
Delaware Register of Regulations

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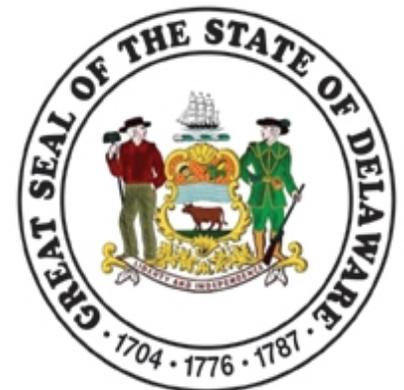


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Pursuant to 29 **Del.C.** Chapter 11, Subchapter III, this issue of the *Register* contains all documents required to be published, and received, on or before August 15, 2012.

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The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.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

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.** 1728 - 1759 (06/01/12)

Refers to Volume 15, pages 1728 - 1759 of the *Delaware Register* issued on June 1, 2012.

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.

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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.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file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title.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.

INFORMATION ABOUT THE DELAWARE REGISTER OF 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.

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*.

CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

ISSUE DATE	CLOSING DATE	CLOSING TIME
October 1	September 17	4:30 p.m.
November 1	October 15	4:30 p.m.
December 1	November 15	4:30 p.m.
January 1	December 17	4:30 p.m.
February 1	January 15	4:30 p.m.

DIVISION OF RESEARCH STAFF

Lori Christiansen, Director; **Judi Abbott**, Administrative Specialist I; **Jeffrey W. Hague**, Registrar of Regulations; **Robert Lupo**, Printer; **Deborah J. Messina**, Print Shop Supervisor; **Kathleen Morris**, Administrative Specialist I; **Georgia Roman**, Unit Operations Support Specialist; **Victoria Schultes**, Administrative Specialist II; **Don Sellers**, Printer; **Sarah Wootten**, Joint Sunset Analyst; **Rochelle Yerkes**, Administrative Specialist II. Legislative Librarian; **Sara Zimmerman**.

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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.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES**DIVISION OF PUBLIC HEALTH**

Statutory Authority: 16 Delaware Code, §122(3)t (16 **Del.C.**, §122(3)t)
16 **DE Admin. Code** 4459

PUBLIC NOTICE**4459 Lead Based Paints Hazards**

The Department of Health and Social Services, Division of Public Health, Health Systems Protection, is proposing revisions to the State of Delaware Regulations Governing Lead Based Paints Hazards. The proposed revisions establish standards for the regulation of lead-based paint hazard control activities for abatement firms, workers, and training programs. The revisions also correct technical errors and inconsistencies; clarify current requirements, such as the Secretary's authority to conduct on-site investigations and the recertification of firms; incorporate minor changes resulting from new Federal training requirements; add necessary definitions; and provide increased flexibilities for individual training, recertification and utilization of electronic methods of communication. Due to the extensive number of amendments the Division has concluded that the current regulations should be repealed and replaced in their entirety with the proposed regulations being published. On September 1, 2012, the Division plans to publish as proposed the amended regulations and hold them out for public comment per Delaware law.

Copies of the proposed regulations are available for review in the September 1, 2012 edition of the Delaware *Register of Regulations*, accessible online at: <http://regulations.delaware.gov> or by calling the Health Systems Protection Section at (302) 744-4705.

Any person who wishes to make written suggestions, testimony, briefs or other written materials concerning the proposed regulations must submit same to Deborah Harvey by Monday, October 1, 2012 at:

Deborah Harvey
Division of Public Health

417 Federal Street
Dover, DE 19901

Email: Deborah.Harvey@state.de.us

Phone: (302) 744-4700

Fax: (302) 739-6659

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

4459 Lead Based Paints Hazards

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF AIR QUALITY

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)
7 DE Admin. Code 1125

REGISTER NOTICE SAN 2012-18; SAN 2012-12

1. TITLE OF THE REGULATION:

7 DE Admin. Code 1125, *Requirements for Preconstruction Review*

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

The Department proposes to revise Section 1.9, Definitions of 7 DE Admin. Code 1125, to include in the definition for "Greenhouse Gases (GHG)" that, prior to July 21, 2014, biogenic carbon dioxide (CO₂) emissions be excluded from consideration. This proposed change mirrors the federal rule at 76 FR 43490 (July 20, 2011) temporarily deferring for a period of three years the application of Prevention of Significant Deterioration (PSD) permitting requirements for CO₂ emissions from bioenergy and other biogenic stationary sources such as landfills.

The Department also proposes to revise Section 2 of 7 DE Admin. Code 1125 to increase the availability of emission offsets. Under the new source review permitting program (7 DE Admin. Code 1125) for stationary sources located in non-attainment areas, a proposed new or modified source exceeding established emission thresholds of ground-level ozone precursors must meet requirements that include the requirement to obtain emission "offsets" in an amount greater than the projected source emissions. Since Delaware sources are now well-controlled, the availability of offsets is costly and limited. The purpose of this revision is to expand the area where offsets can be obtained to an area that encompasses the 15 states that significantly contribute to Delaware's ozone nonattainment problem.

The Department will submit these changes to the Environmental Protection Agency as a revision to the State Implementation Plan (SIP).

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:

The Department will hold a public hearing on these proposed amendments on Thursday, September 27, 2012, starting at 6:00 pm in the Richardson and Robbins Building auditorium, located at 89 King's Highway in Dover. Interested persons may submit comments in writing to David Fees, Division of Air Quality, 655 S. Bay Road, Suite

5N, Dover, DE and/or statements and testimony may be presented either orally or in writing at the public hearing.

7. PREPARED BY:

David Fees (302-739-9402)
August 6, 2012

1125 Requirements for Preconstruction Review

08/11/12 xx/xx/xx

1.0 General Provisions

- 1.1 Requirements of this regulation are in addition to any other requirements of the State of Delaware Regulations Governing the Control of Air Pollution.
- 1.2 Any stationary source which will impact an attainment area or an unclassifiable area as designated by the U.S. Environmental Protection Agency (EPA) pursuant to Section 107 of the Clean Air Act Amendments of 1990 (CAA), is subject to the provisions of 3.0 of this regulation, Prevention of Significant Deterioration (PSD).
- 1.3 Any stationary source which will impact a non-attainment area as designated by the EPA pursuant to Section 107 of the CAA is subject to 2.0 of this regulation, Emission Offset Provisions (EOP).
- 1.4 A source may be subject to PSD for one pollutant and to EOP for another pollutant, or may affect both attainment or unclassifiable areas and a non-attainment area for the same pollutant.
- 1.5 Any emission limitation represented by Lowest Achievable Emission Rate (LAER) may be imposed by the Department pursuant to regulations adopted under 2.0 of this regulation herein notwithstanding any emission limit specified elsewhere in 7 **DE Admin. Code** 1100 Regulations Governing the Control of Air Pollution.
- 1.6 Any emission limitation represented by Best Available Control Technology (BACT) may be imposed by the Department pursuant to regulations adopted under 3.0 of this regulation herein notwithstanding any emission limit specified elsewhere in 7 **DE Admin. Code** 1100, Regulations Governing the Control of Air Pollution.
- 1.7 No stationary source shall be constructed unless the applicant can substantiate to the Department that the source will comply with any applicable emission limit or New Source Performance Standard or Emission Standard for a Hazardous Air Pollutant as set forth in 7 **DE Admin. Code** 1100 Regulations Governing the Control of Air Pollution.
- 1.8 Any stationary source that implements, for the purpose of gaining relief from 3.0 of this regulation, by any physical or operational limitation on the capacity of the source to emit a pollutant, including (but not limited to) air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design and the limitation or the effect it would have on emissions is enforceable, not withstanding any emission limit specified elsewhere in 7 **DE Admin. Code** 1100 Regulations Governing the Control of Air Pollution. If a source petitions the Department for relief from any resulting limitation described above, the source is subject to review under 2.0 and 3.0 of this regulation as though construction had not yet commenced on the source or modification.
- 1.9 Definitions - For the purposes of this regulation
 - **“Actual Emissions”** means the actual rate of emissions of a pollutant from an emission unit, as determined in accordance with the three subparagraphs below.
 - In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

- The Department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.
- For any emissions unit, which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

“Allowable Emissions” means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to enforceable limits, which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

The applicable standards

- as set forth in 7 DE Admin. Code 1120 and 1121;
- Other applicable Delaware State Implementation Plan emissions limitations, including those with a future compliance date; or
- The emissions rate specified as an enforceable permit condition, including those with a future compliance date.

“Baseline Area” means any intrastate area (and every part thereof) designated as attainment or unclassifiable in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact of the pollutant for which the baseline date is established, as follows: equal to or greater than one $\mu\text{g}/\text{m}^3$ (annual average) for SO_2 , NO_2 , or PM_{10} ; or equal to or greater than 0.3 $\mu\text{g}/\text{m}^3$ (annual average) for $\text{PM}_{2.5}$.

- Area redesignations cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:
 - Establishes a minor source baseline date, or
 - Is subject to this regulation.

“Baseline Concentration” means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

- The actual emissions representative of sources in existence on the applicable minor source baseline date, except as listed under Exceptions below.
- The allowable emissions of major stationary sources which commenced construction before the major source baseline date; but were not in operation by the applicable minor source baseline date.

Exceptions: The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase or increases:

- Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and
- Actual emissions increases and decreases at any stationary source occurring after the baseline date.

“Begin Actual Construction” means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

“Best Available Control Technology (BACT)” means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under CAA which would be emitted from any proposed major stationary source or major modification which the Department, on a case-by-case basis, takes into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for

control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 7 **DE Admin. Code** 1120 and 1121. If the Department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

“Building, Structure, Facility, or Installation” means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively). For purposes of 2.0 of this regulation for VOC and NO_x pollutant-emitting activities, this definition shall apply only to the “Building, Structure or Facility”.

“Commence” as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

- Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

“Complete” means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

“Condensable Particulate Matter” means material that is vapor phase at stack conditions, but condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. Note that all condensable PM is assumed to be in the PM_{2.5} size fraction.

“Construction” means any physical change or change in the method of operation (including fabrication, erection, installation, demolition or modification of an emissions unit) which would result in a change in actual emissions.

“Direct Particulate Matter” means particles that enter the atmosphere as a direct emission from a stack or an open source. Direct PM comprises two components: filterable PM and condensable PM. These two PM components have no upper particle size limit.

“Direct PM_{2.5}” means combined filterable PM_{2.5} and condensable PM with an aerodynamic diameter less than or equal to 2.5 micrometers. These solid particles are emitted directly from an air emissions source or activity, or are the gaseous emissions or liquid droplets from an air emissions source or activity that condense to form PM at ambient temperatures. Direct PM_{2.5} emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal material, metals, and sea salt).

“Emissions Unit” means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the CAA.

“Enforceable” means any standard, requirement, limitation or condition established by an applicable federal or state regulation or specified in a permit issued or order entered thereunder, or contained in a SIP approved by the Administrator of the U.S. Environmental Protection Agency (EPA), and which can be enforced by the Department and the Administrator of the EPA.

“**Filterable PM**” means particles that are emitted directly by a source as a solid or liquid at stack or release conditions and captured on the filter of a stack test train.

“**Fugitive Emissions**” means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

“**Fixed capital cost**” means the capital needed to provide all the depreciable components.

“**Greenhouse Gases (GHG)**” means an air pollutant composed of an aggregate group of six greenhouse gases; carbon dioxide (CO₂), nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF₆). For the purposes of this regulation, the term CO₂equivalent emissions (CO₂e) shall represent an amount of GHG emitted, and shall be computed as follows;

- Multiply the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHG by the gases associated global warming potential as shown in Table 1-1 of this regulation. For the purposes of this computation, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).
- Sum the resultant value for each gas to compute a tpy CO₂e

(Break in Continuity Within Section)

02/11/2012

2.0 Emission Offset Provisions (EOP)

- 2.1 Applicability - The provisions of 2.0 of this regulation shall apply to any person responsible for any proposed new major stationary source or any proposed major modification.
- 2.2 For purposes of 2.0 of this regulation, "major stationary source" means:
 - 2.2.1 Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act, except for either volatile organic compound or nitrogen oxides, or
 - 2.2.2 Any stationary source of air pollutants which emits, or has the potential to emit, either volatile organic compounds, or nitrogen oxides, in the following amounts:
 - 2.2.2.1 For areas in ozone attainment, ozone marginal, or ozone moderate nonattainment areas and located in the ozone transport region - 50 tons per year volatile organic compounds or 100 tons per year of oxides of nitrogen, or
 - 2.2.2.2 For serious ozone nonattainment areas - 50 tons per year of either volatile organic compounds or oxides of nitrogen, or
 - 2.2.2.3 For severe ozone nonattainment areas - 25 tons per year of either volatile organic compounds or oxides of nitrogen, or
 - 2.2.2.4 For extreme ozone nonattainment areas - 10 tons per year of either volatile organic compounds or oxides of nitrogen.
 - 2.2.3 Any physical change that would occur at a stationary source not qualifying under 2.2.1 or 2.2.2 of this regulation as a major stationary source, if the change would constitute a major stationary source by itself, or
 - 2.2.4 A major stationary source that is major for either volatile organic compounds or nitrogen oxides shall be considered major for ozone, and "installation" means an identifiable piece of process, combustion or incineration equipment.
 - 2.2.5 Nitrogen oxides and SO₂ shall be considered as precursors, and are considered nonattainment pollutants in any PM_{2.5} nonattainment area.

PROPOSED REGULATIONS

- 2.3 For the purposes of 2.4 and 2.5 of this regulation, emission units located in areas designated as attainment or marginal nonattainment areas that are located within the ozone transport region shall be considered located in a moderate ozone nonattainment area.
- 2.4 Conditions for Approval - No person subject to the provisions of 2.1 of this regulation shall install a major stationary source of volatile organic compounds or of nitrogen oxides, PM_{2.5}, or sulfur oxides or make a major modification to a source which will cause or contribute to any violation of the national ambient air quality standards for ozone or PM_{2.5} within an area of non-attainment for that pollutant unless the following conditions are met:
- 2.4.1 The new major source or the major modification is controlled by the application of lowest achievable emission rate (LAER) control technology.
- 2.4.2 All existing sources in the State owned or controlled by the owner of the proposed new or modified source are in compliance with the applicable local, State and federal regulations or are in compliance with a consent order specifying a schedule and timetable for compliance.
- 2.4.3 The new or modified source must satisfy the following offset requirements:
- 2.4.3.1 The ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:
- 2.4.3.1.1 For moderate ozone nonattainment areas, 1.15 to 1, or
- 2.4.3.1.2 For serious ozone nonattainment areas, 1.2 to 1, or
- 2.4.3.1.3 For severe ozone nonattainment areas, 1.3 to 1, or
- 2.4.3.1.4 For extreme ozone nonattainment areas, 1.5 to 1.
- 2.4.3.2 All offsets shall be federally enforceable at the time of application to construct and shall be in effect by the time the new or modified source commences operation.
- 2.4.3.3 The ratio of total actual emissions reductions of sulfur dioxide, nitrogen oxides or PM_{2.5} to total allowable increased emissions shall be 1:1.
- 2.4.4 The application for construction permit pursuant to 7 **DE Admin. Code** 1102 shall include an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.
- 2.4.5 Public participation for the construction permit shall be pursuant to 12.3 or 12.4 and 12.5 of 7 **DE Admin. Code** 1102.
- 2.5 Criteria for Emission Reductions Used as Offsets
- 2.5.1 All emission reductions claimed as offset credits shall be real, surplus, permanent, quantifiable, and federally enforceable;
- 2.5.2 The baseline for determining credit for emissions reductions shall be the lower of actual or allowable emissions. The offset credit shall only be allowed for emission reductions made below the baseline;
- 2.5.3 Emission reductions claimed as offsets shall have occurred on or after January 1, 1991;
- 2.5.4 Credit for an emission reduction may be claimed for use as an offset to the extent that the Department has not relied on it in issuing any permit under this regulation and has not relied on it for demonstration of attainment or reasonable further progress;
- 2.5.5 Emission reductions shall not be used as offsets in an area with a higher nonattainment classification than the one in which they were generated. For the purpose of 2.5.5, because the following states significantly contribute to non-attainment, or interfere with maintenance, of the ozone National Ambient Air Quality Standard in Delaware, the Department may consider any area in the following states as having the same nonattainment classification as the area of Delaware where the offsets are used: Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.

- 2.5.6 Emission reductions claimed as offsets by a source must be generated from within the same nonattainment area or from any other area that contributes to a violation of the ozone National Ambient Air Quality Standard in the nonattainment area which the source is located which shall specifically include any area in the States of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.
- 2.5.7 The Department may allow the offset requirement in 2.5 of this regulation for direct PM_{2.5} emissions or precursors of PM_{2.5} (sulfur dioxide or NO_x) to be satisfied by offsetting reductions in direct PM_{2.5} emissions or emissions of sulfur dioxide or NO_x using a ratio approved by the Department for the nonattainment area after public review and comment. Prior to making a final determination on the interpollutant trading ratios for a nonattainment area, the Department shall submit the interpollutant trading ratios and supporting information to the EPA for concurrence.
- 2.6 Emission reductions generated in a state other than Delaware and which are placed in the emissions bank established pursuant to 7 **DE Admin. Code** 1134 may be used as offsets provided they are federally enforceable and meet, at a minimum, all the provisions of 7 **DE Admin. Code** 1134 and 2.5.5, and 2.5.6 of this regulation.
- 16 DE Reg. 214 (08/01/12)**

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

1125 Requirements for Preconstruction Review

DIVISION OF FISH AND WILDLIFE

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

REGISTER NOTICE
#2012-09

1. TITLE OF THE REGULATIONS:
3300 Non Tidal Finfish

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

The proposed actions are intended to: formally define designated trout ponds; prohibit the harvest of trout in designated trout ponds prior to the scheduled pond trout season; authorize the taking of northern and blotched snakehead (invasive species) by bow and arrow and spear; and, make a number of minor editorial corrections to the non-tidal regulations.

Division regulations close fishing in stocked freshwater trout streams two weeks prior to the opening of trout season. This allows stocked trout to acclimate to their surroundings; become well dispersed; and, simplifies enforcement of the freshwater trout regulations. However, stocked trout ponds were not included in the definition of the trout streams and, therefore, similar closures to fishing prior to the opening of trout season cannot be adequately enforced. The Division has received numerous complaints from the angling public regarding stocked trout harvest prior to the season opening. The proposed amendments to §§3301 and 3304 seek to expressly define Newton and Tidbury Ponds as designated trout ponds, and establish closed and open seasons of same.

The Division is also proposing to amend §3303 to allow the take of northern and blotched snakehead by hook and line; bow and arrow and spear in non-tidal waters. These species are non-native invasives which have the potential to cause ecological harm. Bow fishing is an effective harvesting technique that may diminish their numbers and slow or prevent their spread. Similar language exists for carp.

Other proposed amendments are editorial in nature. These changes are intended to clarify awkwardly worded language (§3304 (4.0)) and make the non-tidal regulatory language consistent with the Delaware Administrative Code Drafting and Style Manual (September 2009 edition). They are not intended to change the meaning or intent.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

§103(a & b), 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 Non Tidal Finfish regulation will be open October 1, 2012. Individuals may submit written comments regarding the proposed changes via e-mail to 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 October 26, 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 (302) 739-9914

David E. Saveikis, Director

3300 Non-Tidal Finfish

3301 Definitions

1.0 For purposes of Regulations 3301 through ~~3308~~ 3311, the following words and ~~phrases~~ terms shall have the following meaning ~~ascribed to them~~, unless the context clearly indicates otherwise:

“Administered by the Division” ~~shall mean~~ means owned, leased or licensed by the Division.

“Bait” ~~shall mean~~ means any nontoxic food material, compound or mixture of ingredients which wildlife is able to consume.

“Baited Field” ~~shall include~~ means include any farm field, woodland, marsh, water body or other tract of land where minerals, grain, fruit, crop or other nontoxic compounds have been placed to attract wildlife to be hunted.

“Designated Trout Pond” means:

Newton Pond in Sussex county (near Greenwood);

Tidbury Pond in Kent County.

“Designated Trout Stream” ~~shall mean~~ means:

“Beaver Run”, from the boundary line between this State and the Commonwealth of Pennsylvania to the Brandywine River;

“Christina Creek”, from the boundary line between this State and the State of Maryland through Rittenhouse Park;

“Mill Creek”, from Brackenville Road to Route 7;

“Pike Creek”, from Route 72 to Henderson Road;

“White Clay Creek”, from the boundary line between this State and the Commonwealth of Pennsylvania to the downstream side of Paper Mill Road;

“Wilson Run”, from Route 92 through Brandywine Creek State Park; and

“Director” ~~shall mean~~ means the Director or Acting Director of the Division.

“Division” ~~shall mean~~ means the Division of Fish and Wildlife of the Department.

“Established Road” ~~shall mean~~ means a road maintained for vehicular use by the Division and designated for such use by the Division on current wildlife area maps.

- “**Fishing**” or “**to fish**” ~~shall~~ means to take, catch, kill or reduce to possession or attempt to take, catch, kill or reduce to possession any fish by any means whatsoever.
- “**Game Fish**” ~~shall include~~ means smallmouth bass, largemouth bass, black or white crappie, rock bass, white bass, walleye, northern pike, chain pickerel, muskellunge (or hybrids), salmon, trout, sunfishes and white bass/striped bass hybrids.
- “**Possession**” shall means either actual or constructive possession of or any control over the object referred to.
- “**Refuge**” shall means an area of land, whether in public or private ownership, designated by the Department as a refuge. Land shall only be designated with the permission of the landowner and if such designation is thought to be in the best interest of the conservation of wildlife. Refuges shall normally be closed at all times to all forms of hunting, except as permitted by the Director in writing for wildlife management purposes.
- “**Restricted Trout Stream**” shall means the White Clay Creek from a point 25 yards above Thompson Bridge at Chambers Rock Road to the boundary line between this State and the Commonwealth of Pennsylvania.
- “**Roadway**” shall means any road, lane or street, including associated right-of-ways, maintained by this State or any political subdivision of this State.
- “**Season**” shall means that period of time during which a designated species of wildlife may be lawfully hunted or a designated species of fish may be lawfully fished.
- “**Vehicle**” ~~shall include any~~ means in or by which someone travels or something is carried or conveyed or a means of conveyance or transport, whether or not propelled by its own power.

3302 Special Permits

- 1.0 The Director may issue a permit authorizing the holder thereof to fish by means of nets or other device from any of the non-tidal waters of this State, provided the fishing serves a research, management or educational purpose.

3303 Method of Take

(Penalty Section 7 Del.C. §1304)

- 1.0 Non-tidal Waters. It ~~shall be~~ is unlawful for any person to take fish from the non-tidal waters of this State, except by means of hook and line while under the immediate observation of the person using same. Carp, any species of snakehead (Family Channidae) and shad may be taken as set forth otherwise in this regulation.
- 2.0 Carp. It ~~shall be~~ is unlawful for any person to take carp, except by the following methods: hook and line; bow and arrow; and spear. Carp may be taken with a seine from freshwater ponds and non-tidal streams with permission from the Director and under the supervision of a representative of the Division.
- 3.0 Shad. Except as otherwise provided by law, it ~~shall be~~ is unlawful for any person to take shad, except by hook and line, provided said line has no more than two (2) lures attached. Each lure may have no more than one (1) single pointed hook.
- 4.0 Snakehead. It is lawful to take northern snakehead fish (*Channa argus*) or blotched snakehead fish (*Channa maculata*) from non-tidal waters of this State with hook and line; bow and arrow; and spear.
- 45.0 Snagging of Game Fish. It ~~shall be~~ is unlawful for any person to fish in the non-tidal waters of this State with hooks (single, double or treble) knowingly used to snag or otherwise catch or attempt to snag or otherwise catch any game fish by hooking said game fish in any part of the anatomy other than in the mouth.
- 50.0 Fish Ladders. It ~~shall be~~ is unlawful for any person to fish within ten (10) feet of an entrance or exit of a fish ladder or to remove fish from any fish ladder between March 15 and May 30.

PROPOSED REGULATIONS

3304 Creel Limits, Size Limits and Seasons

(Penalty Section 7 Del.C. §1304)

- 1.0 Closed Seasons. Unless otherwise provided by law or regulation of the Department, there ~~shall be~~ is no closed season, size limits or possession limits on any species of fish taken by hook and line in any non-tidal waters of this State.
- 2.0 Bass.
- 2.1 Statewide limits.
- 2.1.1 It ~~shall be~~ is unlawful for any person to have in possession more than six (6) largemouth bass ~~and/or to have in possession more than six (6) smallmouth bass~~ at or between the place where said largemouth and/or smallmouth bass were caught and said person's personal abode or temporary or transient place of lodging.
- 2.1.2 Unless otherwise authorized in this regulation, it ~~shall be~~ is unlawful for any person to possess any largemouth bass that measure less than twelve (12) inches in total length. Any largemouth bass taken which is less than the twelve (12) inches in total length ~~shall~~ must be immediately returned to the water with the least possible injury.
- 2.1.3 It ~~shall be~~ is unlawful for any person to possess any smallmouth bass measuring from twelve (12) inches to and including (17) inches in total length. Any smallmouth bass taken which is greater than twelve (12) inches and less than seventeen (17) inches ~~shall~~ must be immediately returned to the water with the least possible injury.
- 2.1.4 Notwithstanding 2.1.1 of this section, it ~~shall be~~ is unlawful for any person to have in possession more than one (1) smallmouth bass measuring more than seventeen (17) inches in total length at or between the place where said smallmouth bass was caught and said person's personal abode or temporary or transient place of lodging.
- 2.1.5 It ~~shall be~~ is lawful for any person to have in possession while fishing up to six (6) smallmouth bass that are less than twelve (12) inches in total length.
- 2.2 Becks Pond.
- 2.2.1 Notwithstanding 2.1.1 of this section, it ~~shall be~~ is unlawful for any person to have in possession while fishing on Becks Pond more than two (2) largemouth bass.
- 2.2.2 Notwithstanding 2.1.2 of this section, it ~~shall be~~ is unlawful for any person to have in possession while fishing on Becks Pond any largemouth bass less than fifteen (15) inches in total length. Any largemouth bass less than fifteen (15) inches in total length ~~shall~~ must be immediately returned to Becks Pond with the least possible injury.
- 2.3 3.0 Trout.
- 2.3.1 ~~Pond and Stream Seasons. It shall be unlawful for any person to fish for rainbow, brown and/or brook trout in designated trout streams, except between and including the first Saturday of April and the second Saturday of March of each succeeding year.~~
- 3.1.1 ~~It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams, except between and including the first Saturday of April and the second Saturday of March of each succeeding year.~~
- 3.1.2 ~~It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds, except between and including the first Saturday of March and the second Saturday of February of each succeeding year.~~
- 2.3.2 Hours of Fishing. ~~It shall be unlawful for any person to fish for rainbow, brown and/or brook trout in designated trout streams on the opening day of the trout season before 7:30 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.~~
- 3.2.1 ~~It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams on the opening day of the trout season before 7:30 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.~~

- 3.2.2 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds on the opening day of the trout season before 7 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.
- 2-3.3 Possession. It ~~shall be~~ is unlawful for any person to ~~catch and/or have in his or her possession~~ possess in any one day during the prescribed open season more than six (6) rainbow trout, brown trout ~~and/or~~ brook trout or any hybrids of these species in any combination. On any day after a person takes his or her legal limit of trout, said person ~~shall be~~ is prohibited from fishing in a designated trout stream or a designated trout pond on the same day, unless otherwise authorized by law or this regulation.
- 2-3.4 Trout Stamp. It ~~shall be~~ is unlawful for any person to fish in a designated trout stream on or before the first Saturday in April and June 30, of the same year, and on or before the first Saturday in October and November 30, of the same year, unless said person has in his or her possession a valid trout stamp, or, unless said person is exempted by law from having a trout stamp.
- 3.4.1 It is unlawful for any person to fish in a designated trout stream from the first Saturday in April through June 30 and from the first Saturday in October through November 30, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.
- 3.4.2 It is unlawful for any person to fish in a designated trout pond from the first Saturday in March through April 1, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.
- 2-3.5 Restricted Trout Stream.
- 2-3.5.1 It ~~shall be~~ is unlawful for any person to fish in a restricted trout stream with more than two (2) flies on a line at any one time.
- 2-3.5.2 It ~~shall be~~ is unlawful for any person to use any metallic, wooden, plastic or rubber spinners, spoons, lures, plugs, ~~and/or~~ any natural or synthetic bait on any restricted trout stream.
- 2-3.5.3 It ~~shall be~~ is unlawful for any person to have in his or her possession more than four (4) trout within 50 feet of any restricted trout stream. On the restricted trout stream only, trout may be caught and released as long as the four (4) trout possession limit is not exceeded. All trout released must be returned to the water as quickly as possible with the least possible injury.
- 2-3.6 Closure of Designated Trout Streams and Ponds.
- 3.6.1 It ~~shall be~~ is unlawful for any person to fish in a designated trout stream ~~within two weeks (14 days) of a~~ prior to the scheduled opening of the stream trout season.
- 3.6.2 It is unlawful for any person to fish in a designated trout pond two weeks (14 days) prior to the scheduled opening of the pond trout season.
- 2-4 4.0 Striped Bass (~~hybrids~~) and Hybrid Striped Bass
- 2-4.1 It ~~shall be~~ is unlawful for any person to have in his or her possession while fishing in the non-tidal waters of this State more than two (2) striped bass (*Morone saxatilis*) ~~and/or striped bass hybrids (*Morone saxatilis erysops* x *M. chrysops*) or any striped bass or striped bass hybrid under the length of fifteen (15) inches measured from the tip of the snout to the tip of the tail.~~
- 4.2 It is unlawful for any person to possess any striped bass or any striped bass hybrid under the length of fifteen (15) inches measured from the tip of the snout to the tip of the tail while fishing in the non-tidal waters of this State.
- 2-5 5.0 Panfish Limits. It ~~shall be~~ is unlawful for any person to have in possession while fishing in any State-owned non-tidal water more than fifty (50) panfish in aggregate to include bluegill, pumpkinseed, redear sunfish, black crappie, white crappie, white perch or yellow perch, provided no more than twenty-five (25) of the fifty (50) allowed in possession are of any one species.

3305 Ice Fishing

(Penalty Section 7 **Del.C.** §1304)

1.0 Restrictions.

- 1.1 It ~~shall be~~ is unlawful for any person to fish more than five (5) hook and lines in non-tidal water through ice.
- 1.2 It ~~shall be~~ is unlawful for any person to leave any hook and line being fished through the ice unattended.
- 1.3 It ~~shall be~~ is unlawful for any person to fish in non-tidal water through ice with any line having more than three hooks.

3306 Closure of Department Ponds During Drawdowns

(Penalty Section 7 **Del.C.** §1304)

- 1.0 It ~~shall be~~ is unlawful for any person to fish in any pond or lake administered by the Department when the water level in said pond or lake is lowered for the purpose of aiding in the control of aquatic vegetation, the conservation of fishes or the repair of water control facilities, provided said pond or lake is duly posted with signs by the Division that state said pond or lake is closed to fishing.

3307 Speed and Wake of Motorboats on Division Ponds

(Penalty Section 7 **Del.C.** §1304)

- 1.0 It ~~shall be~~ is unlawful for any person to operate a motorized vessel, except at a slow-no-wake speed, on any pond or lake administered by the Division.

3308 Fish Stocking Practices

(Penalty Section 7 **Del.C.** §1304)

- 1.0 Stocking Fish Practices. It ~~shall be~~ is unlawful for any person to stock any species of fish into the non-tidal public waters of this State without the written permission of the Director. This regulation does not prohibit the stocking of private impoundments.
- 2.0 Transportation, Possession and Sale. It ~~shall be~~ is unlawful for any person to transport, purchase, possess, or sell walking catfish (*Clarius batrachus*) or the white amur or grass carp (*Ctenopharyngodon idella*) or live northern snakehead fish (*Channa argus*) or blotched snakehead fish (*Channa maculata*) without the written permission of the Director.

3309 Lake Como

(Penalty Section 7 **Del.C.** §1304)

- 1.0 Bait. It ~~shall be~~ is unlawful for any person to use or have in his or her possession any live fish, as bait, while fishing on Lake Como.

3310 Severability

- 1.0 If any section, subsection, paragraph, sentence, phrase or word of these regulations is declared unconstitutional by a court of competent jurisdiction, the remainder of these regulations shall remain unimpaired and shall continue in full force and effect, and proceedings thereunder shall not be affected.

3311 Freshwater Fisherman Registry

- 1.0 All persons ages 16 and older who wish to fish in Delaware's fresh or tidal waters or both in any given year must first obtain a Fisherman Identification Network (F.I.N.) number for the year in question before fishing. This number may be obtained at no cost to the angler by calling a toll free number and providing the required information over the phone or by entering the required information on-line through an internet access portal designated by the Department for that purpose. Each person who

requests a F.I.N. number is to write this number on his or her Delaware fishing license, or those who are legally unlicensed must be able to produce this number when checked by an enforcement agent when fishing in Delaware waters. Failure to provide a valid F.I.N. number for the year in question is a violation of 7 Del.C. §501 in the case of residents, or 7 Del.C. §506 in the case of non-residents, and will be treated the same as a failure to have a fishing license before going fishing. Information provided during the process of obtaining a F.I.N. number shall be treated as confidential and may only be shared with the National Marine Fisheries Service for the purpose of compliance with federal requirements for a national registry of marine fishermen.

