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# Delaware Register of Regulations

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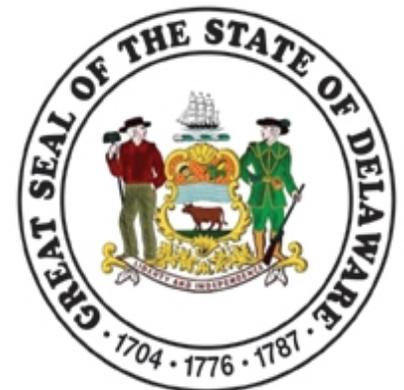


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Pursuant to 29 **Del.C.** Chapter 11, Subchapter III, this issue of the *Register* contains all documents required to be published, and received, on or before February 15, 2012.

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The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.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

15 **DE Reg.** 24-47 (07/01/11)

Refers to Volume 15, pages 24-47 of the *Delaware Register* issued on July 1, 2011.

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## SUBSCRIPTION INFORMATION

The cost of a yearly subscription (12 issues) for the *Delaware Register of Regulations* is \$135.00. Single copies are available at a cost of \$12.00 per issue, including postage. For more information contact the Division of Research at 302-744-4114 or 1-800-282-8545 in Delaware.

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other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.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

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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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.

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

ISSUE DATE	CLOSING DATE	CLOSING TIME
April 1	March 15	4:30 p.m.
May 1	April 16	4:30 p.m.
June 1	May 15	4:30 p.m.
July 1	June 15	4:30 p.m.
August 1	July 16	4:30 p.m.

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1799 Genetic Counselor Advisory Council.....	15 DE Reg. 545 (Final)
1900 Board of Nursing, Sections 1.0, 2.0, 3.0, 4.0, 6.0, 7.0, 9.0, 10.0, 14.0 ....	15 DE Reg. 53 (Prop.) 15 DE Reg. 685 (Final)
2500 Board of Pharmacy.....	15 DE Reg. 321 (Prop.)
Subsection 5.1.13.....	15 DE Reg. 99 (Final) 15 DE Reg. 887 (Final)
2600 Examining Board of Physical Therapists.....	15 DE Reg. 183 (Prop.) 15 DE Reg. 1054 (Final)
2700 Board of Registration for Professional Land Surveyors.....	15 DE Reg. 781 (Prop.)
2900 Real Estate Commission.....	15 DE Reg. 1185(Final)
2930 Council on Real Estate Appraisers.....	15 DE Reg. 888 (Final)
3000 Board of Professional Counselors of Mental Health and Chemical Dependency Professionals.....	15 DE Reg. 322 (Prop.) 15 DE Reg. 1055(Final)
3300 Board of Veterinary Medicine.....	15 DE Reg. 793 (Prop.)

3500 Board of Examiners of Psychologists.....	15 DE Reg. 371 (Final)
3600 Board of Registration of Geologists.....	15 DE Reg. 502 (Prop.)
3700 Board of Examiners of Speech/Language Pathologists, Audiologists & Hearing Aid Dispensers.....	15 DE Reg. 53 (Prop.)
4400 Delaware Manufactured Home Installation Board.....	15 DE Reg. 373 (Final)
5100 Board of Cosmetology and Barbering.....	15 DE Reg. 374 (Final)
5200 Board of Examiners of Nursing Home Administrators.....	15 DE Reg. 224 (Final)
8500 Rules and Regulations Regarding Mandatory Information to be Supplied to the State Bureau of Identification.....	15 DE Reg. 983 (Prop.)
8800 Boxing and Combative Sports Entertainment Rules and Regulations.....	15 DE Reg. 506 (Prop.)
Uniform Controlled Substances Act Regulations.....	15 DE Reg. 986 (Prop.)
	15 DE Reg. 577 (Emer.)
	15 DE Reg. 891 (Final)
<b>Office of the Secretary</b>	
Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 901 (Final)
<b>Office of the State Bank Commissioner</b>	
103 Freedom of Information Act Requests.....	15 DE Reg. 100 (Final)
1114 Alternative Franchise Tax.....	15 DE Reg. 1187 (Final)
1201 Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 1056 (Final)
<b>Public Service Commission</b>	
1202 Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 1063 (Final)
3001 Rules for Certification and Regulation of Electric Suppliers.....	15 DE Reg. 102 (Final)
3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standards Act.....	15 DE Reg. 508 (Prop.)
<b>DEPARTMENT OF TECHNOLOGY AND INFORMATION</b>	
<b>Office of the Secretary</b>	
Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 906 (Final)
<b>DEPARTMENT OF TRANSPORTATION</b>	
<b>Division of Motor Vehicles</b>	
2217 Driver License and Identification Card Application Procedures for Delaware Compliant & Delaware Non-Compliant Identification Documents	15 DE Reg. 322 (Prop.)
	15 DE Reg. 687 (Final)
2287 Public Carrier Regulations.....	15 DE Reg. 55 (Prop.)
	15 DE Reg. 550 (Final)
<b>Division of Planning and Policy</b>	
2306 Crash Data Release.....	15 DE Reg. 795 (Prop.)
	15 DE Reg. 1192 (Final)
2309 Standards and Regulations for Subdivision Streets and State Highway Access.....	15 DE Reg. 56 (Prop.)
	15 DE Reg. 551 (Final)
<b>Division of Transportation Solutions</b>	
2402 Delaware Manual on Uniform Traffic Control Devices.....	15 DE Reg. 106 (Final)
<b>Office of the Secretary</b>	
Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 910 (Final)
<b>EXECUTIVE DEPARTMENT</b>	
<b>Delaware Economic Development Office</b>	
Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 920 (Final)
<b>Office of Management and Budget</b>	
Disability Insurance Program Rules and Regulations.....	15 DE Reg. 799 (Prop.)
Policies and Procedures Regarding FOIA Requests.....	15 DE Reg. 925 (Final)

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**STATE EMPLOYEE BENEFIT COMMITTEE**

2001 Group Health Care Insurance Eligibility and Coverage Rules.....	15 DE Reg. 225 (Final)
	15 DE Reg.1071 (Final)

**Symbol Key**

Arial 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.

**Emergency Regulations**

Under 29 **Del.C.** §10119 an agency may promulgate a regulatory change as an Emergency under the following conditions:

**§ 10119. Emergency regulations.**

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 § 10115, 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 this chapter, 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. (60 Del. Laws, c. 585, § 1; 62 Del. Laws, c. 301, § 2; 71 Del. Laws, c. 48, § 10.)

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL****DIVISION OF AIR AND WASTE MANAGEMENT**

Statutory Authority: 7 Delaware Code, Chapter 60; (7 **Del.C.**, Ch. 60)

**Secretary's Order No. 2012-W-0006**

**Regulations Governing the Discharges from the Application of Pesticides to Waters of the State****AUTHORITY AND FINDINGS:**

The Department of Natural Resources and Environmental Control (DNREC) is authorized, pursuant to 29 **Del.C.** §10119, to adopt emergency regulations if an agency determines that an imminent peril to human health, safety, or welfare requires adoption, amendment, or repeal of a regulation with less than the notice required by 29 **Del.C.** §10115. I hereby find that there is evidence of an imminent peril to human health, safety, and welfare that requires adoption of these emergency regulations.

The proposed regulatory revision of Section 9.0, *Del.C.*, Chapter 60, *General Permit Program*, to add Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, is being promulgated as a result of the 2009 decision by the Sixth Circuit Court of Appeals (Court) that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit.

In 2009, the Court [National Cotton Council, et al. v. Environmental Protection Agency (EPA)] vacated EPA's 2006 Final Rule on Aquatic Pesticides, which determined that NPDES permits were not required for applications of pesticides to U.S. waters. As a result of the court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect. On March 28, 2011, the Court granted EPA's request for an extension to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters from April 9, 2011, to October 31, 2011.

The State of Delaware has delegated authority from EPA for administration of the NPDES and issuance of the State's own NPDES permits. Delaware must, therefore, promulgate regulations to address the new NPDES permitting requirement for the application of pesticides on or near water bodies of the state.

The DNREC Division of Water (DW) has been working to draft regulations to address the new NPDES permitting requirements. However, the required court date of October 31, 2011, was not met by Delaware due to the time-intensive nature of the undertaking combined with staff shortages/turnover in addition to EPA's final rule not having been completed prior to the October 31 deadline. Therefore, DNREC currently is in violation of the federal requirements to have an NPDES program in place for the application of aquatic pesticides in or near Delaware waters.

The emergency *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* will allow pesticide applicators to obtain the required NPDES permits for applying aquatic pesticides from March–September 2012. Much of the aquatic pesticide spraying during this timeframe is concentrated on eliminating mosquito populations, which are a significant risk to human health and welfare due to their ability to transmit diseases and other blood-borne vectors.

The best known mosquito-borne diseases are West Nile Virus, Malaria, and Yellow Fever. Others, such as Dengue Fever and Encephalitides, are common within America but not as well-known throughout the general populous. Historically, mosquito-borne diseases have been at very low levels as the result of our nation's progressive and intensive mosquito-control effort; however, for the first time in nearly 50 years, endemic cases of Dengue Fever and Malaria have been documented in the United States, mostly as a direct result of the declining vector control programs combined with an increase in immigrants who transport such blood-borne diseases into the U.S. ([http://www.mda.state.md.us/plants-pests/mosquito\\_control/mosquito\\_info/mosquitoes\\_disease/index.php](http://www.mda.state.md.us/plants-pests/mosquito_control/mosquito_info/mosquitoes_disease/index.php); and <http://www.cdc.gov/ncidod/dvbid/westnile/index.htm>).

For this reason, it is vital to promulgate such emergency regulations within Delaware to not allow the lapse in Delaware's Mosquito Control Program offered through DNREC's Division of Fish and Wildlife. The DNREC's DW will continue to work with stakeholders toward completion of the full regulations through the normal regulatory process with a target promulgation of September 2012. Additionally, pursuant to 29 **Del.C.** §10119(4), DW will receive, consider, and respond to petitions by any interested person(s) for the reconsideration or revision of this emergency order.

#### **EFFECTIVE DATE OF ORDER**

This emergency order shall take upon promulgation in the *Delaware Register* and shall remain in effect for 90 days from date of publication or until regulations are implemented that eliminate the need for the emergency order.

#### **ORDER**

It is hereby ordered that the above-referenced emergency regulation is adopted pursuant to 29 **Del.C.** §10119.

Collin P. O'Mara, Secretary

#### **7201 Regulations Governing the Control of Water Pollution**

##### ***(Break in Continuity Within Section)***

#### **9.8 Regulations Governing Discharges from the Application of Pesticides to Waters of the State**

**9.8.1 Authority.** These regulations are promulgated pursuant to the authority provided by 3 **Del.C.** §2200 et.al. and 7 **Del.C.** §6000 et.al. and 40 CFR 122 and 412.

**9.8.2 Definitions.** The following words and terms, when used in this Subsection, shall have the following meaning unless the context clearly indicates otherwise:

**"Action Threshold"** means the point at which pest populations or environmental conditions cannot be tolerated necessitating that pest control action be taken based on economic, human health, aesthetic, or other effects. An action threshold may be based on current and/or past environmental factors that are or have been demonstrated to be conducive to pest emergence

and/or growth, as well as past and/or current pest presence. Action thresholds are those conditions that indicate both the need for control actions and the proper timing of such actions.

“Active Ingredient” means any substance (or group of structurally similar substances if specified by the Agency) that will prevent, destroy, repel or mitigate any pest, or that functions as a plant regulator, desiccant, or defoliant within the meaning of FIFRA sec. 2(a). [40 CFR 152.3] Active ingredient also means a pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for the production of such a pesticidal substance. [40 CFR 174.3]

“Adverse Incident” means an unusual or unexpected incident that an Operator has observed upon inspection or of which the Operator otherwise become aware, in which:

- (1) There is evidence that a person or non-target organism has likely been exposed to a pesticide residue; and.
- (2) The person or non-target organism suffered a toxic or adverse effect, either direct as a result of pesticide residue or indirect. The phrase toxic or adverse effects includes effects that occur within Waters of the State on non-target plants, fish or wildlife that are unusual or unexpected (e.g., effects are to organisms not otherwise described on the pesticide product label or otherwise not expected to be present), and may include: distressed or dead juvenile and small fishes; washed up or floating fish; fish swimming abnormally or erratically; fish lying lethargically at water surface or in shallow water; fish that are listless or nonresponsive to disturbance; stunting, wilting, or desiccation of non-target submerged or emergent aquatic plants; or other dead or visibly distressed non-target aquatic organisms (amphibians, turtles, invertebrates, etc.)

The phrase, toxic or adverse effects, also includes any adverse effects to humans (e.g., skin rashes) or domesticated animals that occur either from direct contact with or as a secondary effect from a discharge (e.g., sickness from consumption of plants or animals containing pesticides) to Waters of the State that are temporally and spatially related to exposure to a pesticide residue (e.g., vomiting, lethargy).

“Best Available Technology (BAT)” means a level of technology based on the very best (state of the art) controls and/or treatment measures that have been developed or are capable of being developed and that are economically achievable.

“Best Management Practices (BMPs)” means schedules of activities, prohibition of practices, maintenance procedures, and other management practices or measures to prevent or reduce the discharge of pollutants. BMPs include the following, among other practices and measures: structural and non-structural controls; treatment requirements; and operating procedures and practices to control site runoff, or spillage, or leaks, or drainage from raw materials storage.

“Biological Control Agents” means those agents that are organisms that can be introduced to Operator sites, such as herbivores, predators, parasites, and hyperparasites. [Source: US FWS IPM Guidance, 2004].

“Biological Pesticides (also called biopesticides)” includes microbial pesticides, biochemical pesticides and plant-incorporated protectants (PIP).

Microbial pesticide means a microbial agent intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant, that:

- (1) Is a eukaryotic microorganism including, but not limited to, protozoa, algae, and fungi;
- (2) Is a prokaryotic microorganism, including, but not limited to, Eubacteria and Archaeobacteria; or,
- (3) is a parasitically replicating microscopic element, including but not limited to, viruses. [40 CFR 158.2100(b)]

(1) Biochemical pesticide means a pesticide that:

Is a naturally-occurring substance or structurally-similar and functionally identical to a naturally-occurring substance;

Has a history of exposure to humans and the environment demonstrating minimal toxicity, or in the case of a synthetically-derived biochemical pesticides, is equivalent to a naturally-occurring substance that has such a history; and

Has a non-toxic mode of action to the target pest(s). [40 CFR 158.2000(a)(1)]

Plant-incorporated protectant means a pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for production of such a pesticidal substance. It also includes any inert ingredient contained in the plant, or produce thereof.

“**Chemical Pesticides**” means all pesticides not otherwise classified as biological pesticides.

“**Cultural Methods**” means manipulation of the habitat to increase pest mortality by making the habitat less suitable to the pest.

“**Declared Pest Emergency**” means an event defined by a public declaration by a federal agency, state, or local government of a pest problem determined to require control through application of a pesticide beginning less than ten days after identification of the need for pest control. This public declaration may be based on:

- (1) Significant risk to human health;
- (2) Significant economic loss; or,
- (3) Significant risk to endangered species, threatened species, beneficial organisms, or the environment.

“**Department**” means the State of Delaware Department of Natural Resources and Environmental Control.

“**Discharge**” when used without qualification, means the "discharge of a pollutant."

“**Discharge of a Pollutant**” means the addition of any pollutant, or combination of pollutants, to state waters or the contiguous zone, or the ocean, from any source or activity other than a vessel or other floating craft when being used as a means of transportation and in compliance with Section 312 of the Act. This definition includes additions of pollutants into State waters from: Surface runoff that is collected or channeled by man; discharges through pipes, sewers, or other conveyances which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into a treatment works other than a publicly owned treatment works (POTW).

“**Facility**” means any building, any structure, any complex of buildings or structures, or any process, production equipment or machinery, which makes it possible for an activity to be conducted.

“**Federal Facility**” means any buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned, operated, or leased by, or constructed or manufactured for the purpose of leasing to, the federal government.

“**FIFRA**” means the Federal Insecticide, Fungicide and Rodenticide Act (7 USC § 136 et seq.) as amended.

“**For-Hire**” means an individual or company that has been hired to apply pesticides and includes persons who make contractual pesticide applications for which they or their employer receives compensation (e.g., lawn care firms, pest control companies).

“**Impaired Water**” (or “Water Quality Impaired Water” or “Water Quality Limited Segment”) means a water is impaired for purposes of this Subsection if it has been identified by a State, Tribe or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State or Tribal water quality standards (these waters are called “water quality limited segments” under 40 CFR 130.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

“**Inert Ingredient**” means any substance (or group of structurally similar substances if designated by the Agency), other than an active ingredient, that is intentionally included in a pesticide product. Inert ingredient also means any substance, such as a selectable marker, other than the active ingredient, where the substance is used to confirm or ensure the presence of the active ingredient.

and includes the genetic material necessary for the production of the substance, provided that genetic material is intentionally introduced into a living plant in addition to the active ingredient.

“**Integrated Pest Management**” means an effective and environmentally sensitive approach to pest management that relies on a combination of common-sense practices. IPM uses current, comprehensive information on the life cycles of pests and their interaction with the environment. This information, in combination with available pest control methods, is used to manage pest damage by the most economical means, and with the least possible hazard to people, property, and the environment.

“**Large Entity**” means any:

- (1) Public entity that serves a population greater than 10,000; or,
- (2) Private enterprise that exceeds the Small Business Administration size standard as identified at 13 CFR 121.201 (size standards set by North American Industry Classification System codes, varies by industry type).

“**Mechanical/Physical Methods**” means mechanical tools or physical alterations of the environment for pest prevention or removal.

“**Minimize**” means to reduce and/or eliminate pesticide discharges to Waters of the State through the use of “control measures” to the extent technologically available and economically practicable and achievable.

“**Non-target Organisms**” means the plant and animal hosts of the target species, the natural enemies of the target species living in the community, and other plants and animals, including vertebrates, living in or near the community that are not the target of the pesticide.

“**Operator**” means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof associated with the application of pesticides which results in a discharge to Waters of the State that meets one of the following criteria:

Any entity who performs the application of a pesticide

Any entity who has day-to-day control of the application (i.e., they are authorized to direct workers for hire to carry out those activities).

“**Person**” means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

“**Pest**” means any organism under circumstances that make it deleterious to man or the environment, if it is:

- (1) Any invertebrate animal, including but not limited to, any insect, other arthropod, nematode, or mollusk such as a slug and snail, but excluding any internal parasite of living man or other living animals;
- (2) Any plant growing where not wanted, including any moss, alga, liverwort, or other plant of any higher order, and any plant part such as a root; or,
- (3) Any fungus, bacterium, virus, or other microorganism, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs (as defined in FFDCA sec. 201(g)(1)) and cosmetics (as defined in FFDCA sec. 201(i)).

“**Pesticide Discharge Management Plan (PDMP)**” means a document that identifies the control measures (including inspections, maintenance, monitoring, and corrective action) used to comply with the applicable requirements of the regulation and documents their implementation.

“**Pest Management Area**” means the area of land, including any water, for which an Operator has responsibility for and is authorized to conduct pest management activities as covered by this Subsection (e.g., for an Operator who is a mosquito control district, the pest management area is the total area of the district).

“**Pest Management Measure**” means any practice used to meet the effluent limitations that comply with manufacturer specifications as required under FIFRA, industry standards, and recommended industry practices related to the application of pesticides, relevant legal

requirements and other provisions that a prudent Operator would implement to reduce and/or eliminate pesticide discharges to waters of the State.

**“Pesticide”** means:

- (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
- (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; and.
- (3) any nitrogen stabilizer, except that the term “pesticide” shall not include any article that is a “new animal drug” within the meaning of section 201(w) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(w)), that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or that is an animal feed within the meaning of section 201(x) of such Act (21 U.S.C. 321(x)) bearing or containing a new animal drug.

The term “pesticide” does not include liquid chemical sterilant products (including any sterilant or subordinate disinfectant claims on such products) for use on a critical or semi-critical device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321). For purposes of the preceding sentence, the term “critical device” includes any device that introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body and the term “semi-critical device” includes any device that contacts intact mucous membranes but which does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body [FIFRA Section 2(u)].

The term “pesticide” applies to insecticides, herbicides, fungicides, rodenticides, and various other substances used to control pests. The definition encompasses all uses of pesticides authorized under FIFRA including uses authorized under sections 3 (registration), 5 (experimental use permits), 18 (emergency exemptions), 24(c) (special local needs registrations), and 25(b) (exemptions from FIFRA).

The term “pesticide” is used when referring to the “pesticide, as applied.” When referring to the chemical in the pesticide product with pesticidal qualities, the term “active ingredient” is used.

**“Pesticide Product”** means a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.

**“Pesticide Research and Development”** means activities undertaken on a systematic basis to gain new knowledge (research) and/or the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes (experimental development).

**“Pesticide Residue”** includes that portion of a pesticide application that is discharged from a point source to Waters of the US and no longer provides pesticidal benefits. It also includes any degradates of the pesticide.

**“Pesticide Use Pattern”** means the method and type of pest that is controlled, and includes the following: mosquito and other flying insect control (adulticide and larvaecide); weed and algae control; animal pest control; and forest canopy pest control.

**“Point Source”** means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

**“Pollutant”** means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste

discharged into water. For purposes of this definition, a "biological pesticide" is considered a "biological material," and any "pesticide residue" resulting from use of a "chemical pesticide" is considered a "chemical waste."

"Secretary" means the Secretary of the State of Delaware Department of Natural Resources and Environmental Control or his duly authorized designee.

"State" means the State of Delaware.

"Target Pest" means the organism(s) toward which pest management measures are being directed.

"Tier 3 Waters" means for anti-degradation purposes, pursuant to 40 CFR 131.12(a)(3), Tier 3 waters are identified by States or Tribes as having high quality waters constituting an Outstanding National Resource Water (ONRW), which may include waters of National Parks and State Parks, wildlife refuges, and waters of exceptional recreational or ecological significance.

"Total Maximum Daily Loads (TMDLs)" means the amount of a given pollutant that may be discharged to a waterbody from point, nonpoint and natural background sources and still allow attainment or maintenance of the applicable narrative and numerical water quality standards. A "TMDL" is the sum of the individual wasteload allocations or WLAs for point sources and load allocations or LAs for nonpoint sources of pollution and natural background. A "TMDL" may include a reasonable margin of safety (MOS) to account for uncertainties regarding the relationship between mass loading and resulting water quality. In simplistic terms, a "TMDL" attempts to match the strength, location and timing of pollution sources within a watershed with the inherent ability of the receiving water to assimilate the pollutant without adverse impact.

"Treatment Area" means the entire area, whether over land or water, where a pesticide application is intended to provide pest control benefits within the pest management area. In some instances, the treatment area will be larger than the area where pesticides are actually applied. For example, the treatment area for a stationary drip treatment into a canal includes the entire width and length of the canal over which the pesticide is intended to control weeds. Similarly, the treatment area for a lake or marine area is the water surface area where the application is intended to provide pest control benefits.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the Operator's reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

"Waters of the State" or "State Waters" means all water, on the surface and under the ground, wholly or partially within, or bordering the State, or within its jurisdiction including but not limited to:

- (1) waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean;
- (2) all interstate waters, including interstate wetlands;
- (3) all other Waters of the State, such as lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sand flats, wetlands, sloughs, or natural or impounded ponds;
- (4) all impoundments of waters otherwise defined as Waters of the State under this definition;
- (5) wetlands adjacent to waters (other than waters that are themselves wetlands) identified in the above four statements; and,
- (6) Although waste and stormwater treatment systems or waste storage structures including, but not limited to, treatment ponds or lagoons designed to meet the requirements of the Clean Water Act (other than cooling ponds which otherwise meet the requirements of this definition) are not considered to be "Waters of the State", coverage will be required if determined to discharge into Waters of the State.

"Water Quality Impaired" See 'Impaired Water'.

“Water Quality Standards” means any rule or limit established by the Secretary which consists of a designated use or uses for Waters of the State and the water quality criteria for such waters based upon such designated uses.

“Wetlands” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetland areas are as delineated under and through 7 Del.C. Ch. 66 and the "Corps of Engineers Wetlands Delineation Manual", dated January, 1987.

### 9.8.3 Coverage

9.8.3.1 Any Operator that meets the applicability requirements identified in 9.8.4 is covered under this regulation. As such, more than one Operator may be responsible for compliance with this Subsection for any single discharge from the application of pesticides.

9.8.3.2 Coverage under this regulation shall be granted for a duration of five years unless determined otherwise by the Department. In no case shall coverage be valid for more than five (5) years.

9.8.3.3 Permittees are considered to be temporarily covered under this Subsection once the NOI has been received by the Department. Final coverage will be granted after NOI review by the Department, where the Department may require application resubmission at any time if the NOI is deemed inadequate or incomplete.

9.8.3.4 An issued permit coverage may be modified in whole or in part, revoked and reissued, or terminated by the Department during its term for cause as specified herein:

9.8.3.4.1 Violation of any term or condition of permit coverage, as contained within this Subsection;

9.8.3.4.2 Failure of the permittee to disclose fully all relevant facts in the NOI application or during the permit issuance process or the permittee's misrepresentation of any relevant facts at any time;

9.8.3.4.3 Failure to notify the Department by resubmission of a new NOI upon change in product use or substantial alterations or additions to the permitted activity;

9.8.3.4.4 A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (e.g., the promulgation of any applicable effluent standard or prohibition under the Clean Water Act, any change in State law that requires the reduction or elimination of the discharge, revisions to state Water Quality Standards or TMDLs etc.); or,

9.8.3.4.5 Information indicating that the permitted discharge poses a threat to human health or the environment.

### 9.8.4 Applicability

#### 9.8.4.1 Activities Covered

Operators who discharge into Waters of the State or apply directly to Waters of the State from the application of (1) biological pesticides or (2) chemical pesticides that leave a residue (hereinafter collectively “pesticides”), when the Applicability under these regulations include all Operators who discharge into Waters of the State or apply directly to Waters of the State from the application of (1) biological pesticides or (2) chemical pesticides that leave a residue when the Operator meets one of the following criteria. See also Delaware Pesticide Law (State of Delaware Code Title 3, Part II Chapter 12) § 1206 (a) & (b) and 601 Delaware Pesticide Rules and Regulations Section 5.0 Licensing.

9.8.4.1.1 A private applicator who purchases and applies "Restricted Use" pesticides;

9.8.4.1.2 A commercial applicator (for hire) who uses any pesticides on others' property in exchange for compensation; or,

- 9.8.4.1.3 A commercial applicator (not for hire) who uses any pesticides as part of their job duties on the following types of property owned or leased by them or their employers, and include schools, apartment buildings, nursing homes, hospitals, daycare centers.
- 9.8.4.2 Operators who fall under any one of the following pesticide use patterns: Mosquito and Other Flying Insect Pest Control (adulticide and larvaecide); Weed and Algae Control; Animal Pest Control; or Forest Canopy Pest Control.
- 9.8.4.2.1 Mosquito and Other Flying Insect Pest Control (Adulticide and Larvaecide)  
To control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.
- 9.8.4.2.2 Weed and Algae Pest Control  
To control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.
- 9.8.4.2.3 Animal Pest Control  
To control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.
- 9.8.4.2.4 Forest Canopy Pest Control  
Application of a pesticide to a forest canopy to control the population of a pest species (e.g., insect or pathogen) where, to target the pests effectively, a portion of the pesticide unavoidably will be applied over and deposited to water.
- 9.8.5 Limitations on Coverage
- 9.8.5.1 Discharges to Water Quality Impaired Waters  
The Operator is not eligible for coverage for any discharges from a pesticide application to Waters of the State if the water is identified as impaired by that pesticide or its degradates. If the discharge is not eligible because the water is listed as impaired for that specific pesticide, but there is evidence that shows the water is no longer impaired, this information may be submitted to the Department and request that coverage be allowed.
- 9.8.5.2 Discharges to Waters Designated as Tier 3 for Anti-degradation Purposes  
The Operator is not eligible for coverage for discharges from a pesticide application to waters designated by the Department as Tier 3 for anti-degradation purposes.
- 9.8.5.3 Discharges Currently or Previously Covered by another Permit or Discharges Covered Under the Pesticides General Permit (federal lands)  
The Operator is not eligible for coverage if any of the following circumstances apply:
- 9.8.5.3.1 Pesticide applications taking place on federal lands or federal facilities covered under NPDES Pesticides General Permit administered by EPA
- 9.8.5.3.2 The discharges are covered by another NPDES permit, or
- 9.8.5.3.3 The discharges were included in a permit that within the last five years has been or is in the process of being denied, terminated, or revoked by the Department or EPA (this does not apply to the routine reissuance of permits every five years).
- 9.8.6 Notice of Intent (NOI)
- 9.8.6.1 All Operators who apply pesticides according to 9.8.4 will be required to submit an NOI within ninety (90) days of promulgation under only one of the following two provisions:
- 9.8.6.1.1 Any entity who performs the application of pesticides; or
- 9.8.6.1.2 Any entity who has day-to-day control of the application (i.e., they are authorized to direct workers for hire to carry out those activities).
- 9.8.6.2 All NOI submissions must follow Signatory Requirements as described in 9.8.14, and must be sent to the address as provided in 9.8.15, unless otherwise instructed.
- 9.8.6.3 Coverage under this Subsection shall be granted for five years, unless determined otherwise by the Department. In no case shall coverage be valid for more than five years.

- 9.8.6.4 Operator who has previously submitted an NOI undergoes a name change or change in ownership must submit a new NOI will be required to be submitted to the Department no later than (30) days after this change.
- 9.8.6.5 A change in Operator who was not listed on the original NOI must submit a new NOI to the Department no later than (30) days after this change.
- 9.8.6.6 Any person wishing to extend or renew coverage under this Subsection must submit a new NOI Form not less than 180 days prior to the expiration date of coverage, unless permission for a later date has been granted by the Department. In the event that the permittee submits a timely request to extend or renew existing coverage, and the Department through no fault of the permittee, is unable to make a final determination on the request before the expiration date of coverage, the terms and conditions of the existing coverage shall be continued and remain fully effective and enforceable until the Department makes a final determination on the request.
- 9.8.6.7 Changes in operations including the change of an Operator, change in active ingredients for products used, or change in Pest Management Area, as indicated on the NOI will require the submittal of a new NOI not to exceed thirty (30) days after the anniversary of the previous NOI submittal.
- 9.8.6.8 Failure to Notify  
Persons who discharge pesticides and meet the criteria of 9.8.4.2 who fail to notify the Department of their intent to be covered under this Subsection, or who discharge to waters of the State without an individual NPDES permit, are in violation of 7 Del.C. Ch. 60 and the federal Clean Water Act and may be subject to penalties.
- 9.8.7 Notice of Termination (NOT)
- 9.8.7.1 Coverage under this Subsection continues until a completed Notice of Termination (NOT) form has been submitted to the Department. The NOT shall be submitted on a form provided by the Department. Failure to submit a complete and accurate NOT form will result in the facility being denied termination under this Subsection.
- 9.8.7.2 All NOT submissions must follow Signatory Requirements as described in 9.8.14, and must be sent to the address as provided in 9.8.15.
- 9.8.7.3 The NOT Form shall be submitted within 30 days after one or more of the following conditions have been met:
- 9.8.7.3.1 A new owner or Operator has taken over responsibility of the original Operator;
- 9.8.7.3.2 Operators have ceased applying and, therefore, are no longer discharging; or
- 9.8.7.3.3 Coverage under an individual permit has been granted by the Department.
- 9.8.8 Individual NPDES Permit Coverage
- 9.8.8.1 Requirements for Coverage under an Individual Permit  
The Department may require the Operator to apply for and/or obtain authorization to discharge under an individual NPDES permit in accordance with Section 6.0 of the "Regulations Governing the Control of Water Pollution". If the Department requires Operator to apply for an individual NPDES permit, the Department will notify the Operator in writing that a permit application is required. This notification will include a brief statement of the reasons for this decision and will provide application information. In addition, if the Operator's discharges are authorized under this regulation, the notice will set a deadline to file the permit application, and will include a statement that on the effective date of the individual NPDES permit coverage under this regulation will terminate. The Department may grant additional time to submit the application if the Operator submits a request setting forth reasonable grounds for additional time. If the Operator is covered and fails to submit an individual NPDES permit application as required by the Department, then the applicability of this permit to the Operator is terminated at the end of the day specified by the Department as the deadline for

application submittal. The Department may take enforcement action for any unpermitted discharge or violation of any permit requirement.

9.8.8.2 Request for Coverage under an Individual NPDES Permit

The Operator may apply for an individual permit. In such a case, the Operator must submit an individual permit application in accordance with the requirements of Section 6.0 of the "Regulations Governing the Control of Water Pollution", with reasons supporting the request, to the Department. The request may be granted by issuance of an individual permit if the Operator's reasons are warranted.

When an individual NPDES permit is issued to the Operator to discharge a pollutant to Waters of the State as a result of a pesticide application, the Operator's authorization to discharge under this regulation is terminated on the effective date of the individual permit.

9.8.9 Operator's Responsibilities (All Operators)

9.8.9.1 Requirement to Use Best Management Practices

Operators are required to comply with all other applicable federal or state laws and regulations that pertain to application of pesticides.

If an Operator's discharge of pollutants results from the application of pesticide that is being used solely for the purpose of "pesticide research and development," as defined in 9.8.2, the Operator must use such pesticide consistent with any applicable research plan and experimental use permit.

To meet the requirements of this regulation, all Operators must implement 9.8.9.1 to minimize the discharge of pesticides to Waters of the State from the application of pesticides, through the use of Pest Management Measures, as defined in 9.8.2.

9.8.9.1.1 To the extent determined by the Operator, use only the amount of pesticide and frequency of pesticide application necessary to control the target pest, using equipment and application procedures appropriate for this task.

9.8.9.1.2 Maintain pesticide application equipment in proper operating condition, including requirement to calibrate, clean, and repair such equipment and prevent leaks, spills, or other unintended discharges.

9.8.9.1.3 Assess weather conditions (e.g. temperature, precipitation and wind speed) in the treatment area to ensure application is consistent with all applicable state and federal requirements.

9.8.9.1.4 Problem Identification for All Pest Management Options

Prior to the first pesticide application covered under this permit that will result in a discharge to Waters of the State, and at least once each calendar year thereafter prior to the first pesticide application for that calendar year, Operators that are required to have a PDMP as described in 9.8.10 must do the following for each pest management area, as defined in 9.8.2:

9.8.9.1.4.1 Mosquito and Other Flying Insect Pest Control (Adulticide and larvaecide)

Establish densities for larval and adult mosquito or flying insect pest populations or identify environmental condition(s), either current or based on historical data, to serve as action threshold(s) for implementing Pest Management Measures;

Identify target pest(s) to develop Pest Management Measures based on developmental and behavioral considerations for each pest;

Identify known breeding sites for source reduction, larval control program, and habitat management;

Analyze existing surveillance data to identify new or unidentified sources of mosquito or flying insect pest problems as well as sites that have recurring pest problems; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the conditions in 9.8.9.1.4.1.

9.8.9.1.4.2 Weed and Algae Pest Control

Identify areas with pest problems and characterize the extent of the problems, including, for example, water use goals not attained (e.g. wildlife habitat, fisheries, vegetation, and recreation);

Identify target pest(s);

Identify possible factors causing or contributing to the pest problem (e.g., nutrients, invasive species, etc.);

Establish any pest-and site-specific action threshold, as defined in 9.8.2, for implementing 9.8.9.2; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.2.

**9.8.9.1.4.3 Animal Pest Control**

Identify areas with pest problems and characterize the extent of the problems, including, for example, water use goals not attained (e.g. wildlife habitat, fisheries, vegetation, and recreation);

Identify target pest(s);

Identify possible factors causing or contributing to the problem (e.g., nutrients, invasive species);

Establish any pest-and site-specific action threshold, as defined in 9.8.2 for implementing 9.8.9.2; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.3.

**9.8.9.1.4.4 Forest Canopy Pest Control**

Establish any pest-and site-specific action threshold, as defined in 9.8.2, for implementing 9.8.9.2;

Identify target pest(s) to develop Pest Management Measures based on developmental and behavioral considerations for each pest;

Identify current distribution of the target pest and assess potential distribution in the absence of Pest Management Measures; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.4.

**9.8.9.2 Utilization of Best Available Technology for All Pest Management Options**

Prior to the first pesticide application covered under this Subsection that will result in a discharge to Waters of the State and at least once each calendar year thereafter prior to the first pesticide application for that calendar year, Operators must select and implement efficient and effective means of Pest Management Measures that minimize discharges resulting from the application of pesticides to control mosquitoes or other flying insect pests, weed and algae pests, animal pests, and forest canopy pests. In developing the Pest Management Measures for each pest management area, the Operator must evaluate the following management options, including a combination of these management options, considering impact to water quality, impact to non-target organisms, feasibility, and cost effectiveness:

**9.8.9.2.1** No action

**9.8.9.2.2** Prevention

**9.8.9.2.3** Mechanical or physical methods

**9.8.9.2.4** Cultural methods

**9.8.9.2.5** Biological control agents

**9.8.9.2.6** Pesticides

If a pesticide is selected to manage pests and application of the pesticide will result in a discharge to a Waters of the State, Operators must:

Conduct surveillance in an area that is representative of the pest problem prior to each pesticide application to assess the pest management area and to determine when the action threshold(s) is met. Surveillance may include larval and/or adult life stages, or evaluation of existing larval surveillance data, environmental conditions, or data from adjacent areas; and

Reduce the impact on the environment and on non-target organisms by applying the pesticide only when the action threshold(s) has been met; and

In situations or locations where practicable and feasible for efficacious control, use larvicides as a preferred pesticide for mosquito or flying insect pest control when the larval action threshold(s) has been met; and

In situations or locations where larvicide use is not practicable or feasible for efficacious control, use adulticides for mosquito or flying insect pest control when the adult action threshold(s) has been met; and

Evaluate using pesticides against the most susceptible developmental stage.

#### 9.8.9.3 Visual Monitoring Requirements

During any pesticide application with discharges authorized under this permit, all Operators must, when considerations for safety and feasibility allow, visually assess the area to and around where pesticides are applied for possible and observable adverse incidents, as defined in 9.8.2, caused by application of pesticides, including the unanticipated death or distress of non-target organisms and disruption of wildlife habitat, recreational or municipal water use.

#### 9.8.9.4 Observational Monitoring Requirements

9.8.9.4.1 The amount of pesticide applied shall be monitored to ensure that the lowest effective amount is used to control the pest, consistent with reducing the potential for development of pest resistance without exceeding the maximum allowable rate of the product label.

9.8.9.4.2 Pesticide application activities shall be monitored to ensure that regular maintenance activities are being performed and that application equipment is in proper operating condition to reduce the potential for leaks, spills, or other unintended discharge of pesticides to surface waters.

9.8.9.4.3 Pesticide application activities shall also be monitored to ensure that the application equipment is in proper operating condition by adhering to any manufacturer's conditions and industry practices and by calibrating, cleaning, and repairing equipment on a regular basis.

#### 9.8.9.5 Water Quality-Based Effluent Limitations and Monitoring

Although no numeric water-quality based effluent limits are established under this Subsection, all Operators must control discharges as necessary to meet applicable numeric and narrative state water quality standards, for any discharges authorized under this Subsection, with compliance required upon beginning such discharge.

If at any time an Operator becomes aware or the Department determines that the Operator's discharge causes or contributes to an excursion of any applicable water quality standard, the Operator must take corrective action as required in 9.8.11 up to and including the ceasing of the discharge, if necessary, and the Department can require water quality-based monitoring by the Operator deemed to be necessary at any time. In this circumstance, test procedures shall be approved under 40 CFR Part 136. Calculations for all limitations that require averaging of measurements must use an arithmetic mean unless otherwise specified by the Department.

#### 9.8.10 Pesticide Discharge Management Plan (PDMP) Requirements

##### 9.8.10.1 PDMP development applies to any one of the following:

9.8.10.1.1 Any Operator (including municipalities) that qualify as a Large Entity, as defined in 9.8.2; or

9.8.10.1.2 All State of Delaware Operators, as an Operator has been defined in 9.8.2.

9.8.10.2 Except for any application made in response to a Declared Pest Emergency, as defined in 9.8.2, all entities as defined in 9.8.10.1 must prepare a Pesticide Discharge Management Plan (PDMP) within ninety (90) days of regulatory promulgation, or prior to the first pesticide application covered under this permit thereafter. It is the Operator's responsibility to keep the plan up-to-date for the duration of coverage, even if the Operator discharges subsequently fall below the applicable threshold. The Operator will be required to develop a PDMP consistent with the deadlines outlined in Table 2 below.

<u>Table 2. Pesticide Discharge Management Plan Deadline</u>	
<u>Category</u>	<u>PDMP Deadline</u>
<u>Operators who know prior to commencement of discharge that they will meet the criteria of being a Large Entity.</u>	<u>Within 90 days of regulatory promulgation or prior to first pesticide application covered under this permit.</u>
<u>Operators who do not know until after commencement of discharge that they will exceed the thresholds associated with becoming a Large Entity, as identified in 9.8.2.</u>	<u>Prior to exceeding thresholds associated with becoming a Large Entity.</u>
<u>Operators commencing discharge in response to a Declared Pest Emergency as defined in 9.8.2 that will cause the Operator to exceed thresholds associated with becoming a Large Entity.</u>	<u>No later than 90 days after responding to Declared Pest Emergency.</u>

The PDMP does not contain numeric effluent limitations; non-numeric effluent limitations are specified in 9.8.9.3-9.8.9.5. The PDMP documents how Operators will implement the non-numeric effluent limitations, including the evaluation and selection of Pest Management Measures to meet those non-numeric effluent limitations in order to minimize discharges. In the PDMP, Operators may incorporate by reference any procedures or plans in other documents that meet the requirements of this regulation. If Operators rely upon other documents to comply with the non-numeric effluent limitations, such as a preexisting pest management plan, the Operator(s) must attach to the PDMP a copy of any portions of any documents that are used to document the implementation of the non-numeric effluent limitations.

9.8.10.3 Contents of the Pesticide Discharge Management Plan

The PDMP must include the following elements:

9.8.10.3.1 Address where PDMP, records, and associated documents are kept;

9.8.10.3.2 Copy of the up-to-date NOI submitted to the Department.

9.8.10.3.3 Pesticide Discharge Management Team:

The Operator shall identify all the persons (by name and contact information) who compose the team as well as each person's individual responsibilities, including:

Person(s) responsible for managing pests in relation to the pest management area;

Person(s) responsible for developing and revising the PDMP; and

Person(s) responsible for developing, revising, and implementing corrective actions and other non-numeric effluent limitation requirements;

9.8.10.3.4 Problem Identification;

Pest problem description. Document a description of the pest problem at the pest management area, including identification of the target pest(s), source(s) of the pest problem, and source of data used to identify the problem in 9.8.9.1.4.

Action Threshold(s). Describe the action threshold(s) for the pest management area, including data used in developing the action threshold(s) and method(s) to determine when the action threshold(s) has been met

General location map. In the plan, include a general location map (e.g., USGS quadrangle map, a portion of a city or county map, or other map) that identifies the geographic boundaries of the area to which the plan applies and location of the Waters of the State and

Water quality standards. Document any Tier 3 and any water(s) identified as impaired by a substance which either is an active ingredient or a degradate of such an active ingredient.

9.8.10.3.5 Pest Management Options Evaluation;

Operators shall document the evaluation of the pest management options, including combination of the pest management options, to control the target pest(s). Pest management options include the following: No action, prevention, mechanical/physical methods, cultural methods, biological control agents, and pesticides. In the evaluation, Operators shall consider the impact to water quality, impact to non-target organisms, feasibility, cost effectiveness, and any relevant previous Pest Management Measures.

9.8.10.3.6 Response Procedures;

Operators shall document the following procedures in the PDMP:

9.8.10.3.6.1 Spill Response Procedures – At a minimum, Operators shall have:

Procedures for expeditiously stopping, containing, and cleaning up leaks, spills, and other releases to Waters of the State. Persons who may cause, detect, or respond to a spill or leak must be trained in these procedures and have necessary spill response equipment available. If possible, one of these individuals should be a member of the PDMP team.

Procedures for notification of appropriate facility personnel, emergency response agencies, and regulatory agencies.

9.8.10.3.6.2 Adverse Incident Response Procedures – At a minimum, Operators shall have:

Procedures for responding to any adverse incident resulting from pesticide applications;

Procedures for notification of the adverse incident, both internal to the Operator's agency/organization and external. Contact information for state/federal permitting agency, nearest emergency medical facility, and nearest hazardous chemical responder must be in locations that are readily accessible and available.

9.8.10.3.7 Documentation to support eligibility considerations under other federal laws;

9.8.10.3.8 Summary of how monitoring and effluent requirements are being met; and,

9.8.10.3.9 Signature page per requirements in 9.8.10.4 and 9.8.14.

9.8.10.4 Pesticide Discharge Management Plan Modifications

Operators shall modify the PDMP whenever necessary to address any of the triggering conditions for corrective action in 9.8.11 or when a change in pest control activities significantly changes the type or quantity of pollutants discharged. Changes to the PDMP must be made before the next pesticide application that results in a discharge, if practicable, or if not, no later than 90 days after any change in pesticide application activities. The revised PDMP must be signed and dated in accordance with 9.8.10.4.

9.8.10.5 Pesticide Discharge Management Plan Availability

The Operator shall retain a copy of the current PDMP, along with all supporting maps and documents, at the address provided in PDMP. The PDMP and all supporting documents must be readily available, upon request, and copies of any of these documents provided, upon request, to the Department. The Department may provide copies of the PDMP or other information related to this permit that is in its possession to members of the public. Any Confidential Business Information (CBI), as defined in 40 CFR Part 2, may be withheld from the public provided that a claim of confidentiality is properly asserted and documented in accordance with 40 CFR Part 2; however, CBI must be submitted to the Department, if requested, and may not be withheld from those staff within the Department cleared for CBI review.

**9.8.10.6** Signature Requirements.

**9.8.10.6.1** The Operator shall sign, date, and certify the PDMP in accordance with 9.8.14.

**9.8.10.6.2** Any Pesticide Discharge Management Plan (PDMP), including changes to the PDMP to document any corrective actions taken as required by 9.8.12 and all requested reports submitted to the Department, must be signed by a person described in 9.8.11 or by a duly authorized representative of that person. A person is a duly authorized representative only if the following are true:

**9.8.10.6.2.1** The authorization is made in writing by a person described in 9.8.14.

**9.8.10.6.2.2** The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated activity such as the position of superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

**9.8.10.6.2.3** The signed and dated written authorization is included in the PDMP. A copy must be submitted to the Department, if requested.

**9.8.10.6.3** All other changes to the PDMP, and other compliance documentation required under this permit, must be signed and dated by the person preparing the change or documentation.

**9.8.10.6.4** Any person signing documents in accordance with 9.8.14 above must include the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information contained therein. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information contained is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

**9.8.10.6.5** The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance will, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

**9.8.11** Corrective Action

All Operators must comply with the provisions of 9.8.11 for any authorized discharges, with compliance required upon beginning such discharge.

**9.8.11.1** Situations Requiring Revision of Control Measures

Operators must review and, as necessary, revise the evaluation and selection of Pest Management Measures, Best Management Practices, and utilization of Best Available Technology as described in 9.8.9.1 and 9.8.9.2 for the following situations:

- 9.8.11.1.1 An unauthorized release or discharge associated with the application of pesticides (e.g., spill, leak, or discharge not authorized by this or another NPDES permit) occurs.
- 9.8.11.1.2 Operators become aware, or the Department concludes, that Pest Management Measures are not adequate/sufficient for the discharge to meet applicable water quality standards.
- 9.8.11.1.3 Any monitoring activities indicate failure to meet applicable technology-based non-numeric effluent limitations in 9.8.9.5.
- 9.8.11.1.4 An inspection or evaluation of activities by an EPA official or the Department reveals that modifications are necessary to meet the non-numeric effluent limitations in this permit.
- 9.8.11.1.5 Any Operator observes or is otherwise made aware of an adverse incident as defined in 9.8.2.
- 9.8.11.2 Corrective Action Deadlines  
If an Operator determines that changes to Pest Management Measures, Best Management Practices, and Utilization of Best Available Technology as in 9.8.9.1 and 9.8.9.2 are necessary to eliminate any situation identified, such changes must be made before or, if not practicable, as soon as possible after the next pesticide application that results in a discharge.
- 9.8.11.3 Effect of Corrective Action  
The occurrence of a situation identified in 9.8.11.1 may constitute a violation of this Subsection. Correcting the situation according to 9.8.11.1 does not absolve the Operator of liability for any original violation. However, failure to comply with 9.8.11.1 constitutes an additional violation. The Department will consider the appropriateness and promptness of corrective action in determining enforcement responses to permit violations.  
The Department or a court may impose additional requirements and schedules of compliance, including requirements to submit additional information concerning the condition(s) triggering corrective action or schedules and requirements more stringent than specified in this Subsection. Those requirements and schedules will supersede those of 9.8.11.1 if such requirements conflict.
- 9.8.11.4 Adverse Incident Documentation and Reporting  
9.8.11.4.1 Twenty-Four (24) Hour Adverse Incident Notification  
Except as provided for in 9.8.11.4.5, if an Operator observes or is otherwise made aware of an adverse incident as defined in 9.8.2, which may have resulted from a discharge from a pesticide application, the Operator must immediately notify the Department. Operators must also report any noncompliance which may endanger health or the environment with the same 24-hour timeframe.  
Such notification must be made by telephone by calling the Spill Notification Hotline at 1-800-662-8802 within 24 hours of the Operator becoming aware of the adverse incident and must include at least the following information:
- 9.8.11.4.1.1 The caller's name and telephone number;
- 9.8.11.4.1.2 Operator name and mailing address;
- 9.8.11.4.1.3 The name and telephone number of a contact person, if different than the person providing the 24-hour notice;
- 9.8.11.4.1.4 How and when the Operator became aware of the adverse incident;
- 9.8.11.4.1.5 Location of incident, including the names of any waters affected and appearance of those waters (sheen, color, clarity, etc);

- 9.8.11.4.1.6 The pesticide product (including EPA pesticide registration number), rate of application, method of application for each product applied in the area of the adverse incident;
- 9.8.11.4.2.7 A description of the circumstances of the adverse incident including species affected, estimated number of individual and approximate size of dead or distressed organisms;
- 9.8.11.4.1.8 If known, the identity of any other Operators authorized for coverage under this Subsection for discharges from the pesticide application activities that resulted in the adverse incident; and
- 9.8.11.4.1.9 Description of any steps the Operator has taken or will take to correct, repair, remedy, clean up, or otherwise address any adverse effects.  
If an Operator is unable to notify the Department within 24 hours, the Operator must do so as soon as possible and also provide the rationale for why the Operator was unable to provide such notification within 24 hours.
- 9.8.11.4.2 Requirement for Thirty (30) Day Adverse Incident Written Report  
Except as provided for in 9.8.11.4.5, within 30 days of a reportable adverse incident or health to humans or the environment, Operators must provide a written report of the adverse incident to the Department to the address as provided in 9.8.15. The adverse incident report must include at least the following information:
- 9.8.11.4.2.1 All information also provided in 9.8.11.4.1 above;
- 9.8.11.4.2.2 Date and time the Operator contacted the Department notifying the Department of the adverse incident, who the Operator spoke with, and any instructions received;
- 9.8.11.4.2.3 Magnitude and scope of the affected area (e.g., aquatic square area or total stream distance affected);
- 9.8.11.4.2.4 Description of the habitat and the circumstances under which the adverse incident occurred (including any available ambient water data for pesticides applied);
- 9.8.11.4.2.5 If laboratory tests were performed, an indication of which test(s) were performed, and when; additionally, a summary of the test results must be provided within 5 days after they become available if not available at the time of submission of the 30-day report;
- 9.8.11.4.2.6 Description of actions to be taken to prevent recurrence of adverse incidents; and,
- 9.8.11.4.2.7 Signatory requirements in accordance with 9.8.14.
- 9.8.11.4.3 Notification and Reporting for Adverse Incidents Involving Multiple Operators  
Where multiple Operators are authorized for a discharge that results in an adverse incident, notification and reporting by any one of the Operators constitutes compliance for all of the Operators, provided a copy of the written report required in 9.8.11.4.3 is also provided to all of the other authorized Operators within 30 days of the reportable adverse incident.
- 9.8.11.4.4 Instances when Notification is not Required for Adverse Incidents  
Reporting of adverse incidents is not required under this permit in the following situations:
- 9.8.11.4.4.1 An Operator is aware of facts that clearly establish that the adverse incident was not related to toxic effects or exposure from the pesticide application;
- 9.8.11.4.4.2 An Operator has been notified by the Department, and retains such notification, that the reporting requirement has been waived for this incident or category of incidents;
- 9.8.11.4.4.3 An Operator receives information of an adverse incident, but that information is clearly erroneous; or

9.8.11.4.4 An adverse incident occurs to pests that are similar in kind to potential target pests identified on the FIFRA label.

9.8.11.5 Reportable Spills and Leaks

Where a leak, spill, or other release into Waters of the State containing a hazardous substance or oil in an amount equal to or in excess of a reportable quantity established under either 40 CFR Part 110, 40 CFR Part 117, or 40 CFR Part 302 occurs in any 24-hour period, an Operator must notify the Department immediately by calling the Spill Notification 24 hour HOTLINE at (800) 662-8802 in accordance with the requirements of 40 CFR Part 110, 40 CFR Part 117, and 40 CFR Part 302, and Title 7, Delaware Code, Section 6028(a) as soon as the Operator has knowledge of the release. Contact information must be in locations that are readily accessible and available in the area where the spill, leak, or other unpermitted discharge may occur.

State or local requirements may necessitate also reporting spills or leaks to local emergency response, public health, or drinking water supply agencies.

If an Operator becomes aware of a spill, leak, or other unpermitted discharge in an amount equal to or in excess of a reportable quantity established under 40 CFR Part 110, 40 CFR Part 117, or 40 CFR Part 302, the Operator must additionally follow the written reporting protocol as described in 9.8.11.4.3.

9.8.11.6 Other Corrective Action Documentation

For situations identified in 9.8.11.1, other than for adverse incidents (addressed in 9.8.11.4), or reportable spills or leaks (addressed in 9.8.11.5), Operators must document the situation triggering corrective action and planned corrective action within 30 days of becoming aware of that situation, and retain a copy of this documentation. This documentation must include the following information:

9.8.11.6.1 Identification of the condition triggering the need for corrective action review, including any ambient water quality monitoring that assisted in determining that discharges did not meet water quality standards;

9.8.11.6.2 Brief description of the situation;

9.8.11.6.3 Date the problem was identified;

9.8.11.6.4 Brief description of how the problem was identified and how the Operator learned of the situation and date the Operator learned of the situation;

9.8.11.6.5 Summary of corrective action taken or to be taken including date initiated and date completed or expected to be completed; and,

9.8.11.6.6 Any measures to prevent reoccurrence of such an incident, including notice of whether PDMP modifications are required as a result of the incident.

