

**MEMO# 26380**

August 8, 2012

## **Delaware Provides Additional Guidance Regarding What Constitutes Contact for Purposes of its Escheatment Law**

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TO: BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 36-12  
BROKER/DEALER ADVISORY COMMITTEE No. 39-12  
SEC RULES MEMBERS No. 73-12  
SMALL FUNDS MEMBERS No. 28-12  
TRANSFER AGENT ADVISORY COMMITTEE No. 48-12  
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 11-12 RE: DELAWARE PROVIDES ADDITIONAL GUIDANCE REGARDING WHAT CONSTITUTES CONTACT FOR PURPOSES OF ITS ESCHEATMENT LAW

As we previously informed you, since 2008, Delaware's Escheat Law has utilized a "no contact" standard, rather than a "return postage" (RPO) standard to determine when the period of dormancy begins for purposes of escheating property to the State. Under their no contact standard, if a shareholder has not exercised affirmative dominion or control over the account for a three year period, the account may be deemed dormant and subject to escheatment to the State. Merely receiving mail from the holder of the property (e.g., an account statement from a mutual fund company) does not establish sufficient dominion and control for purposes of Delaware Law.

This new no contact standard raised issues among holders of property, including mutual funds, regarding what conduct on behalf of a shareholder was necessary to establish the shareholder's dominion or control over the account. In May of this year, the Delaware Division of Revenue, which administers the Delaware Escheats Law, provided the industry some guidance on this point. [\[1\]](#) Among other things, this guidance stated that, for accounts with automatic electronic deposit of dividends (ACH accounts) and dividend reinvestment plan (DRP) accounts, "the mailing of an IRS Form 1099 relating to the investment or account" that was not returned to the sender as undeliverable would constitute sufficient evidence of the shareholder's exercise of dominion or control over the account, thereby avoiding it being deemed dormant.

## **Additional Evidence of a Shareholder's Dominion or Control Over an Account**

Subsequent to this interpretation, the Institute discussed with the Director of Delaware's State Escheator Office whether this evidence of dominion or control could be applied to accounts other than ACH or DRP accounts. I am very pleased to inform you that the Director recently affirmed the following:

1. So long as an IRS Form 1099 is sent to an investor and not returned as undeliverable, the mutual fund holder can presume it has contact with its shareholder;
2. With respect to letter sent to a shareholder informing the shareholder of the need under Federal law to take a required minimum distribution (RMD) at the age of 70½:
  1. If a letter is sent to the shareholder and not returned to the holder, contact can be presumed;
  2. In situations where an RMD or any other notice is returned three years after an investor turns 70 ½, absent any other contact from the investor for that period of three years, the state requires the account to be turned over in the next reporting cycle after the undeliverable mail status has been appropriately coded.
  3. If it is determined that the investor is deceased, either before or after reaching the age of 70 ½, and the beneficiary has not contacted the organization within three years after the date of death, the State requires the account to be turned over in the next reporting cycle after the three-year period of dormancy has elapsed.

The Institute also asked, with respect to de minimis investments where an IRS form is not sent to the shareholder because of the small amount involved, whether contact cannot be presumed from an RPO standard. The response was "no" and, to avoid escheatment, holders should track the period of dormancy on these accounts to determine whether there has been affirmative contact from the shareholder exercising dominion over the account.

## **Written Agreements Suspending the Period of Dormancy**

There is a provision in Section 1198(9)(b) of the Delaware Escheats Law providing that "the period of dormancy shall not commence to run with respect to which claims, demands or other property held by a holder pursuant to a written agreement which contemplates that there shall be a specific period of inactivity, until the expiration of the contemplated period of inactivity." The Institute discussed with the Division whether a mutual fund could rely on this language to avoid an account being deemed dormant - e.g., by incorporating into a customer account agreements language that would avoid the account being deemed dormant until such time as an accountholder becomes a "lost securityholder" as defined in SEC Rule 17Ad-17. According to the Division, the provision in Section 1198(9)(b) could not be used for this purpose. This is because, in order for such "written agreement" to suspend the running of the period of dormancy, the agreement, on its face, must have a date certain, or specified period, for which the period of dormancy is being suspended. (An example of such agreement is a trust agreement with a date certain in it.) Merely basing such period on another event (e.g., "lost shareholder" status under Federal law) will not suffice because the period cannot be determined from the face of the agreement. If, however, the customer agrees in writing that the property will not be deemed abandoned for a specified period of time, such a writing would appear to satisfy the requirements of

