

OFFICE OF THE STATE TREASURER
DELAWARE EARNS PROGRAM BOARD
Statutory Authority: 19 Delaware Code, Section 3803 (19 Del.C. 3803)

PROPOSED

PUBLIC NOTICE

Regulations Governing the Expanding Access for Retirement and Necessary Saving Program

NATURE OF PROCEEDINGS; SYNOPSIS OF THE SUBJECT AND SUBSTANCE OF THE PROPOSED REGULATIONS

In compliance with the State's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code), and under the authority of 19 Del.C. §3803, the Delaware EARNS Program Board (the "Board") proposes to introduce regulations concerning the establishment of the Delaware Expanding Access for Retirement and Necessary Saving Program (the "Program"). The Board, with administrative assistance from the Office of the State Treasurer ("OST"), will administer the Program and these regulations.

The General Assembly established the Program to serve as a vehicle through which eligible employees may, on a voluntary basis, provide for additional retirement security through a State-facilitated retirement savings program in a convenient, cost effective, and portable manner. The Program aims to alleviate barriers small employers face in offering retirement options, close the wealth gap among low to modest wage earners, and keep Delaware competitive with neighboring states by attracting talented workers to the State.

The Board is tasked with overseeing the initial design and implementation of the Program. The Board will be disbanded no later than December 31, 2025, at which point all duties and functions of the Board will be transferred to and assumed by the Plans Management Board.

The proposed regulations will guide and govern the implementation and operation of the Program. These proposed regulations provide definitions and standards for identifying covered employers and eligible employees, establish enrollment processes and requirements for employers and prospective participants, and set procedures for complaints and enforcement.

STATUTORY BASIS AND LEGAL AUTHORITY TO ACT

29 Del.C. § 3803(e)(3).

OTHER REGULATIONS AFFECTED

None.

HOW TO COMMENT ON THE PROPOSED REGULATIONS

In accordance with 29 Del.C. §10116, persons wishing to submit written comments, suggestions, briefs, and compilations of data or other written materials concerning the proposed regulations should direct them to the following address:

Ted Griffith
Program Director, Delaware EARNS
Office of the State Treasurer
820 Silver Lake Blvd., Suite 100
Dover, DE 19904
Email: ted.griffith@delaware.gov
Office: (302) 577-4212

Comments may also be directed via electronic mail to EARNS@Delaware.gov. Any written submission in response to this notice and relevant to the proposed regulations must be received by the above contact no later than 4:00 p.m., prevailing Eastern time, on April 1, 2024. The determination of whether to adopt the regulations, as proposed, will be based upon consideration of the written comments and any other written materials filed by the public.

Members of the public may request a copy of the proposed regulations at no charge by contacting Program Director Ted Griffith by US mail, email, or phone using the contact information above.

Regulations Governing the Expanding Access for Retirement and Necessary Saving Program

1.0 Statutory Authority and Purpose

- 1.1 The Board is required by 19 Del.C. §3803(e)(3) to adopt rules and regulations to govern the Program.
- 1.2 This regulation establishes the rules and procedures for the Program.

2.0 Definitions

The following words and terms, when used in this regulation, have the following meaning:

"Acceptable submission method" means an approved mode of submitting documents or information, as detailed on the Program website maintained by the program administrator.

"Account" means an IRA that has been established under the Program.

"Account holder" means an individual who maintains an account with the Program.

"Act" means the Board and Program enabling legislation set forth in 19 Del.C. Ch. 38, as the same may be amended from time to time.

"Automatic escalation" means an automatic annual increase to a covered participant's contribution rate.

"Beneficiary" means an individual, person, or entity entitled to receive the proceeds of an account upon the death of an account holder.

"Board" means the Delaware EARNs Program Board established under the Act, and, after the transition of duties and authority from the Delaware EARNs Program Board pursuant to the Act, the Plans Management Board.

"Capital preservation investment" means a money market fund or other conservative, highly liquid investment that is offered as an investment option in the Program.

"Code" means the Internal Revenue Code of 1986, as amended, and any U.S. Department of Treasury regulations, rulings, announcements, or other guidance issued thereunder.

