

DEPARTMENT OF STATE
ABANDONED OR UNCLAIMED PROPERTY VOLUNTARY DISCLOSURE AGREEMENT PROGRAM
Statutory Authority: 12 Delaware Code, Section 1173(a)(6) (12 Del.C. §1173(a)(6))

FINAL

REGULATORY IMPLEMENTING ORDER

**301 Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Regulations
Relating to Estimation**

In accordance with 29 Del.C. §10003(d) and 12 Del.C. §1173(a)(6), for the reasons stated below, this ORDER is adopted promulgating new guidelines setting forth the rules relating to estimation governing the Department of State Voluntary Disclosure Agreement Program in the Abandoned or Unclaimed Property Law.

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

In accordance with the procedures set forth in 12 Del.C. Ch. 11, and 29 Del.C. Ch. 101, the Department of State (hereinafter the "Department") is proposing to adopt new regulation relating to estimation in the Department's Voluntary Disclosure Agreement Program in the Delaware Abandoned or Unclaimed Property Law as described in 12 Del.C. §1173. The proposed regulation sets forth the rules governing practices as to estimation for this program.

Notice of the proposed regulation was published in the Delaware *Register of Regulations* Vol. 20, Issue 10, from April 1, 2017 through April 30, 2017. Six letters were received from several individuals or firms that contained comments and suggestions.

The suggestions included: (i) change proposed regulation 2.3.1 in that the State of Delaware would project only amounts escheatable to the State in the base years, when estimating liabilities for past due escheats; (ii) change proposed regulation 2.3.2.2 in that at least a three-year minimum be used for data to draw a representative error rate and not use the two oldest continuous year, as those years may include anomalies or not represent periods without records; (iii) change proposed regulation 2.3.4.2 in that a tracer analysis should not be mandated; (iv) change proposed regulation 2.3.3.1 to clarify and define when payments should be excluded; (v) change proposed regulation 2.3.2.3 in that attestation letters would be provided at the conclusion of the VDA because a holder has actual evidence to support their attesting to the availability of records and completeness of submissions to the Secretary of State; (vi) change proposed regulation 2.3.4.2 to clarify the requirements regarding accounts receivable analysis; (vii) change proposed regulation 2.3.5.1 to remove the last sentence regarding priority rules; (viii) change the proposed regulations so that the use of estimation techniques is not employed where the identity of a party entitled to claim abandoned or unclaimed property cannot be identified; (ix) change proposed regulation 2.1.1 to clearly provide that the regulations may only be applied to existing VDAs at the holder's election; (x) change proposed regulation 2.3.2.2 to any two years of complete and researchable records, not just the oldest continuous years; (xi) change proposed regulation 2.3.3 so the list of items to be exempted from estimation calculation be broadened; (xii) change the proposed regulations so that any representation made by a holder's employee subjecting the employee to potential liability must be qualified as being made according to such employee's knowledge after reasonable inquiry; (xiii) recommend at 2.3.3.2 that items refunded, no matter when, be excluded; (xiv) recommend at 2.3.4.2 to limit review of accounting receivable to quarterly aging reports and items aged over 90 days, and (xv) change proposed regulation 2.4.2 by deleting requirement that at a minimum complete and researchable records include name and address of owner.

The Department considered all of the written comments and suggestions and decided to not make suggested changes to the proposed regulations based upon the written comments at this time. However, the Department believes that non-substantive clarifications to 2.3.2.3, 2.3.2.4, and 2.3.4.2 of the regulation is appropriate and would better clarify and explain the intent of the proposed regulation.

II. FINDINGS OF FACT

The Department finds that it is appropriate to adopt the proposed regulations with non-substantive clarifications to 2.3.2.3, 2.3.2.4, and 2.3.4.2 in order to make clear the following: provisions regarding a Holder's representation of records, who executes such representation, and how such representation is undertaken (2.3.2.3); reiterate that a Holder is bound by this representation and clarify the Department's right to review and make a determination regarding such representation (2.3.2.4); and Holders may review recent, not just quarterly, Accounts Receivables and may use statistical sampling in certain circumstances (2.3.4.2).

III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Department concludes that it is appropriate to amend 12 **DE Admin. Code** 301 Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Regulations Relating to Estimation, with the suggested clarifications to 2.3.2.3, 2.3.2.4, and 2.3.4.2. Therefore, pursuant to 12 **Del.C.** §1173, 12 **DE Admin. Code** 301 Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Regulations Relating to Estimation attached hereto as Exhibit "A" is hereby created.

