



## Unclaimed Property ADVISORY ■

**JUNE 7, 2022**

### Litigate, Legislate and Repeat: The Delaware Escheat Law Spin Cycle

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*UPDATE: Delaware Governor John Carney signed SB 281 into law on June 30, 2022, and upon the governor's signature, SB 281 went into effect.*

*SB 281 contains two sections, Sections 2 and 3, that apply retroactively to the bill's effective date, June 30, 2022. Section 2's retention policy is now in effect, meaning that holders have a retroactive record retention obligation that goes back "to any claims, examinations, voluntary disclosure agreements, or litigation pending as of" June 30, 2022. Section 3 gives the State Escheator the statutory power to liquidate securities and subsequently provide notice to owners of the securities' liquidation. Section 3 is retroactive to any claims, examinations, or litigation that are pending as of June 30, 2022, which likely means that owners are now unable to challenge the State Escheator's liquidation and notice processes to claims that were pending as of June 30, 2022.*

*With the enactment of Sections 8 and 9 of SB 281, which are effective on June 30, 2022, the State Escheator can circumvent the VDA notice provisions and convert a compliance review to an audit. Additionally, holders can now be immediately subject to an audit without any warning.*

*Finally, as of June 30, 2022, Delaware's definition of "property" expressly excludes property where a government is the apparent owner.*

In a move that is hardly surprising to anyone familiar with Delaware unclaimed property law, on May 4, 2022, Delaware's Senate Judiciary Committee introduced Senate Bill 281 (SB 281) in a bid to grant additional power to the State Escheator. While the bill purports to "clarify] various aspects of the State's unclaimed property laws..." the bill serves to codify practices (in some instances retroactively) that the State Escheator only began implementing after the 2021 enactment of SB 104. (For a more detailed discussion of SB 104, see our advisories, "[Bracing for the Next Wave of Delaware Unclaimed Property Reform: Review of SB 103 and SB 104](#)" and "[Look Before You PEEP – Delaware OUP \[Office of Unclaimed Property\] Rejects Bid to Address Issues with Program and Agreement](#)." ) More to the point, if this bill is enacted, it almost certainly will trigger additional holder litigation (and potentially owner litigation) with the State, which seems to be what the bill is designed to forestall.

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## Prior Legislation: SB 104

Over the past few years, beginning with SB 104, the Delaware legislature has sought through the legislative process to shore up its unclaimed property law in the face of increasing litigation and holder challenges. In June 2021, Delaware's governor signed SB 104 into law. SB 104 included provisions aimed at addressing the State Escheator's overreach in multiple litigation matters, including: *Delaware v. AT&T* and *Delaware v. Univar*. In *AT&T*, the Delaware Court of Chancery held that a subpoena issued by the Delaware OUP for records in connection with an unclaimed property audit was (1) grossly overbroad and (2) would sweep in "a vast amount of irrelevant data." The court determined that it would be an abuse of discretion to enforce the subpoena. SB 104 amended Del. Code Ann. tit. 12, § 1171(1) to address the court's holding in *AT&T* to specify that in examining records, Delaware may review records that include information to verify the records' completeness, even if the records may not identify property reportable to the state. In *Univar*, the Delaware Court of Chancery recognized confidentiality issues arising from unclaimed property audit firms participating in multistate audits sharing information across separate, unrelated audits. The court's concern resulted in Delaware representing to the court that the auditors working on the Delaware audit would be "wall[ed] off" from the auditors working on audits for other states. To address the court's concern and presumably to avoid holders raising this type of confidentiality issue in the future, SB 104 amended Del. Code Ann. tit. 12, § 1174(4) to prohibit records obtained in an audit or during a voluntary disclosure agreement (VDA) from being used in a joint examination with another state unless the holder consents in writing to such record sharing.

