

State and Local Tax ADVISORY

January 9, 2012

New Delaware Proposed Regulations Address Important Unclaimed Property Issues

On January 1, 2012, Delaware announced that it is proposing to adopt two unclaimed property regulations: (1) a regulation addressing practices and procedures for establishing whether the full period of dormancy has run against certain securities and related property, and (2) guidelines concerning Delaware's new administrative appeals process. Members of the public may present written comments on the proposed regulations by submitting such written comments to Delaware on or before **January 31, 2012**.

Practices and Procedures for Establishing Whether the Full Period of Dormancy Has Run Against Certain Securities and Related Property

The proposed regulation related to securities institutes a new due diligence requirement for holders of "Securities and Related Property." The proposed regulation defines "Securities and Related Property" fairly broadly to mean "[p]roperty that consists of (a) intangible ownership interests in corporations, whether or not represented by a stock certificate, bonds and other securities; (b) dividends, cash, stock and other distributions made (or attempted to be made) by issuers of securities in respect of the securities issued; (c) certificates of membership in a corporation or association; (d) funds deposited by a Holder with fiscal agents or fiduciaries for payment to Owners of dividends, coupon interest and liquidation value of stocks and bonds; and (e) funds to redeem stocks and bonds."

The due diligence obligation set forth in the proposed regulation requires the holder of Securities and Related Property as defined above to attempt to contact the apparent owner of the property by letter sent via first class mail no more than 120 days, and no less than 60 days, before reporting to Delaware any Securities and Related Property with a value of \$250 or more that is otherwise deemed to be abandoned property.

The regulation also establishes the requisite template for such due diligence communications. The first paragraph of the due diligence letter must state: "Our records show that we, [Holder], are holding unclaimed property that may belong to you. We have not had direct contact with you since [mm/dd/yyyy]. The check or identifying number for the [\$Amount] we are holding is No. [xxxxxx], and the item is dated [mm/dd/yyyy]." Many states have not in the past required the date of last contact by a property owner to be included in a due diligence letter. Rather, the date of last contact is typically included in the detail for each item of property reported on a holder's annual report to the state.

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For Securities and Related Property and other property types, it is the date of last contact that begins the running of the dormancy period and therefore this is a significant date in determining if the dormancy period has run and the property is presumed abandoned and therefore possibly reportable.

The regulation also provides guidance to holders for due diligence letters that are coded undelivered. If any letter is returned to the holder undelivered, or if any letter appears to have been delivered, but the apparent owner of the property fails to respond to the letter before the holder's report of abandoned property is due, the Securities and Related Property shall be deemed abandoned property against which a full period of dormancy has run. If the holder has no record of an address of an apparent owner, or if the holder has given the apparent owner substantially similar notice pursuant to laws other than state unclaimed property laws in the past 90 days, the holder is excused from this requirement.

A holder that provides notice under this regulation may charge the cost of postage and other reasonable administrative costs, not to exceed five dollars per mailing, against the Securities and Related Property.

Commentary on Proposed Regulation: Delaware has invited public comment on the proposed regulation, pursuant to its mandate in 29 Del.C., Ch. 1131. In this regard, we observe that several questions deserve consideration by holders that will be subject to this new due diligence requirement, and may be appropriate subjects of written comments to the Department of Finance, Division of Unclaimed Property.

- ***May a Regulation Institute a Due Diligence Requirement?*** Most other states implement due diligence requirements with respect to securities or other property types through their unclaimed property statutes, not through regulation. This is presumably because such a requirement represents a significant compliance burden, with associated costs and potential penalties for failure to properly effectuate the due diligence requirements; hence, it is proper for the state's legislature to impose such an obligation on holders. Here, the Department of Finance attempts to impose an obligation that other states impose by statute through administrative regulatory fiat.
- ***Due Diligence Required for Securities Coded RPO/Undeliverable?*** If a holder or its transfer agent has coded a security or related property as undeliverable (sometimes also referred to as "RPO") because prior mailings to the property owner have been returned as undeliverable, it seems illogical to extend the due diligence mailing requirement to such property items, even if the holder is entitled to charge up to \$5 of its costs to conduct the mailing against the property value.
- ***Does Charging the Due Diligence Expense Against Securities and Related Present a Problem?*** Holders may wish to consider how they will be able to collect their due diligence mailing costs from property that is reportable to Delaware, given that certain securities and related property are required to be reported and paid over in the form in which they were issued (e.g., share certificates) and therefore are not being reduced to cash prior to reporting and payment to the state. Of course, this is not a problem with regard to dividend checks that remain uncashed.

Regulation on Practices and Procedures for Appeals of Determinations of the Audit Manager

The proposed regulation provides additional guidance on Delaware's new appeals process included in SB 272, signed into law by the Delaware governor on July 23, 2010. The regulation provides guidance related to the use of counsel in the appeal; filing motions; service of motions and pleadings; ex parte communications (i.e., prohibited); filing documents related to the proceeding; hearing procedures; etc.

We are not aware that any holders have thus far taken advantage of this new administrative process, and it will be interesting to see if this regulation provides the additional guidance needed to encourage/induce holders to use the administrative process. One concern that was expressed by holders when the law implementing this appeals process was enacted was how an "independent reviewer" would be selected to hear the appeal and whether such person would truly be "independent." The proposed regulation does not provide significant insight into how the independent reviewer will be selected, other than he or she will be selected by the Secretary of Finance.

Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property expertise together have more than 85 years of experience advising major corporations on unclaimed property matters. We assist our clients in analyzing complex legal issues, obtaining legal opinions, conducting multistate/multi-entity internal compliance reviews, designing corporate compliance policies, advising clients on planning and related restructurings, negotiating voluntary disclosure agreements, defending single-state and multistate audits, litigating unclaimed property issues and influencing unclaimed property policy and administration.

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