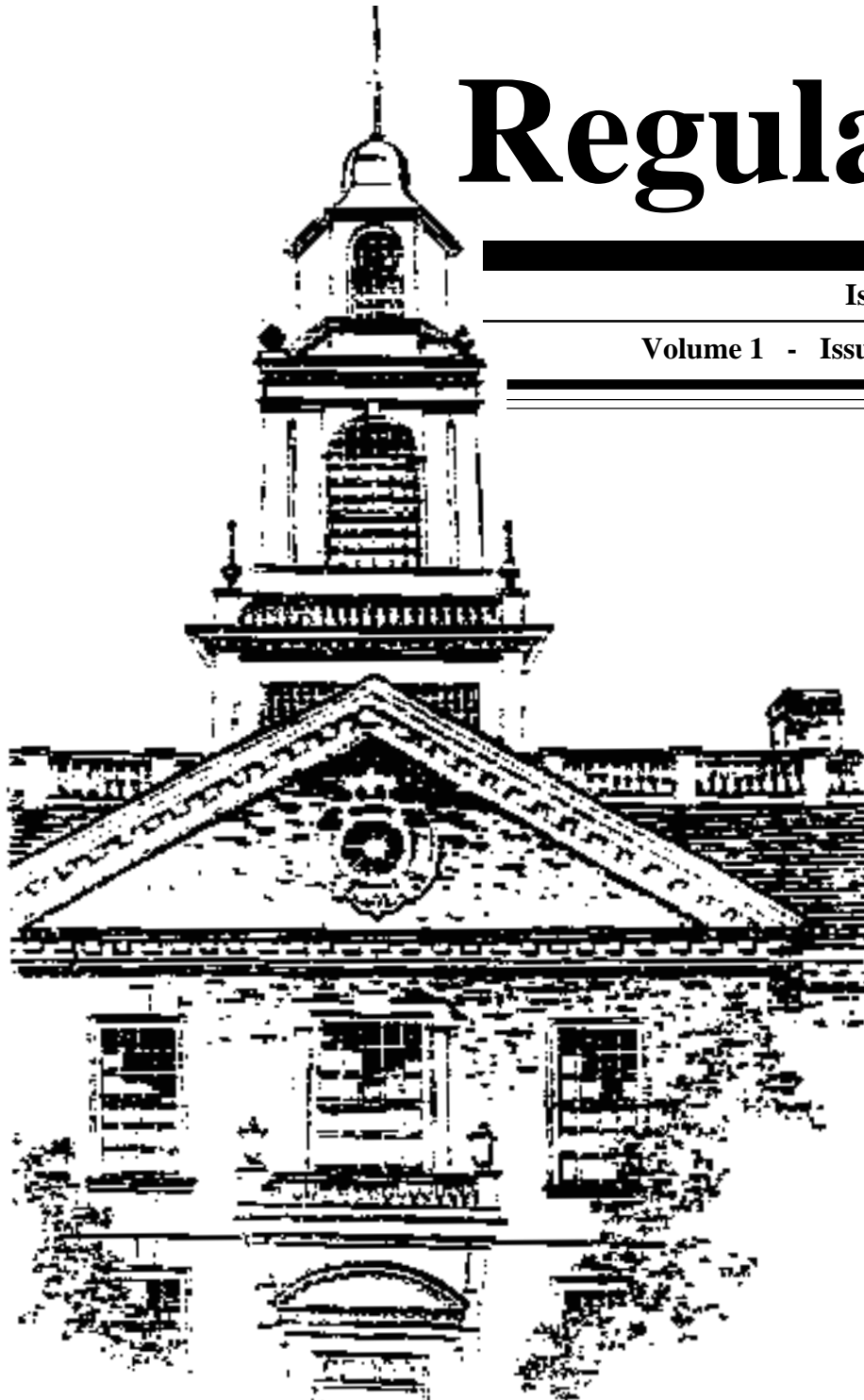


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# Delaware Register of Regulations



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Issue Date: November 1, 1997

Volume 1 - Issue 5

Pages 451 - 638

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Emergency

Final

Proposed

Governor

Appointments

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Pursuant to 29 Del.C. Chapter 11, Subchapter III, this issue of the Register contains all documents required to be published, and received on or before October 15, 1997.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## DELAWARE REGISTER OF REGULATIONS

The Delaware Register of Regulations is an official State publication established by authority of 69 Del. Laws, c. 107 and is published on the first of each month throughout the year.

The Delaware Register will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

The Register will also publish some or all of the following information:

- Governor's Executive Orders
- Governor's Appointments
- Attorney General's Opinions in full text
- Agency Hearing and Meeting Notices
- Other documents considered to be in the public interest.

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## CITATION TO THE DELAWARE REGISTER

The Delaware Register of Regulations is cited by volume, issue, page number and date. An example would be:

1:1 **Del. R.** 35 - 37 (July 1, 1997) refers to Volume 1, Issue 1, pages 35 - 37 of the Delaware Register issued on July 1, 1997.

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## SUBSCRIPTION INFORMATION

A yearly subscription for the Delaware Register of Regulations costs \$80.00 per year from January - December, for 12 issues. Single copies are available at a cost of \$7.00 per issue, including postage. For more information contact the **Division of Research at 302-739-4114 or 1-800-282-8545 in Delaware.**

## CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

Delaware citizens and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation; The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken.

When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

Except as provided in the preceding section, no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations.

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## CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

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ISSUE DATE	CLOSING DATE	CLOSING TIME
DECEMBER 1	NOVEMBER 15	4:30 P.M.
JANUARY 1	DECEMBER 15	4:30 P.M.
FEBRUARY 1	JANUARY 15	4:30 P.M.
MARCH 1	FEBRUARY 15	4:30 P.M.
APRIL 1	MARCH 15	4:30 P.M.

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# EMERGENCY REGULATIONS

## Symbol Key

Roman type indicates the text existing prior to the emergency regulation being promulgated. *Italic type* indicates new text. Language which is ~~stricken through~~ indicates text being deleted.

## Emergency Regulations

Under 29 **Del.C.** §10119, if an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by 29 **Del.C.** §10115, then the following rules shall apply: (1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable; (2) The order adopting, amending or repealing a regulation shall state in writing the reasons for the agency's determination that such emergency action is necessary; (3) the order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days; (4) When such an order is issued without any of the public procedures otherwise required or authorized by Chapter 101 of Title 29, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and (5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations.

## DEPARTMENT OF HEALTH & SOCIAL SERVICES

IN THE MATTER OF:

REVISION OF  
REGULATION  
CONTAINED IN DSSM 8201

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services has determined that a threat to the public welfare exists if revision of regulations contained in DSSM Section 8201 is not implemented without prior notice or hearing. Failure to do so would jeopardize the achievement of mandated work participation rates and thus threaten full federal funding for Delaware under the Temporary Assistance for Needy Families (TANF) program.

SUMMARY OF PROPOSED REVISIONS:

Makes two-parent families eligible for *A Better Chance* benefits only through participation in a pay-after performance work experience position or if the adults are

working and the family's countable income is below the need standard.

NATURE OF PROPOSED REVISIONS:

8201 Time Limit, Temporary Welfare Program

8201.1 Two-Parent Families - Time Limit, Temporary Welfare Program

A) Cash benefits will be time-limited for households headed by two employable adults age 19 or older who are included in the grant. The time limit is forty-eight (48) cumulative months. Families will receive these benefits only through participation in a pay-after performance work experience position or if the adults are working and the family's countable income is below the need standard.

Time limits will not apply when Delaware's unemployment rate exceeds the national average by 2% or when the Delaware unemployment rate is greater than 7.5%.

Time limits apply when four conditions are met:

- the caretaker is included in the grant,
- the caretaker is age 19 or older,

- the caretaker is employable, and
- the unemployment rate does not exceed the national average by 2% or the Delaware unemployment rate is equal to or lower than 7.5%.

When one or more of the conditions listed above is not met, the family receives benefits in the non-time limited program known as the Children's Program.

B) During the time-limited period, employable adult recipients will receive full cash benefits only as long as they fulfill their Contract of Mutual Responsibility, and participate in a pay-after-performance work experience program or they are working and family income is below the need-standard of 75% of the Federal Poverty level.

The pay-after-performance work experience position is intended for families who do not have unsubsidized employment. Determine the number of hours of work required by dividing the ABC benefit by the minimum wage. In addition, participants will be required to conduct up to ten (10) hours of job search each week. Failure to comply with the job search requirements will result in an employment and training sanction being applied as described in Section 8303.2.

C) Periodic Alerts to Families Regarding Time Remaining before the Family Reaches the Time Limit

The Division will track the time remaining before a family's time limits expire and alert the family. The Division will notify families on a quarterly basis of the time they have remaining before the time limits expire.

#### 8201.2 Single Parent / Non-Parent Caretaker Families

A) Under A BETTER CHANCE, AFDC cash benefits will be time-limited for households headed by an employable adult age 19 or older who is included in the grant. The time limit is twenty-four (24) cumulative months. Families will receive benefits for an additional twenty-four (24) cumulative months only through participation in a pay-after-performance work experience position or if the adult is working and the family's countable income is below the need standard.

Time limits will not apply when Delaware's unemployment rate exceeds the national average by 2% or when the Delaware unemployment rate is greater than 7.5%.

Time limits apply when four conditions are met:

- the caretaker is included in the grant;

- the caretaker is age 19 or older;
- the caretaker is employable; and
- the unemployment rate does not exceed the national average by 2% or the Delaware unemployment rate is equal to or lower than 7.5%.

When one or more of the conditions listed above is not met, the family receives benefits in the non-time-limited program known as the Children's Program.

B) Periodic Alerts to Families Regarding Time Remaining Before the Family Reaches the Time Limit

The Division will track the time remaining before a family's time limits expire and alert the family. The Division will notify families on a quarterly basis of the time they have remaining before the time limits expire.

#### FINDING OF FACT

The Department finds that this changes should be made in the best interest of the general public of the State of Delaware. The Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision thereof. Such petitions must be forwarded by November 30, 1997, to the Director, Division of Social Services, P.O. Box 906, New Castle, DE 19720.

THEREFORE, IT IS ORDERED, that the proposed revision to the regulation be adopted on an emergency basis, without prior notice or hearing, and shall become effective immediately.

CARMEN R. NAZARIO  
SECRETARY

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## Symbol Key

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text added at the time of the proposed action. Language which is ~~stricken~~ through indicates text being deleted. [**Bracketed Bold language**] indicates text added at the time the final order was issued. [~~Bracketed bold-stricken through~~] indicates language deleted at the time the final order was issued.

## Final Regulations

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations. At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

## PUBLIC SERVICE COMMISSION

STATUTORY AUTHORITY: 26 Delaware Code  
Section 201 (26 **Del.C.** 201)

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE |  
PROMULGATION OF |  
RULES REGARDING THE |  
DISCOUNTS FOR | **PSC REGULATION**  
INTRASTATE | **DOCKET NO. 47**  
TELECOMMUNICATIONS |  
AND INFORMATION |  
SERVICES PROVIDED TO |  
SCHOOLS AND LIBRARIES |  
(OPENED JUNE 17, 1997) |

ORDER NO. 4601

This 23rd day of September, 1997, the Commission finds, determines, and orders the following:

1. Under 47 U.S.C. § 254(h)(1)(B), all telecommunications carriers serving a geographic area

must, upon request, provide any services falling within the definition of universal service to elementary schools, secondary schools, and libraries at rates less than the amounts charged for similar services to other parties. Carriers providing such discounted services are to be reimbursed for the discounts under universal service support mechanisms. Under §254(h)(1)(B), the Federal Communications Commission ("FCC") determines the discounts for eligible interstate services and the states must determine the discounts for eligible intrastate services.

2. On May 8, 1997, the FCC released its Report and Order which, in part, implemented the federal universal service program for services to schools and libraries. Federal-State Board on Universal Service, CC Dckt. No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) ("the FCC Order"). The FCC Order defines which services are eligible for support, sets the discounts for interstate services, and creates a federal universal service support mechanism to fund the discounts for both interstate and intrastate services provided to schools and libraries. Eligibility for any federal support is predicated upon the state adopting a discount rate for intrastate services as deep as that chosen by the FCC for interstate services. Under

the FCC Order, federal funding is to begin on January 1, 1998, but eligible schools and libraries will be able to apply for support prior to that time.

3. By PSC Order No. 4524 (June 17, 1997), the Commission initiated this docket to consider the formulation and adoption of regulations setting the discounts for intrastate telecommunications services provided to eligible schools and libraries in this State. The rules proposed by Staff, and attached to PSC Order No. 4524, suggested adoption of the federal discount matrix as the discounts for intrastate services.

4. While the proposed rules were pending before the designated Hearing Examiner, this Commission, by Order, adopted the federal discount matrix as the applicable discounts for intrastate services. PSC Order No. 4555 (July 15, 1997). The Commission took this step in order to ensure that Delaware schools and libraries would not be delayed in applying for federal support which will be distributed on a first-come, first served basis.<sup>1</sup> However, by the same Order, the Commission reserved the right to revise the adopted matrix and associated rules based on comments submitted during the rule-making process.

5. After receiving comments and conducting a public hearing, the Hearing Examiner, on August 28, 1997, submitted his Report incorporating his recommendations on the proposed discounts and rules.

6. The Commission considered the Report of the Hearing Examiner and the proposed discount matrix and rules during its meeting on September 9, 1997. After deliberation, the Commission (by four affirmative votes, with Commissioner McRae recused) voted to adopt the Report of the Hearing Examiner and to adopt the proposed "Interim Rules for the Determination of Intrastate Discounts for Services Provided to Elementary and Secondary Schools and Libraries for Purposes of the Receipt of Federal Universal Service Support," attached to the original of this Order as Exhibit "B".

7. The Commission emphasizes that the rules do not create a state universal service fund nor obligate state funds to reimburse carriers for the discounts. Rather, the rules, by adopting the discount matrix, allow carriers providing services to eligible schools and libraries at the prescribed discount to receive reimbursement from the federal universal service fund. The state rules accompanying the discount matrix are intended to merely mirror their federal counterparts. As such, the interpretation of the adopted rules will track the interpretation given the comparable federal rules and questions concerning the eligibility and the scope of support must be determined at the federal level. The Commission does not believe that, in this context, it has authority to offer any independent interpretation of its

rules without placing carriers or schools and libraries in jeopardy of losing their eligibility for support.

8. The Commission has authority to adopt the discount and the accompanying rules under the provisions of 47 U.S.C. § 254(h)(1)(B) and 26 Del. C. §§ 201 and 703(3). The Commission believes that in providing for discounts on telecommunications services provided to eligible schools and libraries, the Commission acts consistent with this State's policy to make advanced telecommunications and computer technology available for use by schoolchildren within this State. See, e.g., 26 Del. C. § 711(2); 29 Del. C. § 6102A(j).

**NOW, THEREFORE, IT IS ORDERED:**

1. That the Commission hereby adopts the Report of the Hearing Examiner ("the Report"), attached to the original hereof as Exhibit "A".

2. That, for the reasons cited in the Report, the Commission affirms its adoption, in PSC Order No. 4555 (July 15, 1997), of the federal discount matrix as the appropriate discount matrix to be applied to eligible intrastate telecommunications services and facilities purchased by eligible schools, school districts, libraries, or library consortia.

3. That, for the reasons cited in the Report, the Commission adopts the proposed "Interim Rules for the Determination of Intrastate Discounts for Services Provided to Elementary and Secondary Schools and Libraries for Purposes of the Receipt of Federal Universal Service Support," attached to the original hereto as Exhibit "B". Pursuant to 29 Del. C. § 10118, the Secretary shall forthwith forward a copy of this Order, the attached Report of the Hearing Examiner, and the adopted rules to the Delaware Registrar for publication in the next issue of the Delaware Register. In accordance with 29 Del. C. § 10118(e), the rules adopted herein shall become effective ten (10) days after publication in the Delaware Register. The effective date shall then be noted on the rules.

4. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

/s/ Robert J. McMahon, Chairman  
/s/ John R. McClelland, Commissioner  
/s/ Arnetta McRae, Commissioner  
/s/ Donald J. Puglisi, Commissioner  
Commissioner

ATTEST:

/s/ Linda A. Mills, Secretary

## EXHIBIT "A"

## BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF DELAWARE

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE |  
PROMULGATION OF |  
RULES REGARDING | PSC REGULATION  
THE DISCOUNTS FOR | DOCKET NO. 47  
INTRASTATE |  
TELECOMMUNICATIONS |  
AND INFORMATION |  
SERVICES PROVIDED TO |  
SCHOOLS AND LIBRARIES |  
(OPENED JUNE 17, 1997) |

### REPORT OF THE HEARING EXAMINER

DATED: AUGUST 28, 1997

WILLIAM F. O'BRIEN  
HEARING EXAMINER

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\* PLEASE NOTE THAT THE ABOVE PAGE NUMBERS REFER TO  
THE ORIGINAL DOCUMENT AND NOT THE REGISTER

IN THE MATTER OF THE |  
PROMULGATION OF |  
RULES REGARDING | PSC REGULATION  
THE DISCOUNTS FOR | DOCKET NO. 47  
INTRASTATE |  
TELECOMMUNICATIONS |  
AND INFORMATION |  
SERVICES PROVIDED TO |  
SCHOOLS AND LIBRARIES |  
(OPENED JUNE 17, 1997) |

### REPORT OF THE HEARING EXAMINER

William F. O'Brien, duly appointed Hearing Examiner  
in this Docket pursuant to 26 Del. C. §502 and 29 Del. C.  
Ch. 101, by Commission Order No. 4524, dated June 17,  
1997, reports to the Commission as follows:

#### I. APPEARANCES

On behalf of the Public Service Commission Staff :  
GARY A. MYERS, RATE COUNSEL

On behalf of the Participants:

Bell Atlantic-Delaware, Inc.:  
DUANE, MORRIS & HECKSCHER  
BY: BONNIE WOLFGANG, ESQUIRE

The Office of the Public Advocate:  
RAJNISH BARUA

AT&T Communications of Delaware, Inc.:  
SAUL, EWING, REMICK & SAUL  
BY: SCOTT JENSEN, ESQUIRE

Delaware Division of Libraries:  
CHARLESA LOWELL, DEPUTY DIRECTOR

Delaware Office of Telecommunications  
Management: PETER A. LA VENIA, DIRECTOR

Delaware Center for Educational Technology:  
PAUL HARJUNG, EXECUTIVE DIRECTOR

Delaware Department of Education:  
THERESA V. KOUGH, EDUCATION ASSOCIATE

#### II. BACKGROUND

1. By PSC Order No. 4524, dated June 17, 1997,  
the Commission initiated this docket to consider the

formulation and adoption of regulations setting the intrastate discounts applicable to certain telecommunications services provided to eligible schools and libraries within this State. The FCC's Universal Service Order conditions federal reimbursement for intrastate discounts on the state's adoption of discounts at least as deep as the schools and libraries discount matrix adopted by the Federal Communications Commission ("FCC") for *interstate* telecommunications services. Staff's proposed rules, as attached to PSC Order No. 4524, incorporate the federal discounts.

2. Because federal support will be provided to states on a first-come, first-served basis, the Commission, on July 15, 1997, by PSC Order No. 4555, adopted the discount matrix set forth in Staff's proposed rules so that schools and libraries in this State will have the opportunity to file for universal service support at the time the federal support administrator begins to accept applications.<sup>2</sup> However, the Commission reserved the right to revise the adopted matrix and the associated rules, based on the comments submitted in this proceeding.

3. By a Notice of Proposed Rulemaking published on June 18, 1997, and by notifying various State agencies, the Commission solicited comments concerning Staff's proposed rules.

4. On July 25, 1997, Staff submitted comments and revised proposed rules. (Exh. 13.) Staff revised the rules attached to PSC Order No. 4524 to reflect the FCC's Order on Reconsideration (Order No. 97-246, CC Docket No. 96-45) released on July 10, 1997, and FCC errata sheets released on June 4, 1997, amending the universal service order (Order No. 97-157.) Staff's comments provide background information regarding the FCC Universal Service Discount Program. (Exh. 13 at 1-5.)

5. In accordance with the schedule set out in the Notice of Proposed Rulemaking, on or about July 31, 1997, initial comments were submitted individually by Bell Atlantic NYNEX Mobile, Inc. ("BANM"), the Office of Telecommunications Management ("OTM"), the Governor's Task Force for School Libraries ("Task Force"), Bell Atlantic-Delaware, Inc. ("BA-Del"), AT&T Communications of Delaware, Inc. ("AT&T"), and the Delaware Division of Libraries. Joint comments were submitted by: (1) the Delaware Department of Education, the Delaware Center for Educational Technology ("DCET"), and the Delaware School Board Association; and, (2) the Delaware Division of Libraries, the Delaware Council on Libraries, the Delaware Library Association and the Action Agenda Implementation Committee.

6. A duly noticed<sup>3</sup> public evidentiary hearing was conducted on August 1, 1997. Those persons specified under "APPEARANCES" above participated. No members

of the public appeared or otherwise participated in the proceeding.

7. In support of Staff's proposed rules and in accordance with PSC Order No. 4524, Rate Counsel moved into the record a copy of the Recommended Decision by the Federal-State Joint Board released by the Federal Communications Commission ("FCC") on November 8, 1996 (FCC Order No. 96J-3 in CC Docket No. 96-45) (Exh. 3)<sup>4</sup>, and a copy of the First Report and Order released on May 8, 1997 (FCC Order No. 97-157 in CC Docket No. 96-45) (Exh. 4).

8. Rate Counsel also moved the comments of each of the participants into the record (Exhs. 5-12). John C. Citrolo testified on behalf of Staff and Charlesa Lowell testified on behalf of the Division of Libraries.

9. At Staff's request, the record was left open after the hearing for two weeks in order to: (1) allow Staff and the participants to reply to the initial comments; (2) allow Staff to update the proposed rules based on FCC revisions; and (3) allow the participants to respond to Staff's revisions. (Tr. at 64-66.) Staff submitted its updated rules on August 8, 1997. (Exh. 14.) The final proposed rules are attached to the original hereto as Exhibit "A". BA-Del's August 8, 1997 reply to the initial comments was the only other post-hearing submission. (Exh. 15.)

10. After receiving into evidence the final two exhibits, the record consisted of fifteen exhibits and a 74-page *verbatim* transcript. I have considered the entire record of this proceeding and, based thereon, I submit for the Commission's consideration this Report of the Hearing Examiner.

### III. STAFF'S PROPOSAL

11. In its July 25, 1997 comments, Staff asserted that in order for federal universal service support to be available for schools and libraries, states must establish intrastate rate discounts no less than the discounts applicable for interstate service. (Exh. 13 at 3.) Staff noted that FCC regulations only require adoption of the federal discount matrix but that Staff recommends adoption of a portion of the corresponding FCC rules, "for ease of reference." (Id. at 5; citing 47 C.F.R. 54.505(e)(1).)

12. Staff explained that the FCC Universal Service Discount Program allows eligible public and non-profit elementary and secondary schools and public libraries to receive, at a discount, any commercially available communications services, internet access, and internal connections (i.e., inside wiring). (Exh. 13 at 3.) Staff noted that the FCC program initially will establish a \$1 billion fund that will be available to provide discounts for eligible services from January 1, 1998 through June

30, 1998. After that, the fund will be capped at \$2.25 billion per year.

13. Those eligible to receive discounts include all public libraries, public schools (K-12), and those non-profit schools (K-12) without an endowment exceeding \$50 million. The level of discount depends on: (1) whether the school or library is in an urban area (New Castle County and Kent County) or rural area (Sussex County); and (2) the level of poverty, as measured by the percentage of student enrollment in the school or school district that is eligible for the national school lunch program. Generally, the discounts range from 20%-90% of the pre-discount price. Staff's proposed rules detail the application procedure and eligibility requirements. (See Exhibit "A" to this Report.)

14. On August 8, 1997, Staff submitted its second revised rules, based on recent FCC amendments, with only minor editorial changes. (Exhibit "A" to this Report includes these revisions.) In order to preserve the eligibility of Delaware's schools and libraries, Staff recommended that the rules remain flexible to allow for revisions based on future FCC amendments. (Exh. 13 at 5.)

#### IV. SUMMARY OF COMMENTS AND DISCUSSION

15. The Commission has jurisdiction over this matter under 26 Del. C. §703(4), which authorizes the Commission to undertake proceedings that may be required by the Telecommunications Act of 1996, and under 26 Del. C. § 209, which authorizes the Commission to issue regulations to be followed by any public utility.

16. In its Notice of Proposed Rulemaking for this docket, the Commission requested comments on three issues, discussed below under "A", "B", and "C".

A. Do any provisions of State law bar adoption of the federal discount matrix and the competitive bidding process for intrastate services provided to schools and libraries?

17. None of the participants asserted that Delaware law bars either the adoption of the federal discount matrix or the competitive bidding procedures. Regarding Delaware's prohibition against "unduly preferential" or "unjustly discriminatory" rates (26 Del. C. § 303(a)), BA-Del asserted:

Almost by definition, discounts provided to achieve the legitimate state and federal policies of extending to schools and libraries affordable access to modern telecommunications services - while arguably

"preferential" and "discriminatory" - are certainly not "unduly preferential" or "unjustly discriminatory".

(Exh. 10 at 2.) (Emphasis in original.)

18. With respect to competitive bidding, BA-Del noted that the sixty-day notice requirement for changes to "basic" service rates under the Telecommunications Technology Investment Act ("TTIA") would hamper BA-Del's opportunity to respond to a request for service from an eligible school or library. (Id.) Therefore, BA-Del recommended that the Commission, by rule, waive the sixty-day notice requirement for "good cause shown," in accordance with § 304. (Id. at 3.)

19. AT&T asserted that Delaware law exempts from the state competitive bidding process those projects or activities which are to be reimbursed in whole or in part by the federal government, if such reimbursement is conditioned on using the federal bidding process. (Exh. 11 at n. 3, citing 29 Del. C. § 6914.) Thus, AT&T concluded that, if the federal competitive bidding law conflicts with the state's, the federal process may lawfully supplant Delaware bidding procedures, in this case.

20. I concur with the above reasons and recommend that the Commission find that state law does not bar adoption of the federal discount matrix or the proposed competitive bidding process for intrastate services provided to schools and libraries. However, I do not recommend that the Commission address, in this proceeding, BA-Del's request for a waiver of the TTIA's sixty-day notice requirement for changes to "basic" services. I believe the issue warrants more attention than what was possible in the scope of this proceeding and I recommend that the Commission consider the matter in another proceeding, perhaps the universal service docket, PSC Regulation Docket No. 48. I note that neither Staff nor the other participants addressed the issue in this docket.

B. What is the appropriate discount for intrastate services during the period through December 31, 1998 and, in particular, should the PSC adopt discounts deeper or slighter than the federal matrix?

21. All participants responded that the Commission should adopt the federal discount matrix for the period through December 31, 1998. BA-Del and AT&T noted that adoption of lower discounts would disqualify Delaware schools and libraries from receiving federal universal service support for intrastate services. (Exh. 10 at 3; Exh. 11 at 3.) BA-Del asserted that it is premature to decide whether there is need for discounts higher than the "very generous" federal matrix discounts. AT&T noted that adopting higher discounts would leave a portion of the subsidy unfunded and would require the Commission



to establish a local funding mechanism from Delaware ratepayers. (Id.)

22. For these reasons, I recommend that the Commission affirm its July 15, 1997 adoption of the federal discount matrix as the appropriate discounts for intrastate services. (PSC Order No. 4555.)

C. What should be the appropriate level of intrastate discounts after December 31, 1998, and how should such discounts be funded?

23. Noting that the FCC plans to complete its review of universal service in 2001, BA-Del recommended that the discount matrix remain in effect for at least three years. BA-Del asserted that three years would allow time for the various stakeholders to gain experience and would provide the time needed to evaluate the program. (Exh. 10 at 4-5.) AT&T recommended that the Commission monitor the situation and revisit, in one year, the issues of what level of subsidy will be necessary and how the subsidy will be funded.

24. Other participants recommended that the Commission form an advisory group that would report to the Commission regarding the appropriate level of intrastate discounts after December 31, 1998. In total, the participants suggested that the advisory group include representatives from: the Task Force, the Department of Education, the Division of Libraries, DCET, the Budget Office, the Office of Information Services/Telecommunications Management and, generally, the library and school communities.

25. BA-Del supported the formation of an advisory group and suggested that the group include representatives from the telecommunications carriers. (Exh. 15 at 1-2.) To allow enough time for sufficient data to become available, BA-Del urged the Commission to commence an evaluation no earlier than January 1, 2000, with a target completion date of December 31, 2000.

26. I support the ongoing evaluation of the discount program and I recommend that Staff consult with the stakeholders to develop an internal plan or to create an advisory group to track the progress of the program and to evaluate the need for modifications to the rules or discount matrix.

D. Other issues.

27. BA-Del suggested that, rather than adopt Staff's proposed rules, which are substantially similar to the federal rules, the Commission should simply note that it intends to follow the federal rules. (Exh. 10 at 5.) In this way, as the federal rules are amended from time to

time, those changes will automatically take effect in Delaware.

28. Staff responded that the Administrative Procedures Act and the Delaware Register of Regulations Act may not allow the Commission to adjust its rules without compliance with procedural requirements. (Tr. at 55.) I concur and, therefore, recommend that the Commission decline BA-Del's suggestion to adopt rules which automatically change to conform to future FCC amendments.

29. BANM recommended that the Commission, in its order, recognize that BANM, as a provider of cellular radio telecommunications service is not required to file tariffs implementing the proposed rate discounts. (Exh. 5 at 2.) BANM argues that: (1) as a provider of cellular services, BANM is excluded from Commission jurisdiction (26 Del. C. §§ 102(2) & 202(c)); (2) as a commercial mobile radio service ("CMRS") provider, BANM is exempted by federal law from state rate regulation; and (3) the Commission does not have authority to regulate the rate changes for cellular service rendered by BANM (citing FCC caselaw.)

30. Neither Staff nor the other participants addressed the extent of PSC jurisdiction over CMRS providers or its impact, if any, on the proposed rules. I recommend that the Commission defer the question of its jurisdiction over CMRS providers until it becomes a contested issue squarely before the Commission.

31. The Delaware Division of Libraries expressed concern over the rules dealing with consortia formed for purposes of seeking competitive bids. (Tr. at 60-62; Exh. 12 at 1-3, citing Rule 2.1(d).) The Division of Libraries asserted that the following rule will present a problem for the Kent County Library System consortia ("KentNet"):

Eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for intrastate services under these rules unless the pre-discount prices of any intrastate services that such consortia receives from a service provider are generally tariffed rates.

(Rule 2.1(d).)

32. The Division of Libraries explained that KentNet, which provides library automation to all the public libraries in Kent County, includes one "ineligible" library, the Wesley College Library. (Exh. 12 at 2.) Currently, KentNet takes telecommunications services under a favorable rate and thus, its pre-discount rate is not a "generally tariffed rate." Consequently, the KentNet consortia may face a higher pre-discount rate and, thus, a higher post-discount rate as a consequence of the

membership of the Wesley College Library. The Division of Libraries argues that the FCC did not intend to discourage the formation of consortia among libraries and requested the Commission to investigate this issue in a universal service proceeding. (Id. at 2-3; Tr. at 61.)

33. Staff addressed the concern of the Division of Libraries regarding consortia and recommended that the Commission investigate the matter in its universal service proceeding (PSC Regulation Docket No. 48). (Tr. at 44-45.) I support Staff's recommendation in this matter.

## V. RECOMMENDATIONS

34. In summary, and for the reasons stated above, I propose and recommend the following to the Commission:

A) That the Commission affirm its adoption, in PSC Order No. 4555, dated July 15, 1997, of the federal discount matrix to be applied to eligible intrastate telecommunications services and facilities purchased by eligible schools, school districts, libraries, or library consortia; and

B) That the Commission adopt Staff's proposed "Interim Rules for the Determination of Intrastate Discounts for Services Provided to Elementary and Secondary Schools and Libraries for Purposes of the Receipt of Federal Universal Service Support" as revised, attached to the original hereto as Exhibit "A".

Respectfully submitted,

/s/ William F. O'Brien  
William F. O'Brien  
Hearing Examiner

Dated: August 28, 1997

<sup>1</sup> By House Joint Resolution No. 9 (July 9, 1997), the General Assembly authorized the Commission to adopt intrastate discounts without undertaking the normal rule-making process.

<sup>2</sup> By House Joint Resolution No. 9, signed by the Governor on July 9, 1997, the General Assembly authorized the Commission to adopt the discounts prior to completion of the comment period and public hearing in this matter.

<sup>3</sup> Exh. 1 consists of the affidavits of publication of notice and Exh. 2 is a copy of the notice that appeared in the *Delaware Register of Regulations*.

<sup>4</sup> References to the exhibits introduced into evidence at the August 1, 1997 evidentiary hearings will be cited as "Exh. \_\_\_\_ at \_\_\_\_". References to the transcript of the proceedings will be cited as "Tr. at \_\_\_\_."

## EXHIBIT "B"

### INTERIM RULES FOR THE DETERMINATION OF INTRASTATE DISCOUNTS FOR SERVICES PROVIDED TO ELEMENTARY AND SECONDARY SCHOOLS AND LIBRARIES FOR PURPOSES OF THE RECEIPT OF FEDERAL UNIVERSAL SERVICE SUPPORT

#### Section 1: General

- 1.1 Basis and purpose
- 1.2 Duration
- 1.3 Intended use of federal universal service support
- 1.4 Terms and definitions

#### Section 2: Eligible Institutions and Supported Services

- 2.1 Eligibility
- 2.2 Supported services
- 2.3 Other supported special services
- 2.4 Requests for service

#### Section 3: Intrastate Discounts

- 3.1 Discounts

#### Section 4: Duties of Eligible Institutions and Service Providers

- 4.1 Ordering and bidding for services
- 4.2 Resale
- 4.3 Support
- 4.4 Record keeping

#### Section 5: Services provided by non-telecommunications carriers.

- 5.1 Support for non-telecommunications carriers

#### Section 1: General

- 1.1 Basis and purpose.

(a) Under the provisions of 47 U.S.C. § 254(h)(1)(B), all telecommunications carriers serving a geographic area must, upon receipt of a bona fide request for services falling within the definition of universal service, provide such services to elementary schools, secondary schools, and libraries at rates less than the amounts charged for similar services to other parties. The discount provided for such services is recovered by the carrier either offsetting such amount against the carrier's obligation to contribute to a universal

service support mechanism or recovering reimbursement from a universal service support mechanism. By the same provision, the states are charged with determining the amount of such discount for intrastate services. These rules set the discounts for intrastate services provided by telecommunications carriers to eligible schools and libraries within Delaware.

(b) These rules are adopted for the purpose of allowing telecommunications carriers to receive federal universal service support for both interstate and intrastate services provided to eligible schools and libraries. See 47 C.F.R. § 54.505(e)(1).<sup>1</sup> These rules do not provide for, nor do they create, a state universal service support funding mechanism. The amount of support available for services provided to eligible schools and libraries is to be determined by the rules adopted by the Federal Communications Commission to implement the *federal* universal service support mechanism.

1.2 Duration.

These rules shall govern the intrastate discounts for services provided by telecommunications carriers to eligible schools and libraries for the period from the effective date of these rules until December 31, 1998. The Commission may hereafter alter, amend, or repeal these rules and may extend the expiration date for these rules.

1.3 Intended use of federal universal service support.

A carrier that receives federal universal service support for intrastate services shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the federal support is intended.

1.4 Terms and definitions.

(a) An "Elementary school" is a non-profit institutional day or residential school that provides elementary education, as determined by state law.

(b) "Information service" is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(c) "Internet access" includes the following elements:

- (1) the transmission of information as common carriage;
- (2) the transmission of information as part of a

gateway to an information service, when that transmission does not involve the generation or alteration of the content of information, but may include data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access information services, and that do not affect the presentation of such information to users; and

- (3) electronic mail services (e-mail).

**[(d)]** **"Existing Contract"** For the purposes of section 4.1, an "existing contract" is any signed contract for services eligible for discounts pursuant to this subpart between an eligible school or library as defined under section 2.1 and a service provided that either:

- (1) was signed prior to November 8, 1996, or
- (2) is limited to services provided before December 31, 1998 and was signed on or after November 8, 1996 but before the first date that the universal service competitive bidding system described in section 2.4 is operational. the competitive bidding system will be deemed to be operational when both the universal service Administrator is ready to accept and post request for service from schools and libraries on a website and that website may be used by potential service providers.]

**[(d)]****[e]** "Internal Connections" includes items such as routers, hubs, network file servers, and wireless local area networks and their installation and basic maintenance needed to switch and route messages within a school or library. A given service is eligible for support as a component of the institution's internal connections only if it is necessary to transport information to individual classrooms.

**[(e)]****[f]** "Intrastate telecommunication" is a communication or transmission from within Delaware to a location within Delaware. "Intrastate transmission" is the same as intrastate telecommunication.

**[(f)]****[g]** A "library" includes:

- (1) a public library;
- (2) a public elementary school or secondary school library;
- (3) an academic library;
- (4) a research library which, for the purposes of this definition, means a library that:
  - (A) makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and
  - (B) is not an integral part of an institution of higher education; and
  - (5) a private library, but only if the Public Service Commission, with the advice of the State Librarian, determines that the library should be considered a library for the purposes of this definition.

~~(g)~~~~(h)~~ A “library consortium” is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of school, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.

~~(h)~~~~(i)~~ “Lowest corresponding price” is the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.

~~(i)~~~~(j)~~ “National school lunch program” is a program administered by the U.S. Department of Agriculture that provides free or reduced price lunches to economically disadvantaged children.

~~(j)~~~~(k)~~ The “pre-discount price” means the price the service provider agrees to accept as total payment for its telecommunications or information services. Such amount is the sum of the amount the service provider expects to receive from the eligible school or library and the amount it expects to receive as reimbursement from the federal universal service support mechanisms because of the discounts provided herein.

~~(k)~~~~(l)~~ A “secondary school” is a non-profit institutional day or residential school that provides secondary education, as determined by state law. A secondary school does not offer education beyond grade 12.

~~(l)~~~~(m)~~ “Telecommunications” is the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

~~(m)~~~~(n)~~ A “telecommunications carrier” is any provider of telecommunications services except that such term does not include aggregators of telecommunications services as defined by 47 U.S.C. § 226. This definition includes cellular mobile radio service (CMRS) providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private mobile radio service (PMRS) providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

~~(n)~~~~(o)~~ “Telecommunications service” is the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

## Section 2: Eligible Institutions and Supported Services

### 2.1 Eligibility

(a) Telecommunications carriers shall be eligible for federal universal service support under these rules for providing supported intrastate services to eligible schools, libraries, and consortia including those entities.

#### (b) Schools.

(1) Only schools meeting the statutory definitions of “elementary school,” as defined in 20 U.S.C. § 8801(14), or “secondary school,” as defined in 20 U.S.C. § 8801(25), and not excluded hereafter, shall be eligible for discounts on telecommunications and other supported services and facilities under these rules.

(2) Schools operating as for-profit businesses shall not be eligible for discounts under these rules.

(3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under these rules.

#### (c) Libraries

(1) Only libraries eligible for assistance from the Division of Libraries [a State library administrative agency] under the Library Services and Technology Act (Pub. L. No. 104-208) and not excluded hereafter shall be eligible for discounts under these rules.

(2) A library’s eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under these rules.

(3) Libraries operating as for-profit businesses shall not be eligible for discounts under these rules.

#### (d) Consortia.

(1) For purposes of seeking competitive bids for telecommunications services pursuant to the provisions of 47 C.F.R. § 54.504, schools and libraries eligible for support under these rules may form consortia with other eligible schools and libraries, with health care providers eligible under 47 U.S.C. § 254(h)(1)(A), and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under the federal universal support mechanism. ~~[With one exception,]~~ ~~e~~~~[E]~~ eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for intrastate services under these rules; ~~unless A consortium may include ineligible private sector~~

~~entities if~~ the pre-discount prices of any **[intrastate]** services that such consortium receives from **[a service provider the local exchange carrier]** are generally tariffed rates.

(2) For consortia, discounts under these rules shall apply only to the portion of eligible telecommunications and other supported services used by the eligible schools and libraries.

(3) Appropriate state agencies may receive discounts on the purchase of telecommunications and information services that they make on behalf of, and for, the direct use of eligible schools and libraries.

(4) Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries - on their own or as part of a consortium. Such records shall be available for public inspection.

2.2 Supported services.

For the purposes of this rules, supported services provided by telecommunications carriers include all commercially available telecommunications services.

2.3 Other supported special services.

For the purposes of these rules, other supported special services provided by telecommunications carriers include Internet access and installation and maintenance of internal connections.

2.4 Requests for Service.

(a) All eligible schools, libraries, and consortia composed of such entities shall participate in a competitive bidding process, pursuant to the requirements established in 47 C.F.R. § 54.504. Such competitive bidding process shall be undertaken in compliance with any applicable provisions of state law pertaining to procurement of services..

(b) Schools, libraries, and eligible consortia wishing to receive discounts for eligible services under the federal support mechanism for intrastate services shall submit requests for services and facilities in compliance with the requirements set forth in 47 C.F.R. §§ 54.504, 54.507(d), & 54.509(a).

(c) Schools, libraries, eligible consortia, and service providers may present to the Public Service Commission complaints regarding intrastate rates if they reasonably believe that the lowest corresponding price is unfairly high or low.

(1) Schools, libraries, and consortia may request lower rates if the rate offered by the provider does not represent the lowest corresponding price.

(2) Service providers may request higher rates if they can show that the lowest corresponding price is not

compensatory, because the relevant school, library, or consortium is not similarly situated to and subscribing to a similar set of services to the customer paying the lowest corresponding price.

Section 3: Intrastate Discounts

3.1 Discounts.

(a) Discounts for eligible schools and libraries shall be set as a percentage discount from the pre-discount price.

(b) The discounts available to eligible schools and libraries shall range from twenty percent (20%) to ninety percent (90%) of the pre-discount price for all eligible services provided by eligible providers. The discounts available to a particular school, library, or consortium of only such entities shall be determined by indicators of poverty and high cost.

(1) For schools and school districts, the level of poverty shall be measured by the percentage of their student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. School districts applying for eligible services on behalf of their individual schools may calculate the district-wide percentage of eligible students using a weighted average. For example, a school district would divide the total number of students in the district eligible for the national school lunch program by the total number of students in the district to compute the district-wide percentage of eligible students. Alternatively, the district could apply on behalf of individual schools and use the respective percentage discounts for which the individual schools are eligible.

(2) For libraries and library consortia, the level of poverty shall be based on the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism in the public school district in which they are located. If the library is not in a school district then its level of poverty shall be based on an average of the percentage of students eligible for the national school lunch program in each of the school districts that children living in the library's location attend. Library systems applying for discounted services or facilities on behalf of their individual branches shall calculate the system-wide percentage of eligible families using an unweighted average based on the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program in the public school district in which they are located for each of their branches or facilities.

(3) Schools and libraries are classified as "urban" or "rural" based on location in an urban or rural area, according to the following designations.<sup>2</sup>

(i) Schools and libraries located in New Castle County and Kent County are designated as urban.

(ii) Schools and libraries located in Sussex County are designated as rural.

(c) The following matrix sets forth a discount rate to be applied to eligible intrastate services ~~and facilities~~ purchased by eligible schools, school districts, libraries, or library consortia based on the institution's level of poverty and location.

SCHOOLS & LIBRARIES [DISCOUNT MATRIX]	DISCOUNT LEVEL	
	urban discount	rural discount
HOW DISADVANTAGED?  % of students eligible for national school lunch program		
< 1	20	25
1-19	40	50
20-34	50	60
35-49	60	70
50-74	80	80
75-100	90	90

(d) Consortia applying for discounted services ~~for facilities~~ on behalf of their members shall calculate the portion of the total bill eligible for a discount using a weighted average based on the share of the pre-discount price for which each eligible school or library agrees to be financially liable. Each eligible school, school district, library, or library consortia will be credited with the discount to which it is entitled.

#### Section 4: Duties and Rights of Eligible Institutions and Service Providers

##### 4.1 Ordering and bidding for services

(a) In selecting a provider of eligible services ~~and facilities~~, schools, libraries, and eligible consortia shall carefully consider all bids submitted and may, to the extent permitted by state law, consider relevant factors other than the pre-discount prices submitted by providers.

(b) Providers of eligible services ~~and facilities~~ shall not charge schools, school districts, libraries, eligible consortia, and state agencies a price above the lowest corresponding price for supported services and facilities, unless the Public Service Commission finds that the lowest corresponding price for intrastate services is not compensatory.

(c) Schools and libraries bound by existing contracts for service shall not be required to breach those contracts in order to qualify for discounts under these rules during the period for which they are bound. This exemption from com-

petitive bidding requirements, however, shall not apply to voluntary extensions of existing contracts.

##### 4.2 Resale

(a) Eligible services provided at a discount under these rules shall not be sold, resold, or transferred in consideration of money or any other thing of value.

(b) The above prohibition on resale shall not bar schools, school districts, libraries, and library consortia from charging either computer lab fees or fees for classes in how to navigate over the Internet. There is no prohibition on the resale of services that are not purchased pursuant to the discounts provided in these rules.

##### 4.3 Support

A telecommunications carrier providing services eligible for support under these rules shall receive an offset or reimbursement for the amount eligible for support from the federal universal service support mechanism in such amount as may be prescribed under the provisions of 47 C.F.R. §§ 54.507 to 54.515.

##### 4.4 Record keeping

Schools and libraries shall maintain for their purchases, at discounted rates, of telecommunications and other supported services and facilities the kind of procurement records that they maintain for other purchases. Schools and libraries shall produce such records at the request of any auditor appointed by the Department of Education, the federal universal service Administrator, or any state or federal agency with jurisdiction. Schools and libraries shall be subject to random compliance audits to evaluate what services they are purchasing and how such services are being used.

#### Section 5: Services Provided by Non-telecommunications Carriers

##### 5.1 Support for non-telecommunications carriers

(a) Non-telecommunications carriers, not subject to the jurisdiction of the Public Service Commission, may also be eligible to receive federal universal service support for providing eligible covered services for eligible schools, libraries, and consortia, including those entities.

(b) Non-telecommunications carriers shall be eligible for federal universal service support for providing Internet access and installation and maintenance of internal connections.

(c) The terms, conditions, and amount of such support shall be determined pursuant to the provisions of 47 U.S.C. § 254(h)(2)(A) and 47 C.F.R. §§ 54.505 to 54.511.

**DEPARTMENT OF EDUCATION**

Statutory Authority: 14 Delaware Code  
Section 2901(a) (14 **Del.C.** 2901(a))

**BEFORE THE STATE BOARD OF EDUCATION  
OF THE STATE OF DELAWARE  
REGULATORY IMPLEMENTING ORDER**

**I. SUMMARY OF THE EVIDENCE AND INFORMATION  
SUBMITTED**

An amendment is requested in order to update the regulations Minimum Standards for School Buses so that manufacturers, distributors, contractors, and educational personnel can have an officially sanctioned document governing school bus body and chassis specifications. It was written to reflect the 1995 National Standards for School Buses and School Bus Operations and all Federal Motor Vehicle Safety Standards. Delaware laws, regulations, and policies superseded the recommended standards where applicable. Two major objectives, safety and economy, served as guideposts for making decisions on these standards and in arriving at sound and common agreement.

Notice of the proposed amendment was published in the News Journal and the Delaware State News on August 18, 1997, in the form hereto attached as Exhibit A. There were no comments received concerning the amendment.

**II. FINDINGS OF FACT**

The Secretary of Education with the approval of the State Board of Education finds that the regulations Standards for School Buses (new title) should be amended. The document has been developed with input from a broad base of national experts, State government agencies, local school districts, school bus vendors, and the school bus contractors association. It represents the best possible thinking concerning the standards needed in school buses to ensure safe, economical pupil transportation.

**III. DECISION TO AMEND REGULATION**

For the foregoing reasons, the Secretary of Education and the State Board conclude that it is necessary to amend the manual of standards for school buses so that manufacturers, distributors, contractors, and educational personnel can have an officially sanctioned document governing school bus body and chassis specifications. Therefore, pursuant to 14 Del. C., Section 2901, the

amended document attached hereto as Exhibit B is hereby adopted. Pursuant to the provisions of 14 Del. C., Section 122(e), the amended document hereby adopted shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

**IV. TEXT AND CITATION**

The text of the regulations adopted hereby shall be in the form attached hereto as Exhibit B, and said regulations shall be cited as Standards for School Buses.

**V. EFFECTIVE DATE OF ORDER**

The actions herein above referred to were taken by the Secretary of Education and the State Board of Education pursuant to 14 Del. C., Section 2901 in open session at the said Board's regularly scheduled meeting on September 18, 1997. The effective date of this Order shall be thirty days from the date hereof.

IT IS SO ORDERED this 18th day of September, 1997.

**STATE BOARD OF EDUCATION**

Dr. Iris T. Metts, Secretary of Education  
Dr. James L. Spartz, President  
Jean W. Allen, Vice President  
Nancy A. Doorey  
John W. Jardine, Jr.  
Dr. Joseph A. Pika  
Dennis J. Savage  
Dr. Claibourne D. Smith

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**\* DUE TO THE LENGTH OF THE REGULATIONS THE TEXT IS NOT  
PRINTED HERE. FOR INFORMATION CONCERNING THE ABOVE  
CITED REGULATIONS PLEASE CONTACT THE DEPARTMENT OF  
EDUCATION**

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**DEPARTMENT OF STATE****OFFICE OF THE STATE BANK COMMISSIONER**

Statutory Authority: 5 Delaware Code,  
Section 121(b) (5 Del.C. 121(b))

## ORDER ADOPTING REVISED REGULATIONS

5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003,  
5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006,  
5.1101etal.0007, 5.1105.0008, 5.1101etal.0009,  
5.1101etal.0010 and 5.1101etal.0011

IT IS HEREBY ORDERED, this 2<sup>nd</sup> day of October, 1997 that revised regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 are adopted as regulations of the State Bank Commissioner. Copies of these revised regulations are attached hereto and incorporated herein by reference. These revised regulations are issued by the State Bank Commissioner in accordance with Title 5 of the Delaware Code. Revised regulations 5.1101(F).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 supersede previous regulations 5.1101(F).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011, respectively. The effective date of revised regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011, is January 1, 1998.

Revised regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 are adopted pursuant to the requirements of Chapters 11 and 101 of Title 29 of the Delaware Code, as follows:

1. Notice of the proposed amendments and the text of amended regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 were published in the September 1, 1997 issue of the Delaware Register of Regulations. The Notice was also published in the News Journal and the Delaware State News on September 9, 1997, and mailed

on or before that date to all persons who had made timely written requests to the Office of the State Bank Commissioner for advance notice of its regulation-making proceedings. The Notice included, among other things, a summary of the proposed amended regulations, invited interested persons to submit written comments to the Office of the State Bank commissioner on or before October 2, 1997, and stated that the proposed amended regulations were available for inspection at the Office of the State Bank Commissioner, that copies were available upon request, and that a public hearing would be held on October 2, 1997 at 10:00 a.m. in the Second Floor Cabinet Room in the Townsend Building, 401 Federal Street, Dover, Delaware 19901.

2. No comments were received on or before October 2, 1997.

3. A public hearing was held on October 2, 1997 at 10:00 a.m. regarding the proposed amended regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011. The State Bank Commissioner, the Deputy Bank Commissioner for Supervisory Affairs, and the Court Reporter attended the hearing. No other person attended the hearing. The State Bank Commissioner and the Deputy Bank Commissioner for Supervisory Affairs summarized the proposed amended regulations for the record. No other comments were made or received at the hearing on the proposed amended regulations.

4. After review and consideration, the State Bank Commissioner decided to adopt revised regulations 5.1101(f).0001, 5.1101etal.0002, 5.1101etal.0003, 5.1101etal.0004, 5.1101etal.0005, 5.1101etal.0006, 5.1101etal.0007, 5.1105.0008, 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 as proposed.

//Timothy R. McTaggart  
State Bank Commissioner

Regulation No.: 5.1101(f).0001  
Effective Date: January 1, 1998

**ELECTION TO BE TREATED FOR TAX PURPOSES AS  
A "SUBSIDIARY CORPORATION" OF A DELAWARE  
CHARTERED BANKING ORGANIZATION OR TRUST  
COMPANY, NATIONAL BANK HAVING ITS  
PRINCIPAL OFFICE IN DELAWARE, OR OUT-OF-**



**STATE BANK THAT OPERATES A RESULTING BRANCH IN DELAWARE (5 Del. C. §1101(f))**

A. **PURPOSE:** Pursuant to 5 Del. C. §1101(f), certain corporations may elect to be treated as a “subsidiary corporation” of a Delaware chartered banking organization or trust company, a national bank having its principal office in Delaware, or an out-of-state bank that operates a resulting branch in Delaware. If a valid election is made, the electing corporation will be taxable on a consolidated basis with its deemed parent Delaware chartered banking organization or trust company, national bank having its principal office in Delaware, or out-of-state bank that operates a resulting branch in Delaware, and the electing corporation will be exempt from Delaware state corporation income taxes and occupational license taxes (as provided in 5 Del. C. §1109).

B. **WHO MAY ELECT:** A corporation may make the election only if it meets the following two tests:

1. **Ownership test:** Eighty percent (80%) of the total combined voting power of all classes of voting stock of the electing corporation (“Electing Corporation”) is owned by an out-of-state bank that operates a resulting branch in Delaware or, directly or indirectly, by a bank holding company (“Qualifying Entity”) that also, directly or indirectly, owns all of the stock of a Delaware chartered banking organization or trust company, a national bank located in Delaware or an out-of-state bank that operates a resulting branch in Delaware (“Deemed Parent”). For purposes of determining ownership of the voting power of an Electing Corporation, non-voting stock convertible into voting stock shall be treated as having been so converted.

In order to determine if this test is met, Question 5 on the election form must be completed. In Column A of Question 5, list each class of stock or property right which has voting rights or can be converted into stock with voting rights. In Column B, state the percentage of the Electing Corporation’s total voting power of that particular class of stock (assuming full conversion). In Column C, state the percentage of each respective class that the Qualifying Entity owns. If each figure in Column C is at least 80%, then this first test is met and Column D need not be completed. If not, Column D should be calculated by multiplying Column B times Column C. The sum of the figures in Column D must be at least equal to 80%. The ownership test must be met at all times during the taxable year for which the election is made.

2. **Employment Test:** The Electing Corporation, together with its affiliates (defined by 5 Del. C. §773(1)),

employs by or before the end of the taxable year following the taxable year in which the election was made at least 200 persons in Delaware.

C. **WHERE TO FILE:** The original of the election form must be filed with the State Bank Commissioner, 555 E. Lookerman Street, Suite 210, Dover, Delaware 19901, and a copy must be filed with the Delaware Division of Revenue, 820 N. French Street, Wilmington, Delaware 19801.

D. **WHEN TO MAKE THE ELECTION:** The election must be made and filed before the first day of the fourth month of the Electing Corporation’s taxable year, except that, (1) in the case of a corporation that is newly formed or acquired by the Qualifying Entity, the election may be made and filed within 90 days of such formation or acquisition, and such later election shall not be subject to the payment of any additional tax under 5 Del. C. §1104(c) for underpayment of estimated tax or installment for periods before the date of such election, and (2) with the approval of the Commissioner, a later election may be made, subject to the payment of any additional tax for underpayment of estimated tax or installment as provided in 5 Del. C. §1104(c) and applicable regulations of the Commissioner.

E. **SUPPLEMENTAL REPORTING REQUIREMENTS:** Once an election has been made under 5 Del. C. §1101(f) for any Electing Corporation, and so long as the same remains in effect, each Estimated Franchise Tax Report under Regulation 5.1101etal.0003 or 5.1101etal.0010 and each Final Franchise Tax Report under Regulation 5.1101etal.0004 or 5.1101etal.0011 filed by the Deemed Parent shall indicate on the first page thereof the name of each Electing Corporation whose income and expenses are consolidated with that of the Deemed Parent. In addition, each such consolidated Report filed by the Deemed Parent shall have attached to it separate Reports completed on an individual non-consolidated basis for each Electing Corporation (complete such attachments only to the extent necessary to calculate estimated or final taxable income).

F. **TERMINATION OF ELECTION:** Once an election is made, it remains in effect until terminated (a) by notice of voluntary termination delivered to the State Bank Commissioner, with a copy to the Delaware Division of Revenue, at any time during the Electing Corporation’s taxable year (which termination shall be effective as of the first day of such taxable year), or (b) by failure to meet the ownership test and the employment test referenced in Section B.1 and B.2 hereof. If either test is first failed at any time during the first six months of



not headquartered in this State but maintaining branches in this State. Regulations 5.1101etal.0009, 5.1101etal.0010 and 5.1101etal.0011 are applicable to resulting branches in this State of out-of-state banks.

## II. Definitions

A. "Bank" means every bank and every corporation conducting a banking business of any kind or plan whose principal place of business is in this State, except a national bank.

B. "Banking organization" means:

1. A bank or bank and trust company organized and existing under the laws of this State;

2. A national bank, including a federal savings bank, with its principal office in this State;

3. An Edge Act corporation organized pursuant to §25(a) of the Federal Reserve Act, 12 U.S.C. §611 et seq., or a state chartered corporation exercising the powers granted thereunto pursuant to an agreement with the Board of Governors of the Federal Reserve System, and maintaining an office in this State;

4. A federal branch or agency licensed pursuant to §4 and §5 of the International Banking Act of 1978, 12 U.S.C. §3101 et seq., to maintain an office in this State;

5. A foreign bank limited purpose branch or foreign bank agency organized pursuant to Chapter 14 of Title 5; or

6. A resulting branch in this State of an out-of-state bank, or a branch office in this State of an out-of-state bank.

C. "International Banking Transaction" shall mean any of the following transactions, whether engaged in by a banking organization, any foreign branch thereof (established pursuant to 5 Del. C. §771 or federal law) or any subsidiary corporation directly or indirectly owned by any banking organization:

1. The financing of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible property or services;

2. The financing of the production, preparation, storage or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad;

3. The financing of contracts, projects or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust or other lien upon real property located in this State;

4. The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage,

deed of trust or other lien upon real property located in this State;

5. The underwriting, distributing and dealing in debt and equity securities outside of the United States and the conduct of any activities permissible to a banking organization described in subsection B.3 above, or any of its subsidiaries, in connection with the transaction of banking or other financial operations; or

6. The entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraphs (1) through (5) above.

D. "International Banking Facility" means a set of asset and liability accounts, segregated on the books of a banking organization, that includes only international banking facility deposits, borrowings and extensions of credit.

E. "National Bank" means a banking association organized under the authority of the United States and having a principal place of business in this State.

F. "Net Operating Income Before Taxes" means the total net interest income plus total non-interest income, minus provision for loan and lease losses, provision for allocated transfer risk, and total non-interest expense, and adjustments made for securities gains or losses and other appropriate adjustments.

G. "Out-of-state bank" has the same meaning as in §795 of Title 5 of the Delaware Code, which is (i) a State bank, as defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813(a), that is not chartered under Delaware law, or (ii) a national bank association created under the National Bank Act (12 U.S.C. §21 et seq.) whose organization certificate identifies an address outside Delaware as the place at which its discount and deposit operations are to be carried out.

H. "Resulting branch in this State of an out-of-state bank" has the same meaning as in §1101(a) of Title 5 of the Delaware Code, which is a branch office in this State of an out-of-state bank resulting from a merger as provided in Subchapter VII of Chapter 7 of Title 5 of the Delaware Code, and, in addition, a branch office in this State of an out-of-state bank.

I. "Securities Business" means to engage in the sale, distribution and underwriting of, and deal in, stocks, bonds, debentures, notes or other securities.

J. "Trust Company" means a trust company or corporation doing a trust company business which has a principal place of business in this State.

### III. Estimated Franchise Tax

A banking organization or trust company whose franchise tax liability for the current year is estimated to exceed \$10,000 shall file an estimated franchise tax report with the State Bank Commissioner and pay estimated franchise tax:

A. 1. Filing. The estimated franchise tax report shall be filed with the State Bank Commissioner on the first day of March of the current year.

2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the estimated franchise tax report required above in section III. A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The estimated franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0003;

C. Calculation of estimated tax. The total estimated annual franchise tax shall be calculated as follows:

1. The estimated net operating income before taxes, which includes the income of any corporation making an election as provided in Regulation No. 5.1101(f).0001;

2. Adjusted for any estimated income from an insurance division or subsidiary;

3. Less any deductions set forth in 5 Del. C. §1101;

4. Multiplied by .56 to arrive at estimated taxable income;

5. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied;

6. The subtotal estimated annual franchise tax shall be adjusted for tax credits applicable pursuant to 5 Del. C. §1105, which are calculated in accordance with Regulation No. 5.1105.0008.

7. The subtotal estimated annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

D. Payment of estimated tax. The estimated tax liability shall be due and payable as follows:

40% due on or before June 1 of the current taxable year;

20% due on or before September 1 of the current taxable year;

20% due on or before December 1 of the current taxable year.

### IV. Final Franchise Tax

A. 1. Filing. The December 31 call report, verified by oath, setting forth the net operating income of the banking organization and the final franchise tax report, setting forth the "taxable income" of the banking organization or trust company, shall be filed with the Office of the State Bank Commissioner on or before January 30 each year; provided, however, that a banking organization entitled to take an additional 15 days to submit its Report of Condition and Income to the appropriate federal bank supervisory authority shall file the December 31 call report and the final franchise tax report with the Office of the State Bank Commissioner on or before February 15 of each year, except as otherwise required by 5 Del. C. §904.

2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the final franchise tax report required above in subsection IV. A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The final franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0004.

C. Calculation of final tax. The total final franchise tax shall be calculated as follows:

1. The net operating income before taxes, which includes the income of any corporation making an election as provided in Regulation No. 5.1101(f).0001;

2. Adjusted for any income from an insurance division or subsidiary;

3. Less any deduction set forth in 5 Del. C. §1101;

4. Multiplied by .56 to arrive at "taxable income";

5. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied to the taxable income to arrive at subtotal annual franchise tax;

6. The subtotal annual franchise tax shall be adjusted for tax credits applicable pursuant to 5 Del. C. §1105, which are calculated in accordance with Regulation No. 5.1105.0008.

7. The subtotal annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

### V. Payment of Final Franchise Tax

A. Taxes owed for the previous calendar year are due and payable on or before March 1 of the following year. Checks or other forms of payment should be made payable or directed to the State of Delaware.

B. The amount due and payable on or before March 1 for the previous calendar year shall be the final franchise tax, less any estimated tax payments made for the taxable year, plus any additional tax due to underpayment of estimated franchise tax or installment. If the final franchise tax is not paid by March 1, a penalty for late payment of the final franchise tax shall be assessed.

**VI. Additional Tax Due to Underpayment of Estimated Franchise Tax or Installment**

A. In the case of any underpayment of estimated franchise tax or installment of estimated tax required by Chapter 11 of Title 5 of the Delaware Code, there shall be added to the tax for the taxable year an amount determined at the rate of 0.05 percent per day upon the amount of the underpayment for the period of the underpayment. The amount of the underpayment shall be the excess of:

1. The amount of the estimated franchise tax or installment payment which would be required to be made if the estimated tax were equal to 80 percent of the tax shown on the final return for the taxable year, or if no return were filed, 80 percent of the tax for such year, over;
2. The amount, if any, of the estimated tax or installment paid on or before the last date prescribed for payment.

B. The period of the underpayment shall run from the date the estimated franchise tax or installment was required to be paid to the earlier of the date when such estimated tax or installment is paid or the date of the final payment of tax for the year;

C. Notwithstanding the above, the addition to the tax with respect to any underpayment of estimated franchise tax or any installment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment thereof equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were the tax shown on the final return of the banking organization or trust company for the preceding taxable year; provided, however, that this paragraph C shall not apply if the banking organization or trust company, or any predecessor thereof, had taxable income of \$200,000 or more for any of the three taxable years immediately preceding the taxable year involved.

**VII. Penalty - Late Payment of Final Franchise Tax**

In the case of a late payment of final franchise tax as required by Chapter 11 of Title 5 of the Delaware Code,

there shall be added to the tax a penalty in an amount determined at the rate of 0.05 percent per day until required payment is made.

**VIII. Election to be listed as a "Subsidiary Corporation"**

Any corporation which has elected to be treated as a "subsidiary corporation" of a banking organization or trust company pursuant to §1101(f) and filed with the State Bank Commissioner the required election form in accordance with Commissioner's Regulation No. 5.1101(f).0001 shall provide (a) a tentative report of income for the electing corporation covering estimated bank franchise tax liability for the current income year to be submitted in conjunction with the estimated franchise tax report due March 1 for a banking organization or trust company whose franchise tax liability for the current year is estimated to exceed \$10,000, and (b) a report of income for the electing corporation as of December 31 of each year to be submitted in conjunction with the final franchise tax report due January 30 or February 15, as applicable.

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Regulation No.: 5.1101etal.0003  
Effective Date: January 1, 1998

**ESTIMATED FRANCHISE TAX REPORT  
(5 Del. C., Chapter 11)**

This report shall be completed by any banking organization (other than a resulting branch in this State of an out-of-state bank, as defined in § 1101(a) of Title 5 of the Delaware Code) or trust company with an estimated tax liability in excess of \$10,000 in a given year. The completed report is to be filed in the Office of the State Bank Commissioner on or before March 1 of the current year. Instructions for the preparation of this report are found in Regulation 5.1101etal.0002.

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Name of Banking Organization or Trust Company

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Location

List corporation(s) electing under Section 1101(f) and attach hereto separate reports of estimated income for each Electing Corporation (include Federal Employer Identification number).

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# FINAL REGULATIONS

	Rounded to the <u>nearest thousand \$</u>		
1. Estimated net operating income before taxes (including income of Electing Corporations)	-----	(c) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State, which subsidiary, foreign branch or other branch established outside of Delaware is subject to shares tax under the laws of another state. In no event shall the income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business.	_____
2. Less: Adjustment for income from an insurance division or subsidiary	-----		
3. Subtotal	-----		
4. Less:			
(a) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is otherwise subject to income taxation under Delaware law.	_____	(d) Net operating income before taxes from any non-United States branch office provided that at least 80% of gross income of such office constitutes "income from sources without the United States" as defined under §862(a) of the Internal Revenue Code of 1954, as amended, or any successor provisions thereto.	_____
(b) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State and subject to income taxation under the laws of another state, and that portion of net operating income before taxes from any such entity other than a Delaware-chartered banking organization or a national bank located in this State (as defined in §801(5) of Title 5, Delaware Code), which entity is a banking organization and which is subject to income taxation under the laws of another state. In no event shall the amount of income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business.	_____	(e) Gross income from international banking transactions after subtracting therefrom any expenses or deductions attributable thereto.	_____
		(f) Gross income from international banking facilities less any attributable expenses or other deductions.	_____
		(g) Interest income from obligations of volunteer fire companies.	_____
		(h) Any examination fee paid to the Office of the State Bank Commissioner pursuant to §127(a) of Title 5 of the Delaware Code.	_____
		5. Total deductions (add lines 4(a)-(h))	_____
		6. Estimated total income before taxes (subtract item 5 from item 3)	_____





# FINAL REGULATIONS

States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is otherwise subject to income taxation under Delaware law.

(b) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State and subject to income taxation under the laws of another state, and that portion of net operating income before taxes from any such entity other than a Delaware-chartered banking organization or a national bank located in this State (as defined in §801(5) of Title 5, Delaware Code), which entity is a banking organization and which is subject to income taxation under the laws of another state. In no event shall the amount of income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business.

(c) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State, which subsidiary, foreign branch or other branch established outside of Delaware is subject to shares tax under the laws of another state. In no event shall the income excluded exceed 50% of such subsidiary's net operating income before

taxes in the case of a subsidiary engaged in a securities business.

(d) Net operating income before taxes from any non-United States branch office provided that at least 80% of gross income of such office constitutes "income from sources without the United States" as defined under §862(a) of the Internal Revenue Code of 1954, as amended, or any successor provisions thereto.

(e) Gross income from international banking transactions after subtracting therefrom any expenses or deductions attributable thereto.

(f) Gross income from international banking facilities less any attributable expenses or other deductions.

(g) Interest income from obligations of volunteer fire companies.

(h) Any examination fee paid to the Office of the State Bank Commissioner pursuant to §127(a) of Title 5 of the Delaware Code.

