

DUFF & PHELPS

ALSTON & BIRD

---

# The New Delaware Legislation Webcast

October 9, 2017

Kendall Houghton, Partner, Alston & Bird

Robert Peters, Managing Director, Duff & Phelps

Sonia Walwyn, Director, Duff & Phelps

---

# Agenda

- Introduction
- General Overview of the DE Legislation (SB 13)
- Implications on Existing Delaware Initiated Audits
- Impact on Existing Secretary of State VDAs
- Impact on Existing Department of Finance VDAs
- Estimations
- Interest and Penalties
- Subsequent Amendment
- What Can You Do Now?

# Nuances of Delaware's SB 13

## A Complete New Unclaimed Property Law:

Last known address is defined by a description, code or other indication of the location of the owner.

Limited audit and VDA lookback period  
(10 years plus dormancy period)

Requires a 10-Year Record Retention

Statute of Limitations  
(changed from 3 to 10 years)

Limitation on the Assignment of Liabilities

# Nuances of Delaware's SB 13

## A Complete New Unclaimed Property Law:

Property exempt under laws of custodial state, such as b-2-b, is not reportable to Delaware

Foreign property is expressly included with property subject to Delaware's jurisdiction (10 years plus dormancy period)

Old law repealed

Provides guidance on the calculation of Maximum Cost for stored value cards

Modeled after the Revised Uniform Unclaimed Property Act for the first time.

# Nuances of Delaware's SB 13

## A Complete New Unclaimed Property Law:

Web-based reporting effective March 1, 2018

Provides for the exclusion of “wholly foreign property”

Verified reports

Securities Liquidation

Includes a new definition and exemption for a “loyalty card”

# Nuances of Delaware's SB 13

## A Complete New Unclaimed Property Law:

Includes a general “catch all” provision

Life Insurance (Death Master Index)

“Compliance Review” – is this an audit, or something else?

Judiciary Review directly to Court of Chancery

The bill has passed the Senate and is on a fast track for approval by the end of January 2017.

# Audit Election Requirements

## Election to Convert Existing Non-Securities Audits to VDAs

- Applies to audits initiated on or before July 22, 2015
- Notice to the State Escheator and Secretary of State **by 60 days after DOF adopts estimation guidelines**

## Election of Expedite Completion of Existing Audit

- Written notification to State Escheator **by 60 days after DOF adopts estimation guidelines**
- Applies to **any** audit authorized by the State of as of the effective date of SB 13
- Expedited audit must conclude within two (2) years of request

## No Election (Current Audit Continues)

- Current audit continues.

# Audit Elections Pros & Cons

## Election to Convert Existing Non-Securities Audits to VDAs

### Pros:

- 10-Year Look-Back (from the date of the original audit notice)
- Waiver of Interest and Penalties
- Self-review (better ability to manage the process)
- Base period can include more recent years
- Retain the ability to litigate

### Cons:

- Separate audit for other jurisdiction remain
- Review starts anew (auditor's workpapers not provided to SOS)

# Audit Elections Pros & Cons, cont...

## Election of Expedite Completion of Existing Audit

### Pros:

- Waiver of Interest and Penalties (provided holder responds in a timely manner)
- Determination (“timely manner” is within the discretion of State Escheator, and subject only to review by the Secretary of Finance).
- Retain the ability to litigate
- No separate audit of other jurisdictions

### Cons:

- Auditor in charge of process and completion
- Restricted to auditor’s base periods (earlier years)

## No Election (Current Audit Continues)

### Pros:

- Retain litigation rights

### Con:

- Likely to be subject to the new mandatory interest provisions
  - Up 50% of the value of the property

# Voluntary Disclosure Agreements (VDAs)

## Existing Secretary of State (“SOS”) VDAs

- The look-back is 10 report years (from the date VDA was accepted by the SOS)
  - Waiver of Interest and Penalties
- Election to participate on or after July 1, 2016
  - 10 report years
  - Interest and penalties are waived

## Existing Department of Finance (“DOF”) VDAs

- Applies to VDAs entered into with the DOF on or before June 30, 2012
- May be converted to a SOS VDA IF:
  - Permission is granted by **both** the Secretary of Finance and the Secretary of State
- If permission is granted, the look back period would be the date of the original notice of intent
  - We presume that interest and penalties will be waived (since it will be concluded under the SOS).

