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# Delaware Register of Regulations

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Issue Date: December 1, 2018

Volume 22 - Issue 6, Pages 424 - 551

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## IN THIS ISSUE:

Regulations:

Errata

Proposed

Final

General Notices

Calendar of Events &  
Hearing Notices



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 November 15, 2018.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## DELAWARE REGISTER OF REGULATIONS

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

The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

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

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

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## CITATION TO THE DELAWARE REGISTER

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

19 **DE Reg.** 1100 (06/01/16)

Refers to Volume 19, page 1100 of the *Delaware Register* issued on June 1, 2016.

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## SUBSCRIPTION INFORMATION

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

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## CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

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file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title.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

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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

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

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

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken. When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

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

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

ISSUE DATE	CLOSING DATE	CLOSING TIME
January 1	December 17	4:30 p.m.
February 1	January 15	4:30 p.m.
March 1	February 15	4:30 p.m.
April 1	March 15	4:30 p.m.
May 1	April 15	4:30 p.m.

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## DIVISION OF RESEARCH STAFF

**Lori Christiansen**, Director; **Mark J. Cutrona**, Deputy Director; **Deborah Gottschalk**, Legislative Attorney; **Robert Lupo**, Graphics and Printing Technician IV; **Colinda Marker**, Executive Secretary; **Kathleen Morris**, Human Resources/Financial Manager; **Nathan Poore**, Graphics and Print Technician; **Victoria Schultes**, Administrative Specialist II; **Don Sellers**, Print Shop Supervisor; **Yvette W. Smallwood**, Registrar of Regulations; **Holly Wagner**, Legislative Attorney; **Natalie White**, Administrative Specialist II; **Sara Zimmerman**, Legislative Librarian.

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL****DIVISION OF CLIMATE, COASTAL AND ENERGY****Delaware Coastal Programs**Statutory Authority: 7 Delaware Code, Section 6010(a) (7 **Del.C.** §6010(a))

Federal Coastal Zone Management Act (15 CFR part 923, subpart H)

**7 DE Admin. Code 2201****ERRATA****2201 Delaware Coastal Management Program Federal Consistency Policies and Procedures**

**\*Please Note:** The final regulation for 2201 Delaware Coastal Management Program Federal Consistency Policies and Procedures, as published in the November 1, 2018 issue of the Delaware *Register of Regulations* (22 DE Reg. 407) under regulation number 108, contained text which was stricken in error. The subsection is reprinted below, with the error corrected:

For the current version of 2201 Delaware Coastal Management Program Federal Consistency Policies and Procedures, see:

<http://regulations.delaware.gov/AdminCode/title7/2000/2201.shtml#TopOfPage>

The effective date for the final order and regulation appearing in the November *Register* remains the same.

**2201 Delaware Coastal Management Program Federal Consistency Policies and Procedures****Delaware Department of Natural Resources and Environmental Control****Division of Climate, Coastal, and Energy****Delaware Coastal Programs**

**Authority: National Oceanic and Atmospheric Administration – Federal Coastal Zone Management Act (15 CFR part 923, subpart H)**

**Delaware Coastal Management Program****Comprehensive Update and Routine Program Implementation 2009*****(Break in Continuity of Sections)*****5.0 Delaware Coastal Management Program Policies*****(Break in Continuity Within Section)*****5.3 Coastal Waters Management****5.3.1 General*****(Break in Continuity Within Section)***

- 5.3.1.5 The designated uses applicable to the various stream basins represent the categories of beneficial use of waters of the ~~state~~ State which must be maintained and protected through application of appropriate criteria. Such uses shall include public water supply; industrial water supply; primary contact recreation involving any waterbased form of recreation, the practice of which has a high probability for total body immersion or ingestion of water such as swimming and water skiing; secondary contact recreation involving a water-based form of recreation, the practice of which has a low probability for total body immersion or ingestion of water such as wading, boating and fishing; maintenance, protection and propagation of fish, shellfish, aquatic life and wildlife preservation; agricultural water supply; and waters of exceptional recreational or ecological significance (ERES waters). [~~Delaware Surface Water Quality Standards, Sections 2 and 3, amended July 11, 2004~~ **7 DE Admin. Code 7401 Sections 2.0 and 3.0**]

**Symbol Key**

Arial type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

**Proposed Regulations**

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

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**DEPARTMENT OF AGRICULTURE**  
**OFFICE OF THE STATE VETERINARIAN**

Statutory Authority: 3 Delaware Code, Chapters 63 and 71, Sections 6301 and 7101 (3 **Del.C.**  
Chs. 63 & 71; §§6301 & 7101)  
3 **DE Admin. Code** 901

**PUBLIC NOTICE****901 Poultry Disease Prevention Regulations**Summary

The Department of Agriculture proposes to amend its Regulations adopted in accordance with Title 3, Chapter 1 of the Delaware Code to revise the Poultry Disease Prevention Regulations at 3 **DE Admin. Code** 901. The purpose of the amended regulations is to update terminology, definitions, requirements for entry to Delaware and reference to federal rules, and to add a new Section 6.3 to prohibit the slaughter, other than for humane euthanasia or disease control, of any poultry on the premises of any dealer or broker of poultry or on the premises of any poultry sales establishment. Other regulations issued by the Department of Agriculture are not affected by this proposal. The Department of Agriculture is issuing these proposed regulations in accordance with Title 3 of the Delaware Code. This notice is issued pursuant to the requirements of Chapter 101 of Title 29 of the Delaware Code.

Comments

A copy of the proposed regulations is being published in the December 1, 2018 edition of the Delaware *Register of Regulations*. A copy is also on file in the office of the Department of Agriculture, 2320 South DuPont Highway, Dover, Delaware 19901 and is available for inspection during regular office hours. Copies are also published online at the *Register of Regulations* website: [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

Interested parties may offer written comments on the proposed regulations or submit written suggestions, data, briefs or other materials to the Department of Agriculture at the above address as to whether these proposed regulations should be adopted, rejected or modified. Pursuant to 29 **Del.C.** §10118(a), public comments must be

received on or before December 31, 2018. Written materials submitted will be available for inspection at the above address.

## Adoption of Proposed Regulation

On or after December 31, 2018, following review of the public comment, the Department of Agriculture will determine whether to amend its regulations by adopting the proposed rules or make additional changes because of the public comments received.

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 434RFA 12-01-18.pdf>

## 901 Poultry Disease Prevention Regulations

### 1.0 Authority-

This regulation is written under the authority of 3 Del.C. Ch. 63 and Ch. 71, and §§6301 and 7101.

### 2.0 Purpose-

- 2.1 The commercial poultry industry in the State of Delaware is of vital economic importance to the state's agricultural community. The threat of serious poultry diseases, such as avian influenza or exotic ~~New Castle~~ Newcastle Disease, necessitates the promulgation of new regulations aimed at safeguarding poultry flocks in Delaware from the introduction of these or other diseases.
- 2.2 The following proposed regulations ~~will~~ apply to the specific categories of poultry as noted.

### 3.0 Definitions-

The following words and terms ~~when used in these regulations mean~~ have the meanings indicated:

**"Commercial Poultry"** ~~means poultry wholly owned by a corporate enterprise that controls the entire growing cycle of the birds, from the breeder flock to the processing plant~~ as defined in 9CFR Part 146.

**"Completely Clean"** means free of all organic material.

**"DDA"** means the Delaware Department of Agriculture.

**"Integrated Poultry Company"** means a corporate enterprise ~~those~~ that contracts the entire growing cycle of its own birds from the breeder flock to the processing plant.

**"Non-commercial Poultry"** means all other species and classes of poultry other than those defined as commercial poultry. ~~Examples include but are not limited to: hobby or pet poultry exhibition poultry, poultry for the owner's own consumption, poultry for trade or resale, etc.~~

**"NPIP"** means the National Poultry Improvement Plan of the United States Department of Agriculture, 9CFR Parts 145-147.

**"Person"** means individual, corporation, partnership, business, cooperative, or any other legal entity.

~~"Persons" means individuals, incorporations, businesses and cooperatives.~~

**"Physical Plant"** means the permanent structure of a building or place including walls, floors, ceilings, crates, coops, or other enclosures that may become contaminated with infectious material.

**"Poultry"** means domesticated fowl, including chickens, turkeys, ostriches, emus, rheas, cassowaries, waterfowl, game birds, doves and pigeons.

**"Poultry Dealer"** means a person or corporation ~~that consistently purchases three or more lots of poultry during a week and resells such poultry within one month of purchase~~ engaged in the business of buying, selling or transporting poultry or operating a livestock auction or livestock sales facility, exempting state-federal approved livestock markets.

**"Poultry Producer"** means any person who owns or operates a poultry producing ~~premise for shares in the profits and risks of loss from such premise,~~ premises and who grows, raises, feeds feeds.

# PROPOSED REGULATIONS

exhibits, owns or produces said agricultural commodity poultry in Delaware. Poultry producer includes both commercial and non-commercial poultry.

“**Poultry Producing Premises**” means any location in Delaware where live poultry is kept.

## 4.0 Registration-

- 4.1 In order to be able to quickly notify all poultry producers in the state of a potential or existing disease threat, ~~the (DDA) will require~~ DDA requires the registration of all premises in Delaware where live poultry is kept. This will allow information regarding disease ~~scenarios~~ incidents to be sent in a timely manner to all poultry producers.
- 4.2 The registration form, available from DDA, shall include at a minimum the following information:
- 4.2.1 Name;<sub>i</sub>
  - 4.2.2 Address;<sub>i</sub>
  - 4.2.3 Telephone number and email address of owner/producer;<sub>i</sub>
  - 4.2.4 Type and number of the poultry being raised;<sub>i</sub>
  - 4.2.5 The geo-reference coordinates (latitude/longitude state plane coordinates NAD 83) of the chicken house(s); (if not available, DDA will provide);<sub>i</sub> and
  - 4.2.6 The general purpose for which they are kept (hobby, show, own consumption, commercial, eventual sale, etc.).
- 4.3 ~~This registration is also in anticipation of the forthcoming national animal premises identification system.~~ Forms will be provided by ~~the Department of Agriculture~~ DDA and when completed, must be returned to that agency. Other timely information may also be sent to registrants.

## 5.0 Sale Or Transfer Of Poultry Leaving The State-

- 5.1 Owners of commercial or ~~privately owned~~ non-commercial poultry leaving the State of Delaware and whose cargo changes ownership outside the State of Delaware must abide by the following provisions:
- ~~5.1-15.1.1~~ Complete and accurate records must be maintained including the name, address and telephone number of the purchaser, the number, species and weight of the poultry ~~to be sold~~ sold, and the date of the sale. These records, invoices or receipts must be retained for at least one year.
  - ~~5.1-15.1.2~~ All vehicles, crates, coops and footwear must be in a completely clean condition before being used to load poultry from a Delaware farm. ~~Department~~ DDA personnel will have the authority to inspect all vehicles and equipment prior to ~~use~~ entry to a Delaware farm. Unsatisfactory inspections will result in an immediate refusal to allow loading of the poultry.
  - ~~5.1-25.1.3~~ After the poultry ~~has~~ have been unloaded at an out of state location, and prior to its return into the State of Delaware, it will be necessary to completely clean and disinfect the entire vehicle, including the inside floorboard and pedals by using ~~(commercial)~~ commercial truck washing personnel and equipment.
  - ~~5.1-35.1.4~~ In addition, all coops, crates, and footwear must be individually washed and completely cleaned and disinfected by commercial equipment before being loaded onto a vehicle and returning to the State of Delaware. A receipt from a company, approved by the DDA to perform this service, must be obtained by the transporter and kept in the vehicle for inspection by Department personnel. DDA personnel will have the authority to inspect all vehicles and equipment as deemed necessary. These receipts must be kept for a period of at least one year.
  - ~~5.1-45.1.5~~ Poultry transported out of the state for the purpose of sale or change of ownership and brought back into Delaware is prohibited and will result in the quarantine and possible destruction of the entire flock and penalties as described in Section 12.0 of this regulation. ~~The foregoing quarantine will be in effect until sufficient diagnostic testing has been completed to ensure that no serious diseases have been introduced. The conclusion by the DDA that the returned poultry has introduced a serious poultry disease may result the destruction of the entire flock.~~
  - ~~5.1-55.1.6~~ It shall be the responsibility of the owner (~~individual or corporation~~) of the birds to obtain all pertinent information from the state of destination regarding any health diagnostic testing or

inspection requirements that must be fulfilled prior to the birds leaving the Delaware farm. Furthermore, it will be the owner's responsibility to make the necessary arrangements with the approved diagnostic laboratory, accredited veterinarian or other persons needed to provide the official documentation necessary to satisfy these requirements.

**6.0 ~~Selling Or Trading~~ Selling, Trading, or Slaughtering Poultry In Within Delaware.**

- 6.1 Livestock or Poultry auctions and swap meets. Livestock/poultry auctions or poultry swap meets taking place within the State of Delaware will be authorized to sell live poultry if they abide by certain requirements imposed by the DDA. To be authorized, the auction or other entity organized for the sale, barter or trade of live poultry must abide by the following:
- 6.1.1 Allow DDA full access to all premises, grounds and buildings where poultry is being kept or offered for sale.
  - 6.1.2 Keep complete and accurate records of names, addresses, type and number of poultry from all consignors. The same information must be recorded for all buyers whether paying cash or making other arrangements for payment. These records must be maintained for at least one year.
  - 6.1.3 Notify the Department of any purchasers at the auction/sale that would be considered a poultry dealer. The person who meets the conditions of being a poultry dealer will be required to purchase a livestock/poultry dealer's license and to comply with the provisions thereof.
  - 6.1.4 Allow Department personnel full access to inspect all lots of poultry offered for sale, trade or barter. If, in the opinion of ~~Department~~ DDA personnel, a lot of poultry exhibits signs of sickness or extremely poor husbandry as to be deemed a possible disease threat, the entire lot will be condemned, confiscated, humanely destroyed and diagnostic tests performed to determine the possible presence of ~~a serious~~ infectious diseases.
- ~~6.36.1.5~~ The physical plant, floors, cages and other equipment used to house or transport poultry must be completely cleaned and disinfected after each sale or swap meet. This procedure must be completed at least two working days prior to the next sale so that Department DDA personnel may inspect the facilities, if desired. If the cleaning and disinfecting procedure is deemed unsatisfactory, management will be notified and given the opportunity to remediate the situation. Failure to do so will result in the cancellation of the next scheduled poultry auction/sale auction, sale, or swap meet.
- 6.2 Poultry Dealers. The vehicles, crates and coops of all poultry dealers coming to auctions/sales within the State of Delaware ~~from out of state~~ entering auction/sales premises. Department DDA personnel may inspect all equipment and any findings of incomplete cleanliness of the vehicle, coops or crates will be cause to prevent that dealer from consigning or remaining at the auction and purchasing any poultry or livestock. Repeat offenders may have their dealer license revoked by DDA.
- 6.3 Limitation on slaughter of live poultry. No dealer, broker, poultry market operator, or employee or contractor thereof or any person acquiring live poultry from any of them shall slaughter, other than for humane euthanasia or disease control, any poultry that are on the premises of the dealer or broker or on the premises of a sales establishment.

**7.0 ~~Non-Commercial Poultry Leaving The State Of Delaware And Returning Under The Same Ownership.~~**

- 7.1 ~~These flocks are strictly non-commercial poultry of a hobby nature. Owners of this class of non-commercial poultry must comply with the following regulations:~~
- 7.1.1 All Delaware show bird exhibitors will be responsible for being completely familiar with the poultry health requirements of the state and the particular show which they are attending.
  - 7.1.2 All crates and coops used to transport the birds must be ~~of such construction and material to be completely cleaned and disinfected before returning to this state. A small, plastic pump up sprayer could be used for this purpose~~ made of material that can be completely cleaned and disinfected

# PROPOSED REGULATIONS

before returning to Delaware. All four vehicle tires, foot mats, and floor board pedals must also be cleaned prior to returning to Delaware.

- 7.1.3 Any newly obtained poultry originating from a state that has had a case of Avian Influenza or other serious infectious poultry disease within the past six months, must be tested by an official state laboratory using an officially recognized test no more ten days prior to that bird entering Delaware. Upon returning to Delaware birds shall be kept separate from all other birds in the flock for a period of 30 days. Birds returning from out of state shall not be sold, traded, or exchanged for 30 days.
- 7.1.4 Each poultry producer bringing birds back into Delaware for re-entry into his flock must abide by a set of biosecurity procedures aimed at minimizing the possibility of spreading a poultry disease contracted at a show to the remainder of his flock or to other flocks in the nearby area.

## 8.0 Commercial Poultry-

- 8.1 The following requirements will be imposed on all commercial poultry companies/growers and growers:
- 8.1.1 Complete a poultry producer registration form (as described above) for each farm owned or operated by an individual or corporation who produces poultry for an integrated company.
- 8.1.2 Submit a plan, signed, approved and verified by the integrated company, for the in-place ~~in farm~~ on-farm disposal method of normal day to day mortality for each separate commercial poultry producing farm.
- 8.1.3 The transport of any poultry which is owned by an integrated poultry company to a public sale or auction is strictly prohibited.
- 8.1.4 In an attempt to minimize the establishment of new back yard poultry flocks, the commercial poultry companies will instruct catching crews to catch and load all live birds and/or killed culls from every house. If any live or dead birds are left in a house, they must be caught and humanely destroyed and/or properly disposed of within 48 hours of ~~when~~ the flock left being taken into processing.

## 9.0 Requirements for live poultry and other avian species entering Delaware

### 9.1 Avian Influenza

- 9.1.1 Live poultry except doves and pigeons must show proof of a negative avian influenza PCR test within 21 days prior to entry to the State of Delaware for any purpose, unless the flock of origin participates in and meets the requirements of the NPIP "U.S. Avian influenza clean", "U.S. H5/H7 Avian influenza clean", or "U.S. Avian influenza monitored" programs.
- 9.1.2 Birds of prey, psittacines and other avian species not included in the NPIP must show proof of a negative avian influenza PCR test within 21 days prior to entry to the State of Delaware for any purpose, including fairs, shows, and swap meets.

### 9.2 Pullorum-Typhoid:

- 9.2.1 Live poultry and hatching eggs except doves and pigeons must meet one of the following conditions to enter Delaware:
- 9.2.1.1 Must be from a flock that participates in and meets the requirements of the "NPIP U.S. Pullorum-Typhoid Clean" program, or
- 9.2.1.2 Individual birds over four months of age entering Delaware must be tested negative for pullorum-typhoid using an NPIP-approved test within 90 days prior to entry and be accompanied by a negative pullorum test report, or
- 9.2.1.3 Must originate from a flock enrolled in an Pullorum-Typhoid clean program approved by DDA, or
- 9.2.1.4 Must originate from a flock in which birds are 4 months of age or older and a minimum of 300 birds are tested negative or the entire flock is tested negative, if the flock is smaller than 300 birds.

- 9.2.2 Psittacines, passerines, and raptors, along with other non-poultry species are exempt from subsection 9.2.
- 9.3 Health certification: any avian species or hatching eggs entering Delaware must be accompanied by certification of health as follows:
- 9.3.1 Flock of origin is not an NPIP flock: must enter Delaware with a health certificate
- 9.3.2 Flock of origin is an active NPIP participant: must enter Delaware with a NPIP 9-3 form.
- 9.3.3 Poultry that are healthy and are being moved to a participating NPIP slaughter plant for immediate slaughter are exempt from health certification requirements described in subsection 9.3.
- 9.4 Additional testing requirements for movement of poultry or other avian species into Delaware may be imposed at any time at the discretion of the State Veterinarian.
- 9.5 Movement permit required: live poultry and other avian species originating from an area that is under quarantine for an infectious disease may not move within Delaware or enter the State of Delaware without an official movement permit approved in advance by the Delaware State Veterinarian.

**9-010.0 Violations And Hearing Procedures-**

- 9-110.1 Failure to comply with these regulation may result in the assessment of a civil penalty.
- 9-210.2 No civil penalty shall be imposed until an administrative hearing is held before the Secretary of Agriculture or his or her designee. Administrative hearings for the provisions of this chapter shall be conducted within 30 days of the violation of this chapter. The Department shall issue a decision in writing to the person(s) charged with a violation of this chapter within 30 days of the conclusion of the administrative hearing.
- 9-310.3 The person(s) charged with a violation of this chapter will be notified in writing of the date and time of the aforementioned administrative hearing. The aforementioned person(s) shall have the right to appear in person, to be represented by counsel and to provide witnesses in his or her own behalf.
- 9-410.4 The Secretary, for the purposes of investigation of a possible violation of this chapter and for its hearings, may issue subpoenas, compel the attendance of witnesses, administer oaths, take testimony and compel the production of documents. In case any person summoned to testify or to produce any relevant or material evidence refuses to do so without reasonable cause, the Department of Agriculture may compel compliance with the subpoena by filing a motion to compel in Superior Court which shall have jurisdiction over this matter.
- 9-510.5 The Department shall preserve a full record of the proceedings and a transcript may be purchased by any interested person.

**40-011.0 Appeal-**

Any party, including an individual or corporation, that feels aggrieved by decision of the Secretary or his or her designee after an administrative hearing may take appeal to the Superior Court within thirty days of the date the decision is mailed to that party by the DDA. After a full hearing, the Court shall make such decree as seems just and proper. Written notice of such appeal, together with the grounds therefore, shall be served upon the Secretary of the DDA.

**44-012.0 Civil Penalties-**

- 44-112.1 It shall be unlawful for any person to interfere with the DDA in its effort to enforce these regulations and will subject the violator to a civil penalty of no less than ~~\$400~~ \$500 nor more than \$1,000 per proven violation.
- 44-212.2 It shall be unlawful for any person to violate a quarantine order issued by the DDA and will subject the violator to a civil penalty of no less than \$1,000 nor more than \$5,000 per proven violation.
- 44-312.3 The payment of penalties assessed under these regulations may be made on a payment schedule approved by the Secretary of the DDA.

~~11.412.4~~ A person who violates an emergency order of the Secretary of DDA or his or her designee exposes themselves to a civil penalty of no less than \$1,000 nor more than \$5,000 per proven violation.

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**DEPARTMENT OF EDUCATION**  
**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) and 303(a) (14 **Del.C.** §§122(b) & 303(a))  
14 **DE Admin. Code** 1008

**PUBLIC NOTICE**

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

**1008 DIAA Junior High and Middle School Interscholastic Athletics**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

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

Pursuant to 14 **Del.C.** Sections 122(b) and 303(a), the Secretary of Education seeks the approval of the State Board of Education to amend 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics. The Delaware Interscholastic Athletic Association ("DIAA"), working in consultation and cooperation with the Department of Education, developed the amendments to 14 **DE Admin. Code** 1008. Section 8.0 is being amended to add fees for officiating contests and competitions in accordance with the amendments to 14 **Del.C.** Ch. 3, which went into effect on July 17, 2018. In addition, subsection 2.7.3.1 is being amended to correct a technical error.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before January 4, 2019 to the Department of Education, Office of the Secretary, Attn: Regulation Review, 401 Federal Street, Suite 2, Dover, Delaware 19901 or email to [DOERegulations.comment@doe.k12.de.us](mailto:DOERegulations.comment@doe.k12.de.us). A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml) or obtained at the Department of Education's Office of the Secretary, located at the address above.

**C. IMPACT CRITERIA**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation concerns interscholastic athletics at the junior high and middle school level.
2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation concerns interscholastic athletics at the junior high and middle school level.
3. Will the amended regulation help to ensure all students' health and safety are adequately protected? The amended regulation is intended, in part, to help ensure all students' health and safety are adequately protected.
4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation is related to interscholastic athletics at the junior high and middle school level.
5. Will the amended regulation preserve the necessary authority and flexibility of decision-makers at the local board and school level? The amended regulation does not change authority and flexibility of decision makers at the local board and school level.
6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.
7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated will

be placed in the same entity.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts, and social studies? The amended regulation is consistent with, and not an impediment to, the implementation of other state educational policies.

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

10. What is the cost to the state and to the local school boards of compliance with the adopted regulation? There is no expected cost to the state and to the local school boards of complying with the amended regulation.

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 440RFA 12-01-18.pdf>

**1008 DIAA Junior High and Middle School Interscholastic Athletics  
(Break in Continuity of Sections)**

**2.0 Eligibility: No Student Shall Represent a School in an Interscholastic Scrimmage or Contest if the Student Does Not Meet the Following Requirements**

*(Break in Continuity Within Section)*

2.7 Eligibility, Years of Participation

*(Break in Continuity Within Section)*

2.7.3 Waiver of the Years of Participation Rule

2.7.3.1 "**Hardship**" shall be defined as extenuating circumstances peculiar to the student athlete caused by unforeseen events beyond the election, ~~control~~ control, or creation of the student athlete, the student's family, ~~or~~ and the student's school which (1) deprive the student of all or part of one of the student's opportunities to participate in a particular sports season; (2) preclude the student from completing the academic requirements for graduation within the normal period of eligibility; and (3) deprive the student of all or part of one of the student's opportunities to participate in a particular sport. The waiver provision is intended to restore eligibility that has been lost as a result of a hardship situation. Injury, ~~illness~~ illness, or accidents, which cause a student to fail to meet the basic requirements, are possible causes for a hardship consideration.

*(Break in Continuity of Sections)*

**8.0 Required Use of Officials, Recognition of Officials' Associations, ~~and~~ Attendance at Rules Clinics, and Fees for Officiating Contests and Competitions**

*(Break in Continuity Within Section)*

8.4 Tournament Fees for Officiating Contests and Competitions

8.4.1 The Board has established the following fees for officiating regular season contests and competitions:

<u>Sport</u>	<u>Level</u>	<u>Number of Officials per Contest</u>	<u>Time Adjustment</u>	<u>Rate per Official (Regular Season Contests)</u>
<u>Baseball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>

## PROPOSED REGULATIONS

<u>Basketball</u>	<u>Boys' Varsity</u>	<u>3, or 2 if mutually agreed</u>		<u>\$75</u>
	<u>Girls' Varsity</u>	<u>2, or 3 upon request</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>	<u>8 minute quarters</u>	<u>\$64</u>
	<u>Subvarsity</u>	<u>2</u>	<u>7 minute quarters</u>	<u>\$59</u>
	<u>Subvarsity</u>	<u>2</u>	<u>6 minute quarters</u>	<u>\$55</u>
	<u>Middle School</u>	<u>2</u>	<u>6 minute quarters</u>	<u>\$54</u>
<u>Cross Country</u>	<u>Starter/Referee</u>	<u>Upon request</u>		<u>\$67</u>
	<u>Timer/Judge</u>	<u>Upon request</u>		<u>\$64</u>
<u>Field Hockey</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle A</u>	<u>2</u>	<u>25 minute halves</u>	<u>\$54</u>
	<u>Middle B</u>	<u>2</u>	<u>25 minute or less halves at the Member School's discretion</u>	<u>\$54</u>
<u>Football</u>	<u>Varsity</u>	<u>5</u>		<u>\$75</u>
	<u>Timer</u>	<u>1</u>		<u>\$52</u>
	<u>Subvarsity</u>	<u>3</u>	<u>8 or 10 minute quarters</u>	<u>\$55</u>
	<u>Middle School</u>	<u>3</u>	<u>8 minute quarters</u>	<u>\$54</u>
<u>Lacrosse (Boys' and Girls')</u>	<u>Varsity</u>	<u>2, or 3 if requested</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Soccer (Boys' and Girls')</u>	<u>Varsity</u>	<u>2, or 3 if requested</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Subvarsity</u>	<u>3</u>		<u>\$48</u>
	<u>Middle A</u>	<u>2</u>	<u>30 minute halves</u>	<u>\$54</u>
	<u>Middle B</u>	<u>2</u>	<u>30 minute or less halves</u>	<u>\$54</u>
<u>Softball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Swimming and Diving</u>	<u>Referee</u>	<u>1</u>		<u>\$67</u>
	<u>Judge</u>	<u>1</u>		<u>\$64</u>
<u>Track and Field</u>	<u>Starter/Referee</u>	<u>Upon request</u>		<u>\$67</u>
	<u>Timer/Judge</u>	<u>Upon request</u>		<u>\$64</u>

<u>Volleyball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Linesman</u>	<u>2 by request</u>		<u>\$37</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Wrestling</u>	<u>Varsity</u>	<u>1</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>1</u>		<u>\$55</u>
	<u>Varsity+</u>	<u>1</u>		<u>\$75, then \$5 per match, up to 7 matches; not to exceed \$35</u>
	<u>Middle School</u>	<u>1</u>		<u>\$54</u>
	<u>Middle+</u>	<u>1</u>		<u>\$54, then \$4 per match, up to 7 matches; not to exceed \$28</u>

8.4.2 The fee for state tournament contests and competitions shall be the rate at the varsity level as provided in subsection 8.4.1 and an additional:

8.4.2.1 \$5 for first, second, and quarterfinal rounds of competition.

8.4.2.2 \$10 for the semi-final round of competition.

8.4.2.3 \$15 for the final or championship contest.

8.4.18.4.3 The Officials' Committee shall work with the Executive Director to help determine the fee amount for officiating a state tournament contest.

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

**1008 DIAA Junior High and Middle School Interscholastic Athletics**

**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) and 303(a) (14 **Del.C.** §§122(b) & 303(a))

14 **DE Admin. Code** 1009

**PUBLIC NOTICE**

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

**1009 DIAA High School Interscholastic Athletics**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

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

Pursuant to 14 **Del.C.** Sections 122(b) and 303(a), the Secretary of Education seeks the approval of the State Board of Education to amend 14 **DE Admin. Code** 1009 DIAA High School Interscholastic Athletics. The Delaware Interscholastic Athletic Association ("DIAA"), working in consultation and cooperation with the Department of Education, developed the amendments to 14 **DE Admin. Code** 1009. Section 8.0 is being amended to add fees for officiating contests and competitions in accordance with the amendments to 14 **Del.C.** Ch. 3, which went into effect

on July 17, 2018. In addition, subsection 2.7.3.1 is being amended to correct a technical error.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before January 4, 2019 to the Department of Education, Office of the Secretary, Attn: Regulation Review, 401 Federal Street, Suite 2, Dover, Delaware 19901 or email to [DOeregulations.comment@doe.k12.de.us](mailto:DOeregulations.comment@doe.k12.de.us). A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml) or obtained at the Department of Education's Office of the Secretary, located at the address above.

## C. IMPACT CRITERIA

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation concerns interscholastic athletics at the high school level.
2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation concerns interscholastic athletics at the high school level.
3. Will the amended regulation help to ensure all students' health and safety are adequately protected? The amended regulation is intended, in part, to help ensure all students' health and safety are adequately protected.
4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation is related to interscholastic athletics at the high school level.
5. Will the amended regulation preserve the necessary authority and flexibility of decision-makers at the local board and school level? The amended regulation does not change authority and flexibility of decision makers at the local board and school level.
6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.
7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated will be placed in the same entity.
8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts, and social studies? The amended regulation is consistent with, and not an impediment to, the implementation of other state educational policies.
9. Is there a less burdensome method for addressing the purpose of the amended regulation? There is not a less burdensome method for addressing the purpose of the amended regulation.
10. What is the cost to the state and to the local school boards of compliance with the adopted regulation? There is no expected cost to the state and to the local school boards of complying with the amended regulation.

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 443RFA 12-01-18.pdf>

### 1009 DIAA High School Interscholastic Athletics (Break in Continuity of Sections)

#### 2.0 Eligibility: No Student Shall Represent a School in an Interscholastic Scrimmage or Contest if the Student Does Not Meet the Following Requirements

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

#### 2.7 Eligibility, Years of Participation

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

#### 2.7.3 Waiver of the Years of Participation Rule

- 2.7.3.1 **"Hardship"** shall be defined as extenuating circumstances peculiar to the student athlete caused by unforeseen events beyond the election, ~~control~~ control, or creation of the student athlete, the student's family, ~~or~~ and the student's school which (1) deprive the student of all or part of one of the student's opportunities to participate in a particular sports season; and (2) preclude the student from completing the academic requirements

for graduation within the normal period of eligibility; and (3) deprive the student of all or part of one of the student's opportunities to participate in a particular sport. The waiver provision is intended to restore eligibility that has been lost as a result of a hardship situation. Injury, ~~illness~~ illness, or accident, which cause a student to fail to meet the basic requirements, are possible causes for a hardship consideration.

***(Break in Continuity of Sections)***

**8.0 Required Use of Officials, Recognition of Officials' Associations, ~~and~~ Attendance at Rules Clinics, and Fees for Officiating Contests and Competitions**

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

8.4 Tournament Fees for Officiating Contests and Competitions

8.4.1 The Board has established the following fees for officiating regular season contests and competitions:

<u>Sport</u>	<u>Level</u>	<u>Number of Officials per Contest</u>	<u>Time Adjustment</u>	<u>Rate per Official (Regular Season Contests)</u>
<u>Baseball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Basketball</u>	<u>Boys' Varsity</u>	<u>3, or 2 if mutually agreed</u>		<u>\$75</u>
	<u>Girls' Varsity</u>	<u>2, or 3 upon request</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>	<u>8 minute quarters</u>	<u>\$64</u>
	<u>Subvarsity</u>	<u>2</u>	<u>7 minute quarters</u>	<u>\$59</u>
	<u>Subvarsity</u>	<u>2</u>	<u>6 minute quarters</u>	<u>\$55</u>
	<u>Middle School</u>	<u>2</u>	<u>6 minute quarters</u>	<u>\$54</u>
	<u>Cross Country</u>	<u>Starter/Referee</u>	<u>Upon request</u>	
<u>Timer/Judge</u>		<u>Upon request</u>		<u>\$64</u>
<u>Field Hockey</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle A</u>	<u>2</u>	<u>25 minute halves</u>	<u>\$54</u>
	<u>Middle B</u>	<u>2</u>	<u>25 minute or less halves at the Member School's discretion</u>	<u>\$54</u>

## PROPOSED REGULATIONS

<u>Football</u>	<u>Varsity</u>	<u>5</u>		<u>\$75</u>
	<u>Timer</u>	<u>1</u>		<u>\$52</u>
	<u>Subvarsity</u>	<u>3</u>	<u>8 or 10 minute quarters</u>	<u>\$55</u>
	<u>Middle School</u>	<u>3</u>	<u>8 minute quarters</u>	<u>\$54</u>
<u>Lacrosse (Boys' and Girls')</u>	<u>Varsity</u>	<u>2, or 3 if requested</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Soccer (Boys' and Girls')</u>	<u>Varsity</u>	<u>2, or 3 if requested</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Subvarsity</u>	<u>3</u>		<u>\$48</u>
	<u>Middle A</u>	<u>2</u>	<u>30 minute halves</u>	<u>\$54</u>
	<u>Middle B</u>	<u>2</u>	<u>30 minute or less halves</u>	<u>\$54</u>
<u>Softball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Swimming and Diving</u>	<u>Referee</u>	<u>1</u>		<u>\$67</u>
	<u>Judge</u>	<u>1</u>		<u>\$64</u>
<u>Track and Field</u>	<u>Starter/Referee</u>	<u>Upon request</u>		<u>\$67</u>
	<u>Timer/Judge</u>	<u>Upon request</u>		<u>\$64</u>
<u>Volleyball</u>	<u>Varsity</u>	<u>2</u>		<u>\$75</u>
	<u>Linesman</u>	<u>2 by request</u>		<u>\$37</u>
	<u>Subvarsity</u>	<u>2</u>		<u>\$55</u>
	<u>Middle School</u>	<u>2</u>		<u>\$54</u>
<u>Wrestling</u>	<u>Varsity</u>	<u>1</u>		<u>\$75</u>
	<u>Subvarsity</u>	<u>1</u>		<u>\$55</u>
	<u>Varsity+</u>	<u>1</u>		<u>\$75, then \$5 per match, up to 7 matches; not to exceed \$35</u>
	<u>Middle School</u>	<u>1</u>		<u>\$54</u>
	<u>Middle+</u>	<u>1</u>		<u>\$54, then \$4 per match, up to 7 matches; not to exceed \$28</u>

8.4.2 The fee for state tournament contests and competitions shall be the rate at the varsity level as provided in subsection 8.4.1 and an additional:

8.4.2.1 \$5 for first, second, and quarterfinal rounds of competition.

8.4.2.2 \$10 for the semi-final round of competition.

8.4.2.3 \$15 for the final or championship contest.

~~8.4.18.4.3~~ 8.4.18.4.3 The Officials' Committee shall work with the Executive Director to help determine the fee amount for officiating a state tournament contest.

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

**1009 DIAA High School Interscholastic Athletics**

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF AIR QUALITY

Statutory Authority: 7 Delaware Code, Chapter 60, Section 6010(a) and (c) (7 **Del.C.** Ch. 60, §6010(a) & (c))

**7 DE Admin. Code 1150**

#### REGISTER NOTICE SAN # 2018-11

#### **1150 Outer Continental Shelf Air Regulations**

**1. TITLE OF THE REGULATIONS:**

Proposed amendments to 7 **DE Admin. Code** 1150, Outer Continental Shelf Air Regulations.

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

The Division of Air Quality (DAQ) is proposing to amend 7 **DE Admin. Code** 1150 to incorporate updates to the federal Outer Continental Shelf (OCS) regulations at 40 CFR 55, which have been made since the regulation was adopted in 2010.

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

None

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

7 **Del.C.** Ch. 60, Sections 6010(a) and 6010(c).

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

None

**6. NOTICE OF PUBLIC COMMENT:**

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Monday, January 7, 2019 beginning at 6:00 PM at the Division of Air Quality's office located at State Street Commons, 100 W. Water Street, Suite 6A, Dover, DE 19904. Interested parties may submit comments in writing to: Mark A. Prettyman, DNREC - Division of Air Quality, State Street Commons, 100 W. Water Street, Suite 6A, Dover, DE 19904. Public comments will be received until close of business Tuesday, January 22, 2019.

**7. PREPARED BY:**

Mark A. Prettyman - [mark.prettyman@state.de.us](mailto:mark.prettyman@state.de.us) - 302-739-9402

\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 **Del.C.** Ch. 104, is available at:

**[http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 447RFA 12-01-18.pdf](http://regulations.delaware.gov/register/december2018/proposed/22%20DE%20Reg%20447RFA%2012-01-18.pdf)**

#### **1150 Outer Continental Shelf Air Regulations**

06/11/2010 ###/###/2019

# PROPOSED REGULATIONS

## 1.0 Applicability

Upon delegation of authority by the Administrator of the EPA to the Department, this regulation shall apply to the owner or operator of any OCS source for which Delaware is the corresponding onshore area (COA) as authorized under Section 328 of the federal Clean Air Act Amendments (42 U.S.C. 7627) and 40 CFR Part 55 (July 1, ~~2009~~2018 ed.).

06/11/2010 ##/##/2019

## 2.0 Requirements

The provisions of Part 40 CFR Part 55 (July 1, ~~2009~~2018 ed.) are incorporated herein as 7 **DE Admin. Code** 1150. OCS sources shall comply with all requirements of 1100 Air Quality Management Section of Title 7 of the Delaware Administrative Code to the extent that they are incorporated by EPA into 40 CFR Part 55.14.

This rule incorporates the following provisions of 40 CFR Part 55:

### Outer Continental Shelf Air Regulations

55.1	Statutory authority and scope.
55.2	Definitions.
55.3	Applicability.
55.4	Requirements to submit a notice of intent.
55.6	Permit requirements.
55.7	Exemptions.
55.8	Monitoring, reporting, inspections, and compliance.
55.9	Enforcement.
55.10	Fees.
55.13	Federal requirements that apply to OCS sources.
55.14	Requirements that apply to OCS sources located within 25 miles of states' seaward boundaries, by State.
55.15	Specific designation of corresponding onshore areas.
Appendix A to 40 CFR Part 55	Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State

### DIVISION OF WASTE AND HAZARDOUS SUBSTANCES

Statutory Authority: 7 Delaware Code, Chapter 91 (7 **Del.C.** Ch. 91)  
7 **DE Admin. Code** 1375

### REGISTER NOTICE SAN # 2017-12

### 1375 Regulations Governing Hazardous Substance Cleanup

#### 1. TITLE OF THE REGULATIONS:

Delaware Regulations Governing Hazardous Substance Cleanup

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

The premise of the Brownfields Development Program (BDP) is to provide liability protections to parties who did not cause or contribute to the release of a hazardous substance on a real property. The intent is to investigate the property, ascertain the quantity and quality of contamination, its fate, transport, and pathways from the source material, and ultimately the potential harm to affected receptors. Upon completion of the investigation, an eligible

brownfield developer would have to remediate the property before putting the property back into reuse. This would cleanup the property for the intended use and prevent any further migration of contamination off of the certified brownfield property.

Remediation of contamination that extends beyond the boundaries of a Brownfield property is not the responsibility of the Brownfield developer but rather all otherwise potentially responsible parties. As the regulations are currently written, certified brownfields are "facilities" which mandates the investigation and cleanup of hazardous substance releases wherever they may be located - on or off the certified brownfield property. The amendments to the Regulations create a definition of a "certified brownfield" to ensure the remedial responsibilities of the Brownfield Developer are limited only to the area of the certified brownfield.

In addition the terminology of "abandoned, vacant or underutilized" to define a potential brownfield has been changed to "the *redevelopment, reuse or expansion* may be hindered by the reasonable belief that the real property is environmentally contaminated" to mirror the language in the Brownfields Development Program enabling statute, 7 Del.C. Chapter 91. The statutory change was made to more closely align with the federal brownfield statute and regulations. While the change is not required by any federal mandate it will create consistency between the state and federal brownfields program that will assist in grant writing.

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

There is no sunset date for the Regulations.

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

7 Del.C. Chapter 91

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

N/A

### 6. NOTICE OF PUBLIC COMMENT:

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Wednesday, January 9, 2019 starting at 6:00 PM in the DNREC Richardson & Robbins Auditorium, 89 Kings Highway, Dover, DE. If you are unable to attend or wish to submit your comments in advance of the public hearing, please send your comments to the address below. Interested parties may also submit written comments to the Department, to the same address below, up until the end of the comment period, which will extend through January 24, 2019, unless a longer period is designated by the hearing officer at the public hearing.