## **Voluntary Disclosure Agreements; Limited Amnesty**

Finally, the Institute discussed with the Division the Division's use of "Voluntary Disclosure Agreements" (VDAs). Such agreements, which are executed between the Division and a holder of property, provide a limited amnesty relating to abandoned property that should have been previously reported to the State but was not. In particular, according to the Division, these VDAs serve both to limit the "look back" period for auditing such property and permit the reporting of previously unreported property without penalty or interest.

Pursuant to legislation enacted this year, [2] the Secretary of State may not initiate an examination of records or abandoned property investigation or seek payments of any amounts of property as to any calendar year prior to:

- 1996 with respect to any holder of property that has indicated in writing its intent to enter into an Unclaimed Property VDA by completing, executing, and delivering to Delaware's Secretary of State after June 30, 2013 the appropriate form, [3] and who enters into an VDA [4] and makes payment in full or enters into a payment plan on or before June 30, 2014; or
- 1993 with respect to any holder that has indicated in writing its intent to enter into a VDA by completing, executing, and delivering to the Secretary of State, after June 30, 2013 and on or before June 30, 2014 an acceptable form and who enters into an VDA and makes payment in full or enters into a payment plan on or before June 30, 2015.

The amnesty provided by this new law is limited in duration in that the Secretary of State cannot accept a notice of intent to enter into a VDA after June 30, 2014 or enter into any VDA with a holder or otherwise receive or seek payment of any amounts of abandoned property after June 30, 2015. Also, the Secretary of State shall have no authority to enter an VDA with, or otherwise receive or seek payment of, any amounts of abandoned property from a holder that has either indicated in writing its intent to enter into a VDA, or entered into a VDA, with the State Escheator on or before June 30, 2012. Unless referred by the Secretary of State, the State Escheator is prohibited from conducting, prior to July 1, 2015, any examination of records or an investigation of any holder who has indicated in writing its intent to enter into a VDA with the Secretary of State on or before June 30, 2014.

The State Escheator also has a VDA process. Persons interested in learning more about that process may want to review:

- A copy of the Regulations governing the process, which are available at: [http://revenue.delaware.gov/unprop/05unclprop\\_regs.pdf](http://revenue.delaware.gov/unprop/05unclprop_regs.pdf);
- A copy of Delaware Form AP DE-1, "Disclosure and Notice of Intent to Voluntarily Comply with Abandoned Property Law," which is available at: <http://revenue.delaware.gov/unprop/de1.pdf>; and
- A copy of Delaware Form AP DE-2, "Voluntary Self Disclosure Agreement," which is available at: <http://revenue.delaware.gov/unprop/de2.pdf>.

The State Escheator recommends that any holder of property that is concerned about having under reported abandoned property on previous reports filed with the Division strongly consider signing a VDA with the State. Importantly, according to the Division, the fact that someone signs a VDA will not, in and of itself, subject them to an audit regarding past reporting. Members interested in learning more about the VDA process may want to

contact their outside counsel or abandoned property service provider for guidance.

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**endnotes**

[1] See Institute [Memorandum](#) No. 26235, dated June 13, 2012 for more information regarding this guidance, including a copy of it.

[2] See new Section 1177 of Chapter 11, Title 12 of the Delaware Code as amended by Delaware Senate Bill 258. A copy of the Senate Bill is available at:  
[http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+258/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+258/$file/legis.html?open).

[3] A copy of this form, Form AP DE-1-SOS, is available at:  
<http://sos.delaware.gov/APDE-1-SOS-7-13-12.pdf>.

[4] As of the date of this memo, the Secretary of State's VDA form is not yet available. Once adopted, the form should be available on the Secretary of State's website at:  
<http://sos.delaware.gov/vcp.shtml>, which contains more information about the Secretary of State's Abandoned Property Program.

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