

CHAPTER 417
FORMERLY
SENATE BILL NO. 272
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND CHAPTER 11 OF TITLE 12 OF THE DELAWARE CODE RELATING TO ESCHEATS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE :

Section 1. Amend Section 1156 of Chapter 11, Title 12 of the Delaware Code by deleting the catch line and replacing it with the words and punctuation “Internal Review Procedure; Court of Chancery – Jurisdiction”, by redesignating the existing subsections (a) and (b) as subsections (k) and (l) respectively and by inserting new subsections (a) through (j) to read as follows:

“(a) If, after examining any report required by this chapter and filed by or on behalf of a holder (as defined in § 1198 of this Title) or after the conclusion of an examination of a holder, the Abandoned Property Audit Manager (hereinafter the “Audit Manager”) determines that a holder has underreported abandoned or unclaimed property due and owing under this chapter, the Audit Manager shall mail a Statement of Findings and Request for Payment to the holder that filed, or on whose behalf the report was filed, or that was the subject of an examination. Sixty days after the date on which the Audit Manager mails a Statement of Findings and Request for Payment, it shall constitute the Audit Manager’s final determination of the amount of the holder’s liability, including interest and penalties, if any, for the abandoned or unclaimed property specified in the Statement of Findings and Request for Payment, excepting only the property types and amounts included in the Statement of Findings and Request for Payment as to which the holder files a timely protest with the Audit Manager pursuant to subsection (b). The State Escheator may thereafter enforce any final determination in accordance with subsection (k).

(b) Within sixty days after the date of the mailing of a Statement of Findings and Request for Payment under subsection (a) the holder may file with the Audit Manager a written protest of the Statement of Findings and Request for Payment in which the holder shall set forth the property type or types and amount of abandoned or unclaimed property protested, and the specific grounds upon which the protest is based. The protest is intended to allow the holder to have its objections to the final request for payment reconsidered in the first instance internally within the Department of Finance by the Audit Manager as a means of expediting resolution of any dispute. If the holder elects to file a protest and to have its objections to the final request for payment reconsidered internally within the Department of Finance, as provided by subsections (b) through (k), the holder shall exhaust these administrative remedies before initiating any proceeding in any Delaware court of competent jurisdiction.

(c) The only matters that the Audit Manager shall reconsider on a protest are those property types, amounts and issues related to the examination that are set out in the written protest of the holder. The holder shall remit with the protest any abandoned or unclaimed property liability attributable to property types for which payment is requested in the Statement of Findings and Request for Payment that are not protested and shall also remit with the protest the amount of abandoned or unclaimed property liability, if any, that the holder believes to be due and owing with respect to the property types or liability that are the subject of the protest. The pendency of a protest shall not prevent the accrual of interest on any protested amount finally found to be due and owing. Holders may remit the entire amount in the Statement of Findings and Request for Payment in order to prevent the accrual of additional interest without waiving any rights for reconsideration or review of protested amounts under subsections (a) through (j) of this section, and such remittance shall be subject to refund, without interest, to the extent not finally determined to be due and owing. Failure to remit amounts required by this subsection shall result in termination of the protest and the State Escheator may thereafter enforce any final determination in accordance with subsection (k).

(d) The holder may submit additional documentation and written submissions to the Audit Manager in support of the protest, provided, however, that such additional documentation and written submissions shall be made no later than thirty days following receipt of the holder's protest. The Audit Manager may convene meetings with the holder to facilitate review of the Statement of Findings and Request for Payment and the protest thereof.

(e) The Audit Manager shall, within sixty days of the receipt of the holder’s protest, or if additional documentation is submitted, no later than ninety days after the receipt of the holder’s protest, make a written determination on the protest setting forth the Audit Manager’s basis of any determination that is adverse, in whole or in part, to the holder, provided, however, that the time periods set forth in this subsection shall be subject to extension by the Audit Manager for good cause, but in no event shall any extension hereunder exceed five hundred forty days from the day the Audit Manager received the holder’s protest. The Audit Manager shall mail the written determination on the protest to the holder by certified or registered mail at the address set forth in the holder’s protest.