DIVISION OF WASTE AND HAZARDOUS SUBSTANCES

Statutory Authority: 7 Delaware Code, Chapter 74B; (7 Del.C., Ch. 74B)
7 DE Admin. Code 1353

REGISTER NOTICE
SAN #2011-12

1. TITLE OF THE REGULATIONS:

1353 Boiler Safety Regulations For Boilers, Pressure Vessels, and Nuclear

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

The Division of Boiler Safety was transferred from the Department of Public Safety to the Department of Natural Resources and Environmental Control in 2003. In 2011 the statutory authority for the Boiler Program was transferred from Title 29 to Title 7 and the program was formally placed in the Division of Waste and Hazardous Substances. The DNREC is proposing changes to the Boiler Safety Regulations that incorporates this administrative change and removes references to the Division Director of Boiler Safety since Boiler Safety is no longer a stand-alone Division within the Department. The proposed revisions also reflect an exemption for high pressure breathing air cylinders used by emergency response organizations as suggested by the Volunteer Fireman's Association; as well as definitional changes that allow third party inspection companies to inspect boiler systems or pressure vessels at uninsured facilities. Lastly, the regulations also add requirements for facilities that have their own boiler inspectors such as the Delaware City Refinery to establish their own quality assurance program.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C., ch. 74B

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

N/A

6. NOTICE OF PUBLIC COMMENT:

The DNREC will conduct a Public Hearing on Wednesday, October 10, 2012. The hearing is scheduled to begin at 6:00 p.m. in the conference room at the DNREC office located at 391 Lukens Drive, New Castle, DE. The public and interested parties are invited to attend the hearing and to make comments orally or in writing at the hearing. Written comments not presented at the hearing should be addressed to Mr. Alex Rittberg, DNREC/TMS, 391 Lukens Drive, New Castle, DE 19720 and must be received by the Department not later than 4:00pm on October 31, 2012 unless a longer time is specified at the hearing.

Copies of the proposed regulations are available online at <http://www.dnrec.delaware.gov/info/Rules.htm>

Copies may be viewed during regular business hours at the following DNREC offices:

DNREC, 391 Lukens Drive, New Castle, DE

DNREC, R&R Building, 89 Kings Highway, Dover, DE

DNREC, Route 113, Sussex Suites, Unit #6, Georgetown, DE

7. PREPARED BY:

Alex Rittberg, Environmental Program Manager II, 395-2500, 8/10/12, Alex.Rittberg@state.de.us

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

1353 Boiler Safety

DEPARTMENT OF SAFETY AND HOMELAND SECURITY

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Statutory Authority: 4 Delaware Code, Section 304 (4 Del.C. §304)

PUBLIC NOTICE

The Alcoholic Beverage Control Commission proposes to amend Rule 8.1 A Rule Governing the Shipment and Storage of Alcoholic Liquors by Suppliers and Wholesalers. The current rule provides for a 72 hour "at rest" period to allow the Commission to carry out its statutory responsibilities. The Commission proposes to shorten that period to 18 hours.

In accordance with 29 Del.C. §100118(a) final date to receive written comments will be October 1, 2012.

RULE 8.1 A RULE GOVERNING THE SHIPMENT AND STORAGE OF ALCOHOLIC LIQUORS BY SUPPLIERS AND WHOLESALERS

I. History

This rule was enacted in its original form on September 1, 1983, and established guidelines for the importation, delivery, and interstate shipment of alcoholic liquor by licensed importers. Prior to 1983, the content of this rule had been part of Rule 8., enacted by the Commission on February 1, 1960.

On February 1, 1990, the Commission amended Rule 8.1 by removing the restriction on the use of separate business entities, owned by one or more licensed importers, to store and transport alcoholic liquor for licensed importers.

Since November, 1965, the hours during which importers can deliver alcoholic liquor have been governed by Rule 10. In order to consolidate the rules regulating importers, the provisions of Rule 10 have been merged into the current revision of Rule 8.1, thereby allowing the Commission to repeal the present Rule 10 dated February 2, 1967.

II. Purpose

This amended rule is promulgated, in part, pursuant to the Commission's authority to regulate time, place, and manner in which alcoholic liquor is sold or dispensed, and provides regulations for the marking of vehicles used by licensed importers for the transportation of alcoholic liquor. It also establishes standards for the distribution of alcoholic liquor by importers to establishments licensed by the Commission for the sale of alcoholic liquor. 4 Del. C., Section 304 (A)(1)(2)

In addition, the Commission has found, pursuant to its authority, to promulgate rules and regulations necessary for the enforcement and furtherance of the objectives of 4 Del. C., Section 501, that all alcoholic liquor imported into this state must be unloaded and physically stored for a reasonable period of time to allow for enforcement of the regulatory provisions of the Liquor Control Act and Commission Rules. 4 Del. C., Section 501(e). This rule, therefore, implements and clarifies 4 Del. C., Section 501 (f) as to what period of time alcoholic liquors must be physically stored after it is unloaded in order to comply with 4 Del. C., Section 501 (f) and all other provisions of Title 4, the Liquor Control Act, and the Commission Rules and Regulations promulgated thereto.

Specifically, the Commission has found that seventy-two (72) hours is a reasonable "at-rest" period of time to enable the Commission to carry out its statutory duties to inspect and inventory licensed Delaware warehouses

pursuant to 4 Del.C., Section 304 (A) (2) (3) and (5) and 4 Del.C., Section 581(c), which the Commission has found to be in furtherance of the objectives for 4 Del.C., Section 501 (f) .

III. Definitions: As Used in this Rule

A. "Supplier" may be a brewery, winery, distiller, alcoholic beverage importer, or alcoholic beverage broker that sells alcoholic beverages to importers of the State of Delaware. A supplier's organization may be located within or without the State of Delaware.

B. "Importer" shall mean wholesaler and shall be located within the State of Delaware.

C. "Establishment" means any place located physically in this state where alcoholic liquor of one or more varieties is stored, sold, or used by authority of any law of this state, or where alcoholic liquor of one or more varieties is manufactured by virtue of any law of this state.

IV. Procedures

A. Importer's vehicles, in which alcoholic beverages are shipped into and throughout Delaware, shall have painted on both of their sides the name of the importer and the words "Delaware Alcoholic Beverage Control Commission - License Number" (Insert the importer's license number) in letters at least two inches high, uncovered, and clearly visible.

B. When shipments for one or more importers are made in vehicles other than those owned by an importer licensed by the Commission, then both sides of the vehicle used for conveyance of alcoholic beverages to or from the importer's warehouse, shall have a sign attached bearing the words, "Delaware Alcoholic Beverage Control Commission License Number" (Insert the license number of each importer shipping goods on such vehicle) in letters at least two inches high, uncovered, and clearly visible.

C. Vehicles owned by suppliers in which alcoholic beverages are shipped into Delaware, need not have the name of the Commission or the Delaware licensed importer's license number affixed to the side of the vehicle.

D. Vehicles owned by all suppliers shall not be used for delivery of alcoholic beverages to retailers in the State of Delaware, except it shall not be unlawful for importers to have suppliers' trucks if:

1. The importer gives evidence of such hiring to the Commission.

2. Delivery shall be made under the supervision of an employee of the importer, who shall accompany the vehicle and be responsible for the delivery complying with the law and regulations of the Commission. Such vehicle shall have the proper signs affixed thereto.

E. No peddling shall be allowed. Definite orders for all alcoholic beverages shipped from an importer's warehouse shall have been received from customers before the loaded vehicles leave the warehouse.

F. No alcoholic beverages in excess of that ordered shall be carried on the vehicles.

G. A statement showing the destination of each package of alcoholic beverages shall be furnished the driver and carried by him over the route.

H. Upon the driver's return to the warehouse, he shall sign the statement showing the alcoholic beverages have been delivered to the destination listed. This statement shall be available for inspection by the Commission at all times.

V. Importers' Warehouses

A. Importers may have one or more warehouses in different locations within the State of Delaware provided proper application for such extra warehouse(s) is filed and approved by the Commission.

B. The person in charge of an importer's warehouse must be approved by the Commission.

C. All importers' warehouses used for the storage of alcoholic liquor, except public cold storage establishments, must be either owned or rented directly by the importer or a business entity in which the importer maintains complete ownership or shares ownership with another licensed importer. The person in charge of the importer's warehouse is to be upon the regular salary list or payroll of such importer.

D. The importer is responsible for ensuring compliance with the Liquor Control Act and Commission Rules at all premises licensed in its name by the Commission.

VI. Hours of Delivery

A. Delivery trucks and other vehicles of an importer, licensed by the Commission for the delivery of alcoholic liquor to licensed retail establishments, may leave the warehouse after seven o'clock in the morning on any day when deliveries of alcoholic liquors are permitted; provided, however, that no actual delivery of beer, spirits, or wine

to any licensed establishment is permitted before nine o'clock in the morning.

B. Delivery trucks or other vehicles may operate as late as necessary to properly deliver orders; provided the trucks or other vehicles leave the warehouse prior to five-thirty o'clock in the afternoon, other than during the period from December 10 to December 31 when the trucks or other vehicles shall be permitted to leave the warehouse prior to eight o'clock in the evening.

C. There shall be no delivery of beer, spirits, or wine on any holiday specified in Title 4, Del.C., Chapter 7, Section 709 (e).

D. Deliveries of alcoholic liquor by importers, or their authorized representatives, to retail establishments, at any time not permitted by this rule is prohibited.

VII. The "At-Rest Requirement" [4 Del.C., Section 501(d)]

A. A licensed Delaware importer shall not import alcoholic liquor into the State of Delaware unless said alcoholic liquor is delivered directly from a Delaware licensed supplier by either the supplier, the importer, or common carrier to a licensed Delaware warehouse or warehouses.

B. Said licensed Delaware warehouse or warehouses must be owned, leased, or operated in accordance with Section V. (C) of this rule.

C. All alcoholic liquor delivered to said warehouse or warehouses must be unloaded and physically stored for a period of at least ~~seventy two (72)~~ eighteen (18) hours.

D. The minimum period of ~~seventy two (72)~~ eighteen (18) hours "at rest" is required to enable the Commission, or its enforcement officers or agents, to inspect and inventory wholesale warehouses for the purpose of verifying taxes that are required to be paid on alcoholic liquor purchased by importers, pursuant to 4 Del . C., Section 581(a) and Delaware Alcoholic Beverage Control Commission Rule 8.

E. Variances of the ~~seventy two (72)~~ eighteen (18) hour storage requirement may be granted for good cause if formally made in writing and submitted to the ~~Executive Secretary of the Commissioner. The Commission may then ratify the Executive Secretary's grant of said variance at the next regularly scheduled Commission meeting.~~

VIII. Inspections and Inventories

Pursuant to 4 Del.C., Section 304 (A) (2) and (5) and 4 Del.C., Section 581 (c), the Commission, its enforcement officers and agents may inspect the establishment of any licensed Delaware importer and inventory any or all alcoholic liquor in the importer's possession at any time the Commission deems reasonable and necessary to carry out its statutory duties to verify the reporting and collection of taxes payable to the State of Delaware.

IX. Interstate Shipments

A. Every person in charge of transportation by motor vehicle, by railroad, by water vessel, by common carrier, or by any other vehicle that transports alcoholic beverages in or through the State of Delaware in an interstate shipment shall have a way bill. The carrier must have in his possession the way bill and be prepared to present it when asked.

B. The way-bill shall embody these written or printed terms:

1. The date of its issue.
2. The name and address of the consignor.
3. The name and address of the consignee.
4. A statement as to whether the goods will be delivered to a specified person or to the order of a specified person.
5. A description of the package, stating the number and contents.
6. The signature of the carrier or his duly authorized agent.

X. Severability.

If any provision of this Rule shall be declared invalid, the remaining portions of this Rule shall remain valid and effective.

XI. Effective Date

This Rule shall be effective on May 1, 1991.

DIVISION OF STATE POLICE

Statutory Authority: 24 Delaware Code, Section 2311 (24 **Del.C.** §2311)
24 **DE Admin. Code** 2300

PUBLIC NOTICE

2300 Pawn Brokers, Secondhand Dealers and Scrap Metal Processors

Notice is hereby given that the Department of Safety and Homeland Security, Division of State Police, in accordance with 24 **Del.C.** §2311 proposes to amend adopted Rule 1.0 - Licensing. This amendment describes its intent to make the licensing and renewal procedures of Pawnbrokers, Secondhand Dealers, and Scrap Metal Processors more efficient and clarifies the electronic reporting requirements. If you wish to view the complete amendment, contact Ms. Peggy Anderson at (302) 672-5304. Any persons wishing to present views may submit them in writing, by September 30, 2012, to Delaware State Police, Professional Licensing, P.O. Box 430, Dover, DE, 19903.

2300 Pawnbrokers, Secondhand Dealers and Scrap Metal Processors

1.0 Licensing

- 1.1 Any individual applying for a pawnbroker, secondhand dealer or scrap metal processor license under 24 **Del.C.** Ch. 23 must meet and maintain the following qualifications:
 - 1.1.1 Must not be convicted of any felony within 5 years of application date; and
 - 1.1.2 Must not have been convicted of any misdemeanor involving theft or fraud within 5 years of application date; and
 - 1.1.3 Must not have been convicted of any misdemeanor involving drugs within 3 years of application date.
- 1.2 A license for a pawnbroker, secondhand dealer or scrap metal processor will not be issued if there is a pending charge as listed in Section 1.1.1, 1.1.2, or 1.1.3.
- 1.3 The individual applying for a pawnbroker, secondhand dealer or scrap metal processor under 24 **Del.C.** Ch. 23 must also meet the following qualifications:
 - 1.3.1 Must be at least 18 years of age; and
 - 1.3.2 Must ~~have~~ submit a current valid Delaware Business License issued by the Delaware Division of Revenue; and
 - 1.3.3 Physical location of business must be in the State of Delaware; and
 - 1.3.4 Appropriate taxes must be filed to the State of Delaware and the United States of America; and
 - 1.3.5 License must be prominently displayed ~~within the business~~ at the location listed on the license along with the Delaware Business License issued by the Delaware Division of Revenue.
- 1.4 The individual applying for licensure under Title 24 Chapter 23 must complete the following for approval:
 - 1.4.1 Applicant must appear in person at the Delaware State Police ~~Criminal Investigative Unit (CIU) at Troop 2, Troop 3 or Troop 4 in their respective county~~ Professional Licensing Section, by appointment only, to submit the initial application. Licenses will be renewed annually. ~~Renewal applications may be submitted via mail~~; and
 - 1.4.2 ~~Any and all applications required by the Delaware State Police CIU~~ Compliance with 24 **Del.C.** §2302 and §2312 for reporting forms; and
 - 1.4.3 Submit fingerprints, if requested to confirm the status or existence of a Delaware (CHRI) criminal history. The Director of the State Bureau of Identification (SBI) determines the fee for this process.
- 1.5 Renewal applications may be submitted via mail to the Professional Licensing Section no later than March 15th of each year for renewal, otherwise submission must be made in person.

- 1.56 Notification of a change of address, phone number, e-mail address, or contact person for the business during the license year must be made to the Delaware State Police CIU at Troop 2, Troop 3 or Troop 4 Professional Licensing Section.

2.0 Notification of Arrest

- 2.1 Anyone licensed under 24 **Del.C.** Ch. 23 shall notify the Delaware State Police CIU within five (5) days of being arrested for a misdemeanor or felony crime. Failure to do so may result in the suspension or revocation of any pawnbroker, secondhand dealer, or scrap metal processor license.

3.0 Revocations and Emergency Suspensions

- 3.1 The Director of State Bureau of Identification (SBI) shall have the authority to suspend any individual licensed under 24 **Del.C.** Ch. 23 of the **Delaware Code** on an emergency basis if the Director has good cause to believe that the individual:
- 3.1.1 Has engaged in any conduct that is an imminent threat to public safety;
 - 3.1.2 Has been arrested for a felony crime; or
 - 3.1.3 Has been arrested for a misdemeanor crime involving theft, receiving stolen property, fraud, or any crime involving drugs.
- 3.2 Any individual whose license is suspended on an emergency basis by the Director shall be entitled to a hearing before the Superintendent of State Police or his designee within thirty (30) days if the individual requests a hearing in writing within ten (10) calendar days of the date of the notice of the emergency suspension. At the hearing, the individual will have the right to counsel, the right to present evidence and to examine and cross examine witnesses. The hearing will not be subject to the case decision requirements of the Administrative Procedures Act. After the hearing, the Superintendent or his designee may either lift the emergency suspension, or continue the suspension until the resolution of the criminal charge(s) and will notify the individual in writing of the decision.
- 3.3 If the individual whose license is suspended on an emergency basis is not convicted of the crime because the charge is nolle prossed or otherwise dismissed by the court, or if the individual no longer poses an imminent threat to public safety, then the individual may apply in writing to the Director to lift the suspension administratively. The individual has the burden to prove that the basis for the emergency suspension no longer exists.
- 3.4 If the individual whose license is suspended on an emergency basis is convicted of the crime, or continues to pose imminent threat to public safety, then the Director may issue a notice of intent to revoke the license. If the individual makes a written request for a hearing within ten (10) days of the date of the notice, the matter will be heard before the Superintendent or his designee. At the hearing, the individual will have the right to counsel, to present evidence, and to examine and cross-examine witnesses. The hearing will not be governed by the case decision requirements of the Administrative Procedures Act.
- 3.5 If the hearing officer determines that there is good cause to revoke the license, then he/she shall so notify the individual in writing. There shall be no further appeal within the Department of Safety and Homeland Security.
- 3.6 Any individual whose license has been revoked cannot be reinstated. Revocation may be a ground for denying the individual's application for a new license, depending upon the reason for the revocation and the lapse of time.

4.0 Electronic Reporting

- 4.1 Pawnbrokers, Secondhand Dealers and Scrap Metal Processors will electronically report their required transactions as outlined by 24 **Del.C.** Ch. 23 via a method acceptable to the Delaware State Police.
- 4.2 All costs and fees associated with this reporting shall be incurred by the business. These fees will be in addition to those required to obtain licensure.

DEPARTMENT OF STATE

DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 1106 (24 **Del.C.** §1106)
24 **DE Admin. Code** 1100

PUBLIC NOTICE

1100 Board of Dentistry and Dental Hygiene

The Board of Dentistry and Dental Hygiene (“the Board”) in accordance with 24 **Del.C.** §1106 (a)(1) has proposed amendments to Rule 7.0 *Anesthesia Regulations*. The proposed amendments clarify the holders of Restricted 1 and Unrestricted Permits may induce conscious sedation by administering nitrous oxide in addition to other permitted methods. The amendment also clarifies that the holder of a Restricted Permit II may induce conscious sedation by administering nitrous oxide **only**. The proposed amendments are intended to address an apparent oversight in the Board’s current rules and regulations.

A public hearing will be held on October 18, 2012 at 3:15 p.m. in the second floor Conference Room of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware 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 the Delaware Board of Dentistry and Dental Hygiene, 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.

In accordance with 29 **Del.C.** §100118(a) final date to receive written comments will be November 2, 2012 which is 15 days following the public hearing. The Board will deliberate on all of the public comment at its regularly scheduled meeting on December 20, 2012 at 3:00 p.m., at which time it will determine whether to adopt the regulation as proposed or make additional changes due to the public comment.

1100 Board of Dentistry and Dental Hygiene

(Break in Continuity of Sections)

7.0 Anesthesia Regulations:

7.1 Definitions:

The following definitions are taken from the **Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry**, American Dental Association, Council on Dental Education (July 1993). These terms refer to the extent of a drug’s depressant effect upon the central nervous system and should not be confused with the route by which the drug is administered.

- 7.1.1 Analgesia -- the diminution or elimination of pain in the conscious patient.
- 7.1.2 Local Anesthesia -- the elimination of sensations, especially pain, in one part of the body by the topical application or regional injection of a drug.
- 7.1.3 Conscious Sedation -- a minimally depressed level of consciousness that retains the patient’s ability to independently and continuously maintain an airway and respond appropriately to physical stimulation and verbal command and that is produced by a pharmacologic or non-pharmacologic method or a combination thereof.

In accord with this definition, the conscious patient is also defined as “one who has intact protective reflexes, including the ability to maintain an airway, and who is capable of rational response to question or command.” The drugs and techniques used should carry a margin of safety wide enough to render unintended loss of consciousness unlikely.

For purposes of these regulations, Conscious Sedation Permits shall be divided into two classifications:

Restricted Permit I and Unrestricted Permits -- Conscious Sedation induced by parenteral or enteral or rectal routes as well as nitrous oxide inhalation. ~~This is not to include the~~ does not preclude the use of usual and customary pre-operative oral sedation.

PROPOSED REGULATIONS

Restricted Permit II -- Conscious Sedation induced by nitrous oxide inhalation only.

7.1.4 Deep Sedation -- is a controlled state of depressed consciousness accompanied by partial loss of protective reflexes, including the inability to continually maintain an airway independently and/or to respond purposefully to verbal command, and is produced by a pharmacologic or non-pharmacologic method or combination thereof.

7.1.5 General Anesthesia -- is a controlled state of unconsciousness accompanied by partial or complete loss of protective reflexes, including inability to independently maintain an airway and respond purposefully to physical stimulation or verbal command, and is produced by a pharmacologic or non-pharmacologic method or a combination thereof.

The same level of advanced training is necessary for the administration of both Deep Sedation and General Anesthesia.

7.1.6 Adverse Occurrences -- any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during, or as a direct result of, the conscious sedation, or deep sedation, or general anesthesia related thereto.

7.2 Conscious Sedation:

7.2.1 No dentist shall employ or use Conscious Sedation, Restricted Permit I or Restricted Permit II, for dental patients unless such dentist possesses a permit of authorization issued by the Delaware State Board of Dentistry and Dental Hygiene. The dentist holding such a permit shall be subject to review and such permit must be renewed biennially.

7.2.2 In order to receive such a permit, the dentist shall produce evidence showing that he or she:

7.2.2.1 For Restricted Permit I Conscious Sedation:

7.2.2.1.1 Has completed a minimum of 60 hours of instruction, including management of at least 20 patients per participant (to achieve competency in this technique).

7.2.2.1.2 Must be certified in CPR as documented by the American Heart Association or the American Red Cross. Advanced Cardiac Life Support Certification is encouraged.

7.2.2.1.3 Must also have a properly equipped facility for the administration of Restricted Permit I Conscious Sedation, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the team is to be determined by the Anesthesia Advisory Consultants appointed by the Board. A certified registered nurse anesthetist may be utilized for Restricted Permit I Conscious Sedation only if the dentist also possesses such a permit.

7.2.3 A list of emergency drugs and equipment that should be on hand would consist of the following:

7.2.3.1 Agents capable of treating:

7.2.3.1.1 hypotension and bradycardia

7.2.3.1.2 allergy/bronchospasm

7.2.3.1.3 seizures

7.2.3.1.4 narcotic-induced respiratory depression (e.g., narcotic antagonists)

7.2.3.1.5 angina pectoris

7.2.3.1.6 adrenal insufficiency (e.g., steroids)

7.2.3.1.7 nausea

7.2.3.2 Equipment necessary to provide artificial respiration and assist in airway maintenance.

7.2.3.3 Equipment necessary to establish an intravenous infusion and to inject medications.

7.2.4 For Restricted Permit II Conscious Sedation:

7.2.4.1 Has completed a minimum of 14 instructional hours including supervised clinical experience in managing patients (in a course required to achieve competency in nitrous oxide inhalation sedation).

7.2.4.2 Must also show certification in cardio-pulmonary resuscitation as certified by the American Heart Association or the American Red Cross.

-
- 7.3 Deep Sedation and General Anesthesia (Unrestricted Permit- Individual):
- 7.3.1 No dentist shall administer deep sedation or general anesthesia for his/her dental patients unless such dentist possesses a permit of authorization issued from the Delaware State Board of Dentistry and Dental Hygiene. This permit also includes all Conscious Sedation techniques. The dentist holding such a permit shall be subject to review and such permit must be renewed biennially.
- 7.3.2 In order to receive such a permit, the dentist must produce evidence showing that he/she:
- 7.3.2.1 Has completed a minimum of two years of advanced training in anesthesiology and related academic subjects (or its equivalent) beyond the undergraduate dental school level in a training program as described in Part II of the Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry or, is a Diplomat of the American Board of Oral and Maxillofacial Surgeons, or has satisfactorily completed a residency in Oral and Maxillofacial Surgery at an institution approved by the Council of Dental Education, American Dental Association, or is a fellow of the American Dental Society of Anesthesiology. A certified registered nurse anesthetist may be utilized for deep sedation or general anesthesia only if the dentist also possesses an Unrestricted Permit.
- 7.3.2.2 Has a properly equipped facility for the administration of deep sedation and general anesthesia, staffed with a supervised team of auxiliary personnel capable of reasonably handling procedures, problems and emergencies incident thereto. Adequacy of the facility and competence of the anesthesia team is determined by the Anesthesia Advisory Committee Consultants appointed by Delaware State Board of Dentistry and Dental Hygiene.
- 7.3.2.3 And is certified in Advanced Cardiac Life Support by the American Heart Association.
- 7.4 Deep Sedation and General Anesthesia (Unrestricted Facility Permit):
- 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 board certified anesthesiologist with an active 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.
- 7.4.2 Inspections: Prior to the issuance of a permit for Restricted Permit I (parenteral, enteral, or rectal Conscious Sedation) or an Unrestricted Permit (Deep Sedation or General Anesthesia), the Board shall require an on site inspection of the facility, equipment and personnel to determine if, in fact, the aforementioned requirements have been met. The evaluation shall be carried out in a manner described by the Board. The evaluation shall be carried out by the Anesthesia Advisory Consultants appointed by the Board. Each office that the dentist utilizes for Restricted Permit I Conscious Sedation or Deep Sedation or General Anesthesia requires individual inspection and must meet the requirements of that permit for which the dentist is applying.
- 7.4.3 Anesthesia Advisory Consultants:
- 7.4.3.1 The Board of Dentistry and Dental Hygiene shall appoint a team of Advisory Consultants and alternates who will visit the facility concurrently to conduct the on-site inspection and evaluation of the facilities, equipment and personnel of a licensed dentist applying for written authorization to administer or to employ another to administer Restricted Permit I Conscious Sedation, or Deep Sedation or General Anesthesia (Unrestricted Permit). The Advisory Consultants shall also aid the Board in the adoption of criteria and standards relative to the regulation and control of Conscious Sedation, Deep Sedation and General Anesthesia. The Anesthesia Advisory Consultants shall utilize the "Guidelines for the use of conscious sedation, deep sedation and general anesthesia for Dentist", as approved by the American Dental Association in October 1996, or any current update thereof. If the applicant has been satisfactorily evaluated by another similar organization (e.g., the Delaware Society of Oral and Maxillofacial Surgeons which uses the AAOMS Office

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Anesthesia Evaluation Manual Standards), then the Board may accept this evaluation and not require additional on-site evaluation.

- 7.4.3.2 If the results of the initial evaluation of an applicant are deemed unsatisfactory, upon written request of the applicant, a second evaluation shall be conducted by a different team of consultants.
- 7.4.4 Re-evaluation: The Board may at any time re-evaluate credentials, facilities, equipment, personnel and procedures of a licensed dentist who has previously received a written authorization or permit from the Board to determine if he/she is still qualified to have such written authorization. If the Board determines that the licensed dentist is no longer qualified to have such written authorization, it may revoke or refuse to renew such authorization, after an opportunity for a hearing is given to the licensed dentist.
- 7.5 Report of Adverse Occurrences:
- 7.5.1 All licensed dentists engaged in the practice of dentistry in the State of Delaware must submit a complete report within a period of thirty (30) days to the Delaware State Board of Dentistry and Dental Hygiene of any mortality or other incident occurring in the out-patient facilities of such dentist which results in temporary or permanent physical or mental injury requiring hospitalization of said patient during, or as a direct result of, the Conscious Sedation or Deep Sedation or General Anesthesia related thereto.
- 7.5.2 Failure to comply with this rule when said occurrence is related to the use of Conscious Sedation or Deep Sedation or General Anesthesia may result in the loss of such permit described above, and will be considered unprofessional conduct.
- 7.6 Applications and Reapplications:
- 7.6.1 A dentist who desires to obtain a permit to administer Conscious Sedation, Deep Sedation, or General Anesthesia or to maintain a facility where such services are provided shall submit an application on the form provided by the Board, pay the permit fee, and meet the requirements for the permit described herein.
- 7.6.2 A dentist who desires to renew a permit shall submit a renewal application on the form provided by the Board and pay the permit renewal fee. Re-inspection of the facility, equipment, and staff shall not be necessary unless new techniques or criteria arise, as determined by the Board with the aid of the Anesthesia Advisory Committee.
- 7.6.3 A permit issued by the Board under these regulations will expire at the same time as the permit holder's dental license and may be renewed biennially at the same time as the dental license is renewed.

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

1100 Board of Dentistry and Dental Hygiene

DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 1713(a)(12) (24 Del.C. §1713(a)(12))
24 DE Admin. Code 1700

PUBLIC NOTICE

1700 Board of Medical Licensure and Discipline

The Delaware Board of Medical Licensure and Discipline ("Board"), in accordance with 24 Del.C. §1713(a)(12), has proposed amendments to Regulation 31 - *Use of Controlled Substances for the Treatment of Pain* - to address concerns related to the applicability of the regulation to the treatment of acute pain. The amendments clarify that the primary focus of the regulation is the use of controlled substances in the treatment of

chronic pain. Instead of stating that the regulations “are” applicable to the use of controlled substances in the treatment of acute pain, the proposed amendments provide that the regulations “may be applicable to prescribing controlled substances for the treatment of acute pain when clinically appropriate.” The amendments also give the Board discretion to refer to current clinical practice guidelines and/or expert review in approaching cases involving the management of pain.

Regulation 31.8.1 is being amended to require that the medical records contain documentation of the patient’s interim history and “physical examination.” Regulation 31.8.2 is being amended to require that the medical records contain documentation of the patient’s vital signs “as clinically appropriate” Finally Regulation 31.10.4 clarifies the definition of a “licensed practitioner” for purposes of the regulations.

The Board will hold a public hearing on October 2, 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 amendments to the regulations. Anyone wishing to receive a copy of the proposed amendments 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. In accordance with 29 **Del.C.** §10118(a) final date to receive written comments will be October 17, 2012 which is 15 days following the public hearing. The Board will deliberate on all of the public comment at its regularly scheduled meeting on November 13, 2012 at 3:00 p.m., at which time it will determine whether to adopt the regulation as proposed or make additional changes due to the public comment.

1700 Board of Medical Licensure and Discipline

(Break in Continuity of Sections)

31.0 Use of Controlled Substances for the Treatment of Pain: Purpose

The Board has adopted the Federation of State Medical Board’s “Model Policy for the Use of Controlled Substances for the Treatment of Pain” (“Model Policy”). These regulations have been developed to define specific requirements applicable to pain control, particularly related to the use of controlled substances, to alleviate licensed practitioners’ uncertainty, to encourage better pain management, and to minimize practices that deviate from the appropriate standard of care and lead to abuse and diversion. Licensed practitioners should familiarize themselves with the Model Policy available online at www.dpr.delaware.gov. To the extent there are any inconsistencies between these regulations and the Model Policy, these regulations shall control.

The principles of quality medical practice dictate that citizens of Delaware have access to appropriate and effective pain relief. The appropriate application of up-to-date knowledge and treatment modalities can serve to improve the quality of life for those patients who suffer from pain as well as reduce the morbidity and costs associated with untreated or inappropriately treated pain. The inappropriate treatment of pain includes a wide spectrum of issues that do not provide treatment appropriate to the patients’ specific needs.

The diagnosis and treatment of pain is integral to the practice of medicine. Licensed practitioners view pain management as a part of quality medical practice for all patients with pain, acute or chronic, and it is especially urgent for patients who experience pain as a result of terminal illness. Licensed practitioners should become knowledgeable about assessing patients’ pain and effective methods of pain treatment, as well as statutory requirements for prescribing controlled substances. These regulations are primarily directed to the treatment of chronic pain but are may be applicable to prescribing controlled substances for ~~other conditions as well~~ the treatment of acute pain when clinically appropriate.

Inappropriate pain treatment may result from the practitioner’s lack of knowledge about pain management. Fears of investigation or sanction by federal, state and local agencies may also result in inappropriate treatment of pain. Appropriate pain management is the treating practitioner’s responsibility. As such, the Board will consider the inappropriate treatment of pain to be a departure from standards of practice and will investigate such allegations, recognizing that some types of pain cannot be completely relieved, and taking into account whether the treatment is appropriate for the diagnosis.

The Board recognizes that controlled substances including opioid analgesics may be essential in the treatment of acute pain due to trauma or surgery and chronic pain, whether due to cancer or non-cancer origins. The Board may refer to current clinical practice guidelines and/or expert review in approaching cases involving the management of pain. The medical management of pain should consider current clinical knowledge and scientific

research and the use of pharmacologic and non-pharmacologic modalities according to the judgment of the licensed practitioner. Pain should be assessed and treated promptly, and the quantity and frequency of doses should be adjusted according to the intensity, duration of the pain, and treatment outcomes. Licensed practitioners should recognize that tolerance and physical dependence are normal consequences of sustained use of opioid analgesics and alone are not the same as addiction.