9.8.12 Recordkeeping

Operators must keep written records as required in this Subsection for all discharges covered under this Subsection. These records must be accurate and complete to demonstrate compliance with the conditions of this Subsection. Operators may rely on records and documents developed for other obligations, such as requirements under FIFRA, and state or local pesticide programs, provided all requirements of this Subsection are satisfied.

The Department recommends that all makers, who are or may be required to develop a PDMP, keep records of acres or linear miles treated for all applicable use patterns covered under this Subsection.

9.8.12.1 Recordkeeping for All Operators

9.8.12.1.1 All Operators must keep the following records:

9.8.12.1.1.1 A copy of this Subsection (an electronic copy is also acceptable);

9.8.12.1.1.2 A copy of any Adverse Incident Reports;

9.8.12.1.1.3 Rationale for any determination that reporting of an identified adverse incident is not required consistent with allowances identified in 9.8.11.4.2;

- 9.8.12.1.1.4 A copy of any corrective action documentation;
- 9.8.12.1.1.5 Proof of Aquatic Pesticides License through the Delaware Department of Agriculture;
- 9.8.12.1.1.6 A copy of any spill and leak or other unpermitted discharge documentation;  
and
- 9.8.12.1.1.7 Documentation of equipment calibration;
- 9.8.12.1.1.8 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any waters, either by name or by location, to which pesticide(s) are discharged;
- 9.8.12.1.1.9 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);
- 9.8.12.1.1.10 Target pest(s);
- 9.8.12.1.1.11 Name of each pesticide product used including the EPA registration number;
- 9.8.12.1.1.12 Quantity and rate of each pesticide product applied to each treatment area;
- 9.8.12.1.1.13 Pesticide application date(s); and,
- 9.8.12.1.1.14 Whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides.
- 9.8.12.1.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.
- 9.8.12.2 Recordkeeping for Operators Who Are For-Hire Only
  - 9.8.12.2.1 Any Operator, who is a For-Hire, as defined in 9.8.2, must retain the following records:
    - 9.8.12.2.1.1 Documentation of equipment calibration;
    - 9.8.12.2.1.2 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any waters, either by name or by location, to which pesticide(s) are discharged;
    - 9.8.12.2.1.3 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);
    - 9.8.12.2.1.4 Target pest(s);
    - 9.8.12.2.1.5 Name of each pesticide product used including the EPA registration number;
    - 9.8.12.2.1.6 Quantity of each pesticide product applied to each treatment area;
    - 9.8.12.2.1.7 Pesticide application date(s); and,
    - 9.8.12.2.1.8 Whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides.
  - 9.8.12.2.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.
- 9.8.12.3 Recordkeeping for Any Operator Considered a Large Entity
  - 9.8.12.3.1 All Operators are considered a Large Entity by 9.8.2 must keep the following records:
    - 9.8.12.3.1.1 All information as described in 9.8.12.1 above;
    - 9.8.12.3.1.2 A copy of the most recent PDMP; and,

9.8.12.3.1.3 Copy of annual reports submitted to the Department as described in 9.8.13.

9.8.12.3.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.

### 9.8.13 Annual Reporting

#### 9.8.13.1 Annual Reporting Requirements

Operators who are considered a Large Entity as defined in 9.8.2 must submit an annual report to the Department. Once an Operator meets the obligation to submit an annual report, the Operator must submit the annual report each calendar year thereafter for the duration of coverage under this Subsection, whether or not the Operator has discharges from the application of pesticides in any subsequent calendar year. The annual report must be submitted no later than January 1 of the following year for all pesticide activities covered under this Subsection occurring during the previous calendar year. Annual reporting requirements begin with those discharges occurring during calendar year 2012.

The annual report must contain the following information:

9.8.13.1.1 Operator's name and contact information;

9.8.13.1.2 Delaware Department of Agriculture Applicator Certification Number;

9.8.13.1.3 Contact person name, title, e-mail address (if any), and phone number; and,

9.8.13.1.4 For each treatment area, report the following information:

9.8.13.1.4.1 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any Waters of the State, either by name or by location, to which pesticide(s) are discharged;

9.8.13.1.4.2 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);

9.8.13.1.4.3 Company name(s) and contact information for pesticide Operator;

9.8.13.1.4.4 Total amount of each pesticide product applied for the reporting year by the EPA registration number(s) and by application method (e.g., aerially by fixed-wing or rotary aircraft, broadcast spray, etc.);

9.8.13.1.4.5 Whether this pest control activity was addressed in the PDMP prior to pesticide application;

9.8.13.1.4.6 If applicable, an annual report of any adverse incidents as a result of these treatment(s), for incidents, as described in 9.8.11.4; and,

9.8.13.1.4.7 If applicable, description of any corrective action(s), including spill responses, resulting from pesticide application activities and the rationale for such action(s).

#### 9.8.13.2 Annual Reporting for All Other Operators

Annual reporting will not be required for Operators other than as specified above in 9.8.13.1.

### 9.8.14 Signatory Requirements

9.8.14.1 For a corporation: By a responsible corporate officer. For the purpose of this subsection, a responsible corporate officer means: (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions that govern the operation of the regulated activity including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long-term environmental compliance with environmental laws and regulations;

the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

9.8.14.2 For a partnership or sole proprietorship: By a general partner or the proprietor, respectively; or

9.8.14.3 For a municipality, state, federal, or other public agency: By either a principal executive officer or ranking elected official. For purposes of this subsection, a principal executive officer includes (i) the chief executive officer of the agency, or (ii) a senior executive officer having responsibility for the overall operations of a principal geographic unit or the agency (e.g., Section Manager or Division Director).

9.8.15 Address for Written Notifications to the Department

Written correspondence to the Department should be addressed to:

Delaware Department of Natural Resources and Environmental Control

Division of Water

Surface Water Discharges Section – NPDES

89 Kings Highway

Dover, DE 19901

9.8.16 Standard Conditions

9.8.16.1 Penalties for Violations

Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 Del.C. Chapter 40, 7 Del.C. Chapter 60, or both. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.

9.8.16.2 Need to Halt or Reduce Activity Not a Defense

It shall not be a defense for an Operator in an enforcement action that it would have been necessary to halt or reduce the permitted activity to maintain compliance with the conditions of this Subsection.

9.8.16.3 Duty to Mitigate

Operators must take all reasonable steps to minimize or prevent any discharge in violation of this Subsection, which has a reasonable likelihood of adversely affecting human health or the environment.

9.8.16.4 Other State and Federal Laws

Nothing shall be construed to preclude the institution of any legal action or relieve any person subject to this regulation from any responsibilities, liabilities, or penalties established pursuant to any applicable State or Federal law or regulation.

9.8.16.5 Proper Operation and Maintenance

Operators must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which the Operators installs or uses to achieve compliance with the conditions of this Subsection. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar systems which the Operator installs only when the operation is necessary to achieve compliance with the conditions of this Subsection.

9.8.16.6 Property Rights

Coverage under this Subsection does not convey any property rights of any sort, any exclusive privileges, any authorization to damage, injure or use any private property, any authority to invade personal rights, any authority to violate federal, State, or local laws or regulations, or any taking, condemnation or use of eminent domain against any property owned by third parties. The Department does not warrant that the Operator's compliance

with this Subsection and operation under this Subsection will not cause damage, injury, or use of private property, an invasion of personal rights, or violation of federal, state, or local laws or regulations. The Operator is solely and severably liable for all damage, injury or use of private property, invasion of personal rights, infringement of federal, State, or local laws and regulations, or taking or condemnation of property owned by third parties, which may result from actions taken under the Subsection.

9.8.16.7 Duty to Provide Information

The Operator shall furnish to the Department, within a reasonable timeframe, any information which the Department may request to determine cause for modifying, revoking and reissuing, or terminating coverage, or to determine compliance with this Subsection. The Operator shall also furnish to the Department upon request, copies of records required to be maintained by this Subsection.

9.8.16.8 Inspection and Entry

Operators must allow the Department upon presentation of credentials and other documents as may be required by law, to do the following:

9.8.16.8.1 Enter upon an Operator's premises where a regulated activity is located or conducted, or where records must be kept under the conditions of this permit;

9.8.16.8.2 Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

9.8.16.8.3 Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and,

9.8.16.8.4 Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location.

9.8.16.9 Upset

9.8.16.9.1 Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based non-numeric effluent limitations if the requirements of 9.8.9.1-9.8.9.5 (where applicable) are met. Any determination made during administrative review of claims that noncompliance was caused by an upset, and before an action for noncompliance, is not final administrative action subject to judicial review.

9.8.16.9.2 Conditions necessary for a demonstration of upset. An Operator who wishes to establish the affirmative defense for an upset must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

9.8.16.9.2.1 An upset occurred and that the Operator can identify the cause(s) of the upset;

9.8.16.9.2.2 The permitted activity was at the time being properly operated;

9.8.16.9.2.3 The Operator submitted notice of the upset as required in 9.8.11.4 (24 hour notice); and,

9.8.16.9.2.4 The Operator complied with any remedial measures required under this Subsection.

9.8.16.9.3 Burden of proof. In any enforcement proceeding, the Operator, as the one seeking to establish the occurrence of an upset, has the burden of proof.

9.8.16.10 Severability. Invalidation of a portion of this regulation does not render the whole regulation invalid. The Department's intent is that the regulation will remain in effect to the extent possible; in the event that any part of this regulation is invalidated, the remaining parts of the regulation will remain in effect unless the Department issues a written statement otherwise.

9.8.16.11 Continuation of Regulatory Requirements. The requirements of this Subsection shall continue in force and effect until this regulation is re-promulgated.

**Symbol Key**

Arial 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.

**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 AGRICULTURE**  
**THOROUGHBRED RACING COMMISSION**

Statutory Authority: 3 Delaware Code, Section 10103(c) (3 **Del.C.** §10103(c))  
3 **DE Admin. Code** 1001

**PUBLIC NOTICE**

The Delaware Thoroughbred Racing Commission in accordance with 3 **Del.C.** §10103(c) has proposed changes to its rules and regulations. The proposal amends the rules and regulations to conform to recently revised national standards for the administration of Salix (furosemide) on race days by regulatory veterinarians and the elimination of all race day adjunct medications including Aminocaproic Acid (Amicar) in Thoroughbred and Arabian race horses.

A public hearing will be held on April 11, 2012 at 10:15 a.m. in the second floor conference room of the Horseman's Office, located on the grounds of Delaware Park, 777 Delaware Park Boulevard, Wilmington, Delaware 19804 where members of the public can offer comments. Anyone wishing to receive a copy of the proposed regulations may obtain a copy from the Delaware Thoroughbred Racing Commission, 777 Delaware Park Boulevard, Wilmington, Delaware 19804. Persons wishing to submit written comments may forward these to the Commission at the above address. The final date to receive written comments will be at the public hearing.

The Commission will consider promulgating the proposed regulation at its regularly scheduled meeting following the public hearing.

**1001 Thoroughbred Racing Rules and Regulations**  
***(Break in Continuity of Sections)*****15.0 Medication; Testing Procedures**

## 15.1 Prohibition and Control of Medication:

***(Break in Continuity Within Section)***

## 15.1.3 Foreign Substances:

## PROPOSED REGULATIONS

- 15.1.3.1 No horse participating in a race shall carry in its body any foreign substance except as provided in Rule 15.1.3.1.3:
- 15.1.3.1.1 A finding by the chemist that a foreign substance is present in the test sample shall be prima facie evidence that such foreign substance was administered and carried in the body of the horse while participating in a race. Such a finding shall also be taken as prima facie evidence that the Trainer and agents responsible for the care or custody of the horse has/have been negligent in the handling or care of the horse.
- 15.1.3.1.2 A finding by the chemist of a foreign substance or an approved substance used in violation of Rule 15.1 in any test sample of a horse participating in a race shall result in the horse being disqualified from purse money or other awards, except for purposes of pari-mutuel wagering which shall in no way be affected.
- 15.1.3.1.3 A foreign substance of accepted therapeutic value may be administered as prescribed by a Veterinarian when test levels and guidelines for its use have been established by the Veterinary-Chemist Advisory Committee of the National Association of State Racing Commissioners and approved by the Commission. Aminocaproic acid may be present in a horse's body while it is participating in a race, subject to all the provisions of these Rules. Androgenic-Anabolic Steroids are subject to the provisions of Rule 15.17.
- 15.1.3.1.4 The only approved non-steroidal anti-inflammatory drug (NSAID) that may be present in a horse's body while it is participating in a race is phenylbutazone/oxyphenbutazone in the level stated in 15.1.3.1.5 or 15.1.3.1.6. The presence of any other NSAID at any test level is forbidden.
- Revised: 1/6/92.
- 15.1.3.1.5 The test level of phenylbutazone under this Rule shall not be in excess of two (2.0) micrograms (mcg) per milliliter (ml) of plasma without penalties in the following format:

Micrograms per milliliter	Penalties
0 to 2.0	No action
2.1 to 4.4	First Offense-\$500.00 fine
2.1 to 4.4	Second Offense within 365 days \$1000.00 fine
2.1 to 4.4	Third Offense within 365 days \$1000.00 fine and/or Suspension and/or Loss of Purse
4.5 and Over	Fine, Suspension, Loss of Purse

- 15.1.3.1.6 The test level for oxphenbutazone under this Rule shall not be in excess of two (2) micrograms (mcg) per milliliter (ml) of plasma.
- 15.1.3.1.7 ~~No bleeder medication otherwise permissible under this Rule may be administered to a horse within one hour of the scheduled post time of the horse's race. The administration of salix to a horse on race day will be governed by Rule 15.2.~~
- 15.1.3.1.8~~7~~ If a horse is to receive one or more bleeder medications, aminocaproic acid and/or salix Furosemide (Salix), the trainer shall declare said use at the time of entry.
- 15.1.3.1.9 ~~A veterinarian administering bleeder medications shall report the administration of such medications on the same form that is used to report the administration of salix.~~
- 15.1.3.1.10~~8~~ The race program shall denote ~~what medication(s) have~~ if Furosemide (Salix) been administered to a horse in the race and the past performance lines in the program, if any, shall denote any medications administered to said horse in those races.

15.1.3.1.449 Any horse running on ~~permissible bleeder medication~~ Furosemide (Salix) under these Rules shall remain on the medication for a period of not less than sixty (60) days, unless permitted by the Stewards, before being permitted to race without the ~~permissible bleeder medication~~ Furosemide (Salix).

15.1.3.1.4210 The detection of ~~permissible bleeder medications (salix and/or aminocaproic acid)~~ Furosemide (Salix) in a horse following the running of a race which was not declared or reported to the Stewards, may result in the disqualification of the horse and other disciplinary action imposed upon the trainer and administering veterinarian. Conversely, the absence of ~~bleeder medication~~ Furosemide (Salix) following the running of a race in which was declared and reported by a trainer and/or veterinarian, may result in the disqualification of the horse and other disciplinary action imposed upon the trainer and administering veterinarian.

15.1.3.1.13 Erythropietin (EPO)

A finding by the official chemist that the antibody of Erythropietin (EPO) was present in a post-race test specimen of a horse shall be promptly reported in writing to the Stewards. The Stewards shall notify the owner and trainer of the positive test result for Erythropietin antibodies. The Stewards shall notify the Commission Veterinarian of the name of the horse for placement on the Veterinarian's List, pursuant to Rule 5.32, if the positive test result indicates that the horse is unfit to race. Any horse placed on the Veterinarian's List pursuant to this Rule shall not be permitted to enter a race until the owner or trainer, at their own expense, provides proof of a negative test result for EPO antibodies from a laboratory approved by the Commission provided said test sample is obtained under collection procedures acceptable to the Commission or its designee under these Rules.

Notwithstanding any inconsistent provision of these Rules, a horse shall not be subject to disqualification from the race and from any share of the purse in the race and the trainer of the horse shall not be subject to application of trainer's responsibility based on the finding by the laboratory that the antibody of Erythropietin was present in the sample taken from that horse.

15.2 Bleeder Medication:

15.2.1 Notwithstanding anything in the Rules of Racing to the contrary, the Stewards may permit the administration of Furosemide (Salix) to control epistaxis (bleeding) to horses under the following conditions:

15.2.1.1 A horse which, during a race or workout at a duly licensed race track in this State or within the first hour immediately following such a race or workout, is observed by the Commission's Veterinarian or the Stewards to be shedding blood from one or both nostrils or is found to have bled internally. (An endoscopic examination of the horse, in order to confirm bleeding, may be performed by the practicing veterinarian in the presence of the Commission's Veterinarian at the detention barn within one (1) hour of workout or race.)

15.2.1.2 A horse which has been certified as a bleeder in another jurisdiction may be placed on the bleeder list provided that the other jurisdiction qualified it as a bleeder using criteria satisfactory to the Commission's Veterinarian and the Stewards. It shall be the absolute responsibility of the Trainer to report bleeders from other jurisdictions to the Commission's Veterinarian or Stewards on official forms from that State prior to entry.

15.2.1.3 The Commission's Veterinarian shall be responsible to maintain an up-to-date "bleeder" list and the list shall be available in the Racing Secretary's office.

15.2.1.4 ~~A horse in the Bleeder Program shall be required to be brought to an area designated by the Licensee and approved by the Commission not later than three and one half (3 ½) hours before post time for the race in which it is entered. During the 3 ½ hour period, the horse shall be under the care and custody of a groom or caretaker appointed by the Trainer. The approved Furosemide medication may be administered by a licensed practicing veterinarian within three (3) hours before post time. The practicing veterinarian~~

## PROPOSED REGULATIONS

~~shall make a report to the Stewards of the treatment on forms provided by the Stewards on the same day of treatment.~~

Horses must be on the grounds and the Furosemide (Salix) administered, not more than three hours and 30 minutes (3-1/2 hours) nor less than three hours (3 hours) prior to post time of their respective races. Failure to meet this time frame will result in scratching the horse, and the trainer may be fined. The Salix Veterinarian who administers Furosemide (Salix) to a horse scheduled to race shall prepare a written certification indicating the time, dosage and method of administration. The written certification shall be delivered to a Commission representative designated by the Stewards within one (1) hour of the last scheduled race for that day.

- 15.2.1.5 ~~(Deleted.)~~ It is the responsibility of the owner or trainer to pay the Salix veterinarian at the rate approved by the Commission. No credit shall be given without approval of the Salix Veterinarian.
- 15.2.1.6 A horse which bled for the first time shall not be permitted to run for a period of ten (10) calendar days. A horse which bleeds a second time shall not be permitted to run for thirty (30) calendar days. A horse which bleeds a third time shall not be permitted to run for ninety (90) days. A horse which bleeds a fourth time shall be barred from further racing in the State of Delaware, except that if a horse's fourth bleeding incident occurs within one year of the first bleeding incident, then the horse shall not be barred but shall not be permitted to run for one year. If a horse has bled three times but at least twelve months have passed since the last bleeding incident, then if the horse bleeds for a fourth time, the horse shall not be permitted to run for twelve (12) months, and any further bleeding incidents will prevent the horse from racing for another twelve (12) month period. A positive endoscopic examination shall be classed as a first time bleeder.
- Revised: 6/19/92.
- 15.2.1.7 Dosage. Furosemide (Salix) shall be administered intravenously, or intramuscularly as permitted under Rule 15.02.1.8, to horses in the Bleeder Program by ~~a licensed practicing~~ the Salix veterinarian, who will administer not more than 500 milligrams nor less than 100 milligrams, subject to the following conditions:
- 15.2.1.8 The dosage administered may not vary by more than 250 milligrams from race to race without the permission of the Commission Veterinarian.
- 15.2.1.9 Restrictions. No one except a licensed practicing veterinarian shall possess equipment or any substance for injectable administration on the race track complex, and no horse is to receive Furosemide (Lasix) in oral or intramuscular form, except that the stewards may approve intramuscular administration for a horse based on written documentation from the Commission veterinarian and the trainer's veterinarian.
- 15.2.1.10 Post-Race Quantification. As indicated by post-race quantification, a horse may not carry in its body at the time of the running of the race more than 100 nanograms of Furosemide (Salix) per milliliter of plasma in conjunction with a urine that has a specific gravity of 1.010 or lower.
- 15.2.1.10.1 If post-race analysis indicates that the specific gravity of a horse's urine is less than 1.010 and the concentration of Furosemide (Salix) in the blood plasma is greater than 100 nanograms per milliliter, the stewards shall take the following action (for each horse):
- 15.2.1.10.1.1 If such overage is the first violation of this rule for this horse, the trainer and/or attending veterinarian shall be issued a warning and be required to participate in a review of all pertinent Commission rules and subsequent penalties at a time scheduled by the stewards. If the trainer wishes to contest the overage, the trainer shall follow a specific procedure under which all of the following conditions must be met:
- 15.2.1.10.1.2 the horse in question must report to the detention barn four hours prior to post time.

- 15.2.1.10.1.3 the same handler/groom must stay with the horse at all times.
- 15.2.1.10.1.4 a blood sample shall be taken by the Commission veterinarian before the administration of Furosemide (Salix).
- 15.2.1.10.1.5 the ~~trainer's~~ Salix veterinarian must administer Furosemide (Salix) at a dosage not to exceed 500 milligrams.
- ~~15.2.1.10.1.6 the Commission veterinarian must witness the administration of furosemide.~~
- 15.2.1.10.1.7~~6~~ the horse must return to the detention barn after the race for the taking of post-race blood and urine testing by the Commission veterinarian or assistant, no matter how the horse finishes in the race.
- 15.2.1.10.2 If, after all of the above conditions are met, the post race tests reveal that the specific gravity of the horse's urine is again below 1.010 and the concentration of Furosemide (Salix) in the blood plasma is greater than 100 nanograms per milliliter of plasma, and the blood sample taken in the detention barn before the administration of Furosemide (Salix) tests negative for Furosemide (Salix), the horse will be placed on an "exempt" list and the first offense will be removed, provided further that any horse on the "exempt" list will be required to have all future prerace Salix treatments administered pursuant to the procedure set forth in Rules 15.2.1.9.1.2 through 15.2.1.9.1.7 set forth above. Any horse that is placed on the "exempt" list and later fails to follow the prerace procedure for Furosemide (Salix) administration set forth in Rules 15.2.1.9.1.2 through 15.2.1.9.1.7 above will be removed from the "exempt" list, disqualified from the race, and subject to the penalties in this Rule for subsequent offenses.
- 15.2.1.10.3 If such overage is the second violation of this rule for the same horse, the trainer and/or attending veterinarian shall be fined a minimum of \$100.00 and a maximum of \$500.00.
- 15.2.1.10.4 If such overage is the third violation of this rule for the same horse, the trainer and/or attending veterinarian shall be issued a minimum suspension of seven (7) days and a maximum suspension of fifteen (15) days and shall be fined a minimum of \$100.00 and a maximum of \$1,000.00, and the stewards in their discretion may order loss of purse as an additional penalty.
- 15.2.1.10.5 If such overage is the fourth violation for the same horse, the trainer and/or attending veterinarian shall be issued a suspension of fifteen (15) days to thirty (30) days, and shall be fined \$250.00 to \$1,000.00, and the stewards will order loss of purse as a mandatory penalty.

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**1001 Thoroughbred Racing Rules and Regulations**

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**DELAWARE JOCKEY'S HEALTH AND WELFARE BOARD**

Statutory Authority: 3 Delaware Code, Section 10171(c), and 29 Delaware Code, Section 4815(b)3(c) (3 **Del.C.** §10171(c); 29 **Del.C.** §4815(b)3(c))  
3 **DE Admin. Code** 1002

**PUBLIC NOTICE**

The Delaware Jockey's Health and Welfare Board in accordance with 3 **Del.C.** §10171(c) and 29 **Del.C.** §4815(b)3(c), has proposed changes to its rules and regulations. The proposal amends the rules and regulations

regarding criteria for an active Delaware Jockey to be eligible for health insurance under the Delaware Jockey's Health and Welfare Fund by increasing the minimum number of mounts from 25 to 50.

A public hearing will be held on April 11, 2012 at 9:15 a.m. in the second floor conference room of the Horseman's Office, located on the grounds of Delaware Park, 777 Delaware Park Boulevard, Wilmington, Delaware 19804 where members of the public can offer comments. Anyone wishing to receive a copy of the proposed regulations may obtain a copy from the Delaware Thoroughbred Racing Commission, 777 Delaware Park Boulevard, Wilmington, Delaware 19804. Persons wishing to submit written comments may forward these to the Commission at the above address. The final date to receive written comments will be at the public hearing.

The Commission will consider promulgating the proposed regulation at its regularly scheduled meeting following the public hearing.

### **1002 Delaware Jockeys' Health and Welfare Benefit Board Regulations**

#### **1.0 Introduction**

- 1.1 These regulations are authorized pursuant to 3 **Del.C.** §10171 and 29 **Del.C.** §4815(b)(3)c which established a Delaware Jockeys' Health and Welfare Benefit Board (hereinafter "the Board") and Delaware Jockeys' Health and Welfare Benefit Fund (hereinafter "the Fund").
- 1.2 The Delaware Jockeys' Health and Welfare Benefit Board shall consist of 1 member of the Delaware Thoroughbred Racing Commission, 1 member from the licensed agent under Chapter 1010 of **Title 3** or Chapter 4 of **Title 28**, 1 member of the Delaware Horsemen's Association, 1 representative from the organization that represents the majority of the jockeys who are licensed and ride regularly in Delaware, and 2 jockeys who are licensed and ride regularly in Delaware. The Chairman of the Thoroughbred Racing Commission shall serve as an *ex officio* member, and vote on matters in the event of a tie vote on any issue. All members shall be appointed by the Thoroughbred Racing Commission, and shall serve a two year term.
- 1.3 The Board shall elect a Chairperson from among the appointed members of the Board. The Chairperson shall serve a two year term and may serve consecutive terms. The Chairperson shall be the presiding officer at all meetings of the Board.
- 1.4 The Board shall administer the Fund pursuant to these regulations and other reasonable criteria for benefit eligibility.
- 1.5 A special fund of the State has been established and will be known as the "Delaware Jockeys' Health and Welfare Benefit Fund." The Fund shall consist of the proceeds transferred from the licensed video lottery agent and the purse account pursuant to 29 **Del.C.** §4815(b)(3)c. The proceeds transferred to the Fund will be maintained in an account established in the Department of Agriculture.
- 1.6 The Fund will be invested by the State Treasurer consistent with the investment policies established by the Cash Management Policy Board. All income earned by the Fund will be reinvested in the Delaware Jockeys' Health and Welfare Benefit Fund.
- 1.7 The Board shall use the Fund to provide for jockeys who regularly ride in Delaware, health benefits for active, disabled and retired jockeys. The Board may also expend usual and customary expenses for administrative purposes from the Fund.
- 1.8 The Thoroughbred Racing Commission's Administrator of Racing will provide administrative support to the Board and keep minutes of all the meetings of the Board and preserve all records of the Board. The Board's Office will be considered as part of the Office of the Thoroughbred Racing Commission.
- 1.9 The Board can propose to amend these regulations by an affirmative vote of the majority of the Board.

#### **2.0 Eligibility Criteria for Health Coverage**

- 2.1 The Board will pay from the Fund for health coverage for active jockeys who regularly ride in Delaware, eligible retired jockeys, and disabled Delaware jockeys.
  - 2.1.1 An Active Delaware Jockey, who regularly rides in Delaware, is eligible for health insurance coverage under the fund, if the jockey had ~~twenty five (25)~~ fifty (50) mounts in a Delaware Park season at Delaware Park; and

- 2.1.1.1 If the jockey's Delaware Park mounts are less than 100 in a Delaware Park season, then 50% or more of that jockey's total mounts during the regular Delaware Park season must be at Delaware Park.
- 2.1.1.2 If the jockey's Delaware Park mounts are 100 or more in a Delaware Park season, the jockey is eligible for health insurance coverage, regardless of the amount of total mounts at other tracks.
- 2.1.2 A Retired Delaware Jockey is eligible for health insurance coverage under the Fund if:
  - 2.1.2.1 The Jockey was receiving health insurance coverage as a retired jockey provided by the Delaware Thoroughbred Racing Commission's health insurance plan with the Jockey's Guild on January 1, 2006; or
  - 2.1.2.2 The Jockey rode a minimum of 100 mounts at Delaware Park during the regular Delaware Park season for at least seven years.
- 2.1.3 A disabled Delaware Jockey's spouse and dependents qualify for health benefits if the disabled jockey meets all of the following requirements:
  - 2.1.3.1 The jockey was an active participant in the Delaware Jockeys' Health and Welfare Fund benefit program at the time of the on-track accident that resulted in total and permanent disability; and
  - 2.1.3.2 Be deemed permanently disabled by Social Security and qualify for Medicare as a result of an injury sustained during the regular Delaware Park season on the premises of Delaware Park, and arising in the course of his/her participation as a licensed jockey.
- 2.2 A jockey and/or the jockey's family who meets the eligibility requirements of either an active Delaware jockey, a retired Delaware jockey, or a disabled Delaware jockey's family will be entitled to health coverage beginning on the first of the month after it can be determined the eligibility requirement has been met, and continuing until December 31<sup>st</sup> of the next calendar year.
- 2.3 The Board will pay from the Fund for health coverage for the dependents of active jockeys who regularly ride in Delaware, eligible retired jockeys, and disabled Delaware jockeys.
  - 2.3.1 Eligibility for coverage for dependants will be determined by the company providing the insurance coverage.

**9 DE Reg. 1749 (05/01/06)**

**13 DE Reg. 1536 (06/01/10)**

**15 DE Reg. 60 (07/01/11)**

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## **DEPARTMENT OF EDUCATION**

### **OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 106A

#### **Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)**

#### **106A Teacher Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

#### **A. TYPE OF REGULATORY ACTION REQUIRED**

Amendment to Existing Regulation

#### **B. SYNOPSIS OF SUBJECT MATTER OF THE REGULATION**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 106A Teacher Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised. The amendments include adding definitions for a "DCAS Teacher" and "Non-DCAS Teacher". The amendments are addressing

policy changes for the 2011-2012 school year, including provisions related to the summative rating determination, pattern of ineffective teaching, and improvement plans.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 5, 2012 to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.

### **C. IMPACT CRITERIA**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is related to teacher evaluation and should support improved student achievement as measured against state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is related to teacher evaluation and does not specifically address all students' receiving an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amended regulation is related to teacher evaluation and does not specifically address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation is related to teacher evaluation and does not specifically address all students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change the authority or flexibility of decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amendments do not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority does not change because of the amendments.

8. Will the amended 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? The amendments are consistent with other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? The amendments do not significantly change the method for teacher evaluation which is the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There are no additional costs to the State or to the local boards or charter schools because of compliance to the regulation with the amendments.

## **106A Teacher Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

### **1.0 Effective Date**

The Teacher Appraisal Process, Delaware Performance Appraisal System (DPAS II) Revised shall be effective for all school districts and charter schools beginning with the 2011-12 school year, and shall, at such time, replace the current 14 **DE Admin. Code** 106 Teacher Appraisal Process Delaware Performance Appraisal System (DPAS II).

**15 DE Reg. 833 (12/01/11)**

### **2.0 Definitions**

The following definitions shall apply for purposes of this regulation:

**"Announced Observation"** shall consist of the Pre-observation Form and conference with the evaluator, an observation by the evaluator at an agreed upon date and time, using the associated

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formative conferences and reports. The observation shall be of sufficient length, at least thirty (30) minutes, to analyze the lesson and assess teacher performance.

**"Board"** shall mean a local board of education or charter school board of directors.

**"Credentialed Evaluator"** shall mean the individual, usually the supervisor of the teacher, who has successfully completed the evaluation training in accordance with 10.0. The Credentialed Evaluator may also be referred to as "Evaluator".

**"DASA"** shall mean the Delaware Association of School Administrators.

**"DCAS Teacher"** shall mean any Novice Teacher or Experienced Teacher providing instruction in reading and/or mathematics to a student that meets the following criteria:

(a) The student is enrolled in any grade three (3) through ten(10) for either reading and/or mathematics instruction as verified by the state's pupil accounting system; and

(b) The student has valid Delaware Comprehensive Assessment System (DCAS) score(s) and the student was not subject to an invalidation or special exemption as provided in 14 DE Admin. Code 103.

**"DPAS II Revised Guide for Teachers"** shall mean the manual that contains the prescribed forms, detailed procedures, specific details about the five (5) components of evaluation and other relevant documents that are used to implement the appraisal process.

**"DSEA"** shall mean the Delaware State Education Association.

**"Experienced Teacher"** shall mean a teacher who holds a valid and current Continuing or Advanced License, issued pursuant to Chapter 12 of Title 14 of the **Delaware Code**; or Standard or Professional Status Certificate issued prior to August 1, 2003.

**"Improvement Plan"** shall be the plan that a teacher and evaluator mutually develop in accordance with 8.0.

**"Interim assessment"** shall mean an assessment given at regular and specified intervals throughout the school year, and designed to evaluate students' knowledge and skills relative to a specific set of academic standards, and the results of which can be aggregated (e.g., by course, grade level, school, or school district) in order to inform teachers and administrators at the student, classroom, school, and district levels.

**"Non-DCAS Teacher"** shall mean any Novice Teacher or Experienced Teacher that does not meet the definition of DCAS Teacher as defined herein.

**"Novice Teacher"** shall mean a teacher who holds a valid and current Initial License issued pursuant to Chapter 12 of Title 14 of the **Delaware Code**.

**"Satisfactory Component Rating"** shall mean the teacher's performance demonstrates an understanding of the concepts of the component under Chapter 12 of Title 14 of the **Delaware Code**.

**"Satisfactory Evaluation"** shall be equivalent to the overall "Highly Effective", "Effective" or "Needs Improvement" rating on the Summative Evaluation and shall be used to qualify for a continuing license.

**"State Assessment"** shall mean the Delaware Comprehensive Assessment System (DCAS).

**"Student Achievement"** shall mean

(a) For tested grades and subjects:

(1) A student's score on the DCAS; and, as appropriate,

(2) Other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: Alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms. Such alternative measures must be approved by the Department and developed in partnership with the local collective bargaining representatives.

**"Student Growth"** shall mean the change in achievement data for an individual student between two points in time. Growth may also include other measures that are rigorous and comparable across classrooms.

**"Summative Evaluation"** shall be the final evaluation at the conclusion of the appraisal cycle.

**"Unannounced Observation"** shall consist of an observation by the evaluator at a date and time that has not been previously arranged using the associated formative conferences and reports. The observation shall be of sufficient length, at least thirty (30) minutes, to analyze the lesson and assess teacher performance.

**"Unsatisfactory Component Rating"** shall mean the teacher's performance does not demonstrate an understanding of the concepts of the component.

**"Unsatisfactory Evaluation"** shall be the equivalent to the overall "Ineffective" rating on the Summative Evaluation.

**"Working Day"** shall mean a day when the employee would normally be working in that district or charter school.

**15 DE Reg. 833 (12/01/11)**

### **3.0 Appraisal Cycles**

- 3.1 Experienced teachers who have earned a rating of "Highly Effective" on their most recent Summative Evaluation shall receive a minimum of one (1) Announced Observation each year with a Summative Evaluation at least once every two (2) years. The Student Improvement component for Highly Effective teachers shall be evaluated each year, regardless of whether or not a Summative Evaluation is conducted. If a Highly Effective teacher does not achieve a Satisfactory rating on the Student Improvement Component, the teacher shall receive a Summative Evaluation the following year, regardless of whether the teacher would otherwise be due for a Summative Evaluation pursuant to this section.
- 3.2 Experienced teachers who have earned a rating of "Effective" and have earned "Satisfactory" ratings on at least four (4) of the components found in 5.0, including Student Improvement, on his or her most recent Summative Evaluation shall receive a minimum of one (1) Announced Observation each year with a Summative Evaluation at least once every two (2) years. The Student Improvement component for Effective teachers shall be evaluated each year, regardless of whether or not a Summative Evaluation is conducted. If an Effective teacher does not achieve a Satisfactory rating on the Student Improvement Component, the teacher shall receive a Summative Evaluation the following year, regardless of whether the teacher would otherwise be due for a Summative Evaluation pursuant to this section.
- 3.3 Experienced teachers who are not otherwise included in 3.1 or 3.2 shall receive a minimum of one (1) Announced Observation and one (1) Unannounced Observation with a Summative Evaluation at the end of the one (1) year period. These teachers shall have an Improvement Plan which may require additional observations and other types of monitoring as outlined in the DPAS II Revised Guide for Teachers.
- 3.4 Novice teachers shall receive a minimum of two (2) Announced Observations and one (1) Unannounced Observation with a Summative Evaluation every year. Novice teachers who have earned a rating of "Needs Improvement" or "Ineffective" on their most recent Summative Evaluation shall have an Improvement Plan which may require additional observations or other types of monitoring as outlined in the DPAS II Revised Guide for Teachers.

**15 DE Reg. 833 (12/01/11)**

### **4.0 DPAS II Guide for Teachers**

- 4.1 All school districts and charter schools shall use the manual entitled DPAS II Guide Revised for Teachers as developed and as may be amended by the Department of Education in collaboration with DASA and DSEA to implement the appraisal system.
- 4.2 The manual shall contain, at a minimum, the following:
  - 4.2.1 Specific details about each of the five (5) components listed in 5.1.
  - 4.2.2 All forms or documents needed to complete the requirements of the appraisal process.
  - 4.2.3 Specific procedures to implement the appraisal system.

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**5.0 Appraisal Components and Appraisal Criteria**

5.1 The following five (5) Appraisal Components, including any Appraisal Criteria specified for each, shall be the basis upon which the performance of a teacher shall be evaluated by a credentialed evaluator:

5.1.1 Planning and Preparation

5.1.1.1 Selecting Instructional Goals: Teacher selects instructional goals that are aligned with the DE content standards and the district or charter school's curricula. Goals are appropriate for the learners and reflect high expectations for all students, consistent with State Assessment levels of performance where applicable.

5.1.1.2 Designing Coherent Instruction: Teacher plans for learning activities that align with the instructional goals and support student learning. Instructional planning shows a structure and selection of materials and activities that support student learning relative to the district or charter school's curricula.

5.1.1.3 Demonstrating Knowledge of Content and Pedagogy: Teacher shows his or her knowledge of content and how to teach it to a variety of learners. The teacher's plans include natural connections among content areas that deepen student learning. The content that he or she teaches is aligned to the district or charter school's curricula.

5.1.1.4 Demonstrating Knowledge of Students: Teacher shows his or her knowledge of student developmental characteristics; approaches to learning, knowledge, and skills; interests; cultural heritage; and, where applicable, State Assessment performance levels.

5.1.1.5 Designing Student Assessments: Teacher creates and or selects assessments that are congruent with instructional goals, criteria and standards. The teacher plans for the use of formative and summative assessments of the teacher's students.

5.1.2 Classroom Environment

5.1.2.1 Managing Classroom Procedures: Teacher has clearly defined procedures for managing learning time, transitions between learning events, and routines that maximize learning time.

5.1.2.2 Managing Student Behavior: Teacher establishes behavioral expectations and consequences and monitors student conduct. Teacher responds to student behavior in appropriate and effective ways to minimize disruptions.

5.1.2.3 Creating an Environment to Support Learning: Teacher creates an atmosphere in which learning is valued. Teacher-to-student and student-to-student interactions show rapport that is grounded in mutual respect.

5.1.2.4 Organizing Physical Space: Teacher organizes, allocates, and manages physical space to create a safe learning environment. Teacher uses physical resources to contribute to effective instruction and makes resources accessible to all students.

5.1.3 Instruction

5.1.3.1 Engaging Students in Learning: Content is appropriate, clear, and linked to student knowledge and experience. Content is aligned with the district or charter school's curricula. Activities and assignments engage all students. Instructional materials are suitable to the instructional goals. The instruction is coherent and paced appropriately for all students.

5.1.3.2 Demonstrating Flexibility and Responsiveness: Teacher has a repertoire of instructional strategies and makes use of them to make modifications to lessons as needed. Teacher differentiates instruction based on learner characteristics and achievement data.

5.1.3.3 Communicating Clearly and Accurately: Verbal and written communication is clear and appropriate to students' ages, backgrounds, and levels of understanding.

5.1.3.4 Using Questioning and Discussion Techniques: Questions are appropriate to the content and level of students' understanding. Teacher encourages students to pose their own questions and is responsive to student questions. Teacher facilitates student led discussions.

5.1.3.5 Using Assessment in Instruction: Teacher makes the criteria of the assessment known to the students, monitors the students' progress, provides descriptive feedback, and promotes student self-assessment and uses data to plan future instruction.

## 5.1.4 Professional Responsibilities

5.1.4.1 Communicating with Families: Teacher shares information about the school's educational program and expectations for student performance. Teacher develops a mechanism for two way communication with families about student progress, behavior, and personal needs or concerns.

5.1.4.2 Recording student data in a Student Record System: Teacher keeps records of attendance, disciplinary actions, emergency contact information, and personal information. Teacher shares relevant information with appropriate school personnel.

5.1.4.3 Growing and Developing Professionally: Teacher chooses and participates in professional development that is aligned with his or her professional needs and aligned with the needs of the school, district or charter school, or students.

5.1.4.4 Reflecting on Professional Practice: Teacher engages in reflective thinking as an individual, as a team participant, or as a school community member with the goal of improving instruction and learning for all students.

## 5.1.5 Student Improvement

5.1.5.1 Measuring Student Improvement: Students collectively demonstrate appropriate levels of Student Growth as benchmarked against standards to be set by the Secretary based on input from stakeholder groups.

5.2 Notwithstanding 5.1, for the 2011-2012 school year the first four (4) Appraisal Components, including any Appraisal Criteria specified for each, shall be the basis upon which the performance of a teacher shall be evaluated by a credentialed evaluator. Appraisal Component 5.1.5 may, however, be used to determine whether a DCAS Teacher shall receive a "Highly Effective" rating.

### 15 DE Reg. 833 (12/01/11)

## 6.0 Summative Evaluation Ratings

6.1 Each Appraisal Component shall be assigned a rating of Satisfactory or Unsatisfactory on the Summative Evaluation.

6.1.1 A satisfactory rating for each of the first four Appraisal Components shall mean the teacher has no more than one unacceptable rating on the Appraisal Criteria specified in each of the components.

6.1.2 A satisfactory rating for the Student Improvement component shall mean that the teacher has demonstrated acceptable performance by meeting the standards set by the Secretary pursuant to 5.1.5.1.

6.2 The Summative Evaluation shall also include one of four overall ratings: "Highly Effective", "Effective", "Needs Improvement", or "Ineffective".

6.2.1 "Highly Effective" shall mean that the teacher has earned a Satisfactory Component rating in at least four (4) of the five (5) Appraisal Components in accordance with 5.0, including an Exceeds rating in the Student Improvement Component meaning that the students collectively demonstrate high rates of student growth as defined in the DPAS II Revised Guide for Teachers, as the same may be amended from time to time, developed pursuant to 4.0 of this regulation.

6.2.1.1 Notwithstanding 6.2.1, for the 2011-2012 school year, for a Non-DCAS Teacher the Summative Evaluation Rating "Highly Effective" shall not be applicable.

6.2.1.2 Notwithstanding 6.2.1, for the 2011-2012 school year, for a DCAS Teacher "Highly Effective" shall mean that the teacher has earned a Satisfactory Component rating in at least four (4) of the five (5) Appraisal Components in accordance with 5.0, including an Exceeds rating in the Student Improvement Component meaning that the students collectively demonstrate high rates of student growth as defined in the DPAS II Revised Guide for Teachers, as the same may be amended from time to time, developed pursuant to 4.0 of this regulation.

6.2.2 **"Effective"** shall mean that:

- 6.2.2.1 The teacher has earned a Satisfactory Component Rating in at least three (3) Appraisal Components, including a Satisfactory rating in the Student Improvement Component, and
- 6.2.2.2 The teacher does not meet the requirements for a "Highly Effective" rating found in 6.2.1.
- 6.2.2.3 Notwithstanding 6.2.2.1 and 6.2.2.2, for the 2011-2012 school year, for a Non-DCAS teacher "Effective" shall mean the teacher has earned a Satisfactory Component Rating three (3) or four (4) of the first four (4) Appraisal Components.
- 6.2.2.4 Notwithstanding 6.2.2.1 and 6.2.2.2, for the 2011-2012 school year, for a DCAS Teacher "Effective" shall mean that the teacher has earned a Satisfactory Component Rating in three (3) or four (4) of the first four (4) Appraisal Components, and
- 6.2.2.5 The DCAS Teacher does not meet the requirements for a "Highly Effective" rating found in 6.2.1.2.

6.2.3 **"Needs Improvement"** shall mean that:

- 6.2.3.1 The teacher has earned one (1) or two (2) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, including a Satisfactory rating in the Student Improvement Component, or
- 6.2.3.2 The teacher has earned three (3) or four (4) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, and the teacher has earned an Unsatisfactory rating in the Student Improvement Component.
- 6.2.3.3 Notwithstanding 6.2.3.1 and 6.2.3.2, for the 2011-2012 school year, "Needs Improvement" shall mean the teacher has earned a Satisfactory Component Rating in two (2) of the first four (4) Appraisal Components.

6.2.4 **"Ineffective"** shall mean that:

- 6.2.4.1 The teacher has earned zero (0), one (1), or two (2) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, and
- 6.2.4.2 The teacher earned an Unsatisfactory Component Rating in the Student Improvement Component.
- 6.2.4.3 Notwithstanding 6.2.4.1 and 6.2.4.2, for the 2011-2012 school year, "Ineffective" shall mean the teacher has earned a Satisfactory Component Rating in zero (0) or one (1) of the first four (4) Appraisal Components.

6.2.5 If a teacher's overall Summative Evaluation rating is determined to be "Needs Improvement" for the third consecutive year, the teacher's rating shall be re-categorized as "Ineffective."

**15 DE Reg. 833 (12/01/11)**

**7.0 Pattern of Ineffective Teaching Defined**

7.1 A pattern of ineffective teaching shall be based on the most recent Summative Evaluation ratings of a teacher using the DPAS II process. Two consecutive ratings of "Ineffective" shall be deemed as a pattern of ineffective teaching. The following chart shows the consecutive Summative Evaluation ratings that shall be determined to be a pattern of ineffective teaching:

Year 1	Year 2	Year 3
Ineffective	Ineffective	
Needs Improvement	Ineffective	Needs Improvement
Needs Improvement	Needs Improvement	Ineffective
Ineffective	Needs Improvement	Ineffective
Ineffective	Needs Improvement	Needs Improvement
Needs Improvement	Ineffective	Ineffective

7.2 ~~Notwithstanding the chart above, for the 2011-2012 school year a teacher with an overall Summative Rating of "Needs Improvement" or "Ineffective" that is based on the following component rating results shall not have that year's summative rating used for any purpose in the determination of a pattern of ineffective teaching:~~

~~7.2.1 Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.2 Satisfactory Component ratings in three (3) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.3 Satisfactory Component ratings in two (2) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

**15 DE Reg. 833 (12/01/11)**

## **8.0 Improvement Plan**

8.1 An Improvement Plan shall be developed for a teacher who receives an overall rating of "Needs Improvement" or "Ineffective" on the Summative Evaluation or a rating of Unsatisfactory on any Appraisal Component in 5.0 on the Summative Evaluation regardless of the overall rating.

8.1.1 An Improvement Plan shall also be developed if a teacher's overall performance during an observed lesson is unsatisfactory. This unsatisfactory performance shall be noted by the evaluator on the Formative Feedback form by noting "PERFORMANCE IS UNSATISFACTORY" and initialing the statement.

8.2 ~~Notwithstanding 8.1, for the 2011-2012 school year, an Improvement Plan shall not be developed related to Appraisal Component 5.1.5. ~~nor shall an Improvement Plan be developed for a teacher with an overall Summative Rating of "Needs Improvement" that is based on the following component rating results:~~~~

~~8.2.1 Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

8.3 The Improvement Plan shall contain the following:

8.3.1 Identification of the specific deficiencies and recommended area(s) for growth;

8.3.2 Measurable goals for improving the deficiencies to satisfactory levels;

8.3.3 Specific professional development or activities to accomplish the goals;

8.3.4 Specific resources necessary to implement the plan, including but not limited to, opportunities for the teacher to work with curriculum specialist(s), subject area specialist(s), instructional specialist(s) or others with relevant expertise;

8.3.5 Procedures and evidence that must be collected to determine that the goals of the plan were met;

8.3.6 Timeline for the plan, including intermediate check points to determine progress;

8.3.7 Procedures for determining satisfactory improvement;

8.3.8 Multiple observations and opportunity for feedback provided by a trained evaluator, a mentor, a lead teacher, or an instructional coach.

8.4 Any state or federally funded professional development that is completed during the time that the Improvement Plan is in effect must be certified by the Department and must directly relate to areas identified as needing improvement.

8.5 The Improvement Plan shall be developed cooperatively by the teacher and evaluator. If the plan cannot be cooperatively developed, the evaluator shall have the authority and responsibility to determine the plan as specified in 8.2 above.

8.6 The teacher shall be held accountable for the implementation and completion of the Improvement Plan.

8.7 Upon completion of the Improvement Plan, the teacher and evaluator shall sign the documentation that determines the satisfactory or unsatisfactory performance of the plan.

**15 DE Reg. 833 (12/01/11)**

**9.0 Challenge Process**

- 9.1 A teacher may challenge any rating on the Summative Evaluation, either a Component Rating or the Overall Rating, or a teacher may challenge the conclusions of a lesson observation if the statement "PERFORMANCE IS UNSATISFACTORY" has been included on the Formative Feedback form. To initiate a challenge, a teacher shall submit additional information specific to the point of disagreement in writing within fifteen (15) working days of the date of the teacher's receipt of the Summative Evaluation. Such written response shall become part of the appraisal record and shall be attached to the Summative Evaluation. All challenges together with the record shall be forwarded to the supervisor of the evaluator unless the supervisor of the evaluator is also in the same building as the teacher. In this situation, the challenge together with the record shall be forwarded to a designated district or charter school level credentialed evaluator.
- 9.1.1 Within fifteen (15) working days of receiving the written challenge, the supervisor of the evaluator or the designated district or charter school level credentialed evaluator shall review the record which consists of all documents used in the appraisal process and the written challenge, meet with the teacher, and issue a written decision.
- 9.1.2 If the challenge is denied, the written decision shall state the reasons for denial.
- 9.1.3 The decision of the supervisor of the evaluator or the designated district or charter school's level credentialed evaluator shall be final.

**15 DE Reg. 833 (12/01/11)**

**10.0 Evaluator Credentials**

- 10.1 Evaluators shall have successfully completed the DPAS II training as developed by the Department of Education. Evaluators shall receive a certificate of completion which is valid for five (5) years and is renewable upon completion of professional development focused on DPAS II as specified by the Department of Education.
- 10.1.1 The Department of Education shall annually monitor evaluation implementation.
- 10.2 The training shall occur no less than once every three (3) years and shall include techniques of observation and conferencing, content and relationships of frameworks for teaching, and a thorough review of the DPAS II Revised Guide for Teachers. Activities in which participants practice implementation of DPAS II procedures shall be included in the training.
- 10.3 The credentialing process shall be conducted by the Department of Education.

**15 DE Reg. 833 (12/01/11)**

**11.0 Evaluation of Process**

The Department of Education shall conduct an annual evaluation of the teacher appraisal process. The evaluation shall, at a minimum, include a survey of teachers and evaluators and interviews with a sampling of teachers and evaluators. Data from the evaluation and proposed changes to the DPAS II Revised Guide for Teachers shall be presented to the State Board of Education for review on an annual basis.

**12.0 Procedures for the Termination of Services of Professional Employees**

For purposes of 14 DeI.C., Chapter 14 Procedures for the Termination of Services of Professional Employees only, the Appraisal Component 5.1.5 Student Improvement shall be considered "Satisfactory" for a teacher for the 2011-2012 school year.

**13 DE Reg. 1067 (02/01/10)**

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# PROPOSED REGULATIONS

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## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 107A

### Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

#### 107A Specialist Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised

#### A. TYPE OF REGULATORY ACTION REQUIRED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF THE REGULATION

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 107A Specialist Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised. The amendments are addressing policy changes for the 2011-2012 school year, including provisions related to the summative rating determination, pattern of ineffective teaching, and improvement plans.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 5, 2012 to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.

#### C. IMPACT CRITERIA

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is related to specialist evaluation and should support improved student achievement as measured against state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is related to specialist evaluation and does not specifically address all students' receiving an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amended regulation is related to specialist evaluation and does not specifically address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation is related to specialist evaluation and does not specifically address all students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change the authority or flexibility of decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amendments do not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority does not change because of the amendments.

8. Will the amended 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? The amendments are consistent with other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? The amendments do not significantly change the method for specialist evaluation which is the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There are no additional costs to the State or to the local boards or charter schools because of compliance to the regulation with the amendments.

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**107A Specialist Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised*****(Break in Continuity of Sections)*****5.0 Appraisal Components and Appraisal Criteria**

- 5.1 The following five (5) Appraisal Components, including any Appraisal Criteria specified for each, shall be the basis upon which the performance of a specialist shall be evaluated by a credentialed evaluator:
- 5.1.1 Planning and Preparation
    - 5.1.1.1 Designing Coherent Programs or Services: Specialist designs activities and plans for services that support the needs of the students or clients served.
    - 5.1.1.2 Demonstrating Knowledge of Best Practice and Models of Delivery: Specialist uses practices and models of delivery that are aligned with local and national standards.
    - 5.1.1.3 Demonstrating Knowledge of Students or Clients: Specialist shows knowledge of the needs and characteristics of the students or clients, including their approaches to learning, knowledge, skills, and interests.
    - 5.1.1.4 Demonstrating Knowledge of Resources: Specialist selects appropriate resources, either within or outside of the school, that support the needs of students or clients.
    - 5.1.1.5 Demonstrating Knowledge of How to Design or Use Student Assessments: Specialist creates and or selects assessments that are congruent with instructional goals, criteria and standards. The specialist plans for the use of formative and summative assessments of the specialist's students.
  - 5.1.2 Professional Practice and Delivery of Services
    - 5.1.2.1 Creating an Environment to Support Student or Client Needs: Specialist creates an environment in which student or client needs are identified and valued. Specialist and student or client interactions show rapport that is grounded in mutual respect.
    - 5.1.2.2 Demonstrating Flexibility and Responsiveness: Specialist has a repertoire of instructional or professional strategies and makes modifications to services based on needs of the students or clients.
    - 5.1.2.3 Communicating Clearly and Accurately: Verbal and written communication is clear and appropriate to students' or clients' ages, backgrounds, needs, or levels of understanding.
    - 5.1.2.4 Delivering Services to Students or Clients: Specialist is responsive to the identified needs of the students or clients and meets standards of professional practice. The resources and materials are suitable and match the needs of the students or clients. The delivery of service is coherent.
  - 5.1.3 Professional Collaboration and Consultation
    - 5.1.3.1 Collaborating with Others: Specialist develops partnerships with school or district staff or external agencies to provide integrated services that meet student or client needs.
    - 5.1.3.2 Serving as a Consultant to the School Community: Specialist shares expertise with school staff to assist them in their work or to respond to school wide issues, problems, or concerns.
    - 5.1.3.3 Providing Resources and Access: Specialist provides school, district or external based resources to appropriate staff, students, or clients or gives information about the effective use of the resources.
    - 5.1.3.4 Communicating with Families: Specialist shares information about district or school educational programs and expectations for student or client performance. Specialist develops a mechanism for two way communication with families about student or client progress, behavior, personal needs, or concerns.
    - 5.1.3.5 Use of Assessment in Planning and Delivery of Services: Specialist makes the criteria of the assessment known to the students, monitors the students' progress, provides

descriptive feedback, and promotes student self-assessment and uses data to plan future instruction.

