ALSTON & BIRD

WWW.ALSTON.COM

Unclaimed Property ADVISORY ▪

MARCH 20, 2023

Volunteers First Need to Be Volun-told: What's in California's Voluntary Compliance Program?

California's voluntary compliance program (VCP) appears to be up and running after over six months since enactment of California AB 2280 on September 13, 2022, which authorized the State Controller's Office (SCO) to establish the VCP. The VCP's implementation was contingent upon an appropriation of funds by the California legislature for the administration of the VCP, and the SCO now appears to be gearing up to start the program in anticipation of such funding by gathering initial holder interest and applications. We covered the VCP in greater detail in our February 23, 2022 advisory and our August 23, 2022 advisory before AB 2280 was signed into law.

The SCO has directed holders interested in enrolling during the initial VCP rollout to complete a brief "Interest Form to Receive an Application" on the SCO's unclaimed property website. Once interested holders complete the form, the SCO will process the form and send approved holders an application for the VCP. Interested holders should be cautioned that the interest form cannot be completed anonymously. Holders must disclose their identities, their reporting histories, and the identities of representatives before receiving an application to the VCP.

This two-step program also creates the possibility that the SCO could target an interested holder for audit before it is able to enter the VCP. Although it seems unlikely that the SCO would undermine its own program in this manner, there does not appear to be a valid reason for the two-step process, as opposed to having holders simply submit applications to the program, as is done in virtually every other state with a program.

Overview of the VCP

While the VCP, added by the new Section 1577.5 of the California Code of Civil Procedure, is welcome news to holders, the program is not available to everyone. Section 1577.5 prohibits participation in the VCP by holders that (1) are the subject of an examination of records or have received notification from the SCO of an impending examination; (2) are the subject of civil or criminal prosecutions involving compliance with the California Unclaimed Property Law (UPL); (3) have an outstanding interest assessment, including holders subject to ongoing SCO review of an abatement request; and (4) have had interest waived through the VCP within the previous five years.

As we indicated in our previous advisories, the VCP as enacted is overly restrictive because it precludes holders from resolving ongoing interest assessment issues with the SCO via the VCP; however, the new Section 1577.5 allows the SCO "discretion" to enroll "eligible holders in the program." The fact that the program is discretionary—even if the holder is otherwise eligible to participate—may be the reason for the two-step process and may increase the risk of gamesmanship by the SCO.

If a holder passes the VCP's eligibility requirements, in order to complete the VCP and qualify for an interest waiver, eligible holders must:

- Enroll and participate in an "educational training program" provided by the SCO.
- Undertake a review of its books and records for "at least" the past 10 report years (typically, 11 transaction years for payroll and 13 transaction years for other property types).
- "Make reasonable efforts" to notify owners by mail or electronically under the UPL procedures.
- Report past-due property within six months of being enrolled in the VCP unless extended by the SCO (the SCO has the authority to extend the reporting date for no more than 18 months after the enrollment date).
- Remit the property in accordance with the statutory remittance timeline (i.e., between seven months and seven months and 15 days after the report is received by the SCO).

It should be emphasized that the VCP is very different from the Delaware voluntary compliance program, which many holders are familiar with. Under the Delaware program, holders generally perform a full-scope review, which is closely scrutinized by the state, and receive a release of liability for all prior periods. By contrast, under the California VCP, holders would identify specific past-due property and would receive a release of liability only for the specific property reported. Thus, participation the California VCP does not ensure that the holder is immune from audit for prior periods, as is the case with the Delaware program.

What Are You Signing Up For?

While holders may now request applications to participate in the VDA program, holders should consider waiting until after this initial phase (1) to ensure that the SCO is permitting all eligible holders to participate, and not using the process to identify audit targets; and (2) so that the SCO can work out any kinks identified during the program's initial implementation. In our experience, other states' implementations of voluntary disclosure programs have not been seamless since states often lack the initial capabilities to fully implement the programs. While most states do eventually get their programs running smoothly, this often comes at the expense of holders that applied first—i.e., the guinea pigs.