DNREC - Site Investigation and Restoration Section

Subject: HSCA Regulations Hearing

Attn: Jill Williams-Hall

391 Lukens Drive

New Castle, DE 19720

[Jill.hall@state.de.us](mailto:Jill.hall@state.de.us)

### 7. PREPARED BY:

Jill Williams-Hall, Planner IV, DNREC Site Investigation and Restoration Section.

[Jill.Hall@state.de.us](mailto:Jill.Hall@state.de.us) 302-395-2600

### \*Please Note:

(1) The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:

[http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 448RFA 12-01-18.pdf](http://regulations.delaware.gov/register/december2018/proposed/22%20DE%20Reg%20448RFA%2012-01-18.pdf)

(2) Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:

[1375 Regulations Governing Hazardous Substance Cleanup](#)

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# PROPOSED REGULATIONS

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## DIVISION OF WATERSHED STEWARDSHIP

Statutory Authority: 7 Delaware Code, Section 1902(a) (7 Del.C. §1902(a))  
7 DE Admin. Code 7402

### REGISTER NOTICE

SAN # 2018-12

### 7402 Shellfish Sanitation Regulations

#### 1. TITLE OF THE REGULATIONS:

Delaware Administrative Code 7402 *Shellfish Sanitation Regulations*

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

The Atlantic Ocean is currently classified as an Approved Shellfish Growing Area (GA-7) but there is no commercial or recreational bi-valve shellfish harvest that occurs in this growing area and the State resources to maintain current sampling and classification work are costly and provide no added benefit to the State. The purpose of this action is to change the classification of the Atlantic Ocean from an Approved Shellfish Growing Area to a Prohibited Shellfish Growing Area. By changing the classification status, it will save the State thousands of dollars annually with no impact to the public which utilizes the State's shellfish resources. If a viable fishery was determined to exist in the Atlantic Ocean in the future, the area could be reclassified to support the fishery.

The Delaware Fishing Guide has listed that clamming cannot occur within seagrass beds. This addition will make the Prohibited Shellfish Growing Area classification consistent with the restriction of clamming in seagrass beds referenced in the Delaware Fishing Guide for over ten years.

The definition of Shellfish Seed and Maximum Seed Size will be added to Shellfish Sanitation Regulations to be consistent with current Fish and Wildlife Shellfish Aquaculture Regulations for the Inland Bays.

There are no costs associated with these regulatory changes and there is minimal or no impact to commercial or recreational bi-valve shellfish harvesters. This action will save the State of Delaware thousands of dollars annually and continue to protect the State's seagrass restoration efforts.

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

There is no sunset date for the proposed regulation change.

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

7 Delaware Code §§1902(a)

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

None

#### 6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed changes to 7402 Shellfish Sanitation Regulations will be open December 1, 2018. Individuals may submit written comments regarding the proposed changes via e-mail to [Lisa.Vest@state.de.us](mailto:Lisa.Vest@state.de.us) or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. Public comments will be accepted through close of business Friday, February 1<sup>st</sup> 2019. A public hearing on the proposed amendment will be held on January 17, 2019 beginning at 6:00 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

#### 7. PREPARED BY:

Michael Bott

Environmental Scientist Shellfish and Recreational Water Programs

State Street Commons

100 W. Water Street-Suite 10-B

Dover, DE 19904

Phone: 302-739-9939

Fax: 302-739-6140  
[Michael.bott@state.de.us](mailto:Michael.bott@state.de.us)

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 450RFA 12-01-18.pdf>

## 7402 Shellfish Sanitation Regulations (Break in Continuity of Sections)

### 2.0 Definitions

NOTE: Those definitions primarily relating to the "Policy To Determine Shellfish Growing Area Classification In And Around Wet Slip Basins And Artificial Lagoons" are contained in Appendix 11.

*(Break in Continuity Within Section)*

**Maximum Seed Size:** The maximum size that seed can be grown in waters classified as Prohibited before being transported to waters classified as Approved, Seasonally Approved or Conditionally Approved.

*(Break in Continuity Within Section)*

**Seed-** Juvenile shellfish used in aquaculture operations.

### 3.0 General Regulations, Water Quality and Classification, Harvesting, Tracking, Permitting, Handling and Shipping:

*(Break in Continuity Within Section)*

#### 3.2 Shellfish Growing Area Water Quality, Classification, and Harvesting:

*(Break in Continuity Within Section)*

##### 3.2.2 Shellfish Harvesting and Tagging:

3.2.2.1 Shellfish harvesting shall not be allowed in the following areas:

3.2.2.1.1 Shellfish growing areas classified as Prohibited, unless for scientific research purposes, and only with written permission of DNREC; or in accordance with 3.2.2.2.4.

*(Break in Continuity Within Section)*

3.2.2.2 Shellfish may be harvested from the following areas under the conditions listed herein and/or in the Appendices:

*(Break in Continuity Within Section)*

3.2.2.2.4 Seed may be grown in waters classified as Prohibited and transported to a lease in a shellfish growing area classified as Approved, Conditionally Approved or Seasonally Approved as long as the seed is removed from waters classified as Prohibited before the maximum seed size is exceeded.

3.2.2.2.4.1 The maximum seed size for oysters is 25 mm and the maximum seed size for clams is 15 mm.

3.2.2.2.4.2 Oysters or clams that are cultured in aquaculture operations in waters classified as Prohibited and exceed the maximum seed size shall be determined to be adulterated and shall be seized, confiscated, and destroyed by DNREC.

## APPENDIX 1

This list of **Prohibited** shellfish growing areas is recorded at the Delaware Department of Natural Resources and Environmental Control on December 20, 1995. Shellfish harvesting is prohibited in the following areas for any reason at any time:

*(Break in Continuity Within Section)*

# PROPOSED REGULATIONS

## Atlantic Ocean:

27. ~~The Atlantic Ocean adjacent to Indian River Inlet encompassed within a line beginning one-half mile south of the Inlet running east into the Atlantic Ocean for one-half mile, thence in a northerly direction for one mile, thence in a westerly direction for one-half mile to the beach, from the northern most point at Cape Henlopen to the Delaware/Maryland State line and due east 3 nautical miles in the State of Delaware's jurisdictional waters. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.~~
28. ~~The Atlantic Ocean within a radius of one-half mile from the South Coastal Sewage Treatment Plant outfall which is located at north latitude 38°31'34" west longitude 75°01'56".~~

## Applies To All Areas:

- ~~29~~28. All artificial lagoons. Most of these areas are unmarked.
- ~~30~~29. All wet slip basins. Most of these areas are unmarked.
30. Seagrass beds (*Zostera marina* and *Ruppia maritima*)

## APPENDIX 2

This list of **Approved** shellfish growing areas is recorded at the Delaware Department of Natural Resources and Environmental Control into the public record on December 20, 1995. Shellfish harvesting is allowed in the following areas with no seasonal restriction:

### (Break in Continuity Within Section)

- ~~6.~~ The Atlantic Ocean with the exception of those areas listed in Appendix 1.

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

**7402 Shellfish Sanitation Regulations**

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## DEPARTMENT OF SAFETY AND HOMELAND SECURITY DELAWARE COUNCIL ON POLICE TRAINING

Statutory Authority: 11 Delaware Code, Sections 8402 & 8404(a)(14) (11 Del.C. §§8402,  
8404(a)(14))  
1 DE Admin. Code 801

### PUBLIC NOTICE

### 801 Regulations of the Delaware Council on Police Training

The Council on Police Training (COPT), pursuant to 11 Del.C. §8404(a)(14), proposes to revise its regulations. The proposed amendments, which were voted on in a regular meeting by the COPT on October 16, 2018, seek to update, clarify and provide more detailed information regarding training requirements and records, employment status, COPT certification, and procedures for non-compliance.

The COPT will allow for the submission of written comments, suggestions, or other materials regarding the proposed rules to the Department of Safety and Homeland Security Attn: Christopher Klein, Public Safety Building Suite 220, P.O. BOX 818, Dover, Delaware 19903-0818 or e-mail [Christopherm.klein@state.de.us](mailto:Christopherm.klein@state.de.us). Any written submission in response to this notice and the relevant proposed regulations must be received by the Department of Safety and Homeland Security no later than 4:30 p.m. (EST) on December 31, 2018. A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

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## DECISION AND ORDER CONCERNING THE REGULATIONS

NOW THEREFORE, under the statutory authority and for the reasons sent forth above, the Council on Police Training does hereby ORDER that the regulations be, and that they hereby are, proposed to be enacted as set forth below.

Robert M. Coupe, Chairman COPT

**\*Please Note:**

(1) The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 452RFA 12-01-18.pdf>

(2) Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:

[801 Regulations of the Delaware Council on Police Training](#)

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### DELAWARE COUNCIL ON POLICE TRAINING

Statutory Authority: 11 Delaware Code, Sections 8402 & 8404(a)(14) (11 Del.C. §§8402, 8404(a)(14))

#### PUBLIC NOTICE

#### [802 COPT K-9 Training Standards and Requirements](#)

The Council on Police Training (COPT), pursuant to 11 Del.C. §8404(a)(14), proposes to create regulations. The proposed regulations, which were voted on in a regular meeting by the COPT on October 16, 2018, seek to establish basic training and qualification standards for police K-9 teams.

The COPT will allow for the submission of written comments, suggestions, or other materials regarding the proposed rules to the Department of Safety and Homeland Security Attn: Christopher Klein, Public Safety Building Suite 220, P.O. BOX 818, Dover, Delaware 19903-0818 or e-mail [Christopherm.klein@state.de.us](mailto:Christopherm.klein@state.de.us). Any written submission in response to this notice and the relevant proposed regulations must be received by the Department of Safety and Homeland Security no later than 4:30 p.m. (EST) on December 31, 2018. A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

## DECISION AND ORDER CONCERNING THE REGULATIONS

NOW THEREFORE, under the statutory authority and for the reasons sent forth above, the Council on Police Training does hereby ORDER that the regulations be, and that they hereby are, proposed to be enacted as set forth below.

Robert M. Coupe, Chairman COPT

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 453RFA 12-01-18.pdf>

#### [802 COPT K-9 Training Standards and Requirements](#)

#### **1.0 Intent and Purpose**

To establish basic training and qualification standards for police K-9 teams and K-9 specialty teams that

include performance objectives for the police officer handler and the police officer-police dog teams.

## **2.0 Definitions**

As used in this regulation:

"Agility Training" means training during which the police dog must surmount or overcome obstacles, such as walls and tunnels, which are likely to be confronted in the performance of duty.

"In-Service Training" means training conducted by a K-9 trainer or Supervising K-9 trainer to maintain skills that must be performed during re-evaluation.

"K-9 Patrol Team" means a team consisting of a police officer handler and police dog used in law enforcement for routine patrol work, such as building searches, area searches article searches, tracking, and criminal apprehension.

"K-9 Specialty Team" means a team consisting of a police officer handler and specialty dog used in law enforcement specifically for scent work, detection or tracking work. Specialty teams are used for narcotics detection, arson accelerant detection, explosive detection, tracking, article searches, or cadaver detection.

"K-9 Team" means a team comprised of the police officer handler and the police dog.

"K-9 Trainer" means a trainer is qualified to conduct basic and in-service training for police officer handler-police dog teams and must meet the qualification requirements set forth herein.

"Law Enforcement Agency" means any police force or organization functioning within this state or any other state which has by statute or ordinance the responsibility of detecting crime and enforcing the criminal or penal laws of this state or any other state.

"Law Enforcement Officer" means any COPT certified employee of a law enforcement agency (not including a civilian employee), any member of a fire department or force who is assigned to an arson investigation unit.

"Police Dog" means a dog that has been trained by a Supervising K-9 trainer or K-9 trainer and is handled by a police officer handler in the performance of his/her duties used for law enforcement purposes or any law enforcement related activities.

"Police Officer Handler" means a COPT certified law enforcement officer who officially utilizes a police dog in the course of assigned duties and responsibilities.

"Police Specialty Dog (single purpose dog)" means a police dog used specifically for specialty work or specialized scent work such as detection and tracking in law enforcement, that is, narcotics detection, arson accelerant detection, explosive detection, tracking, article and cadaver detection.

"Supervising K-9 Trainer" means K-9 trainers that conduct basic and in-service K-9 training and qualifying exercises. They are responsible for supervising K-9 handlers who assist with any K-9 training, and for certifying qualified prospective handlers as K-9 trainers. Supervising K-9 trainers must meet the qualification requirements set forth herein.

## **3.0 K-9 Training Standards and Qualification Requirements**

- 3.1 All law enforcement agencies with a K-9 program for COPT certified officers will establish clearly written policies and procedures that are consistent with the K-9 standards as approved by the COPT.
- 3.2 All Police Officer K-9 handlers will be trained under the same standards and curriculum for Basic training and qualification, in-service training and re-evaluation as approved by the COPT.
- 3.3 Instructors for K-9 trainers must meet the following:
  - 3.3.1 Satisfactory completion of COPT K-9 training or K-9 training equivalent to the basic training and qualification as approved by the COPT;
  - 3.3.2 Five (5) years of experience as a police dog handler;
  - 3.3.3 Must be a full-time law enforcement officer assigned to trainer's duties by his/her employing law enforcement agency;
  - 3.3.4 Satisfactory completion of a Certified Instructor Course approved by COPT or an equivalent course; and

- 3.3.5 Experience assisting a Supervising K-9 Trainer in the delivery of one or more basic K-9 training courses satisfying the requirements as adopted by the COPT or courses having substantially equivalent requirements, during which a minimum of five (5) K-9 teams were successfully trained and qualified. The prospective trainer must have been present for and assisted with the majority of training time.
- 3.4 Supervising K-9 Trainers must meet the following:
- 3.4.1 Satisfactory completion of COPT K-9 patrol training or K-9 patrol training equivalent to the training as approved by the COPT;
- 3.4.2 Must be a full-time law enforcement officer assigned to trainer duties by his/her employing law enforcement agency;
- 3.4.3 Satisfactory completion of a Certified Instructor Course approved by COPT or an equivalent course;
- 3.4.4 Seven (7) years of experience as a police dog handler or trainer;
- 3.4.5 Must have experience in conducting a minimum of two (2) basic K-9 training courses satisfying the requirements as adopted by the COPT (with the exception of those areas of instruction appropriately conducted by qualified specialists) or a course having substantially equivalent requirements, thereby successfully training and qualifying a minimum of ten (10) K-9 teams;
- 3.4.6 A Supervising Patrol K-9 Trainer is responsible for all documentation and certification of prospective trainers. He/she must document the time the prospective trainer committed to the class training, the number of dogs trained, the areas of training, and what involvement the prospective trainer had with the class. Weekly evaluations recommending goals and objectives, as well as documentation of accomplishments are required; and
- 3.4.7 All records pertaining to the certification of K-9 patrol trainers must be maintained by the Supervising K-9 Patrol Trainer for a period of no less than two (2) years, and by the newly certified K-9 patrol trainer for the duration of his/her career.
- 3.5 Training, Qualification and Re-evaluation Records
- 3.5.1 Complete records should reflect all K-9 training, qualification and re-evaluation activities, as well as the performance and proficiency of the police officer handler, police K-9 patrol team, or K-9 specialty team during such activities.
- 3.5.2 Copies of all training course schedules, curricula and lesson plans must be maintained along with the records of individual trainees.
- 3.6 Training Site or Facility Requirements. The training site or facility should provide the environment necessary to conduct all aspects of the training as approved by the COPT, including appropriate simulation exercises. The area used must be adequate to accommodate an agility course as well as various types of searches.
- 

**DIVISION OF STATE POLICE  
5500 BAIL ENFORCEMENT AGENTS**

Statutory Authority: 24 Delaware Code, Section 5504(e) (24 **Del.C.** §5504(e))  
24 **DE Admin. Code** 5500

**PUBLIC NOTICE**

**5500 Bail Enforcement Agents**

Notice is hereby given that the Board of Examiners of Bail Enforcement Agents, in accordance with 24 **Del.C.** Ch. 55 proposes to amend the following adopted rule in 24 **DE Admin. Code** 5500 Bail Enforcement Agents: Rule 2.0 Badges, Patches, and Advertisements. If you wish to view the complete Rule, contact Ms. Ashley Hughes at (302) 672-5337. Any persons wishing to present views may submit them in writing, by December 31, 2018, to Delaware State Police, Professional Licensing Section, P.O. Box 430, Dover, DE 19903. The Board will hold its

quarterly meeting Thursday, February 14, 2019, 10:00am, at the Tatnall Building, 150 Martin Luther King, Jr. Boulevard South, Room 112, Dover, DE.

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 455RFA 12-01-18.pdf>

## 5500 Bail Enforcement Agents (Break in Continuity of Sections)

### 2.0 Badges, Patches, and Advertisements

- 2.1 No individual licensed under 24 Del.C. Ch. 55 shall use any type of uniform or other clothing items displaying logos, badges, patches, or any other type of writing without first being approved by the Board. Under no circumstances shall any item contain the seal or crest of the State of Delaware, any state of the United States, the seal or crest of any county or local sub division, or any facsimile of the aforementioned seals or crests.

#### (Break in Continuity Within Section)

- 2.1.2 Items submitted in compliance with subsection 2.1.1 do not need to be presented to the Board for approval providing that there are no additional logos, patches, or wording displayed on the outermost garment.

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

**5500 Bail Enforcement Agents**

## DEPARTMENT OF STATE

### OFFICE OF THE STATE BANK COMMISSIONER

Statutory Authority: 5 Delaware Code, Section 121(b) (5 Del.C. §121(b))  
5 DE Admin. Code 102

#### PUBLIC NOTICE

### 102 Procedures Governing the Creation and Existence of an Interim Bank

#### Summary

The State Bank Commissioner proposes to amend Regulation 102 - Procedures Governing the Creation and Existence of an Interim Bank. The proposed amendments to the Regulation would add an additional permissible purpose for the formation of an interim bank and, a technical amendment, which removes a reference to the former Regulation number. This proposed amendment is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Other Regulations issued by the State Bank Commissioner are not affected by this proposed amendment. The State Bank Commissioner is issuing this proposed amended Regulation in accordance with Title 5 of the Delaware Code. This Notice is issued pursuant to the requirements of Title 29 of the Delaware Code, Chapter 11, Subchapter III, Chapter 101, Subchapter II, and Chapter 104, Sections 10404A(b)(1) and 10404B(b)(1).

#### Comments

A copy of the proposed amended Regulation is being published in the December 1, 2018 edition of the Delaware *Register of Regulations*. Copies are also on file in the Office of the State Bank Commissioner, 43 South DuPont Highway, Edgehill Shopping Center, Dover, DE 19901 and are available for inspection during regular office hours. Copies are available upon request.

Interested parties may offer comments on the proposed amended Regulation or submit written suggestions, data, briefs or other materials to the Office of the State Bank Commissioner at the above address as to whether the

proposed amended Regulation should be adopted, rejected or modified. Pursuant to 29 **Del.C.** §10118(a), public comments must be received on or before January 3, 2019. Written materials submitted will be available for inspection at the above address.

## Adoption of Proposed Amended Regulations

On or after January 3, 2019, following review of the public comment, the State Bank Commissioner will determine whether to adopt the proposed amended Regulation, or make additional changes because of the public comments received.

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 456RFA 12-01-18.pdf>

## 102 Procedures Governing the Creation and Existence of an Interim Bank

Formerly Regulation No.: 5-121-0002

Effective Date: ~~December 11, 1998~~ XX/XX/XXXX

This regulation establishes procedures governing the creation and existence of an Interim Bank, which shall have no authority to conduct a banking business until merged with an Insured Bank.

### 1.0 Definitions

**“Articles of Association”** means the articles of association described in Section 723 of Title 5 of the **Delaware Code**.

**“Articles of Organization”** means the articles of organization described in Section 728 of Title 5 of the **Delaware Code**.

**“Bank”** means a Delaware State Bank, Out-of-State State Bank, Delaware National Bank or Out-of-State National Bank.

**“Bank Holding Company”** has the meaning specified in the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 et seq.).

**“Certificate Authorizing the Transaction of Business”** means the certificate described in Section 733 of Title 5 of the **Delaware Code**.

**“Delaware Bank”** means a Delaware National Bank or a Delaware State Bank.

**“Delaware National Bank”** means a national banking association created under the National Bank Act (12 U.S.C. § 21 et seq.) that is located in this State.

**“Delaware State Bank”** means a bank (as defined in § 101 of Title 5 of the **Delaware Code**) chartered under the laws of this State.

**“Insured Bank”** means a bank that is an insured depository institution, as defined in the Federal Deposit Insurance Act at 12 U.S.C. § 1813(c).

**“Interim Bank”** means a bank established ~~exclusively~~ for the ~~temporary~~ purposes set forth in this regulation.

**“Interim Bank Agreement”** means an agreement that expressly provides, among other things, for the creation of an Interim Bank and its merger with an Insured Delaware Bank.

**“Located in this State”** means, with respect to a state-chartered bank, a bank created under the laws of this State and, with respect to a national banking association, a bank whose organization certificate identifies an address in this State as the place at which its discount and deposit operations are to be carried out.

**“Notice of Intent”** means a notice of the intention of the incorporators to form an Interim Bank, as provided in Section 5 of this regulation.

**“Out-of-State Bank”** means an Out-of-State State Bank or an Out-of-State National Bank.

“**Out-of-State Bank Holding Company**” has the meaning specified in the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 et seq.).

“**Out-of-State National Bank**” means a national bank association created under the National Bank Act (12 U.S.C. § 21 et seq.) that is not located in this State.

“**Out-of-State State Bank**” means a State bank, as defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. § 1813(a), that is not chartered under the laws of this State.

“**Public Notice**” means a public notice, as provided in Section 5 of this regulation.

## 2.0 Scope

2.1 An Interim Bank may only be formed to facilitate:

2.1.1 The establishment of a Bank Holding Company by an Insured Delaware Bank’s stockholders. The proposed Bank Holding Company, once incorporated, applies in the manner set forth at Section 5 of this regulation for an Interim Bank charter for a subsidiary to be newly formed. An agreement is executed between the proposed Bank Holding Company and the Insured Delaware Bank that provides, among other things, that the Insured Delaware Bank will be merged or consolidated with the Interim Bank and become a subsidiary of the Bank Holding Company upon the receipt of all necessary federal and state approvals for the proposed Bank Holding Company so to act; or

2.1.2 The acquisition of an Insured Delaware Bank by another Insured Delaware Bank or Bank Holding Company (e.g., pursuant to Subchapter VI of Chapter 7 or Subchapters IV or V of Chapter 8 of Title 5 of the **Delaware Code**). In such instances, the Interim Bank is used to assure that the to-be-acquired Insured Delaware Bank will become wholly-owned through a merger or consolidation pursuant to an agreement between the Insured Delaware Banks or between an Insured Delaware Bank and a Bank Holding Company that provides, among other things, for an Insured Delaware Bank to merge or consolidate with the Interim Bank.

2.1.3 The merger of one or more Out-of-State Banks with or into one or more Delaware Banks to result in a Delaware State Bank, in accordance with Section 795D or Section 795G of Title 5 of the **Delaware Code**.

2.1.4 The merger or reorganization of one or more Insured Banks to result in a Delaware State Bank.

## 3.0 Interim Bank Agreement Required

3.1 An Interim Bank may not be chartered unless there is an Interim Bank Agreement.

## 4.0 Who May Incorporate

4.1 An Interim Bank may be incorporated, in accordance with Section 722 of Title 5 of the **Delaware Code**, by three or more individual persons, at least two of whom must be citizens and residents of Delaware.

## 5.0 Application Procedures

5.1 An application to form an Interim Bank shall be submitted as follows, except as otherwise provided in connection with a contemporaneous application in accordance with another regulation (e.g., Regulation 804 (formerly 5.844.0009), “Application by an Out-of-State Bank Holding Company to Acquire a Delaware Bank or Bank Holding Company”):

5.1.1 The Notice of Intent shall be filed in duplicate in the Office of the Commissioner and shall state:

5.1.1.1 ~~the~~ The purpose for forming an Interim Bank;

5.1.1.2 ~~the~~ The proposed name of the Interim Bank;

5.1.1.3 ~~the~~ The name and address of the incorporators; and

5.1.1.4 ~~the~~ The amount of the capital stock of the Interim Bank.

5.1.2 The Notice of Intent shall attach as exhibits:

5.1.2.1 ~~the~~ The Interim Bank Agreement;

- 5.1.2.2 a A copy of the proposed Articles of Association of the Interim Bank;
- 5.1.2.3 a A copy either of the certificate of public convenience and advantage or the legislative and/or corporate instruments of banking authority for the Insured Bank which is to be merged with the Interim Bank pursuant to the Interim Bank Agreement.

5.1.3 Upon notification by the Commissioner that the Notice of Intent to form an Interim Bank is complete, the applicant shall cause to be published in a newspaper of general circulation throughout the State of Delaware, once a week for two (2) consecutive weeks, a Public Notice of its intention to form an Interim Bank. The Public Notice shall include the proposed name of the Interim Bank, the names of the incorporators, the amount of the capital stock of the Interim Bank, and a brief summary of the purpose of the Interim Bank, shall identify this regulation under which the Interim Bank is to be formed, and shall inform interested persons of their right to comment on the application before the Commissioner decides whether to approve the Interim Bank.

## **6.0 Decision of Commissioner; Incorporation**

- 6.1 Within two weeks of the last publication of the Public Notice, the Commissioner shall issue a decision as to whether to charter the Interim Bank. This two week period may be extended by two additional weeks if the Commissioner requires more time or information.
- 6.2 Upon the Commissioner's approval, the Incorporator shall take the necessary steps to form the Articles of Organization and the Commissioner shall endorse the Articles. The Incorporator shall then incorporate the Interim Bank and file the necessary documents with the Secretary of State.
- 6.3 A Certificate Authorizing the Transaction of Business shall not be issued until the Interim Bank has been merged with the Insured Bank.

## **7.0 Powers of Interim Bank Before Merger**

- 7.1 An Interim Bank may not engage in any banking activity or operate as a bank until it has merged with an Insured Bank. An Interim Bank may take only those corporate and fiduciary steps and actions reasonably incidental and necessary to facilitate and complete the merger. Such limitation shall not preclude the Commissioner from granting a certificate of public convenience and advantage, and to otherwise facilitate and authorize the formation and incorporation of the Interim Bank, provided that no Certificate Authorizing the Transaction of Business pursuant to §733 of Title 5 of the **Delaware Code** shall be issued prior to the consummation of the merger of the Interim Bank with an Insured Bank.
- 7.2 The receipt by the Commissioner of an Interim Bank Agreement and a copy of either the certificate of public convenience and advantage or the legislative and/or corporate instruments pursuant to which the Insured Bank with which the Interim Bank will merge derives its banking powers shall constitute sufficient authority for the Commissioner to issue a certificate of public convenience and advantage to the Interim Bank.

## **8.0 Proof of Merger: Revocation of Certificate**

- 8.1 From the date an Interim Bank is authorized pursuant to this regulation, the parties to the Interim Bank Agreement shall have six (6) months in which to effect the merger with the Insured Bank. Proof of the merger must be timely supplied to the Commissioner.
- 8.2 Upon proof of the consummation of the merger of the Interim Bank with the Insured Bank, a Certificate Authorizing the Transaction of Business, as required by § 733 of Title 5 of the **Delaware Code** shall be issued immediately by the Commissioner to the surviving entity if the Interim Bank is the survivor.
- 8.3 Extensions may be granted by the Commissioner if the parties to the Interim Bank Agreement can show good cause as to why an extension is needed to complete the merger.
- 8.4 The Commissioner may revoke the certificate of public convenience and advantage of the Interim Bank (and may take such other steps he deems appropriate at any time) if proof of the merger between the Interim Bank and the Insured Bank has not been provided to the Commissioner at the end of the authorized time, if the Interim Bank actually conducts any banking business prior to its proposed merger, or if any related merger or acquisition application is denied or withdrawn.

**9.0 Fees**

- 9.1 A non-refundable investigation fee of \$1,150 to offset the administrative expense of the Commissioner's office shall be included with the Notice of Intent; provided, however, that such fee shall be considered as part of and not in addition to any fee being paid at the same time to the Commissioner's office in connection with a contemporaneous application for a merger or acquisition. In addition, depending on the structure of the transaction, other fees may be required in accordance with applicable statutes or regulations (e.g., Section 735 of Title 5 of the **Delaware Code**).

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**DEPARTMENT OF TRANSPORTATION**  
**DIVISION OF TRANSPORTATION SOLUTIONS**Statutory Authority: 29 Delaware Code, Section 6962 (29 **Del.C.** §6962)**PUBLIC NOTICE****2408 Performance-Based Contractor Evaluation Procedures**

Senate Bill 208 of the 149<sup>th</sup> General Assembly made changes to 29 **Del.C.** §6962 relating to public works contracting requiring the Delaware Department of Transportation (DelDOT) to implement a performance-based rating system for contractors that is defined in regulations. To fulfill this requirement, the Department, through its Division of Transportation Solutions, seeks to promulgate a new regulation entitled Performance-Based Contractor Evaluation Procedures.

**Public Comment Period**

DelDOT will take written comments on this proposed Section 2408 of Title 2, Delaware Administrative Code, from December 1, 2018 through December 31, 2018. The public may submit their comments to:

Robert McCleary, Chief Engineer, Division of Transportation Solutions  
([Robert.McCleary@state.de.us](mailto:Robert.McCleary@state.de.us)) or in writing to his attention,  
Chief Engineer  
Delaware Department of Transportation  
P.O. Box 778  
Dover, DE 19903

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/december2018/proposed/22 DE Reg 460RFA 12-01-18.pdf>

**2408 Performance-Based Contractor Evaluation Procedures****1.0 Purpose**

In accordance with 29 **Del.C.** §6962, the purpose of this regulation is to set forth the procedures the Delaware Department of Transportation (the "Department") will follow in preparing performance-based contractor evaluations and calculating contractor performance-based ratings.

**2.0 Applicability**

- 2.1 The Department will complete performance-based evaluations (the "Performance Evaluations") on large public works contracts as defined in Title 29, Ch. 69 of the Delaware Code. The Performance Evaluations will be made on the construction company contracted by the Department to build the project (the "Contractor").

- 2.2 The Department shall provide notice to prospective bidders as part of contract advertisement regarding the prequalification requirements related to the performance based rating system under 29 **Del.C.** §6962.
- 2.3 For procurements made based on best value, performance must be at least 10%, but no more than 20% of the weighted selection criteria as described in 29 **Del.C.** §6962(d)(13)a.4.A.
- 2.4 Design Build contracts procured in accordance with Title 29 of the Delaware Code are not subject to these performance-based rating system requirements unless the Department's Request for Proposals (RFP) for a design build contract includes specific language requiring it.

### **3.0 Performance Evaluation Form, Criteria and Scoring**

- 3.1 Performance Evaluations will be made on the Department issued form as shown in Appendix 'A'.
- 3.2 The criteria to be used for Performance Evaluations is as shown on the form in Appendix 'A'.
- 3.3 Scoring will be as shown on the form in Appendix 'A'.
- 3.4 Appendix 'A' is a part of this regulation.

### **4.0 Performance Evaluation Procedures**

- 4.1 Timing of Performance Evaluations
  - 4.1.1 For projects that have an original contract time of 240 calendar days or less, a Performance Evaluation will be made no later than 60 calendar days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
  - 4.1.2 For projects with an original contract time greater than 240 calendar days and less than 365 calendar days, a Performance Evaluation will be made at approximately 50% completion. An additional Performance Evaluation will be made no later than 60 days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
  - 4.1.3 For projects with an original contract time longer than 365 calendar days, Performance Evaluations will be made every six months. An additional Performance Evaluation will be made no later than 60 days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
- 4.2 Performance Evaluations will be completed in accordance with the following steps:
  - 4.2.1 Each Performance Evaluation will be initiated and completed by the Department employee in charge of administering the contract (the "Evaluator") specified by the Department at the preconstruction meeting.
  - 4.2.2 The Performance Evaluation will be reviewed for approval by the Department employee (the "Reviewer") specified by the Department at the preconstruction meeting.
  - 4.2.3 Upon approval, the completed Performance Evaluation will be submitted to the primary point of contact for the Contractor, as specified by the Contractor at the time of the preconstruction meeting, for review.
  - 4.2.4 The Contractor will have ten (10) business days to exercise the following options:
    - 4.2.4.1 Accept the Performance Evaluation;
    - 4.2.4.2 Request a meeting in writing to propose changes to the Performance Evaluation to the Secretary's designee in charge of Construction as specified by the Department at the preconstruction meeting (the "Review Meeting").
  - 4.2.5 Within two (2) business days of receipt of a request for a Review Meeting, the Secretary's designee in charge of Construction shall schedule the Review Meeting with the requesting Contractor. The review meeting shall be held no more than ten (10) business days after the date of the request, unless the Contractor and the Secretary's designee in charge of Construction mutually agree in writing to a later date.

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# PROPOSED REGULATIONS

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- 4.2.6 The purpose of the Review Meeting will be to discuss the Performance Evaluation and the Contractor must bring any and all supporting documentation or witnesses required to support any changes the Contractor is requesting to the Performance Evaluation.
- 4.2.7 Within ten (10) business days after the Review Meeting, the Secretary's designee in charge of Construction shall make a determination in writing (the "Determination") to accept any of the Contractor's changes and revise the Performance Evaluation, or to leave the Performance Evaluation as written.
- 4.2.8 Upon receipt of the Determination, the Contractor may:
- 4.2.8.1 Accept the Performance Evaluation;
- 4.2.8.2 Appeal in accordance with subsection 8.3 of this regulation.
- 4.2.9 If no action is taken by the Contractor within ten (10) business days after the receipt of the Determination then the Performance Evaluation will be considered final.
- 4.3 For contracts with multiple locations, such as open-end contracts and indefinite delivery-indefinite quantity (IDIQ) contracts, Performance Evaluations will be made at the frequency described in subsection 4.1 of these regulations. The Department will aggregate multiple locations under such contracts in one Performance Evaluation as reasonably practicable.

## **5.0 Calculation of Performance Rating; Prequalification of Bidders**

### 5.1 Calculation of Performance Rating

- 5.1.1 The performance-based rating (the "Performance Rating") for a Contractor shall be calculated as a rolling average of the score of all Performance Evaluations on file for that Contractor for the most recent three year period as measured from the date of advertisement.
- 5.1.2 Should no Performance Evaluations exist as set forth in subsection 5.1.1, the Department will utilize the average score of all available Performance Evaluations on file for the previous five year period measured from the date of advertisement.

### 5.2 Prequalification of Bidders

- 5.2.1 The Performance Rating, as calculated in subsection 5.1, for a Contractor shall be utilized as a prequalification to bid at the time of bid.
- 5.2.2 Bidders with scores of equal to or greater than 85% shall be permitted to bid.
- 5.2.3 Bidders with scores of less than 85% who comply with the retainage requirements of 29 Del.C. §6962 shall be permitted to bid provided the Agreement to Accept Retainage in Appendix 'B' is executed and submitted with the bid. Lack of an executed Agreement to Accept Retainage will result in the rejection of the bid by the Department.

- 5.3 Notification of Performance Rating. The Department shall post publicly the Performance Rating for all Contractors on the Department's website on a weekly basis.

## **6.0 Provisional Performance Rating**

- 6.1 Successful bidders awarded Department contracts who have no performance history within the last five (5) years will be assigned a provisional Performance Rating of 85% at the date of advertisement, which shall be applied until a true average can be determined based on actual Performance Evaluations on Department contracts.
- 6.2 Contractors assigned a provisional Performance Rating may request an interim Performance Evaluation in accordance with subsection 7.1.2 of these regulations.

## **7.0 Variable Retainage**

- 7.1 The rate of retainage will be as follows:

- 7.1.1 A 5% retainage shall be withheld by the Department from each monthly progress payment due the Contractor if the Contractor's Performance Rating as calculated in subsection 5.1 of these regulations is less than 85% at the time of advertisement.

- 7.1.2 A Contractor who is subject to retainage pursuant to subsection 5.2.3 may request an interim Performance Evaluation when a contract reaches 50% completion. If final score of that interim performance evaluation is greater than 85%, the retainage withheld by the Department on future progress payments shall be reduced to 2% for the remaining life of that contract. Interim Performance Evaluations shall be placed on file by the Department and utilized in the calculation of a Contractor's Performance Rating. Interim Performance Evaluations shall follow the procedures set forth in Section 4.0 of this regulation.
- 7.2 For the avoidance of doubt, a Contractor is not permitted to hold retainage from its subcontractors and all must be paid in accordance with applicable law.
- 7.3 The Department shall release 60% of the retainage at Substantial Completion as that term is defined in the Contract. The remaining 40% of the retainage will be released upon approval of the final pay estimate in order to satisfy the statutory requirements under 29 **Del.C.** §6962(d)(5) regarding documentation of payment to subcontractors.

## **8.0 Appeals**

- 8.1 Submission. Appeals, and acknowledgement of receipt of appeals, shall be made in writing. Appeals may be submitted by email to the addresses set forth below.
- 8.2 Appeal of Performance Rating
- 8.2.1 A Contractor may appeal their assigned Performance Rating at any time after publication, provided, however, that if a Contractor intends to bid on an upcoming project, the Contractor must appeal the Performance Rating no later than ten (10) calendar days after advertisement for that project. Should a Contractor file an appeal of their Performance Rating more than ten (10) calendar days after advertisement the published Performance Rating on the date of advertisement shall be used for that bid and the result of the appeal will only affect calculation as applied to future bids.
- 8.2.2 All appeals shall be made in writing to the Department's Contract Administration Office and submitted to the Contract Services Administrator electronically at [DOT-ask@state.de.us](mailto:DOT-ask@state.de.us).
- 8.2.3 The Contract Administration Office shall render a decision in writing within 5 business days from the date of receipt of an appeal stating the basis for the decision and providing any and all supporting documentation. The decision shall be transmitted to the Contractor via email.
- 8.2.4 The determination of the Contract Services Administrator shall be the final determination by the Department on this matter and there is no right of further administrative appeal.
- 8.2.5 The scope of appeals pursuant to this section is limited to the mathematical computation of the Performance Rating. Any Contractor wishing to appeal the results of a Performance Evaluation must do so pursuant to subsection 8.3 of this regulation.
- 8.3 Appeal of Performance Evaluation
- 8.3.1 A Contractor may appeal the results of a Performance Evaluation only after first completing the steps outlined in subsection 4.2 of these regulations.
- 8.3.2 Any notice of appeal must be filed within ten (10) business days of receipt of a Determination pursuant to subsection 4.2.7. Failure to provide notice of an appeal within this timeframe constitutes a waiver of the right to appeal.
- 8.3.3 All appeals shall be made in writing to the Secretary of Transportation electronically at [DOT-ask@state.de.us](mailto:DOT-ask@state.de.us).
- 8.3.4 After receiving the notice of appeal, the Secretary or the Secretary's designee will review the record and will contact the Contractor within 15 days to schedule a meeting to discuss the appeal.
- 8.3.5 The scope of appeals pursuant to this section is limited to the issues, facts, and documents raised to the Secretary's designee in charge of Construction. No facts, issues, or documents not presented to the Secretary's designee in charge of Construction will be considered at the appeal meeting.
- 8.3.6 Within 30 business days of the meeting, the Secretary or the Secretary's designee shall issue a written decision that will serve as the final decision of the Department concerning the appeal.

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## PROPOSED REGULATIONS

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- 8.3.7 Should the Performance Evaluation that is the subject of a Contractor's appeal, when factored into the computation of the Contractor's Performance Rating, result in the imposition of retainage under Title 29, Ch. 69 of the Delaware Code, the implementation of retainage provisions as outlined in Section 7.0 will not take place until after a final decision of the Department.

### **Appendix 'A'**

#### **Contractor's Performance Evaluation Form**

#### **Contractor's Performance Evaluation Form**

**[http://regulations.delaware.gov/register/december2018/proposed/Contractors Performance Evaluation Form.pdf](http://regulations.delaware.gov/register/december2018/proposed/Contractors%20Performance%20Evaluation%20Form.pdf)**

### **Appendix 'B'**

#### **Contractor's Agreement to Accept Retainage**

The following statement shall be placed in the bid documents on the Proposal Certification page just above the signatures, which shall indicate the Bidder's acknowledgement, consent and agreement to the withholding of retainage by the Department:

"Bidder acknowledges that its Performance-Based Rating as defined in 29 **Del.C.** §6962 and section 2408 of Title 2 of Delaware's Administrative Code is below the required minimum threshold. As a condition to bid, Bidder acknowledges, consents and agrees to the Department withholding retainage of up to 5% from the monies due at the time of each progress payment under the contract."

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## 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.

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## DELAWARE HEALTH INFORMATION NETWORK

Statutory Authority: 16 Delaware Code, Section 10306 (16 **Del.C.** §10306)  
1 **DE Admin. Code** 103

### ORDER

#### 103 Delaware Health Care Claims Database Data Collection Regulation

In accordance with 16 **Del.C.** §10306, and for the reasons set forth herein, the Delaware Health Information Network (DHIN) enters this Order adopting amendments to the Delaware Health Care Claims Database Data Access Regulation.

### NATURE OF THE PROCEEDINGS

Pursuant to its authority under 16 **Del.C.** §10306, DHIN proposes to amend 1 **DE Admin. Code** 103 Delaware Health Care Claims Database Data Collection Regulation to harmonize the definitions therein with changes to the Delaware Code.

The 149<sup>th</sup> General Assembly enacted SB 227 and the Governor signed it into law on August 29, 2018. This statute expands the definition of "Mandatory Reporting Entity" in 16 **Del.C.** §10312. Proposed amendments to the "Definitions" section of the Health Care Claims Database Data Collection Regulation remove language which merely quotes definitions established in the code and replaces it with a statement that the terms have the meaning assigned in the code. These changes will ensure that the regulation is always congruent with the governing statute.

In addition, changes were made to Appendix A to more clearly characterize the required compliance dates for newly identified mandatory reporting entities.

DHIN gave notice of its intent to adopt the proposed regulation in the October 1, 2018 issue of the Delaware *Register of Regulations*. DHIN solicited written comments from the public for thirty-one (31) days as mandated by 29 **Del.C.** §10118(a).

## SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

Comments were received from United Healthcare (UHC) and Highmark Blue Cross Blue Shield Delaware (HM). The Delaware Health Information Network (DHIN) has considered each comment and the table below summarizes the comments and DHIN's response.

Feedback Received	Response	Submitted by:
Please consider revising the following Appendix A statement: "Reporting Entities shall submit Claims Data files for calendar 2017 and for claims adjudicated in the elapsed months of calendar 2018, as directed by the HCCD Administrator, no later than May 1, 2018." This time frame is not workable for 2018 data.	Change Appendix A language to read,  "Reporting Entities shall submit Required Claims Data files for the previous four full calendar years, that conform to required file formats on the 181st day after the effective date of this rule."	UHC
We suggest allowing plans to report 2017 data within 181 days from the end of 2017 and for elapsed months in 2018, submit it within 181 days of the end of the elapsed month.	As per the enabling legislation, a mandatory reporting entity may not be required to submit claims data to the Delaware Health Care Claims Database until at least 180 days after the final regulations are promulgated. After that point, historical, partial year, and ongoing data files can be collected based on the schedule outlined in the Data Collection Rule. We have revised the language in the proposed rule to reflect this generic timeline.	UHC
We also suggest including language that specifically excludes supplemental only coverage, disease specific coverage and Medicare Supplement coverage from the reporting requirements.	The requested change is inconsistent with the language and intent of 16 <b>Del.C.</b> §10312, and is therefore not accepted.	UHC
To the extent that the changes to Regulation 103 incorporate the expanded definition of "Mandatory Reporting Entity" appearing in 16 <b>Del.C.</b> §10312, as amended by Senate Bill 227, we reiterate our position that federal law preempts the reporting of claims data and health care information to the Delaware Health Information Network and Delaware Health Care Claims Database by insured and self-insured group health plans sponsored by commercial employers and unions.	No change. 16 <b>Del.C.</b> §10313(a)(5) explicitly states that "required claims reporting and any rules and regulations promulgated under this chapter do not apply to required claims data created for any employee welfare benefit plan or other employee health plan that is regulated by the Employee Retirement Income Security Act of 1974 (ERISA) unless otherwise permitted by federal law or regulation." No change to the regulation is needed.	HM

## FINDINGS OF FACT

The public was given notice of DHIN's intention to adopt the proposed regulation and was given opportunity to provide DHIN with comments. The required Regulatory Flexibility Analysis and Impact Statement for this proposed regulation were submitted. Public comments were received, considered, and response provided. Thus, the Delaware Health Information Network (DHIN) finds that the proposed regulation should be adopted as in the best interest of the general public of the State of Delaware.

**THEREFORE, IT IS SO ORDERED**, this 15<sup>th</sup> day of November, 2018, that the amended Delaware Health Care Claims Database Data Collection Regulation 103 is adopted and shall become effective ten (10) days following publication in the Delaware *Register of Regulations*, in accordance with 29 **Del.C.** §10118(e) and (g).

Janice L. Lee, MD, Delaware Health Information Network

**103 Delaware Health Care Claims Database Data Collection Regulation  
(Break in Continuity of Sections)**

**Attachment A  
Reporting Schedule  
(Break in Continuity Within Section)**

**2. Historical Files**

Reporting Entities shall submit Required Claims Data files for [~~calendar years 2013, 2014, 2015 and 2016~~ the **previous four full calendar years**] that conform to [**required**] file formats on the 181st day after the effective date of this rule.

**3. Partial year submission for the current calendar year**

Reporting Entities shall submit Claims Data files for [~~calendar 2017 and for~~ claims adjudicated in the elapsed months of [~~calendar 2018~~ the **current calendar year**], as directed by the HCCD Administrator [~~, no later than May 1, 2018~~].

**\*Please note that no additional changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 251 (22 DE Reg. 251). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:**

**103 Delaware Health Care Claims Database Data Collection Regulation**

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**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 29, 2018, the Commission makes the following findings and conclusions:

**SUMMARY OF THE EVIDENCE**

1. The Commission posted public notice of the proposed amendments to DHRC Length Definition; DHRC Rule 3.5; 7.1.7.1; 7.4.1.12 and 7.6.13.24 in the October 1, 2018 *Register of Regulations*.

2. The Commission received no written comments. The Commission held the public comment period open until close of business on November 1, 2018. The Delaware Harness Racing Commission will finalize the regulations at its regularly scheduled monthly meeting on November 13, 2018. Monthly meetings are noticed public meetings.

**FINDINGS OF FACT AND CONCLUSIONS**

3. The public was given notice and an opportunity to provide the Commission with comments in writing and

# FINAL REGULATIONS

by testimony at the public hearing on the proposed amendments to the Commission's Rules.

4. After considering the rule changes as proposed, the Commission hereby adopts the rule changes as proposed. The Commission believes that these rule changes will allow the Delaware Harness Racing Commission rules to more accurately reflect current policy and procedures.

5. The effective date of this Order will be ten (10) days from publication of this Order in the *Register of Regulations* on December 1, 2018.

**IT IS SO ORDERED this 13<sup>th</sup> day of November 2018**

Beverly H. Steele, Chairman

Jack Berberian, Commissioner (absent)

Patt Wagner, Vice-Chairman

Stephanie Liguori, Commissioner

George P. Staats, Commissioner

**\*Please note that no changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 253 (22 DE Reg. 253). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**501 Harness Racing Rules and Regulations**

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**THOROUGHBRED RACING COMMISSION**

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

**ORDER**

**1001 Thoroughbred Racing Rules and Regulations**

The Thoroughbred Racing Commission ("Commission") issues this Order to take effect ten (10) days after the publication of this Order in the Delaware *Register of Regulations*:

1. Pursuant to its statutory authority (3 **Del.C.** §10103(c)), the Commission proposed for adoption revisions to the Commission's Rule 8 Jockeys and Apprentice Jockeys to add new Rule 8.2.7 relating to Consent to Treatment forms for the athletic trainer and to revise Rule 8.10.2 to allow jockeys to use mobile electronic devices in the jockeys room subject to certain provisions. Other regulations issued by the Thoroughbred Racing Commission are not affected by this Order.

2. A copy of the proposed regulations was published in the October 1, 2018 edition of the Delaware *Register of Regulations* and has been available for inspection in the office of the Commission at 777 Delaware Park Boulevard, Wilmington, Delaware 19804 during regular office hours.

3. The Commission did not receive any written comments on the proposed regulations during the 30 day period following publication of the proposed regulations on October 1, 2018.

4. THEREFORE, IT IS ORDERED, that the proposed regulations are adopted and shall become effective December 11, 2018, after publication of the final regulation in the Delaware *Register of Regulations*.

Approved by unanimous vote of the Thoroughbred Racing Commission on November 14, 2018.

John Wayne, Executive Director

**\*Please note that no changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 255 (22 DE Reg. 255). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**1001 Thoroughbred Racing Rules and Regulations**

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## DEPARTMENT OF EDUCATION OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) and 303(a) (14 **Del.C.** §§122(b) & 303(a))  
14 **DE Admin. Code** 1006

### REGULATORY IMPLEMENTING ORDER

#### 1006 Delaware Interscholastic Athletic Association (DIAA)

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

Pursuant to 14 **Del.C.** Sections 122(b) and 303(a), the Delaware Department of Education ("Department") is amending 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA). The Delaware Interscholastic Athletic Association ("DIAA") is a unit of the Department. Under the provision of 29 **Del.C.** §10113(b)(4), subsection 9.2.1 of 14 **DE Admin. Code** 1006 is being amended to make non-substantive changes to alter style or form and to correct a technical error.

The amendments are exempt from the requirement of public notice and comment and are adopted informally in accordance with 29 **Del.C.** §10113(b)(4).

#### II. FINDINGS OF FACT

The Department finds the proposed amendments to subsection 9.2.1 of this regulation are non-substantive changes to alter style or form and to correct a technical error. Accordingly, the Department finds that it is appropriate to amend 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA).

#### III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Department concludes that it is appropriate to amend 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA). Therefore, pursuant to 14 **Del.C.** §§122(b) and 303(a), 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA) attached hereto as Exhibit "A" is hereby amended.

#### IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA) adopted hereby shall be in the form attached hereto as Exhibit "A" and said regulation shall be cited as 14 **DE Admin. Code** 1006 Delaware Interscholastic Athletic Association (DIAA) in the Administrative Code of Regulations for the Department.

#### 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 *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of November, 2018.

**Department of Education**  
Susan S. Bunting, Ed.D., Secretary of Education

1006 Delaware Interscholastic Athletic Association (DIAA)  
(*Break in Continuity of Sections*)

9.0 Waiver of DIAA Rules and Regulations

*(Break in Continuity Within Section)*

## 9.2 Eligibility Rule Waiver Request

- 9.2.1 Unless specifically defined in the eligibility rule in question, "hardship" means a hardship peculiar to the student athlete caused by unforeseen events beyond the election, control, or creation of the student athlete, ~~his/her~~ his or her family, ~~or and~~ his or her school, which deprive him or her of all or part of one of his or her opportunities to participate in a particular sports season. Ignorance of any rule alone, whether by the student athlete, ~~his/her~~ his or her family, or his or her school, shall not be sufficient reason for waiving a rule. The waiver provision is intended to restore eligibility that has been lost as a result of a hardship situation. Injury, illness or accidents, which cause a student to fail to meet the basic requirements, are possible causes for a hardship consideration.

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

**1006 Delaware Interscholastic Athletic Association (DIAA)**

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**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 1108A (14 Del.C. §1108A)

**REGULATORY IMPLEMENTING ORDER**

**1204 High Needs Educator Student Loan Payment Program**

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

The Secretary of the Delaware Department of Education ("Department") intends to create 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Payment Program pursuant to 14 **Del.C.** §1108A. This regulation is being created to provide eligibility criteria for the High Needs Educator Student Loan Payment Program.

Notice of the proposed regulation was published in the *News Journal* and *Delaware State News* on October 1, 2018, in the form hereto attached as Exhibit "A". In addition, the proposed regulation was published in the *Register of Regulations* on October 1, 2018 in the form attached hereto as Exhibit "B."

Written submittals were received from Governor's Advisory Council for Exceptional Citizens and State Council for Persons with Disabilities regarding: (1) whether teachers in the Department of Correction education program are included under this regulation. The Department believes that this regulation is intended for teachers of students in the K-12 system and not adult learners; therefore, the current language in the regulation addresses juvenile facilities under the Department of Services for Children Youth and Their Families and no change is needed to the regulation; (2) including language related to the statutory requirement that an educator shall instruct in a High Needs Area for at least one school year. The Department has made the nonsubstantive change in the regulation attached hereto as Exhibit "C" so the language is consistent with the statute; (3) language being edited to not broaden eligibility as defined by the statute and as referenced in subsection 5.2.1. The Department notes the eligibility requirement of an applicant maintaining employment in the same school as employed by the previous year applies to everyone equally based on either certification and school; (4) clarification to the definition of "High Needs Area." The Department made nonsubstantive changes to clarify the definition of "High Needs Area" in the regulation attached hereto as Exhibit "C"; and (5) clarification on the amounts to be disbursed and how award amounts are decided. The Department notes that the amount of awards is determined based on the number of applicants and desire to award the maximum number of teachers. Each applicant receives the same amount. The Department believes this is expressed clearly in the proposed language that was published.

**II. FINDINGS OF FACTS**

The Secretary finds that it is appropriate to create 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Payment Program, pursuant to 14 **Del.C.** §1108A, in order to provide eligibility criteria for the High Needs Educator Student Loan Payment Program.

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## III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to adopt 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Payment Program, pursuant to 14 **Del.C.** §1108A, in order to provide eligibility criteria for the High Needs Educator Student Loan Payment Program. Therefore, pursuant to 14 **Del.C.** §122 and 14 **Del.C.** §1108A, 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Program attached hereto as Exhibit "C" is hereby adopted. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Program hereby adopted shall be in effect for a period of five years from the effective date of this order as set forth in Section V below.

## IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Program created hereby shall be in the form attached hereto as Exhibit "C", and said regulation shall be cited as 14 **DE Admin. Code** 1204 High Needs Educator Student Loan Program 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 and 14 **Del.C.** §1108A on November 15, 2018. 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 15<sup>th</sup> day of November, 2018.

**Department of Education**

Susan S. Bunting, Ed.D., Secretary of Education

Approved this 15<sup>th</sup> day of November, 2018

### 1204 High Needs Educator Student Loan Payment Program

#### **1.0 Purpose**

The purpose of this regulation is to provide eligibility criteria and to delineate the application process for the High Needs Educator Student Loan Payment Program, pursuant to 14 **Del.C.** Ch. 11A, §§1101A through 1111A.

#### **2.0 Definitions**

"Award" means the Department's decision to make a Loan Payment on an applicant's behalf.

"Department" means the Delaware Department of Education.

"Educator" means a person licensed and certified by the State 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 and approved by the State Board of Education. For purposes of this regulation, Educator also includes teachers employed by the Delaware Division for the Visually Impaired who teach visually impaired students.

"English Learner" means a student with limited English proficiency and who meets the definition of English Learner as defined by the Department's rules and regulations.

"High Needs Area" means:

(1) Any certification field the Department has identified as being difficult to staff or of critical need;  
or

(2) Any school either:

(a) In the top quartile in three or more of the following:

- (1) Percentage of Low-Income Students;
- (2) Percentage of English Learners;
- (3) Percentage of Students with Disabilities; or
- (4) Percentage of Minority Students; or

(b) Having 90% of its students classified as Low-Income, English Learners, or Minority; [or]

~~[(3)(c)]~~ Any facility operated by the Department of Services for Children, Youth and Their Families in which education programs are provided.

"Loan Payment" means a payment by the Department to a successful applicant's lending agency to retire a portion of the applicant's Qualified Educational Loan.

"Low Income Students" means students within the statewide metric determined by the Department of Education utilizing direct certification for Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Program (SNAP).

"Minority Students" means students who are members of a racial or ethnic group other than the racial or ethnic group that represents the majority of the State of Delaware's population.

"Program" means the High Needs Educator Student Loan Payment Program.

"Qualified Educational Loan" means a government, commercial, or foundation loan for actual costs paid for tuition and reasonable educational expenses related to an Educator's undergraduate or graduate degree program.

"School" means a Delaware public school, including a vocational-technical school and a charter school[, or a facility operated by the Department of Services for Children, Youth and Their Families].

"Secretary" means the Delaware Secretary of Education.

"Students With Disabilities" means students who because of mental, physical, emotional, developmental, speech or learning disability problems, as defined by the Department of Education, require special education and related services in order to develop their own capabilities.

### **3.0 Eligibility**

3.1 In order to qualify to participate in the Program all of the following must apply:

3.1.1 The applicant shall be an Educator;

3.1.2 The applicant shall have secured a Qualified Educational Loan prior to submitting an application;

3.1.3 The applicant shall have obtained a license and certificate through Delaware;

3.1.4 The applicant shall have received a rating of at least "effective" on the Delaware Performance Appraisal System II or an alternate state approved evaluation system in the most recent evaluation cycle;

3.1.5 The applicant shall instruct or provide educational support in an identified High Needs Area [for one school year]; and

3.1.6 The applicant shall not be in default of any federal or state education loan.

### **4.0 Application**

4.1 The application to participate in the Program shall require the applicant to certify that he or she meets all eligibility requirements.

4.2 The applicant must submit for review and approval a new, completed application each year, along with any additional information the Department may request.

### **5.0 Award Decision and Disbursement**

5.1 The ability to make Awards each year is contingent upon the availability of funds.

5.2 If possible, the Department shall make an Award to every applicant who satisfies the requirements of this regulation, consistent with Section 6.0 Amount of Award of this regulation. Awards will be determined based on the pool of eligible applicants in the given year.

- 5.2.1 Applicants seeking eligibility based on eligible school shall maintain continuous employment by the same School as in the previous school year in order to be eligible for the Award.
- 5.2.1.1 Applicants shall still be eligible for an Award if they have separated from the School they were previously employed with if separation was involuntary, including reduction in force, or was otherwise beyond the applicant's control.
- 5.3 Where there are insufficient funds to make an Award to every applicant who satisfies Program requirements, the Secretary shall give priority to applicants who meet the following criteria:
- 5.3.1 Applicants employed in both a certification field and a School~~[- or a facility operated by the Department of Services for Children, Youth and Their Families.]~~ that the Department has identified as a High Needs Area as defined in this regulation.
- 5.3.2 Applicants having the greatest financial need.
- 5.4 The applicants having the greatest financial need shall be determined at the sole discretion of the Secretary. Such decision shall be based upon:
- 5.4.1 The applicant's income;
- 5.4.2 The applicant's spousal income;
- 5.4.3 The number of applicant's dependents; and
- 5.4.4 The total amount of the applicant's Qualified Educational Loans.
- 5.5 The Secretary shall have the sole discretion to prioritize applications and determine Awards consistent with the requirements of the Program as noted in this regulation.
- 5.6 The Department shall make a Loan Payment directly to the applicant's lending agency on behalf of the applicant.
- 5.7 An applicant may receive only one Award per year, and may receive no more than five Awards in their lifetime.
- 6.0 Amount of Award**
- An Award shall be a minimum of \$1,000 and shall not exceed \$2,000.
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## PROFESSIONAL STANDARDS BOARD

Statutory Authority: 14 Delaware Code, Sections 1203 and 1205(b) (14 **Del.C.** §§1203 & 1205(b))  
14 **DE Admin. Code** 1507

## REGULATORY IMPLEMENTING ORDER

### 1507 Alternative Routes to Teacher Licensure and Certification Program

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

Pursuant to 14 **Del.C.** Sections 1203 and 1205(b), the Delaware Department of Education ("Department"), in consultation and cooperation with the Professional Standards Board, is repealing 14 **DE Admin. Code** 1507 Alternative Routes to Teacher Licensure and Certification Program under the provision of 29 **Del.C.** §10113(b)(5). Title 14, Chapter 12, Subchapter VI of the Delaware Code (14 **Del.C.** §§ 1260- 1266) Alternative Routes for Teacher Licensure and Certification was amended effective June 28, 2018. The amendments provide that the Department, not the Professional Standards Board, shall promulgate rules and regulations to implement 14 **Del.C.** §§1260 - 1266. The Department has a regulation in place that addresses alternative routes for teacher licensure and certification programs (14 **DE Admin. Code** 290 Approval of Educator Preparation Programs). Because 14 **DE Admin. Code** 1507 is being repealed to be consistent with changes in basic law, it is exempt from the requirement of public notice and comment and is repealed informally in accordance with 29 **Del.C.** §10113(b)(5).

## II. FINDINGS OF FACT

The Department finds that the regulation is being repealed to be consistent with the amendments to Title 14, Chapter 12, Subchapter VI of the Delaware Code (14 **Del.C.** §§1260 -1266) Alternative Routes for Teacher Licensure and Certification that went into effect on June 28, 2018. Accordingly, the Department finds that it is appropriate to repeal 14 **DE Admin. Code** 1507 Alternative Routes to Teacher Licensure and Certification Program.

## III. DECISION TO REPEAL THE REGULATION

For the foregoing reasons, the Department concludes that it is appropriate to repeal 14 **DE Admin. Code** 1507 Alternative Routes to Teacher Licensure and Certification Program. Therefore, pursuant to 14 **Del.C.** §§1203 and 1205(b), 14 **DE Admin. Code** 1507 Alternative Routes to Teacher Licensure and Certification Program, attached hereto as Exhibit "A , " is hereby repealed.

## IV. EFFECTIVE DATE OF ORDER

The effective date of this Order shall be ten days from the date this Order is published in the *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of November, 2018.

**Department of Education**

Susan S. Bunting, Ed.D., Secretary of Education

### 1507 Alternative Routes to Teacher Licensure and Certification Program

#### 1.0 Content

This regulation shall apply to the Alternative Routes for Teacher Licensure and Certification Program, pursuant to 14 ~~**Del.C.** §§1260 through 1264.~~

#### 2.0 Definitions

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

~~"Coherent Major"~~ means a major in an area appropriate to the instructional field.

~~"Department"~~ means the Delaware Department of Education.

~~"Educator"~~ means a person licensed and certified by the State under Chapter 12 of 14 ~~**Del.C.**~~ 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 and approved by the State Board. For purposes of 14 ~~**Del.C.**~~ Chapter 12, the term 'educator' does not include substitute teachers.

~~"Emergency Certificate"~~ means a temporary credential issued pursuant to 14 ~~**DE Admin. Code**~~ 1506 Emergency Certificate.

~~"Examination of Content Knowledge"~~ means a standardized State test of subject matter knowledge which measures knowledge in a specific content area, such as PRAXIS™ II.

~~"Examination of General Knowledge"~~ means a standardized test which measures general knowledge and essential skills in mathematics or quantitative and verbal skills, including reading and writing, such as PRAXIS™ I, which for the purposes of this regulation, means the State Basic Skills Test.

~~"Initial License"~~ means the first license issued to an educator that allows an educator to work in a position requiring a license in a Delaware public school.

~~“Major or Its Equivalent” means no fewer than thirty (30) credit hours in a content area.~~

~~“Secretary” means the Secretary of the Delaware Department of Education.~~

~~“Standard Certificate” means a credential issued to verify 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.~~

~~“Teach For America” means the nationally established program consisting of recent college graduates and professionals of all academic majors and career interests who commit to a minimum of two (2) consecutive years of classroom teaching in either a low-income urban or rural public school.~~

~~“Teacher Residency Program” means a teacher preparation program meeting the minimum criteria of this regulation and approved pursuant to this regulation and any Department regulation. Such a program is typically sponsored by a regionally accredited college or university in partnership with one or more State Education Agencies and/or an established Organization/Foundation, where the participant is paired with a mentor and veteran teacher in a classroom for their initial school year experience.~~

### ~~3.0 Alternative Routes to Teacher Licensure and Certification~~

- ~~3.1 Qualified Candidates meeting all conditions and seeking participation in an Alternative Routes to Teacher Licensure and Certification program shall be issued an Initial License of no more than three (3) years duration conditioned on continued enrollment in an Alternative Routes for Teacher Licensure and Certification Program and an Emergency Certificate or certificates of no more than three years duration.~~
- ~~3.2 Candidates shall meet the following minimum qualifications:~~
- ~~3.2.1 Successfully completed one of the following education requirements:~~
- ~~3.2.1.1 Hold a bachelor's degree from a regionally accredited college or university in a coherent major, or its equivalent, which shall be no less than thirty (30) credit hours in the instructional field they will teach; or~~
- ~~3.2.1.2 Hold a Bachelor's Degree from a regionally accredited college or university in any content area and are enrolled in the Teach For America program and have completed all pre-service requirements for such program; or~~
- ~~3.2.1.3 Hold a Bachelor's Degree from a regionally accredited college or university in any content area and are enrolled in an approved teacher residency program and have completed all pre-service requirements for such program; and~~
- ~~3.3 Pass an examination of general knowledge, such as PRAXIS™ I, or provide an acceptable alternative to the PRAXIS™ I test scores, as set forth in 14 DE Admin. 1510, within the period of time from the date of hire to the end of the next consecutive fiscal year; and~~
- ~~3.4 Obtain acceptance into an approved alternative routes to licensure and certification program.~~
- ~~3.4.1 Notwithstanding any other provisions to the contrary, candidates enrolled in the Teach For America program shall not be limited to teaching in areas identified as critical curricular areas.~~
- ~~3.4.2 Notwithstanding any other provisions to the contrary, candidates enrolled in an approved teacher residency program shall not be limited to teaching in areas identified as critical curricular areas; and~~
- ~~3.5 Demonstrate the prescribed knowledge and skills for a particular content area by completing the following:~~
- ~~3.5.1 Pass an examination of content knowledge, such as PRAXIS™ II, in the instructional field they desire to teach, if applicable and available, within the period of time from the date of hire to the end of the next fiscal year.~~

- ~~3.5.2 Notwithstanding any other provisions to the contrary, candidates enrolled in the Teach For America program shall, where applicable and available, have achieved a passing score on an examination of content knowledge, such as Praxis II, for the area in which such candidate will be teaching, prior to taking full responsibility for teaching a classroom; or~~
- ~~3.5.3 Notwithstanding any other provisions to the contrary, candidates enrolled in a teacher residency program shall, where applicable and available, have achieved a passing score on an examination of content knowledge, such as Praxis II, for the area in which such candidate will be teaching, prior to taking full responsibility for teaching a classroom; and~~
- 3.6 Obtain an acceptable health clearance and an acceptable criminal background check clearance; and
- 3.7 Obtain a teaching position by one of the following:
  - 3.7.1 Obtain and accept an offer of employment in a position that requires licensure and certification; or
  - 3.7.2 In the case of a teacher residency program, obtain and accept an offer for a position that if paid would require licensure and certification.

#### **4.0 Components of the Program**

- 4.1 An Alternative Routes for Teacher Licensure and Certification Program shall be approved by the Secretary of Education and meet the following minimum criteria:
- 4.2 Incorporate one of the following prerequisite options:
  - 4.2.1 A summer institute of no less than one hundred and twenty (120) instructional (clock) hours completed by the candidate prior to the beginning of his/her teaching assignment. This includes an orientation to the policies, organization and curriculum of the employing school district or charter school, instructional strategies and classroom management and child or adolescent development.
    - 4.2.1.1 Candidates employed too late to participate in the summer institute will complete the practicum experience and seminars on teaching during the first school year and will participate in the summer institute following their first year of teaching; or
  - 4.2.2 A teacher entering a Delaware public school through the Teach For America program shall complete the two hundred (200) hours of pre-service training provided by Teach for America; or
  - 4.2.3 A teacher entering a Delaware public school through a teacher residency program shall complete a minimum of one hundred and twenty (120) hours of pre-service training provided by the approved teacher residency program; and
- 4.3 Require a one year, full time practicum experience which includes a period of intensive on-the-job mentoring and supervision beginning the first day in which the candidate assumes full responsibility for a classroom and continuing for a period of thirty (30) weeks.
- 4.4 Require seminars on teaching that provide Alternative Routes to Licensure and Certification teachers with approximately 200 instructional (clock) hours or equivalent professional development during the first year of their teaching assignment and during an intensive seminar the following summer. Content shall include curriculum, student development and learning, and the classroom and the school, as required in 14 ~~Del.C.~~ §1261.
- 4.5 Receive any required approvals under the Department's regulation 14 ~~DE Admin. Code~~ 290 Approval of Educator Preparation Programs.

#### **5.0 Mentoring Support**

Mentoring support shall be carried out in accordance with 14 ~~DE Admin. Code~~ 1503. No mentor shall participate in any way in decisions which might have a bearing on the licensure, certification or employment of teachers participating in an Alternative Routes for Teacher Licensure and Certification Program.

#### **6.0 Supervision and Evaluation**

Teachers enrolled in an Alternative Routes for Teacher Licensure and Certification Program shall be observed and formally evaluated by a certified evaluator using the state approved evaluation system at least once during the first ten (10) weeks in the classroom, and a minimum of two (2) additional times within the next twenty (20) weeks.

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Evaluations shall be no more than two (2) months apart.

## **7.0 Recommendation for Licensure and Certification**

Upon completion of an Alternative Routes for Teacher Licensure and Certification Program, the certified evaluator shall prepare a summative evaluation report for the teacher participating in the Program. The evaluation report shall include a recommendation as to whether or not a license shall be issued. The evaluation report and license recommendation shall be submitted to the Department. A copy of the evaluation report and license recommendation should be issued to the candidate twenty (20) days before submission to the Department.

## **8.0 Issuance of License**

If the evaluation report recommends approval of the candidate for licensure, provided the candidate is otherwise qualified, the Department shall issue an Initial License valid for the balance of the three (3) year term, if the participant has completed the Program in less than three (3) years, or a Continuing License, if the three (3) year term of the Initial License has expired, and shall issue the appropriate Standard Certificate or Certificates.

Candidates who receive a recommendation of 'disapproved' shall not be issued an Initial License and Standard Certificate by the Department, and may not continue in an Alternative Routes for Licensure and Certification Program.

## **9.0 Recommendation of "Disapproved"**

Candidates who receive a recommendation of "disapproved" may petition the Department for approval of additional opportunities to participate in an Alternative Routes for Teacher Licensure and Certification Program. Within fifteen (15) days of receipt of the evaluation report and the certification recommendation, a candidate disagreeing with the recommendation may submit to the evaluator written materials documenting the reasons that the candidate believes a license should be awarded. The evaluator shall forward all documentation submitted by the candidate, along with the evaluation report and recommendation concerning licensure and certification to the Secretary of Education. The Secretary or his or her designee shall review the evaluation report, the licensure and certification recommendation, and any documentation supplied by the candidate and make a determination with respect to licensure and certification.

## **10.0 Right to a Hearing**

A teacher participating in an Alternative Routes for Teacher Licensure and Certification Program who is denied a license and certificate may appeal the decision, and is entitled to a full and fair hearing before the Standards Board. Hearings shall be conducted in accordance with the Standard Board's Hearing Procedures and Rules.

## **11.0 Program Evaluation**

Those responsible for Alternative Routes to Certification Programs approved by the Standards Board and the State Board shall develop a program evaluation process. The focus of the program evaluation shall be to demonstrate the degree to which teachers who complete the program are effective in the classroom.

## **12.0 Approval of Alternative Routes Programs**

The Secretary may approve for implementation Alternative Routes to Teacher Licensure and Certification Programs, provided the programs meet the minimum criteria set forth in this regulation and in any applicable laws.

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# FINAL REGULATIONS

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## PROFESSIONAL STANDARDS BOARD

Statutory Authority: 14 Delaware Code, Sections 1203 and 1205(b) (14 **Del.C.** §§1203 & 1205(b))

14 **DE Admin. Code** 1513

### REGULATORY IMPLEMENTING ORDER

#### 1513 Denial of Licenses

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

Pursuant to 14 **Del.C.** Sections 1203 and 1205(b), the Delaware Department of Education ("Department"), in consultation and cooperation with the Professional Standards Board, is amending 14 **DE Admin. Code** 1513 Denial of Licenses. The regulation sets forth rules of practice and procedure used by the Professional Standards Board and is being amended under the provision of 29 **Del.C.** §10113(b)(2). In addition, the regulation is being amended to be consistent with 14 **Del.C.** Ch. 12 under the provision of 29 **Del.C.** §10113(b)(5). The amendments do not otherwise alter the substance of the regulation.

The amendments are exempt from the requirement of public notice and comment and are adopted informally in accordance with 29 **Del.C.** §§10113(b)(2) and (b)(5).

#### II. FINDINGS OF FACT

The Department finds that the regulation sets forth rules of practice and procedure used by the Professional Standards Board. The Department further finds that the regulation is being amended to be consistent with 14 **Del.C.** Ch. 12 and that the amendments do not otherwise alter the substance of the regulation. Accordingly, the Department finds that it is appropriate to amend 14 **DE Admin. Code** 1513 Denial of Licenses.

#### III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Department concludes that it is appropriate to amend 14 **DE Admin. Code** 1513 Denial of Licenses. Therefore, pursuant to 14 **Del.C.** §§1203 and 1205(b), 14 **DE Admin. Code** 1513 Denial of Licenses, attached hereto as Exhibit "A," is hereby amended.

#### IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1513 Denial of Licenses adopted hereby shall be in the form attached hereto as Exhibit "A" and said regulation shall be cited as 14 **DE Admin. Code** 1513 Denial of Licenses and Permits in the Administrative Code of Regulations for the Department.

#### V. EFFECTIVE DATE OF ORDER

The effective date of this Order shall be ten days from the date this Order is published in the *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of November, 2018  
Department of Education

Susan S. Bunting, Ed.D., Secretary of Education

#### 1513 Denial of Licenses and Permits

#### 1.0 Content

This regulation shall apply to the denial of an ~~Initial License, Continuing License or Advanced License~~ a license for educators pursuant to 14 ~~Del.C. §1210, 1211, 1212, 1213, 1214, and §1217~~ and a permit for paraprofessionals pursuant to 14 Del.C. §1205(b).

## 2.0 Definitions

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

"**Advanced License**" means a license issued as part of the three tiered licensure system set forth in 14 ~~Del.C. §1213 and §1214.~~

"**Continuing License**" means a license issued as part of the three tiered licensure system set forth in 14 ~~Del.C. §1211 and §1212.~~

~~"Department" means the Delaware Department of Education.~~

~~"Educator" means a person licensed and certified by the State under 14 Del.C. Ch. 12, 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 and approved by the State Board. For purposes of 14 Del.C. Ch. 12, the term 'educator' does not include substitute teachers.~~

~~"Good Moral Character" means conduct which is consistent with the rules and principles of morality expected of an educator.~~

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

~~"Initial License" means a license issued as part of the three tiered licensure system set forth in 14 Del.C. §1210.~~

~~"Nolo Contendere" means a plea by a defendant in a criminal prosecution that, without admitting guilt, subjects him or her to conviction but does not preclude him or her from denying the truth of the charges in a collateral proceeding.~~

~~"Paraeducator" means a paraprofessional as it is used in 14 Del.C. §1205(b). Paraeducators are not "educators" within the meaning of 14 Del.C. §1202(5).~~

~~"Permit" means a document issued by the Department that verifies an individual's qualifications and training to serve as a Title I, Instructional, or Service Paraeducator.~~

~~"Secretary" means the Secretary of the Delaware Department of Education.~~

~~"Standard Certificate" means a credential issued to verify 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. §12051201.~~

~~"State" means the State of Delaware.~~

~~"Unfit" means lack of good moral character, misconduct in office, incompetence, a pattern of ineffective teaching, wilful neglect of duty, disloyalty or falsification of credentials, or any conduct that would be grounds for revocation of an educator's license.~~

## 3.0 Failure to Meet Licensure Requirements Grounds for Denial

3.1 The Department may deny an application and refuse to issue an ~~Initial License, Continuing License, Advanced License or a Standard or Emergency Certificate~~ and ~~deny an applicant's request for a license for failure to meet the statutory or regulatory qualifications for a license.~~ a license or permit based on one or more of the following grounds:

3.1.1 Failure to meet the qualifications for an Initial License as provided in 14 DE Admin. Code 1510 Issuance of Initial License;

- 3.1.2 Failure to meet the qualifications for a Continuing License as provided in 14 DE Admin. Code 1511 Issuance and Renewal of Continuing License;
- 3.1.3 Failure to meet the qualifications for an Advanced License as provided in 14 DE Admin. Code 1512 Issuance and Renewal of Advanced License;
- 3.1.4 Failure to meet the qualifications for a Paraeducator Permit as provided in 14 DE Admin. Code 1517 Paraeducator Permit; or
- 3.1.5 For any of the following causes:
  - 3.1.5.1 Obtaining or attempting to obtain a license, certificate, or permit by fraudulent means or through misrepresentation of material facts;
  - 3.1.5.2 Falsifying official school records, documents, statistics, or reports;
  - 3.1.5.3 Knowingly violating any of the provisions of the state assessment system set forth in 14 Del.C. §172;
  - 3.1.5.4 Pleading guilty or Nolo Contendere with respect to, or is convicted of, any crime against a child constituting a misdemeanor, except for unlawful sexual contact in the third degree in violation of 11 Del.C. §767;
  - 3.1.5.5 Pleading guilty or Nolo Contendere with respect to, or is convicted of, possession of a controlled substance or a counterfeit controlled substance classified as such in Schedule I, II, III, IV, or V of 16 Del.C. Ch. 47;
  - 3.1.5.6 Immorality, incompetence, misconduct in office, wilful neglect of duty, disloyalty, or misconduct involving any cause for suspension or revocation of a license or permit;
  - 3.1.5.7 Having a license, certificate, or permit suspended, revoked, or voluntarily surrendered in another jurisdiction for cause which would be grounds for suspension or revocation;
  - 3.1.5.8 Pleading guilty or Nolo Contendere with respect to, or is convicted of, any of the following:
    - 3.1.5.8.1 Any crime constituting the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance or counterfeit controlled substance as classified in Schedule I, II, II, IV, or V of 16 Del.C. Ch. 47;
    - 3.1.5.8.2 Any crime constituting a violent felony as defined in 11 Del.C. §4201(c);
    - 3.1.5.8.3 Any crime against a child constituting a felony, or unlawful sexual contact in the third degree in violation of in violation of 11 Del.C. §767;
    - 3.1.5.8.4 Any crime constituting a felony sexual offense;
    - 3.1.5.8.5 Any crime constituting a felony offense against public administration involving bribery, improper influence, or abuse of office; or
  - 3.1.5.9 Committing a sexual offense against a child.

#### **4.0 Denial of Unfit Applicants**

- 4.1 ~~The Department may refuse to issue an Initial License, Continuing License, Advanced License or a Standard or Emergency Certificate and deny a license to an applicant who otherwise meets the requirements for a license because the applicant is unfit.~~
- 4.2 ~~The Department may refuse to issue an Initial License, Continuing License, Advanced License or a Standard or Emergency Certificate and deny a license to an applicant who otherwise meets the requirements for a license because the applicant has engaged in any misconduct or conduct that would be a basis for revocation under 14 DE Admin. Code 1514 Revocation, Limitation or Suspension of Licenses.~~

#### **5.04.0 Right to Hearing, Burden of Proof, and Standards Board Hearing Procedures**

- ~~5.14.1~~ The Department shall not take action to deny a license under this section or a permit without providing the applicant with written notice of the reasons for denial and with an opportunity for a full and fair hearing before the Standards Board.

- ~~5.24.1.1~~ The notice of denial shall be sent by certified mail, return receipt requested to the applicant's last known mailing address and shall give notice that a full and fair hearing may be requested before the Standards Board.
- ~~5.2.1~~ The applicant shall report any address changes to the Department and the Standards Board.
- 5.3 An applicant who is denied an Initial, Continuing, or Advanced License may appeal the decision, and is entitled to a full and fair hearing before the Standards Board.
- ~~5.3.1~~ The applicant's request for a hearing before the Standards Board shall be received by the Standards Board's Executive Director within twenty (20) calendar days of the date the denial notice was mailed.
- ~~5.4~~ In any hearing before the Standards Board to challenge action taken under this regulation, the Standards Board shall have the power to administer oaths, order the taking of depositions, issue subpoenas and compel attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.
- ~~5.54.2~~ Unless otherwise provided for in this Section, the The burden of proof in a license or permit denial action shall be on the applicant to show by a preponderance of the evidence that he or she should not be denied a license or permit because he or she meets the qualification qualifications for licensure a license or permit pursuant to the applicable laws and regulations or he or she did not engage in misconduct as provided in subsection 3.1.5.
- ~~5.5.1~~ Provided however, if the denial of the license is on the basis that the applicant is unfit or otherwise committed conduct or misconduct that would be the basis for revocation of a license, the Department shall specify the particular conduct and circumstances giving rise to the denial.
- ~~5.5.1.1~~ Prior to a hearing for a license denial under Section 4.0, the Department shall provide full disclosure of the basis of the denial.
- ~~5.5.2~~ Whenever the basis for an action described within this regulation is a guilty plea, a plea of nolo contendere with respect to, or a conviction of a crime, a copy of the record of the plea, nolo contendere or conviction certified by the Clerk of the Court entering the plea, nolo contendere or conviction shall be conclusive evidence thereof.
- ~~5.64.3~~ Hearings shall be conducted in accordance with the Standard Board's Hearing Procedures and Rules 14 DE Admin. Code 1515 Hearing Procedures and Rules.
- 6.0 Revocation in Another State**
- Notwithstanding any other provisions stated herein or in ~~14 DE Admin. Code 1510, 1511, and 1512,~~ no license or certificate shall be issued to an applicant for an Initial, Continuing or Advanced License or Standard or Emergency Certificate if:
- 6.1 There is legal evidence that the applicant is not of good moral character; or
- 6.2 The applicant has had a certificate or license revoked in another state for immorality, misconduct in office, incompetence, willful neglect of duty, disloyalty or falsification of credentials.

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## PROFESSIONAL STANDARDS BOARD

Statutory Authority: 14 Delaware Code, Sections 1203 and 1205(b) (14 Del.C. §§1203 & 1205(b))

14 DE Admin. Code 1514

### REGULATORY IMPLEMENTING ORDER

#### 1514 Revocation, Limitation, or Suspension of Licenses

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

Pursuant to 14 Del.C. Sections 1203 and 1205(b), the Delaware Department of Education ("Department"), in

consultation and cooperation with the Professional Standards Board, is amending 14 **DE Admin. Code** 1514 Revocation, Limitation, or Suspension of Licenses. The regulation sets forth rules of practice and procedure used by the Professional Standards Board and is being amended under the provision of 29 **Del.C.** §10113(b)(2). In addition, the regulation is being amended to be consistent with 14 **Del.C.** Ch. 12 under the provision of 29 **Del.C.** §10113(b)(5). The amendments do not otherwise alter the substance of the regulation.

The amendments are exempt from the requirement of public notice and comment and are adopted informally in accordance with 29 **Del.C.** §§10113(b)(2) and (b)(5).

## II. FINDINGS OF FACT

The Department finds that the regulation sets forth rules of practice and procedure used by the Professional Standards Board. The Department further finds that the regulation is being amended to be consistent with 14 **Del.C.** Ch. 12 and that the amendments do not otherwise alter the substance of the regulation. Accordingly, the Department finds that it is appropriate to amend 14 **DE Admin. Code** 1514 Revocation, Limitation, or Suspension of Licenses.

## III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Department concludes that it is appropriate to amend 14 **DE Admin. Code** 1514 Revocation, Limitation, or Suspension of Licenses. Therefore, pursuant to 14 **Del.C.** §§1203 and 1205(b), 14 **DE Admin. Code** 1514 Revocation, Limitation, or Suspension of Licenses, attached hereto as Exhibit "A," is hereby amended.

## IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1514 Revocation, Limitation, or Suspension of Licenses adopted hereby shall be in the form attached hereto as Exhibit "A" and said regulation shall be cited as 14 **DE Admin. Code** 1514 Limitation, Suspension, and Revocation of Licenses, Certificates, and Permits in the Administrative Code of Regulations for the Department.