5.1.4 Professional Responsibilities

5.1.4.1 Maintaining Standards of Professional Practice: Specialist adheres to his or her professional standards of practice, including issues surrounding confidentiality.

5.1.4.2 Recording student data in a Record System: Specialist keeps student or client records relevant to their services and shares information with appropriate school personnel.

5.1.4.3 Growing and Developing Professionally: Specialist chooses and participates in professional development that is aligned with his or her professional needs and aligned with the needs of the school, district or students.

5.1.4.4 Reflecting on Professional Practice: Specialist engages in reflective thinking as an individual, as a team participant, or as a school and community member with the goal of improving professional practice and delivery of service.

5.1.5 Student Improvement

5.1.5.1 Measuring Student Improvement: Students collectively demonstrate appropriate levels of Student Growth as benchmarked against standards set by the Secretary based on input from stakeholder groups.

5.2 Notwithstanding 5.1 for the 2011-2012 school year, the first four (4) Appraisal Components, including any Appraisal Criteria specified for each, shall be the basis upon which the performance of a specialist shall be evaluated by a credentialed evaluator.

**15 DE Reg. 835 (12/01/11)**

**6.0 Summative Evaluation Ratings**

6.1 Each Appraisal Component shall be weighted equally and assigned a rating of Satisfactory or Unsatisfactory on the Summative Evaluation.

6.1.1 A satisfactory rating for each of the first four Appraisal Components shall mean the specialist has no more than one unacceptable rating on the Appraisal Criteria specified in each of the five (5) components set forth in 5.1.

6.1.2 A satisfactory rating for the Student Improvement Component shall mean that the specialist demonstrates acceptable performance by meeting the standards set by the Secretary pursuant to 5.1.5.1.

6.2 The Summative Evaluation shall also include one of four overall ratings: Highly Effective, Effective, Needs Improvement or Ineffective.

6.2.1 Highly Effective shall mean that the specialist has earned a Satisfactory Component Rating in at least four (4) of the five (5) Appraisal Components in accordance with 5.0, including an Exceeds rating in the Student Improvement Component meaning that the students collectively demonstrate high rates of student growth, as defined in the *DPAS II Revised Guide for Specialists*, as the same may be amended from time to time, developed pursuant to 4.0 of this regulation.

6.2.1.1 Notwithstanding 6.2.1 for the 2011-2012 school year, for a specialist the Summative Evaluation Rating "Highly Effective" shall not be applicable.

6.2.2 Effective shall mean that:

6.2.2.1 The specialist has earned a Satisfactory Component Rating in at least three (3) Appraisal Components, including a Satisfactory rating in the Student Improvement Component, and

6.2.2.2 The specialist does not meet the requirements for a Highly Effective rating found in 6.2.1.

6.2.2.3 Notwithstanding 6.2.2.1 and 6.2.2.2 for the 2011-2012 school year, "Effective" shall mean the specialist has earned a Satisfactory Component Rating three (3) or four (4) of the first four (4) Appraisal Components.

6.2.3 Needs Improvement shall mean that:

6.2.3.1 The specialist has earned one (1) or two (2) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, including a Satisfactory rating in the Student Improvement Component, or

6.2.3.2 The specialist has earned three (3) or four (4) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, and the specialist has earned an Unsatisfactory rating in the Student Improvement Component.

6.2.3.3 Notwithstanding 6.2.3.1 and 6.2.3.2 for the 2011-2012 school year, "Needs Improvement" shall mean the specialist has earned a Satisfactory Component Rating in two (2) of the first four (4) Appraisal Components.

6.2.4 Ineffective shall mean that:

6.2.4.1 The specialist has earned zero (0), one (1), or two (2) Satisfactory Component Ratings out of the five (5) Appraisal Components in accordance with 5.0, and

6.2.4.2 The specialist has earned an Unsatisfactory Component Rating in the School Improvement Component.

6.2.4.3 Notwithstanding 6.2.4.1 and 6.2.4.2 for the 2011-2012 school year, "Ineffective" shall mean the specialist has earned a Satisfactory Component Rating in zero (0) or one (1) of the first four (4) Appraisal Components.

6.2.5 If a specialist's overall Summative Evaluation rating is determined to be "Needs Improvement" for the third consecutive year, the rating shall be re-categorized as "Ineffective".

**15 DE Reg. 835 (12/01/11)**

## 7.0 Pattern of Ineffective Practice Defined

7.1 A pattern of ineffective practice shall be based on the most recent Summative Evaluation ratings of a specialist using the DPAS II process. Two consecutive ratings of Ineffective shall be deemed as a pattern of ineffective practice. The following chart shows the consecutive Summative Evaluation ratings that shall be determined to be a pattern of ineffective practice:

	Year 1	Year 2	Year 3
Ineffective	Ineffective	Ineffective	Needs Improvement
Needs Improvement	Ineffective	Needs Improvement	Ineffective
Needs Improvement	Needs Improvement	Needs Improvement	Needs Improvement
Ineffective	Needs Improvement	Needs Improvement	Ineffective
Ineffective	Needs Improvement	Ineffective	Ineffective
Needs Improvement	Ineffective	Ineffective	Ineffective

~~7.2 Notwithstanding the chart above, for the 2011-2012 school year a specialist with an overall Summative Rating of "Needs Improvement" or "Ineffective" that is based on the following component rating results shall not have that year's summative rating used for any purpose in the determination of a pattern of ineffective practice:~~

~~7.2.1 Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.2 Satisfactory Component ratings in three (3) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.3 Satisfactory Component ratings in two (2) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

**15 DE Reg. 835 (12/01/11)**

**8.0 Improvement Plan**

- 8.1 An Improvement Plan shall be developed for a specialist who receives an overall rating of Needs Improvement or Ineffective on the Summative Evaluation or a rating of Unsatisfactory on any component in 5.0 on the Summative Evaluation regardless of the overall rating.
- 8.1.1 An Improvement Plan shall also be developed if a specialist's overall performance during an observation is unsatisfactory. This unsatisfactory performance shall be noted by the evaluator on the Formative Feedback form by noting "PERFORMANCE IS UNSATISFACTORY" and initialing the statement.
- 8.2 ~~Notwithstanding 8.1, for the 2011-2012 school year, an Improvement Plan shall not be developed related to Appraisal Component 5.1.5, nor shall an Improvement Plan be developed for a specialist with an overall Summative Rating of "Needs Improvement" that is based on the following component rating results:~~
- 8.2.1 ~~Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~
- 8.32 The Improvement Plan shall contain the following:
- 8.32.1 Identification of the specific deficiencies and recommended area(s) for growth;
- 8.32.2 Measurable goals for improving the deficiencies to satisfactory levels;
- 8.32.3 Specific professional development or activities to accomplish the goals;
- 8.32.4 Specific resources necessary to implement the plan, including but not limited to, opportunities for the specialist to work with curriculum specialist(s), subject area specialist(s), instructional specialist(s) or others with relevant expertise;
- 8.32.5 Procedures and evidence that must be collected to determine that the goals of the plan were met;
- 8.32.6 Timeline for the plan, including intermediate check points to determine progress;
- 8.32.7 Procedures for determining satisfactory improvement.
- 8.32.8 Multiple observations and opportunity for feedback provided by a trained evaluator, a mentor, or lead specialist, or an instructional coach.
- 8.43 The Improvement Plan shall be developed cooperatively by the specialist and evaluator. If the plan cannot be cooperatively developed, the evaluator shall have the authority and responsibility to determine the plan as specified in 8.2 above.
- 8.54 The specialist shall be held accountable for the implementation and completion of the Improvement Plan.
- 8.65 Upon completion of the Improvement Plan, the specialist and evaluator shall sign the documentation that determines the satisfactory or unsatisfactory performance of the plan.

**15 DE Reg. 835 (12/01/11)**

**9.0 Challenge Process**

- 9.1 A specialist may challenge any rating on the Summative Evaluation, either a Component Rating or the Overall Rating, or a specialist may challenge the conclusions of an observation if the statement PERFORMANCE IS UNSATISFACTORY has been included on the Formative Feedback form. To initiate a challenge, a specialist shall submit additional information specific to the point of disagreement in writing within fifteen (15) working days of the date of the specialist's receipt of the Summative Evaluation. Such written response shall become part of the appraisal record and shall be attached to the Summative Evaluation. All challenges together with the record shall be forwarded to the supervisor of the evaluator unless the supervisor of the evaluator is also in the same building as the specialist. In this situation, the challenge together with the record shall be forwarded to a designated district or charter school level credentialed evaluator.
- 9.1.1 Within fifteen (15) working days of receiving the written challenge, the supervisor of the evaluator or the designated district or charter school level credentialed evaluator shall review the record which consists of all documents used in the appraisal process and the written challenge, meet with the specialist, and issue a written decision.

- 9.1.2 If the challenge is denied, the decision shall state the reasons for denial.
- 9.1.3 The decision of the supervisor of the evaluator or the designated district or charter school level credentialed evaluator shall be final.

**15 DE Reg. 835 (12/01/11)**

## 10.0 Evaluator Credentials

- 10.1 Evaluators shall have successfully completed the DPAS II training as developed by the Department of Education. Evaluators shall receive a certificate of completion which is valid for five (5) years and is renewable upon completion of professional development focused on DPAS II as specified by the Department of Education.
- 10.1.1 The Department of Education shall annually monitor evaluation implementation.
- 10.2 The training for the certificate of completion shall include techniques for observation and conferencing, content and relationships of frameworks for practice and a thorough review of the *DPAS II Revised Guide for Specialists*. Activities in which participants practice implementation of DPAS II procedures shall be included in the training.
- 10.3 The credentialing process shall be conducted by the Department of Education.

**15 DE Reg. 835 (12/01/11)**

## 11.0 Evaluation of Process

The Department of Education shall conduct an annual evaluation of the teacher appraisal process. The evaluation shall, at a minimum, include a survey of teachers and evaluators and interviews with a sampling of teachers and evaluators. Data from the evaluation and proposed changes to the *DPAS II Revised Guide for Teachers Specialists* shall be presented to the State Board of Education for review on an annual basis.

## 12.0 Procedures for the Termination of Services of Professional Employees

For purposes of 14 Del.C., Chapter 14 Procedures for the Termination of Services of Professional Employees only, the Appraisal Component 5.1.5 Student Improvement shall be considered "Satisfactory" for a specialist for the 2011-2012 school year.

**13 DE Reg. 1445 (05/01/10)**

**15 DE Reg. 835 (12/01/11)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**107A Specialist Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

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### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 108A

Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

**108A Administrator Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

## A. TYPE OF REGULATORY ACTION REQUIRED

Amendment to Existing Regulation

**B. SYNOPSIS OF SUBJECT MATTER OF THE REGULATION**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 108A Administrator Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised. The amendments are related to improvement plans and "Pattern of Ineffective Administrative Performance." There is also a clarification in section 6.2.1.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 5, 2012 to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.

**C. IMPACT CRITERIA**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is related to administrator evaluation and should support improved student achievement as measured against state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is related to administrator evaluation and does not specifically address all students' receiving an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amended regulation is related to administrator evaluation and does not specifically address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation is related to administrator evaluation and does not specifically address all students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change the authority or flexibility of decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amendments do not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority does not change because of the amendments.

8. Will the amended 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? The amendments are consistent with other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? The amendments do not significantly change the method for administrator evaluation which is the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There are no additional costs to the State or to the local boards or charter schools because of compliance to the regulation with the amendments.

**108A Administrator Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

*(Break in Continuity of Sections)*

**7.0 Pattern of Ineffective Administrative Performance**

- 7.1 A pattern of ineffective administrative performance shall be based on the most recent Summative Evaluation ratings of an administrator using the DPAS II process. Two consecutive ratings of "Ineffective" shall be deemed as a pattern of ineffective administration. The following chart shows the

consecutive Summative Evaluation ratings determined to be a pattern of ineffective administrative performance:

<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>
Ineffective	Ineffective	
Needs Improvement	Ineffective	Needs Improvement
Needs Improvement	Needs Improvement	Ineffective
Ineffective	Needs Improvement	Ineffective
Ineffective	Needs Improvement	Needs Improvement
Needs Improvement	Ineffective	Ineffective

~~7.2 Notwithstanding the chart above, for the 2011-2012 school year an administrator with an overall Summative Rating of "Needs Improvement" or "Ineffective" that is based on the following component rating results shall not have that year's summative rating used for any purpose in the determination of a pattern of ineffective administrative performance:~~

~~7.2.1 Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.2 Satisfactory Component ratings in three (3) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

~~7.2.3 Satisfactory Component ratings in two (2) of the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

**15 DE Reg. 836 (12/01/11)**

## **8.0 Improvement Plan**

8.1 An Improvement Plan shall be developed for an administrator who receives an overall rating of "Needs Improvement" or "Ineffective" on the Summative Evaluation or a rating of Unsatisfactory on any Appraisal Component in 5.0 on the Summative Evaluation regardless of the overall rating.

8.1.1 An Improvement Plan shall also be developed if an administrator's overall performance during the Formative Process is unsatisfactory. This unsatisfactory performance shall be noted by the evaluator(s) on the Formative Feedback form by noting "PERFORMANCE IS UNSATISFACTORY" and initialing the statement.

~~8.2 Notwithstanding 8.1, for the 2011-2012 school year, an Improvement Plan shall not be developed related to Appraisal Component 5.1.5, nor shall an Improvement Plan be developed for an administrator with an overall Summative Rating of "Needs Improvement" that is based on the following component rating results:~~

~~8.2.1 Satisfactory Component ratings in the first four (4) components pursuant to 5.1, with an Unsatisfactory Component rating in 5.1.5 Student Improvement.~~

8.32 The Improvement Plan shall contain the following:

8.32.1 Identification of the specific deficiencies and recommended area(s) for growth;

8.32.2 Measurable goals for improving the deficiencies to satisfactory levels;

8.32.3 Specific professional development or activities to accomplish the goals;

8.32.4 Specific resources necessary to implement the plan, including but not limited to, opportunities for the administrator to work with curriculum specialist(s) or others with relevant experience;

8.32.5 Procedures and evidence that must be collected to determine that the goals of the plan were met;

8.32.6 Timeline for the plan, including intermediate check points to determine progress;

8.32.7 Procedures for determining satisfactory improvement.

8.34 Any state or federally funded professional development that is completed during the time that the Improvement Plan is in effect shall be certified by the Department and shall be directly related to areas identified as needing improvement.

- 8.54 The Improvement Plan shall be developed cooperatively by the administrator and evaluator. If the plan cannot be cooperatively developed, the evaluator shall have the authority and responsibility to determine the plan as specified in 8.2 above.
- 8.65 The administrator shall be held accountable for the implementation and completion of the Improvement Plan.
- 8.76 Upon completion of the Improvement Plan, the administrator and evaluator(s) shall sign the documentation that determines the satisfactory or unsatisfactory performance of the plan.

**15 DE Reg. 836 (12/01/11)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**108A Administrator Appraisal Process Delaware Performance Appraisal System (DPAS II) Revised**

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**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
**14 DE Admin. Code 247**

**Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)**

**247 Delaware Post Secondary Internship Program at The Washington Center (TWC) for Internships and Academic Seminars**

**A. Type of Regulatory Action Required**

Reauthorization of Existing Regulation

**B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education intends to amend 14 **DE Admin. Code** 247 Delaware Post Secondary Internship Program at The Washington Center (TWC) for Internship and Academic Seminars. This regulation was reviewed as part of the five year review cycle. It was determined that amendments were not needed.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before **April 5, 2012** to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.

**C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? This regulation is related to post secondary internships and not directly related to improving student achievement as measured against the state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? This regulation is related to post secondary internships in our two flagship public universities.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? This regulation is related to post secondary internships and not directly related to students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? This regulation is related to post secondary internships and not directly related to improving students' legal right.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? This regulation is related to post secondary internships and does not affect local boards or schools.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? This regulation is related to post secondary internships and does not affect local boards or schools.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? There were no amendments to the current regulation.

8. Will the amended 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? The regulation is consistent with the state's educational goals.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing this program.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There are no additional costs to the state since the regulation was not changed.

### **247 Delaware Post Secondary Internship Program at The Washington Center (TWC) for Internships and Academic Seminars**

The Washington Center (TWC) for Internships and Academic Seminars is an independent, nonprofit educational organization founded in 1975. Its mission is to utilize the resources of the nation's capitol to provide participatory learning experiences in order to enhance students' academic, civic and professional development. The Washington Center (TWC) seeks to promote future leadership for public, private and nonprofit sectors of our society. The purpose of this regulation is to define the terms and the procedures used for the operation of this internship program.

#### **1.0 Definitions:**

**"Department"** means the Delaware Department of Education

**"Financial Aid Package"** means the identification of all of the costs to the student to participate in the internship program and all sources of funding to meet those costs. Funding sources may include scholarships, grants, tuition waivers, loans, family contributions and contributions from the Student Intern.

**"Grant"** means funds that are applied against a student's cost of attending The Washington Center (TWC) for Internships and Academic Seminars program. These funds do not have to be reimbursed by the Student Intern.

**"Student Intern(s)"** means a matriculated student at Delaware State University or the University of Delaware who has been selected by his or her respective University to participate in The Washington Center (TWC) for Internships and Academic Seminars program and is placed in a full time internship for one semester at The Washington Center (TWC) for Internships and Academic Seminars.

**"University"** means the two universities participating in The Washington Center (TWC) for Internships and Academic Seminars program, Delaware State University and the University of Delaware.

#### **2.0 Division of Funds**

Funds appropriated to the Department for the Washington Center (TWC) for Internships and Academic Seminars shall be divided evenly between Delaware State University and the University of Delaware for the purpose of providing Grants to Student Interns at The Washington Center (TWC) for Internships and Academic Seminars. The maximum Grant for a Student Intern shall be a one time grant of \$5,000 per student for one semester, provided further that grant amounts per student may change based on the appropriation made by the General Assembly to fund this program.

**3.0 Each University shall be responsible for the following:**

- 3.1 Identifying a University liaison to The Washington Center (TWC) for Internships and Academic Seminars;
- 3.2 Establishing a selection process for the applicants;
- 3.3 Identifying all sources of financial aid for the Student Interns; and
- 3.4 Arranging for each Student Intern to receive between 12 and 16 credits for a successful term spent at the Washington Center (TWC) for Internships and Academic Seminars.

**4.0 Submission of Financial Aid Packages**

Each University shall submit Financial Aid Packages for up to eight (8) applicants listed in priority order to the Department's Student Assistance Program in accordance with timelines established by The Washington Center (TWC); provided further that the number of applicants may change based on the appropriation made by the General Assembly to fund this program.

- 4.1 The Department's Student Assistance Program staff shall review the Financial Aid Packages and forward the approved Financial Aid Packages to the appropriate University for their selection of the four Student Interns. The number of Student Interns that may be selected to participate in this internship shall be based on 2.0 and 4.0 of this regulation.
- 4.2 If either University selects fewer than their allotted number of Student Interns for the program, the unused funds at that University shall be made available to the other University in order to provide for additional internships.

**5.0 Annual Reports Required**

The Washington Center (TWC) for Internships and Academic Seminars shall provide annual reports to the Delaware Department of Education on the Student Intern program.

**10 DE Reg. 1142 (01/01/07)**

**10 DE Reg. 1430 (03/01/07)**

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**DEPARTMENT OF HEALTH AND SOCIAL SERVICES****DIVISION OF LONG TERM CARE RESIDENTS PROTECTION**

Statutory Authority: 16 Delaware Code, Section 1101(a) (16 Del.C. §1101(a))

**PUBLIC NOTICE****3320 Intensive Behavioral Support and Educational Residence**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 29 of the **Delaware Code**, Section 7971, (d), (1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing the creation of Regulation 3320, Intensive Behavioral Support and Educational Residences (IBSER) to regulate facilities within this new licensure category.

These regulations were originally published as proposed in the November 1, 2011 *Register*, Volume 15, Issue 15, on page 600. As a result of substantial public comments received by the Division, substantive changes were made to the regulations resulting in this re-posting.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS, Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by April 1, 2012.

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The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

## SUMMARY OF PROPOSED CHANGES

This regulatory proposal creates regulations for various aspects and business practices of these facilities as listed below:

- Definition
- Authority
- Glossary
- Licensing requirements and procedures
- General requirements
- Physical Plant
- Kitchen and food storage
- Emergencies and disasters
- Administration
- Description of services
- Maintenance of records
- Insurance
- Personnel policies and procedures
- Orientation and training of employees and volunteers
- Personnel records
- Use of volunteers
- Human rights
- Abuse and neglect
- Use of restraints
- Health
- Administration or Assistance with Self-Administration of Medication
- Universal Precautions
- Incident reports
- Facility closure
- Waivers and severability

### Statutory Authority

29 Del.C. §7971,(d),(1), Duties and functions of the Division

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**3320 Intensive Behavioral Support and Educational Residence**

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### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

### PUBLIC NOTICE

**Medicaid State Plan Governing Payments for Disproportionate Share Hospital**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512 and with 42 CFR §447.205, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan regarding the reimbursement methodology for *Disproportionate Share Hospital*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

### **SUMMARY OF PROPOSAL**

Pursuant to the public notice requirements of Social Security Act §1902(a)(13)(A) and 42 CFR §447.205, the Division of Medicaid and Medical Assistance (DMMA) provides notice to the public that the agency intends to amend the Title XIX Medicaid State Plan related to hospital payments under the *Disproportionate Share Hospital* program.

#### **Statutory Authority**

- Social Security Act §1923(j), *Annual Reports and Other Requirements Regarding Payment Adjustments*;
- Social Security Act §1902(a)(13)(A), *Public process for determination of rates of payment*;
- 42 CFR §447.205, *Public Notice of Changes in Statewide Methods and Standards for Setting Payment Rates*;
- 42 CFR §447, *Payments for Services*; and,
- 42 CFR §455, Subpart D, *Independent Certified Audit of State Disproportionate Share Hospital Payment Adjustments*

#### **Background**

Federal law requires that state Medicaid programs make Disproportionate Share Hospital (DSH) payments to qualifying hospitals that serve a large number of Medicaid and uninsured individuals.

Federal law establishes an annual DSH allotment for each state that limits Federal Financial Participation (FFP) for total statewide DSH payments made to hospitals. Federal law also limits FFP for DSH through the hospital-specific DSH limit.

Under the hospital-specific DSH limit, FFP is not available for state DSH payments that are more than the hospital's eligible uncompensated care cost, which is the cost of providing inpatient hospital and outpatient hospital services to Medicaid patients and the uninsured, minus payments received by the hospital on or on the behalf of those patients.

##### *DSH Audit and Reporting Requirements*

For states to receive FFP for DSH payments, federal law requires states to submit an independent certified audit and an annual report to the Secretary describing DSH payments made to each DSH hospital.

The report must identify each disproportionate share hospital that got a DSH payment adjustment, and provide any other information the Secretary needs to ensure the appropriateness of the payment amount. The annual certified independent audit includes specific verifications to make sure all DSH payments are appropriate.

#### **Summary of Proposal**

The Disproportionate Share Hospital (DSH) program was created by Congress to enable qualifying hospitals which serve a "disproportionate share" of low income individuals, such as people with Medicaid and who are uninsured, to receive supplemental payments to address uncompensated care. The Medicaid State Plan must

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include a description of the criteria used to designate hospitals as DSH hospitals and a definition of the formulas used to calculate the DSH payments.

Under the existing disproportionate share criteria in the Delaware Medicaid State Plan, only the Delaware Psychiatric Center (DPC) has qualified for Medicaid DSH payments. Although hospitals in the private sector could potentially qualify for DSH payments under the current rules, no private hospital has met the criteria thus far. Under the proposed amendment, the new policy will increase the likelihood that additional private hospitals in Delaware may qualify for DSH payments. The new policy also sets forth a process and a timeline for hospitals to apply and be determined eligible for DSH payments. The policy further establishes a methodology for calculating the amount of DSH payments a hospital can receive. DSH payments are funded from a combination of Federal and State funds.

The proposed amendment will become effective May 1, 2012.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

## Fiscal Impact Statement

Funds have been appropriated in the FY12 state budget to make payments to hospitals that meet the new criteria. The Governor's Recommended Budget for FY13 includes ongoing funding to make DSH payments under the new regulations.

	Fiscal Year 2012	Fiscal Year 2013
General (State) funds	\$4.0 million	\$4.0 million
Federal funds	\$4.5 million	\$4.9 million

## DMMA PROPOSED REGULATION #12-06

### REVISION:

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE: **DELAWARE**  
METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES –  
INPATIENT HOSPITAL CARE  
DISPROPORTIONATE SHARE HOSPITAL

~~In accordance with the provisions of Section 1923(b)(1)(A)(B) of the Social Security Act, the Delaware Medicaid Program will determine whether a hospital qualifies as "serving a disproportionate share of the poor".~~

~~Medicaid defines uncompensated care as the cost of services to Medicaid patients, less the amount paid by the State under the non-disproportionate share hospital payment provisions of the State Plan. The cost of services to uninsured patients (those who have no health insurance or source of third party payments) less the amount of payments made by these patients is included in the definition of uncompensated care. Any hospital meeting the definition of a disproportionate share hospital will receive payments in accordance with Section 1923 (c)(3). Hospitals meeting the standard are entitled to receive payments of ninety percent (90%) of its uncompensated care amount.~~

~~Medicaid requires that the 1923(d)(3) provision of the Act be met, which states that any disproportionate share hospital have a Medicaid utilization rate of a least one percent (1%).~~

~~With the exceptions noted in 1923(d)(2)(A), Medicaid also requires that the 1923(d) provision of the Act be met, which states that any disproportionate share hospital have at least two (2) obstetricians who have staff privileges at the hospital and who have agreed to provide obstetric services to individuals who are entitled to medical assistance for such services under the State Plan.~~

# PROPOSED REGULATIONS

~~Medicaid requires that the payment adjustments received by all disproportionate share hospitals not exceed, in the aggregate, the established limits each Federal fiscal year as expressed in Section 1923(f) of the Act as published annually in the HCFA Federal Register. Medicaid also requires that the payment adjustments made to individual hospitals not exceed one hundred percent (100%) of their established limits for the State fiscal year as expressed in Section 1923(g) of the Act.~~

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE: **DELAWARE**  
METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES –  
INPATIENT HOSPITAL CARE  
DISPROPORTIONATE SHARE HOSPITAL

### Disproportionate Share Hospital (DSH) Payments

Delaware hospitals participating in the Delaware Medical Assistance (Medicaid) program that serve a disproportionate share of Medicaid and low income patients may be eligible for reimbursement from the Delaware Hospital DSH Fund. DHSS, DMMA has established criteria regarding the hospital qualifications and the maximum amount of reimbursement for hospitals that apply. For purposes of the DSH program, hospitals that have multiple geographic locations providing inpatient services will be treated as a single hospital when the hospital submits a consolidated Medicare cost report for its locations.

#### DSH Definitions

Note: The terms “costs”, “charges” and “revenue/payment”, as defined below, do not include the costs, charges and revenue/payment related to serving inmates of public institutions for which Medicaid funds are not available.

- : Delaware Hospital DSH Fund – the total annual amount of funds available for distribution to DSH qualified hospitals. The amount is computed each year by the Medicaid agency based on the availability of state matching funds, the FMAP up to the maximum of Delaware’s annual Federal DSH allotment.
- : Hospital Specific DSH Limit – the maximum annual DSH payment amount a hospital can receive in accordance with section 42 CFR 447.299 (c) (16).
- : Low Income Utilization Rate (per section 1923 (b) (3) of the Social Security Act) - In general, for an annual period, the Low Income Utilization Rate is the sum of the percentages computed by dividing:
  - : Medicaid payments for inpatient and outpatient care by total hospital inpatient and outpatient payments received from all sources, plus
  - : Inpatient charity care charges by total inpatient charges.
- : Medicaid Inpatient Utilization Rate (per section 1923 (b) (2) of the Social Security Act) - In general, for an annual period, the Medicaid Inpatient Utilization Rate is the percentage computed by dividing inpatient days attributable to patients who were eligible for Medicaid by total inpatient hospital bed days.
- : Revenue – as used in connection with the DSH program means payments received from any source.

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE: **DELAWARE**  
METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES –  
INPATIENT HOSPITAL CARE

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**Disproportionate Share Hospital (DSH) Payments (cont'd)**

- Uncompensated Care – as used in connection with the DSH program means the sum of the differences between:
  - The annual COST of inpatient and outpatient services to Medicaid eligible patients minus the inpatient and outpatient REVENUE (payments) received for Medicaid eligible patients (including both fee-for-service payments and payments made by Medicaid managed care organizations); plus
  - The annual COST of inpatient and outpatient hospital services provided to uninsured patients (excluding the cost of providing physician services to the uninsured) minus any payments received from or on behalf of the uninsured (including any Federal section 1011 payments for eligible aliens)
- Uninsured – as used in connection with the DSH program means a person who has no source of third party coverage (creditable coverage as defined in Federal regulations at 45 CFR 144 and 146). However, if adopted in final form, the term uninsured shall be defined in accordance with 42 CFR 447.295

**(a) Minimum Criteria:**

No hospital shall receive disproportionate share hospital payments unless it meets the criteria in this section (a) and other criteria as specified in sections (b) or (c) or (d):

- 1) The hospital has a Medicaid Inpatient Utilization rate of at least 1%, and
- 2) The hospital has at least two obstetricians (or in the case of a rural hospital, two physicians) with staff privileges at the hospital who have agreed to provide obstetric services to individuals who are entitled to Medicaid as per section 1923(d)(1) and (2) of the Social Security Act. This requirement does not apply to a hospital which did not offer non-emergency obstetric services to the general population as of December 21, 1987 or to a hospital that predominantly serves individuals under 18 years of age, and
- 3) The hospital's inpatient facility is physically located within the geographic boundaries of the State of Delaware, and
- 4) The hospital must agree to comply and cooperate with the DSH audit requirements, and
- 5) The hospital must submit a timely application with accurate data in accordance with section (f) below unless a waiver is granted by DMMA.

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**Disproportionate Share Hospital (DSH) Payments (cont'd)**

Hospitals that meet the criteria in this section (a) must also meet the criteria identified in either section (b) or (c) or (d) below in order to qualify for the Delaware DSH program.

**(b) Additional Federal Criteria**

If a hospital meets the criteria specified in section (a) above, the following subparagraphs 1 and 2 describe additional criteria that a hospital must meet to qualify as a disproportionate share hospital unless the hospital qualifies under sections (c) or (d):

- 1) The hospital's Medicaid inpatient utilization rate is at least one standard deviation above the mean Medicaid inpatient utilization rate for hospitals receiving Medicaid payment in the State; OR
- 2) The hospital's low income utilization rate exceeds 25%.

**(c) Delaware-Specific DSH Criteria for Acute Care General Hospitals**

If a hospital meets the criteria specified in section (a) above, a hospital may qualify to receive disproportionate share hospital payments under this section if it meets all of the following criteria:

# PROPOSED REGULATIONS

1) It is a not-for-profit hospital and is categorized under Delaware Medicaid criteria as an acute care general hospital and is not categorized as an Institution for Mental Diseases (IMD), and

2) The hospital has an inpatient facility located within an incorporated city in Delaware with a population greater than 50,000 and provides obstetric services at that facility to the general population including both fee-for-service and managed care Medicaid/CHIP recipients, and

3) During the consecutive twenty four (24) month period immediately prior to the month of issuance of the DSH payment, the hospital has been an enrolled provider with all participating Delaware Medicaid/CHIP managed care organizations and the Delaware Medicaid/CHIP fee-for-service program for all inpatient and outpatient services offered by the hospital, and

4) The hospital's low income utilization rate exceeds 15%.

(d) Delaware Specific DSH Criteria for Psychiatric Hospitals (Institutions of Mental Disease - IMD):

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### **Disproportionate Share Hospital (DSH) Payments (cont'd)**

If a hospital meets the criteria specified in section (a) above, a psychiatric hospital (IMD) may qualify as a disproportionate share hospital under this section if it meets all of the following criteria:

1) It must be a public psychiatric hospital (owned or operated by an agency of Delaware State government), and

2) It must serve a disproportionate share of low-income patients. For the purpose of this section (d), the term "disproportionate share" shall be defined as follows: sixty percent (60%) or more of the service revenue is attributable to a combination of the following:

- Public funds
- Bad debts
- Free care

(e) Payments to DSH Qualified Hospitals Under Delaware's Disproportionate Share Program:

1) DSH Payment Limits – All Delaware DSH Qualified Hospitals

A) The state share of payments made to all DSH qualified hospitals cannot exceed the State's maximum annual Delaware Hospital DSH Fund.

Per section 1923(f)(2) of the Social Security Act, an annual maximum Federal DSH allotment is computed for each state each federal fiscal year. Federal DSH funds can only be spent up to the corresponding amount of state matching funds that are available. The amount of federal DSH funds, the amount of state matching funds and the Medicaid federal/state match rate (FMAP) could change every year. Therefore, each year, the exact amount of the Delaware Hospital DSH Fund cannot be known in advance and will be computed by DMMA each year.

B) The amount of an annual DSH payment to an individual hospital must be the lesser of:

- i) the Hospital-Specific DSH limit; or
- ii) the amount determined in accordance with sections (e) (2), (e) (3) and (e) (4) below, or
- iii) the amount determined in accordance with section (e) (1) (C) below.

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**Disproportionate Share Hospital (DSH) Payments (cont'd)**

C) In the event that the State's annual Delaware Hospital DSH Fund amount is not sufficient to make all of the payments described in sections (e) (2), (e) (3) and (e) (4) below, then payments will be made as follows:

- i) from the available funds in the Delaware Hospital DSH Fund, the full amount of DSH payments or the total amount of the Delaware Hospital DSH Fund, whichever is less, will be made first to hospitals that qualify under section (d) above in accordance with section (e) (2) below. If the funds available are not sufficient to make the full payment amount to each hospital qualifying under section (e) (2), then the remaining funds will be allocated proportionately based on each hospital's percentage of the total payments due to all hospitals qualifying under section (e) (2).
- ii) from the amount of any funds remaining in the Delaware Hospital DSH Fund after the payments described in section (e) (1) (C) (i) above, the full amount of DSH payments or the total amount remaining in the Delaware Hospital DSH Fund, whichever is less, will be made to hospitals that qualify under section (e) (3) below. If the funds remaining are not sufficient to make the full payment amount to each hospital qualifying under section (e) (3), then the remaining funds will be allocated proportionately based on each hospital's percentage of the total payments due to all hospitals qualifying under section (e) (3).
- iii) from the amount of any funds remaining in the Delaware Hospital DSH Fund after the payments described in sections (e) (1) (C) (i) and (ii) above, payments will be made to other hospitals that qualify in accordance with section (e) (4) below. If the funds remaining are not sufficient to make the full payment amount to the other qualifying hospitals, then the remaining funds will be allocated proportionately based on each of the other qualifying hospital's percentage of the total payments due to all other qualifying hospitals in accordance with section (e) (4).

**2) DSH Payments to Psychiatric Hospitals:**

Per section 19239h)(2)(A) of the Social Security Act, no more than 33 percent of the annual Federal DSH allotment for Delaware will be used with the appropriate amount of State matching funds to make an annual DSH payment to psychiatric hospitals that meet the Delaware DSH Criteria in sections (b) and/or (d) above. These annual DSH payments will be made in a lump sum to each qualifying hospital. Unless the payment amount is restricted by other sections of this DSH policy, a psychiatric hospital that meets the criteria specified in section (b) but not section (d) above will receive a payment in accordance with section (e) (4) (A) or (C) below.

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**Disproportionate Share Hospital (DSH) Payments (cont'd)**

A psychiatric hospital that meets the criteria specified in section (d) above will receive a payment of 33 percent of the annual Federal DSH allotment for Delaware plus the appropriate amount of State matching funds minus the total amount of any payments made to other psychiatric hospitals

**3) Payments to Hospitals that Meet the Delaware DSH Criteria in section (c) above**

# PROPOSED REGULATIONS

Unless the payment amount is restricted by other sections of this DSH policy, each hospital that meets the criteria specified in section (c) above shall receive an annual payment under Delaware's DSH program equal to the Hospital Specific DSH limit. DSH payments will be made in a lump sum each year.

4) Payments to Hospitals that Meet the Delaware DSH Criteria in section (b) above

Unless the payment amount is restricted by other sections of this DSH policy, each hospital that qualifies under the criteria specified in section (b), but does not meet the criteria specified in sections (c) and (d) above will receive a payment of:

- A) \$10,000 if the hospital is a psychiatric hospital that does not meet the criteria specified in section (d) above and has been an enrolled provider with all participating Delaware Medicaid/CHIP managed care organizations and the Delaware Medicaid/CHIP fee-for-service program for both inpatient and outpatient services offered by the hospital during the consecutive twenty four (24) month period immediately prior to the month of issuance of the DSH payment, or
- B) \$1,000,000 if the hospital is not a psychiatric hospital and has been an enrolled provider with all participating Delaware Medicaid/CHIP managed care organizations and the Delaware Medicaid/CHIP fee-for-service program for both inpatient and outpatient services offered by the hospital during the consecutive twenty four (24) month period immediately prior to the month of issuance of the DSH payment; or
- C) \$5,000 if the hospital has not been an enrolled provider with all Delaware Medicaid/CHIP managed care organizations and the Delaware Medicaid/CHIP fee-for-service program for both inpatient and outpatient services offered by the hospital during the consecutive twenty four (24) month period immediately prior to the month of issuance of the DSH payment.

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
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**Disproportionate Share Hospital (DSH) Payments (cont'd)**

(f) Application Process:

Each year after June 30, the Medicaid agency will compute the amount of funds available in the Delaware Hospital DSH Fund. After September 30 each year, the Medicaid agency will use the applications timely submitted by the hospitals to compile the data and perform any necessary calculations to determine the DSH payment amounts for each hospital. A hospital cannot qualify under section (b) (1) above unless a completed application is timely received from all hospitals in the state that receive Medicaid payments. The other qualifying criteria are hospital specific.

A hospital requesting Medicaid DSH payments must submit a completed application in a format approved by the Medicaid agency. The application must be received on or before September 30 of each year. The application will provide hospital specific inpatient and outpatient financial and other data for the hospital's fiscal year that ended in the prior calendar year.

On or before December 31 of each year, the Medicaid agency will send a written notice of action taken on each hospital's application. Each hospital that applied will be informed either that it does not qualify or that it qualifies and the amount of the hospital's DSH payment. Once a year, the Medicaid agency will issue the full DSH payment amount in a lump sum to hospitals that qualify for a payment.

In the initial year of the Delaware DSH program, the timing for submissions of applications for a hospital's fiscal year that ended in 2011 and the timing of payments to qualifying hospitals will be announced by the Medicaid agency after this DSH State Plan Amendment is approved.

(g) Audit Requirement:

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Within one (1) year after receiving a DSH payment, the Medicaid agency will arrange for an independent audit of each hospital that receives a DSH payment in accordance with section 1923 (j) (2) of the Social Security Act. The auditor will take such steps as determined necessary to verify:

- 1) the extent to which the hospital reduced uncompensated care costs to reflect the total DSH payment received by the hospital; and
- 2) that the total amount of the DSH payment received by the hospital did not exceed the hospital-specific DSH payment limit; and

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### **Disproportionate Share Hospital (DSH) Payments (cont'd)**

- 3) that only the uncompensated care costs of providing inpatient and outpatient hospital services to Medicaid and uninsured individuals as described in section 1923 (g) (1) (A) of the Social Security Act were included in the calculation of the hospital specific limit; and
- 4) that the hospital included all Medicaid payments, including supplemental payments, in the calculation of the hospital-specific limits.

The audit must also verify that DMMA has documented and retained a record of costs, claimed expenditures, uninsured costs, payments made on behalf of the uninsured and other pertinent information related to DSH payments.

(h) Disposition of Overpayments or Underpayments:

If the data upon which a DSH payment is based is revised as a result of an audit or for any other reason and if, based on the revised data, it is determined that a hospital was paid more than it should have received according to the rules of the program, the hospital is required to reimburse the state the full amount of the overpayment within 60 days of notification of the overpayment. The Medicaid agency, including the Medicaid managed care companies, are authorized to recoup the full amount of the overpayment by withholding payments due to the hospital with the overpayment from claims being submitted to the program.

If the data upon which a DSH payment is based is revised as a result of an audit or for any other reason and if, based on the revised data, it is determined that a hospital was paid less than it should have received according to the rules of the program, no retroactive adjustments will be made by the Medicaid agency.

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### **DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

### **PUBLIC NOTICE**

### **Medicaid Provider Screening and Enrollment**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan regarding *Medicaid Provider Screening and Enrollment*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

### **SUMMARY OF PROPOSAL**

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding *Medicaid Provider Screening and Enrollment*.

#### **Statutory Authority**

- Patient Protection and Affordable Care Act (Pub. L. No. 111-148 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152)), together known as the Affordable Care Act. Specifically, Section 6401, Provider Screening and Other Enrollment Requirements Under Medicare, Medicaid, and CHIP;
- 42 CFR Part 455 Subpart E

#### **Background**

Section 6401(a) of the Affordable Care Act, as amended by section 10603 of the Affordable Care Act, establishes procedures under which screening is conducted with respect to providers of medical or other items or services and suppliers under Medicare, Medicaid, and CHIP. Section 1866(j)(2)(B) of the Act requires the Secretary to determine the level of screening to be conducted according to the risk of fraud, waste, and abuse with respect to the category of provider or supplier. Section 1866(j)(2)(C) of the Act requires the Secretary to impose a fee on each institutional provider of medical or other items or services or supplier, to be used by the Secretary for program integrity efforts. Section 6401(b) of the Affordable Care Act includes requirements for States to comply with the process of screening providers and suppliers and imposing temporary enrollment moratoria for the Medicaid program as established by the Secretary. The Centers for Medicare and Medicaid Services (CMS) implemented these requirements with Federal regulations at 42 CFR Part 455 Subpart E. These regulations were published in the Federal Register, Volume 76, February 2, 2011, and were effective March 25, 2011.

#### **Summary of Proposal**

CMS recently issued a State plan preprint to assure compliance with and implementation of Section 6401.

The Division of Medicaid and Medical Assistance (DMMA) intends to make the appropriate changes to the Medicaid State Plan pertaining to the federally required changes in Medicaid provider enrollment processes pursuant to the Affordable Care Act of 2010. As such, the Medicaid state plan will be amended at General Program Administration, 4.46 - Provider Screening and Enrollment.

Initiated to combat fraud and abuse, these directives apply to newly enrolling providers and currently enrolled providers. As implementation of this mandate moves forward, DMMA will notify providers via provider alerts, provider newsletters, remittance advice banners and the Delaware Medical Assistance Program (DMAP) website.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

#### **Fiscal Impact Statement**

These revisions impose no increase in cost on the General Fund.

The costs for system changes are already budgeted in the General Fund.

There will be additional costs for some providers associated with the enrollment/revalidation fee, criminal background checks and fingerprinting.

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**DMMA PROPOSED REGULATION #12-04****REVISION:**

79aa

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: **DELAWARE****4.46 Provider Screening and Enrollment**Citation

1902(a)(77)  
1902(a)(39) of  
the Act adds 1902(kk);  
P.L. 111-148 and  
P.L. 111-152

The State Medicaid agency gives the following assurances:

42 CFR 455

PROVIDER SCREENING

Subpart E

Assures that the State Medicaid agency complies with the process for screening providers under section 1902(a)(39), 1902(a)(77) and 1902(kk) of the Act.

42 CFR 455.410

ENROLLMENT AND SCREENING OF PROVIDERS

Assures enrolled providers will be screened in accordance with 42 CFR 455.400 et seq

Assures that the State Medicaid agency requires all ordering or referring physicians or other professionals, who are not enrolled in Medicare, to be enrolled under the State plan or under a waiver of the Plan as participating providers.

42 CFR 455.412

VERIFICATION OF PROVIDER LICENSES

Assures that the State Medicaid agency has a method for verifying providers licensed by a State and that such providers' licenses have not expired or have no current limitations at the time of enrollment or recertification.

42 CFR 455.414

REVALIDATION OF ENROLLMENT

Assures that providers will be revalidated regardless of provider type at least every 5 years.

79ab

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: **DELAWARE****4.46 Provider Screening and Enrollment Continued**

42 CFR 455.416

TERMINATION OR DENIAL OF ENROLLMENT

Assures that the State Medicaid agency will comply with 1902(a)(39) of the Act and with the requirements outlined in 42 CFR 455.416 for all terminations or denials of provider enrollment.

42 CFR 455.420

REACTIVATION OF PROVIDER ENROLLMENT

X Assures that any reactivation of a provider will include re-screening and payment of application fees as required by 42 CFR 455.460.

42 CFR 455.422

**APPEAL RIGHTS**

X Assures that all terminated providers and providers denied enrollment as a result of the requirements of 42 CFR 455.416 will have appeal rights available under procedures established by State law or regulation.

42 CFR 455.432

**SITE VISITS**

X Assures that pre-enrollment and post enrollment site visits of providers who are in "moderate" or "high risk" categories will occur

42 CFR 455.434

**CRIMINAL BACKGROUND CHECKS**

X Assures that providers as a condition of enrollment will be required to consent to criminal background checks including fingerprints if required to do so under State law or by the level of screening based on risk of fraud, waste or abuse for that category of provider.

42 CFR 455.436

**FEDERAL DATABASE CHECKS**

X Assures that the State Medicaid agency will perform Federal database checks on all providers or any person with an ownership or controlling interest or who is an agent or managing employee of the provider.

42 CFR 455.440

**NATIONAL PROVIDER IDENTIFIER**

X Assures that the State Medicaid agency requires the National Provider Identifier of any ordering or referring physician or other professional to be specified on any claim for payment that is based on an order or referral of the physician or other professional.

79ac

**STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT**State/Territory: **DELAWARE****4.46 Provider Screening and Enrollment Continued**

42 CFR 455.450

**SCREENING LEVELS FOR MEDICAID PROVIDERS**

X Assures that the State Medicaid agency complies with 1902(a)(77) and 1902(kk) of the Act and with the requirements outlined in 42 CFR 455.450 for screening levels based upon the categorical risk level determined for a provider.

42 CFR 455.470

**TEMPORARY MORATORIUM ON ENROLLMENT OF NEW PROVIDERS OR SUPPLIERS**

X Assures that the State Medicaid agency complies with any temporary moratorium on the enrollment of new providers or provider types imposed by the Secretary under section 1866(j)(7) and 1902(kk)(4) of the Act, subject to any determination by the State and written notice to the Secretary that such a temporary moratorium would not adversely impact beneficiaries' access to medical assistance.

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## DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

### PUBLIC NOTICE

#### Food Supplement Program: 2027 Disqualification of Individuals Convicted of Drug Related Offenses

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Social Services is proposing to amend policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program, specifically, *Disqualification of Individuals Convicted of Drug Related Offenses*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy, Program & Development Unit, Division of Social Services, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

### SUMMARY OF PROPOSAL

The proposal described below amends policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program, specifically, *Disqualification of Individuals Convicted of Drug Related Offenses*.

#### Statutory Authority

- 146<sup>th</sup> General Assembly, Senate Bill #12, *An Act to Amend Title 31 of the Delaware Code Relating to the Food Stamp Program*
- 7 CFR §273.11(m), *Individuals Convicted of Drug-Related Felonies*

#### Background

Signed into law by the Governor on July 22, 2011, Senate Bill #12 (SB 12) removes the prohibition against persons convicted of any drug felony from receiving federal food benefit assistance.

#### Summary of Proposed Change

**DSSM 2027**, *Disqualification of Individuals Convicted of Drug Related Offenses*: SB 12 eliminated the bar to receipt of food benefits for those convicted of a felony drug conviction. This policy change removes text from the policy manual that says individuals convicted of a felony drug conviction are ineligible for food benefits. DSSM 2027 was inadvertently omitted when other related sections were removed from the manual.

SB 12 was effective upon the Governor's signature. The rule affected benefits beginning July 1, 2011.

#### DSS PROPOSED REGULATION #12-03

#### REVISIONS:

#### 2027 Disqualification of Individuals Convicted of Drug Related Offenses

##### *For Cash Assistance:*

Individuals convicted under Federal or State law of any offense which is classified as a felony that has the element of possession, use or distribution of controlled substances shall not be eligible for cash assistance.

# PROPOSED REGULATIONS

This provision does not apply to individuals convicted of such offenses which occurred prior to August 22, 1996, the date of enactment of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Determine income, resources, and deductions according to DSSM 4003.2 if the individual is a parent payee. Exclude the income and resources of the individual if the person is a non-parent payee.

## *For Food Stamps:*

~~Individuals convicted under Federal or State law of any offense which is classified as a felony that has the element of distribution of controlled substances shall not be eligible for benefits under the food stamp program.~~

~~Individuals convicted under Federal or State law of any offense which is classified as a felony that has the element of possession or use of controlled substances shall not be eligible for benefits under the food stamp program unless they meet the following conditions:~~

- ~~1. Is currently participating in a substance abuse treatment program approved by DHSS; or~~
- ~~2. Is currently enrolled in a substance abuse treatment program approved by DHSS subject to a waiting list to receive available treatment, and the individual remains enrolled in the treatment program and enters the treatment program at the first available opportunity; or~~
- ~~3. Has satisfactorily completed a substance abuse program approved by DHSS; or~~
- ~~4. Is determined by a treatment provider licensee by DHSS not to need substance abuse treatment according to DHSS' guidelines; and~~
- ~~5. Is complying with, or has already complied with all obligations imposed by the Court, including any substance abuse treatment obligations.~~

~~Individuals who regain eligibility for food stamps due to meeting the above conditions will be required to submit to quarterly random drug testing at the individual's own cost.~~

~~Individuals who return a clean drug test result free of controlled substances will continue to be eligible to get food stamps, if otherwise eligible.~~

~~Individuals who return an unclean drug test result, which shows the use of controlled substances, will be disqualified from receiving food stamps for one year. The period of ineligibility will remain in effect until the end of the one year. The individual must return a clean drug test result free of controlled substances before getting benefits again.~~

~~Individuals who fail to return a drug test result will be ineligible to receive food stamps until a clean drug test result is provided.~~

~~Such ineligible individuals will not be considered part of the household except that the income and resources of such individuals shall be considered to be income and resources of the household.~~

~~Determine the income, resources and deductions of these disqualified individuals according to 9076.1.~~

~~This provision does not apply to individuals convicted of such offenses that occurred prior to August 22, 1996, the date of enactment of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996.~~

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)

### REGISTER NOTICE SAN # 2010-23 and #2012-01

#### 1. TITLE OF THE REGULATIONS:

Amendment to Regulation 1131 Low Enhanced Inspection & Maintenance Program

Amendment to Inspection & Maintenance Plan for Implementation (PFI)

**2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:**

On June 15, 2010 Delaware's governor signed SB 215 as presented by the 145<sup>th</sup> Delaware General Assembly. SB 215 provides an exception to Title 21 vehicle registration requirements for vehicles being driven by Delaware Emission Education Program ("DEEP") certified emission repair technicians during drive cycle testing. SB 215 also added to Title 7 a new section 6709, Permits for operation of motor vehicles during testing. Section 6709 provides for this vehicle registration exception to be administered by DNREC through the establishment of a new permitting program.

The purpose of this action is to update 7 **DE Admin. Code** 1131 to establish the permitting program stipulated by SB 215. In addition, the regulations format will be updated to conform to the style requirements of the Delaware *Register of Regulations* which include amending the Inspection & Maintenance State Implementation Plan also known as the Plan for Implementation (PFI).

There approximately 125 certified emission repair technicians that will be impacted by this proposed amendment. The emission repair technicians were notified that the Division of Air Quality (DAQ) is amending Regulation 1131 and were invited to attend the one of three public workshops that DAQ conducted on March 28, 2011 at Del Tech's Stanton Campus - Newark, March 29, 2011 at Del Tech's Owens Campus - Georgetown and on March 31, 2011 at Del Tech's Terry Campus - Dover.

**3. POSSIBLE TERMS OF THE AGENCY ACTION:**

None

**4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

7 Delaware Code, Chapter 60

**5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:**

None

**6. NOTICE OF PUBLIC COMMENT:**

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Monday, April 2, 2012 beginning at 7:00 PM in DNREC's Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE. Interested parties may submit comments in writing to: Valerie Gray, DNREC Division of Air Quality, 655 S. Bay Road, Dover, DE 19901.

**7. PREPARED BY:**

Valerie Gray (302) 739-9402 valerie.gray@state.de.us February 10, 2012

**1131 Low Enhanced Inspection and Maintenance Program and Plan for Implementation**

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**1131 Low Enhanced Inspection and Maintenance Program**  
**1131 Low Enhanced Inspection and Maintenance Plan for Implementation**

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**PROPOSED REGULATIONS**

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**DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)

**REGISTER NOTICE #2012-02****3552 Spanish Mackerel Size Limit and Creel Limit****1. TITLE OF THE REGULATIONS:**

3552 Spanish Mackerel Size Limit and Creel Limit

**2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:**

Spanish mackerel (*Scomberomorus maculatus*) are managed under the Omnibus Amendment to the Interstate Fishery Management Plans for Spanish Mackerel, Spot and Spotted Seatrout. The primary goal of the Omnibus Amendment is to bring the fishery management plans for Spanish mackerel, spot, and spotted seatrout under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (1993), providing for more efficient and effective management and changes to management for the future.