"Confirmation notice" means a document sent by the program administrator to a covered participant confirming that the participant has been automatically enrolled into the Program.

"Confirmation of employer certification" means a record provided by the program administrator to a business entity that acknowledges receipt of an employer's submission of an employer certification regarding the employer's exempt status.

"Contribution" means moneys contributed to an account.

"Contribution rate" means the rate that is the percentage of wages used for calculating contributions to an account.

"Covered employee" has the meaning ascribed to it in 19 Del.C. §3802. A covered employee may include a person who is employed full-time, part-time or per diem.

"Covered employer" has the meaning ascribed to it in 19 Del.C. §3802.

"Covered participant" means a covered employee who is a participant in the Program.

"Custom automatic escalation" means an automatic annual increase to an account holder's contribution rate affirmatively selected by the account holder, subject to the limitations imposed by the program administrator or applicable law.

"Custom contribution rate" means a contribution rate affirmatively selected by a covered participant, subject to the limitations imposed by the Program or applicable law.

"Custom investment" means any investment option offered by the Program that is affirmatively selected by the account holder.

"Default automatic escalation" means a 1 percentage point annual increase in a covered participant's contribution rate at the beginning of each subsequent calendar year, up to a maximum of 10% of the covered participant's wages.

"Default contribution rate" means 5% of a covered participant's wages.

"Default investment option" means the investment option identified by the program that will receive contributions in the absence of an affirmative selection of a custom investment.

"Employee information" means the information relating to covered employees that a covered employer is required to provide to the program administrator to complete registration.

"Employee leasing company" means an employee leasing company, a professional employment organization, an employer of record service, or any similar entity that provides employee-related services or workers by contract and for a fee to a covered employer.

"Employer" means any person, partnership, limited liability company, corporation, or other entity engaged in a business, industry, profession, trade, or other enterprise in the State of Delaware, including a non-profit entity.

"Employer certification" means the certification submitted by an employer to the program administrator certifying that said employer does not meet the definition of a covered employer.

"Employer information" means the information relating to a covered employer's business that the covered employer is required to provide to the program administrator as part of registration.

"ERISA" means the federal Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1001 et seq.], as amended.

"Exempt" means that an employer is not currently a covered employer.

"FEIN" means the federal "Employer Identification Number" provided by the IRS.

"Grant" means a needs-based small business support grant for eligible covered employers that require payroll software or similar products or support to implement the Program.

"Hold and sweep period" means a period after the end of the opt-out period during which time a covered participant's contributions are held in a capital preservation investment, unless the covered participant makes an affirmative election otherwise.

"IRA" has the meaning set forth in 19 **Del.C. §3802**.

"IRS" means the Internal Revenue Service.

"Non-covered individual" means a person who is not a covered employee.

"Non-covered participant" means a participant who is not a covered employee.

"Non-payroll contribution" means a contribution that a participant remits outside of a payroll deduction contribution.

"Opt out" means a covered employee affirmatively declines the option of being automatically enrolled into the Program.

"Opt-out period" means the period of time following the provision of program information to a covered employee during which a covered employee may opt out of automatic enrollment into the Program.

"OST" means the State Treasurer of the State of Delaware or 1 or more authorized employees of the Office of the State Treasurer.

"Participant" means an account holder.

"Participate" means to have an account open with the Program.

"Participating employer" means a covered employer that is remitting covered participant contributions.

"Payroll deduction contribution" means a contribution made by a covered participant via a payroll deduction through a payroll deduction IRA arrangement with a participating employer.

"Program" means the Delaware Expanding Access for Retirement and Necessary Saving Program established under 19 **Del.C. §3801**.

"Program administrator" means the third-party entity procured by the Board to provide recordkeeping and related services for the Program.

"Program information" means the document detailing the investment options and other Program features that has been approved for distribution to prospective participants. Participants are deemed to have read and understood all program information that they received prior to opening an account.

"Register" means the act of submitting registration information to the program administrator, as required by this regulation.

"Registration" means the process for covered employers to submit registration information to the program administrator.