The Board recognizes that the use of opioid analgesics for other than legitimate medical purposes can pose a threat to the individual and society and that the inappropriate prescribing of controlled substances, including opioid analgesics, may lead to drug diversion and abuse by individuals who seek them for other than legitimate medical use. Accordingly, these regulations mandate that licensed practitioners incorporate safeguards into their practices to minimize the potential for the abuse and diversion of controlled substances.

Licensed practitioners should not fear disciplinary action from the Board for ordering, prescribing, dispensing or administering controlled substances, including opioid analgesics, for a legitimate medical purpose and in the course of professional practice. The Board will consider prescribing, ordering, dispensing or administering controlled substances for pain to be for a legitimate medical purpose if based on sound clinical judgment. All such prescribing must be based on clear documentation of unrelieved pain. To be within the usual course of professional practice, a licensed practitioner-patient relationship must exist and the prescribing should be based on a diagnosis and documentation of unrelieved pain. Compliance with applicable state or federal law is required.

The Board will judge the validity of the licensed practitioner's treatment of the patient based on available documentation, rather than solely on the quantity and duration of medication administration. The goal is to control the patient's pain while effectively addressing other aspects of the patient's functioning, including physical, psychological, social and work-related factors.

Allegations of inappropriate pain management will be evaluated on an individual basis. The Board will take disciplinary action against a licensed practitioner for deviating from these regulations unless contemporaneous medical records document reasonable cause for deviation. The practitioner's conduct will be evaluated to a great extent by the outcome of pain treatment, recognizing that some types of pain cannot be completely relieved, and by taking into account whether the drug used is appropriate for the diagnosis, as well as improvement in patient functioning and/or quality of life.

- 31.1 The following criteria must be used when evaluating the treatment of chronic pain, including the use of controlled substances but may be applicable to prescribing controlled substances for the treatment of acute pain when clinically appropriate:
 - 31.1.1 Evaluation of the Patient- A medical history and physical examination must be obtained, evaluated, and documented in the medical record. The evaluation must document:
 - 31.1.1.1 etiology, the nature and intensity of the pain, current and past treatments for pain,
 - 31.1.1.2 underlying or coexisting diseases or conditions,
 - 31.1.1.3 the effect of the pain on physical and psychological function, and history of substance abuse,
 - 31.1.1.4 the presence of one or more recognized medical indications for the use of a controlled substance.
- 31.2 Treatment Plan- A written treatment plan is required and must state goals and objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function, and should indicate if any further diagnostic evaluations or other treatments are planned. The treatment plan must address whether treatment modalities or a rehabilitation program are necessary depending on the etiology of the pain and the extent to which the pain is associated with physical and psychosocial impairment. After treatment begins, the practitioner must adjust drug therapy to the individual medical needs of each patient.
- 31.3 Informed Consent - The practitioner must discuss the risks and benefits of the use of controlled substances with the patient, persons designated by the patient or with the patient's surrogate or guardian if the patient is without medical decision-making capacity.
- 31.4 Agreement for Treatment- If the patient is at high risk for medication abuse or has a history of substance abuse, the practitioner must use a written agreement between the practitioner and patient outlining patient responsibilities, including:
 - 31.4.1 urine/serum medication levels screening when requested;

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- 31.4.2 number and frequency of all prescription refills; and
 - 31.4.3 reasons for which drug therapy may be discontinued (e.g., violation of agreement).
 - 31.4.4 a requirement that the patient receive prescriptions from one licensed practitioner and one pharmacy where possible.
 - 31.5 Periodic Review- The licensed practitioner shall periodically review the course of pain treatment and any new information about the etiology of the pain or the patient's state of health. Periodic review shall include, at a minimum, evaluation of the following:
 - 31.5.1 continuation or modification of controlled substances for pain management therapy depending on the practitioner's evaluation of the patient's progress toward treatment goals and objectives.
 - 31.5.2 satisfactory response to treatment as indicated by the patient's decreased pain, increased level of function, or improved quality of life. Objective evidence of improved or diminished function must be monitored and information from family members or other caregivers should be considered in determining the patient's response to treatment.
 - 31.5.3 if the patient's progress is unsatisfactory, the practitioner shall assess the appropriateness of continued use of the current treatment plan and consider the use of other therapeutic modalities.
 - 31.6 Consultation- The practitioner shall refer the patient as necessary for additional evaluation and treatment in order to achieve treatment objectives. Special attention must be given to those patients with pain who are at risk for medication misuse, abuse or diversion. The management of pain in patients with a history of substance abuse or with a co-morbid psychiatric disorder requires extra care, monitoring, documentation and may require consultation with or referral to an expert in the management of such patients. At a minimum, practitioners who regularly treat patients for chronic pain must educate themselves about the current standards of care applicable to those patients,
 - 31.7 Medical Records- The practitioner shall keep accurate and complete records. The entire record must, include the:
 - 31.7.1 medical history and physical examination,
 - 31.7.2 diagnostic, therapeutic and laboratory results,
 - 31.7.3 evaluations and consultations,
 - 31.7.4 documentation of etiology;
 - 31.7.5 treatment objectives,
 - 31.7.6 discussion of risks and benefits,
 - 31.7.7 informed consent,
 - 31.7.8 treatments,
 - 31.7.9 medications (including date, type, dosage and quantity prescribed),
 - 31.7.10 instructions and agreements, and
 - 31.7.11 periodic review.
 - 31.8 Records should remain current and be maintained in an accessible manner and readily available for review. Each practitioner should include documentation appropriate for each visit's level of care and will include the:
 - 31.8.1 interim history and physical examination,
 - 31.8.2 vital signs as clinically appropriate,
 - 31.8.3 assessment of progress, and
 - 31.8.4 medication plan.
 - 31.9 Compliance with Controlled Substances Laws and Regulations- To prescribe, dispense or administer controlled substances, the practitioner must be licensed in the state and comply with all applicable federal and state regulations. Licensed practitioners are referred to the Practitioner's Manual of the U.S. Drug Enforcement Administration and specific rules governing controlled substances as well as applicable state regulations.
 - 31.10 The following terms are defined as follows:

PROPOSED REGULATIONS

- 31.10.1 Acute Pain- Acute pain is the normal, predicted physiological response to a noxious chemical, thermal or mechanical stimulus and typically is associated with invasive procedures, trauma and disease. It is generally time-limited.
- 31.10.2 Addiction- Addiction is a primary, chronic, neurobiologic disease, with genetic, psychosocial, and environmental factors influencing its development and manifestations. It is characterized by behaviors that include the following: impaired control over drug use, craving, compulsive use, and continued use despite harm. Physical dependence and tolerance are normal physiological consequences of extended opioid therapy for pain and are not the same as addiction.
- 31.10.3 Chronic Pain- Chronic pain is a state in which pain persists beyond the usual course of an acute disease or healing of an injury, or that may or may not be associated with an acute or chronic pathologic process that causes continuous or intermittent pain over months or years.
- 31.10.4 Licensed Practitioner - Licensed practitioner means those licensed individuals with prescriptive authority regulated under the Medical Practice Act including, but not limited to, physicians, physician assistants and nurse practitioners, except as exempted by 16 Del.C. §4798(b)(9).
- 31.10.5 Pain- An unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage.
- 31.10.6 Physical Dependence- Physical dependence is a state of adaptation that is manifested by drug class-specific signs and symptoms that can be produced by abrupt cessation, rapid dose reduction, decreasing blood level of the drug, and/or administration of an antagonist. Physical dependence, by itself, does not equate with addiction.
- 31.10.7 Pseudo addiction- The iatrogenic syndrome resulting from the misinterpretation of relief seeking behaviors as though they are drug-seeking behaviors that are commonly seen with addiction. The relief seeking behaviors resolve upon institution of effective analgesic therapy.
- 31.10.8 Substance Abuse- Substance abuse is the use of any substance(s) for non-therapeutic purposes or use of medication for purposes other than those for which it is prescribed.
- 31.10.9 Tolerance- Tolerance is a physiologic state resulting from regular use of a drug in which an increased dosage is needed to produce a specific effect, or a reduced effect is observed with a constant dose over time. Tolerance may or may not be evident during opioid treatment and does not equate with addiction.

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

1700 Board of Medical Licensure and Discipline

DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 3105(a)(1) (24 Del.C. §3105(a)(1))
24 DE Admin. Code 3100

PUBLIC NOTICE

3100 Board of Funeral Services

The Delaware Board of Funeral Services, pursuant to 24 Del.C. §3105(a)(1), proposes to revise its regulations by removing the automatic approval of continuing education courses that are approved by another state licensing board. The purpose of the change is to retain jurisdiction and closer review of continuing education credits that are accepted by the Board for licensees. The Board will hold a public hearing on the proposed regulation change on September 25, 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 October 10, 2012.

3100 Board of Funeral Services*(Break in Continuity of Sections)***9.0 Continuing Education Regulations**

9.1 Board Authority

9.1.1 This rule is promulgated under the authority of 24 **Del.C.** §3105 which grants the Board of Funeral Services (hereinafter "the Board") authority to provide for rules for continuing funeral services education as a prerequisite for license renewal.

9.2 Requirements

9.2.1 Every licensed funeral director in active practice shall complete at least 10 hours/credits of approved continuing education (hereinafter "CE") during the two year licensure period prior to the time of license renewal. Licensed funeral directors who are 65 years of age or older are exempt from the CE requirements.

9.2.2 All CE credit hours must further the licensee's skills and understanding in the field of funeral services. Licensees who earn more than the required amount of CE credit hours during a given licensure period may carry over no more than 50% of the total CE credit hours required for the next licensure period.

9.2.3 When a Delaware licensee on inactive status files a written application to return to active practice with the Board, the licensee shall submit proof of having completed the required CE credit hours for the period just prior to the request to return to active practice.

9.3 Waiver of the CE Requirement

9.3.1 The Board has the power to waive any part of the entire CE requirement for good cause if the licensee files a written request with the Board. For example, exemptions to the CE requirement may be granted due to health, military service or economic hardship. Application for exemption shall be made in writing to the Board by the applicant for renewal and must be received by the Board no later than 60 days prior to the license renewal date. The Board shall decide the merits of each individual case at a regularly scheduled meeting.

9.3.2 Newly licensed funeral directors, including those newly licensed by reciprocity, are exempt during the time from initial licensure until the commencement of the first full licensure period.

9.4 Continuing Education Program Approval

9.4.1 Each contact hour (at least fifty minutes) is equivalent to 1.0 CE credit hour. One college credit hour is equivalent to 5 CE credit hours.

9.4.2 Eligible program providers or sponsors include but are not limited to, educational institutions, government agencies, professional or trade associations and foundations and private firms.

9.4.3 Programs approved by the Academy of Funeral Service Practitioners (AFSP) ~~or state boards that license funeral directors~~ are automatically approved and need not be submitted to the Board.

9.4.4 Sources of CE credits include but are not limited to the following:

- Programs sponsored by national funeral service organizations.
- Programs sponsored by state associations.
- Program provided by local associations.
- Programs provided by suppliers.
- Independent study courses for which there is an assessment of knowledge.
- College courses.

9.4.5 The recommended areas include but are not limited to the following:

- Grief counseling
- Professional conduct, business ethics or legal aspects relating to practice in the profession.
- Business management concepts relating to delivery of goods and services.
- Technical aspects of the profession.
- Public relations.
- After care counseling.

PROPOSED REGULATIONS

- 9.4.6 Application for CE program approval shall include the following:
- 9.4.6.1 Date and location.
 - 9.4.6.2 Description of program subject, material and content.
 - 9.4.6.3 Program schedule to time segments in subject content areas for which approval of, and determination of credit is required.
 - 9.4.6.4 Name of instructor(s), background, expertise.
 - 9.4.6.5 Name and position of person making request for program approval.
- 9.4.7 Requests for CE program approval shall be submitted to the Board on the application provided by the Board. Application for approval may be made after the program; however, if the program is not approved, the applicant will be notified and no credit given.
- 9.4.8 The CE credits shall be valid for the biennial renewal cycle in which they are approved. Changes in any aspect of the approved program shall render the approval invalid and the presenter will be responsible for making reapplication to the Committee.
- 9.4.9 Upon request, the Board shall mail a current list of all previously approved programs.
- 9.5 Certification of Continuing Education - Verification and Reporting
- 9.5.1 The program provider/sponsor has sole responsibility for the accurate monitoring of program attendance. Certificates of attendance shall be supplied by the program provider/sponsor and be distributed only at the completion of the program.
- 9.5.2 Verification of completion of an independent study program will be made with a student transcript.
- 9.5.3 The funeral director licensee shall maintain all original certificates of attendance for CE programs for the entire licensure period. A licensee who carries over credits from a prior licensure period must also maintain original certificates of attendance for all CE programs for any period from which credits are carried over.
- 9.5.4 Proof of continuing education is satisfied with an attestation by the licensee that he or she has satisfied the requirements of Rule 9.2.1.
- 9.5.4.1 Attestation may be completed electronically if the renewal is accomplished online. In the alternative, paper renewal documents that contain the attestation of completion may be submitted.
 - 9.5.4.2 Licensees selected for random audit will be required to supplement the attestation with attendance verification pursuant to Rule 9.3.5.3.
- 9.5.5 Random audits will be performed by the Board to ensure compliance with the CEU requirements.
- 9.5.5.1 The Board will notify licensees within sixty (60) days after August 31 that they have been selected for audit.
 - 9.5.5.2 Licensees selected for random audit shall be required to submit verification within ten (10) days of receipt of notification of selection for audit.
 - 9.5.5.3 Verification shall include such information necessary for the Board to assess whether the course or other activity meets the CE requirements in Section 9.4, which may include, but is not limited to, the following information:
 - Proof of attendance;
 - Date of CE course;
 - Instructor of CE course;
 - Sponsor of CE course;
 - Title of CE course; and
 - Number of hours of CE course.
- 9.5.6 If a licensee fails to meet the CE requirement at the time of renewal, the Board may impose discipline as permitted under Section 3114. In its discretion, the Board may permit the licensee to obtain the CE credits within a time period prescribed by the Board while maintaining an active license.

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

3100 Board of Funeral Services

DIVISION OF PROFESSIONAL REGULATION CONTROLLED SUBSTANCE ADVISORY COMMITTEE

Statutory Authority: 16 Delaware Code, Section 4731 (16 **Del.C.** §4731)

PUBLIC NOTICE

Uniform Controlled Substances Act Regulations

The Delaware Controlled Substance Advisory Committee, pursuant to 16 **Del.C.** §4700, proposes to revise its rules and regulations. The proposed revisions to the rules loosen the ban on dispensing filled prescriptions for Schedule II drugs through drive through windows, and will now permit such dispensing when the drive through window has a security system that is approved by the Office of Controlled Substances.

The Board will hold a public hearing on the proposed rule change on September 26, 2012 at 9:30 a.m., Buena Vista Conference Center, 661 South DuPont Highway, New Castle, DE 19720. Written comments should be sent to Catherine Simon, Administrator of the Delaware Controlled Substance Advisory Committee, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904.

Uniform Controlled Substances Act Regulations

(Break in Continuity of Sections)

4.0 Prescriptions

4.1 Definitions. As used in this section:

- 4.1.1 The term “**Act**” means the Controlled Substance Act, 16 **Del.C.**, Ch. 47.
- 4.1.2 The term “practitioner” means physician, dentist, veterinarian, podiatrist, nurse practitioner, physician assistant or other individual, licensed, registered, or otherwise permitted, by the United States or the State of Delaware to prescribe, dispense or store a controlled substance in the course of professional practice but does not include a pharmacist, a pharmacy, or an institutional practitioner.
- 4.1.3 The term “pharmacist” means any pharmacist licensed by the State of Delaware to dispense controlled substances and shall include any other person (e.g. pharmacist intern) authorized by the State of Delaware to prescribe, dispense or store controlled substances under the supervision of a pharmacist licensed by this State.
- 4.1.4 The term “prescription” means an order for medication which is dispensed to or for an ultimate user but does not include an order for medication which is dispensed for immediate administration to the ultimate user. (e.g., an order to dispense a drug to a bed patient for immediate administration in a hospital is not a prescription.)
- 4.1.5 The terms “register” and “registered” refer to registration required by 16 **Del.C.** §4732.

4.2 Persons Entitled to Issue Prescriptions

- 4.2.1 A Prescription for a controlled substance may be issued only by a practitioner who is:
 - 4.2.1.1 Authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession; and
 - 4.2.1.2 Either registered or exempt from registration pursuant to 16 **Del.C.** §4732.
- 4.2.2 A verbal prescription for a controlled substance may only be communicated to a pharmacist, a pharmacy intern or a pharmacy student participating in an approved College of Pharmacy coordinated practical experience program under the direct supervision of a licensed pharmacist by

PROPOSED REGULATIONS

- the prescriber. Verbal prescriptions for schedule III-V controlled substances in a hospice or long term care facility may be communicated by an authorized agent of the prescriber.
- 4.2.3 All verbal prescriptions for controlled substances must be verified and authorized by the prescriber.
- 4.2.4 Prescriptions for controlled substances may be transmitted via facsimile or electronic transmission by a practitioner or by the practitioner's authorized agent to a pharmacy.
- 4.3 Purposes of Issue of Prescription
- 4.3.1 A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by practitioner acting in the usual course of their professional practice. The responsibility for proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription not issued in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of §4738 of the Act and the person knowingly filling such a purported prescription, as well as the person issuing it shall be subject to the penalties provided for violation of the provisions of law relating to controlled substances.
- 4.3.2 A prescription may not be issued in order for a practitioner to obtain controlled substances for supplying the practitioner for the purpose of general dispensing to patients.
- 4.3.3 A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs, unless otherwise authorized by law.
- 4.4 Manner of Issuance of Prescriptions. All prescriptions for controlled substances shall be dated on the day when issued and shall bear the full name and address of the patient, and the name, address, telephone number and registration number of the practitioner. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (e.g. J.H. Smith or John H. Smith). When an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescriptions may be prepared by a secretary or agent for the signature of a practitioner but the prescribing practitioner is responsible where the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist who fills a prescription not prepared in the form prescribed by these regulations. Each written prescription shall have the name of the practitioner stamped, typed, or hand-printed on it, as well as the signature of the practitioner.
- 4.5 Persons Entitled to fill Prescriptions. A prescription for controlled substances may only be filled by a pharmacist acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy or by a registered institutional practitioner.
- 4.6 Dispensing Narcotic Drugs for Maintenance Purposes. No person shall administer or dispense narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence except in compliance with and as authorized by Federal law and regulation.
- 4.7 Emergency Dispensing of Schedule II Substances. In an emergency situation a pharmacist may dispense controlled substances listed in Schedule II upon receiving oral authorization of a prescribing practitioner, provided that the procedures comply with Federal law and regulation.
- 4.8 Expiration of Prescription.
- 4.8.1 Prescriptions for controlled substances in Schedules II and III will become void unless dispensed within seven (7) days of the original date of the prescription or unless the original prescriber authorizes the prescription past the seven (7) day period. Such prescriptions may be dispensed up to 100 dosage units or a 31 day supply whatever is the greater. As an exception to dosage limitations set forth in this subparagraph, and in accordance with 21 **CFR** Section 1306.1(b), prescriptions for controlled substances in Schedule II for patients either having a medically documented terminal illness or patients in Long Term Care Facilities (LTCF), may be filled in partial quantities, to include individual dosage units. For each partial filling, the dispensing pharmacist shall record on the back of the prescription (or another appropriate record, uniformly maintained, and readily retrievable) the date of the partial filling, quantity dispensed, remaining

quantity authorized to be dispensed and the identification of the dispensing pharmacist. The total quantity of Schedule II controlled substances dispensed in all partial fillings must not exceed the total quantity prescribed.

- 4.8.2 Schedule II prescriptions for terminally ill or LTCF patients, shall be valid for a period not to exceed 60 days from the issue date unless sooner terminated by the discontinuance of the medication.
- 4.9 Mail Order Prescription. Before dispensing prescriptions for Schedules II, III, IV, V controlled substances by mail, the registrant and/or the pharmacist-in-charge must assure that the prescription is valid and written by a prescriber properly registered with the Federal Government. Such verification may be made either in writing or orally.
- 4.10 Pursuant to authority granted by 16 **Del.C.** §4732 the Secretary of State finds that waiver of the registration requirements contained in that section as to non-resident practitioners is consistent with the public health and safety subject to the conditions contained in this regulation.
- 4.10.1 The pharmacist must establish that the name of the non-resident practitioner does not appear on the list kept by the Office of Controlled Substances of those non-resident practitioners to whom the waiver granted by this regulation does not apply.
- 4.10.2 The waiver of the registration requirement provided by the registration shall not apply to non-resident practitioners determined by the Office of Controlled Substances to have acted in a manner inconsistent with the Public Health and Safety. The Office of Controlled Substances shall maintain a list of those non-resident practitioners found by them to have so acted. Pharmacists shall not honor the prescriptions of non-resident practitioners whose names appear on that list unless such non-resident practitioners have registered pursuant to the provisions of 16 **Del.C.** §4732.
- 4.11 The pharmacist must establish that a practitioner is properly registered to prescribe controlled substances under Federal Law.
- 4.11.1 The pharmacist and/or an employee under his/her direct supervision must verify the identification of the receiver of the controlled substance prescription by reference to valid photographic identification. For the purposes of this section, a valid photographic identification is limited to the following:
- 4.11.1.1 A valid Delaware motor vehicle operator's license which contains a photograph of the person receiving the prescription - record the license number listed on the license as part of the patient record.
- 4.11.1.2 A valid Delaware identification card which contains the photograph of the person receiving the prescription - record the identification number listed on the card as part of the patient record.
- 4.11.1.3 A valid United States passport.
- 4.11.1.4 A valid passport or motor vehicle operator's license or state identification card of another state, territory or possession of the United States or a foreign country only if it:
- 4.11.1.4.1 Contains a photograph of the person receiving the prescription:
- 4.11.1.4.2 Is encased in tamper-resistant plastic or is otherwise tamper-resistant.
- 4.11.1.4.3 Identifies the date of birth of the person receiving the prescription and has an identification number assigned to the document which can be recorded as part of the patient record.
- 4.11.2 Identification for mail order dispensed controlled substances must comply with all federal standards.
- 4.11.3 No filled prescription for any Schedule II controlled substance may be received at any drive through window unless the pharmacy is authorized to do so by the Office of Controlled Substances. Written prescriptions for Schedule II controlled substances may be initially presented at a drive through if the pharmacy has not obtained authorization, but the filled prescription must be picked up inside the pharmacy. Authorization to permit the receipt of filled Schedule II controlled substance prescriptions at a drive through window may be granted only if the pharmacy can demonstrate all of the following:

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- 4.11.3.1 A security camera system that captures clear images of the driver's face and the license plate of the vehicle receiving any filled prescription; and
- 4.11.3.2 A written policy indicating that when picking up a Schedule II controlled substance at a drive through window, the driver must be recorded as the person picking up the prescription; and
- 4.11.3.3 A written policy requiring staff to review the identification of the driver, capture an image of the identification of the driver, and store that image in the pharmacy's records for at least three years for every filled Schedule II prescription picked up at the drive through window.
- 4.12 Except when dispensed directly by a practitioner other than a pharmacy to an ultimate user, no Schedule V cough preparation containing codeine, dilaudid or any other narcotic cough preparation may be dispensed without the written or oral prescription of a practitioner.

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

Uniform Controlled Substances Act Regulations

DEPARTMENT OF TRANSPORTATION DIVISION OF TECHNOLOGY AND SUPPORT SERVICES

Statutory Authority: 17 Delaware Code, Section 132(e) and 29 Delaware Code, Section 8404(8)
(17 Del.C. §132(e), 29 Del.C. §8408(8))
2 DE Admin. Code 2501

PUBLIC NOTICE

2501 External Equal Employment Opportunity Complaint Procedure

Background

As authorized under 17 **Del.C.** §132(e) and 29 **Del.C.** §8404(8), the Delaware Department of Transportation, through its Division of Technology and Support Services, seeks to adopt amendments to its existing regulations regarding procedures for addressing, investigating and responding to complaints of discrimination on the grounds of race, color, religion, sex, age, national origin or disability with respect to its External EEO Programs.

Public Comment Period

The Department will take written comments on the proposed revisions concerning its External Equal Opportunity Complaint Procedure from September 1, 2012 through September 30, 2012. The proposed Regulations appear below.

Any questions or comments regarding this document should be directed to:

Marti Dobson, Director, Technology and Support Services
Delaware Department of Transportation
P.O. Box 778
Dover, DE 19903
(302) 760 -2099 (phone)
(302) 760-2895 (fax)
marti.dobson@state.de.us

2501 External Equal Opportunity Complaint Procedure

1.0 Purpose

To specify a process to be employed by the Delaware Department of Transportation (DeIDOT) to address, investigate and respond to complaints of discrimination on grounds of race, color, religion, sex, age, or national origin or disability, with respect to the programs comprising DeIDOT's External EEO Programs.

2.0 Coverage

This procedure covers complaints filed by individuals, organizations or business entities which believe that they have been subjected to discrimination in violation of applicable non-discrimination statutes acting pursuant to a Federal-aid contract with the Department. A complaint may also be filed by a representative for the aggrieved person or party with the aggrieved party's consent.

3.0 Definitions

"Discrimination" involves any act or inaction, whether intentional or unintentional in any program or activity of a Federal-aid recipient, sub-recipient, or contractor, which results in disparate (unfavorable) treatment, disparate impact, or perpetuating the effects of prior discrimination based on race, color, sex, national origin, age, disability or in the case of disability, failing to make a reasonable accommodation. An action (or inaction) whether intentional or unintentional, through which a person, based on race, color, sex, age, national origin or disability, has been subjected to unequal treatment or denied benefits under any program or activity receiving financial assistance from the FHWA under Title 23 U.S.C.

"Investigator" means an individual or entity assigned to conduct an investigation of a complaint. This may be DeIDOT personnel or consultant(s) acting on DeIDOT's behalf.

"Investigative report" means a written record which contains various documents and information acquired during the investigation under this procedure, including affidavits of the complainant, the alleged discriminating official, and the witnesses, and copies of, or extracts from, records, policy statements, or regulations of the agency, organized to show their relevance to the complaint or the general environment out of which the complaint arose. This document will be provided to the Federal Highway Administration, as required, and will otherwise be maintained confidentially, except where a lawsuit on the same subject has been filed.

"Probable cause" means evidence and information gathered and reviewed as part of the investigation supports the allegations of the complainant and comprise sufficient support that discrimination, or a violation, and/or non-compliance may have occurred.

"Respondent" means a person, party, business entity or agency whose action or inaction is complained of by an aggrieved party as being discriminatory or non-compliant with applicable statutes, regulations and policies.

4.0 Timely Filing and Withdrawal of Complaint

- 4.1 Complaints must be filed in writing and submitted to DeIDOT. Complaints shall be signed by the complaining party or their representative and shall include the complainant's name, address, and telephone number. Complaints must clearly state specifically those facts and circumstances surrounding the claimed discrimination covered by this procedure and the applicable regulations. Complainants may receive assistance from DeIDOT personnel to reduce to writing the facts and circumstances of the alleged discrimination with specificity to provide for full investigation.
- 4.2 Allegations received by fax containing such information and signature will be processed. Allegations received by e-mail or by telephone will be reduced to writing or printed and provided to the complainant for confirmation or revision for accuracy and signature before processing.
- 4.3 Complaints must be filed no later than 180 days after the following:
 - 4.3.1 The date of the alleged act of discrimination; or

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- 4.3.2 The date when the person(s) became aware of the alleged discrimination; or
- 4.3.3 Where there has been a continuing course of conduct, the date on which that conduct was discontinued or the latest instance of the conduct.
- 4.4 Complainants may withdraw their complaint at any time. This action closes the case without prejudice.
- 4.5 A complaint may be dismissed for any one of the following reasons:
 - 4.5.1 The complaint is not filed in a timely manner, according to the requirement in Section C above.
 - 4.5.2 The complainant does not allege a basis covered by the statutes providing authority for this complaint procedure.
 - 4.5.3 The complaint does not allege any harm with regard to covered programs or statutes.
 - 4.5.4 The complainant fails to respond to repeated requests for additional information needed to process the complaint.
 - 4.5.5 The complainant cannot be located after reasonable attempts.
 - 4.5.6 The complainant has filed a legal action in Federal District Court with the same basis(es) and issue(s) involved in the complaint.
 - 4.5.7 The same complaint allegations have been filed with another Federal, State, or local agency.

5.0 Persons Authorized to Receive Complaints

- 5.1 The Department's Civil Rights Complaint Procedure is designed to provide for progressively more formal steps that give opportunity for adjustment at several key points.
 - 5.1.1 Civil Rights Administrator - DeIDOT
 - 5.1.2 Contract Services Administrator - DeIDOT
 - 5.1.3 Representative of the Federal Highway Administration (FHWA)
- 5.2 Complaints received alleging discrimination and/or discriminatory acts or treatment will be retained by or forwarded to DeIDOT's Civil Rights Administrator for processing. Copies of complaints received alleging discrimination and/or discriminatory acts or treatment by DeIDOT or its personnel will also be forwarded to FHWA. The DelMar Division office can be reached at (302) 734-5323.

6.0 Complaint Processing

- 6.1 All complaints will be logged in, upon receipt, by the Civil Rights Administrator. Complainants will be advised in writing of the receipt of their complaint and of the process for handling the complaint. Acknowledgement letters will be sent to the complainant and to the respondent containing this information and information about forwarding of a complaint to the FHWA, when appropriate.
- 6.2 The Civil Rights Administrator will provide for the prompt formal investigation of the complaint. In instances of alleged Title VI and/or ADA violations, the investigation will include securing necessary information from sub-recipients regarding the project referenced in the complaint. The investigation will include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of similarly-situated individuals or entities, and all other relevant data and information, which will be recorded in the investigative file.
- 6.3 In the event any person (individually or as an agency), organization representative, or business entity (not including the complainant) fails or refuses to furnish information to an investigator, such failure may result in a finding of determination of probable cause that non-compliance exists, except in complaints alleging Title VI or ADA violations. The investigator will indicate in the investigative report that the individual or contractor refused to provide pertinent information and outline efforts made to obtain the information. In those instances of possible Title VI or ADA violations the complaint, along with the investigative file and report will be forwarded to the FHWA DelMar Division Office and the FHWA - Headquarters, Civil Rights for a final determination.
- 6.4 The investigation will be completed within ~~60~~ 90 days of receipt by the Civil Rights Administrator. Where circumstances exist justifying additional investigative time, the deadline for completion of the investigation may be extended as is deemed necessary. Upon completion of the investigation, an investigative report will be generated outlining the investigative steps taken, information and evidence

gathered, analysis of evidence and information, persons contacted and ~~conclusion~~ recommendation(s). The complainant will be given a written summary of the results of the investigation.

6.5 Findings of non-compliance Determinations of Probable Cause reflecting non-compliance

6.5.1 DelDOT's Civil Rights Administrator will review the results of any investigation and determine whether the record contains sufficient information and evidence to support probable cause that any violation or non-compliance exists. The Civil Rights Administrator will render a finding of probable cause exists of non-compliance or violation based on the allegations and investigation in complaints that are filed involving circumstances that do not allege Title VI or ADA violations. recommendations based on the allegations and investigation will be made and the complaint along with full investigation forwarded to the FHWA DelMar Division Office and FHWA - Headquarters, Civil Rights for a final determination.

6.5.2 The Civil Rights Administrator will engage in affirmative efforts to conciliate and resolve satisfactorily all determinations that probable cause exists regarding potential violations of applicable statutes or failure to comply with applicable regulations. A corrective action plan will be generated for any respondent, including any sub-recipient of Federal funds, ~~found to be non-compliant where evidence supports a determination that probable cause of non-compliance exists.~~ Additionally, DelDOT's Civil Rights Administrator will establish and monitor a timetable for remedial action for completion.

6.6 Findings of Compliance Determinations of No Probable Cause or reflecting compliance

6.6.1 DelDOT's Civil Rights Administrator will review the results of any investigation and determine whether there is no probable cause that any violation or non-compliance exists, except in complaints alleging Title VI or ADA violations. The Civil Rights Administrator will render a finding of written determination reflecting that no probable cause exists and that evidence reflects compliance or no violation in those instances where, based on the allegations and investigation, the evidence indicates and it is determined that the responding party acted in conformity with laws/regulations and/or there was no apparent violation. In those instances of possible Title VI or ADA violations the complaint, along with the investigative file and report, will be forwarded to the FHWA DelMar Division Office and FHWA – Headquarters, Civil Rights for a final determination.

6.6.2 Should the complainant disagree the complainant may appeal the determination.

6.7 Notification

6.7.1 Where a ~~finding of~~ determination of probable cause reflecting non-compliance or violation has been rendered, the complainant will receive written notification of any efforts to conciliate, any corrective action plan established, the timetable for completing the corrective actions, and information regarding all available avenues of appeal.

6.7.2 Where a ~~finding of~~ determination of no probable cause which reflects compliance or no apparent violation has been rendered the complainant will receive written notification of the determination and information regarding all available avenues of appeal continued redress. Complainant will be advised that the investigative report and all related documentation will be forwarded to FHWA for a final letter of findings, where appropriate.

