

**DEPARTMENT OF FINANCE
DIVISION OF UNCLAIMED PROPERTY**

Statutory Authority: 12 Delaware Code, Section 1156 (12 **Del.C.** §1156)

FINAL

ORDER

Regulation on Practices and Procedures for Appeals of Determinations of the Audit Manager

NATURE OF PROCEEDINGS

Delaware Department of Finance (“Department”), Division of Unclaimed Property, Escheator of the State of Delaware (the “State Escheator”), initiated proceedings to adopt regulations regarding practices and procedures for appeals of determinations of the Audit Manager. The Department’s proceedings to adopt its regulations were initiated pursuant to 29 **Delaware Code**, Section 10115, with authority prescribed by 12 **Delaware Code**, Section 1154 and Section 1208.

The Department published its notice of proposed regulation pursuant to 29 **Delaware Code**, Section 10115 in the January 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulation to be produced by January 31, 2012 at which time the Department would receive information, factual evidence and public comment to the proposed regulation.

SUMMARY OF PROPOSAL

The proposal creates practices and procedures for appeals of determinations of the Audit Manager under the administrative appeal process created by recent amendments to 12 **Del.C.** §1156.

STATUTORY AUTHORITY

12 **Delaware Code**, §1154, State Escheator to make regulations.

12 **Delaware Code**, §1156, Internal Review Procedure; Court of Chancery – Jurisdiction.

12 **Delaware Code**, §1208, Rules and regulations.

SUMMARY OF COMMENTS RECEIVED

Morris, Nichols, Arsht & Tunnell LLP (MNAT), McKenna, Long & Aldridge LLP (MLA), and Council on State Taxation (COST) offered the following observations. The State Escheator has considered each of the comments and responds as follows.

MLA and COST propose certain additional restrictions upon the selection by the Secretary of Finance of an independent reviewer, interlocutory appeals, assessment of costs, the standard of review to be applied by the Secretary of Finance, and the prohibition against disruptive conduct.

Response: The criteria for selection of the independent reviewer are established by 12 Del.C. §1156. The State Escheator sees no to create additional criteria, even assuming he has the authority to do so. The creation of an interlocutory appeal defeats the purpose of creating an administrative appeal process. The independent reviewer’s discretion to assess costs is established by 12 Del.C. §1156. The State Escheator sees no to limit that discretion, even assuming he has the authority to do so. Likewise, the standard of review to be applied by the Secretary of Finance is established by 12 Del.C. §1156. Finally, the State Escheator sees no reason the independent reviewer should not have control over the tribunal, especially when his or her decisions are subject to review by the Secretary of Finance and, potentially, by the Court of Chancery.

MNAT’s proposals are focused on the procedural aspects of administrative appeals, rather than on the statutory scheme created by the General Assembly. Though numerous, all of the proposals have been given thorough consideration.

Response: The proposals are incorporated in the regulation.

FINDINGS OF FACT:

The Department, acting through the State Escheator, finds that the proposed regulation set forth in the January 2012 *Register of Regulations* should be adopted, subject to the modifications identified above which are purely procedural and not substantive.

THEREFORE IT IS ORDERED, that the proposed changes to the Regulation on Practices and Procedures for Appeals of Determinations of the Audit Manager, with the modification indicated herein, is adopted and shall be final effective March 31, 2012.

Regulation on Practices and Procedures for Appeals of Determinations of the Audit Manager

1.0 Construction of Rules of Practice and Procedure

- 1.1 Unless otherwise provided, these Rules of Practice govern appeals to the Secretary of Finance of any determination by the Audit Manager brought under 12 Del.C. §1156.
- 1.2 For purposes of these rules: (1) any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate; and (2) any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate.