"Registration date" means the deadline established by OST for a covered employer to either register or submit an employer certification.

"Registration information" means employee information and employer information.

"Registration notice" means the written notice that will be provided to certain employers directing the employers to either register with the Program or submit an employer certification by the registration date.

"Roth IRA" has the meaning set forth in 19 **Del.C. §3802**.

"Specified tax-favored retirement plan" has the meaning set forth in 19 **Del.C. §3802**.

"Traditional IRA" has the meaning set forth in 19 **Del.C. §3802**.

"Wages" has the meaning set forth in 19 **Del.C. §3802**.

"Work-site employee" means a covered employee contracted through an employee leasing company.

"Work-site employer" means any person, business, or other entity that procures the services of an employee leasing company under a contract, and which retains direction and control of the covered employee employees

specified in the contract regarding responsibilities not specified in the contract pertaining to the business of the work-site employer.

3.0 Employer Provisions

3.1 Notice of Registration and Exemption Process

3.1.1 As directed by OST, the program administrator shall send registration notices to employers.

3.1.2 The registration notices shall direct employers to either register with the Program or submit an employer certification by the registration date.

3.1.3 The registration notice shall include instructions acceptable to OST.

3.1.4 The registration date shall be no earlier than 30 days following the date of the registration notice.

3.2 Process for Employers to Certify Exempt Status

3.2.1 If an employer receives a registration notice and believes that it is not a covered employer, an authorized representative of the employer may complete and submit an employer certification attesting that the employer is exempt.

3.2.2 After an employer submits an employer certification, the program administrator shall promptly provide the employer with a confirmation of employer certification. A confirmation of employer certification will remain in effect until the employer meets the criteria of a covered employer.

3.2.3 If an employer certification is found to be inaccurate or incomplete, the program administrator shall, if directed by OST, notify the employer of any necessary corrective action and the deadline by which the corrective action must be taken.

3.2.4 Employers that previously received a confirmation of employer certification may be required to recertify exempt status no more frequently than once per calendar year.

3.3 Registration

3.3.1 A covered employer shall register with the Program by submitting all necessary registration information, including both employer information and employee information, via an acceptable submission method by no later than the registration date.

3.3.2 Employer information shall include:

3.3.2.1 Employer name and assumed business name, if any.

3.3.2.2 FEIN.

3.3.2.3 Employer mailing address.

3.3.2.4 Name, telephone number and email address of an individual designated by the employer to serve as the point of contact.

3.3.2.5 Any additional information identified by the program administrator that is necessary to complete registration.

3.3.3 Employee information shall include:

3.3.3.1 Full legal name.

3.3.3.2 Social security number or individual taxpayer identification number.

3.3.3.3 Date of birth.

3.3.3.4 Street address.

3.3.3.5 Email address, if available.

3.3.3.6 Phone number, if available.

3.3.3.7 Any additional information identified by the program administrator that is necessary to complete registration.

3.3.4 A covered employer shall submit employee information for all covered employees who have been employed for at least 120 days.

3.3.5 After initial registration, a covered employer shall have a continuing obligation to:

3.3.5.1 Promptly provide the program administrator with any new or updated employer information.

3.3.5.2 Promptly register new or otherwise unregistered covered employees who have been employed for at least 120 days.

3.3.5.3 Promptly provide the program administrator with new or updated employee information.

3.3.5.4 Provide the program administrator with any additional information as may be needed to administer the Program.

3.3.6 Upon the submission of all necessary employee information, the program administrator shall send confirmation to the covered employer and send the program information to each covered employee.

3.4 Additional Employer Provisions

3.4.1 Business entities that offer a specified tax-favored retirement plan may not register with the Program.

3.4.2 Covered employers shall not:

3.4.2.1 Prohibit, restrict, or discourage employee participation in the Program.

3.4.2.2 Provide account holders or beneficiaries financial advice or direction regarding investment choices, contribution rates, automatic escalation, or any other decision concerning the Program.

3.4.2.3 Remit any payroll deduction contributions for any covered employee who opted out of the Program, unless and until the covered employee subsequently affirmatively elects to enroll in the Program.

