



MULTISTATE TAX

## Delaware – Invitations for 2023 unclaimed property voluntary disclosure agreement Tax Alert

### Overview

The Delaware Secretary of State [announced](#) that invitations to enroll in its unclaimed property voluntary disclosure agreement program were mailed to companies on February 24, 2023. Companies receiving this notice have only 90 days to enroll in the program, before being referred to the Delaware Department of Finance for an unclaimed property audit that may yield a harsher result.

### Delaware unclaimed property VDA invitations sent in late February

Invitations to enroll in the Delaware Secretary of State's voluntary disclosure agreement (VDA) program were sent to companies on February 24, 2023.

### Background

Delaware's [unclaimed property law](#) provides that a company must receive an invitation to enroll in Delaware's VDA program prior to being selected for a Delaware unclaimed property audit. Companies that receive these letters have only 90 days to request participation in the VDA program or be subject to an unclaimed property audit by the Delaware Department of Finance, which uses third party vendors to perform its audit examinations.

Companies in receipt of the invitation letters are perceived as being non-compliant with Delaware's unclaimed property reporting requirements and will be subject to audit examinations if they elect to not enroll in the VDA program. Accordingly, companies should be on the lookout for these important VDA program invitation letters. The letters are typically addressed to the CFO with a copy to the registered agent and may be mistaken for general or trivial correspondence from the state. Furthermore, even companies that do not receive these invitation letters may want to consider whether they may be subject to audit through one of Delaware's statutory exceptions noted below,

as the VDA program can be voluntarily entered at any time, but only before an audit notice is received from the state.

There are several statutory exceptions whereby a company may be selected for a Delaware unclaimed property audit without first receiving a VDA program invitation letter. These exceptions are as follows:

- If Delaware joins a multistate audit that was initiated by another state;
- If a company does not respond to a request for a verified report or a compliance review or does not timely pay a notice of deficiency resulting from a compliance review;
- If a company entered into a VDA with Delaware on or before June 30, 2012; or
- Pursuant to information received under Delaware's False Claims and Reporting Act.

## Risks of non-compliance

Risks of non-compliance with Delaware's (or any state's) unclaimed property laws may include:

- Selection for audit by any state and estimation process by the state of incorporation:
  - Generally, states have a ten Report Year audit lookback period which reaches back ten years preceding the state's dormancy period, which is the number of years a company is allowed to hold the property before it becomes dormant and potentially reportable as unclaimed property. With dormancy periods generally ranging from one to five years, many unclaimed property audits can reach back fifteen years or more.
  - For an extensive look back period where a company's books and records are unavailable to determine the liabilities reportable to each state, the state of incorporation may perform estimation techniques to extrapolate the liabilities presumed owing to all states for the periods where records are available across the periods where records are not available. All of the estimated property is then reported to the state of incorporation as "owner unknown" property that will never be recoverable from the state by any owners. This may result in a financial statement impact for companies that do not have these estimated amounts reserved for on the balance sheet.
- Penalties and interest assessments
  - Delaware requires that interest under an audit must be assessed at no less than 20% of the past due examination liability for companies receiving an audit notice after August 1, 2021. If companies choose Delaware's "expedited audit program," interest will be assessed at 1% of the total past due examination liability.
  - Interest assessments in Delaware can now only be fully waived through successful completion of the VDA program.
  - Penalties for willful failure to file an unclaimed property report in Delaware are the lesser of 5% of the amount of late property per month, for each month late, up to 50% of the reportable amount **or** a civil penalty of \$100 per day for each day the report is late, up to \$5,000.

- Penalties for willful failure to pay reportable unclaimed property is 0.5% per month for each month the payment is late, up to 25% of the total amount due.
- Penalties for a fraudulent report of willful misrepresentation on an unclaimed property report is an amount equal to 75% of the deficiency in payment related to fraud.

## Verified report and compliance review notices

Delaware has another compliance program beyond the VDA and audit programs that the state uses to ensure companies are in compliance with Delaware's unclaimed property law. A **verified report notice** is a letter that is sent to a company to request that the company certify the report submitted to the state is complete, or if no report was submitted, that there is truly no property to report. The report must be signed by an officer and notarized. The **compliance review notice** is the next step after a verified report, and the purpose is to allow the state to request certain documentation to confirm that the report submitted was complete. If one of these notices goes unanswered, the state may initiate an audit without sending a VDA invitation letter.

### Observations

Companies that are incorporated in Delaware, or have Delaware incorporation history, and have not recently completed a Delaware VDA or audit, may receive a VDA invitation letter. Companies that have made acquisitions of Delaware-formed companies should also look out for invitation letters.

Companies receiving these letters should make sure to respond before the end of the 90-day deadline or they may receive an unclaimed property audit notice from the state of Delaware.

## Get in touch

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