2.0 Appearance and Practice Before the Independent Reviewer

- 2.1 In any appeal, a person ~~may shall~~ be represented by an attorney at law admitted to practice before the Supreme Court of the State of Delaware. Attorneys who are not so admitted must apply for admission *pro hac vice* through Rule 2.2 below.
- 2.2 Pursuant to Rule 72(a) of the Delaware Supreme Court Rules, attorneys who are not members of the Delaware Bar may be admitted *pro hac vice* in an appeal in the discretion of the independent reviewer upon written motion by a member of the Delaware Bar who maintains an office in this State for the practice of law ("Delaware Counsel"). Pursuant to Delaware Supreme Court Rule 72(c), Delaware Counsel for any party shall appear in the matter for which admission *pro hac vice* is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the matter and shall attend all proceedings before the independent reviewer, unless excused by the independent reviewer.
- 2.3 Designation of address for service; notice of appearance; withdrawal.
 - 2.3.1 When an attorney first makes any filing or otherwise appears in a representative capacity before an independent reviewer in an appeal, he or she shall file with the independent reviewer, and keep current, a written notice of appearance stating the name of the appeal; the attorney's name, bar identification number, business address, telephone number, and electronic mail address; and the name and address of the person or persons represented.
 - 2.3.2 Withdrawal by any attorney shall be permitted ~~[only by upon]~~ written ~~[order of notice to]~~ the independent reviewer. ~~[A motion seeking leave to withdraw shall state with specificity the reason for such withdrawal.]~~

3.0 Appointment of an Independent Reviewer

If a holder timely files a written notice of appeal with the Secretary of Finance of a determination of the Audit Manager, the Secretary of Finance shall ~~[as soon as practicable, but in no event later than 90 days after receipt,]~~ designate a qualified person to act as the independent reviewer in a particular appeal~~].~~ ~~Alternatively, the Secretary of Finance may generally designate an independent reviewer or]~~ indefinitely until the authority is transferred. ~~[If no independent reviewer has been generally designated, the Audit Manager shall give notice to the Secretary of Finance requesting the appointment of an independent reviewer for the particular appeal.~~ In either case, the Secretary of Finance shall provide written notice to the holder within 5 days regarding the appointed or generally designated independent reviewer, including address and contact information to facilitate filing under Rule 8.0.]

4.0 Disqualification and Recusal of an Independent Reviewer

If at any time an independent reviewer believes himself or herself to be disqualified from considering an appeal, the independent reviewer shall issue a notice stating that he or she is withdrawing from the appeal and setting forth the reasons therefor.

5.0 Ex Parte Communications

- 5.1 No party to an appeal, or counsel to or representative of a party to an appeal, shall make or knowingly cause to be made an *ex parte* communication relevant to the merits of that appeal to the independent reviewer.
- 5.2 No independent reviewer with respect to an appeal shall make or knowingly cause to be made to a party to that appeal, or counsel to a party to that appeal, an *ex parte* communication relevant to the merits of that appeal.

6.0 Motions

- 6.1 Generally. Unless made during a hearing or conference, [including those conducted by telephone or other similar means,] a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon and a proposed order. All written motions shall be served in accordance with Rule 7.0, be filed in accordance with Rule 8.0, meet the requirements of Rule 9.0, and be signed in accordance with Rule 10.0. The independent reviewer may order that an oral motion be submitted in writing. No oral argument shall be heard on any motion unless the independent reviewer otherwise directs.
- 6.2 Opposing and reply briefs. Briefs in opposition to a motion shall be served and filed within 20 days after service of the motion. Reply briefs shall be served and filed within 10 days after service of the brief in opposition.
- 6.3 Length limitation. A brief in support of or opposition to a motion shall not exceed **[40 30]** pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum[, unless the independent reviewer modifies this limitation]. Requests for leave to file briefs in excess of **[40 30]** pages are disfavored.