6.7.3 ~~Respondent will receive written notification upon closure of the investigation and when appropriate notice of all available avenues of appeal. All complaints alleging Title VI or ADA violations will be forwarded, along with the investigative file and report to the FHWA DelMar Division Office and FHWA – Headquarters, Civil Rights for a final determination. In those instances, Complainants will receive written notification the complaints have been forwarded.~~

6.7.4 Respondent will receive written notification upon closure of the investigation, notice of forwarding of the investigation to FHWA, and when appropriate notice of all available avenues of appeal.

7.0 Resolution of Complaint and Appeal Process

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- 7.1 It is in the best interest of all parties involved that issues raised in a complaint of discrimination be resolved informally. Every effort will be made to pursue resolution of the complaint, even while the investigation is underway.
- 7.2 Based on the investigation and the analysis of information and evidence gathered, specific recommendations or a formal corrective action plan may be generated. ~~The respondent has the right to request review of the complaint and the investigation as an appeal where specific recommendations or a formal corrective action plan have been generated.~~
- 7.3 ~~In those instances where the complainant continues to be aggrieved, the complainant has the right to request review of the investigation as an appeal. Complainants will be advised of their right to file their grievances with other governmental agencies (such as the Delaware Human Relations Commission) or appropriate Federal agencies, including but not limited to FHWA, U. S. DOT or the EEOC.~~
- 7.4 Appeals
- 7.4.1 ~~Appeals will be reviewed by the Director, Technology and Support Services. Any decision reached on appeal will be final.~~
- 7.4.2 ~~All appeals must be in writing, outlining the appealing party's issues, concerns, or basis for the appeal.~~
- 7.4.3 ~~After review of the investigative file and any additional information submitted, a final determination will be made. Complainants and respondents will be informed in writing of the final decision within ten business days. Complainants dissatisfied with the results of the Complaint Process will be advised of their right to file their grievances with other governmental agencies (such as the Delaware Human Relations Commission) or appropriate Federal agencies.~~

DIVISION OF TRANSPORTATION SOLUTIONS

Statutory Authority: 17 Delaware Code, Sections 134 and 141; 21 Delaware Code, Chapter 41
(17 Del.C. §134, 141 and 21 Del.C. Ch. 41)
2 DE Admin. Code 2402

PUBLIC NOTICE

2402 Delaware Manual on Uniform Traffic Control Devices

Under Title 17 of the **Delaware Code**, Sections 134 and 141, as well as 21 **Delaware Code** Chapter 41, the Delaware Department of Transportation (DelDOT), adopted a Delaware version of the Federal Manual on Uniform Traffic Control Devices (MUTCD). The Department has now drafted revisions to the Delaware MUTCD. A description of the proposed changes accompanies this notice.

The Department will take written comments on the draft changes to the Delaware MUTCD from September 1, 2012 through September 30, 2012. Copies of the Draft Delaware MUTCD Revisions can be obtained by reviewing or downloading a PDF copy at the following web address: <http://regulations.delaware.gov/>

Questions or comments regarding these proposed changes should be directed to: Adam Weiser, P.E., PTOE, Safety Programs Manager, Traffic Section, Division of Transportation Solutions, Delaware Department of Transportation 169 Brick Store Landing Road Smyrna, DE 19977 (302) 659-4073 (telephone) (302) 653-2859 (fax) adam.weiser@state.de.us

*Please Note: Due to the size of the proposed regulation, the Delaware Manual on Uniform Traffic Control Devices is not being published here. A PDF version is available at the following location:

2402 Delaware Manual on Uniform Traffic Control Devices

DelDOT is proposing several changes to the 2011 version of the Delaware MUTCD. Many of the changes are editorial, or are corrections of errors that were discovered by FHWA during the past two (2) years since the

publication of the 2009 Federal MUTCD. Additionally, DeIDOT has also developed minor modifications to the manual based on experience using the Delaware MUTCD since its publication in July 2011. Each proposed modification, along with the justification for the change, is listed below:

Page	Sec/Fig	Para.	DeIDOT Comment / Proposed Change	Modification
I-5	Table I-2	-	Replace Table I-2 with updated Compliance Deadlines	<p><i>Table was updated accordingly.</i> Justification: DE MUTCD has been revised to make it compliant with Revision 2 of the FHWA MUTCD dated May 2012.</p>
1A-4	1A.08	06 & 06A	<ul style="list-style-type: none"> • Remove "speed measurement pavement markings" from the list of devices in Item B of paragraph 06 • Add items F. and G. to list of devices in paragraph 06 which read "Non-traffic related residential signs, such as neighborhood watch signs and CCTV surveillance signs" and "Municipal/community "Gateway" signs", respectively. • Additional standard paragraph 06A which reads: "The items noted in the preceding paragraph, letters D through G, which are not considered traffic control devices: A. Shall not be co-posted on official traffic control devices. B. Shall not resemble official traffic control devices. C. Shall not be installed, owned, or maintained by the Delaware Department of Transportation." • Remove Standard and Guidance paragraphs 07 and 08 	<p>Text was removed or added accordingly. Justification: Standard was modified to pertain to DeIDOT's requirements for signs and other devices that do not have any traffic control purpose.</p>
1A-5	1A.09	02	Modify the text of this section to conform to the new rulemaking by FHWA related to the term SHALL and Engineering Judgment	<p><i>Text was modified accordingly.</i> Justification: This section of the DE MUTCD is now compliant with the corresponding section of the revised FHWA MUTCD (dated May 2012) and is no longer considered a Delaware Revision to the MUTCD.</p>
1A-12	1A.13	01	Modify the text of this section to conform to the new rulemaking by FHWA related to the term SHALL and Engineering Judgment	<p><i>Text was modified accordingly.</i> Justification: This section of the DE MUTCD is now compliant with the corresponding section of the revised FHWA MUTCD (dated May 2012) and is no longer considered a Delaware Revision to the MUTCD.</p>

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1A-28	1A.14	01	Additional text to be added "LRT – light rail transit" in Item 27	<i>Text was modified accordingly.</i> Justification: Listed on FHWA's "Known Errors in the 2009 MUTCD" dated April 24, 2012.
1A-29	Table 1A-1	-	Change the word "US" in the "US Numbered Route" row to "(See Table 1A-2)"	<i>Text in table was modified accordingly.</i> Justification: Listed on FHWA's "Known Errors in the 2009 MUTCD" dated April 24, 2012.
1A-30	Table 1A-2	-	<ul style="list-style-type: none"> In "State, county, or other non-US or non-Interstate numbered route" row, the double asterisk in the second column should be replaced with a single asterisk, and a double asterisk should be added after "[Number]" in the fourth column. A new row should be added between the rows for "Upper" and "Vehicle(s)" that has "US Numbered Route", "US*", a dash, and "[Number]**" in each column, respectively. 	<i>Text in table was modified accordingly.</i> Justification: Listed on FHWA's "Known Errors in the 2009 MUTCD" dated April 24, 2012.
	Part 2 (All)	-	Revise text, tables and figures throughout document based on federally-identified known errors and omissions.	<i>Text, tables and figures were revised to reflect errors and omissions identified in the federal MUTCD by the FHWA. These changes are generally non-substantive in nature.</i> Justification: Consistency with federal MUTCD
2B-6	2B.03	Table 2B-1	Revise table to reflect changes from Interim Guidance dated 4/2/12 related to NO TEXTING AND HAND HELD CELL PHONES sign	<i>Table was modified accordingly.</i> Justification: Provide guidance regarding the sizes of NO TEXTING AND HAND HELD CELL PHONES sign
2B-54	Figure 2B-21	-	Revise figure to show crosswalks, dotted lines, W2-6 and R6-5P signs as optional at mini-roundabouts.	<i>Figure was modified accordingly.</i> Justification: Consistency with the Traffic Calming Manual
2B-77/ 78	2B.70	01 - 04	Revise text to reflect changes from Interim Guidance dated 4/2/12 related to "Engine Compression Brake Prohibition" sign	<i>Text was modified accordingly.</i> Justification: Guidance revised in to reflect changes from Interim Guidance dated 4/2/12.
2B-78	Figure 2B-33	-	Add NO TEXTING AND HANDHELD CELL PHONE sign	<i>Figure was modified accordingly.</i> Justification: Figure revised in response to new state law regarding the NO TEXTING AND HANDHELD CELL PHONE signs
2B-79	2B.72	01 - 09	Add new section related to NO TEXTING AND HANDHELD CELL PHONES sign	<i>Text was added accordingly.</i> Justification: New sign added to reflect new state law
2C-6	2C.04	Table 2C-2	Revise size of Advance Street Name (W16-8 and W16-8aP) plaques to match recent DelDOT guidance	<i>Table was modified accordingly.</i> Justification: Revised to meet requirements for upper-lower case text.

2C-31/ 32	2C.46	3A&3B	Revise text to make W2-6 signs a "should" condition for state-maintained roads over 25 mph. Add text to allow W2-6 to be omitted at mini-roundabouts with a speed limit of 25 mph or less	<i>Text was modified accordingly.</i> Justification: Consistency with the Traffic Calming Manual
2C-40	2C.63	02A	Provide an option to allow smaller (6 x 12 inch) Type 3 Object markers to be installed along subdivision streets.	<i>Text was added accordingly.</i> Justification: Smaller versions of the Type 3 Object markers should be permitted along subdivision streets.
2D-3	2D.04	Table 2D-1	Update sign heights for D3-1, 1a and D3-1-DE1 in Table 2D-1 to match recent DelDOT guidelines for street name signs	<i>Table was updated accordingly.</i> Justification: Revised to meet requirements for upper-lower case text on street name signs.
2D-29	2D.43	Table 2D-2	Update sign heights in Table 2D-2 to match recent DelDOT guidelines for street name signs	<i>Table was updated accordingly.</i> Justification: Revised to meet requirements for upper-lower case text on street name signs.
2H-1	2H.02	Table 2H-1	Add size of Welcome to Delaware signs	<i>Text was added to the table accordingly.</i> Justification: Provide guidance regarding the sizes of Welcome to Delaware signs
2H-2	Figure 2H-1	-	Add Welcome to Delaware sign	<i>Sign was added to the Figure accordingly.</i> Justification: Sign was omitted from the earlier version of the DE MUTCD
2H-4	2H.04	01B	Add text regarding the use of the Welcome to Delaware sign at state boundaries	<i>Text was added accordingly.</i> Justification: Provide guidance regarding the use of Welcome to Delaware signs
2H-9	2H.08	07A & 07C	Change the word "ground" to "group"	<i>Text was modified accordingly.</i> Justification: Typographical errors
	Part 3 (All)	-	Revise text, tables and figures throughout document based on federally-identified known errors and omissions.	<i>Text, tables and figures were revised to reflect errors and omissions identified in the federal MUTCD by the FHWA. These changes are generally non-substantive in nature.</i> Justification: Consistency with federal MUTCD
3B-54	Figure 3B-15F	-	Revise figure to shown the placement of RPMs along right-turn lanes	<i>Figure was modified accordingly.</i> Justification: Provide additional guidance regarding the placement of RPMs along right-turn lanes
3C-1	3C.03	02A	Add an option to omit dotted lines at mini-roundabouts with a speed limit of 25 mph or less	<i>Text was modified accordingly.</i> Justification: Consistency with the Traffic Calming Manual
3C-2	3C.05	03A	Add an option to omit crosswalks at mini-roundabouts with a speed limit of 25 mph or less	<i>Text was modified accordingly.</i> Justification: Consistency with the Traffic Calming Manual

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4D.11	4D.09	05	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4D-18	4D.13	10	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4D-36	Figure 4D-17	-	Remove "(Delaware Revision)" underneath title block.	<p><i>Text was removed from figure.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4D-38	Figure 4D-19	-	Remove "(Delaware Revision)" underneath title block.	<p><i>Text was removed from figure.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4E-14	4E.11	15	Change reference to "Section 4D.13" to "Section 4E.13"	<p><i>Text was modified accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4F-3	Figure 4F-3	-	Update Figure 4F-3 to match phrase used in section 4F.03 "pedestrian change interval" instead of "pedestrian clearance interval"	<p><i>Text in figure was modified accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4F-4	4F.03	02 & 03	Change three phrases which read "pedestrian clearance interval" to "pedestrian change interval".	<p><i>Text was modified accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
4G-4	4G.04	18	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
6F-1	6F.01	05A	The link to ATSSA does not work on the online version of the DE MUTCD	<p><i>A hyperlink was created in the text so the online version of the DE MUTCD will have the correct URL.</i></p> <p>Justification: Previously, the website was not defined as a hyperlink and users attempting to access the website were taken to an incorrect URL address.</p>

6F-3	Table 6F-1 (Sheet 1 of 3)	-	<ul style="list-style-type: none"> In the "Sign or Plaque" column, the name of the R3-7 sign should be changed from "Mandatory Movement (text)" to "Right (Left) Lane Must Turn Right (Left)" to be consistent with Table 2B-1 In the "Sign or Plaque" column, the name of the W1-8 sign should be changed from "Chevron" to "Chevron Alignment" to be consistent with Table 2C-2. 	<p><i>Text in table was modified accordingly.</i> Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
6F-17	Figure 6F-4 (Sheet 3 of 3)	-	<ul style="list-style-type: none"> The image for the W20-5 sign is shown incorrectly. The correct image is shown and detailed in the 2012 Supplement to the Standard Highway Signs and Markings book. 	<p><i>Image for W20-5 sign was updated to be compliant with the 2012 Supplement to the Standard Highway Signs and Markings book.</i> Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
6F-41	6F.74	02	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i> Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
6F-52	6F.86	05B	Delete "of 15 minutes or less"	<p><i>Text was deleted accordingly.</i> Justification: DelDOT has decided that this Delaware Revision was overly restrictive and prefers removal of this time limitation pertaining to short-duration operations</p>
6G-2	6G.02	13A	Delete "of 15 minutes or less"	<p><i>Text was deleted accordingly.</i> Justification: DelDOT has decided that this Delaware Revision was overly restrictive and prefers removal of this time limitation pertaining to short-duration operations</p>
6H-3	Table 6H-1 (Sheet 2 of 2)	-	Add line for "Rolling Road Blocks on a Limited Access Multi-Lane, Divided Highway" with "-", "-", and "TA-35H" in columns 2, 3, and 4 respectively.	<p><i>Text in table modified to include reference to new Figure 6H.35H</i> Justification: New line added to table to reference new figure which provides additional guidance and uniformity in the maintenance of traffic for Rolling Road Block Operations.</p>

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6H-106	6H.35H	All	Develop new section discussing Rolling Road Block Operations.	<p><i>New section was developed related to Rolling Road Block Operations and was inserted into the document.</i></p> <p>Justification: New section added to provide additional guidance and uniformity in the maintenance of traffic for Rolling Road Block Operations.</p>
6H-107	Figure 6H.35H	-	Create Rolling Road Block Operations figure which corresponds to Rolling Road Block Operations section 6H.35H.	<p><i>New figure related to corresponding section discussing Rolling Road Block Operations was created and inserted into the document.</i></p> <p>Justification: New figure added to provide additional guidance and uniformity in the maintenance of traffic for Rolling Road Block Operations corresponding to Section 6H.35H</p>
7B-2	7B.03	03	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
7B-4	Figure 7B-1	-	Delete asterisk on S3-1 DE sign and remove errant letter "J" in lower left corner	<p><i>Figure revised accordingly</i></p> <p>Justification: Typographical error</p>
8B-9	8B.06	01	Remove "(DE Revision)".	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
8B-15	8B.22	01	Remove "(DE Revision)".	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
9A-1	9A.07	01	Remove "(DE Revision)" and change text to black.	<p><i>Text was removed and color of font was changed accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
9B-2	Table 9B-1 (Sheet 1 of 2)	-	In the "Sign or Plaque" column, the name of the W1-1,2,3,4,5 signs should be changed from "Turn and Curve Warning" to "Horizontal Alignment" to be consistent with Table 2C-2.	<p><i>Text in table was modified accordingly.</i></p> <p>Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>

9B-3	Table 9B-1 (Sheet 2 of 2)	-	<p>In the "Sign or Plaque" column, the numbers of the digits for the D10-1a, D10-2a, and D10-3a signs should be changed to 2, 3, and 4, respectively, to be consistent with Table 2H-1.</p>	<p><i>Text in table was modified accordingly.</i> Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>
9C-9	Figure 9C.1G	-	<p>Create figure related to the placement of RPM's within bicycle lanes adjacent to right turn lanes.</p>	<p><i>New figure related to RPM's within bicycle lanes adjacent to right turn lanes was created and inserted into the document.</i> Justification: New figure created to provide improved guidance and uniformity in the application of RPM's within bicycle lanes.</p>
9C-1	9C.03	04	<p>The reference to "Figure 9C-2" should be changed to "Figure 9C-8"</p>	<p><i>Text was modified accordingly.</i> Justification: This text is no longer a Delaware revision as it has been noted in FHWA's list of "Known Errors in the 2009 MUTCD" dated 4/24/2012.</p>

PDF Versions of each part are available at the following links:

- [Introduction](#)
- [Part 1 - General](#)
- [Part 2 - Signs](#)
- [Part 3 - Markings](#)
- [Part 4 - Highway Traffic Signals](#)
- [Part 5 - Low Volume Roads](#)
- [Part 6 - Temporary Traffic Control](#)
- [Part 7 - School Areas](#)
- [Part 8 - Railroad](#)
- [Part 9 - Bicycle Facilities](#)

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

ORDER**501 Harness Racing Rules and Regulations**

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 August 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 Rules 6.2.2.1.10, 6.2.2.2 and 8.2.2.4 in the July 1, 2012 *Register of Regulations* (Volume 15, Issue 1) and for two consecutive weeks in July, 2012 in *The News Journal* and *Delaware State News*. The Commission proposed to update Rules 6.2.2.1.10, 6.2.2.2 and 8.2.2.4 in its entirety after Rules Committee review.

2. The Commission received no written comments in response to the public notice. The Commission held a public hearing on August 14, 2012, at 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 amendment to the Commission's Rules.

4. After considering the rules change as proposed, the Commission hereby adopts the rules as proposed. The Commission believes that this rules change will allow the Delaware Harness Racing Commission rules 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 September 1, 2012.

IT IS SO ORDERED this 14th day of August, 2012.

Beverly H. Steele, Chairwoman

Robert (Breezy) Brown, Commissioner

George P. Staats, Commissioner

Larry Talley, Commissioner

Patt Wagner, Commissioner

***Please note that no changes were made to the regulation as originally proposed and published in the July 2012 issue of the *Register* at page 17(15 DE Reg. 17). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

501 Harness Racing Rules and Regulations

DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

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

14 DE Admin. Code 815

ORDER

815 Health Examinations and Screening

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 **DE Admin. Code** 815 Health Examinations and Screening related to the 9th grade health examination. The amendments change the requirement for a 9th grade health examination to be effective beginning with the 2013-2014 school year. The 9th grade health examination will be strongly recommended in the 2012-2013 school year. The delay for required implementation is to provide additional time for parents and guardians to be advised and to prepare for the new requirement. Districts and charters schools have already embarked on communicating information to parents and guardians related to the new 9th grade health examination.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on July 6, 2012, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities as well as an educator in Delaware. The Councils would have preferred full implementation in the 2012-2013 but understood the rationale for additional time for the roll-out. The educator supports the delay; however, in addition supports one form rather than a separate form for interscholastic sports and the general health examination form. The Department is working on developing a form that would work for multiple purposes.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 815 Health Examinations and Screening in order to delay the required implementation of the 9th grade health examination until the 2013-2014 school year to allow for more outreach to parents and guardians.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 815 Health Examinations and Screening. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 815 Health Examinations and Screening attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 815 Health Examinations and Screening hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 815 Health Examinations and Screening amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 815 Health Examinations and Screening in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on August 16, 2012. 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 16th day of August 2012.

Department of Education

Mark T. Murphy, Secretary of Education

Approved this 16th day of August 2012

815 Health Examinations and Screening

1.0 Definitions

"**Delaware School Health Examination Form**" means the age appropriate form developed by the Delaware Department of Education for documenting information from the parent, guardian or Relative Caregiver and healthcare provider on the student's health status.

"**Delaware Interscholastic Athletic Association (DIAA) Pre-Participation Physical Evaluation**" means the form approved by the DIAA.

"**Healthcare Provider**" means a currently licensed physician, advanced practice nurse, nurse practitioner, or physician's assistant.

"**Health Examination or Health Evaluation**" means the medical or nursing examination or evaluation and assessment of the body by a healthcare provider to determine health status and conditions.

15 DE Reg. 838 (12/01/11)

2.0 Health Examinations

2.1 All public school students shall have two health examinations, as provided in this section, that have been administered by a healthcare provider. The first health examination shall have been done within the two years prior to entry into school. Beginning in school year 2012-2013, the second health examination shall be ~~required~~ strongly recommended and not required for entering grade 9 students. Beginning in school year 2013-2014, the second health examination shall be required for entering grade 9 students. The required health examination ~~and~~ shall be done within the two years prior to entry into grade 9. Within thirty calendar days after entry, new enterers and grade 9 students who have not complied with the second health examination requirement shall have received the health examination or shall have a documented appointment with a licensed health care provider for the health examination. For purposes of this regulation only, students entering grades 10, 11 or 12 in the ~~2012-~~

~~2013~~ 2013-2014 school year shall not be required to have the second health examination or evaluation.

- 2.1.1 The requirement for the health examination may be waived for students whose parent, guardian or Relative Caregiver, or the student if 18 years or older, or an unaccompanied homeless youth (as defined by 42 USC 11434a) presents a written declaration acknowledged before a notary public, that because of individual religious beliefs, they reject the concept of health examinations.
- 2.1.2 Notwithstanding the above, a second health examination shall not be required if the first health examination is within two years of entering Grade 9.
- 2.1.3 The Delaware School Health Examination Form or the DIAA Pre-Participation Physical Evaluation form may be used as documentation of the health examination. In addition, a district or charter school may accept a health examination or evaluation documentation on a form which includes, at a minimum, health history, immunizations, results on medical testings and screenings, medical diagnoses, prescribed medications and treatments, and healthcare plans.
- 2.1.4 The school nurse shall record all findings within the student's electronic medical record (see 14 **DE Admin. Code** 811) and maintain the original copy in the child's medical file.

Non regulatory note: See 14 **DE Admin. Code** 1008.3 and 14 **DE Admin. Code** 1009.3 for physical or health examination requirements associated with participation in sports.

3.0 Screening

- 3.1 Vision and Hearing Screening
 - 3.1.1 Each public school student in kindergarten and in grades 2, 4, 7 and grades 9 or 10 shall receive a vision and a hearing screening by January 15th of each school year.
 - 3.1.1.1 In addition to the screening requirements in ~~2.1.4~~ 3.1.1, screening shall also be provided to new enterers, students referred by a teacher or an administrator, and students considered for special education.
 - 3.1.1.1.1 Driver education students shall have a vision screening within a year prior to their in car driving hours.
 - 3.1.2 The school nurse shall record the results within the student's electronic medical record and shall notify the parent, guardian or Relative Caregiver or the student if 18 years or older, or an unaccompanied homeless youth (as defined by 42 USC 11434a) if the student has a suspected problem.
- 3.2 Postural and Gait Screening
 - 3.2.1 Each public school student in grades 5 through 9 shall receive a postural and gait screening by December 15th.
 - 3.2.2 The school nurse shall record the findings within the student's electronic medical record (see 14 **DE Admin. Code** 811) and shall notify the parents, guardian or Relative Caregiver, or the student if 18 years or older, or an unaccompanied homeless youth (as defined by 42 USC 11434a) if a suspected deviation has been detected.
 - 3.2.2.1 If a suspected deviation is detected, the school nurse shall refer the student for further evaluation through an on site follow up evaluation or a referral to the student's health care provider.
- 3.3 Lead Screening
 - 3.3.1 Children who enter school at kindergarten or at age 5 or prior, shall be required to provide documentation of lead screening as per 16 **Del.C.** Ch. 26.
 - 3.3.1.1 For children enrolling in kindergarten, documentation of lead screening shall be provided within sixty (60) calendar days of the date of enrollment. Failure to provide the required documentation shall result in the child's exclusion from school until the documentation is provided.
 - 3.3.1.2 Exemption from this requirement may be granted for religious exemptions, per 16 **Del.C.** §2603.

- 3.3.1.3 The Childhood Lead Poisoning Prevention Act, 16 **Del.C.**, Ch. 26, requires all health care providers to order lead screening for children at or around the age of 12 months of age.
- 3.3.2 The school nurse shall document the lead screening within the student's electronic medical record. See 14 **DE Admin. Code** 811.
-

PROFESSIONAL STANDARDS BOARD

Statutory Authority: 14 Delaware Code, Section 1205(b) (14 **Del.C.** §1205(b))
14 **DE Admin. Code** 1570

REGULATORY IMPLEMENTING ORDER**1570 Early Childhood Special Education Teacher****I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

The Professional Standards Board, acting in cooperation and consultation with the Department of Education, seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 1570 Early Childhood Special Education Teacher. It was necessary to amend this regulation in order to facilitate proper and current formatting trends. There were no changes in certification requirements other than clarifying the requirements for those educators who seek this certification as their first Standard Certificate and those adding this Standard Certificate to one or more previously issued on their license. This regulation sets forth the requirements for a teacher of Early Childhood Exceptional Children Special Education.

Notice of the proposed amendment of the regulation was published in the Delaware *Register of Regulations* on June 1, 2012. The notice invited written comments. Comments were received from The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities. Several grammatical edits were noted and subsequently made.

II. FINDINGS OF FACTS

The Professional Standards Board and the State Board of Education find that it is appropriate to amend this regulation to comply with changes in statute.

III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Professional Standards Board and the State Board of Education conclude that it is appropriate to amend the regulation. Therefore, pursuant to 14 **Del.C.** §1205(b), the regulation attached hereto as Exhibit "A" is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), the regulation hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. TEXT AND CITATION

The text of the regulation amended shall be in the form attached hereto as Exhibit "A", and said regulation shall be cited as 14 **DE Admin. Code** 1570 of the *Administrative Code of Regulations* of the Professional Standards Board.

V. 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*.

APPROVED BY THE PROFESSIONAL STANDARDS BOARD THE 10TH DAY OF JULY, 2012

Kathleen Thomas, Chair	Chris Kenton
Michael Casson	David Kohan
Joanne Christian	Jill Lewandowski
Samtra Devard	Wendy Murray
Stephanie DeWitt	Mary Pinkston
Marilyn Dollard	Whitney Price
Karen Gordon	Shelley Rouser
Cristy Greaves	Jacque Wisnauskas

IT IS SO ORDERED THE 16TH DAY OF AUGUST, 2012.

Department of Education
Mark Murphy, Secretary of Education

APPROVED THIS 16th DAY OF AUGUST, 2012**STATE BOARD OF EDUCATION**

Teri Quinn Gray, Ph.D., President	Gregory Coverdale
Jorge L. Melendez, Vice President	Terry M. Whittaker, Ed.D.
G. Patrick Heffernan	Randall L. Hughes
Barbara B. Rutt	

1570 Early Childhood Exceptional Children Special Education Teacher**4.0 Content**

~~This regulation shall apply to the requirements for a Standard Certificate, pursuant to 14 Del.C. §1220(a), for Early Childhood Teacher Special Education (Birth to Grade 2).~~

2.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

“Certification” means the issuance of a certificate, which may occur regardless of a recipient's assignment or employment status.

“Department” means the Delaware Department of Education.

“Educator” means a person licensed and certified by the State under 14 Del.C. §1202 to engage in the practice of instruction, administration or other related professional support services in Delaware public schools, including charter schools, pursuant to rules and regulations promulgated by the Standards Board approved by the State Board. The term ‘educator’ does not include substitute teachers.

“Examination of Content Knowledge” means a standardized test which measures knowledge in a specific content area, such as PRAXIS™ II.

“Fifteen (15) Credits or Their Equivalent in Professional Development” means college credits or an equivalent number of hours, with one (1) credit equating fifteen (15) hours, taken either as part of a degree program or in addition to it, from a regionally accredited college or university of a professional development provided approved by the employing school district or charter school.

“Immorality” means conduct which is inconsistent with the rules and principles of morality expected of an educator and may reasonably be found to impair an educator's effectiveness by reason of his or her unfitness.

“License” means a credential which authorizes the holder to engage in the practice for which the license is issued.

“Major or Its Equivalent” means a minimum of thirty (30) semester hours of course work in a particular content area.

“NASDTEC” means The National Association of State Directors of Teacher Education and Certification. The organization represents professional standards boards, commissions and departments of education in all 50 states, the District of Columbia, the Department of Defense Dependent Schools, the U.S. Territories, New Zealand, and British Columbia, which are responsible for the preparation, licensure, and discipline of educational personnel.

“NCATE” means The National Council for Accreditation of Teacher Education, a national accrediting body for schools, colleges, and departments of education authorized by the U.S. Department of Education.

“Standard Certificate” means a credential issued to certify that an educator has the prescribed knowledge, skill, or education to practice in a particular area, teach a particular subject, or teach a category of students.

“Standards Board” means the Professional Standards Board established pursuant to 14 Del.C. §1201.

“State Board” means the State Board of Education of the State pursuant to 14 Del.C. §104.

“Valid and Current License or Certificate from Another State” means a current full or permanent certificate or license issued by another state. It does not include temporary, emergency or expired certificates or licenses issued from another state.

3.0 ~~Standard Certificate~~

The Department shall issue a Standard Certificate as a Early Childhood Teacher Special Education, Birth to Grade 2 to an educator who holds a valid Delaware Initial, Continuing, or Advanced License; or a Limited Standard, Standard or Professional Status Certificate issued by the Department prior to August 31, 2003 who has met the following requirements:

- 3.1 Acquired the prescribed knowledge, skill or education to practice in a particular area, to teach a particular subject or to instruct a particular category of students by:
 - 3.1.1 Obtaining National Board for Professional Teaching Standards certification in the area, subject, or category for which a Standard Certificate is requested; or
 - 3.1.2 Graduating from an NCATE specialty organization recognized educator preparation program or from a state approved educator preparation program, where the state approval body employed the appropriate NASDTEC or NCATE specialty organization standards, offered by a regionally accredited college or university, with a major or its equivalent in Early Childhood Special Education; or
 - 3.1.3 Satisfactorily completing the Alternative Routes for Licensure and Certification Program, the Special Institute for Licensure and Certification, or such other alternative educator preparation programs as the Secretary may approve; or
 - 3.1.4 Holding a bachelor's degree from a regionally accredited college or university in any content area and for applicants applying after September 11, 2006 for their first Standard Certificate, satisfactory completion of fifteen (15) credits or their equivalent in professional development related to their area of certification, of which at least six (6) credits or their equivalent must focus on pedagogy, selected by the applicant with the approval of the employing school district or charter school which is submitted to the Department; and
 - 3.1.5 A minimum of fifteen (15) credits in early childhood special education from a regionally accredited college or university, as more specifically set forth in 3.1.5.1 through 3.1.5.5. With approval of a Committee comprised of the candidate's principal or other designated school administrator, a higher education representative who teaches one of the approved courses, and a DOE representative, other verifiable professional experiences may be substituted for no more than nine (9) of the required credits.

- 3.1.5.1 Atypical Infants and Toddlers;
- 3.1.5.2 Emergent Literacy in Reading and Writing;
- 3.1.5.3 Assessment of Young Children;
- 3.1.5.4 Differentiated Instruction for Young Children; and
- 3.1.5.5 Consultation or Working with Families; and
- 3.2 For applicants applying after December 31, 2005, where a PRAXIS™ II examination in the area of the Standard Certificate requested is applicable and available, achieved a passing score as established by the Standards Board, in consultation with the Department and with the concurrence of the State Board, on the examination; or
- 3.3 Met the requirements for licensure and holding a valid and current license or certificate from another state in Early Childhood Special Education;
 - 3.3.1 The Department shall not act on an application for certification if the applicant is under official investigation by any state or local authority with the power to issue educator licenses or certifications, where the alleged conduct involves allegations of immorality, misconduct in office, incompetence, willful neglect of duty, disloyalty or falsification of credentials, until the applicant provides evidence of the investigation's resolution; or
- 3.4 Met the requirements for a Meritorious New Teacher Candidate Designation adopted pursuant to 14 Del.C. §1203.

4.0 Multiple Certificates

Educators may hold certificates in more than one area.

5.0 Application Requirements

An applicant for a Standard Certificate shall submit:

- 5.1 Official transcripts; and
- 5.2 Official scores on the Praxis II examination if applicable and available; or
- 5.3 Evidence of passage of the National Board for Professional Teaching Standards Certificate, if applicable; or
- 5.4 An official copy of the out of state license or certification, if applicable.
- 5.5 If applied for simultaneously with application for an Initial License, the applicant shall provide all required documentation for that application in addition to the documentation cited above.

6.0 Application Procedures for License Holders

If an applicant holds a valid Initial, Continuing, or Advanced Delaware License; or a Limited Standard, Standard or Professional Status Certificate issued prior to August 31, 2003 and is requesting additional Standard Certificates, only that documentation necessary to demonstrate acquisition of the prescribed knowledge, skill or education required for the additional Standard Certificate requested is required.

