KPMG

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Delaware: Unclaimed property, voluntary disclosure agreement "invitations" expected soon

The Chief Deputy Secretary of State for Delaware this week emailed interested parties announcing that a new set of invitation letters were being mailed to invite participation in the state's unclaimed property voluntary disclosure agreement (VDA) program.

Companies that receive these "invitations" have 60 days from the receipt of the letters to respond or will be immediately eligible for selection for an unclaimed property audit.

Additional information

Companies at risk of receiving this outreach range from middle-market companies to Fortune 100 companies—both privately and publicly held. In addition to the industries historically targeted for audits—such as retail, banking, utilities, manufacturing, pharmaceutical, and consumer products industries—there has been a marked increase in the receipt of audit notices by REITs, alternative investment companies, companies that have engaged in significant M&A transactions, newer but fast-growing technology companies, and companies with high volumes of transient customer bases such as online marketplaces, online universities, and web-content streaming service providers.

The property holder's state of incorporation / formation (often Delaware) is often 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, or VDA with, Delaware, the lookback period is 10-report years, plus the five-year dormancy period for most property types—that is, 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; thus, in most instances, there is a risk that estimation may be necessary.

What does this mean for companies that receive an invitation letter?

Holders of property that received an invitation letter to participate in Delaware's VDA program need to consider responding 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:

- Waiver of Delaware's statutory penalties and interest charges.

- A 90-day aging criteria for voided disbursement checks applies under the VDA program—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 to be "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 does this mean for businesses that receive an audit notice?

Holders that 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). Below are some initial considerations for companies in receipt of any state audit notice:

- 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 evaluating what will be their 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 want to consider proactively enrolling in Delaware's unclaimed property VDA program.

For more information, contact one of KPMG's unclaimed property professionals:

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