

Unclaimed Property **ADVISORY**

November 29, 2012

The Delaware Secretary of State Promulgates Important Unclaimed Property VDA Guidance

On July 11, 2012, Delaware Governor Jack Markell signed Senate Bill 258 (S. 258) into law, thereby granting the Secretary of State (as opposed to the State Escheator) a limited three-year window to enter into voluntary disclosure agreements (VDAs) with holders of unclaimed property (the “New VDA Program”). Previously, only the State Escheator had the authority to enter into unclaimed property voluntary disclosure agreements (the “Old VDA Program”). S. 258 set forth a number of key provisions of the New VDA Program, including shortened look-back periods. Unlike the look-back period for the Old VDA Program, which requires holders to report property dating back to 1991, holders who enter the New VDA Program with the Secretary of State and complete the VDA by June 30, 2014, will be eligible for a shortened look-back period to 1996. Holders who complete their VDA by June 30, 2015, will be eligible for a shortened look-back period to 1993. Holders may not apply for the New VDA Program after June 30, 2014. [For further background information on the New VDA Program, see A&B’s [July 2, 2012, advisory](#).]

Although S. 258 provided this general framework, it made no mention of how the New VDA Program would be implemented, including the substantive methods that would be employed and the standards that would be utilized in reviewing holder VDA submissions. The bill instead deferred that authority to the Secretary of State through the regulatory and rulemaking process. The Secretary of State in turn selected Drinker Biddle & Reath, LLC (“Drinker Biddle”), a Philadelphia-based law firm with a Delaware presence, to develop and administer the VDA program. Drinker Biddle’s responsibilities include creating the guidelines and regulations governing the VDA program. Such guidance has now been published and is posted on a website dedicated exclusively to the New VDA Program: <http://www.delawarevda.com/>.

The key components of the New VDA Program as set forth in this newly published guidance, including the New VDA Program’s “implementing guidelines,” are addressed below:

VDA Work Plan: The New VDA Program is initiated by completing a Form VDA-1, being accepted into the program, and holding a “kick-off” meeting with the Secretary of State. While this initial process will be familiar to those that have gone through the Old VDA process, the New VDA Program will also involve the creation of a “VDA Work Plan” during the kick-off meeting. The sample VDA work plan on the Secretary of State’s VDA website contains a general 15-step work plan with the various steps occurring over a nine-month time period.

Nine-Month Window: As noted above, the New VDA Program implementing guidelines contemplate that the entire VDA process will be completed within nine months. While this timeline may be a welcome change from an efficiency standpoint, the implementing guidelines state that extensions will “generally not be granted” and the failure to adhere to the work plan will result in “removal from the program or assessment of interest.”

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- A&B Comment: For those unfamiliar with the VDA process, the nine-month window is something that warrants serious consideration. An unclaimed property VDA is a labor-intensive process that involves sustained cooperation among internal business groups, outside advisors and state administrators. Since the repercussions for failure to meet the nine-month window are significant (interest was not imposed under the Old VDA Program for failure to meet a specified time period and holders were often granted extensions), holders should carefully consider the New VDA Program with this nine-month window in mind and make sure that adequate resources are allocated to the process from the outset.
- A&B Comment: Furthermore, query if the state may prevent a holder from enjoying the benefits of the New VDA Program if the holder meets the *statutory* requirement of completing the VDA by June 30, 2014, if that holder required more than nine months to submit its VDA report (e.g., it signed up to participate in 2012 or early-mid 2013). S. 258 does not contain any reference to this nine-month limitation.

Review of Holder Submissions: From its inception, the New VDA Program was touted as a more “holder friendly” program than the Old VDA Program. Indeed, the Secretary of State’s website acknowledges this, noting that the “legislature created a new, more business friendly program.” However, the New VDA Program will likely involve review similar to that of the Old VDA Program. The New VDA Program addresses the standard of review in its implementing guidelines and states that the “analysis will be thorough, reasonable, prompt, and in accordance with the Abandoned Property Law.” The VDA website further states, in response to an FAQ about the “friendly and collaborative” nature of the New VDA Program, that: “First, a word about what it does not mean. The Program is not designed to be a push-over. The Administrator of the program and the forensic accountants retained by the Administrator are seasoned professionals in the abandoned property field and will be appropriately diligent and thorough in working with Holders to assist them in adhering fully to the Abandoned Property Law ... However, the Program is friendlier because its overarching goal is to dramatically reduce the need to conduct audits while dramatically increasing the number of firms meeting their annual reporting requirements ... [and] that the Delaware Department of State has a well-earned reputation for providing businesses with efficient, predictable and friendly customer service.”