(f) Thirty days after the date on which it is mailed, the determination by the Audit Manager of a holder’s protest shall be final, unless within that time a holder files a notice of appeal with the Secretary of Finance. If the holder does not file a timely notice of appeal with the Secretary of Finance, the State Escheator may enforce any final determination in accordance with subsection (k). The notice of appeal shall set forth the holder’s name, mailing address, telephone number, the name of the person or persons representing the holder, the mailing address and telephone number of such persons and the matters in which the holder asserts that the Audit Manager erred in the determination on the protest of the holder.

(g) After receipt of a holder’s written notice of appeal, the Secretary of Finance shall as soon as practicable, but in no event later than 90 days after receipt, appoint a person who is not otherwise currently employed by the Department of Finance to act as an Independent Reviewer to consider the appeal of the Audit Manager’s findings and make a written report to the Secretary of Finance. The Independent Reviewer shall be a former member of the Delaware judiciary, an individual who has been previously appointed and served as a master of any Delaware court, or an attorney licensed in the State of Delaware who is qualified by experience or training to serve.

(h) The appeal to the Independent Reviewer is de novo on the record. The record on the appeal to the Independent Reviewer shall be based solely upon documents submitted during the course of the examination to the Audit Manager or a person who conducted an examination on the Audit Manager’s behalf, other non-privileged materials prepared by or for the Audit Manager during the conduct of an examination, expert reports submitted to the Audit Manager by the person filing a protest, other non-privileged materials and expert reports prepared by or for the Audit Manager during the consideration of a protest.

(i) The Independent Reviewer shall hold an oral hearing on the appeal, which shall be held, absent agreement of the parties, within ninety days after the date on which the Secretary of Finance appoints the Independent Reviewer pursuant to subsection (g). At least five days prior to the oral hearing date, or at such other time ordered by the Independent Reviewer, the

holder and Audit Manager shall each submit to the Independent Reviewer and each other a brief containing argument and referencing supporting documentation from the record before the Audit Manager or an explanation as to why such supporting documentation is not available. A decision in writing by the Independent Reviewer setting forth findings of fact and conclusions of law shall be submitted by the Independent Reviewer to the Secretary of Finance within ninety days from the date of the conclusion of the oral hearing or the completion of any post-hearing briefing requested by the Independent Reviewer, whichever is later. The Independent Reviewer shall assess costs, including the Independent Reviewer's fee, against a party or between the parties in the Independent Reviewer's discretion.

(j) The Secretary of Finance may adopt or reject the Independent Reviewer's determination in whole or in part. If the Secretary of Finance modifies or rejects, in whole or in part, the determination of the Independent Reviewer, the Secretary of Finance shall issue a decision in writing setting forth the basis of any rejection or modification of the determination of the Independent Reviewer. Within sixty days of the receipt by the Secretary of Finance of the Independent Reviewer's decision, a copy of the Secretary of Finance's determination, if any along with, the Independent Reviewer's written decision shall be sent to the holder by certified or registered mail at the address set forth in the holder's notice of appeal. The determination of the Secretary of Finance as to those liabilities that are the subject of the appeal shall be final as to the Department of Finance, and amounts determined to be due and owing shall be subject to collection by the State Escheator under subsection (k) below if unpaid after the review. The holder may, within thirty days after the Secretary's written decision was mailed, appeal the Secretary's determination to the Court of Chancery. The Court's review shall be limited to whether the Secretary's determination was supported by substantial evidence on the record. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record."

Section 2. Amend Chapter 11 of Title 12 of the Delaware Code by adding a new § 1211 to read as follows:

"§ 1211. Limited Exception, Uninvoiced Payables Not Reportable.

(a) Property as defined in § 1198 of this Title shall be deemed to exclude uninvoiced payables as more particularly defined in this section.

(b) Uninvoiced payables are amounts due between merchants as defined in the Delaware Uniform Commercial Code, 6 Del. C §§ 1-101, et seq., from a holder who is a buyer to a creditor who is the seller of goods ordered by a holder in the ordinary course of business when the goods were received and accepted by the holder, but which for any reason were never invoiced by the seller.

(c) Uninvoiced payables include the value of goods received by a holder from a seller from out of balance transactions where the holder's purchase order for goods and the amount of goods received by the holder do not match.