7.0 Effect of Regulation

This regulation shall apply to all requests for issuance of a Standard Certificate, except as specifically addressed herein. Educators holding a Professional Status Certificate or a Standard Certificate issued on or before August 31, 2003 shall be issued a Continuing License upon the expiration of their current Professional Status Certificate or Standard Certificate. The Standard Certificate for each area in which they held a Professional Status Certificate or a Standard Certificate shall be listed on the Continuing License or the Advanced License. The Department shall also recognize a Limited Standard Certificate issued prior to August 31, 2003, provided that the educator successfully completes the requirements set forth in the prescription letter received with the Limited Standard Certificate. Requirements must be completed by the expiration date of the Limited Standard Certificate, but in no case later than December 31, 2008.

8.0 Present Preschool Exceptional Children Teachers Protected

Those teachers authorized to teach classes of preschool exceptional children prior to April 20, 1978 on the basis of a standard exceptional children teaching License and who have the recommendation of the local district superintendent shall be authorized to continue in such a teaching assignment in the district where the assignment was authorized. Authorization to teach in this circumstance does not constitute a License transferable to any other school district.

9.0 Validity of a Standard Certificate

A Standard Certificate is valid regardless of the assignment or employment status of the holder of a certificate or certificates, and is not subject to renewal. It shall be revoked in the event the educator's Initial, Continuing, or Advanced License or Limited Standard, Standard, or Professional Status Certificate is revoked in accordance with 14 ~~DE Admin. Code~~ 1514. An educator whose license or certificate is revoked is entitled to a full and fair hearing before the Professional Standards Board. Hearings shall be conducted in accordance with the Standards Board's Hearing Procedures and Rules.

40.0 Secretary of Education Review

The Secretary of Education may, upon the written request of the superintendent of a local school district or charter school administrator or other employing authority, review credentials submitted in application for a Standard Certificate on an individual basis and grant a Standard Certificate to an applicant who otherwise does not meet the requirements for a Standard Certificate, but whose effectiveness is documented by the local school district or charter school administrator or other employing authority.

10 DE Reg. 696 (10/01/06)

1.0 Content

- 1.1 This regulation shall apply to the issuance of a Standard Certificate, pursuant to 14 Del.C. §1220(a), for Early Childhood Exceptional Children Special Education Teacher. This certification is for Birth to Grade 2, however, certification as an Exceptional Children Special Education Teacher may also be used in K to grade 2.
- 1.2 Except as otherwise provided, the requirements set forth in 14 DE Admin. Code 1505 Standard Certificate, including any subsequent amendment or revision thereto, are incorporated herein by reference.

2.0 Definitions

The definitions set forth in 14 DE Admin. Code 1505 Standard Certificate, including any subsequent amendment or revision thereto, are incorporated herein by reference.

3.0 Standard Certificate

- 3.1 In accordance with 14 Del.C. §1220(a), the Department shall issue a Standard Certificate as an Early Childhood Exceptional Children Special Education Teacher to an educator who has met the following:
 - 3.1.1 Holds a valid Delaware Initial, Continuing, or Advanced License; or a Limited Standard, Standard or Professional Status Certificate issued by the Department prior to August 31, 2003; and,
 - 3.1.2 Has met the requirements as set forth in 14 DE Admin. Code 1505 Standard Certificate, including any subsequent amendment or revision thereto; and,
 - 3.1.3 Has satisfied the additional requirements in this regulation.

4.0 Additional Requirements

- 4.1 An Educator must also have met the following:

4.1.1 If the educator is applying for [their a] first Standard certificate pursuant to 14 DE Admin. Code 1505 Standard Certificate 3.1.5.1, the required 15 credits or their equivalent in professional development required in 14 DE Admin. Code 3.1.5.1 that must be satisfactorily completed for this standard certificate must at a minimum include the following areas:

- 4.1.1.1 Atypical Infants and Toddlers (3 credits);
- 4.1.1.2 Emergent Literacy in Reading and Writing (3 credits);
- 4.1.1.3 Assessment of Young Children (3 credits);
- 4.1.1.4 Differentiated Instruction for Young Children (3 credits); [and]
- 4.1.1.5 Consultation or Working with Families (3 credits).

4.1.2 If the educator is applying for [their a] second or subsequent Standard Certificate pursuant to 14 DE Admin. Code 1505 Standard Certificate 3.1.5, the satisfactory completion of fifteen (15) credits or their equivalent in professional development in the following areas:

- 4.2.1.1 Atypical Infants and Toddlers (3 credits);
- 4.2.1.2 Emergent Literacy in Reading and Writing (3 credits);
- 4.2.1.3 Assessment of Young Children (3 credits);
- 4.2.1.4 Differentiated Instruction for Young Children (3 credits);]; and]
- 4.2.1.5 Consultation or Working with Families (3 credits).

10 DE Reg. 696 (10/01/06)

DEPARTMENT OF FINANCE OFFICE OF THE STATE LOTTERY

Statutory Authority: 29 Delaware Code, Section 4805 (29 Del.C. §4805)

ORDER

204 Sports Lottery Rules and Regulations

NATURE OF THE PROCEEDINGS

Delaware Department of Finance ("Department"), Office of the State Lottery, pursuant to 29 Delaware Code, Section 4805 (29 Del.C. §4805) is adopting amendments to 10 DE Admin. Code 204 in response to the signing of House Bill 333, the Delaware Gaming competitiveness Act of 2012, on June 28, 2012.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code, Section 10115 in the July 2012 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 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

These amendments will update regulations. They rewrite the section on licensing of agents to allow sports betting to take place at retail establishments other than casinos. The amendments substantially rewrite section 6 regarding the duties of agents and substantially rewrite the licensing procedure of section 12. The amendments eliminate section 13 regarding self-excluded persons.

STATUTORY AUTHORITY

29 Delaware Code §4805, Authority to promulgate rules and regulations.

SUMMARY OF COMMENTS RECEIVED AND RESPONSE AND EXPLANATION OF CHANGE

After due notice in the *Register of Regulations*, written comments were received from Delaware Park in a letter

dated July 30, 2012. The written comments requested the removal of the definition of the phrase "Business Plan" from Section 2.0, the removal of the reference to "head-to head" games in Section 2.0, and the removal of the phrase "similar trade style" in the retail licensing requirements established in Section 3.9.7. The Letter also indicated that requirements identified in Sections 3.11.4, 6.22, and 6.32 for a Video Lottery agent to notify the State Lottery of changes in ownership and management were inconsistent with existing regulatory obligations of Video Lottery Agents. The written comments requested a clarification that Video Lottery agents would be reimbursed for Sports lottery tickets redeemed by the agent but sold by another Sports Lottery Agent. Finally, a request was made to remove language in Section 6.20 referring to "self-banned" individuals.

Department Response:

- *The request for removal of the definition "business plan" was reviewed. All references to a "business plan" for sports lottery agents have not been removed from these regulations. This term is found in sections 3.1 and 5.1 of the Sports Betting Regulations and should not be eliminated.*
- *The request to remove references to the phrase "head-to-head" in Section 2.0 has been reviewed and is not deemed necessary.*
- *The request to remove licensing criteria related to "similar trade style" has been reviewed. The expansion of Sports Lottery beyond traditional Video Lottery operations includes a thorough review of all aspects of a retail business. "Similar trade style" is a relevant consideration in determining retail locations and will not be removed from the Lottery's requirements.*
- *The Department reviewed the comment that notification requirements relating to changes in ownership and management are inconsistent with existing regulatory obligations of Video Lottery Agents. The Department finds that notification requirements relating to changes in ownership and management are not inconsistent with requirements found in the Video Lottery Regulations. Video Lottery Regulations Section 3.10.5. states that "An agent shall immediately notify the agency of any proposed or effective change regarding the makeup of the owners, directors, officers, or key employees of the agent."*
- *The Department reviewed the request to clarify that Video Lottery agents will be reimbursed for tickets redeemed by the agent, but sold by another Sports Lottery Retailer. The Department agrees that it will reimburse each video lottery agent for all winning tickets redeemed by the video lottery agent but sold by a Sport Lottery retailer who is not a video lottery agent. This practice is currently in place with winning tickets sold by one video lottery agent and redeemed by another. The expansion of gaming to retail establishments has not lessened the Lottery's responsibility to properly reimburse for cash payouts. As such, additional language does not need to be added to Sections 6.16 and 7.9.*
- *The Department has reviewed the request to remove the reference in Section 6.20 to "self-banned" persons. Although many changes have been made to the self- exclusion requirements of Sports Lottery Retailers, it is essential that Sports Lottery Agents who are also Video Lottery Agents adhere to self-exclusion programs. In response to the above written comments, a change has been made to Section 6.20 to clarify that self-banned individuals may not claim prizes at Video Lottery Agents who are also Sports Lottery Agents.*

FINDINGS OF FACT

The Department finds that the proposed regulation set forth in the July 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 Sports Lottery Rules and Regulations, with the modification indicated herein, is adopted and shall be final effective ten days from the publication of this Order in the *Register of Regulations* on September 1, 2012.

Tom Cook, Secretary
Department of Finance

204 Sports Lottery Rules and Regulations (Break in Continuity of Sections)

6.0 Agents: Duties

The following duties are required of all licensed agents:

- 6.1 Provide a secure location for the placement, operation, and play of all licensed sports lottery machines located on the licensed agent's premises.
- 6.2 Permit no person to tamper with or interfere with the approved operation of any licensed sports lottery machine without prior written approval of the agency ~~and the VLEU~~, unless otherwise directed by the Lottery.
- 6.3 Assure that telephone lines from the central computer system to the licensed sports lottery machines located on the licensed agent's premises are at all times connected, and prevent any person from tampering or interfering with the continuous operation of the lines.
- 6.4 With respect to sports lottery operations, contract only with officers, directors, owners, partners, key employees, and suppliers of sports lottery equipment and paraphernalia authorized by the agency to participate in sports lottery operations within the State of Delaware.
- 6.5 Ensure that licensed sports lottery machines are placed and remain as placed unless the agency authorizes their movement within the sight and control of the agent or a designated employee, through physical presence and if self-service terminals, by the use of surveillance cameras at all times.
- 6.6 Ensure that licensed sports lottery machines are placed and remain as placed in the specific area of the premises as approved by the lottery. The initial placement and any subsequent relocation of any sports lottery machine requires the prior written approval of the agency.
- 6.7 Monitor sports lottery play and prevent play by persons who are under the age of twenty-one (21) years or who are intoxicated, or whom the agent has reason to believe are intoxicated, ~~and prohibit play by persons who are barred by law or self-barred from playing the sports lottery.~~
- 6.8 Commit no violations of the laws of this State concerning the sale, dispensing, and consumption on the premises of alcoholic beverages that result in suspension or revocation of an alcoholic beverage license.
- 6.9 Maintain at all times sufficient cash for daily operations.
- 6.10 Video lottery agents authorized to extend credit shall Exercise caution and good judgment in extending credit for sports lottery play, and comply with all applicable federal and state laws.
- 6.11 Exercise caution and good judgment in providing cash for checks presented for sports lottery play. The agent shall also ensure that any contractor who performs check-cashing services for the agent also exercises caution and good judgment in providing cash for checks under this Regulation.
- 6.12 Report promptly all sports lottery machine malfunctions to the appropriate technology provider and notify the agency of any technology provider failure to provide service and repair of such terminals and associated equipment.
- 6.13 Conduct agency approved advertising and promotional activities related to sports lottery operations.
- 6.14 Install, post and display prominently at locations within or about the premises signs, redemption information and other promotional material as may be required by the agency.
- 6.15 Conduct sports lottery operations only during those hours established and approved by the Director or designee.
- 6.16 Assume responsibility for the proper and timely payment to players of winning sports lottery wagers. Winning sports lottery tickets with a value of more than \$599 (after deducting the amount of the wager) must be cashed at a video lottery agent's Sports Book or the Lottery Office.
- 6.17 Prohibit the possession, use or control of gambling paraphernalia on the premises not directly related to the lottery or horse racing or harness horse racing and prohibit illegal gambling on the premises.
- 6.18 Attend all meetings, seminars, and training sessions required by the agency.
- 6.19 Supervise its employees and their activities to ensure compliance with these rules.
- 6.20 Assume responsibility for the proper and immediate redemption of all credits; however, no credits may be redeemed by a person under twenty-one (21) years of age, and no credits submitted for redemption beyond the one year time limit will be redeemed. No credits or prizes may be redeemed by any person illegally on the agent's premises. ~~[or persons who have requested that they be self-banned from the Agent's premises. For Sports Lottery Agents who are also Video Lottery Agents, no credits or prizes may be redeemed by any persons who have requested that they be self-banned from the agent's premises.]~~

FINAL REGULATIONS

- 6.21 Provide dedicated power and a proper sports lottery environment in accordance with the specifications of the agency. The agent shall permit no person to completely shut off power to an operational sports lottery machine without the prior approval of the agency.
- 6.22 Furnish to the Director complete information pertaining to any change in ownership of the agent or the owner of the premises or beneficial owner ~~(other than a change in ownership by an owner of less than twenty (20) percent of the issued and outstanding capital stock of the agent or premises owner if such stock is publicly traded).~~
- 6.23 Promptly report to the lottery any violation or any facts or circumstances that may result in a violation of State or Federal law and/or any rules or regulations pursuant thereto, excluding violations concerning motor vehicle laws.
- 6.24 Conduct sports lottery operations in a manner that does not pose a threat to the public health, safety, or welfare of the citizens of Delaware, or reflect adversely on the security or integrity of the lottery.
- 6.25 Hold the Director, the State of Delaware, and employees thereof harmless from and defend and pay for the defense of any and all claims which may be asserted against the Director, the State or the employees thereof, arising from the participation in the sports lottery, except claims arising from the negligence or willful misconduct of the Director, the State or the employees thereof.
- 6.26 Maintain all required records.
- 6.27 Provide at the request of the Director or the ~~VLEU~~ DGE immediate access to the premises and to all records related to any aspect of these regulations, including without limitation the duties imposed by these regulations.
- 6.28 Keep current on all payments, tax obligations and other obligations to the agency and other licensees with whom sports lottery business is conducted. The agent shall pay the players and transfer the net proceeds to the State lottery fund in conformity with the requirements set forth in these regulations and **29 Del.C. Ch. 48.**
- 6.29 Locate all self-service sports lottery machines within the viewing range of closed circuit television cameras at all times, including both normal business hours and those periods when sports lottery operations are closed. The presence of these cameras is to ensure the integrity of the lottery, the sports lottery operations, and the safety of the patrons. Surveillance tapes will be maintained by the agent according to a schedule established by the Director ~~and the VLEU~~. The installation of any new closed circuit television or repositioning of any CCTV cameras or new surveillance system must be reviewed and approved by the ~~Director and the VLEU~~ Lottery before being placed in operation.
- 6.30 Comply with such other requirements as shall be specified by the Director. The agent shall may be requested to submit to the Director a description of its system of internal procedures and administrative and accounting controls which shall conform to the rules and regulations of the agency and be otherwise satisfactory to the Director in his or her sole discretion.
- 6.31 At the Director's discretion, ~~Provide,~~ provide, on a continuing basis, to the Director the names and addresses of all employees who are involved in the daily operation of the sports lottery. These employees will include individuals or their supervisors involved with (1) the security of the sports lottery, (2) the handling or transporting of proceeds from sports lottery, or (3) positions that provide direct access to sports lottery machines. ~~It shall be the continuing duty of the sports lottery agent licensee to provide for the bonding of any of the above mentioned employees to ensure against financial loss resulting from wrongful acts on their parts. Likewise, the agent shall post a bond or irrevocable letter of credit in a manner and in an amount established by the agency. Any such bonds shall be issued by a surety company authorized to transact business in Delaware and said company shall be approved by the State Insurance Commissioner as to solvency and responsibility.~~
- 6.32 Notify the Director on a continuing basis of any change in officers, partners, directors, key employees, sports lottery operations employees, and owners.
- ~~6.32.1 The sports lottery agent shall provide this information to the Lottery and the VLEU on a weekly basis. Such persons will also be subject to a background investigation. The failure of any of the above mentioned persons to satisfy a background investigation may constitute "cause" for the suspension or revocation of the sports lottery agent's license, provided that an agent is first given a reasonable opportunity to remove or replace such person if the agent was unaware of such~~

~~"cause" prior to the background investigation. The agent must supply the VLEU with the completed License Application Form ("LAF") and fingerprint cards for each employee before the employee begins employment. Agent employees required to be licensed by the Delaware Lottery laws, 29 Del.C. Ch. 48, and these Regulations must have been successfully completed and been issued a valid license under section 14.0 of these Regulations prior to commencement of employment.~~

- ~~6.32.2 The agent must notify the VLEU of the transfer of any employee within the agent's organization on a weekly basis. The Lottery and the VLEU will determine if a new or updated LAF must be submitted for the transferred employee.~~
- ~~6.32.3 The agent must notify the Lottery and the VLEU of the termination of any employee and the reason for the termination on a weekly basis.~~
- ~~6.32.4 The agent must submit to the Lottery and the VLEU on a weekly basis the names of all new employees who will work on the sports lottery premises.~~
- ~~6.32.5 The agent must obtain advance approval before any temporary employee, consultant, or contractor will be permitted access to secure locations. Any such temporary employee, consultant, or contractor must submit a Request for Temporary Work Approval Form to the VLEU at least forty eight (48) hours prior to the date of assignment. Any such temporary employee, consultant, or contractor must also submit a license application pursuant to Regulation 14.0 and must be employed by a licensed technology provider. Any vendor who proposes to contract with a sports lottery agent or the Lottery for the provision of goods or services, related to the sports lottery operations, must obtain a technology provider license pursuant to Sports Lottery Regulation 4.0. The Lottery will consider secure areas to include, but not be limited to, access to the inside of a sports lottery machine, surveillance rooms, cash vaults, and cash booths.~~
- ~~6.33 As soon as it is known to the agent, file with the Director a copy of any current or proposed agreement and disclose to the Director any other relationship between the agent, its parents, subsidiaries, related entities, partners, owners, directors, officers or key employees for the sale, lease, maintenance, repair or other assignment of the agent's premises, or any other relationship of any vendor, manufacturer or other person who stands to benefit financially from the possession or use of sports lottery machines by such agent. Failure to file such information shall constitute grounds for the revocation or suspension of a license.~~
- ~~6.34 The agent shall file with the Director for approval every contract in excess of \$50,000 which pertains to the agent's sports lottery operations. The agent shall notify the Director of any contract with an entity that is subject to the license requirements for vendors or technology providers under 29 Del.C. §4805(a)(17) and Chapter 4 of these Regulations.~~
- ~~6.35 Comply with the provisions of the business plans as approved and amended.~~
- ~~6.363 Comply on a continuing basis with the requirements for obtaining or retaining a license under the provisions of these regulations and 29 Del.C. Ch. 48.~~

***Please note that no additional 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:**

204 Sports Lottery Rules and Regulations

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF LONG TERM CARE RESIDENTS PROTECTION**Statutory Authority: 16 Delaware Code, Section 1101 (16 **Del.C.** §1101)**ORDER****3102 Long Term Care Transfer, Discharge and Readmission Procedures****NATURE OF THE PROCEEDINGS:**

The Department of Health and Social Services ("Department") / Division of Long Term Care Residents Protection (DLCTRP) initiated proceedings to establish Regulation 3102 Long Term Care Transfer, Discharge and Readmission Procedures. The Department's proceedings to establish the regulation was initiated pursuant to 16 **Delaware Code** Section 1124 and its authority as prescribed by 29 **Delaware Code** Section 7971.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 30, 2012 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSED AMENDMENT

The proposal establishes Regulation 3102 Long Term Care Transfer, Discharge and Readmission Procedures. The proposed change will establish the regulation as required by 16 **Del.C.** §1124.

Statutory Authority

29 **Del.C.** Chap. 79, "Department of Health and Social Services."
16 **Del.C.** §1124, "Staff training; issuance of regulations."

Background

DLCTRP is establishing these regulations as prescribed by 16 **Del.C.** §1124.

Summary of Proposed Amendment

The proposal establishes regulations governing transfer, discharge and readmission procedures of residents of long term care facilities that must be *used* by facilities in these situations. It also establishes the method for residents to request a hearing; and establishes procedures for the conduct of the hearing.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The Governor's Advisory Council for Exceptional Citizens ("GACEC") and the State Council for Persons with Disabilities ("SCPD") offered comments and suggestions. The Delaware Health Care Facilities Association ("DHCFA") also offered comments and suggestions. DLCTRP has considered each comment and responds as follows:

Comment: 1. In its April 24 commentary, Par. 1, the SCPD noted that 57% of Delaware nursing home patients are funded by Medicaid. These patients have a federal right to contest a discharge or transfer with certain protections that were not included in the April version of the regulation. DHSS regulations specifically apply the hearing procedures codified at 16 DE Admin Code Part 5000 to appeals by Medicaid beneficiaries of proposed nursing home discharges and transfers. The SCPD therefore commented that "the better approach would be to adopt or incorporate the Part 5000 regulations as the standards for discharges and transfers from all licensed long-term care facilities." Instead of adopting this approach, the July version of the regulation has 2 sets of standards applicable to the following facilities: 1) Section 3.0 applies to nursing facilities which participate in the Medicaid or Medicare programs; and 2) Section 4.0 applies to State-licensed long-term care facilities. There are several problems with this approach:

A. A discharge from an ICF/MR (e.g. Stockley; Mary Campbell) is not covered by Section 3.0 (since exempt from 42 C.F.R. §483.5) and the procedures in Section 4.0 are not co-terminous with those in 42 C.F.R. §§431.210 - 431.246.

Response: *The section has been revised as follows:*

3.0 Transfer, discharge and readmission rights of residents in a certified skilled nursing facility or a certified nursing facility as defined in 42 CFR §483.5. or an Intermediate Care facility (ICF/MR) as defined in 42 CFR §440.150.

B. If the State proposed to discharge a Medicaid beneficiary from a State-run nursing facility (GBHC; Bissell; DHCI), the beneficiary has a right to a Medicaid hearing under 16 DE Admin Code Part 5000 which conforms to the procedures mandated by Ortiz v. Eichler. Neither Section 3.0 nor Section 4.0 of the DLTCRP regulation complies with Ortiz and the regulation will confuse Medicaid beneficiaries of State-run nursing facilities into believing that only the DLTCRP process applies.

Response: Section 1 was revised as follows:

1.0 Purpose

This regulation applies to decisions by licensed facilities to transfer or discharge a resident. It prescribes the process for providing an impartial hearing to a resident. governs the impartial hearings on contested discharges from long term care facilities. This regulation does not extend to decisions of DHSS, or any of its Divisions, to deny, suspend, delay, reduce, or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 Del.C. Administrative Code §5000. Be aware that the appeal requirements are different from the requirements in this regulation.

C. Section 3.0 applies to nursing homes participating in the Medicare program pursuant to 42 C.F.R. §483.5. Federal law authorizes Medicare beneficiary appeals of proposed nursing home discharges through a QIO. See attached Quality Insights Delaware publication, "How to Appeal if your Services Are Ending". Time periods to contest the discharge are very short. Medicare beneficiaries will likely be confused concerning the overlapping Medicare and DLTCRP appeal systems. At a minimum, the DLTCRP regulation should include an explanatory comment or note highlighting the availability of both appeal systems.

Response: *Section 1 was revised by inserting a second paragraph which states:*

This regulation does not extend to decisions of DHSS, or any of its Divisions, to deny, suspend, delay, reduce, or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 Del. Administrative Code §5000. Be aware that the appeal requirements are different

D. For nursing facilities which are covered by both Section 3.0 (Medicaid/Medicare enrolled) and Section 4.0 (State licensed under 16 Del.C. Ch. 11), it is unclear if only Section 3.0 applies or both Sections 3.0 and 4.0 apply.

Response: *The Division does not consider this unclear. All residents of licensed long term care facilities are covered by Section 4.0 by 16 Del.C. §1118. Medicaid beneficiaries residing in certified facilities are covered by both § 3.0 and § 4.0.*

Comment: 2. In Section 2.0, the definition of "transfer and discharge" is problematic. The definition is as follows:

"Transfer and discharge" includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility.

The April version of the regulation contained a similar definition which limited "transfer and discharge" to removal to another facility. The SCPD objected to the narrow definition which, while based on 42 C.F.R. §483.12(a)(1), categorically presumes that all persons whose residency is terminated go to another facility. To the contrary, involuntarily discharged residents, including those discharged for nonpayment, may go to a relative's home, a homeless shelter, or "the street". Under the proposed definition, the regulation (and its protections) would be inapplicable to terminations of residency if the resident is expected to go to a relative's home, a homeless shelter, or "the street".

Response: *The definition of "transfer and discharge" has been revised as follows: "Transfer and discharge" is defined separately in Section 3.0 and 4.0. ~~includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility~~*

Comment: 3. Section 3.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of “legal representative” in Section 2.0 as follows:

“Legal representative” includes a resident’s guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

Response: *The suggestion was adopted. Legal Representative is now defined in Section 2 as follows:*

“Legal Representative” or “representative” includes a resident’s: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§ 1121(34) and 1122.

Comment: 4. Section 3.3.2 merits revision. It is loosely based on 42 C.F.R. §483.12(a)(6). First, references to “developmentally disabled individuals” and “mentally ill individuals” are not “people-first” and violate Title 29 Del.C. §608(b)(1)a. Second, unlike the federal regulation, it is ambiguous in defining when notice should be given to the P&A. The facility would, with no guidance, determine if such notice is “applicable” and may have to “guess” at the identity of the P&A. Third, there are other key agencies which should also receive notice, including the DSHP Plus MCO and any DHSS agency (APS; DDS) involved in the placement. Consider the following substitute:

3.3.2 Provide a copy of the notice to the Division; the State LTC ombudsman; the resident’s Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident’s placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

Response: *Section 3.3.2. was revised as follows:*

3.3.2 Provide a copy of the notice to the Division; the State LTC ombudsman; the resident’s Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident’s placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.

Comment: 5. In §3.4.2.4, delete the comma after the word “needs”.

Response: *Comma deleted.*

Comment: 6. Sections 3.5.6 and 3.5.7 are based on 42 C.F.R. §§483.12(a)(6). I recommend combining §§3.5.6 and 3.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Delaware’s P&A for individuals with developmental disabilities and mental illness is the same agency.

Response: *The suggestion was adopted as follows:*

~~3.5.6 For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~

~~3.5.7 For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.~~

3.5.6 For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.

Comment: 7. As applied to Medicaid-funded residents, §3.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J., DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must “contain any information needed for the claimant to determine from the notice alone the accuracy of the agency’s intended action” and “provide a detailed individualized explanation of the reason(s) for the action being taken”. These requirements should be added to §3.5.

Response: *The suggestion was adopted as follows:*

3.5 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:

- ~~3.5.1 The reason for transfer or discharge;~~
- 3.5.1 A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:
 - 3.5.1.1 A statement of what action the agency intends to take;
 - 3.5.1.2 The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.
 - 3.5.1.3 The specific policy or regulation supporting such action.

Comment: 8. Section 3.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

Response: *The suggestion was adopted as follows:*

- ~~3.5.4 A statement that the resident has the right to appeal the action to the State;~~
- 3.5.4 A statement of the resident's right to a fair hearing as provided in this section:
- 3.5.5 The method by which the resident may request a fair hearing;
- 3.5.6 A statement that the resident may represent him or herself or may be represented by counsel or by another person.

Comment: 9. Section §3.8 could result in violations of State law. The implication is that a facility can change a resident's room within the same building as of right. This is reinforced by §4.8. However, State law requires the facility to honor the room request of a resident unless impossible to accommodate. See Title 16 Del.C. §1121(28) and compare §4.8.3. Moreover, a facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 3.8 should be amended to clarify that a facility's discretion to transfer residents to another room in the same building is limited by Title 16 Del.C. §§1121(13) and 1121(28).

Response: *The suggestion was adopted as follows:*

3.8 Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in 42 CFR §483.5(c)) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations. A facilities' discretion to transfer residents to another room is limited by Title 16 Del.C. §§121 (13) and (28).

Comment: 10. If §3.0 is a "stand alone" regulation which excludes application of §4.0, §3.9.3 would violate State statute [Title 16 Del.C. §1121(18)] since readmission is not limited to Medicaid beneficiaries. Every LTC resident who is returning from an acute care facility is entitled to be offered the next available bed.

Response: *The suggestion was adopted as follows:*

- 3.9.3Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:
 - 3.9.3.1Requires the services provided by the facility; and
 - 3.9.3.2Is eligible for Medicaid nursing facility services.
 - 3.9.3.3Additional protection for readmission is found at 16 Del.C. §1121 (18).

Comment: 11. Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, if the Division is disinclined to strictly enforce resident readmission rights accorded by §3.9.3 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §3.11 to read as follows:

3.11If a facility issues a discharge notice rather than permitting a resident's readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident's readmission or place limitations on the facility's admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

- 3.11.1Historical bed turnover rates in the facility;
- 3.11.2Availability of public or private funding for costs of care;

3.11.3 Adverse health and quality of life consequences of delaying readmission; and

3.11.4 Federal and State public policy preferences for provision of services in the least restrictive setting.

Response: *The Division has no legal authority to impose bed holds before a decision that a discharge was improper.*

Comment: 12. Consistent with the commentary under Par. 3 above, §4.3.1 could be amended as follows to conform to Title 16 Del.C. §§1121(34) and 1122:

Notify the resident and, if known, a family member or legal representative of the resident, including an agent authorized to act on the resident's behalf pursuant to Title 16 Del.C. §1121(34) and 1122, of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

However, the result is a lengthy, convoluted sentence. It would be preferable to simply add a definition of "legal representative" in Section 2.0 as follows:

"Legal representative" includes a resident's guardian; agent acting through a power of attorney, advance health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.

Response: *Legal Representative is now defined in the Section 2 as follows:*

"Legal Representative" or "representative" includes a resident's: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del C §§ 1121(34) and 1122.

Comment: 13. Consistent with the commentary under Par. 7 above, §4.5 merits revision. As applied to Medicaid-funded residents, §4.5 is overtly deficient since it fails to comply with the permanent injunction imposed on DHSS through Ortiz and implemented through 16 DE Admin Code Part 5000, §5300. See also 42 C.F.R. §§431.210 (requiring regulatory citations). Cf. attached In the Matter of the Hearing of Marie J, DCIS No. 036864 (Del. DES 1987). Thus, if the discharge is based on nonpayment, the notice must include the calculations. The notice must include the citations to the regulation(s) supporting discharge. The notice must "contain any information needed for the claimant to determine from the notice alone the accuracy of the agency's intended action" and "provide a detailed individualized explanation of the reason(s) for the action being taken". These requirements should be added to §4.5.

Response: *The suggestion was adopted as follows:*

4.5 Contents of the notice. *The written notice specified in paragraph 3.3 of this section must include the following:*

4.5.1 The reason for transfer or discharge;

4.5.1 A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:

4.5.1.1 A statement of what action the agency intends to take;

4.5.1.2 The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.

4.5.1.3 The specific policy or regulation supporting such action.

Comment 14: Section 4.5.4 contemplates provision of notice to a resident that there is a right to appeal to the State without identifying how to invoke the right. To be meaningful, the notice should include the procedure for requesting a hearing. See §5.1.1. Compare 16 DE Admin Code, Part 5000, §5300, Par. 1.B.

Response: The suggestion was adopted as follows:

4.5.4 A statement that the resident has the right to appeal the action to the State;

A statement of the resident's right to a fair hearing as provided in this section:

4.5.4.1 The method by which the resident may request a fair hearing;

4.5.4.2 A statement that the resident may represent him or herself or may be represented by counsel or by another person.

Comment 15: As noted under Par. 6 above, §§ 4.5.6 and 4.5.7 are based on 42 C.F.R. §§483.12(a)(6). I recommend combining §§4.5.6 and 4.5.7 as follows:

For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16

Del.C. §1102.

Delaware’s P&A for individuals with developmental disabilities and mental illness is the same agency.

Response: *The suggestion was adopted as follows:*

~~4.5.6 For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~

~~4.5.7 For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.~~

4.5.6 For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102nd

Comment: 16: Consistent with the comments under Par. 9 above, §4.8 could result in violation of State law. The implication is that a facility can change a resident’s room within the same building as of right subject only to §4.8.3. A facility must honor the requests of spouses to share a room if feasible and not medically contraindicated. Section 4.8 should be amended to clarify that a facility’s discretion to transfer residents to another room in the same building is limited by both Title 16 Del.C. §§1121(13) and 1121(28).

Response: *The suggestion was adopted as follows:*

4.8.1 Room changes in a facility must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another location. A facility’s discretion to transfer residents to another room is limited by 16 Del.C. §§121 (13) and (28).

Comment: 17: Strict enforcement of Title 16 Del.C. §1121(18) should be the norm. However, consistent with Par. 11 above, if the Division is disinclined to strictly enforce resident readmission rights accorded by §4.9.2 and Title 16 Del.C. §1121(18), it should at least consider the addition of a §4.9.3 to read as follows:

4.9.3 If a facility issues a discharge notice rather than permitting a resident’s readmission under this section, and the resident requests a hearing to challenge the discharge, the Department, without limiting its discretion to exercise other statutory or regulatory authority, may, during the pendency of proceedings, direct the resident’s readmission or place limitations on the facility’s admissions to preserve one bed. In exercising its discretion, the Department will consider the following:

4.9.3.1Historical bed turnover rates in the facility;

4.9.3.2Availability of public or private funding for costs of care;

4.9.3.3Adverse health and quality of life consequences of delaying readmission; and

4.9.3.4Federal and State public policy preferences for provision of services in the least restrictive setting

Response: *The Division has no legal authority to impose bed holds before a decision that a discharge was improper.*

Comment: 18: In §4.9 there is no definition of “acute care facility” the term used in Title 16 Del.C. §1121(18). The following should be added to §2.0:

“Acute Care Facility” means a health care setting providing intensive services of a type or level not readily available in the current facility, including without limitation, settings licensed or certified pursuant to chapters 10, 11, 22, 50, or 51 of Title 16.