## V. EFFECTIVE DATE OF ORDER

The effective date of this Order shall be ten days from the date this Order is published in the *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of November, 2018  
**Department of Education**

Susan S. Bunting, Ed.D., Secretary of Education

**1514 Revocation, Limitation, or Suspension of Licenses Limitation, Suspension, and Revocation of Licenses, Certificates, and Permits**

### 1.0 Content

~~This regulation shall apply to the revocation, limitation, or suspension of an Initial License, Continuing License or Advanced License issued pursuant to 14 **Del.C.** Ch. 12; or a Limited Standard, Standard or Professional Status Certificate issued prior to August 31, 2003 for educators, pursuant to 14 **Del.C.** §1218. This regulation shall apply to limiting, suspending, and revoking licenses and certificates for educators pursuant to 14 **Del.C.** §1218 and permits for paraprofessionals pursuant to 14 **Del.C.** §1205(b).~~

### 2.0 Definitions

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

**"Advanced License"** means a license issued as part of the three-tiered licensure system set forth in 14 **Del.C.** §1213 and §1214.

**"Continuing License"** means a license issued as part of the three-tiered license system set forth in 14 **Del.C.** §1211 and §1212.

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

**"Educator"** means a person licensed and certified by the State under 14 **Del.C.** Ch. 12, 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 and approved by the State Board. For purposes of 14 **Del.C.** Ch. 12, the term 'educator' does not include substitute teachers.

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

**"Initial License"** means a license issued as part of the three-tiered licensure system set forth in 14 **Del.C.** §1210.

**"License Holder"** or **"Licensee"** means any individual who holds an Initial License, Continuing License or Advanced License, and until a Continuing License is issued, a Limited Standard, Standard, or Professional Status Certificate.

**"Nolo Contendere"** means a plea by the a defendant in a criminal prosecution that that, without admitting guilt guilt, subjects him or her to conviction but does not preclude him or her from denying the truth of the charges in a collateral proceeding.

**"Nolle Prosequi"** means an entry on the record of a legal action denoting that the prosecutor or plaintiff will proceed no further in his or her action or suit either as a whole or as to some count or as to one or more of several defendants.

**"Permit"** means a document issued by the Department that verifies an individual's qualifications and training to serve as a Title I, Instructional, or Service Paraeducator.

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

**"Standards Board"** means the Professional Standards Board established pursuant to 14 **Del.C.** §12051201.

**"State"** means the State of Delaware.

### **3.0 Revocation of License**

#### **3.1 Discretionary Revocations**

The Secretary may revoke an Initial, Continuing or Advanced License that has been issued, for the following causes if the license holder:

- 3.1.1 ~~Obtained or attempted to obtain or renew a license or certificate by fraudulent means or through misrepresentation of material facts; or~~
- 3.1.2 ~~Falsified official school records, documents, statistics or reports; or~~
- 3.1.3 ~~Knowingly violated any of the provisions of the Student Testing Program set forth in 14 **Del.C.** §172; or~~
- 3.1.4 ~~Plead guilty or nolo contendere with respect to, or is convicted of, any crime against a child constituting a misdemeanor, except for Unlawful Sexual Conduct in the Third Degree; or~~
- 3.1.5 ~~Plead guilty or nolo contendere with respect to, or is convicted of, possession of a controlled substance or a counterfeit controlled substance classified as such in 16 **Del.C.** Ch. 47, Schedule I, II, III, IV, or V; or~~
- 3.1.6 ~~Was terminated or dismissed for immorality, incompetence, misconduct in office, willful neglect of duty, disloyalty or misconduct involving any cause for suspension or revocation of a license; or~~

- ~~3.1.7 Resigned or retired pending dismissal for immorality, provided that clear and convincing evidence establishes the underlying misconduct occurred; or~~
- ~~3.1.8 Had a license or certificate revoked or voluntarily surrendered in another jurisdiction for cause which would be grounds for revocation; or~~
- ~~3.1.9 Failed to comply with any of the mandatory notice provisions of this regulation.~~
- ~~3.1.10 Failed to comply with any of the statutory or regulatory requirements for maintaining a license.~~
- 3.2 **Mandatory Revocations**  
The Secretary shall revoke a license if the license holder:
  - 3.2.1 ~~Pleads guilty or nolo contendere with respect to, or is convicted of:~~
    - ~~3.2.1.1 Any crime constituting the manufacture, delivery, possession with intent to manufacture or deliver a controlled substance or a counterfeit controlled substance classified as such in of 16 **Del.C.** Ch. 47, Schedule I, II, III, IV or V; or~~
    - ~~3.2.1.2 Any crime constituting a violent felony as defined in 11 **Del.C.** §4201(c); or~~
    - ~~3.2.1.3 Any crime against a child constituting a felony, or Unlawful Sexual Contact in the Third Degree; or~~
    - ~~3.2.1.4 Any crime constituting a felony sexual offense; or~~
    - ~~3.2.1.5 Any crime constituting a felony offense against public administration involving bribery, improper influence or abuse of office; or~~
  - ~~3.2.2 Is terminated or dismissed for a sexual offense against a child; or~~
  - ~~3.2.3 Resigns or retires after official notice of allegations of a sexual offense against a child, provided that clear and convincing evidence establishes the underlying misconduct occurred.~~

### **3.0 Causes for Limiting, Suspending, and Revoking Licenses, Certificates, and Permits**

- 3.1 The Secretary, or the Standards Board after a hearing, may limit, suspend, or revoke an Initial License, a Continuing License, an Advanced License, a Standard Certificate, or a Permit for any of the following causes:
  - 3.1.1 Obtaining or attempting to obtain a license, certificate, or permit by fraudulent means or through misrepresentation of material facts;
  - 3.1.2 Falsifying official school records, documents, statistics, or reports;
  - 3.1.3 Knowingly violating any of the provisions of the state assessment system set forth in 14 **Del.C.** §172;
  - 3.1.4 Pleading guilty or Nolo Contendere with respect to, or is convicted of, any crime against a child constituting a misdemeanor, except for unlawful sexual contact in the third degree in violation of 11 **Del.C.** §767;
  - 3.1.5 Pleading guilty or Nolo Contendere with respect to, or is convicted of, possession of a controlled substance or a counterfeit controlled substance classified as such in Schedule I, II, III, IV, or V of 16 **Del.C.** Ch. 47;
  - 3.1.6 Immorality, incompetence, misconduct in office, wilful neglect of duty, disloyalty, or misconduct involving any cause for suspension or revocation of a license or permit;
  - 3.1.7 Having a license, certificate, or permit suspended, revoked, or voluntarily surrendered in another jurisdiction for cause which would be grounds for suspension or revocation;
  - 3.1.8 Failing to comply with any of the mandatory notice provisions set forth in 14 **Del.C.** §1218(g); or
  - 3.1.9 Failing to comply with any of the statutory or regulatory requirements for maintaining a license, certificate, or permit.
- 3.2 The Secretary, or the Board after a hearing, shall revoke an Initial License, a Continuing License, an Advanced License, a Standard Certificate, or a Permit for the following causes:
  - 3.2.1 Pleading guilty or Nolo Contendere with respect to, or is convicted of, any of the following:

- 3.2.1.1 Any crime constituting the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance or counterfeit controlled substance as classified in Schedule I, II, III, IV, or V of 16 Del.C. Ch. 47;
- 3.2.1.2 Any crime constituting a violent felony as defined in 11 Del.C. 4201(c);
- 3.2.1.3 Any crime against a child constituting a felony, or unlawful sexual contact in the third degree in violation of in violation of 11 Del.C. §767;
- 3.2.1.4 Any crime constituting a felony sexual offense;
- 3.2.1.5 Any crime constituting a felony offense against public administration involving bribery, improper influence, or abuse of office; or

3.2.2 Committing a sexual offense against a child.

#### **4.0** **Limitation of Licenses and Permits**

- 4.1 ~~The Secretary may limit an Initial, Continuing or Advanced License that has been issued, for any of the grounds for revocation.~~
- 4.2 If any of the causes listed in ~~Sections 3, 4, 5, or 6~~ Section 3.0 are determined, the Secretary or the Standards Board after a hearing, may put limitations on a license, certificate or permit that ~~may~~ include ~~but are not limited to:~~
  - 4.2.14.1.1 Restrictions on the ages of students with whom the license, certificate, or permit holder may work; or
  - 4.2.24.1.2 Additional supervision requirements; or
  - 4.2.34.1.3 Education, counseling or psychiatric examination requirements.

#### **5.0** **Suspension of Licenses and Permits**

- 5.1 ~~The Secretary may suspend an Initial, Continuing or Advanced License that has been issued, for any of the grounds for revocation.~~
- 5.2 A license, certificate or permit may be suspended for a period of time not to exceed five (5) years.
  - 5.2.15.1.1 The license, certificate or permit may be reinstated by the Secretary, upon written request, with verification that all requirements for license renewal have been satisfied the license or permit holder has satisfied all of the requirements for license or permit renewal in effect at the time of the request.
  - 5.2.25.1.2 If the license or permit expired during the period of suspension, the holder of the former license or permit may reapply for the same tier license or type of permit that was suspended but shall meet the license or permit requirements that are in effect at the time of the application for the license.

#### **6.0** **Automatic Suspension after Arrest or Indictment**

- 6.1 ~~The Secretary may automatically suspend any license or permit without a prior hearing if the license or permit holder is arrested or indicted by a Grand Jury grand jury for a violent felony as defined in 11 Del.C. §4201(c) or for any crime against a child constituting a felony. A suspension under this subsection is effective on the date of the arrest or Grand Jury indictment. The suspension is effective on the date of the license or permit holder's arrest or indictment.~~
- 6.2 **Temporary Order**
  - 6.2.1 ~~For a suspension under this subsection, the~~ The Secretary shall issue a written temporary order of suspension to the license or permit holder at his or her last known address.
    - 6.2.1.1 ~~The chief school officer or head of school, on behalf of the local board of education or charter school board of directors, shall report to the Secretary the name and last known address of any license holder employed by the district or charter school who it knows to have been arrested or indicted by a Grand Jury for a violent felony as defined in 11 Del.C. §4201(c). The order of suspension shall remain in effect until the Secretary or the Standards Board, after a hearing, issues a final order.~~

~~6.2.1.2 An order of suspension under this Section shall remain in effect until the final order of the Secretary or the Standards Board becomes effective.~~

### 6.3 Expedited Hearing

6.3.1 A license or permit holder ~~whose license has been suspended pursuant to this Section~~ may request an expedited hearing before the Standards Board within 20 calendar days from the date the notice of the Secretary's decision to temporarily suspend the ~~license holder's license~~ or permit was mailed. The request shall be ~~sent~~ mailed by certified mail to the Standards Board's Executive Director.

6.3.2 In the event that the license or permit holder requests an expedited hearing, the Standards Board shall convene a hearing within 90 calendar days of the receipt of such a request.

6.3.3 The order of suspension is temporary pending resolution of the criminal charges. Therefore, an expedited hearing under this subsection shall be limited to whether the license or permit holder had been arrested or indicted for a violent felony or for any crime against a child constituting a felony.

### 6.4 Revocation after Conviction

6.4.1 If the license or permit holder pleads guilty or ~~nolo contendere~~ Nolo Contendere with respect to, or is convicted of, a violent felony as defined in 11 **Del.C.** §4201(c) or any crime against a child constituting a felony, the Secretary shall proceed with revocation.

### 6.5 Resolution of Charges without Conviction

6.5.1 If the license or permit holder is found not guilty of the underlying criminal charges, a ~~nolle prosequi~~ Nolle Prosequi is entered on the record by the State, or the charges are otherwise dismissed by the Court, the license or permit holder may file a written request for license or permit reinstatement, including documentation of the final status of the judicial proceeding, and ~~their~~ his or her license or permit shall be reinstated if still valid.

6.5.2 If the license or permit expired during the period of suspension, the holder of the former license or permit may reapply for the same tier license or type of permit that was ~~suspended~~, suspended but shall meet the license or permit requirements that are in effect at the time of the application ~~for license~~.

6.5.3 The Secretary may ~~however, continue to pursue revocation under any alternative ground including but not limited to termination of employment for immorality, incompetence, misconduct in office, willful neglect of duty, disloyalty, or misconduct; or resignation or retirement pending dismissal for immorality under the standards provided herein~~ limit, suspend, or revoke the license or permit for any of the following causes set forth in Section 3.0 of this regulation.

## 7.0 ~~Substantially Comparable Conduct~~

~~The Secretary may take any action under this regulation on the basis of substantially comparable conduct occurring in a jurisdiction outside this State or occurring before a person applies for or receives any license.~~

## 8.0 ~~Mandatory Notification Requirements~~

### 8.1 ~~License Holder~~

8.1.1 Any license holder who has pled guilty or nolo contendere to, or has been convicted of, a crime in a court of law which would constitute grounds for revocation, limitation or suspension of license under this regulation or has been arrested or indicted by a Grand Jury for a violent felony as defined in 11 **Del.C.** §4201(c), shall notify the Secretary of such action in writing within twenty (20) calendar days of such conviction, arrest or indictment, whether or not a sentence has been imposed. Failure to do so shall be grounds on which the Secretary may revoke, limit or suspend the holder's license.

8.1.2 Any license holder who has surrendered an educator license or any professional license or certificate or who has had such a license or certificate revoked, limited or suspended in any jurisdiction or by any agency shall notify the Secretary of such action in writing within thirty (30)

~~calendar days of such action. Failure to do so shall be grounds on which the Secretary may revoke, limit or suspend the holder's license.~~

~~8.2 Chief School Officer, Head of School, Local Board or Charter School Board of Directors Responsibilities~~

~~8.2.1 The chief school officer or head of school, on behalf of the local board of education or charter school board of directors, shall report to the Secretary the name and last known address of any license holder who is dismissed, resigns, retires or is otherwise separated from employment with that district or charter school after having received notice of misconduct that constitutes grounds for revocation or suspension this regulation.~~

~~8.2.1.1 Such report shall be made within fifteen (15) calendar days of the dismissal, resignation, retirement or other separation from employment and is required notwithstanding any termination agreement to the contrary that the local board of education or charter school board of directors may enter into with the license holder.~~

~~8.2.1.2 The reasons for the license holder's dismissal, resignation, retirement or other separation from employment with the district or charter school shall also be provided along with all evidence that was reviewed by or is in the possession of the district or charter school relating to the dismissal, resignation, retirement or other separation from employment.~~

~~8.2.1.3 The Department shall give written notice to any license holder of any notification received under this subsection to the license holder's last known address. Such notification shall be made with fifteen (15) calendar days of receipt of the district or charter school's report to the Department of misconduct under this Section.~~

~~8.2.1.4 The obligation to report also applies when a chief school officer or head of school acquires relevant information after a license holder's dismissal, resignation, retirement or other separation from employment.~~

~~8.2.2 The chief school officer or head of school, on behalf of the local board of education or charter school board of directors, shall report to the Secretary the name and last known address of any license holder employed by the district or charter school who it knows to have been arrested or indicted by a Grand Jury for a violent felony as defined in 11 **Del.C.** §4201(c).~~

~~8.2.3 All information obtained from the chief school officer or head of school shall be confidential and shall not be considered public records under Delaware's Freedom of Information Act.~~

~~8.2.4 Failure to make the mandatory reports shall be grounds on which the Secretary may limit, suspend or revoke the chief school officer's or head of school's license.~~

~~8.3 Notice of Action~~

~~The Secretary shall not take action against a person under Sections 3, 4 or 5 without providing the person with written notice of the charges and with an opportunity for a full and fair hearing before the Standards Board.~~

~~8.3.1 Notice shall be sent to the person's last known address.~~

~~8.3.2 The license holder shall have thirty (30) calendar days from the date the notice of the charges was mailed to make a written request for a hearing.~~

~~8.3.3 If no written request for a hearing is received by the Standards Board within thirty (30) calendar days of receipt of notification, the license holder's license shall be deemed to be revoked, limited or suspended and the holder shall be so notified.~~

~~8.3.4 Notice of the revocation, limitation, suspension or reinstatement of a license shall be made by the Secretary, or his or her designee, to all chief state school officers of the other states and territories of the United States.~~

~~8.4 All communications between a license holder and the Department or Standards Board provided for in this Section shall be by certified mail, with a return receipt requested.~~

**9.0 Investigations**

9.1 The Secretary may investigate any information received about a person that reasonably appears to be the basis for action under this regulation.

- ~~9.1.1 The Secretary shall not investigate anonymous complaints.~~
- ~~9.1.2 The Department shall give written notice within a reasonable period of time to a license holder of any investigation initiated hereunder to the license holder's last known address.~~
- ~~9.1.3 All information obtained during an investigation is confidential and shall not be considered public records under Delaware's Freedom of Information Act.~~
- ~~9.1.4 The Secretary shall review the results of each investigation conducted pursuant to this regulation and shall determine whether the results warrant initiating action under this regulation.~~

#### **40.0 License Reinstatement**

- ~~10.1 Subject to the limitation contained herein, an individual whose license has been revoked under Section 3.1 Discretionary Revocation of this regulation may petition the Secretary for reinstatement of the license no sooner than five (5) years from the date of revocation. The individual shall submit to the Secretary a written petition showing credible evidence, by affidavit or otherwise, of the factors set forth in subsection 10.1.1.~~
  - ~~10.1.1 The Secretary shall consider all of the following criteria in evaluating a petition for reinstatement and shall only grant such a petition if it is in the best interest of the public schools of the State of Delaware:~~
    - ~~10.1.1.1 The nature and circumstances of the individual's original misconduct;~~
    - ~~10.1.1.2 The individual's subsequent conduct and rehabilitation;~~
    - ~~10.1.1.3 The individual's present character; and~~
    - ~~10.1.1.4 The individual's present qualifications and competence to engage in the practice of instruction, administration or other related professional support services.~~
  - ~~10.1.2 A former license holder is entitled to a full and fair hearing before the Standards Board to challenge a denial of reinstatement pursuant to this subsection.~~
- ~~10.2 A license revoked under Section 3.2 Mandatory Revocations or suspended under Section 6.0 of this regulation may not be reinstated under this subsection.~~
  - ~~10.2.1 A license suspended under Section 6.0 may only be reinstated pursuant to that section.~~
  - ~~10.2.2 A license revoked under Section 3.2 Mandatory Revocation may only be reinstated under Section 40.3.~~
- ~~10.3 If a decision of license revocation, limitation or suspension is solely based on the conviction of a crime enumerated within this regulation, and if the plea or conviction is overturned and there is no subsequent proceeding leading to a plea or conviction, the individual whose license is revoked, limited or suspended may file a written request for reinstatement, including documentation of the final status of the judicial proceeding, and the license shall be reinstated.~~
  - ~~10.3.1 The Secretary may continue to pursue revocation under an alternative basis.~~

#### **41.07.0 Right to Hearing, Burden of Proof, and Standards Board Hearings and Procedures**

- ~~11.1 In any hearing before the Standards Board to challenge action taken under this regulation, the Standards Board shall have the power to administer oaths, order the taking of depositions, issue subpoenas and compel attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.~~
- 7.1 The Secretary shall not take action to limit, suspend, or revoke a license, certificate, or permit under Section 3.0 without providing the person with written notice of the charges and an opportunity for a full and fair hearing before the Standards Board.
  - 7.1.1 The notice shall be personally delivered or sent by certified mail to the person's last known address.
- ~~11.27.2 Unless otherwise provided for in this Section, the The burden of proof in a license, certificate, or permit disciplinary action shall be on the agency taking official action Department to establish by preponderance of the evidence that the license, certificate, or permit holder has engaged in~~

~~misconduct as defined by Sections 3, 4 and 5 or otherwise has failed to comply with the applicable laws and regulations relating to the retention of the license provided in Section 3.0.~~

- ~~41.3 Whenever the basis for an action described within this regulation is a guilty plea, a plea of nolo contendere with respect to, or a conviction of a crime, a copy of the record of the plea, nolo contendere or conviction certified by the Clerk of the Court entering the plea, nolo contendere or conviction shall be conclusive evidence thereof.~~
- ~~41.4 After a hearing, the Standards Board may take any action and impose any limitation or suspension that could have been taken by the Secretary.~~
- ~~41.5.3 Hearings shall be conducted in accordance with the Standard Board's Hearing Procedures and Rules 14 DE Admin. Code 1515 Hearing Procedures and Rules.~~

## **42.0 Resolution by Consent Agreement**

~~The Secretary may enter into a written consent agreement with a person against whom action is being taken under this regulation.~~

## **43.0 Certification**

~~All Standard Certificates issued to the license holder shall also be revoked upon the revocation of the license.~~

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## **PROFESSIONAL STANDARDS BOARD**

Statutory Authority: 14 Delaware Code, Sections 1203 and 1205(b) (14 Del.C. §§1203 & 1205(b))

14 DE Admin. Code 1515

### **REGULATORY IMPLEMENTING ORDER**

#### **1515 Hearing Procedures and Rules**

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

Pursuant to 14 Del.C. Sections 1203 and 1205(b), the Delaware Department of Education ("Department"), in consultation and cooperation with the Professional Standards Board, is amending 14 DE Admin. Code 1515 Hearing Procedures and Rules. The regulation sets forth rules of practice and procedure used by the Professional Standards Board and is being amended under the provision of 29 Del.C. §10113(b)(2).

The amendments are exempt from the requirement of public notice and comment and are adopted informally in accordance with 29 Del.C. §§10113(b)(2).

#### **II. FINDINGS OF FACT**

The Department finds that the regulation sets forth rules of practice and procedure used by the Professional Standards Board. Accordingly, the Department finds that it is appropriate to amend 14 DE Admin. Code 1515 Hearing Procedures and Rules.

#### **III. DECISION TO AMEND THE REGULATION**

For the foregoing reasons, the Department concludes that it is appropriate to amend 14 DE Admin. Code 1515 Hearing Procedures and Rules. Therefore, pursuant to 14 Del.C. §§1203 and 1205(b), 14 DE Admin. Code 1515 Hearing Procedures and Rules, attached hereto as Exhibit "A," is hereby amended.

**IV. TEXT AND CITATION**

The text of 14 **DE Admin. Code** 1515 Hearing Procedures and Rules adopted hereby shall be in the form attached hereto as Exhibit "A" and said regulation shall be cited as 14 **DE Admin. Code** 1515 Hearing Procedures and Rules in the Administrative Code of Regulations for the Department.

**V. EFFECTIVE DATE OF ORDER**

The effective date of this Order shall be ten days from the date this Order is published in the *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of November, 2018.  
**Department of Education**

Susan S. Bunting, Ed.D., Secretary of Education

**1515 Hearing Procedures and Rules****1.0 Applicability, Construction, and Waiver**

- 1.1 This regulation shall apply to license or permit denial actions under 14 **Del.C.** §§1205(b) and 1217 and license or permit disciplinary actions under 14 **Del.C.** §§1205(b) and 1218.
- 1.2 This regulation shall be liberally construed to secure a just, economical, and reasonably expeditious determination of the issues presented in accordance with the Standards Board's authority under 14 **Del.C.** Ch. 12 and with the Administrative Procedures Act under 29 **Del.C.** Ch. 101.
- 1.3 The Standards Board may waive any of the procedures and rules in this regulation upon application or upon its own initiative for good cause and to the extent consistent with the law.

**2.0 Definitions**

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

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

"**Executive Director**" means the Executive Director of the Delaware Professional Standards Board.

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

"**Standards Board**" means the Delaware Professional Standards Board established pursuant to 14 **Del.C.** §1201 or its designee.

**3.0 Requests for a Hearing**

- 3.1 A person may request a hearing by mailing or hand-delivering a written request for a hearing to the Executive Director.
  - 3.1.1 Requests shall not be sent by electronic mail, facsimile, or other electronic means.
- 3.2 The request shall:
  - 3.2.1 Be in writing;
  - 3.2.2 Be signed by the person making the request or the person's counsel;
  - 3.2.3 Set forth the grounds for action in reasonable detail;
  - 3.2.4 Identify the source of the Standards Board's authority to decide the matter; and
  - 3.2.5 Provide the person's preferred mailing address, phone number, and e-mail address.
- 3.3 Requests must be submitted to the Executive Director as follows:
  - 3.3.1 For license or permit denial actions, requests must be postmarked or ~~mailed~~ hand-delivered within 20 calendar days from the date that the Department's notice under 14 ~~**Del.C.** §1217(b)~~ was mailed.

- 3.3.2 For license or permit disciplinary actions, requests must be ~~submitted~~ postmarked or hand-delivered within 30 calendar days from the date that the Secretary's notice ~~under 14 Del.C. §1218(k)~~ was mailed.
- 3.4 A copy of the request shall be provided to the Department, in license or permit denial actions, or to the Secretary, in license or permit disciplinary actions.
- 3.5 The Executive Director shall provide the request for a hearing to the Standards Board at its next regularly scheduled meeting.
- 3.6 Upon receipt of a request that meets all of the requirements set forth in subsection 3.2, the Standards Board may decide to conduct the hearing itself or designate a hearing officer from a list of hearing officers approved by the Standards Board to conduct the hearing.
- 3.6.1 The hearing officer designated shall have the same authority, powers, and duties as the Standards Board for the purpose of conducting the hearing.
- 3.7 The Standards Board may direct the person or agency taking official action to file a written response to the request for a hearing.

## 4.0 Prehearing Procedures and Rules

- 4.1 Scheduling a Hearing
- 4.1.1 Generally, hearings are scheduled for 1 full day from 8:30 a.m. to 4:30 p.m.
- 4.1.1.1 If a party believes that the presentation of the party's case cannot reasonably be accomplished in one half of the allotted time or less, then the party may mail or hand-deliver a written request for additional time to the Executive Director within 10 days of receipt of the notice of hearing. The request shall specify the reasons for the request. The party shall provide a copy of the request to the other party at the same time.
- 4.1.1.2 The Standards Board may grant the request upon a showing of good cause.
- 4.2 Notice of the Hearing
- 4.2.1 Notice of the date, time, and place of the hearing shall be mailed to the parties.
- 4.3 Requests for a Public Hearing
- 4.3.1 A party shall be deemed to have consented to a closed hearing unless the party notifies the Executive Director in writing that a public hearing is requested.
- 4.3.1.1 The request must be mailed or hand-delivered to the Executive Director within 5 business days of the receipt of the notice in subsection 4.2. A copy of the request shall be provided to the other party at the same time.
- 4.4 Subpoena Requests
- 4.4.1 Requests for subpoenas for witnesses and other sources of evidence shall be mailed or hand-delivered to the Executive Director at least 15 business days before the date of the hearing. A copy of the request shall be provided to the other party at the same time.
- 4.4.1.1 Requests for subpoenas for witnesses shall specify the witness' name and address.
- 4.4.1.2 Requests for subpoenas for other sources of evidence shall specify the person or entity to whom the subpoena is directed, the person or entity's address, and the date by which the person or entity is to respond to the request.
- 4.4.2 The Standards Board shall issue subpoenas in accordance with the law.
- 4.4.3 The party requesting a subpoena is responsible for delivering the subpoena to the person or entity to whom the subpoena is directed.
- 4.4.3.1 Proof of service of a subpoena shall be mailed or hand-delivered to the Standards Board.
- 4.5 Requests for a Stenographic Reporter
- 4.5.1 Any party may request the presence of a stenographic reporter at the hearing.
- 4.5.1.1 The request shall be mailed or hand-delivered to the Executive Director at least 10 business days prior to the date of the hearing. A copy of the request shall be provided to the other party at the same time.

4.5.2 The requesting party shall be liable for the expense of the stenographic reporter and any transcript the party requests.

4.6 Witness List

4.6.1 A written list of witnesses a party intends to call during a hearing shall be mailed or hand-delivered to the Executive Director at least 5 business days prior to a hearing. A copy of the list shall be mailed to the other party at the same time.

4.6.2 The Standards Board may refuse to receive into evidence any testimony of a witness who has not been named on the witness list.

4.7 Exchange of Documents

4.7.1 The parties shall exchange documents they intend to introduce at the hearing at least 5 business days prior to the hearing.

4.7.2 The documents shall be labeled "Petitioner" or "Department" and numbered in sequential order (1, 2, 3).

4.8 Prehearing Conferences

4.8.1 The Standards Board may hold prehearing conferences and teleconferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes, and to regulate and expedite the course of the hearing.

4.9 Continuances, Adjournments, and Postponements

4.9.1 The Standards Board may continue, adjourn, or postpone proceedings for good cause at the request of a party or on its or his or her own initiative.

4.9.2 Any request to continue, adjourn, or postpone a proceeding shall be submitted to the Executive Director in writing at least 3 business days before the date scheduled for the hearing. A copy of the request shall also be provided to the other party at the same time.

**5.0 Hearing Procedures and Rules**

5.1 A verbatim record of the proceedings before the Standards Board will be made either electronically or stenographically, if a party submits a request under subsection 4.5.

5.2 The hearing will proceed with the party with the burden of proof first presenting its evidence and case. The other party may then present its case. The party with the burden of proof will then have an opportunity to present rebuttal evidence.

5.2.1 In license or permit denial actions, the applicant is the party with the burden of proof.

5.2.2 In license or permit disciplinary actions, the Department is the party with the burden of proof.

5.3 The Standards Board may permit the parties to present opening and closing statements.

5.4 The Standards Board may take testimony, hear proof, and receive exhibits into evidence at a hearing.

5.4.1 Strict rules of evidence shall not apply. Evidence having probative value commonly accepted by reasonably prudent people in the conduct of their affairs may be admitted into evidence.

5.4.2 The Standards Board may exclude plainly irrelevant, immaterial, insubstantial, cumulative, and privileged evidence and limit unduly repetitive proof, rebuttal, and cross-examination in accordance with 29 **Del.C.** §10125(b).

5.4.3 Objections to the admission of evidence shall be brief and shall state the grounds for the objection.

5.5 Testimony shall be under oath or affirmation.

5.5.1 The Standards Board may administer oaths to witnesses.

5.6 Any person who testifies as a witness shall also be subject to cross examination by the other party and by the Standards Board.

5.7 Witnesses may be sequestered upon a party's request.

5.8 Any document introduced into evidence at the hearing shall be marked by the Standards Board and shall be made a part of the record of the hearing.

5.8.1 The party offering the document into evidence shall provide a copy of the document to the other party, the Standards Board, and counsel for the Standards Board.

## 6.0 Post-hearing Rules and Procedures

- 6.1 The Standards Board may direct the parties to submit post-hearing briefs.
  - 6.1.1 Post-hearing briefs shall be filed as directed by the Standards Board.
- 6.2 If the Standards Board has designated a hearing officer, the hearing officer shall prepare a proposed order in accordance with 29 **Del.C.** §10126.
- 6.3 The parties shall have 20 calendar days from the date the proposed order is delivered to them to submit in writing to the Standards Board and the other party any exceptions, comments, and arguments respecting the proposed order.
  - 6.3.1 The parties may agree to shorten or waive the comment period.
  - 6.3.2 The parties may agree to consent to the hearing officer's proposed order.
    - 6.3.2.1 When the parties consent to the hearing officer's recommendation, they shall send written notice to the Executive Director.
- 6.4 The Standards Board shall consider the entire record of the case, the hearing officer's proposed order, and any written exceptions, comments, and arguments thereto in reaching its final decision. The Standards Board's decision shall be incorporated in a final order which is signed and mailed to the parties.

## 7.0 Other Hearing Rules and Procedures

- 7.1 Communications
    - 7.1.1 Pursuant to 29 **Del.C.** §10129, no member or employee of the Standards Board assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any person or party, except upon notice to and opportunity for all parties to participate.
      - 7.1.1.1 Subsection 7.1.1 does not apply to communications required for the disposition of ex parte matters authorized by law or to communications by and among members of the Standards Board, the Standards Board's staff, and the Standards Board's counsel.
    - 7.1.2 A copy of any document filed with or submitted to the Standards Board or the hearing officer shall be provided to the other party or the other party's counsel.
    - 7.1.3 Address of the Standards Board and Parties' Contact Information
      - 7.1.3.1 Hand-delivered submissions shall be delivered to the Standards Board at the Townsend Building, 401 Federal Street, 2nd Floor, Dover, Delaware 19901.
      - 7.1.3.2 Mailed submissions shall be delivered to the Standards Board at 401 Federal Street, Suite 2, Dover, Delaware 19901.
      - 7.1.3.3 Parties shall keep the Standards Board informed of their current mailing addresses, phone numbers, and email addresses.
  - 7.2 Counsel
    - 7.2.1 Any party to a proceeding before the Standards Board may be represented by counsel.
    - 7.2.2 The attorney representing a party in a proceeding before the Standards Board shall notify the Executive Director of the representation in writing as soon as practical. A copy of the notice shall be provided to the other party at the same time.
    - 7.2.3 Attorneys who are not members of the Delaware Bar may be admitted pro hac vice before the Standards Board pursuant to Rule 72 of the Rules of the Supreme Court of the State of Delaware.
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# FINAL REGULATIONS

## DEPARTMENT OF FINANCE OFFICE OF THE STATE LOTTERY

Statutory Authority: 29 Delaware Code, Sections 4805(a) (29 **Del.C.** §4805(a))  
10 **DE Admin. Code** 202

### ORDER

#### 202 Delaware Lottery Rules and Regulations

The Director of the Office of the State Lottery ("Director") issues this Order to take effect ten (10) days after it has been published in the Delaware *Register of Regulations*:

1. Pursuant to his statutory authority, the Director proposed for adoption revisions to the Office of the State Lottery's existing Rules and Regulations on traditional games (10 **DE Admin. Code** 202) to update and clarify certain sections. These changes are primarily administrative in nature and sometimes substantive in nature regarding licensing appeal procedures. The revisions also serve in part to clarify the intent of the Director as enacted through these regulations. These revisions should not pose additional burdens on licensees or consumers. Other regulations issued by the Director are not affected by this Order.

2. The statutory authority for these revisions is 29 **Del.C.** §4805(a).

3. A copy of the proposed regulations was published in the October 1, 2018 edition of the Delaware *Register of Regulations* and has been available for inspection in the Office of the State Lottery, 1575 McKee Road, Suite 102, Dover, Delaware 19904 during regular office hours.

4. The Director did not receive any written comments on the proposed regulations during the 30 day period following publication of the proposed regulations on October 1, 2018.

5. The Director finds that the proposed changes as set forth in the October 2018 *Register of Regulations* should be adopted.

### DECISION AND ORDER CONCERNING THE REGULATIONS

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Director of the Office of the State Lottery does hereby ORDER that the regulations be, and that they hereby are, enacted as set forth below. The effective date of this Order is ten days from the date of its publication in the Delaware *Register of Regulations*, in accordance with 29 **Del.C.** §10118(g).

Vernon A. Kirk, Director  
Office of the State Lottery

Date: 11/7/2018

#### 202 Delaware Lottery Rules and Regulations for Traditional Games (Break in Continuity of Sections)

#### 4.0 Suspension, Non-Renewal, or Revocation of Licenses

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

4.2 An Agent's license may be suspended, revoked, or its renewal rejected for any one or more of the following reasons:

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

4.2.13 Whenever the Agent sells lottery tickets to known third-party ticket [~~resalers~~ **resellers**] or enters computer-generated betting slips from third-party ticket [~~resalers~~ **resellers**] for the sale of lottery tickets.

##### (Break in Continuity of Sections)

#### [25.0 Declaratory Rulings by the Lottery Office

25.1 On petition of any interested person, the Director may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it, or the Director may refer such matters to the State Attorney General for such disposition.

25.2 In the case of any matter concerning which a Declaratory ruling is brought for appeal, the petitioner may be represented by an attorney.]

## ~~26.0~~[25.026.0] Postponement of Drawings

The Director may postpone any drawing to a certain time and publicize ~~the same if he finds, in his sole discretion, that such postponement will serve the public interest and protect the public interest~~ the new time of the drawing.

## ~~27.0~~[26.027.0] Amendments

The Director may amend, modify, or otherwise change these Regulations upon full compliance with ~~law; Delaware laws.~~ said Any amendments, modifications or changes shall will become as effective and applicable to ~~Lottery Lottery's~~ business and administration as if part of the original Regulations.

## ~~28.0~~[27.028.0] ~~Fingerprinting Procedures~~ Determination of Suitability and Appeal Process

28.1 ~~State Bureau of Identification~~

28.1.1 ~~[27.128.1]~~ All applicants or licensee will licensees must contact the State Bureau of Identification SBI to make arrangements for fingerprint processing. The SBI shall forward the results of the state and federal criminal history record checks to the attention of the Director in a confidential manner. The SBI shall also send to the Director any subsequently-obtained criminal history information of an applicant or licensee.

28.1.2 ~~[27.228.2]~~ A fee is required for state and federal processing of fingerprint cards and criminal history records, payment. Payment shall must be made in the form of a certified check, credit card, or money order, payable to the Delaware State Police Video Lottery Enforcement Unit (VLEU). The fee is set by the State Bureau of Identifications and payment is to be All applicants and licensees must directly pay the appropriate fee at the time the processing request is made directly to that agency.

28.1.3 ~~[27.328.3]~~ the waiver form to release criminal history record information to the Director. At the time of the processing, the applicant All applicants must show proof of identification to complete the criminal history request and pay the appropriate fee.

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

28.1.3.4 ~~[27.428.4]~~ Should If the Director determine decides that the applicant is to be fully licensed or licensee may receive a full license, the Lottery Office shall send the applicant or licensee a letter stating such that confirms the Director's decision to issue a full license.

28.1.4 ~~[27.528.5]~~ Certified SBI shall send to the Director certified copies of the applicant's or licensee's criminal history and regular copies of the criminal history to the applicant or licensee will be forwarded to the Director of the Lottery, with a copy available to the applicant upon request.

28.1.5 ~~A Verification Form of Processing will be completed by Delaware State Police personnel and provided to the applicant.~~

28.1.6 ~~[27.628.6]~~ The State Bureau of Identification shall act as the intermediary for the receipt of the federal criminal history record checks performed by the Federal Bureau of Identification. The State Bureau of Identification shall forward the results of these federal record checks to the attention of the Lottery Director in a confidential manner All applicants and Agents shall notify the Lottery Office within seventy-two (72) hours of any changes in their criminal history information. The Lottery Office shall use this subsequent criminal history information in determining an applicant's suitability for licensure and an Agent's continued suitability as a licensee.

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

28.2.1.4 ~~[27.728.7]~~ A person subject to 29 Del.C. §4807A shall have the opportunity to respond to the Lottery Director regarding any information obtained prior to a determination of suitability for licensure. Such a response shall must be made within ten (10) working business days of the person's receipt of the criminal background information from the State Bureau of Identification SBI. The determination of suitability for licensure shall be made by the Lottery Office pursuant to the factors listed in 29 Del.C. §4807A §§4830(a)-(e) in regard to an applicant's criminal history and the factors listed in Section 3.0 of

# FINAL REGULATIONS

these Regulations. The Lottery Office will also consider the any other additional factors contained in 29 Del.C. Ch. 48 and the Lottery Regulations in considering agent applications for licensure.

28.2.1.2 ~~[27.828.8]~~ The Lottery Office shall communicate the results of the determination of suitability in writing, within thirty (30) days of the receipt of the person's response to the criminal history information, unless extenuating circumstances require a longer period. If a determination is made to deny a person licensure, the person shall have an opportunity to appeal ~~for reconsideration as set out below the denial decision as set forth in subsections 5.2 to 5.9 of these Regulations.~~

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

28.3 ~~[27.928.9]~~ Confidentiality

28.3.1 ~~[27.9.128.9.1]~~ All records pertaining to criminal background ~~checks, checks~~ pursuant to 29 Del.C. §4807A and all copies of suitability determinations of applicants or licensees for licensure, ~~shall~~ must be maintained in a confidential manner, including, but not limited to, the following:

28.3.1.1 ~~[27.9.1.128.9.1.1]~~ Access to records of criminal background check records and checks, letters of reference accompanying out-of-state criminal background checks, and determinations of suitability of applicants ~~shall~~ or licensees must be limited to the Director and designated personnel;

28.3.1.2 ~~[27.9.1.228.9.1.2]~~ All such records shall be kept in locked, fireproof cabinets;

28.3.1.3 ~~[27.9.1.328.9.1.3]~~ No information from such records ~~shall~~ may be released without the signed approval of of, and appropriate signed release of of, the applicant or licensee.

~~29.0[28.029.0]~~ Non-Discrimination on the Basis of Disability in Delaware Lottery Programs

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

29.2 ~~[28.129.1]~~ Purpose

29.2.1 ~~[28.2.129.1.1]~~ The Americans with Disabilities Act ADA (P.L. 101-336, 42 U.S.C. §§ 12131-12134), known as the ADA, prohibits discrimination on the basis of disability in the delivery of programs offered by entities of any state or local government or other instrumentality of a state or local government. The purpose of this regulation section is to ensure that the Delaware Lottery Office is in compliance with the ADA by ensuring that people persons with disabilities have access to Delaware Lottery the lottery programs.

29.2.2 ~~[28.2.229.1.2]~~ In defining the scope or extent of any duty imposed by these ~~regulations~~ Regulations including compliance with the standard of accessibility defined in ~~paragraph 3(b) subsection~~ [28.2.229.2.2], any higher or more comprehensive obligations established by otherwise applicable federal, state or local enactment may be considered.

29.3 ~~[28.229.2]~~ General Requirements

29.3.1 ~~[28.2.129.2.1]~~ Prohibition of discrimination. No ~~lottery retailer~~ Agent shall discriminate against any individual on the basis of a disability in the full and equal enjoyment of ~~lottery-related~~ lottery-related goods, services, facilities, privileges, advantages, or accommodations of any ~~lottery licensed~~ Agent's facility.

29.3.2 ~~[28.2.129.2.2]~~ Standard of accessibility. Each ~~Retailer~~ Agent is required to meet a standard of accessibility that enables people with disabilities, including those who use wheelchairs, to enter the ~~lottery licensed~~ Agent's facility and participate in the lottery program. ~~An~~ All agents must provide an accessible route ~~must be provided that is~~ is comprised of the following accessible elements:

29.3.2.1 ~~[28.2.2.129.2.2.1]~~ Parking, if parking is provided to the general public;

29.3.2.2 ~~[28.2.2.229.2.2.2]~~ Exterior route connecting parking (or a public way if no parking is provided) to an accessible entrance;

29.3.2.3 ~~[28.2.2.329.2.2.3]~~ Entrance;

29.3.2.4 ~~[28.2.2.429.2.2.4]~~ Interior ~~Route connecting~~ route that connects the entrance to a service site.