IV. TEXT AND CITATION

The text of 12 **DE Admin. Code** 301 Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Regulations Relating to Estimation created hereby shall be in the form attached hereto as Exhibit "A", and said regulation shall be cited as 12 **DE Admin. Code** 301 Department of State Voluntary Disclosure Agreement Program Regulations Relating to Estimation, in the Administrative Code of Regulations for the Department of State.

V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Department of State on June 16, 2017. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

IT IS SO ORDERED the 16th day of June, 2017.
The Hon. Jeffrey Bullock

301 Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Regulations Relating to Estimation

1.0 Purpose, Scope and Authority

1.1 Purpose

1.1.1 On February 2, 2017, the Governor of Delaware signed into law Senate Bill 13 of the 149th General Assembly, which revised and updated the Delaware Abandoned or Unclaimed Property Law. Section 1176(b) states as follows:

The Secretary of Finance, in consultation with the Secretary of State, shall, on or before July 1, 2017, promulgate regulations regarding the method of estimation to create consistency in any examination or voluntary disclosure. These regulations must include permissible base periods, items to be excluded from the estimation calculation, aging criteria for outstanding and voided checks, and the definition of what constitutes complete and researchable records.

1.1.2 These are the Department of State's companion regulations regarding the method of estimation in the Department of State's Voluntary Disclosure Agreement program.

1.2 Scope

1.2.1 The Secretary of State may make such rules and regulations as deemed necessary to enforce Section 1173, the Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement ("VDA") program.

1.3 Statutory Authority

1.3.1 12 Del.C. §1173(a)(6) Rule-making.

2.0 Delaware Department of State Abandoned or Unclaimed Property Voluntary Disclosure Agreement Program Estimation Regulations

2.1 Effective Date

2.1.1 The effective date of these Regulations shall be the date the Regulations are adopted, and the standards contained therein shall apply to all Department of State voluntary disclosures pursuant to 12 Del.C. §1173 commenced after that date. To the extent practical, the Regulations shall apply to any ongoing Department of State voluntary disclosure pursuant to 12 Del.C. §1173 that commenced prior to the effective date of these Regulations, though the failure of the Department of State to have conformed to these regulations not-yet-in-existence would not invalidate a previously settled voluntary disclosure agreement.

2.2 Scope of Abandoned or Unclaimed Property Voluntary Disclosure Agreement ("VDA")

2.2.1 The Holder may determine the scope of the entities and property types included in the Department of State Voluntary Disclosure Agreement program. At the conclusion of the VDA, the Department of State will only

provide a release of liability for what has been determined to be in-scope, so any property types and/or entities excluded would be subject to audit pursuant to 12 Del.C. §1173(a)(4).

2.2.2 Once entity scoping has been established by the Holder, no additional entities may be scoped into the VDA without the Department of State's consent.

2.2.3 At the Holder's discretion and with the consent of the Department of State, legal entities whose acquisition commenced after the conclusion of entity scoping would have the option of being added to the existing VDA.

2.3 Estimation

2.3.1 Overview. Section 1145 requires that a Holder, who is required to file an annual unclaimed property report, retain records for 10 years after the date the report was filed. The record retention requirement corresponds with Section 1173(c)(2) of Title 12 of the Delaware Code authorizing the Department of State to enter into a voluntary disclosure agreement with a Holder based on a self-review of a 10 year period of dormant property. Section 1173(a)(2) grants the Secretary of State the full and complete authority to determine and resolve all such claims consistent with Chapter 11 of Title 12 of the Delaware Code and exercise such authorities as are granted to the State Escheator in Chapter 11 of Title 12 of the Delaware Code, including the authority to estimate the amount of property due using a reasonable method of estimation based on all information available.

2.3.2 Base Periods: The "Base Period" is the period of time for which the holder possesses complete and researchable records. Consistent with a majority of states, Delaware requires that a Holder retain records for a minimum of 10 years plus dormancy (15 years total for most property types). It is expected that the Holder shall possess several years of dormant records even if the Holder does not possess records for the entire 10 year period.

2.3.2.1 If the Holder fails to retain sufficient dormant years of records, the Department of State and Holder shall agree on the records to be utilized for the base period.

