



TaxNewsFlash

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Delaware: Unclaimed property, voluntary disclosure program schedule for 2021

The Delaware Secretary of State posted on its unclaimed property voluntary disclosure agreement (VDA) website the upcoming VDA invitation mailing dates.

Read the [VDA invitation mailing date schedule](#)

The schedule indicates that the Secretary of State has increased the frequency of these mailings from approximately every six months to every three months. The next round of letters will be mailed on or around February 19, 2021. These invitations are part of an ongoing program to identify companies that are not in compliance with Delaware's unclaimed property reporting obligations.

KPMG observation

Typically addressed to the Chief Financial Officer, these letters could be easily missed, given that many businesses are not operating at full onsite capacity. The experience of some companies is that it may take more than 60 days for the invitations to be directed to someone within an organization that understands the significance of the correspondence. It is imperative that companies look out for these mailings and respond in a timely manner. In the past, audit examination notices were sent by Delaware's Department of Finance to companies that did not respond to the VDA invitation letters. Accordingly, companies receiving an invitation and that do not enroll in the VDA program within 60 days may be selected for an unclaimed property audit.

KPMG observation

Companies at risk of receiving this outreach range from middle-market companies through Fortune 100 companies, both privately and publicly held. In addition to the industries historically targeted for audits (oil and gas, retail, banking, utilities, manufacturing, pharmaceutical, and consumer products industries), there has been a marked increase in the receipt of audit notices by companies that have a long filing history but may have made recent acquisitions or inadvertently excluded certain categories of property typical of their industries. An uptick in audit activity has also been reported by newer but faster growing technology companies, and by companies with high volumes of transient customer

bases like online marketplaces, online universities, payment processors, and web-content streaming service providers.

The holder's state of incorporation/formation, which is often Delaware, is able to assess and claim estimated amounts for any periods where complete accounting books and records are not available. For an unclaimed property audit by—or VDA with—Delaware, the look-back 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.

Guidance for businesses receiving an invitation 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.

KPMG observation

Holders of unclaimed property that received audit notices from Delaware were likely companies that did not respond to an invitation to participate in the state's VDA program or were undergoing a multi-state unclaimed property 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. Companies in receipt of an audit notice need to consider the following:

- Securing a non-disclosure agreement with the state or, most often, the third-party audit firm conducting the audit on behalf of multiple states, in place prior to disclosing any information to the auditor
- Requesting 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
- 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.)
- The periods for which records are available and/or 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

Companies that receive a VDA invitation letter or an unclaimed property audit notice from Delaware or other states need to evaluate next steps 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 need to consider enrolling in Delaware's unclaimed property VDA program.

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