~~29.3.3~~ ~~[28.2.329.2.3]~~ Each Unless a permitted exemption exists, each element shall set forth in subsection ~~[28.2.229.2.2]~~ must meet the design standards set forth in the ADA Accessibility Guidelines (ADAAG), published in the Federal Register on July 26, 1994 as applicable.

**29.4 ~~[28.329.3]~~ New License Applicants**

29.4.1 ~~[28.3.129.3.1]~~ License applicants. The State Lottery Office shall inspect the site of all applicants for compliance with ~~this regulation~~ Section [28.029.0] of the Regulations prior to granting a license. The State Lottery Office ~~will~~ shall not grant a license to an applicant who is not in compliance with ~~this regulation~~ all of the requirements of Section [28.029.0].

~~[28.3.229.3.2]~~ If the ownership of an Agent changes, the Lottery Office shall treat such Agent as an applicant for a new license, and such applicant must comply with all of the requirements set forth in Section 28.0.

29.4.2 ~~[28.3.329.3.3]~~ Inspection reports. The State Lottery Office, prior to granting a license, shall provide lottery applicants with an ~~Inspection Report~~ inspection report that ~~shall~~ will identify barrier removal actions, if any, necessary to provide lottery program accessibility. The identified actions must be completed within 90 days of the receipt of the inspection report and prior to the granting of a license.

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

29.5.3 ~~[28.3.429.3.4]~~ Extensions. The Director may grant an extension of up to 90 days to allow a ~~current retailer~~ an applicant to complete barrier removal actions identified in the ~~Inspection Report~~ inspection report.

29.5.3.1 ~~[28.3.529.3.5]~~ Any request for an extension must be in ~~writing~~, writing and ~~shall~~ must include specific reasons for an extension and supporting documentation.

29.5.3.2 ~~[28.3.629.3.6]~~ The Director shall grant an extension to an applicant only upon a showing of good cause.

**29.6 ~~[28.429.4]~~ Permitted exemptions**

29.6.1 ~~[28.4.129.4.1]~~ The following exemptions to the requirements of this ~~rule~~ section may be granted by the Director. The Director shall review the circumstances and supporting documentation provided by the ~~retailer~~ applicant to determine if the ~~retailer's~~ applicant's request for an exemption should be granted. The Director ~~shall~~ will determine the type and scope of documentation ~~to be~~ required for each exemption classification. All decisions made by the Director ~~shall~~ will be ~~final~~; final. ~~any retailer~~ Any applicant whose request for an exemption is denied by the Director shall be required to satisfy the requirements of ~~this rule~~ these Regulations as a condition for maintaining its eligibility for a ~~Lottery retailer contract~~ license.

29.6.1.1 ~~[28.4.1.129.4.1.1]~~ Historic properties. To the extent a historic building is exempt under federal law, and if barrier removal would threaten or destroy the historic significance of the structure, ~~this rule shall~~ the requirement of this section will not apply to a qualified historic building or facility that is listed in or is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or is designated as historic under ~~State~~ state or ~~Local~~ local law.

29.6.1.2 ~~[28.4.1.229.4.1.2]~~ Legal impediment to barrier removal. Any law, act, ordinance, state regulation, ruling or decision which prohibits ~~the lottery retailer~~ any applicant from removing a structural impediment or from making a required improvement to the facility may be the basis for an exemption to this ~~rule-section~~. ~~A lottery retailer requesting~~ An applicant who requests an exemption for a legal impediment will not be required to formally seek a zoning variance to establish such impediment, but the applicant will be required to document that ~~they have~~ it has applied for and ~~have~~ has been refused whatever permit(s) are necessary to remove the identified barrier(s).

29.6.1.3 ~~[28.4.1.329.4.1.3]~~ Landlord refusal. An exemption may be granted based on the refusal of a landlord to grant permission to a ~~Lottery retailer~~ an applicant and/or to pay to make improvements required by the Lottery Office under this ~~rule-section~~, or based on the refusal of a landlord to pay for improvements required by the Lottery Office under this ~~rule~~ section. The exemption shall ~~only~~ apply only to the ~~retailer's~~ applicant's current term and

does not include any possible renewal periods under the lease. To request such an exemption, the ~~retailer~~ applicant must submit documentation to the Director to show that the ~~retailer~~ applicant requested the ~~Landlord's~~ landlord's permission and financial participation to make the required structural improvements, that such request was denied by the landlord, and the reasons for the denial. In making a decision on the exemption request, the Director shall take into consideration, but not be limited to, the sufficiency of the reasons provided by the landlord for denying the ~~retailer's~~ applicant's request.

29.6.1.4 ~~[28.4.1.4]~~ **29.4.1.4** Undue financial hardship. A limited exemption may be granted if ~~a retailer~~ there is a change of ownership of an Agent and the applicant can demonstrate that the cost of removing a structural barrier or of making the required structural modification(s) to the ~~retailer's~~ applicant's facility is an undue financial hardship in that the cost of making such a ~~change(s)~~ change or changes exceeds 25% of the ~~retailer's~~ location's compensation from the Lottery Office for the prior calendar ~~year~~ year. ~~(An An annualized sales figure based upon the retailer's previous owner's most current 13-week sales period shall will be used for those retailer locations with less than a full year's history of sales.)~~ sales. Under the terms of this limited exemption, ~~a retailer~~ an applicant would be required to annually ~~make~~ save, set aside, or spend an amount for those improvements and modifications that ~~can be financed within an amount that is~~ are approximately equal to 25% of the total compensation earned from the Lottery Office in the prior calendar year. This requirement would continue on a year-to-year basis until all the improvements and modifications required by this ~~rule~~ section have been completed. ~~A retailer~~ An applicant shall provide all supporting documentation requested by the Director to substantiate the cost estimates of making the required improvements to the ~~retailer's~~ applicant's location.

29.6.1.5 ~~[28.4.1.5]~~ **29.4.1.5** Technical Infeasibility. ~~[A]~~ permanent ~~[An]~~ exemption may be granted if a ~~retailer~~ an applicant can demonstrate that the removal of architectural barriers identified in the inspection report is not possible due to technical infeasibility. If such a claim is made, the Lottery Office may have the barrier removal action evaluated by a person knowledgeable in accessibility codes and construction to determine the merits of the claim.

29.6.1.6 ~~[28.4.1.6]~~ **29.4.1.6** Alternative methods. ~~Where~~ If an exemption is granted in accordance with the provisions of this ~~sub chapter~~ section, the ~~lottery~~ retailer applicant shall make the ~~lottery-related~~ lottery-related goods and services available through alternative methods. Examples of alternative methods include, but are not limited to:

29.6.1.6.1 ~~[28.4.1.6.1]~~ **29.4.1.6.1** Providing curb service;

~~[28.4.1.6.2]~~ **29.4.1.6.2** Having an accessible service window;

~~[28.4.1.6.3]~~ **29.4.1.6.3** Having an accessible doorbell;

29.6.1.6.2 ~~[28.4.1.6.4]~~ **29.4.1.6.4** Directing customers by signage to the nearest accessible lottery retailer.

## 29.7 Complaints Relating to Non-Accessibility

29.7.1 ~~[28.5]~~ **29.5** An aggrieved party may file an accessibility complaint concerning accessibility to the lottery programs with the ~~Lottery~~ U.S. Department of Justice or the State Human Relations Commission with a copy to the Director or designee for review. ~~Complaints must be in writing and, where possible, submitted on an ADA complaint form. As soon as practical, but not later than 30 days after the filing of a complaint, each complaint will be investigated. After the completion of the investigation, if the agency determines that the lottery retailer is not in compliance with this regulation, a letter of non-compliance will be issued to the lottery retailer with a copy to the complainant. If the lottery retailer is determined to be in compliance, a letter so stating will be mailed to the retailer and complainant. Regardless of whether a complaint has been filed, the agency will issue a letter of non-compliance within 30 days after the completion of an onsite inspection of the [lottery retailer Agent's or licensee's] facility if the agency determines that the [lottery retailer Agent or licensee] is not in compliance with this [regulation subsection].~~

- ~~29.7.2~~ **[28.629.6]** If the a letter of non-compliance shows deficiencies in the accessibility of the retailer facility, the ~~lottery retailer Agent~~ shall submit a plan to the agency within 30 days of the issuance of the letter of non-compliance. The plan shall describe in detail how the **[lottery retailer Agent]** will achieve compliance with this **[regulation section]**. Compliance shall be accomplished within 90 days of the letter of non-compliance. The Lottery **[Office]** may, upon request and for good cause, grant the ~~lottery retailer Agent~~ additional time to submit the plan.
- 29.7.3 **[28.729.7]** Within 20 days of the submission of the compliance plan to the agency, the Lottery shall notify the ~~lottery retailer Agent~~ of the agency's acceptance or rejection of the plan. If the plan is rejected, the notification shall contain the reasons for rejection of the plan and the corrections needed to make the plan acceptable to the Lottery **[Office]**. If the ~~retailer Agent~~ agrees to make the required corrections, the Lottery **[Office]** shall accept the plan as modified.
- 29.7.4 **[28.829.8]** If a ~~retailer an Agent~~ fails to submit a plan within 30 days of issuance of the letter of non-compliance and has not requested an extension of time to submit a plan, the Lottery **[Office]** may proceed to initiate termination proceedings.
- ~~29.7.5~~ **[28.929.9]** If approved, the plan must be completely implemented within 60 days of the agency's notice of approval. The Lottery **[Office]** may, upon request, grant the ~~lottery retailer Agent~~ additional time for good cause. Notice of any extension will also be sent to the complainant, if applicable. Any such extension will commence immediately upon expiration of the first 60 day period.
- 29.7.6 **[28.1029.10]** If the corrective action taken by the ~~lottery retailer Agent~~ corrects the deficiencies specified in the letter of non-compliance as originally issued or as later revised or reissued or if the onsite inspection of the lottery retailer facility reveals compliance with this regulation, the Lottery **[Office]** will issue a notice of compliance. Until this notice is issued, a complaint will be considered pending.
- 29.7.7 **[28.1129.11]** Failure to make the identified modifications in compliance with the accessibility standards and within the required time period will result in the initiation of proceedings to suspend or revoke the lottery license by the agency.
- ~~29.7.8~~ **[28.1229.12]** A license will be suspended if the Lottery **[Office]** determines that the ~~lottery retailer Agent~~ has made significant progress toward correcting deficiencies listed in the compliance report, but has not completed implementation of the approved compliance plan. If the Lottery determines that the ~~lottery retailer Agent~~ has not made a good faith effort to correct the deficiencies listed in the compliance report, this inaction will result in the revocation of the lottery license for that lottery licensed facility.
- 29.7.9 **[28.1329.13]** While proceedings to suspend or revoke a ~~lottery retailer's an Agent's~~ license are pending pursuant to this regulation, and until a notice of compliance is issued pursuant to 29.7.3 subsection **[28.7329.10, of this] section [subsection,]** the Lottery **[Office]** shall withhold incentive payments from the ~~lottery retailer Agent~~. In addition, if a license is revoked pursuant to this **[regulation section]**, and incentive payments and other privileges have been withheld from the affected ~~retailer Agent~~ pending review of the complaint, the ~~lottery retailer Agent~~ forfeits any claim to such incentive payments or other privileges.

*(Break in Continuity Within Section)*

## 29.14 Request for Hearings

29.14.1 If the Lottery Office proposes the denial of an application for a license or the suspension or revocation of an Agent's license pursuant to this section, the agency shall give the applicant or Agent written notice of the time and place of the administrative hearing not later than thirty (30) days before the date of the hearing.

29.14.2 All relevant rules of evidence and time limits established in these rules shall apply to hearings conducted under this regulation.]

## 29.9 Non-Exclusivity of Remedies

29.9.1 **[28.1429.15]** Remedies Any remedies established by these ~~regulations~~ Regulations are not intended to supplant, restrict or otherwise impair a person's resort to remedies otherwise available under law, including those authorized by the ADA, the federal regulations of 29 C.F.R §§ 35.173, 35.175, and 35.176, and Del. Code Ann., Title 6, Ch. 45 (1993) the provisions of 6 **Del.C.** §4508(g) and (h).

\*Please note that no additional changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 261 (22 DE Reg. 261). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:

**202 Delaware Lottery Rules and Regulations**

### OFFICE OF THE STATE LOTTERY

Statutory Authority: 29 Delaware Code, Section 4805(a)(14), (a)(31), and (b)(13) (29 Del.C. §4805(a)(14), (a)(31), and (b)(13))  
10 DE Admin. Code 203

### ORDER

#### 203 Video Lottery and Table Game Regulations

The Director of the Office of the State Lottery ("Director") issues this Order to take effect ten (10) days after it has been published in the Delaware *Register of Regulations*:

1. Pursuant to his statutory authority, the Director proposed for adoption revisions to the Office of the State Lottery's existing regulations on video lottery and table games (10 DE Admin. Code 203) to clarify certain sections of the Delaware Code, to update the regulations to allow exemptions for certain ownership interests in video lottery agents, and to allow waivers for institutional investors. Other regulations issued by the Director are not affected by this Order.

2. The statutory authority for these revisions is 29 Del.C. §§4805(a)(14), (a)(31), and (b)(13).

3. A copy of the proposed regulations was published in the October 1, 2018 edition of the Delaware *Register of Regulations* and has been available for inspection in the Office of the State Lottery, 1575 McKee Road, Suite 102, Dover, Delaware 19904 during regular office hours.

4. The Director received only one written comment on the proposed regulations during the thirty-day period following publication of the proposed regulations on October 1, 2018. The written comment suggested that additional non-substantive language be added to emphasize that a licensed video lottery agent must hold either a horse racing meet license or a harness racing meet license as a requirement for licensing. The Director has incorporated this suggested change in the final version of the regulation. In addition, the Director has also added a definition for a crime of moral turpitude to clarify this undefined term used in the Delaware Code.

5. The Director finds that the proposed changes as set forth in the October 2018 *Register of Regulations*, along with two non-substantive additions, should be adopted.

### DECISION AND ORDER CONCERNING THE REGULATIONS

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Director of the Office of the State Lottery does hereby ORDER that the regulations be, and that they hereby are, enacted as set forth below. The effective date of this Order is ten days from the date of its publication in the Delaware *Register of Regulations*, in accordance with 29 Del.C. §10118(g).

Vernon A. Kirk, Director  
Office of the State Lottery

Date: 11/7/2018

#### 203 Video Lottery and Table Game Regulations (Break in Continuity of Sections)

### 2.0 Definitions

For the purposes of these regulations, the following words and phrases have the meaning ascribed to them in this Section unless the context of the regulation clearly indicates otherwise, or unless they are inconsistent with the manifest intention of the Delaware State Lottery Office. The following words and terms, when used in this regulation, have the following meaning unless the context clearly indicates

otherwise. Words importing the masculine gender include the feminine as well, except as otherwise clearly indicated by the context.

*(Break in Continuity Within Section)*

["Crime of moral turpitude" means a misdemeanor or felony crime punishable by incarceration, a court fine in any amount, or both, and that involves moral turpitude or is in itself immoral or wrong including, but not limited to, the following: Murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, sex trafficking, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography. A crime of moral turpitude also includes the following crimes listed in the Delaware Code (or similar crimes under the laws of other jurisdictions); 11 Del.C. §763 (sexual harassment); 11 Del.C. §764 (indecent exposure in the second degree); 11 Del.C. §765 (indecent exposure in the first degree); 11 Del.C. §766 (incest); 11 Del.C. §767 (unlawful sexual contact in the third degree); 11 Del.C. §781 (unlawful imprisonment in the second degree); 11 Del.C. §840 (shoplifting); 11 Del.C. §861 (forgery); 11 Del.C. §871 (falsifying business records); 11 Del.C. §881 (bribery); 11 Del.C. §907 (criminal impersonation); 11 Del.C. §1101 (abandonment of a child); 11 Del.C. §1102 (endangering the welfare of a child); 11 Del.C. §1105 (crime against a vulnerable adult); 11 Del.C. §1106 (unlawfully dealing with a child); 11 Del.C. §1107 (endangering children); 11 Del.C. §1245 (falsely reporting an incident); 11 Del.C. §1341 (lewdness); 11 Del.C. §1342 (prostitution); 11 Del.C. §1343 (patronizing a prostitute); 11 Del.C. §1355 (permitting prostitution); 16 Del.C. §1136 (violations in Health and Safety, Nursing Facilities and Similar Facilities); and 31 Del.C. §3913 (violations in Welfare, Adult Protective Services).]

### **3.0 Licensing of Agents; Business Plans**

*(Break in Continuity Within Section)*

3.8 The Director shall weigh the following factors in his or her evaluation of the application:

- 3.8.1 Whether the applicant satisfies the requisites of ~~29 Del.C. §4805(b)(13)~~ **[at least one of the following:]** either a horse racing meet license pursuant to Title 3 or Title 28 of the Delaware Code or a harness racing meet license pursuant to Title 3 of the Delaware Code.

*(Break in Continuity Within Section)*

- 3.16 Unless exempted from the licensing requirements under subsection 3.1, the Director, in his sole discretion and upon receipt of a written application, may waive the licensing requirements for institutional investors that hold directly or indirectly up to 15% of the beneficial ownership or legal ownership in the applicant or in any person that will act as the agent. An applicant must submit to the Director any waiver applications at the same time that it submits its licensing application. If the Director grants or denies a person's waiver application, the Director must give the person a written notice of his decision within sixty (60) days of receiving the waiver application. Upon any denial of a waiver, the person must submit to all of the licensing requirements set forth in this Section 3.0. The Director's decision to deny any person a waiver of the licensing requirements is final and cannot be appealed. ~~Nevertheless~~ **However**, the Director upon good cause and with written notice may later revoke any grant of a waiver.

### **4.0 Licensing of Service Companies; Gaming and Non-Gaming Vendors**

*(Break in Continuity Within Section)*

**Non-Gaming Vendors and ~~Service Companies Providing Gaming Excursion Services~~ Providers**

*(Break in Continuity Within Section)*

- 4.5 A non-gaming vendor and ~~service company providing gaming excursion services~~ provider that provides goods or services to ~~[a an] video lottery agent~~ on a regular and continuing basis shall be licensed in accordance with the Delaware Code and these regulations.

\*Please note that no additional changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 261 (22 DE Reg. 261). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:

**203 Video Lottery and Table Game Regulations**

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**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**

**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**

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

**ORDER**

**Health Home Services**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Title XIX Medicaid State Plan regarding Health Home Services, specifically, to expand Delaware's Assertive Community Integration Support Team (ACIST) program which supports individuals with Severe and Persistent Mental Illness (SPMI) and intellectual and developmental disabilities (I/DD). 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 October 2018 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by October 31, 2018 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

**SUMMARY OF PROPOSAL**

Effective for services provided on and after October 1, 2018 Delaware Health and Social Services/ Division of Medicaid and Medical Assistance proposes to amend section 3.1-H and 4.19 B Page 28 of Title XIX Medicaid State Plan regarding Health Home Services.

**Background**

Delaware's ACIST (Assertive Community Integration Support Team) program supports individuals with Severe and Persistent Mental Illness (SPMI) and intellectual and developmental disabilities (I/DD) or Autism to receive a comprehensive, holistic team-based approach to crisis intervention, intensive case management, behavior analysis, psychiatric supports and monitoring of medical conditions in a multi-disciplinary model. The ACIST Health Home program is designed to provide a whole-person approach to supports and services to individuals with dual diagnosis and to ensure strong integration across behavioral health, somatic health and long-term supports and services. The ACIST program is tailored to individuals with chronic conditions of SPMI and I/DD who may require additional and/or different services or modalities to ensure effective intervention. The goals of the ACIST Health Home are:

- a) To lessen or eliminate critical health and safety issues that each member might experience, working toward preventing or mitigating these signs, symptoms, and/or social issues that could lead to crisis situations and the need for hospitalization or re-hospitalization
- b) To provide transitional support and post psychiatric hospitalization follow along that will assist the individual in ameliorating the effects of their mental health condition and dual diagnosis and prevent avoidable readmissions
- c) To improve the overall medical and physical health of the individual
- d) To meet basic human needs and enhance quality of life
- e) To improve the person's opportunity to be successful in social and employment roles and activities
- f) To increase active participation in the person's community
- g) To partner with families, support systems and/or significant other in supporting the individual's recovery

## **Statutory Authority**

- Section 1902(a) of the Social Security Act and 42 CFR 447

## **Purpose**

### *Purpose*

The purpose of this proposed regulation is to expand Delaware's Assertive Community Integration Support Team (ACIST) program which supports individuals with Severe and Persistent Mental Illness (SPMI) and intellectual and developmental disabilities (I/DD).

### *Summary of Proposed Changes*

Effective for services provided on and after October 1, 2018 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend section 3.1-H and 4.19 B Page 28 of Title XIX Medicaid State Plan regarding Health Home Services.

### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the state public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on October 31, 2018.

### *Centers for Medicare and Medicaid Services Review and Approval*

The provisions of this state plan amendment (SPA) are subject to approval by the Centers for Medicare and Medicaid Services (CMS). The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

### *Provider Manuals and Communications Update*

Also, there may be additional provider manuals that may require updates as a result of these changes. The applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding DMAP updates. DMAP updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

## **Fiscal Impact Statement**

The following fiscal impact is projected:

	State Fiscal Year 2019	State Fiscal Year 2020
General (State) funds	\$36,338	\$48,450
Federal funds	\$327,038	\$436,050

**Summary of Comments Received with Agency Response and Explanation of Changes**

Two commenters offered the following summarized observations:

**Comment:** One commenter questioned whether health home funding would pay for direct services or only the six services outlined in the program description:

1. Comprehensive care management
2. Care coordination
3. Health promotion
4. Comprehensive transitional care/ follow up
5. Patient and family support; and
6. Referral to community and social support services.

**Agency Response:** The six services listed above are designated aspects of the Health Home Model and do not replace direct services currently available within the existing Medicaid State Plan. The Health Home will not pay for services already offered within the State Plan and will ensure non-duplication between Health Home benefits and State Plan and Medicaid HCBS services

**Comment:** Two commenters stated that it was unclear if children were included.

**Agency Response:** DMMA agrees that services to Delaware children with serious emotional disturbance (SED) and intellectual and developmental disabilities (ID/DD) is vital to their and their family's success. The proposed regulation does not exclude children, however, Delaware expects that children's utilization of the Health Home benefit to be minimal since the benefits cannot replace services already available to children through the Medicaid State Plan. Title XIX of the Social Security Act requires states to provide Early and Periodic Screening, Diagnostic and Treatment (EPSDT), which includes comprehensive and preventive health care services for children under age 21 who are enrolled in Medicaid. As such, Delaware offers a full array of behavioral and physical health services designed to meet the needs of children.

**Comment:** Two commenters suggested that although the primary focus of the Health Home program is care coordination, there was limited information about how the program will coordinate with the MCO's.

**Agency Response:** The ACIST program will be implementing a person centered treatment plan which will include necessary linkages to supports and services for its effective implementation to include coordination with MCO's.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

**FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the October 2018 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Title XIX Medicaid State Plan regarding Health Home Services, specifically, *to expand Delaware's Assertive Community Integration Support Team (ACIST) program which supports individuals with Severe and Persistent Mental Illness (SPMI) and intellectual and developmental disabilities (I/DD)* is adopted and shall be final effective December 11, 2018.

11/16/18

Date of Signature

Kara Odom Walker, MD, MPH, MSHS  
Secretary, DHSS

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

<http://regulations.delaware.gov/register/december2018/final/Health Home Services.pdf>  
**Health Home Services**

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## DIVISION OF SOCIAL SERVICES

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

### ORDER

#### Child Care Eligibility

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Social Services initiated proceedings to amend Division of Social Services Manual (DSSM) regarding Child Care Eligibility, specifically, *to amend authorization requirements*. 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 October 2018 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by October 31, 2018 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### SUMMARY OF PROPOSAL

Effective for services provided on and after December 12, 2018 the Delaware Health and Social Services/ Division of Social Services proposes to amend the Division of Social Services Manual section 11004.9.5 and 11004.12 of the Division of Social Service Manual regarding Child Care Eligibility.

#### Statutory Authority

- 45 CFR 98.21 - Eligibility determination processes
- Child Care and Development Block Grant (CCDBG) Act

#### Background

The Child Care and Development Block Grant Act of 2014, requires authorization of 12 months of child care to any child who is determined eligible to receive subsidized child care and cases may only be closed based on limited changes in household circumstances. In 2014, the Child Care Development Block Grant Act was reauthorized with the focus on safety and continuity of care for children receiving child care subsidy funds. States are required to revise policies to support the requirements.

#### Purpose

The Child Care and Development Block Grant Act of 2014, requires authorization of 12 months of child care to any child who is determined eligible to receive subsidized child care and cases may only be closed based on limited changes in household circumstances. In 2014, the Child Care Development Block Grant Act was reauthorized with the focus on safety and continuity of care for children receiving child care subsidy funds. States are required to revise policies to support the requirements.

#### Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Social Services (DSS) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on

the proposed regulation. Comments were to have been received by 4:30 p.m. on October 31, 2018.

### Fiscal Impact Statement

The policy amendment will have no fiscal impact since the purpose is to revise the requirements of the program. The policy amendment does not require any additional staff, system changes, agency costs, etc.

### Summary of Comments Received with Agency Response and Explanation of Changes

Two commenters offered the following summarized observations:

**Comment:** Both commenters raised concern that the proposed amendment specified DSS case workers must set child care authorizations for a period of 12 months, unless a limited set of exceptions apply. The suggestion was that the list of exceptions was limiting and does not mention situations involving illness or the need to care for a family member.

**Agency Response:** DSS agrees with the request for additional circumstances to a temporary change regarding situations involving an illness or the need to care for a family member. Additional language has been added to the policy so that there will not be a limit to the situations that may cause a temporary change.

**Comment:** Both commenters agreed that DHSS seeks to close child care cases upon the "death of the case head or of the authorized child." Rather than automatically closing a case upon the death of the case head, DSS should evaluate whether a basis for continued eligibility still exists rather than disrupting services and forcing a new caretaker to reapply for benefits.

**Agency Response:** DSS appreciates the suggestion to evaluate the basis for continued eligibility in the event of the death of the case head. There are operational procedures as well as notification requirements in place based on a change in a household circumstance.

**Comment:** Both commenters were concerned that fluctuations in income would result in the closure of a child care case due to income exceeding 85% of SMI.

**Agency Response:** Policy 11003.9.5 Making Income Determinations states, "If the income is different from pay to pay, use the income from the previous month or the average of the last three months income, whichever is less. This applies for earned and unearned income." A more comprehensive and detailed income policy will be developed in the near future.

**Comment:** Both commenters requested clarification regarding DSS' proposed language related to case closure due to excessive unexplained absences and mailing of Form 330, "Request for Contact". The concern was that DSS should revise this language to make it clear that they must reach out to both families and providers multiple times and notify them of the risk of termination of benefits.

**Agency Response:** DSS appreciates the comments in regards to unexplained absences and closing of child care cases. An operational procedure will be put in place to support the policy.

**Comment:** Both commenters wrote that the 10-day closing notice should cross-reference DSSM 5300, which outlines the requirements for timely and adequate notice. In addition, the proposed language should explicitly require termination notices to include the specific reason(s) for case closure.

**Agency Response:** DSS appreciates the recommendation to cross reference DSSM 5300 in regards to the 10-day closing notice. Notices in the enhanced child care eligibility system will be more specific.

**Comment:** Both commenters suggested that the proposed provisions on ending child care eligibility lacked references to possible barriers to compliance.

**Agency Response:** DSS appreciates your referencing possible barriers and allowing 30 days for families to provide necessary documentation. DSS has in place Presumptive Child Care in which child care may be open before any documentation is received from the applicant. All applicants and recipients of the child care program do have 30 days to return requested verifications to determine eligibility; this can be cross-referenced with Policy 2000.5 Filing Dates and Processing Standards. Another policy that can be cross-referenced is Policy 11004.11 Review/Determination; in this policy there is a list of good cause reasons:

"Good cause can be anything believed to be reasonable, but generally includes things such as:

1. illness;
2. court required appearance;
3. A household emergency (fire, heating problem, family crisis, etc.);
4. lack of transportation; or
5. inclement weather."

DSS is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful

input given.

## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the October 2018 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding Child Care Eligibility, specifically, *to amend authorization requirements* is adopted and shall be final effective December 11, 2018.

11/16/18

Date of Signature

Kara Odom Walker, MD, MPH, MSHS  
Secretary, DHSS

## AMENDED

### POLICY – AMENDMENT

Delaware Health and Social Services  
Division of Social Services  
Policy and Program Development Unit

#### 11004.9.5 Establishing 12-Month Authorization for Child Care

45 CFR 98.21

Families approved for Purchase of Care must be authorized for 12 months of child care.

- 1. DSS case workers must set Purchase of Care authorizations for a 12-month period.**
- 2. Purchase of Care authorizations may be set for a shorter period only if the client provides a written statement verifying the length of time requested for child care. The written statement may be from:**
  - The parent or caretaker;
  - A medical professional verifying the length of time child care is required for a special need;
  - The Delaware Division of Family Services (DFS) verifying the length of time child care is needed to prevent child abuse or neglect.
- 3. Purchase of Care authorizations must continue during the following circumstances:**
  - The child turns 13 years old during the authorization period;
  - The child is temporarily out of state;
  - The parent or caretaker experiences a temporary change in work, education, or training, including[, but not limited to:
    - i. ~~an~~ An] injury resulting in time off of work,
    - [ii. a A] break from approved educational study, or
    - [iii. a A] transition from past employment to new employment[=;
  - Any other temporary circumstance in a household that will not exceed 90 days.]**

## AMENDED

**POLICY – AMENDMENT**

Delaware Department of Health and Social Services  
 Division of Social Services  
 Policy and Program Development Unit

**11004.12 Closing Child Care Cases**

~~A parent/caretaker's authorization for service should end when any of the following occurs:~~

- ~~A. the parent/caretaker need no longer exists;~~
- ~~B. the parent/caretaker's income exceeds income limits;~~
- ~~C. the parent/caretaker fails to pay the child care fees or fails to make arrangements to pay past fees owed;~~
- ~~D. the parent/caretaker refuses to provide requested information or verification of eligibility;~~
- ~~E. the parent/caretaker is a Food Stamp Employment & Training (FS E&T) participant who is sanctioned;~~
- ~~F. a protective case fails to follow the Division of Family Services case plan;~~
- ~~G. at the request of the parent/caretaker;~~
- ~~H. if program funds should be reduced; and;~~
- ~~I. if a parent/caretaker is a TANF child care participant who is sanctioned.~~

~~When closing cases, send the appropriate closing notice which provides a ten day notice. DSS programmed the DCIS II Child Care Sub system to allow for ten day notice before an authorization closes, and informs the participant of his/her right to a Fair Hearing.~~

~~When a case and the authorization is closed the system will end date the case and authorization the last day of the current month or the next month if 10 day notice can not be given.~~

**45 CFR 98.21 (a)**

This policy applies when DSS ends child care eligibility and authorization for services.

- 1. DSS will close child care cases prior to redetermination or during graduated phase-out due to:**
  - Excessive unexplained absences of the child from the child care site;
  - A permanent change in the child's residency;
  - The family's income exceeding 85% of the state median income (SMI);
  - Substantiated fraud or intentional program violations;
  - A written request to close the case or to authorize child care for a specific length of time (see DSSM 11004.9.5); or
  - The death of the case head or of the authorized child.
- 2. DSS case workers must complete the following steps prior to closing child care cases for excessive unexplained absences:**
  - Mail Form 330 "Request for Contact" to the parent or caretaker to request clarification regarding the child's absences;
  - Close the child care case if the parent or caretaker does not contact the DSS office by the requested due date.
- 3. The DSS eligibility system will:**

- Provide a 10-day closing notice informing the parent or caretaker of their right to a fair hearing:
- End date the authorization on the last day of the current month. If a 10-day notice cannot be given, the authorization will end on the last day of the next month.

Note: Excessive unexplained absence is defined as 10 or more unexplained absences per month.

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## DEPARTMENT OF INSURANCE

### OFFICE OF THE COMMISSIONER

Statutory Authority: 18 **Del.C.** §§314, 2101 & 505; 29 **Del.C.** Ch. 101; 29 USC §1144(b)(6)(A)(i); and in response to 29 CFR 2510.3-5  
18 **DE Admin. Code** 1405

### REGULATORY IMPLEMENTING ORDER

#### 1405 Filing Requirements for Multiple Employer Welfare Arrangements

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

##### A. Background

In the September 1, 2018 edition of the *Register of Regulations*, at 22 DE Reg. 180 (September 1, 2018), the Commissioner of the Delaware Department of Insurance (Commissioner) published an order making Emergency Regulation 1405, Filing Requirements for Multiple Employer Welfare Arrangements, immediately effective. Emergency Regulation 1405 became effective on publication and remains in effect for 120 days unless the Commissioner orders a one-time 60-day extension of the effective time period.

Elsewhere in the September 1, 2018 edition of the *Register of Regulations* (see 22 DE Reg. 202 (September 1, 2018)), the Commissioner published a notice of intent to codify proposed new Regulation 1405, the text of which is identical to the text of Emergency Regulation 1405, and solicited written comments from the public for thirty (30) days as mandated by the Administrative Procedures Act at 29 **Del.C.** §10118(a).

In the concurrent proposal, the Commissioner proposed to repeal then-existing Regulation 1405 and replace it with new Regulation 1405, Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans. The authority for the proposed new regulation is 18 **Del.C.** §§311, 505, and 2101, 29 **Del.C.** Ch. 101, and 29 USC §1144(b)(6)(A)(i), and in response to 29 CFR 2510.3-5. The Emergency Regulation currently in effect has temporarily accomplished the repeal and replacement of then-existing Regulation 1405. However, to ensure that the repeal and replacement can be permanently codified, the Commissioner determined to provide the public the opportunity to review and comment on the proposed new rule pursuant to Administrative Procedures Act requirements.

As discussed in the introductory language to the concurrent proposal, a new federal regulation, to be codified at 29 CFR pt. 2510, redefines "employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA) (hereinafter the "Final Rule"). In response, the Department determined to rescind Regulation 1405, entitled "Requirements for Multiple Employer Welfare Arrangements [Formerly Regulation 67]," and replace it with new Regulation 1405, entitled "Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans."

The Department received timely submitted comments from three commenters, copies of which are on file with the Department. The Department did not hold a public hearing on the proposal.

##### B. Summary of Comments Received

The American Heart Association (the AHA) offered its support of the proposed regulation as written, touting the regulation's overall protections for patients and insureds. The AHA also offered strong support for the cost sharing requirements that protect consumers and the surplus requirements in Section 6.0, the rate approval and the medical loss ratio (MLR) standard in Section 7.0, the inclusion of Section 8.0 which codifies the patient protections

central to the Federal Patient Protection and Affordable Care Act (ACA), and the additional consumer protections built into Section 17.0 relating to insurance agents and brokers.

The Leukemia & Lymphoma Society (the LLS) also articulated its overall support of the proposed regulation, offering particular support for the prohibition of risk rating factors such as health status and medical underwriting in subsection 7.3.2, the imposition of an 85 percent medical loss ratio (MLR) in Section 7.0, and the imposition of benefit requirements in section 8.0 that mirror those currently established by the ACA.

At Section 8.0, the LLS suggested that the Department consider either replicating the relevant language of 42 USC §18022 within Regulation 1405, or specifying within the reference that the standard to be used is 42 USC §18022 as it existed on a date certain (for instance, the date of implementation of the regulation). LLS suggested that doing so would preserve the standard of protection if changes are ever made to the cross-referenced federal statute or regulation.

Highmark, Inc. submitted questions about the implementation of the proposed regulation, suggested that the Department propose definitions of "member," "certificate holder," "association," and "plan intermediary," and suggested that the Department consistently refer to an "association or MEWA" as a "fully insured association or MEWA" throughout the regulatory text. Highmark also pointed out that the term "fully insured" references plan coverage by a foreign or domestic insurer licensed to do business in Delaware "under 18 **Del.C.** Ch.5," which can be interpreted to mean that the regulation does not apply to entities such as, for example, health services corporations (HSCs) who are subject to 18 **Del.C.** Ch. 63, since those entities are not licensed under Chapter 5. Highmark also pointed out that subsection 5.5 is inconsistent with the remaining portions of the regulation, because subsection 5.5 appears to regulate only self-insured associations or MEWAs, while, by its title, the regulation states that it contains "Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans" (emphasis added). Finally, Highmark suggested changing "contract" to "health insurance contract" in subsection 16.2 to clarify that this provision applies to health insurance contracts rather than administrative-services-only contracts.

## II. FINDINGS OF FACTS

The Commissioner finds that it is appropriate to adopt 18 **DE Admin. Code** 1405 as proposed in the September 1, 2018 *Register of Regulations*, for the reasons set forth above and in the proposal, with the following amendments that the Commissioner has determined do not require further public notice or comment under the APA because the amendments are non-substantive pursuant to 29 **Del.C.** §10118(c):

- A. In Section 8.0, specify within the cross-references to Federal statutes and regulations the specific version of the referenced Federal statute or regulation to which the Section refers;
- B. Add "fully insured" to subsections 6.2, 6.4, 6.6, 6.7, 6.7.1, 6.7.2, 6.7.3, 8.4, 12.1, 12.3.1, 12.3.2, 12.4, 12.5, 12.6, 12.7, 12.8, 13.0, 14.0, 15.1, 15.2, 15.3, 15.6, 16.0, 16.1, 16.2, 16.3, 16.3.1, 17.1, 17.1.1.2, 17.1.3, 17.1.4 and 17.2, because, as is evident in the proposal of the new regulation and in the proposed regulatory text, the regulation applies to fully insured associations and MEWAs;
- C. Delete subsection 5.5 because this subsection appears to be an inconsistent carry-over from the original regulation 1405 that does not fit within the structure of the current regulation;
- D. Revise the definition of "fully insured" to clearly track the definition of "insurer." "Insurer" clearly contemplates that the regulation applies both to insurers and to such other entities that are not licensed under Chapter 5 such as HSCs. Accordingly, the Department will delete the phrase "under the provisions of 18 **Del.C.** Ch. 5 and" from the definition of "fully insured," to bring these two definitions into alignment;
- E. Changing "contract" to "health insurance contract" in subsection 16.2 to clarify that this provision applies to health insurance contracts rather than administrative-services-only contracts; and
- F. Add Section 19 concerning the effective date of the Regulation to codify the requirement of the APA that the effective date of the Regulation shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*, pursuant to the APA at 29 **Del.C.** §10118 and 29 **DE Admin. Code** 101 - 5.4.

## III. DECISION TO REPEAL THE EMERGENCY REGULATION AND ADOPT THE NEW REGULATION

For the foregoing reasons, the Commissioner concludes that it is appropriate to adopt 18 **DE Admin. Code** 1405 with the non-substantive amendments discussed in the above Findings of Fact. The Commissioner concludes that it is also appropriate to repeal Emergency Regulation 1405 as of the effective date of the newly adopted Regulation 1405 that is the subject of this order.

## V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Commissioner pursuant to 18 **Del.C.** §§311, 505, and 2101, 29 **Del.C.** Ch. 101, and 29 USC §1144(b)(6)(A)(i) and in response to 29 CFR 2510.3-5 on the date indicated below. This Order shall effective on the date signed. The effective date of the Regulation shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*, pursuant to 29 **Del.C.** §10118 and 29 **DE Admin. Code** 101 - 5.4.

### IT IS SO ORDERED.

The 14<sup>th</sup> day of November, 2018.

Trinidad Navarro  
Commissioner  
Delaware Department of Insurance

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

**1405 Filing Requirements for Multiple Employer Welfare Arrangements**

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## 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** 1147

**Secretary's Order No.: 2018-A-0061**

**Date of Issuance: November 8, 2018**

**Effective Date of the Amendment: December 11, 2018**

### 1147 CO<sub>2</sub> Budget Trading Program

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 **Del.C.** §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

### Background, Procedural History and Findings of Fact

This Order relates to proposed regulation amendments ("Amendments") to 7 **DE Admin. Code** 1147: *CO<sub>2</sub> Budget Trading Program ("RGGI Regulations")*. This action is being taken by the Department to align Delaware's CO<sub>2</sub> Budget Trading Program to be consistent with the Regional Greenhouse Gas Initiative's Updated Model Rule, as amended December 2017 ("Updated Model Rule").

The Regional Greenhouse Gas Initiative ("RGGI") is a cooperative effort of nine Northeast and Mid-Atlantic states to regulate and reduce carbon dioxide emissions from the power sector. In accordance with each state's independent legal authority, Connecticut, Delaware, Maine, Massachusetts, Maryland, New Hampshire, New York, Rhode Island, and Vermont ("Participating States") have each committed to propose statutory and/or regulatory

approval revisions to their CO<sub>2</sub> Budget Trading Programs, substantially consistent with the aforementioned Updated Model Rule.

The CO<sub>2</sub> Budget Trading Program was established in 2005 by the Participating States through a Memorandum of Understanding ("MOU"). This MOU outlined the RGGI program design elements, and directed each Participating State to develop a Model Rule for use in their state-specific rule-making processes. The design elements in this MOU were then incorporated into the Model Rule. The 2005 program design elements included the level of the regional emissions cap, the apportionment of each state's portion of that regional cap, the schedule for reductions in the cap through 2018, a three-year compliance period for compliance entities, provisions for offsets (which are the reductions in greenhouse gases from sources outside the electric-generating sector), and the establishment of the first program review, which occurred in 2012. Delaware's RGGI regulations, initially promulgated by DNREC in 2008, established a compliance obligation on fossil fuel-fired electricity generating units with capacities greater than 25 megawatts to report their CO<sub>2</sub> emissions and surrender the corresponding CO<sub>2</sub> allowances for those emissions.

The Department's authority that was established for Delaware's RGGI regulations is found at 7 **Del.C.** §§6043-6046, whereby the General Assembly explicitly authorizes and sanctions prior and ongoing participation of both the DNREC Cabinet Secretary and the Chair of the Public Service Commission, and their duly authorized representatives, to implement and participate in the Regional Greenhouse Gas Initiative. Moreover, the DNREC Cabinet Secretary is further authorized therein to promulgate regulations to implement the RGGI cap-and-trade program, consistent with the aforementioned MOU.

