

AN ALERT FROM THE BDO UNCLAIMED PROPERTY PRACTICE

# BDO KNOWS:

## UNCLAIMED PROPERTY



### SUBJECT

## DELAWARE PROPOSED LAW CHANGE AROUND UNCLAIMED PROPERTY ADMINISTRATION SEEKS TO FOSTER BUSINESS-FRIENDLY ENVIRONMENT

### SUMMARY

Senate Bill No. 141 (“the bill”) was introduced in the Delaware State Senate on June 16, 2015. The pending legislation intends to improve the fairness and foster compliance with Delaware’s Unclaimed Property Program. Specifically the bill proposes: (a) extension of the Voluntary Disclosure Agreement program (“VDA”) and creates an audit notice process, (b) Modifications to the audit and VDA look-back periods, (c) Annual compliance return filing reminder requirement from the State Escheator of a company’s requirement to file unclaimed property report with Delaware, and (d) Reinstatement of interest with a reduced aggregate cap of 25%. It is expected that this legislation will pass the Delaware General Assembly before it adjourns on June 30, 2015.

#### **A. EXTENSION OF DELAWARE VDA PROGRAM & AUDIT NOTICE PROCESS**

SB No. 141 extends the Delaware Secretary of State (“DE SOS” or “SOS”) unclaimed property VDA program. The bill provides that for periods beginning July 1, 2015, the State Escheator shall not initiate any new unclaimed property audits of companies *unless*:

- ▶ The company is notified in writing by the DE SOS that it may enter into a VDA program and the company does not enter the VDA program within 60 days from the mailing date of the invitation to participate in the VDA program; or
- ▶ A company that has entered into the DE VDA program and has failed to comply with its terms and conditions.<sup>1</sup>

<sup>1</sup> See Delaware SOS VDA Implementing Guidelines (February 11, 2014 as amended) for further guidance with respect to filing process requirements, testing methodologies, etc. See also, DE VDA -1 Form Disclosure and Notice of Intent to Voluntarily Comply with Abandoned Property Law Pursuant to 12 Del. C. Sec 1177.

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## B. MODIFICATIONS TO THE AUDIT AND VDA LOOK-BACK PERIODS

Under the new proposed legislation, the audit and VDA look-back periods are adjusted as follows:

### Unclaimed Property Audits

The bill provides what could equate to significant “estimated liability” savings for those companies that are incorporated in Delaware. This savings occur given the reduced look-back periods and the “rolling look-back period” method. The latter of which eliminates what would otherwise be a perpetually inclining audit look-back scale.

#	Audit Notice Issue Period	Audit Look-back Period	Comments
1	Pending Examination (audit began prior to 7/1/15)	1/1/86 - forward (transaction years)	This is 5 year reduction off current 1981 audit look-back period
2	7/1/15 - 12/31/16	1/1/91 - forward (transaction years)	This is a 10 year reduction off current 1981 audit look-back period
3	1/1/17 and after	22 years prior to calendar year in which a company is provided written notice of the examination (transactions years)	For audits that begin in 2017 this is a 14 year reduction off current audit look back periods to 1981 <sup>2</sup>  This is a forward “rolling” 22 year look-back period in contrast to current fixed 1981 look-back date

### Unclaimed Property VDA

Similarly, the VDA modified look-back periods and certain other terms and conditions of the program are highlighted below. Companies that were previously enrolled in the DE SOS VDA program and withdrew from that program or were removed for failure to work in “good faith” to complete the VDA filing are not permitted to re-enter the program prospectively. This adds to the already existing categories preempted from participating in the VDA program, including companies that filed VDA agreements with Delaware prior to 6/30/12 or had received an audit notice prior to entering into the VDA program.

#	VDA FilingDate	VDA Look-back Period	Payment Date <sup>3</sup>	Comments
1	7/1/13 - 9/30/14	1/1/96 - forward (transaction years)	6/30/16	This is a 3 year reduction off current DE SOS VDA look-back periods to 1993
2	9/30/14 - 12/31/16	1/1/96 - forward (transaction years)	Within 2 years of DE SOS fully executed DE VDA - 1 Form	DE SOS at sole discretion can extend due date of VDA completion and payment.
3	1/1/2017 - Forward	19 years prior to year DE VDA - 1 Form was accepted by DE SOS	Within 2 years of DE SOS fully executed DE VDA - 1 Form	DE SOS at sole discretion can extend due date of VDA completion and payment.  This appears to be a forward “rolling” 19 year look-back period in contrast to current fixed 1993 or 1996 look-back periods based on application filing date

<sup>2</sup> Generally, audits commenced in 2017 would look back to 1995 capturing transactions from 1/1/95 - 12/31/11, given Delaware 5 year dormancy period for most property types. It should be noted that the DE VDA -1 Form is the Disclosure and Notice of Intent to Voluntarily Comply with Abandoned Property Law Pursuant to 12 Del. C. Sec 1177. The proposed legislation also requires payment or an agreed payment plan executed 30 days prior to the 2 year review period end date.

<sup>3</sup> Payment date requires either that (a) full payment is received by DE SOS by the stated date or a payment plan is entered into by the stated date.

**C. ANNUAL COMPLIANCE RETURN FILING REQUIREMENT REMINDER**

The legislation provides that the State Escheator sends an annual reminder of a company's requirement to file unclaimed property report with Delaware. Specifically, the State Escheator must send a notice 120 days prior to the State's March 1st unclaimed property report deadline to all those who have filed unclaimed property returns in the past five years. In addition, holders must identify in the report a designated employee of the company who will serve as a contact with the State for all correspondence with the state related to the reporting and remittance of unclaimed property. This person must report any change in contact or contact information, if any, as well.

**D. REINSTATEMENT OF INTEREST WITH A REDUCED AGGREGATE CAP OF 25%**

The Bill seeks to reinstate the imposition of interest at .5% per month on outstanding unpaid amounts from date the amounts or property is due until paid unless such failure is due to reasonable cause. Interest would be capped at 25% of the amount required to be paid. Presumably interest would be imposed on audits and for property reported on annual compliance returns that was reported late. This provision of the bill is effective for any late filed unclaimed property that is reported and remitted on or after March 1, 2016.

**CLOSING CONSIDERATIONS**

Delaware's unclaimed property laws continue to change, providing opportunities to holders that are incorporated in DE or conduct significant business in Delaware to address its unclaimed property matters with the state. While this bill goes a long way to address many concerns regarding unclaimed property compliance in Delaware, it still leaves open many unanswered questions. How will interest be applied on audits going forward, automatic application or consistent with historical practices on a more limited case by case basis? How is "reasonable cause" defined and applied? Is the audit testing methodology going to mirror those laid out in the DE SOS VDA Implementing Guidelines going forward, etc.? These questions and others will have to be addressed and may have a significant impact on pending and new audits alike. Notwithstanding, most of these concerns can be alleviated via participation in the DE SOS VDA program. Under the program, Delaware waives all penalties and interest. The settlement agreement executed at the end of the VDA waives the states right for audit so long as certain conditions are satisfied. Moreover, there is a 2-year "review period" with potential extension opportunities to review and settle escheat liabilities, far less of a period than average 3-7 years it takes to complete an unclaimed property audit. In addition, the DE SOS VDA Implementing Guidelines only require voids after 90 days from issue date to be reviewed, while traditional audit void waiver requires review of all voids after 30 days of initial check issue date, etc. Given the above, the benefits can be significant. BDO has represented over 50 clients in DE VDA filings with the state for which our experience has shown that the program has proven to be a very fair and friendly venue over the course of last 3 years to resolve unclaimed property matters with the state.

**ABOUT BDO**

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