



# SALT Alert!



## **SALT Alert! 2017-25: An Offer You Can't Refuse: Delaware Secretary of State to Send Invitations to Companies Urging Participation in Delaware's Unclaimed Property Voluntary Disclosure Program and Delaware Department of Finance Audit Regulations Start the Clock Ticking for Audit Acceleration Options**

On September 29, 2017, Delaware's Secretary of State (SOS), Jeffrey Bullock, issued an email to all holder advocates indicating that he plans to send invitations to numerous companies that have been identified as potentially non-compliant with Delaware's unclaimed property reporting requirements to participate in the SOS's Unclaimed Property Voluntary Disclosure Agreement (VDA) program. Companies receiving these invitations will have sixty (60) days from the date of receipt to request participation. Bullock further indicates that companies that receive invitations, but choose not to participate in the VDA program, **will be** referred to the State Escheator's Office for audit examination.

In addition, Delaware [Regulation 104, Department of Finance Abandoned or Unclaimed Property Reporting and Examination Manual](#), was formally approved for adoption on October 1, 2017 with an effective date of October 11, 2017. The finalization of this regulation starts the clock ticking for businesses that were under audit by the state prior to the enactment of Delaware Senate Bill 13 on February 2, 2017. That legislation established a 60-day period that begins from the effective date of the final audit regulations (now set for October 11, 2017) for those businesses to elect certain audit acceleration options. Specifically, holders under audit since July 22, 2015 and earlier will have the option to convert to the state's VDA program, and holders whose audits were initiated subsequent to July 22, 2015 but prior to the adoption of Senate Bill 13 will have the option to convert to the state's expedited audit program. Because 60 calendar days from October 11, 2017 falls on a weekend, it is unclear whether the deadline to elect these options will be pushed to Monday, December 11, 2017, but further guidance should be forthcoming from the SOS's office shortly.

### **What This Means for Businesses**

A significant number of companies are expected to receive this correspondence from the SOS, and those companies will need to make a fairly quick decision about whether to participate in the VDA program or to "wait" for a Delaware unclaimed property audit notice. Senate Bill 13, which was passed in February 2017, retains a requirement from prior law that holders be notified of their ability to participate in the VDA program prior to the initiation of an audit. However, this requirement does not apply if Delaware participates in joint examinations initiated by other states at the election of the State Escheator and in consultation with the Secretary of State, or if information is received under Delaware's False Claims Act.<sup>1</sup> The message from Mr. Bullock is silent on whether companies that previously

<sup>1</sup> Del. Code Ann. tit. 12, § 1172 (a) and (d).

received invitations to participate in the VDA program in prior years, but did not respond to those initial notices, also will receive invitations during this next round of mailings; however, the prior invitation letters did indicate that companies that did not respond may be selected for an unclaimed property audit at any time once the 60-day window to respond passed.

Under the unclaimed property priority rules established by the United States Supreme Court in *Texas vs. New Jersey*,<sup>2</sup> the state of incorporation/formation is entitled to claim estimated amounts for any periods where complete accounting books and records (i.e., bank statements and uncashed checklists, accounts receivable aging reports) are not available. For an unclaimed property audit or VDA in Delaware, the look back period is 10 report years, plus the 5-year dormancy period, which equates to a 15-year “lookback.”<sup>3</sup> Most companies are unable to produce complete accounting books and records for an entire lookback period, often due to record retention practices or system conversions. Consequently, for the large number of companies incorporated in the state, Delaware will typically calculate estimated unclaimed property amounts using error ratios based upon available records and extrapolate a liability for all years with incomplete or unavailable records.

Delaware has historically been aggressive in selecting companies perceived as non-compliant for unclaimed property audits and routinely hires third party audit firms that are paid on both an hourly and contingency fee basis, to conduct these audits. Since the third party audit firms are at least partly compensated based on the value of the unclaimed property assessment, the degree of documentation they require to prove that assessed liabilities are not reportable unclaimed property can be higher under an audit than under a VDA.

### Benefits of the SOS VDA Program vs. Audit

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: Delaware can charge interest for each month property is reported late, up to 50 percent of the value of the property.<sup>4</sup> In addition, Delaware has four separate penalties that can be imposed on companies for not filing unclaimed property reports in accordance with the state’s requirements.<sup>5</sup> These penalties and interest assessments are waived under the VDA program.<sup>6</sup> Under a normal audit, the State Escheator may waive some or all penalties and some or all interest, but is not required to waive either.<sup>7</sup>
- Aging criteria: A 90-day aging criteria for voided disbursement checks applies under the VDA program, while a normal audit uses a 30-day period.
- Control over the process: Under the VDA program, a company is allowed more control over the process and is able to perform a “self-review” of its own records and identify and remediate areas of exposure. Under a standard audit, the auditors will review all records they determine as “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 be refuted by the company under audit.

Companies that receive an invitation from the Delaware SOS should contact KPMG 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, may also wish to consider enrolling in Delaware’s unclaimed property VDA program.

<sup>2</sup> *Texas v. New Jersey*, 379 U.S. 674 (1965).

<sup>3</sup> Del. Code Ann. tit. 12, §§ 1172(h) (audits) and 1173(c) (VDAs).

<sup>4</sup> Del. Code Ann. tit. 12, § 1183(a).

<sup>5</sup> Del. Code Ann. tit. 12, §§ 1183(b),(c),(d) and 1184.

<sup>6</sup> Del. Code Ann. tit. 12, § 1173(a)(1).

<sup>7</sup> Del. Code Ann. tit. 12, § 1185.

In addition, companies already undergoing audit examinations by Delaware should carefully consider whether they wish to elect one of the audit acceleration options (VDA conversion or expedited audit) prior to the 60 calendar day deadline in December 2017, as a result of the recent finalization of regulations issued by the Delaware Department of Finance. Stay tuned for additional information from KPMG on those new regulations and other unclaimed property developments.

Companies and practitioners should stay tuned as KPMG continues to monitor changes in Delaware regulations and proposed legislation. For additional information, visit [KPMG Unclaimed Property](#) or contact one of our dedicated unclaimed property professionals listed below.

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<sup>1</sup> Del. Code Ann. tit. 12, § 1172 (a) and (d).

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<sup>7</sup> Del. Code Ann. tit. 12, § 1185.