Specifically, 7 **Del.C.** §6043(a)(9) provides as follows: (1) the MOU sets an initial emissions cap of 7,559,787 of short tons of CO<sub>2</sub> for the State of Delaware; (2) a minimum of twenty-five percent (25%) of Delaware's allocation of the CO<sub>2</sub> allowances under the RGGI cap-and-trade program to be used for public benefit purposes; and (3) the cap and Delaware's allocation may be adjusted in the future.

As called for in the RGGI 2012 Program Review, the Participating States conducted a second program review, now known as the RGGI 2016 Program Review. The RGGI 2016 Program Review was a rigorous and comprehensive evaluation supported by an extensive regional stakeholder process that engaged the regulated community, environmental non-profit organizations, industry advocates, and other interested stakeholders. The Participating States have been working with program review stakeholders since 2015, convening nine stakeholder meetings and webinars. Delaware hosted one of those stakeholder meetings in Wilmington, Delaware on February 22, 2016. The program review has sought to ensure RGGI's continued success, effectively reducing CO<sub>2</sub> emissions while providing benefits to consumers in the region.

The Department's proposed regulatory amendments to 7 **DE Admin. Code** 1147 would implement the program changes presented in the Updated Model Rule and the 2016 Program Review Principles. These changes were agreed upon by the Participating States after the aforementioned comprehensive two-year program review. The purpose of the Updated Model Rule is to serve as a template for similar modifications to each of the Participating States' existing CO<sub>2</sub> trading programs.

The above-referenced modifications strengthen the RGGI program, make it more effective, and realign the regional cap with current emission levels, which are significantly lower than the current regional levels. The proposed changes include the following:

- (1) A reduction in the regional CO<sub>2</sub> budget ("the RGGI cap") for years 2021 through 2030, and for each succeeding year thereafter;
- (2) Adjustments to the RGGI cap in years 2014 through 2020 to account for the private bank of allowances;
- (3) Adjustments to the size of the Cost Containment Reserve ("CCR") to an annual quantity of ten percent (10%) of the State's budget, beginning in 2021;
- (4) Modifications to the CCR trigger price to \$13.00 beginning in 2021 and rising by 7% each year thereafter;
- (5) The establishment of an Emission Containment Reserve to respond to supply and demand in the market if emission reduction costs are lower than projected, beginning in 2021;
- (6) Updates to the RGGI offsets program and removal of two protocols, or offset categories, for SF<sub>6</sub> and End-Use Energy Efficiency; and
- (7) Numerous administrative changes and updates, including updates to all documents that are incorporated by reference in the updated model log.

The Department, along with the other Participating States, also conducted macroeconomic modeling and customer bill analysis in 2017, in order to determine the impacts of the proposed regulatory amendments.

Specifically, the Participating States contracted through RGGI, Inc., to hire ICF, a consulting firm, to use its Integrated Planning Model (“IPM”) to project electricity sector and economic impacts of the numerous proposed potential policy change scenarios. The impacts of these scenarios were then compared against the current RGGI program.

Sensitivity analyses were also conducted to examine impacts resulting from changes to key input variables, such as relative fuel prices and electricity load projections. The IPM outputs were then used as inputs to the economic analyses, including Regional Economic Models, Inc. (“REMI”)’s macroeconomic modeling and customer bill impact analyses<sup>1</sup>. The REMI model showed that the regional economic impacts (which are the cumulative change in Gross State Product, cumulative change in employment, and cumulative change in real personal income) will result in positive impacts for all electricity ratepayers (actually causing billing to be lower), beginning in 2021.

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to **7 DE Admin. Code 1147: CO<sub>2</sub> Budget Trading Program**, pursuant to **7 Del.C. Ch. 60**, specifically, at §§6043-6046. The Department published its initial proposed regulation Amendments in the August 1, 2018 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on August 29, 2018.

It should be noted that, subsequent to the initial proposed regulatory Amendments having been published in the *Delaware Register of Regulations* on August 1, 2018, but prior to the public hearing held on August 29, 2018, numerous clerical errors were found by the Department in the initial proposed Amendments. The Division of Air Quality provided errata handouts for those in attendance at the aforementioned hearing, which charted all of the errors contained within the initial proposed Amendments, and then illustrated the corrected language being made to the same. This errata chart was fully vetted to the public at the time of the hearing, and was also placed on the Department’s website page fully dedicated to this proposed regulatory promulgation. Given this, no additional public vetting or re-publication of the Department’s proposed *revised* Amendments is required in this matter.

Members of the public attended the aforementioned public hearing, with comment being received by the Department at that time. Given the amount of interest concerning this regulatory promulgation, the record remained open for thirty (30) additional days (as opposed to the standard fifteen-day period) subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed for comment in this matter at close of business on September 28, 2018, with additional comment having been received by the Department during the post-hearing phase of this formal promulgation.

After the close of the comment period, the Department performed a thorough review of the hearing record, including all of the comments received on the proposed Amendments. The full range of comments contained in the formal hearing record includes not only those from members of the public, but from other contributors as well, such as the Delaware Electric Cooperative, Sierra Club, the Caesar Rodney Institute, and the State of Delaware House of Representatives.

It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

At the request of the presiding Hearing Officer, a Technical Response Memorandum (“TRM”) was prepared by the Department’s Division of Air Quality staff to serve as a comprehensive summary of the comment received in this matter. The Department’s TRM not only provides a thorough discussion of the comment received in this matter, but also provides the Department’s responses and recommendations concerning the same.

Hearing Officer Vest prepared a Hearing Officer’s Report dated November 2, 2018 (“Report”), which expressly incorporated both the Department’s proposed *revised* Amendments and the aforementioned TRM into the hearing record generated in this matter. The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed *revised* Amendments as attached to the Report as Appendix “A.”

### **Reasons and Conclusions**

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1. Regional Economic Models, Inc., is a dynamic forecasting and policy analysis tool used throughout the world for a wide range of topic areas, including economic development, the environment, energy, transportation, and taxation, forecasting, and planning. See [http://ledsgp.org/resource/regional-economic-models-inc/?loclang=en\\_gb](http://ledsgp.org/resource/regional-economic-models-inc/?loclang=en_gb)

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed *revised* regulatory amendments to **7 DE Admin. Code 1147: CO<sub>2</sub> Budget Trading Program**, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed *revised* Amendments be promulgated as final. I further find that the Department's experts in the Division of Air Quality fully developed the record to support adoption of these *revised* Amendments.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed *revised* Amendments to **7 DE Admin. Code 1147: CO<sub>2</sub> Budget Trading Program**, pursuant to **7 Del.C. §§6043-6046**;
2. The Department has jurisdiction under its statutory authority, pursuant to **7 Del.C. Ch. 60**, to issue an Order adopting these proposed *revised* Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed *revised* Amendments, including at the time of the public hearing held on August 29, 2018, and during the 30 days subsequent to the hearing (through September 28, 2018), before making any final decision;
4. Promulgation of the proposed *revised* Amendments to **7 DE Admin. Code 1147: CO<sub>2</sub> Budget Trading Program**, will enable the Department to align Delaware's CO<sub>2</sub> Budget Trading Program to be consistent with the Regional Greenhouse Gas Initiative's Updated Model Rule, as amended December 2017, as referenced above;
5. The Department has reviewed the proposed *revised* Amendments in the light of the Regulatory Flexibility Act, consistent with **29 Del.C. Ch. 104**, and has selected Exemption "A," as this regulation will not apply to small businesses or individuals at all;
6. The Department's Hearing Officer's Report, including its established record and the recommended proposed *revised* Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;
7. The Department's proposed regulatory Amendments, as initially published in the August 1, 2018 Delaware *Register of Regulations*, and then as *revised*, as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the Delaware *Register of Regulations*; and
8. The Department shall submit the proposed *revised* Amendments as final regulatory amendments to **7 DE Admin. Code 1147: CO<sub>2</sub> Budget Trading Program**, 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.

Shawn M. Garvin  
Secretary

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

**1147 CO<sub>2</sub> Budget Trading Program**

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**DIVISION OF CLIMATE, COASTAL AND ENERGY**

Statutory Authority: 29 Delaware Code, Section 8059(h) (29 Del.C. §8059(h))  
**7 DE Admin. Code 2105**

Secretary's Order No.: 2018-CCE-0059  
Date of Issuance: November 8, 2018  
Effective Date of the Amendment: December 11, 2018

**2105 Regulations Governing Evaluation, Measurement, and Verification Procedures and Standards**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental

Control ("Department" or "DNREC"), pursuant to 29 **Del.C.** §§8058-8059, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

## Background, Procedural History and Findings of Fact

This Order relates to proposed regulation amendments ("Amendments") to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards* ("EM&V", "EM&V Regulations"). The Department's EM&V Regulations define the standards for evaluation, measurement, and verification procedures as they are administered by the State of Delaware's Energy Efficiency Advisory Council ("EEAC"). The EEAC is a thirteen-person council comprised of energy efficiency stakeholders from DNREC, the Delaware Sustainable Energy Utility, and affected energy providers and representatives from the manufacturing, commercial environmental, agricultural, low-income, and residential sectors. The EEAC assists affected energy providers in the development of energy efficiency, peak demand reduction, and emission-reducing fuel switching programs.

In collaboration with the Delaware Public Advocate and the Public Service Commission, the EEAC is tasked to review energy efficiency program plans to ensure that programs are deployed and energy savings targets are met through EM&V standards. The Department oversees the competitive process for acquiring EEAC consulting services, as well as the management of day-to-day consultant efforts. The Chair of the EEAC, and any subcommittees therein, are charged to plan, implement and review the responsibilities defined within the proposed new EM&V Regulations. The EEAC reviews and recommends programs submitted by Program Administrators<sup>1</sup>, reviews and approves the recommendations of subcommittees, and reviews and recommends portfolio-level EM&V plans and budgets.

Under the authority of, and as required by 29 **Del.C.** §8059(h)(3), the Department initially promulgated its EM&V Regulations in 2017 in order to: (1) develop and govern the overall approach to the evaluation of energy efficiency and demand response programs in Delaware; (2) standardize evaluation approaches for the assessment of energy efficiency and demand response programs; (3) provide specific guidance to Program Administrators, contractors, and stakeholders for the evaluation of energy efficiency and demand response programs; and (4) ensure consistency between Program Administrators' energy efficiency evaluation plans, analysis, and reporting efforts.

The EM&V is a vital tool in creating consensus around the impact of current and future investments to reduce energy use and peak demand in Delaware. Results from EM&V are critical to the assessment of progress in meeting Delaware's energy efficiency and peak demand targets outlined in the Energy Efficiency Resource Standards Act, the State of Delaware's "Lead by Example" policy, and the Delaware Sustainable Energy Utility's legislated goals. The results from EM&V provide valuable feedback to improve programs during implementation or suggest their cancellation, inform the development of new programs, and guide the allocation of resources.

The EM&V Regulations include a technical resource manual, the Mid-Atlantic Technical Resource Manual, with an addendum of Delaware-specific measures. In May of 2017, the newest version of this manual was released. Since this manual is incorporated into these regulations and not simply referenced, the EM&V Regulations must be updated to include the newest version. Additionally, the EM&V subcommittee to the EEAC has prepared a list of recommended edits to these regulations. This action is being taken by the Department at this time to update the new Technical Resource Manual and implement recommended edits from the EM&V subcommittee.

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<sup>1</sup> "Program Administrator (PA)" is a defined term, both statutorily and within the Department's EM&V Regulations, as follows: "...any effected energy providers, as defined by 29 **Del.C.** §8059(h) and any other entities who deliver energy efficiency programs and want the energy savings generated to count toward the statewide energy reductions goals."

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards*, pursuant to 29 **Del.C.** §8059(h)(3). The Department published its initial proposed regulation Amendments in the September 1, 2018 Delaware *Register of Regulations*. Thereafter, the public hearing regarding this matter was

held on September 25, 2018. Members of the public attended that public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at close of business on October 10, 2018, with no comment having been received by the Department during any phase of this proposed regulatory promulgation. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Lisa A. Vest prepared the Hearing Officer's Report dated October 22, 2018 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A."

### Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory amendments to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final. I further find that the Department's experts in the Division of Climate, Coastal and Energy fully developed the record to support adoption of these revised regulatory Amendments.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards*, pursuant to 29 **Del.C.** §8059(h)(3);
2. The Department has jurisdiction under its statutory authority, pursuant to 29 **Del.C.** Ch. 101, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on September 25, 2018, and during the 15 days subsequent to the hearing (through October 10, 2018), before making any final decision;
4. Promulgation of the revised proposed Amendments to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards*, will enable the Department to update the new Technical Resource Manual and implement recommended edits from the EM&V sub-committee, as referenced above;
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and has selected Exemption "A" as this regulation will not apply to small businesses or individuals at all;
6. The Department's Hearing Officer's Report, including its established record and the recommended proposed Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;
7. The Department's proposed regulatory Amendments, as initially published in the September 1, 2018 *Delaware Register of Regulations*, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
8. The Department shall submit this Order approving as final the proposed Amendments to 7 **DE Admin. Code** 2105: *Evaluation, Measurement & Verification Procedures and Standards* 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.

Shawn M. Garvin  
Secretary

\*Please note that no changes were made to the regulation as originally proposed and published in the September 2018 issue of the *Register* at page 210 (22 DE Reg. 210). Therefore, the final regulation is not

being republished. A copy of the final regulation is available at:

**2105 Regulations Governing Evaluation, Measurement, and Verification Procedures and Standards**

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**DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Sections 901(c) & (d) and 903(b), (e), (f) & (i); (7 **Del.C.** §§901(c) & (d) and 903(b), (e), (f) & (i))  
**7 DE Admin. Code 3531**

**Secretary's Order No.: 2018-F-0056**

**Date of Issuance: October 23, 2018**

**Effective Date of the Amendment: December 11, 2018**

**3531 Tautog; Size Limits, Creel Limits and Seasons**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 **Del.C.** §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

**Background, Procedural History and Findings of Fact**

This Order relates to proposed regulation amendments ("Amendments") to 7 **DE Admin. Code 3531: Tautog: Size Limits, Creel Limits and Seasons**. This action is being taken by the Department to adopt provisions consistent with current regional measures proposed for both recreational and commercial Tautog management, in compliance with Amendment 1 to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan for Tautog. Amendment 1 provides for the regional management of Tautog, based on the most recent stock assessment findings. That stock assessment indicated that the Delaware, Maryland and Virginia ("DelMarVa") component of the stock is overfished. The recreational and commercial management measures proposed in this action will improve the stock condition of the Tautog fishing resource.

The aforementioned Amendment 1 to the Interstate Fishery Management Plan for Tautog requires that Delaware implement recreational and commercial management measures consistent with the other states in the DelMarVa region. These measures include a 16-inch minimum size limit, a four (4) fish possession limit, and a closed season from May 16 through June 30. Additionally, based upon evidence from law enforcement officials that indicated significant illegal sales of Tautog, states with commercial Tautog fisheries must implement a commercial harvest tagging program by January 1, 2019. Implementation of such a program will require preregistration, harvest tagging, and tag reporting accountability measures to deter the illegal sale of Tautog. Lastly, to prevent or reduce mortality from lost commercial fishing gear, Amendment 1 requires certain degradable materials on pot and trap gear from which Tautog are retained.

The procedural requirements of 29 **Del.C.** §§10115 - 10118 precluded timely implementation of the measures noted above, and would have potentially jeopardized Delaware's Tautog fishing resource through the continuance of unnecessary closures during the periods of May 12 through July 16, and September 1 through September 28 (which are periods of high fishing activity, as they include Independence Day and Labor Day). Those unnecessary closures would have impacted the recreational and commercial fisheries, as well as their dependent businesses (such as seafood retailers, bait and tackle stores, etc.), and would have put the affected parties at a competitive disadvantage to neighboring states. Therefore, pursuant to 29 **Del.C.** §10119 and 7 **Del.C.** §903(h), the Department adopted emergency regulations with the issuance of Secretary's Order No. 2018-F-0035, effective July 1, 2018, in order to immediately implement the aforementioned necessary regulatory change.

The required minimum size limit, possession limit, and closed season are currently in effect through the aforementioned prior issuance of Secretary's Order No. 2018-F-0035. However, these measures, along with all other measures as required by Amendment 1, must be promulgated through the full provisions of the Administrative Procedures Act, as referenced above. Thus, the Department commenced its formal regulatory amendment process with Start Action Notice #2018-08 (April 29, 2018).

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to 7 **DE Admin. Code** 3531: *Tautog: Size Limits, Creel Limits and Seasons*, pursuant to 7 **Del.C.** §901 (c & d), and §903(e)(2)(a). The Department published its initial proposed regulation Amendments in the August 1, 2018 Delaware *Register of Regulations*. Thereafter, the public hearing regarding this matter was held on August 23, 2018. One member of the public attended that public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at close of business on September 7, 2018, with no comment having been received by the Department during any phase of this proposed regulatory promulgation. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Lisa A. Vest prepared the Hearing Officer's Report dated October 17, 2018 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A."

### Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory amendments to 7 **DE Admin. Code** 3531: *Tautog: Size Limits, Creel Limits and Seasons*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final. I further find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these revised regulatory Amendments.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 **DE Admin. Code** 3531: *Tautog: Size Limits, Creel Limits and Seasons*, pursuant to 7 **Del.C.** §901 (c & d) and §903(e)(2)(a);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on August 23, 2018, and during the 15 days subsequent to the hearing (through September 7, 2018), before making any final decision;
4. Promulgation of the proposed Amendments to 7 **DE Admin. Code** 3531: *Tautog: Size Limits, Creel Limits and Seasons*, will enable the Department to bring Delaware's existing Regulations into compliance with current regional measures proposed for both recreational and commercial Tautog management, specifically: (1) a 16-inch minimum size limit; (2) a four (4) fish possession limit; (3) a closed season from May 16 through June 30; (4) the implementation of a commercial harvest tagging program by January 1, 2019, which will require preregistration, harvest tagging, and tag reporting accountability measures to deter the illegal sale of Tautog; and (5) to prevent or reduce mortality from lost commercial fishing gear, the requirement of certain degradable materials on pot and trap gear from which Tautog are retained;
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
6. The Department's Hearing Officer's Report, including its established record and the recommended proposed Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;
7. The Department's proposed regulatory Amendments, as initially published in the August 1, 2018 Delaware *Register of Regulations*, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the Delaware *Register of Regulations*; and

8. The Department shall submit this Order approving as final the proposed Amendments to 7 **DE Admin. Code** 3531: *Tautog: Size Limits, Creel Limits and Seasons* 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.

Shawn M. Garvin  
Secretary

**\*Please note that no changes were made to the regulation as originally proposed and published in the August 2018 issue of the *Register* at page 142 (22 DE Reg. 142). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**3531 Tautog; Size Limits, Creel Limits and Seasons**

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## DEPARTMENT OF STATE DIVISION OF CORPORATIONS

Statutory Authority: 8 Delaware Code, Section 132; 6 Delaware Code, Sections 15-111, 17-104 and 18-104 (8 **Del.C.** §132; 6 **Del.C.** §§15-111, 17-104 & 18-104)

### ORDER

#### Registered Agent Customer Entity Verification Requirements

Pursuant to 29 **Del.C.** §8703(7), the Department of State ("DOS" or "the Department") published proposed regulations to establish customer entity verification requirements for registered agents in the September 1, 2018 edition of the Delaware *Register of Regulations*. Having solicited and received public comment on the proposed regulations in accordance with the *Delaware Administrative Procedures Act*, 29 **Del.C.** Ch. 101, et. seq., this is the Department's Order adopting the proposed regulations, as modified by the public submissions outlined below.

#### SUMMARY OF THE EVIDENCE

1. House Bill 404 of the 149<sup>th</sup> Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 Del. Laws. C. 334, modified 8 **Del.C.** §132 and 6 **Del.C.** §§15-111; 17-104; 18-104 to authorize the Department to establish uniform entity verification regulations for registered agents to verify the identification of their customer business entities.

2. The purpose of this regulation is to clarify the obligation of registered agents in Delaware to comply with regulations as issued by DOS on matters involving filings submitted to DOS on behalf of corporations, partnerships, limited partnerships, trusts and limited liability companies. This regulation outlines requirements, standards, and procedures promulgated by DOS for registered agents regarding verification of customer entities in accordance with these recent legislative changes.

3. The Delaware *Register of Regulations* published the proposed regulations on September 1, 2018. Following publication in the Delaware *Register of Regulations*, DOS invited a period of forty-five (45) days for written comment from the public.

4. Many public comments focused on minor changes to the definition section to clarify the meaning of the defined terms. This paragraph summarizes the proposed changes to the definitions. The public comment suggests that the term "Blocked Persons" should be included in the definition of "Specially Designated Nationals" for consistency with the Office of Foreign Assets Control ("OFAC") reference. "Business Entity Formation" should refer to the act of organizing and filing documents with DOS, and non-profit entities should be included. The public comment recommends deleting a reference to "speaks" in the definition of "Business Entity Representation." A definition of "Customer" further clarifies the defined term "Customer Information." The proposed definition of "Customer" is "the person or persons intending to form, and otherwise conduct activities through, a business entity formed, registered or qualified in Delaware." In addition, the public comment suggests including "series" within the definition of "Limited Liability Company." The public comment suggested adding credit cards to the list of items that

a registered agent could check to verify identity. The comment also corrected a statutory reference to the Delaware Limited Partnership Act.

5. Other public comments suggested that registered agents may be overburdened with additional work such as data collection, research, follow-up, filing and recording data by the proposed regulation. Potentially, the proposed regulatory scheme could induce registered agents to seek deficient due-diligence methods in order to avoid the loss of clients and decreased revenue. The comments suggested a reference to "manual verification" in Section 4.1.1.1 to clarify the reasonable steps that a registered agent may take to verify customer identity. The comments propose including the phrase "before performing services for any new Customer" as a clarification of accepting a new Customer.

6. The comments further question the applicability of other related federal standards that relate to specific industries such as banking. One comment notes that the requirements of the proposed rule are more specific than the OFAC risk matrix, which could be an additional burden for registered agents. Many comments focused on the burden of quarterly periodic review. Finally, the public comments suggested a "safe harbor" for registered agents for reliance on a "Trusted Law Firm."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Delaware *Register of Regulations* published the proposed regulation to establish customer entity verification requirements for registered agents on September 1, 2018.

2. Following publication in the Delaware *Register of Regulations*, the DOS provided a period of forty-five (45) days for written comment from the public.

3. The public notice and opportunity to provide public comments in writing afforded by DOS complied in all respects with the *Delaware Administrative Procedures Act*, Section 10115 of Title 29 of the Delaware Code.

4. In response to the invitation for public comment, DOS received several insightful comments concerning the proposed regulation, as summarized above.

5. The Department finds that it is authorized to establish uniform entity verification regulations for registered agents to verify the identification of their customer business entities pursuant to House Bill 404 of the 149<sup>th</sup> Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 Del. Laws. C. 334, which modified 8 **Del.C.** §132 and 6 **Del.C.** §§15-111; 17-104; 18-104.

6. The Department finds that it is necessary to adopt this proposed regulation to implement the legislative intent to establish uniform requirements, standards, regulations, and procedures for registered agents in Delaware to verify the identification of their customer business entities in filings submitted to DOS on behalf of corporations, partnerships, limited partnerships, trusts and limited liability companies.

7. The Department finds that the proposed regulation strikes the appropriate balance between protecting the public by ensuring that those persons prohibited from conducting business by the federal Office of Foreign Assets Control do not form entities in Delaware, without imposing undue burden on the essential business of registered agents. The Department further finds that it is appropriate to require registered agents to review complete customer registry against the OFAC register or lists at a minimum on a quarterly basis.

8. The Department adopts the following changes to the definition section of the proposed regulation as suggested by the public comment because the changes make the proposed regulation more clear to the registered agents and the general public:

- a) The term "Blocked Persons" will be included in the definition of "Specially Designated Nationals" for consistency with the Office of Foreign Assets Control reference.
- b) "Business Entity Formation" refers to the act of organizing and filing documents with DOS, and non-profit entities are included.
- c) The reference to "speaks" in the definition of "Business Entity Representation" in the proposed regulation is deleted.
- d) A definition of "Customer" is added to mean "the person or persons intending to form, and/or otherwise conduct activities through, a business entity formed or qualified in Delaware."
- e) The definition of "Limited Liability Company" will also include a "series" as set forth in the Delaware Code.
- f) The statutory reference to the Delaware Limited Partnership Act is corrected.

9. The Department incorporates a reference to "manual verification" in Section 4.1.1.1 to clarify the reasonable steps that a registered agent may take to verify customer identity. The Department adopts the comment to include "before performing services for any new Customer" as a clarification of the term accepting a new Customer.

10. DOS determines that the changes included into the regulation as the result of the public comment are procedural and not substantive in accordance with 29 **Del.C.** §10118(c). When the public notice fairly apprises the public of the issues contemplated by the agency in the rulemaking process, changes made to the proposed rule in consideration of the public comment do not require another notice period. *Collazuol v. Tulou*, 1996 WL 658966 (Del. Super. Oct. 31, 1996).

11. The Department does not adopt the public comment that proposed a safe harbor for registered agents. The safe harbor for Trusted Law Firms delegates responsibility for core functions of registered agents to verify their customer entities. While the Department does not expressly list credit cards specifically as a method to verify new customers, by design, the registered agents will exercise some discretion in their methods of identification. Except as expressly referenced to OFAC, the regulation does not incorporate other federal regulatory identification protocols.

## DECISION AND ORDER CONCERNING THE REGULATIONS

Having found that the proposed regulation is necessary, as outlined herein, the Department finds that the regulation shall be adopted as informed by the procedural changes offered in the public comment and adopted by this Order. The regulation changes will be effective on January 1, 2019 following publication of this Order in the Delaware *Register of Regulations* on December 1, 2018.

**IT IS SO ORDERED** this 20<sup>th</sup> day of November, 2018 by the Delaware Department of State.

The Honorable Jeffrey W. Bullock

### Registered Agent Customer Entity Verification Requirements

#### **1.0** Enabling Legislation

House Bill 404 of the 149<sup>th</sup> Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 **Del. Laws**, Ch. 334, modifies 8 **Del.C.** §132; 6 **Del.C.** §§[15-111,] 17-104 and 18-104 to enable the Secretary to establish regulations for Registered Agents to verify the identification of their customer business entities.

#### **2.0** Purpose

The purpose of this regulation is to clarify the obligation of Registered Agents in Delaware to comply with regulations issued by the Secretary pertaining to Business Entity Formation in matters involving filings submitted to the Secretary on behalf of corporations, partnerships, trusts, limited partnerships, and limited liability companies. This regulation outlines the standards for Registered Agents regarding verification of customer entities in accordance with House Bill 404 of the 149<sup>th</sup> Delaware General Assembly, as amended by House Amendment No. 1 and Senate Amendment No. 2, 81 **Del. Laws**, Ch. 334.

#### **3.0** Definitions

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

~~["Blocked Persons" means those persons or entities listed as such with the Office of Foreign Assets Control.]~~

~~"Business Entity Formation" means [the act of] any person, partnership, association, corporation, company, singly or jointly with others, [that organizes in organizing] under the Delaware Code and [files filing] the required documents with the Division of Corporations in the Department of State, but shall expressly exclude a nonprofit association as set forth at 6 Del.C. §1910].~~

**"Business Entity Representation"** means any person, partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), association, corporation, company, singly or jointly with others, that acts ~~[and/or speaks]~~ on behalf of any person or entity as a registered agent.

**"Corporation"** means an entity that is organized or incorporated in accordance with the Delaware Code and as expressly set forth at Title 8 of the Delaware Code.

**["Customer" means the person or persons intending to form, and/or otherwise conduct activities through, a business entity formed, registered or qualified in Delaware.]**

**"Customer Information"** means any and all information or documents relating to the true and correct identity of a potential customer of a Registered Agent that includes, but is not limited to, full name, complete address (to include background information related to a P.O. Box address), photographs, background information, or any other information as needed to verify identification.

**"Department"** means the Delaware Department of State.

**"Limited Liability Company"** means an entity that is organized or created in accordance with the requirements of a "limited liability company" [or a "series"] as set forth in the Delaware Code and as expressly defined at 6 Del.C. §18-101, as amended.

**"Limited [Liability] Partnership"** means an entity that is organized or created in accordance with the requirements of a "limited liability partnership" as set forth in the Delaware Code and as expressly defined at 6 Del.C. §17-101 as amended.

**"Office of Foreign Assets Control"** means the office or its equivalent office(s) as created by federal laws and administered by order of the United States Department of the Treasury or its successor(s) or equivalent department(s).

**"Partnership"** means an entity that is organized or created in accordance with the requirements of a "partnership" as set forth in the Delaware Code at 6 Del.C. §15-202 as amended.

**"Registered Agents"** means an agent or agents as defined or described in accordance with the Delaware Code and as expressly set forth at 8 Del.C. §132 and 6 Del.C. §§15-111, 17-104 and 18-104.

**"Secretary"** means the Secretary of the Delaware Department of State.

**"Specially Designated Nationals [and Blocked Persons (SDN)]"** means individuals, groups and entities as defined or described as "Specially Designated Nationals" by the Office of Foreign Assets Control.

**"Trust"** means a statutory trust as set forth in the Delaware Code and as expressly defined in 12 Del.C. Ch. 38 as amended.

## **4.0 Procedures**

**4.1** Registered Agents are required to complete the following steps to verify filings submitted to the Secretary on behalf of corporations, partnerships, limited partnerships, trusts, and limited liability companies in the course of Business Entity Representation:

**4.1.1** Prior to engaging in business:

**4.1.1.1** Registered Agents will take reasonable steps to verify the identity of potential customers. Such steps may include, but are not limited to, [manual verification,] the use of software or third party services to perform background or identification verification or obtaining such documents sufficient for identity.

**4.1.2** New Customer Information:

**4.1.2.1** Registered Agents shall compare new customer information against the register and lists of the Office of Foreign Assets Control ("OFAC"), before [accepting performing services on behalf of] any new customer. Customer information shall include the full name and complete address of the submitting customer (whether business or individual).

**4.1.2.2** For Business Entity Formation or Business Entity Representation, Registered Agents shall collect and retain the full name, business address and business telephone number of the

current communications contact(s) and any other such information that shall hereafter be required by statute. In addition, Registered Agents may collect additional information, including, but not limited to officers, directors, members, managing members, partners, or owners. All such information collected shall be compared against OFAC.

**4.1.3** Updating names and addresses of related parties:

**4.1.3.1** Registered Agents shall request (at minimum annually) updates to the communications contact(s) and any other information required by statute. To the extent additional information has been collected, Registered Agents may, at their discretion, request updates to such information. All updated information shall be compared against OFAC.

**4.1.4** Entity and Customer Information transferred from another Registered Agent:

**4.1.4.1** Registered Agents shall compare all entity and customer information transferred from another registered agent against the register and lists of OFAC, or its successor, before accepting the customer.

**4.1.4.2** Entity information shall include the full name, business address and business telephone number of communications contact(s), any other information required by statute along with any additional information collected by the previous registered agent.

**4.1.5** Quarterly Review:

**4.1.5.1** Registered Agents shall review complete customer registry against the OFAC register or lists at a minimum on a quarterly basis.

**4.1.6** Notifications:

**4.1.6.1** Registered Agents shall sign up for notifications and updates from OFAC, to include but not limited to updates on specific sanctions.

**4.1.7** OFAC Search Lists:

**4.1.7.1** Registered Agents shall search for either individuals or corporate entities on all OFAC lists, to include but not limited to "Specially Designated Nationals" and "Blocked Persons" lists. Registered Agents may use software or third party services to perform a search of OFAC lists.

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## DIVISION OF PROFESSIONAL REGULATION

### 2000 BOARD OF OCCUPATIONAL THERAPY PRACTICE

Statutory Authority: 24 Delaware Code, Section 2006(a)(1) (24 **Del.C.** §2006(a)(1))  
24 **DE Admin. Code** 2000

#### ORDER

#### 2000 Board of Occupational Therapy Practice

On August 1, 2018 the Delaware Board of Occupational Therapy Practice published proposed changes to its regulations in the Delaware *Register of Regulations*, Volume 22, Issue 2. The notice indicated that written comments would be accepted by the Board, a public hearing would be held, and written comments would be accepted for fifteen days thereafter. After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on September 5, 2018 at a regularly scheduled meeting of the Board of Occupational Therapy Practice to receive verbal comments regarding the Board's proposed amendments to its regulations.

#### SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

At the time of the deliberations, the Board considered the following documents:

**Board Exhibit 1** - Affidavit of publication of the public hearing notice in the *News Journal*; and

**Board Exhibit 2** - Affidavit of publication of the public hearing notice in the *Delaware State News*.

**Board Exhibit 3** - September 20, 2018 email from Lauren Janusz expressing overall support for the changes

but requesting that the Board include language that supervision does not include supervision of OT or OTA students.

There was no verbal testimony presented at the public hearing. One written comment was received by the Board after the public hearing.

#### **FINDINGS OF FACT AND CONCLUSIONS**

1. The public was given notice and an opportunity to provide the Board with comments on the proposed amendments to the Board's regulations in writing and by testimony at the public hearing.

2. During the written public comment period following the public hearing the Board received a written comment from Lauren Janusz, MOT, OTRA, HPCS noting general support for the proposed amendments to the regulations. Ms. Janusz also suggested the Board consider the following addition: "Supervision Guidelines do not pertain to the supervision of OT or OTA students. The amount of OTAs receiving supervision by an OT should not be impacted by the supervision of OT or OTA students." The Board finds Ms. Janusz's suggestion does not address the proposed changes as it did not propose any changes to the supervision regulations. Therefore, the Board finds that the proposed amendment need not be further changed.

3. Pursuant to 24 **Del.C.** §2006(a)(1) the Board has the statutory authority to promulgate rules and regulations clarifying specific statutory sections of its statute.

4. The Board finds no reason to amend the regulations as proposed.

#### **DECISION AND ORDER CONCERNING THE REGULATIONS**

NOW THEREFORE, pursuant to 24 **Del.C.** §2006(a)(1) and for the reasons set forth above, the Board does hereby ORDER that the regulations be, and that they hereby are, adopted and promulgated as set forth in the Delaware *Register of Regulations* on August 1, 2018. The effective date of this Order is ten days from the date of its publication in the Delaware *Register of Regulations*, pursuant to 29 **Del.C.** §10118(g). The new regulations are attached hereto as Exhibit A.

**SO ORDERED** this 7<sup>th</sup> day of November, 2018.

#### **DELAWARE BOARD OF OCCUPATIONAL THERAPY PRACTICE**

Kelly M. Richardson

Karen M. Virion

Mara Beth Schmittinger

Evan Park

Angelita Mosley

**\*Please note that no changes were made to the regulation as originally proposed and published in the August 2018 issue of the *Register* at page 153 (22 DE Reg. 153). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**2000 Board of Occupational Therapy Practice**

## PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code, Section 362(b) (26 Del.C. §362(b))  
26 DE Admin. Code 3008

### 3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)

IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL. C. §§ 351-363, AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005; REOPENED SEPTEMBER 4, 2007; AUGUST 5, 2008; SEPTEMBER 22, 2009; AUGUST 17, 2010; SEPTEMBER 6, 2011, SEPTEMBER 18, 2012; FEBRUARY 2, 2017)

PSC REGULATION DOCKET NO. 56

### FINDINGS, OPINION, AND ORDER NO. 9289

#### APPEARANCES:

On behalf of the Delaware Division of the Public Advocate:

DEPUTY ATTORNEY GENERAL  
Regina A. Iorii, Esquire

On behalf of the Delaware Public Service Commission Staff:

DEPUTY ATTORNEY GENERAL  
Thomas D. Walsh, Esquire

On behalf of the Department of Natural Resources and Environmental Control:

DEPUTY ATTORNEY GENERAL  
Devera B. Scott, Esquire

On behalf of Caesar Rodney Institute:

David Stevenson

On behalf of *Pro Se* Intervenor Gary Myers,

Gary Myers

#### **I. BACKGROUND.**

1. In 2005 the General Assembly enacted, and the Governor signed into law, the "Renewable Energy Portfolio Standards Act," 26 Del.C. §§351-364 ("REPSA"), mandating electric utilities to purchase a portion of their electricity from renewable sources. The General Assembly authorized the Delaware Public Service Commission ("Commission") to administer REPSA and, in doing so, directed the Commission to adopt rules governing REPSA's implementation. The REPSA mandate was accomplished by requiring an annually-increasing percentage of electricity sold in Delaware to be procured from Eligible Energy Resources ("EER").<sup>1</sup> The requirement is termed a Renewable Portfolio Standard ("RPS"). The RPS is met through procuring and retiring Renewable Energy Credits ("REC") produced by EERs. The RPS also has a specific requirement for solar photovoltaic ("PV") electricity production, referred to as a "solar carveout." Solar PV resources also generate credits called Solar Renewable Energy Credits ("SREC"), in the same fashion as EERs.

2. In 2006, the Commission promulgated "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" (the "RPS Rules") (Order No. 6931 dated June 6, 2006).

3. REPSA was amended in 2007,<sup>2</sup> 2010,<sup>3</sup> and 2011.<sup>4</sup> Relevant to this proceeding, the 2010 Cost-Cap Amendments added Sections 354(i) and (j), which state:

(i) The State Energy Coordinator<sup>5</sup> in consultation with the Commission, may freeze the minimum cumulative solar photovoltaics requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 1% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from solar photovoltaics shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments.

(j) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative eligible energy resources requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from eligible energy resources shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 3% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments.

26 **Del.C.** §354(i), (j). ("Sections 354(i) and (j)").

4. In September 2010, the Commission adopted and added 26 *Del. Admin. C.* §3008 in conformance with the Cost-Cap Amendments.<sup>6</sup> These regulations generally mirrored the text of the Cost-Cap Amendments.

5. In April 2012, the Delaware Department of Natural Resources and Environmental Control ("DNREC") began promulgating regulations<sup>7</sup> to establish the process for "freezing" the RPS. The first regulations appeared in the December 2013 *Register of Regulations*.<sup>8</sup> DNREC published second and third revised regulations in 2014 and 2015.<sup>9</sup> DNREC Secretary's Order No. 2015-EC-0047,<sup>10</sup> dated December 15, 2015, finalized the regulations, which were memorialized in 7 *Del. Admin. C.* §104 and effective January 11, 2016.

6. On October 2, 2015, in Docket No. 15-1462, the Delaware Division of the Public Advocate ("DPA") filed a Petition to open a docket and consider amending 26 *Del. Admin. C.* §3008-3.2.21 to issue regulations governing when a freeze of the minimum percentages may be declared. On October 12, 2015, the Caesar Rodney Institute ("CRI") submitted a Petition supporting the DPA's Petition (the "Joint Petition").

7. On October 27, 2015, Commission Staff ("Staff") and DNREC filed a Joint Motion opposing and requesting denial of the Joint Petition. On October 29, 2015, the DPA and CRI filed a joint response ("Joint Response").

8. On November 3, 2015, the Commission heard oral argument on the Joint Petition, Joint Motion, Joint Response, and other written comments. After deliberations, the Commission entered Order No. 8807, denying the Joint Petition and closing the docket.<sup>11</sup>

9. On December 7, 2015, the DPA filed a Notice of Appeal of the Commission's decision in Order No. 8807 with the Superior Court of the State of Delaware (the "Court").

10. On December 30, 2016, after briefing and oral argument, the Court issued a Memorandum Opinion and Order<sup>12</sup> reversing Order No. 8807 and remanding for proceedings consistent with its decision.

11. On February 2, 2017, the Commission adopted Order No. 9025 in Docket No. 15-1462, which: (1) re-opened Docket No. 15-1462 for the limited purpose of complying with the Opinion; (2) reversed Ordering Paragraph No. 21 of Order No. 8807, which denied the Joint Petition; and (3) directed Staff to re-open Regulation Docket 56 for the limited purpose of complying with the Opinion, specifically to promulgate regulations to amend 26 *Del. Admin. C.* §3008-3.2.21 and related regulations as needed to memorialize the procedures for freezing the minimum cumulative solar photovoltaic and eligible energy resource requirements under 26 **Del.C.** §354(i) and (j).

12. On February 2, 2017, the Commission adopted Order No. 9024, which stated "the Commission Secretary

shall transmit to the Registrar of Regulations for publication on March 1, 2017 in the Delaware *Register of Regulations* a copy of this Order, along with copies of the proposed and current Rules.<sup>13</sup> Order No. 9024 further stated that the Commission Secretary shall provide public notice and, pursuant to 29 **Del.C.** §§10115(a) and 10116, establish a public comment period through April 24, 2017.<sup>14</sup>

13. On April 6, 2017, the Commission heard public comments at its regularly-scheduled public meeting. As of April 14, 2017, 104 written public comments were received, including comments from the DPA, CRI, DNREC, and Mr. Gary Myers.

14. On July 20, 2017, Staff filed its Review and Recommendation of the public comments and recommended that the Commission publish revised regulations. On July 25, 2017, after consideration of these public comments and Staff's recommendation, the Commission adopted Order No. 9090, which ordered the republishing of the revised regulations in the September 1, 2017 Delaware *Register of Regulations* and opened a comment period through October 2, 2017. Eight written public comments were received prior to the October 2, 2017 deadline, and an additional twenty-four public comments were received after the deadline.

15. On November 17, 2017, Staff published notice of the December 7, 2017 Commission hearing at which the Commission would determine whether to finalize the proposed regulations approved in Order No. 9090 or republish the substantively revised regulations.

## **II. SUMMARY OF THE EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.**

16. On December 7, 2017, the Commission heard oral argument and deliberated regarding three contested issues. The first issue was which components, as among supply, transmission, and distribution, should be included in the definition of "total retail cost of electricity for retail electricity suppliers?" The second issue was whether the costs of the Qualified Fuel Cell Provider Project ("QFCPP") energy output,<sup>15</sup> which Delmarva is statutorily entitled to use to fulfill its REPSA obligations, should be included in the "Total Cost of Compliance?" The third issue was what discretion the "E&C Director" has to institute or forego a freeze if the statutorily mandated calculations show that the 1% and 3% statutory thresholds have been reached.