In support of the goal, the following objectives were identified for Spanish mackerel:

1. Manage the Spanish mackerel fishery by restricting fishing mortality to rates below the threshold fishing mortality rates to provide adequate spawning potential to sustain longterm abundance of the Spanish mackerel populations.
2. Manage the Spanish mackerel stock to maintain the spawning stock biomass above the target biomass levels.
3. Minimize endangered species by catch in the Spanish mackerel fishery.
4. Provide a flexible management system that coordinates management activities between state and federal waters to promote complementary regulations throughout Spanish mackerel's range which minimizes regulatory delay while retaining substantial ASMFC, Council, and public input into management decisions; and which can adapt to changes in resource abundance, new scientific information and changes in fishing patterns among user groups or by area.
5. Develop research priorities that will further refine the Spanish mackerel management program to maximize the biological, social, and economic benefits derived from the Spanish mackerel population.

Consistent with these objectives and the goal of the Omnibus Amendment, Delaware must adopt for its recreational Spanish mackerel fishery: a 12" fork length (FL) or 14" total length (TL) minimum size limit; a 15 fish creel limit; and require that all Spanish mackerel be landed with head and fins intact. In addition, Delaware must establish for its commercial fishery a 12" fork length (FL) or 14" total length (TL) minimum size limit and a trip limit (per vessel, per day) of 3,500 lbs.

**3. POSSIBLE TERMS OF THE AGENCY ACTION:**

N/A

**4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

§901(c &amp; d), § 903(e) (2)a, Title 7 Delaware Code

**5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:**

N/A

**6. NOTICE OF PUBLIC COMMENT:**

The hearing record on the proposed changes to the Spanish mackerel regulation will be open March 1, 2012. Individuals may submit written comments regarding the proposed changes via e-mail to [Lisa.Vest@state.de.us](mailto:Lisa.Vest@state.de.us) or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public

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hearing on the proposed amendment will be held on April 19, 2012 beginning at 6 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

## 7. PREPARED BY:

Stewart Michels, [stewart.michels@state.de.us](mailto:stewart.michels@state.de.us), (302) 739-9914

David E. Saveikis, Director

## 3552 Spanish Mackerel Size Limit and ~~CreeL~~ Limit Possession Requirements.

(Penalty Section 7 ~~Del.C.~~ §936(b)(2))

- 1.0 Unless otherwise authorized, it shall be unlawful for any person to possess any Spanish mackerel, (*Scomberomorus maculatus*), that measure less than fourteen (14) inches total length.
- 2.0 Unless otherwise authorized, it shall be unlawful for any recreational finfisherman to have in possession more than ~~ten (10)~~ fifteen (15) Spanish mackerel at or between the place caught and his/her personal abode or temporary or transient place of lodging.
- 3.0 Unless otherwise authorized, it shall be unlawful for any recreational finfisherman to possess any Spanish mackerel at or between the place caught and his/her personal abode or temporary or transient place of lodging without the head and fins intact.
- 4.0 Unless otherwise authorized, it shall be unlawful for any commercial finfisherman to possess or land more than 3,500 pounds of Spanish mackerel per vessel, per day.
- 5.0 Unless otherwise authorized, it shall be unlawful for any commercial finfisherman to possess any Spanish mackerel without the head and fins intact prior to selling, trading or bartering said Spanish mackerel.

4 DE Reg 1552 (3/1/01)

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## DEPARTMENT OF SAFETY AND HOMELAND SECURITY DIVISION OF STATE POLICE

Statutory Authority: 24 Delaware Code, Section 1304 (24 ~~Del.C.~~ §1304)  
24 ~~DE Admin. Code~~ 1300

### PUBLIC NOTICE

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with 24 ~~Del.C.~~ c. 13 proposes to amend Rule 1.0 – Firearm’s Policy and adopt Rule 9.0 – Security Guard/Armored Car Guards. Rule 1.0 will require the individual to qualify with the same make/model/caliber weapon they will carry. Rule 9.0 will allow security guards/armored car guards to work for no more than two agencies at a time. If you wish to view the complete Rules, contact Ms. Peggy Anderson at (302) 672-5304. Any persons wishing to present views may submit them in writing, by March 31, 2012, to Delaware State Police, Professional Licensing, P.O. Box 430, Dover, DE 19903. The Board will hold its quarterly meeting Thursday, April 27, 2012, 10:00am, Tatnall Building, Room 113, 150 William Penn Street, Dover, Delaware.

### 1300 Board of Examiners of Private Investigators & Private Security Agencies

#### 1.0 Firearm’s Policy

- 1.1 No person licensed under Title 24 Chapter 13 Sections 1315 & 1317 shall carry a firearm unless that person has first passed an approved firearms course of instruction and an initial qualification administered by a Board approved certified firearms instructor. The course of instruction shall include a minimum 40 hours of training. The Professional Licensing Section may waive the 40 hour training

requirement depending upon the applicant's professional credentials, training and/or work experience (i.e. prior law enforcement).

- 1.2 Individuals licensed to carry a firearm must shoot a minimum of three (3) qualifying shoots per calendar year, scheduled on at least two (2) separate days, with a minimum 90 days between scheduled shoots. Of these three (3), there will be one (1) mandatory "low light" shoot. Simulation is permitted and it may be combined with a daylight shoot. The initial qualification shoot may be used to fulfill one day and one low light requirement during the first year.
  - 1.2.1 An individual not meeting the minimum qualifications set forth in 1.2 may have their firearms license suspended until such time that they meet the minimum three (3) qualifying shoots within the calendar year.
- 1.3 Firearms - approved type of weapons
  - 1.3.1 9mm
  - 1.3.2 .357
  - 1.3.3 .38
  - 1.3.4 .40
- 1.4 All weapons must be either a revolver or semi-automatic and must be double-action or double-action only and must be maintained to factory specifications.
- 1.5 Under no circumstances will anyone be allowed to carry any type of shotgun or rifle or any type of weapon that is not described herein.
- 1.6 ~~All individuals must qualify with the same type of weapon that he/she will carry.~~ All individuals must qualify with the same make/model/caliber of weapon that he/she will carry.
- 1.7 All ammunition will be factory fresh (no re-loads).
- 1.8 The minimum passing score is 80%.
- 1.9 All licenses are valid for a period of five (5) years, subject to proof of compliance of Rule 1.0 by submission of shoot certification or re-certification forms by January 31st of each year for the previous calendar year.
- 1.10 Firearms Instructors
  - 1.10.1 Firearms instructors must be certified by the National Rifle Association, a law enforcement training and standards commission (i.e. C.O.P.T.), and/or another professional firearms training institution as a "certified firearms instructor".
  - 1.10.2 Firearms instructors are restricted to teaching and qualifying individuals according to the type of firearm matching their certification. (For example, a certified shotgun instructor may only instruct and qualify individual with the shotgun.)
  - 1.10.3 All firearms instructors must be approved by the Board before they are authorized to instruct or qualify individuals licensed under Title 24 Chapter 13.

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

**7 DE Reg. (3/1/04)**

**13 DE Reg. 502 (10/01/09)**

**14 DE Reg. 1395 (06/01/11)**

*(Break in Continuity of Sections)*

## **9.0 Security Guards/armored Car Guards**

Under no circumstances will a security guard/armored car guard be permitted to be employed by more than two agencies at a time. It is also the responsibility for each licensed security guard/armored car guard to advise his/her employer(s) of whom he/she is employed with (i.e. if a security guard/armored car guard is employed with two security guard/armored car guard agencies, both employers must be made aware of this fact.)

**910.0 Qualified Manager**

- 910.1 A qualified manager cannot be employed by more than one company at the same time. For example; a person cannot serve as a qualified manager for two separate private security agencies and/or private investigative agencies.
- 910.2 A qualified license holder must be an owner/partner/corporate officer of the agency requesting licensure.

**Adopted 11/04/1994**

**8 DE Reg. 325 (8/1/04)**

**101.0 Uniforms, Patches, Badges, Seals, Vehicular Markings Amended 04/17/97**

- 101.1 No person licensed under 24 **Del.C.** Ch. 13 shall wear or display any uniform, patch, or badge unless first approved by the Board of Examiners. The use of "patrol" and/or "officer" on any type of uniform, patch, badge, seal, vehicular marking or any type of advertisement shall first be proceeded by the word "security". Under no circumstances shall a uniform, patch, badge, seal, vehicular marking, letterhead, business card or any type of advertisement contain the seal or crest of the State of Delaware, any state of the United States, the seal or crest of any county or local sub division, or any facsimile of the aforementioned seals or crests.
- 101.2 Advertisement and other forms of publications:
- 101.2.1 No letterhead, business card, advertisement, or other form of publication including but not limited to uniforms, patches, badges, seals, vehicular markings and similar items may be used or displayed unless first approved by the Board of Examiners. No such items will be approved by the Board if the item will mislead the public by confusing the licensee and/or his/her employees with official law enforcement agencies and/or personnel.
- 101.2.2 All uniforms displaying a patch must contain an approved patch that is not generic in nature. The patch must have the name of the agency printed on it.

**101.3 Vehicle Identification**

- 101.3.1 No person or entity licensed under Title 24, Chapter 13 of the **Delaware Code** shall utilize any vehicle in the course of activities covered by said Chapter 13, unless the appearance of the vehicle, including any identifying marking, shall have been first approved by the Board of Examiners using the standards and criteria set forth in this Rule.
- 101.3.2 The content of any vehicle marking shall be governed by the standards and criteria set forth in Rule 5.1 above.
- 101.3.3 No vehicle utilized for purposes covered by Title 24, Chapter 13 shall have an appearance that creates a reasonable likelihood of confusion with a police vehicle used by the Delaware State Police or a law enforcement agency of any state or governmental subdivision. The Board of Examiners shall have discretion to review the appearance of vehicles, and to make comparisons with known law enforcement vehicles, in order to enforce this Rule.
- 101.3.4 In the event that a vehicle is not approved by the Board of Examiners pursuant to this Rule, the Board may indicate what changes to the vehicle appearance would be sufficient to satisfy the standard and criteria set forth above.
- 101.3.5 Auxiliary lights on vehicles, used for patrol, shall be amber and/or clear only. Use of sirens is prohibited.

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

**8 DE Reg. 325 (8/1/04)**

**142.0 Personnel Rosters and Job Assignments**

# PROPOSED REGULATIONS

142.1 Anyone licensed under 24 **Del.C.** Ch. 13 shall submit an alphabetical personnel roster and a job site list to the director of the Detective Licensing Section by the tenth of every month. Alphabetical personnel rosters shall include the full name, DOB, race, sex, expiration date, and position code of each individual in your employ. For example:

Mark A. Smith	01/25/60	W	M	01/25/99	FA
Helen E. White	03/17/71	B	F	03/17/00	FA
John F. Henry	05/23/43	B	M	05/23/00	PI
James D. Williams	12/03/40	W	M	06/30/99	MG
Frank G. Montgomery	07/24/55	B	M	06/30/99	LH
Anne L. Murray	10/20/40	W	F	06/30/99	CO

SG	Security Guard
FA	Firearm's
PI	Private Investigator
MG	Delaware Manager
LH	License Holder
CO	Corporate Officer

142.2 Job site lists shall include the name, address, location, and hours of coverage. For example:

The DuPont Industry  
 Barley Mill Road  
 2200 - 0600 Hours, Monday, Wednesday, and Friday

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

## 123.0 Record Book; Right of Inspection

All persons licensed under 24 **Del.C.** Ch.13 shall keep and maintain at their place of business, at all times, a book that shall contain the names and positions of all employees along with the location that each employee is assigned to work. This book shall contain all current personnel information and at all times shall be current and up-to-date to include the list of weapons/items each employee is qualified to carry, the certification dates, scores and the serial number of the weapon/item, if applicable, and a current copy of the mandatory 16 hours security guard training.

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

**15 DE Reg. 1181 (02/01/12)**

## 134.0 Licensing Fees

134.1 Class A License - Private Investigative Agency

134.1.1 In-State License Holder

134.1.1.1 Individual - No Employees - Not Corporation

134.1.1.1.1 \$230

134.1.1.1.2 \$5,000 Bond

134.1.1.1.3 \$1,000,000 Liability Insurance per occurrence

134.1.1.2 Corporation - Has Employees

134.1.1.2.1 \$345

134.1.1.2.2 \$10,000 Bond

134.1.1.2.3 \$1,000,000 Liability Insurance per occurrence

**134.1.2 Out-of-State****134.1.2.1 License Holder - Individual and Corporation****134.1.2.1.1 \$345****134.1.2.1.2 \$10,000 Bond****134.1.2.1.3 \$1,000,000 Liability Insurance per occurrence****134.1.2.2 Delaware Manager****134.1.2.2.1 \$230****134.1.2.2.2 \$5,000 Bond****134.2 Class B License - Private Security Agency****134.2.1 In-State License Holder****134.2.1.1 Individual - No Employees - Not Corporation****134.2.1.1.1 \$230****134.2.1.1.2 \$5,000 Bond****134.2.1.1.3 \$1,000,000 Liability Insurance per occurrence****134.2.1.2 Corporation - Has Employees****134.2.1.2.1 \$345****134.2.1.2.2 \$10,000 Bond****134.2.1.2.3 \$1,000,000 Liability Insurance per occurrence****134.2.2 Out-of-State****134.2.2.1 License Holder - Individual and Corporation****134.2.2.1.1 \$345****134.2.2.1.2 \$10,000 Bond****134.2.2.1.3 \$1,000,000 Liability Insurance per occurrence****134.2.2.2 Delaware Manager****134.2.2.2.1 \$230****134.2.2.2.2 \$5000 Bond****134.3 Class C License - Private Investigative & Private Security Agency****134.3.1 In-State License Holder****134.3.1.1 Individual - No Employees - Not Corporation****134.3.1.1.1 \$345****134.3.1.1.2 \$10,000 Bond****134.3.1.1.3 \$1,000,000 Liability Insurance per occurrence****134.3.1.2 Corporation - Has Employees****134.3.1.2.1 \$520****134.3.1.2.2 \$15,000 Bond****134.3.1.2.3 \$1,000,000 Liability Insurance per occurrence****134.3.2 Out-of-State****134.3.2.1 Individual and Corporation****134.3.2.1.1 License Holder****134.3.2.1.1.1 \$520****134.3.2.1.1.2 \$15,000 Bond****134.3.2.1.1.3 \$1,000,000 Liability Insurance per occurrence****134.3.2.1.2 Delaware Manager****134.3.2.1.2.1 \$345****134.3.2.1.2.2 \$10,000 Bond****134.4 Class D License - Armored Car Agency License**

## 134.4.1 License Holder

134.4.1.1 \$345

134.4.1.2 Banking Commissioner License as required by 5 **Del.C.** §3203

134.4.1.3 \$10,000 Bond

134.4.1.4 \$1,000,000 Liability Insurance per occurrence.

## 134.4.2 Delaware Manager

134.4.2.1 \$230

134.4.2.2 \$5000 Bond

134.5 All licenses will expire 2 years from the last day of the month they are approved for licensure.

**6 DE Reg. 637 (11/01/02)**

**7 DE Reg. (03/01/04)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**1300 Board of Examiners of Private Investigators & Private Security Agencies**

## OFFICE OF THE SECRETARY

Statutory Authority: 11 Delaware Code, Section 1448A(k) (11 **Del.C.** §1448A(k))

### PUBLIC NOTICE

#### Regulations Governing the Relief from Disabilities Board

#### A. Type of Regulatory Action Required.

Promulgation of Rules and Regulations pursuant to 11 **Del.C.** §1448A(j).

#### B. Synopsis of Subject Matter of the Regulation.

The Department of Safety and Homeland Security intends to promulgate rules and regulations as they relate to the creation and operations of the Relief from Disabilities Board and the transmission of health information to NICS pursuant to 11 **Del.C.** §1448A(k).

The Department solicits and will consider timely filed written comments from interested individuals and groups concerning these proposed regulations. The deadline for the filing of such written comments will be thirty days after the proposed regulations are published in the Delaware *Register of Regulations*, or by April 1, 2012. Any such submissions should be mailed or hand delivered to Elizabeth Olsen at: Department of Safety and Homeland Security, Public Safety Building, Suite 220, 303 Transportation Circle, P.O. Box 818, Dover, DE 19903, on or before the deadline.

#### Regulations Governing the Relief from Disabilities Board

#### 1.0 Purpose.

- 1.1 To establish rules and regulations for the Relief from Disabilities Board, a forum for persons subject to the disabilities of 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or of 11 **Del.C.** §1448(a)(2) because of an adjudication or commitment to seek relief from a firearms prohibition.
- 1.2 To provide proper and adequate due process to those persons seeking relief from a firearms prohibition arising strictly from a disability under 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or 1 **Del.C.** §1448(a)(2).

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- 1.3 To allow for the expeditious modification or correction of a person's record who is no longer subject to a firearms prohibition under 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or 1 Del.C. §1448(a)(2).
- 1.4 To ensure the confidentiality and security of records and data provided pursuant to 11 Del.C. §1448A.

## **2.0 Scope and Applicability**

- 2.1 Authority. These regulations are promulgated pursuant to 11 Del.C. §1448A(k). These regulations shall be known as "Regulations Governing the Relief from Disabilities Program and Use of Data Pursuant to 11 Del.C. §1448A".
- 2.2 Applicability. These regulations apply to persons who are prohibited from carrying, possessing, owning or transferring firearms as it relates to 18 U.S.C. §§ 922(d)(4) and (g)(4) and/or of 11 Del.C. §1448(a)(2) due to an adjudication or commitment to a hospital, mental institution or sanitarium as a result of a mental disorder.

## **3.0 Definitions.**

The following words, phrases, and terms as used in these regulations shall have the meanings stated below:

"**Adjudication or commitment to a hospital, mental institution or sanitarium as a result of a mental disorder**" means a person admitted under a provisional admission by a psychiatrist or under a civil court order to the custody of the hospital for observation, diagnosis, care and treatment pursuant to 16 Del.C. Ch. 50. It does not include persons transported and held for mental health screening and assessment.

"**Board**" means the Relief from Disabilities Board hereby created by 11 Del.C. §1448A(j) and these regulations.

"**Dangerous instrument**" means any instrument, article or substance which is readily capable of cause death or serious physical injury as defined in 11 Del.C. §222(4).

"**Deadly weapon**" means any object which is or can be used, or attempted to be used, to cause death or serious physical injury as defined in 11 Del.C. §222(5).

"**DELJIS**" means the Delaware Criminal Justice Information System.

"**Disability(ies)**" means a prohibition from possessing, owning and/or transferring firearms as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4).

"**DSCYFS**" means the Department of Services for Children, Youth and Their Families.

"**DHSS**" means the Department of Health and Social Services.

"**DSHS**" means the Department of Safety and Homeland Security.

"Firearm" means any weapon as defined in 11 Del.C. §222(12).

"**NICS**" means National Instant Criminal Background Check System.

"**Notice of De Novo Judicial Review**" means written timely notice to the Superior Court and to the Board that a Petitioner, who has been denied relief after a hearing before the Relief from Disabilities Board, intends to appeal for a de novo review of the Board's decision by the Superior Court.

"**Official record**" means any and all documents, including but not limited to transcripts, evidence, testimony, etc., which has been submitted and presented to the Board for consideration during a hearing on a Petition for Relief.

"**Person prohibited**" means any person prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State pursuant to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§922(d)(4) and (g)(4).

## **4.0 Confidentiality and Security of Data.**

- 4.1 The DHSS, DSHS, DSCYF and DELJIS shall adhere to 42 C.F.R. Part 2; 45 C.F.R. Parts 160, 162, and 164; and 16 Del.C. §1232 in protecting the confidentiality of protected patient health information in

the use and discussion of protected patient health information and in the transmission of this information to the NICS database.

- 4.2 DELJIS shall adhere to 11 Del.C. Chapters 85 and 86 in protecting the confidentiality of criminal justice records and protected patient health information in the use of such information and in its transmission to the NICS database.

## **5.0 Relief from Disabilities Board**

### **5.1 Creation.**

- 5.1.1 The Relief from Disabilities Board is hereby created to carry out the functions and duties pursuant to 11 Del.C. §1448A(j) and these regulations.
- 5.1.2 The Board is authorized to consider petitions for relief pursuant to 11 Del.C. §1448A(j) and these regulations arising from mental health adjudications or commitments which occur in the State of Delaware.
- 5.1.3 All legal processes and all documents required by law to be served or filed with the Board shall be served or filed with the Chairperson of the Board at the Department of Safety and Homeland Security, 303 Transportation Circle, Dover, Delaware 19901.
- 5.1.4 Personal service or Service by Certified First Class Mail shall be considered proper service or filing.
- 5.1.5 Service shall be considered complete upon receipt by the Chairperson, or by a person authorized by the Chairperson to accept service, of a Notice of De Novo Judicial Review and all documents as required by section 4.2.2. of these regulations.
- 5.1.6 All official records of the Board or affidavits by the Chairperson as to the content of such records shall be prima facie evidence of all matters required to be kept by the Board.
- 5.1.7 The Board is not a designated agency pursuant to the Administrative Procedures Act and, therefore, shall be subject only to 29 Del.C. §10161(b).
- 5.1.8 The Board shall adhere to 42 C.F.R. Part 2; 45 C.F.R. Parts 160, 162, and 164; and 16 Del.C. §1232 in protecting the confidentiality of protected patient health information in the use and discussion of protected patient health information and in the transmission of this information to the NICS database.
- 5.1.9 Pursuant to 11 Del.C. §1448A(j), the Board shall be comprised of three (3) members, with the Chairperson appointed by and serving at the pleasure of the Secretary of Safety and Homeland Security and the remaining two (2) members appointed by and serving at the pleasure of the Secretary of the Department of Health and Social Services, one of whom shall be a Delaware licensed psychiatrist.

### **5.2 Procedure.**

- 5.2.1 All three Board members must be present to hear a petition for relief and a simple majority shall constitute the decision of the Board.
- 5.2.2 The petition shall contain, at a minimum, the following:
- 5.2.2.1 The Petitioner's name, address and telephone number;
- 5.2.2.2 The Petitioner's mental health record;
- 5.2.2.3 A certificate from a medical doctor or psychiatrist licensed in this State that the person is no longer suffering from a mental disorder which interferes with or handicaps the person from handling deadly weapons and/or firearms;
- 5.2.2.4 A notarized affidavit signed by the Petitioner stating that the facts and statements contained in the petition are true and correct.
- 5.2.2.5 Any and all documents the Petitioner wishes to introduce or submit to the Board in support of his or her case.
- 5.2.3 The Board shall schedule a hearing on a petition for relief within 60 days from the date of receipt of the petition.

5.2.4 Pursuant to Section 4.1.5 of these regulations, a petition for relief shall be heard by the Board in a closed and confidential hearing on the record.

5.2.4.1 The record of the hearing shall be maintained by the Chairperson at DSHS for a period of one year from the date of the hearing for purposes of de novo judicial review.

5.2.5 The Board shall consider evidence as specified in 11 Del.C. §§1448A(j)(2) and (3). In accordance with 11 Del.C. §1448A(j)(3), the Board may request that the petitioner undergo a clinical evaluation and risk assessment at the recommendation of the Board psychiatrist and if a majority of the Board agrees. The petitioner shall bear the costs of his or her clinical evaluation and/or risk assessment.

5.2.6 Relief shall be granted if the Board finds, by a preponderance of the evidence:

5.2.6.1 The Petitioner will not likely act in a manner dangerous to public safety; and,

5.2.6.2 Granting the relief will not be contrary to the public interest.

5.2.7 The decision of the Board shall be issued in writing explaining its reasons for a denial or grant of relief.

5.2.8 The decision of the Board shall be issued as soon as practicable following the hearing.

## **6.0 Modification of Petitioner's Record.**

6.1 Upon notice that a petition for relief has been granted, the Department of Health and Social Services and the Department of Children, Youth and Their Families shall notify the Attorney General of the United States and shall update, correct, modify or remove from the database it maintains and makes available to NICS to reflect that the petitioner is no longer subject to a firearms prohibition as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4). Pursuant to 11 Del.C. §1448A(j)(7), DSHS shall be responsible for ensuring compliance with this regulation.

6.2 DELJIS shall also update, correct, modify or remove any reference to the petitioner's disability as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4) to reflect that the petitioner is no longer subject to a firearms prohibition under 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4).

## **7.0 De Novo Judicial Review of the Decision of the Board.**

7.1 Any person whose petition for relief has been denied by the Board shall have a right to a de novo judicial review in the Superior Court.

7.2 A petitioner shall file a Notice of De Novo Judicial Review in Superior Court within 30 days from the date the Board rendered its decision. The petitioner shall also file within 30 days of such decision a copy of the Notice of De Novo Judicial Review with the Board by serving the Chairperson, or a person designated to receive service on behalf of the Chairperson, at the Department of Safety and Homeland Security, 303 Transportation Circle, Dover, DE 19901.

7.3 The Board shall provide a copy and transcript of the record and hearing to the Superior Court within 30 days from its receipt of the copy of the Notice of De Novo Judicial Review.

7.4 The De Novo Judicial Review hearing shall be scheduled to be heard by the Superior Court within 30 days of receipt of the record and transcript of the Board hearing.

7.5 Pursuant to 11 Del.C. §1448A(j), the Superior Court shall consider the record of the Board hearing on the petition for relief, the decision of the Board, and, at the Court's discretion, any additional evidence it deems necessary to conduct its review.

7.6 The Superior Court shall issue its decision setting forth the basis to grant or deny the Petitioner's De Novo Judicial Review within a reasonable time after the De Novo Judicial Review hearing has been held. A copy of the Superior Court's decision shall be sent to the Petitioner and the Board.

7.7 If the Superior Court grants Petitioner's Notice of De Novo Judicial Review, the Board shall, as soon as practicable, notify DELJIS, DSCYF and DHSS, which shall update, correct, modify or remove any references to the person's disability from any database maintained and made available to NICS to reflect that the petitioner is no longer a person prohibited from owning, possessing and/or transferring firearms as it relates to 11 Del.C. §1448(a)(2) and 18 U.S.C. §§ 922(d)(4) and (g)(4). In addition,

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# PROPOSED REGULATIONS

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DHSS shall notify the Attorney General of the United States that the Petitioner is no longer subject to a firearms prohibition pursuant to 11 Del.C. §1448(a)(2), 18 U.S.C. §§ 922(d)(4) and (g)(4). Pursuant to 11 Del.C. §1448A(j)(7), DSHS shall be responsible for ensuring compliance with this regulation.

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**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**Board of Charitable Gaming**

Statutory Authority: 28 Delaware Code, Section 1122 (28 Del.C. §1122)  
10 DE Admin. Code 101

**PUBLIC NOTICE**

**101 Regulations Governing Bingo**

**A. Type of Regulatory Action Required**

Amendment to Existing Regulations

**B. Synopsis of Subject Matter of the Regulation**

The Delaware Gaming Board will seek public comments on the issue of whether its current rules in 10 DE Admin. Code 101 regarding bingo should be amended. The Board proposes to change the rules to make it clear that members of charitable organizations who are working at the bingo event may not themselves play in the bingo games and also that the amount of the prize in each bingo game must be announced to the players. In addition, a rule will be amended to explain that where the statute allows promotional giveaways on holidays, the meaning of the term holidays is official state holidays. The Board proposes to change the rules to make it clear that the limit of 15% of the total amount of all prizes which may be offered as an inducement to players refers to inducements other than the cookie jar bingo games, where a cookie jar may have a prize of up to \$1,000.

Persons wishing to present their views regarding this matter may do so at a public hearing to be held on Thursday, April 5, 2012 at a meeting of the Delaware Gaming Control Board, 861 Silver Lake Boulevard, Cannon Building, Suite 203, Dover, DE 19904. Persons may also submit responses in writing by the close of business on or before April 1, 2012 at the same address. A copy of these regulations is available from the above address or may be viewed at the Division of Professional Regulation business office at the same address.

**C. Summary of Proposal**

Currently, the rules do not clearly address the issue of whether members of the charitable organization which is conducting the event may themselves play in the event if they are working at it. Rules do provide that a member must be in charge of the event and the Board believes that members who are working at the event should not be playing the games themselves at the same time.

Currently, the rules do not expressly state that the prize amount in bingo games must be announced, although the sponsor must file an after occasion report which lists the amount of all prizes. To be sure there is no confusion, the Board wishes to make it clear that the amount of the prize at each bingo game must be announced to the players.

Currently, the statute and rules state that promotional giveaways up to \$500 per year may be distributed on the organization's anniversary date and on no more than three (3) holidays per year. The Board wishes to clarify that those holidays are the same holidays as those recognized by the State of Delaware as holidays, namely, New Year's Day, Martin Luther King, Jr. Day, Good Friday, Memorial Day, Independence Day, Labor Day, Election Day, Veterans Day, Thanksgiving Day, the day after Thanksgiving, and Christmas Day.

Currently, Rule 4.6 states that a licensee may offer inducements, including but not limited to cookie jar bingo games that do not exceed \$1,000 per game per night, provided the value of the inducement is limited to 15% of the

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total amount of all other prizes. Prizes at bingo are limited to \$250 per game and \$1,250 total for all games at a single event. The Board wishes to make it clear that the 15% limit refers to inducements other than the cookie jar games.

## 101 Regulations Governing Bingo

### *(Break in Continuity of Sections)*

#### 4.0 Conduct of Bingo

- 4.1 The officers of a licensee shall designate a bona fide, active member to be in charge of and primarily responsible for the conduct of the game of chance on each occasion. The member in charge shall supervise all activities on the occasions for which he or she is in charge and shall be responsible for the making of the required report thereof. The member in charge shall be familiar with the provisions of the Bingo Statute, and these rules and regulations.
- 4.1.1 Neither the member in charge of conducting the event, nor any other member of the sponsoring organization who is assisting in conducting the event or otherwise working at the event shall be permitted to play the bingo games.
- 4.2 The room where any game is being held, operated, or conducted, or where it is intended that any game shall be held, operated, or conducted, or where it is intended that any equipment be used, shall at all times be open to inspection by the appropriate law enforcement officers and agents of the District in which the premises are situated, and to the Board and its agents and employees. Bingo games shall not be commenced prior to 1:30 p.m. and the operation of a function shall be limited to six hours. Instant bingo is permitted during any event sponsored by the organization that is licensed to conduct it, regardless of the day or time.
- 4.3 No person under the age of eighteen (18) may participate in any bingo game. No person under the age of 18 shall be permitted to participate in any instant bingo game. Persons between the ages of 16 through 18 may conduct or assist in conducting the bingo game and persons over the age of fourteen (14) may act as waiters and waitresses in the handling of food or drinks at an occasion on which a licensee conducts bingo.
- 4.4 No organization licensed prior to enactment of 71 **Del. Law 444** (July 14, 1998), may hold, operate, or conduct bingo more often than ten (10) days in any calendar month. No bingo licensee licensed after the enactment of 71 **Del. Laws 444** (July 14, 1998) shall conduct more than one bingo event per week. A bingo licensee licensed prior to the enactment of 71 **Del. Laws 444** (July 14, 1998), whose license lapses for six (6) months or more due to nonrenewal or suspension or any other reason shall, upon licensing thereafter, be considered a licensee licensed after the enactment of 71 **Del. Laws 444** (July 14, 1998).
- 4.5 The Board and its duly authorized agents and employees may examine the books and records of any licensee, so far as those books and records relate to any transaction connected with the holding, operating, and conducting of the game of bingo, and may examine any manager, officer, director, agent, member, employee, or assistant of the licensee under oath in relation to the conduct of the game of bingo.
- 4.6 No prize in an amount or value greater than \$250 shall be offered or given in any single game and the aggregate amount or value of all prizes offered or given in all games played on a single occasion shall not exceed \$1,250. The amount of the prize in each bingo game shall be announced at the start of the game. At the end of each game, there will be an announcement of the total number of winners and the amount paid to each. All winners shall be determined and all prizes shall be awarded in any game played on any occasion within the same calendar day as that upon which the game is played. The value of any promotional giveaways, which shall be no more than \$500 per annum to be distributed at an organizational anniversary date and no more than three (3) holiday dates per year, shall not be counted towards the dollar amounts described in this section. Holiday dates means those holiday dates officially recognized by the State of Delaware as holidays. However, a licensee may offer inducements, ~~including but not limited to cookie jar bingo games that do not exceed \$1,000 per game~~

- ~~per night~~, free refreshments, and free transportation of players to and from bingo events, to attract bingo players to the bingo event, provided that the fair market value of inducements is limited to 15% of the total amount of all other prizes offered or given during the bingo event.
- 4.7 Two or more organizations may not hold games of bingo at the same place on the same day. Unless a bingo licensee has been licensed prior to the enactment of 71 **Del. Laws** 444 (July 14, 1998), only one licensed organization may hold bingo games in a licensed organization's building during any given week.
- 4.8 No alcoholic beverages shall be permitted in the room from the time the bingo hall opens until the conclusion of the last bingo game of the occasion.
- 4.9 All games shall be conducted with equipment that is owned absolutely by the licensee or that is leased for fees not in excess of those allowable under the Schedule of Rental for leasing of equipment on file with the Board. Equipment shall include playing cards. If the licensee uses cards that are for more than one session of playing bingo, these cards should be identified as the property of the licensee.
- 4.10 All winners shall be determined and all prizes shall be awarded in any game played on any occasion within the same calendar day as that upon which the game is played.
- 4.11 When more than one player is found to be the winner on the call of the same number in the same game, the designated prize shall be divided equally as possible; and when division is not possible, substitute prizes, whose aggregate value shall not exceed that of the designated prize, shall be awarded; but such substitute prizes shall be of equal value to each other.
- 4.12 The equipment used in the playing of bingo and the method of play shall be such that each card shall have an equal opportunity to be a winner. The objects drawn shall be essentially equal as to size, shape, weight, and balance, and as to all other characteristics that may control their selection, and all shall be present in the receptacle before each game is begun. All numbers shall be announced so as to be visible or audible to all players present.
- 4.13 The particular arrangement of numbers required to be covered in order to win the game shall be clearly described and announced to the players immediately before each game is begun.
- 4.14 No arrangement of numbers shall be required to be covered in order to win the game other than the following:
- 4.14.1 one unspecified horizontal row;
  - 4.14.2 one unspecified vertical row;
  - 4.14.3 one unspecified full diagonal row;
  - 4.14.4 one unspecified row (horizontal, vertical, or diagonal);
  - 4.14.5 Two or more of the foregoing, forming a specified arrangement;
  - 4.14.6 The entire card;
  - 4.14.7 Four corners;
  - 4.14.8 Eight spaces surrounding the free space.
  - 4.14.9 Any other configuration or shape on the card established by an organization, provided the players are informed of the shape needed to win before play commences.
- 4.15 Within the limits contained in 28 **Del.C.** §1132(b), alternate prizes may be offered depending upon the number of calls within which bingo is reached, provided the application for the bingo license and the license so specify.
- 4.16 Any player shall be entitled to call for a verification of all numbers drawn at the time a winner is determined, and for a verification of the objects remaining in the receptacle and not yet drawn. The verification shall be made in the immediate presence of the member designated to be in charge on the occasion, but if such member is also the announcer, then in the immediate presence of an officer of the licensee.
- 4.17 No licensee shall conduct more than forty (40) games on a single occasion.
- 4.18 In the playing of bingo, no person who is not physically present in the room where the game is actually conducted shall be allowed to participate as a player in the game.

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- 4.19 Within the limits contained in 28 **Del.C.** §1132(6), the prizes offered may be varied depending upon the number of people who attend the occasion, provided the application for bingo license and license so specify. If a licensee avails itself of the provisions of this rule, it must announce at the beginning of each game the number of people present and the prizes to be awarded.
- 4.20 The entire proceeds of the games of bingo must be used solely for the promotion or achievement of the purposes of the licensee.
- 4.21 Any local rules adopted by the licensee that affect the conduct of the players or the awarding of prizes shall be prominently posted in at least four locations within the area where the bingo games are conducted.
- 4.22 The licensee shall be permitted to reserve seats within the area where the bingo games are conducted to provide for the special needs of handicapped persons, and the licensee shall ensure that the remaining seats are made available to the players on an equal basis.
- 4.23 A licensee may charge an admission fee to a game event in any room or area in which a game is to be conducted. The admission fee shall entitle the game player (a) to a card enabling the player to participate without additional charge in all regular games to be played under the license at the event, or (b) to free refreshments. The licensee may charge an additional fee to a game player for a single opportunity to participate in a special game to be played under license at the event.
- 4.24 No person shall conduct or assist in conducting any game except an active member of the organization to which the license is issued.
- 4.25 No item of expense shall be incurred or paid in connection with the conduct of the game except shall be incurred or paid in connection with the conduct of the game except such as are bona fide items of a reasonable amount for merchandise furnished or services rendered which are reasonably necessary for the conduct of the game.

**2 DE Reg. 1224 (1/1/99)**

**2 DE Reg. 1761 (4/1/99)**

**12 DE Reg. 357 (09/01/08)**

**13 DE Reg. 107 (07/01/09)**

**13 DE Reg. 412 (09/01/09)**

**13 DE Reg. 1355 (04/01/10)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**101 Regulations Governing Bingo**

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**DIVISION OF PROFESSIONAL REGULATION**

**1700 Board of Medical Licensure and Discipline**

Statutory Authority: 24 Delaware Code, Section 1713(a)(12) (24 **Del.C.** §1713(a)(12))

**24 DE. Admin. Code 1700**

**PUBLIC NOTICE**

The Delaware Board of Medical Licensure and Discipline in accordance with 24 **Del.C.** §1713(a)(12) is proposing changes to its rules and regulations. The proposal amends outdated renewal provisions in Section 14.0 and replaces them with requirements for renewal and examination for practitioners seeking initial licensure who have been out of clinical practice for 3 or more years prior to the application as authorized by 24 **Del.C.** §1723(d). The amendments also update and clarify provisions related to physician assistants by deleting Regulation 16 and incorporating the relevant provisions into Section 25.0 including provisions related to supervision. The proposal also clarifies that Section 21.0 *Delegation of Responsibilities to Non-Physicians* does not apply to physician assistants.

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# PROPOSED REGULATIONS

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The Board will hold a public hearing on April 3, 2012 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments on the regulations. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Licensure and Discipline, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**1700 Board of Medical Licensure and Discipline**

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## DIVISION OF PROFESSIONAL REGULATION

### 1900 Board of Nursing

Statutory Authority: 24 Delaware Code, Section 1904(c) (24 **Del.C.** §1904(c))  
24 **DE. Admin. Code** 1900

### PUBLIC NOTICE

The Delaware Board of Nursing, pursuant to 24 **Del.C.** §1904(c), proposes to revise regulations 6, 7, 9, 10, 14 and 15. The proposed revisions to this regulation are an attempt to: restate the statutory requirement for late renewal; clarify that nursing specialty organization position statements may be used for professional accountability; clarify the role of the RN to manage care for patients receiving analgesia by catheter techniques by the perineural route; clarify the role of the RN and LPN to manage care for patients receiving subcutaneous infusions; clarify that RNs may collect data from electronic communication; clarify that specially trained PICC nurses may determine the placement of the distal tip of peripherally inserted central catheters by radiograph study; restate the statutory bar on licensing persons convicted of felony sexual offenses; restate the statutory duty to report; and correct typographical errors.

The Board will hold a public hearing on the proposed regulation change on April 11, 2012 at 09:00 a.m., Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Dr. Pamela Zickafoose, Executive Director of the Delaware Board of Nursing, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904.

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**1900 Board of Nursing**

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## DIVISION OF PROFESSIONAL REGULATION

### 3000 Board of Professional Counselors of Mental Health and Chemical Dependency Professionals

Statutory Authority: 24 Delaware Code, Section 3006(1) (24 **Del.C.** §3006(1))  
24 **DE. Admin. Code** 3000

### PUBLIC NOTICE

The Delaware Board of Mental Health and Chemical Dependency Professionals in accordance with 24 **Del.C.** §3006 (1) has proposed amendments to Rule 2.0 License for Professional Counselors of Mental health. The

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proposed revisions to the rules are an attempt to better clarify when a person can apply to be a Professional Counselor of Mental Health.

A public hearing will be held on April 25, 2012 at 12:15 p.m in the second floor Conference Room A of the Cannon Building, 861 Silver Lake Blvd, Dover, DE where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from Jessica Williams, Administrative Assistant for the Delaware Board of Professional Counselors, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

## **3000 Board of Professional Counselors of Mental Health and Chemical Dependency Professionals**

### *(Break in Continuity of Sections)*

## **2.0 Licensure for Professional Counselors of Mental Health (LPCMH)**

### **2.1 Licensure by Certification Requirements**

2.1.1 Certification - The applicant for licensure by certification shall be certified by the National Board for Certified Counselors, Inc. (NBCC) as a National Certified Counselor (NCC), by the Academy of Clinical Mental Health Counselors (ACMHC) as a Certified Clinical Mental Health Counselor (CCMHC), or by another certifying organization acceptable to the Board. This certification shall be verified by the "NBCC Certification Form," the "ACMHC Certification Form" or the "Certifying Organization Certification Form," submitted directly to the Board by the certifying organization.

2.1.1.1 Certifying organizations acceptable to the Board shall include NBCC, ACMHC, or other certifying organizations that meet all of the following criteria:

2.1.1.1.1 The organization shall be a national professional mental health organization recognized as setting national standards of competence in Clinical Mental health Counseling.

2.1.1.1.2 The organization shall require the applicant to take a standardized examination designed to test his/her understanding of the principles involved in the mental health specialty for which he/she is being certified. Certification shall be based upon the applicant's attaining the minimum passing score set by the organization.

2.1.1.1.3 The organization shall prescribe a code of ethics substantially equivalent to that of the NBCC.

2.1.1.1.4 The organization shall require the minimum of a master's degree in Clinical Mental Health Counseling.

2.1.1.2 Individuals licensed prior to the effective date of this requirement must maintain certification or membership in the certifying organization, acceptable to the board at the time of their initial licensure in order to qualify for renewal of their license notwithstanding that such certifying organization is no longer deemed acceptable to the board.

2.1.2 Graduate Transcript - The applicant's master's degree in Clinical Mental Health counseling required by his/her certifying organization for certification, shall be documented by an official transcript submitted directly to the Board by the accredited educational institution granting the degree. In cases where an applicant's master's degree required remediation by the certifying organization the completion date of remediation courses shall be considered the conferment date of the degree of record for all matters before the Board.

2.1.3 Professional Counseling Experience - ~~Professional Counseling experience shall be defined as the accumulation of hours spent providing mental health counseling services in a professional mental health clinical counseling setting, including face to face interaction with clients and other matters directly related to the treatment of clients.~~ means the accumulation of hours spent providing face to face professional mental health clinical counseling services with clients and other matters directly

## PROPOSED REGULATIONS

- related to the treatment of clients, in an setting that is clearly designated to provide professional mental health clinical counseling services and is subject to the Health Insurance Portability and Accountability Act of 1996 (HIPPA). Educational or guidance counseling is not considered clinical mental health counseling. However, professional counseling experience done under the auspicious of a mental health organization providing contracting services to a school or school system may be acceptable to the Board.
- ~~2.1.3.1 Designated Objective Agent — For purposes of professional counseling experience obtained through self employment, a designated objective agent shall be a professional colleague, supervisor or other individual with personal knowledge of the extent of the professional practice of the applicant, who certifies or attests to such professional practice. Under no circumstances shall a spouse, former spouse, parent, step parent, grandparent, child, step child, sibling, aunt, uncle, cousin or in-law of the applicant be acceptable as a designated objective agent.~~
- ~~2.1.3.2 30 graduate semester hours or more attained beyond the master's degree, may be substituted for up to 1,600 hours of the required clinical experience, provided that hours are clearly related to the field of counseling and are acceptable to the Board. Graduate credit hours shall be verified by an official transcript submitted directly to the Board by the accredited educational institution at which the course work was done.~~
- ~~2.1.3.32 Supervised clinical experience or post-master's degree alternative shall be verified by the "Professional Experience Reference Form" or the "Verification of Self Employment" form.~~
- ~~2.1.4 Supervised Clinical Professional Counseling Experience — Supervised Clinical professional counseling experience shall be the accumulation of hours spent providing mental health counseling services while under the supervision of an approved clinical supervisor. Supervised professional counseling experience acceptable to the Board shall be defined as follows: Experience Applications must provide documentation of completion of 3,200 hours mental health counseling services, as defined in 24 Del.C. §3031(3), as a LACMH over a period of no less than two (2) but no more than four (4) consecutive years.~~
- ~~2.1.4.1 Supervised Clinical professional counseling experience shall consist of 1,600 hours of clinical experience, directly supervised by a LPCMH. Where direct supervision by a LPCMH is not available, a licensed clinical social worker, licensed psychologist or licensed physician specializing in psychiatry may supervise the applicant. Of the required 3,200 hours of total experience, 1,600 hours must have been completed under the professional direct supervision of an individual who meets the requirements of regulations 3.1.1. The 1,600 hours of supervised clinical experience must be fulfilled as follows:~~
- ~~2.1.4.1.1 At least 1,500 of the 1,600 hours must be in the actual provision of face to face direct mental health counseling services. Of the 1,500 hours at least 750 of the hours must be individual face to face client sessions and must include the actual provision of direct mental health counseling services; the additional 750 hours may be individual, group, couple or family counseling services, or some combination of those services:~~
- ~~2.1.4.1.2 One hundred (100) hours of face to face professional direct supervision with the applicant's supervisor. Face to face supervision includes both in person and live video conferencing providing supervision by live video conferencing does not exceed fifty percent (50%) of the total 100 hours of supervision.~~
- ~~2.1.4.1.2.1 Individual Direct Supervision – Individual supervision shall consist of one to one, face to face meetings between LPCMH and LACMH. The entire 100 hour requirement may be fulfilled by individual supervision.~~
- ~~2.1.4.1.2.2 Group Supervision – Group supervision shall consist of face to face meetings between LPCMH and no more than six (6) LACMH. No more than 40 hours of group supervision shall be acceptable towards fulfillment of the 100 hour direct supervision requirement.~~
- ~~2.1.4.2 Hours completed under the supervision of an individual who does not meet the requirements of 3.1.1 will not count towards the fulfillment of the 1,500 hours of supervised~~

experience but may count towards the fulfillment of the 1,600 hours of experience not required to be a supervised.

2.1.4.3 Supervision shall be verified by the "Direct Supervision Reference Form," which must be submitted directly to the Board by the approved clinical supervisor. Each supervisor must affirm that the LAMHC is prepared to practice independently without reservations.

2.1.4.4 Supervised professional counseling experience shall consist of 1,600 hours of clinical experience, directly supervised by a LPCMH. Where direct supervision by a LPCMH is not available, an alternative supervisor maybe requested of the Board provided it complies with 3.1.1.

2.1.4.25 Direct Supervision - 1600 hours of direct supervision acceptable to the Board shall mean supervision overseeing the supervisee's application of clinical counseling principles, methods or procedures to assist individuals in achieving more effective personal and social adjustment. At least 100 of the 1600 hours of supervision shall consist of face to face consultation between ~~the supervisor and the supervisee~~ a LPCMH (Supervisor) and a LACMH (Supervisee). Direct supervision may take place in individual and/or group settings, defined as follows:

2.1.4.25.1 Individual Supervision - Individual supervision shall consist of one-to-one, face-to-face meetings between a LPCMH (Supervisor) and LAMCH (Supervisee).

2.1.4.25.2 Group Supervision - Group supervision shall consist of face-to-face meetings between ~~supervisor and no more than six (6) supervisees~~ LPCMH (Supervisor) and not more than six (6) LACMH (Supervisees).

2.1.4.25.3 Supervisory Setting - No more than 40 hours of group supervision shall be acceptable toward the 100-hour requirement. The entire 100-hour requirement may be fulfilled by individual supervision.

2.1.4.6 Application of Rules to Individuals Graduating on or Before June 30, 2012. The Board reserves the right to accept experience obtained under the requirements of the rules in effect prior to these amendments for individual graduating on or before June 30, 2012.

## 2.2 Licensure by Reciprocity Requirements

2.2.1 Proof of Licensure Status - The applicant shall hold an active professional counseling license in good standing from another state. Verification of licensure status shall be submitted directly to the Board by that state on the "Verification of Licensure or Certification from Another State" form.

2.2.2 Notarized Statement of Prior Licensing Jurisdictions - The applicant shall submit a notarized statement listing all licensing jurisdictions in which he/she formerly practiced and a signed "Release of Information" granting the Board permission to contact said jurisdictions for verification of disciplinary history and current status.

2.2.3 Determination of Substantial Similarity of Licensing Standards - The applicant shall submit a copy of the statute and rules of licensure from the state issuing his/her license. The burden of proof is upon the applicant to demonstrate that the statute and rules of the licensing state are at least equivalent to the educational, experience and supervision requirements of this State. Based upon the information presented, the Board shall make a determination regarding whether the licensing requirements of the applicant's licensing state are substantially similar to those of Delaware.

2.2.4 LACMH Option - If the Board determines that the requirements of the applicant's licensing state are not substantially similar to those of Delaware with regard only to the experience requirements, the applicant shall be eligible for licensure as an LACMH, in which case he/she shall have four (4) years to complete the supervision requirements. The applicant shall be given full credit for such properly documented experience and/or supervised experience as was required for licensure in his/her licensing state.

## 2.3 License Renewal

2.3.1 Renewal Date - The LPCMH license shall be renewable biennially on September 30<sup>th</sup> of even-numbered years. License renewal may be accomplished online at the Division of Professional

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## PROPOSED REGULATIONS

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Regulation's (Division) website. Alternatively, licensees may submit paper renewal documents. Requests for paper renewal forms must be directed to the Division.

### 2.3.2 Requirements for Renewal are as follows:

2.3.2.1 Certification - The candidate for renewal shall hold current certification in good standing as of the date of licensure renewal in NBCC, ACMHC or other certifying organization acceptable to the Board. This certification shall be verified by attestation. Attestation shall be completed electronically if the renewal is accomplished online. Alternatively, the attestation of certification may be submitted by paper renewal forms. Requests for paper renewal forms must be directed to the Division.

### 2.3.2.2 Continuing Education (CE)

2.3.2.2.1 Requirement - The candidate for renewal shall have completed no less than 40 clock hours of acceptable CE per two (2) year licensure renewal period. CE requirements for initial licensure periods of less than two (2) years shall be prorated.

### 2.3.2.2.2 Acceptable CE shall include the following:

2.3.2.2.2.1 CE hours approved by a national mental health organization (such as NBCC, ACMHC, or APA), shall be acceptable. Other training programs may apply for Board approval. CE should be oriented towards enhancement of the knowledge and practice of counseling. Hours are to be documented by a certificate signed by the presenter or by a designated official of the sponsoring organization.

2.3.2.2.2.2 Academic course work, presentation of original papers providing training and clinical supervision may be applied for up to 20 clock hours of the continuing education requirement. These hours are to be documented by an official transcript, syllabus, or a copy of the published paper presented. Under no circumstances may there be less than 20 hours of face-to-face participation in CE as outlined above.

2.3.2.2.3 Make-Up of Disallowed Hours - In the event that the board disallows certain CE clock hours, the candidate for renewal shall have three (3) months after the licensure renewal date to complete the balance of acceptable CE hours required.

2.3.2.3 Hardship – The Board shall have the authority to make exceptions to the CE requirements, in its discretion, upon a showing of good cause. "Good Cause" may include, but is not necessarily limited to: disability, illness, military service, extended absence from the jurisdiction, or exceptional family responsibilities. Request for hardship consideration must be submitted to the Board in writing prior to the end of the licensing period, along with payment of the appropriate renewal fee. A license shall be renewed upon approval of the hardship extension by the Board, but the license shall be subject to revocation if the licensee does not comply with the terms of the hardship exception established by the Board.

2.3.2.4 Verification of CE hours shall be by attestation. Attestation shall be completed electronically if the renewal is accomplished online. Alternatively, the attestation of completion may be submitted by paper renewal forms. Requests for paper renewal forms must be directed to the Division.

2.3.3 Post-Renewal Audit – The Board will conduct random audits of renewal applications to ensure the veracity of attestations and compliance with the CE requirements. Licensees selected for the random audit shall submit CE course attendance verification in the form of a certificate signed by the course presenter or by a designated official of the sponsoring organization. Licensees shall retain their CE course attendance documentation for each licensure period. Licensees shall retain their CE course attendance documentation for at least one (1) year after renewal. Licensees found to be deficient or found to have falsely attested may be subject to disciplinary proceedings and may have their license suspended or revoked. Licensees renewing during the late renewal period shall be audited.

### 2.4 Inactive Status

2.4.1 A written request must be submitted to have a license placed on inactive status. Inactive status is effective immediately upon Board approval. The inactive status may continue through the then

current licensure period and the following two-year licensure period. An inactive license shall expire at the end of the two-year licensure period unless either (1) the Board grants an extension before the end of the licensure period or (2) the license is returned to active status before the end of the licensure period.

2.4.2 Extension – The Board shall extend the inactive status for an additional two-year licensure period upon timely written request. Inactive licenses expire at the end of the licensure period, so written requests for extension must be received well in advance of the end of the licensure period to avoid expiration.

2.4.3 Return to Active Status – Before the end of the then current two-year licensure period, a license shall be returned to active status upon fulfillment of the following requirements by the licensee:

2.4.3.1 Written Request – Submit a written request to have the license returned to active status.

2.4.3.2 Certification – Provide proof of certification in good standing by NBCC, ACMHC, or another certifying organization acceptable to the Board pursuant to regulation 2.1.1.1.

2.4.3.3 Continuing Education – Provide proof of completion of 40 hours of acceptable CE, obtained within the two (2) year period immediately preceding the request for return to active status.

2.4.3.4 Fee – Pay the licensure renewal fee. No late fee shall be assessed for return to active status.

2.5 Ethics - The practice of all persons licensed as an LPCMH shall conform to the principles of the National Board for Certified Counselors' Code of Ethics (Code). Violation of the Code shall constitute grounds for discipline.

**4 DE Reg. 970 (12/1/00)**

**5 DE Reg. 2109 (5/1/02)**

**10 DE Reg. 872 (11/01/06)**

**11 DE Reg. 225 (08/01/07)**

**11 DE Reg. 1066 (02/01/08)**

**15 DE Reg. 1055 (01/01/12)**

### **3.0 Licensure for Associate Counselors of Mental Health (LACMH)**

3.1 ~~Written Plan—The applicant shall submit a written plan for supervised professional experience, on the “Written Plan for Professional Counseling Experience and Supervision” form, supplied by the Board, and signed by the approved professional supervisor. Experience – LACMH applicants must provide a written plan for acquiring the LPCMH experience requirements contained in regulation 2.1.3 above. The plan must be signed by the applicant’s proposed supervisor. Supervisors must be acceptable to the Board.~~

3.1.1 To be acceptable to the Board, the supervisor must be:

3.1.1.1 A Delaware LPCMH

3.1.1.2 If a Delaware LPCMH is not available, the LACMH applicant may request approval from the board for the utilization of a professionally licensed professional by the Delaware Board of Mental Health and Chemical Dependency Professionals provided the applicant can document a compelling reason to utilize another licensed professional and the supervisor can demonstrate sufficient competence to supervise a LACMH;

3.1.1.3 If a supervisor licensed by this board is not available, the LACMH applicant may request approval from the board for supervision from a licensed professional counselor of mental health from another state who has held a license in good standing for a minimum of five (5) years in that state, has a certification from the National Board of Certified Counselors, and is pre approved by the Board.