5. Total deductions (add lines 4(a)-(h))

6. Total income before taxes (subtract item 5 from item 3)

7. Taxable income x .56  
(calculated to nearest dollar)

8. Subtotal franchise tax liability (before tax credits)

Calculation Table:

First \$20,000,000 of item 7 at 8.7%	
Next \$ 5,000,000 of item 7 at 6.7%	
Next \$ 5,000,000 of item 7 at 4.7%	
Next \$620,000,000 of item 7 at 2.7%	
Amount of item 7 over \$650,000,000 at 1.7%	
Subtotal	

9. Less: Total employment tax credits (calculated in accordance with Regulation No. 5.1105.0008, completed worksheet attached hereto)



10. Less: Travelink tax credits (calculated in accordance with Department of Transportation Travelink tax credit reporting requirements, completed worksheet attached hereto) \_\_\_\_\_

11. Total annual franchise tax liability (subtract items 9 & 10 from item 8) \$ \_\_\_\_\_

12. Less: Estimated tax payments
a. June 1 payment \_\_\_\_\_
b. September 1 payment \_\_\_\_\_
c. December 1 payment \_\_\_\_\_
d. Total estimated tax payments (add items 12a, 12b, and 12c) \_\_\_\_\_

13. March 1 final tax payment (subtract item 12d from item 11) \_\_\_\_\_

14. Additional tax due to underpayment of estimated franchise tax or installment (if applicable) \_\_\_\_\_

15. Penalty for late payment of final franchise tax (if applicable) \_\_\_\_\_

16. Total final tax payment (add items 13, 14 and 15) \_\_\_\_\_

I, the undersigned officer, hereby certify that this report, including any accompanying schedules and statements, has been prepared in conformance with the appropriate instructions and is true and correct to the best of my knowledge and belief.

Date Signature of President, Treasurer or Other Proper Officer Title
Print Name Phone No.
Print Address

Regulation No.: 5.1101etal.0005
Effective Date: January 1, 1998

INSTRUCTIONS FOR PREPARATION OF FRANCHISE TAX FOR FEDERAL SAVINGS BANKS NOT HEADQUARTERED IN THIS STATE BUT MAINTAINING BRANCHES IN THIS STATE (5 Del. C., Chapter 11)

I. This regulation applies only to federal savings banks not headquartered in this State but maintaining branches in this State. The estimated and final franchise tax reports that accompany this regulation are found in regulations 5.1101etal.0006 and 5.1101etal.0007, respectively.

II. Definitions
A. "Net operating income before taxes" means the total net income calculated in accordance with Section VIII of this Regulation, with adjustments made for securities gains or losses and other appropriate adjustments.

III. Estimated Franchise Tax
A federal savings bank not headquartered in this State whose franchise tax liability for the current year is anticipated to exceed \$10,000 shall file an estimated franchise tax report with the State Bank Commissioner and pay estimated franchise tax.

A. 1. Filing. The estimated franchise tax report shall be filed with the State Bank Commissioner on the first day of March of the current year.
2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the estimated franchise tax report required above in section III.A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The estimated franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0006;

C. Calculation of estimated tax. The total estimated annual franchise tax shall be calculated as follows:
1. The estimated net operating income before taxes of the branch or branches located in Delaware;
2. Less the interest income from obligations of volunteer fire companies;
3. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied;
4. The subtotal estimated annual franchise tax shall be adjusted for tax credits applicable pursuant to 5 Del. C. §1105, which are calculated in accordance with

Regulation No. 5.1105.0008.

5. The subtotal estimated annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

D. Payment of estimated tax. The estimated tax liability shall be due and payable as follows:

- 40% due on or before June 1 of the current year;
- 20% due on or before September 1 of the current year;
- 20% due on or before December 1 of the current year.

#### IV. Final Franchise Tax

A. 1. Filing. The December 31 call report, verified by oath, setting forth the net operating income of the Delaware branch or branches of the federal savings bank not headquartered in this State and the final franchise tax report shall be filed with the Office of the State Bank Commissioner on or before January 30 each year;

2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the final franchise tax report required above in section IV. A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The final franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0007.

C. Calculation of final tax. The total final franchise tax shall be calculated as follows:

- 1. The net operating income before taxes of the branch or branches located in Delaware;
- 2. Less the interest income from obligations of volunteer fire companies;
- 3. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied;
- 4. The subtotal annual franchise tax shall be adjusted for tax credits applicable pursuant to 5 Del. C. §1105, which are calculated in accordance with Regulation No. 5.1105.0008.

5. The subtotal annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

#### V. Payment of Final Franchise Tax

A. Taxes owed for the previous calendar year are due and payable on or before March 1 of the following year. Checks or other forms of payment should be made payable or directed to the State of Delaware.

B. The amount due and payable on or before March

1 for the previous calendar year shall be the final franchise tax, less any estimated tax payments made for the taxable year, plus any additional tax due to underpayment of estimated franchise tax or installment. If the final franchise tax is not paid by March 1, a penalty for late payment of the final franchise tax shall be assessed.

#### VI. Additional Tax Due to Underpayment of Estimated Franchise Tax or Installment

A. In the case of any underpayment of estimated franchise tax or installment of estimated franchise tax required by Chapter 11 of Title 5 of the Delaware Code, there shall be added to the tax for the taxable year an amount determined at the rate of 0.05 percent per day upon the amount of the underpayment for the period of the underpayment. The amount of the underpayment shall be the excess of:

1. The amount of the estimated franchise tax or installment payment which would be required to be made if the estimated tax were equal to 80 percent of the tax shown on the final return for the taxable year, or if no return were filed, 80 percent of the tax for such year, over;

2. The amount, if any, of the estimated tax or installment paid on or before the last date prescribed for payment.

B. The period of the underpayment shall run from the date the estimated franchise tax or installment was required to be paid to the earlier of the date when such estimated tax or installment is paid or the date of the final payment of tax for the year;

C. Notwithstanding the above, the addition to the tax with respect to any underpayment of estimated franchise tax or any installment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date for the payment thereof equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were the tax shown on the final return of the federal savings bank not headquartered in this State for the preceding taxable year; provided, however, that this paragraph C shall not apply if the federal savings bank not headquartered in this state, or any predecessor thereof, had taxable income of \$200,000 or more for any of the three taxable years immediately preceding the taxable year involved.

#### VII. Penalty - Late Payment of Estimated Franchise Tax or Installment or Final Franchise Tax

In the case of a late payment of final franchise tax as required by Chapter 11 of Title 5 of the Delaware Code, there shall be added to the tax a penalty in an amount

determined at the rate of 0.05 percent per day until required payment is made.

### VIII. Separate Accounting by Delaware Branches

A. Books and Records. Each branch in this State of a federal savings bank not headquartered in this State must keep a separate set of books and records as if it were an entity separate from the rest of the federal savings bank that operates such Delaware branch. These books and records must reflect the following items attributable to the Delaware branch:

1. Assets and the credit equivalent amounts of off-balance sheet items used in computing the risk-based capital ratio under 12 C.F.R. part 567;
2. Liabilities;
3. Income and gain;
4. Expense and loss.

B. Consolidation of Delaware Branches. If a federal savings bank not headquartered in this State operates more than one Delaware branch, it may treat all Delaware branches as a single separate entity for purposes of computing the assets, liabilities, income, gain, expense, and loss referred to above.

### C. Determining Assets Attributable to a Delaware Branch

1. General Principle of Asset Attribution. The general principle will be to attribute assets to a Delaware branch if personnel at the Delaware branch actively and materially participate in the solicitation, investigation, negotiation, approval, or administration of an asset.

2. Loans and Finance Leases. These assets will be attributed to a Delaware branch if personnel at the Delaware branch actively and materially participated in the solicitation, investigation, negotiation, final approval, or administration of a loan or financing lease. Loans include all types of loans, including credit and travel card accounts receivable.

3. Stocks and Debt Securities. These assets will be attributed to a Delaware branch if personnel at the Delaware branch actively and materially participated in the acquisition of such assets.

4. Foreign Exchange Contracts and Futures Options, Swaps, and Similar Assets. These assets will be attributed to a Delaware branch if personnel at the Delaware branch actively and materially participated in the solicitation, investigation, negotiation, acquisition, or administration of such assets.

5. Patents, Copyrights, Trademarks, and Similar Intellectual Property. These assets will be attributed to a

Delaware branch if personnel at the Delaware branch actively and materially participated in the licensing of such asset.

6. Currency. U.S. and foreign currency will be attributed to a Delaware branch if physically stored at the Delaware branch.

7. Tangible Personal and Real Property. These assets (including bullion and other precious metals) will be attributed to a Delaware branch if they are located at or are part of the physical facility of a Delaware branch.

8. Other Business Assets. Other business assets will be attributed to a Delaware branch if personnel at the Delaware branch actively and materially participated in the acquisition of such assets.

9. Credit Equivalent Amounts of Regulatory Off-Balance Sheet Items Taken Into Account in Determining Risk-Based Capital Ratio. These are the credit equivalent amounts of off-balance sheet items described in 12 C.F.R. part 567 not otherwise addressed above (e.g., guarantees, standby letters of credit, commercial letters of credit, risk participations, sale and repurchase agreements and asset sales with recourse if not already included on the balance sheet, forward agreements to purchase assets, securities lent (if the lending federal savings bank is exposed to risk of loss), bid and performance bonds, commitments, revolving underwriting facilities). These assets will be attributed to a Delaware branch if personnel at the Delaware branch actively and materially participated in the solicitation, investigation, negotiation, acquisition, or administration of such assets.

### D. Liabilities Attributable to a Delaware Branch.

The liabilities attributable to a Delaware branch shall be the deposits recorded on the books of the Delaware branch plus any other legally enforceable obligations of the Delaware branch recorded on the books of the Delaware branch or the federal savings bank not headquartered in this State.

### E. Income of a Delaware Branch.

1. Income from Assets. Income and gain from assets (including fees from off-balance sheet items) attributed to a Delaware branch in accordance with the rules in subsection C above will be attributed to the Delaware branch.

2. Income from Fees. Fee income not attributed to a Delaware branch in accordance with subsection 1 above will be attributed to the Delaware branch depending on the type of fee income.

a. Fee income from letters of credit, travelers checks, and money orders will be attributed to the Delaware branch if the letters of credit, travelers

checks, or money orders are issued by the Delaware branch, except to the extent that subsection 1 above requires otherwise.

b. Fee income from services (e.g., trustee and custodian fees) will be attributed to the Delaware branch if the services generating the fees are performed by personnel at the Delaware branch. If services are performed both within and without Delaware, the fees from such services must be allocated between Delaware and other states based on the relative value of the services or upon the time spent in rendering the services or on some other reasonable basis. The basis for allocation must be disclosed and applied consistently from period to period.

**F. Determining the Expenses of a Delaware Branch.**

1. Interest. The amount of interest expense of a Delaware branch shall be the actual interest booked by the Delaware branch, which should reflect market rates.

2. Direct Expenses of a Delaware Branch. Expenses or other deductions that can be specifically identified with the gross income, gains, losses, deductions, assets, liabilities or other activities of the Delaware branch are direct expenses of such Delaware branch. Examples of such expenses are payroll, rent, depreciation and amortization of assets attributed to the Delaware branch, some taxes, insurance, the cost of supplies and fees for services rendered to the Delaware branch.

3. Indirect Expenses of a Delaware Branch. Expenses or other deductions that cannot be specifically identified with the gross income, gains, losses, deductions, assets, liabilities, or other activities of a Delaware branch must be allocated between the Delaware branch and the rest of the federal savings bank operating the Delaware branch. If the federal savings bank makes such an allocation on any reasonable basis, and applies such basis consistently from period to period, the allocation likely will be respected. If the federal savings bank makes no such allocation, such expenses could be allocated on the basis of the ratio of assets of the Delaware branch to the assets of the entire federal savings bank or based on the ratio of gross income of the Delaware branch to gross income of the entire federal savings bank.

Regulation No.: 5.1101etal.0006

Effective Date: January 1, 1998

**ESTIMATED FRANCHISE TAX REPORT  
FEDERAL SAVINGS BANKS NOT HEADQUARTERED  
IN DELAWARE  
(5 Del. C., Chapter 11)**

This report shall be completed by any federal savings bank not headquartered in this State but maintaining branches in this State with an estimated tax liability in excess of \$10,000 in any given year. The completed report is to be filed in the Office of the State Bank Commissioner on or before March 1 of the current year. Instructions for the preparation of this report are found in Regulation 5.1101etal.0005.

\_\_\_\_\_  
Name of Federal Savings Bank

\_\_\_\_\_  
Location

Rounded to the  
nearest thousand \$

1. Estimated net operating income before taxes \_\_\_\_\_

2. Less: Interest income from obligations of volunteer fire companies \_\_\_\_\_

3. Estimated taxable income before taxes (subtract item 2 from item 1) \_\_\_\_\_

4. Estimated subtotal annual franchise tax liability (before tax credits)

Calculation Table:

First \$20,000,000 of item 3 at 8.7% \_\_\_\_\_

Next \$ 5,000,000 of item 3 at 6.7% \_\_\_\_\_

Next \$ 5,000,000 of item 3 at 4.7% \_\_\_\_\_

Next \$620,000,000 of item 3 at 2.7% \_\_\_\_\_

Amount of item 3 over \$650,000,000 at 1.7% \_\_\_\_\_

Subtotal \_\_\_\_\_

5. Less: Total employment tax credits (calculated in accordance with Regulation No. 5.1105.0008, completed worksheet attached hereto) \_\_\_\_\_

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# FINAL REGULATIONS

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6. Less: Travelink tax credits (calculated in accordance with Department of Transportation Travelink tax credit reporting requirements, completed worksheet attached hereto) \_\_\_\_\_

7. Estimated total annual franchise tax liability (subtract items 5 and 6 from item 4) \_\_\_\_\_

8. Payment Structure and Dates                      \$ Amount

June 1 40% of estimate due                      \_\_\_\_\_

September 1 20% of estimate due                      \_\_\_\_\_

December 1 20% of estimate due                      \_\_\_\_\_

March 1 (of succeeding year)                      \_\_\_\_\_

Final payment                      \_\_\_\_\_

I, the undersigned officer, hereby certify that this report, including any accompanying schedules and statements, has been prepared in conformance with the appropriate instructions and is true and correct to the best of my knowledge and belief.

\_\_\_\_\_  
Date                      \_\_\_\_\_  
Signature of President,  
Treasurer or Other  
Proper Officer                      \_\_\_\_\_  
Title

\_\_\_\_\_  
Print Name                      \_\_\_\_\_  
Phone No.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Print Address

Regulation No.: 5.1101etal.0007  
Effective Date: January 1, 1998

**FINAL FRANCHISE TAX REPORT  
FEDERAL SAVINGS BANKS NOT HEADQUARTERED  
IN DELAWARE  
(5 Del. C., Chapter 11)**

This report shall be completed by any federal savings bank not headquartered in this State but maintaining branches in this State and submitted to the Office of the State Bank Commissioner on or before January 30. Income reported is for the previous calendar year. Instructions for the preparation of this report are found in Regulation 5.1101etal.0005.

\_\_\_\_\_  
Name of Federal Savings Bank

\_\_\_\_\_  
Location

Rounded to the  
nearest thousand \$

1. Net Operating Income Before Taxes  
verifiable by documentary evidence                      \_\_\_\_\_

2. Less: Interest income from  
obligations of volunteer fire companies                      \_\_\_\_\_

3. Taxable income before taxes (subtract  
item 2 from item 1)                      \_\_\_\_\_

4. Subtotal annual franchise tax liability  
(before tax credits)                      \_\_\_\_\_

Calculation Table:

First \$20,000,000 of item 3 at 8.7%                      \_\_\_\_\_

Next \$ 5,000,000 of item 3 at 6.7%                      \_\_\_\_\_

Next \$ 5,000,000 of item 3 at 4.7%                      \_\_\_\_\_

Next \$620,000,000 of item 3 at 2.7%                      \_\_\_\_\_

Amount of item 3 over \$650,000,000  
at 1.7%                      \_\_\_\_\_

Subtotal                      \_\_\_\_\_

5. Less: Total employment tax credits  
(calculated in accordance with  
Regulation No. 5.1105.0008, completed  
worksheet attached hereto)                      \_\_\_\_\_

6. Less: Travelink tax credits (calculated  
in accordance with Department of  
Transportation Travelink tax credit

# FINAL REGULATIONS

reporting requirements, completed worksheet attached hereto) \_\_\_\_\_

Regulation No.: 5.1105.0008  
Effective Date: January 1, 1998

7. Total annual franchise tax liability (subtract items 5 and 6 from item 4) \_\_\_\_\_

**INSTRUCTIONS FOR CALCULATION OF  
EMPLOYMENT TAX CREDITS  
(5 Del. C. §1105)**

8. Less: Estimated tax payments  
 a. June 1 payment \$ \_\_\_\_\_  
 b. September 1 payment \_\_\_\_\_  
 c. December 1 payment \_\_\_\_\_  
 d. Total estimated tax payments (add items 8a, 8b and 8c) \_\_\_\_\_

This regulation provides for the calculation of employment tax credits for the years 1997 through 2001 for entities subject to the bank franchise tax. These employment tax credits are provided in Section 1105(d), and subject to requirements in Sections 1105(e) and 1105(f), of Title 5 of the Delaware Code.

9. March 1 final tax payment (subtract item 8d from item 7) \_\_\_\_\_

**I. Definitions**

10. Additional tax due to underpayment of estimated franchise tax or installment (if applicable) \_\_\_\_\_

A. "Base year" means calendar year 1996.

11. Penalty for late payment of final franchise tax (if applicable) \_\_\_\_\_

B. "Full-time employment" means employment of any individual for at least 35 hours per week, not including absences excused by reason of vacations, illness, holidays or similar causes.

12. Total final tax payment (add items 9, 10 and 11) \$ \_\_\_\_\_

C. "Health care benefits" means financial protection against the medical care cost arising from disease and accidental bodily injury (for which the employer pays at least 50%) for workers employed by the employer for a continuous period of 6 months or more.

I, the undersigned officer, hereby certify that this report, including any accompanying schedules and statements, has been prepared in conformance with the appropriate instructions and is true and correct to the best of my knowledge and belief.

D. "New investment" includes (1) machinery, (2) equipment and (3) the cost of land and improvements to land, provided that the new investment is placed into service within Delaware after December 1996 and was not used by any person at any time within the one year period ending on the date the taxpayer placed such property in service in the conduct of the taxpayer's business. If the new investment is leased or subleased by the taxpayer, the amount of the new investment shall be deemed to be eight times the net annual rent paid or incurred by the taxpayer. The net annual rent represents the gross rent paid or incurred by the taxpayer during the taxable year, less any gross rental income received by the taxpayer from sublessees of any portion of the facility during the taxable year.

\_\_\_\_\_  
Date      Signature of President, Treasurer or Other Proper Officer      Title

\_\_\_\_\_  
Print Name      Phone No.

\_\_\_\_\_  
Print Address

E. "Qualified employee" means an employee engaged in regular full-time employment, for whom the taxpayer provides health care benefits, who has been employed in Delaware by the taxpayer for a continuous period of at least 6 months and who was not employed at the same facility in substantially the same capacity by a different employer during all or part of the base year.

**II. Employment Tax Credit**

A tax credit for the current tax year shall be allowed against the tax imposed under subsection 1105(a) of Title 5 of the Delaware Code. The amount of the credit shall be \$400 for each new qualified employee in excess of 50 qualified employees above the number of employees employed by the taxpayer in full-time employment during the base year.

**III. New Investment Required**

The employment tax credit provided above may not be claimed until the taxpayer has made new investments of at least \$15,000 per qualified employee in excess of the numbers of employees employed by the taxpayer in full-time employment during the base year.

**IV. Annual Limit On Credit**

The amount of the employment tax credit allowable for the current tax year (including any credit carried forward as provided below) shall not exceed 50 percent of the amount of tax imposed on the taxpayer under Section 1105(a) of Title 5 of the Delaware Code for the current tax year.

**V. Applicable Years**

The employment tax credit provided above may be earned and applied only in tax years beginning after December 31, 1996 and ending before January 1, 2002, subject to the credit carryover described below.

**VI. Credit Carryover**

The amount of the employment tax credit for any taxable year that is not allowable for such taxable year solely as a result of the limitation described above in Section IV shall be a credit carryover to each of the succeeding 9 years in the manner described in Section 2011(f) of Title 30 of the Delaware Code.

**VII. Calculation Worksheet**

The employment tax credit provided above shall be calculated on the accompanying Employment Tax Credit Calculation Worksheet, which shall be submitted with the taxpayer's tax report.

**EMPLOYMENT TAX CREDIT CALCULATION  
WORKSHEET FOR YEARS 1997 - 2001**

THE FOLLOWING ELIGIBILITY REQUIREMENTS APPLY TO THE EMPLOYMENT TAX CREDIT:

- THE NUMBER OF QUALIFIED EMPLOYEES MUST HAVE INCREASED BY AT LEAST 50 SINCE BASE YEAR 1996.
- YOUR ORGANIZATION MUST HAVE MADE AT LEAST \$750,000 IN NEW INVESTMENTS WITHIN DELAWARE AFTER 12/96.

**A. EMPLOYMENT REQUIREMENT**

1. TOTAL QUALIFIED EMPLOYEES AT YEAR END	_____
2. LESS NUMBER OF FULL-TIME EMPLOYEES WORKING DURING BASE YEAR	_____
3. SUBTOTAL	_____
4. LESS MINIMUM NEW QUALIFIED EMPLOYEE THRESHOLD	<u>(50)</u>
5. MAXIMUM QUALIFIED EMPLOYEES	_____

**B. REQUIRED INVESTMENT**

6. NEW INVESTMENT FROM 1/1/97 TO CURRENT TAX YEAR	_____
7. LESS MINIMUM NEW INVESTMENT FOR FIRST 50 EMPLOYEES (\$750,000)	_____
8. SUBTOTAL	_____
9. DIVIDED BY \$15,000 (ROUNDED DOWN TO THE NEXT LOWEST WHOLE NUMBER)	_____
10. ELIGIBLE QUALIFIED EMPLOYEES (USE THE LESSER OF LINE 5 OR 9)	_____

**C. CREDIT CALCULATION**

11. EMPLOYMENT TAX CREDIT FOR CURRENT TAX YEAR (\$400 X LINE 10)	_____
12. PRIOR YEARS' TAX CREDIT CARRYOVER (IF APPLICABLE)	_____
13. TOTAL TAX CREDIT AVAILABLE	_____



## D. CREDIT ALLOWED

14. CURRENT YEAR FRANCHISE TAX LIABILITY PURSUANT TO CHAPTER 11 OF TITLE 5 \_\_\_\_\_

15. MAXIMUM TAX CREDIT ALLOWED (50% OF LINE 14) \_\_\_\_\_

E. TOTAL TAX CREDIT TAKEN (LESSER OF LINE 13 OR LINE 15) \_\_\_\_\_

Regulation No.: 5.1101etal.0009

Effective Date: January 1, 1998

**INSTRUCTIONS FOR PREPARATION OF FRANCHISE TAX FOR RESULTING BRANCHES IN THIS STATE OF OUT-OF-STATE BANKS**  
(5 Del. C., Chapter 11)

I. This regulation applies only to resulting branches in this State of out-of-state banks. The estimated and final franchise tax reports that accompany this regulation are found in regulations 5.1101etal.0010 and 5.1101etal.0011, respectively.

## II. Definitions

A. "Bank" means every bank and every corporation conducting a banking business of any kind or plan whose principal place of business is in this State, except a national bank.

B. "Banking organization" means:

1. A bank or bank and trust company organized and existing under the laws of this State;
2. A national bank, including a federal savings bank, with its principal office in this State;
3. An Edge Act corporation organized pursuant to §25(a) of the Federal Reserve Act, 12 U.S.C. §611 et seq., or a state chartered corporation exercising the powers granted thereunto pursuant to an agreement with the Board of Governors of the Federal Reserve System, and maintaining an office in this State;
4. A federal branch or agency licensed pursuant to §4 and §5 of the International Banking Act of 1978, 12 U.S.C. §3101 et seq., to maintain an office in this State;
5. A foreign bank limited purpose branch or foreign bank agency organized pursuant to Chapter 14 of Title 5; or
6. A resulting branch in this State of an out-of-state bank, or a branch office in this State of an out-of-state bank.

C. "International Banking Transaction" shall mean any of the following transactions, whether engaged in by a banking organization, any foreign branch thereof (established pursuant to 5 Del. C. §771 or federal law) or any subsidiary corporation directly or indirectly owned by any banking organization:

1. The financing of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible property or services;
2. The financing of the production, preparation, storage or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad;
3. The financing of contracts, projects or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust or other lien upon real property located in this State;
4. The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage, deed of trust or other lien upon real property located in this State;
5. The underwriting, distributing and dealing in debt and equity securities outside of the United States and the conduct of any activities permissible to a banking organization described in subsection B.3 above, or any of its subsidiaries, in connection with the transaction of banking or other financial operations; or
6. The entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraphs (1) through (5) above.

D. "International Banking Facility" means a set of asset and liability accounts, segregated on the books of a banking organization, that includes only international banking facility deposits, borrowings and extensions of credit.

E. "National Bank" means a banking association organized under the authority of the United States and having a principal place of business in this State.

F. "Net Operating Income Before Taxes" means the total net income calculated in accordance with Section IX of this Regulation, with adjustments made for securities gains or losses and other appropriate adjustments.

G. "Out-of-state bank" has the same meaning as in §795 of Title 5 of the Delaware Code, which is (i) a State bank, as defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. §1813(a), that is not chartered under Delaware law, or (ii) a national bank association



created under the National Bank Act (12 U.S.C. §21 et seq.) whose organization certificate identifies an address outside Delaware as the place at which its discount and deposit operations are to be carried out.

H. "Resulting branch in this State of an out-of-state bank" has the same meaning as in §1101(a) of Title 5 of the Delaware Code, which is a branch office in this State of an out-of-state bank resulting from a merger as provided in Subchapter VII of Chapter 7 of Title 5 of the Delaware Code, and, in addition, a branch office in this State of an out-of-state bank.

I. "Securities Business" means to engage in the sale, distribution and underwriting of, and deal in, stocks, bonds, debentures, notes or other securities.

J. "Trust Company" means a trust company or corporation doing a trust company business which has a principal place of business in this State.

### III. Estimated Franchise Tax

A resulting branch or branches in this State of an out-of-state bank whose franchise tax liability for the current year, on a consolidated basis, is estimated to exceed \$10,000 shall file an estimated franchise tax report with the State Bank Commissioner and pay estimated tax.

A. 1. Filing. The estimated franchise tax report shall be filed with the State Bank Commissioner on the first day of March of the current year.

2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the estimated franchise tax report required above in section III.A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The estimated franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0010;

C. Calculation of estimated tax. The total estimated annual franchise tax shall be calculated as follows:

1. The estimated net operating income before taxes of the resulting branch or branches in this State of the out-of-state bank, which includes the income of any corporation making an election as provided in Regulation No. 5.1101(f).0001;

2. Increased by the resulting branch imputed capital addback for the preceding income year (calculated in accordance with Section IV.C.2. of this Regulation).

3. Adjusted for any estimated income from an insurance division or subsidiary;

4. Less any deductions set forth in 5 Del. C. §1101;

5. Multiplied by .56 to arrive at estimated taxable income;

6. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied;

7. The subtotal estimated annual franchise tax shall be adjusted for tax credits applicable pursuant 5 Del. C. §1105, which are calculated in accordance with Regulation No. 5.1105.0008.

8. The subtotal estimated annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

D. Payment of estimated tax. The estimated tax liability shall be due and payable as follows:

40% due on or before June 1 of the current taxable year;

20% due on or before September 1 of the current taxable year;

20% due on or before December 1 of the current taxable year.

### IV. Final Franchise Tax

A. 1. Filing. The December 31 call report, verified by oath, setting forth the net operating income, on a consolidated basis, of the resulting branch or branches in this State of the out-of-state bank and the final franchise tax report, setting forth the "taxable income", on a consolidated basis, of the resulting branch or branches in this State of the out-of-state bank, shall be filed with the Office of the State Bank Commissioner on or before January 30 each year; provided, however, that a resulting branch of an out-of-state bank that is entitled to take an additional 15 days to submit its Report of Condition and Income to the appropriate federal bank supervisory authority shall file the December 31 call report and the final franchise tax report with the Office of the State Bank Commissioner on or before February 15 of each year.

2. Penalty for late filing. A late filing penalty shall be assessed against the taxpayer in the amount of \$25 for each day after the due date that the taxpayer fails to file the final franchise tax report required above in subsection IV.A.1., unless the State Bank Commissioner is satisfied that such failure was not willful.

B. Form. The final franchise tax report shall be in the form set out in Regulation No. 5.1101etal.0011.

C. Calculation of final tax. The total final franchise tax shall be calculated as follows:

1. The net operating income before taxes of

the resulting branch or branches in this State of the out-of-state bank, which includes the income of any corporation making an election as provided in Regulation No. 5.1101(f).0001;

2. Increased by the resulting branch imputed capital addback, which is the product of the greater of the products determined under subparagraphs (a) and (b) of this subsection (2) and the average of the monthly short-term applicable federal rates, as determined under §1274(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. §1274(d)), or any successor provisions thereto, and as published each month in the Internal Revenue Bulletin, for the twelve-month period preceding the date on which the resulting branch imputed capital addback is being determined.

a. The product of (i) the deposits recorded on the books of the resulting branch in this State, and (ii) the minimum risk-based capital ratio (expressed as a decimal fraction) that a resulting branch in this State would be required to maintain, if it were a bank, in order to be deemed "adequately capitalized" pursuant to 12 C.F.R. Part 325.

b. The product of (i) the value of that portion of the total risk-weighted assets (as defined in 12 C.F.R. Part 325) of the out-of-state bank operating the resulting branch in this State that are attributable to such resulting branch in accordance with section IX.C of this regulation, and (ii) the minimum risk-based capital ratio (expressed as a decimal fraction) that a resulting branch in this State would be required to maintain, if it were a bank, in order to be deemed 'adequately capitalized' pursuant to 12 C.F.R. Part 325.

3. Adjusted for any income from an insurance division or subsidiary;

4. Less any deduction set forth in 5 Del. C. §1101;

5. Multiplied by .56 to arrive at "taxable income";

6. The appropriate rate of taxation set forth in 5 Del. C. §1105 shall be applied to the taxable income to arrive at subtotal annual franchise tax;

7. The subtotal annual franchise tax shall be adjusted for tax credits pursuant to 5 Del.C. §1105, which are calculated in accordance with Regulation No. 5.1105.0008.

8. The subtotal annual franchise tax shall be adjusted for Travelink tax credits calculated in accordance with Department of Transportation Travelink tax credit reporting requirements.

#### V. Payment of Final Franchise Tax

A. Taxes owed for the previous calendar year are due and payable on or before March 1 of the following year. Checks or other forms of payment should be made

payable or directed to the State of Delaware.

B. The amount due and payable on or before March 1 for the previous calendar year shall be the final franchise tax, less any estimated tax payments made for the taxable year, plus any additional tax due to underpayment of estimated franchise tax or installment. If the final franchise tax is not paid by March 1, a penalty for late payment of the final franchise tax shall be assessed.

#### VI. Additional Tax Due to Underpayment of Estimated Franchise Tax or Installment

A. In the case of any underpayment of estimated franchise tax or installment of estimated tax required by Chapter 11 of Title 5 of the Delaware Code, there shall be added to the tax for the taxable year an amount determined at the rate of 0.05 percent per day upon the amount of the underpayment for the period of the underpayment. The amount of the underpayment shall be the excess of:

1. The amount of the estimated franchise tax or installment payment which would be required to be made if the estimated tax were equal to 80 percent of the tax shown on the final return for the taxable year, or if no return were filed, 80 percent of the tax for such year, over;

2. The amount, if any, of the estimated tax or installment paid on or before the last date prescribed for payment.

B. The period of the underpayment shall run from the date the estimated franchise tax or installment was required to be paid to the earlier of the date when such estimated tax or installment is paid or the date of the final payment of tax for the year;

C. Notwithstanding the above, the addition to the tax with respect to any underpayment of estimated franchise tax or any installment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment thereof equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were the tax shown on the final return of the resulting branch(es) of the out-of-state bank for the preceding taxable year; provided, however, that this paragraph C shall not apply if the out-of-state bank, or any predecessor thereof, had taxable income of \$200,000 or more for any of the three taxable years immediately preceding the taxable year involved.

D. Notwithstanding the above, the addition to the tax with respect to any underpayment of estimated franchise tax or any installment shall not be imposed if

the addition is attributable to the difference between the imputed capital addback for the current and preceding income years.

#### VII. Penalty - Late Payment of Final Franchise Tax

In the case of a late payment of final franchise tax as required by Chapter 11 of Title 5 of the Delaware Code, there shall be added to the tax a penalty in an amount determined at the rate of 0.05 percent per day until required payment is made.

#### VIII. Election to be listed as a "Subsidiary Corporation"

Any corporation which has elected to be treated as a "subsidiary corporation" of the resulting branch(es) of the out-of-state bank pursuant to §1101(f) and filed with the State Bank Commissioner the required election form in accordance with Commissioner's Regulation No. 5.1101(f).0001 shall provide (a) a tentative report of income for the electing corporation covering estimated bank franchise tax liability for the current income year to be submitted in conjunction with the estimated franchise tax report due March 1 for the resulting branch(es) of the out-of-state bank whose franchise tax liability for the current year is estimated to exceed \$10,000, and (b) a report of income for the electing corporation as of December 31 of each year to be submitted in conjunction with the Final Franchise Tax Report due January 30 or February 15, as applicable.

#### IX. Separate Accounting by Resulting Branches

A. Books and Records. Each resulting branch must keep a separate set of books and records as if it were an entity separate from the rest of the bank that operates such resulting branch. These books and records must reflect the following items attributable to the resulting branch:

1. Assets and the credit equivalent amounts of off-balance sheet items used in computing the risk-based capital ratio under 12 C.F.R. part 325;
2. Liabilities;
3. Income and gain;
4. Expense and loss.

B. Consolidation of Delaware Branches. If a bank operates more than one resulting branch, it may treat all resulting branches as a single separate entity for purposes of computing the assets, liabilities, income, gain, expense, and loss referred to above.

C. Determining Assets Attributable to a Resulting Branch

1. General Principle of Asset Attribution. The

general principle will be to attribute assets to a resulting branch if personnel at the resulting branch actively and materially participate in the solicitation, investigation, negotiation, approval, or administration of an asset.

2. Loans and Finance Leases. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation, negotiation, final approval, or administration of a loan or financing lease. Loans include all types of loans, including credit and travel card accounts receivable.

3. Stocks and Debt Securities. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the acquisition of such assets.

4. Foreign Exchange Contracts and Futures, Options, Swaps, and Similar Assets. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation, negotiation, acquisition, or administration of such assets.

5. Patents, Copyrights, Trademarks, and Similar Intellectual Property. These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the licensing of such asset.

6. Currency. U.S. and foreign currency will be attributed to a resulting branch if physically stored at the resulting branch.

7. Tangible Personal and Real Property. These assets (including bullion and other precious metals) will be attributed to a resulting branch if they are located at or are part of the physical facility of a resulting branch.

8. Other Business Assets. Other business assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the acquisition of such assets.

9. Credit Equivalent Amounts of Regulatory Off-Balance Sheet Items Taken Into Account in Determining Risk-Based Capital Ratio. These are the credit equivalent amounts of off-balance sheet items described in Appendix A to 12 C.F.R. part 325 (the "Appendix") not otherwise addressed above (e.g., guarantees, surety contracts, standby letters of credit, commercial letters of credit, risk participations, sale and repurchase agreements and asset sales with recourse if not already included on the balance sheet, forward agreements to purchase assets, securities lent (if the lending bank is exposed to risk of loss), bid and performance bonds, commitments, revolving underwriting facilities, note issuance facilities described in the Appendix). These assets will be attributed to a resulting branch if personnel at the resulting branch actively and materially participated in the solicitation, investigation,

negotiation, acquisition, or administration of such assets.

D. Liabilities Attributable to a Resulting Branch. The liabilities attributable to a resulting branch shall be the deposits recorded on the books of the resulting branch plus any other legally enforceable obligations of the resulting branch recorded on the books of the resulting branch or its parent.

E. Income of a Resulting Branch.

1. Income from Assets. Income and gain from assets (including fees from off-balance sheet items) attributed to a resulting branch in accordance with the rules in section IX.C above will be attributed to the resulting branch.

2. Income from Fees. Fee income not attributed to a resulting branch in accordance with 1. above will be attributed to the resulting branch depending on the type of fee income.

a. Fee income from letters of credit, travelers checks, and money orders will be attributed to the resulting branch if the letters of credit, travelers checks, or money orders are issued by the resulting branch, except to the extent that 1. requires otherwise.

b. Fee income from services (e.g., trustee and custodian fees) will be attributed to the resulting branch if the services generating the fees are performed by personnel at the resulting branch. If services are performed both within and without Delaware, the fees from such services must be allocated between Delaware and other states based on the relative value of the services or upon the time spent in rendering the services or on some other reasonable basis. The basis for allocation must be disclosed and applied consistently from period to period.

F. Determining the Expenses of a Resulting Branch.

1. Interest. The amount of interest expense of a resulting branch shall be the actual interest booked by the resulting branch, which should reflect market rates.

2. Direct Expenses of a Resulting Branch. Expenses or other deductions that can be specifically identified with the gross income, gains, losses, deductions, assets, liabilities or other activities of the resulting branch are direct expenses of such resulting branch. Examples of such expenses are payroll, rent, depreciation and amortization of assets attributed to the resulting branch, some taxes, insurance, the cost of supplies and fees for services rendered to the resulting branch.

3. Indirect Expenses of a Resulting Branch. Expenses or other deductions that cannot be specifically identified with the gross income, gains, losses, deductions, assets, liabilities, or other activities of a resulting branch must be allocated between the resulting branch and the rest of the bank operating the resulting branch. If the bank makes such an allocation on any

reasonable basis, and applies such basis consistently from period to period, the allocation likely will be respected. If the bank makes no such allocation, such expenses could be allocated on the basis of the ratio of assets of the resulting branch to the assets of the entire bank or based on the ratio of gross income of the resulting branch to gross income of the entire bank.

Regulation No.: 5.1101etal.0010  
Effective Date: January 1, 1998

**ESTIMATED FRANCHISE TAX REPORT FOR  
RESULTING BRANCHES IN THIS STATE OF OUT-OF-  
STATE BANKS  
(5 Del. C., Chapter 11)**

This report shall be completed by the resulting branch(es) in this State of an out of state bank with an estimated tax liability in excess of \$10,000 in a given year. The completed report is to be filed in the Office of the State Bank Commissioner on or before March 1 of the current year. Instructions for the preparation of this report are found in Regulation 5.1101etal.0009.

Name of Out-of-State Bank

Location

List corporation(s) electing under Section 1101(f) and attach hereto separate reports of estimated income for each Electing Corporation (include Federal Employer Identification number).

Rounded to the  
nearest thousand \$

1. Estimated net operating income before taxes (including income of Electing Corporations) \_\_\_\_\_

2. Plus: Resulting branch imputed capital addback for the preceding income year \_\_\_\_\_

<p>3. Less: Adjustment for income from an insurance division or subsidiary _____</p>	<p>on outside the State, which subsidiary, foreign bank or other branch established outside of Delaware is subject to shares tax under the laws of another state. In no event shall the income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business. _____</p>
<p>4. Subtotal _____</p>	
<p>5. Less:</p> <p style="padding-left: 20px;">(a) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is otherwise subject to income taxation under Delaware law. _____</p> <p style="padding-left: 20px;">(b) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived and subject to income taxation under the laws of another state, and that portion of net operating income before taxes from any such entity other than a Delaware-chartered banking organization or a national bank located in this State (as defined in §801(5) of Title 5 of the Delaware Code), which entity is a banking organization and which is subject to income taxation under the laws of another state. In no event shall the amount of income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business. _____</p> <p style="padding-left: 20px;">(c) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried</p>	<p style="padding-left: 20px;">(d) Net operating income before taxes from any non-United States branch office provided that at least 80% of gross income of such office constitutes "income from sources without the United States" as defined under §862(a) of the Internal Revenue Code of 1954, as amended, or any successor provisions thereto. _____</p> <p style="padding-left: 20px;">(e) Gross income from international banking transactions after subtracting therefrom any expenses or deductions attributable thereto. _____</p> <p style="padding-left: 20px;">(f) Gross income from international banking facilities less any attributable expenses or other deductions. _____</p> <p style="padding-left: 20px;">(g) Interest income from obligations of volunteer fire companies. _____</p> <p style="padding-left: 20px;">(h) Any examination fee paid to the Office of the State Bank Commissioner pursuant to §127(a) of Title 5 of the Delaware Code. _____</p>
	<p>6. Total deductions (add lines 5(a)-(h)) _____</p> <p>7. Estimated total income before taxes (subtract item 6 from item 4) _____</p> <p style="text-align: right;">x.56</p> <p>8. Estimated taxable income (calculated to nearest dollar) _____</p> <p>9. Estimated subtotal annual franchise tax liability (before tax credits) Calculation Table: _____</p>

# FINAL REGULATIONS

First \$20,000,000 of item 8 at 8.7% \_\_\_\_\_  
 Next \$ 5,000,000 of item 8 at 6.7% \_\_\_\_\_  
 Next \$ 5,000,000 of item 8 at 4.7% \_\_\_\_\_  
 Next \$620,000,000 of item 8 at 2.7% \_\_\_\_\_  
 Amount of item 8 over \$650,000,000 at 1.7% \_\_\_\_\_  
 Subtotal \_\_\_\_\_

10. Less: Total employment tax credits (calculated in accordance with Regulation No. 51105.0008, completed worksheet attached hereto) \_\_\_\_\_

11. Less: Travelink tax credits (calculated in accordance with Department of Transportation Travelink tax credit reporting requirements) \_\_\_\_\_

12. Estimated total annual franchise tax liability (subtract items 10 and 11 from item 9) \$ \_\_\_\_\_

13. Payment structure and dates \$ Amount

June 1 40% of estimate due \_\_\_\_\_  
 September 1 20% of estimate due \_\_\_\_\_  
 December 1 20% of estimate due \_\_\_\_\_  
 March 1 (of succeeding year) \_\_\_\_\_  
 Final payment \_\_\_\_\_

I, the undersigned officer, hereby certify that this report, including any accompanying schedules and statements, has been prepared in conformance with the appropriate instructions and is true and correct to the best of my knowledge and belief.

Date	Signature of President, Treasurer, or Other Proper Officer	Title
	Print Name	Phone No.
	_____	
	_____	
	Print Address	

Regulation No.: 5.1101etal.0011  
 Effective Date: January 1, 1998

**FINAL FRANCHISE TAX REPORT  
 FOR RESULTING BRANCHES IN THIS STATE  
 OF OUT-OF-STATE BANKS  
 (5 Del. C., Chapter 11)**

This report shall be completed by all resulting branch(es) in this state of out-of-state banks and submitted to the Office of the State Bank Commissioner on or before January 30; provided, however, that a resulting branch of an out-of-state bank that is entitled to take an additional 15 days to submit its Report of Condition and Income to the appropriate federal bank supervisory authority shall submit this report to the Office of the State Bank Commissioner on or before February 15. Income reported is for the previous calendar year. Instructions for the preparation of this report are found in Regulation 5.1101etal.0009.

\_\_\_\_\_  
 Name of Out-of-State Bank

\_\_\_\_\_  
 Location

List corporation(s) electing under Section 1101(f) and attach hereto separate reports of income for each Electing Corporation (include Federal Employer Identification number).

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Rounded to the nearest thousand \$

1. Net operating income before taxes (including income of Electing Corporations)	_____
2. Plus: Resulting branch imputed capital addback	_____
3. Less: Adjustment for income from an insurance division or subsidiary (report of income attached hereto).	_____
4. Subtotal	_____
5. Less: (a) Net operating income before	

taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is otherwise subject to income taxation under Delaware law.

(b) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State and subject to income taxation under the laws of another state, and that portion of net operating income before taxes from any such entity other than a Delaware-chartered banking organization or a national bank located in this State (as defined in §801(5) of Title 5 of the Delaware Code), which entity is a banking organization and which is subject to income taxation under the laws of another state. In no event shall the amount of income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business.

(c) Net operating income before taxes verifiable by documentary evidence from any subsidiary or foreign branch established within the United States pursuant to §771 of Title 5, or other branch established within the United States but outside of Delaware pursuant to federal law or other applicable Delaware law, which is derived from business activities carried on outside the State, which subsidiary, foreign branch or other branch established outside of Delaware is subject to shares tax under the laws of another state. In no event shall the

income excluded exceed 50% of such subsidiary's net operating income before taxes in the case of a subsidiary engaged in a securities business.

(d) Net operating income before taxes from any non-United States branch office provided that at least 80% of gross income of such office constitutes "income from sources without the United States" as defined under §862(a) of the Internal Revenue Code of 1954, as amended, or any successor provisions thereto.

(e) Gross income from international banking transactions after subtracting therefrom any expenses or deductions attributable thereto.

(f) Gross income from international banking facilities less any attributable expenses or other deductions.

(g) Interest income from obligations of volunteer fire companies.

(h) Any examination fee paid to the Office of the State Bank Commissioner pursuant to §127(a) of Title 5 of the Delaware Code.

6. Total deductions (add lines 5(a)-(h))

7. Total income before taxes (subtract item 6 from item 4)

x .56

8. Taxable income (calculated to nearest dollar)

9. Subtotal annual franchise tax liability (before tax credits)

Calculation Table:

First \$20,000,000 of item 8 at 8.7%

Next \$ 5,000,000 of item 8 at 6.7%

Next \$ 5,000,000 of item 8 at 4.7%

Next \$620,000,000 of item 8 at 2.7%

Amount of item 8 over \$650,000,000 at 1.7%

Subtotal

# FINAL REGULATIONS

10. Less: Total employment tax credits (calculated in accordance with Regulation No. 5.1105.0008, completed worksheet attached hereto) \_\_\_\_\_

11. Less: Travelink tax credits (calculated in accordance with Department of Transportation Travelink tax credit reporting requirements, completed worksheet attached hereto) \_\_\_\_\_

12. Total annual franchise tax liability (subtract items 10 and 11 from item 9) \$ \_\_\_\_\_

13. Less: Estimated tax payments  
 a. June 1 payment \$ \_\_\_\_\_  
 b. September 1 payment \_\_\_\_\_  
 c. December 1 payment \_\_\_\_\_  
 d. Total estimated tax payments (add items 13a, 13b and 13c) \_\_\_\_\_

14. March 1 final tax payment (subtract item 13d from item 12) \_\_\_\_\_

15. Additional tax due to underpayment of estimated franchise tax or installment (if applicable) \_\_\_\_\_

16. Penalty for late payment of final franchise tax (if applicable) \_\_\_\_\_

17. Total final tax payment (add items 14, 15 and 16) \$ \_\_\_\_\_

I, the undersigned officer, hereby certify that this report, including any accompanying schedules and statements, has been prepared in conformance with the appropriate instructions and is true and correct to the best of my knowledge and belief.

Date	Signature of President, Treasurer or Other Proper Officer	Title
	Print Name	Phone No.
	Print Address	

## DELAWARE HARNESS RACING COMMISSION

Statutory Authority: 3 Delaware Code,  
Section 10027 (3 Del.C. 10027)

### BEFORE THE DELAWARE HARNESS RACING COMMISSION IN RE: PROPOSED RULES AND REGULATIONS ORDER

Pursuant to 29 Del.C. section 10118, the Delaware Harness Racing Commission ("Commission") hereby issues this Order promulgating the proposed amendment to the Commission's Rules. Following notice and a public hearing held on August 22, 1997 on the proposed Rules, the Commission makes the following findings and conclusions:

#### SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

1. The Commission posted public notice of the proposed rule revisions in the Register of Regulations and in the News-journal and Delaware State News. The Commission received no written comments from the public concerning the proposed regulations. The Commission conducted a public hearing on the proposed Rules on August 22, 1997. The following comments were received at that public hearing.

2. Mr. Salvatore DiMario who is the executive director of DSOA presented comments to the proposed rules. Mr. DiMario objected to proposed amendment #2, the amendment to chapter III, rule II.H.2 to add horses with high blood gas test to the Steward's list. Mr. DiMario believed this proposed amendment would add unnecessary language to the rule and would be redundant.

Mr. DiMario objected to proposed amendment #5, the amendment to chapter VI, rule II.B.5 regarding bonuses. Mr. DiMario stated that this rule should be clearly advertised if adopted.

Mr. DiMario objected to proposed amendment #9 to amend chapter VII, rule VI.M.14 for whipping violations. Mr. DiMario took exception to the proposed rule which would require mandatory fines and suspensions for all whipping violations.

Mr. DiMario objected to proposed amendment #15 to amend chapter X, rule III.C.1 on the belief that this



new rule would allow the Commission investigator to summarily suspend licensees.

Mr. DiMario objected to proposed amendment #17 to amend chapter X, rule 11.1.2 to increase the appeal bond to \$250. Mr. DiMario believed the Commission should waive the appeal bond for persons who are indigent.

Mr. DiMario, objected to proposed amendment #18 to amend chapter VIII, rule III.C.3 to define a blood gas level. Mr. DiMario stated that other states have chosen not to test for blood gas levels since the testing is too unreliable.

3. Mr. George Dalphon objected to proposed amendment #16 to amend chapter VIII, rule IV to allow for the taking of split samples. Mr. Dalphon stated that this rule was not workable without an area where horses could be quarantined, and there would also need to be a supply of buckets and water.

Mr. Dalphon objected to proposed amendment #17 to amend chapter X, rule 11. 1. 2 as too much of an increase in the appeal bond. Mr. Dalphon objected to any rule that would give the Commission investigator the power to summarily suspend licensees.

4. Ms. Elizabeth Harris stated that she is a horse breeder and member of the First State Horsemen's organization. Ms. Harris opposed proposed amendment #9 to chapter VII, rule VI.M.14 because it provided mandatory penalties for whipping violations. Ms. Harris objected to proposed amendment #17 to increase the appeal bond to \$250. Ms. Harris also opposed the blood gas amendment to chapter VII.C.3(c) unless the testing was fairly administered.

5. Mr. Russ McKinnon stated that he is a director of the First State Horsemen's organization. Mr. McKinnon agreed with the proposed blood gas amendment but believed there should be a quarantine procedure. Mr. McKinnon also opposed the proposed increase in the appeal bond.

#### FINDINGS OF FACT

6. The public was given notice and an opportunity to provide the Commission with comments in writing and by oral testimony on the proposed amendments to the Commission's Rules. The oral testimony received is described in paragraphs 2-5.

7. The Commission has considered the comments elicited from the public in the final draft of the rules. The Commission received comments concerning proposed amendments #9, 10, 15, 17, and 18. The Commission received no comments or opposition to the

other proposed amendments. The Commission finds that those proposed rules are necessary to comply with the statutory authority of the Commission under 3 Del. C. chapter 100 and for the effective enforcement of that chapter. The proposed rules in proposed amendments #1-8, 11-14, and 16 are adopted as proposed.

8. As to proposed amendment #9, the Commission proposed to amend chapter VII, rule VI.M.14. This amendment would specify the basis for whipping violations and impose mandatory penalties. The Commission agrees with the public comments that the imposition of mandatory fines and suspensions is ill-advised. The judges have discretion over all other driving offenses and should have the same discretion for whipping offenses. Therefore, the Commission will delete the second paragraph of the proposed rule which mandated minimum penalties.

9. As to proposed amendment #10, the Commission proposed to amend chapter VII, rule VI.M.18. This amendment would require mandatory inspections of each horse after each race for evidence of excessive whipping. The Commission finds that the word "shall" in this rule should be changed to "may" to provide for some discretion in inspections.

10. As to proposed amendment #15, the Commission proposed to amend chapter X, rule III.C.1. This amendment would allow the Commission's investigator to issue subpoenas for the attendance of witnesses and the production of books, records, papers, and correspondence, and documents. The public comments that opposed this rule were on the mistaken belief that the amendment would allow the Commission investigator to summarily suspend licensees. The rule would not have any effect on the current summary suspension procedure in place under the Rules. The Commission finds this amendment should be enacted in its proposed form.

11. As to proposed amendment #17, the Commission proposed to amend chapter X, rule II.I.2. This amendment would raise the appeal bond from \$100 to \$250. The Commission did receive some comments opposing this rule. The Commission finds that the proposed rule should be enacted in its proposed form. The Commission finds that the increased purse levels have led to a number of frivolous appeals. The proposed appeal bond is the same bond used by the Thoroughbred Racing Commission. The Commission notes that the appeal bond has not been

raised in at least nine years. The Commission will adopt this proposed amendment in its proposed form.

12. As to proposed amendment #18, the Commission proposed to amend chapter VIII, rule III.C.3(c). This amendment would add language to the existing definition of "prohibited substance." The proposed amendment specifies the illegal carbon dioxide level for horses racing with and without furosemide. The Commission received comments opposing the use of blood gas testing unless a fair procedure was employed. The Commission finds the existing rule is necessary but will, in response to the public comments, will add the following phrase to the end of the proposed rule:

"provided that a licensee has the right, pursuant to procedures to be established by the Commission, to attempt to prove that a horse has a naturally high carbon dioxide level in excess of the above-mentioned levels."

13. For proposed amendments #9, #10, and #18, the Commission finds that substantive amendments are necessary to these rules. The Commission is required pursuant to 29 Del. C. section 10118(c) to consider these three amended rules as a revised proposal and will republish notice of these rules. The other proposed rules are adopted as proposed.

#### CONCLUSIONS

14. The proposed rules were promulgated by the Commission in accord with its statutory duties and authority as set forth in 3 Del.C. section 10027.

15. The Commission deems these rules as amended necessary for the effective enforcement of 3 Del. C. chapter 100 and for the full and efficient performance of its duties thereunder.

16. The Commission concludes that the adoption of the proposed rules without amendments as set forth above, would be in the best interests of the citizens of the State of Delaware and necessary to insure the integrity and

security of the conduct of harness racing in the State of Delaware.

17. The Commission, therefore, adopts the following rule amendments pursuant to 3 Del. C. section 10027 and 29 Del. C. section 10113:

- Amendment to chapter I, paragraph 34.
- Amendment to chapter III, rule II.H.2.
- Amendment to chapter IV, rule II.A.2.
- Amendment to chapter V, rule II.C.
- Amendment to chapter VI, rule II.B.5.
- Amendment to chapter VI, rule III.B.7.
- Amendment to chapter VI, rule III.B.7.
- Amendment to chapter VI, rule IV.D.23.
- Amendment to chapter II, rule VII.1.
- Amendment to chapter III, rule I.A.
- Amendment to chapter III, section XIV.
- Amendment to chapter V, rule III.A.
- Amendment to chapter X, rule III.C.I.
- Amendment to chapter VIII, rule IV.C.
- Amendment to chapter X, rule II-1-2.

The Commission has considered the comments and suggestions made by the witnesses at the public hearing.

18. These rules replace in their entirety the former version of the Rules of the Delaware State Harness Racing Commission Rules and Regulations and any subsequent amendments.

19. The effective date of this Order shall be ten (10) days from the publication of this order in the Register of Regulations on November 1, 1997.

20. The Commission will publish notice of the proposed amendments to the following rules:

- Amendment to chapter VII, rule VI.M.14
- Amendment to chapter VII, rule VI.M.18
- Amendment to chapter VIII, rule III.C.3(c)

Attached hereto and incorporated herein is the amended Rules and Regulations marked as Exhibit A and executed simultaneously by this Commission this 7th day of October, 1997.

Anthony, G. Flynn, Chairman  
 H. Terry Johnson, Commission  
 Beth Steele, Commissioner  
 Mary Ann Lambertson Commissioner

Dated: October 7, 1997

**THOSE RULE AMENDMENTS ADOPTED BY THE  
COMMISSION FOLLOW**

1. Amendment to Chapter I, paragraph 34 by clarifying the definition of a "maiden" horse.

2. Amendment to Chapter III, Rule II-H-2 by expanding the class of horses eligible to be placed on the Steward's list. This amendment would allow the State Steward to place horses with positive tests for high blood gas on the list of horses unfit to race.

3. Amendment to Chapter IV, Rule II-A-2 by adding language requiring the licensee conducting a meet to obtain medical insurance equal to the amount of the average daily purse account.

4. Amendment to Chapter V, Rule II-C by adding language which provides that clarifies that a lease of a horse for an indefinite term is terminable at the will of either party.

5. Amendment to Chapter VI, Rule II-B-5 by adding a new provision to allow for calculation of the present value of a bonus to determine a horse's earnings.

6. Amendment to Chapter VI, Rule III-B-7 by reducing the time from 45 to 30 days on the time during which a mare which has been bred can be declared in a claiming race.

7. Amendment to Chapter VI, Rule III-b-7 by clarifying the procedure for voiding the claim of a mare that is found to be pregnant.

8. Amendment to Chapter VI, Rule IV-D-23 by adding a sentence to establish a procedure for selection of horses in a final heat when the entered horses are unable to finish due to an accident.

9. Amendment to Chapter II, Rule VII-1 to allow the new created Commission investigator to issue subpoenas for attendance of witnesses or production of documents.

10. Amendment to Chapter III, Rule I-A by adding the position of Commission investigator as a racing official under the Commission's jurisdiction.

11. Amendment to Chapter III, by adding a new subsection XIV which details the general authority of the new Commission investigator position.

12. Amendment to Chapter V, Rule III-A by adding a new

subsection "3" to establish requirements for persons to be listed as trainers of record. The new subsection also provides that all trainers are equally liable for rule violations.

13. Amendment to Chapter X, Rule III-C-1 by adding language to allow the Commission investigator to summarily suspend a licensee in cases of immediate danger to the public health, safety, of welfare.

14. Amendment to Chapter VIII, Rule IV by adding a new subsection C which would allow for the taking of a secondary or split samples from horses for testing. The proposed rule would allow an owner or trainer to have a secondary sample tested for illegal substances after the primary sample has revealed a positive test.

15. Amendment to Chapter X, Rule II-I-2 by deleting the existing section and adding a new subsection. The new subsection would change the amount of the appeal bond from \$100 to \$250. This proposed increase is consistent with the appeal bond currently used by the Thoroughbred Racing Commission.

1. AMEND Chapter I, paragraph 34, by adding the following at the end of the paragraph:

34. "Maiden" is a stallion, mare or gelding that has never won a heat or race at the gait at which it is entered to start and for which a purse is offered; provided, however, that other provisions of these Rules notwithstanding, races and/or purse money awarded to a horse after the 'Official Sign' has been posted shall be considered winning performance and effect status as a maiden, and in such cases a horse placed first by virtue of disqualification shall acquire a win race record only if such horse's actual time can be determined by photo finish or electronic timing in accordance with the provisions of Chapter VII, Rule II.A. of these Rules.

2. AMEND Chapter III, Rule II.H.2., by inserting, following the phrase "to qualify for races at the meeting" and before the phrase "or otherwise unfit to race", the phrase "scratched as a result of a high blood gas test".

**H. Steward's List**

1. The judges shall maintain a Steward's List of the horses which are ineligible to be entered in a race.

2. A horse that is unfit to race because it is dangerous, unmanageable or unable to show a performance to qualify for races at the meeting scratched as a result of a high blood gas test, or otherwise unfit to race at the meeting may be placed on the Steward's List by the Presiding Judge and declarations and/or entries on the horse shall be refused. The owner or

trainer shall be notified of such action and the reason shall be clearly stated. When any horse is placed on the Steward's List, the clerk of the course shall make a note on the eligibility certificate of such horse, showing the date the horse was put on the Steward's List the reason and the date of removal if the horse has been removed.

3. All horses scratched by a veterinarian for either lameness or sickness will be put on the Steward's List and may not be removed for seven (7) days from the date of the race from which they were scratched. No entries will be accepted on these horses until the seven-day period has expired.

4. No Presiding Judge or other official at a fair meeting shall have the power to remove from the Steward's List and accept as an entry any horse which has been placed on a Steward's List and not subsequently removed therefrom for the reason that he/she is dangerous or an unmanageable horse. Such meetings may refuse declarations and/or entries on any horse that has been placed on the Steward's List and has not been removed therefrom.

5. No horse shall be admitted to any racetrack facilities in this jurisdiction without having had a negative official test for equine infectious anemia within twelve (12) months.

6. The judges may put any horse on the Steward's List for performance when such horse shows a reversal of form or does not race near its own capabilities. Such horse shall qualify in a time comparable to its known capabilities from one to three times, at the discretion of the judges, before being allowed to start.

7. Any horse put on the Steward's List as unmanageable or dangerous must qualify in a satisfactory manner for the judges at least two times.

8. The judges may put any horse on the Steward's List for being noncompetitive or unfit to race at the meeting.

9. The judges may place a horse on the Steward's List when there exists a question as to the exact identification, ownership or management of said horse.

10. A horse which has been placed on the Steward's List because of questions as to the exact identification or ownership of said horse, may be removed from the Steward's List when, in the opinion of the judges, proof of exact identification and/or ownership has been established.

11. A horse may not be released from the Steward's List without the permission of the judges.

3. AMEND Chapter IV, Rule II.A.2., by adding the following at the end of the rule:

## II. FINANCIAL REQUIREMENTS

### A. Insurer of the Race Meeting

1. Approval of a race meeting by the Commission does not establish the Commission as the insurer or guarantor of the safety or physical condition of the association's

facilities or purse of any race.

2. In accordance with §10043 of the Act, an association shall timely provide the Commission with a certificate of liability insurance, in an amount approved by the Commission, with premium prepaid. The insurance shall provide a minimum of medical expense coverage equal to the average daily purse account raced for at the previous meeting conducted by the association.

3. An association shall maintain in an approved depository, those amounts deducted from the pari-mutuel handle for distribution for the purposes specified in the Act and Commission rules.

4. An association is responsible to ensure that the amounts retained from the pari-mutuel handle are distributed according to the Act and Commission rules and not otherwise.

5. An association shall ensure that all purse monies, disbursements and appropriate nomination race monies are available to make timely distribution in accordance with the Act, Commission rules, association rules and race conditions, and with any contractual arrangements with the horsemen's association recognized for purposes related to the allocation of purses, if applicable.

4. AMEND Chapter V, Rule II.C., by adding the following sentence at the end of the rule:

### C. Lease Agreements

A horse may be raced under lease provided a completed breed registry or other lease form acceptable to the Commission is attached to the certificate of registration and on file with the Commission. The lessor and lessee shall be licensed as horse owners. For purposes of issuance of eligibility certificates and/or transfers of ownership, a lease for an indefinite term shall be considered terminable at the will of either party unless extended or reduced to a term certain by written documentation executed by both lessor and lessee.

5. AMEND Chapter VI, Rule II.B.5, by adding at the end of the rule:

### B. Conditions

1. Conditions may be based only on:

- a) horses' money winnings in a specified number of previous races or during a specified previous time;
- b) horses' finishing positions in a specified number of previous races or during a specified period of time;
- c) age;
- d) sex;
- e) number of starts during a specified period of time;
- f) special qualifications for foreign horses that do not have a representative number of starts in the United States

or Canada;

g) the exclusion of schooling races; or  
 h) any one or more combinations of the qualifications herein listed.

2. Conditions shall not be written in such a way that any horse is deprived of an opportunity to race in a normal preference cycle. Where the word preference is used in a condition, it shall not supersede date preference as provided in the rules. Not more than three also eligible conditions shall be used in writing the conditions for overnight events.

3. The Commission may, upon application from the racing secretary, approve conditions other than those listed above for special events.

4. In the event there are conflicting published conditions and neither one nor the other is withdrawn by the association, the one more favorable to the declarer shall govern.

5. For the purpose of eligibility, a racing season or racing year shall be the calendar year. All races based on winnings will be programmed Non-Winners of \$301 or Winners over \$1,001. Additional conditions may be added. When recording winnings, gross winnings shall be used and cents shall be disregarded. In the case of a bonus, the present value of the bonus shall be credited to the horse as earnings for the race or series of races for which it received the bonus. It shall be the responsibility of the organization offering the bonus to report the present value of the bonus to the United States Trotting Association in a timely manner.

6. Records, time bars shall not be used as a condition of eligibility.

7. Horses must be eligible when declarations close subject to the provision that:

- a) Wins and winnings on or after the closing date of declarations shall not be considered;
- b) Age allowances shall be given according to the age of the horse on the date the race is contested.
- c) In mixed races, trotting and pacing, a horse must be eligible under the conditions for the gait at which it is stated in the declaration the horse will perform.

8. When conditions refer to previous performances, those performances shall only include those in a purse race. Each dash or heat shall be considered as a separate performance for the purpose of condition races.

9. In overnight events, not more than one trailer shall be permitted, regardless of the size of the track except with the approval of the Commission. At least eight feet per horse must be provided the starters in the front tier.

10. The racing secretary may reject the declaration to an overnight event of any horse whose past performance indicates that it would be below the competitive level of other horses declared to that particular event.

6. AMEND Chapter VI, Rule III.B.7., by striking the figure "45" where it appears in the second line and substituting in

lieu thereof the figure "30".

6. FURTHER AMEND Chapter VI, Rule III.B.7., by adding the following at the end of the last sentence of the rule:

B. Prohibitions on Claims

1. A person shall not claim directly or indirectly his/her own horse or a horse trained or driven by him/her or cause such horse to be claimed directly or indirectly for his/her own account.

2. A person shall not directly or indirectly offer, or directly or indirectly enter into an agreement, to claim or not to claim or directly or indirectly attempt to prevent another person from claiming any horse in a claiming race.

3. A person shall not have more than one claim on any one horse in any claiming race.

4. A person shall not directly or indirectly conspire to protect a horse from being claimed by arranging another person to lodge claims, a procedure known as protection claims.

5. No qualified owner or his agent shall claim a horse for another person.

6. No person shall enter in a claiming race a horse against which there is a mortgage, bill or sale, or lien of any kind, unless the written consent of the holder thereof shall be filed with the Clerk of the Course of the association conducting such claiming race.

7. Any mare which has been bred shall not be declared into a claiming race for at least ~~45~~ 30 days following the last breeding of the mare, and thereafter such a mare may only be declared into a claiming race after a veterinarian has pronounced the mare not to be in foal. Any mare pronounced in foal shall not be declared into a claiming race. Where a mare is claimed out of a claiming race and subsequently proves to be in foal from a breeding which occurred prior to the race from which she was claimed, the claim may be voided by the judges at the option of the successful claimant provided the mare is subjected to a pregnancy examination within 18 days of the date of the claim, and is found pregnant as a result of that pregnancy examination. A successful claimant seeking to void the claim must file a petition to void said claim with the judges within 10 days after this pregnancy examination and shall thereafter be heard by the judges after due notice of the hearing to the parties concerned.

8. AMEND Chapter VI, Rule IV.D.23., by adding the following:

D. Nominations, Fees and Purses

23. The number of horses allowed to qualify for the final heat of an event conducted in elimination heats shall not exceed the maximum number permitted to start in accordance with the rules. In any elimination dash where there are horses unable to finish due to an accident and there

are fewer horses finishing than would normally qualify for the final, the additional horses qualifying for the final shall be drawn by lot from among those unoffending horses not finishing.

PLEASE NOTE that the Commission is not proposing to adopt certain rule changes adopted by the United States Trotting Association because they pertain either to membership in the USTA or to the registration of horses, which the Delaware Harness Racing Commission does not regulate. These USTA rule changes which are not proposed for adoption in Delaware include a new Rule 1 §4 pertaining to reciprocity of membership between the USTA and the Canadian Standardbred Horse Society, a change to Rule 26 §27 pertaining to Embryo Transfer, a new Rule 26 §30 pertaining to reciprocity of registration of horses, and changes to Rule 26 §§7, 24, 28 and 29 pertaining to DNA testing for blood typing of foals for 1998 and thereafter.

In addition to the foregoing, the Commission proposes the following changes to the Delaware Harness Racing Commission Rules and Regulations:

9. AMEND Chapter II, Rule VII.1 by inserting the phrase “the Commission Investigator”, following the phrase “the State Steward or judges,” and before the phrase “the presiding officer of a Commission proceeding”.

#### VII. SUBPOENAS

1. A member of the Commission, the Director of Poultry and Animal Health, the State Steward or judges, the Commission Investigator, the presiding officer of a Commission proceeding or other person authorized to perform duties under the Act may require by subpoena the attendance of witnesses and the reproduction of books, papers and documents. Subpoenas as authorized by such persons shall be issued in blank under the hand of any Commissioner and over the seal of the Commission to any party.

2. A member of the Commission, the Director of Poultry and Animal Health, a presiding officer of a Commission proceeding or other person authorized by the Commission may administer an oath or affirmation to a witness appearing before the Commission or a person authorized by the Commission.

