

Anything But Independent: Delaware's Proposed Regulation Addressing Administrative Unclaimed Property Appeals

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On January 1, 2012, the Delaware Department of Finance issued a proposed regulation setting out the specifics of Delaware's new administrative procedure for appealing unclaimed property assessments. The proposed regulation is likely to prove disappointing to property holders, because the procedure it sets out falls far short of the "independent review" that property holders had been expecting. Interested parties that want to comment on the proposed regulation should note that the comment period only runs until January 31.

Last July, Delaware adopted legislation that provided for a new administrative procedure for appeals of unclaimed property assessments. The proposed regulation is intended to implement the July 2010 legislation. Prior to the July 2010 legislation, the only recourse for assessed holders was to file for injunctive relief in Chancery Court, a process that can be lengthy, burdensome, and costly. Unfortunately, it is not clear that the procedure set out in the proposed regulation is a significant improvement.

The proposed regulation, 15 Del. Reg. 959, addresses the "Independent Review" process for unclaimed property assessments. This is the second level of administrative appeal—the level immediately preceding an appeal to state court and the level that appears to be designed to provide a more impartial review than the initial protest to the Audit Manager. But despite its name, the proposed procedure is blatantly slanted in favor of the state.¹ One major problem with the procedure is the unfettered power of that adjudicator, coupled with the adjudicator's lack of independence from the Secretary of Finance.

A Not So "Independent" Reviewer

First, the statute provides that the Secretary of Finance may appoint the "independent reviewer" to handle administrative appeals of audit determinations from the "Audit Manager." 12 Del. C. § 1156(g). The title of the position, along with the requirement that the appointee may not be an employee of the Delaware Department of Finance, indicates that the position is intended to have

some degree of independence from the Department of Finance, despite the fact that the Secretary of Finance may accept or reject the reviewer's recommendation.

Under the statute, the Secretary of Finance can appoint a specific reviewer to handle any single appeal or can appoint a general reviewer that it can terminate at any time. The regulation confirms the Secretary's flexibility with respect to choosing the reviewer. Proposed Reg. at § 3.0 (providing that the Secretary "shall designate a qualified person to act as the independent reviewer in a particular appeal or indefinitely until the authority is transferred"). But the regulation also provides that it is up to the reviewer himself, in his own discretion, to determine whether there is any conflict of interest or other reason for disqualification from a particular appeal. Proposed Reg. at § 4.0. As a result, a holder effectively has no means for contesting the qualification of any particular reviewer. That decision lies wholly within the discretion of the Secretary's appointee.

Unfettered Discretion to Impose Sanctions and Fees

Moreover, the "independent" reviewer is not only hired by the state, but is also charged with determining who pays his fees. 12 Del. C. § 1156(i),(j). There are no legal guidelines as to how much those fees can be, nor any indication as to when such fees are to be borne by a specific party. The statute, therefore, provides the independent reviewer with the authority to assess significant fees against the holder.² In short, there is no risk, and may be no cost, to the Division associated with any administrative appeal. Rather, any downside (a potentially expensive downside) lies only on the shoulders of the holder.

If you are familiar with the state tax appeal process, you may be thinking that the proposed procedure, although tilted in favor of the state, is no worse than the tax appeal process in some states, where the adjudicator is an employee of the state taxing agency. Although this is true, appeals officers within state taxing agencies typically do not have the ability to charge unregulated fees to the taxpayers, to determine, with no statutory guidelines, whether they themselves are impartial enough to serve, or, perhaps most importantly, to affect the merits of the appeal at their own discretion.

This last piece may be the most concerning provision in the proposed regulation. Section 20.0 delegates to the reviewer the power to impose "non-monetary sanctions" on either party in the event of any "disruptive conduct." There is no definition of "disruptive conduct" in the regulation

(and the statute does not mention the concept at all), so the reviewer is charged with full authority for determining what conduct is disruptive. This discretion is troubling, because the sanctions that a reviewer can impose on an alleged holder for such conduct include penalties that can place an alleged holder at a severe disadvantage in contesting the merits of the appeal.

For example, as punishment for "disruptive conduct," the independent reviewer can strike briefs, exclude the party or counsel from participating at the hearing, and ignore or accept facts into the record. As a result, this section of the regulation delegates carte blanche authority for the independent reviewer to influence the outcome of the appeal. These sanctions can affect not only the determination of the reviewer (and the Secretary of Finance), but can also impact the factual record on which the Chancery Court will base its own decision on appeal.

In sum, the Secretary of Finance chooses the independent reviewer and can change the person serving for any given appeal. The reviewer can determine the level at which the holder can participate in the process and can determine who bears the costs. Thus, there is, on the very face of the statute and proposed regulation, both a means and an incentive for the process to substantially favor the state. These provisions demonstrate that the independent review process is anything but independent.

The administrative process is required for appeals of any audits not in progress as of July 23, 2010, and the public has until January 31, 2012 to officially comment on the proposed regulation.

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1. There are several concerns with respect to the process outlined by the statute itself, including the short timeframe in which holders may establish a factual record for the appeal, as well as the standard of deference the law provides to the state's determination. Those issues, however, are not affected by the proposed regulation, and thus are not addressed in this alert.
2. To the extent this occurs arbitrarily or routinely, the statute may be subject to challenge on procedural due process grounds.

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