# Estimation

## Estimation MAY NOT be used (In an Audit):

- Without the holder's consent IF the holder has filed reports and retained records for the prescribed periods

## Estimation MAY be used:

- If the holder has not retained required records
  - The Secretary of Finance in consultation with the Secretary of State is directed to promulgate estimation regulations by July 1, 2017
- Regulations to Include:
  - Permissible base periods,
  - Items to be “excluded” from the estimation calculation;
  - Aging criteria for outstanding and voided checks;
  - Definition of what constitutes complete and researchable records

**Current estimation methodology is currently in place for VDAs and ongoing audits.**

# Interest

## Mandatory Interest

- All property filed late on or after July 1, 2017
- 0.5% per month (on the outstanding unpaid amounts)
- Interest cannot exceed 50% of the amount owed
  - Statutory Interest Threshold Increases from 25% to 50%

## Waiver of Interest

- Secretary of State VDA program
- Expedited Examinations (State Escheator)
- Up to 50% for “good cause” (at State Escheator’s discretion)

---

# New Civil Penalties

## **Evasion or Willful Non-Performance**

- Holder is subject to a civil penalty of \$1,000 (for each day the obligation is evaded or the duty not performed)
- Up to a cumulative maximum of \$25,000
- Plus 25% of the amount or value of any property that should have been but was not reported, paid, or delivered.

This is in addition to existing (retained) penalty provisions.

# Delaware's Interest and Penalty Provisions

## CURRENT LAW

### INTEREST

.5% Per month; Limited to 25%

### PENALTIES

#### FAILURE TO FILE

- .5% per month; Not to exceed 50% of the amount required to be shown on the report

#### FAILURE TO PAY

- .5% per month with a maximum of 25% of the value of the property that should have been paid

#### FRAUDULENT REPORT

- 75% of the fraudulent amount

## PROPOSED LEGISLATION

### INTEREST

.5% Per month; Limited to **50%**

### PENALTIES

#### FAILURE TO FILE

- .5% per month; Not to exceed 50% of the amount required to be shown on the report

#### FAILURE TO PAY

- .5% per month with a maximum of 25% of the value of the property that should have been paid

#### FRAUDULENT REPORT

- 75% of the fraudulent amount

### **NEW CIVIL PENALTIES**

#### **Evasion or Willful Non-Performance**

- \$1,000 for each day the obligation is evaded or the duty not performed; Max. \$25,000
- Plus 25% of the amount that should have been reported, paid, or delivered

# Amendments to SB 13 by Senate

**Notice by a holder to convert an existing audit, initiated on or before July 22, 2015, to a Secretary of State VDA:**

- No longer required by July 1, 2017;
- Required within 60 days of the state's adoption of regulations regarding the methods of estimation.

**Notice by holder to elect an Expedited Audit:**

- No longer required by July 1, 2017;
- Required within 60 days of the state's adoption of regulations regarding the methods of estimation.

**“Virtual currency” is taken off the list of escheatable property.**

**The escheatable amount of a stored-value card or gift card is now simply the “amount representing the maximum cost of the issuer...”**

**The IRA dormancy standard has been adjusted in a favorable manner.**

# Managing the Changes: Sea Change or Tsunami?

## What Should You Do Now?

- **Model Your Potential Outcomes Based on:**
  - A traditional audit
  - Conversion to a VDA
  - Expedited Review; or
  - Settlement with Department of Finance
- **Finding the Right Balance:**
  - Waiver of interest and penalties vs. preserving the right to litigate
  - Reduced look back vs. current estimation methodology
  - Compare positions of DOF and SOS on specific issues that will impact your exposure
- **Timing:**
  - When to make election
  - Delay will inevitably render your decision more informed, as “intel” on the various options becomes available
- **Resources:**
  - Do you have the staff to model the options to make an informed decision and to pursue a new track?
  - Factor the costs into your decision

---

Questions?



---

# Contact Us



## **Kendall Houghton**

Partner, Alston & Bird LLP

+1 202 239 3673

[kendall.houghton@alston.com](mailto:kendall.houghton@alston.com)



## **Robert Peters**

Managing Director, Duff & Phelps

+1 312 697 4924

[robert.peters@duffandphelps.com](mailto:robert.peters@duffandphelps.com)



## **Sonia Walwyn**

Director, Duff & Phelps

+1 312 697 4662

[sonia.walwyn@duffandphelps.com](mailto:sonia.walwyn@duffandphelps.com)