3.1.1.4 Only if one of the above professionals is not available, an individual with any of the following licenses in any state and training in professional mental health counseling supervision can be used : clinical social worker, psychologist practicing in the clinical

# PROPOSED REGULATIONS

realm, or physician specializing in psychiatry if the supervisor is pre approved by the Board.

3.1.1.5 If a proposed supervisor is not a professional licensed by the Delaware Board of Professional Counselors of Mental Health and Chemical Dependency Counselors, the proposed supervisor must attest, on a form provided by the Board for this purpose, that he/she has read and is familiar with the requirements for licensure in Delaware, including the applicable statutes, rules and regulations; that he/she has a minimum of five years of good standing, post licensure experience; and that she/he has the training to provide clinical supervision.

3.2 Licensees must notify the Board in writing, on the Board approved form, within 30 days if there is a change in the clinical supervision. Any supervisor must meet the requirements of 3.1.1. All changes are subject to Board approval. To obtain approval contact the Board office or to the website [www.dpr.delaware.gov](http://www.dpr.delaware.gov) to obtain the proper form.

3.23 Ethics – The practice of all persons licensed as an LAMCH shall conform to the principles of the National Board for Certified Counselors' Code of Ethics (Code). Violation of the Code shall be grounds for discipline.

**4 DE Reg. 970 (12/1/00)**

**10 DE Reg. 872 (11/01/06)**

**11 DE Reg. 1066 (02/01/08)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**3000 Board of Professional Counselors of Mental Health and Chemical Dependency Professionals**

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## DIVISION OF PROFESSIONAL REGULATION

### 3100 Board of Funeral Services

Statutory Authority: 24 Delaware Code, Section 3105(a)(1) (24 **Del.C.** §3105(a)(1))  
**24 DE. Admin. Code 3100**

### PUBLIC NOTICE

The Delaware Board of Funeral Services, pursuant to 24 **Del.C.** §3105(a)(1), proposes to revise its regulations by adding a new regulation 12 concerning advertising by licensees. The proposed revisions to this regulation are an attempt to to clarify the Board's objective at 24 **Del.C.** §3100 of protecting the general public from unsafe practices and from occupational practices which tend to reduce competition or fix the price of services rendered by establishing minimum standards for advertising funeral services in the State of Delaware. The Board will hold a public hearing on the proposed regulation change on March 27, 2012 10:15 a.m., Conference Room B, Second Floor Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Ms. Michele Howard, Administrator to the Delaware Board of Funeral Directors, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments will be accepted until April 2, 2012.

### 3100 Board of Funeral Services *(Break in Continuity of Sections)*

#### **12.0 Standards for Advertising by Funeral Directors.**

The Purpose of these standards is to protect the general public and to prohibit false, misleading, untrue or deceptive advertising practices by licensees.

#### 12.1 Definitions

12.1.1 "Advertise," "advertising," or "promotional medium" means the use of printed media, radio, television, billboards, the internet, stationary, contracts, price lists, calendars, fans, novelty items, or any other advertising method or medium.

12.1.2 For the purposes of this rule, "funeral establishment" means any licensed place used in the care and preparation of human remains for funeral services.

## 12.2 General Rule

12.2.1 A licensee may not make or cause to be made an inaccurate or deceptive statement, representation, guaranty, warranty, testimonial or endorsement through advertising or promotional medium.

12.2.2 A licensee shall be accountable under this regulation if the licensee uses an agent or partnership to implement actions prohibited by this regulation.

12.2.3 A licensee who violates these regulations regarding advertising may be guilty of consumer fraud, deception, restraint of completion, or price fixing and may be disciplined pursuant to 24 Del. C. § 3112(a)(5) and subjected to the disciplinary sanctions set forth in 24 Del. C. § 3114.

## 12.3 Prohibitions

12.3.1 A licensee shall not use, publish or disseminate any false, misleading, untrue or deceptive advertising in any manner.

12.3.2 The contents of any advertising shall include the name of the funeral establishment, its address and its business phone number.

12.3.3 An advertisement shall not contain any representations that the licensee is willing to provide services which are illegal under the laws or regulations of the State of Delaware or the United States.

12.3.4 A licensee shall not engage in solicitation from a dying individual or the relatives of a dying individual other than through general advertising.

12.3.5 Any mention of fees in an advertisement shall disclose any relevant variables that would affect that fee so that the statement can not be misunderstood or deceptive to the general public.

**8 DE Reg. 1285 (03/01/05)**

**12 DE Reg. 1335 (04/01/09)**

**\*Please Note: As the rest of the sections are not being amended, they are not being published here. A copy of the regulation is available at:**

**3100 Board of Funeral Services**

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## **PUBLIC SERVICE COMMISSION**

Statutory Authority: 26 Delaware Code, Section 209(a) (26 Del.C. §209(a))

IN THE MATTER OF THE ADOPTION OF  
REGULATIONS GOVERNING ADMINISTRATION OF  
THE DISTRIBUTION SYSTEM IMPROVEMENT  
CHARGE AND THE UTILITY FACILITY RELOCATION  
CHARGE PROVIDED FOR IN 26 DEL.C. §§314 AND  
315 (OPENED JANUARY 31, 2012)

PSC REGULATION DOCKET NO. 63

**ORDER NO. 8103**

**AND NOW**, this 31st day of January, 2012:

**WHEREAS**, the General Assembly has enacted statutes creating a Water Utility Distribution System Improvement Charge ("DSIC") and a Utility Facility Relocation Charge ("UFRC") (26 **Del.C.** §§314 and 315); and

**WHEREAS**, 26 **Del.C.** §314(d) provides that the Delaware Public Service Commission (the "Commission") may adopt rules and regulations to administer the DSIC that are not inconsistent with the Public Utilities Act of 1974 (the "Act"); and

**WHEREAS**, 26 **Del.C.** §315(f) similarly provides that the Commission may adopt rules and regulations to administer the UFRC that are not inconsistent with the Act; and

**WHEREAS**, in Order No. 8011 dated August 9, 2011, the Commission directed its Staff to prepare proposed regulations to govern the administration and operation of the DSIC and UFRC; and

**WHEREAS**, in November 2011 Staff convened a workshop to which the Division of the Public Advocate and all utilities were invited to review proposed draft DSIC and UFRC regulations; and

**WHEREAS**, the Division of the Public Advocate and all utilities have had the opportunity to comment on the proposed regulations; and

**WHEREAS**, Staff has presented the Commission with proposed regulations; and

**WHEREAS**, the Commission has considered Staff's proposed regulations and objections thereto and finds that the proposed regulations should be proposed for public comment;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:**

1. Pursuant to 26 **Del.C.** §209(a) and 29 **Del.C.** §10111 *et seq.*, the Commission promulgates the proposed Regulations Governing Administration of the Distribution System Improvement Charge and the Utility Facility Relocation Charge (the "Regulations").

2. The Commission Secretary shall transmit to the Registrar of Regulations for publication in the *Delaware Register* this Order, the Notice of the proposed Regulations attached hereto as Exhibit A and the proposed Regulations attached hereto as Exhibit B.

3. The Commission Secretary shall cause the Notice attached hereto as Exhibit A to be published in *The News Journal* and the *Delaware State News* newspapers on or before February 24, 2012.

4. The Commission Secretary shall cause the Notice attached hereto as Exhibit A to be sent by United States mail, first class postage prepaid, to all persons who have made written requests for advance notice of the Commission's regulation-making proceedings and to the following utilities:

- Artesian Water Company, Inc.
- Broadkilm Beach Water Co.
- Cantwell Water Co.
- Chesapeake Utilities Corporation
- Delmarva Power & Light Company
- Long Neck Water Co.
- Pickering Beach Water Co.
- Prime Hook Water Co.
- Slaughter Beach Water Co.
- Southern Shores Water Co.
- Sussex Shores Water Co.
- Tidewater Utilities, Inc.
- United Water Delaware Inc.
- Wilkerson Water Co.

Additionally, the Commission Secretary shall also send the Notice and the Regulations to the Division of the Public Advocate.

5. The public utilities identified in Paragraph 4 of this Order are hereby placed on notice that the costs of the proceedings will be charged to them under the provisions of 26 **Del.C.** §§114(b) (1) and (b) (4).

6. 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:

Jeffrey J. Clark, Commissioner  
Joann T. Conaway, Commissioner  
Jaymes B. Lester, Commissioner

ATTEST:

Alisa Carrow Bentley, Secretary

## EXHIBIT "A"

### **PUBLIC NOTICE OF COMMENT PERIOD ON PROPOSED REGULATIONS CONCERNING ADMINISTRATION OF THE WATER UTILITY DISTRIBUTION SYSTEM IMPROVEMENT CHARGE TO BE APPLIED TO WATER UTILITIES AND THE UTILITY FACILITY RELOCATION CHARGE APPLICABLE TO ELECTRIC AND NATURAL GAS DISTRIBUTION UTILITIES SUBJECT TO THE JURISDICTION OF THE DELAWARE PUBLIC SERVICE COMMISSION**

The Delaware General Assembly has enacted legislation pursuant to which water, electric distribution and natural gas distribution utilities subject to the jurisdiction of the Delaware Public Service Commission (the "Commission") may file rate schedules that allow such utilities to semiannually automatically adjust their basic rates to recover the cost of new, used and useful utility plant that meets certain eligibility criteria. See 26 **Del.C.** §§314 (Distribution System Improvement Charge, or "DSIC") and 315 (Utility Facility Relocation Charge, or "UFRC"). The legislation further provides that the Commission may adopt rules and regulations to administer the DSIC and UFRC so long as those rules and regulations are not inconsistent with the Public Utilities Act of 1974.

The Commission has promulgated proposed regulations to implement and administer the DSIC and UFRC (the "Regulations"), 26 **DE Admin. Code** 1009. The Regulations establish filing deadlines for DSIC/UFRC applications; effective dates of new DSIC/UFRC rates; requirements for filing a DSIC/UFRC application; a review and approval process; and annual reconciliation and audit procedures.

The Commission has the authority to promulgate the Regulations pursuant to 26 **Del.C.** §§209(a), 314(d), 315(f) and 29 **Del.C.** c. 101.

The Commission hereby solicits written comments, suggestions, compilations of data, briefs or other written materials concerning the Regulations. Anyone submitting any written materials must file ten (10) copies of such material with the Commission at its office located at 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904. **All such materials shall be filed with the Commission on or before March 31, 2012.** Persons who wish to participate in the proceedings but who do not intend to file written materials shall inform the Commission in writing of their intent to participate on or before March 31, 2012. Such notice shall be sent to the attention of Staff Public Utilities Analyst Dr. Vincent Ikwagwu.

Any public hearing conducted by the Commission shall be duly noticed in accordance with 29 **Del.C.** §§10115(b).

The Regulations and any materials submitted in connection therewith will be available for public inspection and copying (to the extent they are "public records" under the Freedom of Information Act, 29 **Del.C.** §10002(g)) at the Commission's Dover office identified above during normal business hours. The fee for copying is \$.10 per page, with the first 20 pages being free of charge. If you wish to request copies of documents in this matter, please submit a Freedom of Information Act Request Form. This form may be found at <http://smu.portal.delaware.gov/cgi-bin/mail.php?foia-request&subj=DOS>. There is also a link to the Freedom of Information Act Request Form on the Commission's website, <http://dep.sc.delaware.gov/default.shtml>. The Commission will respond to your request in accordance with the Freedom of Information Act, 29 **Del.C.** ch. 100. The Regulations may also be reviewed by appointment at the office of the Public Advocate, 820 N. French Street, 4<sup>th</sup> Floor, Carvel State Office Building,

Wilmington, DE 19801. The Regulations will also be available on the Commission's website: <http://dep.sc.delaware.gov>.

Any individual with disabilities who wishes to review submissions or to participate in this docket should contact the Commission to discuss any auxiliary aids or services to facilitate such review or participation. Such contact may be in person, in writing, by telephone or otherwise. The Commission's toll-free telephone number in Delaware is (800) 282-8574. Any person with questions may contact Dr. Ikwuagwu at (302) 736-7524, by voice and/or Text Telephone at (302) 736-7500, or via electronic mail at [vincent.ikwuagwu@state.de.us](mailto:vincent.ikwuagwu@state.de.us).

**EXHIBIT "B"****DELAWARE PUBLIC SERVICE COMMISSION****REGULATIONS IMPLEMENTING THE WATER UTILITY DISTRIBUTION SYSTEM IMPROVEMENTS CHARGE ("DSIC")****AND THE UTILITY FACILITY RELOCATION CHARGE ("UFRC")****JANUARY 31, 2012****1009 Regulations Implementing the Water Utility Distribution System Improvement Charge ("DSIC") and the Utility Facility Relocation Charge ("UFRC")****1.0 General**

- 1.1 Authority. These regulations are adopted pursuant to 26 Del.C. §§209(a), 314(d) and 315(f) and 29 Del.C. ch. 101.
- 1.2 Purpose. The purpose of these regulations is to standardize the format utilities shall use to present financial and operating data that support the recovery of eligible capital improvements costs, made pursuant to 26 Del.C. §§314 and 315.
- 1.3 Capitalized Terms. Capitalized terms used herein that are defined in 26 Del.C. §§314 and 315 shall have the same meaning as they have in those sections. Other capitalized terms shall have the meaning ascribed to them in these regulations.

**2.0 Effective Date and Recovery Period**

- 2.1 A utility may initiate or seek a change in its DSIC or UFRC rate by filing an application and supporting schedules as required by these Regulations with the Commission to be effective on January 1<sup>st</sup> or July 1<sup>st</sup> of each year. Applications shall be filed with the Commission at least 30 days prior to the effective date.
- 2.2 New DSIC and UFRC rates shall be effective for bills rendered on and after January 1 and July 1 each year without proration.
- 2.3 The DSIC rate shall be adjusted semi-annually for Eligible Distribution System Improvements placed in service during the six-month period ending two months prior to the effective date. For a January 1 effective date, the applicable recovery period is May 1 through October 31; for a July 1 effective date, the applicable recovery period is November 1 through April 30.
- 2.4 The UFRC rate shall be adjusted semi-annually for Eligible Utility Facility Relocations occurring during the six-month period ending two months prior to the effective date. For a January 1 effective date, the applicable recovery period is May 1 through October 31; for a July 1 effective date, the applicable recovery period is November 1 through April 30.
- 2.5 The DSIC/UFRC rate shall be reset to zero as of the effective date of new base rates that provide for the prospective recovery of the annual costs theretofore recovered under the DSIC/UFRC rate.
- 2.6 Utilities may file DSIC/UFRC applications while a base rate case is pending; however, where the application includes Eligible Distribution System Improvements or Eligible Utility Facility Relocations that fall within the utility's selected test period in the base rate case, the utility shall demonstrate in the DSIC/UFRC application that the Eligible Distribution System Improvements or Eligible Utility Facility Relocations were not included in the test period rate base.

## **3.0 Filing Requirements**

- 3.1 Each DSIC / UFRC filing shall include the following information:
  - 3.1.1 A PSC filing cover sheet (which can be found at the Commission website);
  - 3.1.2 A cover letter from the utility;
  - 3.1.3 The appropriate filing fee as required by 26 Del.C. §114(a);
  - 3.1.4 An original application and five (5) copies (Staff reserves the right to request additional copies), which shall include:
    - 3.1.4.1 A request to place rates into effect in no less than thirty (30) days from the date of the application;
    - 3.1.4.2 The new DSIC/UFRC rate expressed as a percentage carried to two (2) decimal places; and
    - 3.1.4.3 The dollar amount and percentage of the proposed DSIC/UFRC rate change.
  - 3.1.5 The identification of a utility contact person responsible for the application.
  - 3.1.6 A DSIC / UFRC Application shall include the following schedules:
    - 3.1.6.1 Schedule 1: Development of rate and supporting data (see Form 1);
    - 3.1.6.2 Schedule 1A: Capital structure approved in the utility's most recent base rate/general rate case (see Form 2);
    - 3.1.6.3 Schedule 1B: Overcollections or Undercollections from the utility's previous DSIC/UFRC filing (see Form 3);
    - 3.1.6.4 Schedule 2 (see Form 4):
      - 3.1.6.4.1 For DSIC Filings: Net cost of projects (identified by utility's internal project number) placed into service, and unreimbursed plant additions and plant retired, for the appropriate DSIC filing period.
      - 3.1.6.4.2 For UFRC Filings: Identification (by utility's internal project number) of relocated unreimbursed utility plant or facilities and plant retired for the appropriate UFRC filing period.
    - 3.1.6.5 Schedule 2A: Net Accumulated Depreciation, identified by NARUC account number for DSIC Filings and by FERC USOA account number for UFRC Filings (see Form 5);
    - 3.1.6.6 Schedule 3: Revised tariff page(s). Additions should be indicated by underlining; deletions should be indicated by strikethroughs.
- 3.2 The utility shall serve the Division of the Public Advocate's office with a copy of the Filing at the same time that the utility files the Filing with the Commission.
- 3.3 The utility shall notify its customers of changes in the DSIC or UFRC rate by including appropriate information in the first bill that customers receive following any change in the DSIC or UFRC rate. A message printed directly on the bill shall be acceptable notice.

## **4.0 Review and Approval Procedure**

- 4.1 Staff will review each utility's DSIC/UFRC application to ensure compliance with the provisions of 26 Del.C. §§314 and 315 and these regulations. Staff has five (5) days to review a Filing for compliance.
- 4.2 Staff shall notify the utility of any defect(s) in its Filing within five (5) business days of its submission to the Commission. The utility shall have five (5) business days to correct such defect(s) and resubmit the Filing.
- 4.3 Within five (5) business days of a utility's Filing, Staff and the Division of the Public Advocate may issue data requests to the utility concerning the Filing. Staff will attach a Certificate of Service identifying the person upon whom electronic service was made. Such data requests shall be deemed served if sent to the utility's identified representative(s) via electronic mail at the correct electronic mail address.

- 4.4 The utility shall submit its written responses to any data requests issued by Staff and/or the Division of the Public Advocate to the Staff analyst, Staff counsel, and the Division of the Public Advocate within five (5) business days of their receipt.
- 4.5 As soon as reasonably practicable, but in no event fewer than seven (7) calendar days before the Commission meeting at which the Filing is scheduled for consideration, Staff shall advise the utility in writing whether it intends to recommend that the Commission approve or deny the Filing. If Staff will recommend that the Commission deny the Filing, Staff shall fully set forth its reasons therefore. Staff shall also provide its recommendation to the Commission in writing.
- 4.6 The Filing will be scheduled for consideration at the Commission meeting that is the closest meeting prior to the thirty (30) day deadline. If Staff has recommended that the Commission deny the Filing, the utility will be permitted to submit evidence contesting that recommendation.
- 4.7 Upon Commission approval of the Filing, the DSIC/UFRC rate will be implemented pending the year-end Staff audit discussed in Section 6.

### **5.0 DSIC/UFRC and Customer Bills**

- 5.1 The DSIC/UFRC charge shall be broken out as a separate line item on customers' bills.
- 5.2 The DSIC/UFRC rate shall be expressed as a percentage carried out to two (2) decimal places.
- 5.3 The DSIC shall be applied to the total amount billed to each customer under the utility's applicable water rates and charges.
- 5.4 The UFRC shall be applied to the portion of the customer's charge related to the delivery or distribution of natural gas or electricity.
- 5.5 The DSIC/UFRC rate applied between base rate filings shall be capped at 7.5% of the amount billed to customers under otherwise applicable rates and charges. The DSIC/UFRC rate increase applied shall not exceed 5% within any twelve (12)-month period. With respect to any UFRC rate filed by any electric or natural gas utility, the aforesaid level of increase, consistent with 26 **Del.C.** §315(c), is limited to the portion of the customer's charge related to the delivery or distribution of natural gas or electricity.

### **6.0 Annual Reconciliation and Audit**

- 6.1 DSIC and UFRC rates shall be subject to an annual reconciliation based on a period consisting of the twelve months ending December 31 of each year.
- 6.2 DSIC and UFRC rates shall be subject to audit by the Staff. Such audits will be conducted between February and May of each year. Staff will visit the utility's Delaware administrative offices to review the utility's documents. The utility must make staff available to assist with the field audit.
- 6.3 Discovery.
- 6.3.1 Staff may issue data requests to the utility during the annual audit to obtain information regarding but not limited to:
- 6.3.1.1 Whether the plant included in the calculation of the proposed DSIC/UFRC was an Eligible Distribution System Improvement or an Eligible Utility Facility Relocation;
- 6.3.1.2 Whether the utility used the correct depreciation and cost of capital rates in the calculation;
- 6.3.1.3 Whether the utility correctly accounted for all retirements corresponding to the Eligible Distribution System Improvement or the Eligible Utility Facility Relocation;
- 6.3.1.4 Whether the approved DSIC/UFRC rate was applied correctly to customers' bills; and
- 6.3.1.5 Whether any over- or undercollections were properly reflected in the calculation of the DSIC/UFRC rates.
- 6.3.2 26 **DE Admin. Code** §1001-2.6.6 shall govern the deadline for responses to such data requests.

# PROPOSED REGULATIONS

1307

## FORM 1

### SCHEDULE 1: DEVELOPMENT OF RATE AND SUPPORTING DATA

	<u>Item</u>	<u>11/1/XXXX-4/30/XXXX</u>
1	Net Utility Plant Additions (Schedule 1A and Schedule 2)	\$
2	Net Accumulated Depreciation Reserve Change (Schedule 2A)	\$
3	Net Change in Rate Base (Line 1 + Line 2)	\$
4	Pre-Tax Rate of Return (Schedule 1A)	%
5	Semi-Annual Pre-Tax Rate of Return (Line 4/ 2)	%
6	Semi-Annual Investment Cost Recovery (Line 3 * Line 5)	\$
7	Semi-Annual Depreciation Expense (Schedule 2A)	\$
8	Semi-Annual DSIC/UFRC Revenue Requirement (Line 6 + Line 7)	\$
8A	Total Over-/Undercollection from Previous DSIC/UFRC (Schedule 1B)	\$
9	Total Semi-Annual DSIC/UFRC Revenue Requirement (Line 8 + Line 8A)	\$
10	Semi-Annual Projected Total Revenues (for DSIC) Semi-Annual Projected Distribution Revenues (for UFRC)	\$
11	Projected DSIC/UFRC Rate Increase (Line 9/Line 10)	%

## FORM 2

### SCHEDULE 1A: CAPITAL STRUCTURE APPROVED IN MOST RECENT GENERAL/BASE RATE CASE

Capital Structure in PSC Docket No. XX-XXX					
	%	Cost	Weighted Cost	Revenue Multiplier	Pre-Tax Cost
Cost of Debt	XX.XX%	X.XX%	X.XX%	X.XXXXX	X.XX%
Cost of Equity	XX.XX%	X.XX%	X.XX%	X.XXXXX	X.XX%
	100%		X.XX%		X.XX%

## FORM 3

### SCHEDULE 1B: OVER/UNDERCOLLECTIONS FROM PREVIOUS DSIC/UFRC FILINGS

Docket No.	Over/(Under)Collection
XX-XXX	\$ _____
XX-XX	\$ _____

## FORM 4

### SCHEDULE 2: PROJECTS PLACED INTO SERVICE AND/OR RETIRED

Utility Plant in Service 11/1/XX – 4/30/XX
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# PROPOSED REGULATIONS

Project Name	Description	Project No.	DSIC/UFRC Amount(net of CIAC)	Retirement Cost
Rt. 13 Street Widening	Relocate water/gas main	XXXXX	\$ _____	\$ _____
Rt. 7 mall construction	Relocate gas line	XXXXX	\$ _____	\$ _____
I-95 lane addition	Relocate gas line	XXXXX	\$ _____	\$ _____
Old North Rd. repair	Relocate meter	XXXXX	\$ _____	\$ _____
New Street road repair	Relocate meter	XXXXX	\$ _____	\$ _____
Total			\$ _____	\$ _____
Net Total			\$ _____	

## FORM 5

### SCHEDULE 2A: NET ACCUMULATED DEPRECIATION

Net Additions to Plant and Depreciation Expense 11/1/XX – 4/30/XX				
Account Name	FERC/NARUC Account No.	Amount	Depreciation Rate	Depreciation Amount
Mains	XXXXX	\$ _____	X.XX%	\$ _____
Meters	XXXXX	\$ _____	X.XX%	\$ _____
Lines	XXXXX	\$ _____	X.XX%	\$ _____
TOTAL		\$ _____ (Schedule 2)		\$ _____
Semi-Annual Depreciation Expense				\$ _____

Accumulated Depreciation Reserve Change	
Semi-Annual Depreciation Expense (above)	\$ ( _____ )
Retirements (Schedule 2)	\$ _____
TOTAL	\$ _____

### PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code, Section 209(a) (26 Del.C. §209(a))  
26 DE Admin. Code 3008

IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL.C. §§351-363, AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005; REOPENED SEPTEMBER 4, 2007; AUGUST 5, 2008, SEPTEMBER 22, 2009; AUGUST 17, 2010; SEPTEMBER 20, 2011

PSC REGULATION DOCKET NO. 56

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**ORDER NO. 8102**

**AND NOW**, this 31st day of January, 2012:

**WHEREAS**, in 2005 the General Assembly enacted, and the Governor signed into law, the “Renewable Energy Portfolio Standards Act,” 26 **Del.C.** §§351-364 (the “RPS Act”), which, beginning in 2007, required every retail electric supplier to annually accumulate a portfolio of “renewable energy credits” equivalent to a specified percentage of its retail electric supply sales in Delaware; and

**WHEREAS**, in 2006 the Delaware Public Service Commission (the “Commission”) promulgated “Rules and Procedures to Implement the Renewable Energy Portfolio Standard” (the “RPS Rules”) (Order No. 6931 dated June 6, 2006); and

**WHEREAS** the Commission has revised the RPS Rules from time to time to reflect amendments to the RPS Act (PSC Order No. 7377, dated Apr. 17, 2008; PSC Order No. 7494, dated Dec. 16, 2008; PSC Order No. 7653, dated Sep. 22, 2009; and PSC Order No. 7933 dated March 22, 2011); and

**WHEREAS**, on July 7, 2011, the Governor signed into law Senate Bill No. 124 as amended by Senate Amendment No. 1 (78 **Del. Laws** ch. 99) (July 7, 2011), which, among other things, amended various sections of the RPS Act; and

**WHEREAS**, by Order No. 8026 dated September 6, 2011, the Commission authorized the publication in the *Delaware Register of Regulations* of proposed amendments to the RPS Rules; and

**WHEREAS**, the Commission received several comments on the proposed amended RPS Rules; and

**WHEREAS**, Commission Staff has convened several workshops to address commenters’ concerns with the proposed RPS Rules; and

**WHEREAS**, the Commission now proposes to modify the RPS Rules to reflect these agreed-upon RPS Act amendments (attached as Exhibits “A” and “B” hereto are black-lined and clean copies of the proposed amended RPS Rules); and

**WHEREAS** the Commission finds that the proposed revised RPS Rules should be published in the *Delaware Register of Regulations* to provide public notice of the rulemaking to develop final RPS Rules;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:**

1. That, for the reasons set forth in the body of this Order, and pursuant to 26 **Del.C.** §362 and 29 **Del.C.** §10115, the Commission proposes to revise the RPS Rules as set forth herein in Exhibits “A” and “B.” A copy of the RPS Rules in their current form as approved by the Commission in PSC Order No. 7933 (March 22, 2011) is attached as Exhibit “C” to this Order.<sup>1</sup>

2. That, pursuant to 29 **Del.C.** §§1133 and 10115(a), the Secretary shall transmit to the Registrar of Regulations for publication in the March 2012 *Delaware Register of Regulations* a copy of this Order, along with copies of the proposed and current RPS Rules (Exhibits “A” and “B”, respectively).

3. That the Secretary shall cause the Notice of Proposed Rulemaking attached as Exhibit “C” to be published in the *Delaware Register of Regulations*. In addition, the Secretary shall cause such Notice of Proposed Rulemaking to be published in The News Journal and the Delaware State News newspapers on or before **March 1, 2012**. The Secretary shall include proof of such publication in the docket file before the public hearing in this matter. Further, the Secretary shall serve (by regular mail or by electronic e-mail) a copy of such Notice on: (a) the Division of the Public Advocate; (b) the Delaware Energy Office; (c) Delmarva Power & Light Company; (d) all certificated retail electric suppliers; and (e) each person or entity who submitted comments or who appeared (through counsel) at the workshops conducted by Staff regarding the proposed amended RPS Rules.

4. That, pursuant to 29 **Del.C.** §§10115(a) and 10116, persons or entities may file written comments, suggestions, compilations of data, briefs, or other written materials, on or before **April 2, 2012**. Pursuant to 29 **Del.C.** §10117, the Commission will conduct a public hearing on the proposed revisions to the RPS Rules on Tuesday, **April 17, 2012, beginning at 1:00 P.M.** at the Commission’s office at 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware.

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1. The exhibits to this order do not reflect formatting changes made by the Registrar of Regulations.

5. 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:

Jeffrey J. Clark, Commissioner

Joann T. Conaway, Commissioner

Jaymes B. Lester, Commissioner

ATTEST:

Alisa Carrow Bentley, Secretary

**NOTICE OF PROPOSED RULE-MAKING AMENDING "RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARD"**

**TO: ALL ELECTRIC SUPPLIERS, ELECTRIC UTILITIES, ELECTRIC GENERATORS USING RENEWABLE RESOURCES, AND OTHER INTERESTED PERSONS**

Under the "Renewable Energy Portfolio Standards Act," 26 Del.C. §§351-364 (the "RPS Act"), each electric supplier making retail electric sales in Delaware must accumulate a portfolio of "renewable energy credits" equivalent to a specified percentage of its overall retail electric supply sales. In 2006, the Delaware Public Service Commission ("PSC") adopted "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" (the "RPS Rules"), 10 DE Reg. 151-157 (July 1, 2006). The PSC has amended the RPS Rules several times since then to conform to subsequent RPS Act amendments.

On July 7, 2011, Senate Bill No. 124, as amended by Senate Amendment No. 1 (78 Del. Laws ch. 99) (July 7, 2011), which amends several sections of the RPS Act was signed into law. The recently enacted law, among other things:

"Amends the definitions section of 26 Del. C. §352 to include definitions for "Qualified Fuel Cell Provider" and "Qualified Fuel Cell Provider Project;"

"Transfers the responsibility for procuring renewable energy credits ("RECs") and solar renewable energy credits ("SRECs") and any other required attributes necessary to comply with the RPS Act to Commission-regulated electric companies;

"Creates special provisions for Qualified Fuel Cell Providers with respect to recovery of certain costs; and

"Creates special provisions for Commission-regulated electric companies to recover certain costs with respect to their purchase of the output from Qualified Fuel Cell Providers.

The PSC proposes to revise the RPS Rules to incorporate, and assure consistency with, the statutory changes made by the recently enacted law.

The PSC is soliciting comments, suggestions, compilations of data, briefs, or other written materials about the proposed revisions to its RPS Rules. If you wish to file any such materials, you should submit an original and ten copies of such written documents on or before April 2, 2012. You should file such materials with the PSC at the following address:

Public Service Commission  
861 Silver Lake Boulevard  
Cannon Building, Suite 100  
Dover, Delaware, 19904  
Attn: Reg. Dckt. No. 56

If possible, you should accompany such written comments with an electronic version of the submission. Such electronic copy may be filed on a copy-capable CD-ROM disk or sent as an attachment to an Internet e-mail addressed to [pamela.Knotts@state.de.us](mailto:pamela.Knotts@state.de.us).

The PSC will also conduct a public evidentiary hearing on the new proposed regulations on April 17, 2012 at 1:00 P.M. at the PSC's office at the address set forth above.

You may review PSC Order No. 8102 (January 31, 2012) (the "Order") and the proposed revised RPS Rules in the March 2012 issue of the Delaware Register of Regulations. You may also review the Order and the proposed revised RPS Rules at the PSC's Internet website located at <http://dep.sc.delaware.gov>.

Any materials submitted in connection with the proposed revised RPS Rules will be available for public inspection and copying (to the extent they are "public records" under the Freedom of Information Act, 29 Del. C. §10002(g)) at the Commission's Dover office identified above during normal business hours. The fee for copying is \$.10 per page, with the first 20 pages being free of charge. If you wish to request copies of documents in this matter, please submit a Freedom of Information Act Request Form. This form may be found at <http://smu.portal.delaware.gov/cgi-bin/mail.php?foia-request&subj=DOS>. There is also a link to the Freedom of Information Act Request Form on the Commission's website, <http://dep.sc.delaware.gov/default.shtml>. The Commission will respond to your request in accordance with the Freedom of Information Act, 29 Del. C. ch. 100. The Regulations may also be reviewed by appointment at the office of the Public Advocate, 820 N. French Street, 4th Floor, Carvel State Office Building, Wilmington, DE 19801. The Regulations will also be available on the Commission's website: <http://dep.sc.delaware.gov>.

Any individual with disabilities who wishes to review submissions or to participate in this docket should contact the Commission to discuss any auxiliary aids or services to facilitate such review or participation. Such contact may be in person, in writing, by telephone or otherwise. The Commission's toll-free telephone number in Delaware is (800) 282-8574. Any person with questions may contact Pamela Knotts at (302) 736-7541, by voice and/or Text Telephone at (302) 736-7500, or via electronic mail at [pamela.knotts@state.de.us](mailto:pamela.knotts@state.de.us).

## 3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)

### 1.0 Definitions

- 1.1 The following words and terms, when used in this Regulation, should have the following meanings unless the context clearly indicates otherwise:

**"Alternative Compliance Payment"** or "ACP" means a payment of a certain dollar amount per megawatt hour, which a Retail Electricity Supplier may submit in lieu of supplying the minimum percentage of RECs required under Section 3.3.5 of this Regulation.

**"Commission"** means the Delaware Public Service Commission.

**"Compliance Year"** means the calendar year beginning with June 1 and ending with May 31 of the following year, for which a Retail Electricity Supplier must demonstrate that it has met the requirements of this Regulation.

**"Customer-Sited Generation"** means a Generation Unit that is interconnected on the End-Use Customer's side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the End-Use Customer.

**"DNREC"** means Delaware Department of Natural Resources and Environmental Control.

**"Eligible Energy Resources"** means the following energy sources located within the PJM region or imported into the PJM region and tracked through the PJM Market Settlement System:

Solar Photovoltaic Energy Resources means solar photovoltaic or solar thermal energy technologies that employ solar radiation to produce electricity or to displace electricity use;

Electricity derived from wind energy;

Electricity derived from ocean energy including wave or tidal action, currents, or thermal differences;

Geothermal energy technologies that generate electricity with a steam turbine, driven by hot water or steam extracted from geothermal reservoirs in the earth's crust;

Electricity generated by a fuel cell powered by Renewable Fuels;

Electricity generated by the combustion of gas from the anaerobic digestion of organic material;

Electricity generated by a hydroelectric facility that has a maximum design capacity of 30 megawatts or less from all generating units combined that meet appropriate environmental standards as determined by DNREC (see DNREC Regulation's Secretary's Order No. 2006-A-0035);

Electricity generated from the combustion of biomass that has been cultivated and harvested in a sustainable manner as determined by DNREC, and is not combusted to produce energy in a waste to energy facility or in an incinerator (see DNREC Regulation's Secretary's Order No. 2006-A-0035);

Electricity generated by the combustion of methane gas captured from a landfill gas recovery system; provided, however, that:

Increased production of landfill gas from production facilities in operation prior to January 1, 2004 demonstrates a net reduction in total air emissions compared to flaring and leakage;

Increased utilization of landfill gas at electric generating facilities in operation prior to January 1, 2004 (i) is used to offset the consumption of coal, oil, or natural gas at those facilities, (ii) does not result in a reduction in the percentage of landfill gas in the facility's average annual fuel mix when calculated using fuel mix measurements for 12 out of any continuous 15 month period during which the electricity is generated, and (iii) causes no net increase in air emissions from the facility; and

Facilities installed on or after January 1, 2004 meet or exceed 2004 Federal and State air emission standards, or the Federal and State air emission standards in place on the day the facilities are first put into operation, whichever is higher.

**"End-Use Customer"** means a person or entity in Delaware that purchases electrical energy at retail prices from a Retail Electricity Supplier.

**"Fund"** means the Delaware Green Energy Fund.

**"GATS"** means the Generation Attribute Tracking System developed by PJM-Environmental Information Services, Inc. (PJM-EIS).

**"Generation Attribute"** means a non-price characteristic of the electrical energy output of a Generation Unit including, but not limited to, the Unit's fuel type, geographic location, emissions, vintage, and RPS eligibility.

**"Generation Unit"** means a facility that converts a fuel or an energy resource into electrical energy.

**"Industrial Customer"** means an End-Use Customer with a North American Industry Classification System (NAICS) Manufacturing Sector Code.

**"Municipal Electric Company"** means a public corporation created by contract between 2 or more municipalities pursuant to provisions of Title 22, Chapter 13 of the **Delaware Code** and the electric utilities that are municipally owned within the State of Delaware.

**"New Renewable Generation Resources"** means Eligible Energy Resources first going into commercial operation after December 31, 1997.

**"Peak Demand"** shall have the same meaning as and be determined consistently with how such term or a similar term is defined and determined in the applicable utility's tariff then in effect and approved by the Commission. For customers with more than one account, the peak demands shall be aggregated for all accounts. The calculation will be applied in the current year based on the Peak Demand, as defined above, in the prior year.

**"PJM"** or **"PJM Interconnection"** means the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.

**"PJM region"** means the area within which the movement of wholesale electricity is coordinated by PJM Interconnection. The PJM region is as described in the Amended and Restated Operating Agreement of PJM.

**"Qualified Fuel Cell Provider"** means an entity that:

a. By no later than the commencement date of commercial operation of the full nameplate capacity of a fuel cell project, manufactures fuel cells in Delaware that are capable of being powered by renewable fuels, and

b. prior to approval of required tariff provisions, is designated by the Director of the Delaware Economic Development Office and the Secretary of DNREC as an economic development opportunity.

**"Qualified Fuel Cell Provider Project"** (or **"QFCPP"**) means a fuel cell power generation project located in Delaware owned and/or operated by a Qualified Fuel Cell Provider under a tariff approved by the Commission pursuant to 26 **Del.C.** §364(d).

**"Renewable Energy Credit"** or ("REC") means a tradable instrument comprised of all the Generation Attributes equal to 1 megawatt-hour of electricity derived from Eligible Energy Resources and that is used to track and verify compliance with the provisions of this Regulation. A REC does not include emission reduction credits and/or allowances encumbered or used by a Generation Unit for compliance with local, state, or federal operating and/or air quality permits associated with the 1 megawatt-hour of electricity.

**"Renewable fuel"** means a fuel that is derived from Eligible Energy Resources. This term does not include a fossil fuel or a waste product from a fossil fuel source.

**"RPS"** or **"Renewable Energy Portfolio Standard"** means the percentage of electricity sales at retail in the State that is to be derived from Eligible Energy Resources.

**"Retail Electricity Product"** means an electrical energy offering that is distinguished by its Generation Attributes only and that is offered for sale by a Retail Electricity Supplier to End-Use Customers. Multiple electrical energy offerings with the same Generation Attributes may be considered a single Retail Electricity Product.

**"Retail Electricity Supplier"** means a person or entity that sells electrical energy to End-Use Customers in Delaware, including, but not limited to, non-regulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to End-Use Customers. A Retail Electricity Supplier does not include a Municipal Electric Company for the purposes of this Regulation.

**"Rural Electric Cooperative"** means a non-stock, non-profit, membership corporation organized pursuant to the Federal "Rural Electrification Act of 1936" and operated under the cooperative form of ownership.

**"Solar Alternative Compliance Payment"** or "SACP" means a payment of a certain dollar amount per megawatt-hour, which a Retail Electricity Supplier or Municipal Electric Supplier may submit in lieu of supplying the Minimum Percentage from Solar Photovoltaic required under Section 3.3.4 of this Regulation.

**"Sustainable Energy Utility"** or ("SEU") is the nonprofit entity according to the provisions of 29 **Del.C.** §8059 that develops and coordinates programs for energy end-users in Delaware for the purpose of promoting the sustainable use of energy in Delaware.

**"Solar Renewable Energy Credit"** or "SREC" means a tradable instrument that is equal to 1 megawatt-hour of retail electricity sales in the State that is derived from Solar Photovoltaic Energy Resources and that is used to track and verify compliance with the provisions of this Regulation.

**"Total Retail Sales"** means retail sales of electricity within the State of Delaware exclusive of sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.

11 DE Reg. 1670 (06/01/08)

13 DE Reg. 952 (01/01/10)

14 DE Reg. 1241 (05/01/11)

## 2.0 Purpose and Scope

- 2.1 The benefits of electricity from renewable energy resources accrue to the public at large, and electric suppliers and consumers share an obligation to develop a minimum level of these resources in the

electric supply portfolio of the State. The purpose of this Regulation, in support of 26 **Del.C.**, Subchapter III-A, is to set forth the rules for governing the RPS.

- 2.2 This Regulation shall apply to all retail electricity sales in the State of Delaware except for retail electricity sales of Municipal Electric Companies and retail electricity sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.
- 2.2.1 An Industrial Customer with Peak Demand in excess of 1,500 kilowatts may elect to have ~~their~~ its load exempt from this Regulation provided that ~~they~~ it meets the definitions found in Section 1.1 and:
- 2.2.1.1 submits a notice to the Commission's Staff including, but not limited to, Name and Address of Industrial Customer, and NAICS Code, and load for each account;
- 2.2.1.1.1 the Commission's Staff shall, within thirty (30) days of receipt of the notice, provide to the Industrial Customer an acknowledgement of the status, exempt or non-exempt, of the Industrial Customer; and
- 2.2.1.2 submits the Commission's Staff acknowledgement referenced in Section 2.2.1.1.1 of this Regulation to ~~their~~ its Retail Electricity Supplier.
- 2.2.2 For an End-Use Customer with multiple accounts totaling in excess of 1,500 kilowatts within an applicable utility's service territory and served by a single Retail Electricity Supplier, to have ~~their~~ its load exempt, the aggregate of ~~their~~ its accounts with an NAICS Manufacturing Sector Code must have a Peak Demand of at least 751 kilowatts and ~~they~~ it must follow the procedure found in Section 2.2.1.
- 2.3 Any Rural Electric Cooperative that has opted-out of Commission regulation by its membership pursuant to 26 **Del.C.** §223 of the **Delaware Code** shall, for all purposes of administering and applying this Regulation, be treated as a Municipal Electric Company during any period of time the Rural Electric Cooperative is exempt from Commission regulation.
- 2.4 A Rural Electric Cooperative may elect to be exempt from the requirements of this Regulation if it develops and implements a program for its ratepayers that is comparable to the RPS beginning in 2013. A Rural Electric Cooperative electing to be exempt from this Regulation must notify the Commission of such election and shall be subject to the requirements set forth in 26 **Del.C.** §363. A Rural Electric Cooperative not electing to be exempt from this Regulation shall be subject to this Regulation and the applicable provisions of 26 **Del.C.** §363.

**11 DE Reg. 1670 (06/01/08)**

**14 DE Reg. 1241 (05/01/11)**

### **3.0 Administration of RPS**

- 3.1 Certifying and Decertifying Eligible Energy Resources:
- 3.1.1 The Commission through its Staff will certify Generation Units as Eligible Energy Resources based on the definition of Eligible Energy Resources found in Section 1.1 of this Regulation.
- 3.1.2 Any Generation Unit seeking certification as an Eligible Energy Resource must submit an Application for Certification as an Eligible Energy Resource Under the Delaware Renewable Energy Portfolio Standard (Application) to the Commission. This may include Customer-Sited Generation or a Generation Unit owned or operated by a Municipal Electric Company.
- 3.1.3 Customer-sited generation is eligible to be considered an Eligible Energy Resource provided the facility is physically located in Delaware.
- 3.1.34 Commission Staff will review the Application and will notify the applicant of its approval as an Eligible Energy Resource or of any deficiencies in ~~their~~ its Application within 30 days of receipt. The applicant will have the opportunity to revise ~~their~~ its submission, if appropriate.
- 3.1.5 If an Eligible Energy Resource, once notified by Commission Staff, fails to provide the required documentation or missing information within 60 days of the date of such notification, the Application will be dismissed and must be resubmitted.
- 3.1.46 If Commission Staff finds the Generation Unit to be in compliance with this Regulation and other applicable law, Staff will issue a State of Delaware Certification Number.

- 3.1.57 Upon receipt of the State of Delaware Certification Number, a Generation Unit will be deemed an Eligible Energy Resource.
- 3.1.68 Upon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) REC for each mega-watt hour of energy derived from Eligible Energy Resources other than Solar Photovoltaic Energy Resources. Upon designation as an Eligible Energy Resource, the owner of a Generation Unit employing Solar Photovoltaic Energy Resources shall be entitled to one (1) SREC for each mega-watt hour of energy derived from Solar Photovoltaic Energy Resource. SRECs and RECs will be created and supplied by the PJM-EIS GATS, or its successor at law. Eligible Energy Resources are subject to applicable PJM-EIS GATS rules and shall pay applicable PJM-EIS GATS fees.
  - 3.1.68.1 The Commission may establish or participate in another renewable energy tracking system, if the Commission finds that PJM-EIS's GATS is not applicable or not suited to meet the needs or requirements of the RPS.
- 3.1.79 If a Generation Unit is deemed an Eligible Energy Resource under ~~Section 3.4~~ and the Eligible Energy Resource's GATS account continues to be maintained in good standing, the Eligible Energy Resource may achieve a Delaware designation for RECs or SRECs recorded with PJM-EIS's GATS for the calendar year being traded in GATS at the time of the Commission Staff's approval of the Eligible Energy Resource.
- 3.1.810 An Eligible Energy Resource will remain certified unless substantive changes are made to its operational characteristics. Substantive changes include but are not limited to changes in fuel type, fuel mix and generator type. An Eligible Energy Resource making substantive changes to its operational characteristics shall notify the Commission of such changes at least 30 days prior to the effective date of such changes. At such time, the Generation Unit shall submit a revised Application, which shall be subject to review and re-certification pursuant to ~~Section 3.4~~ of this Regulation.
- 3.1.11 An Eligible Energy Resource must provide updates to any changes to information submitted in the Application within 30 days of those changes becoming effective. These changes include but are not limited to changes in ownership of the generating unit, changes in ownership of the RECs or SRECs, changes in system size, or the deactivation of the unit.
- 3.1.912 RECs or SRECs created by an Eligible Energy Resource shall remain valid for compliance, subject to Section 3.2.37, Section 3.3.3 and Section 3.3.4 of this Regulation, even if that Eligible Energy Resource is subsequently decertified for eligibility.
- 3.1.13 An Eligible Energy Resource may be decertified for any of the following:
  - 3.1.13.1 Failure to comply with Sections 3.1.1 through 3.1.11;
  - 3.1.13.2 A material change in circumstances that causes it to become ineligible for certification under Section 3.1;
  - 3.1.13.3 Fraud or misrepresentation in the Application or to PJM-EIS GATS;
  - 3.1.13.4 Failure to properly update the Commission on changes to information submitted in the Application; or
  - 3.1.13.5 Good cause as determined by the Commission.
- 3.2 Compliance with RPS
  - 3.2.1 The Total Retail Sales of each Retail Electricity Product ~~sold~~ delivered to End-Use Customers by a Retail Electricity Supplier during any given Compliance Year shall include a minimum percentage of electrical energy sales from Eligible Energy Resources and Solar Photovoltaics as shown in Schedule 1.

<b>SCHEDULE 1</b>		
Compliance Year (beginning June 1st)	Cumulative Minimum Percentage from Solar Photovoltaics Energy Resources	Minimum Cumulative Percentage from Eligible Energy Resources
2007		2.0%
2008	0.011%	3.0%

# PROPOSED REGULATIONS

2009	0.014%	4.0%
2010	0.018%	5.0%
2011	0.20%	7.0%
2012	0.40%	8.5%
2013	0.60%	10.0%
2014	0.80%	11.5%
2015	1.0%	13.0%
2016	1.25%	14.5%
2017	1.50%	16.0%
2018	1.75%	17.5%
2019	2.00%	19.0%
2020	2.25%	20.00%
2021	2.50%	21.00%
2022	2.75%	22.00%
2023	3.00%	23.00%
2024	3.25%	24.00%
2025	3.50%	25.00%

Minimum Cumulative Percentage from Eligible Energy Resources includes the Minimum Cumulative Percentage from Solar Photovoltaics

3.2.2 A Retail Electricity Supplier's compliance with Schedule 1 shall be based on accumulating RECs and SRECs equivalent to the current Compliance Year's Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers and subject to Section 3.2.37 of these Regulations and, where appropriate, other Commission regulations.<sup>2</sup> ~~Such RECs and SRECs shall be filed annually with the Commission within 120 days following the completion of the Compliance Year. Each Retail Electricity Suppliers shall file a report detailing its compliance with its RPS obligations within 120 days following the end of Compliance Year 2011.~~

3.2.3 Beginning June 1, 2012, Commission-regulated electric companies ("CREC") shall be responsible for procuring RECs, SRECs, and any other attributes needed to comply with 26 Del.C. §354 and Section 3.2.1 with respect to all energy delivered to End-Use Customers. Such RECs and SRECs shall be filed annually with the Commission within 120 days following the completion of the Compliance Year.

3.2.3.1 The transitional process set forth in these Regulations shall apply to all Retail Electricity Suppliers that entered into retail electric supply contracts prior to March 1, 2012 that include RPS compliance costs for Compliance Year 2012 and thereafter and that extend beyond June 1, 2012 (such retail electric supply contracts shall be referred to as "Transitional Retail Contracts". The transitional process will end when the particular contract expires<sup>3</sup>, or is otherwise terminated, or is modified to transfer the RPS compliance costs to the CREC, whichever occurs first.

2. The Commission understands the legislation to mean that the Total Retail Sales of *each* Retail Electricity Product sold to End-Use Customers during a given Compliance Year shall include a minimum percentage of SRECs and RECs determined by the current Cumulative Minimum Percentage as defined in Schedule 1 ~~or Schedule 2. The Commission shall, in another proceeding, further define how SRECs and RECs from Green Power products, as that term is defined in Commission Docket Number 49, are to be tracked and utilized for compliance in the RPS.~~

3. For purposes of this rule, a contract will be considered to have expired as of the date of the end of the original contract term. Any extension(s) to the original contract term will, for purposes of this rule, be considered a new contract.

- 3.2.3.1.1 On or before March 1, 2012, each Retail Electricity Supplier shall provide the CREC, the Commission Staff and the DPA with identification of all End-Use Customers supplied through a Transitional Retail Contract and shall further provide such supporting data as may be requested. Such identification shall include, but shall not be limited to, the name of the End-Use Customer and the expiration date of the Transitional Retail Contract. All such information required to be submitted hereunder may be submitted confidentially by the Retail Electric Supplier.
- 3.2.3.1.2 End-Use Customers who dispute their designation may file a complaint with the Commission according to 26 DE Admin. Code §1000.
- 3.2.3.1.3 Retail Electricity Suppliers shall transfer the RECs and SRECs necessary to meet their RPS compliance obligations for each Transitional Retail Contract for the respective Compliance Year beginning with Compliance Year 2012, to the CREC's GATS account for retirement at no cost to the CREC. The CREC will provide to the respective Retail Electricity Supplier the sales number based on metered data pertaining to the identified Transitional Retail Contracts for determining its RPS obligation with preliminary data on or before June 15<sup>th</sup>, and final data on or before August 15<sup>th</sup>. Ninety percent of the Retail Electricity Supplier's expected total RECs/SRECs necessary for compliance with its RPS obligations for each Transitional Retail Contract shall be transferred to the CREC's GATS account on or before August 1<sup>st</sup> following the end of the Compliance Year, and the remaining RECs and SRECs necessary for compliance with the Retail Electricity Supplier's RPS compliance obligations for each Transitional Retail Contract shall be transferred to the CREC's GATS account on or before September 1<sup>st</sup> following the end of the Compliance Year. Should either of these deadlines fall on a weekend or legal holiday, the deadline will be the next business day following August 1<sup>st</sup> and September 1<sup>st</sup>.
- 3.2.3.1.4 If a Retail Electricity Supplier fails to transfer to the CREC's GATS account sufficient RECs or SRECs to comply with its RPS obligations for each Transitional Retail Contract, it shall reimburse the CREC for the CREC's weighted average purchase cost of procuring such RECs and /or SRECs necessary to comply with the Retail Electricity Supplier's obligations and/or any associated ACPs or SACP's by the CREC. The CREC shall accept the retail supplier's designation of Transitional Retail Contracts in determining the RPS obligation for such supplier.
- 3.2.3.1.4.1 The CREC shall notify the Retail Electricity Supplier of its deficiency and the amount owed to the CREC by October 1<sup>st</sup> of each year. The CREC shall provide the Retail Electricity Supplier with all supporting documentation of the costs incurred, if requested by the Retail Electricity Supplier. The Retail Electricity Supplier shall have fifteen (15) business days to reimburse the CREC or to advise the Commission in writing of any dispute relating to the deficiency. Interest shall accrue for any late payment (after the 15 business days) and shall be payable to the CREC. The interest rate shall be based on Delmarva's short term debt rate in effect on the date when the payment was due from the Retail Electricity Supplier.
- 3.2.3.1.5 To protect a CREC and its customers from incurring an ACP or SACP due to a Retail Electricity Supplier's failure to transfer the appropriate number of RECs and/or SRECs necessary for compliance with its RPS obligations during the transitional process, a CREC may request the Commission to approve a temporary reduction in its RPS obligation or a reduction in the ACP or SACP price for that Compliance Year.
- 3.2.3.2 Beginning with sales as of June 1, 2012, the CREC will charge all of its distribution system customers for RPS compliance costs through a non-bypassable charge based on the weighted average cost of the RECs and SRECs supplied by the CREC.