7.0 Service of Papers by Parties

- 7.1 Service initiating an appeal. At the outset of an appeal, the notice of appeal and any accompanying papers shall be served on the **[Secretary of Finance, with a copy to the]** Audit Manager[,], by certified mail, return receipt requested. **[The return of a return receipt signed by the Audit Manager is not required for service to be effective.]**
- 7.2 Service of all other filings.
- 7.2.1 When required. In every appeal, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in accordance with the provisions of this section until such time as a notice of appearance has been served by counsel for the party or other person represented pursuant to Rule 2.0, after which time service shall be made pursuant to paragraph 7.2.2 of this section upon counsel for the party or other person represented, unless service upon the party or other person represented is ordered by the independent reviewer.
- 7.2.2 How made. Service shall be made by delivering a copy of the filing. "Delivering" means:
- 7.2.2.1 Personal service by handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed, or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;
- 7.2.2.2 Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person;
- 7.2.2.3 Sending the papers through a commercial courier service or express delivery service; or
- 7.2.2.4 Transmitting the papers by facsimile machine or electronic mail transmission where the following conditions are met:
- 7.2.2.4.1 The persons serving each other by facsimile transmission or electronic mail transmission have agreed to do so in a writing, and
- 7.2.2.4.2 Receipt of each document served is confirmed electronically **[by a system-generated confirmation]** or by a manually signed receipt.
- 7.2.3 When service is complete. Personal service, service by U.S. Postal Express Mail or service by commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile or electronic mail transmission is complete upon confirmation of transmission[, whether system-generated or manual].

8.0 Filing of Papers with the Independent Reviewer: Procedures

- 8.1 When to file. All papers required to be served by a party upon any person shall be filed with the independent reviewer at the time of service. Papers required to be filed with the independent reviewer must be received within the time limit, if any, for such filings.
- 8.2 Where to file. Filing of papers shall be made by filing the original papers or duplicates of the original papers with the independent reviewer.
- 8.3 To whom to direct the filing. All motions, objections, applications or other filings made during an appeal shall be directed to and decided by the independent reviewer.

- 8.4 Certificate of service. Papers filed with the independent reviewer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service and the mailing address, facsimile telephone number, or electronic mail address to which service was made, if not made in person.

9.0 Filing of Papers: Form

- 9.1 Specifications. Papers filed in connection with any administrative appeal shall:
- 9.1.1 Be on one grade of unglazed white paper measuring 8-1/2 x 11 inches, except that, to the extent that the reduction of larger documents would render them illegible, such documents may be filed on larger paper;
 - 9.1.2 Be typewritten or printed in either ten or twelve-point typeface or otherwise reproduced by a process that produces permanent and plainly legible copies;
 - 9.1.3 Include at the head of the paper, or on a title page, the title of the appeal, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the appeal;
 - 9.1.4 Be paginated with all margins at least one inch wide;
 - 9.1.5 Be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and
 - 9.1.6 Be stapled, clipped or otherwise fastened in the upper left corner.
- 9.2 Signature required. All papers must be dated and signed as provided in Rule 10.0.
- 9.3 Suitability for record keeping. Documents which, in the opinion of the independent reviewer, are not suitable for computer scanning or microfilming may be rejected. The party submitting the document shall have 10 days within which to provide a suitable copy.

10.0 Filing of Papers: Signature Requirement and Effect.

- 10.1 General requirements. Every filing of a party represented by counsel shall be signed by Delaware Counsel of record in his or her name and shall state that counsel's bar identification number, business address, electronic mail address, and telephone number. **[Any form of electronic signature is sufficient for compliance with this Rule.]**
- 10.2 Effect of signature.
- 10.2.1 The signature of counsel or a party shall constitute a certification that:
 - 10.2.1.1 the person signing the filing has read the filing;
 - 10.2.1.2 to the best of his or her knowledge, information and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
 - 10.2.1.3 the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication.
 - 10.2.2 If a filing is not signed, the independent reviewer shall strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

11.0 Computation of Time

- 11.1 Computation. In computing any period of time prescribed in or allowed by these Rules of Practice or by order of the independent reviewer, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or State legal holiday in which event the period runs until the end of the next day that is not a Saturday, Sunday or State legal holiday. Unless otherwise specified, intermediate Saturdays, Sundays and State legal holidays shall be excluded from the computation when the period of time prescribed or allowed is 10 days or less, not including any additional time allowed for service by mail in paragraph 11.2 of this section. If on the day a filing is to be made, weather or other conditions have caused the designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, Sunday nor State legal holiday.
- 11.2 Additional time for service by mail. If service is made by mail, three days shall be added to the prescribed period for response.

