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Delaware: Additional unclaimed property audit notices and voluntary disclosure program invitations

Delaware's Secretary of State in late September 2019 sent new unclaimed property voluntary disclosure agreement (VDA) invitations to companies.

Companies in receipt of these invitations that do not enroll within 60 days of receipt of the letters will be immediately eligible for selection for an unclaimed property audit by Delaware state officials. Companies that did not respond to earlier notices within 60 days may have received audit examination notices from the Delaware Department of Finance.

Additional information

Companies at risk of receiving this outreach range from middle-market companies up through Fortune 100 companies, both privately and publicly held. In addition to the industries historically targeted for audits (such as oil and gas, retail, banking, utilities, manufacturing, pharmaceutical, and consumer products industries), real estate investment trusts (REITs), alternative investment companies, companies that have engaged in significant merger and acquisition (M&A) transactions, newer but faster growing technology companies, and companies with high volumes of transient customer bases such as online marketplaces, online universities, payment processors, and web content streaming service providers may be targeted.

The holder's state of incorporation or formation (often Delaware) is able to assess and claim estimated amounts for any periods when complete accounting books and records are not available. For an unclaimed property audit by Delaware, the lookback period is 10-report years, plus the five-year dormancy period for most property types, which equates to a 15-year "lookback." Most companies are unable to produce complete accounting books and records for the entire lookback period due to system limitations and record retention policies, so—in most instances—there is risk that estimation will be necessary.

What does this means for businesses that received an invitation letter?

Holders that received an invitation letter to participate in the Delaware VDA program may need to respond to the invitation by requesting participation in the program within 60 days from the date of the

letter. The benefits of enrolling in the VDA program versus being selected for audit include, but are not limited to, the following:

- Waiver of Delaware's statutory penalties and interest charges
- A 90-day aging criteria for voided disbursement checks applies under the VDA program, while a normal audit uses a 30-day period and presumes that all checks voided more than 30 days after issuance are unclaimed property liabilities unless the company under audit can prove otherwise
- Control over the process—under the VDA program, a company is allowed to perform a "self-review" of its own records to identify and remediate areas of exposure. This contrasts with a standard audit when the auditors will review all records they determine are "in-scope," require extensive supporting documentation to support any claims that assessed items are not unclaimed property liabilities, and calculate their own assessments of liability that then must be refuted by the company under audit

What this means for businesses that received an audit notice?

Holders that received recently received audit notices from Delaware were either invited to participate in the state's VDA program and did not respond to the invitation or were already undergoing a multi-state audit (Delaware's unclaimed property law includes a loophole that allows the state to sign on to audits initiated by other states without sending a VDA invitation first). Some initial considerations for companies in receipt of any state audit notice include:

- Secure a non-disclosure agreement with the state or, most often, the third-party audit firm conducting the audit on behalf of multiple states, prior to disclosing any information to the auditor
- Request a list of states invited to participate in the audit, as well as copies of all state audit notices sent, from the third-party audit firm conducting the audit to confirm the auditor is indeed authorized to be conducting the audit on behalf of the states
- Consider how the company's fact pattern may limit the scope of the audit (e.g., entities divested via stock acquisition, entities that underwent bankruptcies, etc.) or whether the auditors are entitled to receipt of all information being requested (e.g., data requests extending beyond the lookback periods employed by the states, etc.)
- Consider the periods of records that are not only available but also researchable, which will be important as the auditors will use certain "base years" to develop error ratios for the calculation of potential estimated assessments for the state(s) of incorporation participating in the audit

KPMG observation

Companies that receive a VDA invitation letter or an audit notice from Delaware or other states need to consider what steps to take and risk areas related to unclaimed property non-compliance. Companies that are incorporated in Delaware, but are not in compliance and have not yet received an invitation may need to consider proactively enrolling in Delaware's unclaimed property VDA program.

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