17. On January 26, 2018, the Commission issued Order No. 9016, publishing further revised draft regulations reflecting the outcome of the December deliberations and directing the Commission Secretary to transmit the proposed regulations reflecting the Commission's December 7, 2017 deliberations to the Registrar of Regulations for publication in the February 1, 2018 issue of the Delaware *Register of Regulations*.<sup>16</sup>

18. The Commission received multiple written comments on the proposed regulations,<sup>17</sup> including a letter from DNREC Secretary Garvin and a response to Secretary Garvin from the former Commission Executive Director.

19. On March 26, 2018, Staff filed a memorandum<sup>18</sup> requesting that the Commission enter Proposed Order No. 9197 and Exhibit A thereto and approve as final the most recent draft regulations published in the February *Register of Regulations*.<sup>19</sup>

20. Proposed Order No. 9197 was placed on the Commission's agenda for its March 27, 2018 meeting. At that meeting, the Commission decided to re-open its consideration of the then proposed regulations, including revisiting the voting determinations made at its December 7, 2017 deliberations. On June 5, 2018, the Commission heard and considered such further comments and arguments on the proposed regulations and the three issues identified at the December 7<sup>th</sup> meeting.<sup>20</sup> The Commission then again voted on then-pending proposed regulations and the three central issues. The Commission's resolution of those issues are set out here in these Findings and Order. However, because those resolutions changed the then-proposed regulations substantively, the Commission republished (on July 1, 2018) new and altered proposed regulations in accordance with 29 **Del.C.** §10118(c).<sup>21</sup> The July 2018 proposed rules incorporated the determinations made at the June 5, 2018 meeting. In response to these proposed rules, further comments were received from the DPA, DNREC,<sup>22</sup> the Sierra Club, the Delaware Solar Energy Coalition, and two members of the general public. At its meeting on November 8, 2018, the Commission considered such additional comments and determined to adopt the regulations proposed in the July 1 Register Notice as the final regulations. These are the Commission's final findings, opinion, and Order to support such adoption.<sup>23</sup>

## **III. Total Retail Cost of Electricity for Retail Electric Suppliers.**

**A. Staff's Position: "Total Retail Cost of Electricity for Retail Electricity Suppliers" Includes Supply, Transmission, and Distribution.**

21. Staff argued that including supply, transmission, and distribution is the only definition which comports with the Court's directive that the Commission rely on the statute's "plain and ordinary meaning" and not "collapse... plain, and presumably intentional, statutory distinction[s]" where they may exist.<sup>24</sup> Properly effectuating the required calculation demands that the definition accords meaning for every word in the statute. Staff explained that adherence to the statutory definitions of the individual terms within "the total retail cost of electricity for retail electricity suppliers" ("TRCE") compelled Staff's definition of TRCE to include supply, transmission, and distribution" definition.

22. Staff contended that "[r]etail electricity supplier[s]" are statutorily defined as "mean[ing] a person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."<sup>25</sup> The statute unambiguously confines "retail" sales as those to "end-use customers." Further support is found in the statutory definition of "end-use customer," which "means a person or entity in Delaware that purchases electrical energy at **retail** prices from a **retail** electricity supplier or municipal electric company."<sup>26</sup> The definition of "wholesale" electric sales is similarly fundamental; the Federal Power Act instructs that the "sale of electric energy at wholesale" means "a sale of electric energy to any person for **resale**."<sup>27</sup> Thus, because "retail" inextricably defines the "total costs of electricity," the latter's plain and ordinary meaning denotes all bottom-line costs of all electricity sold for end-use.

23. Staff then addressed the "total" cost of electricity, stating it is "axiomatic that no commodity of electricity exists without its being delivered to a point of sale."<sup>28</sup> As there are no "electricity stores" where customers can purchase electricity without paying associated transmission or distribution charges, there exists instead a network for electricity delivery and the properties of its use. That is, a customer's usage of electricity from a retail electricity supplier occurs at the location of end-use connected to the transmission and distribution system. Thus, the qualifier "total" requires that *all* charges mandated by the supply of electricity service, including distribution and transmission charges, be included in the definition.<sup>29</sup>

24. Staff continued that the next inquiry must be identifying "who" are the "retail electricity suppliers." Staff again relied upon the statutory definition: "entit[ies] that sell electrical energy to end-use customers in Delaware," which include, but are not limited to, "nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."<sup>30</sup> Where the statutory definition of "Retail Electricity Supplier" states "electric utility distribution company," distribution costs must be included in the total costs for that Retail Electric Supplier. Delmarva Power & Light Company ("Delmarva") is the only standard offer service ("SOS") provider to end-use customers in Delaware.<sup>31</sup> As the exclusive electric distribution utility – and the owner and provider of the distribution network – Delmarva's distribution service base includes every end-user of electricity in its territory. Any other entity selling electricity to end-use customers similarly, and statutorily, falls within the expansive definition.

25. Staff's final inquiry in according meaning for every word in the statute focused on the meaning of "for" in TRCE. Staff argued that its analysis bares two potential meanings: 1) the total cost "for" electricity services incurred by the retail electricity supplier to provide service; or 2) the total cost "for" selling retail electricity to end-use customers.<sup>32</sup> These interpretations distinguish the "total costs for" buying or providing electricity versus the "total costs for" selling electricity. The statute's use of "retail" must be included in interpreting other language; therefore, the former meaning is precluded. To include only the utility's costs incurred for providing electricity entertains certain "wholesale" costs in the definition. Namely, Delmarva purchases supply at wholesale, for resale to its end-use customers at retail. The Federal Power Act corroborates that this is a wholesale cost.<sup>33</sup> Retail and wholesale transactions are distinct and mutually exclusive; in electricity, there can be many wholesale sales for resale, yet only one retail sale for end-use. If the cost of the power Delmarva purchases at wholesale is included in the definition, that definition cannot be correct. Accordingly, the statute's plain and ordinary meaning dictates that, due to the inclusion of the word "retail," only the total cost "for" selling retail electricity to end-use customers can provide the correct definition.<sup>34</sup>

26. Lastly, Staff emphasized that the Court's directive not to collapse statutory distinctions provided further support of its inclusive TRCE definition. Twenty-six *Del.C.* §363 provides "Special Provisions for Municipal

Electric Companies and ... Cooperatives” for complying with the RPS requirement. Staff points to the contrast between §363(f) and (g) and Delmarva’s requirements under §354(i) and (j). Section 363(f) provides that “[t]he total cost of complying with eligible energy resources shall not exceed 3% **of the total cost of the purchased power of the utility**<sup>35</sup> for any calendar year,” which language is mirrored in § 363(g). In defining the dispositive terms within Sections 354(i) and (j), Staff underscores the “presumably intentional distinction” between “purchased power” and “total retail cost of electricity.”<sup>36</sup> The costs in § 363(f) and (g) point explicitly to the “purchased power” which equates the wholesale cost. Additionally, the adjective “total” defines not the total cost of retail electricity (as in Sections 354(i) and (j)) but the total cost only of purchased power (presumably for resale).<sup>37</sup> Sections 363(f) and (g) therefore would preclude the cost of delivering electricity to retail customers, and the distinction between the two statutory provisions mandate that such delivery and transmission charges must be included under the instruction of the Order and the language of Sections 354(i) and (j).

**B. The DPA’s Position: “Total Retail Cost of Electricity for Retail Electricity Suppliers” Includes only Supply and Transmission.**

27. The DPA argued that interpreting Sections 354(i) and (j) required an understanding of what restructuring did to the electric industry. It explained that before restructuring, utilities were vertically integrated, which meant the utilities owned all of the plant used to provide electricity to customers, and billed for all of those functions in one bundle. With restructuring, however, the General Assembly unbundled the supply function from the transmission and distribution functions, and created a commodity (supply/generation) that existed separate and apart from the poles, lines and wires that transmitted and distributed that energy. This unbundling allowed the “[c]ustomers of Delaware electric distribution companies [sic] ... to have the opportunity, but not the obligation, to purchase electricity from their choice of electric suppliers ... .”<sup>38</sup> To achieve this, the General Assembly instructed Delmarva to file a plan for implementing retail competition in its service territory, which was to include “[s]eparate prices or rates for electric supply, transmission, distribution and other service (which may later be combined for billing purposes).”<sup>39</sup>

28. The DPA argued that REPSA recognized the difference between supply and other services, and specifically limited the definitions of “retail electricity supplier” and “end-use customer” to the provision and use of supply.<sup>40</sup> It contended that REPSA’s definitions of “end-use customer” and “retail electricity suppliers” showed that the General Assembly intended to differentiate between “electric supply” and “transmission, distribution and other services” because neither the definition of “end-use customer” nor the definition of “retail electricity supplier” includes “distribution” or “delivery.”<sup>41</sup> The DPA argued that “‘end-use customer’ means ‘a person or entity in Delaware that purchases *electrical energy* [that is, supply] *at retail prices from a Retail Electricity Supplier*. ...,”<sup>42</sup> and “a ‘retail electric supplier’ means ‘a person or entity that *sells electrical energy* [that is, supply] to end-use customers in Delaware[.]”<sup>43</sup> The DPA noted that the General Assembly used the word “means” for these definitions, which excluded any meaning that is not stated, and which exhausted the meaning of the defined term.<sup>44</sup> The DPA asserted that Delmarva (the electric distribution company supplying SOS) was included in the definition of “retail electricity supplier” because it sells electrical energy (SOS) to end-use customers, not because it also sells distribution and delivery services to end-use customers.”<sup>45</sup>

29. The DPA next argued that Staff’s definition of TRCE “collapse[d] the plain, and presumably intentional, statutory distinction” between “retail electricity supplier” and “end-use customer” in concluding the TRCE must be measured by “the total cost that end-use customers pay for all of the functions of the electric utility industry.”<sup>46</sup> The DPA explained Staff’s argument as: (1) the electricity that end-use customers buy from either Delmarva or a third-party supplier must be provided to the customer somehow; and (2) therefore, the TRCE for retail electricity suppliers necessarily includes distribution and delivery service costs.<sup>47</sup> The DPA called this wrong as a matter of law because it did not recognize “the distinction that the General Assembly made between the cost of electricity as a commodity that can be sold by itself and the cost of how that electricity gets to end-users.”<sup>48</sup>

30. Next, the DPA stated that Staff’s parsing of separate words in the statutory phrases violated “a fundamental rule of statutory construction - that a statute’s words and phrases should not be read in isolation.”<sup>49</sup> The DPA contended that “[w]hen the statute is read as a whole, the only sensible and logical conclusion is that the appropriate measure [of TRCE] is the retail price that retail electricity suppliers (which includes Delmarva as the

SOS provider) charge to their customers.”<sup>50</sup>

31. Next, the DPA contended that even if Staff’s isolation of the statutory words and phrases were permissible, it still did not produce the conclusion that Staff reached, because it demonstrated a lack of understanding of what electricity restructuring did. As the DPA previously discussed, restructuring unbundled the supply function from the transmission, distribution and delivery functions, and created a competitive market for supply; thus, electricity as a product can and does exist without being delivered to a point of sale, and whether an end-user could purchase electricity from a store was irrelevant.<sup>51</sup> The DPA attached a copy of the bill of a customer that purchased electricity supply from a third party to demonstrate that supply and distribution services are separate things that can be (and, in the attached customer’s bill case, are) provided by two different entities, and that a customer can purchase electrical energy as a commodity by itself even though they cannot physically purchase it at a store.<sup>52</sup>

32. The DPA next took issue with Staff’s contention that TRCE necessarily includes distribution and delivery costs because Delmarva is an SOS provider, is the exclusive distribution utility, and every customer is located in Delmarva’s footprint. Noting Staff’s acknowledgement that there is no competitive market for distribution and delivery service, the DPA argued that Staff’s claim that because the definition of “retail electricity supplier” includes Delmarva, the definition of TRCE must also include distribution and delivery service was both circular and legally wrong for the reasons provided previously.<sup>53</sup>

33. The DPA further argued that Staff’s explanation for the use of the word “for” in the phrase “for retail electricity suppliers” would lead to the untenable conclusion that there is only one “retail” sale – from Delmarva to the end-user. The DPA observed that this conclusion was inconsistent with Staff’s recognition that the definition of “retail electricity suppliers” encompassed non-Delmarva third-party suppliers. Additionally, this conclusion was directly contrary to the Restructuring Act, which unbundled the electric supply function from distribution and delivery functions and made it possible for end-use customers to purchase their electricity supply directly from whatever third-party suppliers offer retail electric suppliers other than Delmarva.<sup>54</sup>

34. The DPA argued against Staff’s contention that the language “total cost of purchased power” that the General Assembly used in 26 **Del.C.** §363 for cooperatives and municipalities demonstrated that the General Assembly meant to include transmission, distribution and delivery costs in the TRCE. First, the DPA argued that because the REPSA provided a particular meaning “retail electricity suppliers,” the Commission was bound by that definition and could not look to different language in another part of the statute to attempt to re-define it. Second, even if it were proper to look to Section 363, the different language was immaterial. The DPA claimed that it had never contended that the TRCE was simply the wholesale cost of supply; the DPA acknowledged that the TRCE also includes other costs such as the profit margin that go into that cost. Third, the DPA argued that it was not surprising that the legislature used a different term for municipalities and cooperatives because those entities are non-for-profit entities that the Commission does not regulate. The DPA explained that municipalities use the money earned from selling electricity to provide other services to constituents (such as police and fire protection, road repair, and libraries), and the cooperative returns all profits to its member customers. For-profit retail electricity suppliers do neither of these, so it was sensible for the General Assembly to use different terminology for the different entities.<sup>55</sup>

35. The DPA next argued that if distribution was intended as a component of TRCE, the General Assembly could have omitted the phrase “for retail electricity suppliers” after “the total retail cost of electricity” because the “total retail cost of electricity” would encompass supply, distribution and delivery. Yet that phrase was included and must be given meaning;<sup>56</sup> therefore, TRCE must be “the supply costs plus whatever else retail electricity suppliers include in the retail price they charge for electrical energy. ...”<sup>57</sup>

36. The DPA argued that including distribution costs would result in end-use customers being charged twice for the same costs. In support, the DPA stated that “the General Assembly limited the costs to be considered in Sections 354(i) and (j) to the retail cost of electricity that *retail electricity suppliers* charge for their product.”<sup>58</sup> Including distribution and delivery costs that end-use customers pay results in customers paying those costs twice: once on their actual bills, and again by including those costs in the calculation of the total retail cost of electricity for retail electric suppliers.<sup>59</sup> The DPA opposed Staff’s contention that the DPA’s definition would charge end-use customer twice for supply costs, observing that Staff was assuming that the cost of RECs and SRECs are part of the cost of supply; the DPA argued out that the cost of RECs and SRECs are separate from the cost of supply.<sup>60</sup>

37. Finally, the DPA contended that even assuming that Sections 354(i) and (j) were ambiguous, long-established rules of statutory construction supported the DPA's proposed definition of TRCE. It pointed out that statutes must be viewed as a whole, and literal or perceived interpretations that yield mischievous or absurd results should be avoided.<sup>61</sup> Similarly, an ambiguous statute must be construed to promote its purpose and harmonize it with other statutes within the statutory scheme.<sup>62</sup> Lastly, a provision that may seem ambiguous in isolation is frequently clarified by the rest of the statutory scheme because the same terms are used elsewhere in a context that makes its meaning clear or because only one of the meanings produces a substantive effect compatible with the rest of the law.<sup>63</sup> The DPA pointed out REPSA's policy:

(b) The General Assembly finds and declares that the benefits of electricity from renewable energy resources accrue to the public at large, and that electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electricity supply portfolio of the state. These benefits include improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities.

(c) It is therefore the purpose and intent of the General Assembly in enacting the Renewable Energy Portfolio Standards Act to establish a market for electricity from these resources in Delaware, and to lower the cost to consumers of electricity from these resources.<sup>64</sup>

The DPA argued that the General Assembly did not establish a market for distribution and delivery resources because Delmarva has a state-granted monopoly on those services within its designated service territory.<sup>65</sup> The DPA also identified other sections of REPSA to support its argument that the statute is concerned with electricity supply, not distribution and delivery service.<sup>66</sup>

**C. DNREC's Position: "Total Retail Cost of Electricity for Retail Electricity Suppliers" Includes Supply, Transmission, and Distribution.**

38. DNREC argued in support of Staff as having properly drafted language defining TRCE in a manner consistent with REPSA and commensurate to the cost of electricity to consumers.

39. Initially, DNREC explained that defining TRCE to mean Delmarva's wholesale supply costs is wholly inconsistent with the meaning of "retail." Simply stated, Delmarva is not a retail customer but rather purchases electricity in wholesale markets.

40. Further, TRCE must include all of the costs on customers' bills because electricity is not a retail product unless and until it is delivered to end-use customers. That cannot be accomplished without distribution. DNREC stated, "there is no such thing as 'I can get it for you wholesale' for the retail electric consumer."<sup>67</sup> A customer cannot become an "end-use" customer without purchasing electricity from Delmarva – and that cannot be accomplished without using Delmarva's transmission and distribution assets. DNREC further argued that because transmission and distribution costs are part of Delmarva's customers' bills, transmission and distribution costs must be included components in defining TRCE.<sup>68</sup> Under the plain language of Sections 354(i) and (j), "total retail cost of electricity" cannot be "the total costs paid by" Delmarva because Delmarva is not a retail customer; it buys electricity in wholesale markets.<sup>69</sup>

41. DNREC next stated that the difference in REPSA application to municipal electric companies and rural electric cooperatives bolsters the argument that TRCE must be understood to mean all of customers' retail costs.<sup>70</sup> The cost cap provision in §354(i) and (j) refers to "the total retail cost of electricity" while the cost cap provisions for municipal electric companies and rural electric cooperatives are found in §363(f) and (g), which refer to "the total cost of the purchased power." DNREC argued that the sharp difference in statutory language was instructive because the General Assembly clearly did not intend that those different terms in correlating section of the same legislation were to mean the same thing. Therefore, DNREC supported defining TRCE to include supply, transmission, and distribution.

**D. Mr. Myers' Position: "Total Retail Cost of Electricity for Retail Electricity Suppliers" Excludes Any Delivery Charges.**

42. Mr. Gary Myers ("Mr. Myers") argued that the definition of TRCE should include only supply costs, to the exclusion of transmission and delivery charges. Mr. Myers posed three arguments on this issue, each similar to the DPA's.

43. First, Mr. Myer's claimed that Staff conflated "retail electricity suppliers" with "end-use customers." He

argued that, “[t]he statutory text says nothing about ‘costs paid by customers,’ or ‘all customer costs,’ or even all revenues or costs *received by* retail electricity suppliers.”<sup>71</sup> Rather, it directs that the appropriate reference is to be the ‘*cost of electricity for retail electricity suppliers:*’ that is, the outlay ... *incurred ... by retail electricity suppliers to produce or procure electricity.*”<sup>72</sup> Mr. Myers argued that the statutory text focus is on the cost of electricity *for retail electricity suppliers*, not the costs or charges paid by retail customers or consumers.<sup>73</sup>

44. Mr. Myers next argues that “retail electricity suppliers do not incur distribution or delivery charges.”<sup>74</sup> Mr. Myers argued that there is a distinction between Delmarva in its role as a supplier versus its role as a distribution utility. That is, distribution and delivery services are separate and distinct from the sale of electrical energy. The former are provided by Delmarva in its role as an electric distribution company.<sup>75</sup>

45. Regarding what costs retail electricity suppliers pay for “electricity,” Mr. Myers stated that the answer lies in REPSA’s definition of a “retail electricity supplier,” which states that it is an entity “that sells electrical energy to end use customers.”<sup>76</sup> It can be an independent “power producer[]” or an electric distribution company acting in its capacity as a default or standard offer supply provider. “Electrical energy” is the commodity of a retail electricity supplier’s business; therefore, the company bears the costs of procuring (at wholesale), or producing on its own, the “electrical energy” that it will then sell to end-use customers.<sup>77</sup>

46. Mr. Myers emphasized, however, that the retail electricity supplier, here Delmarva, does not “bear the work[] or costs” for delivery or distribution because those services are separate and distinct from the sale of electrical energy in the “restructured electricity world that prevails.”<sup>78</sup> In essence, Delmarva bears delivery costs which its customers then pay to Delmarva via separate delivery charges, but “[r]etail electricity suppliers” accrue no costs related to delivery or distribution because neither is a “retail cost of electricity” for those suppliers.<sup>79</sup> Retail electric suppliers simply “utilize” the distribution network of distribution utilities and pay no fee for such use.<sup>80</sup> Thus, such, delivery and distribution costs and charges cannot be included as TRCE components.

47. Mr. Myers argued that TRCE does include the electricity supplier’s costs to procure or produce the electricity it then re-sells, which he suggests “might be described as the supplier’s ‘wholesale’ cost of power.”<sup>81</sup> Mr. Myers expands this argument by stating that adjective “*retail*” in TRCE suggests that the described amount includes more than the suppliers’ “wholesale” costs of power.<sup>82</sup> Rather, “[r]etail” suggests that the benchmark should include not just the “true” wholesale purchase or production costs, but also the suppliers’ additional costs incurred... to retail the electrical energy commodity.”<sup>83</sup> Mr. Myers stated that “[t]he benchmark would thus include wholesale purchase or production costs plus the ‘back-office’ and other additional costs incurred by suppliers to retail their electrical energy product.”<sup>84</sup>

#### **E. Commission Decision.**

48. The Commission hereby votes 4-1 to approve the arguments of the DPA and Mr. Myers that excludes any delivery charges from the definition of Total Retail Cost of Electricity for Retail Electric Suppliers. The Commission incorporates by reference the supporting language from both DPA and Mr. Myers.

49. The Commission rejects Staff’s argument that to “capture Total Retail Cost, it is necessary to include the retail costs sold to end-use customers by all Retail Electricity Suppliers.” By doing so, Staff was including Delmarva and, in doing so, “has thus bootstrapped the distribution into the recommended definition of Total Cost of Electricity for Retail Electric Suppliers.”<sup>85</sup>

50. Also, the Commission relies upon the Restructuring Act, which “mandates that separate charges for supply, transmission, distribution, et cetera, be set forth on the billing to end-use customers even though that doesn’t necessarily happen exactly that way as of today.”<sup>86</sup>

51. Finally, the Commission has found nothing in the record – expert testimony or any evidence – as to transmission charges. Therefore, the Commission must rely on what is in the statutes and the Restructuring Act and the definition of Retail Electric Supplier “so that we have to make our best stab at the statutes.”<sup>87</sup>

### **IV. Whether Bloom Costs Should Be Included In “Total Cost of Compliance?”**

#### **A. Staff’s Position: Bloom Costs Should Be Excluded.**

52. Staff’s initial argument points to the 2011 Bloom Amendments (“2011 Amendments”), wherein the General Assembly amended REPSA to add provisions related to Qualified Fuel Cell Providers (“QFCP”) and

Qualified Fuel Cell Provider Projects (“QFCPP” or “Bloom”). Specifically, the 2011 Amendments codified procedures for fuel cells that were, “manufactured fuel cells in Delaware, capable of being powered by renewable fuels, and designated... as an economic development opportunity for the state.”<sup>88</sup> Staff emphasized that the 2011 Amendments did not alter REPSA’s definition of EERs so as to include QFCPPs and, therefore, the QFCPP does not produce RECs or SRECs.<sup>89</sup> Staff argued that the 2011 Amendments did, however, provide for REC equivalencies, a method for “reducing” REC and SREC requirements of the Commission-regulated electric company (“CREC”) in proportion to the output of the QFCPP<sup>90</sup> in exchange for the monthly disbursement of CREC customers to the QFCPP. Staff argued that Bloom costs must be excluded because § 354(i) and (j) mandate that “the total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments,” which Section 354(j) mirrors as to all renewable energy.<sup>91</sup> Staff argued that this statutory reading compels excluding Bloom costs in “Total Cost of Compliance” as consistent with the Court’s directive to observe the plain and ordinary meaning in the statute and not to “collapse plain, and presumably intentional, statutory distinction[s]” where they exist.<sup>92</sup>

53. Staff further contended that Section 363(e) of REPSA bolstered its argument in memorializing parallel cost-cap provisions for municipalities and co-ops, thus providing a similar statutory construction against which to contrast Sections 354(i) and (j). Section 363(e) states: “[t]he total cost of compliance with this section shall include the costs associated with any ratepayer funded renewable energy rebate programs, REC and SREC purchases, or other costs incurred in meeting renewable energy programs.”<sup>93</sup> Staff contended that Sections 354(i) and (j) *per se* have no instruction to include “other costs incurred” in meeting REPSA’s requirement; accordingly, the statute’s plain meaning compels that other costs incurred to meet REPSA’s requirement, aside from those specifically enumerated in Sections 354(i) and (j), must not be included in the calculation of total cost of compliance.<sup>94</sup>

#### **B. The DPA’s Position: Bloom Costs Should Be Included.**

54. The DPA argued that Delaware law makes clear that Bloom must be included in the total cost of compliance. The DPA pointed to 26 **Del.C.** §353(d), which states the Commission shall develop procedures for tracking the QFCPP generation output such that the energy produced by a QFCPP “shall fulfill the [CREC’s] state-mandated REC and SREC requirements’ according to the statutorily-defined equivalencies that the DNREC Secretary may adjust.”<sup>95</sup> The DPA observed that Section 353(d)(1)a. and (d)(1)b. establish equivalencies of 1 REC for every 1 MWH of energy produced by a QFCPP, and 6 MWH of RECs per 1 MWH of SRECs.<sup>96</sup> DNREC may, after coordination with the Commission and the CREC, adjust these equivalencies.<sup>97</sup> Lastly, “the CREC’s right to use a QFCPP’s energy output to fulfill its REC and SREC requirements does not expire until the CREC actually applies the output to satisfy its REC and SREC requirements.”<sup>98</sup> The DPA argued that “[t]he QFCPP output walks like a REC/SREC and quacks like a REC/SREC. It *is* a REC/SREC, and the cost of the QFCPP output that Delmarva uses to satisfy its REPSA obligations must be included in the calculation of the total cost of complying with REPSA.”<sup>99</sup> The DPA advanced several arguments to support its interpretation.

55. First, the DPA opposed Staff’s contention that the General Assembly created a distinction between “producing” RECs and SRECs through renewable energy generation and “reducing” the number of RECs and SRECs by the Section 353(d) equivalencies. It claimed that Section 353(d) was a clear instruction that Delmarva shall use some of the Bloom output to fulfill its REPSA requirements, and nothing in REPSA indicated otherwise.<sup>100</sup> The DPA contended that it was irrelevant that the General Assembly did not amend the definition of “eligible energy resource” because the General Assembly *did* ensure that Delmarva could fulfill its REPSA requirements with Bloom output that ratepayers pay for, just as they pay for the cost of RECs and SRECs produced from renewable energy generation.<sup>101</sup> Moreover, the DPA observed that Section 353(d) specifically provided that Delmarva could use Bloom output to satisfy its SREC requirement in lieu of incurring a solar alternative compliance payment due to lack of SREC availability in the market. The DPA pointed out that Section 354(i) explicitly identifies solar alternative compliance payments as a cost of compliance, and argued that this language would have been unnecessary if Bloom output were not to be considered a compliance cost for purposes of the cost cap.<sup>102</sup> The DPA argued that Staff’s interpretation produced a “mischievous or absurd result”<sup>103</sup> that did not reflect the General Assembly’s intent that the cost of the QFCPP equivalencies that

Delmarva uses to satisfy its REPSA requirements be included in the cost of REPSA compliance. The DPA further stated that “Staffs interpretation deprives ratepayers of the only benefit they have as a result of the 2011 REPSA amendments that force them to pay substantially higher prices for fuel cell-generated energy than for energy that Delmarva could purchase elsewhere.”<sup>104</sup>

56. Next, the DPA argued that Staff misconstrued the word “include” in Sections 354(i) and (j) by contending that because Sections 354(i) and (j) do not contain the same language as Section 363(e), which states that the total cost of REPSA compliance “shall include . . . other costs incurred in meeting renewable energy programs,” the absence of that language from Sections 354(i) and (j) limits the total cost of REPSA compliance to only these items, and because the QFCPP output that the General Assembly has explicitly directed “shall fulfill” Delmarva’s REC and SREC requirements is not explicitly listed in Sections 354(i) and (j), it cannot count toward the total cost of REPSA compliance.<sup>105</sup> The DPA contended that the Bloom surcharges are purchases of output that fulfill REC and SREC requirements. The DPA asked, “[h]ow is that not a *purchase* of a REC or SREC?”<sup>106</sup> Moreover, the DPA’s viewed Staff’s definition of “include” as contrary to the General Assembly’s instruction to give statutory words their “common and approved usage in the English language,” as well as to the Legislative Drafting Manual’s instruction that “‘includes’ should be used ‘if a definition is intended to make clear that the term encompasses *only some of the specific matter*.’”<sup>107</sup> The DPA argued that this was indicative of the General Assembly’s not intending to limit compliance costs to the three items specifically identified, but rather to leave room for other similar items such as the Bloom REC and SREC equivalencies.<sup>108</sup>

57. The DPA next contended that Staff’s comparison of the language of Sections 354(i) and (j) to that of Section 363(e) was out of context. The DPA again noted that Section 363(e) only applies to municipalities and cooperatives, which are statutorily permitted to exempt themselves from compliance with the REPSA as long as they develop and implement a program comparable to REPSA. If they do exempt themselves, they must either contribute to the Green Energy Fund at levels commensurate with other retail electricity suppliers, or create a separate independent fund to be used for energy efficiency and renewable energy technologies or demand side management programs, into which they shall make payments of at least \$0.178 for each megawatt hour they sold, transmitted or distributed in Delaware.<sup>109</sup> The DPA argued that “other costs incurred in meeting renewable energy programs” language refers to this self-administered fund described in Section 363(d). The DPA pointed out that non-municipal electric companies and non-rural electric cooperatives do not have the option of exempting themselves from REPSA’s requirements, nor may they comply with REPSA by creating a self-administered fund to support energy efficiency technologies, renewable energy technologies or demand side management programs. The DPA argued that “Staff ignore[d] this difference between municipal electric companies/rural electric cooperatives and retail electricity suppliers. But if the statute is to be read as a whole, this difference matters.”<sup>110</sup>

58. Furthermore, the DPA observed that the Commission had already recognized that the 2011 Amendments added Delaware-manufactured fuel cells to REPSA and allowed energy output from such fuel cells to be considered a resource eligible to fulfill a portion of Delmarva’s REPSA requirements.<sup>111</sup> The DPA pointed out that every order the Commission has issued approving Delmarva’s monthly QFCPP filings has contained language acknowledging that the Bloom amendments “added Delaware-manufactured fuel cells to REPSA and allowed energy output from such fuel cells to be considered a resource eligible to fulfill a portion of a Delaware Public Service Commission-regulated electric company’s renewable energy credit requirements under REPSA.”<sup>112</sup> Similarly, the Commission’s current regulations acknowledge that Delmarva may use Bloom output to satisfy its REC and SREC requirements as set forth in §353(d). The DPA further argued: “Delmarva may (but does not have to) use QFCPP output to satisfy its REPSA obligations. If it does not use the REPSA output, then it has to purchase RECs and SRECs from somewhere else. Staff does not dispute that the costs of RECs and SRECs purchased elsewhere would be part of the total cost of complying with REPSA. The QFCPP output that Delmarva uses to satisfy its REPSA requirements is equivalent to RECs and SRECs for purposes of REPSA compliance . . . .”<sup>113</sup>

59. The DPA also contended that Staff’s proposal was inconsistent with what Delmarva ratepayers have been told about REPSA compliance costs. The DPA pointed out that Delmarva’s website identifies Bloom as one of the three sources of clean energy generation, and that Delmarva uses the Bloom output to meet approximately half of its REPSA requirements. Similarly, Delmarva’s bills include a separate line item for Renewable Compliance Charges, which is further broken out into (1) Wind & Solar and (2) Delaware Qualified Fuel

Cells.<sup>114</sup>

60. Finally, the DPA pointed out that the proposed regulations contained definitions for “Qualified Fuel Cell Provider” and “Qualified Fuel Cell Provider Project.” The DPA queried why these definitions were necessary if the Bloom output did not count toward the total cost of compliance.<sup>115</sup>

**C. DNREC’s Position: Bloom Costs Should Be Excluded.**

61. DNREC first argued that Bloom costs must be excluded because the legislature did not intend otherwise; namely, Bloom was not enumerated among the definitional components of the cost of compliance in Section 354(i) and (j).<sup>116</sup> DNREC’s position was that including Bloom costs is contrary to the plain language of REPSA because inclusion of Bloom costs in the calculations, as proposed by the Commission, is directly at odds with subsections 354(i) and (j). Sections 354(i) and (j) are clear that they relate to “the total cost of complying with” the “minimum cumulative solar photovoltaics requirement” and the “minimum cumulative eligible energy resources requirement.” These terms are statutorily defined. *Id.* §352(6). These definitions explicitly do not include Bloom costs. Indeed, Bloom costs, which are powered by natural gas, are explicitly excluded from the definitions of eligible energy resources and solar photovoltaics. *See id.* §352(6)(e) (“Electricity generated by a fuel cell powered by renewable fuels”) (emphasis added); *id.* § 352(20) (“‘Renewable fuel’ mean a fuel that is derived from eligible energy resources. The term does not include a fossil fuel or waste product from a fossil fuel source.”) (emphasis added). DNREC contended that including Bloom costs, as contemplated by proposed regulations subsections 3.2.21.1.6, 3.2.21.1.7, 3.2.21.3.7, 3.2.21.3.8, and 3.2.21.4.4, is directly contrary to the plain language of REPSA.<sup>117</sup>

62. DNREC’s next argued that Bloom is not statutorily defined as an EER under REPSA; accordingly, by legislative definition Bloom cannot produce RECs.<sup>118</sup> DNREC stated that “Bloom output is not traded as RECs, is not used by any other utilities to meet their RPS requirements, and is not traded or tracked on PJM GATS, the system used to monitor and retire RECs. Instead the power generated by Bloom is used to offset Delmarva’s required REC or SREC purchases through a specific, limited process.”<sup>119</sup> Instead, Bloom output is the subject of a special tariff as authorized in 364(d) and approved by the Commission on April 17, 2012 in Order 8136, Docket No. 11-362. As this tariff cannot be frozen, it cannot be part of the freeze process under 354 (i) & (j). DNREC argued that neither it nor the Commission have the statutory authority to freeze Bloom costs, and therefore the attempt to include those costs in the calculations under § 354(i) & (j) is wholly at odds with the framework applicable to Bloom.<sup>120</sup> DNREC contended that the legislature intent in not defining Bloom as an EER shows a clear intent: Bloom does not generate RECS.<sup>121</sup>

**D. Mr. Myers’ Position: Bloom Costs Should Be Included.**

63. Mr. Myers’ first argued that while a QFCPP’s energy output does not meet all the definitional requirements of “REC or SREC equivalents” under either 26 **Del.C.** §352(18) or 352(25) – for example, the “equivalencies” cannot be traded – the dispositive inquiry is not whether “the equivalencies are, or are not, technical RECs.”<sup>122</sup> Rather, the dispositive inquiry is “whether the surcharge payments paid for the Bloom generation that creates such equivalencies constitute a part of the “total cost of complying” with [REPSA].”<sup>123</sup> Mr. Myers contended that “the statutory text repeatedly answers ‘yes.’”<sup>124</sup>

64. Next, Mr. Myers argued 26 **Del.C.** §354(e) codified (i) Delmarva’s “sole responsibility to ‘procur[e] RECs, SRECs and any other attributes needed to comply with subsection [354](a) . . . with respect to all energy delivered to [its] end use customers[,]”<sup>125</sup> and (ii) a “decree[] that the ‘equivalencies’ created by Bloom Energy output were available as a means to ‘comply’ with those REPSA annual percentage requirements.”<sup>126</sup> Mr. Myers stressed that Bloom costs should be included because its “energy output ‘shall fulfill [DP&L’s] state-mandated *REC and SREC requirements* set forth in § 354.”<sup>127</sup> Further, Mr. Myers argued that each Bloom output equates a REC or SREC because it is both “fungible, just like tradable RECs” and can be “banked” and used to meet REPSA requirements in a subsequent compliance year.<sup>128</sup>

65. Mr. Myers further argued that the 2011 Amendments did not change REPSA’s annual percentage requirements; on the contrary, the 2011 Amendments gave Bloom status as REC and SREC “equivalents” which “then can be used to meet or ‘fulfill’ the *pre-existing* REPSA percentage requirements.”<sup>129</sup> Thus, Mr. Myers argued, Delmarva customers’ “monthly payments... to Bloom for such REC ‘equivalents’ (used to fulfill “the state-mandated REC and SREC requirements set forth in §354”) are part and parcel of the ‘total cost of complying with”

'the minimum cumulative solar photovoltaics requirements' or 'the minimum cumulative eligible energy resources requirement.'"130

66. Continuing, Mr. Myers offered additional excerpts from the legislative history surrounding the Bloom Amendments and resulting Commission proceedings, arguing that many have characterized the output of the QFCPP as "fulfilling" the RPS requirements.<sup>131</sup>

67. Next, Mr. Myers argued that REPSA's 2010 definition of "total cost of compliance" did not include REC/SCREC equivalencies, nor Bloom costs, because the Bloom Amendments were not enacted until 2011. Mr. Myers argued that "[w]hen a statutory definition uses the term 'includes.' [sic] the presumptive, common understanding is that such term 'signal[s] that the list that follows is meant to be illustrative rather than exclusive.'"132 Thus, because "the Bloom Energy surcharge payments easily share the same characteristics as the costs described in the definitional listings[.]" and "the statutory text [and] legislative history [are] rife with statements that such REC equivalents will be used to fulfill [Delmarva's] 'REC and SREC requirements,' Bloom should be included in the total cost of compliance in § 354(i)&(j)."<sup>133</sup>

68. Mr. Myers also argued that the "constitutional avoidance canon" states that agencies "should avoid interpretations that would render a statute unconstitutional, if that can be done without impairing the legislature's purpose."<sup>134</sup> Mr. Myers emphasized the quandary of the Federal Power Act's<sup>135</sup> federal preemption of state actions, arguing that "[t]he Bloom Energy scheme bears a striking, if not mirror, resemblance to Maryland's 'contract for differences,'" which he stated was struck down by the Supreme Court as unconstitutional.<sup>136</sup> Mr. Myers submits that the Supreme Court has held that "States may not seek to achieve ends, however legitimate... that intrude on FERC's authority over interstate wholesale rates."<sup>137</sup>

#### **E. CRI's Position: Bloom Costs Should Be Included.**

69. CRI first argued that "the Commission has repeatedly established ratepayers receive an offsetting value from the legislated renewable energy attributes of the QFCP project, so clearly the QFCP costs need to be included, and the proposed regulation needs clarifying language to do so."<sup>138</sup>

70. CRI then argued that including Bloom was supported in PSC Order 8835, wherein Delmarva was directed to "modify its bill format to either (1) break the existing Renewable Portfolio Compliance Charge into two line items on its electrical customers' bill, one containing the monthly QFCP charge, the other containing *the remaining* components of the Renewable Compliance Charge[,] or (b) add a one line description note on the bill that separately identifies the monthly QFCP charge."<sup>139</sup>

#### **F. Public Comments regarding Bloom Costs In Cost of Compliance.**

71. Hundreds of citizens filed public comments concerning this issue. The Commission considered the following, which were summarized as follows: (a) sixty-six (66) wanted Bloom included in the Cost of Compliance; (b) one hundred and forty-nine (149) did not want Bloom included; and (c) fifteen (15) did not want any changes because they did not want any increase in their utility bills which may result.

#### **G. Commission Decision.**

72. The Commission hereby unanimously votes in favor of Mr. Myers and the DPA that all Bloom costs should be included.<sup>140</sup> The Commission incorporates by reference the supporting language from both the DPA and Mr. Myers.