## PROPOSED REGULATIONS

- 3.2.3.2.1 The CREC will credit the distribution portion of the bill of the End-User Customers identified in Section 3.2.3.1.1 of these Regulations by the amount equal to the non-bypassable charge for the duration of the Transitional Retail Contract.
- 3.2.3.3 The CREC and Retail Electricity Suppliers shall place on their websites customer education pertaining to the RPS non-bypassable charge and credit required in Section 3.2.3.2 and 3.2.3.2.1. The CREC shall also include information on the RPS non-bypassable charge and credit on its bill message or bill insert.
- 3.2.3.4 Retail Electricity Suppliers that prior to March 1, 2012, have entered into contracts to purchase or produce RECs and/or SRECs specifically for Delaware RPS compliance may offer to the CREC those RECs and/or SRECs. The price would be determined by separate agreement between the Retail Electricity Supplier and the CREC. In no case shall the CREC be obligated to purchase any RECs/SRECs from the Retail Electricity Supplier.
- 3.2.4 CRECs may use energy output produced by a Qualified Fuel Cell Provider Project to fulfill their REC and SREC requirements as determined by the Secretary of DNREC in consultation with the Commission.
- 3.2.5 Energy output must be tracked using PJM-EIS GATS or its successor at law or pursuant to Section 3.1.8.1 of this Regulation.
- 3.2.6 The right of Commission-regulated electric companies to use energy output produced by a Qualified Fuel Cell Provider Project to fulfill their REC and SREC requirements shall not expire until actually applied to fulfill such requirements.
- 3.2.37 ~~Each~~ No CREC, or Retail Electricity Supplier with existing contractual electric supply obligations can provide ~~no~~ more than 1% of each Compliance Year's Total Retail Sales from Eligible Energy Resources operational before December 31, 1997. The remainder of each year's retail sales, up to the required amount as specified in Section 3.2.1 of this Regulation must come from New Renewable Generation resources. In Compliance Year 2026 and for each Compliance Year thereafter, all Eligible Energy Resources used to meet the cumulative minimum percentage requirements set by the Commission rules shall be New Renewable Generation Resources.
- 3.2.48 A Retail Electricity Supplier shall not use RECs or SRECs used to satisfy another state's renewable energy portfolio requirements for compliance with Section 3.2.1 and Schedule 1. A Retail Electricity Supplier may sell or transfer any RECs or SRECs not required to meet this Regulation.
- 3.2.59 On or after June 1, 2006, Eligible Energy Resources may create and accumulate RECs or SRECs for the purposes of calculating compliance with the RPS.
- 3.2.10 Eligible Energy Resources that do not settle through the PJM Market settlement system must document their actual output of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.
- 3.2.611 Aggregate generation from small Eligible Energy Resources, totaling 100 kilowatts or less of capacity ~~or less~~, may be used to meet the requirements of Section 3.2.1 and Schedule 1 provided that the generators or their agents ~~shall, on an annual basis~~, document the level of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.
- 3.2.712 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 300% credit toward meeting the Minimum Cumulative Percentage from Eligible Energy Resources of Sections 3.2.1 and Schedule 1 of the RPS for energy derived from the following sources installed on or before December 31, 2014:
- 3.2.712.1 Customer-Sited solar photovoltaic physically located in Delaware; or
- 3.2.712.2 A fuel cell powered by Renewable Fuels; for Retail Electricity Suppliers, and such a fuel cell sited in Delaware for Rural Electric Cooperatives.
- 3.2.813 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 150% credit toward meeting the RPS for wind energy installations sited in Delaware on or before December 31, 2012.

- ~~3.2.914~~ A ~~Commission-regulated electric company~~ CREC shall receive 350% credit toward meeting the ~~Renewable Energy Portfolio Standards established~~ RPS for energy derived from off-shore wind energy installations sited off the Delaware coast on or before May 31, 2017.
- 3.2.914.1 To be entitled to 350% credit, contracts for energy and renewable energy credits from such off-shore wind energy installations must be executed by ~~Commission-regulated electric companies~~ CREC prior to commencement of construction of such installations.
- 3.2.914.2 ~~Commission-regulated electric companies~~ CREC shall be entitled to such multiple credits for the life of contracts for renewable energy credits from off-shore wind installations executed pursuant to section 3.2.914.
- 3.2.105A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware, provided that a minimum of 50% of the cost of the renewable energy equipment, inclusive of mounting components, ~~are manufactured in~~ relates to Delaware manufactured equipment.
- 3.2.146 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware provided that the facility is constructed and/or installed ~~with a minimum of 75% in state workforce~~ with a workforce that consists of at least 75% Delaware residents and/or the installing company employs in total a minimum of 75% workers who are Delaware residents.
- 3.2.127 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive credit toward meeting the RPS for electricity derived from the fraction of eligible landfill gas, biomass or biogas combined with other fuels (for a Rural Electric Cooperative the Eligible Energy Resource must be sited in Delaware).
- 3.2.138 Cumulative minimum percentage requirements of Eligible Energy Resources and Solar Photovoltaic Resources shall be established by Commission rules for Compliance Year 2026 and each subsequent year. In no case shall the minimum percentages established by Commission rules be lower than those required for Compliance Year 2025 in Sections 3.2.1 and Schedule 1. Each of the rules setting such minimum percentage shall be adopted at least two years prior to the minimum percentage being required.
- 3.2.149 Beginning in Compliance Year 2010, and in each Compliance Year thereafter, the Commission may review the status of Section 3.2.1 and Schedule 1 and report to the legislature on the status of the pace of the scheduled percentage increases toward the goal of 25%. If the Commission concludes at this time that the schedule either needs to be accelerated or decelerated, it may also make recommendations to the General Assembly for legislative changes to the RPS.
- 3.2.4520 Beginning in Compliance Year 2014, and in each Compliance Year thereafter, the Commission may, in the event of circumstances specified in this subsection and after conducting hearings, accelerate or slow the scheduled percentage increases towards meeting the goal of 25%. The Commission may only slow the increases if the Commission finds that at least 30% of RPS compliance has been met through the ACP or SACP for three (3) consecutive years, despite adequate planning by the CREC and, where applicable, Retail Electricity Suppliers with existing contractual electric supply obligations. The Commission may only accelerate the scheduled percentage increases after finding that the average price for RECs and SRECs eligible for RPS compliance has, for two (2) consecutive years, been below a predetermined market-based price threshold to be established by the Commission. The Commission shall establish the predetermined market-based price threshold in consultation with the Delaware Energy Office. Rules that would alter the percentage targets shall be promulgated at least two years before the percentage change takes effect. In no event shall the Commission reduce the percentage target below any level reached to that point.
- 3.2.4621 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for ~~Commission-regulated electric companies~~ CRECs as authorized by, and pursuant to, 26 **Del.C.** § 354(i)-(j). For a freeze to occur, the Delaware Energy Office must determine that the cost of complying with the requirements of this Regulation exceeds 1%, for Solar Photovoltaic Energy Resources, ~~4%~~, and

~~3%~~ for Eligible Energy Resources, ~~3%~~ of the total retail cost of electricity for ~~Retail e~~Electricity ~~s~~Suppliers during the same ~~e~~Compliance ~~y~~Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACP alternative compliance payments.

3.2.4621.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the ~~e~~Compliance ~~y~~Year in which the freeze was instituted.

3.2.4621.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.

3.2.4722 The Renewable Energy Taskforce shall be formed for the purpose of making recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware according to 26 **Del.C.** §360(d).

### 3.3 Verification of Compliance with the RPS

3.3.1 Within 120 days of the end of a ~~the e~~Compliance ~~y~~Year 2011, each Retail Electricity Supplier who has made sales to an End-use Customer in the State of Delaware must submit a completed Retail Electricity Supplier's Verification of Compliance with the Delaware Renewable Energy Portfolio Standard Report (Report) which includes, but is not limited to, evidence of the specified number of SRECs and RECs required for that Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product. Beginning with the Compliance Year 2012, the CREC must submit a completed Retail Electricity Supplier's Verification of Compliance with the Delaware Renewable Energy Portfolio Standard Report (Report) which includes, but is not limited to, evidence of the specified number of SRECs and RECs required for the Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product according to Section 3.2.3.

3.3.2 SRECs or RECs must have been created by PJM-EIS's GATS, or its successor at law, or pursuant to Section 3.1.68.1 of this Regulation.

3.3.3 SRECs or RECs, submitted for compliance with this Regulation, may be dated no earlier than three (3) years prior to the beginning of the current Compliance Year.

3.3.4 The three (3) year period referred to in Section 3.3.3 shall be tolled during any period that a renewable energy credit or solar renewable energy credit is held by the SEU as defined in 29 **Del.C.** §8059.

3.3.5 In lieu of standard means of compliance with the RPS, any Retail Electricity Supplier may pay into the Fund an SACP or ACP pursuant to, and in such amounts as stated in, 26 **Del.C.** §358, or in such other amounts as may be determined by the State Energy Coordinator of the Delaware Energy Office consistent with 26 **Del.C.** §354(ei)-(ej).

3.3.6 The Commission Staff shall notify any Retail Electricity Supplier of any compliance deficiencies within 165 days of the close of the current Compliance Year. If the Retail Electricity Supplier is found to be deficient by the Commission Staff, the Retail Electricity Supplier shall be required to pay the appropriate ACP or SACP, according to Section 3.3.5 of this Regulation. All such payments shall be due within 30 days of notification by the Commission Staff. Upon receipt of payment, the Retail Electricity Supplier shall be found to be in compliance for that given year.

3.3.7 All compliance payments, made by ~~the a~~ Retail Electricity Supplier, shall be payable to the Delaware Green Energy Fund and sent to the Commission.

**11 DE Reg. 1670 (06/01/08)**

**12 DE Reg. 1110 (02/01/09)**

**13 DE Reg. 952 (01/01/10)**

**14 DE Reg. 1241 (05/01/11)**

### 4.0 Recovery of Costs

4.1 A Retail Electricity Supplier may recover, through a non-bypassable surcharge ~~on its supply portion of the bill,~~ actual dollar for dollar costs incurred in complying with the State of Delaware's RPS, except

that any compliance fee assessed pursuant to Section 3.3.5 and its subsections of these Rules and Regulation shall be recoverable only to the extent authorized by Section 4.2 of this Regulation.

- 4.2 A Retail Electricity Supplier may recover any ACP or SACP if the payment of an ACP or SACP is the least cost measure to ratepayers as compared to the purchase of RECs and SRECs to comply with the RPS; or if there are insufficient RECs and SRECs available for the Retail Electricity Supplier to comply with the RPS.
- 4.3 Any cost recovered under this section shall be disclosed to customers at least annually on inserts accompanying customer bills.
- 4.4 Special provisions for customers of ~~Public Service Commission regulated electric companies~~ CRECs. All costs arising out of contracts entered into by a ~~Commission regulated electric company~~ CREC pursuant to 26 **Del.C.** §1007 (d) shall be distributed among the entire Delaware customer base of such companies through an adjustable non-bypassable charge which shall be established by the Commission. Such costs shall be recovered if incurred as a result of such contracts unless, after Commission review, any such costs are determined by the Commission to have been incurred in bad faith, are the product of waste or out of an abuse of discretion, or in violation of law.

**11 DE Reg. 1670 (06/01/08)**

**12 DE Reg. 1110 (02/01/09)**

**14 DE Reg. 1241 (05/01/11)**

#### **5.0 ~~Other General Rules~~ Miscellaneous**

- 5.1 Under Delaware's Freedom of Information Act, 29 **Del.C.** Ch. 100, all information filed with the Commission is considered of public record unless it contains "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 **Del.C.** §10002(d)(2). To qualify as a non-public record under this exemption, materials received by the Commission must be clearly and conspicuously marked on the title page and on every page containing the sensitive information as "proprietary" or "confidential" or words of similar effect. The Commission shall presumptively deem all information so designated to be exempt from public record status. However, upon receipt of a request for access to information designated proprietary or confidential, the Commission may review the appropriateness of such designation and may determine to release the information requested. Prior to such release, the Commission shall provide the entity that submitted the information with reasonable notice and an opportunity to show why the information should not be released.
- 5.2 Any End-Use Customer, Retail Electricity Supplier, Eligible Energy Resource, potential Eligible Energy Resource, Qualified Fuel Cell Provider Project or other interested party to which this Regulation may apply may file a complaint with the Commission pursuant to the Rules of Practice and Procedure of the Delaware Public Service Commission.
- 5.3 The failure to comply with this Regulation may result in penalties, including monetary assessments, suspension or revocation of eligibility as an Eligible Energy Resource, or other sanction as determined by the Commission consistent with 26 **Del.C.**, §205(a), §217, and §1019.

**10 DE Reg. 151 (07/01/06)**

**11 DE Reg. 1670 (06/01/08)**

**14 DE Reg. 1241 (05/01/11)**

## Symbol Key

Arial 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.

**DEPARTMENT OF AGRICULTURE  
HARNESS RACING COMMISSION**

Statutory Authority: 3 Delaware Code, Section 10005 (3 **Del.C.** §10005)  
3 **DE Admin. Code** 501

**501 Harness Racing Rules and Regulations****ORDER**

Pursuant to 29 **Del.C.** §10118 and 3 **Del.C.** §10005, the Delaware Harness Racing Commission issues this Order adopting proposed amendments to the Commission's Rules. Following notice and a public hearing on February 14, 2012, the Commission makes the following findings and conclusions:

**SUMMARY OF THE EVIDENCE**

1) The Commission posted public notice of the proposed amendments to DHRC Rule 7.14 and DHRC Rule 8.3.5.9.4 in the January 1, 2012 *Register of Regulations* (Volume 15, Issue 7) and for two consecutive weeks in January, 2012 in *The News Journal* and *Delaware State News*. The Commission proposed to update Rule 7.14 and Rule 8.3.5.9.4 in its entirety after Rules Committee review.

2) The Commission received no written comments. The Commission held a public hearing on February 14, 2012, in which no public comments were made.

**FINDINGS OF FACT AND CONCLUSIONS**

3) The public was given notice and an opportunity to provide the Commission with comments in writing and by testimony at the public hearing on the proposed amendments to the Commission's Rules.

4) After considering the rule changes as proposed, the Commission hereby adopts the rule changes as proposed. The Commission believes that these rule changes will allow the Delaware Harness Racing Commission to more accurately reflect current policy and procedures.

5) The effective date of this Order will be ten (10) days from the publication of this Order in the *Register of Regulations* on March 1, 2012.

IT IS SO ORDERED this 14<sup>th</sup> day of February, 2012

Beverly H. Steele, Chairwoman

Robert (Breezy) Brown, Commissioner

George P. Staats, Commissioner

Larry Talley, Commissioner

Patt Wagner, Commissioner

## 501 Harness Racing Rules and Regulations

\*Please note that no changes were made to the regulation as originally proposed and published in the January 2012 issue of the *Register* at page 956 (15 DE Reg. 956). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**501 Harness Racing Rules and Regulations**

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## DEPARTMENT OF FINANCE

### DIVISION OF UNCLAIMED PROPERTY

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

### ORDER

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

#### NATURE OF PROCEEDINGS

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

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

#### SUMMARY OF PROPOSAL

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

#### STATUTORY AUTHORITY

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

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

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

## SUMMARY OF COMMENTS RECEIVED

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

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

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

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

*Response: The proposals are incorporated in the regulation.*

## FINDINGS OF FACT:

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

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

Mark Udinski, State Escheator  
Department of Finance

**Regulation on Practices and Procedures for Appeals of Determinations of the Audit Manager****1.0 Construction of Rules of Practice and Procedure**

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

**2.0 Appearance and Practice Before the Independent Reviewer**

- 2.1 In any appeal, a person ~~may~~ shall be represented by an attorney at law admitted to practice before the Supreme Court of the State of Delaware. Attorneys who are not so admitted must apply for admission *pro hac vice* through Rule 2.2 below.
- 2.2 Pursuant to Rule 72(a) of the Delaware Supreme Court Rules, attorneys who are not members of the Delaware Bar may be admitted *pro hac vice* in an appeal in the discretion of the independent reviewer upon written motion by a member of the Delaware Bar who maintains an office in this State for the practice of law ("Delaware Counsel"). Pursuant to Delaware Supreme Court Rule 72(c), Delaware

Counsel for any party shall appear in the matter for which admission *pro hac vice* is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the matter and shall attend all proceedings before the independent reviewer, unless excused by the independent reviewer.

2.3 Designation of address for service; notice of appearance; withdrawal.

2.3.1 When an attorney first makes any filing or otherwise appears in a representative capacity before an independent reviewer in an appeal, he or she shall file with the independent reviewer, and keep current, a written notice of appearance stating the name of the appeal; the attorney's name, bar identification number, business address, telephone number, and electronic mail address; and the name and address of the person or persons represented.

2.3.2 Withdrawal by any attorney shall be permitted **[only by upon]** written **[order of notice to]** the independent reviewer. ~~**[A motion seeking leave to withdraw shall state with specificity the reason for such withdrawal.]**~~

### **3.0 Appointment of an Independent Reviewer**

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

### **4.0 Disqualification and Recusal of an Independent Reviewer**

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

### **5.0 Ex Parte Communications**

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

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

### **6.0 Motions**

6.1 Generally. Unless made during a hearing or conference, **[including those conducted by telephone or other similar means,]** a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon and a proposed order. All written motions shall be served in accordance with Rule 7.0, be filed in accordance with Rule 8.0, meet the requirements of Rule 9.0, and be signed in accordance with Rule 10.0. The independent reviewer may order that an oral motion be submitted in writing. No oral argument shall be heard on any motion unless the independent reviewer otherwise directs.

6.2 Opposing and reply briefs. Briefs in opposition to a motion shall be served and filed within 20 days after service of the motion. Reply briefs shall be served and filed within 10 days after service of the brief in opposition.

- 6.3 Length limitation. A brief in support of or opposition to a motion shall not exceed ~~[40 30]~~ pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum[, **unless the independent reviewer modifies this limitation**]. Requests for leave to file briefs in excess of ~~[40 30]~~ pages are disfavored.

## **7.0 Service of Papers by Parties**

- 7.1 Service initiating an appeal. At the outset of an appeal, the notice of appeal and any accompanying papers shall be served on the **[Secretary of Finance, with a copy to the]** Audit Manager[,] by certified mail, return receipt requested. ~~[The return of a return receipt signed by the Audit Manager is not required for service to be effective.]~~

- 7.2 Service of all other filings.

- 7.2.1 When required. In every appeal, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in accordance with the provisions of this section until such time as a notice of appearance has been served by counsel for the party or other person represented pursuant to Rule 2.0, after which time service shall be made pursuant to paragraph 7.2.2 of this section upon counsel for the party or other person represented, unless service upon the party or other person represented is ordered by the independent reviewer.

- 7.2.2 How made. Service shall be made by delivering a copy of the filing. "Delivering" means:

- 7.2.2.1 Personal service by handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed, or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

- 7.2.2.2 Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or Express Mail delivery addressed to the person;

- 7.2.2.3 Sending the papers through a commercial courier service or express delivery service; or

- 7.2.2.4 Transmitting the papers by facsimile machine or electronic mail transmission where the following conditions are met:

- 7.2.2.4.1 The persons serving each other by facsimile transmission or electronic mail transmission have agreed to do so in a writing, and

- 7.2.2.4.2 Receipt of each document served is confirmed electronically [by a system-generated confirmation] or by a manually signed receipt.

- 7.2.3 When service is complete. Personal service, service by U.S. Postal Express Mail or service by commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile or electronic mail transmission is complete upon confirmation of transmission[, **whether system-generated or manual**].

## **8.0 Filing of Papers with the Independent Reviewer: Procedures**

- 8.1 When to file. All papers required to be served by a party upon any person shall be filed with the independent reviewer at the time of service. Papers required to be filed with the independent reviewer must be received within the time limit, if any, for such filings.

- 8.2 Where to file. Filing of papers shall be made by filing the original papers or duplicates of the original papers with the independent reviewer.

- 8.3 To whom to direct the filing. All motions, objections, applications or other filings made during an appeal shall be directed to and decided by the independent reviewer.

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

**9.0 Filing of Papers: Form**

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

**10.0 Filing of Papers: Signature Requirement and Effect.**

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

**11.0 Computation of Time**

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

**12.0 Notice of Appeal: Form and Content**

- 12.1 Each notice of appeal shall be in writing and signed by the holder's Delaware Counsel. The notice of appeal shall specify in reasonable detail the matters in which the holder asserts that the Audit Manager

erred in the determination of the protest of the holder, and any statutory provision, rule or regulation the Audit Manager is alleged to be violating or to have violated.

12.2 If the appeal consists of several claims, each claim shall be stated separately.

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

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

### **13.0 Notice of Appeal: Amendment and Withdrawal**

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

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

### **14.0 Scheduling a Hearing.**

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

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

### **15.0 Pre-Hearing Submissions**

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

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

### **16.0 Oral Hearings**

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

- 16.1.1 All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.
- 16.1.2 All hearings shall open to the public unless otherwise ordered by the independent reviewer.
- 16.1.3 All hearings shall be recorded by sound, sound-and-visual, or stenographic means. The cost of recording shall initially be borne by the Audit Manager, subject to later assessment as costs against a party or between the parties in the independent reviewer's discretion, and subject to confirmation by the Secretary of Finance. Any party may at its own expense arrange for a transcription to be made from the recording of any oral hearing recorded by non-stenographic means.
- 16.2 Continuance. Any motion for a continuance of the hearing date shall be filed as far in advance of the hearing date as practicable. Motions must be for good cause and state with specificity the reason for the continuance request. Any motion for a continuance filed within 10 days of a scheduled hearing is disfavored and will be denied in the absence of extraordinary circumstances.
- 16.3 Hearing procedure. In the hearing, each party is entitled to present its case or defense by oral argument.

## **17.0 Evidence**

- 17.1 Admissibility. The independent reviewer may consider all relevant evidence *de novo* on the record.
  - 17.1.1 The independent reviewer may make reference to and be guided by the Delaware Uniform Rules of Evidence. Notwithstanding those rules, the independent reviewer may consider any evidence that reasonable and prudent individuals would commonly accept in the conduct of their affairs, and give probative effect to that evidence.
  - 17.1.2 Evidence may not be excluded solely on the ground that it is hearsay, but the weight to be given to any such evidence is subject to the independent reviewer's discretion.
- 17.2 Objections. Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon.

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

- 18.1 At the discretion of the independent reviewer, the parties may be ordered to file proposed findings of fact and conclusions of law, or post-hearing briefs, or both. The independent reviewer may order that such proposed findings and conclusions be filed together with, or as part of, post-hearing briefs.
- 18.2 Proposed findings of fact or other statements of fact in briefs shall be supported by specific references to the record.
- 18.3 In any case in which the independent reviewer has ordered the filing of proposed findings of fact and conclusions of law, or post-hearing briefs, the independent reviewer shall, after consultation with the parties, prescribe the period within which proposed findings of fact and conclusions of law and/or post-hearing briefs are to be filed. The period shall be reasonable under all the circumstances but the total period allowed for the filing of post-hearing submissions shall not exceed 30 days after the conclusion of the hearing unless the independent reviewer permits a different period and sets forth in an order the reasons why a longer period is necessary.
- 18.4 Unless the independent reviewer orders otherwise, no post-hearing submission shall exceed **[25 50]** pages, exclusive of cover sheets, tables of contents and tables of authorities, and exclusive of the evidence in the record to which the post-hearing submission refers.

## **19.0 Decision After a Hearing.**

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

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

**20.0 Failure to Appear at Hearing**

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

**21.0 Disruptive Conduct**

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

**22.0 Appeals**

22.1 Any holder aggrieved by a final determination of the Secretary of Finance may file an appeal to the Court of Chancery. A copy of the notice of appeal shall be promptly filed with the Secretary of Finance.

22.2 Upon the filing of an appeal to the Court of Chancery, the administrative record shall be filed **[by the Secretary of Finance or a designee of the Secretary of Finance]** with the Court in accordance with Court of Chancery Rule 72.

22.3 Any party that files an appeal to the Court of Chancery shall be responsible for filing with the Court in a timely manner the transcript of that portion of the appeal in which error allegedly occurred. Each party on appeal shall bear his, her or its own costs of transcription.

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**DIVISION OF UNCLAIMED PROPERTY**

Statutory Authority: 12 Delaware Code, Section 1198 (12 Del.C. §1198)

**ORDER**

**Regulation on Practice and Procedure for Establishing Running of the Full Period of Dormancy for Certain Securities Related Property**

**NATURE OF PROCEEDINGS:**

Delaware Department of Finance ("Department"), Division of Unclaimed Property, Escheator of the State of Delaware (the "State Escheator"), initiated proceedings to adopt regulations regarding the establishment of the running of the full Period of Dormancy for certain securities related property. The Department's proceedings to adopt its regulations were initiated pursuant to 29 **Delaware Code**, Section 10115, with authority prescribed by 12 **Delaware Code**, Section 1208.

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

**SUMMARY OF PROPOSAL**

The proposal creates practices and procedures for establishing whether the full period of dormancy has run against certain securities related property as described in 12 **Del.C.** §1198.

**STATUTORY AUTHORITY**

- 12 **Delaware Code**, §1154, State Escheator to make regulations.
- 12 **Delaware Code**, §1198(9), Definition of Period of Dormancy.
- 12 **Delaware Code**, §1199, Report by holders of abandoned property
- 12 **Delaware Code**, §1208, Rules and regulations.

**SUMMARY OF COMMENTS RECEIVED AND RESPONSE AND EXPLANATION OF CHANGE**

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

MNAT correctly observes that more than forty states and other jurisdictions have established “Holder Due Diligence” requirements by legislative adoption, in whole or in part, of either the 1981 version or the 1995 version of the Uniform Unclaimed Property Act the “Act”), and that at least one state that has adopted neither version of the Act has nevertheless adopted “Holder Due Diligence” requirements by statute. Both MNAT and COST express concern that the Department may leave itself vulnerable to potential litigation challenging the validity of the regulation because the due diligence requirement it contains was not adopted by legislative action, and that the General assembly is the appropriate vehicle for adoption of a due diligence requirement.

*Response: The State of Delaware has not adopted either version of the Act. It has, however, granted specific authority to the State Escheator in 12 Del.C. §§1154 and 1208 to “make such rules and regulations as the Escheator may deem necessary to administer and enforce this subchapter.” The regulation as proposed falls squarely within the definition of “Regulation” in 29 Del.C. §10102(7). Given the broad authority granted the State Escheator by the General Assembly to promulgate regulations that, among other things, act as a guide for the decision of cases before the Department and the Courts, it does not appear that the regulation exceeds the State Escheator’s authority to promulgate regulations even though the vast majority of states have adopted the same requirement through legislation.*

Computershare expresses its belief that a specific due diligence requirement is an important component of any state’s unclaimed property program, but it also expresses concern that the regulation may cause confusion among owners of securities related property. It also expresses concern that, while the regulation is clear about the consequences of non-return of mail, the statute to which the regulation applies is silent.

*Response: Recent amendments to 12 Del.C. §1198(9) have changed the status of the State of Delaware from a “lost owner” state to a “no activity” state. Rather than causing confusion among owners, the regulation eliminates confusion among owners about the type of contact that constitutes “activity.” It also eliminates the uncertainty inherent in the silence of the statute to which the regulation applies regarding the consequences of non-return of mail.*

MNAT comments that the regulation should be modified to make clear that holders may recover costs of compliance allowed by the regulation without violating 12 **Del.C.** §1201.

*Response: Appropriate language has been added.*

**FINDINGS OF FACT:**

The Department, acting through the State Escheator, finds that the proposed regulation set forth in the January 2012 *Register of Regulations* should be adopted, subject to the modification described above which is not substantive.

THEREFORE IT IS ORDERED, that the proposed changes to the Regulation on Practice and Procedure for Establishing Running of the Full Period of Dormancy for Certain Securities and Related Property, with the modification indicated herein, is adopted and shall be final effective March 31, 2012.

Mark Udinski, State Escheator  
Department of Finance

**Regulation on Practice and Procedure for Establishing Running of the Full Period of Dormancy for Certain Securities and Related Property**

**1.0 Construction of Rules of Practice and Procedure**

- 1.1 Unless otherwise provided, these Rules of Practice and Procedure govern the determination or whether the full period of dormancy has run against certain securities and related property as described in 12 Del.C. §1198.
- 1.2 For purposes of these rules: (1) any term in the singular includes the plural, and any term in the plural includes the singular, if such use would be appropriate; and (2) any use of a masculine, feminine, or neuter gender encompasses such other genders as would be appropriate.

**2.0 Definitions**

- 2.1 All capitalized terms in this regulation shall have the same meaning ascribed to them in 12 Del.C. §1198 as it may be amended from time to time.
- 2.2 "Securities and Related Property" shall mean Property that consists of (a) intangible ownership interests in corporations, whether or not represented by a stock certificate, bonds and other securities; (b) dividends, cash, stock and other distributions made (or attempted to be made) by issuers of securities in respect of the securities issued; (c) certificates of membership in a corporation or association; (d) funds deposited by a Holder with fiscal agents or fiduciaries for payment to Owners of dividends, coupon interest and liquidation value of stocks and bonds; and (e) funds to redeem stocks and bonds.

**3.0 Attempt to Contact Owners of Securities and Related Property**

No more than 120 days, and no less than 60 days, before reporting to the State Escheator any Securities and Related Property with a value of \$250.00 or more that is otherwise deemed to be Abandoned Property, the Holder of the Securities and Related Property shall attempt to contact the apparent Owner of the Property by letter sent via first class mail, postage prepaid, in substantially the following form:

[Date]

Missing Owner Name

Missing Owner Last-Known Address

[City], [State] [Zip Code]

Re: Abandoned or Unclaimed Property

Dear [Missing Owner Name]:

Our records show that we, [Holder], are holding unclaimed property that may belong to you. We have not had direct contact with you since [mm/dd/yyyy]. The check or identifying number for the [\$Amount] we are holding is No. [xxxxxx], and the item is dated [mm/dd/yyyy].

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Under Delaware law, we may be required to deliver this property to the State Escheator, on or before [mm/dd/yyyy] if the property is not claimed. Please complete the information below and return this letter to [Holder] no later than [mm/dd/yyyy], so that we may meet our unclaimed property reporting obligations. Do not forget to sign and date your response.

\_\_\_\_\_ I am entitled to the above referenced property. Please issue a new check and mail to the following address:

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

\_\_\_\_\_ I am not entitled to the above referenced funds or these funds have already been paid to me.

\_\_\_\_\_ I am aware of these funds and choose not to claim them at the present time.

\_\_\_\_\_ Please change the address on my account to:

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

\_\_\_\_\_  
\_\_\_\_\_  
Owner signature \_\_\_\_\_ Date signed \_\_\_\_\_

If any letter is returned to the Holder undelivered, or if any letter appears to have been delivered but the apparent Owner of the Property fails to respond to the letter before the Holder's report of Abandoned Property is due, the Securities and Related Property shall be deemed Abandoned Property against which a full Period of Dormancy has run.

#### **4.0 Attempt to Contact Owner Excused**

The Holder is excused from attempting to contact the apparent Owner if the Holder has no record of an address for the apparent Owner, or if the Holder has already given notice to the apparent Owner in a form substantially similar to that required by this regulation under existing federal or state law, rules, or regulations within 90 days of the time specified for notice in this regulation.

#### **5.0 Cost of Compliance; Charge Against Property**

A Holder that provides notice under this regulation may charge the cost of postage and other reasonable administrative costs, not to exceed five dollars per mailing, against the Securities and Related Property [that would otherwise be paid or delivered to the State pursuant to 12 Del.C. §1201].

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**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
Statutory Authority: 31 Delaware Code, Section 512 (31Del.C. §512)

### ORDER

**Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) Dental Services**

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Title XIX Medicaid State Plan regarding Medicaid dental

benefits for eligible recipients. Dental services are available only to clients under the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) program. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

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

### **SUMMARY OF PROPOSAL**

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding Medicaid dental benefits for eligible recipients. Dental services are available only to clients under the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) program.

#### **Statutory Authority**

- 42 CFR §447.205, *Public notice of changes in Statewide methods and standards for setting payment rates*;
- 42 CFR §441 Subpart B, *Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) of Individuals under Age 21*; and,
- 42 CFR §440.100, *Dental services*.

#### **Background**

The Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) service is Medicaid's comprehensive and preventive child health program for individuals under the age of 21. EPSDT was defined by law as part of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89) legislation and includes periodic screening, vision, dental, and hearing services. In addition, Section 1905(r)(5) of the Social Security Act (the Act) requires that any medically necessary health care service listed at Section 1905(a) of the Act be provided to an EPSDT recipient even if the service is not available under the State's Medicaid plan to the rest of the Medicaid population.

#### **Summary of Proposal**

The Division of Medicaid and Medical Assistance (DMMA), pursuant to the requirement of 42 CFR §447.205, gives notice to the following action relating to Medicaid reimbursement for dental services for eligible recipients under age 21 years.

With approval of the Centers for Medicare and Medicaid Services (CMS) by a submitted state plan amendment, effective for services provided on or after April 1, 2012, DMMA modifies reimbursement for dental services provided under the EPSDT program.

The provisions of this state plan amendment are subject to approval by the CMS.

#### **Fiscal Impact Statement**

The proposed revision imposes no increase in cost on the General Fund.

### **SUMMARY OF COMMENTS RECEIVED WITH AGENCY**

The Governor's Advisory Council for Exceptional Citizens (GACEC), the State Council for Persons with Disabilities (SCPD), and Peninsula Dental, L.L.C. and Bear-Glasgow Dental, L.L.C. offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

**GACEC and SCPD**

As background, the Division's current standard reimburses dentists for most treatment at 85% of billed charges. There are a few problems with this approach. First, CMS disfavors such payment methodology which is not based on a uniform fee schedule. Second, inequities arise when DMMA pays different amounts to providers for the same service. Third, DMMA is interested in cost containment which is better secured through use of a fee schedule than a percentage of dentists' typical billing.

The new reimbursement standard would be the lower of: 1) the provider's billed amount that represents their usual and customary charge; or 2) the Delaware maximum allowed amount based on a fee schedule. DMMA worked with representatives of the Dental Society to arrive at an approach to the fee schedule which is based on a National Dental Advisory Service (NDAS) survey. DMMA plans to use the latest survey results (not yet released) to create the final schedule which will be effective in April, 2012.

GACEC and SCPD have the following observations.

First, the current "85% of charges" approach is actually more generous than the State VCAP dental reimbursement rate of "80% of U&C charges" adopted in November, 2011. [15 DE Reg. 176 (August 1, 2011) (proposed); 15 DE Reg. 678 (November 1, 2011) (final)].

**Agency Response:** Actually, the current reimbursement rate for dentists is 80% of charges. The agency reduced the fee from 85% to 80% as of April 1, 2009. DMMA apologizes for the agency-error; simply, a typo.

Second, use of a uniform fee schedule is ostensibly a preferable approach to dental services than use of an individual provider's usual and customary billing. The Councils previously endorsed a similar approach to renal services in which DMMA historically had a similar "85% of charges" standard. DMMA changed its approach and adopted a cap of "100% of the Medicare rate" for uniformity. See 13 DE Reg. 375 (September 1, 2009) (proposed); and 13 DE Reg. 658 (November 1, 2009) (final). DMMA's rationale for that change was as follows:

Currently, DMMA pays providers based on their U&C charges for each procedure and different providers can charge different rates for the same service. The purpose of this methodology is to promote predictability of payments, equity and consistency of those payments among providers while maintaining access to quality care.

**13 DE Reg. 375, 376 (September 1, 2009)**

Third, based on a comparison of actual Medicaid dental expenditures versus expenditures that would have resulted from use of the 2011 NDAS survey results, the overall differences are not dramatic. The biggest reduction would be in the context of orthodontic care. In some cases (e.g. diagnostic and restorative services), the reimbursement rate would actually be somewhat higher.

**Agency Response:** The fees in the draft dental fee schedule were based on the 2010 NDAS survey. The most current 2011 NDAS survey upon which the dental fees will be constructed will result in a total comprehensive orthodontic service being paid at \$6,592.00 vs. the current total of \$5530.00. The new fee schedule will be posted once it is finalized.

Fourth, the prospect for the State not revising the rates on an annual basis is obviated by the inclusion of the following sentence in the standards: "Delaware will rebase its dental fee schedule rates each time the NDAS publishes a new survey."

Fifth, the regulation does authorize DMMA to adjust the maximum allowable amount if "not appropriate for the service provided". It would be preferable for DMMA to clarify that this could result in enhanced reimbursement for services rendered to particularly "involved" individuals. For example, providers such as Practice Without Pressure may need to conduct some acclimation sessions with individuals with severe disabilities which might not be fairly compensated through a standard fee schedule.

**Agency Response:** Practice Without Pressure is enrolled and paid like any other dental provider. Acclimation is part of a continuum of behavior management approaches which are considered part of the service being provided.

Sixth, the Councils recommend that DMMA “track” the number of Medicaid dental providers to determine if the number of such providers decreases given the implementation of this initiative. The Division should establish a current baseline number and monitor this number in the outlying years subsequent to implementation of the new reimbursement standards. **Agency Response:** There are 296 confirmed providers. The DMMA thanks the Councils for their recommendation to track the number of participating dentists following implementation of the dental fee schedule and will adopt the recommendation to assure that access to care is not unduly diminished.

GACEC and SCPD **endorse** the proposed regulation subject to the clarification request consistent with the fifth observation and the recommendation in the sixth observation.

**Agency Response:** DMMA thanks the Councils for their endorsement.

### **Peninsula Dental and Bear-Glasgow Dental**

With offices in both Sussex and New Castle Counties, our 8 doctors and staff of nearly 50 make up one of the largest Medicaid providers in the State. Both of our practices provide general dental services to families and have a strong focus on special needs dentistry, including children.

The comments/suggestions are numbered for reference, and include a descriptive synopsis of our thoughts. We would welcome the opportunity to discuss further should you find it constructive to the process.

#### **1. Extend the public comment period.**

Even if the implementation date is not to be moved, we do not feel that adequate time has been allowed to collect public comment on the proposal. The public notice has likely been published in the normal, required fashion. However, it includes erroneous direction to view the proposed fees on the DMAP (DMMA) website. The fees have not been made available. We have spent weeks either on the phone or by e-mail, trying to get a copy to evaluate. In addition, the link to use for public comments is broken. These problems with the official notice have likely caused confusion and discouraged public input.

We are aware that the Delaware State Dental Society was provided with a copy of the proposed fees, and that based on their suggestions, some modifications may have been made to the formulas proposed. While the DSDS is certainly a major stakeholder in this proposal, and we agree that it was wise to consult with the group, it does not represent every dentist accepting Delaware Medicaid. It also does nothing for the families of children who may be affected by services offered or access to care. Without seeing the fees or being able to understand how they compare to what their doctor’s reimbursement is currently, the general public cannot determine if this change affects them positively, negatively, or not at all.

**Agency Response:** You are correct that the normal process for public comment has been followed in this process. In our work with the State Dental Society, it was our request and understanding that they would share the information about the proposed change in rate methodology with the members of the Society. The draft fees, which were shared with the DSD and which should have been forwarded to the members, were examples of how the fee schedule would work under the new methodology. We ultimately did not publish the draft fees on the DMMA website since they were not the true final version. Once the final rates are completed they will be made available on the DMMA website. In the meantime, we have provided you with a copy of the draft rates in order to understand the rate methodology.

#### **2. Hold a public hearing.**

While it may not be required by the regulations, holding a public hearing would serve to help educate the public about the ramifications of the proposed fee changes. Additional public input should be sought via a hearing before the proposed change is implemented.

We are aware that the Delaware State Dental Society was provided with a copy of the proposed fees, and that based on their suggestions, some modifications may have been made to the formulas proposed. While the

DSDS is certainly a major stakeholder in this proposal, and we agree that it was wise to consult with the group, it does not represent every dentist accepting Delaware Medicaid. It also does nothing for the families of children who may be affected by services offered or access to care. Without seeing the fees or being able to understand how they compare to what their doctor's reimbursement is currently, the general public cannot determine if this change affects them positively, negatively, or not at all.

**Agency Response:** The public notice does serve to advise the public and providers and any other interested parties about changes occurring in the Medicaid Program, and does so in a way that is available to everyone. As part of the process to develop the new dental rate methodology, DMMA worked directly with a subgroup of the DSD. That subgroup reported back to the DSD to keep the Executive Committee and members apprised of the progress on the fee schedule. We believe the workgroup process and the release of the public notice adequately provides for informing the public about the proposed change in reimbursement methodology.

### **3. Do not adopt the proposed formula for reimbursement for dental services.**

Imposing a fee schedule whereby every single procedure has a maximum allowable charge is contrary to the current regulation which recognizes, in part *"...the consideration that 65- 70% of the usual and customary rate is nationally known to account for the dental provider's actual costs"* and *"...an allowance... to permit a reasonable and fair profit and as an incentive for providers to participate in the Medicaid Program..."*. Even non-profit providers must be able to cover their overhead in order to operate.

By capping every procedure at some predetermined, artificially lower rate, providers are unable to make up for procedures on which they break even or even lose money to treat patients.

A fee schedule with reimbursements that are too low is one factor contributing the failure of Medicaid programs in surrounding states. This is nothing to emulate, regardless of whether CMS may approve of it. Delaware enjoys almost 65 % participation by its dentists in the State Medicaid program for children, in part because it recognizes the need for adequate revenue for providers.

In some cases the proposed fees will create "winners" who may be able to raise fees to offset other losses. This will quickly eliminate any cost savings to the program. In many cases, the proposed fees will create "losers" whose practices provide much needed services that they can no longer sustain financially. Non-profits like LaRed or the other clinics who provide mostly basic services may stand to lose money to treat most or all of their patients. Practices like ours, with a focus on office based dental sedation, may be unable to continue to offer these much needed services below cost. Paradoxically, in an effort to save money or meet CMS guidelines, the proposed reimbursement formula stands to actually cost the State more when care is transferred to hospitals, and emergency room visits increase for those patients who go without treatment until it is too late.

**Agency Response:** The rate methodology established for the Medicaid and CHIP dental benefit is based on annual surveys by the National Dental Advisory Services (NDAS) – an organization which many dental offices use to assist with the setting of their own rates. This particular survey was chosen by the members of the DSD's dental workgroup as being more comprehensive and more closely reflecting the rates currently charged by dentists in the Delaware region. The ADA annual survey of rates was determined not to be representative of Delaware rates. By using the NDAS survey and calculating the DMMA dental rates, we believe we will continue to provide for a rate that will both cover a dental office's costs and allow for a fair mark-up. Access to care is always a concern within Medicaid and CHIP, and while we do not believe that the final rates will result in an unacceptable loss of access or will result in a spike of referrals to hospital emergency rooms, we will be monitoring closely the impact.

### **4. Amend the proposed reimbursement formula to include other options – a hybrid option.**

One method employed by private insurance is to contract with providers including a fee schedule of maximum allowable charges, similar to what is proposed here. However, only certain fees in each category of procedures are included. Insurers recognize that most of their expense falls under frequently performed, routine procedures. By limiting their exposure on these fees, but allowing providers to make up revenue on other necessary procedures, a win-win situation is created for providers, patients, and the insurance company. This well established market practice could benefit DMAP.

Another option available to the private insurance market is to modify their contracts with individual providers, further customizing their fee allowances, modifying the need for pre-authorizations, etc. This could be a powerful tool to reduce overall Medicaid expense, while simultaneously increasing access to care for different

services in different parts of the state. There is ample precedent for these types of contracts in the way that DHSS agencies contract for services already. By extending this flexibility to the DMAP, providers would have even more incentive to participate in the program. After an initial review and modification of the boilerplate contract language, fees would be allowed to fluctuate up and down, taking inflation into account, as delineated in the current proposal. The individual provider modifications would carry forward, unchanged, from fiscal year to year unless the provider were to request changes prior to contract renewal. We feel that CMS would likely endorse a plan encompassing these well established procedures from the private sector. I hope that the comments provided here will be given serious consideration before, and perhaps in conjunction with, any implementation of the proposed regulations. We here at Peninsula Dental and Bear-Glasgow Dental have been proud to partner with the Delaware Children's Medicaid Program in its mission to improve public health while efficiently using State resources.

**5. Agency Response:** DMMA felt the pursuit of a hybrid option would add an unnecessary level of complexity to the proposed rate methodology. DMMA reached this decision after consulting the DSD dental work group who strongly advocated that a rate methodology based on NDAS would be well received by the majority of the dental community. It was agreed by all, the reimbursement methodology introduced needed to be a simplistic model to facilitate an easy transition from a percentage of billed charges to a maximum allowable rate schedule.

#### FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the January 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan regarding the reimbursement methodology for EPSDT Dental Services is adopted and shall be final effective March 10, 2012.

Rita M. Landgraf, Secretary, DHSS

#### DMMA FINAL ORDER REGULATION #12-05

#### REVISION:

ATTACHMENT 4.19-B

Page 19

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE: DELAWARE  
METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES –  
OTHER TYPES OF CARE

Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services are reimbursed as follows. Except as otherwise noted in the plan, State developed fee schedule rates are the same for both government and private providers.

- ~~1. Screening services—fee for service.~~
- ~~2. Treatment services—fee for service.~~
- ~~3. Dental Treatment—reimburse 85% of billed charges for routine dental services.~~
- ~~4. Specialized Dental Services—reimburse (a) a percentage of charges for non orthodontic related services and (b) a flat fee for service for orthodontic related services.~~

~~a. Percentage of Charges for non orthodontic services—The State pays 85% of billed charges for medically necessary non orthodontic dental care, determined by: 1) the consideration that 65-70% of the usual & customary rate is nationally known to account for the dental provider's actual costs; and, 2) an allowance of an additional mark up to permit a reasonable and fair profit and as incentive for providers to participate in the Medicaid Program in order to create adequate access to dental care.~~

~~b. Flat Fee for Service for orthodontic services—The State identifies three primary orthodontic related services that encompass orthodontic reimbursement: 1) Pre-orthodontic treatment visit; 2) Comprehensive orthodontic treatment of the adolescent dentition; and, 3) Periodic orthodontic treatment visit. Rates for each orthodontic service are determined by adopting the 75<sup>th</sup> percentile of orthodontic rates paid by the Division of Public Health Special Dental Program, which, compare favorably to commercial coverage and encourage provider participation and adequate access to orthodontic care. Care provided outside of these three services will be reimbursed at a percentage of charges. Medicaid reimbursement for these three orthodontic services will be the lower of the submitted charges or the established Medicaid rate.~~

Dental Services – Effective for dates of service on or after April 1, 2012, Delaware pays for dental services at the lower of:

- the provider's billed amount that represents their usual and customary charge; or
- the Delaware Medicaid maximum allowed amount per unit per covered dental procedure code according to a published fee schedule.

The Delaware Medicaid dental fee schedule will be developed based on the National Dental Advisory Service (NDAS) annual Comprehensive Fee Report. For each covered dental procedure code, Delaware's maximum allowable amount will be computed as a percentage of the NDAS published national fee. Delaware will rebase its dental fee schedule rates each time the NDAS publishes a new survey.

General Dental Services shall be paid at 84% of the NDAS 70th percentile amounts Specialty Dental Services shall be paid at 80% of the NDAS 80th percentile amounts.

The Delaware Medicaid Dental Fee Schedule is effective April 1 through March 31 of each year.

The State reserves the right to adjust the fee schedule in order to:

1. Comply with changes in state or federal requirements;
2. Comply with changes in nationally-recognized coding systems such as HCPCS and CPT and CDT;
3. Establish an initial maximum allowable amount for a new procedure code based on information that was not available when the fee schedule was established for the current year;
4. Adjust the maximum allowable amount when the State determines that the current amount is:
  - a. Not appropriate for the service provided; or
  - b. Based on errors in data or calculation.

The dental fee schedule is available on the Delaware Medicaid Assistance Program (DMAP) website at: <http://www.dmap.state.de.us/downloads.html>

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**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

**Fair Hearings**

**DSSM 5311 - Notifying Appellants and Others of Hearings;**  
**DSSM 5312 - Responding to Fair Hearing Requests**

**ORDER**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the Division of Social Services Manual (DSSM) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests*. The Department's proceedings to amend its

regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

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

### SUMMARY OF PROPOSAL

The proposal described below amends policies in the Division of Social Services Manual (DSSM) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests*.

#### Statutory Authority

45 CFR §205.10, *Hearings*

#### Summary of Proposed Changes

**DSSM 5311**, *Notifying Applicants and Others of Hearings*: Text was modified to clarify that the word “record” refers to the “case record”. Case record is meant to include the totality of all files and records on the client. This clarification was made to ensure that clients can access their full case record and not just the materials that were submitted with the fair hearing summary.

**DSSM 5312**, *Responding to Fair Hearing Requests*: Text was modified to include reference to the Managed Care Organization (MCO) or other Contractor. This change clarifies that MCOs prepare fair hearing summaries where there are appeals of MCO actions.

Other proposed changes include minor formatting and punctuation changes.

### SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGE(S)

The Governor’s Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Social Services (DSS) has considered each comment and responds as follows.

First, in the “notice” context, the Councils’ recommendation and DSS response were as follows:

Thirteenth, in §5311, Par. 3, it would be preferable to include a disclosure of right to access “case records” apart from the documents the agency or MCO has submitted as part of the Fair Hearing summary (the “record”). For example, an agency or MCO may not submit documents which undermine its position to the hearing officer but they may be in its case records. Access is a beneficiary’s right and should be disclosed in the hearing notice. See §5403, Par. 2.

Agency Response: The 6 items in §5311 make up the hearing notice. Item 6 currently reads: “Explain that the appellant or representative may examine the record prior to or during the hearing.” This statement encompasses your request.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils’ view:

Text was modified to clarify that the word “record” refers to the “case record”. Case record is meant to include the totality of all files and records on the client. This clarification was made to ensure that

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clients can access their full case record and not just the materials that were submitted with the fair hearing summary.

15 DE Reg. 971, 972 (January 1, 2012) [emphasis supplied]

The change is an improvement. However, beneficiaries may still be confused by the term “case record” and believe that it only refers to documents submitted to the hearing officer. The federal regulation uses the term “case file” as distinct from “all documents and records to be used by the agency at the hearing”. See attached 45 C.F.R. §205.10(a)(13). The term “record” is a term of art which generally refers to materials actually submitted to a tribunal. Indeed, Section 5000 contains the following definition of “hearing record”:

Hearing Record - Is a verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and other documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.

At a minimum, GACEC and SCPD recommend that DSS use the federal term “case file” which would include both “paper” and “computer” records. See attached broad Wikipedia definition of “file”. DSS should then include a definition of “case file” in Section 5000. It could be as simple as the following:

Case File - Is comprised of the totality of all files and records on a client within the custody, control, or possession of an agency in electronic, paper, or other format.

**Agency Response:** DSS and DMMA have considered your comment. We choose to retain the term case record. We have however, amended the text to clarify that the case record refers to documents beyond those submitted to the hearing officer. The referenced text of §5311 is amended as follows:

F. Explain that the appellant or representative may examine the **[agency and/or MCO]** case record prior to or during the hearing

Second, in the context of fair hearing summaries, the Councils’ recommendation and DSS response were as follows:

Fourteenth, in §5312, the introduction recites that the policy applies to decisions made by DSS or DMMA. There is no comparable provision covering MCOs which also issue appealable decisions. The regulation covers “Medicaid Managed Care Cases” [§5304, Par. 1B; §5401, Par. C.6]. We believe the superseded version of §5312 contained references such as “if completed by DSS” because it contemplated MCOs responding to hearing requests in addition to the State. The new version solely contemplates “State Agency” preparation of the hearing summary, etc. which has not been the historic practice for appeals from MCO decisions. MCOs have traditionally been required to prepare their own Fair Hearing Summaries.

**Agency Response:** We believe the revised language in §5312 more accurately captures the requirements for responding to Fair Hearing requests. In fact, the previous language, “If completed by DSS..” was specific to that Division. DMMA’s procedures were never specified. Because the MCOs are a contractual arm of DMMA for purposes of service delivery, we believe the reference to DMMA inherently includes the requirements for MCO Fair Hearing responsibilities.

15 DE Reg. 87, 89 (July 1, 2011) [emphasis supplied]

The new proposal mirrors the Councils' view: "Within 5 working days of receipt of a fair hearing, the agency (or MCO or other Contractor) will prepare a hearing summary and submit the summary to the Hearing Office." This is an improvement over the current regulation. Councils' only recommendation would be to delete the word "State" from the heading to §5312, Par. 1. It would then read "(t)he ~~State~~ Agency Prepares a Hearing Summary". The regulations contain many references to "agency" as juxtaposed to "State agency". See, e.g., Section 5000, definition of State Presenter, as an "agency employee"; and definition of Hearing Summary" as document prepared by "an agency"

**Agency Response:** The text of §5312 is amended as follows:

1. The [~~State~~] Agency Prepares a Hearing Summary

#### FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the January 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual (DSSM) regarding Fair Hearings, specifically, *Notifying Appellants and Others of Hearings and Responding to Fair Hearing Requests* is adopted and shall be final effective March 10, 2012.

Rita M. Landgraf, Secretary, DHSS

#### DSS FINAL ORDER REGULATION #12-07

##### REVISIONS:

#### 5311 NOTIFYING APPELLANTS AND OTHERS OF HEARINGS

45 CFR 205.10(a)(8), (a)(13)(i)

This policy applies to applicants and recipients of any public assistance program administered by the Division of Social Services (DSS) or the Division of Medicaid and Medical Assistance (DMMA).

1. Hearings Are Made Accessible to the Appellant  
The Hearing Office will arrange the time, date, and place of the hearing so that it is accessible to the appellant.
2. Hearing Office Provides Advance Notice  
The Hearing Office will mail written notice to all parties involved at least 12 days before the hearing.  

Exception: An appellant may request less notice in order to speed up the scheduling of the hearing.
3. Hearing Notice is Specific  
The hearing notice will:
  - ~~4~~-A. Inform the appellant or representative of the name, address, and phone number of the person to notify if it is not possible for the appellant to attend the scheduled hearing.
  - ~~2~~-B. Stipulate that the hearing request will be dismissed if the appellant or his or her representative fails to appear for the hearing without good cause (~~i.e.~~, e.g., death in family, personal illness, unexpected emergency).
  - ~~3~~-C. Include the hearing procedures and any other information that would provide the appellant with an understanding of the proceedings that would contribute to the effective presentation of the household's case. It will also include the fair hearing summary and documents filed for the hearing.

- 4-D. Explain that the appellant has the right to bring an attorney or other representative to his or her hearing.
- 5-E. Explain that the appellant may present any information that he or she desires at the hearing.
- 6-F. Explain that the appellant or representative may examine the **[agency and/or MCO] case** record prior to or during the hearing.

**5312 RESPONDING TO FAIR HEARING REQUESTS**

45 CFR 205.10

This policy applies anytime anyone requests a fair hearing due to a decision made by the Division of Social Services (DSS) or the Division of Medicaid and Medical Assistance (DMMA) for a program administered by DSS or DMMA.

**1. The [State] Agency Prepares a Hearing Summary**

Within 5 working days of receipt of a request for a fair hearing, the agency (or MCO or other Contractor) will prepare a hearing summary and submit the summary to the Hearing Office.