3.4.2.4 Exercise any authority, control or responsibility regarding the Program, other than those duties prescribed in the Act or regulations promulgated thereunder.

3.4.2.5 Make a contribution to a participant's account.

3.4.3 Covered Employers may contact the program administrator for technical assistance in completing registration or other Program requirements.

3.4.4 Covered Employers may apply for a grant under any grant program approved by majority vote of the Board, subject to funding and applicable eligibility and other requirements, terms and conditions. OST shall administer all grant programs.

3.5 Withholding and Remitting Payroll Deduction Contributions by Participating Employer

3.5.1 Participating employers shall be responsible for withholding and remitting payroll deduction contributions for covered employees who participate in the Program.

3.5.2 Participating employers shall not remit payroll deduction contributions until the end of the opt-out period, or the time at which a covered employee affirmatively enrolls in the Program, whichever is earlier.

3.5.3 Participating employers shall remit all payroll deduction contributions withheld from wages to the program administrator as soon as administratively practicable, and in no event later than 14 days from the close of the payroll period in which the wages were earned.

3.5.4 Amounts withheld by the participating employer for payroll deduction contributions shall not exceed the amount of the covered employee's wages remaining after any payroll deductions required by law or other deductions that have higher precedence, including a court or administrative order.

3.6 Multi-Party Employment Relationships

3.6.1 If a business utilizes an employee leasing company, the entity that pays unemployment insurance premiums for covered employees, as indicated by the FEIN that appears in the Delaware Department of Labor's records, shall be the entity that is responsible for either certifying exempt status or registration in accordance with this regulation.

3.6.2 Any wages paid to a work-site employee by an employee leasing company shall be treated as wages received from the work-site employer.

3.6.3 Nothing in this regulation prohibits a party in a relationship between a business and an employee leasing company from assisting another party in the relationship with the performance of responsibilities under this regulation.

4.0 Covered Employees and Non-Covered Participants

4.1 Covered Employee Right to Opt Out

4.1.1 Covered employees who have been registered with the Program have the right to opt out of autoenrollment during the opt-out period. No account will be established if a covered employee opts out during the opt-out period.

4.1.2 OST shall set the opt out period for covered employees, which shall be no less than 30 calendar days from the date on which the covered employee receives notice of right to opt out and the opt-out period.

4.1.3 A covered participant may at any time elect to stop making contributions or cease participation in the Program, subject to the submission of any necessary information or forms required by the program administrator and applicable law.

4.1.4 If the covered employee does not opt out during the opt-out period, the program administrator shall subsequently send a confirmation notice to the covered employee indicating that the covered employee has been automatically enrolled in the Program, and that an IRA account has been opened in the covered employee's name.

4.1.5 Covered employees who opt out may subsequently elect to participate at any time.

4.2 Non-Covered Individuals

- 4.2.1 Non-covered individuals may participate in the Program by completing an approved self-enrollment process as long as they meet the requirements to open an IRA and provide all registration information as may be required by the program administrator.
- 4.2.2 The program administrator shall provide program information to non-covered individuals as soon as administratively possible after all required registration information has been received.

