



## **SALT Alert! 2024-11: Delaware: Law Changes Implicate Non-US Unclaimed Property Reporting Requirements**

On August 15<sup>th</sup>, the Delaware Governor signed Senate Bill 267 into law. The legislation made many immediate and some retroactive changes to the Delaware unclaimed property law. Some of the more significant changes include limitations on the reporting of property owed to those with foreign addresses, reporting property prior to it becoming dormant ("early reporting"), eliminating reimbursement of businesses that file amended reports, and requiring that property presumed abandoned be held in trust for the Delaware State Escheator.

### **Foreign-Addressed Unclaimed Property**

A few provisions in the Delaware unclaimed property law were changed resulting in unclaimed property with an owner's address in a foreign country which provides for the custodial taking of unclaimed property, not to be reportable to Delaware. The state to which unclaimed property is reportable (and the state law that applies) was defined in a series of United States Supreme Court decisions beginning with the threshold decision, *Texas v. New Jersey*, which it set forth rules as to which state had the right to custodial taking of property.<sup>1</sup> The first "priority" rule is that the state listed in the last known address of the owner as recorded in the records of the holding business ("holder") is the state law that applies and the state to which the property is sourced. The second priority rule is that if the owner is unknown or the owner's address is insufficient, the property is sourced to the state of domicile of the holder.

Businesses holding unclaimed property for owners with non-U.S. addresses have often defaulted to reporting and remitting this property to their state of domicile under the second priority rule. Often the state of domicile for such businesses is Delaware. The revisions to the Delaware law define "foreign country" and "foreign jurisdiction"<sup>2</sup> and then revise the statutory provision pertaining to the jurisdictional circumstances when Delaware may take property. The modifications indicate that Delaware can take property when the last known address of the owner is in a foreign jurisdiction *if* that jurisdiction *does not* itself provide for custodial taking of property.<sup>3</sup>

Considering this, if the unclaimed property is owed to a person with a foreign address, and the country/jurisdiction where that address is located has an applicable law pertaining to custodial taking of the property, Delaware would not take custody of the

unclaimed property. For example, the Canadian provinces of Alberta and New Brunswick have unclaimed property laws somewhat similar to those of the states. If one of these provincial laws were to apply to the holder and the property, then—under these law revisions—the property may not be reportable to Delaware even if the holder's state of domicile is Delaware.

Further, consider that SB 267 changed Delaware law regarding when the state will defend the holder for claims by a person or other state, or indemnify the holder against liability on a claim for property remitted to Delaware in good faith. SB 267 redefines "good faith." Prior to the change, good faith required all of three components: (1) payment made in a reasonable attempt to comply; (2) the holder delivering property was not a fiduciary in breach of trust; and (3) the holder had a reasonable belief that the property was abandoned and that there is no showing that the records didn't meet reasonable commercial standards of practice in the industry.

The new law changes the first component of good faith to indicate that the payment or delivery of property must have been made in a reasonable attempt to comply with the Delaware unclaimed property law "and any other applicable law, including but not limited to relevant decisions of the Supreme Court of the United States *and applicable law of any foreign jurisdiction.*"<sup>4</sup>

### **Early Reporting Restrictions**

The changes to the Delaware unclaimed property law also provide that the state will not defend the holder against claims by the person or another state or indemnify the holder against any liability on a claim for property reported early.<sup>5</sup> This means that while the Delaware State Escheator may allow the holder to report and pay or deliver property before the full period of dormancy has run, it will not defend the holder against claims or indemnify the holder for any liability.

In addition, the revisions provide that while the Delaware State Escheator may permit the holder to report, pay or deliver property early, it may condition that permission on the holder entering into a written agreement requiring the holder to indemnify the state for liability or expenses included by the state in connection with the property. Further, due to the changes in the law, the State Escheator may add other terms to the agreement. The new language also indicates, "The decision to allow or deny a request under § 1155(b) of this title and to require or refuse the terms of any written agreement under this section shall be within the complete discretion of the State Escheator and shall not be subject to review."<sup>6</sup>

As businesses sometimes desire to report property early when there are organizational changes including spin-offs, mergers, or other corporate actions, the new Delaware restrictions on reporting early adds another level of complexity to these situations.

### **Amended Reports**

A new paragraph was added to the report deadline section of the Delaware law that pertains to filing an amended report. The new language specifically permits a holder to file an amended report.<sup>7</sup> However, the new paragraph provides that the holder will not be entitled to a refund or return of property paid or delivered in connection with the initial report that is changed by the amended report if: (1) any claim has been paid for any property paid in connection with the report; (2) the amended report would amend a report previously filed as a part of an examination or voluntary disclosure; or (3) the refund would be due to a change or error in the application of the cost of goods sold to the reported property, unless the amended report is filed no later than 3 years after the earlier of the date the initial report was filed or the date on which the property was

paid or delivered in connection with a report.

## Property Presumed Abandoned Held in Trust

A new section was added to the Delaware law specifying that a business holding property that is presumed abandoned (dormancy period has run), now holds such property in trust for the benefit of the State Escheator on behalf of the owner from and after the date the property is presumed abandoned.<sup>8</sup> Further, the new section mandates that a holder establish trust accounts or otherwise segregate such property pending its delivery to the State Escheator.<sup>9</sup> This trust designation and segregation requirement for unclaimed property could have implications in a holder's bankruptcy proceeding, including how the property may be categorized as a debt.

## Contacts

For more information about the unclaimed property law changes triggered by SB 267 and the potential impacts on your company, please contact:

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## Footnotes

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

<sup>2</sup> Del. Code Ann. tit. 12, § 1130 (7)

<sup>3</sup> Del. Code Ann. tit. 12, § 1141 (a)(3)

<sup>4</sup> Del. Code Ann. tit. 12, § 1153 (d)(1)(emphasis added)

<sup>5</sup> Del. Code Ann. tit. 12, § 1153 (c)(last sentence)

<sup>6</sup> Del. Code Ann. tit. 12, § 1153 (e)

<sup>7</sup> Del. Code Ann. tit. 12, § 1144 (e)

<sup>8</sup> Del. Code Ann. tit. 12, § 1152A

<sup>9</sup> *Id.*