



## Unclaimed Property ADVISORY ■

**SEPTEMBER 27, 2021**

### Look Before You PEEP – Delaware OUP Rejects Bid to Address Issues with Program and Agreement

Delaware's SB 104, signed into law on June 30, 2021, created a permanent expedited examination program – PEEP – for companies whose unclaimed property audits began after February 2, 2017. The legislation provides that the audit is to be completed within two years after a company elects to participate in the PEEP. In addition, companies that complete their audits under the PEEP will have all penalties and interest waived other than a nominal amount (1%) of nonwaivable interest. By comparison, companies that receive audit notices on or after August 1, 2021 and opt not to join the PEEP are subject to a minimum interest assessment of 20%, but that can be increased to the 50% maximum under the statute in addition to statutory penalties; interestingly, there is no minimum interest or penalty for companies that received audit notices before August 1, 2021. (For a more detailed discussion of the legislation, see our advisory, "[Bracing for the Next Wave of Delaware Unclaimed Property Reform: Review of SB 103 and SB 104.](#)") Given the length of time otherwise required to complete unclaimed property audits (which often last five to eight years or even longer) and the potential for interest and penalty relief, the allure of the PEEP may at first glance appear to present a sizable carrot. But beware the stick and look before you PEEP.

Companies invited into the PEEP are required to execute a "Request to Expedite Completion of Unclaimed Property Examination Under 12 Del. C. § 1172(c)(1)." This request, which is in the nature of a binding contract, requires that the company agree to certain terms, including:

- Providing responses to all outstanding document requests and workplan by September 29, 2021.
- Providing responses to all auditor requests "within the time and in the manner established by the State."
- The potential waiver of "all remedies."

After the request is submitted, the Delaware Office of Unclaimed Property (OUP) transmittal letter provides that the OUP will review the request and the audit workplan, and the OUP retains the ability to "accept, deny or otherwise seek revisions to the detailed work plan and schedule for completion." Thus, the thumbs up or thumbs down for companies requesting participation in the PEEP is within the discretion of the OUP and is only subject to review by the state secretary of finance. The PEEP also requires that "full and final payment" must be made by the earlier of 90 days from the issuance of the statement of findings and request for payment or three years after acceptance into the PEEP. A single extension up to 180 days of the time to pay, at the OUP's discretion and subject only to the review of the secretary of finance, can be requested. Notably, this 180-day extension relates to the deadline for payment by the company, not the deadline for the state to complete the examination.

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A holder executing the request will be required to respond to any and all requests for information as a condition of completing the audit under the PEEP, regardless of the reasonableness of those requests, notwithstanding that the statute provides that only “sufficient responses” are required. The determination of sufficiency is, however, within the OUP’s discretion subject to review by the secretary of finance; the right to terminate an expedited audit for failure to comply with auditor requests is also in the OUP’s discretion, again subject only to secretary of finance review. Under the legislation, a holder that did not provide sufficient responses to document requests can be ejected from the PEEP at the state escheator’s discretion, in which case it will be subject to minimum interest of 20%. In addition, by signing a contract pledging to provide any and all records that may be requested by Delaware or its auditors, Delaware could potentially argue that the holder actually waived its rights to object to any document/information requests. In theory, the state could even pursue a breach of contract action against the holder.

Indeed, the request not only contains unequivocal language that the holder will produce the documents requested but also includes language providing for the waiver of “all remedies” by the holder. It is not clear what this waiver language means. Our view is that the better and more reasonable view of the language is that while a holder may decide to waive, i.e., forgo, its right to pursue its appeal and other rights, the request does not divest holders of any appeal rights, with the notable exception of obtaining pre-payment review. However, we have some significant concern that the state may construe the language to mean that a holder waives all appeal rights by participating in the PEEP.

To address these concerns, the Alston & Bird Unclaimed Property Team reached out to the OUP to seek clarification and guidance and to propose revisions to the request. However, the OUP refused to modify the request to address these concerns. More tellingly, the OUP did not suggest that our concerns were unfounded, nor did OUP suggest (much less confirm) that (1) holders waive no rights by entering into the PEEP (whether related to production of records or appeals); and (2) holders will suffer no adverse consequences if they refuse to produce records in the audit (other than potential risks that any holder may face if the holder refuses to produce records that the state is lawfully entitled to request in an audit).

Notably, the OUP’s lack of regard for holder rights and concerns comes on the heels of the Delaware Court of Chancery’s decision *State of Delaware, Department of Finance v. AT&T Inc.*, No. 2019-0985-JTL (July 10, 2020), that criticized a subpoena by the OUP for records in connection with an unclaimed property audit. The court held that the subpoena was grossly overbroad, would sweep in “a vast amount of irrelevant data,” and would be abuse of discretion by the court to enforce the subpoena. To our knowledge, the OUP has not made a single change in its normal records requests as a result of this decision. This suggests that a holder can *expect* to receive requests for information that are improper, and yet Delaware is apparently hoping that holders will waive their rights to object to such requests in exchange for waivers of penalties and interest.

Even more concerning is the potential loss of appeal rights. As has long been known, Delaware derives much of its revenues from unclaimed property audits by using a highly controversial method of “estimating” a company’s unclaimed property liability for past periods. Indeed, in *Temple-Inland Inc. v. Cook*, 192 F. Supp. 3d 527 (D. Del. 2016), a federal court held that Delaware’s audit practices, including its estimation methodology, violated due process. Yet Delaware has steadfastly refused to change its methodology. Delaware also engages in other highly questionable practices, including the escheatment of foreign-address property and the aggressive application of statute of limitations provisions. These audit practices mean that many, if not most, holders will want to appeal the OUP’s ultimate audit findings. Audit settlements generally take into account such anticipated appeals. A waiver of the holder’s appeal rights thus could result in dramatically increased liability at the conclusion of an audit.

In addition to these key areas of concern, we also asked the OUP whether:

- Auditors would commit to the workplan timelines submitted by holders.
- The 90-day void check convention utilized in the voluntary disclosure program will be used with the PEEP.
- The OUP is intending to be flexible in granting 180-day extension requests to complete the PEEP.

Even on these issues, the OUP was less than forthcoming. While the OUP said that workplan timelines submitted by holders would be followed if the plan was accepted by the state, no responses to the other questions were provided. Given that the impetus for the PEEP was to encourage expedited audits, it was disappointing and somewhat troubling that the OUP is so evasive about the program.

The OUP has indicated that additional guidance would be forthcoming, but with the September 30 deadline for filing requests fast approaching, holders and their representatives are facing significant uncertainty. Indeed, without assurance from the OUP, it is difficult to understand why any holder would take the risks of participating in the PEEP.

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