3. If any person refuses to obey any subpoena requiring the person to appear, to testify, or to produce any books, papers and documents, the Commission may apply to the Superior Court of the county in which the Commission is sitting, and, thereupon, the Court shall issue its subpoena requiring the person to appear and to testify, or to produce the books, papers and documents.

10. AMEND Chapter III, Rule I.A., by deleting the word “and” where it appears at the end of subparagraph 14, renumbering subparagraph 15 and “16”, and adding a new subparagraph 15 as follows:

#### I. GENERAL PROVISIONS

##### A. Racing Officials

Officials at a race meeting may include the following, as determined by the Commission:

1. State Steward;
2. board of judges;
3. racing secretary;
4. paddock judge;
5. horse identifier and equipment checker;
6. clerk of the course;
7. official starter;
8. official charter;
9. official timer;
10. photo finish technician;
11. patrol judge;
12. program director;
13. State veterinarian;
14. LASIX veterinarian; ~~and~~
15. Investigator; and

~~+5.~~ 16. any other person designated by the Commission.

11. AMEND Chapter III by renumbering Section XIV as “XV” and adding a new Section XIV as follows:

#### “XIV. INVESTIGATOR

##### General Authority

The Commission may appoint an investigator to assist the State Steward and judges, and the Commission, in the enforcement of these Rules.

Subject to the approval of the Commission, and under the direction of the State Steward, the Investigator may be delegated one or more of the following responsibilities:

1. Supervising the licensing function of the Commission, including performing background checks and fingerprinting applicants for licensure, and facilitating the Commission’s participation in a uniform, multi-jurisdictional, reciprocal licensing scheme;
2. Consulting with track security and with law enforcement agencies both within and outside of Delaware;
3. Supervising the human and equine drug-testing programs provided for in these Rules;
4. Conducting vehicle and stall searches;
5. Intelligence gathering and dissemination;
6. Responding to patron complaints regarding the integrity of racing; and
7. Where appropriate, presenting complaints to the Commission for disposition, including complaints seeking

disciplinary action against licensees of the Commission.”

**XIV. XV. ANY OTHER PERSON DESIGNATED BY THE COMMISSION**

The Commission may create additional racing official positions, as needed. Persons selected for these positions shall be considered racing officials and shall be subject to the general eligibility requirements outlined in Section I of this chapter.

12. AMEND Chapter V, Rule IIIA., by adding a new subsection as follows:

**III. TRAINERS**

**A. Eligibility**

1. A person shall not train horses, or be programmed as trainer of record at extended meetings, without first having obtained a trainer license valid for the current year by meeting the standards for trainers, as laid down by the United State Trotting Association, and being licensed by the Commission. The “trainer of record” shall be any individual who receives compensation for training the horse. The holder of a driver’s license issued by the United States Trotting Association is entitled to all privileges of a trainer and is subject to all rules respecting trainers.

2. Valid categories of licenses are:

- a) “A,” a full license valid for all meetings and permitting operation of a public stable.; and
- b) “L,” a license restricted to the training of horses while owned by the holder and/or his or her immediate family at all race meetings.

“3. If more than one person receives any form of compensation, directly or indirectly, for training the horse, then the principal trainer or trainers must be listed as “trainer of record”. It shall be a violation for the principal trainer or trainers of a horse not to be listed as “trainer or record”, and, if such unlisted principal trainer or trainers are licensees of the Commission, then he, she or they shall be subject to a fine and/or suspension for such violation. In addition, it shall be a violation for a person who is not the principal trainer of the horse to be listed as “trainer of record”, and such person shall be subject to a fine and/or suspension for such violation. Principal trainers and programmed trainers shall be equally liable for all rule violations. For purposes of this rule, the Steward and judges shall use the following criteria in determining the identity of the principal trainer or trainers of a horse:

- a) The identity of the person who is responsible for the business decisions regarding the horse, including, but not limited to, business arrangements with and any payments to or from owners or other trainers, licensed or otherwise, veterinarians, feed companies, hiring and firing of employees, obtaining workers’ compensation or proof of

adequate insurance coverage, payroll, horsemen’s bookkeeper, etc.;

- b) The identity of the person responsible for communicating, or who in fact does communicate, with the racing secretary’s office, stall manager, association and track management, owners, etc. regarding racing schedules and other matters pertaining to the entry, shipping and racing of the horse;

- c) The identity of the person responsible for the principal conditioning of the horse;

- d) The identity of the person responsible for race day preparation including, but not limited to, accompanying the horse to the paddock or ship-in barn, selection of equipment, authority to warm up the horse before the public, discussion with the driver of race strategy, etc.; and

- e) The identity of the person who communicates on behalf of the owner with the Steward, judges and other Commission personnel regarding the horse, including regarding any questions concerning the location or condition of the horse, racing or medication violations, etc.

13. AMEND Chapter X, Rule III.C.1., by inserting the phrase “the Commission Investigator,” following the phrase “the State Steward or judges,” and before the phrase “the presiding officer of a Commission proceeding”.

**C. Summary Suspension**

1. If the State Steward or judges determine that a licensee’s actions, other than those of a licensed association, constitute an immediate danger to the public health, safety or welfare, the State Steward or judges the Commission Investigator, may summarily suspend the license pending a hearing.

2. A licensee whose license has been summarily suspended is entitled to a hearing on the summary suspension not later than the third racing day after the license was summarily suspended. The licensee may waive his/her right to a hearing on the summary suspension within the three-day limit.

3. The State Steward or judges shall conduct a hearing on a summary suspension in the same manner as other disciplinary hearings. At a hearing on a summary suspension, the sole issue is whether the licensee’s license should remain suspended pending a final disciplinary hearing and ruling.

14. AMEND Chapter VIII, Rule IV by adding a new subsection to read as follows.

**C. Procedure for Taking Specimens**

(1) Horses from which specimens are to be drawn shall be taken to the detention area at the prescribed time and remain there until released by the Commission veterinarian. Only the owner, trainer, groom, or hotwalker of horses to be

tested shall be admitted to the detention area without permission of the Commission veterinarian.

(2) Stable equipment other than equipment necessary for washing and cooling out a horse shall be prohibited in the detention area.

(a) Buckets and water shall be furnished by the Commission veterinarian.

(b) If a body brace is to be used, it shall be supplied by the responsible trainer and administered only with the permission and in the presence of the Commission veterinarian.

(c) A licensed veterinarian shall attend a horse in the detention area only in the presence of the Commission veterinarian.

(3) One of the following persons shall be present and witness the taking of the specimen from a horse and so signify in writing:

(a) The owner;

(b) The responsible trainer who, in the case of a claimed horse, shall be the person in whose name the horse raced; or

(c) A stable representative designated by such owner or trainer.

(4) (a) All urine containers shall be supplied by the Commission laboratory and shall be sealed with the laboratory security seal which shall not be broken, except in the presence of the witness as provided by subsection (3) of this section.

(b) Blood vacutainers will also be supplied by the Commission laboratory in sealed packages as received from the manufacturer.

(5) Samples taken from a horse, by the Commission veterinarian or his assistant at the detention barn, shall be collected and in double containers and designated as the "primary" and "secondary" samples.

(a) These samples shall be sealed with tamper-proof tape and bear a portion of the multiple part "identification tag" that has identical printed numbers only. The other portion of the tag bearing the same printed identification number shall be detached in the presence of the witness.

(b) The Commission veterinarian shall:

1. Identify the horse from which the specimen was taken.

2. Document the race and day, verified by the witness; and

3. Place the detached portions of the identification tags in a sealed envelope for delivery only to the stewards.

(c) After both portions of samples have been identified in accordance with this section, the "primary" sample shall be delivered to the official chemist designated by the Commission.

(d) The "secondary" sample shall remain in the

custody of the Commission veterinarian at the detention area and urine samples shall be frozen and blood samples refrigerated in a locked refrigerator/freezer.

(e) The Commission veterinarian shall take every precaution to ensure that neither the Commission chemist nor any member of the laboratory staff shall know the identity of the horse from which a specimen was taken prior to the completion of all testing.

(f) When the Commission chemist has reported that the "primary" sample delivered contains no prohibited drug, the "secondary" sample shall be properly disposed.

(g) If after a horse remains a reasonable time in the detention area and a specimen can not be taken from the horse, the Commission veterinarian may permit the horse to be returned to its barn and usual surroundings for the taking of a specimen under the supervision of the Commission veterinarian.

(h) If one hundred (100) milliliters (ml.) or less of urine is obtained, it will not be split, but will be considered the "primary" sample and will be tested as other "primary" samples.

(i) Two (2) blood samples shall be collected in twenty (20) milliliters vacutainers, one for the "primary" and one for the "secondary" sample.

(j) In the event of an initial finding of a prohibited drug or in violation of these Rules & Regulations, the Commission chemist shall notify the Commission, both orally and in writing, and an oral or written notice shall be issued by the Commission to the owner and trainer or other responsible person no more than twenty-four (24) hours after the receipt of the initial finding, unless extenuating circumstances require a longer period, in which case the Commission shall provide notice as soon as possible in order to allow for testing of the "secondary" sample.

1. If testing of the "secondary" sample is desired, the owner, trainer, or other responsible person shall so notify the Commission in writing within 48 hours after notification of the initial positive test or within a reasonable period of time established by the Commission after consultation with the Commission chemist. The reasonable period is to be calculated to insure the integrity of the sample and the preservation of the alleged illegal substance.

2. Testing of the "secondary" samples shall be performed at a referee laboratory selected by representatives of the owner, trainer, or other responsible person from a list of not less than two (2) laboratories approved by the Commission.

(k) The Commission shall bear the responsibility of preparing and shipping the sample, and the cost of preparation, shipping, and testing at the referee laboratory shall be assumed by the person requesting the testing, whether it be the owner, trainer, or other person charged.

1. A Commission representative and the owner, trainer, or other responsible person or a



representative of the persons notified under these Rules and Regulations may be present at the time of the opening, repackaging, and testing of the "secondary" sample to ensure its identity and that the testing is satisfactorily performed.

2. The referee laboratory shall be informed of the initial findings of the Commission chemist prior to making the test.

3. If the finding of the referee laboratory is proven to be of sufficient reliability and does not confirm the finding of the initial test performed by the Commission chemist and in the absence of other independent proof of the administration of a prohibited drug of the horse in question, it shall be concluded that there is insubstantial evidence upon which to charge anyone with a violation.

(l) The Commission veterinarian shall be responsible for safeguarding all specimens while in his possession and shall cause the specimens to be delivered only to the Commission chemist as soon as possible after sealing, in a manner so as not to reveal the identity of a horse from which the sample was taken.

(m) If an Act of God, power failure, accident, strike or other action beyond the control of the Commission occurs, the results of the primary official test shall be accepted as prima facie evidence.

15. AMEND Chapter X, Rule II-I-2 by deleting the existing section and substituting a new section to provide as follows:

I. Appeals

1. A person aggrieved by a ruling of the State Steward or judges may appeal to the Commission except as provided in subdivision 6 of this subsection. A person who fails to file an appeal by the deadline and in the form required by this section waives the right to appeal.

~~2. An appeal under this section must be filed with the State Steward not later than 48 hours after the ruling. The appeal must be accompanied by a deposit in the amount of \$100, together with a check or money order payable to a court reporter designated by the Commission in the amount charged for the reporter's attendance at and recording of the hearing before the Commission on the appeal. Unless the Commission determines the appeal to be meritorious, either by reversing the decision of the State Steward or judges or by reducing the penalty imposed, the appeal deposit shall not be repaid to the appellant. In no event shall the advance payment of the court reporter's fee be refunded.~~

An appeal under this section must be filed with the State Steward not later than 48 hours after the ruling. The appeal must be accompanied by a deposit in the amount of \$250, together with a check or money order payable to a court reporter designated by the Commission in the amount charged for the reporter's attendance at and recording and transcribing of the hearing before the Commission on the

appeal. Unless the Commission determines the appeal to be meritorious, either by reversing the decision of the State Steward or judges or by reducing the penalty imposed, the appeal deposit shall not be repaid to the appellant. In no event shall the advance payment of the court reporter's fee be refunded.

3. An appeal must be in writing on a form prescribed by the Commission. The appeal must include:

- a) the name, address, telephone number and signature of the person making the appeal; and
- b) a statement of the basis for the appeal.

4. On notification by the Commission that an appeal has been filed, the State Steward or judges shall forward to the Commission the record of the proceeding on which the appeal is based.

5. If a person against whom a fine has been assessed timely files an appeal of the ruling that assesses the fine, the person need not immediately pay the fine in accordance with these rules.

6. A notice of appeal filed with the Commission pursuant to these rules may be accompanied by a request for a stay pending a final decision by the Commission. In his discretion the State Steward may approve such stay requests unless he determines that granting the stay would be adverse to the best interests of racing or inimical to the integrity of the sport. If the State Steward denies a stay request, the appellant may submit a written request to the Commission, in which case the Chairman of the Commission in his discretion may grant or deny the request.

**DELAWARE THOROUGHBRED  
RACING COMMISSION**

Statutory Authority: 3 Delaware Code  
Section 10103, 10128(m)(1)  
(3 Del.C. 10103, 10128(m)(1))

**BEFORE THE DELAWARE THOROUGHBRED  
RACING COMMISSION  
IN RE: PROPOSED RULES AND REGULATIONS  
ORDER**

Pursuant to 29 Del.C. section 10118, the Delaware Thoroughbred Racing Commission ("Commission") hereby issues this Order promulgating the proposed amendment of Rule 15.10 of the Commission's Rules. Following notice and a public hearing held on August 27, 1997, the Commission makes the following findings and conclusions:

**SUMMARY OF EVIDENCE AND INFORMATION  
SUBMITTED**

1. The Commission posted public notice of the proposed revision to Rule 15.10 in the Register of Regulations and in the News-Journal and Delaware State News. The Commission received no written comments from the public concerning the proposed regulation.

2. The Commission conducted a public hearing on the proposed Rule 15.10 on August 27, 1997. The Commission was informed by the Steward Jack Houghton that he was in favor of the proposed split sample rule contained in Rule 15.10. The Horsemen's representative Roger Legg also approved of the split sample rule in Rule 15.10. The Commission notes that the proposed draft of Rule 15.10 was produced with the assistance of the stewards and the horsemen's group.

**FINDINGS OF FACT**

3. The public was given notice and an opportunity to provide the Commission with comments in writing and by oral testimony on the proposed amendment to Rule 15.10. The evidence received by the Commission is summarized in paragraph #2.

4. The Commission has considered the comments elicited from the public in the final draft of the rules. The proposed Rule 15.10 will allow for the taking of secondary or split samples from horses for testing by owners. The rule is consistent with the intent of the

Commission's rules to ensure accuracy in testing of horse. The proposed rule will allow horsemen to verify or challenge the accuracy of a test result from the Commission laboratory. The Commission finds that the proposed rule is necessary to comply with the statutory authority of the Commission under 3 Del.C. section 10103 to regulate the conduct of participants in thoroughbred racing and for the effective enforcement of 3 Del.Code chapter 101.

**CONCLUSIONS**

5. The proposed Rule 15.10 was promulgated by the Commission in accord with its statutory duties and authority as set forth in 3 Del.C. section 10103.

6. The Commission deems this rule amendment necessary for the effective enforcement of 3 Del.C. chapter 101 and for the full and efficient performance of its duties thereunder.

7. The Commission concludes that the adoption of the proposed Rule 15.10 would be in the best interests of the citizens of the State of Delaware and necessary to insure the integrity and security of the conduct of thoroughbred racing in the State of Delaware.

8. The Commission, therefore, adopts these rules as revised and amended pursuant to 3 Del.C. section 10103 and 29 Del.C. section 10113. The Commission has considered the comments and suggestions made by the witnesses at the public hearing.

9. This adopted Rule 15.10 shall replace in entirety the former Rule 15.10 of the Rules of the Delaware Thoroughbred Racing Commission.

10. The effective date of this order shall be ten (10) days from the date of publication of this Order in the Register of Regulations on November 1, 1996.

11. Attached hereto and incorporated herein is the amended Rules and Regulations marked as Exhibit A and executed simultaneously by this Commission this 23rd day of September, 1997.

Duncan, Patterson, Commissioner  
Deborah Killeen, Commissioner

THE RULE AMENDMENT ADOPTED BY THE  
COMMISSION FOLLOW

## 15.10 Procedure for Taking Specimens:

~~Licensee's Veterinarian, with the approval of the Stewards, shall prescribe the procedures for taking specimens:~~

### AMENDMENT OF RULE 15.10 OF RULES AND REGULATIONS FOR DELAWARE STATE THOROUGHBRED RACING COMMISSION

## 15.10 Procedure for Taking Specimens

(1) Horses from which specimens are to be drawn shall be taken to the detention area at the prescribed time and remain there until released by the Commission veterinarian. Only the owner, trainer, groom, or hotwalker of horses to be tested shall be admitted to the detention area without permission of the Commission veterinarian.

(2) Stable equipment other than equipment necessary for washing and cooling out a horse shall be prohibited in the detention area.

(a) Buckets and water shall be furnished by the Commission veterinarian.

(b) If a body brace is to be used, it shall be supplied by the responsible trainer and administered only with the permission and in the presence of the Commission veterinarian.

(c) A licensed veterinarian shall attend a horse in the detention area only in the presence of the Commission veterinarian.

(3) One of the following persons shall be present and witness the taking of the specimen from a horse and so signify in writing:

(a) The owner;

(b) The responsible trainer who, in the case of a claimed horse, shall be the person in whose name the horse raced; or

(c) A stable representative designated by such owner or trainer.

(4) (a) All urine containers shall be supplied by the Commission laboratory and shall be sealed with the laboratory security seal which shall not be broken, except in the presence of the witness as provided by subsection (3) of this section.

(b) Blood vacutainers will also be supplied by the Commission laboratory in sealed packages as received from the manufacturer.

(5) Samples taken from a horse, by the Commission veterinarian or his assistant at the detention barn, shall be

collected and in double containers and designated as the "primary" and "secondary" samples.

(a) These samples shall be sealed with tamper-proof tape and bear a portion of the multiple part "identification tag" that has identical printed numbers only. The other portion of the tag bearing the same printed identification number shall be detached in the presence of the witness.

(b) The Commission veterinarian shall:

1. Identify the horse from which the specimen was taken.

2. Document the race and day, verified by the witness; and

3. Place the detached portions of the identification tags in a sealed envelope for delivery only to the stewards.

(c) After both portions of samples have been identified in accordance with this section, the "primary" sample shall be delivered to the official chemist designated by the Commission.

(d) The "secondary" sample shall remain in the custody of the Commission veterinarian at the detention area and urine samples shall be frozen and blood samples refrigerated in a locked refrigerator/freezer.

(e) The Commission veterinarian shall take every precaution to ensure that neither the Commission chemist nor any member of the laboratory staff shall know the identity of the horse from which a specimen was taken prior to the completion of all testing.

(f) When the Commission chemist has reported that the "primary" sample delivered contains no prohibited drug, the "secondary" sample shall be properly disposed.

(g) If after a horse remains a reasonable time in the detention area and a specimen can not be taken from the horse, the Commission veterinarian may permit the horse to be returned to its barn and usual surroundings for the taking of a specimen under the supervision of the Commission veterinarian.

(h) If one hundred (100) milliliters (ml.) or less of urine is obtained, it will not be split, but will be considered the "primary" sample and will be tested as other "primary" samples.

(i) Two (2) blood samples shall be collected in twenty (20) milliliters vacutainers, one for the "primary" and one for the "secondary" sample.

(j) In the event of an initial finding of a prohibited drug or in violation of these Rules & Regulations, the Commission chemist shall notify the Commission, both orally and in writing, and an oral or written notice shall be issued by the Commission to the owner and trainer or other responsible person no more than twenty-four (24) hours after the receipt of the initial finding, unless extenuating circumstances require a longer period, in which case the Commission shall provide notice as soon as possible in order to allow for testing of the "secondary" sample.

1. If testing of the "secondary" sample is desired, the owner, trainer, or other responsible person shall so notify the Commission in writing within 48 hours after notification of the initial positive test or within a reasonable period of time established by the Commission after consultation with the Commission chemist. The reasonable period is to be calculated to insure the integrity of the sample and the preservation of the alleged illegal substance.

2. Testing of the "secondary" samples shall be performed at a referee laboratory selected by representatives of the owner, trainer, or other responsible person from a list of not less than two (2) laboratories approved by the Commission.

(k) The Commission shall bear the responsibility of preparing and shipping the sample, and the cost of preparation, shipping, and testing at the referee laboratory shall be assumed by the person requesting the testing, whether it be the owner, trainer, or other person charged.

1. A Commission representative and the owner, trainer, or other responsible person or a representative of the persons notified under these Rules and Regulations may be present at the time of the opening, repackaging, and testing of the "secondary" sample to ensure its identity and that the testing is satisfactorily performed.

2. The referee laboratory shall be informed of the initial findings of the Commission chemist prior to making the test.

3. If the finding of the referee laboratory is proven to be of sufficient reliability and does not confirm the finding of the initial test performed by the Commission chemist and in the absence of other independent proof of the administration of a prohibited drug of the horse in question, it shall be concluded that there is insubstantial evidence upon which to charge anyone with a violation.

(l) The Commission veterinarian shall be responsible for safeguarding all specimens while in his possession and shall cause the specimens to be delivered only to the Commission chemist as soon as possible after sealing, in a manner so as not to reveal the identity of a horse from which the sample was taken.

(m) If an Act of God, power failure, accident, strike or other action beyond the control of the Commission occurs, the results of the primary official test shall be accepted as prima facie evidence.

## DEPARTMENT OF EDUCATION

Statutory Authority: 14 Delaware Code  
Section 2901(a) (14 Del.C. 2901(a))

### BEFORE THE STATE BOARD OF EDUCATION OF THE STATE OF DELAWARE REGULATORY IMPLEMENTING ORDER AMENDMENT TO REGULATIONS ON SCHOOL POLICE RELATIONS

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

House Bill 322 was signed into law in July 1997, replacing 14 Del. C., Section 4112, (also known as House Bill 85) with a new Section 4112 entitled, "Reporting School Crimes" and also adding another Section 4122 entitled, "Parents Failure to Attend School Conference with Superintendent; Subpoena to Compel Attendance". The new law made it necessary to amend the regulations in the *Handbook for K-12 Education* that addressed School Police Relations and related discipline issues.

The new language in the Code provides authority to local school superintendents to issue subpoenas to compel the attendance of parents, custodians, or guardians of students at school parent conferences and restructures the present school crime reporting statute. Violent felonies are included, and some sex crimes have been added to the list of crimes which must be reported. Time limits for reporting are specified. The bill clarifies that the superintendent or a designee is the person responsible for filing criminal charges when a school employee is the victim, unless the police agree to file the charges. Principals are required to report to the police crimes committed by children under the age of 9 only if they are violent felonies or weapon or drug offenses. The types of alternative services and suspension required are also clarified. This law places emphasis on the rights of a victim, including a juvenile victim's parents' right to be notified when their child is a victim and when an offender returns to school. Notice of the proposed amendment was published in the News Journal and Delaware State News on August 28, 1997 in the form attached hereto as Exhibit A. The notice invited written comments and none were received.

#### II. FINDINGS OF FACT

The Secretary finds that in order to meet the requirements of the new law and to bring clear focus to the intent of House Bill 322 the amendments to the

existing regulations are required. The amended regulation mandates the development of a local district Memorandum of Agreement between the district and the police department which serves the district, training for all administrators involved in the disciplinary process, notification to all school employees as to their duties in reporting school crime, and how and what crimes the district superintendent must report.

III. DECISION TO AMEND THE REGULATIONS

For the foregoing reasons, the Secretary concludes that the proposed amendment is necessary to bring the regulation into compliance with the changes in the Delaware Code. Therefore, pursuant to 14 Del. C., Section 121, the attached amendment hereto referred to as Exhibit B is hereby adopted. Pursuant to the provisions of 14 Delaware Code, Section 121(e), the amendment hereby adopted shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. TEXT AND CITATION

The text of the amendment hereby shall be in the form attached hereto as Exhibit B” and said regulations shall be cited in the *Handbook for K-12 Education*, Section I.B.2.a,b,c,d and e.

V. EFFECTIVE DATE OF ORDER

The actions herein above referred to were taken by the Secretary pursuant to 14 Del. C., Section 121, in open session at the State Board’s regularly scheduled meeting on October 16, 1997. 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 this 16<sup>th</sup> day of October, 1997.

DEPARTMENT OF EDUCATION

Dr. Iris T. Metts, Secretary of Education

Consented to this 16<sup>th</sup> day of October, 1997.

STATE BOARD OF EDUCATION

Dr. James L. Spartz, President  
 Jean W. Allen, Vice President  
 Nancy A. Doorey  
 John W. Jardine, Jr.  
 Dr. Joseph A. Pika  
 Dennis J. Savage  
 Dr. Claibourne D. Smith

“EXHIBIT B”

Handbook for K-12 Education

B. DISCIPLINE

1. DISCIPLINE POWERS AND RESPONSIBILITIES OF SUPERINTENDENTS

b. Student violence; mandatory complaints. In any instance where a school employee reports to the superintendent any assault or offensive touching (as prohibited in ~~§601, §611-613~~ of Title 11) against such employee by a pupil, the superintendent or his designee, after verifying the identity of the pupil involved and the probable cause to believe that a criminal charge is appropriate, without unreasonable delay after the incident being reported, shall file such appropriate charge against such pupil. The superintendent or his designee shall also file a report of such incident with the State Department of Public Instruction. The obligations of the superintendent as set forth in this subsection are mandatory, and are not discretionary.

e. Student possession of weapons and unlawful drugs; mandatory complaints. In any instance where a school employee reports to the superintendent any incident where a pupil has on his person, or concealed among his possessions, or placed elsewhere on the school premises any controlled drug (as prohibited by Title 16), dangerous instrument or deadly weapon (as prohibited by Title 11), the superintendent or his designee, after verifying the identity of the pupil involved and the probable cause to believe that a criminal charge is appropriate, without unreasonable delay after the incident being reported, shall report such incident to the police department having jurisdiction over the offense. The superintendent or his designee shall also file a report of such incident with the State Department of Public Instruction. The obligations of the superintendent as set forth in this subsection are mandatory, and are not discretionary.

d. Immunity from civil liability: Review of criminal complaint. A school employee, superintendent, or his designee who in good faith provides information to police and/or the State Department of Public Instruction under subsection (b) or (c) of this section shall not be held civilly liable for providing such information. Prior to lodging any criminal charges against a school employee, superintendent or his designee who provides information to police and/or the State Department of Public Instruction under subsection (b) or (c) of this section, the Attorney General’s Office shall be consulted to determine the appropriateness of the charges. 14 Del. C. 4114.

~~3. SCHOOL/POLICE RELATIONS POLICY AND GUIDELINES~~

~~All local school districts must establish their own policies on school/police relations. The local district policy must be based on the policies and guidelines included in the State Board of Education document, School/Police Relations Policy and Guidelines for School Administrators, Appendix D. (State Board Approved October 1988, Revised June, 1993)~~

2. School/Police Relations

a. All local school districts must establish a policy on school/police relations. Each school district shall develop a Memorandum of Agreement (MOA) between the district board of education and each police department which provides police coverage to the district. Each district's MOA shall be in a form substantially similar to the Model Memorandum of Agreement Between Board(s) of Education and Law Enforcement Agencies in the State of Delaware (MMA) as approved by the Secretary of the Department of Education (Secretary). Section 6 of the MMA must be included in each district's MOA verbatim. Districts shall submit a signed copy of its current MOA to the Department of Education (DOE).

b. Each school administrator involved in the student disciplinary process shall complete DOE approved training in school/police relations and in student disciplinary matters in general and, thereafter, such additional training in those areas as the DOE may from time to time prescribe.

c. Each school district shall, at the time of hiring and at the beginning of each school year thereafter, advise each school employee (as that term is defined in 14 Del. C. Section 4112) of his/her duty to report school crimes and the penalty for failure to so report.

d. The Superintendent of each school district, or his/her designee, shall report to the DOE all school crimes required to be reported pursuant to 14 Del. C. Section 4112 and any subsequent amendment thereto. Such reports shall be made on the Student Conduct Report (SCR) form to be provided by the DOE and filed with the DOE within the time prescribed by statute.

e. In addition to those school crimes required to be reported pursuant to statute, the Superintendent of each school district shall report to the DOE the following incidents of student misconduct:

- |  |                       |
|--|-----------------------|
| Pornography, exhibitionism,<br>peeping | Fraud offenses        |
| Criminal mischief                      | Tampering with public |

- |                                    |  |
|------------------------------------|--|
| Evidence of organized gambling     | records                                |
| Offenses involving school property | Computer/recorded sounds offenses      |
| Felony theft offenses              | Disorderly conduct/ fighting           |
| Forgery offenses                   | Offensive touching (non-employee)      |
|                                    | Terroristic threatening (non-employee) |

Such reports shall be made on the SCR form to be provided by the DOE and filed with the DOE not later than five working days following the incident of student misconduct.

APPENDIX D

SCHOOL/POLICE RELATIONS POLICY AND GUIDELINES FOR SCHOOL ADMINISTRATORS

Delaware State Board of Education  
Approved: June 23, 1993

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RELATIONSHIPS BETWEEN LOCAL SCHOOL DISTRICTS AND LAW ENFORCEMENT AGENCIES

Introduction

The school/police function is only as effective as the communication and cooperation of the respective agencies and all the various other agencies involved with the education, safety and welfare of Delaware's youth. This belief has

evolved into a well structured and cooperative set of policies and practices between and among the school/police agencies in Delaware which have been compiled into this document containing policy and guidelines for school/police relations. The *Model Memorandum of Agreement Between Board(s) of Education and Law Enforcement Agencies in the State of Delaware*, included in the document, was developed through the input of many highly experienced persons serving on the Task Force for School/Police Relations, all of whom are involved in the school/police function and represent many years of experience. It was first developed in 1968 and was revised in 1972 and 1988. In 1993, the policy elements of the document were added. This format, a memorandum of agreement, has been identified by the Task Force as the single most effective means of prescribing a guide for statewide use on the subject.

For law enforcement agencies to effectively serve the school community, there must be some flexibility in the documents which provide a basis for the procedures in use in the local school district. However, in some areas it is felt that the uniform establishment of statewide procedures are beneficial to the child, the police authorities and school administration.

State Board Regulations

In order to ensure such uniformity, the State Board of Education at its June 17, 1993 meeting established the following as statewide regulations:

a. Section 6 of the *Model Memorandum* in this document, in regard to Reporting Crimes, is enacted as policy, and is mandated to be included, word for word, in each district's MOA(s) on school/police relations.

b. Each school district shall develop a memorandum of agreement between the district board of education and each department providing police coverage to the district. The MOA shall be established or reviewed, to incorporate State Board policy and current local procedures for school/police relations, by September 30, 1993. A copy of each district's executed memoranda shall be submitted to the State Board of Education by October 15, 1993. Thereafter, such memoranda shall be reviewed on a regularly established schedule enacted by the district board of education, and be reviewed subsequent to any changes made to the *Model Memorandum* at the State level.

c. A Special Task Force for School/Police Relations, composed of representatives of the school districts, of the law enforcement agencies which have responsibility for crimes in the school environment, and of the Fire Marshal's Office, shall meet to review the contents of the *Model Memorandum* at least every five years. The Special Task Force shall make recommendations for inservice training of school

administrators involved in the student disciplinary process, as a result of these changes to the *Model Memorandum*, and as a result of all subsequent changes, if such training is deemed necessary.

d. Each school administrator involved in the student disciplinary process shall complete six hours of training in school/police relations, including the training of administrators as trainers of teachers in the above changes to the MOA and in student disciplinary matters in general, by September 30, 1993. The sessions shall be provided by the Department of Public Instruction, in consultation with a committee of members of the Special Task Force for School/Police Relations. Sessions on school/police relations shall be made available on an annual basis thereafter, and school administrators new to the student disciplinary process shall be required to attend such training.

e. The Department of Public Instruction shall develop the forms required by Section 6 of the *Model Memorandum*. Those forms shall be used by the districts to report crimes committed by students in the school environment in a timely fashion.

f. Each district shall ensure that teachers are informed at the time of hire and at the beginning of each school year thereafter of their duty to report immediately to the principal an act of violence as set out in 14 Del. C. 4112, i.e., assault and extortion against a pupil, or an assault, offensive touching, terroristic threatening or extortion against a school employee, or weapons or unlawful drug offenses (see 14 Del. C. 4112(d) and (f), and of the penalties established in 4112(f).

MODEL MEMORANDUM OF AGREEMENT BETWEEN THE BOARD(S) OF EDUCATION AND LAW ENFORCEMENT AGENCIES IN THE STATE OF DELAWARE

1. The Board of Education of and the following Law Enforcement Agency(ies): hereby agree that the following practices and procedures shall govern their relations:

2. All law enforcement agency officers performing law enforcement functions under this Agreement will be governed by the provisions contained herein:

3. ARRESTS

a. When possible and appropriate, arrest by police should be made during non-school hours and away from school premises:

b. Arrest on school premises during school hours should be undertaken in such a manner as to avoid embarrassment to the pupil being arrested or to jeopardize the safety

and welfare of other pupils:

c. In the event of an apprehension during school hours, the principal or designee should summon the student to his/her office before surrendering the student. Unless absolutely essential, the officer should not appear in the classroom to apprehend the student.

d. If the student is to be surrendered to the custody of the police officer, the principal or designee should record the name and organization of the officer, the time the officer leaves the school, the destination (police station, detention facility, or Family Court), and the offense for which the arrest was made. A substantial effort should be made by the principal or designee to immediately inform the parent(s) or guardian(s) of the student upon any contact by the police. If the student is arrested and removed from the premises before such contact is made, the police and the principal or designee share a joint responsibility for that contact.

#### 4. QUESTIONING OR INTERROGATION BY POLICE ON SCHOOL PREMISES

a. Police investigations involving the questioning or interrogation of pupils should not be permitted on school premises unless in connection with a crime committed on school premises or in connection with an investigation which, if not immediately permitted, would compromise the success of that investigation or endanger the lives or safety of the student or other persons. Questioning becomes interrogation when it becomes accusatory in nature and is designed to elicit an admission of guilt from the suspected offender. Law enforcement officers must provide Miranda warnings, if the suspect is being interrogated and is not free to leave.

b. The principal or designee should be present throughout the questioning or interrogation, except in cases where the investigation concerns a student who is the victim of physical or sexual abuse where a member of the student's immediate family or household is suspected of being the perpetrator or a conspirator in such abuse and where the police investigator is a representative of a special unit trained to do such interviews.

c. In any case, where a student is in custody and being questioned regarding involvement in a criminal matter and where the student's Fifth Amendment protection against self-incrimination may apply, the law enforcement officer should consider the environment in which questioning takes place and the ability of the student to discontinue the questioning. Unless unreasonable to do so, the law enforcement officer should notify the principal or his designee when such questioning becomes custodial in nature. Questioning becomes "custodial in nature" when a law enforcement officer is conducting an interview and the party being interviewed is not free to leave the presence of the officer.

d. Before the police commence the questioning or interrogation of a minor on school premises, the principal should contact the student's parent(s) or guardian(s) to pro-

vide them an opportunity to be present or consult an attorney. Such contact is particularly important in the case of students below the high school level. Questioning or interrogation without such parental contact should only proceed where:

(1) The contact may endanger the safety of the student or other persons:

(2) The contact would compromise the success of the investigation because a member of the student's immediate family or household is suspected of being a perpetrator or conspirator or potential conspirator to a crime, or the delay caused by lack of contact would compromise the success of the investigation and a substantial effort has been made to contact the student's parent(s) or guardian(s) without success.

The police should ensure that the student is afforded all constitutional rights due in such a situation:

e. School officials should request the arresting officer to remove the student from the premises as soon as possible, after the arrest is made. In the absence of an arrest, school officials should not authorize the removal of a student from the school without the consent of the parent or guardian unless such contact would endanger the student or unreasonably compromise an investigation, or every reasonable effort to notify the parent or guardian has failed, in which case, if appropriate, the Division of Child Protective Services should be notified.

#### 5. SEARCHES AND SEIZURES

a. Law enforcement officers in reliance upon probable cause that a crime is, has, or is about to be committed, may search for evidence of that crime. Whenever reasonable, a search warrant, issued by a court of competent jurisdiction, will be sought before a search is conducted. As a general policy, a school official will accompany the law enforcement officer. However, they will not participate in the actual search unless specifically requested to do so by the police.

b. Efforts should be made by police and school administrators to conduct searches in a manner which will minimize disruption of the normal school routine and will minimize embarrassment to pupils affected.

c. A frisk (pat-down) may be conducted by the police where the officer has reason to believe that the person being encountered is armed and presents a risk of injury to the officer or an innocent third party.

d. The principal or designee may, at any time, conduct such searches as are essential to the security, discipline, and sound administration of the particular school but are limited as stated above whenever the search is in connection with a police investigation. The appropriate police agency will respond to a request from a school official conducting an administrative search when the official feels that the search might reveal a violation of the law.



6. REPORTING CRIMES

a. School officials are charged with the responsibility to provide for the safety of students and for the security of school property. School officials shall report promptly evidence of criminal offenses which occur in the school environment, including incidents which occur on or in connection with school buses. Additionally, evidence of those crimes which has occurred off school property but which come to the attention of school authorities should be reported. The Delaware Code requires mandatory reporting of the offenses listed in 14 Del. C., §4112; a substantial fine can be assessed against any superintendent, principal or teacher who fails to make such a mandatory report (§4112(f)). The following list is not all inclusive but, at a minimum, the following shall be reported to the appropriate law enforcement agency:

(1) Evidence that suggests the commission of the crimes of assault and extortion against pupil, or an assault, offensive touching, terroristic threatening or extortion against a school employee as defined in 11 Del. C., Ch. 5 (See 11 Del. C., 601, 611, 612, 613, 614, 621, and 846 (referring to 841); see also 14 Del. C., 4112(b) and (f)).

(2) Evidence that suggests the commission of a felony (See 11 Del. C., Ch. 5), for example:

Reckless Endangering	Arson
Assault Offenses	Criminal Mischief
Homicide	Bombs, etc.
Unlawful sexual contact, penetration or intercourse	Unlawful Imprisonment,
	Kidnapping
Sexual exploitation of Children, Pornography	Offenses Involving Concealed Deadly or Destructive Weapons
Promoting Prostitution	Computer/Recorded
Burglary	Sounds Offenses
Robbery	Fraud Offenses
Felony Theft Offenses	Forgery Offenses
Extortion	Riot

(3) Evidence that suggests violations of the laws concerning controlled substances and alcohol (See 16 Del. C., Ch. 47 and 14 Del. C., 4112(e)), for example:

Manufacture, delivery or possession with intent to manufacture or deliver a controlled substance or a counterfeit controlled substance	Possession, use or consumption of a controlled or counterfeit substance or of alcohol
Possession, delivery, possession with intent to deliver non-controlled prescription drugs (not obtained with valid	Trafficking in marijuana, cocaine, illegal drugs, methamphetamines, L.S.D., designer or other drugs

prescription), including steroids, etc.

Unauthorized possession or delivery of hypodermic syringe or drug paraphernalia

(4) Evidence that suggests incest, sexual abuse or the neglect or other abuse of children. See 11 Del. C., Ch. 5, Subchapter II, Subpart D and Subchapter V; see also 16 Del. C., Ch. 9 for required reporting by any "person who knows or reasonably suspects child abuse or neglect" to the Division of Child Protective Services.

(5) Evidence that suggests the use, possession or sale of dangerous instruments or deadly weapons, e.g., knives, firearms, ammunition, explosives or blasting caps. (See 14 Del. C. 4112(e) and 11 Del. C., Ch. 5, Subchapter VII, Subpart E, and 1338.)

(6) Evidence that suggests morals offenses, e.g., pornography, exhibitionism, peeping, etc. (See 11 Del. C., Ch. 5, Subchapter VII, Subparts B and C, and 820.)

(7) Evidence that suggests organized gambling. (See 11 Del. C., Ch. 5, Subchapter VII, Subpart D.)

(8) Evidence that suggests an assault, offensive touching, terroristic threatening or menacing of a school employee. (See 14 Del. C. 4112(b) and 11 Del. C., Ch. 5, Subchapter II, Subpart A.)

(9) Evidence of offenses involving school property, e.g., false fire alarms, telephone threats, computer crimes, vandalism and criminal mischief, trespass, burglary and theft, reckless driving and safety hazards. (11 Del. C., Ch. 5)

(10) Reports of suspicious persons or unauthorized persons on or near school grounds or property, or rumors, information or observations of gang rivalries or activities. These activities need not be reported to the State Board of Education.

b. Reportable offenses should not include conduct which has been traditionally treated as a matter of discipline to be handled at the discretion of school administrators. Whenever an administrator is unsure about whether a charge is appropriate, the applicable police authorities should be consulted. These reporting requirements shall not apply to offenses committed between students enrolled in grades kindergarten through third grade.

c. All conduct of a serious nature should be promptly reported to the parent or guardian concerned. Such persons should not be contacted where the student is the victim and the parent/guardian is a perpetrator of or conspirator in the reportable incident; see section 4.d of this Memorandum.

d. The school district superintendent or designee is required to report to the State Department of Public Instruction those incidents involving possession of weapons and unlawful drugs, (14 Del. C. 4112(e)), and incidents of violence against pupils or school employees, (14 Del. C. 4112(b)). In addition, the superintendent, or designee shall report to the State Department of Public Instruction all inci-

dents of student behavior as described in Section 6.a. of this document. The procedures for filing these reports shall be as follows:

(1) When the building administrator has determined that there is probable cause to believe that a criminal charge is appropriate, the administrator shall immediately report their incident to the appropriate local police agency and to the district superintendent or designee.

(2) The parent or guardian will be notified of the action in accordance with Section 6.e. of this document, as soon as is reasonably possible.

(3) Within 5 days after the original report to the police, the superintendent or designee shall be in contact with the police to determine whether and/or how charges will be filed.

(4) The superintendent or designee shall complete the "District Superintendent's Student Conduct Report" and submit it to the State Department of Public Instruction within 5 days of the event precipitating the report. If the offense committed is one of assault and extortion against pupil, or an assault, offensive touching, terroristic threatening or extortion against a school employee as defined in 11 Del. C. Ch. 5 {See 11 Del. C., 601, 611, 612, 613, 614, 621 and 846 (referring to 841); see also 14 Del. C. 4112(b) and (f)}, or involving weapons or drug offenses as set out in 14 Del. C. 4112(e), a copy of the Report also shall be submitted to the Youth Division of the Delaware State Police.

(5) A short "Disposition Report" shall be sent to the appropriate agencies to follow up on the Report listed in (4) immediately above, if final disposition of the case takes place after the "District Superintendent's Student Conduct Report" form is submitted.

All of Paragraph 6 in bold above is State Board regulation and shall be included in all Memoranda of Agreement.

#### 7. FILING OF CHARGES:

a. In any instance where a pupil, parent or guardian is found to have committed an assault, offensive touching, terroristic threatening or an extortion under 14 Del. C. 4112(b) against a school employee, the superintendent or his designee shall, without unreasonable delay, file the appropriate charge against the pupil, parent or guardian.

b. In all cases where a reportable offense has occurred, other than those listed in subparagraph a., immediately above, school officials should consult with police authorities to determine who will file the appropriate charges.

#### 8. SCHOOL DISTURBANCES

a. The request for police assistance in a crisis situation requires special care because of the possibility of aggravating a situation.

(1) It is preferable that the principal or designee call the police. If a law enforcement officer is on the scene, it is desirable that the decision to call for additional police support be reached in collaboration with that officer.

(2) No person other than the principal or designee, the superintendent of the district or his designee, or the highest ranking police officer present and qualified, may request the tactical deployment of police to a school.

(3) Police manpower called to a school should be limited to that number which may reasonably be expected to be required to deal with the situation. This determination as to the level of force required can best be made by the ranking police officer on the scene, working jointly with the principal or designee.

b. In general, plain clothes officers are preferable to uniformed personnel in situations where student or faculty sensitivity may crucially influence the success of the short-term investigation required by the law enforcement agency. These sensitive situations will include most investigations where student informant must come forward, and most situations where inter-group tension may be intensified by the presence of uniformed officers. It is recognized that in many situations it may be possible to specify whether uniformed or plain clothes officers will or shall make the initial response to a routine school request, and for that reason, the Board of Education must recognize that any policy governing the use of these different categories of police officers must be flexible and that final authority rests with the police.

c. Tactical coordination between the principal or designee and police officers on the scene is a necessity. During any crisis situation, it will be the responsibility of the ranking police officer on the scene to ensure that direct, secure, continuing communication with the principal or designee is maintained.

#### 9. SCHOOL ATTENDANCE

a. The code of the State of Delaware requires mandatory school attendance between the ages of five and sixteen, Del. C. 2701.

b. School/Police Procedures in Attendance Cases:

(1) Normally, the school principal will refer attendance cases to the visiting teacher. Any court action against the parents for violation of the compulsory attendance statutes should be initiated by the school superintendent or his/her designee in the Magistrate Court.

(2) Police should not be requested to apprehend a student solely because the student is absent from school.

(3) A school-age student identified by a police officer as being off school property without official authorization may be returned to his or her home school or may be detained in accordance with 14 Del. C. 2713.

#### 10. SIGNATURES

School District

Law Enforcement Agency

Date

*All appropriate agencies involved should be provided space for signature and date.*

**DEPARTMENT OF EDUCATION**

Statutory Authority: 14 Delaware Code  
Section 2901(a) (14 Del.C. 2901(a))

**BEFORE THE STATE BOARD OF EDUCATION  
OF THE STATE OF DELAWARE  
REGULATORY IMPLEMENTING ORDER  
REPEAL OF DISCIPLINE POWERS AND  
RESPONSIBILITIES OF  
SUPERINTENDENTS, PARENT CONFERENCES**

**I. SUMMARY OF THE EVIDENCE AND INFORMATION  
SUBMITTED**

House Bill 322 was signed into law in July 1997, replacing 14 Del. C., Section 4112, (also known as House Bill 85) with a new Section 4112 entitled, "Reporting School Crimes" and also adding another Section 4122 entitled, "Parents Failure to Attend School Conference with Superintendent; Subpoena to Compel Attendance". The new law makes it necessary to repeal the regulation I.B.1.a. in the *Handbook for K-12 Education*, because that section repeated the content of 14 Delaware Code, Section 4112. Repeal of the regulation is recommended because the law has changed and also there is no need in the future to repeat the content of the law in the form of a State Board regulation. Notice of the proposed repeal was published in the News Journal and Delaware State News on August 28, 1997 in the form attached hereto as Exhibit A. The notice invited written comments and none were received.

**II. FINDINGS OF FACT**

The Secretary finds that because of the new law and the lack of any need to restate the Code in the form of a regulation that section I.B.1.a. of the *Handbook for K-12 Education* should be repealed.

**III. DECISION TO REPEAL REGULATION**

For the foregoing reasons, the Secretary concludes that repealing the section of the *Handbook for K-12*

*Education* is necessary due to the changes in the Delaware Code. Therefore, pursuant to 14 Del. C., Section 121, the attached section hereto referred to as Exhibit B is hereby repealed.

**IV. TEXT AND CITATION**

The text of the amendment hereby shall be in the form attached hereto as Exhibit B and said regulation shall be eliminated from the *Handbook for K-12 Education*.

**V. EFFECTIVE DATE OF ORDER**

The action herein above referred to was taken by the Secretary pursuant to 14 Del. C., Section 121, in open session at the State Board's regularly scheduled meeting on October 16, 1997. 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 this 16<sup>th</sup> day of October, 1997.

DEPARTMENT OF EDUCATION

Dr. Iris T. Metts, Secretary of Education

Consented to this 16<sup>th</sup> day of October, 1997.

STATE BOARD OF EDUCATION

Dr. James L. Spartz, President  
Jean W. Allen, Vice President  
Nancy A. Doorey  
John W. Jardine, Jr.  
Dr. Joseph A. Pika  
Dennis J. Savage  
Dr. Claibourne D. Smith

"EXHIBIT B"

The Department of Education recommends that Section B.1.a. Discipline Powers and Responsibilities of Superintendents, Parent Conferences, in the *Handbook for K-12 Education* be repealed due to the enactment of a change in 14 Del. C., Section 4112a. Parent Conferences (Subpoena Powers) found in 14 Del. C., Section 4112, Discipline Powers, Reporting Requirements of Superintendents, Principals and Teachers. This section has been amended by striking the section in its entirety and adding a new Section 4122 entitled Parent's Failure to Attend School Conference with Superintendent; Subpoena to Compel Attendance.

Since the regulation in Section B.1.a. of the *Handbook for K-12 Education* was a restatement of the old 14 Del. C., Sec-

tion 4112, it must be repealed and it is not necessary to create a new regulation to restate the requirements already delineated in the new 14 Del. C., Section 4122.

Handbook for K-12 Education

**B. DISCIPLINE**

**1. DISCIPLINE POWERS AND RESPONSIBILITIES OF SUPERINTENDENTS**

a. ~~Parent Conferences.--The authority of the superintendent of schools in each district shall include that of issuing subpoenas as such may be required, in his opinion, to compel the presence of a parent, parents or person having custody of a child going to school in such school district or attendance zone to discuss matters involving violations of school rules and regulations by such child; provided, however, before the issuance of such subpoena, the superintendent shall first schedule a conference with such parent, parents or custodian of such child at a time that does not conflict with the employment hours of such parent, parents or custodian of such child.~~

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**Symbol Key**

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

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**Proposed Regulations**

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation; The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

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**DEPARTMENT OF LABOR****DIVISION OF INDUSTRIAL AFFAIRS**

Statutory Authority: 29 Delaware Code,  
Section 8503(7) (29 **Del.C.** §8503(7))

Pursuant to the authority granted to the Department of Labor under 29 **Del.C.** §8503(7), the Department is proposing amendments to regulations under 29 **Del.C.** §6960, "Prevailing Wage Requirements".

Interested parties are invited to present their views at the public hearing which is scheduled as follows:

9:00 a.m., Tuesday, November 25, 1997  
Department of Labor  
4425 North Market Street  
Wilmington, Delaware 19802

First Floor, Conference Room 049

Interested parties can obtain copies of the proposed amendments at no charge by contacting the Office of Labor Law Enforcement at the above address, or by telephone at (302) 761-8208.

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**PROPOSED AMENDMENTS TO  
DELAWARE PREVAILING WAGE REGULATIONS**

## Amendment # 1

Amend the Delaware Prevailing wage Regulations by deleting the citation "29 Del. C. §6912", wherever it appears in the Regulations and substituting in lieu thereof the citation "29 Del.C. §6960".

## Amendment # 2

**IV. DETERMINING PREVAILING WAGES.****B. Data to be collected.****1. What Information. (Page 11.)**

Delete the words, "survey period" in line 7 of the second paragraph and substitute "period being surveyed". The new second paragraph of Regulation IV. B. 1. will read:

"The survey reporting form used by the Department to collect wage and fringe information, "Report of Construction Wage Rates", provides for reporting data which includes the contractor's name and address,

telephone number, project description and location, the highest number of workers employed in each classification, during the peak week of the period being surveyed (which shall be within the period July 1 to December 31 of the year preceding the request for data) and the wage rate, including bona fide fringe benefits, paid to each worker.”

Amendment # 3

## V. THE SURVEY.

### E. Code and Record Data. (Page 14.)

Delete the words, “by the close of the survey period” in line 5 of the third paragraph and substitute “prior to the publication of the Prevailing Wage Determination (see Regulation VI. C.)” The new third paragraph of Regulation V. E. will read:

“Respondents who submit code “C” survey responses (incomplete) shall be contacted by telephone by the Department. The Department will give the respondent an opportunity to supply the missing information. Failure to submit the missing information prior to the publication of the Prevailing Wage Determination (see Regulation VI. C.) will result in a disqualification of the survey response (to the extent that it is not usable).”

Amendment # 4

## VI. ISSUING WAGE DETERMINATIONS.

### B. Post Determination Actions. (Pages 17-18.)

Amend Regulation VI. D. by adding a new section 6. The section will read:

“6. Determination of Wages for Classifications for Which No Rates Are Published. Whenever a public project requires the services of a laborer or mechanic for which no rate has been published, the Department shall be notified in writing and shall determine the worker classification (from among the 21 classifications recognized by the Department of Labor) and the rate to be paid. The rate shall be determined as follows:

a. Using “Building Construction” rates as the baseline rate in each county, the Department of Labor will determine the relationship between the “Building Construction” rates and the rates of the type of construction for which the rate is sought. To determine the relationship, (which is to be expressed as a percentage), the Department will use only those rates which were determined by data received in the relevant survey.

b. The Department will compare only those

classifications for which corresponding rates were determined.

c. The total of the corresponding rates will be determined for each type of construction. The Heavy or Highway total will be divided into the Building rate to find the percentage of the Heavy or Highway rate to the Building rate.

d. The Department of Labor will multiply the Building rate for the requested classification of worker by the percentage determined in “c” to establish the applicable prevailing wage rate.

Hypothetical example:

A plumber’s rate is needed for a New Castle County project. The Department of Labor has not published a rate for this classification.

The Department of Labor will determine the relationship between New Castle County Highway rates and Building rates, comparing only corresponding rates which were actually determined by the relevant survey (rates carried forward from previous years due to lack of sufficient data are not to be used).

	N.C.C. Building	N.C.C. Highway
Bricklayers	\$19.65	\$12.29
Carpenters	23.37	21.69
Cement Finishers	23.55	15.52
Laborers	13.62	10.60
Power Equipment		
Operator	22.94	15.77
Truck Drivers	15.15	13.75
	\$118.28	\$89.62

$$\$89.62 \text{ divided by } 118.28 = 75.77\%$$

The plumber’s rate for New Castle County Building is \$26.54.  $\$26.54 \times 75.77\% = \$20.11$

The plumber’s rate for New Castle County Highway = \$20.11

The same method can be used between corresponding types of construction when the Building construction rates do not contain a rate for the requested classification of worker; i.e., Heavy construction rates in Sussex County can be compared with Heavy construction rates in New Castle.”

Amendment # 5

## VII. ENFORCEMENT.

**A. DUTIES OF CONTRACTORS.**

3. Keep the following records for a period of three years: (Page 20.)

Delete Regulation VII. A. 3. c. in its entirety and substitute in lieu thereof the following:

“c. For employees who perform work in more than one trade, a daily log for each individual employed upon the site of construction. The log must describe the tasks performed by each employee, the tools used to perform each task and the amount of time spent performing each task;”

**THE DELAWARE PREVAILING WAGE REGULATIONS WITH THE PROPOSED AMENDMENTS FOLLOW**

**DELAWARE PREVAILING WAGE REGULATIONS**

STATE OF DELAWARE  
DEPARTMENT OF LABOR  
4425 NORTH MARKET STREET  
WILMINGTON, DELAWARE 19802  
(302) 761-8200

Adopted: April 3, 1992  
Amended: July 1, 1993  
Amended: September 15, 1993  
Amended: December 28, 1994  
Amended: October 15, 1995

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\* PLEASE NOTE THAT THE ABOVE PAGE NUMBERS REFER TO THE ORIGINAL DOCUMENT, NOT THE REGISTER.

## REGULATIONS PREVAILING WAGES

Pursuant to 29 Del.C. §8503(7), the Department of Labor, State of Delaware, hereby promulgates the following rules and regulations to implement the provisions of 29 Del.C. §~~6912~~ 6960, "Wage provisions in public construction contracts." These regulations supersede Regulations PW101, entitled "Regulations Concerning Apprentices and Supportive Service Program Trainees Employed on State Projects" (adopted April 11, 1978 and repealed April 5, 1992) and "Delaware Prevailing Wage Regulations" (adopted April 5, 1992 as amended September 15, 1993).

### I. INTRODUCTION.

The prevailing wage law states that the specifications for every contract or aggregate of contracts relating to a public works project in excess of \$100,000 for new construction (including painting and decorating) or \$15,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction (including painting and decorating of building or works) to which this State or any subdivision thereof is a party and for which the State appropriated any part of the funds and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Delaware Department of Labor, Division of Industrial Affairs, to be prevailing in the county in which the work is to be performed.

### II. ADMINISTRATION.

The prevailing wage law assigns to the Department of Labor the responsibility for predetermining wage rates prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the counties where the work is to be performed. The Secretary of Labor has delegated the prescribed functions of the Department to the Administrator of the Office of Labor Law Enforcement of the Division of Industrial Affairs. The Office of Labor Law Enforcement has responsibility for enforcing and determining the

prevailing rates, and ensuring that prevailing wages are paid in accordance with the provisions of the law.

Enforcement responsibility includes the conducting of investigations regarding compliance with the law; settling, adjusting and adjudicating, by informal means, cases involving the payment of prevailing wages; coordinating the enforcement activities of the various State agencies having contract compliance and enforcement responsibilities; requiring the withholding of payments to employers who have failed to pay prevailing wages; and recommending the commencement of legal proceedings against those failing to comply with the law.

### III. CONCEPTS AND DEFINITIONS

This section presents definitions and explanations to provide a basic understanding of elements inherent in collecting wage data and issuing wage determinations, and enforcing prevailing rates.

- A. Activity Covered. 29 Del.C. §~~6912~~ 6960 applies to every contract or aggregate of contracts relating to a public works project in excess of \$100,000 for new construction (including painting or decorating) or \$15,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction (including painting and decorating of building or works) to which this State or any subdivision thereof is a party and for which the State appropriated any part of the funds and which requires or involves the employment of mechanics and/or laborers.
- B. "Building" or "Work". The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment is not a "building" or "work" within the meaning of the regulations unless conducted at the site of such a building or work.
- C. Laborers and Mechanics. The terms "laborer" and "mechanic" includes at least those workers whose duties are manual or physical in nature (including



those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term “laborer” or “mechanic” includes apprentices and Supportive Service Program (SSP) trainees. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity are not deemed to be laborers or mechanics. Working foremen who devote more than twenty (20) percent of their time during a workweek to mechanic or laborer duties are deemed to be laborers and mechanics for the time so spent.

The terms “laborers” and “mechanics” do not apply to watchmen, guards, dispatchers, or weighmasters. The following classifications of workers are recognized by the Department:

Asbestos Workers  
Boilermakers  
Bricklayers  
Carpenters  
Cement Finishers  
Electricians  
Elevator Constructors  
Glaziers  
Iron Workers  
Laborers  
Millwrights  
Painters  
Plasterers  
Plumbers/Pipefitters/Steamfitters  
Power Equipment Operators  
Roofers  
Sheet Metal Workers  
Soft Floor Layers  
Sprinkler Fitters  
Terrazzo/Marble/Tile Setters  
Terrazzo/Marble/Tile Finishers  
Truck Drivers

Definitions for each classification are contained in a separate document entitled “Classifications of Workers Under Delaware’s Prevailing Wage Law.” Workers performing tasks not listed in the Department’s definitions (but performed by mechanics and laborers on public projects) shall be classified by the Department. The Department will utilize the U.S. Department of Labor’s Dictionary of Occupational Titles (Fourth Edition, Revised 1991) to determine the correct classifications of workers, as those definitions relate to the classifications recognized by the Department. In cases of conflicts

or voids in the Dictionary of Occupational Titles, the Department may utilize additional sources including, but not limited to, the U.S. Department of Labor, employer organizations, employee organizations, or other government agencies involved in classifying workers. Classification determinations shall be recorded by the Department as they are made and shall be published annually.

Laborers and mechanics are to be paid the appropriate wage rates for the classification of work actually performed, without regard to skill.

#### D. Apprentices and Supportive Service Program Trainees.

##### 1. Definitions. As used in this section:

a. The term “apprentice” means persons who are indentured and employed in a bona fide apprenticeship program and individually registered by the program sponsor with the Delaware Department of Labor.

b. The term “apprenticeship agreement” means a written agreement between an apprentice and either his/her employer or a joint apprenticeship committee which contains the terms and conditions of the employment and training of the apprentice.

c. The term “apprenticeship program” means a complete plan of terms and conditions for the employment and training of apprentices.

d. The term “Joint apprenticeship committee” means a local committee equally representative of employers and employees which has been established by a group of employers with a bona fide bargaining agent or agents to direct the training of apprentices with whom it has made agreements.

e. The term “SSP Trainee” or “trainee” means a participant in the “Supportive Service Program” mandated by the Federal Highway Administration for federally aided state highway projects.

f. The term “registration” means the approval by the Department of Labor of an apprenticeship program or agreement as meeting the basic standards adopted by the Bureau of Apprenticeship and Training, United States Department of Labor. The term “registration” for SSP Trainees means the individual registration of a participant in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.

##### 2. Employment of Apprentices and SSP Trainees on State Projects.

a. Apprentices and SSP Trainees will be permitted to work as such on State contracts in excess of \$100,000 for new construction or \$15,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction only when they are registered with the

Department of Labor or an approved SSP Training Program.

b. The mechanic's rate on all such State contracts is that rate determined by the Department of Labor. The percentage of the mechanic's rate that the registered apprentice or SSP Trainee receives will be the percentage that the apprentice or trainee qualifies for under the terms of the individual's formal Apprenticeship/Trainee agreement.

c. Any person employed at an apprentice or trainee wage rate who is not registered as above, shall be paid the wage rate determined by the Department of Labor for the classification of work (s)he actually performed.

d. The ratio of apprentices to mechanics on the site of any work covered by 29 Del.C. § ~~6942~~ 6960 in any craft classification may not be greater than the ratio permitted to the contractor for the entire workforce under the registered apprenticeship program. Any apprentice performing work on the job site in excess of the ratio permitted under the registered program must be paid not less than the wage rate that the applicable wage determination specifies for the work (s)he actually performs. Entitlement to mechanic's wages shall be based upon seniority in the apprenticeship program or (in the case of equal seniority) seniority on the job site.

### 3. Records.

a. Every employer who employs an apprentice or SSP trainee under this part must keep the records required by Title 19, Delaware Code, Chapters 9 and 11, including designation of apprentices or trainees on the payroll. In addition, every employer who employs apprentices or SSP trainees shall preserve the agreements under which the individuals were employed.

b. Every joint apprenticeship committee or SSP Program sponsor shall keep a record of the cumulative amount of work experience gained by the apprentice or trainee.

c. Every joint apprenticeship committee shall keep a list of the employers to whom the apprentice was assigned and the period of time (s)he worked for each. Every SSP Program sponsor shall keep a list of the projects to which the trainee was assigned and the period of time (s)he worked on each.

d. The records required by paragraphs (a), (b), and (c) of this section shall be maintained and preserved for at least three (3) years from the termination of the apprenticeship or training period. Such records shall be kept safe and accessible at the place or places of employment or at a central location where such records are customarily maintained. All records shall be available at any time for inspection and copying by the Department of Labor.

E. Working Foremen. 29 Del.C. § ~~6942~~ 6960 does not

apply to (and therefore survey data are not collected for) workers whose duties are primarily administrative, executive or clerical, rather than manual. However, working foremen who devote more than twenty (20) percent of their time during a workweek to mechanic or laborer duties are laborers and mechanics for the time so spent and data will be collected for the hours spent as laborers or mechanics.

F. Helpers. Helper classifications are not recognized by the Department of Labor. All laborers and mechanics are to be paid the appropriate wage rate for the classification of work actually performed, without regard to skill.

G. Construction Projects. In the wage determination process, the term "project" refers to construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work away from the site of the work and consists of all construction necessary to complete a facility regardless of the number of contracts involved so long as all contracts awarded are closely related in the purpose, time and place. For example, demolition or site clearing work preparatory to construction is considered a part of the project.

1. Character Similar. 29 Del.C. § ~~6942~~ 6960 requires the predetermination of wage rates which are prevailing on projects of a "character similar to the construction work." As a general rule, the Department identifies projects by end use type and classifies them into three major categories:

a. Building Construction. Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level as well as incidental grading, utilities and paving. Additionally, such structures need not be "habitable" to be building construction. The installation of heavy machinery and/or equipment shall not change the project's character as a building. Examples: Alterations and additions to nonresidential buildings; Apartment buildings (5 stories and above); Arenas (enclosed); Auditoriums; Automobile parking garages; Banks and financial buildings; Barracks; Churches; Hospitals; Hotels; Industrial buildings; Institutional buildings; Libraries; Mausoleums; Motels; Museums; Nursing and convalescent facilities; Office buildings; outpatient clinics; Passenger and freight terminal buildings; Police stations; Post offices; City halls; civic centers; Commercial buildings; Court houses; Detention facilities; Dormitories; Farm buildings; Fire stations;

Power plants; Prefabricated buildings; Remodeling buildings; Renovating buildings; Repairing buildings; Restaurants; Schools; Service stations; Shopping centers; Stores; Subway stations; Theaters; Warehouses; Water and sewage treatment plants (building only).

b. Heavy Construction. Heavy projects are those that are not properly classified as either "building" or "highway". Unlike these classifications, heavy construction is not a homogeneous classification. Examples of Heavy construction: Antenna towers; Bridges (major bridges designed for commercial navigation); Breakwaters; Caissons (other than building or highway); Canals; Channels; Channel cut-offs; Chemical complexes or facilities (other than buildings); Cofferdams; Coke ovens; Dams; Demolition (not incidental to construction); Dikes; Docks; Drainage projects; Dredging projects; Electrification projects (outdoor); Flood control projects; Industrial incinerators (other than building); Irrigation projects; Jetties; Kilns; Land drainage (not incidental to other construction); Land leveling (not incidental to other construction); Land reclamation; Levees; Locks, Waterways; oil refineries; Pipe lines; Ponds; Pumping stations (pre-fabricated drop-in units); Railroad construction; Reservoirs; Revetments; Sewage collection and disposal lines; Sewers (sanitary, storm, etc.); Shoreline maintenance; Ski tows; Storage tanks; swimming pools (outdoor); Subways (other than buildings); Tipples; Tunnels; Unsheltered piers and wharves; Viaducts (other than highway); Water mains; Waterway construction; Water supply lines (not incidental to building); Water and sewage treatment plants (other than buildings); Wells.

c. Highway Construction. Highway projects include the construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, greenway projects and other similar projects not incidental to building or heavy construction. Examples: Alleys; Base courses; Bituminous treatments; Bridle paths; Concrete pavement; Curbs; Excavation and embankment (for road construction); Fencing (highway); Grade crossing elimination (overpasses or underpasses); Parking lots; Parkways; Resurfacing streets and highways; Roadbeds; Roadways; Shoulders; Stabilizing courses; Storm sewers incidental to road construction; Street Paving; Guard rails on highway; Highway signs; Highway bridges (overpasses; underpasses; grade separation); Medians; Surface courses; Taxiways; Trails.

d. Multiple Categories. In some cases a project includes construction items that in themselves encompass different categories of construction. Generally, a project is considered mixed and a "multiple schedule" used if the construction items are substantial in relation to project cost, i.e. more than twenty (20) percent. Only one schedule is used if construction items are "incidental" in function to the overall character of a project (e.g., paving of parking

lots or an access road on a building project), and if there is not a substantial amount of construction in the second category.

2. Site of Work. A basic characteristic of the construction industry is the continual shift in the site of employment. 29 Del.C. § ~~6912~~ 6960 provides that prevailing wages are to be paid to "...all mechanics and laborers employed directly upon the site of the work ..." (emphasis added). The site of the work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed.

H. Prevailing Wage Rates. Every contract and the specifications for every contract to which section ~~6912~~ 6960 applies are required to contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. These rates are to be based upon the wages that the Department of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the county in which the work is to be performed, as reported in the Department's annual prevailing wage survey.

The prevailing wage shall be the wage paid to a majority of employees performing similar work as reported in the Department's annual prevailing wage survey or, in the absence of a majority, the weighted average wage paid to all employees reported.

I. Wages. The term "wages"-means the basic hourly rate of pay plus fringe benefits as defined below.

J. Fringe Benefits. Fringe benefits may be considered in determining whether an employer has met his/her prevailing wage obligations. As a general rule, any fringe benefit may be considered as long as the employer is not legally required to provide it. Therefore, benefits such as health, welfare or retirement benefits, vacation, holiday pay or sick leave pay could be considered fringe benefits. Employer payments for unemployment insurance, workers' compensation, FICA, etc. (which are required by law) would not be considered fringe benefits.

In order to be considered a valid fringe benefit, payments must be made either in cash, or contributed to an irrevocable escrow account at least once each month. "Irrevocable" means that the benefit may not be forfeited. However, a benefit plan can be considered by the Department provided that payments to the plan are made irrevocably by the employer, even

though certain employees may forfeit their individual rights to the benefits under certain prescribed conditions. Thus, if payments are made by the employer, and no return of those payments is possible, the plan would be acceptable, even though individual employees might not receive the benefits under certain situations. Benefits forfeited by such employees remain in an escrow account for the use of the other employees.