Response: *The generally accepted meaning of “Acute Care” is short-term medical treatment, usually in a hospital for patients having an acute illness or injury or recovering from surgery. There is no indication that any broader meaning of “Acute Care Facility” was intended by the statute.*

Comment: 19: There is some “tension” between §§5.1.1.2-5.1.1.3 versus §§3.5.4 and 4.5.4. The hearing request should be submitted to the State not to the provider with a “cc” to the State. Moreover, it is unclear if §5.1.1.3 (contemplating a “cc” to the DLTCRP and Ombudsman) is a “directory” or a sine qua non for perfection of the appeal. In the latter case, a pro se resident who did not send a copy to the Ombudsman could have his/ her appeal dismissed. This would be an unfortunate result.

Response: *The facility and the resident are the parties to a discharge. As such, the facility is aware of the date that the discharge notice was received by the resident, and is aware of when the 30 days for requesting a hearing expires. In addition, it is likely to be easier for resident to provide notice to the facility than to the DLTCRP, or the*

State LTC Ombudsman. The copies to DLTCRP and the State LTC Ombudsman do not have a time requirement and would not be the basis for a technical dismissal.

Comment: 20: Sections 5.1.1.2 categorically applies a minimum 30-day appeal timeline. A Medicaid beneficiary requesting a hearing to contest discharge from a State-run facility, an ICF/MR, or other LTC facility would ostensibly have 90 days to request a hearing. Compare to 42 CFR §§431.206(C)(3) and 431.221(d) and 16 Del Admin Code 5000, §§5001, Par. 2V; 5307, Par C.2; and 5401, Par. C.3. This is not addresses anywhere within the DLTCRP regulation.

Response: *A Medicaid beneficiary requesting a hearing to contest a discharge has 30 days to do so. Only after a determination regarding discharge is there a determination as to continued eligibility for Medicaid benefits. If eligibility is modified, then the 90 day time period applies.*

Comment 21: Section 5.4 omits the right to examine case records regardless of their lack of intended use in the proceedings. Compare 42 CFR §431.242(a)(1); 42 USC §483.10(b)(2); Title 16 Del.C. §1121(19); and 16 DE Admin Code, Part 5000, §5403. A reference to this right should be added.

Response: *The suggestion has been adopted. The rights mentioned above have been incorporated by reference at §5.4.6.*

Comment: 22: As a general comment, assisted living facilities (ALF) have expressed concern about the possibility that an ALF could give a notice of discharge because a resident's care needs exceed the level of care that may be provided under the ALF licensing law and regulations, but then the facility is cited during survey for having a resident whose needs exceed the permitted level of care. ALFs have requested that the Division consider adopting a "safe harbor" provision to the effect that absent other pertinent considerations relating to the discharge, an ALF that has given a notice of discharge based on level of care will not receive a survey deficiency based solely on having a resident who exceeds the permitted level of care, particularly as such circumstance exists during the discharge notice period and while an appeal is pending. I'm not sure how often such a scenario could arise, but it nonetheless has been raised as an issue of concern.

Response: The suggestion has been adopted. Language has been added to § 3.1

§3.1 If the resident appeals a discharge notice that is based on this section the facility will not be cited by the State Survey Agency during the pendency of the appeal for having a resident whose needs exceed the permitted level of care in that facility.

Comment: 23: Also, as a general observation, it is noted that the proposed regulations do not mention the Medicaid managed care organizations (MMCO) that are now coordinating long term care services for Medicaid beneficiaries in Delaware. As a practical matter, certain discharge decisions – at least for Medicaid beneficiaries – may now be originating with the MMCOs, rather than the long term care facilities. Thus, it raises the issue of whether the discharge procedures should address the role of the MMCOs, both in terms of the discharge decision and with respect to any appeal thereof, since in many cases, the MMCO may be considered an essential party to the proceedings.

Response: *Medicaid MCOs determine and re-determine Medicaid eligibility for levels of care within long term care facilities. They cannot discharge a resident, order a facility to discharge a resident or even close Medicaid for a particular resident.*

Comment: 24: Section 4.8.2 of the proposed regulations requires that a facility give "reasonable notice" before a resident's room or roommate is changed, except in emergencies. Many facilities address room and roommate changes as terms of their admission agreements. It would be helpful to have a more definitive statement in this regulation as to the Division's view of "reasonable notice," so as to avoid an interpretation dispute down the road.

Response: Reasonable has to be determined in the context of the circumstances. While it is not specific, the goal always must be to provide the amount of time necessary to protect the best interests of the residents.

Comment: 25: Sections 4.9.1 and 4.9.2 raise an overarching concern about the Delaware discharge statute (16 Del.C. Sec. 1121(18)), which may not be addressable through the proposed regulations, but which nonetheless warrants comment. The requirement that facilities readmit residents following an acute care stay, while seemingly beneficial on its face, has a few perhaps unintended consequences. First, the acute care stay is not time-limited in

any fashion, so in theory, a resident who has been hospitalized for 6 months has the same standing with respect to facility readmission as a resident who has been out of the facility for a 10-day hospitalization. It is quite possible that during a lengthy hospitalization, a resident's condition will have changed dramatically, and thus, the resident may no longer be appropriate for facility readmission. This may be especially true for an ALF resident. Yet, the discharge statute requires the facility to readmit the resident (regardless of the resident's level of care and regardless of the potential violation of a facility's licensure restrictions), and then initiate a potentially lengthy discharge process that ultimately would result in the resident being placed in the most appropriate care setting (hopefully). Wouldn't it be in the resident's best interest to avoid an interim move and instead, be admitted to the most appropriate care setting immediately following discharge from the acute care setting? That seems obvious, but there is no flexibility under the discharge statute as currently written (unless of course, the resident and/or responsible party voluntarily seeks an alternative placement).

Moreover, an open-ended readmission right is prejudicial to other potential facility residents, as it essentially allows the hospitalized resident to "bump" candidates on a facility's waiting list. The discharge law should include a reasonable temporal element that strikes a balance between the readmission rights of residents and a facility's ability to plan for new admissions and run its business. Particularly in the case of a long-term hospitalization, there should be a definitive point at which the relationship between a facility and a resident who is in an acute care setting is deemed terminated. Of course, that resident can always apply for new admission, and the facility can evaluate the new realities of the resident's medical condition -- as they exist at the time application is made -- to determine whether admission is appropriate. At present, the discharge statute does not afford any flexibility -- it simply states that the facility must readmit the resident following an acute hospitalization, regardless of the how long the resident has been out of the facility and regardless of the realities of the resident's condition. That is not good for the resident or the facility, whose license may be at risk. Facilities would welcome the opportunity to work collaboratively on an amendment that would balance the interests of residents *and* facilities.

Response: *As the commenter states, this is a statutory matter that cannot be resolved by regulation.*

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations*, with the amendments listed herein, should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Title 16 of the Delaware Administrative Code is adopted and shall be final effective September 1, 2012

Rita Landgraf, Secretary, DHSS

3102 Long Term Care Transfer, Discharge and Readmission Procedures

1.0 Purpose

This regulation ~~[governs the impartial hearings on contested discharges from long term care facilities applies to decisions by licensed facilities to transfer or discharge a resident. It prescribes the process for providing an impartial hearing to a resident].~~

[This regulation does not extend to decisions of DHSS, or any of its Divisions, to deny, suspend, delay, reduce, or terminate benefits. The regulation governing appeals related to benefit eligibility are found at 16 Del. Administrative Code §5000. Be aware that the appeal requirements are different from the requirements in this regulation.]

2.0 Definitions

"DHSS" means the Department of Health and Social Services

"Division" means the Division of Long Term Care Residents Protection.

["Legal representative" or "representative" includes a resident's: guardian; agent pursuant to a power of attorney, advanced health care directive, or similar document; or authorized representative pursuant to Title 16 Del.C. §§1121(34) and 1122.]

"Party" means the resident or resident's representative and the facility.

“Resident” means resident or patient.

“Transfer and discharge” ~~[includes movement of a resident to a bed outside of the licensed facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same licensed facility]~~ is defined separately in Section 3.0 and 4.0.]

3.0 Transfer, discharge and readmission rights of residents in a certified skilled nursing facility or a certified nursing facility as defined in 42 CFR §483.5 [or an Intermediate Care facility (ICF/MR) as defined in 42 CFR §440.150. ~~See 42 CFR §483.12]~~

- 3.1 Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
- 3.1.1 The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; **[If the resident appeals a notice of discharge based on this section, the facility will not be cited during the pendency of the appeal for housing a resident whose needs exceed the permitted level of care in that facility.]**
 - 3.1.2 The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
 - 3.1.3 The safety of individuals in the facility is endangered;
 - 3.1.4 The health of individuals in the facility would otherwise be endangered;
 - 3.1.5 The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
 - 3.1.6 The facility ceases to operate.
- 3.2 Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 3.1.1 through 3.1.5 of this section, the resident's clinical record must be documented. The documentation must be made by:
- 3.2.1 The resident's physician when transfer or discharge is necessary under paragraph 3.1.1 or paragraph 3.1.2 of this section; and
 - 3.2.2 A physician when transfer or discharge is necessary under paragraph 3.1.4 of this section.
- 3.3 Notice before transfer. Before a facility transfers or discharges a resident, the facility must—
- 3.3.1 Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - 3.3.2 ~~[Provide a copy of the notice to the Division, the State LTC ombudsman, and if applicable, the agency responsible for the protection and advocacy of developmentally disabled individuals and/or the agency responsible for the protection and advocacy of mentally ill individuals. Provide a copy of the notice to the Division; the State LTC ombudsman; the resident's Delaware Medicaid managed care organization (MCO), if any; any DHSS agency involved in the resident's placement in the facility, including APS; and the protection and advocacy agency as defined in Title 16 Del.C. §1102 if the resident is an individual with a developmental disability or mental illness.]~~
 - 3.3.3 Record the reasons in the resident's clinical record; and
 - 3.3.4 Include in the notice the items described in paragraph 3.5 of this section.
- 3.4 Timing of the notice.
- 3.4.1 Except as specified in paragraphs 3.4.2 and 3.8 of this section, the notice of transfer or discharge required under paragraph 3.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
 - 3.4.2 Notice may be made as soon as practicable before transfer or discharge when:
 - 3.4.2.1 The safety of individuals in the facility would be endangered under paragraph 3.1.3 of this section;

- 3.4.2.2 The health of individuals in the facility would be endangered, under paragraph 3.1.4 of this section;
- 3.4.2.3 The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph 3.1.2 of this section;
- 3.4.2.4 An immediate transfer or discharge is required by the resident's urgent medical needs under paragraph 3.1.1 of this section.
- 3.5 Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
 - 3.5.1** **[The reason for transfer or discharge; A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:**
 - 3.5.1.1** **A statement of what action the agency intends to take;**
 - 3.5.1.2** **The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facility's intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months.**
 - 3.5.1.3** **The specific policy or regulation supporting such action.]**
 - 3.5.2 The effective date of transfer or discharge;
 - 3.5.3 The location to which the resident ~~[is will be]~~ transferred or discharged;
 - 3.5.4 **~~[A statement that the resident has the right to appeal the action to the State; A statement of the resident's right to a fair hearing as provided in this section;~~**
 - 3.5.5** **The method by which the resident may request a fair hearing;**
 - 3.5.6** **A statement that the resident may represent him or herself or may be represented by counsel or by another person.**
 - 3.5.67]** **The name, address and telephone number of the State long term care ombudsman;**
 - [3.5.6** **~~For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and~~**
 - 3.5.7** **~~For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.]~~**
- 3.6 Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.
- 3.7 Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the Secretary, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents, as required at 42 CFR §483.75(r).
- 3.8 Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in 42 CFR §483.5(c)) must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations. **[A facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§121 (13) and (28).]**
- 3.9 Notice of bed-hold policy and readmission.
 - 3.9.1 Notice before transfer. Before a nursing facility transfers a resident to a hospital or allows a resident to go on therapeutic leave, the nursing facility must provide written information to the resident and a family member or legal representative that specifies:
 - 3.9.1.1 Notice of State bed-hold. The duration of the bed-hold policy under the State plan, if any during which the resident is permitted to return and resume residence in the nursing

facility. See DHSS Long Term Care Institutional Provider Specific Policy Manual at Section 4.5; and

- 3.9.1.2 Facility policies. The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph 3.9.3 of this section, permitting a resident to return.
- 3.9.2 Bed-hold notice upon transfer. At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and a family member or legal representative written notice which explains the bed-hold policy described in paragraph 3.9.1.1 of this section.
- 3.9.3 Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:
- 3.9.3.1 Requires the services provided by the facility; and
- 3.9.3.2 Is eligible for Medicaid nursing facility services.
- [3.9.3.3 Additional protection for readmission is found at 16 Del.C. §1121 (18).]**
- 3.10 Readmission to a composite distinct part. When the nursing facility to which a resident is readmitted is a composite distinct part (as defined in 42 CFR§483.5(c)), the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which he or she resided previously. If a bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed there.

4.0 Transfer, discharge and readmission rights of residents of a Nursing Facility and Similar Facility as defined in 16 Del.C. 1102(4). See 16 Del.C. 1121.

- 4.1 **“Transfer and discharge” includes movement of a resident to a location outside of the licensed facility.]**
- 4.~~42~~ Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility except for:
- 4.~~42~~.1 Medical needs which cannot be met in the facility;
- 4.~~42~~.2 The resident's own welfare;
- 4.~~42~~.3 The welfare of the other individuals in the facility;
- 4.~~42~~.4 Nonpayment of justified charges, after appropriate notice;
- 4.~~42~~.5 Termination of facility operation.
- 4.~~23~~ Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs 4.1.1 or 4.1.2 of this section, the resident's clinical record must be documented. The documentation must be made by:
- 4.~~23~~.1 The resident's physician when transfer or discharge is necessary under paragraph 4.1.1 or paragraph 4.1.2 of this section; and
- 4.~~23~~.2 A physician when transfer or discharge is necessary under paragraph 4.1.3 of this section.
- 4.~~34~~ Notice before transfer. Before a facility transfers or discharges a resident, the facility must:
- 4.~~34~~.1 Notify the resident and, if known, a family member or legal representative, of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
- 4.~~34~~.2 Record the reasons in the resident's clinical record; and
- 4.~~34~~.3 Include in the notice the items described in paragraph 4.5 of this section.
- 4.~~45~~ Timing of the notice. (i) Except as specified in paragraphs 4.4.2 and 4.8 of this section, the notice of transfer or discharge required under paragraph 4.3 of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
- 4.~~45~~.2 Notice may be made as soon as practicable before or after transfer or discharge when:
- 4.~~45~~.2.1 The welfare of individuals in the facility would be endangered under paragraph 3.1.3 of this section;

- 4.~~[45]~~.2.2 An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph 3.1.1. of this section; or
- 4.~~[56]~~ Contents of the notice. The written notice specified in paragraph 3.3 of this section must include the following:
- 4.~~[56]~~.1 **[The reason for transfer or discharge; A detailed individualized explanation of the reason(s) for the action being taken which includes, in terms understandable to the resident:**
- 4.6.1.1 **A statement of what action the agency intends to take;**
- 4.6.1.2 **The reasons for the intended action, including any information needed for the resident to determine from the notice alone the accuracy of the facilities intended action. When the reason is non-payment, an itemized statement of the resident's account for the preceding 12 months; and**
- 4.6.1.3 **The specific policy or regulation supporting such action.]**
- 4.~~[56]~~.2 The effective date of transfer or discharge;
- 4.~~[56]~~.3 The location to which the resident ~~[is will be]~~ transferred or discharged;
- 4.~~[56]~~.4 **[A statement that the resident has the right to appeal the action to the State; A statement of the resident's right to a fair hearing as provided in this section:**
- 4.6.4.1 **The method by which the resident may request a fair hearing; and**
- 4.6.4.2 **A statement that the resident may represent him or herself or may be represented by counsel or by another person.]**
- 4.~~[56]~~.5 The name, address and telephone number of the State long term care ombudsman;
- 4.~~[56]~~.6 **[For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and For nursing facility residents with a developmental disability or mental illness, the mailing address and telephone number of the Delaware protection and advocacy agency as defined in Title 16 Del.C. §1102.**
- ~~4.5.7~~ **For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.]**
- 4.~~[67]~~ Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.
- 4.~~[78]~~ Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to Division, the State LTC ombudsman, residents of the facility, and the legal representatives of the residents or other responsible parties, as well as the plan for the transfer and adequate relocation of the residents. [The notice shall be provided as far in advance of closure as possible.]
- 4.~~[89]~~ Room changes.
- 4.~~[89]~~.1 Room changes in a facility must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another location. [A facility's discretion to transfer residents to another room is limited by Title 16 Del.C. §§1121 (13) and (28).]
- 4.~~[89]~~.2 The facility must give reasonable notice before the resident's room or roommate is changed, except in emergencies.
- 4.~~[89]~~.3 The facility shall endeavor to honor roommate requests whenever possible.
- 4.~~[910]~~ Notice of bed-hold policy and readmission:
- 4.~~[910]~~.1 Notice before transfer. When a nursing facility transfers a resident out of a facility to an acute care facility it must provide written information to the resident and a family member or legal representative that specifies that the facility must accept the patient or resident back into the

facility when the resident no longer needs acute care and there is space available in the facility. If no space is available, the resident shall be accepted into the next available bed.

- 4.[910].2 Permitting resident to return to facility. A nursing facility must establish and follow a written policy for implementing its obligation to immediately offer the first available bed to a resident who is entitled to be readmitted to the facility when acute care is no longer required.

5.0 Fair Hearing Practice and Procedures which pertain to grievances under either Section 3.0 or 4.0 of this regulation.

- 5.1 Right to hearing. An impartial hearing may be requested by a resident who believes a facility has erroneously determined that he or she must be transferred or discharged.
- 5.1.1 The hearing request must:
- 5.1.1.1 Be in writing;
- 5.1.1.2 Be received by the facility within 30 days from the date that the discharge notice is received by the resident or the resident's legal representative;
- 5.1.1.3 Be copied to the Division and the State LTC ombudsman.
- 5.2 DHSS may deny or dismiss a request for a hearing if:
- 5.2.1 The resident withdraws the request in writing; or
- 5.2.2 The resident or his or her legal representative fails to appear at a scheduled hearing without good cause.
- 5.3 Impartial hearing must be conducted:
- 5.3.1 At a reasonable time, date and place;
- 5.3.2 After adequate written notice of the hearing;
- 5.3.3 By an impartial fact-finder who has not been directly involved in the initial determination of the action in question;
- [5.3.54] With appropriate translation services available to parties or witnesses as needed to be provided at State expense.
- [5.3.4] If the hearing involves medical issues as the basis for the transfer or discharge and if the impartial fact finder considers it necessary to have a medical assessment other than that of the facility involved in making the transfer or discharge decision, such a medical assessment must be obtained at State expense and made part of the record.
- 5.[45] Procedural rights. The parties must be given the opportunity to:
- 5.[45].1 Examine at a reasonable time before the date of the hearing and during the hearing all documents and records to be used by either party at the hearing;
- 5.[45].2 Bring witnesses;
- 5.[45].3 Establish all pertinent facts and circumstances;
- 5.[45].4 Present an argument without undue interference; and
- 5.[45].5 Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.
- [5.5.6 Residents within the scope of 3.0 have additional rights to as provided in 42 CFR §483.10(b)(2). All residents have additional rights under 16 Del.C. §1121(19).]**
- 5.[56] Hearing decisions must be based exclusively on evidence introduced at the hearing.
- 5.[67] The record must consist only of:
- 5.[67].1 The transcript or recording of testimony and exhibits;
- 5.[67].2 All papers and requests filed in the proceeding; and
- 5.[67].3 The decision of the hearing officer.
- 5.[78] The parties must have the access to the record at a convenient place and time in order to review or to secure a transcript at the party's expense.
- 5.[89] The impartial decision must:

5.[89].1 Summarize the facts; and

5.[89].2 Identify the statutes and/or regulations pertinent to the decision

5.[89].3 Specify the reasons for the decisions; and

5.[89].4 Identify the supporting evidence and apply the relevant legal principles.

5.[910] The impartial fact-finder must:

5.[910].1 Notify the parties of the decision, in writing.

5.[910].2 Notify the parties that this is the final decision of DHSS with the right to an appeal pursuant to the Administrative Procedures Act, Title 29, Chapter 101.

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

ORDER

Nursing Facility Quality Assessment

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Title XIX Medicaid State Plan regarding *Nursing Facility Quality Assessment*. 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 July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 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 amends the Title XIX Medicaid State Plan to implement a nursing facility quality assessment fee, also known as a nursing facility provider tax, effective June 1, 2012.

Statutory Authority

- Social Security Act §1902(a)(13)(A), *Public process for determination of rates of payment*;
- 42 CFR
- §§433.55 through 433.74, *Health Care-Related Taxes*;
- 42 CFR §440, Subpart A, *Definitions*;
- 42 CFR Part 447, Subpart C – *Payment for Inpatient Hospital and Long-Term Care Facility Services*;
- 42 CFR §447.205, *Public Notice of Changes in Statewide Methods and Standards for Setting Payment Rates*

Background

Congress passed the Medicaid Voluntary Contribution and Provider Specific Tax Amendments (P.L. 102-234) in 1991, amending Section 1903(w) of the Social Security Act (42 USC §1396b(w)). Those laws were later revised through the Tax Relief and Health Care Act of 2006 (P.L. 109-432). These laws, along with corresponding federal regulations (42 CFR §§433.54 through 433.74), provide the authority and guidelines that states must follow in order to fund a portion of the state share of Medicaid program costs by assessing/taxing health care providers or services. The federal authority for health care-related taxes is the Centers for Medicare and Medicaid Services (CMS).

Federal law permits states to collect revenues or “health care-related taxes” from nineteen (19) specified classes of health care providers or services. Revenues collected from health care-related taxes can be used to raise provider rates, fund other costs of the Medicaid program or be used for other non-Medicaid purposes, such as depositing the funds into the state’s general treasury. States must meet strict federal requirements when

implementing health care-related taxes, including taxing all providers or services in a class (i.e., the tax cannot be limited to Medicaid providers only) and applying a methodology that is similar for all providers or services in that class (i.e., same rate or amount of tax is applied).

Health care-related taxes are fees, assessments or other mandatory payments related to:

- (1) Health care items or services;
- (2) Provision of, or authority to provide, health care items or services; and,
- (3) Payment for health care items or services.

In order to be permissible under federal law, any provider tax enacted by a state must be (1) broad based, (2) uniformly imposed and (3) cannot violate hold harmless provisions.

Summary of Proposal

Nursing facility services are a mandatory Medicaid state plan service. Delaware Medicaid's reimbursement policy establishes eight levels of care within nursing facilities based on patient acuity with up to three "add-ons" for additional services required by nursing facility residents as determined by Division of Medicaid and Medical Assistance (DMMA) nurses. Facility-specific per diem rates are computed annually based on annual facility cost reports. Because of potential budget shortfalls caused by the nation's poor economy, nursing facility Medicaid rates have been frozen since April 1, 2009 at the level they were as of December 31, 2008.

With approval of the Centers for Medicare and Medicaid Services (CMS) of a Title XIX State Plan amendment that will be submitted before June 30, 2012, effective for services provided on or after June 1, 2012, DMMA intends to modify reimbursement for nursing facility services provided under the Medicaid program by increasing the nursing facility per diem amounts for each facility by an amount computed annually that will use proceeds of a nursing facility provider tax to fund the state share of the increased per diem rates. The implementation of this increase in per diem payments is contingent upon passage by the Delaware General Assembly of legislation that defines the applicability of the Nursing Facility Quality Assessment provider tax.

In compliance with 42 CFR §447.205, Public Notice was published before the proposed effective date of the change on May 30, 2012 in the News Journal and on May 31, 2012 in the Delaware State News.

Fiscal Impact Statement

DMMA estimates that the proposed amendment to the Medicaid State Plan is expected to increase payments to nursing facilities by approximately \$29 million in State Fiscal Year 2013 but will require no increase in spending from the General Fund because the state share of the increased claims will be funded by the proceeds of the Nursing Facility Quality Assessment Fund currently under consideration by the Delaware General Assembly.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

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 Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

GACEC and SCPD have the following observations.

As the Summary of Proposal section (p. 39) indicates, Medicaid reimbursement rates to nursing facilities "have been frozen since April 1, 2009 at the level they were as of December 31, 2008." DMMA proposes to impose a quality assessment "tax" on nursing home providers which would generate federal Medicaid matching funds. See S.B. No. 227, lines 35-38 and 118-119. Ninety percent (90%) of the collected quality assessment funds will be deposited in a Nursing Facility Quality Assessment Fund (lines 71-72) and ten percent (10%) will be diverted to the Delaware's General Fund (line 73). The "90%" in the Quality Assessment Fund would be used to increase nursing facility rates. DMMA anticipates increasing payments to nursing facilities by \$29 million in State FY13. See regulatory "Fiscal Impact Statement" at p. 39. We infer that the federal match is being used to essentially offset the additional payments to nursing facilities. Some nursing facilities would be exempt from the assessment, including State-run facilities and facilities that exclusively serve children. See regulatory Section "(c)" on p. 41.

The Councils have one (1) technical observation. Literally, S.B. No. 227 requires all nursing facilities to be charged a quality assessment unless exempt under §6502(d). See lines 35-38 and 58-68. One would therefore expect the exemptions in the regulation (p. 41) to match the exemptions in §6502(d). They do not match. For

example, the bill requires DHSS to exempt facilities with 46 or fewer beds and continuing care retirement communities (lines 62-65). The regulation [§(c)] on p. 41], does not exempt such facilities. Moreover, the regulation lists several facilities as exempt which are not exempt under the legislation.

Agency Response: DMMA wishes to thank the Councils for their comments on the proposed change to the Medicaid State Plan. In their letters, GACEC and SCPD indicated that they believe there was a discrepancy between Senate Bill 227 (S.B. 227), the law that creates a new Nursing Facility Quality Assessment and the DMMA proposed regulations with regard to facilities that are exempted from the Assessment per §6502(d) and the proposed regulation. The exclusions in the two documents are purposefully different.

The two documents serve different purposes: S.B. 227 creates the Assessment and the Medicaid State Plan Amendment, to which the published regulatory change relates, details the methodology by which the proceeds of the tax will be used to increase per diem payments to nursing facilities. The rules regarding which facilities are subject to the Assessment are defined in the law. The rules regarding which facilities may receive increased per diem payments and how those increased payments will be determined are defined in the State Plan Amendment. The two sets of exclusions are different and serve different purposes.

The law, S.B. 227 does the following: 1) creates the Assessment, 2) indicates which nursing facilities to be assessed and the maximum allowable rate for the initial period from June 1, 2012 through May 31, 2013, 3) requires the proceeds from the Assessment to be deposited into a specified fund and 4) indicates that 90% of the proceeds of the fund are to be used to secure federal Medicaid matching funds that will be used to provide “per diem rate adjustments in accordance with §10504 to Medicaid enrolled nursing facilities” and to “reimburse the Medicaid share of the quality assessment in accordance with §10504”. The law does not indicate the method that will be used to determine the actual payment adjustment for each Medicaid enrolled nursing facility.

The State Plan Amendment, for which the proposed regulation was published, specifies the method by which the per diem rates of certain Medicaid enrolled nursing facilities will be increased using the proceeds from the Assessment as the state match.

The table below shows the facilities that are exempted from the Assessment per S.B. 227 and which facilities are excluded from receiving the increased Medicaid per diems per the State Plan Amendment.

Type of Facility	Exempt from Assessment	Excluded from Increased Diems	from Per
Government Owned Facilities (§6501 (4))	Yes	Yes	
Nursing Facilities that Exclusively Serve Children (§6501 (4))	Yes	Yes	
Nursing Facilities with less than 46 Beds (§6502 (d)(1))	Yes	No	
Continuing Care Retirement Communities (§6502 (d)(1))	Yes	No	
Facilities that have no Medicaid paid bed days	No	Yes	

No change to the regulation was made as a result of this comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to update the Title XIX Medicaid State Plan regarding *Nursing Facility Quality Assessment* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

***Please note that no changes were made to the regulation as originally proposed and published in the July 2012 issue of the Register at page 30 (16 DE Reg. 30). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

Nursing Facility Quality Assessment

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

ORDER

State Survey Agency State Long-Term Care Ombudsman Program

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 Delaware Title XIX Medicaid State Plan regarding *State Survey Agency* specifically, *a change in the administrative authority of the State Long-Term Care Ombudsman 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 July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 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 State Survey Agency, specifically, *a change in the administrative authority of the State Long-Term Care Ombudsman Program*.

Statutory Authority

- Social Security Act §1919(g)(1)(C), *Survey and Certification Process*
- Older Americans Act, Title VII
- 146th General Assembly, Senate Bill 102, *An Act to Amend Title 16 of the Delaware Code Relating to the Long-Term Care Ombudsman*

Background

The State Long-Term Care Ombudsman program was established by Title III of the Older Americans Act (OAA) in 1978 as a demonstration program and was transferred to a new Title VII of the OAA (which also includes other programs) in 1992. With enactment States are required to establish and operate an Office of the State Long-Term Care Ombudsman, headed by the State Long-Term Care Ombudsman. The Ombudsman Program identifies, investigates and resolves complaints made by or on behalf of residents of nursing, board and care and similar adult care homes; addresses major issues which affect residents; works to educate residents, nursing home personnel and the public about residents rights and other matters affecting residents; and performs other functions specified in the Act to protect the health, safety, welfare and rights of residents.

Today, the Ombudsman Program exists in all states, the District of Columbia, Puerto Rico and Guam, under the authorization of the Older Americans Act. Each state has an Office of the State Long-Term Care Ombudsman, headed by a full-time state ombudsman assisting residents and their families and providing a voice for those unable to speak for themselves.

Delaware's Ombudsman Program has received Medicaid funding since 1990 and was previously administered through the Delaware Division of Services for Aging and Adults with Physical Disabilities (DSAAPD).

Summary of Proposal

What Prompted the Change?

Delaware Health and Social Services (DHSS) received authorization in State Fiscal Year 2011 Budget Bill to consolidate the three (3) long-term care facilities, Delaware Hospital for the Chronically Ill (DHCI), Emily P. Bissell Hospital (EPBH), and Governor Bacon Health Center (GBHC) into the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). The consolidation was implemented to improve access to services as the

needs of the residents of the three facilities are similar to the needs of DSAAPD's overall target population. The perception of a conflict of interest would have been created if the same Division Director supervised the three facilities and supervised the Long Term Care Ombudsman Program (LTCOP), which is charged with monitoring clients' rights of the residents who live there. Federal regulations require the Ombudsman program be in a Division separate from long-term care facilities.

Authorized by Senate Bill 102 (146th General Assembly) and signed into law by the Governor on July 13, 2011, this change was not only to enhance crucial constituent services consistent with the Secretary's focus on client advocacy and protections and to elevate their visibility across the Department and State Government, but also to address the possible perception of a conflict of interest which would exist if the program remained within the DSAAPD, which now houses the long term care facilities. The effective date of the transition was January 1, 2011.

Summary of Proposed Amendment

As referenced above, the Medicaid State plan will be amended at General Program Administration, 4.40(d), *Survey & Certification Process* to identify a change in the administrative authority over the State Long-Term Care Ombudsman Program from the DSAAPD to the Office of the Secretary, Delaware Health and Social Services (DHSS). DHSS is the designated single State agency responsible for the administration of Delaware Medicaid.

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

Fiscal Impact Statement

This plan amendment imposes no increase in cost on the General Fund.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

GACEC and SCPD have the following observations.

As the "Summary of Proposal" section (p. 43) indicates, transfer of three (3) State long-term care facilities (DHCI, EPBH, and GBHC) to the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) in the FY11 budget bill created a conflict of interest. The conflict resulted from the DSAAPD Division Director supervising both the State LTC facilities and the Ombudsman since the Ombudsman is expected to be an independent monitor of LTC facilities. To resolve the conflict, legislation (S.B. 102) was enacted to place the Ombudsman under the Office of the Secretary. The proposed regulation merely revises the Medicaid State Plan to reflect this change. GACEC and SCPD endorse the proposed regulation.

Agency Response: DMMA thanks the Councils for their endorsement.

GACEC further comments as follows:

However, consistent with the June 17, 2011 GACEC letter on Senate Bill No. 102, the GACEC requested a DHSS commitment to address the following: 1) conflicts between DHSS Administration and the Ombudsman; and 2) the need to ensure the availability of independent legal counsel to the Ombudsman. Council would like to request additional information to assess whether the Department ever implemented its commitment.

