



# TaxNewsFlash

United States



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## Delaware: Unclaimed property, voluntary disclosure agreement invitations to be mailed for 2022

The Delaware Secretary of State's Office issued an [announcement](#) that it will be mailing letters to companies inviting them to join the state's unclaimed property voluntary disclosure agreement (VDA) program on or around February 18, 2022, and May 20, 2022.

Companies that do not respond and enroll in the VDA program within 90 days of the date of the letter will be referred to Delaware's Department of Finance and may be selected for audit. Accordingly, companies need to be on the lookout for these mailings and respond in a timely manner.

### **KPMG observation**

Delaware's VDA invitations are usually addressed to a company's Chief Financial Officer and can be easily overlooked. Companies at risk of receiving this outreach have historically ranged from middle-market companies through Fortune 100 companies—both privately and publicly held—across a broad range of industries including oil and gas, retail, banking, utilities, technology, media, healthcare, manufacturing, pharmaceutical, and consumer products.

### **Background**

Recently, there has been a marked increase in the receipt of audit notices by: (1) companies that have a long filing history but may have made recent acquisitions or inadvertently excluded certain categories of property typical of their industries; and (2) companies that have formed within the last 10 years but have experienced rapid growth within the last few years (for example, start-ups that have recently gone public, software-as-a-service companies, and companies with online and transient customer bases such as payment processors and online marketplaces). While many of these companies may believe they have minimal unclaimed property exposure, providing records for the entire VDA lookback period and completing the program can still be challenging.

For both unclaimed property audits and the VDA program, 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 records for the entire lookback period due to system limitations and record retention policies. As a result, a company's state of incorporation or formation (often, Delaware) has the authority to assess and claim estimated amounts for any periods where complete books and records are not available. In many instances, there is a risk that estimation (a liability typically not already accounted for on a company's balance sheet) may 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:

- **Waiver of Delaware's statutory penalties and interest charges.** Recent legislative updates pursuant to Senate Bill 104 (enacted in June 2021) now limit the State Escheator's authority to waive penalties and interest for companies under audit. For audits authorized on or after August 1, 2021, a 20% assessment of interest on past due property uncovered (including estimated amounts) is now considered "un-waivable" unless participation in an "expedited audit" option, which contains its own risks and an "un-waivable" 1% interest assessment, is elected by the holder. Del. Code Ann. tit. 12, § 1185
- 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. This can provide a substantial benefit in terms of reduction of volume of checks requiring remediation, as well as the associated dollars of potential exposure.
- 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 in which the auditors will review all records and entities that 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 must then be refuted by the company under audit.
- As previously noted, businesses that do not enroll in the VDA program may be selected for audit by Delaware's Department of Finance and State Escheator. For audits authorized after August 1, 2021, businesses may request an "expedited" audit program. Considerations related to the "expedited" audit program include:
  - Expedited audit requests by businesses are granted or denied at the sole discretion of the State Escheator within 60 days of the request. If accepted, a holder must provide "sufficient responses" to auditor requests within prescribed timeframes generally following an 18-month timeline. If a holder provides sufficient responses during the expedited audit, the Escheator must provide an audit report within two years—as compared to historical audits that have typically taken three to five years (or more) to complete.
  - The State Escheator cannot waive the 20% assessment of interest on past due property for audits authorized on or after August 1, 2021. However, if a business elects to resolve an examination through the expedited audit process, it may only be subject to a reduced 1% interest assessment. Del. Code Ann. tit. 12, § 1185

### **KPMG observation**

Holders of unclaimed property that received audit notices from Delaware are often companies that did not respond to an invitation to participate in the Delaware's VDA program or were undergoing a multi-state unclaimed property audit. Delaware's unclaimed property law allows the state to initiate audits of companies without first sending a VDA invitation if (1) an audit was initiated by another state, (2) the company applied for or entered into a VDA with Delaware prior to June 30, 2012, or (3) the company enrolled but later withdrew from Delaware's VDA program on its own or was removed from the program due to not working in good faith to complete the program. Del. Code Ann. tit. 12, §§ 1172(a) and 1173(e)

Companies in receipt of an audit notice need to consider the following:

- Securing a non-disclosure agreement with Delaware or—most often—the third-party audit firm conducting the audit on behalf of multiple states, 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
- Determining 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.) and whether the auditors are entitled to receive all information being requested (e.g., data requests extending beyond the lookback periods employed by the states, etc.)
- Considering 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, a compliance review notice or an unclaimed property audit notice from Delaware or other states accordingly need to evaluate next steps and risk areas related to unclaimed property non-compliance. Additionally, companies that are incorporated in Delaware but are not in compliance and have not yet received an invitation need to proactively assess their overall compliance with unclaimed property and consider enrolling in Delaware’s unclaimed property VDA program.

For more information, contact a member of KPMG’s National Unclaimed Property Team:

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