The actual cost of the benefit to the employer is the basis for evaluating the value of the fringe benefit. Administration costs are not considered fringe benefits.

The cost of the benefits must be apportioned between employment on both public and private projects. Thus, the total value of the benefit would be divided by the total amount of time worked. This will result in benefit per unit of time which would be equally applicable to public and private employment projects. Example: an employee works two weeks (80 hours) on a public project and two weeks (80 hours) on a private project. The employer pays \$160 for the employee's health insurance for the month. The value of the benefit is \$1.00 per hour. The employer is not permitted to apply the entire premium to the public project alone.

- K. **Peak Week.** In determining prevailing wages, the Department utilizes a "peak week" survey concept to ensure that wage and fringe benefit data obtained from employers reflects for each classification, the payroll period during which the greatest number of workers in each classification are used on a project. The survey solicits the number of employees and wages paid at each given rate during the peak week. The contractor or reporting organization selects the week (between July 1 to December 31 of the previous year) during which the greatest number of each classification of laborers and mechanics was working. Peak weeks may be different for each classification of worker.
- L. **Wage Determinations.** A "wage determination" is the listing of wages (including fringe benefits) for each classification of laborers and mechanics, which the Administrator has determined to be prevailing in a given county and type of construction. Wage determinations are issued annually.
- M. **Maintenance Work.** To "maintain" means to preserve or keep in an existing state or condition to prevent a decline, lapse, or cessation from that state or condition. Wages paid to workers performing maintenance work shall not be used in determining prevailing wage rates.

- N. **Area.** The term "area" in determining wage rates under 29 Del.C. § ~~6942~~ 6960 shall mean the county of the State in which the work is to be performed. The term "area" in determining classifications of workers under 29 Del.C. § ~~6942~~ 6960 shall mean the State of Delaware.
- O. **Secretary.** "Secretary" means the Secretary of Labor for the State of Delaware.
- P. **Administrator.** "Administrator" means the Administrator of the Office of Labor Law Enforcement for the Delaware Department of Labor, Division of Industrial Affairs.
- Q. **Department.** "Department" means the Delaware Department of Labor.

#### IV. DETERMINING PREVAILING WAGES.

The Department of Labor shall conduct an annual survey for obtaining and compiling wage rate information and shall encourage the voluntary submission of wage data by contractors, contractors, associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area.

- A. **Scope of Task.** State directed and assisted construction activity is not restricted to any geographic sector of the state or to any particular type of construction. As a result, data collection methods employed by the Department for gathering prevailing wage information must be capable of determining patterns of wage compensation, including fringe benefits, for virtually all classifications of construction workers in at least the three major types of construction, within each of the three counties in Delaware. And, since the objective is determining "prevailing" wages, the collection of data must be completed within a relatively brief time frame.
- B. **Data to be Collected.** Operation of the prevailing wage program necessitates an annual effort by the Department to obtain, compile and analyze wage rate information. This section explores the nature of the data and the means of collection.
  - 1. **What Information.** Wage rates are issued for each classification of laborer and mechanic that will likely be employed in State funded or assisted construction in a certain type of construction. Information on wages paid, therefore, must be collected and tabulated on the basis of

distinct job classifications and construction categories.

The survey reporting form used by the Department to collect wage and fringe information, "Report of Construction Wage Rates", provides for reporting data which includes the contractor's name and address, telephonenumber, project description and location, the highest number of workers employed in each classification during the peak week of the ~~survey period~~ period being surveyed (which shall be within the period July 1 to December 31 of the year preceding the request for data) and the wage rate, including bona fide fringe benefits, paid to each worker.

2. Geographic Scope. A prime objective of the prevailing wage law is to protect local rates of pay and 29 Del.C. § ~~6942~~ 6960 stipulates that the "area" for the determination of wage rates is to be the county in which the work is performed.

#### V. THE SURVEY.

The purpose of prevailing wage surveys is to collect information on wage and fringe benefit rates paid to mechanics and laborers working on construction projects of a similar character in a predetermined geographic area and calendar period. The Department attempts to give each contractor equal opportunity to be included in the final data base from which the prevailing rates are derived.

The Department shall conduct the survey in accordance with the following steps:

##### A. Plan the Survey.

The Department shall begin the survey preparation process no later than November of each year. Forms will be printed and supplies (envelopes, postage, etc.) will be ordered in preparation for the survey mailing. The Department will request from the Division of Unemployment Insurance a computer printout (with two sets of address labels) of the names and addresses of all employers in the following Standard Industrial Classification (SIC) Codes, who reported workers during the calendar year in which the request is made:

- 1522 Residential Buildings, Other Than Single-Family [The Department will specify that buildings under five stories should not be reported]
- 1541 Industrial Buildings and Warehouses
- 1542 Nonresidential Buildings, Other Than Industrial Buildings and Warehouses
- 1611 Highway and Street Construction, Except Elevated Highways
- 1622 Bridge, Tunnel, and Elevated Highway

- Construction
- 1623 Water, Sewer, Pipeline, and communications and Power Line Construction
- 1629 Heavy Construction, Not Elsewhere Classified
- 1711 Plumbing, Heating and Air Conditioning
- 1721 Painting and Paper Hanging
- 1731 Electrical Work
- 1741 Masonry, Stone Setting, and Other Stone Work
- 1742 Plastering, Drywall, Acoustical, and Insulation Work
- 1743 Terrazzo, Tile, Marble, and Mosaic Work
- 1751 Carpentry Work
- 1752 Floor Laying and Other Floor Work, Not Elsewhere Classified
- 1761 Roofing, Siding, and Sheet Metal Work
- 1771 Concrete Work
- 1781 Water Well Drilling
- 1791 Structural Steel Erection
- 1793 Glass and Glazing Work
- 1794 Excavation work
- 1795 Wrecking and Demolition Work
- 1796 Installation or Erection of Building Equipment, Not Elsewhere Classified
- 1799 Special Trade Contractors, Not Elsewhere Classified

The Department will begin to assemble the survey packets in mid-December of each year in preparation for the early January mailing.

##### B. Conduct the Survey.

On or before January 7th of each-year, survey forms will be mailed to every employer identified by the Division of Unemployment Insurance as having employed workers in the SIC Codes listed above during the calendar year preceding the collection of data. Completed survey forms must be received by the Department or postmarked no later than February 8 of the survey year in order to be used in determining prevailing rates for that year. All other forms not complying with this deadline shall not be included. In the event that February 8th falls on a Saturday, Sunday, or legal holiday, the deadline for submitting survey forms shall be the next Department business day following the February 8th deadline.

By January 10th of each year, the Department shall notify the Delaware Contractor's Association, the Building Trades Council of Delaware, the Associated Builders and Contractors, the Delaware State AFL-CIO, the Secretary of the Department of Administrative Services, the Secretary of the

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Department of Transportation and the Roofing Contractors Association that the annual survey is being conducted. The notification shall contain a copy of the list of employers to whom survey forms were mailed and shall invite the addressees to submit the names and addresses of any employers whose names do not appear on the list. The notification shall also contain blank survey forms for the organizations' use.

**C. Conduct Follow-Up.**

On or before February 1st of each year, the Department shall mail a second notice to all employers who failed to respond to the first request for data. A second copy of the Department's master mailing list (indicating the employers who responded) shall be sent to the organizations listed in the preceding paragraph so that they can encourage the voluntary participation of their members.

**D. Clarify and Analyze Data.**

The data clarification process is to begin immediately upon receipt of survey responses. Each survey response is reviewed to determine completeness, appropriateness, and accuracy of data.

**E. Code and Record Data.**

Survey responses are to be coded as follows:

"A" Survey response is usable (i.e., it is timely, complete, appropriate, and accurate)

"B" Employer reports no employees during survey period

"C" Survey response is incomplete

"D" Survey response is not applicable

"E" Survey request not deliverable at address used/  
Respondent not identified on survey form/  
Information is not usable

Data from usable responses are to be recorded weekly in a summary ledger which contains a breakdown of each classification of worker for each type of construction for each county. Survey responses coded "A" shall be filed by county and type of construction. Survey responses coded "B", "D", and "E" shall be kept in files separate from the usable responses.

Respondents who submit code "C" survey responses (incomplete) shall be contacted by telephone by the Department. The Department will give the respondent an opportunity to supply the missing information. Failure to submit the missing information ~~by the close of the survey period~~ prior to the publication of the Prevailing Wage determination (see Regulation VI. C.) will result in a disqualification of the survey

response (to the extent that it is not usable).

The master mailing list shall be coded weekly to show the identity of survey participants as well as the number and types of responses.

All survey responses and documents are to be retained by the Department for a period of three years.

**F. Determine Adequacy of Data.**

At the conclusion of the survey period, the Department will review the survey ledger to determine the adequacy of data in each classification in each type of construction in each county. Data will be considered adequate if the worker classification contains the wages of ten or more employees. Classification data not meeting the above criteria will be added to the previous year's survey data for the same classification. If the data still do not reflect the wages paid to at least ten workers, the data will be considered inadequate.

**G. Compute Prevailing Wage Rates.**

The Department will enter usable data (from the summary ledgers) in the computer. If a majority (i.e., more than 50% of the workers reported in a particular category are paid at the same rate, that rate shall be the prevailing wage rate for the classification. For example:

Laborers / New Castle County / Building Construction

Workers	Rate of Pay [including benefits]	
50 @	\$17.25 =	Majority
39 @	16.75	
10 @	17.55	
99		

The prevailing wage rate = \$17.25

In the absence of a majority, the computer will determine the average (mean) of the wages-paid, weighted by the numbers of workers paid at each rate. For example:

Laborers/New Castle County/Building Construction

Workers	Rate of Pay (including benefits)	
25 @	\$15.50 =	\$387.50
25 @	17.25 =	431.25
39 @	16.75 =	653.25
10 @	17.55 =	175.50
99		\$1,647.50

$\$1,647.50 \div 99 \text{ workers} = \$16.64$  prevailing rate

H. Determine Wage Rates for Classes of Workers For Which Inadequate Data Are Received.

The Department is required by law to determine wages to be paid to all classes of workers employed on public projects. For that reason, the Department must have a means by which it can determine rates for which no data or inadequate data were received. If no data are received for a given classification, or if inadequate data are received (i.e., fewer than 10 workers reported in a given classification), the previous year's prevailing rates shall be reissued.

VI. ISSUING WAGE DETERMINATIONS.

A. Publication of Preliminary Determination.

On or before February 15th of each year, the Department shall publish a "Preliminary Determination of Prevailing Wage Rates." In the event that February 15th falls on a Saturday, Sunday, or legal holiday, the Department shall issue the preliminary results on the next Department business day following February 15th.

B Appeals.

From February 15th to February 25th, the Administrator of the Office of Labor Law Enforcement will consider protests and inquiries relating to the preliminary results. An interested person seeking review or reconsideration of a wage determination must present a request in writing accompanied by a statement with any supporting data or other pertinent information.

Requests for reconsideration must be substantive and specific in order to be considered by the Department. For example: A request stating that, "the highway rates don't look right", would not be considered substantive or specific. However, a request stating that, "residential rates appear to have been erroneously included for carpenters in New Castle County Building Construction" would be considered substantive and specific.

From February 25th to March 1st, the Department will attempt to gather information necessary to resolve objections and requests for reconsideration. However, no appeals, objections, or requests will be considered if received by the Department after the February 25th deadline. The Department will respond in writing to all interested persons who submit a written request

for review.

An appeal from the Administrator's decision must be made in writing and received by the Secretary of Labor within five calendar days from the date of the postmark on the Administrator's decision. The Secretary or his/her designee shall render a final decision in writing.

C. Issuance of Determination

On or before March 15th of each year, the Department shall publish its annual "Prevailing Wage Determination." The Determination shall be valid for a period of one year or until subsequent rates or amendments are issued by the Department.

Public agencies (covered by the provisions of 29 Del.C. § ~~6912~~ 6960) are required to use the rates which are in effect on the date of the publication of specifications for a given project. "Date of publication" means the date on which the specifications are made available to interested persons (as specified in the published bid notice). In the event that a contract is not executed within one hundred and twenty (120) days from the earliest date the specifications were published, the rates in effect at the time of the execution of the contract shall be the applicable rates for the project.

D. Post Determination Actions. Wage determinations will be modified only for the purpose of correcting errors. Determinations will not be modified to include survey data received after the close of the survey period.

1. Amendment to Correct Errors of Inadvertence.

Amendments may be issued to correct inadvertent errors in the written text of a wage determination. The sole purpose is to correct wage schedules so that the wage determination will accurately and fully reflect the actual rates prevailing in the locality at the time the wage determination was issued. Such amendments (which may be issued at any time) are used to correct errors due to transposition of rates and other clerical mistakes made in processing the schedule; they are not used to correct errors in judgment. Contracts which have already been awarded will not be affected by such amendments. Amendments issued more than ten (10) days prior to a bid opening must be used. Amendments issued less than ten (10) days prior to a bid opening may be disregarded.

2. Amendment to Correct Errors in Survey Data.

Amendments which affect the validity of a wage determination may be issued to correct errors in rates resulting from erroneous information submitted by survey

participants.

When the Department of Labor is notified in writing that a survey participant has submitted erroneous data (with regard to wages, fringe benefits, characterization of project, classification of workers, or county in which the work was performed), the Department shall determine the validity of the data. Corrections, if warranted, shall be made in the form of amended determinations at the end of each calendar quarter (beginning with the date the wage determination was issued). Contracts which have already been awarded will not be affected by such amendments. Amendments issued more than ten (10) days prior to a bid opening must be used. Amendments issued less than ten days prior to a bid opening may be disregarded.

3. Incorrect Wage Determinations: Before Contract Award.

If notification is received from the Department of Labor any time prior to the contract award that the bid documents contain the wrong wage schedule, such schedule or wage determination shall no longer be valid and may not be used - without regard to whether the bid opening has occurred.

If the bid documents contain no wage schedule, it is the contractor's (or subcontractor's) responsibility to contact the Department of Labor for the correct wage schedule. Such requests must be in writing. Responses to such requests will be in writing. Any contractor or subcontractor found using an incorrect wage schedule will be required to pay the correct wages based upon the proper classification of work as determined by the Department of Labor.

4. Lack of Valid wage Determination: After Contract Award. If a contract is awarded without a wage determination or awarded with an incorrect wage determination, the contractor is responsible for the payment of the appropriate prevailing wage rates as determined by the Department of Labor.

5. Additional Classifications. Any class of laborers or mechanics which is not listed in the applicable wage determination but which is to be employed under the contract is to be classified by the Department of Labor in accordance with the procedures set forth in Part III, Section C, of these regulations.

6. Determination of Wages for Classifications for Which No Rates Are Published. Whenever a public project requires the services of a laborer or mechanic for which no rate has been published, the Department shall be notified in writing and shall determine the worker classification (from among the 21 classifications recognized by the Department of Labor) and the rate to be paid. The rate shall be determined as follows:

a. Using "Building Construction" rates as the baseline rate in each county, the Department of Labor will

determine the relationship between the "Building Construction" rates and the rates of the type of construction for which the rate is sought. To determine the relationship, (which is to be expressed as a percentage), the Department will use only those rates which were determined by data received in the relevant survey.

b. The Department will compare only those classifications for which corresponding rates were determined.

c. The total of the corresponding rates will be determined for each type of construction. The Heavy or Highway total will be divided into the Building rate to find the percentage of the Heavy or Highway rate to the Building rate.

d. The Department of Labor will multiply the Building rate for the requested classification of worker by the percentage determined in "c" to establish the applicable prevailing wage rate.

Hypothetical example:

A plumber's rate is needed for a New Castle County project. The Department of Labor has not published a rate for this classification.

The Department of Labor will determine the relationship between New Castle County Highway rates and Building rates, comparing only corresponding rates which were actually determined by the relevant survey (rates carried forward from previous years due to lack of sufficient data are not to be used).

	<u>N.C.C. Building</u>	<u>N.C.C. Highway</u>
<u>Bricklayers</u>	<u>\$19.65</u>	<u>\$12.29</u>
<u>Carpenters</u>	<u>23.37</u>	<u>21.69</u>
<u>Cement Finishers</u>	<u>23.55</u>	<u>15.52</u>
<u>Laborers</u>	<u>13.62</u>	<u>10.60</u>
<u>Power Equipment</u>		
<u>Operator</u>	<u>22.94</u>	<u>15.77</u>
<u>Truck Drivers</u>	<u>15.15</u>	<u>13.75</u>
	<u>\$118.28</u>	<u>\$89.62</u>

$$\underline{\$89.62} \div \underline{118.28} = \underline{75.77\%}$$

The plumber's rate for New Castle County Building is \$26.54. \$26.54 x 75.77% = \$20.11

The plumber's rate for New Castle County Highway = \$20.11

The same method can be used between corresponding types of construction when the Building construction rates do not contain a rate for the requested classification of worker; i.e., Heavy construction rates in Sussex County can be compared with Heavy construction rates in New Castle."



**VII. ENFORCEMENT**

The authority to enforce the prevailing wage rates derives from 29 Del.C. §~~6912~~ 6960(b) which states: “The Department of Labor shall investigate all claims that the prevailing wage rates as provided for under this section are not being or have not been paid.”

A. **DUTIES OF CONTRACTORS.** Every contractor and subcontractor on a public project shall:

1. Post in a prominent and accessible place at the site of the work, a legible copy of the applicable prevailing wage determination issued by the Department. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever amended wage rate determinations are issued by the Department.

2. Pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those stated in the prevailing wage rate determination.

a. Laborers or mechanics performing work in more than one occupation shall be compensated at least the rate specified for each occupation for the time actually worked therein.

b. An employer shall not pay or permit any worker to accept wages less than the prevailing rate of wages as determined by the Department;

c. Every employer performing work on a public project shall furnish weekly payroll reports to the Department of Labor on forms provided (upon request) by the Department. Payroll reports shall be mailed or delivered by the employer to the Department within-one week from the last work day covered by the report. Failure to complete each and every section of the report (including the requirement that the form be notarized) will constitute a failure to submit sworn payroll information as required by the Department.

d. An employer shall not, at any time during the project, pay less than the prevailing rate of wages for each hour worked, regardless of the rate of pay being paid at any other time.

e. An employer shall not pay less than the prevailing rate of wages by docking pay, docking time, or deducting pay for any purpose unless provided for by law including the Wage Payment and Collection Act of the State of Delaware (19 Del.C. §1107).

f. A person shall not, either for himself/herself or any other person, request, demand, or receive, either before or after an employee is engaged, that such employee pay back, return, donate, contribute, or give any part or all of said employee’s wages, salary, or thing of value, to any person, upon the statement, representation, or

understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment. This paragraph does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization as permitted by law.

g. A person shall not, directly or indirectly, aid, request, or authorize any person to sign a release for any claim of wages with the intent to avoid payment of the prevailing wage rates.

3. .Keep the following records for a period of three years:

a. The name and address of each employee;

b. The social security number of each employee;

c. ~~The type of work performed by each employee~~ For employees who perform work in more than one trade, a daily log for each individual employed upon the site of construction. The log must describe the tasks performed by each employee, the tools used to perform each task and the amount of time spent performing each task;

d. Each employee’s basic hourly rate of pay (If an employee performs public project work in more than one trade, the employer’s record must reflect the hourly rate paid for each type of work performed; If an employee performs both prevailing wage work and non-prevailing wage work, the records must reflect the-rates paid for each.)

e. The number of hours worked in each occupation on the project in the applicable pay schedule, the number of hours worked in each day, and the total number of hours worked each week;

f. The amount of wages paid each employee;

g. The amount of wages paid each employee as fringe benefit payments;

h. The amount of any deductions withheld from each employee’s wages; and

i. An accurate description of the nature of the deductions withheld from each employee’s wages. (Fringe benefit deductions must be supported by a written fringe benefit policy as required by the Wage Payment and Collection Act.)

B. **INVESTIGATION.** A complaint may be filed with the Department by any employee upon a public project or any interested party. The complaint shall be in writing. Upon receipt of a complaint or upon its own motion the Department shall initiate an investigation.

1. The Department shall notify the employer that a complaint has been filed and/or that an investigation has been initiated. The Department may request (or subpoena, if necessary) records, documents, or testimony necessary to make a determination as to the validity of the complaint or the employer’s compliance with the law.

2. Upon finding that an employer has not paid or is not paying the correct prevailing wage rates, the Department of Labor shall notify the employer of the violations by certified mail and make an effort to obtain compliance.

3. Upon failure to obtain compliance within fifteen (15) days of receipt of said certified mail, the Department may direct the contracting agency and/or the prime contractor to withhold payments to the employer (in an amount equal to the prevailing wage deficiencies, as determined by the Department) which are to be remitted to the Department for distribution upon resolution of the matter. In addition, the Secretary may terminate all rights of the employer to proceed with the work under the contract and the employer shall be responsible for all damages resulting therefrom.

4. If the dispute between the Department and the employer pertains to the classification of workers as determined by the Office of Labor Law Enforcement, the determination shall be reviewable by the Secretary or his/her designee and shall be reversed only upon a finding of abuse of discretion. Such appeals from the Office of Labor Law Enforcement's decision must be made in writing and must be received by the Secretary within fifteen (15) days from receipt of the Department's certified letter.

C. **HEARINGS.** A hearing shall be held only in cases involving the termination of rights to proceed with the work under the public construction contract.

#### D. HEARING PRACTICES AND PROCEDURES.

1. **SCOPE OF RULES.** These rules shall govern the conduct of hearings initiated by the Department of Labor pursuant to 29 Del.C. §§~~6912~~ 6960(d) to terminate all rights of the contractor or subcontractor to proceed with work under a public construction contract for failure to pay prevailing wage rates.

2. **INITIATION OF HEARING.** The Secretary of Labor may initiate a hearing by notifying the contractor or subcontractor by registered mail that said contractor or subcontractor is alleged to have violated 29 Del.C. §§~~6912~~ 6960. The notice shall give 20 days prior notice to all parties as follows:

- a. The notice shall describe the subject matter of the proceedings;
- b. The notice shall give the date, time and place the hearing will be held;
- c. The notice shall cite the law or regulation giving the Department authority to act;
- d. The notice shall inform the party of his/her right to present evidence, to be represented by counsel, and to appear personally or by other representative; and
- e. The notice shall inform the parties that the Department will reach its decision based upon the evidence

received.

#### 3. CONDUCT OF HEARING.

a. The hearing may be conducted by the Secretary of Labor or by a hearing officer designated for that purpose by the Secretary.

b. In connection with such hearing, the Secretary or hearing officer may:

- (1) Issue subpoenas for witnesses and other sources of evidence, either on the Department's initiative or at the request of any party;
- (2) Administer oaths to witnesses;
- (3) Exclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence;
- (4) Limit unduly repetitive proof, rebuttal and cross-examination;
- (5) Hold preheating conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes and to regulate and to expedite the course of the hearing.

c. The conduct of hearing shall not be bound by technical rules of evidence pursuant to 19 Del.C. 105(8).

d. The burden of proof shall be upon the Department. (If the records maintained by the employer do not provide sufficient information to determine the exact amount of wages owed, the Department may make a determination based on available evidence.)

e. A record from which a verbatim transcript can be prepared shall be made of all hearings in contested cases. Transcripts shall be made at the request and expense of the requesting party.

#### 4. PROPOSED ORDERS.

a. Whenever a hearing officer presides over a hearing (s)he shall prepare a proposed order for the consideration of the Secretary which shall include:

- (1) A brief summary of the evidence and recommended findings of fact based upon the evidence;
- (2) Recommended conclusions of law; and
- (3) Recommended decision.

b. When the proposed order is submitted to the Secretary, a copy shall be delivered to each of the other parties who shall have 10 days to submit in writing to the Secretary exceptions, comments and arguments respecting the proposed order.

5. **RECORD.** With respect to each case, all notices, correspondence between the agencies and the parties, all exhibits, documents in testimony admitted into evidence and all recommended orders, summary of evidence and findings of all interlocutory and final orders of the agency shall be included in the agency's record of the case and shall be retained by the agency for three years.

#### 6. DECISION; FINAL ORDER.

a. The Secretary shall make his/her decision based upon the entire record of the case and upon

summaries and recommendations of the hearing officer.

b. Every case decision of the Secretary shall be incorporated in a final order which shall include, where appropriate:

- (1) A brief summary of the evidence;
- (2) Findings of fact based upon the evidence;
- (3) Conclusions of law;
- (4) Any other conclusion required by the law

or the Department of Labor;

(5) A concise statement of the Department of Labor's determination or action on the case.

c. Every final order shall be authenticated by the signature of the Secretary.

d. Every final order shall immediately be mailed or delivered to each party, to the contracting agency, and each other person requesting it.

e. Every final order may be amended or modified by the same procedure used for the initial adoption of the order.

7. **INFORMAL DISPOSITION.** Informal disposition may be made of any matter set for hearing by stipulation, agreed settlement, consent order, or default.

**VIII. SUBSEQUENT MODIFICATION OF REGULATIONS.**

The Secretary may, upon his/her own motion or upon the written request of any interested person setting forth reasonable grounds therefore, revoke or modify these regulations, after an opportunity has been given to interested persons to present their views on proposed changes. These regulations shall take effect thirty (30) days after the date of adoption.

SO ORDERED, this 15<sup>th</sup> day of September 1995.

These Regulations were originally adopted April 3, 1992 and became effective on May 4, 1992.

- Amended: July 1, 1993  
Amended: September 15, 1993  
Amended: December 28, 1994  
Amended: October 15, 1995

**DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS**  
Statutory Authority: 29 Delaware Code,  
Section 8503(7) (29 Del.C. §8503(7))

Pursuant to the authority granted to the Department of Labor under 29 Del.C. §8503(7), the Department is proposing combined regulations under 19 Del.C. §708 and 11 Del.C. §8563, "Special Employment Practices Relating to Health Care and Child Care Facilities" and under 11 Del.C. §8564, "Adult Abuse Registry Check".

Interested parties are invited to present their views at the public hearing which is scheduled as follows:

9:00 a.m., Tuesday, November 25, 1997  
Department of Labor  
4425 North Market Street  
Wilmington, Delaware 19802

First Floor, Conference Room 049

Interested parties can obtain copies of the proposed amendments at no charge by contacting the Office of Labor Law Enforcement at the above address, or by telephone at (302) 761-8208.

DELAWARE DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS

**PROPOSED REGULATIONS**

**SPECIAL EMPLOYMENT PRACTICES RELATING TO HEALTH CARE AND CHILD CARE FACILITIES (19 DEL.C. §5708 and 11 DEL.C. §8563)**

**ADULT ABUSE REGISTRY CHECK (11 DEL.C. §8564)**

Pursuant to 29 Del.C. §8503(7), the Department of Labor hereby promulgates the following regulations to provide guidance to employers and applicants regarding the implementation of 19 Del.C. §708, 11 Del.C. §8563 and 11 Del.C. §8564.

**I. INTRODUCTION.**

The General Assembly enacted two laws, "SPECIAL EMPLOYMENT PRACTICES RELATING TO HEALTH CARE AND CHILD CARE FACILITIES" (19 DEL.C. §708 and 11 DEL.C. §8563) and "ADULT ABUSE REGISTRY CHECK" (11 DEL.C. §8564) in order to provide a degree of protection for the "vulnerable"

population in hospitals, nursing homes, child care facilities and other institutions. Together, the two laws require employers to obtain a reference check, or "service letter", and check two registries to insure that they are not hiring individuals with a past history of violent behavior in the workplace, or individuals who have engaged in abuse or neglect to adults or children in their care.

## II. DEFINITIONS.

The words, terms and phrases used in these Regulations shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning.

A. "PERSON SEEKING EMPLOYMENT" means any person applying for employment in a health care or child care facility that affords direct access to persons receiving care at such a facility, or a person applying for licensure to operate a child care facility.

B. "HEALTH CARE FACILITY" means any custodial or residential facility where health, nutritional, or personal care is provided for persons, including nursing homes, hospitals, home health care agencies, and adult day care facilities.

C. "CHILD CARE FACILITY" means any child care facility which is required to be licensed by the Department of Services for Children, Youth, and their Families.

D. "DIRECT ACCESS" means the opportunity to have personal contact with persons receiving care during the course of one's assigned duties.

## II. SERVICE LETTER.

### A. REQUIREMENTS.

No employer who operates a health care facility or child care facility shall hire any person without obtaining one or more service letter(s) for that person. The employer must obtain a service letter from the person's current or most recent previous employer. In addition, if the person seeking employment was employed in a health care and/or child care facility within the past five (5) years, the employer shall also obtain a service letter from such employer(s). If the person seeking employment has not been previously employed, or was self-employed, then the employer must require the person seeking employment to provide letters of reference from two adults who are familiar with the person, but are not relatives.

### B. SERVICE LETTER FORM.

The required service letter shall be a form provided by the Department of Labor, Office of Labor Law Enforcement. The service letter form shall be signed by

the current or previous employer and shall be filled out by that employer. The service letter form is a checklist requiring information about the type of work performed by the employee; the duration of the employment; the nature of the employee's separation from employment; and information as to any reasonably substantiated incidents involving violence, threat of violence, abuse or neglect by the person seeking employment.

### C. DUTIES.

#### 1. Duties of the hiring employer.

a. Service letter(s). The employer must obtain the required service letter(s) by sending a service letter form to all of the current or previous employers named by the person seeking employment. The employer must make a "good faith" attempt to locate the current or previous employers and to obtain the service letter from such employer(s). In order to prove that the service letter form has been sent, an employer may wish to consider sending the form by Certified Mail so that the employer has a receipt.

b. Full release from person seeking employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release to obtain information from the current and/or previous employer(s).

c. Complete disclosure of information from person seeking employment. The employer must obtain a signed statement from the person seeking employment that the information he/she has given on the application represents a full and complete disclosure of his/her current and previous employment, and that all information contained in the employment application is true and complete to the best of the knowledge and belief of the person seeking employment.

d. Acknowledgment from person seeking employment. The employer must obtain a signed acknowledgment from the person seeking employment that he/she understands that failure to provide a full and complete disclosure is a violation of the law.

e. Exigent circumstances. When exigent circumstances exist and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis prior to actually having the completed service letter(s) for that person. The continued employment of that person, however, is conditioned upon the receipt of the required service letter(s). In addition, the person hired must be informed in writing and must sign an acknowledgment that he/she understands that his/her continued employment is contingent upon the receipt of the required service letter(s).

#### 2. Duties of the person seeking employment.

a. Provision of necessary information. The person seeking employment must provide all of the

necessary information about his/her current or past employers so that the service letter(s) can be obtained.

b. Full release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain information from the current or previous employment.

c. Complete disclosure of information. The person seeking employment must provide complete and full disclosure of information and must sign a statement in which he/she attests that information given in his/her application represents a full and complete disclosure of information about his/her current or previous employer and is true and correct to the best of his/her knowledge and belief.

d. Acknowledgment. The person seeking employment must sign an acknowledgment that he/she understands that failure to provide a full and complete disclosure of employment information is a violation of the law.

e. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the service letter(s).

3. Duties of the employer receiving the service letter form.

a. Completion of service letter form. The employer must complete the service letter form, providing complete and truthful information about the person named on the service letter form. The law, specifically 19 Del. C. 708(b)(10), provides that a person who discloses information about a current or former employee is immune from civil liability for such disclosure.

b. Return of the service letter form. The employer receiving the service letter form must complete it and return it within ten (10) business days from the date the request was received.

#### IV. CHILD ABUSE REGISTRY CHECK.

##### A. REQUIREMENTS

No employer who operates a health care facility or child care facility shall hire any person without requesting and receiving the results of a Child Abuse Registry check for that person. The Child Abuse Registry check shall relate to substantiated cases of child abuse or neglect reported after August 1, 1994. The results of the Child Abuse Registry check shall be obtained from the Child Abuse Registry as established by 16 Del. C. §905.

##### B. DUTIES.

1. Duties of the hiring employer.

a. Full release from person seeking

employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release for the employer to obtain the information provided pursuant to the Child Abuse Registry check.

b. obtaining the Child Abuse Registry check. The employer must contact the Division of Children, Youth, and Their Families to request and receive the Child Abuse Registry check.

c. Exigent Circumstances. When exigent circumstances exist and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested a Child Abuse Registry check. The continued employment of that person, however, is conditioned upon the receipt of the Child Abuse Registry check. Any person hired on a conditional basis must be informed in writing, and must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Child Abuse Registry check.

2. Duties of the person seeking employment.

a. Provision of necessary information. The person seeking employment must provide any and all necessary information so that the Child Abuse Registry check can be completed.

b. Full Release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain the information provided pursuant to the Child Abuse Registry check.

c. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Child Abuse Registry check.

#### C. REGULATIONS AND PROCEDURES.

Specific Regulations and procedures for the Child Abuse Registry check shall be promulgated by the Division of Children, Youth, and Their Families.

#### V. ADULT ABUSE REGISTRY CHECK.

##### A. REQUIREMENTS.

No employer who operates a health care facility or child care facility shall hire any person without requesting and receiving an Adult Abuse Registry check for that person. The Adult Abuse Registry check shall relate to substantiated cases of adult abuse or neglect. The Adult Abuse Registry check shall be performed by the

Ombudsman's office of the Division of Health and Social Services.

**B. DUTIES.**

1. Duties of the hiring employer,

a. Full release from person seeking employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release for the employer to obtain the information provided pursuant to the Adult Abuse Registry check.

b. Obtaining the Adult Abuse Registry check. The employer must contact the Ombudsman's Office of the Division of Health and Social Services to request and receive the Adult Abuse Registry check.

c. Exigent circumstances. When exigent circumstances exist and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested an Adult Abuse Registry check. The continued employment of that person, however, is conditioned upon receipt of the Adult Abuse Registry check. Any person hired on a conditional basis must be informed in writing, and must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Adult Abuse Registry check.

2. Duties of the person seeking employment.

a. Provision of all necessary information. The person seeking employment must provide any and all necessary information so that the Adult Abuse Registry check can be completed.

b. Full release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain the information provided pursuant to the Adult Abuse Registry check.

c. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Adult Abuse Registry check.

**C. REGULATIONS.**

Specific Regulations and procedures relating to the Adult Abuse Registry check shall be promulgated by the Division of Health and Social Services.

**VI. ENFORCEMENT.**

**A. COMPLAINT.**

Any person may file a complaint with the office of Labor Law Enforcement alleging a violation of any provision of these laws. The complaint shall be in writing, and shall set forth the specifics of any alleged violation. The complaint shall be directed to the Administrator of the Office of Labor Law Enforcement.

Upon receipt of the complaint, the Administrator of the Office of Labor Law Enforcement will assign the complaint to an investigator.

**B. INVESTIGATION.**

The Office of Labor Law Enforcement may serve notice to the employer informing them of the complaint and requiring proof of compliance with the provisions of these laws. Evidence that may be requested to establish whether an employer has complied with the provisions of these laws includes, but is not limited to, the following:

1. Service letter(s) for each employee hired after January 1, 1998 (or proof that the employer has made a good faith attempt to obtain such service letter(s)).

2. Verification from the Division of Services Children, Youth and Their Families that the employer has requested and/or received the required check of the Child Abuse Registry as required by 11 Del. C. 8563.

3. Verification from the Ombudsman's office of the Division of Health and Social Services that the employer has requested and/or received the required check of the Adult Abuse Registry as required by 11 Del. C. §8564.

4. Copies of all statements and acknowledgments signed by the person seeking employment.

5. Application forms, personnel records or any other related documents.

**C. Determination.**

1. Upon completion of the investigation, the Office of Labor Law Enforcement will determine whether a violation has occurred. The Office of Labor Law Enforcement may issue a notice requiring corrective action. Such notice will give a specified date on which compliance is required.

2. Upon proof that corrective action has been taken, the Office of Labor Law Enforcement may issue a warning letter or may forward the matter to the Department of Justice for further legal action.

**VII. VIOLATIONS AND PENALTIES.**

**A. Violations of the law shall include the following:**

1. Failure by the hiring employer to obtain the service letter(s) or make a good faith attempt to do so;

2. Failure by the hiring employer to obtain the

required statements and acknowledgments from the person seeking employment;

3. Failure by the hiring employer to request and receive the Child Abuse Registry check;
4. Failure by the hiring employer to request and receive the Adult Abuse Registry check;
5. Failure by the person seeking employment to provide complete and full disclosure of all information regarding current or previous employers;
6. Failure by the person seeking employment to provide a full and complete disclosure of any information necessary to obtain the Child Abuse Registry check and the Adult Abuse Registry check;
7. Failure by the person seeking employment to sign the required statements and acknowledgments;
8. Failure by the employer receiving a service letter form to provide full and complete disclosure about the person seeking employment;
9. Failure by the employer receiving a service letter form to complete and return the service letter form.

**B. PENALTIES.**

Violations of any of the provisions of these laws may result in civil penalties of not less than \$1,000 nor more than \$5,000.

**VIII. SEVERABILITY.**

If any of the provisions of 19 Del.C. §708, 11 Del.C. §8563, 11 Del.C. §8564, or these Regulations, or any portion thereof or the application or method of implementation is held invalid, the remainder of the laws and these Regulations shall not be affected by such holding and shall remain in full force and effect.

**IX. SUBSEQUENT MODIFICATION OF REGULATIONS.**

The Secretary of Labor may, upon his/her own motion or upon the written request of any member of the public setting forth reasonable grounds therefore, revoke or modify these regulations, after an opportunity has been given to members of the public to present their views on the proposed changes. These regulations shall take effect thirty (30) days after the date of adoption.

Darrell J. Minott,  
Secretary of Labor

Approved and adopted this \_\_\_\_ day of \_\_\_\_\_ 1997.

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**DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS  
Statutory Authority: 29 Delaware Code,  
Section 8503(7) (29 Del.C. §8503(7))**

Pursuant to the authority granted to the Department of Labor under 29 Del.C. §8503(7), the Department is proposing to amend the Procedures of the Equal Employment Review Board under 19 Del.C. Chapter 7, subchapter II, "Discrimination in Employment".

Interested parties are invited to present their views at the public hearing which is scheduled as follows:

9:00 a.m., Tuesday, November 25, 1997  
Department of Labor  
4425 North Market Street  
Wilmington, Delaware 19802

First Floor, Conference Room 049

Interested parties can obtain copies of the proposed amendments at no charge by contacting the Office of Labor Law Enforcement at the above address, or by telephone at (302) 761-8208.

**PROPOSED AMENDMENT TO  
"PROCEDURES OF THE EQUAL EMPLOYMENT  
REVIEW BOARD"**

**IV. HEARING PROCEDURES**

4.1 Hearings generally

Add the sentence, "Any representation by counsel must be obtained privately by the parties at their own expense." after sentence 3 of Regulation IV. 4.1. The new Regulation IV. 4.1 will read:

"Hearings generally - The Review Board is authorized to hear complaints filed by the Department of Labor against an employer alleged to have engaged in an unlawful employment practice. The purpose of the hearing is to develop a full and complete factual record upon which the Review Board may discharge its duties under 19 Del.C. § 712. Every party may appear with or without counsel, except for corporations which must be represented by counsel. Any representation by counsel must be obtained privately by the parties at their own expense. Oaths shall be administered by a member of the Review Board or the Deputy Attorney General, and documents or other tangible evidence shall be presented to the Review Board and examined by all parties."

**THE PROCEDURES OF THE DELAWARE EQUAL  
EMPLOYMENT REVIEW BOARD WITH THE  
AMENDMENT FOLLOW**

**PROCEDURES OF THE DELAWARE EQUAL  
EMPLOYMENT REVIEW BOARD**

STATE OF DELAWARE  
DEPARTMENT OF LABOR  
4425 N. MARKET STREET  
WILMINGTON, DE 19802  
(302) 761-8200

Amended: March 15, 1996

**PROCEDURES OF THE EQUAL EMPLOYMENT  
REVIEW BOARD** The following procedures are  
established by the Equal Employment Review Board in  
order to carry out its statutory duties under the provisions  
of 19 Del.C. §710 (8) and 712.

## I. DEFINITIONS

1. Definitions. For the purpose of these rules:

(a) Administrative Officer - Administrator of the  
office of Labor Law Enforcement of the Delaware  
Department of Labor, or her/his designee.

(b) Department - Delaware Department of Labor.

(c) Party - Any person, organization or employer,  
public or private, named as a party in a Charge of  
Discrimination filed under 19 Del.C. §712; any person,  
organization or employer, public or private, whose  
intervention in a proceeding is permitted by law; and the  
Delaware Department of Labor.

(d) Quorum - Three members of the Review Board  
shall constitute a quorum. The majority of a quorum shall  
be empowered to make binding decisions for the entire  
Review Board. A quorum shall be required for all hearings  
before the Review Board. This requirement cannot be  
waived.

(e) Review Board - The Equal Employment Review  
Board as established by 19 Del.C. S710 (8). All  
communication to the Review Board, the Board's staff or  
the Board's legal counsel shall be addressed to the  
Administrative Officer.

## II. PRE-HEARING PROCEDURES

### 2.1 Sessions

a. Meetings will be held by the Review Board for  
the transaction of its business at the time and place

designated by the Board.

b. Procedural issues arising prior or subsequent to a  
hearing may be decided by the Chairperson of the Review  
Board.

### 2.2 Filing of Papers

a. The Administrator of the Office of Labor Law  
Enforcement shall have custody of the Board's seal and  
official records, and shall be responsible for the  
maintenance and custody of the docket, files, and records  
of the Board.

b. All orders and other actions of the Board shall be  
signed by the Chairperson or his or her designee, or other  
members of the Review Board upon whose authority the  
order is issued.

c. All pleadings or papers required to be filed with  
the Review Board shall be filed with the Administrative  
Officer of the Board. All requests for official information,  
copies of official records, or opportunity to inspect public  
records shall be made to the Administrative officer of the  
Board. A copying charge shall be assessed by the  
Administrative Officer and shall be payable to the  
Delaware Department of Labor.

2.3 Initiation of Hearing - An action before the Equal  
Employment Review Board (hereinafter Review Board),  
shall be commenced by the Department after:

a) it has determined after an investigation that there  
is reasonable cause to believe that unlawful discrimination  
occurred; and

b) it has attempted to eliminate any such alleged  
unlawful employment practice by informal methods of  
conference, conciliation and persuasion; and

c) it was unable to secure a conciliation that was  
reasonable to all parties.

2.4 The Complaint - The Department shall issue and serve  
the Respondent with a complaint stating the facts upon  
which the allegation of unlawful employment practice is  
based, together with a notice of the hearing before the  
Review Board. The complaint may be amended at any  
reasonable time with the approval of the Review Board,  
provided that the Respondent has sufficient time to  
respond. Related proceedings may be consolidated for  
the hearing. Any employee of the Department who filed  
a charge in any case shall not participate in a hearing on  
any complaint arising out of such charge, except as a  
witness.

2.5 Notice of Hearing - The Department shall give at least  
twenty (20) days notice, from the date of service, to all  
parties with respect to any hearing before the Review  
Board.

a. The notice shall be served with the complaint;

b. The notice shall set forth the date, time, and place



of the hearing;

c. The notice shall state the authority under which the Review Board is acting;

d. The notice shall inform the party of their right to present evidence, to appear personally, and to be represented by counsel. (Attorneys who are not members of the Delaware Bar may refer to Delaware Supreme Court Civil Rules, Rule 72, "Admission Pro Hac Vice before Administrative Agencies of this State.")

e. The notice shall inform the parties that the Review Board will reach a decision based upon the evidence presented at the hearing.

2.6 Answer to complaint - Respondent has the right to file an answer to the complaint within ten (10) days of receipt of the complaint, but is not required to do so. Respondent may amend the answer at any time prior to the hearing with the approval of the Review Board. The approval shall be granted when it is reasonable and fair to do so.

2.7 Intervenors - The Review Board may grant to such other persons as it considers appropriate, the right to intervene, to file briefs or to make oral arguments as amicus curiae or for other purposes. Any person who seeks to intervene at the discretion of the Review Board shall make application to the Review Board in writing at least five (5) days prior to the date of the hearing. This application must state the reason for the intervention and shall be served on the Department and on the parties.

2.8 Pretrial Procedure - At any time after the filing of a Complaint, the Chairperson of the Review Board, on motion of either party or upon its own motion, may hold one or more conferences, in person or by teleconference for the resolution or simplification of issues, for the disposal of procedural requests or disputes, and to consider such matters as will promote a fair and expeditious hearing.

2.9 Request for Continuance - The Review Board may grant a request for continuance when compelling reasons exist.

Continuances shall not be routinely granted.

a. A request for continuance must be made in writing to the Review Board at least five (5) days prior to a scheduled hearing and shall contain the opposing party's position with respect to the continuance request.

b. The request shall be filed with the Review Board and set forth the facts upon which the request is based.

c. Notice shall be given to all parties.

d. Each request will be considered on its own merit.

e. The request shall be ruled upon by the Chairperson of the Review Board.

2.10 Pre-hearing Filings - At least two (2) days prior to the date of a hearing, both parties must submit the following to the Review Board:

a. a brief statement of the pertinent facts;

b. a brief statement of the applicable law(s);

c. a brief summary of each party's case;

d. a complete list of witnesses to be called; and

e. at least three copies of each deposition to be placed into evidence.

2.11 Subpoena Duces Tecum

a. Parties may request the Review Board to issue subpoenas for evidence or for witnesses.

b. The Review Board shall issue subpoenas for witnesses and/or other sources of evidence at the request of any party made in writing at least fifteen (15) days prior to the date of the hearing. The Review Board may also issue subpoenas on its own initiative.

### III. DISCOVERY

3.1 Discovery - Each party has the right to request discovery with permission of the Chairperson of the Review Board. The discovery shall be according to the manner, time, and conditions set by the Chairperson. The parties may also conduct pre-hearing discovery by agreement of all parties and shall provide the Review Board with a written stipulation regarding the extent of the discovery.

### IV. HEARING PROCEDURES

4.1 Hearings generally - The Review Board is authorized to hear complaints filed by the Department of Labor against an employer alleged to have engaged in an unlawful employment practice. The purpose of the hearing is to develop a full and complete factual record upon which the Review Board may discharge its duties under 19 Del.C. § 712. Every party may appear with or without counsel, except for corporations which must be represented by counsel. Any representation by counsel must be obtained privately by the parties at their own expense. Oaths shall be administered by a member of the Review Board or the Deputy Attorney General, and documents or other tangible evidence shall be presented to the Review Board and examined by all parties.

4.2 Record - All proceedings before the Review Board shall be on the record. An electronic transcription of the hearing shall be made by the use of a recording device. Such electronic transcript shall be converted into a written transcript upon written request of any party to the proceedings to the Review Board. Any person requesting a written transcript shall deposit such amount to defray

the cost of transcription as shall be set by the Administrative Officer of the Review Board.

4.3 Burden of Proof - The burden of proof upon a complaint of discrimination shall be with the Charging Party. The Respondent shall have the burden of proof relative to any defense presented in justification of its actions. Where facts are shown which give rise to a presumption, the ordinary function of the presumption shifts the burden to the other party on going forward with the evidence as to that issue. Although the burden of production of evidence may shift from one party to another, the Charging Party shall bear the ultimate burden of proving the Complaint of Discrimination by a preponderance of the evidence.

#### 4.4 Evidence

a. The Review Board shall make its findings and rulings based upon the evidence presented to it by the parties to the proceeding at the hearing. Prior to the hearing the parties may enter into a stipulation of facts and present it to the Review Board. This stipulation shall be considered as evidence.

b. The Delaware Rules of Evidence shall not be controlling, but shall be used by the Review Board as a guideline for its decisions on evidence. The decisions of the Review Board on evidentiary matters shall be made in the interest of fairness and justice. Every party shall have a right to present its case or defense by witness testimony and documentary evidence. The Charging Party shall have the right of rebuttal. Both parties shall have the right to present a brief summation and/or closing argument.

c. Written statements pertaining to the allegation of discrimination must be in the form of sworn affidavits. Evidence in the form of written affidavit(s) shall be served upon the other party and the Department at least two (2) work days prior to the hearing.

d. Each witness shall be subject to direct examination by the party offering the testimony and shall be subject to cross-examination by all other parties, and by members of the Review Board.

e. The Review Board, at its discretion, shall exclude irrelevant, immaterial, insubstantial and cumulative evidence. The Review Board may limit testimony which it deems to be repetitive, irrelevant or cumulative.

#### 4.5 The Order of the Hearing

a. The Charging Party shall go first and the Respondent shall follow in each stage of the proceedings. Charging Party shall have the right of brief rebuttal after Respondent's presentation. The following shall be the order of presentation for a hearing before the Review Board: opening statements; evidence in support of or in opposition to the complaint or defense; closing arguments;

post-hearing applications; deliberation and vote by the Review Board; and adjournment.

b. The Review Board issues its formal decision in writing within a reasonable time after the conclusion of the hearing. A decision shall not be considered final for purposes of enforcement of appeal until the Review Board issues its formal decision in writing.

#### 4.6 Applicability of Other Laws

These rules incorporate by reference applicable provisions of the Freedom of Information Act, 29 Del.C. §§ 10001 et seq., and the Administrative Procedures Act, 29 Del.C. §§ 10101 et seq. to which the Review Board shall adhere.

### V. DECISION OF THE REVIEW BOARD

#### 5.1 Decision of Equal Employment Review Board

Upon consideration of the evidence presented at the hearing, the Equal Employment Review Board shall state its findings and conclusions to the parties involved.

a. Every decision by the Review Board shall include, where appropriate:

1. The statutory authority under which the Review Board is acting;
2. A summary of the allegations;
3. A brief summary of the evidence;
4. Findings of fact based on the evidence presented to the Review Board;
5. Conclusions of law;
6. Any other conclusions required by law and/or regulations of the Review Board; and
7. A concise statement of the Review Board's determination or action on the case.

b. The decision shall be signed by a quorum of the members of the Review Board.

c. Every final order shall be mailed to each party by the Administrator of the Office of Labor Law Enforcement.

#### 5.2 Contents of the Decision

If the Review Board finds that the Respondent has engaged in an unlawful employment practice, the Review Board shall state its findings of fact in writing. The Review Board shall issue and cause to be served on the Respondent and the Charging Party an order providing for such relief as shall be permitted by law. Such order shall provide any and all relief which the review Board is empowered to grant in order to remedy the unlawful employment practice which includes:

1. Awarding the Charging Party back wages;
2. Reinstatement or hiring of Charging Party with or without back pay to be paid by Respondent;
3. Requiring the Respondent to cease and desist from its unlawful employment practice;

4. Such other affirmative action as will effectuate the policies of the law; and

5. The Review Board's order may also require the Respondent to make reports from time to time showing the extent of compliance with the order.

### 5.3 Interim Earnings

If Charging Party is awarded back pay, the Charging Party's interim earnings, or amounts earnable with reasonable diligence by the Charging Party shall operate to reduce the total allowable back pay.

### 5.4 Dismissal

If the Review Board finds that the respondent has not engaged in any unlawful employment practice, the Review Board shall state its findings of fact in writing and shall issue and cause to be served to all the parties, an order dismissing the complaint.

## VI. APPEAL

### 6.1 Appeal

a. Any party taking the appeal shall serve written notice of the appeal upon the other parties to the action and to the Review Board; shall file written directions for transcription of the record; and shall make such deposit for the cost thereof as shall be determined by the Administrative officer of the Review Board. The rules for processing the appeal shall be as prescribed by the court which shall hear the appeal.

b. The cost of any transcript of the record required by the Court on review or appeal of a decision by the Review Board, shall be borne by the party seeking the review or appeal, in such amount as shall be determined by the Administrative Officer of the Review Board.

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## **DELAWARE HARNESS RACING COMMISSION**

Statutory Authority: 3 Delaware Code,  
Section 10027 (3 **Del.C.** 10027)

A public hearing was held on August 22, 1997 to consider proposed rule amendments. It was decided to renounce the following proposed rule amendments pursuant to 29 **Del.C.** §10118(c).

The Commission proposes these amendments pursuant to 3 Del. C. section 10027 and 29 Del. C. section 10115. The proposed Rule amendments are as follows:

1. Amendment to Chapter VII, Rule VI-M-15 to revise the definition of improper whipping and discretionary penalties for violations.

2. Amendment to Chapter VII, Rule VI-M-18 to allow for racing officials to inspect horses after each race for any evidence of excessive whipping.

3. Amendment to Chapter VIII, Rule III-C-3(c) by adding language to the existing definition of "prohibited substance." The proposed amendment specifies the illegal carbon dioxide level for horses racing with and without furosemide. The proposed rule would also allow for a procedure for a licensee to prove that a horse has a naturally high carbon dioxide level.

The Commission will consider written comments from the public on these proposed Rules until November 30, 1997, pursuant to 29 Del. C. section 10115(a)(2). Copies of the proposed rule may be obtained from the Commission. Comments may be submitted in writing to the Commission office on or before 4:00 p.m. on November 30, 1997. The Commission Office is located at 2320 South DuPont Highway, Dover, DE 19901 and the phone number is (302)739-4811.

### **PROPOSED CHANGES TO DELAWARE HARNESS RACING COMMISSION RULES**

The following changes follow the 1997 Bylaws Rules and Regulations changes adopted by the United States Trotting Association effective May 1, 1997, and are proposed by the Delaware Harness Racing Commission in accordance with 3 Del. C. section 10027:

1. Amend Chapter VII, Rule VI.M.14, by adding the following additional paragraph:

## PROPOSED REGULATIONS

“The use of the whip shall be confined to an area above and between the sulky shafts and the outside wheel discs. Drivers shall keep a line in each hand from the start of the race until the head of the stretch finishing the race.”

The following is taken from the Order following the public hearing of August 22, 1997.

“8. As to proposed amendment #9, the Commission proposed to amend chapter VII, rule VI.M.14. This amendment would specify the basis for whipping violations and impose mandatory penalties. The Commission agrees with the public comments that the imposition of mandatory fines and suspensions is ill-advised. The judges have discretion over all other driving offenses and should have the same discretion for whipping offenses. Therefore, the Commission will delete the second paragraph of the proposed rules which mandated minimum penalties.”

2. Amend Chapter VII, Rule VI.M.18, by adding the following at the end of the rule:

“At extended pari-mutuel meetings, under the supervision of the judges, there may be a visual inspection of each horse following each race for evidence of excessive or brutal use of the whip. At all other meetings, the judges shall have the authority to order and/or to conduct such visual inspections at their discretion.”

The following is taken from the Order following the public hearing of August 22, 1997.

“9. As to proposed amendment #10, the Commission proposed to amend chapter VII, rule VI.M.18. This amendment would require mandatory inspections of each horse after each race for evidence of excessive whipping. The Commission finds that the word ‘shall’ in this rule should be changed to ‘may’ to provide for some discretion in inspections.”

### M. Conduct of the Race

14. Drivers will be allowed to use whips not to exceed three feet, nine inches in length plus a snapper not to exceed six inches in length.

The use of the whip shall be confined to an area above and between the sulky shafts and the outside wheel discs. Drivers shall keep a line in each hand from the start of the race until the head of the stretch finishing the race.

~~**The mandatory minimum penalty for a whipping violation, including a violation of subsections 18 and 19 of this section, shall be a fine in the amount of \$100.00 and a 3-day suspension from driving for a first offense, and for each subsequent violation the mandatory minimum penalty shall increase by the amount of \$100.00 and 3**~~

~~**additional days of suspension (e.g., \$200.00 and a 6-day suspension for a second offense, \$300.00 and a 9-day suspension for a third offense, etc.)**~~

15. The use of any goading device, or chain, or spur, or mechanical or electrical device other than a whip as allowed in the rules, upon any horse, shall constitute a violation.

16. The possession of any mechanical or electrical goading device on the grounds of an association shall constitute a violation.

17. The judges shall have the authority to disallow the use of any equipment or harness that they feel is unsafe or not in the best interests of racing.

18. Brutal or excessive or indiscriminate use of a whip, or striking a horse with the butt end of a whip, or striking a wheel disc of a sulky with a whip, shall be a violation. At extended pari-mutuel meetings, under the supervision of the judges, there shall [may] be a mandatory visual inspection of each horse following each race for evidence of excessive or brutal use of the whip. At all other meetings, the judges shall have the authority to order and/or to conduct such visual inspections at their discretion.

3. Amend Chapter VIII, Rule III.C.3(c), by adding the following to the existing rule:

“3. A finding by the official chemist of a prohibited drug, chemical or other substance in a test specimen of a horse is prima facie evidence that the prohibited drug, chemical or other substance was administered to the horse and, in the case of a post-race test, was present in the horse’s body while it was participating in a race. Prohibited substances include:

c) substances present in the horse in excess of levels at which such substances could occur naturally, and such prohibited substances shall include a total carbon dioxide level of 37 mmol/L of serum in a submitted blood sample from a horse or 39 mmol/L of serum from a horse which has been administered furosemide in compliance with these rules, provided that a licensee has the right, pursuant to procedures to be established by the Commission, to attempt to prove that a horse has a naturally high carbon dioxide level in excess of the above mentioned levels.”

The following is taken from the Order following the public hearing of August 22, 1997.

“12. As to proposed amendment #18, the Commission proposed to amend chapter VIII, rule III.C.3. this amendment would add language to the existing definition of ‘prohibited substance.’ The proposed amendment specifies the illegal carbon dioxide level for horses racing with and without furosemide. The Commission received

comments opposing the use of blood gas testing unless a fair procedure was employed. The Commission finds the existing rule is necessary but will, in response to the public comments, will add the following phrase to the end of the proposed rule:

‘provided that a licensee has the right, pursuant to procedures to be established by the Commission, to attempt to prove that a horse has a naturally high carbon dioxide level in excess of the above-mentioned levels.’

C. Medication Restrictions

1. Drugs or medications in horses are permissible, provided:

a) the drug or medication is listed by the Association of Racing Commissioners International’s Drug Testing and Quality Assurance Program; and

b) the maximum permissible urine or blood concentration of the drug or medication does not exceed the published limit.

2. Except as otherwise provided by this chapter, a person may not administer or cause to be administered by any means to a horse a prohibited drug, medication, chemical or other substance, including any restricted medication pursuant to this chapter during the 48-hour period before post time for the race in which the horse is entered. Such administration shall result in the horse being scratched from the race and may result in disciplinary actions being taken.

3. A finding by the official chemist of a prohibited drug, chemical or other substance in a test specimen of a horse is prima facie evidence that the prohibited drug, chemical or other substance was administered to the horse and, in the case of a post-race test, was present in the horse’s body while it was participating in a race. Prohibited substances include:

a) drugs or medications for which no acceptable levels have been established;

b) therapeutic medications in excess of established acceptable levels;

c) substances present in the horse in excess of levels at which such substances could occur naturally and such prohibited substances shall include a total carbon dioxide level of 37 mmol/L or serum in a submitted blood sample from a horse or 39 mmol/L if serum from a horse which has been administered furosemide in compliance with these rules, [provided that a licensee has the right, pursuant to procedures to be established by the Commission, to attempt to prove that a horse has a naturally high carbon dioxide level in excess of the above-mentioned levels]; and

d) substances foreign to a horse at levels that cause interference with testing procedures.

4. The tubing, dosing or jugging of any horse for any reason within 24 hours prior to its scheduled race is prohibited unless administered for medical emergency purposes by a

licensed veterinarian, in which case the horse shall be scratched. The practice of administration of any substance via a naso-gastric tube or dose syringe into a horse’s stomach within 24 hours prior to its scheduled race is considered a violation of these rules and subject to disciplinary action, which may include fine, suspension and revocation of license.

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DEPARTMENT OF  
ADMINISTRATIVE SERVICES

DIVISION OF ADMINISTRATIVE SERVICES

BOARD OF DENTAL EXAMINERS

Statutory Authority: 24 Delaware Code,  
Section 1105(a)(1), (24 Del.C. 1105(a)(1))

PROPOSED REGULATIONS

These regulations are intended to implement and further the objectives of the Board as specified in 24 Del. C. Section 1100. Specifically, these regulations are proposed to promote public health and safety, and no exemptions are proposed under Chapter 104 of Title 29.

PURPOSE: These regulations repeal the existing anesthesia regulations found in Section 7 of the Board’s Rules and Regulations and replace them with a new Section 7 Anesthesia Regulations.

The comment for the repeal of the old Section 7 “Anesthesia Regulations” and their replacement with the new Section 7 “Anesthesia Regulations” ends on December 2, 1997. Written comments should be addressed to Gayle Franzolino, Division of Professional Regulation, Cannon Building, Suite 203, P. O. Box 1401, Dover, Delaware 19903.

The public hearing to discuss the proposed repeal of the old Section 7 “Anesthesia Regulations” and the adoption of the new Section 7 “Anesthesia Regulations” will be held on Tuesday, December 2, 1997 at 6:00 p.m. in the Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, Delaware.

7. ANESTHESIA REGULATIONS: (Proposed to be Revoked)

~~1. DEFINITIONS: The following definitions are taken from the GUIDELINES FOR TEACHING THE COMPREHENSIVE CONTROL OF PAIN AND ANXIETY IN DENTISTRY (November 1985). These terms~~

## PROPOSED REGULATIONS

refer to the extent of a drug's depressant effect upon the central nervous system and should not be confused with the route by which the drug is administered.

A. Analgesia -- the diminution or elimination of pain in the conscious patient through the use of drugs that act on the central nervous system:

B. Local Anesthesia -- the diminution or elimination of pain through the use of injected or topically applied drugs that act on peripheral nerves to produce neural blockade.

C. Conscious Sedation -- a minimally depressed level of consciousness. (For the purpose of these regulations, consciousness will be defined as a state in which the patient is capable of rational response to command and has all protective reflexes intact, including the ability to maintain his own airway in a patent state.)

For purposes of these regulations, conscious sedation shall be divided into two classifications:

Class A -- conscious sedation induced by parenteral or rectal routes. This is not to include the usual and customary pre-operative sedation.

Class B -- conscious sedation induced by nitrous oxide inhalation analgesia:

D. Deep Sedation -- a controlled state of depressed consciousness, accompanied by partial loss of protective reflexes, including inability to respond purposefully to verbal command, produced by a pharmacologic or non-pharmacologic method, or a combination thereof.

E. General Anesthesia -- a controlled state of unconsciousness accompanied by partial, or complete loss of protective reflexes, including inability to independently maintain an airway and respond purposefully to physical stimulation or verbal command, produced by a pharmacologic or non-pharmacologic method, or a combination thereof.

F. Adverse Occurrences -- any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during, or as a direct result of, the conscious sedation or general anesthesia related thereto.

H. Conscious Sedation:

A. No dentist shall employ or use conscious sedation, Class A or Class B., for dental patients unless such dentist

possesses a Permit of Authorization issued by the Delaware State Board of Dental Examiners ("Board"). The dentist holding such a Permit shall be subject to review and such Permit must be renewed biennially.

B. In order to receive such a Permit, the dentist shall produce evidence show that he/she:

1. For Class A Conscious Sedation:

(a) Has completed a minimum of 60 hours of instruction, including management of at least 10 patients per participant (to achieve competency in this technique).

(b) Must also be certified in CPR as documented by the American Heart Association or the American Red Cross.

(c) Must also have a properly equipped facility for the administration of Class A conscious sedation, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the team may be determined by the constants appointed by the Board. A list of emergency drugs and equipment that should be on hand would consist of the following:

(A) Agents capable of treating:

(1) hypotension and bradycardia

(2) allergy/bronchospasm

(3) seizures

(4) narcotic-induced respiratory depression, e.g., narcotic antagonists

(5) angina pectoris

(6) adrenal insufficiency, e.g. steroids

(7) nausea

(B) Equipment necessary to provide artificial respiration and assist in airway maintenance not including endotracheal intubation.

(C) Equipment necessary to establish an intravenous infusion and to inject medications.

2. For Class B Conscious Sedation:

a. Has completed a minimum of 8 instructional hours including supervised clinical experience in managing patients (in a course required to achieve competency in nitrous oxide inhalation sedation).

b. Must also show certification in CPR as certified by the American Heart Association or the American Red Cross.

III. Deep Sedation and General Anesthesia:

A. No dentist shall employ or use deep sedation or general

anesthesia for his/her dental patients unless such dentist possesses a Permit of Authorization issued from the Board.

B. In order to receive such a Permit, the dentist must produce evidence that he/she:

1. Has completed a minimum of one year of advanced training in anesthesiology and related academic subjects (or its equivalent) beyond the undergraduate dental school level in a training program as described in Part II of the Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry or; is a Diplomate of the American Board of Oral and Maxillofacial Surgeons, or has satisfactorily completed a residency in oral and maxillofacial surgery at an institution approved the Council of Dental Education, American Dental Association, or is a fellow of the American Dental Society of Anesthesiology; or employs or works in conjunction with a trained M.D. or D.O. who is a member of the anesthesiology staff of an accredited hospital, provided that such anesthesiologist must remain on the premises of the dental facility until any patient given a general anesthetic or deep sedation regains consciousness.

2. Has a properly equipped facility for the administration of deep sedation and general anesthesia, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the anesthesia team may be determined by the consultant appointed by the Board and who is certified in CPR, as documented by the American Heart Association or the American Red Cross.

#### IV. Facility and Staff Requirements:

A. Prior to the issuance of a Permit for Class A Conscious Sedation or Deep Sedation or General Anesthesia, the Board shall require an on-sit inspection of the facility, equipment and personnel to determine if in fact, the aforementioned requirements have been met. The evaluation shall be carried out by a team of consultants appointed by the Board.

#### B. Advisory Committee:

1. The Board shall appoint a team of Advisory Consultants and alternates who will visit the facility concurrently to conduct the on-site inspection and evaluation of the facilities, equipment and personnel of a licensed dentist applying for written authorization to administer or to employ another to administer Class A Sedation, Deep Sedation or General Anesthesia. The Advisory Consultants shall also aid the Board in the adoption of

criteria and standards relative to the regulation and control of Conscious Sedation, Deep Sedation and General Anesthesia. If the applicant has been satisfactorily evaluated by another, similar organization, e.g., the Delaware Society of Oral and Maxillofacial Surgeons, which uses the AAOMS Office Anesthesia Evaluation Manual Standards, then the Board may accept this evaluation and not require additional on-site evaluation.

2. If the results of the initial evaluation of an applicant are deemed unsatisfactory, upon written request of the applicant, a second evaluation shall be conducted by a different team of consultants.

3. Re-evaluation -- The Board may at any time re-evaluate credentials, facilities, equipment, personnel and procedures of a licensed dentist who has previously received a written authorization or Permit from the Board to determine if he/she is still qualified to have such written authorization. If the Board determines that the licensed dentist is no longer qualified to have such written authorization, it may revoke or refuse to renew such authorization, after an opportunity for a hearing has been given to the licensed dentist.

#### V. Applications:

A. Submittal of form, fee and documented evidence of requirements:

B. For new applicants who are otherwise properly qualified, a temporary, provisional Permit of one year in duration, may be granted by the Board based solely upon the credentials contained in the application pending complete processing of the application and thorough investigation via an on-sit evaluation as described therein. THIS IS NOT RENEWABLE.

C. Each dentist who has been using or employing Class A Sedation, Deep Sedation or General Anesthesia prior to adoption of these rules, shall make application on the prescribed form to the Board within one year of the effective date of these rules, if such dentist desires to continue to use or employ Class A Conscious Sedation, Deep Sedation or General Anesthesia. If he/she meets the requirements of these rules as herein outlined, he/she shall be issued such a Permit. An on-sit evaluation of the facilities and personnel shall be required prior to the issuance of such Permit.

#### VI. Report of Adverse Occurrences:

A. All licensed dentists engaged in the practice of dentistry in the State of Delaware must submit a complete report

## PROPOSED REGULATIONS

within a period of 30 days to the Board of any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during or as a direct result of, the conscious sedation or general anesthesia related thereto.

B. Failure to comply with this rule when said occurrence related to the use of conscious sedation or general anesthesia may result in the loss of such Permit described above.

### 7. ANESTHESIA REGULATIONS: (Proposed to be Adopted)

#### I. Definitions:

The following definitions are taken from the GUIDELINES FOR TEACHING THE COMPREHENSIVE CONTROL OF PAIN AND ANXIETY IN DENTISTRY, American Dental Association, Council on Dental Education (July 1993). These terms refer to the extent of a drug's depressant effect upon the central nervous system and should not be confused with the route by which the drug is administered.

A. Analgesia -- the diminution or elimination of pain in the conscious patient.

B. Local Anesthesia -- the elimination of sensations, especially pain, in one part of the body by the topical application or regional injection of a drug.

C. Conscious Sedation -- a minimally depressed level of consciousness that retains the patients ability to independently and continuously maintain an airway and respond appropriately to physical stimulation and verbal command and that is produced by a pharmacologic or non-pharmacologic method or a combination thereof.