**2. Staff Ensure the Summary Contains Pertinent Information**

The hearing summary will contain enough information for the appellant to prepare his or her case. The summary must contain:

- A. Identifying information - Give the client's name, the client's address, and the DCIS identification number.
- B. Action taken – Indicate the basis of the client's appeal (rejection, reduction, closure, amount of benefits, etc.).
- C. Reason for action - Describe the specific action taken by the agency, as well as the factual basis for its decision.
- D. Has assistance continued? - Indicate whether or not the appellant's assistance was restored because the appellant filed a request for a hearing within the timely notice period.
- E. Policy basis - Cite the specific State and federal rules supporting the action taken.
- F. Persons expected to testify - This section lists the names and addresses (if any) of persons that the agency expects to call to testify.

**3. The Hearing Office Notifies the Appellant**

Upon receipt of the hearing summary, the Hearing Office will:

- A. Set a prompt date for the hearing.
- B. Send a notice conforming to the requirements of §5311. The notice will include the hearing summary.
- C. Notify all parties, including witnesses, of the date, time, and place of the hearing.

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**DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

**ORDER**

**Fair Hearing Provisions: DSSM; 5000, 5501, 5502, 5600, 5600.1, 5601, 5602, 5603, 5604, 5605, 5606 and 5607**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the Division of Social Services Manual (DSSM) regarding various Fair Hearing provisions. The

Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

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

### SUMMARY OF PROPOSAL

The proposal described below amends policies in the Division of Social Services Manual (DSSM) regarding various Fair Hearing provisions including *Definitions*, *Public Access to Hearing Records*, *Admissible Evidence*, *Official Notice*, *Protocol*, and *Request for Continuance*.

#### Statutory Authority

- Federal Rule of Evidence 803
- Delaware Uniform Rules of Evidence
- 31 Del Code §1101,
- Confidential character of public assistance records; penalties for violations
- 7 CFR 272.1(c), *General Terms and Conditions, Disclosure*
- 7 CFR 273.15(c)(4), *Fair hearings, Timely action on hearings; household requests for postponement*
- 7 CFR 273.15(m), *Hearing official*
- 7 CFR 273.15(q)(5), *Hearing decisions*
- 7 CFR 273.15(s), *Implementation of final State agency decisions*
- 42 CFR 431.240(a)(3), *Conducting the hearing*
- 42 CFR 431.244(g), *Hearing decisions*
- 42 CFR 431.246, *Corrective action*
- 45 CFR 205.10(a)(9), 45 CFR 205.10(a)(14), 45 CFR 205.10(a)(16), 45 CFR 205.10(19), *Hearings, State plan requirements*
- 45 CFR 205.50, *Safeguarding information for the financial assistance programs*

#### Summary of Proposed Changes

The proposed changes reformat and clarify text for ease of readability. Additional changes include updating DSSM 5000; moving DSSM 5601 to *Definitions*; and, incorporating DSSM 5602, 5603, and 5607 into DSSM 5600.1. Also, section titles were renamed to more accurately reflect the section contents.

The proposed changes affect the following policy sections in the Division of Social Services Manual (DSSM):

- DSSM 5000, *Definitions*
- DSSM 5501, *Corrective Payments*
- DSSM 5502, *Public Access to Hearing Decisions*
- DSSM 5600, *Admission of Hearsay Evidence*
- DSSM 5600.1, *Admissible Evidence*
- DSSM 5601, *Rule of Legal Residuum*
- DSSM 5602, *Exclusionary Rules of Evidence*
- DSSM 5603, *Official Notice*
- DSSM 5604, *Protocol*
- DSSM 5605, *Requests for Continuance*
- DSSM 5606, *Recusation*
- DSSM 5607, *Demeanor Evidence*.

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## SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGE(S)

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Social Services (DSS) has considered each comment and responds as follows.

As background, DSS proposed a set of comprehensive revisions to its fair hearing regulation in January, 2011. The Councils submitted extensive comments resulting in a final regulation in July, 2011 which incorporated several amendments prompted by the commentary [14 DE Reg. 618 (January 1, 2011) (proposed); 15 DE Reg. 86 (July 1, 2011) (final)]. The GACEC and the SCPD have the following observations and recommendations on the latest proposed revisions.

1. In §5000, definition of "abandonment", delete the comma after "cause".

**Agency Response:** Correction made.

2. In §5000, definitions of "advance notice period" and "timely notice period" are inaccurate since they categorically state that the period is ten days. A notice can be provided which gives more than a 10-day notice. The 10 days is a "minimum" which an agency or MCO may exceed. See, e.g., 42 C.F.R. 431.211 and 5300, Par. 2.B. ("timely notice is one mailed at least 10 days before the time of action"). If an MCO mailed out a notice with an effective date 15 days from notice date, the "timely" notice period would be 15 days, not 10 days. Reduction or termination of benefits would be barred within that 15 day period, not a 10 day period.

**Agency Response:** DSS and DMMA agree that a notice can be provided which gives more than a 10-day notice. However, with few exceptions, notices are not considered timely if mailed with less than 10 days between the date a notice is mailed and the date a proposed action is to take effect. No change is made to the definitions.

3. In §5000, definition of "fair hearing", Par.5 refers to "(t)he opportunity to obtain counsel". This is somewhat misleading. Compare 42 C.F.R. 431.206(b)(3), which requires DSS to publish hearing procedures which include notice that the appellant "may represent himself or use legal counsel, a relative, a friend, or other spokesman." See also 7 C.F.R. 273.15(f). Finally, other sections (§5000, definition of "group hearing"; §5606, Par. 3) refer to "authorized representative" or "authorized agent".

**Agency Response:** Appropriate text changed as follows.

5. The opportunity to obtain counsel[, **represent him or herself, or use any other person of his or her choice**]

4. In §5000, it is redundant to have a separate definition of "fair hearing summary" and "hearing summary". It would be preferable to combine the definitions and ensure that it encompasses the text from both of the current definitions and §5312 components, including a reference to the omitted persons expected to testify on behalf of the agency.

**Agency Response:** Two definitions are used because some users use the term "fair hearing summary" and others use the term "hearing summary". Putting the definition in both places saves the user time in that she or he can easily find the definition for the term that she or he is familiar with. A closer review of the definitions shows that they are slightly different from each other. The text of "hearing summary" has been changed to mirror the text of "fair hearing summary".

Section 5312 addresses the steps the State takes when responding to hearing requests. It is not appropriate to include "§5312 components, including a reference to the omitted persons expected to testify on behalf of the agency" in the definition of a hearing summary.

5. Section 5000 now defines an MCO as including "individual medical service providers of an MCO panel." This may be "overbroad". The Councils are dubious that the federal regulations contemplate hearings involving a beneficiary and a doctor's office or child's dentist. The federal regulations contemplate "agencies" as parties, not individual providers.

**Agency Response:** DMMA reviewed your comment and amends the definition of an MCO to read as follows:

**MCO - [4-] A Managed Care Organization [under contract with DHSS to administer the delivery of medical services to recipients of Medicaid and CHIP through a network of**

participating providers] [~~offering or providing medical services to recipients of medical assistance from the DHSS~~

~~2. Individual medical service providers of an MCO panel.]~~

6. Section 5000 includes a definition of “State Presenter”. DSS may wish to consider substituting “agency presenter” since MCOs involved as parties are not “State” presenters.

**Agency Response:** A review of the Policy Manual reveals the term State Agency is not used anywhere except in the Definitions. Consequently, that definition is being removed from the manual.

7. In §5501, the “note” is “overbroad”. It recites as follows: “Staff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency’s action.” GACEC and SCPD shared a similar concern in connection with the January, 2011 proposed regulation resulting in the following commentary and response:

Third, §5300, Par. 2.A.6 is not literally accurate. It categorically recites “(i)f the agency action is upheld, that such assistance must be repaid.” Repayment is discretionary and the State or MCO can decide to not pursue recovery. The analogous federal regulation [42 C.F.R. 431.230(b)] states that the agency “may institute recovery”. Moreover, a beneficiary can elect to not continue benefits during the pendency of appeal. See §5308, Par. 2.A and §5300, Par. 2.C. Finally, this section would literally impose a mandatory repayment duty for benefits received prior to issuance of the notice and during the minimum 10-day notice period.

**Agency Response:** DSS and DMMA thank you for your comment. The regulation is amended and indicated by [Bracketed Bold Text]. See §5300, Par. 2.A.6.

The proposed categorical requirement that “(s)taff must always prepare a claim” should be amended or deleted.

**Agency Response:** The note is amended as follows:

NOTE: [**For food benefits and cash assistance, Ss**]taff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency's action.

8. Section 5600.1, Par. 1.D contains a highly objectionable provision: “The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege.” The corresponding Delaware Rule of Evidence explicitly bars such a “negative assumption”:

Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) Comment or inference not permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

It is highly inappropriate to penalize a party for invoking the attorney-client or other privilege.

**Agency Response:** The referenced text is deleted from the policy.

9. Section 5600.1, Par. D.1 recites as follows: “Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal.” This is also “overbroad”. Simply because what a party told his attorney could be “relevant” to a defense does not automatically waive the attorney-client privilege.

**Agency Response:** The referenced text is deleted from the policy.

10. Section 5604, Par. 1. B, recites as follows: “However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.” There is no definition of “made final”. Moreover, the regulation ostensibly allows ex parte contact. This authorization is problematic for several reasons. A party can ask for reconsideration of a fair hearing decision. Cf. Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super.

1972)(Delaware quasi-judicial administrative hearing bodies have inherent jurisdiction to entertain applications for reconsideration). If one party has already had ex parte contact with the hearing officer, the hearing officer could not impartially entertain the application for reconsideration. A party could also request “reopening” based on criteria contained in the attached Superior Court (Civ) Rule 60. Accord, Henry at 581. If parties have had ex parte contact with the hearing officer, such applications could not be impartially entertained by the hearing officer.

**Agency Response:** Section 5604, Par.1.B is amended as follows to remove the referenced text.

B. After the Hearing

Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned.

~~[However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.]~~

~~Exception: The parties may not discuss the results of the hearing with the hearing officer if the hearing officer sends the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.]~~

11. Section 5605, Par. 2, which addresses continuances, is problematic.

a. This section omits consideration of the status of a party’s attorney or representative (e.g. illness). This should be included in Par. 2.B .1.

b. There are no exceptions for a continuance within 24 hours of hearing. A medical emergency, hospitalization, or sudden illness can occur within 24 hours of hearing. Adoption of a “no-exceptions” regulation violates due process.

**Agency Response:** Section 5605, Par. 2 is amended as follows:

**2. Requests For A Continuance Meet Specific Requirements**

A request for a continuance[ **must**]:

- A. **[Should Be be]** made at least 24 hours in advance of the hearing so that the other party may be notified
- B. **[Must Specify specify]** the reason that a continuance is needed

Examples of requests for which a continuance should be granted[;] include, but are not

limited to:

- 1. Illness of a party or witness
- 2. Extreme inclement weather
- 3. Request for additional time to prepare for the hearing

**FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the January 2012 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Division of Social Services Manual (DSSM) regarding various Fair Hearing provisions referenced above is adopted and shall be final effective March 10, 2012.

Rita M. Landgraf, Secretary, DHSS

**DSS FINAL ORDER REGULATION #12-08 REVISIONS**

**5000 Definitions**

~~Advance Notice Period or Timely Notice Period~~ Is the ten (10) day period between the date a notice is mailed to the date a proposed action is to take effect.

~~Appellant—Is a recipient who has requested a hearing.~~

~~Benefits—Are any kind of assistance, payments or benefits made by TANF, GA, Medicaid, Child Care or Food Stamps.~~

~~Claimant—Is an applicant who has requested a hearing.~~

~~DHSS—Is the Department of Health and Social Services, including~~

~~1) the Division of Social Services (“DSS”), in connection with economic, medical, vocational or child care subsidy assistance;~~

~~2) the Division of Medicaid and Medical Assistance (“DMMA”) or a managed care organization (“MCO”) under contract with DHSS to manage an operation of the Medicaid Program, in connection with medical assistance;~~

~~3) the Division of State Service Centers (“DSSC”) in connection with the Emergency Assistance Program;~~

~~4) the Division of Developmental Disabilities Services (DDDS) in connection with Medicaid Program services;~~

~~5) the Division of Public Health in connection with Medicaid Program services;~~

~~6) the Division of Services for the Aging and Adults with Physical Disabilities (DSAAPD) in connection with Medicaid Program services.~~

~~DSS—Is the Division of Social Services (or “the Division.”)~~

~~Fair Hearing—Is an administrative hearing held in accordance with the principles of due process which include:~~

~~1) Timely and adequate notice;~~

~~2) The right to confront and cross-examine adverse witnesses;~~

~~3) The opportunity to be heard orally;~~

~~4) The right to an impartial decision maker;~~

~~5) The opportunity to obtain counsel.~~

~~Hearing Decision—Is the decision in a case appealed to the State hearing officer. The decision includes the substance of what transpired at the hearing and a summary of the case facts, supporting evidence, and pertinent State or federal regulations and gives the reason for the decision. In Food Stamp disqualification cases, the hearing decision must also respond to reasoned arguments by the appellant.~~

~~EXAMPLE: At a Food Stamp Program Intentional Program Violation Hearing involving a failure to report a change promptly, an appellant may argue that a failure to report does not constitute “clear and convincing evidence” of intent to defraud. The hearing officer’s decision must respond to this argument.~~

~~Hearing Officer—Is the individual responsible for conducting the hearing and issuing a final decision on issues of fact and questions of law.~~

~~Hearing Record—Is a verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and other documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.~~

~~Hearing Summary—Is a document prepared by an agency stating the reason(s) the action under appeal was taken and the information upon which the reasons are based. The summary may include documents to be used to decide the issue in question. Its purpose is to provide an appellant with information to prepare his case for the hearing.~~

~~MCO—Means a Managed Care Organization offering or providing medical services to recipients of medical assistance from DHSS and individual medical service providers of an MCO panel.~~

~~Party—A party to a hearing is a person or an administrative agency or other entity who has taken part in or is concerned with an action under appeal. A party may be composed of one or more individuals.~~

~~Request for a Fair Hearing—Any clear expression (oral or written) by the appellant or his authorized agent that the individual wants to appeal a decision to a higher authority. Such request may be oral in the case of actions taken under the Food Stamp Program.~~

~~State Presenter—Is the agency employee advocating the State’s case in a hearing.~~

~~**“Abandonment”:** When the claimant fails without good cause to appear (by himself or by authorized representative) at his or her scheduled hearing.~~

**“Adequate Notice”**: A written notice that includes:

1. A statement of what action the agency intends to take
2. The reasons for the intended agency action
3. The specific regulations supporting such action
4. An explanation of the individual's right to request a State agency hearing
5. The circumstances under which assistance is continued if a hearing is requested
6. If the agency action is upheld, that such assistance must be repaid under title IV-A, and must also be repaid under titles I, X, XIV or XVI (AABD) if the State plan provides for recovery of such payments.

**“Advance Notice Period”**: The 10 day period between the date a notice is mailed to the date a proposed action is to take effect. (Also called Timely Notice Period.)

**“Appellant”**: Anyone who requests a hearing. (Also called Claimant.)

**“Benefits”**: Any kind of assistance, payments or benefits made by TANF, GA, Medicaid, Child Care, Refugee, Emergency Assistance or Food Supplement programs.

**“Claimant”**: Anyone who requests a hearing. (Also called Appellant.)

**“DSS”**: The Division of Social Services (or “the Division.”)

**“DHSS”**: The Department of Health and Social Services, including:

1. The Division of Social Services (DSS), in connection with economic, medical, vocational or child care subsidy assistance
2. The Division of Medicaid & Medical Assistance (DMMA) or a managed care organization (MCO) under contract with DHSS to manage an operation of the Medicaid Program, in connection with medical assistance
3. The Division of State Service Centers (DSSC) in connection with the Emergency Assistance Program
4. The Division of Developmental Disabilities Services (DDDS) in connection with Medicaid Program services
5. The Division of Public Health in connection with Medicaid Program services
6. The Division of Services for the Aging and Adults with Physical Disabilities (DSAAPD) in connection with Medicaid Program services

**“Fair Hearing”**: An administrative hearing held in accordance with the principles of due process which include:

1. Timely and adequate notice
2. The right to confront and cross-examine adverse witnesses
3. The opportunity to be heard orally
4. The right to an impartial decision maker
5. The opportunity to obtain counsel[, represent him or herself, or use any other person of his or her choice]

**“Fair Hearing Summary”**: A document prepared by the agency stating the factual and legal reason(s) for the action under appeal. The purpose of the hearing summary is to state the position of the agency/entity that initiated the action in order to provide the appellant with the necessary information to prepare his or her case.

**“Good Cause”**: May include, but is not limited to the following:

1. Death in the family
2. Personal injury or illness
3. Sudden and unexpected emergencies
4. Failure to receive the hearing notice

**“Group Hearing”**: A series of individual requests for a hearing consolidated into a single group hearing. A group hearing is appropriate when the sole issue involved is one of State or federal law, regulation, or policy. The policies governing hearings will be followed in all group hearings. The

individual appellant in a group hearing is permitted to present his or her case or be represented by an authorized representative.

“Hearing Decision”: The decision in a case appealed to the State hearing officer. The decision includes:

1. The substance of what transpired at the hearing
2. A summary of the case facts
3. Supporting evidence
4. Pertinent State or federal regulations
5. The reason for the decision

In Food Supplement Program disqualification cases, the hearing decision must also respond to reasoned arguments by the appellant.

EXAMPLE: At a Food Supplement Program Intentional Program Violation Hearing involving a failure to report a change promptly, an appellant may argue that a failure to report does not constitute "clear and convincing evidence" of intent to defraud. The hearing officer's decision must respond to this argument.

“Hearing Officer”: The individual responsible for conducting the hearing and issuing a final decision on issues of fact and questions of law.

“Hearing Record”: A verbatim transcript of all evidence and other material introduced at the hearing, the hearing decision, and all other correspondence and documents which are admitted as evidence or otherwise included for the hearing record by the hearing officer.

“Hearing Summary”: ~~[A document prepared by an agency stating the reason(s) the action under appeal was taken and the information upon which the reasons are based. The summary may include documents to be used to decide the issue in question. Its purpose is to provide an appellant with information to prepare his or her case for the hearing.]~~ A document prepared by the agency stating the factual and legal reason(s) for the action under appeal. The purpose of the hearing summary is to state the position of the agency/entity that initiated the action in order to provide the appellant with the necessary information to prepare his or her case.]

“Hearsay Evidence”: Testimony about a statement made by a third party that is offered as fact without personal knowledge.

“Individual Hearing”: A hearing in which an individual client disagrees with the action taken by the Department on the facts of his or her case.

“MCO”: ~~[4.] A Managed Care Organization [under contract with DHSS to administer the delivery of medical services to recipients of Medicaid and CHIP through a network of participating providers offering or providing medical services to recipients of medical assistance from the DHSS.~~

~~**2. Individual medical service providers of an MCO panel.]**~~

“Party”: A party to a hearing is a person or an administrative agency or other entity who has taken part in or is concerned with an action under appeal. A party may be composed of one or more individuals.

“Privilege”: Appellants may decline to present testimony or evidence at a fair hearing under claim of privilege. Privilege may include the privilege against self-incrimination or communication to an attorney, a religious advisor, a physician, etc.

“Request for a Fair Hearing”: Any clear expression (oral or written) by the appellant or his authorized agent that the individual wants to appeal a decision to a higher authority. Such request may be oral in the case of actions taken under the Food Supplement Program.

“Relevance”: Refers to evidence. Evidence is relevant if an average person believes that the evidence makes a significant fact more probable.

**[“Remand”; to send back for further action.]**

“Rule of Residuam”: Findings of fact must be supported by at least some evidence which is admissible in a court of law.

~~**[“State Presenter”; The agency employee advocating the State's case in a hearing.]**~~

“Timely Notice Period”: The 10 day period between the date a notice is mailed to the date a proposed action is to take effect. (Also called Advance Notice Period.)

*(Break in Continuity of Sections)*

## **5501 ~~Corrective Payments~~ MAKING CORRECTIVE PAYMENTS OR ACTIONS**

~~When the hearing decision is favorable to the appellant, or when the agency decides in favor of the appellant prior to the hearing, the agency will promptly make corrective payments (retroactive to the date incorrect action was taken). For the purpose of this section, "prompt" means action must be taken to initiate the corrective payments or other remedy within five (5) business days of the date of the hearing decision. Benefits will be restored to food stamp households which are leaving a project area before their departure, whenever possible. If benefits are not restored prior to the household's departure, the agency shall forward an authorization for benefits to the household or new project area if this information is known.~~

~~When the hearing decision upholds the agency's action, a claim against the household for any overissuance will be prepared.~~

7 CFR 273.15(s), 42 CFR 431.246, 45 CFR 205.10(a)(16)

This policy applies any time a hearing decision requires an adjustment in benefits. It also applies when an error that favors the appellant/claimant is discovered by the Division of Social Services (DSS) or the Division of Medicaid & Medical Assistance (DMMA).

### **1. The State Agency Initiates Corrective Actions**

Staff will take corrective action (retroactive to the date an incorrect action was taken) when:

- A. A hearing decision is favorable to the appellant
- B. The agency decides in favor of the appellant prior to the hearing

Staff will take action to initiate the corrective payments or other remedy within 5 business days of the date of the hearing decision.

DSS or DMMA staff will restore benefits to food benefit households that are leaving the State before the household's departure, whenever possible.

NOTE: <b>[For food benefits and cash assistance, Ss]</b> taff must always prepare a claim against the household for any over-issuance when the hearing decision upholds the agency's action.
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## **5502 ~~Public Access to Hearing Decisions~~ PROVIDING PUBLIC ACCESS TO HEARING DECISIONS**

~~Decisions are accessible to the public subject to provisions for safeguarding public assistance information. Under 31 Delaware Code 1101, "no person may reveal information concerning applicants for or recipients of public assistance except for the purposes directly connected with the administration of the program."~~

7 CFR 272.1(c), 7 CFR 273.15(q)(5), 42 CFR 431.244(g), 45 CFR 205.10(19), 45 CFR 205.50, 31 Del.C. §1101

This policy applies to all hearing decisions made by the Division of Social Services (DSS) or the Division of Medicaid & Medical Assistance (DMMA).

### **1. Hearing Decisions are Available to The Public**

Hearing decisions are available to the public on the Division of Social Services and Division of Medicaid & Medical Assistance websites.

DSS: (<http://www.dhss.delaware.gov/dhss/dss/redactedfairhearings.html>)

DMMA: (<http://www.dhss.delaware.gov/dhss/dmma/fairhearings.html>).

### **2. DSS and DMMA Take Steps to Keep Identities Confidential**

DSS and DMMA remove information that might identify the appellant/claimant before the decision is made available.

No information concerning applicants or recipients of public assistance is revealed except for the purposes directly connected with the administration of the program.

*(Break in Continuity of Sections)*

**5600 Admission of Hearsay Evidence ADMITTING HEARSAY EVIDENCE**

1) Hearsay evidence is evidence of a statement made outside the hearing which is introduced at the hearing as proof of the truth of its content.

2) Hearsay evidence is not admissible over objection unless it meets one of the exceptions to the hearsay rule (evidence which, although it falls within definition of hearsay, is nevertheless admissible because of special necessity) listed in the Delaware Uniform Rules of Evidence. Admissible hearsay evidence includes:

a) Any statements where the claimant has had an opportunity to cross examine the witness at a prior proceeding or statements of agency staff who could be available as witnesses upon a claimant's request; and.

b) Evidence which falls within recognized hearing exceptions where cross examination of the witness would not be meaningful, such as those enumerated in Federal Rule of Evidence 803. (See Ortiz v. Eichler, 794 F2d 889,896 (3rd Cir. 1986).

c) Official records of the Department of Health and Social Services and other official records when authenticated by a custodian of the record.

d) Evidence recognized by official notice as an exception to the hearsay rule (see 5603).

Recognized exceptions to the hearsay rule include statements for purposes of medical diagnosis, records of regularly conducted activity (such as E&T logs), records of vital statistics, records of religious organizations, records of or statements in documents affecting an interest in property. For other exceptions, refer to 803 Delaware Uniform Rules of Evidence.

Federal Rule of Evidence 803, Delaware Uniform Rules of Evidence

This policy applies to applicants and recipients for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

**1. The Hearing Officer Decides if Hearsay Evidence is Admissible**

Admissible hearsay evidence includes:

- A. Statements where the claimant has had an opportunity to cross examine the witness at a prior proceeding
- B. Statements of agency staff who could be available as witnesses upon a claimant's request
- C. Evidence which falls within recognized hearing exceptions where cross-examination of the witness would not be meaningful
- D. Official records of the Department of Health and Social Services and other official records when authenticated by a custodian of the record
- E. Evidence recognized by official notice as an exception to the hearsay rule (see DSSM 5603)

Exception: Recognized exceptions to the hearsay rule include:

- 1. Statements for purposes of medical diagnosis
- 2. Records of regularly conducted activity (such as Employment and Training logs)
- 3. Records of vital statistics
- 4. Records of religious organizations
- 5. Records of or statements in documents affecting an interest in property

See Delaware Uniform Rules of Evidence §803 for more exceptions.

**2. Hearsay Evidence is Not Admissible if There is an Objection**

If a party to the hearing objects to the use of hearsay evidence, the evidence will not be admitted.

Exception: Hearsay evidence is admissible, regardless of objections, if it meets one of the exceptions to the hearsay rule listed in the Delaware Uniform Rules of Evidence.

## **5600.1 Admissible Evidence ADMITTING EVIDENCE**

~~Evidence admitted at the hearing shall be limited to evidence having a bearing on the issue(s) on appeal. Such issues include those offered by the appellant at the time of his/her appeal and those offered by the State or other party as a basis for the action or inaction under appeal. No other evidence or issues shall be considered.~~

45 CFR 205.10(14)

This policy applies to applicants and recipients for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

### **1. Hearing Officer Determines if Evidence is Admissible**

Evidence must meet the following minimum criteria to be admissible.

- A. Relevance - In order for evidence to be admissible in a fair hearing it must be relevant. Evidence is relevant if an average person believes that the evidence makes a significant fact more probable.
- B. Reliability - In order for evidence to be admissible in a fair hearing it must be reliable.
- C. Competence - In addition to relevance and reliability, evidence admitted at a hearing must be competent.
- D. Privilege - Appellants may decline to present testimony or evidence at a fair hearing under claim of privilege.

~~[The hearing officer may make a negative assumption when a party declines to give testimony under a claim of privilege.]~~

Privilege may include the privilege against self-incrimination or communication to an attorney, a religious advisor, or doctor.

Exception: Privilege may not be disclosed without the consent of the person who sought the professional assistance unless:

- 1. It has been waived
- 2. The person attempting to claim it has put the subject of the privilege at issue in the fair hearing

### **1. Claimants or Witnesses May Waive Privilege**

Privileges are waived by a claimant or witness if he or she testifies to some part of the privileged matter.

~~[Privileges are waived by a claimant if the information is relevant to the defense of the action or inaction under appeal.]~~

EXAMPLE: A person who makes his or her medical condition an issue may not use Doctor/Patient privileges to exclude any information relating to his or her condition.

### **2. Hearing Officer Limits Admissible Evidence**

Only evidence relating to the issue under appeal is admissible at the hearing. Issues under appeal include those offered by:

- A. The appellant at the time of his or her appeal
- B. The State as a basis for the action or inaction under appeal
- C. Another party as a basis for the action or inaction under appeal

### **3. Hearing Officer May Admit Other Evidence**

Information concerning matters of common knowledge and generally accepted as true may be relied on in a fair hearing whether or not it is introduced by evidence or testimony.

# FINAL REGULATIONS

The behavior of a party to a hearing may be taken by a hearing officer into evidence only when the behavior has been noted in the hearing record.

## 5601 ~~Rule of Legal Residuuum~~ **RESERVED**

~~Findings of fact must be supported by at least some evidence which is admissible in a court of law.~~

## 5602 ~~Exclusionary Rules of Evidence~~ **RESERVED**

~~1) Relevance—In order for evidence to be admissible in a fair hearing it must be relevant. Evidence is relevant if a reasonable person could feel that, assuming the evidence is true, it renders a significant fact more probable than it appeared before the introduction of the evidence.~~

~~2) Reliability—In order for evidence to be admissible in a fair hearing it must be reliable.~~

~~3) Competence—In addition to relevance and reliability, evidence admitted at a hearing must be competent.~~

~~4) Privilege—Appellants may decline to present testimony or evidence at a fair hearing under claim of privilege.~~

~~Privilege may include the privilege against self incrimination or communication to an attorney, a religious advisor, or physician (and may not be disclosed without the consent of the person who sought the professional assistance unless it has been waived or the person attempting to claim it has put the subject of the privilege at issue in the fair hearing).~~

~~Privileges are waived by a claimant or witness if he/she testifies to some part of the privileged matter or, in the case of a claimant, the matter is relevant to a claim in defense that is the subject of the hearing.~~

~~EXAMPLE: A person who makes his/her medical condition an issue may not use Doctor/ Patient privileges to exclude any information relating to his/her condition), or~~

~~The hearing officer may take a negative inference when a party declines to give testimony under a claim of privilege.~~

## 5603 ~~Official Notice~~ **RESERVED**

~~Information concerning matters of common knowledge and generally accepted as true may be relied on in a fair hearing whether or not it is introduced by evidence or testimony.~~

## 5604 ~~Protect~~ **DISCUSSING THE CASE**

~~1) If a hearing is requested, a party to the hearing may not discuss the merits of the case with the hearing officer before the hearing.~~

~~2) Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned. However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer. An exception to this is if the hearing officer has remanded or sent the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.~~

This policy applies to all parties involved with a hearing for any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

### 1. Discussions About the Case Are Prohibited

#### A. Before the Hearing:

A party to the hearing may not discuss the merits of the case with the hearing officer.

#### B. After the Hearing

Agency employees may not discuss the merits of the case with the hearing officer after the hearing is adjourned. ~~However, after the hearing decision is made final, the parties may discuss the results of the hearing with the hearing officer.~~

<p><del>[Exception: The parties may not discuss the results of the hearing with the hearing officer if the hearing officer sends the case back with instructions for further action and the agency worker expects to receive another request for a fair hearing.]</del></p>
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## 5605 ~~Requests for Continuance~~ **REQUESTING A CONTINUANCE**

~~Either party to a hearing may request that the hearing officer continue the hearing on a different date.~~

~~A witness or party in interest to the hearing does not have standing to request that the date of a hearing be continued.~~

~~A request for a continuance must be made at least twenty-four (24) hours in advance of the hearing so that the other party may be notified.~~

~~The request for a continuance must specify the reason that a continuance is needed.~~

~~Examples of requests for which a continuance should be granted, include, but are not limited to:~~

- ~~1) Illness of a party or witness;~~
- ~~2) Extreme inclement weather;~~
- ~~3) Request for additional time to prepare for the hearing.~~

~~The hearing officer will respond to the request not later than ten (10) days after the request is received.~~

~~No continuance will be granted to the State or its agent if the continuance would result in the State exceeding the time limits specified in §5305 and §5309 or any statutory time limit.~~

7 CFR 273.15(c)(4)

This policy applies to every appellant, appellant's authorized agent, and agency staff involved in the hearing. It applies to any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

### **1. Either Party To A Hearing May Request A Continuance**

Either party to a hearing may request that the hearing officer continue the hearing on a different date.

Exception: A witness or party in interest to the hearing may not request a continuance.

### **2. Requests For A Continuance Meet Specific Requirements**

A request for a continuance must:

A. **[Be Should be]** made at least 24 hours in advance of the hearing so that the other party may be notified

B. **[Specify must specify]** the reason that a continuance is needed

Examples of requests for which a continuance should be granted, include, but are not limited to:

1. **Illness of a party or witness**
2. **Extreme inclement weather**
3. **Request for additional time to prepare for the hearing**

### **3. Hearing Officer Responds to Requests**

The hearing officer will respond to the request not later than 10 days after the request is received.

No continuance will be granted to the State or its agent if the continuance would result in the State exceeding the time limits specified in DSSM 5305 and DSSM 5309 or any statutory time limit.

## 5606 ~~Recusation~~ **DISQUALIFYING A HEARING OFFICER**

~~Either party at a hearing may request that a hearing officer disqualify himself from hearing the issue for reasons of interest or prejudice. A hearing officer may disqualify himself sua sponte (on his own motion). If disqualified, a hearing officer will immediately notify the Director of the Division of Social Services who will promptly appoint a new hearing officer.~~

7 CFR 273.15(m), 42 CFR 431.240(a)(3), 45 CFR 205.10(a)(9)

This policy applies to every hearing officer, appellant, appellant's authorized agent, and agency staff involved in the hearing. It applies to any public assistance program administered by the Division of Social Services or the Division of Medicaid & Medical Assistance.

**1. Hearing Officer Is Impartial**

The hearing officer must be impartial with no personal stake or involvement in the case. The hearing officer is prohibited from having any involvement in the initial determination of the action in question.

**2. Hearing Officer May Disqualify Himself**

**3. Either Party May Ask to Disqualify a Hearing Officer**

The appellant, the appellant's authorized agent, or the agency employee may ask the hearing office to disqualify himself or herself from the hearing. This could happen if they believe the hearing officer has an interest in or prejudice against an issue of the hearing.

**4. Hearing Officer Gives Notice of Disqualification**

If a hearing officer is disqualified, the officer will immediately notify the Director of the Division of Social Services. The Director will promptly appoint a new hearing officer.

**5607 ~~Demeanor Evidence~~ RESERVED**

~~The behavior of a party to a hearing may be taken by a hearing officer into evidence only when the behavior has been noted in the hearing record.~~

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## **DEPARTMENT OF SAFETY AND HOMELAND SECURITY**

### **DIVISION OF STATE POLICE**

#### **5500 Bail Enforcement Agents**

Statutory Authority: 24 Delaware Code, Section 5504(a) (24 **Del.C.** §5504(a))

### **ORDER**

Pursuant to the Guidelines in 29 **Del.C.** §10118(a)(1)-(7), the Board of Examiners of Bail Enforcement Agents ("Board") hereby issues this Order. Following notice and a public hearing on the proposed adoption of amendments to the Rules & Regulations, the Board makes the following Findings and Conclusions:

#### **Summary of Evidence and Information Submitted**

1. The Board did not receive written evidence or information pertaining to the proposed adoption.
2. The Board expressed its desire to adopt the amendment to improve the safety of the public and the bail enforcement agents and to professionalize the industry.

#### **Findings of Fact**

3. The public was given notice and the opportunity to provide the Board with comments, in writing and by oral testimony, on proposed amendments. The written comments and oral testimony received are described in paragraph 1.
4. The Board finds that the adoption of this rule will improve the safety of the public and the bail enforcement agents and to professionalize the industry.
5. The Board finds that the adoption will have no adverse impact on the public.
6. The Board finds that the amendment is well written and describes its intent to adopt the rule to improve the safety of the public and the bail enforcement agents and to professionalize the industry.

**Conclusion**

7. The proposed rule adoption was published by the Board in accord with the statutory duties and authority as set forth in 24 **Del.C.** §5503 et seq. and, in particular, 24 **Del.C.** §5503(d)(2).

8. The Board deems this adoption necessary and expedient to the full and official performance of its duties under 24 **Del.C.** §5503 et. seq.

9. The Board concludes that the adoption of this rule will be in the best interests of the citizens of the State of Delaware.

10. The Board therefore adopts the amendment pursuant to 24 **Del.C.** §5503(d)(2) and guidelines of 29 **Del.C.** §10118 of the Administrative Procedures Act. See, *Strauss v. Silverman*, Del. Supr., 399 A.2d 192 (1979).

11. This adopted rule replaces in its entirety any former rule or regulation heretofore promulgated by the Board.

12. The effective date of this Order shall be March 11, 2012.

13. Attached hereto and incorporated herein this order is the amended rule marked as exhibit A and executed simultaneously on the 27th day of February 2012.

Major Nathaniel McQueen, Chairman

Director John Yeomans

Ms. Robin David

Mrs. Jennifer A. Esposito

Rebecca L. Byrd, Esquire

Mr. R. Dale Hamilton

Mr. J. Russell Dean

Mrs. Brunilda Luna-Mercado

Mr. Kevin C. Jones

February 27, 2012

**\*Please note that no changes were made to the regulation as originally proposed and published in the December 2011 issue of the *Register* at page 768 (15 DE Reg. 768). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**5500 Bail Enforcement Agents**

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**OFFICE OF THE SECRETARY**

Statutory Authority: 16 Delaware Code, Section 4797(c)  
(16 **Del.C.**, §4797(c))

**AMENDED ORDER****Regulations Governing the Statewide Authorized Tamper Resistant Prescription Forms**

Pursuant to 29 **Del.C.** §10118 and 16 **Del.C.** §4797(c), the Delaware Department of Safety and Homeland Security and a committee of officials established pursuant to 16 **Del.C.** §4797(c), by and through their designee the Director of Professional Regulation, does hereby issue this Order adopting Regulations Governing the Statewide Use of Authorized Tamper Resistant Prescription Forms:

**Nature and Stage of the Proceedings**

The Delaware Uniform Controlled Substances Act, 16 **Del.C.** Ch. 47, was amended in July 2008 so as to provide the Secretary of the Delaware Department of Homeland Security (hereinafter the "Department") with the authority to promulgate regulations which establish a statewide prescription form designed to eliminate or significantly reduce drug prescription fraud.

The Department posted public notice of its draft regulations pursuant to 16 **Del.C.** §4797(c) in the News Journal and the Delaware State News on June 22, 2011. Notice of such regulations was also posted in the Register of Regulations on July 1, 2011.

A public hearing pursuant to 29 **Del.C.** §10117 was convened before James Collins, Director, Division of Professional Regulation, in the offices of the Division of Professional Regulation, Delaware Department of State, Cannon Building, 861 Silver Lake Blvd., Dover DE at 9:00 a.m., July 13, 2011.

The Final Order submitted to the *Register of Regulations* for publication on October 1, 2011 inadvertently included an incorrect version of the changes to the regulations attached as "Exhibit A" that failed to incorporate all of the non-substantive changes to the regulations. This amended final order is being republished with the corrected exhibit which includes all of the changes.

**Summary of the Evidence and Information Submitted**

Prior to the July 13, 2011 hearing, the Division of Professional Regulation (hereinafter the "Division") received certain public input in the form of correspondence and emails. Four witnesses appeared at the hearing.

Mark Thompson, a representative of the Medical Society of Delaware, testified that he believes the cost of tamper-proof prescription forms is an unfunded mandate to be imposed on the medical community. He further stated that the definition of "practitioner" in Sec. 3.0 of the proposed regulations and the exemption set forth in that definition require further explication.

Jake MacKinnon, Vice President, Rx Security, Inc., testified that it is unnecessary to require the use of thermochromic ink on the front and back of the tamper-proof prescription forms because such ink will not enhance security and will significantly add to the cost of the forms. He also stated that requiring heavier stock paper such as 24# will add to the expense of the forms without enhancing security. He also testified that it is unnecessary to require a different color of ink such as the color orange on the forms because that will add to the cost of the forms without enhancing security. He stated that barcoding the forms is unnecessary unless such a requirement facilitates scanning efficiency at the pharmacy level. If barcodes cannot be scanned, security is not enhanced and cost is increased. Finally, Mr. MacKinnon stated that in his opinion limiting the number of vendors of the forms may impact prices, reduce support and service, and increase the possibility that statewide demand cannot be met.

Steven Artz, a Delaware dental office manager, testified that increased inspections of medical offices by multiple state agencies will be disruptive.

Paul Keeley, King Medical Systems, stated that in his opinion it is unfair to impose the entire cost of the new security measures on the medical community alone. He agreed with Mr. MacKinnon that the requirement of thermochromic ink adds to cost but does not enhance security.

**Findings of Fact and Conclusions of Law**

The public was given due notice as required by law and an opportunity to provide the Department with comments in writing and by testimony at the public hearing on the proposed regulations.

The General Assembly has determined that prescription fraud is a phenomenon which should be addressed in order to protect the health, safety and welfare of the citizens of the State of Delaware. The regulations promulgated hereby advance a valid public purpose rationally related to the legitimate state goal of eliminating or significantly reducing such prescription fraud.

These regulations implement a comprehensive and effective means by which prescription fraud may be eliminated or substantially reduced in Delaware.

After carefully considering the public input in conjunction with the public hearing in this matter, certain suggestions and recommendations have been accepted and implemented. The requirement of a heavier stock of

paper for the forms has been eliminated. Thermochromic ink will now be required only on the back of the prescription forms. The requirement of the use of a contrasting color of thermochromic ink has been eliminated. The requirement of barcoding has been eliminated.

The changes to the regulations listed in the preceding paragraphs will likely increase the pool of qualified vendors who will be capable of producing the new tamper- proof prescription forms.

None of the changes made in the regulations subsequent to the receipt of public input is substantive as that term is employed at 29 **Del.C.** §10118(c).

## Decision and Effective Date

The Regulations Governing the Statewide Authorized Tamper Resistant Prescription Forms, as amended and attached hereto as Corrected Exhibit A, are hereby adopted. The effective date of such regulations shall be March 11, 2012.

SO ORDERED this 14th day of February 2012.

James L. Collins, Director

Division of Professional Regulation, designee of the Secretary of the Department of Safety and Homeland Security and a committee of officials established pursuant to 16 **Del.C.** §4797(c)

**\*Please Note: Due to the size of the final regulation, it is not being published here. A copy of the regulation is available at:**

**Regulations Governing the Statewide Authorized Tamper Resistant Prescription Forms**

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## DEPARTMENT OF STATE

### DIVISION OF PROFESSIONAL REGULATION

#### 1100 Board of Dentistry and Dental Hygiene

Statutory Authority: 24 Delaware Code, Section 1106(a)(1) (24 **Del.C.** §1106(a)(1))

24 **DE. Admin. Code** 1100

## ORDER

After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on January 12, 2012 at a scheduled meeting of the Delaware Board of Dentistry and Dental Hygiene (the "Board") to receive comments regarding the Board's proposed amendments to the Board's rules and regulations.

Pursuant to 24 **Del.C.** §1106(a)(1) the Board proposed amendments to Board Regulation 7.0 *Anesthesia Regulations*. The proposed amendments clarify and distinguish the requirements for a dentist seeking an "Unrestricted Permit" to administer anesthesia in his or her individual capacity and the requirements for an "Unrestricted Facility Permit" that would enable an anesthesiologist to be utilized at a dental facility to provide the anesthesia.

## SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

**Board Exhibit 1**, the *News Journal* Affidavit of Publication, and **Board Exhibit 2**, the *Delaware State News* Affidavit of Publication, were made a part of the record. No written comments were received. The Board received comment from 2 members of the public.

**Richard R. Wier, Jr., Esquire**, counsel for Bear-Glasgow Dental and Peninsula Dental addressed the Board. Mr. Wier's first comment did not concern the substance of the regulations but rather how the regulatory change

would affect Dr. Goleburn's current unrestricted permit that was granted under the previous regulations. He asked the Board to confirm that the existing permit would not be affected.

Mr. Wier's second comment was directed to proposed regulation 7.4.1. He pointed out that the regulation as drafted requires the dental facility to employ an anesthesiologist who is a member of the staff at a JCAHO accredited hospital. Mr. Weir submitted that the JCAHO requirement is too restrictive and that the regulation should only require that the anesthesiologist for the facility be board certified. He submitted that he did not believe that the requested modification was a substantive change.

**Dr. Glen Goleburn** of Bear-Glasgow Dental and Peninsula Dental addressed the Board and reiterated the question raised by Mr. Weir as to how the regulation would affect his existing permit.

### FINDINGS OF FACT AND CONCLUSIONS

1. The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board's rules and regulations. The Board received no written comments on the proposed amendments.

2. The verbal comment from Mr. Wier and Dr. Goleburn regarding how the proposed regulations affect Dr. Goleburn's existing permit do not go to the substance of the regulations. The Board will send a letter to Dr. Goleburn referencing questions he posed during the hearing about his anesthesia permits that explains that upon the expiration of Dr. Goleburn's Unrestricted Permit-Individual for his Bear-Glasgow office, he will either need to qualify to renew the Unrestricted Permit-Individual or apply for a new Unrestricted Permit-Facility. However, he is free to convert the permit to a facility permit sooner if he wishes subject to such fees as are determined by the Division of Professional Regulation.

3. The Board finds that Mr. Wier's comment with regard to proposed regulation 7.4.1 has merit. The Board finds that the regulation would be improved by accepting the proposed modification and agrees that the change is non-substantive. Specifically, regulation 7.4.1 is modified as reflected below with the deleted language shown by strikethrough and the new language shown as underlined:

7.4.1 General anesthesia, deep sedation, conscious sedation by means other than nitrous oxide, may be administered in a dental office that has these services provided by an individual meeting the requirements of 7.3.2.1 and 7.3.2.2 or employs or works in conjunction with a ~~trained M.D. or D.O. who is a member of the anesthesiology staff of a JCAHO (Joint Commission Administration of Hospital Organizations) accredited hospital~~ board certified anesthesiologist with an active license Delaware license, 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. The requirements of regulations 7.4, 7.5 and 7.6 shall apply to the facility

4. Pursuant to 24 **Del.C.** §1106 the Board has statutory authority to promulgate rules and regulations clarifying specific sections of its statute. The amendments to Regulation 7.0 *Anesthesia Regulations* clarify the requirements for anesthesia permits that the Board is authorized to establish under the provisions of 24 **Del.C.** §1106(a)(15).

5. The Board finds that the proposed amendments are necessary to clarify ambiguities in the existing regulation related to qualifications for obtaining an unrestricted anesthesia permit and to protect the public by assuring that anesthesia is administered only by individuals who are qualified to do so either by having an individual permit or a facility permit in which an anesthesiologist is utilized.

### DECISION AND EFFECTIVE DATE

The Board hereby adopts the changes to its rules and regulations to be effective 10 days following publication of this order in the *Register of Regulations*.

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## TEXT AND CITATION

The text of the revised regulations remains as published in *Register of Regulations*, Vol. 15, Issue 6, on December 1, 2012 except that Regulation 7.4.1 is modified as indicated in paragraph 3 of this Order.

**SO ORDERED** this 12<sup>th</sup> day of January 2012.

### **BOARD OF DENTISTRY AND DENTAL HYGIENE**

Blair Jones, DMD, President, Professional Member  
Robert Director, DDS, Professional Member  
John Lenz, DDS, Professional Member  
Neil McAneny, DDS, Professional Member

Thomas Cox, DDS, Professional Member  
Joan Madden, RDH, Professional Member  
Nathaniel Gibbs, Public Member

### **1100 Board of Dentistry and Dental Hygiene**

**\*Please note that no changes were made to the regulation as originally proposed and published in the December 2011 issue of the *Register* at page 777 (15 DE Reg. 777). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**1100 Board of Dentistry and Dental Hygiene**

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### **DIVISION OF PROFESSIONAL REGULATION**

### **BOARD OF REGISTRATION FOR PROFESSIONAL LAND SURVEYORS**

Statutory Authority: 24 Delaware Code, Section 2706(a) (24 **Del.C.** §2706(a))  
**24 DE. Admin. Code 2700**

### **ORDER**

### **2700 Board of Registration for Professional Land Surveyors**

Pursuant to 29 **Del.C.** § 10118 and 24 **Del.C.** § 2701, the Delaware Board of Professional Land Surveyors issues this Order adopting proposed amendments to the Board's Rules. Following notice and a public hearing on January 19, 2012 the Board makes the following findings and conclusions:

### **SUMMARY OF THE EVIDENCE**

1. The Board posted public notice of the proposed amendments in the December 1, 2011 Register of Regulations and for two consecutive weeks in the Delaware News Journal and Delaware State News. The proposed revisions to this regulation requires ALTA/ACSM be titled according to current published standards, requires subdivision surveys be titled according to the governing regulatory agency, and clarifies boundary survey plans as the only acceptable plat title; clarifies that when no recorded rights-of-way are provided, it is to be noted on the plan; requires written property descriptions accompany boundary survey, ALTA/ACSM land title Surveys and Subdivision Surveys except in certain circumstances; details the setting of boundary corners for major and minor subdivision surveys; renames MIP to MSP; details the necessary language for ultimate user waiver and disclosure forms; and requires licensees to maintain waivers on file for three years. The requirement of two corner markers to be included with every MSP has been deleted.

2. The Board received one written comment during the thirty-day comment period. Thomas H. Whitehead wrote to congratulate those members of the Board and the public that support requirement of two set corners. Mr. Whitehead also wrote that he is concerned that at the last public hearing members of the legislature were present

and testified that they will pass a law to overturn the Board if the Board continued with the requirement of two set corners. Mr. Whitehead believes this set a bad precedent for the Board.

3. The Board received no public comment during the public hearing on January 19, 2012.

#### **FINDINGS OF FACT AND CONCLUSIONS**

4. The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board's Rules.

5. The Board has considered the written public comment received prior to the January 19, 2012 public hearing. The Board does not find those comments require further revisions of the proposed rules. The Board finds that the new rules have been vetted through numerous public hearings, and input has been received from countless members of the public. The new rules have received overwhelming public support and the Board believes the changes are necessary for the proper protection of the public safety and welfare.

The effective date of this Order will be ten (10) days from the publication of this Order in the Register of Regulations on March 1, 2012.

IT IS SO ORDERED this 16th day of February, 2012.

Thomas M. Plummer  
Michael T. Szymanski  
James Bielicki, Jr.  
Mary Chvostal  
Mark Rosenthal  
Laurence R. McBride

**\*Please note that no changes were made to the regulation as originally proposed and published in the December 2011 issue of the *Register* at page 781 (15 DE Reg. 781). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**2700 Board of Registration for Professional Land Surveyors**

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#### **DIVISION OF PROFESSIONAL REGULATION 3300 BOARD OF VETERINARY MEDICINE**

Statutory Authority: 24 Delaware Code, Section 3306(a)(1) (24 **Del.C.** §3306(a)(1))  
24 **DE Admin. Code** 3300

#### **ORDER**

The Board of Veterinary Medicine ("the Board") was established to protect the general public from unsafe practices and from occupational practices which tend to reduce competition or fix the price of services rendered by the profession under its purview. The Board was further established to maintain minimum standards of practitioner competence in the delivery of services to the public. The Board is authorized, by 24 **Del.C.** §3306(a)(1), to make, adopt, amend and repeal regulations as necessary to effectuate those objectives.

Pursuant to 24 **Del.C.** §3306(a)(1), the Board has proposed revisions to its rules and regulations. The Board proposes amendments to Rule 2.0, addressing Unprofessional Conduct for Veterinarians. Specifically, Rule 2.1.17 is added to provide that, upon request of the client, directed to the veterinarian, the veterinarian shall disclose common side effects of the medications prescribed by the veterinarian.

Pursuant to 29 **Del.C.** §10115, notice of the public hearing and a copy of the proposed regulatory changes were originally published in the Delaware *Register of Regulations*, Volume 15, Issue 6 on December 1, 2011.

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Notice of the rescheduled hearing was published in the Delaware *Register of Regulations*, Volume 15, Issue 7 on January 1, 2012.

## Summary of the Evidence and Information Submitted

A public hearing on the proposed rule revisions was held on February 14, 2012. No written comment was submitted and there was no public comment.

## Findings of Fact

The Board carefully reviewed and considered the proposed rule revisions. The proposed revisions will serve to protect the public because, upon request of the client, directed to the veterinarian, the veterinarian shall disclose common side effects of the medications prescribed by the veterinarian. Therefore, the Board finds that adopting the amended rules and regulations as proposed is in the best interest of the citizens of the State of Delaware and is necessary to protect the health and safety of the general public.

## Decision and Effective Date

The Board hereby adopts the proposed amendments to the rules and regulations to be effective 10 days following final publication of this Order in the Register of Regulations.

## Text and Citation

The text of the revised rules and regulations remains as published in the Delaware *Register of Regulations*, Volume 15, Issue 6 on December 1, 2011.

IT IS SO ORDERED this 14th day of February 2012 by the Delaware Board of Veterinary Medicine.

Craig Metzner, DVM, President, Rachel Longfellow, LVT, Vice-President

Lynn Nellius, LVT, Roberta Jackson, VMD

Natalie Titus, DVM, Patricia Ennis, Lena Corder

**\*Please note that no changes were made to the regulation as originally proposed and published in the December 2011 issue of the *Register* at page 793 (15 DE Reg. 793). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**3300 Board of Veterinary Medicine**

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## DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 8510A (24 Del.C. §8510A)

## ORDER

### **8500 Rules and Regulations Regarding Mandatory Information to be Supplied to the State Bureau of Identification**

The Division of Professional Regulation ("the Division") published notice in the *Register of Regulations* and two Delaware newspapers of its intent to adopt regulations governing what information the Division must supply to the State Bureau of Identification regarding the Division's investigations, civil enforcement actions or complaints, and changes in license status when such information is related to alleged criminal conduct. The proposed regulations

were developed in cooperation with the Executive Director of the Delaware Criminal Justice Information System. The public was afforded the opportunity to provide written comment on the proposed changes to James L. Collins, Director of the Division ("the Director").

The full text of the proposed regulations was published in the *Register of Regulations*, Volume 15, Issue 4, on October 1, 2011. The comment period was held open in excess of thirty (30) days after the October 1, 2011 publication date.

### **SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

No written comments were received in regard to the proposed rules and regulations as published on October 1, 2011.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The public was given notice and an opportunity to provide the Division with comments in writing on the proposed regulations governing information to be supplied to the State Bureau of Identification. The Division received no public comment.

2. Pursuant to 11 **Del.C.** §8510A the Division has statutory authority and is mandated to promulgate regulations governing information to be supplied to the State Bureau of Identification regarding the Division's investigations, civil enforcement actions or complaints, and changes in license status when such information is related to alleged criminal conduct.

3. These regulations satisfy the legislative mandate of 11 **Del.C.** § 8510A and were developed in cooperation with the Executive Director of the Delaware Criminal Justice Information System.

### **DECISION AND EFFECTIVE DATE**

The Director hereby adopts the amendments to the regulations to be effective 10 days following publication of this final Order in the *Register of Regulations*.

### **TEXT AND CITATION**

The text of the regulations remains as published in the *Register of Regulations*, Vol. 15, Issue 4, October 1, 2011, without any modifications.

SO ORDERED this 13th day of February, 2012.

DIVISION OF PROFESSIONAL REGULATION  
James L. Collins, Director

### **8500 Rules and Regulations Regarding Mandatory Information to be Supplied to the State Bureau of Identification**

#### **1.0 Source of Authority: 11 Del.C. §8510A**

The Rules and Regulations herein contained constitute, comprise, and shall be known as the Rules and Regulations Regarding Mandatory Information to be supplied to the State Bureau of identification and are hereby promulgated, pursuant to 24 Del.C. §8510A.

#### **2.0 Definitions**

Whenever used in these Rules and Regulations unless expressly otherwise stated, or unless the context or subject matter requires a different meaning, the following terms shall have the respective meanings hereinafter set forth or indicated.