12.0 Notice of Appeal: Form and Content

- 12.1 Each notice of appeal shall be in writing and signed by the holder's Delaware Counsel. The notice of appeal shall specify in reasonable detail the matters in which the holder asserts that the Audit Manager erred in the determination of the protest of the holder, and any statutory provision, rule or regulation the Audit Manager is alleged to be violating or to have violated.
- 12.2 If the appeal consists of several claims, each claim shall be stated separately.

12.3 Upon ~~[filing of the notice of appeal]~~ the holder's receipt of notice from the Secretary of Finance of the appointment or general designation of an independent reviewer], the holder shall within 20 days designate all evidence it deems necessary to include in the record on appeal. The Audit Manager shall then have an additional 10 days within which to designate all evidence he or she deems necessary to include in the record on appeal.

12.4 It shall not be necessary to include copies of any evidence as a part of the record if (and to the extent that) all parties having an interest in the outcome of the appeal shall execute within 10 days after the ~~[filing of the appeal a written stipulation that the evidence may be omitted as part of the record]~~ holder's receipt of notice from the Secretary of Finance of the appointment or general designation of an independent reviewer], in which case the stipulation shall be included as part of the record; provided that the independent reviewer or any Chancellor or Vice Chancellor of the Court of Chancery (as the case may be) may order copies of all or part of the omitted evidence to be filed as a part of the record at any time during the pendency of the appeal.

13.0 Notice of Appeal: Amendment and Withdrawal

13.1 At any time prior to ~~[the end of the]~~ thirty days after the date on which the ~~[determination by the Audit Manager of the holder's protest is mailed]~~ holder receives notice from the Secretary of Finance of the appointment or general designation of an independent reviewer], the holder may amend the notice of appeal, after which period the notice of appeal may not be amended.

13.2 The holder may withdraw the notice of appeal without prejudice at any time prior to the end of the thirty days after the date on which the ~~[determination by the Audit Manager of the holder's protest was mailed]~~ holder receives notice from the Secretary of Finance of the appointment or general designation of an independent reviewer], but the holder may only re-file before the end of the thirty days after the date on which the ~~[determination by the Audit Manager of the holder's protest was mailed]~~ holder receives notice from the Secretary of Finance of the appointment or general designation of an independent reviewer]. Otherwise the withdrawal shall be with prejudice.

14.0 Scheduling a Hearing.

14.1 Independent reviewer order requiring hearing. ~~[Upon the filing of the notice of appeal, the The]~~ independent reviewer should promptly schedule an oral hearing on the appeal to be held, absent agreement of the parties, within 90 days after the date ~~[on which the holder received notice from]~~ the Secretary of Finance ~~[appoints the of the appointment or general designation of an]~~ independent reviewer.

14.2 Notice of hearing. Upon scheduling a hearing, the independent reviewer shall issue a notice stating the date, time and place of the hearing, and shall serve such notice on the parties.

15.0 Pre-Hearing Submissions

15.1 Submissions generally. At least 5 days prior to the oral hearing date, or at such other time ordered by the independent reviewer, the holder and the Audit Manager shall each submit to the independent reviewer and each other a brief containing argument and referencing supporting documentation from the record before the Audit Manager or an explanation as to why such supporting documentation is not available. **[Length limitations, if any, may be determined by the independent reviewer.]**

15.2 Timing of production. The independent reviewer may modify the time limits for production of evidence set by these rules.

16.0 Oral Hearings

16.1 Oral Hearings. The oral hearing on the appeal shall be held upon order of the independent reviewer.

16.1.1 All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

16.1.2 All hearings shall open to the public unless otherwise ordered by the independent reviewer.

16.1.3 All hearings shall be recorded by sound, sound-and-visual, or stenographic means. The cost of recording shall initially be borne by the Audit Manager, subject to later assessment as costs against a party or between the parties in the independent reviewer's discretion, and subject to confirmation by the Secretary of Finance. Any party may at its own expense arrange for a transcription to be made from the recording of any oral hearing recorded by non-stenographic means.

16.2 Continuance. Any motion for a continuance of the hearing date shall be filed as far in advance of the hearing date as practicable. Motions must be for good cause and state with specificity the reason for the continuance

request. Any motion for a continuance filed within 10 days of a scheduled hearing is disfavored and will be denied in the absence of extraordinary circumstances.