In accord with this definition, the conscious patient is also defined as "one who has intact protective reflexes, including the ability to maintain an airway, and who is capable of rational response to question or command." The drugs and techniques used should carry a margin of safety wide enough to render unintended loss of consciousness unlikely.

For purposes of these regulations, Conscious Sedation Permits shall be divided into two classifications:

Restricted Permit I -- Conscious Sedation induced by parenteral or enteral or rectal routes. This is not to include the usual and customary pre-operative oral sedation.

Restricted Permit II -- Conscious Sedation induced by nitrous oxide inhalation.

D. Deep Sedation -- is a controlled state of depressed consciousness accompanied by partial loss of protective

reflexes, including the inability to continually maintain an airway independently and/or to respond purposefully to verbal command, and is produced by a pharmacologic or non-pharmacologic method or combination thereof.

E. General Anesthesia -- is a controlled state of unconsciousness accompanied by partial or complete loss of protective reflexes, including inability to independently maintain an airway and respond purposefully to physical stimulation or verbal command, and is produced by a pharmacologic or non-pharmacologic method or a combination thereof.

The same level of advanced training is necessary for the administration of both Deep Sedation and General Anesthesia.

F. Adverse Occurrences -- any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during, or as a direct result of, the conscious sedation, or deep sedation, or general anesthesia related thereto.

#### II. Conscious Sedation:

A. No dentist shall employ or use Conscious Sedation, Restricted Permit I or Restricted Permit II, for dental patients unless such dentist possesses a permit of authorization issued by the Delaware State Board of Dental Examiners. The dentist holding such a permit shall be subject to review and such permit must be renewed biennially.

B. In order to receive such a permit, the dentist shall produce evidence showing that he or she:

##### 1. For Restricted Permit I Conscious Sedation:

a. Has completed a minimum of 60 hours of instruction, including management of at least 20 patients per participant (to achieve competency in this technique).

b. Must be certified in CPR as documented by the American Heart Assn. or the American Red Cross Advanced Cardiac Life Support Certification is encouraged.

c. Must also have a properly equipped facility for the administration of Restricted Permit I Conscious Sedation, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the team is to be determined by the Anesthesia Advisory Consultants appointed by the Board. A certified registered nurse anesthetist may be utilized for Restricted Permit I Conscious Sedation only if the dentist also possesses such a permit.

A list of emergency drugs and equipment that should be on hand would consist of the following:

##### (A) Agents capable of treating:

(1) hypotension and bradycardia



(2) allergy/bronchospasm  
(3) seizures  
(4) narcotic-induced respiratory depression (e.g., narcotic antagonists)  
(5) angina pectoris  
(6) adrenal insufficiency (e.g., steroids)

(7) nausea  
(B) Equipment necessary to provide artificial respiration and assist in airway maintenance.

(C) Equipment necessary to establish an intravenous infusion and to inject medications.

2. For Restricted Permit II Conscious Sedation:

a. Has completed a minimum of 14 instructional hours including supervised clinical experience in managing patients (in a course required to achieve competency in nitrous oxide inhalation sedation).

b. Must also show certification in cardiopulmonary resuscitation as certified by the American Heart Association or the American Red Cross.

III. Deep Sedation and General Anesthesia (Unrestricted Permit):

A. No dentist shall employ or use deep sedation or general anesthesia for his or her dental patients unless such dentist possesses a permit of authorization issued from the Delaware State Board of Dental Examiners. This permit also includes all Conscious Sedation techniques. The dentist holding such a permit shall be subject to review and such permit must be renewed biennially.

B. In order to receive such a permit, the dentist must produce evidence showing that he or she:

1. Has completed a minimum of two years of advanced training in anesthesiology and related academic subjects (or its equivalent) beyond the undergraduate dental school level in a training program as described in Part II of the Guidelines For Teaching The Comprehensive Control of Pain and Anxiety in Dentistry or, is a Diplomat of the American Board of Oral and Maxillofacial Surgeons, or has satisfactorily completed a residency in Oral and Maxillofacial Surgery at an institution approved by the Council of Dental Education, American Dental Association, or is a fellow of the American Dental Society of Anesthesiology, or employs or works in conjunction with a trained M.D. or D.O. who is a member of The Anesthesiology staff of an accredited hospital, provided that such anesthesiologist must remain on the premises of the dental facility until any patient given a general anesthetic or deep sedation regains consciousness. A certified registered nurse anesthetist may be utilized for deep sedation or general anesthesia only if the dentist also possesses an Unrestricted Permit.

2. Has a properly equipped facility for the

administration of deep sedation and general anesthesia, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the anesthesia team is determined by the Anesthesia Advisory Committee Consultants appointed by Delaware State Board of Dental Examiners.

3. And is certified in Advanced Cardiac Life Support by the American Heart Association.

IV. Facility and Staff Requirements:

A. Inspections: Prior to the issuance of a permit for Restricted Permit I (parenteral, enteral, or rectal Conscious Sedation) or an Unrestricted Permit (Deep Sedation or General Anesthesia), the Board shall require an on site inspection of the facility, equipment and personnel to determine if, in fact, the aforementioned requirements have been met. The evaluation shall be carried out in a manner described by the Board. The evaluation shall be carried out by the Anesthesia Advisory Consultants appointed by the Board. Each office that the dentist utilizes for Restricted Permit I Conscious Sedation or Deep Sedation or General Anesthesia requires individual inspection and must meet the requirements of that permit for which the dentist is applying.

B. Anesthesia Advisory Consultants:

1. The Board of Dental Examiners shall appoint a team of Advisory Consultants and alternates who will visit the facility concurrently to conduct the on-site inspection and evaluation of the facilities, equipment and personnel of a licensed dentist applying for written authorization to administer or to employ another to administer Restricted Permit I Conscious Sedation, or Deep Sedation or General Anesthesia (Unrestricted Permit). The Advisory Consultants shall also aid the Board in the adoption of criteria and standards relative to the regulation and control of Conscious Sedation, Deep Sedation and General Anesthesia. If the applicant has been satisfactorily evaluated by another similar organization (e.g., the Delaware Society of Oral and Maxillofacial Surgeons which uses the AAOMS Office Anesthesia Evaluation Manual Standards), then the Board may accept this evaluation and not require additional on-site evaluation.

2. If the results of the initial evaluation of an applicant are deemed unsatisfactory, upon written request of the applicant, a second evaluation shall be conducted by a different team of consultants.

C. Re-evaluation: The Board may at any time re-evaluate credentials, facilities, equipment, personnel and procedures of a licensed dentist who has previously received a written authorization or permit from the Board to determine if he or she is still qualified to have such written authorization. If the Board determines that the

licensed dentist is no longer qualified to have such written authorization, it may revoke or refuse to renew such authorization, after an opportunity for a hearing is given to the licensed dentist.

**V. Report of Adverse Occurrences:**

A. All licensed dentists engaged in the practice of dentistry in the State of Delaware must submit a complete report within a period of thirty (30) days to the Delaware State Board of Dental Examiners of any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during, or as a direct result of, the Conscious Sedation or Deep Sedation or General Anesthesia related thereto.

B. Failure to comply with this rule when said occurrence is related to the use of Conscious Sedation or Deep Sedation or General Anesthesia may result in the loss of such permit described above, and will be considered unprofessional conduct.

**VI. Applications and Reapplications:**

A. A dentist who desires to obtain a permit to administer Conscious Sedation, Deep Sedation, or General Anesthesia shall submit an application on the form provided by the Board, pay the permit fee, and meet the requirements for the permit described herein.

B. A dentist who desires to renew a permit shall submit a renewal application on the form provided by the Board and pay the permit renewal fee. Re-inspection of the facility, equipment, and staff shall not be necessary unless new techniques or criteria arise, as determined by the Board with the aid of the Anesthesia Advisory Committee.

C. A permit issued by the Board under these regulations will expire at the same time as the permit holder's dental license and may be renewed biennially at the same time as the dental license is renewed.

## **INDUSTRIAL ACCIDENT BOARD**

Statutory Authority 19 Delaware Code,  
Section 2121 (19 Del.C. 2121)

**Notice of proposed rule changes.**

**Summary:**

The Industrial Accident Board proposes to adopt or amend Rule nos. 2,3, 6, 9,12, 25, 26, 27, and 28 at its regular meeting on Dec. 10 1997 at 11:00 at the Hearing Room of the Board, First Federal Plaza, 710 King Street, Wilmington, DE.

The changes in Board Rule 2, 6, and 25 relating to a quorum, the Secretary of the Board, and the Second Injury and Contingency Fund are indicated because of the adoption of the Worker's Compensation Improvement Act effective December 24, 1997. The change in Rule 3 will increase administrative efficiency by increasing the use of the IAB number in correspondence. The change in Board Rule 9 is intended to improve the pre-trial process in insure timely filing of the pre-trial memorandum identifying and narrowing issues. The addition to Board Rule 12 will insure that the Board is able to approve continuance requests when required to insure due process. Current rule 26 is being replaced to implement an efficient mechanism for those who are eligible for a expedited hearing. New Board Rule 27 officially adopts the unofficial practice on motion day of handling certain procedural matters with orders prepared by the parties. Finally, the addition of Board Rule 28 clarifies what issues may be raised in the pre-trial proceedings by letter amendment to the pre-trial memorandum and what must be added by separate petition.

**Comments :**

Copies of the proposed rules are published in the Delaware Register of Regulations and are on file at the Department of Labor, Division of Industrial Affairs, 4425 Market St., Wilmington, DE 19802 for inspection during regular hours. Copies are available upon request. Interested persons may submit comments in writing at before December 2, 1997 to the Industrial Accident Board c/o the Division of Industrial Affairs.

**Public hearing:**

A public hearing on the changes will be held during the regular meeting of the Industrial Accident Board at 11:00 a.m. on December 10, 1997 at the Hearing Room of the Board, First Federal Plaza, 710 King St.,

Wilmington, DE. where interested persons can present their views.

Text of current rule and proposed change:

*Current Rule 2. Sessions*

(A) Regular meetings of the Board for the transaction of its business will be held during the normal work week at its office in Wilmington at such times as may be set upon notice by the Board.

(B) Special sessions of the Board for the transaction of business may be held at any time and place in the State of Delaware as may be scheduled by the Board.

(C) Two members of the Board shall constitute a quorum for the transaction of business, and a decision or award by a quorum shall be valid.

(D) Procedural matters arising prior or subsequent to a hearing may be decided by one member of the Board.

*Proposed Rule 2. Sessions*

(A) Regular meetings of the Board for the transaction of its business will be held during the normal work week at its office in Wilmington at such times as may be set upon notice by the Board.

(B) Special sessions of the Board for the transaction of business may be held at any time and place in the State of Delaware as may be scheduled by the Board with notice as provided by law.

(C) and (D) omitted

*Current Rule No. 3. The Secretary: Filing of Papers*

(A) The Secretary shall have custody of the Board's seal and official records, and shall be responsible for the maintenance and custody of the docket, files and records of the Board, including the transcripts of testimony and exhibits with all tapes and requests filed in proceedings, the minutes of all action taken by the Board, and of its findings, determinations, reports, opinions, orders, rules, regulations and approved forms.

(B) All orders and other actions of the Board shall be authenticated or signed by the Secretary or such other person as may be authorized by the Board.

(C) All pleadings or papers required to be filed with the Board shall be filed in the office of the Board in

Wilmington, within the time limit, if any, fixed by law or Board rule for such filing; and similarly all requests for official information, copies of official records, or opportunity to inspect public records shall be made to the Secretary of the Board.

(D) Communications addressed to the Board and all petitions, and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents, received or filed in the office kept by the Secretary, shall be stamped showing the date of the receipt of filing thereof.

*Proposed Rule No. 3. The Administrator of the Office of Workers' Compensation: Filing of Papers*

(A) The Administrator of the Office of Worker's Compensation shall have custody of the Board's seal and official records, and shall be responsible for the maintenance and custody of the docket, files and records of the Board, including the transcripts of the testimony and exhibits with all papers and requests filed in proceedings, the minutes of all action taken by the Board, and of its findings, determinations, reports, opinions, orders, rules, regulations and approved forms.

(B) All orders and other actions of the Board shall be authenticated or signed by the Administrator of the Office of Workers' Compensation or such person as may be authorized by the Board.

(C) All pleadings or papers required to be filed with the Board shall be filed in the office of the Board at Wilmington or other location designated for that purpose, within the time limit, if any, fixed by law or Board rule for such filing; and similarly all requests for official information, copies of official records, or opportunity to inspect public records shall be made to the Administrator of the Office of Workers' Compensation. All communication after the Petition to Determine Compensation Due is filed shall contain the assigned IAB file number.

(D) Communications addressed to the Board and all petitions, and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents, received or filed in the office kept by the Administrator of the Office of Workers' Compensation, shall be stamped showing the date of the receipt of filing thereof.

*Current Rule 6. Formal Pleadings not required*

(A) No formal pleadings or formal statement of claim or

formal answer shall be required of any parties to any action before the Board, but each person making written request for a hearing shall file with the Secretary of the Board, on forms to be furnished by the Board, a statement giving substantially the information requested on said forms.

(B) If, during the progress of any hearing, it shall appear to the Board that persons other than those named or referred to in the claim petition are, or may be entitled to, or liable to, pay compensation, the Board may inquire into and ascertain their rights and liabilities of such parties at an adjourned hearing of said case upon due notice to all such parties in interest. After the rights of all parties are determined, the Board may amend the title of the cause in such manner as may be right and proper.

*Proposed Rule 6 Formal Pleadings not required*

(A) No formal pleadings or formal statement of claim or formal answer shall be required of any parties to any action before the Board, but each person making written request for a hearing shall file with the Administrator of the Office of Workers' Compensation, on forms to be furnished by their Board, a statement giving substantially the information requested on said forms.

(B) If, during the progress of any hearing, it shall appear to the Board that persons other than those named or referred to in the claim petition are, or may be entitled to, or liable to, pay compensation, the Board may inquire into and ascertain the rights and liabilities of such parties at an adjourned hearing of said case upon due notice to all such parties in interest. After the rights of all parties are determined, the Board may amend the title of the cause in such manner as may be right and proper.

*Proposed Rule 9 (I)*

(I) The pre-trial conference shall be held on a date not later than 30 days after the date of filing of the petition at issue. In the event that the pre-trial memorandum has not yet been filed with the Board, the Board shall issue an order compelling the submission of the pre-trial memorandum by a date certain, not to exceed 30 days.

*Current Rule 12. Request for Continuance*

(A) Continuance

(1) Before hearing:

a) Prior to 10 days before hearing:

Requests for continuance may be granted in the discretion of the Industrial Accident Board Scheduling Officer upon good cause being shown by the party requesting the continuance. Good cause shall be found

when and only when 1) a medical or other material witness shall be unavailable on the date for which the hearing has been scheduled and the taking of said witness' deposition is not feasible; 2) an attorney for a party shall be unavailable due to an unintended conflicting court appearance; 3) illness of a party, a party's attorney, or of a medical or other material witness; 4) an unexpected absence from the State of a party, a party's attorney, or of a medical or other material witness. Said requests shall be in writing and shall set forth the facts upon which the request is based. Requests for continuances shall not be routinely granted.

b) Requests for continuances shall be granted in the discretion of a member of the Industrial Accident Board upon good cause being shown by the party requesting the continuance. Except as provided below, every request for a continuance upon the ground of absence of or unavailability of a medical witness or other material witness shall be filed in writing with notice to the opposing party and shall be accompanied by an affidavit on behalf of the party applying therefore, setting forth the facts which he expects to prove by such witness, the efforts made to procure his attendance, and the date when the absence or unavailability of the witness became known. If it be stipulated by the opposite party, that the witness if called would testify as set forth in the affidavit, the Board member in his discretion, may refuse the request, and under such circumstances, the affidavit may be offered in evidence at the hearing. Requests for continuances based upon unexpected emergency services to be performed by a prospective medical witness need not be made in writing when such unexpected emergency service is brought to the attention of the party requesting the continuance within 3 days of the hearing date. Said request must nevertheless be ruled upon by a Board Member. The same requirement exists for any other emergency situation arising within 3 days of the hearing date. Notice must always be given to the opposite party. In all such cases, within 1 week after the Board receives notice of the request, the party requesting the continuance shall file with the Board an affidavit setting forth the facts upon which the oral request was based.

(2) During Hearing:

Continuances requested after the commencement of the hearing shall not be granted except in case of emergency, or to prevent a miscarriage of justice.

*Proposed Board Rule No. 12. Request for Continuance*

(A) Continuance

(1) Before Hearing:

a) Prior to 10 days before hearing:

Requests for continuances may be granted in the discretion of the Board Scheduling Officer upon good

cause being shown by the party requesting the continuance. Good cause shall be found when and only when 1) a medical or other material witness shall be unavailable on the date for which the hearing has been scheduled and the taking of said witness' deposition is not feasible; 2) an attorney for a party shall be unavailable due to an unintended conflicting court appearance; 3) illness of a party, a party's attorney, or of a medical or other material witness; 4) an unexpected absence from the State of a party, a party's attorney, or of a medical or other material witness. Said requests shall be in writing and shall set forth the facts upon which the request is based. Requests for continuances shall not be routinely granted.

b) Within 10 days before hearing:

Requests for continuances shall be granted in the discretion of a member of the Board upon good cause being shown by the party requesting the continuance. In addition to the reasons set forth in (1) a), good cause is shown if circumstances, including but not limited to the adequacy of notice, prevent a party from having a full and fair opportunity to be heard. Except as provided below, every request for a continuance upon the grounds of the absence of or unavailability of a medical or other material witness shall be filed in writing with notice to the opposing party and shall be accompanied by an affidavit on behalf of the party applying therefore, setting forth the facts which s/he expects to prove by such witness, the efforts made to procure the attendance, and the date when the absence or unavailability of the witness became known. If it be stipulated by the opposite party, that the witness if called would testify as set forth in the affidavit, the Board member in his/her discretion, may refuse the request, and under such circumstances, the affidavit may be offered in evidence at the hearing. Requests for continuances based upon unexpected emergency services to be performed by a prospective medical witness need not be made in writing when such unexpected emergency service is brought to the attention of the party requesting the continuance within 3 days of the hearing date. Said request must nevertheless be ruled upon by a Board member. The same requirement exists for any other emergency situation arising within 3 days of the hearing date. Notice must always be given to the opposite party. In all such cases, within 1 week after the Board receives notice of the request, the party requesting the continuance shall file with the Board an affidavit setting forth the facts upon which the oral request was based.

2) During Hearing:

Continuances requested after the commencement of the hearing shall not be granted except in cases of emergency, or to prevent a miscarriage of justice.

*Current Rule No. 25. Reimbursement from the Industrial*

*Accident Board Second Injury and Contingency Fund*

No petition of an employer or its insurance carrier for reimbursement from the Industrial Accident Board Second Injury and Contingency Fund as provided in 19 Del.C. Section 2327 will be accepted by the Board unless the employer or its insurance carrier first notify by certified mail the Deputy Attorney General assigned to the Industrial Accident Board, of its intention to seek reimbursement from said fund, and supply the Board with proof of compliance when its petition is filed. Any application for reimbursement from said fund shall be by petition with supporting medical documentation attached.

*Proposed Rule No. 25. Reimbursement from the Workers' Compensation Fund*

No petition of an employer or its insurance carrier for reimbursement from the Workers' Compensation Fund as provided in 19 Del. C. 2327 will be accepted by the Board unless the employer or its insurance carrier first notifies by certified mail the Deputy Attorney General assigned to defend said Fund, of its intention to seek reimbursement from said Fund, and supply the Board with proof of compliance when its petition is filed. Any application for reimbursement from said Fund shall be by petition with supporting medical documentation attached.

*Current Board Rule No. 26*

(A) If a claimant who is receiving no wages or benefits desires to have his petition heard at the earliest possible time, or is out of work without income or substantial income, he may file with his petition, or thereafter, a Request for Expedited Hearing, which shall state the grounds for the Request and shall be accompanied by the following:

(1) A copy of the Board's standard Pretrial Memorandum, filled out as completely as possible with regard to the claimant's case.

(2) A copy of a medical report, hospital record, or similar documentation, which fairly describes the nature of claimant's injury and disability and the cause thereof; if such documentation is unavailable, or incomplete, claimant shall submit a supplementary statement describing, to the best of his knowledge and understanding, the nature of his injury and disability and the cause thereof.

(3) A statement identifying : (a) the name and address of employer's insurer, if known; and (b) the name of the person, if known, who denied the claim and his office address and telephone number.

(B) Upon filing of a Request for Expedited Hearing, it shall be reviewed for completeness by a pretrial officer of

the Board. Unless substantially lacking in compliance with the requirements of (A), a copy of the Request and supporting papers shall promptly be sent, certified mail, return receipt requested, to the employer and its insurance carrier, if known, together with a copy of this Rule (or a resume of its requirements) and a notice as to the name and telephone number of the Board's pretrial officer handling the case.

If the filed Request does not fully comply with the requirements of (A), the pretrial officer may direct the claimant to submit further information or documentation before the Request will be sent to employer or its insurer, or the officer may direct claimant to submit the additional material directly to employer, its insurer, and the Board.

(C) Within five (5) business days after receipt of a Request for Expedited Hearing, employer or its insurer shall notify the designated pretrial officer by telephone, or by writing delivered within the allowed time, of the following:

(1) Whether the Request is opposed and, if so, the reasons therefor. If additional time for this decision is requested, the pretrial officer may, for good cause allow up to five (5) additional days, and shall notify claimant if this is done.

(2) The name and address of the lawyer who will represent it.

(3) The name and address of each physician or other expert being engaged to examine or test claimant and the dates of appointments. If additional time for scheduling appointments is requested, the pretrial officer may, for good cause, allow up to ten (10) additional days for submission of this information, and shall notify claimant if this is done.

(4) Whether a formal pretrial conference is requested.

(D) If a formal pretrial conference is requested, it shall be scheduled as promptly as practicable by the pretrial officer. Otherwise, the Pretrial Memorandum shall be completed, served on claimant, and filed with the Board within ten (10) business days after the deadline for the response under (C)(1).

(E) As soon as it is determined (by consent or by ruling) that a case will have an Expedited Hearing, the pretrial officer shall confer with the parties to set a date and time for hearing. Should it appear to the pretrial officer that undue delay is threatened, due to difficulty in securing pertinent records or a timely appointment for examination or other cause, the pretrial officer may endeavor to resolve the cause for delay by direct communication with any person responsible, and both parties shall cooperate in supporting efforts to secure an early hearing date. As soon as the pretrial officer is satisfied that all responsible efforts

to secure an early date have been completed, the officer shall schedule a hearing and notify both parties.

(F) If the Request for Expedited Hearing is opposed, or if a proposed hearing date is opposed, or if a postponement is sought, or if there is any other procedural dispute, the pretrial officer shall schedule a conference at the earliest practicable time before a Member of the Board, who shall hear the parties and determine the issues presented, including the establishment of appropriate terms and conditions and a hearing date. Ruling may be issued orally or in writing; if so direct, counsel for one of the parties shall prepare a form of order.

*Proposed Board Rule No. 26*

(A) A claimant who meets the criteria set forth below may request that the Board consider his/her petition on an expedited basis.

(B) In order to be eligible for an expedited hearing, the claimant must meet all of the following criteria:

(1) (S)he is not currently working and has no other sources of income.

(2) (S)he has been certified by a physician as totally disabled from engaging in any form of work activity.

(3) (S)he has filed the petition no later than 30 days after the period of total disability began or 30 days after the employer issued a denial of the claim for recurrence.

(4) (S)he has notified the employer and/or carrier of the claimed disability within 15 days of the date the same is alleged to have begun.

(C) A petition for an expedited hearing shall be filed with the following documents attached:

(1) A medical authorization fully executed by the claimant and appropriately witnessed.

(2) A copy of all disability certificates issued by a physician relating to the current period of disability alleged.

(3) A statement signed by the claimant and, if represented, his/her attorney certifying that a copy of all medical records of the claimant in the possession of the claimant and his/her attorney shall be produced to the employer's counsel with 5 days of notification of representation.

(4) A statement signed by the claimant listing all medical providers by whom (s)he has been treated in the 10 years preceding the filing of the petition at issue.

(5) An affidavit, duly executed by the claimant and subject to the penalties of perjury, that (s)he meets the criteria of (B) of this rule.

(6) A certification by counsel that (s)he has examined the claim and, in his/her opinion, the claim meets the

criteria for an expedited hearing, and further, that the claimant is prepared at this time to pursue his/her claim.

(7) An original pretrial memorandum, on the Board's standard form, completed with respect to the claimant's case.

(8) A copy of a cover letter to the carrier and/or carrier's counsel forwarding a courtesy copy of the petition and supporting documents or a written statement signed by the claimant and his/her counsel detailing the reasons prohibiting the forwarding of a courtesy copy of the petition.

(D) A petition requesting expedited relief shall clearly so state. All such petitions shall be reviewed for completeness by the pretrial officer. A petition failing to meet any of the criteria of (B) and (C) above, shall not be accepted for purposes of an expedited hearing. It shall, rather, be considered in the due course of Board scheduling.

(E) A petition meeting the criteria of the Subsections (B) and (C) above shall be sent to the carrier and/or self-insured employer either via fax and regular mail (if the carrier has previously been provided with a courtesy copy of the petition) or by certified mail, return receipt requested within 5 days of the filing of the petition, unless counsel has already entered an appearance on behalf of the carrier/employer.

(F) A petition meeting the criteria of (B) and (C) above shall be set for a pretrial conference not later than 10 days after its filing with the Board. Counsel of Record for the parties shall participate in the pretrial conference absent approval from the pretrial officer. Such approval shall be given only upon certification by Counsel of Record that the person participating in the conference shall be fully familiar with the claim and shall have the authority to schedule the hearing, coordinate witnesses and narrow the issues to be heard.

(G) A petition meeting the criteria of (B) and (C) above shall be scheduled for a hearing no later than 90 days from the date of the filing of the petition.

(H) The Board shall reserve 2 hearing times per month for the purposes of hearing cases meeting the criteria of (B) and (C) above.

(I) A party wishing to challenge the sufficiency of a petition for an expedited hearing shall do so at the time of the pretrial conference. Within 3 days thereafter, the party shall submit a written statement as to the basis for the challenge, including documentation of any medical records or facts upon which it relies. The ruling as to the sufficiency of the petition for an expedited hearing shall

be made in the first instance by the pretrial officer.

(J) Any party may seek reconsideration of the pretrial officer's determination as to the sufficiency of the petition for an expedited hearing. Such application for reconsideration shall be made to the Board at the first regularly scheduled motion day following the pretrial conference.

*Proposed Board Rule No. 27*

(A) Any party seeking relief from the Industrial Accident Board on any of the matters listed below shall present the Board with a proposed form of order, suitable for immediate signatures by the Board member(s) hearing the request for relief. This rule shall apply to:

(1) Motions to compel production of documents.

(2) Motions to compel claimant to execute a medical or other authorization (including a copy of the proposed authorization).

(3) Motions to dismiss for failure to prosecute.

(4) Uncontested petitions to terminate temporary total or temporary partial disability benefits.

(5) Uncontested petitions for approval of commutation of benefits.

(6) Application to take the deposition of a witness unavailable for trial.

(7) Application for reconsideration of a pretrial officer's decision.

*Proposed Board Rule No. 28*

Whenever a petition is pending before the Board, either party may file an additional petition or assert an additional issue in the manner prescribed below.

(A) The following issues may be added to a pending petition through a letter request timely filed with the Board and sent to opposing counsel in the same manner as service is made upon the Board:

(1) A request for payment of medical expenses.

(2) A request for reimbursement of travel expenses.

(3) A request for partial disability benefits under section 2325 if the pending petition involves a petition for a period of total disability benefits or a request for a review of the compensation agreement.

(B) The following issues may be added to a pending matter upon the filing of a formal petition:

(1) A petition for Review of Compensation Agreement.

(2) A petition for permanent partial impairment benefits.

(3) A petition for recurrence of total disability.

(4) A petition for disfigurement benefits.

(C). A determination regarding the consolidation or severance of two petitions or issues for hearing before the Board shall be made, in the first instance, by the pretrial officer. In so determining, the pretrial officer shall consider the following:

(1) Whether a party may sufficiently respond to a newly raised issue within the time constraints of the Board Rule 9 regarding the listing of witnesses and 19 Del. C. section 2127(b) regarding settlement.

(2) Whether the party who must respond to the new petition and/or issue objects to its consolidation with the pending petition.

(3) Whether medical testimony has been committed to the record.

(4) Whether the introduction of the new issue will so alter the amount or nature of the evidence to be presented that the hearing cannot be completed within the time originally estimated by the parties.

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## **DEPARTMENT OF EDUCATION**

STATUTORY AUTHORITY: 14 DELAWARE CODE  
SECTION 122(d), (14 DEL.C. 122(d))

EDUCATIONAL IMPACT ANALYSIS PURSUANT  
TO 14 DEL. C., SECTION 122(d)

The following amendment to a regulation is recommended by the Secretary with the consent of the Board of Education and will be discussed at the November 20, 1997 State Board of Education meeting for adoption at the December State Board of Education meeting.

### **THE HIGH SCHOOL DIPLOMA AND THE RECORD OF PERFORMANCE**

A. TYPE OF REGULATORY ACTION REQUESTED  
Amendment to Existing Regulations

B. SYNOPSIS OF SUBJECT MATTER OF REGULATION

The Handbook for K-12 Education has five regulations related to the high school diploma and the Record of Performance. They are found in Section IV.K., Diploma and Record of Performance Procedures, K.1., Diplomas, K.2., Diploma Procedures, K.3., Record of Performance, K.4., Replacement of High School Diploma, and K.5., Certification of High School Diploma. Another

regulation titled "Commencement" is found in Section I.J.4., and also refers to diploma information. These regulations generally contain procedural information and often repeat the same information stated in different ways. The amendment places these regulations in a single section and includes only those three issues that are regulatory. There is one change, December 31, rather than September 30, will be the cut off date for completing all work required to receive the June diploma. The new section would be referred to as High School Diploma and Record of Performance and would be found in Section IV.K.1., 2. and 3. in the Handbook for K-12 Education.

### C. IMPACT CRITERIA

1. Will the amendments help improve student achievement as measured against state achievement standards?

The amendments do not address curriculum issues, their focus is on the high school diploma and the Record of Performance.

2. Will the amendments help ensure that all students receive an equitable education?

The amendments address issues of fairness concerning the granting of the high school diploma and the Record of Performance as was true of the original regulations.

3. Will the amendments help to ensure that all students' health and safety are adequately protected?

The amendments do not address health and safety issues, they address granting of the high school diploma and the Record of Performance.

4. Will the amendments help to ensure that all students' legal rights are respected?

The amendments, as with the original regulations, address students rights concerning diplomas and the Record of Performance.

5. Will the amendments preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amendments preserve, as the original regulations did, the necessary authority and flexibility of decision making at the local board and school level.

6. Will the amendments place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amendments do not change the reporting or administrative requirements of the original regulations.

7. Will decision making authority and accountability



for addressing the subject to be regulated be placed in the same entity?

The amendments do not change the decision making authority and accountability required by the original regulations.

8. Will the amendments be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The amendments will not be an impediment to the implementation of other educational policies.

9. Is there a less burdensome method for addressing the purpose of the amendments?

The amendments are necessary to clarify what in the original regulations is actually required and remove the procedural and technical assistance statements.

10. What is the cost to the state and local school boards of compliance with the amendments.

The amendments do not effect the cost.

#### AS AMENDED

#### IV.K. High School Diploma and Record of Performance

1. A state sanctioned diploma will be granted to pupils who meet the state and local school district requirements for graduation. It is the responsibility of local school districts to establish guidelines for granting the Record of Performance in lieu of a diploma.

2. Diplomas from one school year can not be issued after December 31 of the next school year.

3. Duplicate diplomas will not be issued, but legitimate requests for validation of graduation will be satisfied through a letter of certification. Requests for diploma information from graduates of Delaware high schools should be directed to the high school the student was attending at the time of graduation. If the school does not have the records then the student should contact the Department of Education in Dover. The letter of certification must contain the name of the applicant, the name of the school, the date of graduation, and the diploma registry number and must be notarized.

#### FROM THE HANDBOOK FOR K-12 EDUCATION

#### H.4. COMMENCEMENT

~~A bona fide diploma will be granted to pupils who meet state and local school district requirements. The Record of Performance may be used to recognize the accomplishments of certain other pupils. It is the~~

~~responsibility of the local school district to establish guidelines for the granting of the Record of Performance and for determining which students participate in commencement exercises.~~

#### IV. K. DIPLOMA AND RECORD OF PERFORMANCE PROCEDURES

##### 1. DIPLOMA

~~A local school district issues a high school diploma under the auspices of the State Board of Education. The diploma indicates that the recipient has satisfactorily fulfilled the minimal program requirements established by the State Board of Education and the local board of education in respect to the units of credit required for graduation.~~

##### 2. DIPLOMA PROCEDURES

~~a. Established procedures for the certification of seniors and the ordering of diplomas for graduates are forwarded during the December prior to commencement to each high school principal by the Department of Public Instruction Education.~~

~~b. The requirements for graduation from a Delaware high school are specified in the section of this Handbook entitled Credit Requirements.~~

~~c. Diplomas for one school year cannot be issued after September of the next school year. A student completing graduation requirements during the fall of the next school year will receive a diploma from the school year in which he or she completes the requirements.~~

~~d. Although duplicate diplomas will not be issued, legitimate requests for validation of graduation will be satisfied through a letter of certification.~~

~~e. Requests for diploma information from graduates of Delaware high schools should be directed to the Department of Public Instruction high school attending at the time of graduation. If the school does not have the records, call the Department of Education.~~

##### 3. RECORD OF PERFORMANCE

~~a. There are a limited number of pupils who are unable to meet the general educational requirements necessary for the granting of a diploma.~~

~~b. The Record of Performance may be used to recognize the efforts and accomplishments of these pupils.~~

~~c. School districts using the Record of Performance should establish guidelines for its use including which pupils are to participate in commencement.~~

~~d. The availability of the Record of Performance should serve to remind us that each high school has the responsibility to do the following:~~

~~(1) develop programs adapted to individual differences;~~

~~(2) recognize the total concern of the school is to provide for a comprehensive and flexible program of~~

individualized learning; and

(3) place pupils in regular programs when they can progress beyond the special education program.

#### 4. ~~REPLACEMENT OF HIGH SCHOOL DIPLOMA~~

In the event that a graduate of a Delaware public high school should require the replacement of a diploma, the following procedure should be followed:

a. ~~contact the principal or appropriate school official of the high school from which the person graduated;~~

b. ~~the appropriate school official within the high school will verify the date of graduation and the diploma registry number;~~

c. ~~the appropriate school official of the high school will contact the company producing the diploma to determine the cost of replacement; and~~

d. ~~the person will provide the amount necessary for the replacement of the diploma to be sent with the verifying information.~~

#### 5. ~~CERTIFICATION OF HIGH SCHOOL DIPLOMA~~

Should a graduate of a Delaware high school require verification of graduation, these procedures are to be followed:

a. ~~The principal or appropriate high school official would provide a letter of verification that includes the following:~~

- ~~• Name of applicant~~
- ~~• Date of graduation~~
- ~~• Name of school~~
- ~~• Diploma registry number~~

b. ~~The personal letter should then be notarized and sent to the person concerned.~~

c. ~~In the event that the person requesting a verification is not able to obtain the appropriate information from their high school due to a closing or reorganization, the person may contact the Department of Public Instruction Education for appropriate verification.~~

## DEPARTMENT OF EDUCATION

STATUTORY AUTHORITY: 14 DELAWARE CODE  
SECTION 122(d), (14 DEL.C. 122(d))

### EDUCATIONAL IMPACT ANALYSIS PURSUANT TO 14 DEL. C., SECTION 122(d)

The following amendment to a regulation is recommended by the Secretary with the consent of the Board of Education and will be discussed at the November 20, 1997 State Board of Education meeting for adoption at the December State Board of Education meeting.

### EDUCATION OF HOMELESS CHILDREN AND YOUTH

A. TYPE OF REGULATORY ACTION REQUESTED  
Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulations for the Education of Homeless Children and Youth, Section L.10.a.- j. on pages A-43 to A-46 in the Handbook for K-12 Education are for the most part being readopted as they are presently written. The exceptions are, changing the lead paragraph to more concisely state the relationship of the Department of Education regulations to the federal legislation, removing subsection e.(1)(b), because of its inaccuracy and changing the Department of Public Instruction to the Department of Education in section 10.j. The regulations define who homeless children and youth are and what their rights and responsibilities are as well as the responsibilities of local school districts concerning their education including transportation and immunization and when necessary the rapid transfer of records. The amended regulations would remain in the same section, L.10.a.- j., of the Handbook for K-12 Education.

C. IMPACT CRITERIA

1. Will the amendment help improve student achievement as measured against state achievement standards?

The regulation is designed to give homeless children and youth full access to the benefits of public education even though their place of residence is not always stable and the amendment does not change that.

2. Will the amendment help ensure that all students receive an equitable education?

The regulation is designed to give homeless children and youth the same educational opportunities as those

children and youth whose housing arrangements are more stable and the amendment does not change that.

3. Will the amendment help to ensure that all students' health and safety are adequately protected?

The regulation helps to insure that homeless children and youth have the same health and safety protections as other children and the amendment does not change that.

4. Will the amendment help to ensure that all students' legal rights are respected?

The regulation addresses the legal rights of homeless children and youth concerning their education and the amendment does not change that.

5. Will the amendment preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amendment does not change the necessary authority and flexibility of decision making that existed with the original regulation.

6. Will the amendment place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amendment does not change the necessary reporting or administrative requirements of the original regulation.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The amendment does not change decision making authority and the accountability for homeless children and youth required in the existing regulation.

8. Will the regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

This regulation with the amendment is not an impediment to the implementation of any other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the amendment.

This regulation as amended is necessary to compliment the federal legislation.

10. What is the cost to the state and local school boards of compliance with the amendment?

This amendment does not effect the cost.

Handbook for K-12 Education

~~I.L.10. POLICY PERTAINING TO PROCEDURES REGULATIONS FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH~~

~~The State Board of Education is concerned about the problem of homelessness and wishes to assure that children and youth who are homeless have access to a free, appropriate, public education which would be provided to students who are residents of the State, consistent with State school attendance laws. Further, Congress passed Consistent with the provisions of the Stewart B. McKinney Homeless Assistance Act, 42 USC 11301, in 1987, and the State Board supports that Act. For these reasons, the Secretary with the consent of the State Board of Education adopts the following regulations on assistance to homeless children and youth:~~

a. The term "homeless" or "homeless individual" shall include:

(1) an individual who lacks a fixed, regular, and adequate nighttime residence; and

(2) an individual who has a primary nighttime residence that is:

(a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(b) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings;

but does not include any individual imprisoned or otherwise detained pursuant to an Act of Congress or a State law.

b. A homeless individual shall be eligible for assistance if the individual complies with state or federal income eligibility requirements applicable to assistance to the homeless.

c. All local school districts, in cooperation with each other, shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate, public education which would be provided to the children of a resident of the State, consistent with school attendance laws.

d. After consultation with the parent or guardian of a homeless child, the homeless youth, and/or the applicable social worker, the local school district in which a homeless child or youth resides, as defined in section a. of this policy, ("the new school district"), shall determine whether the homeless child or youth shall:

(1) be enrolled in the appropriate school in the attendance area of the school district in which the homeless child or youth resides; or

(2) be provided a free appropriate public education program with services comparable to services offered to other students in the district, in the shelter or other temporary living accommodation; or

(3) continue his/her education in the home school serving the attendance area of residence in the district of origin for the remainder of the school year.

Such a determination shall be made consistent with the homeless child's or youth's best interests, and, where necessary, shall be made in consultation with and with the cooperation of, the homeless child's or youth's district of origin.

e. School bus transportation shall be provided consistent with those services offered other students in the State. To that end, school districts shall provide transportation:

(1) where it is determined that the homeless child or youth will attend school in the new school district;

(a) through regularly scheduled school transportation, to the appropriate school serving the attendance area of the new school district in which the homeless child or youth resides; or

~~(b) as necessary to provide comparable services for a program of education in the shelter or other temporary living accommodation; or~~

(2) where it is determined that the homeless child or youth will remain in the home school serving the attendance area of residence in the district of origin:

(a) through regularly scheduled school transportation, from the nearest bus stop, to the student's temporary residence, in the attendance area of the district of origin, to the home school.

f. School districts shall ensure that policies concerning immunization, guardianship and birth certificates do not create barriers to the school enrollment of homeless children and youth. To that end, school districts shall:

(1) assist homeless children and youth in meeting the immunization requirements;

(2) assist homeless children and youth in matters concerning guardianship;

(3) assist homeless children and youth in obtaining birth records as needed; and

(4) keep documentation of efforts made by the district in this regard in each student's file.

g. School districts shall ensure that the school records of each homeless child or youth shall:

(1) be maintained so that such records are

available within ten (10) school days to the new school district;

(2) when there is a request for such records, be transferred in a speedy fashion, employing the use of couriers, if necessary;

(3) when such records cannot be provided with sufficient speed to ensure continuity of programming, be supplemented by telephonic communication regarding the appropriate placement of and programming for the homeless child or youth.

To this end, all shelters and other regularly established temporary living accommodations shall be provided, by the school district in which they are located, signature forms for the release of such information by the district of origin. Couriers should be used to expedite the delivery of such forms to the district of origin.

All such exchanges of records shall be done in a manner which is consistent with the Procedures for the Collection, Maintenance and Disclosure of Student Data.

h. Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of section d., including educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs.

i. Dispute resolution shall be through the applicable local boards of education, appealable to the State Board of Education pursuant to 14 Del. C. §1058.

j. One person shall be designated by each school district to coordinate services to homeless children and youth, and each district shall report the name of that person to the Department of ~~Public Instruction~~ Education, Office of Coordinator of Education of the Homeless, at the beginning of each fiscal year.

(State Board Approved September 1989; Revised March 1993)

**DEPARTMENT OF EDUCATION**

STATUTORY AUTHORITY: 14 DELAWARE CODE  
SECTION 122(d), (14 DEL.C. 122(d))

**EDUCATIONAL IMPACT ANALYSIS PURSUANT  
TO 14 DEL. C., SECTION 122(d)**

The following amendment to a regulation is recommended by the Secretary with the consent of the Board of Education and will be discussed at the November 20, 1997 State Board of Education meeting for adoption at the December State Board of Education meeting.

**EDUCATIONAL IMPACT ANALYSIS PURSUANT  
TO 14 DEL. C., SECTION 122(d)****DRIVER EDUCATION****A. TYPE OF REGULATORY ACTION REQUESTED**  
Amendment to Existing Regulation**B. SYNOPSIS OF SUBJECT MATTER OF  
REGULATION**

The regulations for Driver Education programs are found in three places in the Handbook for K-12 Education. They are I.G.2, Driver Education Policy, I.G.3, State Board Policy on Driver Education, and IV.A.2.h, Driver Education. There is also another regulation on Adult Driver Education approved by the State Board in November 1971, revised in August 1988, and again in June 1996, but not placed in any particular document. The amendments consolidate these Driver Education regulations and make six changes and/or additions to the existing regulations. The additions are sections on special education students and adult education. There is also a new section stating that students may not be released from English Language Arts, mathematics, science or social studies classes for behind the wheel practice sessions that will begin with the 1998-1999 school year. The changes include: making the grading system pass/fail and permitting local school districts to decide if they want to grant credit for driver education and if they want to count the credit, if awarded, toward graduation. This change also begins with the 1998-1999 school year. The amended regulations would be titled Driver Education and become section IV.A.3.h,(1) through (9).

1. Will the amendments help improve student achievement as measured against state achievement standards?

The amendments will help improve student achievement in Driver Education and will prevent students

from losing class time in English Language Arts, mathematics, science and social studies.

2. Will the amendments help ensure that all students receive an equitable education?

Driver Education programs are statewide programs and all students receive the exact same curriculum, the amendments make it clear that the curriculum is to be the same for all students.

3. Will the amendments help to ensure that all students' health and safety are adequately protected?

Driver education programs stress issues of safety as part of the curriculum and the amendments do not change that fact.

4. Will the amendments help to ensure that all students' legal rights are respected?

Driver education programs include content on the legal rights and responsibilities of drivers and the amendments do not change that fact.

5. Will the amendments preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amendments provide for additional authority and flexibility of decision making at the local district and school level by giving districts the choice of granting credit or not for the driver education course and counting the course or not counting it toward graduation. The decision as to what classes students can miss in order to accumulate "behind the wheel driving" time has been made through the amendments.

6. Will the amendments place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amendments do not include any additional reporting or administrative requirements.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The decision making authority and accountability for addressing the subject will remain in the same entity.

8. Will the amendment be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The amendments are consistent with the emphasis on the core academic areas since driver education students

will no longer be permitted to leave these core academic classes in order to accumulate "behind the wheel driving" time.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The amendments are necessary to consolidate the existing regulations in one section and to make changes that are consistent with the reform movement.

10. What is the cost to the state and local school boards of compliance with the regulation?

These amendments will not change the cost of supporting the statewide driver education program.

#### FROM HANDBOOK FOR K-12 EDUCATION

##### I.G.2. DRIVER EDUCATION POLICY

a. The current philosophy of the State Department of Public Instruction stipulates that it is important that the day-to-day supervision of educational programs in the State be conducted at the local school building level. The supervisory function of State Department of Public Instruction personnel should be that of giving general leadership to curriculum procedures and instructional programs. This, we believe, must be done by working with the secondary school principal through the office of the chief school officer. Direct classroom observation and supervision of instructional personnel should be done only with the knowledge of the secondary school principal.

Historically and traditionally in Delaware, because the driver education program has been a state-oriented program, there has been a tendency for local school principals to assume that State supervision is the necessary, desirable and complete supervision of that program.

It is the purpose of this memorandum to indicate that local secondary school building principals should now include driver education courses within the regular schedule of their supervisory activities. Driver education should receive no more and particularly no less attention than do other programs of instruction within the school curriculum.

The relative position of the State Supervisor of Driver Education and Safety will be that of any other content supervisor in that he will now be free to provide the necessary specialized aid and advice to secondary school principals in the area of driver education as well as programs of general school safety. The State Supervisor of Driver Education and Safety will begin immediately to make more contacts with driver education instructors. This memorandum is not to be construed as denying the State Supervisor of the sense that he is a specialist in this particular teaching area, but rather to orient these contacts in order that they might take place in the total context of

the local supervisory program.

Driver education teachers have been expected to carry on as local staff members. This is to continue. Driver education teachers are subject to the same assignments and general duties and responsibilities as any teacher in the school district, but it is recommended that such assignments should not interfere with their responsibility for serving 125 driver education students.

Driver education teachers are being instructed to "report in" to the local principal and establish a first line of communication and rapport there as opposed to the traditional attachment to the State Department of Public Instruction.

b. In order to be eligible for approval by the State Board of Education the course must be an integral part of the school curriculum and must appear in the regular school schedule. Furthermore, the following minimum time standards for the driver education course must be met by all participating schools:

(1) The driver education course shall include a minimum of forty-four (44) class hours of instruction consisting of thirty (30) class hours of classroom instruction, seven (7) class hours of in-the-car behind-the-wheel laboratory instruction and seven (7) hours of observation. The class hours are not to be less than forty-five (45) minutes each. For those schools with varying class schedules the minimum classroom instruction shall be no less than one thousand three hundred fifty (1,350) minutes and behind-the-wheel laboratory instruction no less than three hundred fifteen (315) minutes.

(2) Driving simulators may be substituted for the required hours of behind-the-wheel laboratory instruction but only up to three (3) hours of the time at the ratio of four (4) hours of driving simulation to one (1) hour of actual behind-the-wheel laboratory instruction.

(3) Off-the-street driving ranges or multiple car driving ranges that are off the street may be substituted for actual behind-the-wheel laboratory instruction up to three (3) hours time at the ratio of two (2) hours of range instruction time to one (1) hour of actual behind-the-wheel laboratory instruction time.

(4) Driving simulation and off-the-street driving range time shall not be taken from or cause a reduction of classroom instruction time.

(5) Driving simulation and off-the-street driving range time shall not be substituted for more than one-half (1/2) of the total required six (6) hours of actual behind-the-wheel laboratory instruction and only at the ratios defined in the above items. This shall include individually or in any combination.

c. Please note also that driver education automobiles are to be used for no other purposes than teaching; no school errands, student trips or personal business. Only driver education teachers may commute directly between

home and school assignments related to driver education with the driver education car. However, when a teacher is assigned full time to a particular district where secure parking is available, the chief school officer may require that the automobile be parked on school property at the close of the teaching day.

d. In summation, we wish that the relationship between the State Department of Public Instruction and the instructional program in driver education should be on the same basis as the relationship between the State Department and any other content field in the local school.

(State Board Approved August 1971, Revised August 1988)

### I.G.3. STATE BOARD RESOLUTION ON DRIVER EDUCATION

The State Board of Education adopted the following resolution in June 1971. In August 1988 the resolution was changed to revise the student teacher ratio from 1 to 140 to 1 to 125.

WHEREAS, the student-teacher ratio established by law for driver education teachers is one teacher for each 125 students or one-fifth of a teacher for each 25 pupils; and

WHEREAS, by law the right to prescribe rules and regulations for the conduct and management of the schools is conferred upon local boards of education; and

WHEREAS, by law local boards of education operate within rules and regulations prescribed by the State Board of Education;

NOW, THEREFORE, BE IT RESOLVED, that it is State Board of Education policy that local districts insure through effective planning that the above stated student-teacher ratio is scheduled for and completed by each driver education teacher; that interruptions to scheduled classes be minimized; that driver education teachers be scheduled for a full assignment in driver education; that maximum use be made of summer programs authorized in 14 Del. C. §1321(e)(8); and that driver training be made available in summer programs for Delaware residents who attend school out of state, for school dropouts, for those exceptional cases approved by the State Board of Education who could not be scheduled in the regular year, and for those who are in excess of the unit allotment.

#### IV.A.3.h. Driver Education

(1) The Delaware Code established the following regulation in respect to driver education:

"...No person shall be issued a temporary instruction permit who has not reached his/her 18th birthday and who is not currently enrolled in or who has not successfully completed a course in Driver Education in a public or private high school in the State of Delaware,

such course having been approved by the State Board of Education and meeting the standards for such courses described by the Board."

(2) In view of the preceding law and due to the fact that teacher allocations for driver education are based on the number of tenth grade students, it is recommended that the following serve as a guideline in granting credit:

(a) One-fourth credit shall be granted for driver education when it is taught as a separate course and when interruptions to the regular educational program do not go beyond study halls:

(b) The one-fourth credit received for driver education shall be included as part of the credits required for graduation.

### ADULT DRIVER EDUCATION

Due to the rapid growth of driver education and its expansion to all public, private and parochial schools of Delaware and the ever increasing demand for adult driver education programs, it has become necessary for the State Department of Education to provide adult driver education program guidelines in order to maintain recognized standards of high performance.

The State Department of Education strongly urges that driver education courses for adults and out-of-school youth be made available in each community under the direct control of the local board of education.

Therefore, the following guidelines are designed to permit and encourage each school district or combination of school districts to provide adult and after school hours driver education courses:

#### I. Administration

1. The local school district shall be responsible for all publicity and recruitment of students, physical facilities and administration and supervision of the course in meeting the State Department of Education driver education standards:

2. All courses must meet the minimum standards as set forth by the State Department of Education and shall consist of at least 30 class hours of classroom instruction, at least 7 class hours of actual driving experience and 7 class hours of observation time in the automobile.

3. Records shall be kept on all pupils and a final report is to be submitted to the Education Associate of Driver Education and Safety immediately upon conclusion of the course. Student final report forms and certificates will be provided by the State Department of Education upon written request.

4. A standard registration form is to be completed

# PROPOSED REGULATIONS

and kept on file for each student enrolled and each student under 21 years of age must have parental approval before the start of the course.

5. All students will be administered the standardized written and performance final examinations as required by the State Department of Education.

6. All students are to be approved by the school nurse to determine compliance to the basic mental and physical requirements of Motor Vehicle Laws.

7. The adult "student" does not need a temporary instruction of "learner's" permit if the State Department of Education approved driver education course is taught which includes specifically a dual controlled car and a State Department of Education certified State Department of Education certified instructor occupying the seat beside the driver.

8. The school administration may assess and collect fees from those students enrolled in the driver education course in order that the course is self-supporting only in the amount beyond the funds provided by the local school district for any other adult or after school hours course. The driver education teacher is not to collect fees or handle the monies in any manner. The school administration is to provide this service and pay the driver education teachers' salary and car expenses from the local funds and assessed fees.

## H. The Driver Education Teachers

1. The driver education teacher shall be certified to teach driver education by the Certification Office, Assessments and Accountability Branch, State Department of Education.

2. The teacher shall occupy the seat beside the student driver at all times during the in-car instruction.

3. The teacher shall conduct the course in the same manner as the regular high school course.

## HH. The Driver Education Program

1. The automobile shall be equipped with the proper dual clutch and/or brake depending on type of transmission in the vehicle.

2. The automobile shall display on its roof or rear bumper a sign designating it as a driver education vehicle whenever a student is behind the wheel. (The sign is to be the same as those now approved for use by the State

Department of Education):

3. The automobile used in the regular high school program may be used in the adult or after school hours program.

4. Recommended class meeting time length for any one day: 2 hours (exclusive of driving time).

5. Further assistance in organization or planning may be obtained by contacting the Education Associate of Driver Education, Safety and Physical Education.

ADOPTED BY THE STATE BOARD OF EDUCATION  
NOVEMBER 18, 1971. (R8/8/88) (R6/96) (R9/97)

## Driver Education

(1) Delaware residents are entitled to free driver education one time only. Students who are not successful in their initial driver education course may register in any of the adult driver education programs for a fee.

(2) The Individualized Education Program Team, in consultation with the Driver Education teacher, can make modifications to the Driver Education program for special education students through the students' Individual Education Program (I.E.P.).

(3) Delaware residents attending school out of state as sophomores, students in excess of the September 30<sup>th</sup> unit allotment, students attending private and parochial academies in state with sophomore enrollments of less than twenty-five, home schooled students and any student approved by the Secretary as an exceptional case are entitled to attend summer driver education without charge. Districts must notify all nonpublic and public high schools in their district by April 1<sup>st</sup> annually as to the location of the nearest summer driver education program. Summer Driver Education must be offered between June 1 - August 31 and each request for free-tuition must be approved by the Secretary of Education through the Office of the Education Associate for Driver Education, Safety and Physical Education.

(4) Adult Driver Education programs, when offered, must follow the same regulations established for the high school and the summer programs. The adult programs are available to any individual for a fee through a local school district in each county. The costs per student for adult driver education will be determined by the Department of Education.

(5) The driver education course must include a



minimum of forty-four (44) class hours of instruction consisting of thirty (30) class hours of classroom instruction, seven (7) class hours of in-the-car behind-the-wheel laboratory instruction and seven (7) hours of actual observation in-the-car. The class hours must not be less than forty-five (45) minutes each. For those schools with varying class schedules the minimum classroom instruction must be no less than one thousand three hundred fifty (1350) minutes and behind-the-wheel laboratory instruction no less than three hundred fifteen (315) minutes.

(a) Driving simulators may be substituted for the required hours of behind-the-wheel laboratory instruction but only up to three (3) hours of time at the ratio of four (4) hours of driving simulation to one (1) hour of actual behind-the-wheel laboratory instruction.

(b) Off-the-street driving ranges or multiple driving ranges that are of the street may be substituted for actual behind-the-wheel laboratory instruction up to three (3) hours time at the ratio of two (2) hours of range instruction time to one (1) hour of actual behind-the-wheel laboratory instruction time.

(c) Driving simulation and off-the-street driving range time must not be taken from or cause a reduction of classroom instruction time.

(d) Driving simulation and off-the-street driving range time must not be substituted for more than one-half (1/2) of the total required seven (7) hours of actual behind-the-wheel laboratory instruction and only at the ratios defined in the above items. This must include individually or in any combination.

(6) Beginning with the 1998-1999 school year, students may not be released from classes in English language arts, mathematics, social studies or science in order to fulfill their 7 required hours of actual observation in-the-car and their 7 required hours of in-the-car-behind-the-wheel experience. This also applies to release from class for time on the driving simulators.

(7) The Driver Education teachers must use the "Teachers' Guide for Driver Education" developed by the Department of Education for classroom instruction and behind-the-wheel laboratory instruction time. Teachers should include student activities requiring reading, writing and research as part of the Driver Education curriculum.

(8) Beginning with the 1998-99 school year, grades for the Driver Education Program shall be either pass or fail. Districts may grant one-fourth credit for successful completion of the minimum hours in both the classroom and the behind-the-wheel laboratory experience. The one fourth credit for driver education may be included as part of the credits counted toward graduation.

(a) Pass/Fail grades for publication in the Department of Education "Report of Educational Statistics" must be received by the Department of Education no later than June 30<sup>th</sup> for Regular Driver Education Programs and August 31<sup>st</sup> for Summer Driver Education Programs. Final grades will be maintained by the Department for a seven year period.

(9) Automobiles procured through State funding for driver education must be used solely for instruction of students duly enrolled in driver education.

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## **DEPARTMENT OF HEALTH & SOCIAL SERVICES DIVISION OF SOCIAL SERVICES**

### **PUBLIC NOTICE**

Medicaid / Medical Assistance Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, the Delaware Department of Health and Social Services (DHSS) Division of Social Services/Medical Assistance Program (DMAP) hereby publishes notice of proposed policy amendments to the Durable Medical Equipment manual and the Home Health manual as follows:

### **DURABLE MEDICAL EQUIPMENT MANUAL**

New policy added:

Osteogenesis Stimulators

The DMAP may cover use of a nonspinal electrical osteogenesis stimulator, non-invasive (E0747), if the following criteria are met:

- Diagnosis must be non-union of a long bone fracture after six (6) or more months have elapsed without healing of the fracture, or
  - failed fusion of a joint other than in the spine where a minimum of nine (9) months has elapsed since the last surgery, or
  - congenital pseudarthrosis.
- In addition to the physician's letter of medical necessity, documentation detailing history of diagnosis and previous treatment (e.g., operative

notes, x-ray reports, office notes), must accompany the CMN(Appendix B).

The DMAP may cover the use of a spinal electrical osteogenesis stimulator (E0748) if the following criteria are met:

- Failed spinal fusion where a minimum of nine (9) months has elapsed since the last surgery, or
  - following a multi level spinal fusion surgery, or
  - following spinal fusion surgery where there is a history of a previously failed spinal fusion at the same site.
- In addition to the physician's letter of medical necessity, documentation detailing history and previous treatment (e.g., operative notes, x-ray reports, office notes), must accompany the CMN (Appendix B).

## HOME HEALTH MANUAL

New wording added by Federal regulation

*Home Health Agency* (HHA) is a public or private agency or organization, or part of an agency or organization, that meets the requirements for participation in Medicare and any additional standards legally promulgated by the State that are not in conflict with Federal requirements.

Comments or requests for copies of proposed changes or relevant materials may be made in writing to: Medicaid Administrative Offices, Division of Social Service, P.O. Box 906, New Castle, DE 19720, attention: Thelma G. Mayer, or by calling (302) 577-4880, extension 131, or may be viewed at the following locations: New Castle County: Medicaid Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE, 19720; Kent County: Medicaid Unit, Division of Social Services, Williams State Service Center, 805 River Rd., Dover, DE 19901; Sussex County: Medicaid Unit, Division of Social Services, Georgetown State Service Center, 546 S. Bedford St., Georgetown, DE, 19947. Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed change must be received by mail no later than December 1, 1997, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated.

Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4904 for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

## DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

### AIR QUALITY MANAGEMENT SECTION

Statutory Authority: 7 Delaware Code,  
Chapter 60, (7 Del.C. Ch. 60)

## REGISTER NOTICE

1. **TITLE OF THE REGULATIONS:** NO<sub>x</sub> Budget Program
2. **BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:** The NO<sub>x</sub> Budget Program is a new air regulation needed to implement the September 27, 1994 NO<sub>x</sub> Memorandum of Understanding (MOU) between the States of the Ozone Transport Region. This regulation establishes Delaware's portion of a regional nitrogen oxides (NO<sub>x</sub>) cap-and-trade program that will result in substantial reductions in regional NO<sub>x</sub> emissions. The regulation will effect fossil fuel fired boilers or indirect heat exchangers with a maximum rated heat input capacity of equal to or greater than 250 mmBTU/hr; and all electric generating facilities with a rated heat output of equal to or greater than 15 MW.
3. **POSSIBLE TERMS OF THE AGENCY ACTION:** None.
4. **STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:** 7 Del. C., Chapter 60.
5. **OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:** None.
6. **NOTICE OF PUBLIC COMMENT:** A public hearing on this proposed regulation will be held on December 8, 1997 commencing at 6:00 p.m. in the Richardson and

Robbins Building auditorium, 89 Kings Highway, Dover, Delaware.

7. PREPARED BY:

Ronald A. Amirikian/323-4542

10/15/97

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NO<sub>x</sub> Budget Program  
Regulation No. 37  
Proposed Regulation  
October 14, 1997

Section 1 - General Provisions

a. The purpose of this regulation is to implement Delaware's portion of the Ozone Transport Commission's (OTC) September 27, 1994 Memorandum of Understanding (MOU) by establishing in the State of Delaware a NO<sub>x</sub> Budget Program.

b. A NO<sub>x</sub> allowance is an authorization to emit NO<sub>x</sub>, valid only for the purposes of meeting the requirements of this regulation.

1. All applicable state and federal requirements remain applicable.

2. A NO<sub>x</sub> allowance does not constitute a security or other form of property.

c. On or after May 1, 1999, the *owner or operator* of each *budget source* shall, not later than December 31 of each calendar year, hold a quantity of NO<sub>x</sub> allowances in the *budget source's current year NATS account* that is equal to or greater than the total NO<sub>x</sub> emitted from that *budget source* during the period May 1 through September 30 of the subject year.

d. Allowance transfers between *budget sources* sharing a common *owner or operator* and/or *authorized account representative* are subject to all applicable requirements of this regulation, including the *allowance transfer* requirements identified in Section 11 of this regulation.

e. Offsets required for new or modified sources subject to non-attainment new source review must be obtained in accordance with Regulation 25 of Delaware's "Regulations Governing the Control of Air Pollution" and Section 173 of the Clean Air Act. Allowances are not considered offsets within the context of this regulation.

f. Nothing in this regulation shall be construed to limit the authority of the Department to condition, limit, suspend, or terminate any allowances or authorization to

emit.

g. The Department shall maintain an up to date listing of the NO<sub>x</sub> sources subject to this regulation.

1. The listing shall identify the name of each NO<sub>x</sub> *budget source* and its annual *allowance allocation*, if any.

2. The Department shall submit a copy of the listing to the *NATS Administrator* by January 1 of each year, commencing in 1999.

Section 2 - Applicability

a. The NO<sub>x</sub> Budget Program applies to any *owner or operator* of a *budget source* where that source is located in the State of Delaware.

b. Any person who owns, operates, leases, or controls a stationary NO<sub>x</sub> source in Delaware not subject to this program, by definition, may choose to *opt into* the NO<sub>x</sub> Budget Program in accordance with the requirements of Section 8 of this regulation. Upon approval of the *opt-in* application by the Department, the person shall be subject to all terms and conditions of this regulation.

c. A *general account* may be established in accordance with Section 7 of this regulation. The person responsible for the *general account* shall be responsible for meeting the requirements for an *Authorized Account Representative* and applicable *account* maintenance fees.

