



ABANDONED PROPERTY SERVICES LLC

## **Unclaimed Property Requirements:** **The Due Diligence Letter**

By: Karen Anderson, Senior Compliance Advisor  
Abandoned Property Services, LLC

Many would agree that the most difficult unclaimed property requirement for businesses to fulfill is the obligation to perform due diligence. To comply with the due diligence requirements a business must fully understand what each state requires, when compliance must take place, and how to accomplish the task. As state unclaimed property laws differ with regard to these specifications, compliance requires an organized, targeted effort that includes precise policies and procedures.

### What is the Due Diligence Requirement?

The objective of due diligence requirements is for the business holding the property to make a last ditch effort to notify the owner of the property. Many state statutes require this effort to be made using the last known address of the owner in the records of the business. Some statutes go so far as to state that if the business has reason to know that the address in their records is inaccurate, that the due diligence requirement for the corresponding item is satisfied. For example, the Ohio unclaimed property statute states that the due diligence notice must be sent unless, “the holder has verified that the last known address of the owner or beneficiary as shown by the records of the holder is not accurate.” The Ohio law goes on to state that for a holder to verify that the last known address is not accurate it must document at least two of the following:

“(1) The owner or beneficiary failed to respond to a first class mail notice sent to the last known address of the owner or beneficiary.

(2) A first class mail notice sent by the holder to the last known address of the owner or beneficiary was returned as undeliverable.

(3) An electronic or manual search of available public records failed to confirm that the last known address of the owner or beneficiary is accurate. The holder shall maintain documentation of its search efforts. If a search of public records or databases identifies a more recent address for the owner or beneficiary than the address in the holder’s records, the

holder shall send notice to the owner or beneficiary at that more recent address in accordance with this section.” Ohio Revised Code, Chapter 169.03 (D)

In any case, most states, except Pennsylvania, have some type of due diligence requirement. (In May 2009, Texas enacted legislation requiring due diligence. For more information about this change, please see the article entitled, “The Heightened Importance of Due Diligence”.) Even Delaware has a due diligence requirement, however, it applies only to banks, courts and life insurance companies which are required to publish notice in a newspaper in particular counties. While there are a few other states that require this type of “publication” notice for particular industries (in addition to a “letter” notice), a majority of states require businesses holding unclaimed property to notify the owner by letter.

A few states are vague as to the method of notification. For example, the Oregon unclaimed property statute states that if the business holding property that has been presumed abandoned knows “the whereabouts” of the owner, the business must, “communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.” Oregon Revised Statutes, Chapter 98.352(5). Pertinent Oregon regulation, mandates that the holder attempt to locate the owner and notify the owner that the property will be turned over to the Department of State Lands if there is no indication of interest from the owner.

Further, this regulation specifies that if the business cannot locate the owner it must perform certain tasks such as a review of telephone books to verify address and telephone number information and a verification that the owner is not a current employee. Oregon Administrative Rules, 141-045-0061(3). In addition, this regulation specifies that the holder “shall retain records or documentation of its compliance” with the due diligence requirements for 3 years and make these records available for public inspection if requested. Note that on its website, the Department of State Lands (the Oregon agency which administers the Oregon unclaimed property law), provides some guidance as to the actions that may satisfy the due diligence requirement: “Acceptable efforts may include phone calls, email, letters, and personal contacts.”

<http://www.oregonstatelands.us/DSL/UP/upholders.shtml> (September, 2009).

#### When The Notice Requirement is a Letter

While most states require or accept letter notification when due diligence is required, it is important to note that the timing and contents of the letter varies among states. Many states require that the due diligence letter be mailed within 60 to 120 days prior to the reporting deadline. Other states require the letter to be sent earlier. For example, the California letter mailing requirement is that the notice must be sent not less than 6 nor more than 12 months before the property becomes reportable. California Unclaimed Property Law, Sections 1513.5(a)(2) and 1516(d).

States may have specific requirements as the content of the due diligence letter as well. California law requires that the letter include the time the interest will escheat to the state, the effect of escheat and the necessity for filing a claim to retrieve the property. Most significant is the California requirement that the letter also contain the following and that these items be in bold face type or in a font that is a minimum of 2 points larger than the rest of the notice:

1. The last activity date or a statement that there has been no customer activity for a prescribed period of time;
2. Identifying number, etc. of the property;
3. An indication that the property may escheat to the state; and
4. An indication that California Law requires the holder to report and remit the property to the state.

Further, the California law requires that the letter include a form for the owner to declare his or her intention regarding the property and/or to confirm the owner's current address. California Unclaimed Property Law Sections 1513.5(b) and 1516(d).