5.0 Accounts

- 5.1 Contributions. It shall be the responsibility of the account holder to determine whether the individual is eligible under the Code and other applicable law to make contributions to an account and whether the amount of their contributions to an account complies with the contribution limits established under the Code, and whether the contributions are deductible.
- 5.2 Default Account
 - 5.2.1 If a covered participant is automatically enrolled into the Program, the program administrator shall open a Roth IRA for the covered participant, and any contributions made by the covered participant shall be made to the Roth IRA until the covered participant elects otherwise.
 - 5.2.2 A participant may affirmatively elect to open a Traditional IRA in place of, or in addition to, a Roth IRA. A participant may affirmatively elect to make contributions to a Traditional IRA.
 - 5.2.3 The program administrator shall instruct participants on how to open a Traditional IRA in place of, or in addition to, a Roth IRA, and how to make contributions to a Traditional IRA.
- 5.3 Default Investment and Custom Investment Options
 - 5.3.1 The program administrator shall provide participants with instructions on how to select custom investments in place of the default investment option.
 - 5.3.2 Account holders may direct their contribution to any single investment option or combination investment options offered by the Program.
 - 5.3.3 If a covered participant is automatically enrolled into the Program, then, during the hold and sweep period, the covered participant's payroll deduction contributions will be directed into the capital preservation investment, unless the covered participant has made an affirmative election to invest in a custom investment option or to cease making contributions.
 - 5.3.4 After the hold and sweep period, the program administrator shall direct payroll deduction contributions into the default investment option unless the covered participant has made an affirmative election to invest in a custom investment option or to cease making contributions.
 - 5.3.5 OST shall set the hold and sweep period for covered participants, which shall be no less than 30 calendar days from the date on which the covered participants are automatically enrolled into the Program.
 - 5.3.6 Account holders may change their investment choices at any time.
- 5.4 Default Contribution Rate and Custom Contribution Rate
 - 5.4.1 The default contribution rate shall be 5% of a covered participant's wages.
 - 5.4.2 A covered participant may select a custom contribution rate at any time.
 - 5.4.3 The program administrator shall provide covered participants with instructions on how to elect a custom contribution rate. The program administrator may limit participants to selecting contribution rates that are whole-number percentages. The program administrator may allow covered participants to select flat-dollar payroll deduction contributions.
- 5.5 Non-Payroll Contributions
 - 5.5.1 Any account holder may choose to make non-payroll contributions to the Program.
 - 5.5.2 The program administrator may set an acceptable minimum initial deposit and a minimum recurring deposit for individuals who wish to open an account and fund the account through non-payroll contributions.
 - 5.5.3 The program administrator shall establish acceptable methods and procedures for making non-payroll contributions.
- 5.6 Default Automatic Escalation and Custom Automatic Escalation
 - 5.6.1 Contributions of covered participants who have participated in the Program for at least 6 months shall be subject to default automatic escalation, except as provided in this regulation. Under default automatic escalation, a covered participant's contribution rate will automatically increase by 1% of the covered participant's wages at the beginning of each subsequent calendar year, up to a maximum of 10% of the covered participant's wages.

- 5.6.2 The program administrator may offer participants the option of custom automatic escalation. If the program administrator offers this function, the program administrator shall establish acceptable limits and procedures pertaining to custom automatic escalation.
- 5.6.3 On an annual basis, the program administrator shall notify covered participants in advance of any pending contribution rate increase due to automatic escalation to allow for covered participants to opt out of automatic escalation, select a custom automatic escalation (if offered), revert to default automatic escalation, or affirmatively change a contribution rate.
- 5.7 **Termination of Participating Employer Status Through Program Exemption**
- 5.7.1 Participating employers who will begin offering a specified tax-favored retirement plan must provide the program administrator with at least 60 days' notice prior to the cessation of payroll deduction contributions.
- 5.7.2 Participating employers that have become exempt must notify covered participants at least 30 days before payroll deduction contributions cease and provide them with information describing how to contact the program administrator.
- 5.7.3 Unless covered participants elect otherwise, accounts will remain in the Program after the participating employer certifies its exemption.
- 5.8 **Conversion Status of Covered Participants.** If the participating employer became exempt due to the number of covered employees falling below 5, the status of the remaining employees of the now-exempt employer automatically converts to non-covered Individuals.
- 5.9 **Portability**
- 5.9.1 An account holder may receive rollovers and transfers from other retirement savings vehicles in accordance with the time limits established under the Code and other applicable law.
- 5.9.2 An account holder or beneficiary may roll over or transfer all or a portion of an account to a different retirement savings vehicle in accordance with the Code. The account holder must commence the process by notifying the program administrator and providing any information required to effectuate the rollover or transfer.
- 5.10 **Termination of Employment**
- 5.10.1 If a covered participant's employment with a covered employer is terminated, or if the covered participant otherwise ceases to be a covered employee, the participant's account or accounts will remain open, unless the participant affirmatively elects to close the account or accounts.
- 5.10.2 If a covered participant's employment with a covered employer is terminated, or if the covered participant otherwise ceases to be a covered employee, the participant may continue to make contributions to the account or accounts.
- 5.11 **Withdrawals**
- 5.11.1 An account holder may withdraw all or a portion of funds from their account at any time by submitting a completed request to the program administrator, in a form or format established by the program administrator and permitted by the IRS.
- 5.11.2 The Program shall not assess any penalty for withdrawals. Withdrawals shall be subject to any applicable state and federal income tax obligations and may be subject to penalties under the Code.
- 5.11.3 An account holder may close an account at any time.
- 5.12 **Number of Accounts.** Participants shall have no more than one user account on the program administrator's platform, no more than one Roth IRA, and no more than one Traditional IRA with the Program. This holds true even if a participant makes payroll deduction contributions through multiple employers. A participant may open both a Roth IRA and Traditional IRA with the Program.
- 5.13 **Abandoned Accounts.** An account that remains inactive for a dormancy period prescribed under applicable law may be deemed abandoned and paid or delivered under 12 **Del.C.** Ch. 11 or other applicable law.