(d) Uninvoiced payables include unsolicited goods received by a holder from a seller that fall within 6 Del C. § 2505.

(e) Uninvoiced payables specifically do not include accounts payable, accounts receivable, or any other type of credit or amount due to the creditor, including uncashed checks of any kind whatsoever whether relating to inventory, goods, or services, and all of these types of property are still reportable as abandoned or unclaimed property.

(f) Nothing in this section shall be construed to create a business-to-business exemption of any kind regardless of whether a current business relationship exists between the holder and the creditor."

Section 3. The General Assembly finds that the employment of estimation techniques is an accepted and routine practice used both by holders of abandoned and unclaimed property and by the State Escheator in determining holders' liability to report and pay such property to the State with respect to periods for which inadequate holder records exist, and desires to ratify and affirm that the State Escheator has inherent authority to estimate abandoned and unclaimed property liability when adequate records do not exist.

Section 4. Amend § 1155 of Chapter 11 of Title 12, Delaware Code, by adding a new sentence at the end of the existing section to read as follows: "Where the records of the holder available for the periods subject to this chapter are insufficient to permit the preparation of a report, the State Escheator may require the holder to report and pay to the State the amount of abandoned or unclaimed property that should have been but was not reported that the State Escheator reasonably estimates to be due and owing on the basis of any available records of the holder or by any other reasonable method of estimation."

Section 5. Amend § 1171 of Chapter 11 of Title 12 of the Delaware Code by deleting the dates "August 1" or "August 10" as they may appear therein and substituting in lieu thereof the date "November 10".

Section 6. Amend § 1172(a) of Chapter 11 of Title 12 of the Delaware Code by striking the words, numerals and punctuation "Within 30 days after making a report of abandoned property pursuant to §1171 of this Title" and replace them with the following "A minimum of 60 days prior to making a report of abandoned property and remitting payment pursuant to § 1171 and § 1173 of this Title".

Section 7. Amend § 1172(c)(3)a. of Chapter 11 of Title 12 of the Delaware Code by striking that subparagraph in its entirety and by redesignating subparagraphs § 1172(c)(3)b. and § 1172(c)(3)c. as § 1172(c)(3)a. and § 1172(c)(3)b., respectively

Section 8. Amend § 1182(a) of Chapter 11 of Title 12 of the Delaware Code by deleting the date "May 1" as it may appear therein and substituting in lieu thereof the date "December 20".

Section 9. Amend § 1183 of Chapter 11 of Title 12 of the Delaware Code by deleting the words "following the making" as they appear in § 1183(a) and substituting in lieu thereof the words "prior to the making".

Section 10. Amend § 1185(a) of Chapter 11 of Title 12 of the Delaware Code by deleting the phrase, "on or before the following December 20" and substituting in lieu thereof the words, "with the annual report on or before December 20".

Section 11. Amend § 1198(11)a. of Title 12 of the Delaware Code by striking the words, roman numerals and punctuation "mentioned in items (i) through (xii) of this paragraph" in that subparagraph and substituting "specifically enumerated above in subdivision 1198(11)".

Section 12. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.

Section 13.

(a) Section 1 of this Act shall be effective with respect to examinations initiated by or on behalf of the State Escheator after the date of the enactment of this Act into law. Any holder who has been notified prior to date of the enactment of this Act into law of the State's intention to examine the books and records of the holder to determine whether the holder has complied with any provision of the Abandoned or Unclaimed Property Law of Delaware, Chapter 11, Title 12 of the Delaware Code, may elect either to utilize the administrative appeal procedures provided by subsections (b) through (k) after receiving the Statement of Findings and Request for Payment or, without exhausting its remedies, to independently pursue all legal and equitable remedies available in any court of competent jurisdiction.

(b) Section 2 of this Act shall be effective upon its enactment into law and shall apply with respect to all uncompleted examinations being conducted by the State Escheator as of the date of enactment and to all litigation pertaining to the subject matter thereof that is pending as of the date of enactment.

(c) Sections 3 through 13 of this Act shall become effective upon their enactment into law

Approved July 23, 2010