- 2.1 "Bureau" shall mean the Delaware State Bureau of Identification
- 2.2 "DELJIS" shall mean the Delaware Criminal Justice Information System.
- 2.3 "Director" shall mean the Director of the Division of Professional Regulation.
- 2.4 "Division" shall mean the Delaware Department of State, Division of Professional Regulation.
- 2.5 "Executive Director" shall mean the Executive Director of the Delaware Criminal Justice Information System.
- 2.6 "LEISS" shall mean the Law Enforcement Investigative Support System.
- 2.7 "Licensee" shall mean persons licensed, certified or registered under Titles 16, 23, 24, 28 and 29.

### **3.0 Purpose**

The purpose of the rules and regulations is to establish appropriate guidelines for the Division to comply with the mandates of Title 11, §8510A. These rules serve to publish the agreed upon guidelines for the submission of information by the Director or designee to the Executive Director of DELJIS.

### **4.0 Reports of Criminal Conduct**

- 4.1 Any investigation of a complaint or mandatory report conducted by the Division when there is reasonable cause to believe that criminal conduct has occurred shall be reported to the Executive Director of DELJIS within 30 days of making that determination. The manner of reporting shall be through the LEISS or in any other manner prescribed by the Executive Director.
- 4.2 All civil enforcement actions taken by the Division when it has been determined that criminal conduct has occurred or when testimony presented in the accompanying hearing has established evidence of criminal conduct, shall be reported to the Executive Director of DELJIS within 30 days of determining the existence of criminal conduct on the part of any licensee or other person.
- 4.3 Any change in license status (suspension, probation or revocation) of a licensee as a result of a finding, either by investigation, Board Hearing, hearing before a Hearing Officer, consent agreement or testimony offered at a hearing, which establishes that the licensee has been involved in criminal conduct, shall be reported to the Executive Director of DELJIS within 30 days of determining that such criminal conduct has occurred.

### **5.0 Required Information**

- 5.1 The information that is provided to the Executive Director of DELJIS by the Director shall include the full name, sex, DOB (if available), address and any other identifying information necessary to fully and properly identify the person being reported. The information reported will include sufficient details of the alleged criminal conduct that will allow other Criminal Justice Agencies to understand the alleged criminal conduct perpetrated by the person being reported. Types of criminal conduct that shall be reported include, but are not limited to, the following:
  - 5.1.1 Medicaid Fraud
  - 5.1.2 Insurance Fraud of any type
  - 5.1.3 Sexual Misconduct including boundary violations
  - 5.1.4 Tax Fraud
  - 5.1.5 Drug offenses including over prescribing and diversion
  - 5.1.6 Fraudulent activity in the trades (plumbing, HVAC and electrical)

**6.0 Authorized DELJIS Access**

Access to the DELJIS system shall be in compliance with policies and regulations promulgated by the Executive Director of DELJIS.

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**DIVISION OF PROFESSIONAL REGULATION****8800 Combative Sports Entertainment Rules and Regulations**

Statutory Authority: 28 Delaware Code, Chapter 1 (28 Del.C. Ch. 1)  
28 DE Admin. Code 8800

**ORDER****8800 Combative Sports Entertainment Rules and Regulations**

The Division of Professional Regulation ("the Division") published notice in the Register of Regulations and two Delaware newspapers of its intent to amend the existing regulations related to combative sports and combative sports entertainment. The public was afforded the opportunity to provide written comment on the proposed changes to James L. Collins, Director of the Division ("the Director").

The full text of the proposed revisions was published in the Register of Regulations, Volume 15, Issue 7, on January 1, 2012. The comment period was held open until the close of business on February 4, 2012.

**SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

No written comments were received in regard to the proposed amendments to the regulations as published on January 1, 2012.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The public was given notice and an opportunity to provide the Division with comments in writing on the proposed amendments to the combative sports and sports entertainment regulations. The Division received no public comment.

2. The regulations as published on January 1, 2012 took into consideration public comment submitted at a previous public hearing on proposed changes that resulted in the regulations being republished in their entirety with the public again being given notice and the opportunity to comment.

3. Pursuant to 28 Del.C. §103(b)(1) the Division has statutory authority to promulgate rules regulating all professional and amateur boxing, mixed martial arts and combative sports entertainment events held in the State.

4. The Division finds that the proposed regulations are necessary to clarify sections of the existing regulations based upon experience, and investigations into and observation of the practical effect of the regulations since they were first implemented. The changes to the regulations include, but are not limited to, specifications related to weight classes, equipment and clothing, bandage wraps, protective equipment fouls and violations, warnings, legal strikes, matchmaking, physical exams and other testing, requirements of the Division, and responsibilities of the promoter, fighter and seconds/cornermen. Changes were made to the regulations governing professional mixed martial arts, amateur mixed martial arts and combative sports entertainment.

5. The Division finds that the amendments to the regulations are necessary for the interest and protection of the public health, safety, and welfare of the public viewing combative sports and combative sports entertainment events and for the participants of the events.

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## DECISION AND EFFECTIVE DATE

The Director hereby adopts the amendments to the regulations to be effective 10 days following publication of this final Order in the Register of Regulations.

## TEXT AND CITATION

The text of the regulations remains as published in the Register of Regulations, Vol. 15, Issue 7, January 1, 2012, without any modifications.

SO ORDERED this 14th day of February, 2012.

DIVISION OF PROFESSIONAL REGULATION

James L. Collins, Director

**\*Please note that no changes were made to the regulation as originally proposed and published in the January 2012 issue of the *Register* at page 986 (15 DE Reg. 986). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**8800 Combative Sports Entertainment Rules and Regulations**

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## EXECUTIVE DEPARTMENT OFFICE OF MANAGEMENT AND BUDGET STATEWIDE BENEFITS OFFICE

29 Delaware Code, Section 5256 (29 Del.C. §5256)

## ORDER

### **Disability Insurance Program Rules and Regulations**

### **Summary of the Evidence and Information Submitted**

Pursuant to the State's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code) and under the authority of 29 Del.C. §5256, the State Employee Benefits Committee (SEBC) established by 29 Del.C. §9602 considered adopting rules and regulations for the general administration of the Disability Insurance Program established pursuant to Title 29, Chapter 52A of the **Delaware Code**. Notice of the proposed regulation was published in the *Wilmington News Journal* and the *Delaware State News* on December 23, 2011 and December 30, 2011 requesting any person who wished to submit written suggestions, compilations of data, briefs or other written materials concerning the proposed rules and regulations to submit same to Brenda Lakeman, Director, at Statewide Benefits Office, 500 W. Loockerman Street, Suite 320, Dover, DE 19904 or by email at [brenda.lakeman@state.de.us](mailto:brenda.lakeman@state.de.us) or by fax at (302) 739-8339 by January 20, 2012. Comments were received from the Department of Health and Social Services and from Diane Dunmon, Claudia Hughes, Barbara Finnan and Margery Windolph.

## Findings of Fact

A public hearing to consider the adoption of the Disability Insurance Program Rules and Regulations was held during the SEBC meeting on January 30, 2012 at 2:00 pm at the Tatnall Building, 150 William Penn Street, Dover, DE 19901. Prior to the meeting, members of the SEBC were presented with copies of all written comments along with a separate document created by the Statewide Benefits Office addressing each comment. In consideration of

all comments and written materials submitted, the Disability Insurance Program Rules and Regulations contained herein reflect the results and recommendations of staff analysis and were approved by the SEBC on January 30, 2012.

### **Decision to Amend the Regulation**

As the results of the public comments, the SEBC concluded that it was appropriate to approve changes to the proposed rules published in the *Register of Regulations* in December 2011. Therefore, pursuant to the authority vested in the SEBC by 29 **Del.C.** §5210(4), §9602(b)(2) and §5255, the SEBC adopts the attached Disability Insurance Program Rules and Regulations. The changes to the proposed rules approved by the SEBC have been determined to be nonsubstantive under the provisions of 29 **Del.C.** §10118(c).

### **Effective Date of Order**

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** the 30<sup>th</sup> day of January 2012.

#### **State Employee Benefits Committee**

Ann Visalli, Director, Office of Management  
and Budget - SEBC Chair

Tom Cook, Secretary, Department of Finance

Chip Flowers, Treasurer, Office of the Treasurer

Rita Landgraf, Secretary, Department of  
Health and Social Services

Russell T. Larson, Controller General, Office of the  
Controller General

Myron T. Steele, Chief Justice, Supreme Court

Karen Weldin Stewart, Commissioner, Department  
of Insurance

### **Disability Insurance Program Rules and Regulations**

**\*Please Note: Due to the size of the final regulation, it is not being published here. A copy of the regulation is available at:**

**[Disability Insurance Program Rules and Regulations](#)**

**STATE OF DELAWARE  
EXECUTIVE DEPARTMENT  
DOVER**

**EXECUTIVE ORDER  
NUMBER THIRTY-FOUR**

**RE: Allocation And Sub-Allocation Of State Private Activity Bond Volume Cap For Calendar Year 2012  
And Reallocation Of State Private Activity Bond Volume Cap For Calendar Year 2011**

**WHEREAS**, the Internal Revenue Service issued Revenue Procedure 2011-52, which provides the State of Delaware (the "State") with \$284,560,000 in private activity bond volume cap ("Volume Cap") for 2012, and pursuant to 29 **Del.C.** §5091(a), the State's 2012 Volume Cap is to be allocated among the various State and local government issuers; and

**WHEREAS**, the Governor hereby confirms the initial allocation of the 2012 Volume Cap as set forth in 29 **Del.C.** §5091(a) to various State and local government issuers; and

**WHEREAS**, pursuant to 29 **Del.C.** §5091(b), the State's allocation of 2012 Volume Cap of \$142,280,000 is to be sub-allocated by the Governor between the Delaware State Housing Authority and the Delaware Economic Development Authority; and

**WHEREAS**, pursuant to 29 **Del.C.** §5091(d), the Governor has the right, by Executive Order, to modify the allocations made under 29 **Del.C.** §5091(a) provided that no such modification shall cause any obligation issued prior to the date of such modification to lose its qualification for tax-exempt treatment under the Internal Revenue Code of 1986, as amended; and

**WHEREAS**, the allocation of Volume Cap for 2011 in Executive Order Number Twenty-Five is subject to modification by further Executive Order; and

**WHEREAS**, pursuant to Executive Order Number Twenty-Five, \$138,910,000 of 2011 Volume Cap which had been allocated to the State of Delaware was further sub-allocated between the Delaware Economic Development Authority and the Delaware State Housing Authority; and

**WHEREAS**, also pursuant to Executive Order Number Twenty-Five, \$138,910,000 of 2011 Volume Cap which had been allocated to local government issuers as described in 29 **Del.C.** §5091(a) is hereby reassigned as follows:

- New Castle has reassigned \$48,620,000 of its unallocated Volume Cap for 2011 to the State of Delaware;
- Kent County has reassigned \$27,780,000 of its unallocated Volume Cap for 2011 to the State of Delaware;
- Sussex County has reassigned \$27,780,000 of its unallocated Volume Cap for 2011 to the State of Delaware;
- The City of Wilmington has reassigned \$34,730,000 of its unallocated Volume Cap for 2011 to the State of Delaware; and

**WHEREAS**, the Secretary of Finance recommends: (i) that the State's \$142,280,000 of 2012 Volume Cap be allocated equally between the Delaware State Housing Authority and the Delaware Economic Development Authority; (ii) that the \$69,455,000 of unallocated 2011 Volume Cap previously sub-allocated to the Delaware Economic Development Authority be reassigned to the Delaware State Housing Authority for carry forward for use in future years; and (iii) that the \$138,910,000 of unallocated 2011 Volume Cap reassigned to the State of Delaware by local issuers be sub-allocated to the Delaware State Housing Authority for carry forward for use in future years.

**WHEREAS**, the Chairperson of the Delaware Economic Development Authority and the Chairperson of the Delaware State Housing Authority concur in the recommendation of the Secretary of Finance.

**NOW, THEREFORE, I, JACK A. MARKELL**, by the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. The \$142,280,000 allocation to the State of Delaware of the 2012 Volume Cap is hereby sub-allocated: \$71,140,000 to the Delaware State Housing Authority and \$71,140,000 to the Delaware Economic Development Authority.

2. \$142,280,000 of the 2012 Volume Cap is hereby allocated to the various local government issuers as

follows:

- \$49,800,000 of the 2012 Volume Cap is hereby allocated to New Castle County, Delaware;
- \$35,570,000 of the 2012 Volume Cap is hereby allocated to the City of Wilmington, Delaware;
- \$28,455,000 of the 2012 Volume Cap is hereby allocated to Kent County, Delaware; and
- \$28,455,000 of the 2012 Volume Cap is hereby allocated to Sussex County, Delaware.

3. The \$138,910,000 of unallocated 2011 Volume Cap that has been reassigned by New Castle County, Kent County, Sussex County and the City of Wilmington to the State of Delaware is hereby re-allocated to the Delaware State Housing Authority for carry forward use. In addition, the \$69,455,000 of 2011 Volume Cap previously sub-allocated to the Delaware Economic Development Authority under Executive Order Number Twenty-Five is hereby re-allocated to the Delaware State Housing Authority for carry forward use. Furthermore, the \$69,455,000 of 2011 Volume Cap previously sub-allocated to the Delaware State Housing Authority under Executive Order Number Twenty-Five is to be carried forward for a total carry forward amount of \$277,820,000.

4. The aforesaid sub-allocations have been made with due regard to actions taken by other persons in reliance upon previous sub-allocations to bond issuers.

**APPROVED** this 13th day of February, 2012

Jack A. Markell,  
Governor

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<b>BOARD/COMMISSION OFFICE</b>	<b>APPOINTEE</b>	<b>TERM OF OFFICE</b>
Advisory Council to the Division of Substance Abuse and Mental Health	Anthony J. Brazen, III, D.O.	11/01/2011
	Colonel Robert M. Coupe	10/11/2011
	Reverend Robert W. Daniels	11/22/2011
	Ms. Andrea Guest	11/01/2011
	Ms. Barbara H. Hanson	11/29/2011
	Mr. Matthew J. Heckles	11/22/2011
	Mr. James J. Lafferty	11/01/2011
	Mr. Dennis E. Rozumalski	11/07/2011
Architectural Accessibility Board	Mr. Jackie R. Turner	12/09/2011
	Mr. Scott R. Ward	12/15/2011
Board of Accountancy	Mr. Robert D. Mosch, Jr.	10/18/2011
	Mr. Jeffrey L. Premo	10/18/2011
	Ms. Denise R. Stokes	12/15/2011
Board of Architects	Mr. Richard W. Wertz	10/18/2011
Board of Chiropractic	Brian R. Chandler, D.C.	10/18/2011
	Ms. Jill K. Morrison	10/18/2011
Board of Dentistry and Dental Hygiene	John J. Lenz, D.D.S.	10/18/2011
Board of Dietetics/Nutrition	Ms. Elizabeth A. Tschiffely	11/01/2011
Board of Electrical Examiners	Mr. Thomas Hartley, Sr.	01/13/2012
Board of Examiners of Psychologists	Marcia S. Halperin, Ph.D.	10/18/2011
	Ms. Rosa M. Robinson	10/18/2011
	Joseph C. Zingaro	10/18/2011
Board of Geologists	Mr. Scott C. Blaier	10/18/2011
	Ms. Maureene Lafate	10/18/2011
	Mr. Douglas E. Rambo	10/18/2011
Board of Landscape Architecture	Jeffrey W. Seemans	01/24/2012
Board of Massage and Bodywork	Ms. Sharon L. Harris	10/18/2011
Board of Parole	Joyce M. Bembry	01/25/2012
Board of Pension Trustees	Arturo F. Agra	01/18/2012
	Ms. Suzanne Barton Grant	01/18/2012
Board of Pharmacy	Ms. Kimberly Z. Robbins	01/03/2012
Board of Plumbing, Heating, Ventilation, Air Conditioning and Refrigeration	Mr. Charles J. Robbins	11/03/2011

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# GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Board of Podiatry	Raymond V. Feehery, Jr., DPM	10/18/2011
Board of Professional Counselors of Mental Health & Chemical Dependency Professionals	Tracey D. Frazier, Psy.D. Ms. Joan T. McDonough Ms. Elisabeth A. Vassas	10/20/2011 10/18/2011 11/14/2011
Board of Veterinary Medicine	Natalie S. Titus, DVM	10/18/2011
Cabinet Committee on State Planning Issues	Mr. Andrew H. Lippstone	10/25/2011
Child Death, Near Death and Stillbirth Review Commission	Ms. Kathy A. Janvier	12/15/2011
Child Placement Review Board - Kent	Ms. Gail L. Allen Ms. Mary Austria Ms. Jean R. King Ms. Dana S. Stonesifer	11/01/2011 11/01/2011 11/01/2011 11/01/2011
Child Placement Review Board - New Castle	Ms. Mary W. Angerer Ms. Nancy Czeiner Ms. K. Sun Moon Ms. Mary R. Morgan	11/01/2011 11/01/2011 11/01/2011 11/01/2011
Child Placement Review Board - Sussex	Ms. Cora Norwood Selby Ms. Ruth T. Tull	11/01/2012 11/01/2011
Commission for the Purchase of Products & Services of the Blind & Other Severely Disabled Individuals	Ms. Sondra Dianne Bingham Mr. Wayne C. Carter	01/25/2012 01/25/2012
Commissioner of Superior Court	The Honorable Mark S. Vavala	01/26/2012
Commissioner of Family Court	The Honorable David W. Jones The Honorable Sonja Truitt Wilson	02/03/2012 02/15/2012
Committee to Review Police Pensions and Healthcare	Mr. Frederick M. Calhoun, III Mr. David C. Craik Ms. Leighann Hinkle The Honorable James Johnson Ms. Donna S. Mitchell The Honorable Henry W. Supinski Chief William S. Topping	11/30/2011 11/22/2011 11/22/2011 11/22/2011 11/22/2011 11/22/2011 12/08/2011
Community Involvement Advisory Council	Ms. Sarah B. Bucic	10/11/2011
Council on Apprenticeship and Training	Mr. Donato R. Buccini Mr. Danny L. Crowe Mr. David G. Kitto Mr. Thomas P. Shields	12/21/2011 12/21/2011 12/21/2011 12/21/2011

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# GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Council on Boiler Safety	Mr. Paul W. Frank	11/01/2011
	Mr. Carl D. Kinney, Sr.	11/01/2011
Council on Forestry	Mr. Steven L. Ditmer, Sr.	11/01/2011
	Ms. Grace W. Lowe	11/01/2011
Council on Health Promotion and Disease Prevention	Faith B. Kuehn, Ph.D.	10/20/2011
	Mrs. Rachael M. Mears	12/30/2011
	Ms. Linda A. Payne	10/21/2011
	Mr. Matthew Ritter	10/21/2011
	Michael Rosenthal, M.D.	10/20/2011
	Theresa L. Strawder	01/25/2012
	Ms. Valeria O. Whiting	10/20/2011
Ms. Linda C. Wolfe	10/20/2011	
Council on Manufactured Housing	John C. Badger	11/03/2011
	Mr. John H. Morris	11/03/2011
Council on Real Estate Appraisers	Mr. Richard B. Wheeler	10/18/2011
Council on Recreational Fishing Funding	Mr. Floyd T. Morton, III	12/15/2011
	Mr. Douglas M. Valentine	10/18/2011
Council on Services for Aging and Adults with Physical Disabilities	Mr. William A. Bell	11/01/2014
	Ms. Carolyn E. Fredricks	11/01/2011
Council on Social Services	Ms. Mable E. Cephas	11/01/2011
	Mr. Robert L. Doyle, III	09/04/2012
	Ms. Retha S. Fisher	11/01/2011
	Mr. Kevin M. Hansbury	11/01/2011
Council on Transportation	Mr. Robert S. Fifer	11/07/2011
	Mr. Martin S. Lessner	10/13/2011
	Ms. Sue McNeil	10/18/2011
DE Institute of Medical Education & Research, Board of Directors	Mr. Michael A. Alexander, M.D.	11/21/2011
	John A. Forest, M.D.	11/21/2011
	Calicano F. Inguito, Jr., M.D.	11/21/2011
	Vincent Lobo, Jr., D.O.	11/21/2011
	Carl E. Turner, M.D.	11/21/2011
Delaware Bicycle Council	Mr. Fred N. Breukelman	11/01/2011
Delaware Board of Examiners of Nursing Home Administrators	Mr. Timothy W. Bane	10/07/2011
	Ms. Elizabeth F. Hague	10/18/2011
Delaware Board of Nursing	Ms. Gwelliam Hines	01/04/2012
Delaware Commission of Veterans' Affairs	Mr. Mark M. Newman	11/08/2011

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# GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Delaware Commission for Women	Kathleen C. Jacobs, Ph.D.	12/13/2011
	Ms. Lynn M. Kelleher	12/14/2011
	Ms. Sarah E. Lockman	12/13/2011
	Kathleen S. Matt, Ph.D.	01/05/2012
	Ms. Sally F. McBride	12/13/2011
	Ms. Farzana A. McCormick	11/03/2011
	Ms. Alisa E. Moen	12/13/2011
	Ms. Monique K. Portee-Hampton	12/13/2011
Delaware Commission on Italian Heritage and Culture	Mr. James Gambacorta	11/08/2011
Delaware Greenways and Trails Council	Ms. Mary Everhart	11/01/2011
	Mr. James G. Ireland	11/01/2011
	Ms. Peggy C. Koster	11/01/2011
	Mr. John W. Martin	01/11/2011
	Ms. Diane K. Wilson	11/01/2011
Delaware Guardianship Commission	The Honorable Sam Glasscock, III	11/03/2011
	Ms. Carla R. Griffith	11/03/2011
	Ms. Krista M. Griffith	11/03/2011
	Ms. Sherri J. Harmer	11/03/2011
	Mr. Brian Hartman	11/03/2011
	Ms. Patricia S. Justice	11/03/2011
	Rosemary T. Madl-Young, Ph.D.	11/03/2011
	Mr. James R. Reynolds	11/03/2011
Ms. Kathleen A. Weiss	11/03/2011	
Delaware Health Care Commission	Mr. Theodore W. Becker, Jr.	10/21/2011
	Kathleen S. Matt, Ph.D.	10/21/2011
	Janice E. Nevin, M.D.	10/21/2011
Delaware Health Resources Board	Ms. Brenda C. Heckert	10/28/2011
	Mr. David A. Hollen	10/28/2011
	Gina F. Ward	01/05/2012
Delaware Hispanic Commission	Ms. Sonia Aguilar	11/29/2011
	Mr. Craig D. Aleman	11/29/2011
	Ms. Rosario Calvachi-Mateyko	11/29/2011
	Ms. Jennifer Cohan	11/29/2011
	Mr. Miquel Gonzalez	11/29/2011
	Ms. Zaida I. Guajardo	11/29/2011
	Mr. Matthew J. Heckles	11/29/2011
	Mr. Robert H. Heflin	11/29/2011
	Ms. Mabel Hernandez-Saienni	11/29/2011
	Mr. Jose F. Irizarry	11/29/2011
	Ms. Jissell Martinez	11/29/2011
Ms. Maria M. Matos	11/29/2011	
Ms. Tanisha L. Merced, Esq.	11/29/2011	

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# GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Delaware Hispanic Commission	The Honorable Joseph E. Miro	10/17/2011
	Lourdes I. Puig, Ph.D.	11/29/2011
	Mr. Eli Ramos	11/29/2011
	The Honorable Vivian Rapposelli	10/09/2011
	Ms. Brenda L. Rodriguez	11/29/2011
	Mr. Steven A. Rose	11/29/2011
	Mr. Kevin L. Smith	11/29/2011
	Ms. Sandra C. Spangler	11/29/2011
	Mr. Javier G. Torrijos, II	11/29/2011
Mr. Steven D. Uhthoff	11/29/2011	
Delaware Institute of Dental Education & Research Board of Directors	Wanda Gardiner Smith, D.D.S.	11/03/2011
Delaware Interscholastic Athletic Association	Robert S. Walter, M.D.	01/18/2012
Delaware Manufactured Home Relocation Authority	The Honorable Mitchell G. Crane	12/01/2011
	Richard H. Lemire	11/03/2011
	Mr. George B. Meldrum, Jr.	12/08/2011
	Mr. Andrew C. Strine	11/03/2011
	Mr. Anthony J. Testa	11/03/2011
Delaware Mentoring Council	Ms. Karen D. Lessey	10/06/2011
Delaware Nursing Home Residents Quality Assurance Commission	Chief Kenneth McLaughlin	12/14/2011
Delaware Open Space Council	Mr. David A. Humes	11/13/2011
Delaware Real Estate Commission	Mr. Joseph F. McCann	12/15/2011
Delaware State University Board of Trustees	Devona E. Williams	01/25/2011
Delaware STEM Education Council	Ms. Theresa L. Angelus	11/03/2011
	Ms. Pratyusha Gupta	11/03/2011
	Douglas C. Hicks, Ph.D.	01/25/2012
	Mr. Steven K. Vanderloo	11/03/2011
Delaware Technical & Community College Board of Trustees	Mr. John M. Maiorano	01/25/2012
	Louis F. Owens, Jr., M.D.	01/25/2012
	Mrs. Sue Saliba	01/25/2012
Dental Hygiene Advisory Committee	Ms. Buffy L. Parker	10/18/2011
Developmental Disabilities Council	Mr. William J. Bancroft	11/01/2011
	Ms. Bhavana P. Viswanathan	12/14/2011
Dover Housing Authority	Ms. Sandra Mifflin Taylor	01/03/2012

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# GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Early Childhood Council	Ms. Melia J. Anderson	11/03/2011
	Daniel D. Curry, Ed.D.	11/03/2011
	Ms. Carlina L. Hall	11/03/2011
	Mr. Paul H. Harrell, Jr.	11/03/2011
	Dr. Tony J. Marchio, Ed.D.	11/03/2011
	Ms. Terri C. Murphy	11/03/2011
	Daniel Rich, Ph.D.	11/03/2011
	Ms. Jocelyn Stewart	11/03/2011
Education Commission of the States	Ms. Jennifer Ranji	10/11/2011
	Daniel Rich, Ph.D.	10/11/2011
Governor's Public Works and Procurement	Mr. Cleon L. Cauley, Sr.	09/04/2012
Governor's Supplier Diversity Council	The Honorable Anas Ben Addi	11/14/2011
Healthy Mother and Infant Consortium	Ms. Michelle A. Taylor	10/18/2011
Investment Infrastructure Committee	Mr. Michael Ratchford	10/27/2011
Interagency Coordinating Council	Ms. Jessica C. Arbuet	12/07/2011
	The Honorable Patricia M. Blevins	12/07/2011
	Mr. Rodney Brittingham	12/07/2011
	Anne Meduri Cannuli, M.D.	12/07/2011
	Susan A. Cycyk, M.Ed.	12/07/2011
	Carlos Duran, M.D.	12/07/2011
	Ms. Pamela S. Lilly	12/07/2011
	Ms. Kathleen V. Orr	12/07/2011
	Ms. Susan T. Starrett	12/07/2011
	Ms. Christina M. Thompson	12/07/2011
	Ms. Bhavana P. Viswanathan	12/07/2011
	Mr. Glyne A. Williams	12/07/2011
Ms. Arnetta D. Woodson	12/07/2011	
Judicial Nominating Commission	Mr. Ian Connor Bifferato	10/17/2011
	Ms. Teresa J. Ford	10/17/2011
	Mr. Scott A. Green	10/17/2011
	Mr. Michael P. Kelly	10/17/2011
	Ms. Ileana M. Smith	10/17/2011
Justice of the Peace	The Honorable Ernst M. Arndt	01/28/2012
	The Honorable Jeni L. Coffelt	02/06/2012
	The Honorable Richard D. Comly, Jr.	02/15/2012
	The Honorable Kathleen C. Lucas	01/27/2012
	The Honorable Sean P. McCormick	01/27/2012
	The Honorable Katharine B. Ross	01/27/2012
	The Honorable Rosalie O. Rutkowski	02/03/2012
	The Honorable David R. Skelley	01/27/2012
The Honorable Paul J. Smith	01/27/2012	

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# GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Justice of the Peace	The Honorable Robert J. Wall, Jr.	01/30/2012
New Castle County Vocational-Technical Board of Education	Madeline Johnson	12/21/2011
	Ms. Renee C. Taschner	12/15/2011
Office of the Public Guardian	Ms. Lexie S. McFassel	01/18/2012
Professional Standards Board	Ms. Jill T. Lewandowski	06/29/2013
Recycling Public Advisory Council	Ms. Coralie A. Pryde	11/21/2011
Riverfront Development Corporation, Board of Directors	Mr. Bernhard M. Koch	11/09/2011
	Ms. Linda M. Parkowski	11/07/2011
School Libraries Council	Ms. Jamie M. Brown	12/02/2011
	Ms. Maria R. Degnats	12/02/2011
	Ms. Erin C. Daix	12/02/2011
	Mr. Michael W. Hojnicky	12/02/2011
	Ms. Christine A. Payne	12/02/2011
	Mr. James L. Rau	12/02/2011
	The Honorable Darryl M. Scott	12/07/2011
	Ms. Suzanne D. Smith	12/02/2011
Ms. Marian L. Wolak	12/02/2011	
State Fire Prevention Commission	Mr. William F. Tobin, Jr.	09/16/2012
State Election Commissioner	M. Elaine Manlove	01/25/2012
State Employee's Charitable Campaign Steering Committee	Ms. Kelly M. Bachman	11/03/2011
	Mr. David M. Hanich	11/03/2011
State Examining Board of Physical Therapists and Athletic Trainers	Ms. Cheryl L. Fruchtman	10/18/2011
	Mr. Damien A. McGovern	10/18/2011
	Mr. W. Wayne Woodzell	10/18/2011
State Human Relations Commission	Ms. Erika R. Caesar, Esq.	01/26/2012
	Ms. Bernice M. Edwards	11/01/2011
	Mr. Douglas T. James	11/01/2011
	Ms. Prameela D. Kaza	11/01/2011
	Mr. Wayne A. Keller	01/26/2012
	Nancy A. Maihoff, Ph.D.	11/01/2011
Statewide Independent Living Council	Ernest G. Cole, Ed.D.	11/01/2011
	Ms. Suzanne A. Howell	11/01/2011
	Ms. Andrewa J. Wozny	11/01/2011
Superior Court	The Honorable T. Henley Graves	01/26/2012

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**GOVERNOR'S APPOINTMENTS**

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<b>BOARD/COMMISSION OFFICE</b>	<b>APPOINTEE</b>	<b>TERM OF OFFICE</b>
Sussex County Vocational-Technical School Board of Education	Ms. Judy L. Emory Mr. George H. Torbert, III	11/03/2011 11/03/2011
Sustainable Energy Utility Oversight Board	Mr. Kristopher E. Knight	11/21/2011
Vocational Rehabilitation Advisory Council for DVI	Ms. Alice S. Coleman	11/01/2011
Welfare Employment Committee	Ms. Carol R. Aiken Mr. Scott M. Welch	11/01/2011 11/01/2011

**DELAWARE RIVER BASIN COMMISSION**

The Delaware River Basin Commission will hold a public hearing and business meeting on Wednesday, March 7, 2012, beginning at 10:30 a.m. The meeting will be held at the West Trenton Volunteer Fire Company, West Upper Ferry Road, West Trenton, NJ. For more information, visit the DRBC web site at [www.drbc.net](http://www.drbc.net) or contact Pamela M. Bush, Esq., Commission Secretary and Assistant General Counsel, at 609 883-9500 extension 203.

**DEPARTMENT OF AGRICULTURE  
THOROUGHBRED RACING COMMISSION  
1001 Thoroughbred Racing Rules and Regulations  
PUBLIC NOTICE**

The Delaware Thoroughbred Racing Commission in accordance with 3 **Del.C.** §10103(c) has proposed changes to its rules and regulations. The proposal amends the rules and regulations to conform to recently revised national standards for the administration of Salix (furosemide) on race days by regulatory veterinarians and the elimination of all race day adjunct medications including Aminocaproic Acid (Amicar) in Thoroughbred and Arabian race horses.

A public hearing will be held on April 11, 2012 at 10:15 a.m. in the second floor conference room of the Horseman's Office, located on the grounds of Delaware Park, 777 Delaware Park Boulevard, Wilmington, Delaware 19804 where members of the public can offer comments. Anyone wishing to receive a copy of the proposed regulations may obtain a copy from the Delaware Thoroughbred Racing Commission, 777 Delaware Park Boulevard, Wilmington, Delaware 19804. Persons wishing to submit written comments may forward these to the Commission at the above address. The final date to receive written comments will be at the public hearing.

The Commission will consider promulgating the proposed regulation at its regularly scheduled meeting following the public hearing.

**DELAWARE JOCKEY'S HEALTH AND WELFARE BOARD  
1002 Delaware Jockeys' Health and Welfare Benefit Board Regulations  
PUBLIC NOTICE**

The Delaware Jockey's Health and Welfare Board in accordance with 3 **Del.C.** §10171(c) and 29 **Del.C.** §4815(b)3(c), has proposed changes to its rules and regulations. The proposal amends the rules and regulations regarding criteria for an active Delaware Jockey to be eligible for health insurance under the Delaware Jockey's Health and Welfare Fund by increasing the minimum number of mounts from 25 to 50.

A public hearing will be held on April 11, 2012 at 9:15 a.m. in the second floor conference room of the Horseman's Office, located on the grounds of Delaware Park, 777 Delaware Park Boulevard, Wilmington, Delaware 19804 where members of the public can offer comments. Anyone wishing to receive a copy of the proposed regulations may obtain a copy from the Delaware Thoroughbred Racing Commission, 777 Delaware Park Boulevard, Wilmington, Delaware 19804. Persons wishing to submit written comments may forward these to the Commission at the above address. The final date to receive written comments will be at the public hearing.

The Commission will consider promulgating the proposed regulation at its regularly scheduled meeting following the public hearing.

**DEPARTMENT OF EDUCATION  
PUBLIC NOTICE**

The State Board of Education will hold its monthly meeting on Thursday, March 15, 2012 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES****DIVISION OF LONG TERM CARE RESIDENTS PROTECTION****3320 Intensive Behavioral Support and Educational Residence****PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 29 of the **Delaware Code**, Section 7971, (d), (1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing the creation of Regulation 3320, Intensive Behavioral Support and Educational Residences (IBSER) to regulate facilities within this new licensure category.

These regulations were originally published as proposed in the November 1, 2011 *Register*, Volume 15, Issue 15, on page 600. As a result of substantial public comments received by the Division, substantive changes were made to the regulations resulting in this re-posting.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS, Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by April 1, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**DIVISION OF MANAGEMENT SERVICES**Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)**PUBLIC NOTICE****Part C of the Individuals with Disabilities Education Improvement Act of 2004**

The Delaware Department of Health and Social Services will submit its annual grant application under Part C of the Individuals with Disabilities Education Improvement Act of 2004. Public Comment is being accepted from March 1, 2012 ~ March 31, 2012.

Please contact the Part C Birth to Three office at 302-255-9134 (call collect from Kent and Sussex) to secure a copy of the application or e-mail [Inita.joyner@state.de.us](mailto:Inita.joyner@state.de.us). Send your written comments to Part C/Birth to Three, DMS/DHSS, 2<sup>nd</sup> floor, Main Building, Suite 249, 1901 N. DuPont Hwy, New Castle, DE 19720 or fax to 302-255-4407.

**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE****Notice of Proposed Changes to the Medicaid State Plan Governing Payments for Disproportionate Share Hospital****PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512 and with 42 CFR §447.205, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan regarding the reimbursement methodology for *Disproportionate Share Hospital*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
**Medicaid Provider Screening and Enrollment**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan regarding *Medicaid Provider Screening and Enrollment*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**DIVISION OF SOCIAL SERVICES**  
**2027 Disqualification of Individuals Convicted of Drug Related Offenses**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - **Title 29, Chapter 101 of the Delaware Code**) and under the authority of **Title 31 of the Delaware Code, Chapter 5, Section 512**, Delaware Health and Social Services (DHSS) / Division of Social Services is proposing to amend policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program, specifically, *Disqualification of Individuals Convicted of Drug Related Offenses*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy, Program & Development Unit, Division of Social Services, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4425 by March 31, 2012.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**

**DIVISION OF AIR AND WASTE MANAGEMENT**  
**1131 Low Enhanced Inspection and Maintenance Program**  
**PUBLIC NOTICE**

On June 15, 2010 Delaware's governor signed SB 215 as presented by the 145<sup>th</sup> Delaware General Assembly. SB 215 provides an exception to Title 21 vehicle registration requirements for vehicles being driven by Delaware Emission Education Program ("DEEP") certified emission repair technicians during drive cycle testing. SB 215 also added to Title 7 a new section 6709, Permits for operation of motor vehicles during testing. Section 6709 provides for this vehicle registration exception to be administered by DNREC through the establishment of a new permitting program.

The purpose of this action is to update 7 **DE Admin. Code** 1131 to establish the permitting program stipulated by SB 215. In addition, the regulations format will be updated to conform to the style requirements of the *Delaware Register of Regulations* which include amending the Inspection & Maintenance State Implementation Plan also known as the Plan for Implementation (PFI).

There approximately 125 certified emission repair technicians that will be impacted by this proposed amendment. The emission repair technicians were notified that the Division of Air Quality (DAQ) is amending

Regulation 1131 and were invited to attend the one of three public workshops that DAQ conducted on March 28, 2011 at DelTech's Stanton Campus - Newark, March 29, 2011 at DelTech's Owens Campus - Georgetown and on March 31, 2011 at DelTech's Terry Campus – Dover.

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Monday, April 2, 2012 beginning at 7:00 PM in DNREC's Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE. Interested parties may submit comments in writing to: Valerie Gray, DNREC Division of Air Quality, 655 S. Bay Road, Dover, DE 19901.

**DIVISION OF FISH AND WILDLIFE**  
**3552 Spanish Mackerel Size Limit and Creel Limit**  
**PUBLIC NOTICE**

Spanish mackerel (*Scomberomorus maculatus*) are managed under the Omnibus Amendment to the Interstate Fishery Management Plans for Spanish Mackerel, Spot and Spotted Seatrout. The primary goal of the Omnibus Amendment is to bring the fishery management plans for Spanish mackerel, spot, and spotted seatrout under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (1993), providing for more efficient and effective management and changes to management for the future.

In support of the goal, the following objectives were identified for Spanish mackerel:

1. Manage the Spanish mackerel fishery by restricting fishing mortality to rates below the threshold fishing mortality rates to provide adequate spawning potential to sustain longterm abundance of the Spanish mackerel populations.
2. Manage the Spanish mackerel stock to maintain the spawning stock biomass above the target biomass levels.
3. Minimize endangered species by catch in the Spanish mackerel fishery.
4. Provide a flexible management system that coordinates management activities between state and federal waters to promote complementary regulations throughout Spanish mackerel's range which minimizes regulatory delay while retaining substantial ASMFC, Council, and public input into management decisions; and which can adapt to changes in resource abundance, new scientific information and changes in fishing patterns among user groups or by area.
5. Develop research priorities that will further refine the Spanish mackerel management program to maximize the biological, social, and economic benefits derived from the Spanish mackerel population.

Consistent with these objectives and the goal of the Omnibus Amendment, Delaware must adopt for its recreational Spanish mackerel fishery: a 12" fork length (FL) or 14" total length (TL) minimum size limit; a 15 fish creel limit; and require that all Spanish mackerel be landed with head and fins intact. In addition, Delaware must establish for its commercial fishery a 12" fork length (FL) or 14" total length (TL) minimum size limit and a trip limit (per vessel, per day) of 3,500 lbs.

The hearing record on the proposed changes to the Spanish mackerel regulation will be open March 1, 2012. Individuals may submit written comments regarding the proposed changes via e-mail to [Lisa.Vest@state.de.us](mailto:Lisa.Vest@state.de.us) or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public hearing on the proposed amendment will be held on April 19, 2012 beginning at 6 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

**DEPARTMENT OF SAFETY AND HOMELAND SECURITY**  
**DIVISION OF STATE POLICE**  
**1300 Board of Examiners of Private Investigators & Private Security Agencies**  
**PUBLIC NOTICE**

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with 24 Del.C. c. 13 proposes to amend Rule 1.0 – Firearm's Policy and adopt Rule 9.0 – Security Guard/Armored Car Guards. Rule 1.0 will require the individual to qualify with the same make/model/caliber

weapon they will carry. Rule 9.0 will allow security guards/armored car guards to work for no more than two agencies at a time. If you wish to view the complete Rules, contact Ms. Peggy Anderson at (302) 672-5304. Any persons wishing to present views may submit them in writing, by March 31, 2012, to Delaware State Police, Professional Licensing, P.O. Box 430, Dover, DE 19903. The Board will hold its quarterly meeting Thursday, April 27, 2012, 10:00am, Tatnall Building, Room 113, 150 William Penn Street, Dover, Delaware.

**OFFICE OF THE SECRETARY**  
**Regulations Governing the Relief from Disabilities Board**  
**PUBLIC NOTICE**

The Department of Safety and Homeland Security intends to promulgate rules and regulations as they relate to the creation and operations of the Relief from Disabilities Board and the transmission of health information to NICS pursuant to 11 **Del.C.** §1448A(k).

The Department solicits and will consider timely filed written comments from interested individuals and groups concerning these proposed regulations. The deadline for the filing of such written comments will be thirty days after the proposed regulations are published in the Delaware *Register of Regulations*, or by April 1, 2012. Any such submissions should be mailed or hand delivered to Elizabeth Olsen at: Department of Safety and Homeland Security, Public Safety Building, Suite 220, 303 Transportation Circle, P.O. Box 818, Dover, DE 19903, on or before the deadline.

**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**Gaming Control Board**  
**101 Regulations Governing Bingo**  
**PUBLIC NOTICE**

The Delaware Gaming Board will seek public comments on the issue of whether its current rules in 10 **DE Admin. Code** 101 regarding bingo should be amended. The Board proposes to change the rules to make it clear that members of charitable organizations who are working at the bingo event may not themselves play in the bingo games and also that the amount of the prize in each bingo game must be announced to the players. In addition, a rule will be amended to explain that where the statute allows promotional giveaways on holidays, the meaning of the term holidays is official state holidays. The Board proposes to change the rules to make it clear that the limit of 15% of the total amount of all prizes which may be offered as an inducement to players refers to inducements other than the cookie jar bingo games, where a cookie jar may have a prize of up to \$1,000.

Persons wishing to present their views regarding this matter may do so at a public hearing to be held on Thursday, April 5, 2012 at a meeting of the Delaware Gaming Control Board, 861 Silver Lake Boulevard, Cannon Building, Suite 203, Dover, DE 19904. Persons may also submit responses in writing by the close of business on or before April 1, 2012 at the same address. A copy of these regulations is available from the above address or may be viewed at the Division of Professional Regulation business office at the same address.

Currently, the rules do not clearly address the issue of whether members of the charitable organization which is conducting the event may themselves play in the event if they are working at it. Rules do provide that a member must be in charge of the event and the Board believes that members who are working at the event should not be playing the games themselves at the same time.

Currently, the rules do not expressly state that the prize amount in bingo games must be announced, although the sponsor must file an after occasion report which lists the amount of all prizes. To be sure there is no confusion, the Board wishes to make it clear that the amount of the prize at each bingo game must be announced to the players.

Currently, the statute and rules state that promotional giveaways up to \$500 per year may be distributed on the organization's anniversary date and on no more than three (3) holidays per year. The Board wishes to clarify that those holidays are the same holidays as those recognized by the State of Delaware as holidays, namely, New Year's Day, Martin Luther King, Jr. Day, Good Friday, Memorial Day, Independence Day, Labor Day, Election Day,

Veterans Day, Thanksgiving Day, the day after Thanksgiving, and Christmas Day.

Currently, Rule 4.6 states that a licensee may offer inducements, including but not limited to cookie jar bingo games that do not exceed \$1,000 per game per night, provided the value of the inducement is limited to 15% of the total amount of all other prizes. Prizes at bingo are limited to \$250 per game and \$1,250 total for all games at a single event. The Board wishes to make it clear that the 15% limit refers to inducements other than the cookie jar games.

**DIVISION OF PROFESSIONAL REGULATION**  
**1700 Board of Medical Licensure and Discipline**  
**PUBLIC NOTICE**

The Delaware Board of Medical Licensure and Discipline in accordance with 24 **Del.C.** §1713(a)(12) is proposing changes to its rules and regulations. The proposal amends outdated renewal provisions in Section 14.0 and replaces them with requirements for renewal and examination for practitioners seeking initial licensure who have been out of clinical practice for 3 or more years prior to the application as authorized by 24 **Del.C.** §1723(d). The amendments also update and clarify provisions related to physician assistants by deleting Regulation 16 and incorporating the relevant provisions into Section 25.0 including provisions related to supervision. The proposal also clarifies that Section 21.0 *Delegation of Responsibilities to Non-Physicians* does not apply to physician assistants.

The Board will hold a public hearing on April 3, 2012 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments on the regulations. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Licensure and Discipline, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

**DIVISION OF PROFESSIONAL REGULATION**  
**1900 Board of Nursing**  
**PUBLIC NOTICE**

The Delaware Board of Nursing, pursuant to 24 **Del.C.** §1904(c), proposes to revise regulations 6, 7, 9, 10, 14 and 15. The proposed revisions to this regulation are an attempt to: restate the statutory requirement for late renewal; clarify that nursing specialty organization position statements may be used for professional accountability; clarify the role of the RN to manage care for patients receiving analgesia by catheter techniques by the perineural route; clarify the role of the RN and LPN to manage care for patients receiving subcutaneous infusions; clarify that RNs may collect data from electronic communication; clarify that specially trained PICC nurses may determine the placement of the distal tip of peripherally inserted central catheters by radiograph study; restate the statutory bar on licensing persons convicted of felony sexual offenses; restate the statutory duty to report; and correct typographical errors.

The Board will hold a public hearing on the proposed regulation change on April 11, 2012 at 09:00 a.m., Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Dr. Pamela Zickafoose, Executive Director of the Delaware Board of Nursing, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904.

**DIVISION OF PROFESSIONAL REGULATION**  
**3000 Board of Professional Counselors of Mental Health and Chemical Dependency Professionals**  
**PUBLIC NOTICE**

The Delaware Board of Mental Health and Chemical Dependency Professionals in accordance with 24 **Del.C.** §3006 (1) has proposed amendments to Rule 2.0 License for Professional Counselors of Mental health. The

proposed revisions to the rules are an attempt to better clarify when a person can apply to be a Professional Counselor of Mental Health.

A public hearing will be held on April 25, 2012 at 12:15 p.m in the second floor Conference Room A of the Cannon Building, 861 Silver Lake Blvd, Dover, DE where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from Jessica Williams, Administrative Assistant for the Delaware Board of Professional Counselors, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

**DIVISION OF PROFESSIONAL REGULATION**  
**3100 Board of Funeral Services**  
**PUBLIC NOTICE**

The Delaware Board of Funeral Services, pursuant to 24 **Del.C.** §3105(a)(1), proposes to revise its regulations by adding a new regulation 12 concerning advertising by licensees. The proposed revisions to this regulation are an attempt to clarify the Board's objective at 24 **Del.C.** §3100 of protecting the general public from unsafe practices and from occupational practices which tend to reduce competition or fix the price of services rendered by establishing minimum standards for advertising funeral services in the State of Delaware. The Board will hold a public hearing on the proposed regulation change on March 27, 2012 10:15 a.m., Conference Room B, Second Floor Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Ms. Michele Howard, Administrator to the Delaware Board of Funeral Directors, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments will be accepted until April 2, 2012.

**PUBLIC SERVICE COMMISSION**  
**1009 Regulations Implementing the Water Utility Distribution System Improvement Charge ("DSIC") and**  
**the Utility Facility Relocation Charge ("UFRC")**  
**PUBLIC NOTICE**

The Delaware General Assembly has enacted legislation pursuant to which water, electric distribution and natural gas distribution utilities subject to the jurisdiction of the Delaware Public Service Commission (the "Commission") may file rate schedules that allow such utilities to semiannually automatically adjust their basic rates to recover the cost of new, used and useful utility plant that meets certain eligibility criteria. See 26 **Del.C.** §§314 (Distribution System Improvement Charge, or "DSIC") and 315 (Utility Facility Relocation Charge, or "UFRC"). The legislation further provides that the Commission may adopt rules and regulations to administer the DSIC and UFRC so long as those rules and regulations are not inconsistent with the Public Utilities Act of 1974.

The Commission has promulgated proposed regulations to implement and administer the DSIC and UFRC (the "Regulations"), 26 **DE Admin. Code** c. 1009. The Regulations establish filing deadlines for DSIC/UFRC applications; effective dates of new DSIC/UFRC rates; requirements for filing a DSIC/UFRC application; a review and approval process; and annual reconciliation and audit procedures.

The Commission has the authority to promulgate the Regulations pursuant to 26 **Del.C.** §§209(a), 314(d), 315(f) and 29 **Del.C.** c. 101.

The Commission hereby solicits written comments, suggestions, compilations of data, briefs or other written materials concerning the Regulations. Anyone submitting any written materials must file ten (10) copies of such material with the Commission at its office located at 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904. **All such materials shall be filed with the Commission on or before March 31, 2012.** Persons who wish to participate in the proceedings but who do not intend to file written materials shall inform the Commission in writing of their intent to participate on or before March 31, 2012. Such notice shall be sent to the attention of Staff Public Utilities Analyst Dr. Vincent Ikwuagwu.

Any public hearing conducted by the Commission shall be duly noticed in accordance with 29 **Del.C.** §§10115(b).

The Regulations and any materials submitted in connection therewith will be available for public inspection and

copying (to the extent they are "public records" under the Freedom of Information Act, 29 **Del.C.** §10002(g)) at the Commission's Dover office identified above during normal business hours. The fee for copying is \$.10 per page, with the first 20 pages being free of charge. If you wish to request copies of documents in this matter, please submit a Freedom of Information Act Request Form. This form may be found at <http://smu.portal.delaware.gov/cgi-bin/mail.php?foia-request&subj=DOS>. There is also a link to the Freedom of Information Act Request Form on the Commission's website, <http://dep.sc.delaware.gov/default.shtml>. The Commission will respond to your request in accordance with the Freedom of Information Act, 29 **Del.C.** ch. 100. The Regulations may also be reviewed by appointment at the office of the Public Advocate, 820 N. French Street, 4<sup>th</sup> Floor, Carvel State Office Building, Wilmington, DE 19801. The Regulations will also be available on the Commission's website: <http://dep.sc.delaware.gov>.

Any individual with disabilities who wishes to review submissions or to participate in this docket should contact the Commission to discuss any auxiliary aids or services to facilitate such review or participation. Such contact may be in person, in writing, by telephone or otherwise. The Commission's toll-free telephone number in Delaware is (800) 282-8574. Any person with questions may contact Dr. Ikwuagwu at (302) 736-7524, by voice and/or Text Telephone at (302) 736-7500, or via electronic mail at [vincent.ikwuagwu@state.de.us](mailto:vincent.ikwuagwu@state.de.us).

### **PUBLIC SERVICE COMMISSION**

#### **3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)**

#### **PUBLIC NOTICE**

**AND NOW**, this 31st day of January, 2012:

**WHEREAS**, in 2005 the General Assembly enacted, and the Governor signed into law, the "Renewable Energy Portfolio Standards Act," 26 **Del.C.** §§351-364 (the "RPS Act"), which, beginning in 2007, required every retail electric supplier to annually accumulate a portfolio of "renewable energy credits" equivalent to a specified percentage of its retail electric supply sales in Delaware; and

**WHEREAS**, in 2006 the Delaware Public Service Commission (the "Commission") promulgated "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" (the "RPS Rules") (Order No. 6931 dated June 6, 2006); and

**WHEREAS** the Commission has revised the RPS Rules from time to time to reflect amendments to the RPS Act (PSC Order No. 7377, dated Apr. 17, 2008; PSC Order No. 7494, dated Dec. 16, 2008; PSC Order No. 7653, dated Sep. 22, 2009; and PSC Order No. 7933 dated March 22, 2011); and

**WHEREAS**, on July 7, 2011, the Governor signed into law Senate Bill No. 124 as amended by Senate Amendment No. 1 (78 **Del. Laws** ch. 99) (July 7, 2011), which, among other things, amended various sections of the RPS Act; and

**WHEREAS**, by Order No. 8026 dated September 6, 2011, the Commission authorized the publication in the *Delaware Register of Regulations* of proposed amendments to the RPS Rules; and

**WHEREAS**, the Commission received several comments on the proposed amended RPS Rules; and

**WHEREAS**, Commission Staff has convened several workshops to address commenters' concerns with the proposed RPS Rules; and

**WHEREAS**, the Commission now proposes to modify the RPS Rules to reflect these agreed-upon RPS Act amendments (attached as Exhibits "A" and "B" hereto are black-lined and clean copies of the proposed amended RPS Rules); and

**WHEREAS** the Commission finds that the proposed revised RPS Rules should be published in the *Delaware Register of Regulations* to provide public notice of the rulemaking to develop final RPS Rules;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:**

1. That, for the reasons set forth in the body of this Order, and pursuant to 26 **Del.C.** §362 and 29 **Del.C.** §10115, the Commission proposes to revise the RPS Rules as set forth herein in Exhibits "A" and "B." A copy of the RPS Rules in their current form as approved by the Commission in PSC Order No. 7933 (March 22, 2011) is attached as Exhibit "C" to this Order.

2. That, pursuant to 29 **Del.C.** §§1133 and 10115(a), the Secretary shall transmit to the Registrar of Regulations for publication in the March 2012 *Delaware Register of Regulations* a copy of this Order, along with

copies of the proposed and current RPS Rules (Exhibits "A" and "B", respectively).

3. That the Secretary shall cause the Notice of Proposed Rulemaking attached as Exhibit "C" to be published in the *Delaware Register of Regulations*. In addition, the Secretary shall cause such Notice of Proposed Rulemaking to be published in The News Journal and the Delaware State News newspapers on or before **March 1, 2012**. The Secretary shall include proof of such publication in the docket file before the public hearing in this matter. Further, the Secretary shall serve (by regular mail or by electronic e-mail) a copy of such Notice on: (a) the Division of the Public Advocate; (b) the Delaware Energy Office; (c) Delmarva Power & Light Company; (d) all certificated retail electric suppliers; and (e) each person or entity who submitted comments or who appeared (through counsel) at the workshops conducted by Staff regarding the proposed amended RPS Rules.

4. That, pursuant to 29 **Del.C.** §§10115(a) and 10116, persons or entities may file written comments, suggestions, compilations of data, briefs, or other written materials, on or before **April 2, 2012**. Pursuant to 29 **Del.C.** §10117, the Commission will conduct a public hearing on the proposed revisions to the RPS Rules on Tuesday, **April 17, 2012, beginning at 1:00 P.M.** at the Commission's office at 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware.

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