6.0 Compliance

- 6.1 **Authority.** The Board has and shall retain exclusive authority to ensure compliance with and enforce the Act and all regulations promulgated under the Act, subject only to any compliance authority or duties as may be expressly delegated to OST under the Act or any other provision of the Delaware Code, or any regulations promulgated under the Act, or by majority vote of the Board.
- 6.2 **Complaints**
- 6.2.1 A covered employee with a complaint concerning a covered employer's alleged failure to comply with the Act or any regulations promulgated thereunder may submit the complaint to OST in writing, by phone, by email, or through any other means permitted by OST.

- 6.2.2 All complaints concerning a covered employer's compliance with this chapter received by any other State of Delaware agency shall be referred to the Board.
 - 6.2.3 OST shall maintain on the Board's website instructions and information relating to the submission of a complaint. OST also shall publish on the website an email address, phone number, and other relevant contact information for assistance with the submission of complaints.
 - 6.2.4 All complaints shall be held and treated as confidential to the fullest extent permitted by applicable law.
 - 6.2.5 OST shall promptly review, investigate and attempt to resolve informally all complaints submitted under this Section.
 - 6.2.6 If OST is unable to resolve a complaint informally within 30 days from the date the complaint was received, OST shall promptly refer the matter to the Board for review and provide all documentation to the Board.
 - 6.2.7 The Board shall review a matter referred by OST promptly and make a determination with respect to the complaint within 90 days from the date of the referral. The Board shall review the matter in executive session if permitted under applicable law.
- 6.3 Enforcement
- 6.3.1 If the Board determines by majority vote that a covered employer is not in compliance with the Act or any regulations promulgated thereunder, OST shall issue or cause to be issued a notice to the covered employer outlining the nature and extent of the alleged noncompliance, providing instructions for compliance, and specifying the potential administrative penalties for noncompliance.
 - 6.3.2 If a covered employer to which a notice is issued does not come into compliance within 90 days of the date the notice was issued, the Board, in its discretion, may direct OST to initiate formal enforcement proceedings on behalf of the Board under subchapter III, Chapter 101 of Title 29, as permitted by 19 Del.C. §3805(e).
 - 6.3.3 In accordance with 19 Del.C. §3805(e), the Board may, in a final order, impose administrative penalties against a covered employer that fails to comply with the Act, or any regulations promulgated thereunder, which penalties shall not exceed \$250 per covered employee per year, up to a maximum total penalty of \$5,000 per year.
 - 6.3.4 A covered employer shall have a right to appeal a final order imposing a penalty within 30 days of the day the notice of the decision was mailed to the covered employer.
- 6.4 Compliance Monitoring. OST shall, with or without a complaint, monitor the status of covered employers' compliance with this chapter, including through review of available data and documents, and provide the Board with periodic reports of OST's findings.

7.0 Severability

If any section or other individual provision of this regulation is found to be invalid, the remaining portion of this regulation shall remain in full force and effect.

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