



## Unclaimed Property ADVISORY ■

**FEBRUARY 23, 2022**

### California Dreaming of a Voluntary Compliance Program

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The California legislature has once again proposed adoption of a California Voluntary Compliance Program (VCP) through the introduction of Assembly Bill 2280 (AB 2280). California's last unclaimed property amnesty program expired in 2002, and the most recent attempt to enact a VCP in 2018 (AB 2773) lacked the support of the State Controller's Office (SCO) and did not make it to the finish line. In addition, the SCO summarily rejected the prospect of an unclaimed property amnesty program in 2020. Will AB 2280 provide a different result? The fact that State Controller Betty Yee has expressed support for this effort provides reason for optimism.

Last year, California enacted AB 466, which authorized the Franchise Tax Board to disclose to the controller whether taxpayers had filed unclaimed property reports. So perhaps it should not come as a surprise that AB 2280 includes a declaration that "as of 2020, approximately 1.3 million businesses that file taxes with the Franchise Tax Board [are] estimated to have unclaimed property to report, but have failed to submit an unclaimed property report to the Controller."

Under the current California Unclaimed Property Law (UPL), holders are subject to 12% interest on late reported and delivered property, unless the failure to timely report and deliver is due to "reasonable cause." The SCO automatically generates interest assessments on past-due property, and holders must plead their case for a waiver, citing "reasonable cause" grounds for the SCO's withdrawal (e.g., the failure was due to circumstances beyond the holder's control). A \$10,000 cap is provided if a holder timely delivers the unclaimed property but the report is not in substantial compliance (this would not apply to most reports containing past-due property). The legislative declaration recognizes that the 12% interest imposition is "a deterrent to would-be first-time filers," as well as a deterrent for holders that regularly report property to California and periodically identify past-due property in the normal course of business.

Under existing California law, there is not a currently applicable voluntary compliance or similar program for holders to report past-due unclaimed property. California is unusual in this respect; almost all other states have adopted a formal or informal voluntary disclosure program that would guarantee waiver of penalties and interest for holders that voluntarily report past-due property and are not already under audit. The last California amnesty program ended in 2002, and this bill would repeal the provisions of that prior program and enact in its place the new VCP provisions. Under the new VCP, a holder is ineligible to participate in the VCP if the holder is the subject of an examination of records (or has received notification of an impending examination), is the subject of a civil or criminal prosecution involving compliance with the UPL, has been notified of an interest assessment under Section 1577 in the past five years that has remained unpaid, or has had interest waived by the SCO within the previous five years.

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Notably, to qualify for the interest waiver under the VCP, a holder would be required to participate in an “educational training program” provided by the SCO’s office (the bill does not specify whether this requirement only applies to first-time filers of unclaimed property or to all holders). In addition, a holder is required to undertake review of its books and records for “at least” the past 10 years, conduct due diligence to property owners in accordance with the statute, report past-due property within six months of being enrolled in the VCP (unless extended by the controller), and remit the property in accordance with the statutory remittance timeline (i.e., between seven months and seven months and 15 days after the report is received by the controller).

The introduced bill also authorizes the SCO to adopt guidelines and forms for program administration and addresses some of the well-placed concerns that information reported by holders—often including personal financial records, social security numbers, and addresses and other personal information of property owners—would be subject to public disclosure under the California Public Records Act and used to perpetrate fraud. Further, owners might be dissuaded from claiming property if the personal information needed to secure a return of their property may be viewed under the Public Records Act. The bill would exempt from disclosure under the Public Records Act records obtained by the SCO pursuant to the UPL, including financial records obtained from holders during unclaimed property examinations, as well as records containing personal information of claimants and owners.

Given California’s routine confiscatory imposition of 12% interest for late-reported unclaimed property, adoption of a new VCP will provide welcome relief to noncompliant holders and assist California in reaching its stated goal of enacting the UPL to “enable the state to return [abandoned] property to its rightful owners.” Without such a program, holders have no way to clean up past-due liabilities from unclaimed property in California without being subject to onerous interest impositions.

However, the proposed bill is overly restrictive in certain respects. If increased UPL compliance is truly the legislative goal, holders should be eligible for the VCP even if they received an interest abatement within the last five years or if they have a current outstanding interest assessment—including one subject to an ongoing SCO review of the holder’s asserted reasonable cause for late filing. It would also be reasonable to allow holders to opt into the VCP program in lieu of an existing or pending audit (even if just as a one-time offer), as Delaware has recently done.

Separate and apart from the VCP proposed legislation, it’s high time for the 12% “interest” provision to be repealed or subject to a reasonable maximum cap. Interest impositions should be limited to addressing the time value of money and should be based on currently applicable market interest rates; they should not be a penalty proxy. Holders—possibly 1.3 million of them—nonetheless are hoping that this bill makes it to the finish line, as the holder community has long dreamt of a VCP in California.

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