## Delaware SB 281

Like SB 104, SB 281 appears designed to shore up Delaware's unclaimed property law, while also expanding the tools available to it to enforce its laws. The following are the highlights from the pending legislation:

- **Record Retention: A Moving Target:** Section 2 of SB 281 would amend Del. Code Ann. tit. 12, § 1145 to require that holders who have either received an examination notice or who have applied to the VDA program have a record retention obligation of 10 years plus the applicable dormancy period until completion of the examination or the VDA; this 10-year period starts running upon the earliest of (a) delivery of the notice of examination, (b) the Secretary of State's delivery of a VDA notice, or (c) the holder's election to enter into the VDA program. As part of the proposed record retention policy, holders would be required to maintain records of items that were not reported as unclaimed to "allow review to determine whether the holder has complied with this chapter [Delaware's Escheats laws]." In addition, Section 2's record retention policy applies *retroactively* "to any claims, examinations, voluntary disclosure agreements, or litigation pending as of the effective date of this Act."
  - The retroactive nature of Section 2 invites litigation. Specifically, how can a state require a holder to maintain records retroactively, if such records were not already being maintained?
- **Expanding the Department of Finance's Authority to Audit:** Section 8 of SB 281 would expand the State Escheator's ability to require verified reports by amending Del. Code Ann. tit. 12, § 1170 to give the State Escheator the power to request such a report from holders that have previously filed a report and who otherwise appear to be compliant with Delaware's unclaimed property laws. Currently, Del. Code Ann. tit. 12, § 1170 only gives the State Escheator the ability to request a verified report from holders who have not filed a report and from holders who the "State Escheator believes [to] have filed an inaccurate, incomplete, or false report." Similarly, Section 8 proposes to expand the State Escheator's use of compliance reviews by allowing the State Escheator to initiate a compliance review for any reason (i.e., not limited to when the State Escheator believes that a person may have filed an "inaccurate,

incomplete, or false report"). In conjunction with this expansion in power, Section 9 would amend Del. Code Ann. tit. 12, § 1172(d) to allow the State Escheator to initiate an audit without giving holders an opportunity to first participate in the state's VDA program in instances when the State Escheator has determined that the holder "has not completed or responded to a verified report or compliance review."

– If Sections 8 and 9 are adopted, the takeaway is that the State Escheator could circumvent the VDA notice provisions of Del. Code Ann. tit. 12, § 1173(b) by first initiating a compliance review for any reason and then convert the compliance review to an audit at the end of the one-year period required under Del. Code Ann. tit. 12, § 1170(b) for completing compliance reviews.

– Further, because Sections 8 and 9 were drafted to apply to existing compliance reviews, holders could immediately be subject to an audit without any warning.

- **Needle Moves on the Security Liquidation Process:** Section 3 of SB 281, which would amend Del. Code Ann. tit. 12, § 1150, has the potential to displace the rights of owners of unclaimed securities. Section 3 would codify the State Escheator's current practice of liquidating securities and subsequently providing notice to owners of the securities' liquidation. The bill's view on Section 3 is that while the State Escheator strives to liquidate securities and mail notice to owners contemporaneously, sometimes the State Escheator is unable to follow its own established practices. In light of this failure to follow its own guidelines, Section 3 would allow the State Escheator to liquidate securities and then send notice to owners.

– Section 3's proposed notice requirement has the potential to fuel shareholder litigation, similar to *JLI Invest, S.A. & Lin Invest, S.A. v. Cook* and *Salvato v. Harris*, because of the very real chance of delayed notice to shareholders or, potentially, a lack of notice sent to shareholders.

– Section 3 is also set to apply retroactively if the governor signs SB 281 into law with Section 3 as drafted – convenient if other security owners are lined up to litigate improper notice and liquidation claims, so as to recover the full market value of liquidated security positions. Once again, Delaware is inviting litigation, this time by owners, to challenge the constitutionality of the retroactive effective date of SB 281. Of course, holders could get swept into these actions via "wrongful escheat" or similar claims that may be asserted by aggrieved owners.

- **Government-Owned Property:** Section 1 of SB 281 provides one helpful "clarification" to holders of certain unclaimed property. SB 281 expressly excludes from the definition of "Property," "[p]roperty where the apparent owner is a foreign government, the federal government, any other state government, or any local or municipal government not within this State." Prior to the 2017 amendments to the Delaware Escheats Law, the law similarly did not apply to amounts due to governmental agencies, including Delaware agencies. However, the 2017 amendments incorporated a broader definition of "owner" from the Revised Uniform Unclaimed Property Act, creating uncertainty whether Delaware's policy regarding such property had changed. Section 1 thus returns holders and the State to the prior status quo.

We will continue to monitor SB 281 as it makes its way through the Delaware legislature, although we expect this bill to move quickly through the legislation process.

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