Holders that are interested in participating in the initial VCP rollout should focus on the strict timeline that the SCO has provided for completion of the VCP. In particular, enrolled holders must:

- Complete all educational training sessions by July 31, 2023.
- Have due diligence completed by September 30, 2023.
- Submit the SCO's Notice Report before November 1, 2023.
- Submit a report and remit all property between June 1 and June 15, 2024.

Timelines for subsequent VCP enrollees have yet to be published by the SCO. Despite having no set timelines, the SCO indicated that it is currently accepting interest forms for subsequent VCPs and intends to provide applicable timelines for future programs.

According to the SCO's interest form, applications have yet to be sent to holders, and there is no set date when applications will be sent or processed (presumably they will be available well before July 31, 2023, consistent with the timeline, and we have received informal information that they will be sent out within the next few weeks). If applications for the VCP are delayed (either in distribution or processing), once they are finally approved by the SCO, holders participating in the initial VCP group will have less time to meet all the deadlines mandated by the SCO. This would include completing the educational training, which the SCO has yet to make available, and completing the required due diligence.

Holders may also want to consider delaying their VCP application until the SCO has adopted formal guidelines and forms that provide specific procedures for the administration of the program. Section 1577.5 gives the SCO such power, and we fully expect the SCO to provide guidance on aspects of the VCP program that will impact a holder's decision of whether and when to apply to conduct a VCP self-review process.

You can subscribe to future *Unclaimed Property* advisories and other Alston & Bird publications by completing our **publications subscription form**.

Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property experience 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.

Click **here** for Alston & Bird's Tax Blog

Please direct any questions to the following members of Alston & Bird's Unclaimed Property Group:

Kendall L. Houghton
+1 202 239 3673
kendall.houghton@alston.com

Matthew P. Hedstrom
+1 212 210 9533
matt.hedstrom@alston.com

Ethan D. Millar
+1 213 293 7258
ethan.millar@alston.com

Michael M. Giovannini
+1 704 444 1189
michael.giovannini@alston.com

John L. Coalson, Jr.
+1 404 881 7482
john.coalson@alston.com

Kathleen S. Cornett
+1 404 881 4445
kathleen.cornett@alston.com

Daniel Dubin
+1 213 576 1156
daniel.dubin@alston.com

Joshua A. Labat
+1 212 210 9569
josh.labat@alston.com

Maryann H. Luongo
+1 202 239 3675
maryann.luongo@alston.com

Amy Nogid
+1 212 210 9413
amy.nogid@alston.com

Tiffany Li Qu
+1 404 881 7272
tiffany.li.qu@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ 404.881.7000 ▪ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86 10 8592 7500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ▪ 3rd Floor ▪ 1000 Brussels ▪ Brussels, 1000, BE ▪ +32.2.550.3700 ▪ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ 704.444.1000 ▪ Fax: 704.444.1111
DALLAS: Chase Tower ▪ 2200 Ross Avenue ▪ Suite 2300 ▪ Dallas, Texas, USA, 75201 ▪ 214.922.3400 ▪ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ▪ 301 Commerce ▪ Suite 3635 ▪ Fort Worth, Texas, USA, 76102 ▪ 214.922.3400 ▪ Fax: 214.922.3899
LONDON: 4th Floor, Octagon Point, St. Paul's ▪ 5 Cheapside ▪ London, EC2V 6AA, UK ▪ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ 213.576.1000 ▪ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ 212.210.9400 ▪ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ 919.862.2200 ▪ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ 415.243.1000 ▪ Fax: 415.243.1001
SILICON VALLEY: 755 Page Mill Road ▪ Building C - Suite 200 ▪ Palo Alto, California, USA 94304-1012 ▪ 650.838.2000 ▪ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ 202.239.3300 ▪ Fax: 202.239.3333