



Unclaimed Property ADVISORY ■

JANUARY 26, 2016

Post-Delaware VDA Compliance – Reporting

Hundreds of holders have voluntarily enrolled in the Delaware Secretary of State's (SOS) Unclaimed Property Voluntary Disclosure Agreement (VDA) program since its implementation in 2012, with many of the VDAs closing within the past six months. Now the focus for the holders that have completed the process has turned to compliance. One of the conditions contained in the Delaware Form VDA-2 (i.e., the closing agreement) is that the holder commit to file three successive annual unclaimed property reports in accordance with Delaware's Abandoned Property Law. Failure to file the required reports results in the issuance of a "warning letter" from the SOS notifying the holder of its failure. If the holder fails to meet the requirements after receiving the warning letter, the state in its "sole discretion" is permitted to void the waiver of interest and penalties and the release from audit, which were the primary VDA program benefits.

New Requirement to Send Copy of Annual Report to the SOS

On January 21, 2016, holders that successfully completed a VDA and their counsel may have received an email from the SOS's unclaimed property administrator, titled "Post SOS VDA Compliance," reminding holders that they have an obligation to file an annual unclaimed property report with the Department of Finance in accordance with the VDA-2. These unclaimed property reports must be filed by the standard March 1 deadline in order to stay in compliance with the VDA. *Significantly, the email also instructs holders to send a copy of the filed reports directly to the SOS via email to SOS.VDA@state.de.us.*

Holders who have executed a VDA-2 should note this requirement, which the email suggests is mandatory for holders pursuant to the terms of the VDA-2. However, copying reports to the SOS is a new and separate requirement for VDA participants, at least based on the current iteration of the VDA-2 document, and holders may not be aware of this apparent additional condition to a successful completion of the VDA program. It is possible that by failing to send a copy of a report to the SOS, a holder could be considered out of compliance with its VDA-2 agreement. On a prospective basis, holders may wish to expressly address this dual-agency filing obligation with the VDA administrator when negotiating the final VDA-2.

Suggested Best Practices for Complying with the Three-Year Reporting Requirement

In addition, holders that have completed a VDA may not have any property to report to Delaware in 2016 or in the future because the holder does not have any property owed to an owner with a Delaware address, or in the case of a Delaware-domiciled holder, to an owner with a foreign address or an unknown owner. Holders other than financial institutions are not required to file negative reports to Delaware if they do not hold reportable property.¹ Nonetheless, to avoid any questions or scrutiny from Delaware about why a holder has not filed an unclaimed property report pursuant to the terms of the VDA-2, we recommend that holders file a negative report with the state even if they have no reportable property. In addition to ensuring that holders meet the conditions set forth in the VDA-2, filing such a negative report should have the effect of running the statute of limitations for the 2016 report year. If a holder files a negative report, we would also recommend that the holder list every conceivable property type on the report and designate each as “zero liability”—to address any assertion by the state that the statute of limitations applies on a property-type-by-property-type basis—and include a notation that the holder has no property owed to an owner with a Delaware address, an owner with a foreign address or an unknown owner.

¹ [Delaware Escheat Handbook January 2015](#); see Del. Code Ann. tit. 12 § 1171.

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