



# TaxNewsFlash

United States



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## Delaware: New unclaimed property enforcement provisions are enacted

The governor on June 30, 2021, signed into law Senate Bill 104—legislation that significantly modifies certain aspects of the Delaware unclaimed property audit and voluntary disclosure agreement (VDA) programs.

Many of the changes are effective August 1, 2021, while others are retroactive in application.

### **KPMG observation**

Delaware-domiciled companies need to be aware of these changes even if they have no other significant business contacts with the state. Delaware's long statutory look-back period and unique practice of estimating unclaimed property exposures can lead to unexpected unclaimed property assessments.

### **Background**

Delaware is one of the most active states in the United States with respect to unclaimed property audits and enforcement activity. At least one reason for this is that under the unclaimed property priority rules established by the U.S. Supreme Court<sup>1</sup> the state of the last known address of the owner as reflected in a business's records has first priority in taking custody of the unclaimed property. If the owner or owner's last known address is unknown, the jurisdiction that is the business's state of incorporation has the claim over that property.

Delaware's unclaimed property law authorizes audits to cover the prior 15 transaction years, and the state may estimate a company's exposure for years in which a business's records do not exist or are incomplete and un-researchable. Estimated exposures are generally treated as "owner unknown" amounts.

Most U.S.-based businesses are incorporated in Delaware, which means the state generates a lot of revenue from escheated property, and over time Delaware has developed a robust unclaimed property audit regime and complex enforcement procedures. Delaware-incorporated businesses that may not

have other significant contacts with the state need to be aware of these activities in general, as well as recent changes to the state's enforcement and audit procedures.

### **Delaware unclaimed property law enforcement changes**

Certain of the more important changes in Senate Bill 104 that businesses need to consider are:

- **VDA program invitations limited**—Currently, Delaware requires that prior to notifying a business of an audit, the business must generally first be invited to complete a VDA enrollment offered through the Secretary of State<sup>2</sup> (refer to the most recent [VDA invitation mailing dates](#)). Senate Bill 104 **extends** the VDA invitation response time to 90 days (from 60 days) and permits an audit to be authorized **without** first providing a voluntary disclosure invitation in specific instances, such as when the holder previously enrolled in the VDA program but withdrew or was dismissed from the program by the Secretary of State for particular reasons.<sup>3</sup> Further, the legislation clarifies that businesses that entered into a VDA with the State Escheator prior to June 30, 2012 (under an earlier, more onerous program) are not required to receive an invitation letter.
- **Expedited audit options**—Consistent with current law, businesses that do not enroll in the Secretary of State's VDA program are eligible for audit by the Department of Finance and State Escheator. Senate Bill 104 reinstates the State Escheator's "expedited" audit program. In addition to being a permanent option for audits authorized after August 1, 2021, **businesses subject to an existing audit that was authorized between February 2, 2017, but before August 1, 2021, may also be eligible to apply.** Expedited audit requests by businesses are granted or denied at the sole discretion of the State Escheator within 60 days of the request. If accepted, a holder must provide "sufficient responses" to auditor requests within prescribed timeframes generally following an 18-month timeline. If a holder provides sufficient responses during the expedited audit, the Escheator must provide an audit report within two years.<sup>4</sup> Holders that receive a VDA invitation letter may also elect to participate in an expedited audit under the new law.
- **"Unwaivable" interest on past due property**—For audits authorized on or after August 1, 2021, a 20% assessment of interest on past due property uncovered (including estimated amounts) is considered "unwaivable" by the State Escheator. However, if a business elects to resolve an examination through the expedited audit process, it may only be subject to a reduced 1% interest assessment.<sup>5</sup>
- **Audit time scope**—Under Delaware law, the State Escheator is generally barred from examining records for any period more than 10 years from the date property is presumed abandoned (typically 15 transaction years). Senate Bill 104 retains the 10-year limitation but measures it back from the earlier of the date of an exam notice or the date the Secretary of State delivers a VDA invitation. Currently, this period is measured from the calendar year in which the State Escheator provides the exam notice.<sup>6</sup>
- **Audit record scope**—The scope of the records that can be reviewed in audit is broadened to include data that can be used to verify the "completeness or accuracy" of the records provided, even if such records do not identify reportable property.<sup>7</sup> This change codifies a justification for what are often broad record-requests issued to businesses being reviewed by Delaware's contract auditors.
- **Audit investigations of other parties**—Senate Bill 104 permits the State Escheator to examine or investigate the records of any persons or parties that hold information related to the audit of another party. The provision permits Delaware to do so without providing any reason or justification to either party other than that the investigation/request is related to the unclaimed property audit.<sup>8</sup>
- **Audit and VDA process records**—Current law prohibits Delaware's use of records that are received in an audit from being used in joint audits with another state, unless the other state is

