



MULTISTATE TAX

Delaware – Invitations for 2024 unclaimed property voluntary disclosure agreement Tax Alert

Overview

The Delaware Secretary of State (“SOS”) [announced](#) that invitations to enroll in its unclaimed property voluntary disclosure agreement (“VDA”) program will be mailed to companies on or around February 23, 2024 and July 26, 2024. Companies receiving these notices have 90 days to enroll in the program before being referred to the Delaware Department of Finance (“DOF”) for an unclaimed property audit that may yield a more unfavorable result.

This Tax Alert summarizes the VDA program and provides some observations.

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 (Del. Code Ann. tit. 12, § 1172(a)). Companies that receive these letters have 90 days to request participation in the VDA program or be subject to an unclaimed property audit by the DOF, which uses third-party vendors to perform its audit examinations. See our recent [Tax Alert](#) for details on audit notices sent in October 2023 to companies that did not respond to July 2023 invitations.

Companies receiving 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 VDA program invitation letters. The letters are typically addressed to the company’s chief financial officer with a copy to the registered agent (for publicly traded companies). These letters can easily be mistaken for general or insignificant correspondence from the state.

There are statutory exceptions where a company may be selected for a Delaware unclaimed property audit without first receiving a VDA program invitation letter. The 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 (Del. Code Ann. tit. 12, § 1172(d)).

Verified report and compliance review notices

In addition, companies should be aware of Delaware’s alternate enforcement programs, beyond the VDA and audit programs, that the state uses to validate whether companies are in compliance with Delaware’s unclaimed property reporting requirements. A Verified Report notice, for example, is a letter requesting that a company certify the completion of reports submitted to the state. If no such report was submitted, the letter requests that the company certify that there is truly no property to report. Companies are also required to disclose a listing of all legal entities included in these verified reports, as well as a copy of its policies and procedures for unclaimed property reporting, both of which will be evaluated by one of four third party vendors engaged by the DOF to review the submissions. Several of these vendors are also engaged by the DOF to conduct unclaimed property audit examinations. Further, the report must be signed by an officer of the company and notarized.

A Compliance Review notice may be sent following a Verified Report notice, or it may be sent as a separate notice in lieu of a Verified Report notice. With a compliance review notice, the state requests an extensive amount of documentation (e.g., trial balances, check registers, bank reconciliations, and accounts receivable aging reports for up to three months of each year from the dormant year included in the report and the subsequent five years) to be provided to its third-party vendors to confirm that the most recent report submitted to Delaware was complete. This documentation must be submitted to the DOF’s third-party vendor for review within 180 days of receipt of the notice.

If either of these notices goes unanswered, or the reviews are not completed within one year, the DOF may initiate an audit examination without sending a VDA invitation letter. It is our understanding that several hundred notices were mailed in fall 2023. See our recent [Tax Alert](#) for more details.

Risks of non-compliance

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

1. 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 a look back period where a company’s books and records are unavailable, the state of incorporation may perform estimation techniques

to extrapolate the liabilities presumed owed 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.” This may result in a financial statement impact for companies that do not have these estimated amounts reserved on the balance sheet.

2. 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 but if all available statutory penalties and interest are applied, at the DOF’s discretion, the assessment is far greater than 20%. If companies elect into Delaware’s “expedited audit program,” the interest assessment is limited to 1% of the total past due examination liability (Del. Code Ann. tit. 12, § 1183, SB104) .

Interest assessments in Delaware can now only be fully waived through successful completion of the VDA program.

Considerations for taxpayers:

- Taxpayers should consider developing formal policies related to unclaimed property compliance and record retention so they can adequately respond to the state’s numerous methods of compliance enforcement. Companies that cannot produce sufficient policies and procedures to the DOF’s third party vendors for the verified report request may be advanced to the DOF’s compliance review or audit examination programs.
- Given the number of different notices being sent by Delaware, taxpayers that received such notices should consider consulting with experienced advisors for assistance in understanding the scope of each type of notice and any implications from not timely responding to the notices.

Please contact us with any questions.

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