Agency Response: DMMA appreciates the comment. However, issues around DHSS and Ombudsman conflict resolution and the availability of independent counsel are processes outside the scope and authority of this Medicaid regulation. The proposed Medicaid state plan amendment simply identifies a change in the administrative authority over the State Long-Term Care Ombudsman Program. DMMA will forward your request for additional information to the Office of the Secretary. No change was made to the regulation as a result of this comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Title XIX Medicaid State Plan regarding *State Survey Agency, specifically, a change in the administrative authority of the State Long-Term Care Ombudsman Program* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

*Please note that no changes were made to the regulation as originally proposed and published in the July 2012 issue of the *Register* at page 42 (16 DE Reg. 42). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

State Survey Agency State Long-Term Care Ombudsman Program

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

ORDER

Telemedicine

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 Delaware Title XIX Medicaid State Plan regarding *Telemedicine Services*. 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 July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 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 State Plan *to allow for the use of a telemedicine delivery system for providers enrolled under Delaware Medicaid*.

Statutory Authority

- 42 CFR Part 440, *Services*
- 42 CFR §410.78, *Telehealth services*

Background

For the purposes of Medicaid, telemedicine seeks to improve a patient's health by permitting two-way, real time interactive communication between the patient, and the physician or practitioner at the distant site. This electronic communication means the use of interactive telecommunications equipment that includes, at a minimum, audio and visual equipment. This definition is modeled on Medicare's definition of telehealth services (42 CFR §410.78).

According to the Centers for Medicare and Medicaid Services (CMS), the Medicaid program and the federal Medicaid statute (Title XIX of the Social Security Act) does not recognize telemedicine as a distinct service. CMS does note, however, that "telemedicine is viewed as a cost-effective alternative to the more traditional face-to-face way of providing medical care" (e.g., face-to-face consultations or examinations between provider and patient) that states can choose to cover under Medicaid and that there is "flexibility inherent in federal law to create innovative payment methodologies for services that incorporate telemedicine technology."

States may seek a State Plan amendment to allow the use of telemedicine as a delivery system.

Summary of Proposal

The Division of Medicaid and Medical Assistance (DMMA) proposes to amend the Medicaid State plan to allow for Medicaid reimbursement for medically necessary telemedicine services, a mode of delivery of health care services for covered services rendered to Medicaid eligible recipients by enrolled Delaware Medicaid providers.

DMMA's objectives in recognizing telemedicine-provided services include:

- Improved access to health care services and behavioral health services with no loss in quality, safety or access to existing medical services; and
- Improved access to medical subspecialties not widely available in a service area; and
- Improved recipient compliance with treatment plans; and
- Medical and behavioral health services rendered at an earlier stage of disease; and
- Improved health outcomes for patients; and
- Reduced Delaware Medical Assistance Program (DMAP) costs for covered services such as hospitalizations and transportation.

The proposed plan amendment, when approved, would allow the following telemedicine services, including delivery of consultation services, office visit evaluation and management services, individual psychotherapy services, pharmacologic management, psychiatric diagnostic interview examinations, end stage renal disease related services, and individual medical nutrition therapy via an interactive telecommunications system. For these services, an interactive telecommunications system is considered to meet the requirements of a face-to-face encounter.

The appropriate State plan pages will be amended and the appropriate DMAP provider manuals will be updated with applicable coverage parameters and billing guidelines.

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

Fiscal Impact Statement

- The fiscal impact of adding telemedicine cannot be estimated.
- The projected number of telemedicine-provided services cannot be determined at this time as the actual number will depend on the number of Medicaid practitioners and beneficiaries who choose to use the technology, as appropriate.
- The coverage and limitations for telemedicine-provided services will mirror the respective service delivered face-to-face to eliminate the possibility of any financial impact on Medicaid.
- Providers who wish to deliver telemedicine-provided services will have to invest in the necessary interactive telecommunications equipment.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

Insight Telepsychiatry, LLC, 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 Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

Insight Telepsychiatry, LLC

As an active provider of telemedicine services in Delaware and throughout the mid-Atlantic region, we applaud the DMMA for its forward thinking in creating these proposed changes, particularly for recognizing the large needs for telemedicine services within the behavioral health arena.

Provider Licensure/Enrollment Requirements:

Of note is the requirement that all eligible telemedicine providers be located within the continental United States. As a local telemedicine entity that presently engages local telemedicine providers, we submit that this geographic requirement should be removed from the final rule.

Placing a geographic requirement around a concept like telemedicine that is specifically designed to break down boundaries and minimize the impact of location is counter-productive to the long-term intent of the revised rule. Given a national shortage of qualified providers, particularly within the field of mental health, we must keep every option open to the delivery of appropriate clinical services through carefully planned and managed telemedicine programs. Regulations and practice guidelines, coupled with careful monitoring from state medical

boards and federal regulators will ensure that qualified professionals deliver services appropriately, and while the licensure and qualifications of the provider should be considered, location should not.

This point is particularly salient within the field of mental health, where our nation faces an increasing prevalence of behavioral health issues paired with a decreasing supply of qualified mental health professionals to serve these consumers. This trend is extremely well documented within the literature, and no recognizable end is in sight. With this trend, the limited supply of providers will grow increasingly in demand. This demand will see an increase in the salaries of these providers as well as considerable demands from providers for preferential work assignments and schedules. Simply put, providers will become more expensive and increasingly resistant to conducting afterhours call. The 24/7 requirements of medical emergencies and psychiatric crises are in direct conflict with a resistance by providers to deliver services beyond normal working hours.

Telemedicine, and its ability to reach across borders and time zones, represents a unique opportunity to leverage time differences. Through telemedicine the limited pool of providers can be granted the ability to work during what are normal business hours at their distant site while providing after hours services to an originating site within a distant time zone.

Agency Response: DMMA appreciates the interest expressed for permitting providers residing outside the continental United States to participate in the telemedicine program. However, two issues specifically preclude accommodating providers located out of the country.

First, under current Delaware licensure requirements, only providers who are licensed in the State of Delaware but who are located in another State may provide services through the means of telemedicine. On that basis alone, it is unlikely that a provider residing in another country will have a Delaware license.

Second, effective January 1, 2011, Section 6505 of the Affordable Care Act entitled, *Prohibition on Payments to Institutions or Entities Located Outside of the United States*, requires that a State shall not provide any payments for items or services provided under the State plan or under a waiver to any financial institution or entity located outside of the United States (U.S.).

For purposes of implementing this provision, section 1101(a)(2) of the Social Security Act defines the term "United States" when used in a geographical sense, to mean the "States." The Act defines the term "State" to include the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa, when used under Title XIX (Medicaid).

Further, this provision specifically prohibits payments to telemedicine providers located outside of the U.S., Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

No change to the regulation was made as a result of this comment.

GACEC and SCPD

GACEC and SCPD have the following observations and recommendations.

First, authorizing telemedicine offers many advantages to individuals with disabilities, including less transportation time and expense in reaching providers and improved access to subspecialties not widely available in a local area. The concept therefore merits endorsement.

Agency Response: DMMA thanks the Councils for their endorsement.

Second, the standards omit any requirement that the use of telemedicine be considered only when it is consistent with effective communication. The Americans with Disabilities Act generally contemplates accommodations to ensure effective communication between medical providers and patients. See attachments. Therefore, it would be preferable to "highlight" this consideration in the regulation since it could otherwise be inadvertently overlooked. The following sentence could be added:

The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modifications, if necessary to ensure effective communication.

Agency Response: DMMA agrees with the suggestion to highlight consideration of accommodations to ensure effective communication between medical providers and patients. Because not all providers will be in a position to provide these accommodations due to size, staffing, and costs, DMMA will slightly modify the suggested language and incorporate it into the telemedicine policy as follows: *"The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the*

Americans with Disabilities Act (ADA), to ensure effective communication.”

Third, in Section 27, “Provider Qualifications”, second paragraph, first bullet, the verb/predicate has been omitted and the word “within” is misspelled. Consider the following amendment: “Act within their scope of practice”.

Agency Response: This was a publication error. The proposed text should have read, “Act within their scope of practice”.

Fourth, in the “Covered Services” section, the reference to “illness or injury” is “underinclusive” since it would exclude diagnoses and treatment of “conditions” such as cerebral palsy or epilepsy. Medicaid covers more than illnesses and injuries. Compare attached DHSS definition of “medical necessity”.

Agency Response: DMMA also agrees with the comment that telemedicine is available to clients for care beyond those who have sustained an illness or injury. The language under Covered Services will be modified to read as follows: “DMAP covers medically necessary telemedicine services and procedures covered under the Title XIX State Plan. Telemedicine is not limited based on the diagnosed medical condition of the eligible recipient. All telemedicine services must be furnished within the limits of provider program policies and within the scope and practice of the provider’s professional standards as described and outlined in the Delaware Medical Assistance Program (DMAP) Provider Manuals which can be found at:

<http://www.dmap.state.de.us/downloads/manuals.html>”

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Title XIX Medicaid State Plan regarding *Telemedicine Services* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER REGULATIONS #12-41
REVISION:**

ATTACHMENT 3.1-A
Page 12

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE/TERRITORY: **DELAWARE**
LIMITATIONS ON AMOUNT, DURATION, AND SCOPE OF MEDICAL AND
REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

27. TELEMEDICINE SERVICES

The Delaware Medical Assistance Program (DMAP) covers medically necessary health services furnished to eligible DMAP members as specified in the Medicaid State Plan. To facilitate the ability of recipients to receive medically necessary services, DMAP allows for the use of a telemedicine delivery system for providers enrolled under Delaware Medicaid.

Telemedicine services under DMAP are subject to the specifications, conditions, and limitations set by the State. Telemedicine is the practice of health care delivery by a practitioner who is located at a site, known as the distant site, other than the site where the patient is located, known as the originating site, for the purposes of consultation, evaluation, diagnosis, or recommendation of treatment.

Providers rendering telemedicine must be able to use interactive telecommunications equipment that includes, at a minimum, audio and video equipment permitting two-way, real time, interactive communication between the recipient and the practitioner to provide and support care when distance separates participants who are in different geographical locations.

[The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the Americans with Disabilities Act (ADA), to ensure

effective communication.]

Telephone conversations, chart reviews, electronic mail messages, facsimile transmissions or internet services for online medical evaluations are not considered telemedicine.

All equipment required to provide telemedicine services is the responsibility of the providers.

PROVIDER QUALIFICATIONS

In order to provide telemedicine under DMAP, providers at both the originating and distant site must be enrolled with DMAP or have contractual agreements with the managed care organizations (MCOs) and must meet all requirements for their discipline as specified in the Medicaid State Plan.

In order for services delivered through telemedicine technology from DMAP or MCOs to be covered, healthcare practitioners must:

- Act within their scope of practice;
- Be licensed (in Delaware, or the State in which the provider is located if exempted under Delaware State law to provide telemedicine services without a Delaware license) for the service for which they bill DMAP;
- Be enrolled with DMAP/MCOs;
- Be located within the continental United States.

COVERED SERVICES

DMAP covers medically necessary telemedicine services and procedures covered under the Title XIX State Plan. ~~[for the diagnosis and treatment of an illness or injury as indicated by the eligible recipient's condition]~~ **Telemedicine is not limited based on the diagnosed medical condition of the eligible recipient.]** All telemedicine services must be furnished within the limits of provider program policies and within the scope and practice of the provider's professional standards as described and outlined in DMAP Provider Manuals which can be found at: <http://www.dmap.state.de.us/downloads/manuals.html>

NON-COVERED SERVICES

If a service is not covered in a face-to-face setting, it is not covered if provided through telemedicine. A service provided through telemedicine is subject to the same program restrictions, limitations and coverage which exist for the service when not provided through telemedicine.

(Break in Continuity of Sections)

ATTACHMENT 4.19-B
Page 24

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE/TERRITORY: DELAWARE
METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES (Continued)

27. TELEMEDICINE SERVICES

Payment for services delivered at the distant site via telemedicine is made according to the standard Delaware Medical Assistance Program (DMAP) payment methodology for the comparable in-person service and provider type.

In addition to the payment for the actual service rendered, qualifying originating patient sites are reimbursed 98% of the Medicare rate for the facility fee for dates of services on or after July 1, 2012.

Fee schedules for telemedicine-provided services are available on the DMAP website at: <http://www.dmap.state.de.us/downloads>.

Except as otherwise noted in the Medicaid State Plan, State-developed fee schedule rates are the same for both government and private providers.

Separate reimbursement is not made for the use of technological equipment and systems associated with a telemedicine application to render the service.

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)
16 **DE Admin. Code** 11003

ORDER

Child Care Subsidy Program: Determining Technical Eligibility for Child Care

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 the Child Care Subsidy Program, specifically, *Determining Technical Eligibility for Child Care*. 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 July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced July 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 the Child Care Subsidy Program, specifically, *Determining Technical Eligibility for Child Care*.

Statutory Authority

45 CFR §98.20, *A child’s eligibility for child care services*

Summary of Proposed Changes

DSSM 11003, ~~Eligibility Requirements~~ *Determining Technical Eligibility for Child Care*: The name of the section is changed to more accurately indicate the content of the policy. This policy section is reformatted and clarifying language is also provided to make the rules easier to understand and follow. Specifically, this regulatory action adds the eligibility requirement that parents/caretakers must be Delaware residents. The applicable federal citation is also added to the policy section.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGE(S)

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, §3.C refers to “(o)btaining status as a a sy lee.” The error appears in both the printed and on-line version of the regulation. Based on the current Administrative Code version of the regulation, the reference should be “(o)btaining status as an asylee.” The Webster’s Dictionary definition of an “asylee” is attached.

Agency Response: The reference “obtaining status as an asylee” has been corrected.

Second, as noted above, the Summary of Proposed Changes indicates that the regulation is being reformatted for clarity. Unfortunately, while the current regulation contains punctuation, the proposed version omits corresponding punctuation. Consider the following:

- Subsection 1.A. should have a concluding period.
- Subsections 1.B. 1-6 omit semicolons and Subsection 1.B. 7. should have a concluding period.
- Subsection 2.A. omits a semicolon; Subsection 2.B. should conclude with “; or”; and Subsection 2.C. should have a concluding period.
- Subsections 3.A. and B. lack concluding semicolons.

- Subsections 3.C.A. omits a concluding semicolon;
- Subsection 3.C.B. should conclude with “; or”; and
- Subsection 3.C.C. lacks a concluding period.

Agency Response: According to the Gregg Reference manual, the suggested punctuation is not required in this style of writing. No change to the regulation was made as a result of this comment.

Third, the Division should consider converting Subsections 1.C., Pars. A-C, to Pars. 1-3. Compare Subsection 1.B., Pars. 1-7.

SCPD endorses the proposed regulation subject to consideration of the above recommended edits.

Agency Response: DSS is unable to address this recommendation as your letter refers to 1.C. and there is no paragraph labeled 1.C.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 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 the Child Care Subsidy Program, specifically, *Determining Technical Eligibility for Child Care* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

DSS FINAL ORDER REGULATION #12-39 REVISION:

11003 Eligibility Requirements Determining Technical Eligibility for Child Care

45 CFR 98.20

PRWORA 401 and 402

~~DSS provides child care services to eligible Delaware families with a children) who resides in the home and who is under the age of 13, or children 13 to under 19 who are physically or mentally incapable of caring for themselves or are active with the Division of Family Services.~~

~~Under Title IV, Sections 401 and 402 of the Personal Responsibility and Work Opportunity Act of 1996, the Division is prohibited from using CCDBG and SSBG funds to pay for child care services for most persons who are not U.S. citizens. At State option, the Division may choose to use State only funds to pay for child care services for such persons. Certain aliens are exempt from this restriction for a period of five (5) years from the date of obtaining status as either a refugee, a sy lee, or one whose deportation is being withheld. In addition, aliens admitted for permanent residence who have worked forty (40) qualifying quarters and aliens and their spouses or unmarried dependent children who are either honorably discharged veterans or on active military duty are exempt from this restriction.~~

~~The Division will provide Child Care services for eligible families where there is at least one U.S. citizen or legal alien in the family. If one member of the family is a U.S. citizen or legal alien and they meet both technical and financial eligibility criteria Child Care Services can be provided. The Division will evaluate non U.S. citizen cases on an individual basis.~~

~~Non US citizens referred to the Child Care subsidy program through the Division of Family Services, due to a protective need, are eligible to receive services regardless of their citizenship status.~~

~~A family needs service when parents/ caretakers are required to be out of the home, or are reasonably unavailable (may be in the home but cannot provide supervision, such as a parent works a third shift, is in the home, but needs to rest), and no one else is available to provide supervision.~~

~~A. Parents/caretakers need service to:~~

- ~~1. accept employment,~~
- ~~2. keep employment,~~

3. participate in a training component, as part of one of the DSS Employment and Training programs, leading to employment;

4. participate in an education component, as part of one of the DSS Employment and Training programs;

5. work and the other parent/caretaker or adult household member is chronically ill or incapacitated;

6. have someone care for the children because of a parent/caretaker special need.

-B. A children) needs service to:

1. provide for a special need (physical or emotional disabilities, behavior problems, or developmental delays, etc.);

2. provide protective supervision in order to prevent abuse or neglect.

In addition to having an eligible child and a child care need, certain DSS Child Care programs require parents/ caretakers to meet income limits. Under certain other Child Care programs, DSS guarantees child care. These financial requirements along with other technical requirements help determine the parent/caretaker's child care category. Categories relate to the funding sources used by DSS to pay for Child Care services. The following sections discuss the technical requirements for child care services based on category and need.

This policy applies to applicants for and recipients of child care assistance.

1. Parents/Caretakers Must Meet Certain Criteria

To be technically eligible parents/caretakers must have a need that requires them to be out of the home or reasonably unavailable to provide supervision (e.g., a medical condition, needing rest because of working a third shift, etc.).

A. Parents/Caretakers must be Delaware residents

B. Parents/Caretakers need services to meet one of the following:

1. Accept or keep a job

2. Participate in a DSS Employment and Training program

3. Participate in the Transitional Work Program

4. Participate in job search

5. Have a break in education/training

6. Prevent child abuse or neglect as referred by DFS

7. Provide care for the children) when the parents/caretakers have a special need

2. Children Must Meet Certain Criteria

Children may be eligible if they:

A. Live in the home and are under the age of 13

B. Live in the home and are age 13 to 18 and are physically or mentally incapable of caring for themselves

C. Are active with and referred by the Division of Family Services

3. Non-Citizens May Qualify for Child Care

Non-citizens may qualify if[:

A. **At least one U.S. citizen or legal alien lives in the household**

B. ~~Both~~ **both parents/caretakers meet technical and financial eligibility criteria[. and they meet at least one of the following criteria.**

C. **The following aliens qualify for a period of five years from the date of:]**

[A1]. Obtaining status as a refugee [or]

[B2]. Obtaining status as a[n] asylee [or]

[C3]. Their deportation being withheld

[BD]. They are aliens admitted as permanent residents who have worked 40 qualifying quarters

[CE]. They, their spouses or unmarried dependent children are honorably discharged veterans or on active military duty.

~~[Qualified aliens may qualify for a period of five years from the date of:]~~

9 DE Reg. 572 (10/01/05)

10 DE Reg. 1007 (12/01/06)

15 DE Reg. 47 (07/01/12)

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF WATER

Surface Water Discharges Section

Statutory Authority: 7 Delaware Code, Section 6000 (7 Del.C. §6000)

7 DE Admin. Code 7201

Secretary's Order No.: 2012-W-0033

7201 Delaware Regulations Governing the Control of Water Pollution

Date of Issuance: August 15, 2012

Effective Date of the Amendment: September 11, 2012

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulatory amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* (hereinafter referred to as the "proposed Aquatic Pesticides Regulations", or "APR"). The Department's Division of Water commenced the regulatory development process with Start Action Notices 2010-25. This proposed revision to Delaware's existing Water Pollution regulations is being promulgated as a result of the 2009 decision by the U.S. Sixth Circuit Court, whereby the Court determined 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. Being an NPDES-delegated state (with the exception of federal facilities), the State of Delaware, through DNREC, is required to issue its own NPDES permits and develop regulations that align with the federal Pesticide General Permit (PGP) issued on October 31, 2011.

In order to allow aquatic pesticide application through the summer months of 2012, the Department's Division of Water issued emergency regulations, to wit: *Emergency Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, which are effective from March 1, 2012, through August 31, 2012. 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 regulations with less than the notice required by 29 Del.C. §10115. Much of the aquatic pesticide spraying during the above-referenced timeframe was 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. Delaware's proposed APR will allow pesticide applicators to obtain the required permits coverage for applying aquatic pesticides, as required, from this point forward.

The Department's proposed amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, were initially published as Emergency Regulations in the March 1, 2012 edition of the *Delaware Register of Regulations*. It should be noted that the Department engaged many stakeholders during this promulgation process to revise these regulations. A Writing Committee made up of industry representatives and divisional staff met numerous times, beginning with the initial Regulatory Advisory Comment (RAC) meeting held in

December of 2010, to discuss the proposed revisions to the regulations. In addition, several subcommittees made up of Writing Committee members, interested parties and staff met several times over the course of the past year and a half to provide feedback with regard to these proposed regulatory revisions. The input from the subcommittees and Writing Committee has been given consideration by the Department in the development of the regulatory language. Prior to the public hearing held in this matter on July 30, 2012, the Department's Surface Water Discharges Section also hosted three public workshops in March of 2012 (one in each county) to discuss the aforementioned proposed revisions. It should also be noted that no members of the public were present at the time of the public hearing on July 30, 2012, nor were any public comments received by the Department regarding this proposed promulgation prior to the close of the record on August 14, 2012.

Subsequent to the record closing in this matter, the Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated August 15, 2012 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Moreover, I find that the Department's experts in the Division of Water fully developed the record to support adoption of these Amendments.

With the adoption of this Order, Delaware will be enabled to amend its Water Pollution Regulations, specifically, with the addition of new subsection Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, thereby enabling the Department to comply with the 2009 decision by the U.S. Sixth Circuit Court, to wit: 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. Additionally, this promulgation will allow the Department to incorporate the above proposed new regulations into its existing **7 DE Admin. Code 7201**, under new Subsection 9.8, as the current Emergency Regulations concerning this matter, (which, as noted above, were enacted by DNREC effective March 1, 2012) are set to expire August 31, 2012.

In conclusion, the following findings and conclusions are entered:

1. The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
2. The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on July 30, 2012;
3. The Department held a public hearing on July 30, 2012 in order to consider public comments before making any final decision;
4. The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;
5. The recommended Amendments do not reflect any changes from the proposed Amendments as published in the July 1, 2012, *Delaware Register of Regulations*;
6. The recommended Amendments should be adopted as final regulation Amendments because Delaware will be enabled to (1) comply with the 2009 decision by the U.S. Sixth Circuit Court, to wit: 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; (2) incorporate the above proposed new regulations into its existing **7 DE Admin. Code 7201**, under new Subsection 9.8, as the Emergency Regulations concerning this matter, which were enacted by DNREC effective March 1, 2012, are set to expire August 31, 2012; (3) promote a greater understanding of said regulations for the regulated community; and (4) the amendments are well supported by documents in the record; and that
7. The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Collin P. O'Mara, Secretary

*Please note that no changes were made to the regulation as originally proposed and published in the July 2012 issue of the *Register* at page 50 (16 DE Reg. 50). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

7201 Regulations Governing the Control of Water Pollution

**DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION**

Statutory Authority: 24 Delaware Code, Section 205 (24 Del.C., §205)
24 DE Admin. Code 200

ORDER

200 Board of Landscape Architecture

Pursuant to 29 Del.C. §10118 and 24 Del.C. §205, the Delaware Board of Landscape Architecture issues this Order adopting proposed amendments to the Board's Rules. Following notice and a public hearing on May 10, 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 April 1, 2012 *Register of Regulations* and in the *Delaware News Journal* and *Delaware State News*. The Board proposed to completely rework its regulations in an attempt to better organize and clearly establish the standards governing licensed Landscape Architects in the State of Delaware.
2. The Board received no written comments during April 2012. The Board held a public hearing on May 10, 2012 and received no public comments.
3. The Board proposed to revise its rules in an attempt to better organize and clearly establish the standards governing Landscape Architects in the State of Delaware.
4. The Board made three non-substantive technical corrections to its regulations pursuant to 29 Del.C. §10113(b)(4). Rule 1.0 was changed from Filing for Applications for Written Exam to Filing for Applications for Licensure which was a technical error because the Board does not administer the exam. Rule 1.5 was also changed from written examination to licensure because the Board does not administer the exam. Rule 11.0 was changed from Crimes substantially related to the practice of Architecture to Crimes substantially related to the practice of Landscape Architecture. This was a technical error because the Board is the Board of Landscape Architecture and not the Board of Architecture.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

5. 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. No public comment was received and therefore no further revision of the rules need be considered.

6. There being no public comment to consider, the Board hereby adopts the regulation changes as originally published on April 1, 2012 and the non-substantive technical corrections to those rules.

The effective date of this Order will be ten (10) days from the publication of this Order in the *Register of Regulations* on September 1, 2012.

IT IS SO ORDERED this 16th day of August, 2012

Eric Wahl, RLA, President

Rachel Dunning, Treasury

William Bullock
Jeffrey Clark, RLA

Jeffrey Seemans, RLA, Secretary

200 Board of Landscape Architecture

1.0 Filing of Applications for ~~[Written Examination]~~ Licensure]

- 1.1 ~~Persons seeking licensure pursuant to 24 Del.C. §206 shall submit an application for written examination on a form prescribed by the Board to the Board's office at the Division of Professional Regulation (the "Division") along with the application fee established by the Division. Applicants for written examination shall be filed in such office of the Board no later than twelve (12) weeks prior to the opening date of the examination. Prior to seeking licensure, applicants must have passed all sections of the national examination administered by the Council of Landscape Architectural Registration Board "CLARB".~~
- 1.2 Applicants seeking licensure pursuant to 24 Del.C. §206(a)(1) shall have graduated from a school or college of landscape architecture approved or accredited by the ~~national Council of Landscape Architectural Registration Boards,~~ the American Society of Landscape Architects Landscape Architectural Accreditation Board, or other legitimate national association of landscape architects.
- 1.3 For purposes of 24 Del.C. §206(a)(32), courses in landscape architecture shall have been taken at a school or college of landscape architecture approved or accredited by the ~~national Council of Landscape Architectural Registration Boards,~~ the American Society of Landscape Architects Landscape Architectural Accreditation Board, or other legitimate national association of landscape architects.
- 1.4 ~~Each applicant must submit documentary evidence, as more fully described on the application form, to show the Board that the applicant is clearly eligible to sit for the examination under 24 Del.C. §206. Upon successfully passing all required sections of the national exam as administered by CLARB, applicants will then submit a completed application to the Division of Professional Regulation.~~
- 1.5 The Board shall not consider an application for ~~written examination~~ licensure until all items described in sections 1.1, ~~and 1.2, 1.3, 1.4, and 4.0 of this~~ the rules have been submitted to the Board's office.
- 1.6 The Board reserves the right to retain as a permanent part of the application any or all documents submitted.
- 1.7 The examination shall be the Council of Landscape Architectural Registration Board's ("CLARB") current ~~uniform~~ national examination. CLARB establishes a passing score for each ~~uniform~~ section of the national examination.

Statutory Authority: 24 Del.C. §§206, 207

(Break in Continuity of Sections)

7.0 Continuing Education as a Condition of Biennial Renewal

- 7.1 General Statement: Each licensee shall be required to meet the continuing education requirements of these guidelines for professional development as a condition for license renewal. Continuing education obtained by a licensee should maintain, improve or expand skills and knowledge obtained prior to initial licensure, or develop new and relevant skills and knowledge.
 - 7.1.1 In order for a licensee to qualify for license renewal as a landscape architect in Delaware, the licensee must have completed 20 hours of continuing education acceptable to the Board within the previous two years, or be granted an extension by the Board for reasons of hardship. Such continuing education shall be obtained by active participation in courses, seminars, sessions, programs or self-directed activities approved by the Board.
 - 7.1.1.1 For purposes of seminar or classroom continuing education, one hour of acceptable continuing education shall mean 60 minutes of instruction.
 - 7.1.2 All courses, seminars, sessions and programs are acceptable for continuing education credit if sponsored by organizations listed in Rule 7.1.3. All other continuing education credits will be

reviewed at the time of renewal. All self-directed activities for continuing education credit allowed by rule 7.6 must be pre-approved and submitted by the licensee ~~60 days~~ 6 months prior to license renewal. ~~[prior to the activity on the form provided in 7.3 and 7.4.]~~

- 7.1.2.1 Each course, seminar, session, program, or self-directed activity to be recommended for approval by the Board shall have a direct relationship to the practice of landscape architecture as defined in the **Delaware Code** and contain elements which will assist licensees to provide for the health, safety and welfare of the citizens of Delaware served by Delaware licensed landscape architects.
- 7.1.3 Continuing Education courses offered or sponsored by the following organizations will be automatically deemed to qualify for continuing education credit:
- 7.1.3.1 LA CESTM - Landscape Architecture Continuing Education SystemTM
 - 7.1.3.42 American Society of Landscape Architects (National and local/chapter levels)
 - 7.1.3.23 Council of Landscape Architectural Registration Boards
 - 7.1.3.4 American Planning Association
 - 7.1.3.5 American Institute of Certified Planners
 - 7.1.3.6 Delaware Department of Natural Resources (DNREC) Division of Soil and Water Conservation, seminars or educational programs dealing with sediment erosion and control
- 7.1.4 ~~Erroneous or false information attested to by the licensee shall constitute grounds for denial of license renewal.~~ Self-directed Activities: The Board will have the authority to allow self-directed activities to fulfill the continuing education requirements of the licensees. However, these activities must result in a book draft, published article, delivered paper, workshop, symposium, or public address within the two (2) year reporting period. Self-directed activities must advance the practitioner's knowledge of the field and be beyond the practitioner's normal work duties. Instructors will not be granted CE credit for studies customarily associated with their usual university or college instruction teaching loads.
- 7.1.4.1 The Board may, upon request, review and approve credit for self-directed activities in a given biennial licensing period. A licensee must obtain pre-approval of the Board prior to undertaking the self-directed activity in order to assure continuing education credit for the activity. Any self-directed activity submitted for approval must include a written proposal outlining the scope of the activity, the number of continuing education hours requested, the anticipated completion date(s), the role of the licensee in the case of multiple participants and whether any part of the self-directed activity has ever been previously approved or submitted for credit by the same licensee. Determination of credit will be made by the Board upon review of the completed final project.
- ~~7.3.4~~ 7.2 Each licensed landscape architect shall complete, biennially, 20 units of continuing education as a condition of license renewal.
- 7.2 ~~Effective Date: The Board shall commence requiring continuing education as a condition of renewal of a license for the license year commencing on February 1, 1995. The licensee shall be required to successfully complete twenty (20) hours of continuing education within the previous two calendar years (example: February 1, 1993 through January 31, 1995).~~
- 7.3-3 ~~The continuing education period will be from October 31st~~ February 1 to November 1st January 31 of each biennial licensing period.
- 7.4 Documentation: Each licensee must retain copies of all supporting materials documenting proof of continuing education compliance for submission to the Board upon request. Supporting materials include a syllabus, agenda, itinerary or brochure published by the sponsor of the activity and a document showing proof of attendance (i.e., certificate, a signed letter from the sponsor attesting to attendance, report of passing test score). The Board reserves its right to request additional information and/or documentation to verify continuing education compliance.
- 7.35 Proof of continuing education is satisfied with an attestation by the licensee that he or she has satisfied the Requirement of Rule ~~6~~7.0.

- ~~7.35.1~~ Attestation may be completed electronically. ~~if the renewal is accomplished online. In the alternative, paper renewal documents that contain the attestation of completion may be submitted.~~
- ~~7.35.2~~ Licensees selected for random post renewal audit will be required to supplement the attestation with attendance verification pursuant to Rule ~~6-3~~ 7.9.
- ~~7.5.3~~ Each licensed landscape architect shall complete, biennially, 20 units of continuing education as a condition of license renewal.
- ~~7.56~~ Hardship: The Board will consider any reasonable special request from individual licensees for continuing education credits and procedures. The Board may, in individual cases involving physical disability, illness, or extenuating circumstances, grant an extension, not to exceed two (2) years, of time within which continuing education requirements must be completed. In cases of physical disability or illness, the Board reserves the right to require a letter from a physician attesting to the licensee's physical condition. No extension of time shall be granted unless the licensee submits a written request to the Board prior to the expiration of the license.
- ~~7.6~~ ~~Self directed Activities: For renewal periods beginning February 1, 2001, the following rules regarding self directed activity shall apply. The Board will have the authority to allow self directed activities to fulfill the continuing education requirements of the licensees. However, these activities must result in a book draft, published article, delivered paper, workshop, symposium, or public address within the two (2) year reporting period. Self directed activities must advance the practitioner's knowledge of the field and be beyond the practitioner's normal work duties. Instructors will not be granted CE credit for studies customarily associated with their usual university or college instruction teaching loads.~~
- ~~7.6.1~~ ~~The Board may, upon request, review and approve credit for self directed activities in a given biennial licensing period. A licensee must obtain pre-approval of the Board prior to undertaking the self directed activity in order to assure continuing education credit for the activity. Any self directed activity submitted for approval must include a written proposal outlining the scope of the activity, the number of continuing education hours requested, the anticipated completion date(s), the role of the licensee in the case of multiple participants and whether any part of the self directed activity has ever been previously approved or submitted for credit by the same licensee. Determination of credit will be made by the Board upon review of the completed final project.~~
- ~~7.7~~ Exemptions: New licensees by way of uniform national examination or by way of reciprocity shall be exempt from the continuing education requirements set forth herein for their first renewal period.
- Statutory Authority: 24 **Del.C.** §205(12).
- ~~7.8~~ Audit. Each biennium, the Division of Professional Regulation shall randomly select from the list of renewed licensees a percentage, determined by the Board, of the licensees to be audited. The Board may also audit based on complaints or charges against an individual license, relative to compliance with continuing education requirements or based on a finding of past non-compliance during prior audits.
- ~~7.9~~ Documentation and Audit by the Board. When a licensee whose name or number appears on the audit list applies for renewal, the Board shall obtain documentation from the licensee showing detailed accounting of the various CEU's claimed by the licensee. Licensees selected for random audit are required to supplement the attestation with supporting materials which may include a syllabus, agenda, itinerary or brochure published by the sponsor of the activity and a document showing proof of attendance (i.e., certificate, a signed letter from the sponsor attesting to attendance, report of passing test score). The Board reserves the right to request additional information and/or documentation to verify continuing education compliance.
- ~~7.9.1~~ The Board shall attempt to verify the CEUs shown on the documentation provided by the licensee. The Board shall then review the documentation and verification. Upon completion of the review, the Board shall decide whether the licensee's CEU's meet the requirements of these rules and regulations. The licensee shall sign and seal all verification documentation with a Board approved seal.
- ~~7.10~~ Board Review. The Board shall review all documentation requested of any licensee shown on the audit list. If the Board determines the licensee has met the requirements, the licensee's license shall remain in effect. If the Board initially determines the licensee has not met the requirements, the licensee shall

be notified and a hearing may be held pursuant to the Administrative Procedures Act. This hearing will be conducted to determine if there are any extenuating circumstances justifying the apparent noncompliance with these requirements. Unjustified noncompliance of these regulations shall be considered grounds for disciplinary action pursuant to 24 Del.C. §231(a)(6). The minimum penalty for unjustified noncompliance shall be a letter of reprimand and a \$250.00 fine.