Consider that only few states like California, Massachusetts, Maryland and North Carolina have letter content requirements in their statutes. Other states have such requirements in their administrative rules/regulations (like West Virginia; see WV Administrative Rule 112-5-6 (6a - 6f)). However, most states' letter content requirements, if they have such requirements, can be found in their holder report/annual compliance manuals or on their websites. Generally, these requirements are not as specific as those in the California law and may be in the form of a "sample due diligence" letter for a business to use in creating a due diligence letter. (For an example, please see page 5 of the State of Wisconsin "2009 Holder Reporting Guide" at

<http://www.statetreasury.wisconsin.gov/category.asp?linkcatid=2621&linkid=1381&locid=155>)

## Suggested Practices – The Due Diligence Letter

### 1. Understand the Pertinent State Requirements and Provide for Updated Information

As noted above, state due diligence requirements vary. For this reason, a practitioner must understand the requirements of the states for which the business has potentially reportable unclaimed property. Reviewing state statutes and regulations, state-issued reporting guides/manuals, state unclaimed property websites and requesting assistance from the holder's counsel and unclaimed property experts may be essential in gaining the appropriate understanding. As state requirements are modified by state legislators and reinterpreted by state officials, it is important to stay apprised of the changes. The practitioner should compile a list of or contract for the resources necessary to maintain current due diligence compliance information.

### 2. Develop Compliance Tools: Matrices and Due Diligence Letter Templates

The practitioner should create or retrieve a matrix of state unclaimed property due diligence requirements that reflects the information necessary for complying with each of the states' requirements. In addition, from the requirements information, state letter and publication templates should be devised that can be used by the practitioner in performing necessary letter due diligence mailings and publications. By creating and, when necessary, updating these compliance tools, the practitioner can plan and organize the due diligence compliance effort.

### 3. Establish Policies and Procedures for Performing the Obligation

Using the compliance tools, the practitioner can establish timelines, policies and procedures for performing due diligence. These policies and procedures should, at a minimum, outline the tasks to be performed, designate the staff that will perform and be responsible for each task and set forth the business' policy with regard to issues such as proof of owner identity when responding to a due diligence letter, etc. Examples of tasks that should be listed in the procedures are: letter creation for each state, letter mailing, response retrieval and recordation and "proof of due diligence" document retention.

### 4. Retain Proof of Due Diligence

If a business is selected for unclaimed property audit by a state(s), the auditors most likely will request proof that the business has performed its due diligence obligations. A few states like Ohio and Oregon have a specific due diligence record retention requirement which must be met. While the majority of states

do not have a specific “due diligence” record requirement they do have record retention requirements for documentation relating to reportable unclaimed property.

Also, it is important to consider that states may impose penalties for failing to perform due diligence. Some states have a specific penalty for failure to perform due diligence. However, most states have a general penalty for failure to perform a compliance obligation set forth in their unclaimed property law or regulations. Maintaining records which indicate compliance with state due diligence requirements may permit a business to avoid these penalties if audited.

### Summary

The due diligence measures that businesses are required to undertake via state unclaimed property laws can be perplexing and time consuming. Pro-active management of this compliance obligation can reduce the time and burden of compliance but entails a thorough knowledge of the pertinent laws and the development of compliance tools such as requirements matrices and due diligence letter templates. The practitioner must keep in mind that the end result is to reunite the owner with their property and that performing the obligation, in some instances, may serve the business purpose of maintaining key vendor or customer relationships as well.

*About Abandoned Property Services LLC (APS): APS serves the unclaimed property compliance needs of all types of businesses. APS provides policy /procedure and liability prevention consulting, audit defense and compliance maintenance via its annual reporting and due diligence services. Annual reporting and due diligence services are facilitated by APS' specially-devised and perpetually updated "in-house" systems.*

APS, LLC was formed in 2003 with the mission of providing high quality, effective, efficient and affordable unclaimed property compliance and audit support services to the business community. To this end, the fourteen (14) APS staffers have over 160 years of combined unclaimed property experience including unclaimed property consulting for big four accounting firms, and serving as unclaimed property officials for Illinois, New York, and Oregon. APS, LLC's principal office is located in New York, New York. For more information, please visit the APS LLC website at [www.abandonedpropertyservices.com](http://www.abandonedpropertyservices.com) or contact Karen Anderson at 317-577-9530 or [kanderson@apsescheat.net](mailto:kanderson@apsescheat.net)

*This information was created by Abandoned Property Services, LLC (APS) for reference only, and is not intended to be legal advice. APS does not provide legal services and encourages readers to consult with their legal advisors.*