



Volume 19 Number 2 June 2012

Delaware Legislation Offers Incentives for Delaware Corporations and Other Businesses to Disclose Unreported Unclaimed Property

[Charolette Noel](#)

Dallas

1.214.969.4538

cfnoel@jonesday.com

[Jessica Brown](#)

Washington

1.202.879.3601

jlbrown@jonesday.com

The Delaware Legislature recently passed Senate Bill 258 to allow most holders of abandoned or unclaimed property a limited opportunity to enter into a Delaware voluntary disclosure agreement with a reduced look-back period. Delaware corporations not currently under audit may be particularly interested in the implications of the legislation, which was recently signed into law by the Governor.

As noted in the preamble of Delaware S.B. 258,¹ “[W]hile many Delaware entities report abandoned property regularly, others have not historically done so, and the State may [benefit] by promoting . . . regular reporting with attractive incentives” Although participation in the voluntary disclosure program is not limited to Delaware entities, these entities generally have the greatest exposure risk for property escheatable to Delaware and the strongest incentive to participate.

Why Should Delaware Corporations Care?

The new Delaware program may reduce the audit period that is subject to assessment by 15 years. Most businesses formed in Delaware are surprised to learn that Delaware auditors regularly assert unclaimed property liability back to accounting periods beginning in 1981. Where the company no longer maintains complete historic records sufficient to prove that all unclaimed property has been reported, Delaware asserts that liability can be estimated as a projection from amounts of unclaimed property reportable to other states in more recent years, even when no business was conducted in Delaware. The time and expense that may be required to challenge such assertions can be staggering.

Delaware asserts such claims of liability against businesses formed in Delaware on the basis of the rules established by the U.S. Supreme Court for determining which state has the priority right to escheat unclaimed property. The state of the owner’s last-known address has the

¹ See [http://legis.delaware.gov/LIS/lis146.nsf/EngrossmentsforLookup/SB+258/\\$file/Engross.html?open](http://legis.delaware.gov/LIS/lis146.nsf/EngrossmentsforLookup/SB+258/$file/Engross.html?open) (last visited July 16, 2012).

first priority right to escheat unclaimed property. Where there is no last-known address, property may be subject to escheat by the state of corporate domicile, where the business is incorporated.² While Delaware's claims may be disputed, Delaware regularly asserts the right to escheat estimated unclaimed property from entities formed in Delaware for years where records are insufficient to disprove the asserted claims.

What Are the Incentives for Voluntary Disclosure Under S.B. 258?

The legislation provides three general incentives: (1) shortened look-back periods; (2) limited authority for the Secretary of State or the State Escheator to audit the voluntary disclosures; and (3) the opportunity for holders of property to negotiate the terms with the Secretary of State, as opposed to the State Escheator of the Delaware Department of Finance, where the prior audit policies were established.

The S.B. 258 voluntary disclosure program incentivizes companies to come forward sooner rather than later by tying the look-back period of the voluntary disclosure program to the company's date of disclosure. S.B. 258 provides that the look-back period begins:

- In 1996 for companies that enter voluntary disclosure agreements prior to June 30, 2013, and make full payment or enter into payment plans by June 30, 2014.
- In 1993 for companies that enter voluntary disclosure agreements after June 30, 2013, but before June 30, 2014, and make full payment or enter into payment plans by June 30, 2015.

Entering into the Secretary of State's voluntary disclosure program during these periods protects companies against unclaimed property audits by the Secretary of State or the State Escheator. During these periods, any voluntary disclosure agreement accepted by the Secretary of State results in a deemed waiver of the audit rights of the Secretary of State and the State Escheator with respect to the disclosed (and prior) periods, except where there is evidence of willful misrepresentation by the holder or those acting on the holder's behalf.

The new voluntary disclosure program authorizes the Secretary of State to resolve and compromise claims for abandoned property otherwise owing to the State Escheator with respect to holders that qualify to participate in the Secretary of State's voluntary disclosure program. The authority to enter into voluntary disclosure agreements and collect payment ends July 30, 2015. Until the termination of the Secretary of State's voluntary disclosure program, or until the Secretary of State determines it is unable to resolve claims by agreement and refers the matter to the State Escheator, the State Escheator cannot conduct an examination or investigation of any holder that has indicated in writing its intent to enter into an agreement with the Secretary of State.

² *Texas v. New Jersey*, 379 U.S. 674, 682 (1965).

Who Is Not Eligible for the Secretary of State's Voluntary Disclosure Program Under S.B. 258?

The Secretary of State's voluntary disclosure program is not available to companies that: (i) have applied for or entered into voluntary disclosure agreements or voluntary self-disclosure agreements with the State Escheator on or before June 30, 2012; (ii) those holders to which a notice of examination has been mailed by the State Escheator; or (iii) those holders that the Secretary of State has previously referred to the State Escheator. Nevertheless, holders that applied for and/or entered a voluntary disclosure agreement prior to June 30, 2012, are allowed the same look-back periods as available under the Secretary of State's program, but the State Escheator shall retain authority over all previously requested voluntary disclosures.

What's Next?

S.B. 258 became effective immediately upon signature by the Governor. The Secretary of State may make rules and regulations deemed necessary to enforce the voluntary disclosure program. If a voluntary disclosure is being considered, monitor the Secretary of State's rules and regulations. Delaware corporations and other businesses should carefully evaluate their unclaimed property compliance and exposure with respect to the various property types reportable to Delaware. Companies that are not currently under audit or already negotiating a Delaware voluntary disclosure should carefully evaluate the potential benefits of the Secretary of State's voluntary disclosure program and the processes for conducting a privileged and confidential review of relevant accounting records to complete a potential disclosure. Care should be taken to maintain important documentation related to unclaimed property filings (and halt possible destruction of key documents under existing document-retention policies).



This article is reprinted from the *State Tax Return*, a Jones Day monthly newsletter reporting on recent developments in state and local tax. Requests for a subscription to the *State Tax Return* or permission to reproduce this publication, in whole or in part, or comments and suggestions should be sent to Christa Smith (214.969.5165) in Jones Day's Dallas Office, 2727 N. Harwood, Dallas, Texas 75201 or StateTaxReturn@jonesday.com.

©Jones Day 2012. All Rights Reserved. No portion of the article may be reproduced or used without express permission. Because of its generality, the information contained herein should not be construed as legal advice on any specific facts and circumstances. The contents are intended for general information purposes only.