legally bound to maintain the security and confidentiality of the information in a manner similar to Delaware's confidentiality provisions.<sup>9</sup> Under Senate Bill 104, for examinations initiated after August 1, 2021, documents obtained in an examination initiated by Delaware may be used in a multistate examination if the holder agrees in writing to such use. The requirement that the other state have substantially equivalent confidentiality provisions is eliminated.<sup>10</sup>

- **Indemnification curtailed**—Prior to Senate Bill 104, Delaware was required to indemnify a holder against liability when the holder paid or delivered property to the State Escheator in good faith, if another person or state asserted a claim to the same property.<sup>11</sup> Senate Bill 104 limits this indemnification by providing that the holder will not be indemnified against penalties imposed by another state.<sup>12</sup>

## **KPMG observation**

The changes made to the Delaware unclaimed property law by Senate Bill 104 will have significant implications for current and future VDA invitations, enrollments, and examinations. The broader audit content scope and investigative authority may cause businesses (even those not under audit) to consider having to expend additional staff time and funds to meet audit information requests, even if such requests may have little likelihood of identifying reportable unclaimed property.

The “re-upped” expedited audit program may be appropriate in certain situations and creates incentives for companies by reducing mandatory interest assessments. However, record and resource availability fact patterns for businesses differ, and Senate Bill 104 creates new statutory grounds for expansive requests. Therefore, an expedited audit may not be optimal in every case. However, failure to elect the expedited audit course may subject a holder to significant penalty and interest exposures.

Delaware-domiciled companies need to consider certain action steps such as:

- If a company is subject to an existing Delaware audit that was authorized between February 2, 2017, and before August 1, 2021, the company may need to consider the expedited audit option.
- If a company has not been audited by Delaware or undertaken a VDA with the Secretary of State, the company may need to consider proactive enrollment in a VDA to mitigate the chance of being selected for audit.
- As always, a company needs to continue to monitor for a Delaware VDA invitation and related correspondence and to respond in a timely manner.
- If a company previously completed a VDA (before June 30, 2012) or withdrew from the VDA for a certain reason (i.e., bankruptcy or acquisition), it needs to consider options to mitigate selection for an audit.

All companies need to understand and evaluate their overall compliance with unclaimed property statutes to assess potential exposures to Delaware, given the breadth and expansive scope of the state's laws.

For more information, contact a tax professional with KPMG's National Unclaimed Property Team:

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A KPMG webcast replay outlining this and other developments is also available: [Updates in Unclaimed Property: Enforcement, Compliance, and Litigation Developments \(June 2021\)](#).

## Footnotes

<sup>1</sup> *Texas v. New Jersey*, 379 U.S. 674 (1965)

<sup>2</sup> Del. Code Ann. tit. 12, § 1172(a)

<sup>3</sup> Delaware Senate Bill 104, 1172(7)(d)

<sup>4</sup> *Id.* at §§ 1172(c) and 1176(a)

<sup>5</sup> *Id.* at § 1185

<sup>6</sup> *Id.* at § 1172

<sup>7</sup> *Id.* at § 1171(1) – retroactive application

<sup>8</sup> *Id.* at § 1172

<sup>9</sup> Del. Code Ann. tit. 12, § 1174

<sup>10</sup> Delaware Senate Bill 104, § 1174

<sup>11</sup> Del. Code Ann. tit. 12, § 1153(b)

<sup>12</sup> Delaware Senate Bill 104, § 1153(c)

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