lookback period for both audits and VDAs; (2) a corresponding ten year holder record retention period, which begins to run from the date a holder submits a report; (3) a version of RUUPA's ten year statute of limitations for the state to commence an action or proceeding against a holder; and (4) a requirement that the State Escheator promulgate estimation regulations by July 1, 2017. These modifications to Delaware's unclaimed property statute reflect a willingness on behalf of the state to address the constitutional concerns raised by the *Temple-Inland* Court.

### B. Ability to Convert Pending Audits into the VDA Program

S.B. 13 also provides the ability for certain holders currently under audit to convert into the VDA program or on to an accelerated two year audit track. S.A. 1 made a slight modification to these provisions, giving holders an extended time period to decide whether to make this conversion. Originally, holders had until July 1, 2017 to make this decision. S.A. 1 extended this time to 60 days after the State Escheator promulgates the estimation regulations, meaning decisions will likely be due by September 2017. This is a positive change as it will not only provide holders more time to weigh their options, but also, will give holders a chance to review and comprehend the estimation technique that may be utilized. The forthcoming estimation regulations stand to significantly alter the estimation methodology currently used, as the legislation specifically points to such areas as permissible base periods, items to be excluded, aging criteria for outstanding and voided checks, and the definition of what constitutes complete and researchable records, that the regulations will address.

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

The VDA conversion is available to holders under audit as of July 22, 2015, while the conversion to the accelerated 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. It is important to note that, in the event holders 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.

#### C. Definitions – Incorporated from RUUPA

S.B. 13 adopts a number of RUUPA definitions, most notably cleaning up and reorganizing the previous statute's unwieldy definition of "property." One major change made by S.A. 1 to these definitional provisions is the removal of "virtual currency" from the definition of "property." S.B. 13 previously included a truncated version of RUUPA's definition of "virtual currency," which left open many questions as to what types of items would be seen as falling under this definition. Its removal should be noted by holders in the digital, web, and gaming arenas, who have long struggled with how to treat items, for unclaimed property purposes, which exist and can only be used in the virtual space.

Other important definitions incorporated from RUUPA include "domicile" and "loyalty card," the latter being excluded from the definition of "property," an important consideration for holders who employ promotional items such as reward points as part of their business. However, S.B. 13 makes a significant omission in adopting "domicile," leaving out RUUPA's fourth definition of "domicile" which provides that, for holders such as partnerships, the "domicile" is the principal place of business.

#### D. RUUPA 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, and S.A. 1 leaves intact, 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 previous, multi-step regime involving a lengthy administrative appeals process, with limited Court of Chancery review.

#### E. Presumption of Abandonment, Indication of Owner Interest in Property, "Knowledge of Death"

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 presentation 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."

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.

S.A. 1 also makes changes affecting both owner indication of interest and "knowledge of death" with respect to presumptions of abandonment concerning tax deferred individual retirement accounts, which should be closely reviewed.

#### F. RUUPA Owner Address and Priority Rules

RUUPA's priority rule scheme and the related provision establishing the determination of an owner's last-known address have been incorporated into S.B. 13 with some variation. S.A. 1 makes no change to this. Delaware's previous statute did 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.

#### G. 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 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.

#### H. 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. S.A. 1 made no alterations to this deletion, despite appeals from securities industry trade groups. In its place, however, 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.

#### I. Confidentiality of Information

Starting on March 1, 2018, S.B. 13 requires 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.

#### J. 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 previous statute. The ability to subtract the cost of merchandise (and now, goods or services) is a unique feature of Delaware statute and does not have an analogue in RUUPA. S.A. 1 made a slight change to this provision, in order to clarify that it is the holder's profit that may be retained.

#### K. Anti-Limitations Provisions

Like the previous 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

S.B. 13's enactment reflects that significant changes are coming to Delaware's unclaimed property practices. There are many potential benefits to holders arising from this legislation, as well as areas of uncertainty, including the implications of choosing converting an audit into a VDA or electing the "fast track" audit option. The estimation regulations, which must be promulgated by July 1, 2017, and must cover specifically enumerated areas, will also have a major impact going forward. Holders should make sure they are in the best position to take advantage of and meet these changes.

***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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