Estimation: The implementing guidelines acknowledge that estimation of liabilities for no-records years will (of course) be a part of the New VDA Program. However, the New VDA Program guidelines contemplate that the “Holder and State [will] agree upon an appropriate estimation methodology.”

- A&B Comment: While estimation was certainly a part of the Old VDA Program, the New VDA Program implementing guidelines suggest that the state and the holder will be able to agree on the estimation methodologies *before* the VDA is submitted. Under the Old VDA Program, the estimation methodology was often tailored to the expectations of the State Escheator and any disagreement on methodology occurred *after* the VDA was submitted. As a result, holders (and their advisors) were wary to deviate from the methodologies that were known to be acceptable, even if they had supportable reasons to do so. Moreover, disagreements with respect to the methodologies employed often became a barrier to closing the VDA and holders sometimes chose to concede the issues in order to close the VDA. Since the New VDA Program seems to permit estimation to be addressed and agreed to before the VDA is submitted, it may afford holders the ability to advocate for estimation methodologies that, in the past, were not employed or were only addressed at the end of the process.

Closing Agreement & Release Provision: At the conclusion of the New VDA Program process, the Form VDA-2 (generally referred to as a “closing agreement”) is executed. Similar to the Old VDA Program’s Form AP DE-2, the new Form VDA-2 contains a “release provision.” The New VDA Program implementing guidelines state that the “release ... protects the Holder from any audit through the last calendar year reflected in the report unless (1) there is evidence of fraud or willful misrepresentation by the Holder in its participation in the New VDA Program, or (2) the Holder fails in the future to comply with the annual reporting requirement under the Abandoned Property Law.” The implementing guidelines further state that the standard under which the Secretary of State may review the VDA is in contrast to the Old VDA Program, which allowed the State Escheator to review VDAs for *any reason* within an 18-month window.

- **A&B Comment:** The New VDA Program terms of release are arguably more favorable with respect to limiting the state’s ability to audit the VDA look-back period. The New VDA Program requires that the perceived omission be the result of “fraud” or “willful misrepresentation” in order for the state to have a right to audit the look-back period, whereas under the Old VDA Program, the State Escheator could review a submitted VDA for any reason within an 18-month timeframe. However, it bears noting that under the Old VDA Program, the State Escheator would only assert additional liability upon reexamination if the holder did not disclose the property in “good faith.” Thus, both VDAs use the same “good faith” standard in determining whether to assert additional liability (even if the New VDA Program appears to impose a higher standard for review/audit).
- **A&B Comment:** In addition, the New VDA Program is contingent upon the holder filing *future* unclaimed property reports, which could have the effect of leaving the VDA open indefinitely. If the holder fails to file adequate reports, the state will issue a “warning letter” to the holder for failing to comply with the VDA and give the holder 30 days to correct its noncompliance. Query how this requirement will operate in practice, considering that many holders may not possess Delaware-address property and Delaware does not require negative returns. Does this mean that holders that have no Delaware-address property and do not file reports should expect to receive a warning letter and then be required to prove that they had no property or risk jeopardizing the VDA? Will the Secretary of State be the arbiter of such discussions even after the New VDA Program sunsets? It is also noteworthy that the New VDA Program, like the Old VDA Program, while granting immunity under Del. Code tit. 12, § 1203, does not deem payment by holder to be in “good faith” for indemnity purposes.

Disclosure: Under the New VDA Program, as was the case with the Old VDA Program, the holder is required to disclose all issues where it made a determination that (1) there is no property or (2) property is omitted on any basis from the VDA report (e.g., legal defenses, etc.).

As we noted in our previous advisory, the New VDA Program may provide holders with a valuable opportunity to address their historic unclaimed property compliance. However, holders should carefully review the features of the New VDA Program and discuss them with their advisors, so that they are fully versed in what will be expected and prepared to complete the VDA process within the tight nine-month window. In addition, holders that are interested in the New VDA Program should confer with legal counsel to ensure that attorney-client privilege and other protections are established and maintained.

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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