Section 3 - Definitions

For the purposes of this regulation, the following definitions apply. All terms not defined herein shall have the meaning given them in the Clean Air Act and Regulation 1 of the State of Delaware "Regulations Governing the Control of Air Pollution".

a. *Account* means the place in the *NO<sub>x</sub> Allowance Tracking System* where allowances held by a *budget source (compliance account)*, or allowances held by any person (*general account*), are recorded.

b. *Account number* means the identification number assigned by the *NO<sub>x</sub> Allowance Tracking System (NATS) Administrator* to a compliance or *general account* pursuant to Section 10 of this regulation.

c. *Administrator* means the Administrator of the U.S. EPA. The *Administrator* of the U.S. EPA or his designee(s) shall manage and operate the *NO<sub>x</sub> Allowance Tracking System* and the *NO<sub>x</sub> Emissions Tracking System*.

d. *Allocate* or *Allocation* means the assignment of

*allowances* to a *budget source* through this regulation; and as recorded by the Administrator in a *NO<sub>x</sub> Allowance Tracking System compliance account*.

e. *Allowance* means the limited authorization to emit one ton of NO<sub>x</sub> during a specified *control period*, or any *control period* thereafter subject to the terms and conditions for use of *banked allowance* as defined by this regulation. All *allowances* shall be allocated, transferred, or used as whole allowances. To determine the number of whole allowances, the number of allowances shall be rounded down for decimals less than 0.50 and rounded up for decimals of 0.50 or greater.

f. *Allowance deduction* means the withdrawal of allowances for permanent retirement by the NATS Administrator from a *NO<sub>x</sub> Allowance Tracking System account* pursuant to Section 16 of this regulation.

g. *Allowance transfer* means the conveyance to another *account* of one or more *allowances* from one person to another by whatever means, including but not limited to purchase, trade, auction, or gift in accordance with the procedures established in Section 11 of this regulation, effected by the submission of an *allowance transfer request* to the NATS Administrator.

h. *Alternative monitoring system* means a system or component of a system, designed to provide direct or indirect data of mass emissions per time period, pollutant concentrations, or volumetric flow as provided for in Section 13 of this regulation.

i. *Authorized Account Representative (AAR)* means the responsible person who is authorized, in writing, to transfer and otherwise manage *allowances* as well as certify reports to the NATS and the NETS.

j. *Banked Allowance* means an *allowance* which is not used to reconcile emissions in the designated year of *allocation* but which is carried forward into the next year and flagged in the *compliance* or *general account* as "banked".

k. *Banking* means the retention of unused *allowances* from one *control period* for use in a future *control period*.

l. *Baseline* means, except for the purposes of Section 12(d) (Early Reductions) of this regulation, the NO<sub>x</sub> emission inventory approved by the Ozone Transport Commission on June 13, 1995, and revised thereafter, as the official 1990 baseline emissions of May 1 through September 30 for purposes of the NO<sub>x</sub> Budget Program.

m. *Boiler* means a unit which combusts *fossil fuel* to produce steam or to heat water, or any other heat transfer medium.

n. *Budget* or *Emission Budget* means the numerical result in tons per *control period* of NO<sub>x</sub> emissions which results from the application of the emission reduction requirement of the OTC MOU dated September 27, 1994, and which is the maximum amount of NO<sub>x</sub> emissions which may be released from the *budget sources* collectively during a given *control period*.

o. *Budget source* means a *fossil fuel fired boiler* or *indirect heat exchanger* with a *maximum heat input capacity* of 250 MMBTU/Hour, or more; and all *electric generating units* with a *generator nameplate capacity* of 15 MW, or greater. (Although not a *budget source* by definition, any person who applies to *opt into* the NO<sub>x</sub> Budget Program shall be considered a *budget source* and subject to applicable program requirements upon approval of the application for *opt-in*.)

p. *Clean Air Act* means the federal Clean Air Act (42 U.S.C. 7401- 7626).

q. *Compliance account* means the *account* for a particular *budget source* in the *NO<sub>x</sub> Allowance Tracking System*, in which are held current and/or future year allowances.

r. *Continuous Emissions Monitoring System (CEMS)* means the equipment required by this regulation used to sample, analyze, and measure which will provide a permanent record of emissions expressed in pounds per million British Thermal Units (Btu) and tons per day. The following systems are component parts included in a continuous emissions monitoring system: nitrogen oxides pollutant concentration monitor, diluent gas monitor (oxygen or carbon dioxide), a data acquisition and handling system, and flow monitoring systems (where appropriate).

s. *Control period* means the period beginning May 1 of each year and ending on September 30 of the same year, inclusive.

t. *Current year* means the calendar year in which the action takes place or for which an *allocation* is designated. For example, an *allowance allocated* for use in 1999 which goes unused and becomes a *banked allowance* on January 1, 2000 can be used in the "Current Year" 2000 subject to the conditions for *banked allowance* use as stated in this regulation.

u. *Early Reduction Allowance* means an *allowance* credited

for a NO<sub>x</sub> emission reduction achieved during the *control periods* of either 1997 or 1998, or both.

v. *Electric generating unit* means any *fossil fuel fired* combustion unit which provides electricity for sale or use.

w. *Excess emissions* means emissions of nitrogen oxides reported by a *budget source* during a particular *control period*, rounded to the nearest whole ton, which is greater than the number of *allowances* which are available in that *budget source's NO<sub>x</sub> Allowance Tracking System compliance account* on December 31 of the calendar year for the subject NO<sub>x</sub> control season. For the purpose of determining whole tons on *excess emissions*, the number of tons of *excess emissions* shall be rounded down for decimals less than 0.50 and rounded up for decimals of 0.50 or greater.

x. *Existing budget source* means a *budget source* that operated at any time during the period beginning May 1, 1990 through September 30, 1990.

y. *Fossil fuel* means natural gas, petroleum, coal or any form of solid, liquid or gaseous fuel derived wholly, or in part, from such material.

z. *Fossil fuel fired* means the combustion of *fossil fuel* or any derivative of *fossil fuel* alone, or, if in combination with any other fuel, where *fossil fuel* comprises 51% or greater of the annual *heat input* on a BTU basis.

aa. *General Account* means an *account* in the *NATS* that is not a *compliance account*.

bb. *Heat input* means heat derived from the combustion of any fuel in a *budget source*. *Heat input* does not include the heat derived from preheated combustion air, recirculated flue gas, or exhaust from other sources.

cc. *Indirect heat exchanger* means combustion equipment in which the flame and/or products of combustion are separated from any contact with the principal material in the process by metallic or refractory walls, which includes, but is not limited to, steam boilers, vaporizers, melting pots, heat exchangers, column reboilers, fractioning column feed preheaters, reactor feed preheaters, and fuel-fired reactors such as steam hydrocarbon reformer heaters and pyrolysis heaters.

dd. *Maximum heat input capacity* means the ability of a *budget source* to combust a stated maximum amount of fuel on a steady state basis, as determined by the greater of the physical design rating or the actual maximum operating capacity of the *budget source*. *Maximum heat*

*input capacity* is expressed in millions of British Thermal Units (MMBTU) per unit of time which is the product of the gross caloric value of the fuel (expressed in MMBTU/pound) multiplied by the fuel feed rate in the combustion device (expressed in pounds of fuel/time).

ee. *Nameplate capacity* means the maximum electrical generating output that a generator can sustain when not restricted by seasonal or other deratings.

ff. *New budget source* means a NO<sub>x</sub> source that is a *budget source*, by definition, that did not operate between May 1, 1990 and September 30, 1990, inclusive. A NO<sub>x</sub> source, that is a *budget source* by definition, that was constructed prior to or during the period May 1, 1990 through September 30, 1990, but did not operate during the period May 1, 1990 through September 30, 1990, shall be treated as a *new budget source*.

gg. *NO<sub>x</sub> Allowance Tracking System (NATS)* means the computerized system established and used by the *Administrator* to track the number of *allowances* held and used by any person.

hh. *NO<sub>x</sub> Emissions Tracking System (NETS)* means the computerized system established and used by the *Administrator* to track and provide a permanent record of NO<sub>x</sub> emissions from each *budget source*.

ii. *Non-Part 75 Budget Source* means any *budget source* not subject to the requirements for emissions monitoring adopted pursuant to Regulation 36 of the State of Delaware "Regulations Governing the Control of Air Pollution".

jj. *Off budget* means not subject to this regulation.

kk. *Off budget source* means any source of NO<sub>x</sub> emissions that is not included in the NO<sub>x</sub> Budget Program as either a *budget source*, by definition, or as an *opt in source*.

ll. *Opt in* means to choose to voluntarily participate in the NO<sub>x</sub> Budget Program, and comply with the terms and conditions of this regulation.

mm. *Opt-in-baseline* means the Department approved *heat input* and/or NO<sub>x</sub> emissions for use as a basis for *allowance allocation* and deduction.

nn. *OTC* means the Ozone Transport Commission.

oo. *OTC MOU* means the Memorandum of Understanding that was signed by representatives of eleven states and the District of Columbia on September 27, 1994.

pp. *OTR* means the Ozone Transport Region as designated

by Section 184(a) of the Clean Air Act.

qq. *Owner or Operator* means any person who is an owner or who operates, controls or supervises a *budget source* and shall include, but not be limited to, any holding company, utility system or plant manager of a *budget source*.

rr. *Quantifiable* means a reliable and replicable basis for calculating the amount of an emission reduction that is acceptable to both the Department and to the Administrator of the U.S.EPA.

ss. *Part 75 Budget Source* means any *budget source* subject to the requirements for emissions monitoring adopted pursuant to Regulation 36 of the State of Delaware "Regulations Governing the Control of Air Pollution".

tt. *Real* means a reduction in the rate of emissions, quantified retrospectively, net of any consequential increase in actual emissions due to shifting demand.

uu. *Recorded* with regard to an *allowance transfer or deduction* means that an *account* in the NATS has been updated by the *Administrator* with the particulars of an *allowance transfer or deduction*.

vv. *Regional NO<sub>x</sub> budget* means the maximum amount of NO<sub>x</sub> emissions which may be released from all *budget sources*, collectively throughout the *OTR*, during a given *control period*.

ww. *Repowering*, for the purpose of *early reduction credit* means either: 1) Qualifying Repowering Technology as defined by 40 CFR, Part 72 or; 2) the replacement of a *budget source* by either a new combustion source or the purchase of heat or power from the owner of a new combustion source, provided that: a) The replacement source (regardless of owner) is on the same, or contiguous property as the *budget source* being replaced; b) The replacement source has a maximum heat output rate that is equal to or greater than the maximum heat output rate of the *budget source* being replaced; or, c) The replacement source has a power output rate that is equal to or greater than the power output rate of the combustion source being replaced; and d) The replacement source incorporates technology capable of controlling multiple combustion pollutants simultaneously with improved fuel efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

xx. *Submitted* means sent to the appropriate authority under the signature of the *authorized account*

*representative* or alternate *authorized account representative*. An official U.S. Postal Service postmark, or electronic time stamp, shall establish the date of submittal.

yy. *Surplus* means that, at the time the reduction was made, the emission reduction was not required by Delaware's SIP, was not relied upon in an applicable attainment demonstration, was not required by state or federal permit or order, and was made enforceable in a permit that was issued after the date of the *OTC MOU* (September 27, 1994).

zz. *Use* means, for purposes of emission reductions moved off budget, that approval of the Department has been obtained to apply the emission reduction at a source.

#### Section 4 - Allowance Allocation

a. This program establishes NO<sub>x</sub> emission *allowances* for each NO<sub>x</sub> *control period* beginning May 1, 1999 through the NO<sub>x</sub> *control period* ending September 30, 2002. *Allowance allocation* levels for each of these annual NO<sub>x</sub> *control periods* are based on actual May 1, 1990 to September 30, 1990 actual NO<sub>x</sub> mass emissions.

b. The NO<sub>x</sub> Budget Program does not establish NO<sub>x</sub> emission *allowances* for any NO<sub>x</sub> *control period* subsequent to the year 2002 NO<sub>x</sub> *control period*. NO<sub>x</sub> emission *allowances* for each NO<sub>x</sub> *control period* subsequent to the year 2002 NO<sub>x</sub> *control period* will be established through amendment of this regulation.

c. NO<sub>x</sub> *allowance allocations* to *budget sources* may be made only by the Department in accordance with Section 4, Section 8, and Section 12 of this regulation.

d. Appendix A of this regulation identifies the *budget sources* and identifies the number of *allowances* each *budget source* is *allocated*. *Allowance allocations* to each of the *budget sources* was determined as follows:

1. Unless otherwise noted in Appendix A of this regulation, the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory" served as the basis for determination of the number of *OTC MOU Allowances* *allocated* to each *existing budget source*.

i. Each *existing budget source's OTC MOU Allowance allocation* for NO<sub>x</sub> *control periods* during the period May 1, 1999 to September 30, 2002, inclusive, was identified in the referenced document, Appendix B, Final OTC NO<sub>x</sub> Baseline Inventory, Delaware, Point-Segment Level Data, Phase II Target (Point Level).

ii. The identified values were rounded to the nearest whole *allowance* by rounding down for *allowances* less

than 0.5 and rounding up for decimals of 0.5 or greater.

2. Exceptional Circumstances *Allowances*, as granted by the *OTC* and as identified in the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory" for the *existing budget sources*, are identified in Appendix A. These Exceptional Circumstance *Allowances* were adjusted for the appropriate NO<sub>x</sub> emission rate reduction requirement prior to inclusion in Appendix A.

3. The *OTC* allocated to the state of Delaware an additional 86 *allowances*, referred to as reserve *allowances*, prior to application of NO<sub>x</sub> emission rate reduction requirements, as its share of a total 10,000 ton reserve. Application of *OTC* required emission reductions resulted in a total of 35 Reserve *Allowances* available for distribution, as identified in the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory".

i. Each of the 28 *existing budget sources* identified in Appendix A as the *existing budget sources* were allocated one (1) reserve *allowance*.

ii. One (1) additional reserve *allowance* was allocated to each of the four organizations with *existing budget sources*. The additional reserve *allowance* for each of the four organizations was added to the respective *existing budget source* with the greatest *heat input* rating.

iii. The remaining three (3) reserve *allowances* shall be held by the Department unused for the NO<sub>x</sub> *control periods* between May 1, 1999 and September 30, 2002.

iv. Reserve *Allowances* are applicable only for the NO<sub>x</sub> *control periods* during the period May 1, 1999 to September 30, 2002, inclusive. Reserve *Allowances* do not exist for NO<sub>x</sub> *control periods* subsequent to the year 2002.

4. The final NO<sub>x</sub> *allowance allocation* for each of the 28 *existing budget sources*, for each of the NO<sub>x</sub> *control periods* during the period of May 1, 1999 and September 30, 2002, is the sum of the values determined in Sections 4(d)(1) - (3) and is identified in Appendix A. For the *existing budget sources* that were not identified in the document "1990 OTC NO<sub>x</sub> Baseline Emissions Inventory", the final *allowance allocation* includes an *allowance allocation* determined in accordance with the procedures identified in Section 4(f)(2)(i) - (ii) of this regulation.

5. Known operating NO<sub>x</sub> sources, that are *budget sources by definition*, that did not operate in the May 1, 1990 to September 30, 1990 period are identified in Appendix A with a final *allowance allocation* of zero (0) *allowances*.

e. *Budget sources* that receive a NO<sub>x</sub> emission *allowance allocation* and subsequently cease to operate shall continue to receive *allowances* for each *control period* unless the *allowances* are reduced under Section 4(g) of this regulation or a request to reallocate *allowances* has been approved in accordance with Section 11 of this regulation.

f. Any NO<sub>x</sub> source, that is a *budget source* by definition, and that is not included in Attachment A of this regulation and which operated at any time between May 1, 1990 and September 30, 1990, inclusive, shall comply with the requirements of this regulation prior to operating in any NO<sub>x</sub> *control period*.

1. The *owner or operator* shall submit to the Department an application including, as a minimum, the following information:

i. Identification of the source by plant name, address, and plant combustion unit number or equipment identification number.

ii. The name, address, telephone and facsimile number of the *authorized account representative* and, if desired, of an alternative authorized account representative.

iii. A list of the owners and operators of the source.

iv. A description of the source, including fuel type(s), maximum rated heat input capacity and electrical output rating where applicable.

v. Documentation of the May 1, 1990 - September 30, 1990 mass emissions (in tons), including:

1. Quantification of the mass emissions (in tons).

2. A description of the method used to determine the NO<sub>x</sub> emissions.

3. Under no circumstances shall the emissions exceed any applicable federal or state emission limit.

vi. Documentation of the May 1, 1990 - September 30, 1990 *heat input* (in MMBTU), including:

1. Quantification of the *heat input* (in MMBTU/hr).

2. A description of the method used to determine the *heat input*.

3. The *heat input* shall be consistent with the *baseline control period* NO<sub>x</sub> mass emissions determined in Section 4(f)(1)(v) of this regulation.

vii. Determination of the May 1, 1990 - September 30, 1990 NO<sub>x</sub> emission rate, consistent with the guidelines of the "Procedures for Development of the OTC NO<sub>x</sub> Baseline Emission Inventory", using the mass emissions identified in Section 4(f)(1)(v) of this regulation and the *heat input* identified in Section 4(f)(1)(vi) of this regulation.

viii. An emission monitoring plan in accordance with Section 13 of this regulation.

ix. A statement that the *submitted* information is representative of the true emissions during the May 1, 1990 - September 30, 1990 and that the source was operated in accordance with all applicable requirements during that time.

x. The following statement: "I am authorized to make this submission on behalf of the owners and operators of the *budget source* for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its



attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.”

xi. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. For sources that notify the Department that they are subject to this regulation within six months of the effective date of this regulation, the Department shall *allocate* NO<sub>x</sub> emissions *allowances* to the source as follows:

i. For *fossil fuel fired boilers* and *indirect heat exchangers* with a maximum *heat input* capacity of 250 MMBTU/hr or more, *allowance allocations* shall be determined as follows:

A. For sources located in New Castle and Kent counties, *allowance allocations* shall be based on the more stringent of the following:

1. The less stringent of:

i. The actual May 1, 1990 to September 30, 1990 mass emissions reduced by 65%; or,

ii. The mass emissions resulting from the multiplication of the actual May 1, 1990 to September 30, 1990 heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

2. If an approved RACT emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 4(f)(2)(i)(A)(1)(i) and 4(f)(2)(i)(A)(1)(ii), then the RACT value shall be the emissions limit for the NO<sub>x</sub> Budget Program.

B. For sources located in Sussex county, *allowance allocations* shall be based on the more stringent of the following:

1. The less stringent of:

i. The actual May 1, 1990 to September 30, 1990 mass emissions reduced by 55%; or,

ii. The mass emissions resulting from the multiplication of the actual May 1, 1990 to September 30, 1990 heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

2. If an approved RACT emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 4(f)(2)(i)(B)(1)(i) and 4(f)(2)(i)(B)(1)(ii), then the RACT value shall be the emissions limit for the NO<sub>x</sub> Budget Program.

ii. For *electric generating units* with a rated output of 15 MW or more that is not affected by Section 4(f)(2)(i) of this regulation, *allowance allocations* shall equal the more stringent of the May 1, 1990 to September 30, 1990 actual emissions or that derived from the application of

an approved RACT limit to the actual May 1, 1990 to September 30 heat input value.

3. Within 60 days of receipt of the submittal, the Department shall review the submittal and take the following actions:

i. If the Department does not approve the submittal, the *authorized account representative* identified in the submittal shall be notified in writing of the finding and the reason(s) for the finding.

ii. If the Department approves the submittal, the Department shall:

A. Notify in writing the *authorized account representative* identified in the submittal.

B. The Department shall notify the *OTC* of the *allowance allocation* and authorize the *NATS Administrator* to open a *compliance account* for the subject source.

4. Any subject source that does not notify the Department within six months of the effective date of this regulation or that can not quantify its May 1, 1990 - September 30, 1990 emissions rate or heat input shall be treated as a new *budget source* in accordance with Section 9 of this regulation.

5. Compliance with Section 4(f) of this regulation does not imply compliance nor sanction noncompliance with this regulation for prior NO<sub>x</sub> *control period* operation.

g. If, after the effective date of this regulation, a *budget source* reduces *control period* emissions and said emission reductions are to be *used* by a source that is not a *budget source* (i.e. the emissions are moved off *budget*), that *budget source* shall request that the Department reduce its current year and future year allocation.

1. The request shall be *submitted* to the Department not later than the date that the request to *use* the emissions reduction at the *off budget source* is *submitted*, and shall include the following information, as a minimum:

i. The *compliance account* number of the *budget source* providing the emissions reduction.

ii. Identification of the NO<sub>x</sub> source that is to *use* the emissions reduction, including:

A. Name and mailing address of the source.

B. Name, mailing address, and telephone number of a knowledgeable representative from that source.

iii. Identification of the calendar date for which the reduction of *current year* and future year allocations is to be effective, which shall not be later than the effective date of the *use* of the emissions reduction.

iv. A statement documenting the physical changes to the *budget source* or changes in the methods of operating the *budget source* which resulted in the reduction of NO<sub>x</sub> emissions.

v. Quantification and justifying documentation of the NO<sub>x</sub> emissions reduction, including a description of the



methodology used to verify the emissions reduction.

vi. The quantity of *current year* and future year allocations to be reduced, which is the portion of the *control period* emissions reduction that is to move off budget.

vii. Certification by the *authorized account representative* or alternate *authorized account representative* including the following statement in verbatim: “I am authorized to make this submission on behalf of the owners or operators of the *NO<sub>x</sub>* source and I hereby certify under penalty of law, that I have personally examined the foregoing and am familiar with the information contained in this document and all attachments, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment.”

viii. Signature of the *authorized account representative* or alternate *authorized account representative* of the *budget source* providing the emissions reduction and the date of signature.

2. Within 30 days of receipt of the submittal, the Department shall review the submittal and take the following actions:

i. If the Department does not approve the request, the *authorized account representative* identified on the submittal shall be notified in writing of the finding and the reason(s) for the finding.

ii. If the Department approves the request, the Department shall notify in writing the *authorized account representative* identified on the request and the following provisions apply:

A. The Department shall authorize the *NATS Administrator* to deduct from the *compliance account* of the *budget source* providing the emissions reduction the quantity of *current year* and future year *allowances* to be reduced.

B. The deducted *current year* and future year *allowances* shall be permanently retired from the *NO<sub>x</sub>* Budget Program.

Section 5 - Permits

a. Within 120 days of the effective date of this regulation, the *owner or operator* of an *existing budget source* shall request amendment of any applicable construction or operating permit issued, or application for any permit submitted, in accordance with the State of Delaware “Regulations Governing the Control of Air Pollution”. The amendment request shall include the following:

1. A condition(s) that requires the establishment of a *compliance account* in accordance with Section 6 of this

regulation.

2. A condition(s) that requires *NO<sub>x</sub>* mass emission monitoring during *NO<sub>x</sub> control periods* in accordance with Section 13 of this regulation.

3. A condition(s) that requires *NO<sub>x</sub>* mass emission reporting and other reporting requirements in accordance with Section 15 of this regulation.

4. A condition(s) that requires end-of-season *compliance account* reconciliation in accordance with Section 16 of this regulation.

5. A condition(s) that requires compliance certification in accordance with Section 17 of this regulation.

6. A condition(s) that prohibits the source from emitting *NO<sub>x</sub>* during each *NO<sub>x</sub> allowance control period* in excess of the amount of *NO<sub>x</sub> allowances* held in the source’s *compliance account* for the *NO<sub>x</sub> allowance control period* as of December 31 of the subject year.

7. A condition(s) that authorizes the transfer of *allowances* for purposes of compliance with this regulation, containing reference to the source’s *NATS compliance account* and the *authorized account representative* and alternate *authorized account representative*, if any.

b. Permit revisions/amendments shall not be required for changes in emissions that are authorized by *allowances* held in the *compliance account* provided that any transfer is in compliance with this regulation by December 31 of each year, is in compliance with the authorization for transfer contained in the permit, and does not affect any other applicable state or federal requirement.

c. Permit revisions/amendments shall not be required for changes in *allowances* held by the source which are acquired or transferred in compliance with this regulation and in compliance with the authorization for transfer in the permit.

d. Any equipment modification or change in operating practices taken to meet the requirements of this program shall be performed in accordance with all applicable state and federal requirements.

Section 6 - Establishment of Compliance Accounts

a. The *owner or operator* of each *existing budget source*, and each *new budget source*, shall designate one *authorized account representative* and, if desired, one alternate *authorized account representative* for that *budget source*. The *authorized account representative* or alternate *authorized account representative* shall submit to the Department an “Account Certificate of Representation”.

1. For *existing budget sources*, initial designations shall be submitted no more than 30 days following the effective

date of this regulation.

2. For *new budget sources*, initial designations shall be *submitted* no less than 90 days prior to the first hour of operation in a *NO<sub>x</sub> control period*.

3. An *authorized account representative* or alternative account representative may be replaced at any time with the submittal of a new "Account Certificate of Representation". Notwithstanding any such change, all submissions, actions, and inactions by the previous *authorized account representative* or alternate *authorized account representative* prior to the date and time the *NATS Administrator* receives the superseding "Account Certificate of Representation" shall be binding on the new *authorized account representative*, on the new alternate *authorized account representative*, and on the *owners and operators* of the *budget source*.

4. Within 30 days following any change in *owner or operator, authorized account representative*, or any alternate *authorized account representative*, the *authorized account representative* or the alternate *authorized account representative* shall submit a revision to the "Account Certificate of Representation" amending the outdated information.

b. The "Account Certificate of Representation" shall be signed and dated by the *authorized account representative* or the alternate *authorized account representative* for the *NO<sub>x</sub> budget source* and shall contain, as a minimum, the following information:

1. Identification of the *NO<sub>x</sub> budget source* by plant name, address, and plant combustion unit number or equipment identification number for which the certification of representation is *submitted*.

2. The name, address, telephone and facsimile number of the *authorized account representative* and alternate *authorized account representative*, if applicable.

3. A list of the *owners and operators* of the *NO<sub>x</sub> budget source*.

4. A description of the source, including fuel type(s), *maximum heat input capacity*, and electrical output rating where applicable.

5. The following statement: "*I am authorized to make this submission on behalf of the owners and operators of the budget source for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the*

*possibility of fine or imprisonment.*"

6. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

c. The Department shall review all *submitted* "Account Certificate of Representation" forms. Within 30 days of receipt of the "Account Certificate of Representation", the Department shall take one of the following actions:

1. If not approved by the Department, the Department shall notify in writing the *authorized account representative* identified in the "Account Certificate of Representation" of the reason(s) for disapproval.

2. If approved by the Department, the Department shall forward the "Account Certificate of Representation" to the *NATS Administrator* and authorize the *NATS Administrator* to open a *compliance account* for the *budget source*.

d. *Authorized account representative* and alternate *authorized account representative* designations or changes become effective upon the logged date of receipt of a completed "Account Certificate of Representation" by the *NATS Administrator*. The *NATS Administrator* shall acknowledge receipt and the effective date of the designation or changes by written correspondence to the *authorized account representative*.

e. The alternate *authorized account representative* shall have the same authority as the *authorized account representative*. Correspondence from the *NATS Administrator* shall be directed to the *authorized account representative*.

f. Only the *authorized account representative* or the alternate *authorized account representative* may request transfers of *NO<sub>x</sub> allowances* in a *NATS account*. The *authorized account representative* shall be responsible for all transactions and reports *submitted* to the *NATS*.

#### Section 7 - Establishment of General Accounts

a. An *authorized account representative* and alternate *authorized account representative*, if any, shall be designated for each *general account* by the *general account owners*. Said representative shall have obligations similar to that of an *authorized account representative* of a *budget source*.

b. Any person or group of persons may open a *general account* in the *NATS* for the purpose of holding and transferring *allowances*. That person or group of persons shall submit to the Department an application to open a *general account*. The *general account* application shall include the following minimum information:

1. Organization or company name to be used for the general account name listed in the NATS, and type of organization (if applicable).

2. The name, address, telephone, and facsimile number of the *account's authorized account representative* and alternate authorized account representative, if applicable.

3. A list of all persons subject to a binding agreement for the *authorized account representative* or alternate *authorized account representative* to represent their ownership interest with respect to the *allowances* held in the *general account*.

4. The following statement: "I certify that I was selected under the terms of an agreement that is binding on all persons who have an ownership interest with respect to allowances held in the NO<sub>x</sub> allowance tracking system (NATS) account. I certify that I have all necessary authority to carry out my duties and responsibilities on behalf of the persons with ownership interest and that they shall be fully bound by my actions, inactions, or submissions under this regulation. I shall abide by my fiduciary responsibilities assigned pursuant to the binding agreement. I am authorized to make this submission on behalf of the persons with an ownership interest for whom this submission is made. I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the information is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false material information, or omitting material information, including the possibility of fine or imprisonment for violations."

5. Signature of the *general account's authorized account representative* or alternate *authorized account representative* and date of signature.

c. The Department shall review all *submitted general account* and revised *general account* applications. Within 30 days of receipt of the application, the Department shall take one of the following actions:

1. If not approved by the Department, the Department shall notify in writing the *authorized account representative* identified in the *general account* application of the reason(s) for disapproval.

2. If approved by the Department, the Department shall forward the *general account* application to the *NATS Administrator* and authorize the *NATS Administrator* to open/revise a *general account* in the organization or company name identified in the *general account* application.

d. No *allowance transfer* shall be recorded for a *general account* until the *NATS Administrator* has established the

*new account*.

e. The *authorized account representative* or alternate *authorized account representative* of an established *general account* may transfer *allowances* at any time in accordance with Section 11 of this regulation.

f. An *authorized account representative* or alternative account representative of an existing *general account* may be replaced by submitting to the Department a revised *general account* application in accordance with Section 7(b) of this regulation.

g. The *authorized account representative* or alternate *authorized account representative* of a *general account* may apply to the Department to close the *general account* as follows:

1. By submitting a copy of an *allowance transfer* request to the *NATS Administrator* authorizing the transfer of all *allowances* held in the *account* to one or more other *accounts* in the *NATS* and/or retiring *allowances* held in the *account*.

2. By submitting to the Department, in writing, a request to delete the *general account* from the *NATS*. The request shall be certified by the *authorized account representative* or alternate *authorized account representative*.

3. Upon approval, the Department shall authorize the *NATS Administrator* to close the *general account* and confirm closure in writing to the *general account's authorized account representative*.

Section 8 - Opt In Provisions

Except as provided for in Section 4(g) of this regulation, the owner or operator of any stationary source in the state of Delaware that is not subject to the NO<sub>x</sub> Budget Program by definition, may choose to *opt into* the NO<sub>x</sub> Budget Program as follows:

a. The *owner or operator* of a stationary source who chooses to *opt into* the NO<sub>x</sub> Budget Program shall submit to the Department an *opt-in* application. The *opt-in* application shall include, as a minimum, the following information:

1. Identification of the *opt-in* source by plant name, address, and plant combustion unit number or equipment identification number.

2. The name, address, telephone and facsimile number of the *authorized account representative* and, if desired, of an alternative authorized account representative.

3. A list of the owners and operators of the *opt-in* source.

4. A description of the *opt-in* source, including fuel type(s), maximum rated heat input capacity and electrical output rating where applicable.

5. Documentation of the *opt-in-baseline control period* mass emissions (in tons).

i. The *opt-in-baseline control period* emissions shall be the lower of the average of the mass emissions from the immediately preceding two consecutive  $\text{NO}_x$  *control periods* and the allowable emissions.

A. If the mass emissions from the preceding two *control periods* are not representative of normal operations, the Department may approve use of an alternative two consecutive  $\text{NO}_x$  *control periods* within the five years preceding the *date of the opt-in* application.

B. If the *opt-in* source does not have two consecutive years of operation, the *owner or operator* shall identify the lower of the permitted allowable  $\text{NO}_x$  emissions and any applicable Federal or State emission limitation as the *opt-in-baseline* emissions.

ii. The documentation shall include:

A. Identification of the time period represented by the emissions data.

B. Quantification of the *opt-in-baseline control period* mass emissions (in tons).

C. A description of the method used to determine the *opt-in-baseline control period*  $\text{NO}_x$  emissions.

6. Documentation of the *opt-in-baseline*  $\text{NO}_x$  *control period heat input* (in MMBTU).

i. The *opt-in-baseline control period heat input* shall be consistent with the *opt-in-baseline control period*  $\text{NO}_x$  mass emissions determined in Section 8(a)(5) of this regulation.

ii. The documentation shall include:

A. Quantification of the *opt-in-baseline control period heat input* (in MMBTU/hr).

B. A description of the method used to determine the *opt-in-baseline control period heat input*.

7. Determination of the *opt-in-baseline*  $\text{NO}_x$  emission rate, consistent with the guidelines of the "Procedures for Development of the OTC  $\text{NO}_x$  Baseline Emission Inventory", using the *opt-in-baseline control period* mass emissions identified in Section 8(a)(5) of this regulation and the *opt-in-baseline*  $\text{NO}_x$  *control period heat input* identified in Section 8(a)(6) of this regulation.

8. An emission monitoring plan in accordance with Section 13 of this regulation.

9. A statement that the source was operated in accordance with all applicable requirements during the *control periods*.

10. The following statement: "*I am authorized to make this submission on behalf of the owners and operators of the budget source for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information,*

*I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

11. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

b. Within 60 days of receipt of any *opt-in* application, the Department shall take the following actions:

1. The Department shall review the application for completeness and accuracy and:

i. Verify that the monitoring methods used to determine the *opt-in-baseline control period*  $\text{NO}_x$  mass emissions and the *opt-in-baseline*  $\text{NO}_x$  *control period heat input* are consistent with those described in Section 13 of this regulation.

ii. Verify that the *opt-in-baseline* emissions were calculated in accordance with the guidelines in the "Procedures for Development of the OTC  $\text{NO}_x$  Baseline Emission Inventory".

2. If the Department disapproves the *opt-in* application, the *authorized account representative* identified in the *opt-in* application shall be notified in writing of the determination and the reason(s) for the application not being approved.

3. If the Department determines that the *opt-in* application is acceptable, the Department shall request the OTC Stationary/Area Source Committee to review the application. Within 30 days of receiving the OTC Stationary/Area Source Committee comments, the Department shall consider the comments and take the following action:

i. If it is determined that the *opt-in* application does not properly justify opting the source into the  $\text{NO}_x$  Budget Program, the Department shall notify the *authorized account representative* in writing of the determination and the reason(s) for the application not being accepted.

ii. If it is determined that the *opt-in* application justifies opting the source into the  $\text{NO}_x$  Budget Program, the Department shall notify the *authorized account representative* in writing of that determination.

c. The Department shall assign an *allowance allocation* to any *owner or operator* that has been approved by the Department to *opt into* the  $\text{NO}_x$  Budget Program.

1. The *allowance allocation* for an *opt-in* source, that is not considered a *budget source* by definition, shall be equal to the more stringent of the *opt-in-baseline control period* emissions or the allowable  $\text{NO}_x$  emissions from the source.

2. The *allowance allocation* for an *opt-in* source that has a maximum *heat input* rating of 250 MMBTU/hr shall be

determined as follows:

i. For sources located in New Castle and Kent counties, *allowance allocations* shall be based on the more stringent of the following:

A. The less stringent of:

1. The *opt-in-baseline* actual mass emissions reduced by 65%; or,

2. The mass emissions resulting from the multiplication of the actual *opt-in-baseline* heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

B. If any permitted NO<sub>x</sub> emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 8(c)(2)(i)(A)(1) and 8(c)(2)(i)(A)(2), then the permitted emissions limit shall be used to determine the emissions limitation for the NO<sub>x</sub> Budget Program.

ii. For sources located in Sussex county, *allowance allocations* shall be based on the more stringent of the following:

A. The less stringent of:

1. The *opt-in-baseline* actual mass emissions reduced by 55%; or,

2. The mass emissions resulting from the multiplication of the actual *opt-in-baseline* heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

B. If any permitted NO<sub>x</sub> emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 8(c)(2)(ii)(A)(1) and 8(c)(2)(ii)(A)(2), then the permitted emissions limit shall be used to determine the emissions limitation for the NO<sub>x</sub> Budget Program.

3. If the *owner or operator* of an *opt-in* source is required to obtain NO<sub>x</sub> emissions offsets in accordance with Regulation 25 of the State of Delaware "Regulations Governing the Control of Air Pollution", the *allowance allocation* calculated under Section 8(c)(1) or (2) of this regulation shall be reduced by the portion of the *control period* emission reduction that is associated with any *budget source*.

4. The *allowance allocation* associated with the *opt-in* source shall be added to Delaware's NO<sub>x</sub> *budget* prior to *allocation of allowances* to the *opt-in* source. This regulation shall be revised to reflect changes in the number of allowances in the NO<sub>x</sub> Budget Program.

5. Under no circumstances shall the *allocation of allowances* to a source which chooses to *opt into* the program require adjustments to the *allocation of allowances* to *budget sources* in the NO<sub>x</sub> Budget Program.

d. Upon the approval of the *opt-in* application and assignment of an *allowance allocation*, the Department shall authorize the *NATS Administrator* to open a *compliance account* for the *opt-in* source in accordance with Section 10 of this regulation.

e. Any *owner or operator* approved to *opt into* the NO<sub>x</sub> Budget Program shall apply for a permit, or the modification of applicable permits, in accordance with Section 5 of this regulation.

f. Upon approval of the *opt-in* application and establishment of the *compliance account*, the *owner or operator* of the source shall be subject to all applicable requirements of this regulation including the requirements for *allowance transfer* or deduction, emissions monitoring, record keeping, reporting, and penalties.

g. Any *owner or operator* approved to *opt into* the NO<sub>x</sub> Budget Program that did not have two consecutive years of operation upon initial application and determined *opt-in-baseline* emissions in accordance with Section 8(a)(5)(i)(B) of this regulation shall submit to the Department a revised *opt-in* application.

1. The revised *opt-in* application shall be *submitted* no more than 60 days following first completion of operation in two consecutive NO<sub>x</sub> *control periods*.

2. The revised *opt-in* application shall provide actual operating information, including NO<sub>x</sub> mass emissions and *heat input*, for each of the two NO<sub>x</sub> *control periods*.

3. The Department shall review the revised *opt-in* application.

i. If the Department does not approve the revised *opt-in* application:

A. The Department shall notify the *opt-in source's authorized account representative* of the determination in writing and indicate the reason(s) for the determination.

B. The *opt-in source's authorized account representative* shall resolve the Department's comments and an updated revised *opt-in* application shall be submitted to the Department no more than 60 days from the Department's request.

C. Upon approval of any updated revised *opt-in* application, the Department shall process the application in accordance with Section 8(g)(3)(ii) of this regulation.

ii. If the Department is in concurrence with the revised *opt-in* application, the following actions shall be taken:

A. The Department shall request the *OTC Stationary/Area Source Committee* to comment on the revised *opt-in* application, and shall consider any comments offered by the *OTC Stationary/Area Source Committee*.

B. If it is determined that the revised *opt-in* application shall not be approved:

1. The Department shall notify the *opt-in source's authorized account representative* of the determination in writing and indicate the reason(s) for the determination.

2. The *opt-in source's authorized account representative* or alternate *authorized account*

*representative* shall resolve the Department's comments and an updated revised *opt-in* application shall be submitted to the Department no more than 60 days from the Department's request.

3. Upon approval of any updated revised *opt-in* application, the Department shall process the application in accordance with Section 8(g)(3)(ii)(C) of this regulation.

C. If it is determined that the revised *opt-in* shall be approved, the following actions shall be taken:

1. If the initial *allocation* was lower than that indicated in the revised application:

a. The Department shall revise the NO<sub>x</sub> *budget* to reflect the *allocation* determination identified in the revised *opt-in* application.

b. The Department shall authorize the *NATS Administrator* to revise the *allocation* to the subject source's *compliance account*.

c. The Department shall not authorize any additional allowances to cover any shortfall in the two *opt-in-baseline* NO<sub>x</sub> *control periods*. Any violation of a permit condition or of this regulation may result in an enforcement action.

2. If the initial *allocation* was higher than that indicated in the revised application:

a. The Department shall revise the NO<sub>x</sub> *budget* to reflect the *allocation* determination identified in the revised *opt-in* application.

b. The Department shall authorize the *NATS Administrator* to revise the *allocation* to the subject source's *compliance account*.

c. The Department shall authorize the *NATS Administrator* to deduct the *excess allowances allocated* to the *opt-in* source, calculated as the difference between the actual *allocated allowances* and the *allowances allocated* on the basis of the revised *opt-in* application for the years of operation in NO<sub>x</sub> *control periods*.

h. Any *owner or operator* who chooses to *opt into* the NO<sub>x</sub> Budget Program can not *opt-out* of the program unless NO<sub>x</sub> emitting operations at the *opt-in* source have ceased, and the *allowance* adjustment provisions of Section 8(i) of this regulation apply.

i. Any *owner or operator* who chooses to *opt into* the NO<sub>x</sub> Budget Program and who subsequently chooses to cease or curtail operations during any NO<sub>x</sub> *allowance control period* after *opting-in* shall be subject to an *allowance* adjustment equivalent to the NO<sub>x</sub> emissions decrease that results from the shut down or curtailment.

1. The *NETS Administrator* shall compare actual *heat input* data following each NO<sub>x</sub> *control period* with the *opt-in-baseline heat input* for each *opt-in* source.

2. The *NATS Administrator* shall calculate and deduct *allowances* equivalent to any decrease in the *opt-in*

source's *heat input* below its *opt-in-baseline heat input*. This deduction shall be calculated using the average of the two most recent years *heat input* compared to the *heat input* used in the *opt-in-baseline* calculation.

3. The *NATS Administrator* shall notify the NO<sub>x</sub> *budget source's authorized account representative* and the Department of any such deductions.

4. This adjustment affects only the *current year allocation* and shall not effect the NO<sub>x</sub> *budget source's allocations* for future years.

5. No deduction shall result from reducing NO<sub>x</sub> emission rates below the rate used in the *opt-in allowance* calculation.

6. A source that is to be repowered or replaced can be opted into the NO<sub>x</sub> Budget Program without the shutdown/curtailment deductions. The *heat input* for the repowered or replaced source can be substituted for the present year's activity for the *opt-in* NO<sub>x</sub> *allowance* adjustment calculation.

j. For replacement sources, all sources under common control in the State of Delaware to which production may be shifted shall be opted-in together.

k. When an *opt-in* source undergoes reconstruction or modification such that the source becomes a *budget source* by definition:

1. The *opt-in* source's *authorized account representative* or alternate *authorized account representative* shall notify the Department within 30 days of completion of the modification or reconstruction.

2. The Department shall authorize the *NATS Administrator* to deduct *allowances* equal to those allocated to the *opt-in* source in the NO<sub>x</sub> *control period* for the calendar year in which the *opt-in* source becomes a *budget source* by definition.

3. The Department shall authorize the *NATS Administrator* to deduct all *allowances* that were allocated pursuant to Section 8(c) of this regulation to the *opt-in* source, for all future years following the calendar year in which the *opt-in* source becomes a *budget source* by definition. This regulation shall be revised to reflect changes in the number of allowances in the NO<sub>x</sub> Budget Program.

4. The reconstructed or modified source shall be treated as a *new budget source* in accordance with Section 9 of this Regulation.

#### Section 9 - New Budget Source Provisions

a. NO<sub>x</sub> *allowances* shall not be created for new NO<sub>x</sub> sources that are *budget sources* by definition. The *owner or operator* is responsible to acquire any required NO<sub>x</sub> *allowances* from the *NATS*.

b. The *owner or operator* of a *new budget source* shall establish a compliance account and be in compliance with all applicable requirements of this regulation prior to the commencement of operation in any *NO<sub>x</sub> control period*. *New budget sources* shall:

1. Request a permit amendment/revision in accordance with Section 5 of this regulation.
2. Submit a monitoring plan to the Department, in accordance with Section 13 of this regulation, no later than 90 days prior to the anticipated performance of monitoring system certification.
3. Install and operate an approved monitoring system(s) to measure, record, and report hourly and cumulative *NO<sub>x</sub>* mass emissions.
4. Complete the monitoring system certification prior to operation in any *NO<sub>x</sub> control period*.

Section 10 - *NO<sub>x</sub>* Allowance Tracking System (NATS)

a. The *NO<sub>x</sub> allowance tracking system* is an electronic recordkeeping and reporting system which is the official database for all *NO<sub>x</sub> allowance* deduction and transfer within this program. The *NATS* shall track:

1. The *allowances* allocated to each *budget source*.
2. The *allowances* held in each *account*.
3. The *allowances* deducted from each *budget source* during each *control period*, as requested by a transfer request submitted by the *budget source's authorized account representative* or alternate *authorized account representative* in accordance with Section 16(b) of this regulation.
4. *Compliance accounts* established for each *budget source* to determine the compliance for the source, including the following information:
  - i. The *account number* of the *compliance account*.
  - ii. The name(s), address(es), and telephone number(s) of the *account owner* (s).
  - iii. The name, address, and telephone number of the *authorized account representative* and alternate *authorized account representative*, as applicable.
  - iv. The name and street address of the associated *budget source*, and the state in which the *budget source* is located.
  - v. The number of *allowances* held in the *account*.
5. *General accounts* opened by individuals or entities, upon request, which are not used to determine compliance, including the following information:
  - i. The *account number* of the *general account*.
  - ii. The name(s), address(es) and telephone number(s) of the *account owner*(s).
  - iii. The name, address, and telephone number of the *authorized account representative* and alternate *authorized account representative*, as applicable.

- iv. The number of *allowances* held in the *account*.
6. *Allowance transfers*.
7. Deductions of *allowances* by the *NATS Administrator* for compliance purposes, in accordance with Section 16(d) of this regulation.

b. The *NATS Administrator* shall establish *compliance* and *general accounts* when authorized to do so by the Department pursuant to Sections 6, 7, and 8 of this regulation.

c. Each *compliance account* and *general account* shall have a unique identification number and each *allowance* shall be assigned a unique serial number. Each *allowance* serial number shall indicate the year of *allocation*.

Section 11 - Allowance Transfer

a. *Allowances* may be transferred at any time during any year, not just the *current year*.

b. The transfer of *allowances* between *budget sources* in different states for purposes of compliance is contingent upon the adoption and implementation by those states of comparable and consistent *NO<sub>x</sub> budget* program regulations, and their participation in the *NATS*. A program is considered comparable and consistent if it is approved by the EPA for incorporation in the subject states' state implementation plan (SIP).

c. Transfer requests shall be *submitted* to the *NATS Administrator* on a form or electronic media, as directed by the *NATS Administrator*, and shall include the following information:

1. The *account number* of the originating *account* and the acquiring *account*.
2. The name(s) and address(es) of the owner(s) of the originating *account* and the acquiring *account*.
3. The serial number of each *allowance* being transferred.
4. The following statement from the *authorized account representative* or alternate *authorized account representative* of the originating *account*, in verbatim: "I am authorized to make this submission on behalf of the owners or operators of the budget source and I hereby certify under penalty of law, that I have personally examined the foregoing and am familiar with the information contained in this document and all attachments, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment."

5. Signature of the *authorized account representative* or alternate *authorized account representative* of the originating account and the date of signature.

d. The *Authorized account representative* or alternate *authorized account representative* for the originating account shall further provide a copy of the transfer request to each *owner or operator* of the *budget source*.

e. Transfer requests shall be processed by the *NATS Administrator* in order of receipt.

f. A transfer request shall be determined to be valid by the *NATS Administrator* if:

1. Each *allowance* listed in the transfer request is held by the originating *account* at the time the transfer is to be recorded.

2. The acquiring party has an *account* in the *NATS*.

3. The transfer request has been certified by the person named as *authorized account representative* or alternate *authorized account representative* for the originating *account*.

g. Transfer requests judged valid by the *NATS Administrator* shall be completed and recorded in the *NATS* by deducting the specified *allowances* from the originating *account* and adding them to the acquiring *account*.

h. Transfer requests judged to be invalid by the *NATS Administrator* shall be returned to the *authorized account representative* indicated on the transfer request along with documentation why the transfer request was judged to be invalid.

i. The *NATS Administrator* shall provide notification of an *allowance* transfer to the *authorized account representatives* of the originating *account*, the *authorized account representative* of the acquiring *account*, and the Department, including the following information:

1. The effective date of transfer.

2. Identification of the originating *account* and acquiring *account* by name as well as by *account number*.

3. The number of *allowances* transferred and their serial numbers.

j. The *authorized account representative* or alternate *authorized account representative* of a *compliance account* or a *general account* may request that some or all allocated *allowances* be transferred to another *compliance account* or to a *general account* for the current year, any future year, block of years, or for the duration of the program. The *authorized account representative* or alternate *authorized account representative* of the originating

*account* shall submit a request for transfer that states this intent to the *NATS Administrator*, and the transfer request shall conform to the requirements of this Section. In addition, the request for transfer shall be *submitted* to the Department with a letter requesting that the *budget* be revised to reflect the change in *allowance* allocations.

k. Upon request by the Department any *authorized account representative* or alternate *authorized account representative* shall make available to the Department information regarding transaction cost and *allowance* price.

#### Section 12 - Allowance Banking

a. The *banking* of *allowances* is permitted to allow retention of unused *allowances* from one year to a future year in either a *compliance account* or a *general account*.

b. Except for *allowances* created under Section 12(d) of this regulation, *allowances* not used under Section 16 of this regulation shall be held in a *compliance account* or *general account* and designated as "*banked*" *allowances* by the *NATS Administrator*.

c. The use of *banked allowances* shall be restricted as follows:

1. By March 1 of each year the *NATS Administrator* shall divide the total number of *banked allowances* by the regional  $\text{NO}_x$  *budget*.

i. If the total number of *banked allowances* in the *NATS* is less than or equal to 10% of the regional  $\text{NO}_x$  *budget* for the *current year control period*, all *banked allowances* can be deducted in the *current year* on a 1-for-1 basis.

ii. If the total number of *banked allowances* in the *NATS* exceeds 10% of the regional  $\text{NO}_x$  *budget* for the *current year control period*, *budget sources* shall be notified by the *NATS Administrator* of the *allowance* ratio which must be applied to *banked allowance* in each *compliance account* and *general account* to determine the number of *allowances* available for deduction in the *current year control period* on a 1-for-1 basis and the number of *allowances* available for deduction on a 2-for-1 basis.

2. Where a finding has been made by the *NATS Administrator* that *banked allowances* exceed 10% of the *current year regional NO<sub>x</sub> budget*, each *NATS compliance account* and *general account* of *banked allowances* shall be subject to the following *banked allowance* deduction protocol:

i. A ratio shall be established according to the following formula:



0.10 x the regional NO<sub>x</sub> Budget

the total number of *banked allowances* in the region

ii. The ratio calculated in Section 12(c)(2)(i) of this regulation shall be applied to the *banked allowances* in each *account*. The resulting number is the number of *banked allowances* in the *account* which can be used in the *current year control period* on a 1-for-1 basis. *Banked allowances* in excess of this number, if used, shall be used on a 2-for-1 basis.

d. The *owner or operator* of a *budget source* may apply to the Department to receive *early reduction allowances* for actual NO<sub>x</sub> reductions occurring in 1997 and/or 1998.

1. No later than October 1, 1998, the *authorized account representative* or alternate *authorized account representative* from any *budget source* seeking *early reduction allowances* shall submit to the Department an application that includes, at a minimum, the following information:

i. Identification of the *budget source*.

ii. Identification of the calendar time period for which *early reduction allowances* are being sought (i.e. May 1 - September 30, 1997, May 1 - September 30, 1998, or both).

iii. Identification of the *baseline NO<sub>x</sub> control period* emission limit (tons), which shall be the more stringent of the following:

A. The level of control required by the *OTC MOU*;

B. The lower of the permitted allowable emissions for the source and the allowable emissions identified in the state implementation plan (SIP);

C. The actual emissions for the 1990 *control period*, or;

D. The actual emissions for the average of two representative year *control periods* within the first five years of operation if the *budget source* did not commence operation until after 1990.

iv. The *baseline NO<sub>x</sub> control period heat input* (MMBTU) corresponding to the *baseline NO<sub>x</sub> control period* emission limit (tons) determined in Section 12(d)(1)(iii) of this regulation.

v. The actual NO<sub>x</sub> *control period* NO<sub>x</sub> emissions (tons) occurring in 1997 and/or 1998, as applicable.

vi. The actual NO<sub>x</sub> *control period heat input* (MMBTU) occurring in 1997 and/or 1998, as applicable.

vii. The calculated NO<sub>x</sub> *control period* emissions rate (lb/MMBTU), as determined using the *control period* NO<sub>x</sub> emissions identified in Section 12(d)(1)(v) of this regulation multiplied by 2000 to obtain actual emissions in pounds (lbs), divided by the *control period heat input* (MMBTU) identified in Section 12(d)(1)(vi) of this regulation.

viii. The amount of NO<sub>x</sub> emissions *early reduction allowances* shall be calculated by subtracting the actual *control period* NO<sub>x</sub> emissions (in tons), identified in Section 12(d)(1)(v) of this regulation, from the *baseline* NO<sub>x</sub> emissions limit (in tons) identified in Section 12(d)(1)(iii) of this regulation.

ix. If the actual *control period heat input*, as identified in Section 12(d)(1)(vi) of this regulation, is less than the *baseline NO<sub>x</sub> control period heat input*, as identified in Section 12(d)(1)(iv) of this regulation, the NO<sub>x</sub> emissions *early reduction allowances* determined in Section 12(d)(1)(viii) of this regulation shall be corrected as follows:

A. The actual *control period heat input* (MMBTU), as identified in Section 12(d)(1)(vi) of this regulation, shall be subtracted from the *baseline NO<sub>x</sub> control period heat input* (MMBTU), as identified in Section 12(d)(1)(iv) of this regulation, to obtain the *heat input* correction.

B. The *heat input* correction (MMBTU) is multiplied by the calculated NO<sub>x</sub> *control period* emissions rate (lb/MMBTU) determined in Section 12(d)(1)(vii) of this regulation. The resulting value is divided by 2000 to obtain tons of NO<sub>x</sub>.

C. The corrected NO<sub>x</sub> emissions *early reduction allowance* is the result of subtracting the results of Section 12(d)(1)(ix)(B) of this regulation from the NO<sub>x</sub> emissions *early reduction allowances* calculated in Section 12(d)(1)(viii) of this regulation.

x. A statement indicating the *budget source* was operating in accordance with all applicable requirements during the applicable NO<sub>x</sub> *control period* including:

A. Whether the monitoring plan that was *submitted* in accordance with Section 13 of this regulation was maintained to reflect the actual operation and monitoring of the unit and contains all information necessary to attribute monitored emissions to the *budget source*. If *early reduction allowances* are being sought for a *control period* prior to the implementation of monitoring in accordance with Section 13(a) of this regulation, a monitoring plan prepared in accordance with Section 13(a) of this regulation shall be *submitted* describing the monitoring method in use during the *control period* for which *early reduction allowances* are being sought.

B. Whether all the emissions from the *budget source* were monitored, or accounted for, throughout the NO<sub>x</sub> *control period* and reported.

C. Whether the information that formed the basis for certification of the emissions monitoring plan has changed affecting the certification of the monitoring.

D. If a change in the monitoring method is reported under Section 12(d)(1)(x)(C) of this regulation, specify the nature of the change, the reason for the change, when the change occurred, and what method was used to

determine emissions during the period mandated by the change.

xi. A statement documenting the specific physical changes to the *budget source* or changes in the methods of operating the *budget source* which resulted in the reduction of emissions.

xii. The following statement: "*I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

xiii. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. *Early reduction allowance* requests shall be reviewed by the Department.

i. If the Department determines that the emissions reductions were not enforceable, *real*, *quantifiable*, or *surplus*, the Department shall notify the *budget source's authorized account representative* in writing, indicating the reason(s) the request for *early reduction allowances* is being denied.

ii. If the Department determines that the emissions reductions are enforceable, *real*, *quantifiable*, and *surplus*:

A. The Department shall request the *OTC Stationary/Area Source Committee* to comment on the generation of potential *early reduction allowances*.

B. The Department shall consider the *OTC Stationary/Area Source Committee* comments and either:

1. Notify the *budget source's authorized account representative* in writing denying the request for *early reduction allowances* and indicate the reason(s) for the determination; or

2. Notify the *budget source's authorized account representative* in writing that the requested emissions reduction *allowances* shall be added to the *budget source's account*; and

3. Authorize the *NATS Administrator* to add the *allowances* to the *budget source's account* as 1999 *allowances*.

3. Reductions associated with *repowering* of a *budget source* are eligible for *early reduction credit* provided that the permit for construction of the replacement source was issued after the date of the *OTC MOU* (September 27, 1994), and the *budget source* being replaced ceases operation in 1997 or 1998.

4. On or before May 1, 1999, the Department shall

publish a report which documents the applicable sources and the number of *early reduction credits* awarded.

### Section 13 - Emission Monitoring

a.  $\text{NO}_x$  emissions from each *budget source* shall be monitored in accordance with this section and in accordance with the requirements of the *OTC* documents titled "Guidance for Implementation of Emissions Monitoring Requirements for the  $\text{NO}_x$  Budget Program", dated January 28, 1997, and " $\text{NO}_x$  Budget Program Monitoring Certification and Reporting Instructions", dated July 3, 1997. The provisions of these documents are hereby adopted by reference.

b. Monitoring systems are subject to initial performance testing and periodic calibration, accuracy testing, and quality assurance/quality control testing as specified in the *OTC* document titled "Guidance for Implementation of Emissions Monitoring Requirements for the  $\text{NO}_x$  Budget Program". If an *owner or operator* uses certified monitoring systems under Part 75 to meet the requirements of this program and maintains and operates those monitoring systems according to the requirements of Part 75, it is not necessary to re-perform initial certification tests to ensure the accuracy of these components under the  $\text{NO}_x$  Budget Program.

c. During a period when valid data is not being recorded by devices approved for use to demonstrate compliance with the requirements of this section, the *owner or operator* shall provide substitute data in accordance with the requirements of:

1. For *Part 75 budget sources*, the procedures of 40 CFR Part 75, Subpart D, and Part 1 of the *OTC* document titled "Guidance for Implementation of Emissions Monitoring Requirements for the  $\text{NO}_x$  Budget Program".

2. For *non-Part 75 budget sources*, the procedures of Part 2 of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the  $\text{NO}_x$  Budget Program".

d. The *owner or operator* of a  $\text{NO}_x$  *budget source* shall meet the following emissions monitoring deadlines:

1. All existing *Part 75*  $\text{NO}_x$  *budget sources* not required by the  $\text{NO}_x$  Budget Program to install additional monitoring equipment, or required to only make software changes to implement the additional requirements of this program, shall meet the monitoring requirements of the  $\text{NO}_x$  Budget Program as follows:

i. By meeting all current Part 75 monitoring requirements during the  $\text{NO}_x$  *control period* during each calendar year.

ii. By monitoring hourly and cumulative  $\text{NO}_x$  mass

emissions for the *NO<sub>x</sub> control period* in each calendar year starting in 1999 in accordance with the *OTC* documents "Guidance for Implementation of Emissions Monitoring Requirements for the *NO<sub>x</sub> Budget Program*" and "*NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions*".

2. All existing *Part 75 budget sources* required to install and certify new monitoring systems to meet the requirements of the *NO<sub>x</sub> Budget Program* shall meet the monitoring requirements of this program as follows:

i. By meeting all current *Part 75* monitoring requirements during the *NO<sub>x</sub> control period* during each calendar year.

ii. Monitoring systems required to be installed by the *NO<sub>x</sub> Budget Program* shall be installed and monitoring and recording hourly mass emissions data on and after July 1, 1998.

iii. By monitoring hourly and cumulative *NO<sub>x</sub>* mass emissions using certified monitoring systems for each *NO<sub>x</sub> control period* each calendar year starting in 1999 in accordance with the *OTC* documents "Guidance for Implementation of Emissions Monitoring Requirements for the *NO<sub>x</sub> Budget Program*" and "*NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions*".

3. All existing *non-Part 75 budget sources* shall meet the monitoring requirements of the *NO<sub>x</sub> Budget Program* as follows:

i. Monitoring systems required to be installed by the *NO<sub>x</sub> Budget Program* shall be installed and monitoring and recording hourly emissions data on July 1, 1998.

ii. By monitoring hourly and cumulative *NO<sub>x</sub>* mass emissions using certified monitoring systems for each *NO<sub>x</sub> control period* of each calendar year starting in 1999 in accordance with the *OTC* documents "Guidance for Implementation of Emissions Monitoring Requirements for the *NO<sub>x</sub> Budget Program*" and "*NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions*".

e. The *owner or operator* of a *budget source* subject to 40 CFR Part 75 shall demonstrate compliance with this section with a certified *Part 75* monitoring system.

1. The *authorized account representative* or alternate *authorized account representative* shall submit to the Department a monitoring plan prepared in accordance with 40 CFR Part 75 and the additional requirements of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the *NO<sub>x</sub> Budget Program*" and the *OTC* document "*NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions*".

i. All existing *Part 75 budget sources* not required to install additional monitoring equipment shall submit to the Department a complete hardcopy monitoring plan containing monitoring plan changes and additions required by the *NO<sub>x</sub> Budget Program* in the second quarter 1998

quarterly report as required under Section 15 of this regulation. These *Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

ii. For any *Part 75 budget source* required to install and certify new monitoring systems, submit to the Department a complete hardcopy monitoring plan acceptable to the Department at least 45 days prior to the initiation of certification tests for the new system(s). These *Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

iii. For *new budget sources* under 40 CFR Part 75, submit to the Department the *NO<sub>x</sub> Budget Program* information with the hardcopy Acid Rain Program monitoring plan no later than 90 days prior to the projected Acid Rain Program participation date. These new *Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

2. The *authorized account representative* or alternate *authorized account representative* shall obtain certification of the *NO<sub>x</sub>* emissions monitoring system in accordance with 40 CFR Part 75 and the additional requirements of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the *NO<sub>x</sub> Budget Program*" and the *OTC* document "*NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions*".

i. If the *Part 75 budget source* uses certified monitoring systems under *Part 75* to meet the requirements of the *NO<sub>x</sub> Budget Program* and maintains and operates those monitoring systems according to the requirements of *Part 75*, it is not necessary to re-perform initial certification tests to ensure the accuracy of the monitoring systems under the *NO<sub>x</sub> Budget Program*.

A. Formula verifications must be performed to demonstrate that the data acquisition system accurately calculates and reports *NO<sub>x</sub>* mass emissions (lb/hr) based on hourly *heat input* (MMBTU/hr) and *NO<sub>x</sub>* emission rate (lb/MMBTU).

B. Formula verifications shall be *submitted* to the Department no later than July 1, 1998.

ii. If it is necessary for the *owner or operator* of a *Part 75 budget source* to install and operate additional *NO<sub>x</sub>* or flow systems or fuel flow systems because of stack and unit configuration, the *owner or operator* must certify the monitoring systems using the procedures of 40 CFR Part 75.

A. Successful certification testing of the monitoring system in accordance with the requirements of 40 CFR Part 75 shall be completed no later than April 30, 1999.

B. A certification test notice and protocol shall be

submitted to the Department for approval no later than 90 days prior to the anticipated performance of the certification testing.

C. A certification report meeting the requirements of the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" shall be submitted to the Department no later than 45 days following the performance of the certification testing.

3. If the *Part 75 budget source* has a flow monitor certified under Part 75, NO<sub>x</sub> emissions in pounds per hour shall be determined using the Part 75 NO<sub>x</sub> CEMS and the flow monitor. The NO<sub>x</sub> emission rate in pounds per million BTU shall be determined using the procedure in 40 CFR Part 75, Appendix F, Section 3. The hourly *heat input* shall be determined by using the procedures in 40 CFR Part 75, Appendix F, Section 5. The NO<sub>x</sub> emissions in pounds per hour shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) by the *heat input* rate (in million BTU per hour).

4. If the *Part 75 budget source* does not have a certified flow monitor, but does have a certified NO<sub>x</sub> CEMS, the NO<sub>x</sub> emissions rate in pounds per hour shall be determined by using the NO<sub>x</sub> CEMS to determine the NO<sub>x</sub> emission rate in pounds per million BTU and the *heat input* shall be determined by using the procedures in 40 CFR Part 75, Appendix D. The NO<sub>x</sub> emissions rate (in pounds per hour) shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) by the *heat input* rate (in million BTU per hour).

5. If the *Part 75 budget source* uses the procedures in 40 CFR Part 75, Appendix E, to determine the NO<sub>x</sub> emission rate, the NO<sub>x</sub> emissions in pounds per hour shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) determined using the Appendix E procedures times the *heat input* (in million BTU per hour) determined using the procedures in 40 CFR Part 75, Appendix D.

6. If the *Part 75 budget source* uses the procedures in 40 CFR Part 75, Subpart E, to determine NO<sub>x</sub> emission rate, the NO<sub>x</sub> emissions in pounds per hour shall be determined using the alternative monitoring method approved under 40 CFR Part 75, Subpart E, and the procedures contained in the *OTC* document titled "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

7. The relevant procedures of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" shall be employed for unusual or complicated stack configurations.

f. The *owner or operator* of a *budget source* not subject to 40 CFR Part 75 shall seek the use of a NO<sub>x</sub> monitoring method to comply with this regulation as follows:

1. The *authorized account representative* or alternate

*authorized account representative* shall prepare and submit to the Department for approval a hardcopy monitoring plan for each NO<sub>x</sub> *budget source*. Upon request by the Department, the *authorized account representative* or alternate *authorized account representative* shall also submit to the Department a complete electronic monitoring plan. Sources subject to the program on July 1, 1998 shall submit the complete monitoring plan no later than March 30, 1998. Sources becoming subject to the *budget* program after July 1, 1998 must submit a complete monitoring plan no later than 90 days prior to projected initial participation date. The monitoring plan shall be prepared in accordance with the requirements of the *OTC* documents "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring and Certification and Reporting Instructions", and shall contain the following information, as a minimum:

- i. A description of the monitoring method to be used.
- ii. A description of the major components of the monitoring system including the manufacturer, serial number of the component, the measurement span of the component and documentation to demonstrate that the measurement span of each component is appropriate to measure all of the expected values. This requirement applies to all monitoring systems including NO<sub>x</sub> CEMS which have not been certified pursuant to 40 CFR Part 75.
- iii. An estimate of the accuracy of the system and documentation to demonstrate how the estimate of accuracy was determined. This requirement applies to all monitoring systems that are not installed/being installed in accordance with the requirements of 40 CFR Part 75.
- iv. A description of the tests that will be used for initial certification, initial quality assurance, periodic quality assurance, and relative accuracy.
- v. If the monitoring method of determining *heat input* involves *boiler* efficiency testing, a description of the tests to determine *boiler* efficiency.
- vi. If the monitoring method uses fuel sampling, a description of the test to be used in the fuel sampling program.
- vii. If the monitoring method utilizes a generic default emission rate factor, the monitoring plan shall identify the generic default emission rate factor and provide documentation of the applicability of the generic default emission rate factor to the *non-Part 75 budget source*.
- viii. If the monitoring method utilizes a unit specific default emission rate factor the monitoring plan shall include the following:

A. All necessary information to support the emission rate including:

1. Historical fuel use data and historical emissions test data if previous testing has been performed prior to May 1, 1997 to meet other state or federal requirements

and the testing was performed using Department approved methods and protocols; or

2. If emissions testing is performed to determine the emission rate, include a test protocol explaining the test to be conducted. All test performed on or after May 1, 1997 must meet the requirements of 40 CFR Part 75, Appendix E, and the requirements of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

B. Procedures which will be utilized to demonstrate that any control equipment in operation during the testing to develop source specific emission factors, or during development of load-based emission curves, are in use when those emission factors are applied to estimate NO<sub>x</sub> emissions.

C. Alternative uncontrolled emission rates to be used to estimate NO<sub>x</sub> emissions during periods when control equipment is not being used or is inoperable.

ix. If the monitoring method utilizes fuel flow meters to determine *heat input* and said meters have not been certified pursuant to 40 CFR Part 75, the monitoring plan shall include a description of all components of the fuel flow meter, the estimated accuracy of the fuel flow meter, the most recent calibration of each of the components and the original accuracy specifications from the manufacturer of the fuel flow meter.

x. The *submitted* complete monitoring plan shall meet all of the provisions of Part 2, Section II of the *OTC* document "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

2. The *authorized account representative* or alternate *authorized account representative* shall obtain certification of the NO<sub>x</sub> emissions monitoring system in accordance with the requirements of the *OTC* documents "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

i. The certification testing shall be successfully completed no later than April 30, 1999.

ii. A certification test notice and protocol shall be *submitted* to the Department no later than 90 days prior to the anticipated performance of the certification testing.

iii. A certification report meeting the requirements of the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" shall be *submitted* to the Department no later than 45 days following the performance of the certification testing.

3. The *owner or operator* of a *non-Part 75 budget source* shall monitor NO<sub>x</sub> emissions in accordance with one of the following requirements:

i. Any *non-Part 75 budget source* that has a maximum

rated *heat input* capacity of 250 MMBTU/hr or greater which is not a peaking unit as defined in 40 CFR 72.2, or whose operating permit allows for the combustion of any solid fossil fuel, or is required to install a NO<sub>x</sub> *CEMS* for the purposes of meeting either the requirements of 40 CFR Part 60 or any other Department or Federal requirement, shall install, certify, and operate a NO<sub>x</sub> *CEMS*. Any *budget source* that has previously installed a NO<sub>x</sub> *CEMS* for the purposes of meeting either the requirements of 40 CFR Part 60 or any other Department or Federal requirement shall certify and operate the NO<sub>x</sub> *CEMS*.

A. The NO<sub>x</sub> *CEMS* shall be used to measure stack gas NO<sub>x</sub> concentration and the NO<sub>x</sub> emissions rate in lb/MMBTU calculated in accordance with the procedures in 40 CFR Part 75, Appendix F.

B. Any *non-Part 75 budget source* utilizing a NO<sub>x</sub> *CEMS* shall meet the following requirements from the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program":

1. Initial certification requirements identified in Part 2, Section III.

2. Quality assurance requirements identified in Part 2, Section IV.

3. Re-certification requirements identified in Part 2, Section V.

ii. The *owner or operator* of a *non-Part 75 budget source* not required to install a NO<sub>x</sub> *CEMS* in accordance with Section 13(f)(3)(i) of this regulation may elect to install a NO<sub>x</sub> *CEMS* meeting the requirements of 40 CFR Part 75 or Section 13(f)(3)(i) of this regulation.

iii. The *owner or operator* of a *non-Part 75 budget source* that is not required to have a NO<sub>x</sub> *CEMS* may request approval from the Department to use any of the following methodologies to determine the NO<sub>x</sub> emission rate:

A. The *owner or operator* of a *non-Part 75 budget source* may request the use of an alternative monitoring methodology meeting the requirements of 40 CFR Part 75, Subpart E. The Department must approve the use of an *alternative monitoring system* before such system is operated to meet the requirements of the NO<sub>x</sub> Budget Program. If the methodology must be incorporated into a permit pursuant to Regulation 30 of Delaware's "Regulations Governing the Control of Air Pollution", the methodology must also be approved by the EPA.

B. The *owner or operator* of a *boiler* or combustion turbine *non-Part 75 budget source* may request the use of the procedures contained in 40 CFR Part 75, Appendix E, to measure the NO<sub>x</sub> emission rate, in lb/MMBTU, consistent with the requirements identified in Part 2 of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a combustion turbine

*non-Part 75 budget source* may request the use of default emission factors to determine NO<sub>x</sub> emissions, in pounds per MMBTU, as follows:

1. For oil-fired combustion turbines, the generic default emission factor is 1.2 pounds of NO<sub>x</sub> per MMBTU.

2. For gas-fired combustion turbines, the generic default emission factor is 0.7 pound of NO<sub>x</sub> per MMBTU.

3. The *owner or operator* of oil-fired and gas-fired combustion turbines may perform testing, in accordance with Department approved methods, to determine unit specific maximum potential NO<sub>x</sub> emission rates in accordance with the requirements of Part 2 of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program."

D. The *owner or operator* of a *boiler non-Part 75 budget source* may request the use of default emission factors to determine NO<sub>x</sub> emissions, in pound per MMBTU, as follows:

1. For oil-fired *boilers*, the generic default emission factor is 2.0 pounds of NO<sub>x</sub> per MMBTU.

2. For gas-fired *boilers*, the generic default emission factor is 1.5 pound of NO<sub>x</sub> per MMBTU.

3. The *owner or operator* of oil-fired and gas-fired *boilers* may perform testing, in accordance with Department approved methods, to determine unit specific maximum potential NO<sub>x</sub> emission rates in accordance with the requirements of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program."

4. The *owner or operator* of a *non-Part 75 budget source* may determine *heat input* in accordance with the following guidelines:

i. The *owner or operator* of a *non-Part 75 budget source* using a NO<sub>x</sub> *CEMS* to measure NO<sub>x</sub> emission rate may elect to measure stack flow and diluent (O<sub>2</sub> or CO<sub>2</sub>) concentration and use the procedures of 40 CFR Part 75, Appendix F, to determine the hourly *heat input*. For flow monitoring systems, the *non-Part 75 budget source* must meet all applicable requirements of 40 CFR Part 75.

ii. The *owner or operator* of a *non-Part 75 budget source* combusting only oil and/or natural gas may determine hourly *heat input* rate by monitoring fuel flow and conducting fuel sampling.

