

MEMO# 26235

June 13, 2012

Interpretation of "Dormancy" for Purposes of Delaware's Escheatment Law

[26235]

June 13, 2012

TO: BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 26-12
BROKER/DEALER ADVISORY COMMITTEE No. 29-12
SEC RULES MEMBERS No. 50-12
SMALL FUNDS MEMBERS No. 19-12
TRANSFER AGENT ADVISORY COMMITTEE No. 37-12 RE: INTERPRETATION OF "DORMANCY"
FOR PURPOSES OF DELAWARE'S ESCHATEMENT LAW

In 2008, Delaware revised the period of dormancy in its escheatment law in two significant ways that impact intangible property, including mutual fund accounts. In particular, it revised what constitutes dormancy for purposes of the law and it reduced the period of dormancy from five years to three years. [\[1\]](#) With respect to the former, prior to these changes, intangible property was deemed to be dormant based on the owner of the property being lost, as determined by a returned mail standard. [\[2\]](#) As a result of the revision, Delaware now deems property to be dormant if the owner has “ceased, failed or neglected to exercise dominion or control” or “assert a right of ownership or possession or to make presentation and demand for payment and satisfaction or to do any other act in relation to or concerning such property.” See Section 1198(9) of the Delaware Escheats Law.

In other words, intangible property, including a mutual fund account, is deemed dormant under Delaware law unless the “holder of the property” [\[3\]](#) can demonstrate that, within the preceding three years, the securityholder has affirmatively exercised a right of ownership over the account. Importantly, Delaware does not consider the securityholder’s receipt of mailings (e.g., account statements) to evidence the securityholder exercising a right of ownership over the account. Instead, generally speaking, to avoid dormancy and escheatment, the securityholder must affirmatively contact the financial institution.

Thus, to avoid triggering a period of dormancy and possible escheatment, the Delaware law imposes upon financial institutions holding property an implicit duty to track contact initiated by a securityholder, whether such contact is by phone, email, fax, internet access,

correspondence, or otherwise. The Delaware Division of Revenue, which administers the Delaware Escheats Law, recently provided some relief from this new standard by defining, with respect to accounts with automatic electronic deposit of dividends (ACH accounts) and dividend reinvestment plan (DRP) accounts, what constitutes “evidence of exercise of dominion or control over property.” Under this interpretation, each of the following activities by the account owner will avoid the account being deemed dormant and subject to escheatment:

1. Increasing or decreasing the amount of the account;
2. Corresponding with the financial institution in writing, via regular mail, e-mail, the internet, or fax;
3. Initiating telephone contact with the financial institution regarding the account provided the contact is documented; and
4. Otherwise indicating an interest in the investment or account as evidenced by:
 - a. A memorandum on file with the financial institution or its agent;
 - b. The owner’s internet access of the account, provided the access is documented by the financial institution; or
 - c. The mailing of an IRS Form 1099 relating to the investment or account by the financial institution or its agent provided that the mailing is not returned to the financial institution or its agent by the U. S. Postal Service.

Also, if the securityholder has more than one investment or account with the financial institution, Delaware will interpret any of the above activities over one investment or account with the financial institution to constitute activity in all accounts of the owner with respect to that institution.

In the absence of evidence of the securityholder taking any of the above-listed actions, prior to escheatment, Delaware rules require the financial institution holding the property or the its agent to mail a “due diligence” letter to the owner’s address of record for each investment or account in an effort to reestablish contact with the owner and to rebut a presumption of abandonment.

A copy of Delaware’s letter discussing the above interpretation is attached.

Tamara K. Salmon
Senior Associate Counsel

[Attachment](#)

endnotes

[\[1\]](#) Under Delaware’s law, dormant property is subject to escheatment to the State once the period of dormancy runs. With the shortening of the dormancy period, property that has been dormant since 2008 was required to be reported to the State earlier this year.

[\[2\]](#) The returned mail standard is the standard the Securities and Exchange Commission utilizes to require registered transfer agents to annually report “lost securityholders” to the SEC on Form TA-2. Under this standard, a securityholder is deemed to be “lost” if mail sent to the securityholder at the securityholder’s last known address is returned to the sender as undeliverable. See Rule 17Ad-17 under the Securities Exchange Act of 1934.

[3] Generally speaking, state escheatment laws apply to the “holder of the property,” which is the institution holding the securityholder’s property or maintaining the securityholder’s financial account. With respect to mutual fund shares, the holder would likely be the mutual fund’s transfer agent on behalf of the mutual fund or a retail broker-dealer, depending on where the securityholder’s account resides. To avoid confusion between the term “holder of the property” and the term “securityholder,” which refers to the mutual fund shareholder, this memorandum will use the term “financial institution” to refer to the holder of the property.

Source URL: <https://icinew-stage.ici.org/memo-26235>

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.