- 7.11 Non-compliance – Extenuating Circumstances. A licensee applying for renewal may request an extension and be given up to an additional twelve (12) months to make up all outstanding required CEUs providing he/she can show good cause why he/she was unable to comply with such requirements at the same time he/she applies for renewal. The licensee must state the reason for such extension along with whatever documentation he/she feels is relevant. The Board shall consider requests such as extensive travel outside the United States, military service, extended illness of the licensee or his/her immediate family, or a death in the immediate family of the licensee. The written request for extension must accompany the renewal application. The Board shall issue an extension when it determines that one or more of these criteria have been met or if circumstances beyond the control of the licensee have rendered it impossible for the licensee to obtain the required CEU's. A licensee who has successfully applied for an extension under this paragraph shall make up all outstanding hours of continuing education within the extension period approved by the Board.
- 7.12 Appeal. Any licensee denied renewal pursuant to these rules and regulations may contest such ruling by filing an appeal of the Board's final order pursuant to the Administrative Procedures Act.

***Please note that no additional changes were made to the regulation as originally proposed and published in the April 2012 issue of the *Register* at page 1443 (15 DE Reg. 1443). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

200 Board of Landscape Architecture

DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 1106 (24 Del.C. §1106)
24 DE Admin. Code 1100

ORDER

1100 Board of Dentistry and Dental Hygiene

After due notice in the Register of Regulations and two Delaware newspapers, a public hearing was held on July 19, 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 of Dentistry and Dental Hygiene ("Board") gave notice of its proposal to consider adoption of amendments to the Board's Rules and Regulations. The Board proposed amendments to Regulation 4.0 *Qualifications of Applicant; Residency Requirements* to define active practice for applicants applying for licensure as dentists and dental hygienists by reciprocity. The Board also proposed amending Regulation 6.0 *Continuing Professional Education* to clarify that the Board will accept courses approved by PACE (Program Approval for Continuing Education) and CERP (Continuing Education Recognition Program) for continuing education. Finally, the amendments to Regulation 6.0 clarify that CPR courses provided or approved by organizations approved for continuing education identified in Regulations 6.5.1.1 through 6.5.1.4 are also acceptable to meet the CPR requirement.

Finally, the Board's proposed amendments correct the date for determining the proration of continuing education in Regulations 6.7.2.1 and 6.11.2.1 from March 1st to May 31st.

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. The Board received one written comment on July 19, 2012 via e-mail from Fay Stayton Rust, RDH which was marked and admitted as **Board Exhibit 3**. No members of the public attended the hearing to offer public comment.

Ms. Rust attested in her capacity as a four-term former member of the Dental Hygiene Advisory Committee that the Board has previously discussed defining "active practice" but had not done so because of the number of practitioners it will affect.

She noted that it has always been a concern that a licensee can maintain their license just by keeping current with the regulations requirement for licensure but added that defining "active practice" will force many retirees and those who work part-time from retaining their license. She added that the Board has always understood the possible implications for non-practicing, but licensed, retirees working on patients when they have not been "practicing" for a period of time. She suggested defining the amount of time "not practicing" as a dental hygienist or dentist would be a solution to the concern.

She cautioned the Board to be careful in the working of a requirement based on number of hours to stay active because of the ramifications of literal interpretation and the impact on vacations, sick leave and leave of absence, etc. She also questioned the how and who would do the monitoring and queried whether the Board had looked at how other states have done.

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 oral comments on the proposed amendments at the public hearing. The Board did receive one written comment on July 19, 2012 via e-mail from Fay Stayton Rust, RDH.

2. In regard to Ms. Rust's comments, the Board believes that perhaps Ms. Rust did not fully understand that the proposed regulation on active practice is limited in its scope and application. The active practice requirement only applies to applicants initially applying for licensure by reciprocity under the provision of 24 **Del.C.** §1124(a)(4). In addition, the regulation is not based on a weekly number of hours but rather a total number of hours per year. Also, the Board did review other state laws before determining the proposed number of hours.

As reflected in the February 2012 Board minutes, the Board compared Delaware law with the laws of Maryland, Pennsylvania, New Jersey, New York, and Wisconsin. After an extended discussion, including the Hygiene Advisory Committee, discussion the Board and Hygiene Advisory Committee voted to define active practice for hygienists applying for licensure through reciprocity as 350 hours per year in three of the last five years, and the Board voted to define active practice for dentists applying for licensure through reciprocity as 1000 hours per year. The Board appreciates Ms. Rust's comments; however, the Board is not persuaded that the comments require any change to the regulations on active practice as proposed.

3. 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 4.0 *Qualifications of Applicant; Residency Requirements* define active practice for applicants applying for licensure as dentists and dental hygienists by reciprocity. The Board is required to assess active practice under the provisions of 24 **Del.C.** §1124(a)(4) but until now had no guidelines for doing so. The regulation will provide consistency to the Board's interpretation.

The amendments to Regulation 6.0 *Continuing Professional Education (CPE)* will assist licensees by clarifying that the Board will accept courses approved by PACE (Program Approval for Continuing Education) and CERP (Continuing Education Recognition Program) for continuing education and that CPR courses provided by organizations approved for continuing education will also be approved. The Board is required to establish continuing education under the provisions of 24 **Del.C.** §1106(a)(1) and (7).

4. Finally, the change to the date for determining the proration of continuing education in Regulations 6.7.2.1 and 6.11.2.1 from March 1st to May 31st is clerical in nature.

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*.

TEXT AND CITATION

The text of the revised regulations remains as published in *Register of Regulations*, Vol. 15, Issue 12, on June 1, 2012.

SO ORDERED this 19th day of July 2012.

BOARD OF DENTISTRY AND DENTAL HYGIENE

Blair Jones, DMD, President, Professional Member

John Lenz, DDE, Secretary, Professional Member

Cheryl Calicott-Trawick, Public Member

Thomas Cox, DDS

Robert C. Director, DDS, Professional Member

Bonnie Thomas, RDH, Hygiene Advisory
Committee Member

Buffy Parker, RDH, Hygiene Advisory Committee
Member

Bernadette Evans, Public Member

Nathaniel Gibbs, Public Member

Joan Madden, RDH, Professional Hygiene
Member

Neil G. McAneny, DDS, Professional Member

Lucinda Bunting, DMD, Professional Member

Debra Bruhl, RDH, Hygiene Advisory Committee
Member

***Please note that no changes were made to the regulation as originally proposed and published in the June 2012 issue of the *Register* at page 1699 (15 DE Reg. 1699). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

1100 Board of Dentistry and Dental Hygiene

DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 1713(a)(12) (24 **Del.C.** §1713(a)(12))
24 **DE Admin. Code** 1700

ORDER

1700 Board of Medical Licensure and Discipline

After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on July 24, 2012 at a scheduled meeting of the Delaware Board of Medical Licensure and Discipline ("Board") to receive comments regarding proposed amendments to the Board's Rules and Regulations; specifically, the proposal amends regulation 14.0. The proposal amends outdated renewal provisions and replaces them with requirements for renewal and examination for physicians 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 Board initially proposed changes to Regulation 14 on March 1, 2012 at 15 DE Reg. 1293 and held a public hearing on April 3, 2012. As a result of the public comment, the Board determined to republish the regulation and to limit its application to physicians. The original proposal considered at the April public hearing would have included all professionals under the Medical Practice Act. The Board was persuaded that each of the advisory councils for each of the other professions regulated under the Medical Practice Act should address its own practice specific re-entry to practice requirements.

SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The following exhibits were made a part of the record:

Board Exhibit 1: *News Journal* Affidavit of Publication

Board Exhibit 2: *Delaware State News* Affidavit of Publication

No written comments were received. No members of the public offered public comment on the proposed amendments at the public hearing.

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 or verbal comments on the proposed amendments.

2. The Board's proposals are necessary to delete outdated language and delineate the current procedures and requirements for renewal including filing the application online, attesting to continuing education and payment of fees determined by the Division of Professional Regulation ("Division"). The regulation is also necessary to clarify the provisions for late renewal which enable a physician to renew late for a period up to one year provided the physician attests that they have not been practicing during the period of expiration, that they have completed all continuing education and by paying any late fees determined by the Division. A licensee who has allowed his or her license to lapse for a period in excess of one year will be required to apply as a new licensee and must meet the requirements for re-entry under Rule 14.7, if applicable.

The new language in Regulation Rule 14.7 implements provisions for determining clinical competency for physicians seeking licensure who have not been engaged in the active clinical practice of medicine. The Board has authority to establish the standards under the provisions of 24 **Del.C.** §1723(d). The regulations require that an applicant for initial licensure who has not been engaged in active practice for 3 years immediately preceding the application shall be required to demonstrate clinical competency as provided in 14.7.1 and 14.7.2 of the regulations. The Board believes the regulation is necessary based on a number of applications it has reviewed calling into question the clinical competency of physicians who have been out of practice at the time of the application.

3. The Board finds that the proposed amendments to the rules and regulations will improve the regulations related to renewal of licensure and will benefit the public implementing requirements related to demonstrating clinical competency for physicians seeking licensure in Delaware who have not been engaged in the active practice of clinical medicine for more than 3 years immediately preceding the application.

THE LAW

Pursuant to 24 **Del.C.** §1713(a)(12) the Board has statutory authority to promulgate regulations clarifying specific statutory sections of its statute. Pursuant to 24 **Del.C.** §1723(d) the Board has authority to adopt regulations regarding renewal and examination.

DECISION AND EFFECTIVE DATE

The Board hereby adopts the amendments to Regulation 14 as effective 10 days following publication of this order in the *Register of Regulations*.

TEXT AND CITATION

The text of the Regulation 30 remains as published in *Register of Regulations*, Vol. 15, Issue 12, June 1, 2012 without any additional changes.

SO ORDERED this 24st day of July, 2012.

BOARD OF MEDICAL LICENSURE AND DISCIPLINE

Stephen Cooper, M.D., President

Raymond Moore, Public Member

Gregory Adams, M.D., Vice-President

Joseph Parise, D.O.

Garrett H. Colmorgen, M.D.

Karyl Rattay, M.D.

FINAL REGULATIONS

Thomas Desperito, M.D.

Leslie C. Ramsey, Public Member

Vincent Lobo, D.O.

Anthony M. Policastro, M.D.

Daryl Sharman, M.D.

Malvine Richard, Ed.D., Public Member

***Please note that no changes were made to the regulation as originally proposed and published in the June 2012 issue of the *Register* at page 1705 (15 DE Reg. 1705). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

1700 Board of Medical Licensure and Discipline

BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT DATE
Advisory Council to the Division of Developmental Disabilities Services	Mrs. Jamie F. Doane	5/29/2012
Alderman	The Hon. Catherine Chen Hester The Hon. Charles F. McMullen	5/23/2012 7/13/2012
Board of Dentistry and Dental Hygiene	Lucinda K. Bunting, DMD	7/2/2012
Board of Examiners of Private Investigators & Private Security Agencies	Mr. Wayne A. Keller	5/14/2012
Board of Massage and Bodywork	Kari I. Ainsworth Ms. Holly T. Overmyer	5/29/2012 5/29/2012
Board of Parole	LeeAnn Bullock David Henderson	6/20/2012 5/9/2012
Board of Pension Trustees	Mrs. Nancy J. Shevock	6/27/2012
Child Death, Near Death and Stillbirth Review Commission	Mr. Mawuna Gardesey The Hon. Joelle P. Hitch Ms. Patricia D. Lewis Ms. Mary Kate McLaughlin Mary Ann Mieczkowski Adrienne E. Owen	5/29/2012 5/29/2012 6/13/2012 5/29/2012 5/29/2012 5/29/2012
Child Placement Review Board Executive Committee	Martha A. Brooks, Ed.D.	5/29/2012
Child Placement Review Board - New Castle	Sheila L. Boyer Mrs. Deborah L. Sydnor	5/29/2012 6/4/2012
Child Placement Review Board - Kent	Carolyn Eanes	5/29/2012
Child Placement Review Board - Sussex	Mr. John H. Kreitzer, Ed.D.	5/29/2012
Child Protection Accountability Commission	Ms. Kathleen M. Jennings Ms. Patricia D. Lewis Bridget V. Poulle	6/13/2012 6/13/2012 6/29/2012
Clean Water Advisory Council	Ms. Jennifer A. Adkins Mr. Gary L. Burcham Mr. Jeffrey C. Flynn Bruce W. Jones Mr. Hans M. Medlarz	6/13/2012 6/13/2012 6/13/2012 6/20/2012 6/13/2012

GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT DATE
Council on Game and Fish	Mr. Raymond F. Burris	6/12/2012
	Mr. John N. Dukes	6/12/2012
	Mr. Garrett L. Grier, Jr.	6/12/2012
	Joe C. Johnson	6/12/2012
	Mr. Craig A. Karsnitz	6/12/2012
	Mr. Edward A. Montague	6/12/2012
	Mr. Robert C. Nichols	6/12/2012
Council on Housing	Terry D. Ratliff	6/12/2012
	Francis R. Julian	5/30/2012
	Mr. Hugh D. Leahy, Jr.	5/30/2012
	Ms. Connie H. Louder	5/30/2012
	Corrine M. Massey	5/30/2012
	Ms. Donna G. Mitchell	5/30/2012
	Mr. Ralph W. Peters, Jr.	5/30/2012
	Ms. Ruth S. Sokolowski	5/30/2012
Ms. Norma H. Zumsteg	5/30/2012	
Council on Manufactured Housing	Mr. Daniel L. Haldeman	5/29/2012
Council on the Blind	Ms. Janet K. Brown	6/11/2012
Court of Common Pleas	The Hon. Kenneth S. Clark, Jr.	5/21/2012
Delaware Board of Charitable Gaming	Ms. Janet A. Williams-Coger	6/20/2012
	Timothy E. Winstead	6/20/2012
Delaware Board of Examiners of Nursing Home Administrators	Mr. E. Ray Quillen	5/29/2012
Delaware Council on Faith-Based Partnerships	Anastacio Matamoros, Ph.D.	6/4/2012
Delaware Economic and Financial Advisory Council	The Honorable Michael L. Morton	7/2/2012
Delaware Health Information Network	Stephen T. Lawless, M.D.	6/20/2012
Delaware Natural Areas Advisory Council	Mr. Edward A. Lewandowski	6/20/2012
	T. Harold Palmer, Jr.	6/20/2012
	James F. White, Jr.	6/20/2012
Delaware Nursing Home Residents Quality Assurance Commission	The Hon. Michael A. Barbieri	7/16/2012
Delaware Nutrient Management Commission	Mr. D. Mark Adkins	6/11/2012

GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT DATE
Delaware Nutrient Management Commission	Mr. Richard W. Sterling	6/11/2012
Delaware River and Bay Authority	Mr. Fernando N. Guajardo	5/16/2012
Delaware Statewide Interoperability Executive Council	David S. Hall	5/29/2012
Delaware Workforce Investment Board	The Hon. Mark T. Murphy	6/20/2012
Developmental Disabilities Council	Mrs. Debra A. McCann	5/29/2012
Education Commission of the States	The Hon. Mark T. Murphy	6/20/2012
Enhanced 911 Emergency Reporting System Service Board	Lt. Lewis W. Briggs, II The Hon. James H. Sills, III Mr. Michael H. Vincent	5/16/2012 6/27/2012 6/20/2012
Environmental Appeals Board	Mr. Sebastian A. LaRocca	6/13/2012
Family Court	The Hon. Mardi F. Pyott	5/18/2012
Governor's Advisory Council for Exceptional Citizens	Ms. Marie-Anne E. Aghazadian	5/29/2012
Industrian Accident Board	Mr. John F. Brady Mr. John D. Daniello Mr. Terrence M. Shannon	6/13/2012 6/20/2012 6/13/2012
Lottery Commission	Ms. Patricia R. Uhlenbrock	6/13/2012
Mid-Atlantic Regional Planning Body	John H. Clark Sarah W. Cooksey	7/11/2012 7/11/2012
N11 Review Committee	Mr. Gregory B. Patterson	7/17/2012
New Castle County Board of Elections	Sharon A. Williams-Mayo	6/27/2012
Professional Standards Board	Ms. Mary E. Pinkston	6/20/2012
Recycling Public Advisory Council	Mr. Michael D. Parkowski	5/29/2012
Secretary of Education	The Hon. Mark T. Murphy	6/1/2012
Southern Regional Education Board	The Hon. Mark T. Murphy	6/20/2012

GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT DATE
State Board of Education	Randall L. Hughes, II Barbara B. Rutt	5/16/2012 5/9/2012
State Examining Board of Physical Therapists and Athletic Trainers	Samuel T. Sullivan	5/29/2012
State Fire Prevention Commission	Mr. Marvin C. Sharp	6/11/2012
State Human Relations Commission	Mr. Daniel H. Bungy Pamela S. Davis Ms. Marian L. Harris	5/29/2012 5/29/2012 5/29/2012
State Public Integrity Commission	Mr. William F. Tobin, Jr.	6/13/2012
Superior Court	The Hon. E. Scott Bradley The Hon. Richard. R. Cooch	5/17/2012 6/13/2012
Tax Appeals Board	Sindy Rodriguez	5/16/2012
Unemployment Insurance Appeal Board	Mr. Vance G. Daniels, Sr.	5/16/2012
Welfare Employment Committee	Neva D. Anton-Wilkinson Daisy M. Payne	6/6/2012 6/6/2012
Wilmington Housing Authority	Ms. Mary Ann Miller	6/7/2012

DELAWARE RIVER BASIN COMMISSION
PUBLIC NOTICE

The Delaware River Basin Commission will hold a public hearing and business meeting on Wednesday, September 12, 2012 beginning at 11:00 a.m. at the Commission's office building, 25 State Police Drive, West Trenton, New Jersey. For more information visit the DRBC web site at www.drbc.net or contact Pamela M. Bush, Esq., Commission Secretary and Assistant General Counsel, at 609 883-9500 extension 203.

DEPARTMENT OF EDUCATION
PUBLIC NOTICE

The State Board of Education will hold its monthly meeting on Thursday, July 19, 2012 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF PUBLIC HEALTH
4459 Lead Based Paints Hazards
PUBLIC NOTICE

The Department of Health and Social Services, Division of Public Health, Health Systems Protection, is proposing revisions to the State of Delaware Regulations Governing Lead Based Paints Hazards. The proposed revisions establish standards for the regulation of lead-based paint hazard control activities for abatement firms, workers, and training programs. The revisions also correct technical errors and inconsistencies; clarify current requirements, such as the Secretary's authority to conduct on-site investigations and the recertification of firms; incorporate minor changes resulting from new Federal training requirements; add necessary definitions; and provide increased flexibilities for individual training, recertification and utilization of electronic methods of communication. Due to the extensive number of amendments the Division has concluded that the current regulations should be repealed and replaced in their entirety with the proposed regulations being published. On September 1, 2012, the Division plans to publish as proposed the amended regulations and hold them out for public comment per Delaware law.

Copies of the proposed regulations are available for review in the September 1, 2012 edition of the Delaware *Register of Regulations*, accessible online at: <http://regulations.delaware.gov> or by calling the Health Systems Protection Section at (302) 744-4705.

Any person who wishes to make written suggestions, testimony, briefs or other written materials concerning the proposed regulations must submit same to Deborah Harvey by Monday, October 1, 2012 at:

Deborah Harvey
Division of Public Health
417 Federal Street
Dover, DE 19901
Email: Deborah.Harvey@state.de.us
Phone: (302) 744-4700
Fax: (302) 739-6659

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**DIVISION OF AIR QUALITY****1125 Requirements for Preconstruction Review****PUBLIC NOTICE**

The Department proposes to revise Section 1.9, Definitions of 7 **DE Admin. Code** 1125, to include in the definition for "Greenhouse Gases (GHG)" that, prior to July 21, 2014, biogenic carbon dioxide (CO₂) emissions be excluded from consideration. This proposed change mirrors the federal rule at 76 FR 43490 (July 20, 2011) temporarily deferring for a period of three years the application of Prevention of Significant Deterioration (PSD) permitting requirements for CO₂ emissions from bioenergy and other biogenic stationary sources such as landfills.

The Department also proposes to revise Section 2 of 7 **DE Admin. Code** 1125 to increase the availability of emission offsets. Under the new source review permitting program (7 **DE Admin. Code** 1125) for stationary sources located in non-attainment areas, a proposed new or modified source exceeding established emission thresholds of ground-level ozone precursors must meet requirements that include the requirement to obtain emission "offsets" in an amount greater than the projected source emissions. Since Delaware sources are now well-controlled, the availability of offsets is costly and limited. The purpose of this revision is to expand the area where offsets can be obtained to an area that encompasses the 15 states that significantly contribute to Delaware's ozone nonattainment problem.

The Department will submit these changes to the Environmental Protection Agency as a revision to the State Implementation Plan (SIP).

DIVISION OF FISH AND WILDLIFE**3300 Non Tidal Finfish****PUBLIC NOTICE**

The proposed actions are intended to: formally define designated trout ponds; prohibit the harvest of trout in designated trout ponds prior to the scheduled pond trout season; authorize the taking of northern and blotched snakehead (invasive species) by bow and arrow and spear; and, make a number of minor editorial corrections to the non-tidal regulations.

Division regulations close fishing in stocked freshwater trout streams two weeks prior to the opening of trout season. This allows stocked trout to acclimate to their surroundings; become well dispersed; and, simplifies enforcement of the freshwater trout regulations. However, stocked trout ponds were not included in the definition of the trout streams and, therefore, similar closures to fishing prior to the opening of trout season cannot be adequately enforced. The Division has received numerous complaints from the angling public regarding stocked trout harvest prior to the season opening. The proposed amendments to §§3301 and 3304 seek to expressly define Newton and Tidbury Ponds as designated trout ponds, and establish closed and open seasons of same.

The Division is also proposing to amend §3303 to allow the take of northern and blotched snakehead by hook and line; bow and arrow and spear in non-tidal waters. These species are non-native invasives which have the potential to cause ecological harm. Bow fishing is an effective harvesting technique that may diminish their numbers and slow or prevent their spread. Similar language exists for carp.

Other proposed amendments are editorial in nature. These changes are intended to clarify awkwardly worded language (§3304 (4.0)) and make the non-tidal regulatory language consistent with the Delaware Administrative Code Drafting and Style Manual (September 2009 edition). They are not intended to change the meaning or intent.

The hearing record on the proposed changes to the Non Tidal Finfish regulation will be open October 1, 2012. Individuals may submit written comments regarding the proposed changes via e-mail to 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 October 26, 2012 beginning at 6 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

DIVISION OF WASTE AND HAZARDOUS SUBSTANCES**1353 Boiler Safety****PUBLIC NOTICE**

The Division of Boiler Safety was transferred from the Department of Public Safety to the Department of Natural Resources and Environmental Control in 2003. In 2011 the statutory authority for the Boiler Program was transferred from Title 29 to Title 7 and the program was formally placed in the Division of Waste and Hazardous Substances. The DNREC is proposing changes to the Boiler Safety Regulations that incorporates this administrative change and removes references to the Division Director of Boiler Safety since Boiler Safety is no longer a stand-alone Division within the Department. The proposed revisions also reflect an exemption for high pressure breathing air cylinders used by emergency response organizations as suggested by the Volunteer Fireman's Association; as well as definitional changes that allow third party inspection companies to inspect boiler systems or pressure vessels at uninsured facilities. Lastly, the regulations also add requirements for facilities that have their own boiler inspectors such as the Delaware City Refinery to establish their own quality assurance program.

The DNREC will conduct a Public Hearing on Wednesday, October 10, 2012. The hearing is scheduled to begin at 6:00pm in the conference room at the DNREC office located at 391 Lukens Drive, New Castle, DE. The public and interested parties are invited to attend the hearing and to make comments orally or in writing at the hearing. Written comments not presented at the hearing should be addressed to Mr. Alex Rittberg, DNREC/TMS, 391 Lukens Drive, New Castle, DE 19720 and must be received by the Department not later than 4:00pm on October 31, 2012 unless a longer time is specified at the hearing.

Copies of the proposed regulations are available online at <http://www.dnrec.delaware.gov/info/Rules.htm>
Copies may be viewed during regular business hours at the following DNREC offices:

DNREC, 391 Lukens Drive, New Castle, DE

DNREC, R&R Building, 89 Kings Highway, Dover, DE

DNREC, Route 113, Sussex Suites, Unit #6, Georgetown, DE

DEPARTMENT OF SAFETY AND HOMELAND SECURITY**ALCOHOLIC BEVERAGE CONTROL COMMISSION****Regulations Governing Wholesale and Supply Operation, Section 2.7, The "At-Rest" Requirement****PUBLIC NOTICE**

The Alcoholic Beverage Control Commission proposes to amend Rule 8.1 A Rule Governing the Shipment and Storage of Alcoholic Liquors by Suppliers and Wholesalers. The current rule provides for a 72 hour "at rest" period to allow the Commission to carry out its statutory responsibilities. The Commission proposes to shorten that period to 18 hours.

In accordance with 29 Del.C. §100118(a) final date to receive written comments will be October 1, 2012.

DIVISION OF STATE POLICE**2300 Pawn Brokers, Secondhand Dealers and Scrap Metal Processors****PUBLIC NOTICE**

Notice is hereby given that the Department of Safety and Homeland Security, Division of State Police, in accordance with 24 Del.C. §2311 proposes to amend adopted Rule 1.0 - Licensing. This amendment describes its intent to make the licensing and renewal procedures of Pawnbrokers, Secondhand Dealers, and Scrap Metal Processors more efficient and clarifies the electronic reporting requirements. If you wish to view the complete amendment, contact Ms. Peggy Anderson at (302) 672-5304. Any persons wishing to present views may submit them in writing, by September 30, 2012, to Delaware State Police, Professional Licensing, P.O. Box 430, Dover, DE, 19903.

DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION
1100 Board of Dentistry and Dental Hygiene
PUBLIC NOTICE

The Board of Dentistry and Dental Hygiene ("the Board") in accordance with 24 **Del.C.** §1106 (a)(1) has proposed amendments to Rule 7.0 *Anesthesia Regulations*. The proposed amendments clarify the holders of Restricted 1 and Unrestricted Permits may induce conscious sedation by administering nitrous oxide in addition to other permitted methods. The amendment also clarifies that the holder of a Restricted Permit II may induce conscious sedation by administering nitrous oxide only. The proposed amendments are intended to address an apparent oversight in the Board's current rules and regulations.

A public hearing will be held on October 18, 2012 at 3:15 p.m. in the second floor Conference Room of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware 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 the Delaware Board of Dentistry and Dental Hygiene, 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.

In accordance with 29 **Del.C.** §100118(a) final date to receive written comments will be November 2, 2012 which is 15 days following the public hearing. The Board will deliberate on all of the public comment at its regularly scheduled meeting on December 20, 2012 at 3:00 p.m., at which time it will determine whether to adopt the regulation as proposed or make additional changes due to the public comment.

DIVISION OF PROFESSIONAL REGULATION
1700 Board of Medical Licensure and Discipline
PUBLIC NOTICE

The Delaware Board of Medical Licensure and Discipline ("Board"), in accordance with 24 **Del.C.** §1713(a)(12), has proposed amendments to Regulation 31 - *Use of Controlled Substances for the Treatment of Pain* - to address concerns related to the applicability of the regulation to the treatment of acute pain. The amendments clarify that the primary focus of the regulation is the use of controlled substances in the treatment of chronic pain. Instead of stating that the regulations "are" applicable to the use of controlled substances in the treatment of acute pain, the proposed amendments provide that the regulations "may be applicable to prescribing controlled substances for the treatment of acute pain when clinically appropriate." The amendments also give the Board discretion to refer to current clinical practice guidelines and/or expert review in approaching cases involving the management of pain.

Regulation 31.8.1 is being amended to require that the medical records contain documentation of the patient's interim history and "physical examination." Regulation 31.8.2 is being amended to require that the medical records contain documentation of the patient's vital signs "as clinically appropriate" Finally Regulation 31.10.4 clarifies the definition of a "licensed practitioner" for purposes of the regulations.

The Board will hold a public hearing on October 2, 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 amendments to the regulations. Anyone wishing to receive a copy of the proposed amendments 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. In accordance with 29 **Del.C.** §10118(a) final date to receive written comments will be October 17, 2012 which is 15 days following the public hearing. The Board will deliberate on all of the public comment at its regularly scheduled meeting on November 13, 2012 at 3:00 p.m., at which time it will determine whether to adopt the regulation as proposed or make additional changes due to the public comment.

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 removing the automatic approval of continuing education courses that are approved by another state licensing board. The purpose of the change is to retain jurisdiction and closer review of continuing education credits that are accepted by the Board for licensees. The Board will hold a public hearing on the proposed regulation change on September 25, 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 October 10, 2012.

DIVISION OF PROFESSIONAL REGULATION**CONTROLLED SUBSTANCE ADVISORY COMMITTEE****PUBLIC NOTICE****Uniform Controlled Substances Act Regulations**

The Delaware Controlled Substance Advisory Committee, pursuant to 16 **Del.C.** §4700, proposes to revise its rules and regulations. The proposed revisions to the rules loosen the ban on dispensing filled prescriptions for Schedule II drugs through drive through windows, and will now permit such dispensing when the drive through window has a security system that is approved by the Office of Controlled Substances.

The Board will hold a public hearing on the proposed rule change on September 26, 2012 at 9:30 a.m., Buena Vista Conference Center, 661 South DuPont Highway, New Castle, DE 19720. Written comments should be sent to Catherine Simon, Administrator of the Delaware Controlled Substance Advisory Committee, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904.

DEPARTMENT OF TRANSPORTATION**DIVISION OF TECHNOLOGY AND SUPPORT SERVICES****2501 External Equal Employment Opportunity Complaint Procedure****PUBLIC NOTICE**

As authorized under 17 **Delaware Code** Section 132(e) and 29 **Delaware Code**, Section 8404(8), the Delaware Department of Transportation, through its Division of Technology and Support Services, seeks to adopt amendments to its existing regulations regarding procedures for addressing, investigating and responding to complaints of discrimination on the grounds of race, color, religion, sex, age, national origin or disability with respect to its External EEO Programs.

The Department will take written comments on the proposed revisions concerning its External Equal Opportunity Complaint Procedure from September 1, 2012 through September 30, 2012. The proposed Regulations appear below.

Any questions or comments regarding this document should be directed to:

Marti Dobson, Director, Technology and Support Services

Delaware Department of Transportation

P.O. Box 778

Dover, DE 19903

(302) 760 -2099 (phone)

(302) 760-2895 (fax)

marti.dobson@state.de.us

DIVISION OF TRANSPORTATION SOLUTIONS
2402 Delaware Manual on Uniform Traffic Control Devices
PUBLIC NOTICE

Under Title 17 of the **Delaware Code**, Sections 134 and 141, as well as 21 **Delaware Code** Chapter 41, the Delaware Department of Transportation (DelDOT), adopted a Delaware version of the Federal Manual on Uniform Traffic Control Devices (MUTCD). The Department has now drafted revisions to the Delaware MUTCD. A description of the proposed changes accompanies this notice.

The Department will take written comments on the draft changes to the Delaware MUTCD from September 1, 2012 through September 30, 2012. Copies of the Draft Delaware MUTCD Revisions can be obtained by reviewing or downloading a PDF copy at the following web address: <http://regulations.delaware.gov/>

Questions or comments regarding these proposed changes should be directed to: Adam Weiser, P.E., PTOE, Safety Programs Manager, Traffic Section, Division of Transportation Solutions, Delaware Department of Transportation 169 Brick Store Landing Road Smyrna, DE 19977 (302) 659-4073 (telephone) (302) 653-2859 (fax) adam.weiser@state.de.us