A. The *owner or operator* of a *non-Part 75 budget source* may monitor fuel flow by using fuel flow meter systems certified under 40 CFR Part 75, Appendix D, or as defined in Part 2, Section III of the *OTC* document "Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

B. The *owner or operator* of a *non-Part 75 budget source* combusting oil may perform oil sampling and testing in accordance with the requirements of 40 CFR Part 75 or Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions

Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a *non-Part 75 budget source* combusting gas must determine the heating value of the gas in accordance with the requirements of 40 CFR Part 75 or the methodologies approved in Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

iii. The *owner or operator* of a *non-Part 75 budget source* electrical generating unit less than 25 megawatts rated capacity that combusts only oil or gas may petition the Department to determine *heat input* by measuring fuel used on a frequency of greater than one hour but no less than weekly.

A. The fuel usage must be reported on an hourly basis by apportioning the fuel based on electrical load in accordance with the following formula:

$$\text{Hourly fuel usage} = \frac{\text{Hourly electrical load} \times \text{total fuel usage}}{\text{Total electrical load}}$$

Total electrical load

B. The *owner or operator* of a *non-Part 75 budget source* combusting oil may perform oil sampling and testing in accordance with the requirements of 40 CFR Part 75 or Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a *non-Part 75 budget source* combusting gas must determine the heating value of the gas in accordance with the requirements of 40 CFR Part 75 or the methodologies approved in Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

iv. The *owner or operator* of a *non-Part 75 budget source* that combusts only oil and/or gas and has elected to use a unit-specific or generic default NO<sub>x</sub> emission rate, may petition the Department to determine hourly *heat input* based on fuel use measurements for a specified period that is longer than one hour.

A. The petition must include a description of the periodic measurement methodology, including an assessment of its accuracy.

B. Each time period must begin on or after May 1 and conclude on or before September 30 of each calendar year.

C. To determine hourly input, the *owner or operator* shall apportion the long term fuel measurements to operating hours during the *control period*.

D. Fuel sampling and analysis must conform to the requirements of Part 2, Section I(C)(2) of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

v. The owner or operator of a non-Part 75 budget source that combusts any fuel other than oil or natural gas may petition the Department to use an alternative method of determining *heat input*, including:

A. Conducting fuel sampling and analysis and monitoring fuel usage.

B. Using *boiler* efficiency curves and other monitored information such as *boiler* steam output.

C. Any other method approved by the Department and which meets the requirements identified in Part 2, Section I, of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

vi. The owner or operator of a non-Part 75 budget source may petition the Department to use a unit-specific maximum hourly *heat input* based on the higher of the manufacturer's rated capacity or the highest observed hourly *heat input* in the period beginning five years prior to the program participation date. The Department may approve a lower maximum *heat input* if an owner or operator demonstrates that the highest observed hourly *heat input* in the last five years is not representative of the unit's current capabilities because modifications have been made limiting its capacity permanently.

vii. Methods used for determination of *heat input* are subject to both applicable initial and periodic relative accuracy and quality assurance testing requirements in accordance with the following provisions of the *OTC* document "Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program":

A. Initial certification requirements identified in Part 2, Section III.

B. Quality assurance requirements identified in Part 2, Section IV.

C. Re-certification requirements identified in Part 2, Section V.

5. Once the NO<sub>x</sub> emission rate in pounds per million BTU has been determined in accordance with Section 13(f)(3) of this regulation and the *heat input* rate in MMBTU per hour has been determined in accordance with Section 13(f)(4) of this regulation, the two values shall be multiplied together to result in NO<sub>x</sub> emissions in pounds per hour and reported to the *NETS* in accordance with Section 15 of this regulation.

6. The relevant procedures of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" shall be employed for unusual or complicated stack configurations.

Section 14 - Recordkeeping

The owner or operator of any budget source shall maintain, for a period of at least five years, copies of all measurements, tests, reports, data, and other information

required by this regulation.

Section 15 - Emissions Reporting

a. The Authorized account representative or alternate authorized account representative for each budget source shall submit to the *NETS Administrator*, electronically in a format which meets the requirements of the EPA's Electronic Data Reporting (EDR) convention, emissions and operating information for the second and third calendar quarter of each year in accordance with the *OTC* documents "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

1. All existing Part 75 budget sources not required to install additional monitoring equipment shall meet the reporting requirements of the NO<sub>x</sub> Budget Program as follows:

i. By meeting all current Part 75 reporting requirements and reporting the additional unit identification information as required by the NO<sub>x</sub> Budget Program (100 and 500 level records) beginning with submittal of the quarterly report for the third calendar quarter of 1998.

ii. It is not necessary to submit hourly NO<sub>x</sub> mass emissions data in 1998.

iii. Beginning with the quarterly report for the second quarter of 1999, report all Part 75 required information and all additional information required by the NO<sub>x</sub> Budget Program including:

A. Additional unit identification information.

B. Hourly NO<sub>x</sub> mass emissions in pounds per hour based on reported hourly *heat input* and hourly NO<sub>x</sub> emission rate.

C. Cumulative NO<sub>x</sub> control period NO<sub>x</sub> mass emissions in tons per NO<sub>x</sub> control period.

D. Additional monitoring plan information related to the NO<sub>x</sub> Budget Program.

E. Certification status information as required by the NO<sub>x</sub> Budget Program.

2. Beginning with the quarterly report for the third quarter of 1998, all Part 75 budget sources, that are required to install and certify new monitoring systems to meet the requirements of the NO<sub>x</sub> Budget Program, shall meet the reporting requirements of the NO<sub>x</sub> Budget Program by meeting all current Part 75 reporting requirements and the additional reporting requirements of the NO<sub>x</sub> Budget Program including submittal of the following information:

i. Additional unit identification information.

ii. Hourly NO<sub>x</sub> mass emissions in pounds per hour based on reported hourly *heat input* and hourly NO<sub>x</sub> emission rate.

iii. Cumulative NO<sub>x</sub> *control period* NO<sub>x</sub> mass emissions in tons per NO<sub>x</sub> *control period*.

iv. Additional monitoring plan information related to the NO<sub>x</sub> Budget Program.

v. Certification status information as required by the NO<sub>x</sub> Budget Program.

3. All *non-Part 75 budget sources* shall meet the reporting requirements of the NO<sub>x</sub> Budget Program by reporting all information required by the NO<sub>x</sub> Budget Program as well as reporting hourly and cumulative NO<sub>x</sub> mass emissions beginning with the quarterly report for the third quarter of 1998.

b. The *authorized account representative* or alternate *authorized account representative* of a *budget source* subject to 40 CFR Part 75 shall submit NO<sub>x</sub> Budget Program quarterly data to the U.S. EPA as part of the quarterly reports *submitted* for the compliance with 40 CFR Part 75.

c. The *authorized account representative* or alternate *authorized account representative* of a *budget source* not subject to 40 CFR Part 75 shall submit NO<sub>x</sub> budget program quarterly data to the U.S. EPA as follows:

1. For *non-Part 75 budget sources* not utilizing NO<sub>x</sub> CEMS, submit two quarterly reports each year, one for the second quarter and one for the third quarter.

2. For *non-Part 75 budget sources* using any NO<sub>x</sub> CEMS based measurement methodology, submit a complete quarterly report for each quarter in the year.

3. The submission deadline is thirty days after the end of the calendar quarter. If the thirtieth day falls on a weekend or federal holiday, the reporting deadline is midnight of the first day following the holiday or weekend.

d. Should a *budget source* be permanently shutdown, the *authorized account representative* or alternate *authorized account representative* may submit a written request the Department for an exemption from the requirements of Sections 13 and 14 of this regulation. The shutdown exemption request shall identify the *budget source* being shutdown and the date of permanent shutdown. Within 30 days of receipt of the shutdown exemption request, the Department shall:

1. If the Department does not approve the shutdown exemption request, the *authorized account representative* shall be notified in writing, including the reason(s) for not approving the request.

2. If the Department approves the shutdown exemption request:

i. The *authorized account representative* shall be notified in writing.

..... ii. The Department shall notify the *NETS Administrator* of the approved

shutdown request.

#### Section 16 - End-of Season Reconciliation

a. *Allowances* may be used for compliance with this program in a designated compliance year by being in a *compliance account* as of December 31 of the subject year, or by being identified in an *allowance transfer* request that is *submitted* by December 31 of the subject year.

b. Each year during the period November 1 through December 31, inclusive, the *authorized account representative* or alternate *authorized account representative* shall request the *NATS Administrator* to deduct *current year allowances* from the *compliance account* equivalent to the NO<sub>x</sub> emissions from the *budget source* in the most recent *control period*. This request shall be *submitted* by the *authorized account representative* or alternate *authorized account representative* to the *NATS Administrator* by not later than December 31. This request shall identify the *compliance account* of the *budget source* and the serial number of each of the *allowances* to be deducted.

1. *Allowances* allocated for the current NO<sub>x</sub> *control period* may be used without restriction.

2. *Allowances* allocated for future NO<sub>x</sub> *control periods* may not be used.

3. *Allowances* which were allocated for any preceding NO<sub>x</sub> *control period* which were banked may be used in the current *control period*. *Banked allowance* shall be deducted against NO<sub>x</sub> emissions in accordance with the ratio of NO<sub>x</sub> *allowances* to emissions as specified in Section 12 of this regulation.

c. If the emissions from a *budget source* in the current *control period* exceed the *allowances* held in that *budget source's compliance account* for that *control period*:

1. The *budget source* shall obtain additional *allowances* by December 31 of the subject year so that the total number of *allowances* in the *compliance account* meeting the criteria of Section 16(b)(1) through (3) of this regulation, including *allowances* identified in any *allowance transfer* request properly *submitted* to the *NATS Administrator* by December 31 of the subject year, equals or exceeds the *control period* emissions of NO<sub>x</sub> rounded to the nearest whole ton.

2. If there is an insufficient number of NO<sub>x</sub> *allowances* available for NO<sub>x</sub> *allowance deduction*, the source is out of compliance with this regulation and subject to enforcement action and penalties pursuant to Section 18 of this regulation.

d. If by the December 31 compliance deadline the *authorized account representative* or alternate *authorized*



*account representative* either makes no  $\text{NO}_x$  allowance deduction request, or a  $\text{NO}_x$  allowance deduction request insufficient to meet the allowances required by the actual emissions, a violation of this regulation may have occurred and the *NATS Administrator* may deduct the necessary number of  $\text{NO}_x$  allowances from the *budget source's compliance account*. The *NATS Administrator* shall provide written notice to the *authorized account representative* that  $\text{NO}_x$  allowances were deducted from the source's *account*.

e. The *authorized account representative* or alternate *authorized account representative* may notify the *NATS Administrator* of any claim that the *NATS Administrator* made an error in recording transfer information that was submitted in accordance with Section 11 of this regulation, provided that such claim of error notification is submitted to the *NATS Administrator* by no later than 15 business days following the date of the notification by the *NATS Administrator* pursuant to actions taken in accordance with Section 16(d) of this regulation.

1. Such claim of error notification shall be in writing and shall include:

i. A description of the error alleged to have been made by the *NATS Administrator*.

ii. A proposed correction of the alleged error.

iii. Any supporting documentation or other information concerning the alleged error and proposed corrective action.

iv. The following statement: "*I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

v. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. The *NATS Administrator*, at the *NATS Administrator's* sole discretion based on the documentation provided, shall determine what changes, if any, shall be made to the *account(s)* subject to the alleged error. Not later than 20 business days after receipt of a claim of error notification, the *NATS Administrator* shall submit to the *authorized account representative* and to the Department a written response stating the determination made, any action taken by the *NATS Administrator*, and the reason(s) for the determination and actions.

3. The *NATS Administrator* may, without prior notice of a claim of error and at the *NATS Administrator's* sole discretion, correct any errors in any account on the *NATS Administrator's* own motion. The *NATS Administrator* shall notify the *authorized account representative* and the Department no later than 20 business days following any such corrections.

Section 17 - Compliance Certification

a. For each  $\text{NO}_x$  allowance control period, the *authorized account representative* or alternate *authorized account representative* of each *budget source* shall submit to the Department an annual compliance certification.

b. The compliance certification shall be submitted no later than December 31 of each year.

c. The compliance certification shall contain, at a minimum, the following information:

1. Identification of the *budget source*, including the *budget source's* name and address, the name of the *authorized account representative* and alternate *authorized account representative*, if any, and the *NATS account number*.

2. A statement indicating whether or not emissions data was submitted to the *NETS Administrator* pursuant to Section 15 of this regulation.

3. A statement indicating whether or not the *budget source* held sufficient  $\text{NO}_x$  allowances, as determined in Section 16 of this regulation, in its *compliance account* for the  $\text{NO}_x$  allowance control period as of December 31 of the subject year, or by being identified in an *allowance transfer* request that was submitted by December 31 of the subject year, to equal or exceed the *budget source's* actual emissions as reported to the *NETS Administrator* for the control period.

4. A statement of certification whether the monitoring plan which governs the *budget source* was maintained to reflect actual operation and monitoring of the *budget source* and contains all information necessary to attribute monitored emissions to the *budget source*.

5. A statement of certification that all emissions from the *budget source* were accounted for, either through the applicable monitoring or through application of the appropriate missing data procedures.

6. A statement whether the facts that form the basis for certification of each monitor or monitoring method approved in accordance with Section 13 of this regulation have changed.

7. If a change is required to be reported in accordance with Section 17(c)(6) of this regulation, specify the nature of the change, when the change occurred, and how the *budget source's* compliance status was determined

subsequent to the change, including what method was used to determine emissions when a change mandated the need for monitor re-certification.

8. The following statement in verbatim, "*I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fines or imprisonment.*"

9. Signature of the *budget source's* authorized account representative or alternate authorized account representative and the date of signature.

d. The Department may verify compliance by whatever means necessary, including but not limited to:

1. Inspection of facility operating records.
2. Obtaining information on *allowance deduction* and transfers from the *NATS Administrator*.
3. Obtaining information on emissions from the *NETS Administrator*.
4. Testing emission monitoring devices.
5. Requiring the *budget source* to conduct emissions testing using testing methods approved by the Department.

#### Section 18 - Failure to Meet Compliance Requirements

a. If the emissions from a *budget source* exceed *allowances* held in the *budget source's compliance account* for the *control period* as of December 31 of the subject year, the *NATS Administrator* shall deduct *allowances* from the *budget source's compliance account* for the next *control period* at a rate of three (3) *allowances* for every one (1) ton of *excess emissions*.

1. The *NATS Administrator* shall provide written notice to the *budget source's authorized account representative* that  $\text{NO}_x$  *allowances* were deducted from the *budget source's* account.

2. The *authorized account representative* or alternate *authorized account representative* may notify the *NATS Administrator* of any claim that the *NATS Administrator* made an error in recording *submitted* transfer information in accordance with Section 16(e) of this regulation.

b. In addition to  $\text{NO}_x$  *allowance deduction* penalties under Section 18(a) of this regulation, the Department may enforce the provisions of this regulation under 7 Del. C. Chapter 60. For the purposes of determining the number of days of violation, any *excess emissions* for the *control*

*period* shall presume that each day in the *control period* (153 days) constitutes a day in violation unless the *budget source* can demonstrate, to the satisfaction of the Department, that a lesser number of days should be considered.

#### Section 19 - Program Audit

a. The Department shall conduct an audit of the  $\text{NO}_x$  Budget Program prior to May 1, 2002, and at a minimum every three years thereafter. The audit shall include the following:

1. Confirmation of emissions reporting accuracy through validation of  $\text{NO}_x$  *allowance* monitoring and data acquisition systems at the *budget source*.

2. Examination of the extent to which *banked allowances* have, or have not, contributed to emissions in excess of the *budget* for each *control period* covered by the audit.

3. An analysis of the geographic distribution of emissions as well as hourly and daily emission totals in the context of ozone control.

4. An assessment of whether the program is providing the level of emissions reductions anticipated and include in the SIP.

b. The Department shall prepare a report on the results of the audit. The Department shall seek public input on the conclusions contained in the audit report and provide for a public notice, public comment period, and allow for the request to hold a public hearing on the conclusions contained in the report.

c. In addition to the Department audit, the Department may seek a third party audit of the program. Such an audit could be implemented by the Department or could be performed on a region-wide basis under the supervision of the *OTC*.

d. Should an audit result in recommendations for program revisions at the state level, the Department shall consider the audit recommendations, in consultation with the *OTC*, and if found necessary, propose the appropriate program revisions as changes to current procedures or modifications to this regulation.

#### Section 20 - Program Fees

The *authorized account representative* or alternate *authorized account representative* of each *compliance account* and each *general account* shall pay fees to the Department consistent with the fee schedule established from time to time by the Delaware General Assembly, should a fee schedule be established.

# PROPOSED REGULATIONS

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NO <sub>x</sub> BUDGET PROGRAM --- APPENDIX "A"						
COMPANY	FACILITY and PLANT POINT	OTC IDENTIFIED ALLOWANCES	EXCEPTIONAL CIRCUMSTANCES ALLOWANCES	RESERVE ALLOWANCES	FINAL ALLOWANCES	SOURCE TYPE
DELMARVA POWER	Christiana Sub 001	6	-0-	1	7	Non-Part 75
	Christiana Sub 002	6	-0-	1	7	Non-Part 75
	Delaware City 002	1	-0-	1	2	Non-Part 75
	Edge Moor 001	1	-0-	1	2	Non-Part 75
	Edge Moor 002	241	-0-	1	242	Part 75
	Edge Moor 003	345	-0-	1	346	Part 75
	Edge Moor 004	621	28	1	650	Part 75
	Hay Road 001	49	-0-	1	50	Non-Part 75
	Hay Road 002	34	-0-	1	35	Non-Part 75
	Hay Road 3*	-0-	-0-	-0-	-0-	Part 75
	Indian River 001	340	-0-	1	341	Part 75
	Indian River 002	397	-0-	1	398	Part 75
	Indian River 003	762	-0-	1	763	Part 75
	Indian River 004	1,652	-0-	2	1,654	Part 75
	Indian River 10**	-0-	-0-	1	2	Non-Part 75
	Madison Str. 001	-0-	-0-	1	1	Non-Part 75
	West Sub 001	2	-0-	1	3	Non-Part 75
DFD Operating Services	McKee Run 001	72***	-0-	1	73	Non-Part 75
	McKee Run 002	44***	-0-	1	45	Non-Part 75
	McKee Run 003	184	-0-	2	186	Part 75
	VanSant 1*	-0-	-0-	-0-	-0-	Part 75
FIRST STATE	Co-Gen 1**	-0-	-0-	2	203	Non-part 75
STAR ENTERPRISE	Delaware City 001	93	-0-	1	94	Non-Part 75
	Delaware City 007**	-0-	-0-	1	105	Non-Part 75
	Delaware City 019	20	-0-	1	21	Non-Part 75
	Delaware City 034	70	-0-	1	71	Non-Part 75
	Delaware City 068	206	-0-	1	207	Non-Part 75
	Delaware City 069	227	-0-	1	228	Non-Part 75
	Delaware City 070	214	-0-	2	216	Non-Part 75
	Delaware City 074	117	-0-	1	118	Non-Part 75
<b>TOTAL:</b>		5,704	28	32	6,070	

NOTES: (\*) These Units did not start operation until after 1990.

(\*\*) Units operated in the 1990 NO<sub>x</sub> control period but were not included in the "1990 OTC Baseline Emissions Inventory".

(\*\*\*) OTC MOU allowances corrected from "1990 OTC Baseline Emissions Inventory" due to use of incorrect RACT factor.

# PROPOSED REGULATIONS

<b>NO<sub>x</sub> BUDGET PROGRAM APPENDIX "B"</b>					
COMPANY	FACILITY or PLANT POINT	1990 BASELINE HEAT INPUT (10 <sup>6</sup> BTU)	1990 BASELINE NO <sub>x</sub> EMISSIONS (Tons)	1990 BASELINE EMISSION RATE (lb/mmBTU)	RACT NO <sub>x</sub> EMISSIONS (Tons)
DELMARVA POWER	Christiana Sub 001	16,245	5.8	0.709	5.8
	Christiana Sub 002	15,447	5.5	0.709	5.5
	Delaware City 002	1,612	0.6	0.703	0.6
	Edge Moor 001	1,835	0.7	0.708	0.7
	Edge Moor 002	2,409,836	655.8	0.545	648.1
	Edge Moor 003	3,451,182	928.7	0.540	516.0
	Edge Moor 004	6,213,944	1,436.8	0.463	1,147.3
	Hay Road 001	938,341	49.0	0.105	49.0
	Hay Road 002	631,111	33.6	0.106	33.6
	Hay Road 3*	-0-	-0-	-0-	-0-
	Indian River 001	1,816,612	755.6	0.828	755.6
	Indian River 002	2,134,257	882.3	0.828	882.3
	Indian River 003	4,521,301	1,853.7	0.819	762.1
	Indian River 004	8,747,546	3,671.6	0.838	1,830.8
	Indian River 10**	-0-	-0-	-0-	-0-
	Madison Street 001	1,079	0.4	0.706	0.4
West Sub 001	6,105	2.2	0.709	2.2	
DFD	McKee Run 001	344,472	91.6	0.524	55.0
	McKee Run 002	211,742	56.3	0.505	33.8
	McKee Run 003	1,724,601	411.7	0.447	321.8
	VanSant 1*	-0-	-0-	-0-	-0-
FIRST STATE	Co-Gen 1**	-0-	-0-	-0-	-0-
STAR ENTERPRISE	Delaware City 001	931,712	229.0	0.486	116.5
	Delaware City 007**	-0-	-0-	-0-	-0-
	Delaware City 019	318,601	20.1	0.126	20.1
	Delaware City 034	1,100,470	69.5	0.126	69.5
	Delaware City 068	1,820,133	588.5	0.647	345.8
	Delaware City 069	2,002,309	647.4	0.647	440.5
	Delaware City 070	1,888,905	610.7	0.647	368.3
	Delaware City 074	1,847,552	116.7	0.126	116.7

NOTES: Data as identified in "1990 OTC NO<sub>x</sub> Baseline Emission Inventory",  
Final OTC NO<sub>x</sub> Baseline Inventory, Point-Segment Level Data.

(\*) These Units did not start operation until after 1990.

(\*\*) *Indian River Point 10, First State Co-Gen 1, and Delaware City 007* were not included in the Reference Document, but were operating in the 1990 NO<sub>x</sub> control period.

**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code  
Section 311 & Chapter 24  
(18 Del.C. §311 & Ch. 24)

INSURANCE COMMISSIONER DONNA LEE H. WILLIAMS hereby gives notice that a PUBLIC HEARING will be held on MONDAY, DECEMBER 1, 1997 at 1:00p.m., in the Main Conference Room of the Delaware Insurance Department, 841 Silver lake Boulevard, Dover, Delaware. This Hearing is to consider implementation of Regulation 75 (proposed) entitled "WRITTEN NOTICE BY INSURERS OF PAYMENT OF THIRD PARTY CLAIMS".

The proposed regulation will create a requirement that insurers licensed to do business in Delaware notify a third party beneficiary when a payment is forwarded to that person's lawyer, accountant, agent or other representative.

The Hearing will be conducted in accordance with the Delaware Administrative Procedures Act, 29 Del. C., Chapter 101. Comments are being solicited from any interested party. Comments may be in writing or may be presented orally at the Hearing. Written comments must be received by the Department of Insurance no later than Thursday, November 27, 1997 and should be addressed to Michael W. Teichman, 841 Silver lake Boulevard, Dover, DE 19904. Those wishing to testify or give an oral statement must notify Michael W. Teichman at (302) 739-4251, Ext. 171 or (800) 282-8611 no later than Thursday, November 27, 1997.

Any interested person may contact the Department for a copy of the proposed amendment.

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REGULATION NUMBER 75 (PROPOSED)  
WRITTEN NOTICE BY INSURERS OF PAYMENT  
OF  
THIRD PARTY CLAIMS

## Sections:

1. Authority
2. Purpose
3. Scope
4. Requirement of Notice
5. Contents of Notice
6. Causes of Action and Defenses
7. Effective Date

## Section 1. Authority

This regulation is adopted by the Insurance Commissioner pursuant to 18 Del.C. § 311 and 18 Del.C. Chapter 24. It is promulgated in accordance with 29 Del.C. Chapter 101.

## Section 2. Purpose

The purpose of this regulation is to protect the third party claimant from misuse or mishandling of funds payable under a liability or casualty insurance contract, when those funds are disbursed to the third party claimant's attorney, accountant, agent or other representative.

## Section 3. Scope

This regulation will apply to all insurers who make payment in excess of \$5,000.00 to third party claimants under casualty or liability insurance contracts.

## Section 4. Requirement of Notice

Upon payment in excess of \$5,000.00 in settlement of or upon judgment on any third party liability or casualty claim and where the claimant is a natural person, the insurer or its representative (including the insurer's attorney) shall mail to the third party claimant written notice of payment at the same time such payment is made to the third party's attorney, accountant, agent or other representative.

## Section 5. Contents of Notice

The written notice referred to in Section 4 above shall be mailed to the claimant by regular mail at the claimant's last known address, and shall include at least the following information:

- 1) The amount of the payment;
- 2) The party or parties to whom the instrument is made payable;
- 3) The party to whom the instrument was forwarded; and
- 4) The address of the party to whom the instrument was forwarded.

## Section 6. Causes of Action and Defenses

Nothing in Sections 4 and 5 above shall create a cause of action for any person or entity, other than the Delaware Insurance Commissioner, against an insurer or its representative based upon a failure to serve such notice, or defective service of such notice. Nothing in Sections 4 and 5 above shall establish a defense for any party to any cause of action based upon a failure by the insurer or its representative to serve such notice, or by the defective service of such notice.

## Section 7. Effective Date

This regulation shall become effective 30 days from the date of the Commissioner's signature.

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Donna Lee H. Williams  
Insurance Commissioner

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## DEPARTMENT OF STATE

### OFFICE OF THE STATE BANKING COMMISSIONER

Statutory Authority: 5 Delaware Code,  
Section 121(b) (5 Del. C. 121(b))

#### NOTICE OF PROPOSED AMENDMENT OF REGULATIONS OF THE STATE BANK COMMISSIONER

##### Summary:

The State Bank Commissioner proposes to adopt amended Regulation Nos. 5.121.0002, 5.701/744.0001, 5.777.0002, 5.771.0005, 5.770.0009, 5.795etal.0016, 5.761.0017, 5.833.0004 and 5.844.0009, and to rescind Regulation Nos. 5.769.0006 and 5.772.0014. Proposed revised regulation 5.121.0002 ("Procedures Governing the Creation and Existence of an Interim Bank") makes technical and conforming changes in accordance with relevant statutory provisions, including Senate Bill 207 ("SB 207"), signed by the Governor on June 28, 1995 and Senate Bill 67 ("SB 67"), signed by the Governor on May 14, 1997. Proposed revised regulation 5.701/774.0001 ("Procedures for Applications to Form a Bank, Bank and Trust Company or Limited Purpose Trust Company Pursuant to Chapter 7 of Title 5 of the Delaware Code") (previously numbered 5.701/774.0002.P/A) makes technical and conforming changes, and clarifies the application of the regulation to the formation of limited purpose trust companies. Proposed revised regulation 5.777.0002 ("Application for a Certificate of Public Convenience and Advantage for a Limited Purpose Trust Company Pursuant to Subchapter V of Chapter 7 of Title 5 of the Delaware Code") (previously numbered 5.777.0001.P) updates and simplifies the application form for a limited purpose trust company. Proposed revised regulation 5.771.0005 ("Procedures Governing Applications to Open Branch Offices Outside the State of Delaware") incorporates the reduced fees for out-of-state and foreign branches provided in SB 67. Proposed revised regulation 5.770.0009 ("Establishment of a Branch Office by a Bank or Trust Company") incorporates the elimination of the requirement of \$25,000 in paid-in capital stock for each office provided in Senate Bill 44 ("SB 44"), signed by the Governor on April 23, 1997, and the reduced fees for in-state branches provided in SB 67. Proposed revised regulation 5.795etal.0016 ("Merger with Out-of-State Banks") incorporates the reduced fees provided in SB 67. Proposed revised regulation 5.761.0017 ("Incidental Powers") clarifies that the notice procedure for specific permissible activities identified in Part I of the regulation applies to the activities described in paragraphs A, B, C and D of Part I. Proposed revised

regulation 5.833.0004 ("Application by an Out-of-State Savings Institution, Out-of-State Savings and Loan Holding Company or Out-of-State Bank Holding Company to Acquire a Delaware Savings Bank or Delaware Savings and Loan Holding Company") makes technical and conforming changes in accordance with relevant statutory provisions, including Senate Bill 336 ("SB 336"), signed by the Governor on May 2, 1996, and SB 67. Proposed revised regulation 5.844.0009 ("Application by an Out-of-State Bank Holding Company to Acquire a Delaware Bank or Bank Holding Company") makes technical and conforming changes in accordance with SB 207. Regulation 5.769.0006 ("Application for Approval of the Acquisition by a Delaware Bank of All or Substantially All of the Voting Stock of a Bank Located in the State of Delaware") is proposed for rescission because it is unnecessary as a result of statutory changes in SB 207 and SB 336. Regulation 5.772.0014 ("Procedures Governing Filings and Determinations with Respect to Applications to Establish an Automated Service Branch") is proposed for rescission because it is unnecessary as a result of statutory changes in SB 44. Proposed amended Regulation Nos. 5.121.0002, 5.701/744.0001, 5.777.0002, 5.771.0005, 5.770.0009, 5.795etal.0016, 5.761.0017, 5.833.0004 and 5.844.0009 would be adopted, and Regulation Nos. 5.769.0006 and 5.772.0014 would be rescinded by the State Bank Commissioner on or after December 3, 1997. Other regulations issued by the State Bank Commissioner are not affected by these proposed amendments. These regulations are issued by the State Bank Commissioner in accordance with Title 5 of the Delaware Code.

##### Comments:

Copies of the proposed revised regulations are published in the Delaware Register of Regulations. Copies also are on file in the Office of the State Bank Commissioner, 555 E. Lockerman Street, Suite 210, Dover, Delaware 19901, and will be available for inspection during regular office hours. Copies are available upon request.

Interested parties are invited to comment or submit written suggestions, data, briefs or other materials to the Office of the State Bank Commissioner as to whether these proposed regulations should be adopted, rejected or modified. Written material submitted will be available for public inspection at the above address. Comments must be received by December 3, 1997.

##### Public Hearing:

A public hearing will be held on the proposed revised regulations in the Second Floor Library Conference Room in the Townsend Building, 401 Federal Street, Dover, Delaware 19901, on Wednesday, December 3, 1997 at

10:00 a.m.

This notice is issued pursuant to the requirements of Subchapter III of Chapter 11 and Chapter 101 of Title 29 of the Delaware Code.

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Regulation No.: 5.121.0002  
Proposed

**PROCEDURES GOVERNING THE CREATION AND  
EXISTENCE OF AN INTERIM BANK**

This regulation establishes procedures governing the creation and existence of an Interim Bank, which shall have no authority to conduct a banking business until merged with an Insured Bank.

1. Definitions

(a) "Articles of Association" means the articles of association described in Section 723 of Title 5 of the Delaware Code.

(b) "Articles of Organization" means the articles of organization described in Section 728 of Title 5 of the Delaware Code.

(c) "Bank" means a Delaware State Bank, Out-of-State State Bank, Delaware National Bank or Out-of-State National Bank.

(d) "Bank Holding Company" has the meaning specified in the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 et seq.).

(e) "Certificate Authorizing the Transaction of Business" means the certificate described in Section 733 of Title 5 of the Delaware Code.

(f) "Delaware Bank" means a Delaware National Bank or a Delaware State Bank.

(g) "Delaware National Bank" means a national banking association created under the National Bank Act (12 U.S.C. § 21 et seq.) that is located in this State.

(h) "Delaware State Bank" means a bank (as defined in § 101(1) of Title 5 of the Delaware Code) chartered under the laws of this State.

(i) "Insured Bank" means a bank that is an insured depository institution, as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c).

(j) "Interim Bank" means a bank established exclusively for the temporary purposes set forth in this regulation.

(k) "Interim Bank Agreement" means an agreement that expressly provides, among other things, for the creation of an Interim Bank and its merger with an Insured Delaware Bank.

(l) "Located in this State" means, with respect to a state-chartered bank, a bank created under the

laws of this State and, with respect to a national banking association, a bank whose organization certificate identifies an address in this State as the place at which its discount and deposit operations are to be carried out.

(m) "Notice of Intent" means a notice of the intention of the incorporators to form an Interim Bank, as provided in Section 5 of this regulation.

(n) "Out-of-State Bank" means an Out-of-State State Bank or an Out-of-State National Bank.

(o) "Out-of-State Bank Holding Company" has the meaning specified in the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 et seq.).

(p) "Out-of-State National Bank" means a national bank association created under the National Bank Act (12 U.S.C. § 21 et seq.) that is not located in this State.

(q) "Out-of-State State Bank" means a State bank, as defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. § 1813(a), that is not chartered under the laws of this State.

(r) "Public Notice" means a public notice, as provided in Section 5 of this regulation.

2. Scope

An Interim Bank may only be formed to facilitate:

(a) The establishment of a Bank Holding Company by an Insured Delaware Bank's stockholders. The proposed Bank Holding Company, once incorporated, applies in the manner set forth at Section 5 of this regulation for an Interim Bank charter for a subsidiary to be newly formed. An agreement is executed between the proposed Bank Holding Company and the Insured Delaware Bank that provides, among other things, that the Insured Delaware Bank will be merged or consolidated with the Interim Bank and become a subsidiary of the Bank Holding Company upon the receipt of all necessary federal and state approvals for the proposed Bank Holding Company so to act; or

(b) The acquisition of an Insured Delaware Bank by another Insured Delaware Bank or Bank Holding Company (e.g., pursuant to Subchapter VI of Chapter 7 or Subchapters IV or V of Chapter 8 of Title 5 of the Delaware Code). In such instances, the Interim Bank is used to assure that the to-be-acquired Insured Delaware Bank will become wholly-owned through a merger or consolidation pursuant to an agreement between the Insured Delaware Banks or between an Insured Delaware Bank and a Bank Holding Company that provides, among other things, for an Insured Delaware Bank to merge or consolidate with the Interim Bank.

(c) The merger of one or more Out-of-State Banks with or into one or more Delaware Banks to result in a Delaware State Bank, in accordance with Section 795D or Section 795G of Title 5 of the Delaware Code.



**3. Interim Bank Agreement Required**

An Interim Bank may not be chartered unless there is an Interim Bank Agreement.

**4. Who May Incorporate**

An Interim Bank may be incorporated, in accordance with Section 722 of Title 5 of the Delaware Code, by three or more individual persons, at least two of whom must be citizens and residents of Delaware.

**5. Application Procedures**

An application to form an Interim Bank shall be submitted as follows, except as otherwise provided in connection with a contemporaneous application in accordance with another regulation (e.g., Regulation 5.844.0009, "Application by an Out-of-State Bank Holding Company to Acquire a Delaware Bank or Bank Holding Company"):

(a) The Notice of Intent shall be filed in duplicate in the Office of the Commissioner and shall state:

- (i) the purpose for forming an Interim Bank;
- (ii) the proposed name of the Interim Bank;
- (iii) the name and address of the incorporators; and
- (iv) the amount of the capital stock of the Interim Bank.

(b) The Notice of Intent shall attach as exhibits:

- (i) the Interim Bank Agreement;
- (ii) a copy of the proposed Articles of Association of the Interim Bank;
- (iii) a copy either of the certificate of public convenience and advantage or the legislative and/or corporate instruments of banking authority for the Insured Bank which is to be merged with the Interim Bank pursuant to the Interim Bank Agreement.

(c) Upon notification by the Commissioner that the Application to form an Interim Bank is complete, the applicant shall cause to be published in a newspaper of general circulation throughout the State of Delaware, once a week for three (3) consecutive weeks, a Public Notice of its intention to form an Interim Bank. The Public Notice shall include the proposed name of the Interim Bank, the names of the incorporators, the amount of the capital stock of the Interim Bank, and a brief summary of the purpose of the Interim Bank, shall identify this regulation under which the Interim Bank is to be formed, and shall inform interested persons of their right to comment on the application before the Commissioner decides whether to approve the Interim Bank.

**6. Decision of Commissioner; Incorporation**

Within two weeks of the last publication of the Public Notice, the Commissioner shall issue a decision as to

whether to charter the Interim Bank. This two week period may be extended by two additional weeks if the Commissioner requires more time or information.

Upon the Commissioner's approval, the Incorporator shall take the necessary steps to form the Articles of Organization and the Commissioner shall endorse the Articles. The Incorporator shall then incorporate the Interim Bank and file the necessary documents with the Secretary of State.

A Certificate Authorizing the Transaction of Business shall not be issued until the Interim Bank has been merged with the Insured Bank.

**7. Powers of Interim Bank Before Merger**

An Interim Bank may not engage in any banking activity or operate as a bank until it has merged with an Insured Bank. An Interim Bank may take only those corporate and fiduciary steps and actions reasonably incidental and necessary to facilitate and complete the merger. Such limitation shall not preclude the Commissioner from granting a certificate of public convenience and advantage, and to otherwise facilitate and authorize the formation and incorporation of the Interim Bank, provided that no Certificate Authorizing the Transaction of Business pursuant to § 733 of Title 5 of the Delaware Code shall be issued prior to the consummation of the merger of the Interim Bank with an Insured Bank.

The receipt by the Commissioner of an Interim Bank Agreement and a copy of either the certificate of public convenience and advantage or the legislative and/or corporate instruments pursuant to which the Insured Bank with which the Interim Bank will merge derives its banking powers shall constitute sufficient authority for the Commissioner to issue a certificate of public convenience and advantage to the Interim Bank.

**8. Proof of Merger: Revocation of Certificate**

From the date an Interim Bank is authorized pursuant to this regulation, the parties to the Interim Bank Agreement shall have six (6) months in which to effect the merger with the Insured Bank. Proof of the merger must be timely supplied to the Commissioner.

Upon proof of the consummation of the merger of the Interim Bank with the Insured Bank, a Certificate Authorizing the Transaction of Business, as required by § 733 of Title 5 of the Delaware Code shall be issued immediately by the Commissioner to the surviving entity if the Interim Bank is the survivor.

Extensions may be granted by the Commissioner if the parties to the Interim Bank Agreement can show good cause as to why an extension is needed to complete the merger.

The Commissioner may revoke the certificate of



public convenience and advantage of the Interim Bank (and may take such other steps he deems appropriate at any time) if proof of the merger between the Interim Bank and the Insured Bank has not been provided to the Commissioner at the end of the authorized time, if the Interim Bank actually conducts any banking business prior to its proposed merger, or if any related merger or acquisition application is denied or withdrawn.

#### 9. Fees

A non-refundable investigation fee of \$1,150 to offset the administrative expense of the Commissioner's office shall be included with the Notice of Intent; provided, however, that such fee shall be considered as part of and not in addition to any fee being paid at the same time to the Commissioner's office in connection with a contemporaneous application for a merger or acquisition. In addition, depending on the structure of the transaction, other fees may be required in accordance with applicable statutes or regulations (e.g., Section 735 of Title 5 of the Delaware Code).

Document Control No.:

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Regulation No.: 5.701/774.0001  
Proposed

### **PROCEDURES FOR APPLICATIONS TO FORM A BANK, BANK AND TRUST COMPANY OR LIMITED PURPOSE TRUST COMPANY PURSUANT TO CHAPTER 7 OF TITLE 5 OF THE DELAWARE CODE**

#### 1. Scope

This Regulation establishes procedures for filing an application to organize a bank or bank and trust company (hereinafter collectively referred to as a "Bank") or limited purpose trust company pursuant to Chapter 7 of Title 5 of the Delaware Code and the manner in which determinations will be made by the State Bank Commissioner (the "Commissioner") respecting such applications.

#### 2. Notice of Intent

(a) Notice of the intention ("Notice of Intent") of the incorporators (the "Incorporators") to form a Bank or limited purpose trust company shall be filed with the Commissioner. All filings must be in duplicate.

(b) A \$1,150 non-refundable investigation fee shall be submitted with the Notice of Intent, payable to "Office of the State Bank Commissioner."

(c) The Notice of Intent shall specify: (i) the names of all Incorporators; (ii) the name of the proposed Bank or limited purpose trust company (note: the word "trust" may be used only if a limited purpose trust company or a

bank with trust powers is being formed); (iii) the city or town in which the Bank or limited purpose trust company will be located; and (iv) the amount of capital stock of the proposed Bank or limited purpose trust company.

(d) The Notice of Intent shall have attached as exhibits: (i) a copy of the application for a Certificate of Public Convenience and Advantage (the "Application") in the form the Incorporators intend to file pursuant to Section 4 of this Regulation; (ii) a copy of the proposed form of written agreement in which the subscribers thereto associate themselves with the intent of forming a Bank or limited purpose trust company (the "Articles of Association"); (iii) a proposed form of public notice as provided for in Section 3 of this Regulation (the "Public Notice"); and, (iv) where the Incorporators are acting on behalf of a corporate entity in the application process, a copy of the corporate resolution, sworn to and subscribed by a president or vice-president and certified by the secretary or an assistant secretary, authorizing the Incorporators to execute and file the Notice of Intent and Application on behalf of the corporation.

#### 3. Public Notice

(a) If the Notice of Intent and the attached exhibits filed with the Commissioner are in the form required by this Regulation, conform to applicable provisions of law and are approved by the Commissioner, the Commissioner shall schedule a formal, public evidentiary hearing to receive testimony and documentary evidence relevant to determining whether the public convenience and advantage would be promoted by the establishment of the Bank or limited purpose trust company and whether the Articles of Association are in compliance with applicable provisions of law (such hearing to be held within 60 days following the third publication of Public Notice in accordance with Section 3(b) of this Regulation, but not prior to the expiration of thirty days following the date of the third publication).

(b) The Incorporators shall cause a Public Notice in such form as the Commissioner shall have approved to be published at least once a week, for three successive weeks, in at least two Delaware newspapers of general circulation designated by the Commissioner, at least one of which newspapers shall be published in the county where it is proposed to establish the Bank.

(c) The Public Notice shall (i) specify the names of all Incorporators; (ii) set forth the name of the proposed Bank or limited purpose trust company; (iii) identify the city or town where the Bank or limited purpose trust company is to be located; (iv) specify the amount of the Bank's capital stock; (v) describe the subject matter of the proceedings; (vi) give the date, time and place fixed for a hearing on the Application; (vii) cite the law (5 Del. C. § 726 for a Bank, and 5 Del. C. § 777 for a limited

purpose trust company) and regulations (State Bank Commissioner Regulations 5.701/774.0001 and 5.725/726.0003.P/A for a Bank, and 5.701/774.0001 and 5.777.0002 for a limited purpose trust company) giving the Commissioner authority to act; (vii) inform interested parties of their right to present evidence, to be represented by counsel and to appear personally or by other representatives; and (ix) state the Commissioner's obligation to reach his decision based upon the evidence received.

#### 4. Application For A Determination of Public Convenience and Advantage

(a) Within sixty days following the third publication of Public Notice, and prior to or on the date of the public hearing, but not prior to the expiration of thirty days following the date of the third publication, the Incorporators shall file the definitive fully executed Application in the form prescribed by the Commissioner. See Commissioner's Regulation No. 5.725/726.0003.P/A for a Bank, and 5.777.0002 for a limited purpose trust company.

(b) The Application shall include the information specifically requested in the form of application supplied by the Commissioner and any supplemental information requested by the Commissioner.

#### 5. Public Hearing

(a) The public hearing provided for in this Regulation may be conducted by the Commissioner or his designee. At such hearing, the Commissioner or his designee shall accept all relevant, non-cumulative evidence offered by or on behalf of the Incorporators or by any interested person. Interested parties may appear at the public hearing, in person or by counsel or by other representative. Anyone wishing to present testimony is requested to register with the Commissioner in advance of the hearing.

(b) A record from which a verbatim transcript can be prepared shall be made. The Incorporators shall be responsible for arranging for a certified court reporter to be present at the public hearing and shall bear the expense of an original written transcript for the Commissioner's use (which shall be supplied to the Commissioner as promptly as practical following the public hearing). Additional transcripts provided to any interested person shall be at the expense of the person requesting the transcript.

(c) The Commissioner or his designee may request the Incorporators or any other party or parties who appear at the public hearing to submit proposed findings of fact and conclusions of law.

#### 6. Record

(a) With respect to each Application, all notices,

correspondence between the Commissioner and the Incorporators or other interested parties, all exhibits, documents and testimony admitted into evidence and all recommended orders, summaries of evidence and findings, and all interlocutory and final orders shall be included in the Commissioner's record of the matter and shall be retained for a period of at least five (5) years following final action on the Application.

(b) A copy of the proposed order shall be mailed or hand delivered to the Incorporators (or their agent) and to each person who presented data, views or argument at the public hearing, each of whom shall thereafter have twenty (20) days to submit in writing to the Commissioner exceptions, comments and arguments respecting the proposed order.

(c) If the decision on the Application is not adverse to the Incorporators, the Commissioner may waive the entry of a proposed order and may instead proceed directly to the entry of a final order under Section 7 of this Regulation.

#### 7. Decision and Final Order

(a) Every decision on an Application shall be incorporated in a final order which shall include: (i) a brief summary of the evidence; (ii) findings of fact based upon the evidence; (iii) conclusions of law; (iv) any other conclusions or findings required by law; and (v) a concise statement of the determination or action on the case.

(b) Every final order shall be authenticated by the signature of the Commissioner and shall be mailed or delivered to (i) the Incorporators (or their agent); (ii) each person that presented data, views or argument at the hearing; and (iii) any other person requesting a copy of the final order.

#### 8. Organization Meeting of Incorporators

(a) The first meeting of the Incorporators shall be called by a notice signed by the Incorporator designated in the Articles of Association for that purpose or by a majority of Incorporators (see 5 Del. C. § 727). The statutory purpose of the first meeting is to organize by: (i) choosing by ballot a temporary secretary; (ii) adopting bylaws; and (iii) electing in such manner as the bylaws may determine directors, a president, a secretary, and such other officers as the bylaws may prescribe. All of the officers elected shall be sworn to the faithful performance of their duties. Action permitted to be taken at the organization meeting may be taken without a meeting if each Incorporator signs a written consent in lieu of meeting which states the action so taken.

(b) The President and a majority of directors elected at the organization meeting of the Incorporators shall make, sign and make oath to a certificate (hereinafter the "Articles of Organization") setting forth: (i) a true copy

of the Articles of Association; (ii) the names of the subscribers thereto; (iii) the name, residence, and mailing address of each officer; and (iv) the date of the first meeting of the Incorporators (see 5 Del. C. § 728).

(c) The Articles of Organization and attachments shall be submitted to the Commissioner. The Commissioner may require such amendments or additional information as he may consider proper or necessary. The Commissioner shall endorse approval upon the Articles of Organization at such time as he has determined that the applicable provisions of law have been complied with (see 5 Del. C. § 729).

#### 9. Incorporation and Commencement of Business

(a) The Articles of Organization shall be filed with the Secretary of State within 30 days after the date of the Commissioner's endorsement (see 5 Del. C. § 730).

(b) Upon issuance of a Certificate of Incorporation by the Secretary of State and compliance with all provisions of law, a certified copy of the Certificate of Incorporation together with the endorsed Articles of Organization shall be recorded in the Office of the Recorder of Deeds for the county in which the place of business of the Bank or limited purpose trust company is to be located (see 5 Del. C. § 731).

(c) A certified copy of the Bank's or limited purpose trust company's Certificate of Incorporation together with its bylaws and its Articles of Organization shall be filed with the Commissioner together with the \$5,750 fee for the certificate to transact business. No transaction of business can begin until authorized by the Commissioner by the issuance of a certificate to transact business (see 5 Del. C. §§ 733, 735, 902, 903).

(d) An application for a certificate to transact business shall include a certification as to the issuance of the whole capital stock of the Bank or limited purpose trust company (unless the Articles of Organization otherwise specifically provide) and receipt of payment therefor in cash; a list of stockholders (including the number of shares held by each and the residence and post office address of each stockholder), which list shall be certified by the president and the cashier or treasurer of the Bank; evidence of the deposit of the proceeds of the sale of capital stock in an account for the benefit of the Bank or limited purpose trust company; and, for a Bank, evidence satisfactory to the Commissioner demonstrating that FDIC deposit insurance for the Bank has been approved by the FDIC.

(e) The Commissioner shall review the application and, in the case of a Bank, the status of the applicant's FDIC insurance. If the above referenced \$5,750 fee has been paid and it appears that all requirements of this Regulation and applicable law have been complied with, the Commissioner shall issue a certificate authorizing the Bank or limited purpose trust company to begin the

transaction of business.

Document Control No.:

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Regulation No.: 5.761.0017 Proposed

### **INCIDENTAL POWERS** **(5 Del. C. § 761(a)(17))**

This regulation describes activities that are within the scope of the powers incident to a banking corporation pursuant to Section 761(a)(17) of Title 5, Delaware Code (each a "Permissible Activity"), and provides a procedure for determining other Permissible Activities. This regulation also establishes procedures to be used to exercise incidental powers under Section 761(a)(17) of Title 5, Delaware Code, to engage in any Permissible Activity by: (i) banks established pursuant to Chapter 7 of Title 5, Delaware Code; (ii) banks established pursuant to other law of this State that are entitled to amend their charters or certificates of incorporation in accordance with Section 749 of Title 5, Delaware Code; or (iii) by the subsidiaries of all such banks, in accordance with Section 761(a)(13) of Title 5, Delaware Code. This regulation is not intended to be in derogation of any other powers granted to banks by statute or legislative charter.

#### I. Specific Permissible Activities.

Any bank established pursuant to Chapter 7 of Title 5, Delaware Code, any bank established pursuant to other law of this State that is entitled to amend its charter or certificate of incorporation in accordance with Section 749 of Title 5, Delaware Code, or any subsidiary of any such bank, that desires to exercise its incidental powers under Section 761(a)(17) of Title 5, Delaware Code, to engage in one or more of the activities described below, in paragraphs A, B, C and D of this Part I of this regulation, shall provide 30 days prior written notice of its intent to conduct such activity to the State Bank Commissioner (the "Commissioner"). If the Commissioner does not object in writing to the proposed activity within 30 days of his receipt of such notice, the bank may engage in the activity. The Commissioner may also permit the bank to begin engaging in the activity before the end of the 30 day notice period. In the interest of bank safety and soundness, the Commissioner may require that any Permissible Activity be conducted through a subsidiary of the bank.

If the Commissioner objects in writing to the proposed activity within the 30 day notice period, the bank or its subsidiary may not engage in the activity until the Commissioner issues a written Order approving such activity. The bank or its subsidiary may submit an application to the Commissioner seeking approval of the

proposed activity. The Commissioner at his discretion may require additional information as deemed necessary, and the application shall not be considered complete until such additional information is provided. Within 30 days of the completed application, if any, the Commissioner shall issue an Order approving or disapproving the application.

**A. Activities Permissible For A National Bank Or Bank Holding Company.**

Any activity that is permissible for a national bank as principal or permissible for a bank holding company under Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., is a Permissible Activity.

**B. Activities Permissible For A State Chartered Bank Under Section 24 Of The Federal Deposit Insurance Act.**

Any activity identified in Part 362.4(c)(3) of the Rules and Regulations of the Federal Deposit Insurance Corporation (the "FDIC") as an activity that does not pose a significant risk to the FDIC deposit insurance fund, and therefore is permitted to a state chartered bank by the FDIC pursuant to Section 24 of the Federal Deposit Insurance Act, and which is not expressly prohibited by the law of this State or otherwise permitted by paragraph I.A of this regulation, is a Permissible Activity.

**C. Travel Agency.**

The provision of travel agency services is a Permissible Activity. Banks chartered by the Delaware General Assembly before 1933 traditionally provided travel agency services to their customers, in reliance on the broad grants of agency power typically conferred by their charters. Delaware bank customers historically relied upon Delaware banks as providers of travel agency services, and continue to look to Delaware banks for such services. Accordingly, the Commissioner has concluded that travel agency services constituted part of the generally accepted business of banking when Delaware's Corporation Law for State Banks and Trust Companies was enacted in 1933, and that the provision of travel agency services continues to be authorized by the powers incident to a banking corporation pursuant to Section 761(a)(17) of Title 5, Delaware Code.

**D. General Management Consulting.**

The provision of general management consulting services is a Permissible Activity. Many banks chartered by the Delaware General Assembly before 1933 were given broad powers to act in a fiduciary capacity, and the fulfillment of fiduciary duties in the context of banking affairs ordinarily involves the provision by banks of disinterested advice on many business and financial matters. Accordingly, the Commissioner has concluded that general management consulting services constituted part of the generally accepted business of banking when

Delaware's Corporation Law for State Banks and Trust Companies was enacted in 1933, and that the provision of general management consulting services continues to be authorized by the powers incident to a banking corporation pursuant to Section 761(a)(17) of Title 5, Delaware Code.

**II. Other Permissible Activities.**

A bank established pursuant to Chapter 7 of Title 5, Delaware Code, a bank established pursuant to other law of this State that is entitled to amend its charter or certificate of incorporation in accordance with Section 749 of Title 5, Delaware Code, or any subsidiary of any such bank, may apply to the Commissioner for permission to conduct any other Permissible Activity not described in Part I of this regulation. The bank or subsidiary making such application must demonstrate that the proposed activity is both authorized by the powers "incident to a banking corporation" and "necessary or proper" to the transaction of its business, within the meaning of Section 761(a)(17) of Title 5, Delaware Code. The Commissioner at his discretion may require additional information as deemed necessary, and the application shall not be considered complete until such additional information is provided. Within 30 days of the completed application, and after considering all the circumstances raised in the application, including the general financial condition and performance of the applicant, the Commissioner shall issue an Order approving or disapproving the application. In the interest of bank safety and soundness, the Commissioner may require that any Permissible Activity be conducted through a subsidiary of the bank.

Document Control No.:

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Regulation No.: 5.770.0009  
Proposed

**ESTABLISHMENT OF A BRANCH OFFICE BY A  
BANK OR TRUST COMPANY  
(5 Del. C. § 770)**

**1. Scope**

This regulation establishes procedures for the filing of an application to establish a branch office of a bank or trust company pursuant to Section 770 of Title 5 of the Delaware Code and states the manner in which the State Bank Commissioner (the "Commissioner") will review and act upon such applications.

**2. Application**

An application pursuant to Section 770 of Title 5 of the Delaware Code shall be in writing and shall include the following:

- A. Name of applying bank or trust company.
- B. Location of proposed branch, including address.
- C. The name, address and phone number of the person(s) to whom inquiries may be directed.
- D. Explanation of the necessity for the opening of the branch.

### 3. Fee

The application shall be accompanied by a non-refundable investigation fee of two hundred and fifty dollars (\$250.00). Checks shall be made payable to the Office of the State Bank Commissioner.

### 4. Notice

Upon notification by the Commissioner that the application conforms to the requirements for applications pursuant to Section 770 of Title 5 of the Delaware Code and this regulation, the applicant shall cause a single notice of such application to be published in at least two Delaware newspapers of general circulation. The notice shall provide a brief synopsis of the application and state that interested persons may present their views in writing to the Office of the State Bank Commissioner, and shall be in a form to be approved by the Commissioner before publication.

### 5. Additional Information, Investigation and Hearing

In addition to the documents filed in accordance with this regulation, the Commissioner at his discretion may require additional information, conduct an investigation, or hold a public hearing in accordance with the Administrative Procedures Act, Chapter 101 of Title 29 of the Delaware Code.

### 6. Decision

No earlier than 20 days after publication of the Notice described in section 4 of this regulation, the Commissioner shall issue a written Order approving or disapproving the application. In determining whether to approve the application, the Commissioner shall consider the convenience of the public of this State, and whether there is good and sufficient reason that the bank or trust company should have the branch office.

### 7. Certificate of Authority

A Certificate of Authority shall be issued by the Commissioner for each approved branch.

### 8. Time to Open Approved Branch Office

Branch offices approved in accordance with Section 770 of Title 5 of the Delaware Code and this regulation shall open within one year of the date when the

Commissioner issues the Certificate of Authority. The Commissioner may upon review of the application for such branch extend the initial opening date to a date greater than one year, if by his review he determines that the proposed completion date will exceed one year. In no instance shall the initial opening date exceed the planned completion date by ninety (90) days. Any Certificate of Authority issued by the Commissioner shall be void and of no effect at the expiration of the initial opening date prescribed on approval of the branch unless the branch is actually opened for business. Unavoidable delay in opening the branch due to construction problems or controls or other matters beyond the control of the bank or trust company may be taken into consideration and the Commissioner may extend the Certificate of Authority for periods of six months in the event of such circumstances.

Document Control No.:

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Regulation No.: 5.771.0005  
Proposed

**PROCEDURES GOVERNING APPLICATIONS TO  
OPEN BRANCH OFFICES OUTSIDE THE STATE OF  
DELAWARE**

This regulation establishes procedures for the consideration and determination of applications under § 771(a) of Title 5 of the Delaware Code for permission to open branch offices outside of the State of Delaware.

#### I. Branch Offices In the United States Outside the State of Delaware

##### A. Application

An application to open a branch office in the United States outside the State of Delaware pursuant to Section 771(a) of Title 5 of the Delaware Code shall be in writing and shall include the following:

1. Name of applying bank or trust company.
2. Location of proposed branch, including address.
3. The name, address and phone number of the person(s) to whom inquiries may be directed.
4. Explanation of the necessity for the opening of the branch.

##### B. Fee

The application shall be accompanied by a non-refundable investigation fee of two hundred and fifty dollars (\$250.00). Checks shall be made payable to the Office of the State Bank Commissioner.

## C. Notice

Upon notification by the Commissioner that the application to open a branch office in the United States outside the State of Delaware conforms to the requirements for applications pursuant to Section 771(a) of Title 5 of the Delaware Code and this regulation, the applicant shall cause a single notice of such application to be published in a newspaper of general circulation in the locality of the proposed branch. The notice shall provide a brief synopsis of the application, and state that interested persons may present their views in writing to the Office of the State Bank Commissioner, and shall be in a form to be approved by the Commissioner before publication.

## D. Additional Information, Investigation and Hearing

In addition to the documents filed in accordance with this regulation, the Commissioner at his discretion may require additional information, conduct an investigation, or hold a public hearing in accordance with the Administrative Procedures Act, Chapter 101 of Title 29 of the Delaware Code.

## E. Decision

No earlier than 20 days after publication of the Notice described in section I.C. of this regulation, the Commissioner shall issue a written Order approving or disapproving the application.

## F. Certificate of Authority

A Certificate of Authority shall be issued by the Commissioner for each approved branch office in the United States outside the State of Delaware.

## G. Time to Open Approved Branch Office In the United States Outside the State of Delaware

Branch offices in the United States outside the State of Delaware approved in accordance with Section 771(a) of Title 5 of the Delaware Code and this regulation shall open within one year of the date when the Commissioner issues the Certificate of Authority. The Commissioner may upon review of the application for such branch extend the initial opening date to a date greater than one year. Any Certificate of Authority issued by the Commissioner shall be void and of no effect at the expiration of the time prescribed for the opening of the branch unless the branch is actually opened for business.

## II. Branch Offices in Foreign Countries

This section applies to applications under § 771(a) of Title 5 of the Delaware Code for permission to open branch offices in foreign countries where the applicant has no existing foreign branch office.

## A. Application

An application to open a branch office in a foreign country pursuant to § 771(a) of Title 5 of the Delaware Code shall be in writing, signed by the President of the applicant, and include the following information.

1. Name of the applying bank or trust company.
2. Location (city and country) of the proposed branch, including the address, if available.
3. a) Existing representation in the foreign country, if any;
  - b) Reasons for the proposed branch, including the ways in which it is believed the branch would further the development of the applying bank or trust company's international or foreign business.
4. The type of business to be conducted and types of services to be offered, including:
  - a) Volume of business now conducted through subsidiaries or parents for customers in the proposed market;
  - b) Whether any existing or planned future business will be transferred to the proposed branch, indicating the volume and type of such business;
  - c) Whether the branch will engage in trust activities, and whether that business will be conducted on behalf of customers in the United States.
5. a) Where appropriate, if there has been more than a 25% change in the Bank's (and its affiliates') consolidated exposure in the country of the proposed branch from that reported in the most recently filed Federal Reserve Board Country Exposure Report (F.R. 2036), show the consolidated direct and indirect exposure to borrowers from this country. The exposure in question is both: (a) cross-border exposure (which may be calculated for this purpose by adding the figures under columns 4, 10 and 12 of the form and subtracting the sum of columns 9 and 11); and (b) local currency exposure (column 18 of the form);
  - b) If projections indicate that at the end of the third year of operations of the proposed branch, the direct and indirect exposure, as calculated above, will increase by more than 25% from present levels and this amount is greater than 10% of consolidated capital, show the projected consolidated country exposure.
6. Estimated start-up costs and projected balance sheets and income statements for at least three years, or until the break-even point is reached if longer.
7. Management of the proposed branch.
8. Description of the competitive situation in the foreign country, including representation of other U.S. financial institutions, any existing representation of applicant, its subsidiaries, or parent bank holding company. Status of foreign government approvals, if any. A summary of the bank or trust company's experience in international banking or trust activities, including the



volume and character of present international business, a description of the foreign or international department, the number of its staff, and background of its officers. Details of any locally imposed capital requirements and any other special requirements relating to the utilization of capital funds.

**B. Fee**

The application shall be accompanied by a non-fundable investigation fee of two hundred and fifty dollars (\$250.00). Checks shall be made payable to the Office of the State Bank Commissioner.

**C. Notice**

Upon receipt of any application pursuant to Section II of this regulation, the State Bank Commissioner will afford notice of the filing of such application to such persons as he deems appropriate.

**D. Additional Information**

In addition to the foregoing, the State Bank Commissioner may, in a particular case, request any additional information he deems appropriate.

**E. Decision**

The Commissioner shall issue a written Order approving or disapproving the application.

**F. Certificate of Authority**

If, on the basis of the information submitted, the State Bank Commissioner concludes that the application for the proposed branch office in a foreign country should be approved, he shall issue a Certificate of Authority permitting such office to be opened; such Certificate may contain such conditions as the State Bank Commissioner deems appropriate.

**G. Time to Open Approved Branch Office In a Foreign Country**

Branch offices in foreign countries approved in accordance with Section 771(a) of Title 5 of the Delaware Code and this regulation shall open within one year of the date when the Commissioner issues the Certificate of Authority. The Commissioner may upon review of the application for such branch extend the initial opening date to a date greater than one year. Any Certificate of Authority issued by the Commissioner shall be void and of no effect at the expiration of the time prescribed for the opening of the branch unless the branch is actually opened for business.

Document Control No.:

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Regulation No.: 5.795etal.0016

Proposed

**MERGER WITH OUT-OF-STATE BANKS\***  
**(§§ 795D, 795F, 795G, 795H)**

This regulation establishes procedures governing: (i) the merger of one or more out-of-state banks with or into one or more Delaware banks to result in a Delaware state bank, pursuant to § 795D of Title 5, Delaware Code; (ii) the merger of one or more Delaware state banks with or into one or more out-of-state banks to result in an out-of-state state bank, pursuant to § 795F of Title 5, Delaware Code; (iii) the merger with an out-of-state bank of a Delaware state bank that is in default or in danger of default, pursuant to § 795G of Title 5, Delaware Code; and (iv) the approval by the Commissioner, pursuant to § 795H of Title 5, Delaware Code, of a merger in accordance with §§ 795C, 795D, 795E, 795F or 795G of Title 5, Delaware Code, even though the resulting bank (including all insured depository institutions, as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c), which would be affiliates of the resulting bank), upon consummation of the transaction, would control 30 percent or more of the total amount of deposits of insured depository institutions in this State. This regulation is to be used in conjunction with statutory provisions included by reference in §§ 795D, 795F, 795G and 795H of Title 5, Delaware Code, and the merger procedure prescribed in Subchapter IX of Chapter 1 of Title 8, Delaware Code, for the merger or consolidation of domestic and foreign corporations.

**1. Merger Application By A Delaware State Bank**

A merger application by a Delaware state bank in accordance with § 795D, § 795F and § 795G of Title 5, Delaware Code, in which the resulting bank will be a state bank, shall be filed with the Commissioner. Such application shall include: a merger agreement in the same form as that prescribed in § 784 of Title 5, Delaware Code; certified copies of the authorizing resolutions of each board of directors showing approval by a majority of the entire board and evidence of proper action by the board of directors of any merging national bank, as provided in § 784(b) of Title 5, Delaware Code; a copy of the complete application as submitted to the Federal Deposit Insurance Corporation (the "FDIC"), the Board of Governors of the Federal Reserve System (the "FRB") or the Office of the Comptroller of the Currency (the "OCC"), as applicable; the \$1,150 investigation fee as provided in § 792 of Title 5, Delaware Code; a cover letter indicating that the application is made pursuant to § 795D, § 795F or § 795 G of Title 5, Delaware Code, as applicable, and providing information about the disposition of existing locations of

the merging Delaware state bank, if any; and, when applicable, the information required by regulation 5.803.0011.

#### 2. Application For Waiver Of The 30% Concentration Limit

A Delaware bank that is a party to a merger in accordance with §§ 795D or 795F (with a resulting state bank) or § 795G (with a resulting state or national bank) of Title 5, Delaware Code, in which the resulting bank, upon consummation of the transaction, would control 30% or more of the total amount of deposits of insured depository institutions in this State, may apply for a waiver of the 30% concentration limit in accordance with § 795H of Title 5, Delaware Code, as part of the merger application to the Commissioner.

A Delaware bank that is a party to a merger in accordance with §§ 795C or 795E of Title 5, Delaware Code, in which the resulting bank would be a national bank and, upon consummation of the transaction, would control 30% or more of the total amount of deposits of insured depository institutions in this State, may apply for a waiver of the 30% concentration limit in accordance with § 795H of Title 5, Delaware Code, by submitting to the Commissioner a copy of the complete application as submitted to the FDIC, the FRB or the OCC, as applicable, and a cover letter indicating that the application is made pursuant to § 795H of Title 5, Delaware Code, and providing information about the disposition of existing locations of the merging Delaware bank.

#### 3. Additional Information, Investigation, Notice, Comment and Hearing

In addition to the documents filed in accordance with this regulation, the Commissioner at his discretion may require additional information as deemed necessary, conduct an investigation, order public notice of the merger, period for public comment, and/or a public hearing. The application shall not be considered complete until such additional matters, if any, are completed.

#### 4. Findings and Decision

Within 30 days of receipt of the completed application, the Commissioner shall issue Findings and Decision approving or disapproving the application. Any merging bank whose application is disapproved shall receive an opportunity to amend its application to satisfy the objections of the Commissioner.

#### 5. Filing Of Merger Agreement With The Secretary Of State

Upon receipt of approval of the merger by the FDIC, the FRB or the OCC, as applicable, and verification that the provisions of § 252 of Title 8, Delaware Code, have

been complied with, the Commissioner shall affix his signature of approval to the merger agreement for filing with the Secretary of State.

\* Terms used in this regulation are as defined in § 795 of Title 5, Delaware Code, unless otherwise noted.

Document Control No.:

Regulation No.: 5.833.0004

Proposed

**APPLICATION BY AN OUT-OF-STATE SAVINGS INSTITUTION, OUT-OF-STATE SAVINGS AND LOAN HOLDING COMPANY OR OUT-OF-STATE BANK HOLDING COMPANY TO ACQUIRE A DELAWARE SAVINGS BANK OR DELAWARE SAVINGS AND LOAN HOLDING COMPANY (5 DEL. C. §833)**

#### INSTRUCTIONS

This Application is to be filed by an "out-of-state savings institution", "out-of-state savings and loan holding company" or an "out-of-state bank holding company" (as defined in Section 831 of Title 5 of the Delaware Code), or subsidiary thereof, for the purpose of acquiring a Delaware savings bank or Delaware savings and loan holding company pursuant to the Savings Bank Acquisition Act (5 Del. C. §831 et seq.).