2.3.2.2 Base periods shall consist of complete and researchable records. (See definition in subsection 2.4 of these Regulations). In order to draw a representative error rate, the base periods utilized by the Holder shall consist of at least the two (2) oldest continuous years the Holder has complete and researchable records outside the dormancy period. Holders may use more than two years for the base period. Depending on the unique facts and circumstances of each Holder, the Department of State and the Holder may agree to include non-dormant periods in the base periods.

2.3.2.3 At the conclusion of the Holder scoping its voluntary disclosure, ~~[the Chief Financial Officer or other officer of the]~~ Holder shall provide in a form amenable to the Department of State, a representation of the Holder regarding what records are available, for which property types and what years. ~~[The Holder is bound by this representation, absent good cause in the determination of the Secretary of State. A determination by the Department of State of a false statement will be considered willful misrepresentation made with intent to mislead the Secretary of State.]~~

[2.3.2.4 At the conclusion of the Holder's analysis and with the submission of the Holder's findings to the State, Holder shall prepare a management representation letter signed by an officer of the company and notarized. The format and contents of the letter as provided by the Secretary of State. The Holder is bound by this representation, absent good cause in the determination of the Secretary of State. A determination by the Department of State of a false statement will be considered willful misrepresentation made with intent to mislead the Secretary of State.]

2.3.3 Items to be Excluded from Estimation Calculation

2.3.3.1 Items payable to an owner that is a United States federal department or agency shall be removed from the population subject to estimation.

2.3.3.2 Funds returned in the normal course of business, prior to enrollment in the Department of State Voluntary Disclosure Agreement program will not be included in the population of potential unclaimed items. Conversely, funds returned outside of the normal course of business (i.e. change in process) after enrollment in the Department of State Voluntary Disclosure Agreement program, will be included in the population of potential unclaimed items.

2.3.4 Aging Criteria

2.3.4.1 Checks that are outstanding or are voided less than 90 days after issuance shall be excluded from the estimation population.

2.3.4.2 As part of the Holder's self-review, it is expected that Holders will perform the following analysis of its Accounts Receivable a) an analysis of aged credit balances remaining on the company's books

and records and b) an analysis to determine whether accounts receivable credits have been written off. For the former, Holders may review ~~quarterly~~ recent year end] Accounts Receivable aging reports for Accounts Receivable credits aged 90 days or greater. For the latter, the Holder should conduct a credit tracing analysis of Accounts Receivable credit balances to test for any Accounts Receivable credits that may have been adjusted off of a customer's account. All credits adjusted off a customer's account and all of the accounts used to adjust credits off a customer's account should be included in the Holder's review. [Nothing in this Regulation shall preclude a Holder from the use of statistical sampling should the population of credits identified be large enough to warrant sampling.]

2.3.5 Projection

2.3.5.1 If for certain periods the amount of reportable property cannot be ascertained from the books and records of the Holder, projection techniques may be used to determine the reportable amounts for such periods. Such determination shall be made by first examining records during periods in which records exist to establish a "base period" of data from which statistical inferences can be made for periods in which records are incomplete or do not exist. To the extent permitted by law, names and addresses identified in the base period shall not be used to determine which state has the priority claim to the abandoned property estimated to be due over periods where records of owners' addresses do not exist.

2.3.5.2 All sampling, projection and estimation techniques used by the Holder to determine unclaimed property due to Delaware shall be presented to the Department of State. The Department of State and the Holder must agree to the sampling, projection and estimation techniques in order to complete a Voluntary Disclosure Agreement. It is the intent of the State that any estimation methodologies used shall result in a reasonable representation of the unclaimed property potentially due for the estimated periods.

2.4 Complete and Researchable Records

2.4.1 The expectation is that a Holder, at a minimum, may have complete and researchable records for a period that would cover seven to eight (7-8) years from the date the Holder voluntarily enrolled in the Department of State Voluntary Disclosure Agreement program. If there are unique circumstances where a Holder does not have 7-8 years of researchable records, the Holder may present the circumstances to the Department of State and the Holder and the Department of State may agree to use an alternative data set with fewer years.

2.4.2 Complete records shall reconcile to the general ledger with the understanding that immaterial differences may occur. Researchable records are records to which the Holder may research the resolution of an item. At a minimum, researchable records shall include those items that contain a last known address of the owners of property.