16.3 Hearing procedure. In the hearing, each party is entitled to present its case or defense by oral argument.

17.0 Evidence

17.1 Admissibility. The independent reviewer may consider all relevant evidence *de novo* on the record.

17.1.1 The independent reviewer may make reference to and be guided by the Delaware Uniform Rules of Evidence. Notwithstanding those rules, the independent reviewer may consider any evidence that reasonable and prudent individuals would commonly accept in the conduct of their affairs, and give probative effect to that evidence.

17.1.2 Evidence may not be excluded solely on the ground that it is hearsay, but the weight to be given to any such evidence is subject to the independent reviewer's discretion.

17.2 Objections. Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon.

18.0 Proposed Findings of Fact and Conclusions of Law, and Post-hearing Briefs.

18.1 At the discretion of the independent reviewer, the parties may be ordered to file proposed findings of fact and conclusions of law, or post-hearing briefs, or both. The independent reviewer may order that such proposed findings and conclusions be filed together with, or as part of, post-hearing briefs.

18.2 Proposed findings of fact or other statements of fact in briefs shall be supported by specific references to the record.

18.3 In any case in which the independent reviewer has ordered the filing of proposed findings of fact and conclusions of law, or post-hearing briefs, the independent reviewer shall, after consultation with the parties, prescribe the period within which proposed findings of fact and conclusions of law and/or post-hearing briefs are to be filed. The period shall be reasonable under all the circumstances but the total period allowed for the filing of post-hearing submissions shall not exceed 30 days after the conclusion of the hearing unless the independent reviewer permits a different period and sets forth in an order the reasons why a longer period is necessary.

18.4 Unless the independent reviewer orders otherwise, no post-hearing submission shall exceed **[25 50]** pages, exclusive of cover sheets, tables of contents and tables of authorities, and exclusive of the evidence in the record to which the post-hearing submission refers.

19.0 Decision After a Hearing.

19.1 In any appeal in which a hearing is held, the independent reviewer shall issue a written decision. The decision shall be submitted to the Secretary of Finance within 90 days after the last day of the hearing or the filing of any post-hearing submission, whichever is later. The decision shall include: (i) a brief summary of the evidence; (ii) findings of fact based on the evidence; (iii) conclusions of law; and (iv) an assessment of costs, including the independent reviewer's fee, against a party or between the parties in the independent reviewer's discretion.

19.2 The Secretary of Finance may adopt or reject the independent reviewer's decision in whole or in part. If the Secretary of Finance modifies or rejects, in whole or in part, the decision of the independent reviewer, the Secretary of Finance shall issue a determination in writing setting forth the basis of any rejection or modification of the independent reviewer's decision.

20.0 Failure to Appear at Hearing

A party's failure to appear at a hearing that has been duly noticed shall not be cause to continue the hearing. If the independent reviewer so orders, the hearing shall proceed in the party's absence, which shall be noted in the record.

21.0 Disruptive Conduct

If a party, or counsel to a party, engages in conduct in violation of an order of the independent reviewer, or other disruptive conduct during an oral hearing, the independent reviewer may impose non-monetary sanctions therefor, including the issuance of an order: (i) excluding the party and/or his or her counsel from any further participation in the hearing; (ii) striking briefs from the record; (iii) providing that certain facts shall be taken to be established for purposes of the appeal; or (iv) providing for such other relief as is just and equitable under the circumstances.

22.0 Appeals

- 22.1 Any holder aggrieved by a final determination of the Secretary of Finance may file an appeal to the Court of Chancery. A copy of the notice of appeal shall be promptly filed with the Secretary of Finance.
- 22.2 Upon the filing of an appeal to the Court of Chancery, the administrative record shall be filed **[by the Secretary of Finance or a designee of the Secretary of Finance]** with the Court in accordance with Court of Chancery Rule 72.
- 22.3 Any party that files an appeal to the Court of Chancery shall be responsible for filing with the Court in a timely manner the transcript of that portion of the appeal in which error allegedly occurred. Each party on appeal shall bear his, her or its own costs of transcription.

15 DE Reg. 1323 (03/01/12) (Final)