This Application is to be completed, executed and acknowledged by a lawfully empowered officer of the out-of-state savings institution, savings and loan holding company or bank holding company. The completed Application and required exhibits should be filed with the Office of the State Bank Commissioner, Dover, Delaware, in duplicate, accompanied by a non-refundable filing fee made payable to the State of Delaware in the amount of five thousand seven hundred and fifty dollars (\$5,750.00), together with a non-refundable processing fee in the amount of one thousand one hundred and fifty dollars (\$1,150.00) made payable to the Office of the State Bank Commissioner. **THE COMMISSIONER WILL NOT DEEM ANY APPLICATION AS FILED UNTIL THE COMMISSIONER HAS DETERMINED THAT ALL OF THE INFORMATION REQUESTED IN THE APPLICATION HAS BEEN PROVIDED; THAT THE CERTIFICATE HAS BEEN PROPERLY SIGNED AND ACKNOWLEDGED; THAT ALL REQUIRED EXHIBITS ARE ATTACHED; AND THAT ALL FEES HAVE BEEN PAID.**



Application Process

CONFIDENTIAL INFORMATION

Upon notification by the Commissioner that this Application is deemed as filed, the applicant shall cause to be published in a newspaper of general circulation throughout the State of Delaware, once a week for three (3) consecutive weeks, a notice of its intention to acquire a Delaware savings bank or Delaware savings and loan holding company, and, if applicable, to form an interim savings bank in connection therewith. Such notice shall include the date, time and location of the public hearing on the application as established by the Commissioner. Such notice shall expressly invite members of the public to examine the Application on file with the Office of the State Bank Commissioner and to submit comments regarding the Application to the Office of the State Bank Commissioner. A public hearing will be conducted by the Commissioner or the Commissioner's designee in accordance with Chapter 101 of Title 29, Delaware Code, to review the Application and to take such testimony and to gather such evidence as the Commissioner or the Commissioner's designee deems necessary to determine whether the proposed acquisition (and, where applicable, the formation of the proposed interim savings bank) will serve the public convenience and advantage pursuant to the criteria set forth in 5 Del. C. §833 (b). When applicable, the Commissioner or his designee will also consider whether a proposed acquisition should be approved even though the acquiring out-of-state savings institution, out-of-state savings and loan holding company or out-of-state bank holding company, or any subsidiary thereof, would control, together with any affiliated insured depository institution, 30 percent or more of the total amount of deposits of insured depository institutions in this State, as provided in 5 Del. C. §832(b). A record from which a verbatim transcript can be prepared shall be made of all hearings. The expense of any transcription of the proceedings requested by the Commissioner or the Commissioner's designee shall be borne by the applicant; in all other instances, the expense of such transcription shall be borne by the person requesting it. The Commissioner or the Commissioner's designee will issue preliminary findings of fact and law and make the same available for comment to the applicant and all parties shall have thereafter twenty (20) days to submit in writing to the Commissioner or the Commissioner's designee exceptions, comments and arguments respecting the preliminary findings. If the Commissioner or the Commissioner's designee presides at a hearing conducted pursuant to this regulation and if the decision on the applicant is not adverse to the applicant, the Commissioner or the Commissioner's designee has the right to waive the preliminary findings of fact and law and proceed directly to the entry of a final order.

An applicant may request that specific information included in this Application be treated as confidential. Any information or exhibits for which the applicant claims the designation of confidential shall be segregated at the end of the Application as a separate exhibit which the applicant shall designate as "confidential". The Commissioner, in his sole discretion, will determine whether any or all of the information for which the "confidential" designation is requested by the applicant meets the criteria for confidentiality set forth in 29 Del. C. §10112(b)(4). All portions of this Application which the Commissioner does not designate as "confidential" will be made available for public inspection and copying.

**APPLICATION FOR AUTHORITY OF AN OUT-OF-STATE SAVINGS INSTITUTION, O U T - O F - STATE SAVINGS AND LOAN HOLDING COMPANY OR OUT-OF-STATE BANK HOLDING COMPANY TO ACQUIRE A DELAWARE SAVINGS BANK OR DELAWARE SAVINGS AND LOAN HOLDING COMPANY**

I. Certification

The undersigned, \_\_\_\_\_  
(Name and Title)

\_\_\_\_\_  
(Name of out-of-state savings institution, out-of-state savings and loan holding company or out-of-state bank holding company) having first been duly authorized, does hereby make application on behalf of \_\_\_\_\_ to acquire \_\_\_\_\_  
(Name of Delaware Savings Bank or Delaware Savings and Loan Holding Company)

The undersigned acknowledges that he/she has read and is familiar with the provisions of the Savings Bank Acquisition Act of 1987 and all rules and regulations issued in connection therewith; that all of the information provided as part of this Application is, to the best of the knowledge and belief of the undersigned, true and accurate; and that he/she is duly authorized to execute this certification on behalf of the applicant.

\_\_\_\_\_  
WITNESS  
\_\_\_\_\_

Sworn to and subscribed before me, a Notary Public of the State of \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_,  
.

**II. Identification of Applicant**

A. State formal name and state of incorporation of applicant.

B. Identify the name and address of a resident of the State of Delaware who is designated as agent of the applicant for the service of any paper, notice or legal process upon applicant in connection with any matter arising out of Subchapter III, Chapter 8, Title 5, Delaware Code.

**III. Acquisition**

A. Identify the Delaware savings bank or Delaware savings and loan holding company to be acquired (if a savings and loan holding company, further identify the savings bank subsidiary or subsidiaries of such holding company).

B. Describe the method of acquisition of the Delaware savings bank or Delaware savings and loan holding company (enclose as an exhibit to this Application a copy of the acquisition agreement between the applicant and the Delaware savings bank or Delaware savings and loan holding company).

C. Indicate whether this Application is the only pending application for the acquisition of a Delaware bank or savings bank or Delaware bank holding company or savings and loan holding company. If not, identify and attach a copy of any other application pending.

D. Attach as an exhibit a statement of counsel that the Delaware savings bank or Delaware savings and loan holding company is not prohibited by its articles of incorporation, charter, or legislative act from being acquired.

E. If not previously filed, attach as exhibits the most recent statement of income and condition, together with the three most recent annual statements of income and condition of each savings bank subsidiary of the Delaware savings and loan holding company to be acquired filed with the Office of the State Bank Commissioner or, if a federal savings bank, the Office of Thrift Supervision.

F. State whether the proposed acquisition has received: (1) the necessary approval of the stockholders of the out-of-state savings institution, out-of-state savings and loan holding company or out-of-state bank holding company and the Delaware savings and loan holding company or Delaware savings bank (if so, attach certified copies of the resolutions of such approval; if not, describe the status of such approval processes); and (2) whether all necessary federal regulatory approvals have been obtained (if so, provide copies of such approvals; if not, describe the status of the application process for such approvals and attach actual or pro forma applications without exhibits except for transmittal correspondence, and any responses from the federal regulatory authorities).

**IV. Information regarding formation of interim savings bank (OPTIONAL).**

If applicant has applied for a certificate of public convenience and advantage for an interim savings bank from the Office of Thrift Supervision, attach the certificate of public convenience and advantage issued with respect to such interim savings bank. If such certificate has not been issued, provide a copy of the application to form such interim savings bank without exhibits other than the transmittal letter and any responses received from the Office of Thrift Supervision.

**V. Information addressing the criteria for approving or disapproving an acquisition provided for at 5 Del. C. §833(b).****A. Financial history of the applicant.**

1. Describe in narrative fashion the financial history of the applicant, its affiliates, and its bank, savings bank and non-bank subsidiaries over the past three (3) years. Include as exhibits all annual statements of income and condition filed with the bank regulatory authority or authorities in each state where the out-of-state savings institution operates or where the out-of-state bank holding company or out-of-state savings and loan holding company maintains a bank or savings bank subsidiary, or with the Office of the Comptroller of the Currency or the Office of Thrift Supervision; provided, that such filings shall not be required with respect to any bank or savings bank under the jurisdiction of a bank regulatory authority with whom the State Bank Commissioner shall have entered into a cooperative agreement for the provision of such reports pursuant to the provisions of 5 Del. C. §834(4) or any other provision of Title 5.

2. Provide for the past three calendar years, copies of all Form 10-K's and quarterly reports filed on Form 10-Q (or their state equivalents) (if required) with respect to the out-of-state savings institution, out-of-state bank holding company or out-of-state savings and loan holding company, together with all proxy statements, tender offer materials, other disclosure documents, etc., relating to the proposed application (if required), or any other acquisition undertaken by applicant.

If an applicant is not required to file any report under the Securities and Exchange Act of 1934 (15 U.S.C. §78 et seq. as amended), or an equivalent state filing, the applicant shall file information substantially equivalent to the information which would otherwise be contained in such reports in a form reasonably satisfactory to the Bank Commissioner, including the previous three years' statements of condition and a three year income statement, statements of changes in shareholders' equity, all as prepared in accordance with generally accepted accounting principles.

B. Provide a statement in narrative form of a three (3) year business plan of the applicant for the Delaware savings and loan holding company and its savings bank and non-bank subsidiaries, or the Delaware savings bank to be acquired. Such plan should include but is not limited to a description of:

1. In detail, any proposed change during the first year of operation in the products or services offered by the Delaware savings bank or the subsidiary or subsidiaries of the Delaware savings and loan holding company;

2. In detail, any contemplated or proposed change during the first year after the effective date of the acquisition in the executive officers of the Delaware savings bank or the Delaware savings and loan holding company and its savings bank and non-bank subsidiaries, with specific reference to the termination, transfer, or reduction of authority or responsibilities of any such executive officers;

3. Using the current table of organization of the Delaware savings bank or Delaware savings and loan holding company and its savings bank and non-bank subsidiaries, describe proposed changes in levels of employment among non-management personnel;

4. Any change in the geographic market to be served by the Delaware savings bank or the subsidiary of the Delaware savings and loan holding company (with specific reference to the opening, closing or expansion of branches);

5. Additional products or services which the Delaware savings bank or subsidiary of the Delaware savings and loan holding company will provide after the acquisition;

6. For the next three (3) years, proposed changes in the capitalization of the Delaware savings bank or the Delaware savings and loan holding company and any subsidiary thereof;

With respect to each of the above subject areas, include specific references, if any, to any relevant sections of the acquisition agreement, merger agreement with an interim savings bank, any other agreement or understanding (with any person or party) not incorporated in such acquisition or merger agreements or any exhibits or supplements as to any of such items.

C. State whether the applicant, or any subsidiary thereof, would control, together with any affiliated insured depository institution (as defined in the Federal Deposit Insurance Act at 12 U.S.C. §1813(c)), 30 percent or more of the total amount of deposits of insured depository institutions in this State after the proposed acquisition. If so, explain why the Application should be approved in accordance with the convenience and needs of the public of this State.

D. If applicant has acquired or has made application to acquire any other Delaware bank holding company,

Delaware savings and loan holding company, Delaware bank, or Delaware savings bank describe in detail the extent to which the acquisition which is the subject of this Application will affect present competition between the savings bank or savings bank subsidiaries of a Delaware savings and loan holding company to be acquired under this Application and the Delaware bank or Delaware savings bank or subsidiary of a Delaware bank holding company or Delaware savings and loan holding company previously acquired or pending acquisition approval.

E. Describe in detail the activities which applicant proposes for fostering economic development and employment within the State of Delaware. By way of historical background, and as part of such description, include the following information:

1. With respect to the commercial loan activity of the applicant and the Delaware savings bank or subsidiary of the Delaware savings and loan holding company to be acquired, the total dollar value, and the percentage of total commercial loans outstanding, of the following categories of commercial loans:

- a. Small business loans (SBA);
- b. Other small business loans;
- c. Industrial authority development loans;
- d. Financing of ESOP's and leveraged buy-outs;
- e. Financing directly or indirectly of non-profit, community development projects;
- f. Loans in other categories designed to stimulate industrial growth and employment.

2. Enclose for both the applicant and/or its subsidiaries and the Delaware savings bank or subsidiaries of the Delaware savings and loan holding company to be acquired copies of the most recent report filed pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. §§2801-9.

Document Control No.:

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Regulation No.: 5.844.0009  
Proposed

**APPLICATION BY AN OUT-OF-STATE BANK  
HOLDING COMPANY TO ACQUIRE A DELAWARE  
BANK OR BANK HOLDING COMPANY  
5 DEL. C. §844**

#### INSTRUCTIONS

This Application is to be filed by an "out-of-state bank holding company" (as defined in Section 801 of Title 5 of the Delaware Code) for the purpose of acquiring a Delaware bank or bank holding company pursuant to the Delaware Interstate Banking Act (5 Del.C. §841 et seq.).

This Application is to be completed, executed and acknowledged by a lawfully empowered officer of the out-of-state bank holding company. The completed Application and required exhibits should be filed with the Office of the State Bank Commissioner, Dover, Delaware in duplicate, accompanied by a non-refundable filing fee made payable to the State of Delaware in the amount of five thousand seven hundred and fifty dollars (\$5,750.00), together with a non-refundable processing fee made payable to the Office of the State Bank Commissioner in the amount of one thousand one hundred and fifty dollars (\$1,150.00). THE COMMISSIONER WILL NOT DEEM ANY APPLICATION AS FILED UNTIL THE COMMISSIONER HAS DETERMINED THAT ALL OF THE INFORMATION REQUESTED IN THE APPLICATION HAS BEEN PROVIDED; THAT THE CERTIFICATE HAS BEEN PROPERLY SIGNED AND ACKNOWLEDGED; THAT ALL REQUIRED EXHIBITS ARE ATTACHED; AND THAT ALL FEES HAVE BEEN PAID.

#### APPLICATION PROCESS

Upon notification by the Commissioner that this Application is deemed as filed, the applicant shall cause to be published in a newspaper of general circulation throughout the State of Delaware, once a week for three (3) consecutive weeks, a notice of its intention to acquire a Delaware bank holding company or bank, and, if applicable, to form an interim bank in connection therewith. Such notice shall include the date, time and location of the public hearing on the application as established by the Commissioner. Such notice shall expressly invite members of the public to examine the Application on file with the Office of the State Bank Commissioner and to submit comments regarding the Application to the Office of the State Bank Commissioner. A public hearing will be conducted by the Commissioner or his designee in accordance with Chapter 101 of Title 29, Delaware Code to review the Application and to take such testimony and to gather such evidence as the Commissioner or his designee deems necessary to determine whether the proposed acquisition (and, where applicable, the formation of the proposed interim bank) will serve the public convenience and advantage pursuant to the criteria set forth in 5 Del.C. §844(b). When applicable, the Commissioner or his designee will also consider whether a proposed acquisition should be approved even though the acquiring out-of-state bank holding company, or any subsidiary thereof, would control, together with any affiliated insured depository institution, 30 percent or more of the total amount of deposits of insured depository institutions in this State, as provided in 5 Del. C. § 843(b). A record from which a verbatim

transcript can be prepared shall be made of all hearings. The expense of any transcription of the proceedings requested by the Commissioner or his designee shall be borne by the applicant; in all other instances, the expense of such transcription shall be borne by the person requesting it. The Commissioner or his designee will issue preliminary findings of fact and law and make the same available for comment to the applicant and all parties having presented data, views or argument at the hearing. Said parties shall have thereafter twenty (20) days to submit in writing to the Commissioner exceptions, comments and arguments respecting the preliminary findings. If the Commissioner or his designee presides at a hearing conducted pursuant to this regulation and if the decision on the Application is not adverse to the applicant, the Commissioner or his designee has the right to waive the preliminary findings of fact and law and may instead proceed directly to the entry of a final order.

#### CONFIDENTIAL INFORMATION

An applicant may request that specific information included in this Application be treated as confidential. Any information or exhibits for which the applicant claims the designation of confidential shall be segregated at the end of the Application as a separate exhibit which the applicant shall designate as "confidential". The Commissioner, in his sole discretion, shall determine whether any or all of the information for which the "confidential" designation is requested by the applicant meets the criteria for confidentiality set forth in 29.Del. C. §10112(b)(4). All portions of this Application which the Commissioner shall not designate as "confidential" shall be made available for public inspection and copying in the manner provided by law.

#### APPLICATION FOR AUTHORITY OF AN OUT-OF-STATE BANK HOLDING COMPANY TO ACQUIRE A DELAWARE BANK OR BANK HOLDING COMPANY

##### I. Certification

The undersigned, \_\_\_\_\_  
(Name and Title)

\_\_\_\_\_  
(Name of Bank Holding Company)

having first been duly authorized, does hereby make application on behalf of \_\_\_\_\_ to acquire \_\_\_\_\_  
(Name of Delaware Bank or Bank Holding Company)

The undersigned acknowledges that he/she has read and is familiar with the provisions of the Delaware Interstate Banking Act and all rules and regulations issued

in connection therewith; that all of the information provided as part of this Application is, to the best of the knowledge and belief of the undersigned, true and accurate; and that he/she is duly authorized to execute this certification on behalf of the applicant.

\_\_\_\_\_

WITNESS

\_\_\_\_\_

Sworn to and subscribed before me, a Notary Public of the State of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_

**II. Identification of Applicant**

A. State formal name and state of incorporation of applicant.

B. Identify the name and address of a resident of the State of Delaware who is designated as agent of the applicant for the service of any paper, notice or legal process upon applicant in connection with any matter arising out of Subchapter IV, Chapter 8, Title 5, Delaware Code.

**III. Acquisition**

A. Identify the Delaware bank or bank holding company to be acquired (if a bank holding company, further identify the bank subsidiary or subsidiaries of such holding company).

B. Describe the method of acquisition of the Delaware bank holding company or bank (if not otherwise included as part of the Application for Formation of an Interim Bank, enclose as an exhibit to this Application a copy of the acquisition agreement between the applicant and the Delaware bank or bank holding company).

C. Indicate whether this Application is the only pending application for the acquisition of a Delaware bank or bank holding company. If not, identify and attach a copy of any other application pending.

D. Attach as an exhibit a statement of counsel that the Delaware bank holding company and/or Delaware bank are not prohibited by its articles of incorporation, charter, or legislative act from being acquired.

E. If not previously filed, attach as exhibits the most recent statement of income and condition, together with the three most recent annual statements of income and condition of each bank subsidiary of the Delaware bank holding company to be acquired filed with the Office of the State Bank Commissioner or, if a national bank, the Comptroller of the Currency.

F. State whether the proposed acquisition has

received: (1) the necessary approval of the stockholders of the out-of-state bank holding company and the Delaware bank holding company or bank (if so, attach certified copies of the resolutions of such approval; if not, describe the status of such approval processes); and (2) whether all necessary federal regulatory approvals have been obtained (if so, provide copies of such approvals; if not, describe the status of the application process for such approvals and attach actual or pro forma applications without exhibits except for transmittal correspondence, and any responses from the federal regulatory authorities).

**IV. Information regarding formation of interim bank (OPTIONAL).**

A. If applicant is seeking a certificate of public convenience and advantage from the Commissioner for an interim bank as part of this Application, then applicant should comply with the provisions of Regulation No. 5.121.0002 with respect to the formation of such interim bank as part of this Application; provided, however, that an application for authorization to form an interim bank which is filed as part of this Application by an out-of-state bank holding company shall be governed by the notice, publication and hearing requirements of this Application as described in the section captioned "Application Process", rather than the notice and publication requirements of Regulation No. 5.121.0002.

B. If applicant has previously applied for a certificate of public convenience and advantage for an interim bank from the Comptroller of the Currency, attach the certificate of public convenience and advantage issued with respect to such interim bank. If such certificate has not been issued, provide a copy of the application to form such interim bank without exhibits other than the transmittal letter and any responses received from the Office of the Comptroller of the Currency.

**V. Information addressing the criteria for approving or disapproving an acquisition provided for at 5 Del.C. §844(b).**

A. Financial history of the applicant.

1. Describe in narrative fashion the financial history of the applicant, its affiliates, and its bank and non-bank subsidiaries over the past three (3) years. Include as exhibits all annual statements of income and condition filed with the bank regulatory authority or authorities in each state where the bank holding company maintains a bank subsidiary or, in the case of a national bank, with the Comptroller of the Currency; provided, that such filings shall not be required with respect to any bank subsidiary under the jurisdiction of a bank regulatory authority with whom the State Bank Commissioner shall have entered into a cooperative agreement for the provision of such reports pursuant to the provisions of 5 Del.C. §845

or any other provision of Title 5.

2. Provide for the past three calendar years, copies of all Form 10-K's and quarterly reports filed on Form 10-Q (or their state equivalents) (if required) with respect to the bank holding company, together with all proxy statements, tender offer materials, other disclosure documents, etc. relating to the proposed application (if required), or any other acquisition undertaken by applicant.

If an applicant is not required to file any report under the Securities Exchange Act of 1934 (15 U.S.C. §78 et seq. as amended), or an equivalent state filing, the applicant shall file information substantially equivalent to the information which would otherwise be contained in such reports in a form reasonably satisfactory to the Commissioner, including the previous three years' statements of condition and a three year income statement, statements of changes in shareholders' equity, all as prepared in accordance with generally accepted accounting principles.

B. Provide a statement in narrative form of a three (3) year business plan of applicant for the Delaware bank holding company and its bank and non-bank subsidiaries, or the Delaware bank to be acquired. Such plan should include but is not limited to a description of:

1. In detail, any proposed change during the first year of operation in the products or services offered by the Delaware bank or the subsidiary or subsidiaries of the Delaware bank holding company;

2. In detail, any contemplated or proposed change during the first year after the effective date of the acquisition in the executive officers of the Delaware bank or the Delaware bank holding company, with specific reference to the termination, transfer, or reduction of authority or responsibilities of any such executive officers;

3. Using the current table of organization of the Delaware bank or bank subsidiary, describe proposed changes in levels of employment among non-management personnel.

4. Any change in the geographic market to be served by the Delaware bank or the subsidiary of the Delaware bank holding company (with specific reference to the opening, closing or expansion of branches);

5. Additional products or services which the Delaware bank or subsidiary of the Delaware bank holding company will provide after the acquisition;

6. For the next three (3) years, proposed changes in the capitalization of the Delaware bank or the Delaware bank holding company and any subsidiary thereof.

With respect to each of the above subject areas, include specific references, if any, to any relevant sections of the acquisition agreement, merger agreement with an interim bank, any other agreement or understanding (with any person or party) not incorporated in such acquisition or merger agreements or any exhibits or supplements as to

any of such items.

C. State whether the applicant, or any subsidiary thereof, would control, together with any affiliated insured depository institution (as defined in the Federal Deposit Insurance Act at 12 U.S.C. §1813(c)), 30 percent or more of the total amount of deposits of insured depository institutions in this State after the proposed acquisition. If so, explain why the Application should be approved in accordance with the convenience and needs of the public of this State.

D. If applicant has acquired or has made application to acquire any other Delaware bank holding company or Delaware bank, describe in detail the extent to which the acquisition which is the subject of this Application will affect present competition between the banks or bank subsidiaries of a Delaware bank holding company to be acquired under this Application and the Delaware bank or bank subsidiary of a Delaware bank holding company previously acquired or pending acquisition approval.

E. Describe in detail the activities which applicant proposes for fostering economic development and employment within the State of Delaware. By way of historical background, and as part of such description, include the following information:

1. With respect to the commercial loan activity of the bank subsidiaries of both the applicant and the Delaware bank or bank subsidiary of the bank holding company to be acquired, the total dollar value, and the percentage of total commercial loans outstanding, of the following categories of commercial loans:

- a. Small business loans (SBA)
- b. Other small business loans
- c. Industrial authority development loans
- d. Financing of ESOP's and leveraged buy-outs
- e. Financing directly or indirectly of non-profit, community development projects
- f. Loans in other categories designed to stimulate industrial growth and employment

2. Enclose for both the bank subsidiary or subsidiaries of applicant and the Delaware bank or bank subsidiaries of the bank holding company to be acquired copies of the most recent report filed pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. §2801 et seq.

Document Control No.:

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**GOVERNOR'S APPOINTMENTS**

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<b>BOARD/COMMISSION OFFICE</b>	<b>APPOINTEE</b>	<b>TERM OF OFFICE</b>
Commission on National and Community Service	Sandra H. Dole	8/29/00
	Andrew W. Hastings	8/29/00
Council on Corrections	Weston E. Nellius	9/17/00
Council on Game and Fish	Dr. Lisa A. Muller	9/22/00
	Verna Price	9/22/00
Delaware Commission for Women	Eileen Conner	3/7/98
	Beverly J. Wik	9/22/00
	Mary Margaret Williams	9/22/00
	Richard L. Windsor	3/29/98
Pesticide Advisory Committee	David Allen Chorman	9/22/00
	Dr. Amalendu Dasgupta	9/22/00
	Maria G. Rejai	9/22/00
Tuition Savings Board	Herbert A. Nehrling, Jr.	9/22/99
	William N. Spiker	9/22/98

**DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL  
DIVISION OF AIR and WASTE MANAGEMENT  
AIR QUALITY MANAGEMENT SECTION**

1. TITLE OF THE REGULATIONS:

1993 Periodic Ozone State Implementation Plan Emission Inventory for VOC, NO<sub>x</sub>, and CO for the State of Delaware.

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

The CAAA requires States with non-attainment areas for ground level ozone to develop comprehensive periodic emission inventories of ozone precursor pollutants (volatile organic compounds, nitrogen oxides and carbon monoxide) once every three years after 1990. These emission inventories are purely technical and informational documents. However, states are required to incorporate them into the State Implementation Plan (SIP). Consequently, these periodic emission inventories must be made available for public review and public hearing, and submitted to EPA. The first of these inventories is the 1993 Periodic Emission Inventory, covering all three Delaware counties for the 1993 calendar year and ozone season.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C. Chapter 60, Section 6003, Clean Air Act Amendments of 1990

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

6. NOTICE OF PUBLIC COMMENT:

A Public Hearing on this Emission Inventory will be held on Thursday, December 4, 1997, 6:30 p.m. at the Richardson and Robbins Building, Canteen Conference Room. For further information, please contact Mr. Al deramo at (302) 739-4791).

1993 Periodic Ozone State Implementation Plan  
Emissions Inventory for VOC, NO<sub>x</sub>, and CO  
Summary for the State of Delaware

Final Draft  
September 1997

SECTION 1  
BACKGROUND AND EMISSIONS SUMMARY



**BACKGROUND**

This document presents the 1993 Periodic Ozone State Implementation Plan (SIP) Emissions Inventory for VOC, NO<sub>x</sub>, and CO, as required by the Clean Air Act Amendments (CAAA) of 1990. As does the original Clean Air Act of 1970, the CAAA of 1990 contains provisions for the attainment and maintenance of National Ambient Air Quality Standards (NAAQS) for criteria pollutants. More specifically, the CAAA of 1990 acknowledges that many areas of the United States remain in violation of the NAAQS for ozone and other criteria pollutants despite the development and implementation of SIP's that contain various control strategies to address the problems in these areas. Therefore, the CAAA requires the revision of existing plans in states containing areas designated as nonattainment prior to 1990 and the development of new plans in newly designated nonattainment areas. The CAAA requirements are very specific, but vary in accordance with the severity of the particular area's air pollution problem.

Section 182(a)(1) of the CAAA requires states with nonattainment areas to submit a comprehensive, accurate, current inventory of actual emissions of ozone precursors from all sources within two years of enactment. This initial inventory is for calendar year 1990, and is widely known as the 1990 Base Year Ozone SIP Inventory. Section 182(a)(3) of the CAAA requires states with nonattainment areas to submit periodic inventories starting with 1993 and every three years thereafter until the area is redesignated to attainment. As a first step in meeting the requirements of Section 182(a)(3) of CAAA, this document presents Delaware's 1993 periodic inventory for the nonattainment areas of Kent, New Castle, and Sussex Counties. The 1990 Base Year Ozone SIP Emissions Inventory for VOC, CO, and NO<sub>x</sub> was submitted to and approved by U.S. EPA, Region III on May 27, 1994, and March 25, 1996, respectively. For ozone nonattainment areas, three precursor pollutants must be inventoried: volatile organic compounds (VOCs), oxides of nitrogen (NO<sub>x</sub>), carbon monoxide (CO). For purposes of this inventory, VOC and NO<sub>x</sub> are defined in Regulation No. 1 of the Regulation Governing the Control of Air Pollution, 40-09-81/02/01, Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, updated in January 1993.

Delaware has three counties, all of which are in nonattainment of the NAAQS for ozone. As shown in Figure 1-1, New Castle and Kent Counties are part of the Philadelphia-Wilmington-Trenton Consolidated Metropolitan Statistical Area (Philadelphia CMSA), which is classified as a "severe" nonattainment area with a design value of 0.187 part per million (ppm). Sussex County is classified as "marginal" with a design value of 0.130 ppm. The nonattainment areas are defined by Designation of Areas for Air Quality Planning Purposes, 40 CFR Part 81, Final Rule, U.S. Environmental Protection Agency, Office of Air and Radiation, Washington, D.C., November 6, 1991. The Philadelphia CMSA contains parts of Pennsylvania, New Jersey, and Maryland.

**[All graphics not printed in this document available through the Air Quality Management Section]**

Figure 1-1. Philadelphia-Wilmington-Trenton CMSA Ozone Nonattainment Area<sup>1</sup>

<sup>1</sup> This map was adapted from *Major CO, NO<sub>2</sub> and VOC Sources In the 25-Mile Boundary Around Ozone Nonattainment Areas, volume 1: Classified Ozone Nonattainment Area*, EPA450/4-92-005a, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Office of Air and Radiation, Research Triangle Park, NC, February 1992.

As mentioned in the foregoing, Section 182(a) of the CAAA requires states with ozone nonattainment areas classified marginal and above to inventory VOC, NO<sub>x</sub>, and CO emissions for the 1990 base year and every three years from 1993 onwards. In the document entitled *Major CO, NO<sub>2</sub> and VOC Sources in the 25-Mile Boundary Around Ozone Nonattainment Areas, Volume 1: Classified Ozone Nonattainment Area*, EPA450/4-92-005a, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Office of Air and Radiation, Research Triangle Park, NC, February 1992, EPA requires that states include in the 1990 base year inventory point sources whose emissions exceed one hundred TPY of VOC, NO<sub>x</sub>, and CO located within the 25-mile boundary of each designated nonattainment area. This requirement was imposed for the 1990 Base Year Inventory to meet the data demands for modeling domains as part of the air quality modeling exercise, and does not apply to the periodic inventories. Therefore, in order to satisfy the requirements of Section 182(a) of the CAAA, Delaware inventoried the emissions from the Kent, New Castle, and Sussex Counties nonattainment areas. The total geographic area covered by this inventory includes Kent, New Castle, and Sussex Counties nonattainment areas as shown in Figure 1-2, but does not include the 25-mile zone around Delaware.

For the purposes of creating a consistent, state-wide 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO, and in accordance with Delaware's Ozone Inventory Preparation Plan, Delaware Department of Natural Resources and Environmental Control, Air Quality Management Section (formerly known as Air Resources Section), Dover, Delaware, April 1992, (hereafter referred to as the IPP), the entire state of Delaware, including Sussex County, was inventoried according to USEPA guidelines for severe areas. Inventorying Sussex County as if it were a severe area had no effect on the method used to prepare this inventory, nor will it affect future ozone attainment planning activities. The only effect of this decision to inventory Sussex County as if it were a severe area is to improve the accuracy of the point source inventory by including sources in Sussex County that emit between ten and one hundred tons per year (TPY) of VOCs. Otherwise, point sources in Sussex County would be inventoried only if VOC emissions are greater than or equal to one hundred TPY.

The agency directly responsible for preparing and submitting the 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO is the Delaware Department of Natural Resources and Environmental Control (DNREC), Division of Air and Waste Management, Air Quality Management Section. The Delaware Department of Transportation (DelDOT) was responsible for performing the work necessary to create the on-road mobile source portion of this inventory. Various other State agencies, including the Department of Agriculture, the Department of Labor, and the Department of Public Safety, provided activity level data for use in estimating emissions for this inventory.

**[All graphics not printed in this document available through the Air Quality Management Section]**

Figure 1-2. Inventory Area for Delaware 1993 Periodic Ozone State Implementation Plan Emissions Inventory for VOC, NO<sub>x</sub>, and CO.

The overall responsibility for inventory development falls within the Planning and Community Protection Branch of DNREC's Air Quality Management Section, under the management of Raymond H. Malenfant, Program Manager II. Alfred R. Deramo, Program Manager I of DNREC's Emission Research and Policy Analysis Group, was the project supervisor of the 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO report. Mike Duross, Transportation Planning Supervisor in the Division of Planning, Transportation Policy and Research Section at DelDOT, replaced Ralph Reeb as the project leader responsible for development and documentation of the on-road mobile source inventory.

The following personnel in DNREC's Air Quality Management Section were responsible for developing their respective portion of this inventory:

- Margaret A. Jenkins, Environmental Scientist - Report Coordinator and Technical Editor
- Mohammed A. Mazeed, Environmental Engineer - Senior QA/QC Coordinator and Other Off-Road Emissions Inventory Developer
- John L. Outten, Environmental Scientist - Point Source Coordinator
- William H. Elliott, Environmental Engineer - Point Source QA Analyst/Engineering Reviews
- Craig A. Koska, Senior Environmental Compliance Specialist - Point Source QA Analyst
- Whitney Gadsby, Environmental Scientist - Off-Road Mobile Source Coordinator
- Mark H. Glaze, Resource Planner - On-Road Mobile Source Coordinator, On-Road and Off-Road Mobile Source QA Analyst
- Kelly A. Lion, Environmental Scientist - Stationary Area and Biogenic Source Coordinator
- John L. Sipple, Environmental Scientist - Area Source QA Analyst

Demographic data for the state of Delaware is used to estimate air emissions from many of the sources in this inventory. The demographic data compiled for this inventory include population, employment, housing, and other statistics. A summary of 1993 demographic information for Delaware by county is presented in Table 1-1. Subsequent sections of this report describe how this data is used to estimate emissions for particular sources.

The remainder of this section presents a summary of Delaware's VOC, NO<sub>x</sub>, and CO emissions totals for 1993.

TABLE 1-1  
SUMMARY OF 1993 DEMOGRAPHIC INFORMATION FOR THE STATE OF DELAWARE

Demographic Parameter	Kent County Value	New Castle County Value	Sussex County Value	State Value
Land Area (square miles) <sup>b</sup>	594	439	950	1,983
Number of Housing Units <sup>c</sup>	42,106	173,560	4,253	289,919
Manufacturing Employment <sup>d</sup>	6,147	47,009	12,158	65,314
Construction Employment <sup>d</sup>	2,481	12,782	3,281	18,544
Retail Employment <sup>d</sup>	11,291	40,834	11,561	63,686
Commercial/Institutional Employment <sup>d</sup>	32,807	164,428	31,773	229,008
Gasoline RVP <sup>e</sup>	8.1	8.1	8.1	8.1

- a 1993 Census of Population and Housing, Summary Population and Housing Characteristics--Delaware, U.S. Department of Commerce, Bureau of the Census, January 1993.
- b Webster's New Geographic Dictionary, Miriam Webster Publishing Company, 1984.
- c Selected Housing Characteristics, 1990, Summary Tape File (STF-3A), CPH-L-80, U.S. Department of Commerce, Bureau of the Census.
- d Delaware Department of Labor. See Attachment 3.2, p. 3-15a through 3-18a. To avoid double counting, employees working in more than one county were accounted for once.
- e Developed per EPA guidance using the American Automobile Manufacturers Association National Fuel Survey for Philadelphia, PA--Summer 1993. See Attachment 5, page 5-23a.

## EMISSIONS SUMMARY

The emissions of VOC, NO<sub>x</sub>, and CO in the 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO report are estimated on both an annual (TPY) and a daily (TPD) basis. Annual emissions are estimated for calendar year 1993. Daily emissions are estimated for a typical peak ozone season day. The peak ozone season is defined as that contiguous three-month period of the year during which the highest number of ozone exceedances have occurred over the past three to four years. During 1993, all ozone exceedances in Delaware occurred during June, July, and August. A review of data for past years also revealed that the highest number of exceedances always occurred during this three month period. Therefore, the peak ozone season for the 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO report is defined as June through August. Peak ozone season daily emissions represent average emissions that occur on a typical weekday during the peak ozone season. All references to daily or seasonal emissions in this document mean peak ozone season daily emissions.

In this inventory, VOC, NO<sub>x</sub>, and CO emissions sources are categorized into point, stationary area, off-road mobile, on-road mobile, and biogenic sources. Peak ozone season daily emissions are estimated for all of these categories. Annual emissions, however, are only estimated for the point source category, the stationary area source category (except for leaking underground storage tanks and vehicle refueling and spillage), and the off-road mobile source category. There are currently no methods for determining annual emissions for the on-road mobile and biogenic source categories, or for the leaking underground storage tank and vehicle refueling and spillage emissions sources within the stationary area source category. The U.S. EPA guidance document, Example Documentation Report for 1990 Base Year Ozone and Carbon Monoxide State Implementation Plan Emission Inventories, EPA-450/4-92-007, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1992, states that source categories that have no calculated annual emissions can be excluded from the emissions summary. Therefore, annual emissions totals in this summary do not include on-road mobile, biogenic, leaking underground storage tank, or vehicle refueling and spillage emissions. Peak ozone season daily emissions totals for VOC in this summary include

emissions from all source categories. However, neither annual nor peak ozone season daily emissions of NO<sub>x</sub> or CO are reported for the biogenic source category, because the PC-BEIS model for biogenic emission estimations does not calculate NO<sub>x</sub> and CO. Throughout this document, annual emissions are listed in TPY, and peak ozone season daily emissions are listed in TPD.

Prior to compiling the final numbers in this summary, several adjustments were made to the estimated emissions values. First, in accordance with Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone, Volume I: General Guidance for Stationary Sources, EPA-450/4-91-016, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, May 1991, [hereafter referred to as Procedures, Volume I (1991)], photochemically nonreactive VOC emissions were removed from the inventory. While most VOCs engage in photochemical reactions, some are considered nonreactive under atmospheric conditions. These compounds, as defined in Regulation No. 1 of the Regulations Governing the Control of Air Pollution, 40-09-81/02/01, Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, updated to January 1993, do not contribute to ozone formation, therefore are subtracted from the inventory. All references to “nonreactive VOCs” in this document mean photochemically, nonreactive VOCs.

Second, emissions from regulated sources were adjusted for rule effectiveness and/or rule penetration. Rule effectiveness is an adjustment to the emissions estimates of regulated sources to account for the fact that all sources are not in compliance with applicable air regulations 100 percent of the time. The rule effectiveness adjustment compensates for underestimates of emissions caused by noncompliance with existing regulations, control equipment downtime, operating problems, and process upsets. Rule effectiveness adjustments were made according to the Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories, EPA-452/R-92-010, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, November 1992.

Rule penetration factors are used in conjunction with rule effectiveness to adjust regulated stationary area source emissions estimates. Rule penetration is the portion of an area source category that is affected by a regulation. If a regulation applies to only a certain percentage of sources within a source category, a rule penetration factor is applied to ensure that the rule effectiveness adjustment affects only the emissions values for those regulated sources, and not the emissions values for the unregulated sources in the category. Adjustments for removal of nonreactive VOCs, rule effectiveness, and rule penetration are discussed in detail in appropriate sections of this document. All summary tables in this document list emissions values that have been adjusted as appropriate for removal of nonreactive VOCs, rule effectiveness, and rule penetration.

The results of Delaware’s 1993 Periodic Ozone SIP Emissions Inventory for VOC, NO<sub>x</sub>, and CO are presented in both tabular and graphic form. Table 1-2 summarizes Delaware’s 1993 annual emissions of VOC, NO<sub>x</sub>, and CO for each county and for the state.

Table 1-3 summarizes Delaware’s 1993 peak ozone season daily emissions of VOC, NO<sub>x</sub>, and CO for each county and for the state. The state’s total peak ozone season daily emissions of VOC, NO<sub>x</sub>, and CO are depicted graphically in Figure 1-3. Using the information from Table 1-3, a distribution of the peak ozone season daily emissions by county was prepared as shown in Figure 1-4.

Table 1-4 summarizes Delaware’s 1993 annual and peak ozone season daily emissions of VOC, NO<sub>x</sub>, and CO by source category. The distribution of peak ozone season daily emissions by source category is depicted graphically in Figure 1-5.

TABLE 1-2  
STATE AND COUNTY ANNUAL VOC, NO<sub>x</sub>, AND CO EMISSIONS  
DELAWARE 1993 PERIODIC OZONE EMISSIONS INVENTORY

COUNTY	POLLUTANT EMISSIONS (TPY) <sup>a</sup>		
	VOC	NO <sub>x</sub>	CO <sub>b</sub>
Kent	5,563	4,203	11,087
New Castle	21,680	36,954	46,718
Sussex	6,975	21,835	11,373
<b>STATE TOTAL</b>	<b>34,218</b>	<b>62,992</b>	<b>69,178</b>

TABLE 1-3  
STATE AND COUNTY PEAK OZONE SEASON DAILY  
VOC, NO<sub>x</sub>, AND CO EMISSIONS  
DELAWARE 1993 PERIODIC OZONE EMISSIONS INVENTORY

COUNTY	POLLUTANT EMISSIONS (TPD)		
	VOC	NO <sub>x</sub>	CO <sub>b</sub>
Kent	60.737	26.094	108.951
New Castle	125.028	146.707	380.446
Sussex	84.266	85.219	152.868
<b>STATE TOTAL</b>	<b>270.031</b>	<b>258.020</b>	<b>642.287</b>

a Annual emissions totals do not include emissions from on-road mobile, biogenic, leaking underground storage tank, and vehicle refueling and spillage sources because there are no methods for determining annual emissions for these sources.

b Emissions of NO<sub>x</sub> and CO from biogenic sources are not generated by the PC-BEIS model, therefore are not reported in this inventory.

PUT FIGURE 1.3 HERE. HARVARD GRAPHICS FILENAME: fig1\_3f.CH3

All graphics not printed in this document available through the Air Quality Management Section at (302) 739-4791.

PUT FIGURE 1.4 HERE. HARVARD GRAPHICS FILENAME: fig1\_4f.CH3

**[All graphics not printed in this document available through the Air Quality Management Section]**

TABLE 1-4  
ANNUAL<sup>a</sup> AND PEAK OZONE SEASON DAILY<sup>b</sup> EMISSIONS BY SOURCE CATEGORY  
DELAWARE 1993 PERIODIC OZONE SIP EMISSIONS INVENTORY

SOURCE CATEGORY	POLLUTANT EMISSIONS					
	VOC		NO <sub>x</sub>		CO	
	Annual (TPY)	Daily (TPD)	Annual (TPY)	Daily (TPD)	Annual (TPY)	Daily (TPD)
Point Sources	10,037	33.318	49,139	155.367	13,213	45.472
Stationary Area Sources	18,641 <sup>a</sup>	60.948	4,964	11.605	18,052	40.304
Off-road Mobile Sources	5,540	23.915	8,889	33.458	37,913	151.461
On-road Mobile Sources	N/Ab	55.890	N/Ab	57.590	N/Ab	405.050
Biogenic Sources	N/Ab	95.960	N/Ac	N/Ac	N/Ac	N/Ac
<b>STATE TOTAL</b>	<b>34,218</b>	<b>270.031</b>	<b>62,992</b>	<b>258.020</b>	<b>69,178</b>	<b>642.287</b>

a There are no methods for determining annual VOC emissions for leaking underground storage tank, and vehicle refueling and spillage emissions sources within the stationary area source category. Consequently, annual VOC totals for the stationary area source category do not include emissions from these two sources. These two sources do not emit NO<sub>x</sub> or CO.

b Not Applicable. There are no methods for determining annual emissions for the on-road mobile and biogenic source categories. Annual emissions for these categories are not reported in accordance with the Example Documentation Report for 1990 Base Year Ozone and Carbon Monoxide State Implementation Plan Emission Inventories, EPA-450/4-92-007, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1992.

c Not Applicable. Emissions of NO<sub>x</sub> and CO from biogenic sources are not generated by the PC-BEIS model, therefore are not reported in this inventory.

PUT FIGURE 1.5 HERE. HARVARD GRAPHICS FILENAME: fig1\_5f.CH3

**[All graphics not printed in this document available through the Air Quality Management Section]**

Table 1-5 presents a summary of Delaware's 1990 annual and peak ozone season daily VOC emissions by county and by source category. Tables 1-6 and 1-7 present similar information for NO<sub>x</sub> and CO, respectively. This information is presented graphically in Figures 1-6, 1-7, and 1-8, which show comparisons of source category emissions by county for VOC, NO<sub>x</sub>, and CO, respectively.

**DOCUMENT ORGANIZATION**

The remainder of this document presents detailed discussions of the emission estimation methods, data sources, and quality assurance procedures used to compile this inventory. Each source category is discussed in its own section as follows:

- Section 2 - Point Sources
- Section 3 - Stationary Area Sources
- Section 4 - Off-Road Mobile Sources
- Section 5 - On-Road Mobile Sources
- Section 6 - Biogenic Sources

Quality Assurance procedures are discussed in two sections as follows:

- Section 7 - Quality Assurance Implementation by DNREC
- Section 8 - Quality Assurance Implementation by DelDOT

Reference documentation that is pertinent to the discussion in a particular section of this document is included in an attachment at the end of that particular section. For example, computer printouts and excerpts from emissions reports relevant to the Section 2 point source discussion are labeled in Attachment 2 and are found at the end of Section 2. Reference documents less directly related to emissions estimations in this inventory, or too large to be included in the attachments, are placed in appendices at the end of this document.

TABLE 1-5  
SUMMARY OF VOC EMISSIONS BY COUNTY AND SOURCE CATEGORY  
DELAWARE 1993 PERIODIC OZONE SIP EMISSIONS INVENTORY

COUNTY	VOC EMISSIONS											
	Joint Sources		Stationary Area Sources		Off-Road Mobile Sources		On-Road Mobile Sources		Biogenic Sources		Total	
	Annual (TPY)	Daily (TPD)	Annual (TPY) <sup>a</sup>	Daily (TPD)	Annual (TPY)	Daily (TPD)	Annual (TPY) <sup>a</sup>	Daily (TPD)	Annual (TPY) <sup>a</sup>	Daily (TPD)	Annual (TPY) <sup>a</sup>	Daily (TPD)
Kent	835	2,857	3,711	11,749	1,017	3,671	N/A	10,000	N/A	32,460	5,563	60,737
New Castle	7,366	4,913	10,636	35,271	3,678	16,824	N/A	30,510	N/A	17,510	21,680	125,028
Sussex	1,836	5,548	4,294	13,928	845	3,420	N/A	15,380	N/A	45,990	6,975	84,266
TOTAL	10,037	33,318	18,641	60,948	5,540	23,915	N/A	55,890	N/A	95,960	34,218	270,031

a There are no methods for determining annual VOC emissions for the leaking underground storage tank and vehicle refueling and spillage emissions sources within the stationary area source category. Consequently, annual values for the stationary area source category do not include emissions from these two sources. Similarly, there are no methods for determining annual emissions for the on-road mobile and biogenic source categories. Annual emissions for these categories, marked N/A (not applicable) in the table, are not reported in accordance with the *Example Documentation Report for 1990 Base Year Ozone and Carbon Monoxide State Implementation Plan Emission Inventories*, EPA-450/44-92-007, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1992.

PUT FIGURE 1.6 HERE. HARVARD GRAPHICS FILENAME: fig1\_6f.ch3

[All graphics not printed in this document available through the Air Quality Management Section]

TABLE 1-6  
SUMMARY OF NO<sub>x</sub> EMISSIONS BY COUNTY AND SOURCE CATEGORY  
DELAWARE 1993 PERIODIC OZONE SIP EMISSIONS INVENTORY

COUNTY	NO <sub>x</sub> EMISSIONS <sup>a</sup>									
	POINT SOURCES		STATIONARY AREA SOURCES		OFF-ROAD MOBILE SOURCES		ON-ROAD MOBILE SOURCES		TOTAL	
	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY) <sup>a</sup>	DAILY (TPD)	ANNUAL (TPY) <sup>a</sup>	DAILY (TPD)
Kent	1,316	5,549	716	1,557	2,171	8,088	N/A	10,900	4,203	26,094
New Castle	28,757	90,021	3,251	7,623	4,946	18,713	N/A	30,350	36,954	146,707
Sussex	19,066	59,797	997	2,425	1,772	6,657	N/A	16,340	21,835	85,219
TOTAL	49,139	155,367	4,964	11,605	8,889	33,458	N/A	57,590	62,992	258,020

a NO<sub>x</sub> emissions from biogenic sources are not generated by the PC-BEIS model. Therefore, the biogenic source category is not included in this table.

b There is no method for determining annual emissions for the off-road mobile source category. Annual emissions for this category, marked N/A (not applicable) in the table, are not reported in accordance with the *Example documentation Report for 1990 Base Year Ozone and Carbon Monoxide State Implementation Plan Emission Inventories*, EPA-450/44-92-007, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1992.

# GENERAL NOTICES

PUT FIGURE 1.7 HERE. HARVARD GRAPHICS FILENAME: fig1\_7f.CH3

[All graphics not printed in this document available through the Air Quality Management Section]

TABLE 1-7  
SUMMARY OF CO EMISSIONS BY COUNTY AND SOURCE CATEGORY DELAWARE 1993 PERIODIC  
OZONE SIP EMISSIONS INVENTORY

COUNTY	CO EMISSIONS <sup>a</sup>									
	POINT SOURCES		STATIONARY AREAS SOURCES		OFF-ROAD MOBILE SOURCES		ON-ROAD MOBILE SOURCES		TOTAL	
	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY)	DAILY (TPD)	ANNUAL (TPY) <sup>b</sup>	DAILY (TPD)	ANNUAL (TPY) <sup>b</sup>	DAILY (TPD)
Kent	1,070	6.157	4,165	8.362	5,852	21.252	N/A	73.180	11,087	108.951
New Castle	11,450	36.011	9,129	23.060	26,139	107.225	N/A	214.170	46,718	380.446
Sussex	693	3.304	4,758	8.882	5,922	22.982	N/A	117.700	11,373	152.868
TOTAL	13,213	45.472	18,052	40.304	37,913	151.461	N/A	405.050	69,178	642.285

a CO emissions from biogenic sources are not generated by the PC-BEIS model. Therefore, the biogenic source category is not included in this table.

b There is no method for determining annual emissions for the on-road mobile source category. Annual emissions for this category, marked N/A (not applicable) in the table, are not reported in accordance with the *Example Documentation Report for 1990 Base Year Ozone and Carbon Monoxide State Implementation Plan Emission Inventories*, EPA-450/4-92-007, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1992.

PUT FIGURE 1.8 HERE. HARVARD GRAPHICS FILENAME: fig1\_8f.CH3

[All graphics not printed in this document available through the Air Quality Management Section]



**DELAWARE HARNESS RACING  
COMMISSION**

Statutory Authority: 3 Delaware Code,  
Section 10027 (3 **Del.C.** 10027)

A public hearing was held on August 22, 1997 to consider proposed rule amendments. It was decided to renote the following proposed rule amendments pursuant to 29 **Del.C.** §10118(c).

The Commission proposes these amendments pursuant to 3 Del. C. section 10027 and 29 Del. C. section 10115. The proposed Rule amendments are as follows:

1. Amendment to Chapter VII, Rule VI-M-15 to revise the definition of improper whipping and discretionary penalties for violations.

2. Amendment to Chapter VII, Rule VI-M-18 to allow for racing officials to inspect horses after each race for any evidence of excessive whipping.

3. Amendment to Chapter VIII, Rule III-C-3(c) by adding language to the existing definition of "prohibited substance." The proposed amendment specifies the illegal carbon dioxide level for horses racing with and without furosemide. The proposed rule would also allow for a procedure for a licensee to prove that a horse has a naturally high carbon dioxide level.

The Commission will consider written comments from the public on these proposed Rules until November 30, 1997, pursuant to 29 Del. C. section 10115(a)(2). Copies of the proposed rule may be obtained from the Commission. Comments may be submitted in writing to the Commission office on or before 4:00 p.m. on November 30, 1997. The Commission Office is located at 2320 South DuPont Highway, Dover, DE 19901 and the phone number is (302)739-4811.

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**DEPARTMENT OF HEALTH &  
SOCIAL SERVICES  
DIVISION OF SOCIAL SERVICES**

**PUBLIC NOTICE**  
**Medicaid / Medical Assistance Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, the Delaware Department of Health and Social Services (DHSS) Division of Social Services/Medical Assistance Program (DMAP) hereby publishes notice of proposed policy amendments to the Durable Medical Equipment manual and the Home Health manual as follows:

**DURABLE MEDICAL EQUIPMENT MANUAL**

New policy added:

**Osteogenesis Stimulators**

The DMAP may cover use of a nonspinal electrical osteogenesis stimulator, non-invasive (E0747), if the following criteria are met:

- Diagnosis must be non-union of a long bone fracture after six (6) or more months have elapsed without healing of the fracture, or
  - failed fusion of a joint other than in the spine where a minimum of nine (9) months has elapsed since the last surgery, or
  - congenital pseudarthrosis.
- In addition to the physician's letter of medical necessity, documentation detailing history of diagnosis and previous treatment (e.g., operative notes, x-ray reports, office notes), must accompany the CMN(Appendix B).

The DMAP may cover the use of a spinal electrical osteogenesis stimulator (E0748) if the following criteria are met:

- Failed spinal fusion where a minimum of nine (9) months has elapsed since the last surgery, or
  - following a multi level spinal fusion surgery, or
  - following spinal fusion surgery where there is a history of a previously failed spinal fusion at the same site.
- In addition to the physician's letter of medical

necessity, documentation detailing history and previous treatment (e.g., operative notes, x-ray reports, office notes), must accompany the CMN (Appendix B).

#### HOME HEALTH MANUAL

New wording added by Federal regulation

*Home Health Agency* (HHA) is a public or private agency or organization, or part of an agency or organization, that meets the requirements for participation in Medicare and any additional standards legally promulgated by the State that are not in conflict with Federal requirements.

Comments or requests for copies of proposed changes or relevant materials may be made in writing to: Medicaid Administrative Offices, Division of Social Service, P.O. Box 906, New Castle, DE 19720, attention: Thelma G. Mayer, or by calling (302) 577-4880, extension 131, or may be viewed at the following locations: New Castle County: Medicaid Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE, 19720; Kent County: Medicaid Unit, Division of Social Services, Williams State Service Center, 805 River Rd., Dover, DE 19901; Sussex County: Medicaid Unit, Division of Social Services, Georgetown State Service Center, 546 S. Bedford St., Georgetown, DE, 19947. Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed change must be received by mail no later than December 1, 1997, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4904 for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

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**DEPARTMENT OF LABOR****DIVISION OF INDUSTRIAL AFFAIRS**

Statutory Authority: 29 Delaware Code,  
Section 8503(7) (29 **Del.C.** §8503(7))

Pursuant to the authority granted to the Department of Labor under 29 **Del.C.** §8503(7), the Department is proposing amendments to regulations under 29 **Del.C.** §6960, "Prevailing Wage Requirements".

Pursuant to the authority granted to the Department of Labor under 29 **Del.C.** §8503(7), the Department is proposing combined regulations under 19 **Del.C.** §708 and 11 **Del.C.** §8563, "Special Employment Practices Relating to Health Care and Child Care Facilities" and under 11 **Del.C.** §8564, "Adult Abuse Registry Check".

Pursuant to the authority granted to the Department of Labor under 29 **Del.C.** §8503(7), the Department is proposing to amend the Procedures of the Equal Employment Review Board under 19 **Del.C.** Chapter 7, subchapter II, "Discrimination in Employment".

Interested parties are invited to present their views at the public hearing which is scheduled as follows:

9:00 a.m., Tuesday, November 25, 1997  
Department of Labor  
4425 North Market Street  
Wilmington, Delaware 19802

First Floor, Conference Room 049

Interested parties can obtain copies of the proposed amendments at no charge by contacting the Office of Labor Law Enforcement at the above address, or by telephone at (302) 761-8208.

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**DEPARTMENT OF EDUCATION**

The Department of Education hereby gives notice that three public hearings will be held to provide information about and input to the "Delaware Administrator Standards" prior to the presentation of the Administrator Standards to the State Board of Education for adoption. The format of the hearings will be to present changes that have been made as a result of previous input from the education community, followed by a question and answer period. There will be one hearing per county as indicated:

**SUSSEX COUNTY**

Thursday, November 6, 1997, 6:30 p.m. - 7:30 p.m. at Delaware Technical and Community College, Owens Campus, Higher Ed Building, Room 555 C

**KENT COUNTY**

Monday, November 10, 1997, 6:30 p.m. - 7:30 p.m. at the Sheraton Inn, Dover, Sussex Room

**NEW CASTLE COUNTY**

Tuesday, November 18, 1997, 6:30 p.m. - 7:30 p.m. Wallace Wallin Building, Multi Purpose Room (located beside William Penn High School), Basin Road, New Castle.

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES****DIVISION OF ADMINISTRATIVE SERVICES****BOARD OF DENTAL EXAMINERS**

Statutory Authority: 24 Delaware Code,  
Section 1105(a)(1), (24 **Del.C.** 1105(a)(1))

These regulations are intended to implement and further the objectives of the Board as specified in 24 *Del.C.* Section 1100. Specifically, these regulations are proposed to promote public health and safety, and no exemptions are proposed under Chapter 104 of Title 29.

**PURPOSE:** These regulations repeal the existing anesthesia regulations found in Section 7 of the Board's Rules and Regulations and replace them with a new Section 7 Anesthesia Regulations.

The comment for the repeal of the old Section 7 "Anesthesia Regulations" and their replacement with the new Section 7 "Anesthesia Regulations" ends on December 2, 1997. Written comments should be addressed to Gayle Franzolino, Division of Professional Regulation, Cannon Building, Suite 203, P. O. Box 1401, Dover, Delaware 19903.

The public hearing to discuss the proposed repeal of the old Section 7 "Anesthesia Regulations" and the adoption of the new Section 7 "Anesthesia Regulations" will be held on Tuesday, December 2, 1997 at 6:00 p.m. in the Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, Delaware.

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### **INDUSTRIAL ACCIDENT BOARD**

Statutory Authority 19 Delaware Code,  
Section 2121 (19 Del.C. 2121)

Notice of proposed rule changes.

Summary:

The Industrial Accident Board proposes to adopt or amend Rule nos. 2,3, 6, 9,12, 25, 26, 27, and 28 at its regular meeting on Dec. 10 1997 at 11:00 at the Hearing Room of the Board, First Federal Plaza, 710 King Street, Wilmington, DE.

The changes in Board Rule 2, 6, and 25 relating to a quorum, the Secretary of the Board, and the Second Injury and Contingency Fund are indicated because of the adoption of the Worker's Compensation Improvement Act effective December 24, 1997. The change in Rule 3 will increase administrative efficiency by increasing the use of the IAB number in correspondence. The change in Board Rule 9 is intended to improve the pre-trial process in insure timely filing of the pre-trial memorandum identifying and narrowing issues. The addition to Board Rule 12 will insure that the Board is able to approve continuance requests when required to insure due process. Current rule 26 is being replaced to implement an efficient mechanism for those who are eligible for a expedited hearing. New Board Rule 27 officially adopts the unofficial practice on motion day of handling certain procedural matters with orders prepared by the parties. Finally, the addition of Board Rule 28 clarifies what issues may be raised in the pre-trial proceedings by letter amendment to the pre-trial memorandum and what must be added by separate petition.

Comments :

Copies of the proposed rules are published in the Delaware Register of Regulations and are on file at the

Department of Labor, Division of Industrial Affairs, 4425 Market St., Wilmington, DE 19802 for inspection during regular hours. Copies are available upon request. Interested persons may submit comments in writing at before December 2, 1997 to the Industrial Accident Board c/o the Division of Industrial Affairs.

Public hearing:

A public hearing on the changes will be held during the regular meeting of the Industrial Accident Board at 11:00 a.m. on December 10, 1997 at the Hearing Room of the Board, First Federal Plaza, 710 King St., Wilmington, DE. where interested persons can present their views.

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### **DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL**

#### **AIR QUALITY MANAGEMENT SECTION**

Statutory Authority: 7 Delaware Code,  
Chapter 60, (7 Del.C. Ch. 60)

#### REGISTER NOTICE

1. TITLE OF THE REGULATIONS: NO<sub>x</sub> Budget Program
2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES: The NO<sub>x</sub> Budget Program is a new air regulation needed to implement the September 27, 1994 NO<sub>x</sub> Memorandum of Understanding (MOU) between the States of the Ozone Transport Region. This regulation establishes Delaware's portion of a regional nitrogen oxides (NO<sub>x</sub>) cap-and-trade program that will result in substantial reductions in regional NO<sub>x</sub> emissions. The regulation will effect fossil fuel fired boilers or indirect heat exchangers with a maximum rated heat input capacity of equal to or greater than 250 mmBTU/hr; and all electric generating facilities with a rated heat output of equal to or greater than 15 MW.
3. POSSIBLE TERMS OF THE AGENCY ACTION: None.
4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT: 7 Del. C., Chapter 60.
5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL: None.
6. NOTICE OF PUBLIC COMMENT: A public hearing

on this proposed regulation will be held on December 8, 1997 commencing at 6:00 p.m. in the Richardson and Robbins Building auditorium, 89 Kings Highway, Dover, Delaware.

7. PREPARED BY:

Ronald A. Amirikian/323-4542 10/15/97

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**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code  
Section 311 & Chapter 24  
(18 Del.C. §311 & Ch. 24)

**INSURANCE COMMISSIONER DONNA LEE H. WILLIAMS** hereby gives notice that a PUBLIC HEARING will be held on MONDAY, DECEMBER 1, 1997 at 1:00p.m., in the Main Conference Room of the Delaware Insurance Department, 841 Silver lake Boulevard, Dover, Delaware. This Hearing is to consider implementation of Regulation 75 (proposed) entitled "WRITTEN NOTICE BY INSURERS OF PAYMENT OF THIRD PARTY CLAIMS".

The proposed regulation will create a requirement that insurers licensed to do business in Delaware notify a third party beneficiary when a payment is forwarded to that person's lawyer, accountant, agent of other representative.

The Hearing will be conducted in accordance with the Delaware Administrative Procedures Act, 29 Del. C., Chapter 101. Comments are being solicited from any interested party. Comments may be in writing or may be presented orally at the Hearing. Written comments must be received by the Department of Insurance no later than Thursday, November 27, 1997 and should be addressed to Michael W. Teichman, 841 Silver lake Boulevard, Dover, DE 19904. Those wishing to testify or give an oral statement must notify Michael W. Teichman at (302) 739-4251, Ext. 171 or (800) 282-8611 no later than Thursday, November 27, 1997.

Any interested person may contact the Department for a copy of the proposed amendment.

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**DEPARTMENT OF STATE**

**OFFICE OF THE STATE BANKING COMMISSIONER**

Statutory Authority: 5 Delaware Code,  
Section 121(b) (5 Del. C. 121(b))

**NOTICE OF PROPOSED AMENDMENT OF  
REGULATIONS OF THE STATE BANK  
COMMISSIONER**

Summary:

The State Bank Commissioner proposes to adopt amended Regulation Nos. 5.121.0002, 5.701/744.0001, 5.777.0002, 5.771.0005, 5.770.0009, 5.795etal.0016, 5.761.0017, 5.833.0004 and 5.844.0009, and to rescind Regulation Nos. 5.769.0006 and 5.772.0014. Proposed revised regulation 5.121.0002 ("Procedures Governing the Creation and Existence of an Interim Bank") makes technical and conforming changes in accordance with relevant statutory provisions, including Senate Bill 207 ("SB 207"), signed by the Governor on June 28, 1995 and Senate Bill 67 ("SB 67"), signed by the Governor on May 14, 1997. Proposed revised regulation 5.701/774.0001 ("Procedures for Applications to Form a Bank, Bank and Trust Company or Limited Purpose Trust Company Pursuant to Chapter 7 of Title 5 of the Delaware Code") (previously numbered 5.701/774.0002.P/A) makes technical and conforming changes, and clarifies the application of the regulation to the formation of limited purpose trust companies. Proposed revised regulation 5.777.0002 ("Application for a Certificate of Public Convenience and Advantage for a Limited Purpose Trust Company Pursuant to Subchapter V of Chapter 7 of Title 5 of the Delaware Code") (previously numbered 5.777.0001.P) updates and simplifies the application form for a limited purpose trust company. Proposed revised regulation 5.771.0005 ("Procedures Governing Applications to Open Branch Offices Outside the State of Delaware") incorporates the reduced fees for out-of-state and foreign branches provided in SB 67. Proposed revised regulation 5.770.0009 ("Establishment of a Branch Office by a Bank or Trust Company") incorporates the elimination of the requirement of \$25,000 in paid-in capital stock for each office provided in Senate Bill 44 ("SB 44"), signed by the Governor on April 23, 1997, and the reduced fees for in-state branches provided in SB 67. Proposed revised regulation 5.795etal.0016 ("Merger with Out-of-State Banks") incorporates the reduced fees provided in SB 67. Proposed revised regulation 5.761.0017 ("Incidental Powers") clarifies that the notice procedure for specific permissible activities identified in Part I of the regulation applies to the activities described in paragraphs A, B, C and D of Part I. Proposed revised regulation 5.833.0004 ("Application by an Out-of-State Savings Institution, Out-of-State Savings and Loan Holding Company or Out-of-State Bank Holding Company to Acquire a Delaware Savings Bank or Delaware Savings and Loan Holding Company") makes technical and conforming changes in accordance with relevant statutory provisions, including Senate Bill 336 ("SB 336"), signed by the Governor on May 2, 1996, and SB 67. Proposed revised regulation 5.844.0009 ("Application by an Out-of-State Bank Holding Company to Acquire a Delaware



Bank or Bank Holding Company”) makes technical and conforming changes in accordance with SB 207. Regulation 5.769.0006 (“Application for Approval of the Acquisition by a Delaware Bank of All or Substantially All of the Voting Stock of a Bank Located in the State of Delaware”) is proposed for rescission because it is unnecessary as a result of statutory changes in SB 207 and SB 336. Regulation 5.772.0014 (“Procedures Governing Filings and Determinations with Respect to Applications to Establish an Automated Service Branch”) is proposed for rescission because it is unnecessary as a result of statutory changes in SB 44. Proposed amended Regulation Nos. 5.121.0002, 5.701/744.0001, 5.777.0002, 5.771.0005, 5.770.0009, 5.795etal.0016, 5.761.0017, 5.833.0004 and 5.844.0009 would be adopted, and Regulation Nos. 5.769.0006 and 5.772.0014 would be rescinded by the State Bank Commissioner on or after December 3, 1997. Other regulations issued by the State Bank Commissioner are not affected by these proposed amendments. These regulations are issued by the State Bank Commissioner in accordance with Title 5 of the Delaware Code.

**Comments:**

Copies of the proposed revised regulations are published in the Delaware Register of Regulations. Copies also are on file in the Office of the State Bank Commissioner, 555 E. Lockerman Street, Suite 210, Dover, Delaware 19901, and will be available for inspection during regular office hours. Copies are available upon request.

Interested parties are invited to comment or submit written suggestions, data, briefs or other materials to the Office of the State Bank Commissioner as to whether these proposed regulations should be adopted, rejected or modified. Written material submitted will be available for public inspection at the above address. Comments must be received by December 3, 1997.

**Public Hearing:**

A public hearing will be held on the proposed revised regulations in the Second Floor Library Conference Room in the Townsend Building, 401 Federal Street, Dover, Delaware 19901, on Wednesday, December 3, 1997 at 10:00 a.m.

This notice is issued pursuant to the requirements of Subchapter III of Chapter 11 and Chapter 101 of Title 29 of the Delaware Code.

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES  
ADULT ENTERTAINMENT COMMISSION**

The Adult Entertainment Commission will hold a public hearing on November 3, 1997 beginning at 6:00 p.m. in the auditorium on the second floor of the Carvel State Office Building, 9th and North French Street, Wilmington, Delaware. The hearing will consider thapplication filed by Entertainment Solutions, LTD for a license to operate an adult entertainment establishment to be located at 516 South Market Street, Wilmington, Delaware. The Commission is authorized by statute to take such action pursuant to Chapter 16, Title 24 of the Delaware Code. The applicant has the right to present evidence at the hearing, to appear personally and to be represented by counsel. The Commission is obligated by law to reach a decision on the application based upon the evidence received.

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**STATE FIRE PREVENTION  
COMMISSION**

The State Fire Prevention Commission will hold two public meetings to receive comments pertaining to a proposed regulation that may be enacted by the State Fire Prevention Commission pursuant to 16 Del.C. §6603 and 29 Del.C. Ch. 101. The proposed regulation will require all existing buildings of a residential or business occupancy which are 5 floors and/or more than 50’ in height to be provided with an automatic fire sprinkler system. The location and dates of the meetings are:

**NEW CASTLE COUNTY:**

November 20, 1997, 7:30 p.m. Talleyville Fire Co., 3919 Concord Pike, Wilmington, Delaware 19803

**SUSSEX COUNTY:**

November 10, 1997, 7:30 p.m., Delaware Technical & Community College, Georgetown Campus, Route 9, Georgetown, Delaware.

A short presentation will be made regarding the application of the proposed regulation.

The Commission will conduct this public meeting because the Commission may propose a new chapter, Chapter 7 to Part VI of the State Fire Prevention Regulations. The new Part VI, Chapter 7 will concern: Residential and/or business occupancies in high rise buildings. Automatic sprinkler systems to be required in all high rise buildings 50; or 5 sotries in height or above. **REGULATION TO BE APPLIED RETROACTIVELY.** A copy of the proposed regulation may be obtained by calling the Office of the State Fire Prevention Commission, 302-739-4773.