73. First, the Commission finds Section 354(i) to be dispositive: "[t]he total cost of compliance shall include the cost associated with any ratepayer funded [state renewable energy rebate program, REC purchases, and alternative compliance payments.]"<sup>141</sup> And, "and ratepayers would clearly support the notion that they are paying in part, at least the Bloom energy."<sup>142</sup>

74. The Commission relies on two clear points: (a) Bloom clearly is not a State Solar Rebate Program and not an SREC purchase; and (b) Bloom is not a Solar Alternative Compliance Payment.<sup>143</sup> This finding is supported by the mirrored language in Section 354(j).<sup>144</sup>

75. The Commission also finds compelling the fact that the cost of compliance statute preceded the Bloom amendments, "[a]nd the Legislature never clarified whether or not Bloom was part of the Section 354(i)."<sup>145</sup>

76. Next, as Mr. Myers argued, Delmarva was not a purchaser of SRECs. Rather, pursuant to 26 Del.C. §364(d), it is solely the agent for collection and disbursement of funds for Bloom and uses Bloom energy output to

fulfill its REPSA obligations. Thus, the Bloom energy output “acts, basically, as a solar REC under REPSA.”<sup>146</sup>

77. Finally, the Commission’s decision to include Bloom in the cost of compliance – where “there’s no clear language in the statute indicating that it should be included” – is “because of the fact that Delmarva fulfills its REPSA obligations through the Bloom payments.”<sup>147</sup>

#### **V. What Discretion Does The Director Of The Division Of Energy & Climate Have To Institute Or Forego A Freeze If The Statutorily Mandated Calculations Show That The 1% And 3% Thresholds Have Been Reached?**

##### **A. Staff’s Position: The Commission Should Determine By Order Whether to Adopt The E&C Director’s Determination After Consultation.**

78. Staff argued that because the Commission – and not DNREC – has the exclusive and original jurisdiction over regulated utilities and because a Commission order is necessary to institute a freeze, the Commission should consider the E&C Director’s determination under Section 354(i) before the Commission decides whether to freeze the RPS.<sup>148</sup> Staff also argued that Sections 354(i) and (j) use distinctive language (“may” versus “shall”) should be bound to the specific context of this proceeding and the guidance of the Court. In this context, the Opinion provides explicit direction to not collapse presumably intentional statutory distinctions where they may occur in the text; Staff views this as direction to give separate meanings to the terms “may” and “shall” in Sections 354(i) and (j).<sup>149</sup>

79. Moreover, Staff argued that under the Proposed Regulations, the Commission would have the ability to deliberate over the E&C Director’s determination and then decide whether to freeze or not to freeze the RPS. Staff noted that when the Commission exercises a freeze, such action would change the level of RPS compliance required from the CREC. As a result, the Proposed Regulations limit the Commission’s authority to matters within its jurisdiction. Staff argued that this language protects the Commission from any potential court appeal in which it may be forced to defend an order with which it does not agree.<sup>150</sup>

80. Finally, Staff argues that the Proposed Regulations allow the Commission to consider and review DNREC’s determination that “the total cost of compliance can reasonably be expected to be under the [...] threshold.” Because the statute directs that the freeze “shall be lifted” upon a finding of reasonableness, Staff argues that the Proposed Regulations allow the Commission to consider and decide whether to lift the freeze, based on the E&C Director determination, by deciding whether the determination is “reasonable” in accordance with the statute.<sup>151</sup>

##### **B. The DPA’s Position: The Revised Regulations Have Satisfied Its Issues, But Public Comment Should Be Allowed At The Consultation.**

81. The DPA stated that it is satisfied with the language of the Proposed Regulations except that the Proposed Regulations should provide for public comments during the actual consultation process rather than during the public comment portion of the Commission’s meetings.<sup>152</sup> As noted by the DPA, public comments after the Commission has already deliberated and reached a decision would make the public’s input pointless. In addition, the DPA emphasized that public commenters often provide both valuable insight and a point of view that the Commission may not have considered.<sup>153</sup>

##### **C. Mr. Myers’ Position: DNREC Has No Discretion, And The Regulations Are Insufficient.**

82. Mr. Myers argues that both “may” (in Section 364(i)) and “shall” (in Section 364(j)) impose a mandatory duty on the E&C Director. According to Mr. Myers, judicial opinions hold that when a government official is given a discretionary power to be exercised to protect or benefit the public welfare or to guarantee a right granted to a third party, the “may” term imposes a duty to act without any discretion.<sup>154</sup> According to Mr. Myers, that is the scenario here: the E&C Director holds the power to suspend the RPS mandates to protect ratepayers from paying for renewable energy costs at levels the General Assembly has already determined to be excessive.<sup>155</sup> In contrast, Section 364(j)’s use of the word “shall” does not grant the Director any right or privilege. Instead, such word simply emphasizes that once the cost levels are expected to fall below the cap limits, the Director has a ministerial duty to return to the “normal” statutory RPS scheme. In both instances, he notes that although one sentence uses “may” and the second uses “shall,” both directives are obligatory.<sup>156</sup>

83. Mr. Myers also argues that the Commission should reject the notion that the Director has the discretionary authority to forego a freeze otherwise required by the percentage cap levels.<sup>157</sup> According to Mr. Myers, the wording in 26 Del.C. §362(b) stresses that the Commission, not DNREC, has the final say on how

freezes will occur. In Mr. Myers' view, neither the statutory text nor the legislative history supports the discretionary power claimed by the Director.

84. Mr. Myers also argued that the Proposed Regulations create technical difficulties in two ways. First, the citations to the Administrative Procedures Act ("APA") that Staff cited in support of calling the E&C Director's decision to freeze the RPS requirements a "final agency action" did not support such a conclusion in fact. Mr. Myers asserted that 29 Del.C. §10141(b) was limited to making, amending, or repealing regulations, and 29 Del.C. §10141(a) was limited to judicial action on the unlawfulness of a regulation. In contrast, the E&C Director's decision to freeze/not freeze cannot be squeezed into the definition of a "regulation" under the APA. In support of this argument, he notes that the APA requires public notice in the *Register of Regulations* and the opportunity for public comments, neither of which have been considered within the Proposed Regulations as drafted. In addition, he argues that under the APA, a final decision on a regulation must be based on all of the testimonial and written evidence and information submitted.<sup>158</sup> However, the Proposed Regulations do not allow for submissions of public comments.<sup>159</sup>

85. Mr. Myers also argues that the Proposed Regulations distort basic administrative law principles and violate the Delaware Constitution.<sup>160</sup> He points out that the separation of powers doctrine assigns to the legislature the duty to decide major policy issues--not the executive branch as set forth in the Proposed Regulations. He also argues that Article I, section 10 of the Delaware Constitution precludes an executive official from being granted the power to suspend the operation of a statutory enactment based on her discretionary finding or view that the previously enacted statutory benefit or regime no longer remains good public policy.<sup>161</sup>

**D. DNREC's Position: The E&C Director Has The Authority To Calculate The Total Costs Of Compliance And The Discretion To Freeze The RPS In Consultation With The Commission.**

86. DNREC argued that the Commission should reject any attempt to limit the authority of the E&C Director regarding decision-making authority under both 26 Del.C. §354(i) and (j).<sup>162</sup> Moreover, DNREC argued that when a statute uses two different words in the same paragraph of the same statute, one can only conclude that the words convey different meanings. Hence, "may," as used in Section 354(i) confers discretion, whereas "shall" means the E&C Director does not have discretion regarding lifting a freeze.<sup>163</sup> In addition, DNREC argued that the statutory language used in Section 354(i) is unambiguous and therefore a review of legislative history was unnecessary.

87. DNREC also argued that the words "in consultation with" the Commission hinges upon the E&C Director's exercise of discretion, and a freeze cannot be declared without the Director's affirmative decision to freeze the RPS.<sup>164</sup> According to DNREC, the Director has no reason to consult with the Commission unless and until the Director decides to freeze the RPS caps.<sup>165</sup>

88. DNREC argued that this Docket was "for the limited purpose of complying with the Memorandum Opinion, issued December 30, 2016, in *Delaware Division of the Public Advocate v. Delaware Public Service Commission*." (PSC Order No. 9024, p. 3.) As stated by Judge LeGrow, that purpose is "to promulgate regulations for freezing the minimum renewable energy purchase requirements, including regulations regarding when and how the calculations will be made."<sup>166</sup> DNREC argued that the Commission should not expand the scope of this docket beyond Judge LeGrow's ruling and in no case is it legally permissible to utilize this rulemaking to deviate from the plain meaning and purpose of REPSA. DNREC argued that, in particular, REPSA is explicit that DNREC has authority not only to perform the calculation, but also to determine, after consultation with the Commission, whether a freeze of the RPS requirement should be implemented and when a freeze should be lifted, and Judge LeGrow confirmed this. In support of its argument, DNREC cites Judge LeGrow's decision: "the General Assembly gave DNREC the ability to calculate cost caps and determine, in consultation with the Commission, whether a freeze should be implemented and subsequently lifted."<sup>167</sup> Despite this, the proposed regulations seek to give the Commission the ultimate authority on this. DNREC argues this exceeds both the clear direction from Judge LeGrow and the plain language of REPSA.<sup>168</sup>

89. DNREC further argued that §354 (i) and (j) provide not a ceiling, but a floor. That is, if the cost of compliance falls under the 3 percent and 1 percent thresholds, there is no authority to freeze the RPS. On the other hand, if the cost of compliance rises above the 3 percent or 1 percent thresholds, DNREC has authority to exercise its discretion to freeze the increases in the minimum RPS standards, then bringing that determination to the Commission for consultation. In contrast, the proposed regulations in sections 3.2.21.5 and 3.2.21.6

appears to provide the Commission with the ultimate authority to decide whether a freeze will be implemented: "the Commission shall consider the determination and issue an Order to the CREC as to whether to institute a Freeze." Proposed Regulation §3.2.21.6.2. Such a regulation conflicts with the plain language of REPSA.<sup>169</sup>

90. DNREC further argued that the proposed regulations regarding unfreezing, sections 3.2.21.7, 3.2.21.8, and 3.2.21.9, are similarly in conflict with REPSA, which provides that a "freeze *shall be lifted upon a finding by the Coordinator*, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the [1% or 3%] threshold," 29 **Del.C.** §354(i), (j) (emphasis added); i.e., the authority is DNREC's and the freeze *must* be lifted upon a finding by DNREC. In contrast, the proposed regulations take that authority away from DNREC and provide the Commission with discretion to "*consider* the determination and issue an Order to the CREC *as to whether to resume*. . . ." Proposed Regulation §3.2.21.9.2 (emphasis added). DNREC argued that such a regulation conflicts with the plain language of REPSA.<sup>170</sup> DNREC asserted that the allocation of authority between the Commission and DNREC is further underscored by the alternative statutory language found in Sections 354(c) and (d) where the Legislature provided the Commission with authority; as the Legislature plainly knew how to provide such a delegation of authority in subsections (c) and (d), the distinction in subsections (i) and (j) must have meaning.<sup>171</sup>

91. DNREC also found issue with a portion of the Proposed Regulations that, according to DNREC, would effectively create a right of judicial review of the Director's determination to freeze or not to freeze the RPS.<sup>172</sup> Because the Proposed Regulations state that the E&C Director's decision is a final agency action under 29 **Del.C.** §10141(b), the Proposed Regulations effectively create a right of judicial review of the Director's determination. This language, according to DNREC, is erroneous for six reasons.

92. First, no language in REPSA exists to support this new proposed right of judicial review. According to DNREC, Section 362(b) limits the Commission's regulatory authority to specifying procedures for freezing the RPS and adjusting the alternative compliance payment — not for contesting the Director's decision to freeze or not to freeze. Because REPSA has no provision for an appeal and because the regulatory authority of the Commission in this matter is limited to the matters specified in §362(b), DNREC argues that the Proposed Regulations cannot add a new right of judicial review.

93. Second, the Opinion<sup>173</sup> did not require any right of judicial review or even suggest it. According to DNREC, the Court in that decision stated that Section 362(b) contains the only explicit rule-making authority granted by the General Assembly.<sup>174</sup> Hence, the Commission reopened this docket for the limited purpose of complying with the Delaware Superior Court's Memorandum Opinion in that case.

94. Third, to create a right of judicial review would exceed the scope of PSC Order Nos. 9024 and 9025. Because the issues were limited in those orders, DNREC argued that the Commission should not expand the scope of this docket to include the additional matter of creating a right of judicial review.

95. Fourth, the language in the Proposed Regulations that created this new right of judicial review was based on an incorrect interpretation of 29 **Del.C.** §10141(b). That statute, DNREC argued, does not support the conclusion that DNREC's decision to freeze the RPS is a "final agency action" because DNREC is not subject the provisions of the APA that govern case decisions and the subsequent right to judicial review.

96. Fifth, the Commission lacks the authority to assert or create a right to judicial review for another state agency. DNREC argued that Title 29 governs judicial review of a DNREC decision, and matters within Title 29 extend beyond the purview of the Commission. Thus, DNREC contended that the Commission does not have the authority under Title 29 to decide this matter for a state agency not subject to its regulation.

97. DNREC further argued that Staff had not offered a sufficient policy basis or legal reasoning for asserting a right of judicial review. Although Staff cited to an "intense disagreement,"<sup>175</sup> DNREC asserted that this disagreement by itself did not provide sufficient basis for asserting a right to judicial review.

98. Finally, DNREC generally objected to the proposed regulations as contrary to the underlying statutory purpose of REPSA. As declared in REPSA, "It is therefore *the purpose and intent* of the General Assembly in enacting the Renewable Energy Portfolio Standards Act *to establish a market for electricity from these resources in Delaware, and to lower the cost to consumers of electricity from these resources.*" (26 **Del.C.** §351 (emphasis added).) To that end, "*the benefits of electricity from renewable energy resources accrue to the public at large, and that electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electricity supply portfolio of the state. These benefits include improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply*

disruption, improved transmission and distribution performance, and new economic development opportunities.” *Id.* To that purpose, REPSA reiterates numerous times that its goal is to meet 25% of electricity from eligible energy resources by 2025, and that once reached the percentage can never be lower than 2025 levels. (26 **Del.C.** §354(b), (c), (d). Measured by the purpose and intent of REPSA, the RPS is working. The RPS has created a market for eligible energy resources that has led to a consistent, long-term expansion in the market for eligible energy resources and a consistent, long-term decline in REC and SREC prices. Any amendments to Reg. 3008 that would interfere with the long-term development of renewable energy—even as renewable energy costs are falling as intended—is inconsistent with the purpose of REPSA.<sup>176</sup>

**E. CRI’s Position: The Director Must Freeze RPS Compliance If The Cost Caps Are Reached.**

99. CRI argued that both the words “may” in Section 354(i) and “shall” in Section 354(j) both mean the same thing—that DNREC must freeze the minimum cumulative solar photovoltaics/eligible energy resources requirements for regulated utilities if the cost caps are reached. According to CRI, the General Assembly stated in legislative hearings that if a cost cap were to be exceeded, this fact caused an absolute “circuit breaker” to occur in order to protect ratepayers.<sup>177</sup> Hence, CRI’s position was that the E&C Director does not have discretion in deciding whether to freeze or not freeze the cost caps.

**F. Commission Decision.**

100. This Commission, by a vote of 4-1 (Chairman Winslow dissenting) finds that Staff’s arguments are persuasive and holds that Staff’s position on this issue is the correct view. The Commission has the exclusive jurisdiction over RPS compliance — not the E&C Director. Moreover, the Commission has exclusive jurisdiction over Delmarva, as the distribution company, regarding RPS compliance. This position of authority places the Commission in an ideal position in which to review and determine, after consultation with the E&C Director, whether to freeze or not freeze RPS compliance. The Commission therefore can veto DNREC’s determination on whether to institute a freeze or not.

101. Thus, the Commission will determine by order whether to adopt DNREC’s determination after consulting with DNREC. If DNREC’s calculations determine that either the 1% or the 3% requirements have been met, the Commission shall consult with DNREC as to whether a freeze of the yearly increase should be instituted or not. Twenty days after the consultation, DNREC will submit to the Commission a written decision that includes the basis for its determination, including the basis of why it decided to declare a freeze or not. At the next regularly scheduled Commission meeting, we will consider DNREC’s determination and issue an order to the CREC as to whether to institute a freeze or not.

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

1. That this Findings, Opinion and Order constitute the Commission’s issuance of its conclusion under 29 **Del.C.** §10113(a) to adopt as final the “Rules and Procedures to Implement the Renewable Energy Portfolio Standard” (Opened August 23, 2005) (26 *Del. Admin. C.* §3008) set forth in Exhibit “A” to this Order, which amend the current regulations set forth in attached Exhibit “B.” In accordance with 29 **Del.C.** §10118, these Regulations shall become effective on December 12, 2018.

2. That, pursuant to 29 **Del.C.** §§1133 and 10115(a), the Secretary shall transmit to the Registrar of Regulations for publication in the December 2018 Delaware *Register of Regulations* a copy of this Order.

3. The Commission reserves jurisdiction and authority to enter such further orders as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

Dallas Winslow, Chairman

Harold B. Gray, Commissioner

Manubhai C. Karia, Commissioner

Vacant, Commissioner

Vacant, Commissioner

ATTEST: Donna Nickerson, Secretary

<sup>1</sup> 26 Del.C. §352(6).

<sup>2</sup> 76 Del. Laws, c. 165 (2007).

<sup>3</sup> 77 Del. Laws, c. 451 (2010). (The "Cost-Cap Amendments").

<sup>4</sup> 78 Del. Laws, c. 99 (2011). (The "Bloom Amendments").

<sup>5</sup> The State Energy Coordinator position and the Delaware Energy Office no longer exist. The Director of DNREC's Division of Energy and Climate is now the pertinent entity for participating in this determination with the Commission, and that division also performs the calculations necessary to determine whether the cost caps have been met.

<sup>6</sup> PSC Order No. 7834 (Sept. 7, 2010).

<sup>7</sup> DNREC Start Action Notice 2012-03: "[T]o develop rules for administering the determination of the cost of the Renewable Portfolio Standard and whether or when to implement a freeze of the RPS." April 10, 2012. Available at <http://bit.ly/2rj0Hdn>.

<sup>8</sup> 17 DE Reg. 600 (12/01/13).

<sup>9</sup> 18 DE Reg. 432 (12/01/14); 19 DE Reg. 397 (11/01/15).

<sup>10</sup> Available at <http://bit.ly/2pPo4eC>.

<sup>11</sup> PSC Order No. 8807 (Dec. 3, 2015).

<sup>12</sup> Delaware Div. of the Pub. Advocate v. Public Serv. Comm'n, 2016 WL 7494899 (Del. Super. Dec. 30, 2016)("DPA v. PSC" or "Opinion").

<sup>13</sup> PSC Order No. 9024 (Feb. 2, 2017).

<sup>14</sup> *Id.*

<sup>15</sup> See 26 Del.C. §364.

<sup>90</sup> *Id.* (citing 26 Del.C. §353(d)). "See also 26 Del.C. §364(d): "entitle the [CREC] to reduce its REC and SREC requirements as provided for in § 353(d) of this title. ..." *Id.* at n.69. (emphasis and alteration in original).

<sup>91</sup> *Id.* (citing 26 Del.C. §354(i) and (j)).

<sup>92</sup> *Id.* (citing *DPA v. PSC* at \*6).

<sup>93</sup> *Id.* at 16-17 (citing 26 Del.C. §363(e). (emphasis in original).

<sup>94</sup> *Id.* at 17.

<sup>95</sup> DPA October 2, 2017 Comments at 29 (citing 26 Del. C. §353(d) (emphasis in original).

<sup>96</sup> *Id.* (citing § 353(d)(l)a. and (d)(1)b.).

<sup>97</sup> *Id.* (citing § 353(d)(1)b.).

<sup>98</sup> *Id.* (citing § 353(d)(l)c.).

<sup>99</sup> *Id.* at 40.

<sup>100</sup> *Id.* at 31.

<sup>101</sup> *Id.* at 30.

<sup>102</sup> *Id.* at 30-31.

<sup>103</sup> *Id.* at 31, citing Opinion, slip op. at 9 and *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1288 (Del. 2011).

<sup>104</sup> *Id.* at 31.

<sup>16</sup> The Commission voted as follows: 3-2 to "support Staff's position and DNREC's position on the first question regarding what should be included in the definition of total retail cost of electricity. ..." (Tr., Dec. 7, 2018, at 1075, lines 21-24, 1076 at 1); 5-0 "in favor of the DPA and Mr. Myers' argument," to include the cost of the Bloom Fuel Cell in the calculation for total cost of compliance. (Tr. at 1078, lines 5-6); and 4-1 to support "the position put forth by Staff" that the Commission will determine by Order whether to adopt the E&C Director's determination to freeze after consultation with the Commission. (Tr. at 1081, lines 20:21).

<sup>105</sup> *Id.* at 32-33.

<sup>17</sup> The following persons and entities filed comments: Mr. Myers, Sierra Club, the DPA, DNREC, and Staff. Another 128 public comments were filed. See 57, *infra*.

<sup>106</sup> *Id.* at 32.

<sup>18</sup> Staff Memo, Regulation Docket 56 (March 16, 2018).

<sup>107</sup> *Id.* at 33, citing Legislative Drafting Manual, Rule 26(b) (emphasis added by DPA).

<sup>19</sup> 21 DE Reg. 620 (Feb. 1, 2018).

<sup>108</sup> *Id.* at 32-33.

<sup>20</sup> See 16, *supra*.

<sup>109</sup> *Id.* at 34, quoting 26 *Del.C.* §363(d).

<sup>21</sup> DE Register of Reg. Notice - 22 DE Reg. 37 (7/01/18).

<sup>110</sup> *Id.* at 35.

<sup>22</sup> In its July 31, 2018 Comments ("DNREC July 2018 Comments"), DNREC in particular argued that Commission action on the proposed regulations should be postponed given the possibility of legislative action on the RPS and to allow DNREC and the Commission to engage in further discussions on the future of the RPS, as had been suggested by a letter from Secretaries Bullock and Garvin which concluded: "[W]e will urge everyone involved to put on hold any legal or regulatory actions until a consensus agreement can be obtained." (DNREC July 2018 Comments at 1-2).

<sup>111</sup> *Id.* at 36.

<sup>23</sup> Because the July 1 proposed rules adopted the determinations made at the June 5, 2018 deliberations, these findings and opinion explain those determinations

<sup>112</sup> *Id.* at 36.

<sup>24</sup> Staff's July 21, 2017 Recommendation ("Staff Recommendation") at 6, (citing *DPA v. PSC* at \*11).

<sup>113</sup> *Id.* at 37.

<sup>25</sup> *Id.* (citing 26 *Del.C.* §352(22)).

<sup>114</sup> *Id.* at 39-40.

<sup>26</sup> *Id.* (citing 26 *Del.C.* §352(7)). (emphasis in original).

<sup>115</sup> *Id.* at 40.

<sup>27</sup> *Id.* (citing 16 U.S.C. §824(d)). (emphasis in original).

<sup>116</sup> DNREC Comments at 3.

<sup>28</sup> Staff Recommendation at 6.

<sup>117</sup> DNREC July 2018 Comments at 11.

<sup>29</sup> *Id.* at 7.

<sup>118</sup> DNREC Comments at 3.

<sup>30</sup> *Id.* (citing 26 Del.C. §352(22)).

<sup>31</sup> *Id.* (citing 26 Del.C. §1007(a)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 8 (citing 16 U.S.C. §824(d)).

<sup>34</sup> Staff Recommendation at 8.

<sup>35</sup> *Id.* (emphasis in original).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> DPA Oct. 2, 2017 Comments at 13 (citing 26 Del.C. §1003) (alteration, sans brackets, in original). The statute reads, "[c]ustomers of electric *distribution companies in this State shall continue* to have the opportunity, but not the obligation, to purchase electricity from their choice of electric suppliers ..." 26 Del.C. §1003. (emphasis added).

<sup>39</sup> *Id.* at 13 (citing 26 Del.C. §1005(a)(1)a.).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 13-14.

<sup>42</sup> *Id.* at 14 (emphasis and alteration in original).

<sup>43</sup> *Id.* at 13 (emphasis and alteration in original).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.*

<sup>119</sup> *Id.* at 4-5 (citing 26 Del.C. §352(9)("GATS" means the generation attribute tracking system developed by PJM.); and 26 Del.C. §352(14)("PJM" or "PJM interconnection" means the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.)

<sup>120</sup> DNREC July 2018 Comments at 12.

<sup>121</sup> *Id.* at 5.

<sup>122</sup> Mr. Myers' March 31, 2017 Comments ("Myers Comments") at 12 (citing 26 Del.C. §352(18), (25)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (citing 26 Del.C. §352(18)). (alteration in original).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (citing 26 Del.C. §353(d)). (emphasis in original). (alteration in original).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 12-13.

<sup>130</sup> *Id.* at 13.

<sup>131</sup> *Id.* at 13-14; Mr. Myers' March 31, 2017 Comments included transcripts of the following: Senate Proceedings, Senate Substitute No. 1 for Senate Bill No. 119, 145th Gen. Assembly, 2d Sess. (June 22, 2010) (enacted); H.R. Proceedings, Senate Substitute No. 1 for Senate Bill No. 119, 145th Gen. Assembly, 2d Sess. (June 29, 2010) (enacted); Senate Proceedings, Senate Bill No. 124 and Senate Amend. No. 1, 146th Gen. Assembly, 1st Sess. (June 16, 2011) (enacted); and H.R. Proceedings, Senate Bill No. 124 with Senate Amend. No. 1, 146th Gen. Assembly, 1st Sess. (June 23, 2011).

<sup>132</sup> *Id.* at 16 (citing *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010)). (internal citations omitted).

<sup>133</sup> *Id.* at 16-17.

<sup>134</sup> *Id.* at 17 (citing *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016)).

<sup>135</sup> 16 U.S.C. § 791a, et seq.

<sup>136</sup> *Id.* at 20.

- <sup>48</sup> *Id.*
- <sup>49</sup> *Id.* at 16. (citations omitted).
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.*
- <sup>52</sup> *Id.* at 16-17.
- <sup>53</sup> *Id.* at 17-18.
- <sup>54</sup> *Id.* at 18.
- <sup>55</sup> *Id.* at 19-20.
- <sup>56</sup> *Id.* at 20, n.59 (citing *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 715 (Del. 1995)).
- <sup>57</sup> *Id.* at 21.
- <sup>58</sup> *Id.* (emphasis in original).
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.* at 21-22.
- <sup>61</sup> *Id.* at 24, citing *Zambrana v. State*, 118 A.3d 775 (Del. 2015).
- <sup>62</sup> *Id.* at 24, citing *Chase Alexa LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) and *Terex Corp. v. S. Track & Pump*, 117 A.3d 537, 543-44 (Del. 2015).
- <sup>63</sup> *Id.* at 24-25, citing *Terex Corp.*, 117 A.3d at 543.
- <sup>64</sup> *Id.* at 25.
- <sup>65</sup> *Id.*
- <sup>66</sup> *Id.* at 25-26.
- <sup>67</sup> DNREC's April 24, 2017 Comments ("DNREC Comments") at 3.
- <sup>68</sup> *Id.*
- <sup>69</sup> DNREC's July 2018 Comments at 10.
- <sup>70</sup> DNREC's Comments at 3.
- <sup>71</sup> G. Myers' March 31, 2017 Comments ("Myers Comments") at 30. (emphasis in original).
- <sup>72</sup> *Id.* at 30. (internal citation omitted). (emphasis in original).
- <sup>73</sup> *Id.* at 30-31. (emphasis in original).
- <sup>74</sup> *Id.* at 31.
- <sup>75</sup> *Id.* at 30 (citing 26 Del.C. §10001(10),(12)).
- <sup>137</sup> *Id.* at 19.
- <sup>138</sup> CRI's April 6, 2017 Addendum Comments ("CRI Addendum") at 2.
- <sup>139</sup> *Id.* at 1-2 (referencing PSC Order No. 8835, Docket 13-250 (Dec. 15, 2015)). (emphasis in original).
- <sup>140</sup> Tr., June 5, 2018, at 1175, lines 10-12.
- <sup>141</sup> *Id.* at lines 13-16.
- <sup>142</sup> *Id.* at lines 16-17.
- <sup>143</sup> *Id.* at p. 1175, lines 21-22; p. 1176, line 5-8 (quoting 26 Del.C. §354(i)).
- <sup>144</sup> *Id.* at p. 1176, lines 9-11.
- <sup>145</sup> *Id.* at lines 12-16.
- <sup>146</sup> *Id.* at p. 1176, lines 22-24; p. 1177, line 1.
- <sup>147</sup> *Id.* at p. 1177, lines 2-11.
- <sup>148</sup> Staff Memorandum dated December 1, 2017 ("Staff Memorandum") at 6.
- <sup>149</sup> Staff Review and Recommendation dated July 20, 2017 ("Staff Recommendation") at 25.
- <sup>150</sup> Staff Memorandum at 5.
- <sup>151</sup> Staff Memorandum at 5.
- <sup>152</sup> DPA Oct. 2, 2017 Comments at 41-42.
- <sup>153</sup> *Id.* at 42.
- <sup>154</sup> Mr. Myers' Sept. 28, 2017 Reply Comments (Myers' Reply Comments") at 10.
- <sup>155</sup> *Id.* at 10-11.
- <sup>156</sup> *Id.* at 11.
- <sup>157</sup> Myers' Comments at 23.
- <sup>158</sup> 29 Del.C. §10008.
- <sup>159</sup> Myers' Comments at 13.
- <sup>160</sup> *Id.*
- <sup>161</sup> *Id.* at 13-14; see, e.g., *Clinton v. City of N.Y.*, 524 U.S. 417, 442-47(1998).
- <sup>162</sup> DNREC Initial Comments, April 24, 2017, at 8.
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.* at 9.

<sup>76</sup> *Id.* at 31. (citing 26 *Del.C.* §352(22) (emphasis in original)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 32.

<sup>80</sup> *Id.* (citing 26 *Del.C.* §10001(14)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (emphasis in original).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> June 5, 2018 Tr., p. 1166, lines 5-14.

<sup>86</sup> *Id.* at p. 1166, lines 20-24; p. 1167, line 1.

<sup>87</sup> *Id.* at p. 1167, lines 21-24.

<sup>88</sup> Staff's July 21, 2017 Recommendation ("Staff Recommendation") at 15, (citing 26 *Del.C.* §352(16)).

<sup>89</sup> *Id.*

<sup>165</sup> Mid-Atlantic Renewable Energy Coalition ("MAREC") supports this position.

<sup>166</sup> *DPA v. PSC* at \*11. DNREC argues that because it was not a party to *DPA v. PSC*, it was not directly bound by Judge LeGrow's ruling. In support, DNREC cites *State v. McCoy*, 143 A.3d 7, 15-16 (Del. 2016) (holding that the involvement of one state agency in litigation will not necessarily bind other state agencies who are not parties to such litigation, particularly where the agencies are represented by separate counsel).

<sup>167</sup> *DPA v. PSC* at \*10. (Emphasis added).

<sup>168</sup> DNREC July 2018 Comments at 3-4.

<sup>169</sup> DNREC July 2018 Comments at 6-7.

<sup>170</sup> *Id.* at 7.

<sup>171</sup> *Id.* at 9-10.

<sup>172</sup> DNREC's comments filed October 2, 2017.

<sup>173</sup> *DPA v. PSC*, supra n.12

<sup>174</sup> *Id.*, at \*5.

<sup>175</sup> PSC Regulation Docket 56, Staff Review and Recommendation dated July 20, 2017, at 32.

<sup>176</sup> DNREC July 31 Comments at 5-6.

<sup>177</sup> Addendum to CRI Comments, April 6, 2017, at 2.

**\*Please note that no changes were made to the regulation as originally proposed and published in the July 2018 issue of the *Register* at page 37 (22 DE Reg. 37). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**[3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard](#)**

**DEPARTMENT OF TRANSPORTATION**

**DIVISION OF TRANSPORTATION SOLUTIONS**

Statutory Authority: 17 Delaware Code, Section 137 (17 **Del.C.** §137)

**2 DE Admin. Code 2406**

**ORDER**

**2406 Policies and Procedures for Acquisition of Certain Real Property**

Pursuant to the authority provided by 17 **Del.C.** §137, the Delaware Department of Transportation ("DelDOT") proposed to adopt changes to its regulation entitled Policies and Procedures for Acquisition of Certain Real Property. Notice of the proposed changes was published in the Delaware *Register of Regulations* Issue 289, dated October 1, 2018.

The public was given notice and the opportunity to provide DelDOT with comments on proposed amendments.

There were no questions or comments received during the public comment period and no changes were made to the regulation as originally proposed and published. Accordingly, the final regulation is not being republished.

### **Summary of the Evidence and Information Submitted**

The proposed changes to the Policies and Procedures for Acquisition of Certain Real Property are procedural changes, administrative in nature and serve to clarify the intent of the Department.

### **Findings of Fact**

Based on the record in this docket, I make the following findings of fact:

1. The proposed amendments to the existing Policies and Procedures for Acquisition of Certain Real Property are useful and proper. The public comment period was appropriately held open for 30 days and no public comment was received.

2. The adoption of these proposed changes to the Policies and Procedures for Acquisition of Certain Real Property is in the best interests of the State of Delaware. Having receive no public comment, there is no basis upon which to further amend the regulation and it is adopted as amended.

### **Decision and Effective Date**

Based on the provision of Delaware law and the record of this docket, I hereby adopt the amended Policies and Procedures for Acquisition of Certain Real Property, as set forth in the version attached hereto, to be effective December 11, 2018.

It is so ordered on this 15<sup>th</sup> day of November, 2018.

Jennifer Cohan, Secretary  
Delaware Department of Transportation

**\*Please note that no changes were made to the regulation as originally proposed and published in the October 2018 issue of the *Register* at page 289 (22 DE Reg. 289). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**[2406 Policies and Procedures for Acquisition of Certain Real Property](#)**

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF WATERSHED STEWARDSHIP

Statutory Authority: 7 Delaware Code, Section 4006(h) and (i) (7 **Del.C.** §4006(h) and (i))

#### REGISTER NOTICE

#### 5101 Sediment and Stormwater Regulatory Guidance Documents

The Department of Natural Resources and Environmental Control (DNREC) Division of Watershed Stewardship Sediment and Stormwater Program has released regulatory guidance documents for public review. These documents support **Regulation No. 5101 Sediment and Stormwater Regulations**, as set forth at 7 **Del.C.** §4006(h) and (i).

The regulatory guidance documents include the following:

- Standard Guidelines for Operation and Maintenance of Stormwater BMPs
- Project Application Meeting checklist
- Stormwater Assessment Study (SAS) Checklist
- Step 2: Preliminary Sediment & Stormwater Management Plan Review Checklist
- Step 3: Sediment & Stormwater Management Plan Review Checklist
- Step 2/3: Sediment & Stormwater Management Plan Review Checklist
- Application for Sediment and Stormwater Management Plan Approval
- Standard Plan Application Forms
- Post Construction Stormwater BMP Construction Review Checklists
- Post Construction Verification Documentation Requirements for Stormwater BMPs

The DNREC Sediment and Stormwater Program hereby provides notice of these regulatory guidance documents, pursuant to 7 **Del.C.** §4006(i), which incorporates the provisions of 7 **Del.C.** §6004. A public hearing will NOT be held unless the Secretary receives a meritorious request for a hearing within 15 days of date of this notice, ending December 17, 2018. A request for a public hearing shall be in writing and show familiarity with the regulatory guidance document and provide a reasoned statement of the regulatory guidance document's probable impact.

The regulatory guidance documents may be reviewed online at the following website: <http://www.dnrec.delaware.gov/swc/Pages/SedimentStormwater.aspx>

The regulatory guidance documents may also be reviewed at the Department of Natural Resources and Environmental Control, 89 Kings Highway, Dover, DE 19901.

For appointments to review the regulatory guidance documents, please contact Elaine Webb, DNREC Sediment and Stormwater Program, 89 Kings Highway, Dover, DE 19901, (302) 739-9921, or email [elaine.webb@state.de.us](mailto:elaine.webb@state.de.us).

PREPARED BY:

Elaine Z. Webb

(302) 729-9921

[Elaine.webb@state.de.us](mailto:Elaine.webb@state.de.us)

**DEPARTMENT OF AGRICULTURE**  
**OFFICE OF THE STATE VETERINARIAN**  
**PUBLIC NOTICE**  
**901 Poultry Disease Prevention Regulations**

The Department of Agriculture proposes to amend its Regulations adopted in accordance with Title 3, Chapter 1 of the Delaware Code to revise the Poultry Disease Prevention Regulations at 3 **DE Admin. Code** 901. The purpose of the amended regulations is to update terminology, definitions, requirements for entry to Delaware and reference to federal rules, and to add a new Section 6.3 to prohibit the slaughter, other than for humane euthanasia or disease control, of any poultry on the premises of any dealer or broker of poultry or on the premises of any poultry sales establishment. Other regulations issued by the Department of Agriculture are not affected by this proposal. The Department of Agriculture is issuing these proposed regulations in accordance with Title 3 of the Delaware Code. This notice is issued pursuant to the requirements of Chapter 101 of Title 29 of the Delaware Code.

A copy of the proposed regulations is being published in the December 1, 2018 edition of the Delaware *Register of Regulations*. A copy is also on file in the office of the Department of Agriculture, 2320 South DuPont Highway, Dover, Delaware 19901 and is available for inspection during regular office hours. Copies are also published online at the *Register of Regulations* website: [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

Interested parties may offer written comments on the proposed regulations or submit written suggestions, data, briefs or other materials to the Department of Agriculture at the above address as to whether these proposed regulations should be adopted, rejected or modified. Pursuant to 29 **Del.C.** §10118(a), public comments must be received on or before December 31, 2018. Written materials submitted will be available for inspection at the above address.

On or after December 31, 2018, following review of the public comment, the Department of Agriculture will determine whether to amend its regulations by adopting the proposed rules or make additional changes because of the public comments received.

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**DEPARTMENT OF EDUCATION**  
**PUBLIC NOTICE**

The State Board of Education will hold its monthly meeting on Thursday, December 20, 2018 at 5:00 p.m. in the Townsend Building, Dover, Delaware.

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**  
**DIVISION OF AIR QUALITY**  
**PUBLIC NOTICE**  
**1150 Outer Continental Shelf Air Regulations**

The Division of Air Quality (DAQ) is proposing to amend 7 **DE Admin. Code** 1150 to incorporate updates to the federal Outer Continental Shelf (OCS) regulations at 40 CFR 55, which have been made since the regulation was adopted in 2010.

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Monday, January 7, 2019 beginning at 6:00 PM at the Division of Air Quality's office located at State Street Commons, 100 W. Water Street, Suite 6A, Dover, DE 19904. Interested parties may submit comments in writing to: Mark A. Prettyman, DNREC - Division of Air Quality, State Street Commons, 100 W. Water Street, Suite 6A, Dover, DE 19904. Public comments will be received until close of business Tuesday, January 22, 2019.

**DIVISION OF WASTE AND HAZARDOUS SUBSTANCES****PUBLIC NOTICE****1375 Regulations Governing Hazardous Substance Cleanup**

The premise of the Brownfields Development Program (BDP) is to provide liability protections to parties who did not cause or contribute to the release of a hazardous substance on a real property. The intent is to investigate the property, ascertain the quantity and quality of contamination, its fate, transport, and pathways from the source material, and ultimately the potential harm to affected receptors. Upon completion of the investigation, an eligible brownfield developer would have to remediate the property before putting the property back into reuse. This would cleanup the property for the intended use and prevent any further migration of contamination off of the certified brownfield property.

Remediation of contamination that extends beyond the boundaries of a Brownfield property is not the responsibility of the Brownfield developer but rather all otherwise potentially responsible parties. As the regulations are currently written, certified brownfields are "facilities" which mandates the investigation and cleanup of hazardous substance releases wherever they may be located - on or off the certified brownfield property. The amendments to the Regulations create a definition of a "certified brownfield" to ensure the remedial responsibilities of the Brownfield Developer are limited only to the area of the certified brownfield.

In addition the terminology of "abandoned, vacant or underutilized" to define a potential brownfield has been changed to "the redevelopment, reuse or expansion may be hindered by the reasonable belief that the real property is environmentally contaminated" to mirror the language in the Brownfields Development Program enabling statute, 7 Del.C. Chapter 91. The statutory change was made to more closely align with the federal brownfield statute and regulations. While the change is not required by any federal mandate it will create consistency between the state and federal brownfields program that will assist in grant writing.

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Wednesday, January 9, 2019 starting at 6:00 PM in the DNREC Richardson & Robbins Auditorium, 89 Kings Highway, Dover, DE. If you are unable to attend or wish to submit your comments in advance of the public hearing, please send your comments to the address below. Interested parties may also submit written comments to the Department, to the same address below, up until the end of the comment period, which will extend through January 24, 2019, unless a longer period is designated by the hearing officer at the public hearing.

DNREC - Site Investigation and Restoration Section

Subject: HSCA Regulations Hearing

Attn: Jill Williams-Hall

391 Lukens Drive

New Castle, DE 19720

Jill.hall@state.de.us

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**DIVISION OF WATERSHED STEWARDSHIP****PUBLIC NOTICE****7402 Shellfish Sanitation Regulations**

The Atlantic Ocean is currently classified as an Approved Shellfish Growing Area (GA-7) but there is no commercial or recreational bi-valve shellfish harvest that occurs in this growing area and the State resources to maintain current sampling and classification work are costly and provide no added benefit to the State. The purpose of this action is to change the classification of the Atlantic Ocean from an Approved Shellfish Growing Area to a Prohibited Shellfish Growing Area. By changing the classification status, it will save the State thousands of dollars annually with no impact to the public which utilizes the State's shellfish resources. If a viable fishery was determined to exist in the Atlantic Ocean in the future, the area could be reclassified to support the fishery.

The Delaware Fishing Guide has listed that clamming cannot occur within seagrass beds. This addition will make the Prohibited Shellfish Growing Area classification consistent with the restriction of clamming in seagrass beds referenced in the Delaware Fishing Guide for over ten years.

The definition of Shellfish Seed and Maximum Seed Size will be added to Shellfish Sanitation Regulations to be consistent with current Fish and Wildlife Shellfish Aquaculture Regulations for the Inland Bays.

There are no costs associated with these regulatory changes and there is minimal or no impact to commercial or recreational bi-valve shellfish harvesters. This action will save the State of Delaware thousands of dollars annually and continue to protect the State's seagrass restoration efforts.

The hearing record on the proposed changes to 7402 Shellfish Sanitation Regulations will be open December 1, 2018. Individuals may submit written comments regarding the proposed changes via e-mail to [Lisa.Vest@state.de.us](mailto:Lisa.Vest@state.de.us) or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. Public comments will be accepted through close of business Friday, February 1<sup>st</sup> 2019. A public hearing on the proposed amendment will be held on January 17, 2019 beginning at 6:00 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

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**DEPARTMENT OF SAFETY AND HOMELAND SECURITY****DELAWARE COUNCIL ON POLICE TRAINING****PUBLIC NOTICE****801 Regulations of the Delaware Council on Police Training**

The Council on Police Training (COPT), pursuant to 11 **Del.C.** §8404(a)(14), proposes to revise its regulations. The proposed amendments, which were voted on in a regular meeting by the COPT on October 16, 2018, seek to update, clarify and provide more detailed information regarding training requirements and records, employment status, COPT certification, and procedures for non-compliance.

The COPT will allow for the submission of written comments, suggestions, or other materials regarding the proposed rules to the Department of Safety and Homeland Security Attn: Christopher Klein, Public Safety Building Suite 220, P.O. BOX 818, Dover, Delaware 19903-0818 or e-mail [Christopherm.klein@state.de.us](mailto:Christopherm.klein@state.de.us). Any written submission in response to this notice and the relevant proposed regulations must be received by the Department of Safety and Homeland Security no later than 4:30 p.m. (EST) on December 31, 2018. A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

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**DELAWARE COUNCIL ON POLICE TRAINING****PUBLIC NOTICE****802 COPT K-9 Training Standards and Requirements**

The Council on Police Training (COPT), pursuant to 11 **Del.C.** §8404(a)(14), proposes to create regulations. The proposed regulations, which were voted on in a regular meeting by the COPT on October 16, 2018, seek to establish basic training and qualification standards for police K-9 teams.

The COPT will allow for the submission of written comments, suggestions, or other materials regarding the proposed rules to the Department of Safety and Homeland Security Attn: Christopher Klein, Public Safety Building Suite 220, P.O. BOX 818, Dover, Delaware 19903-0818 or e-mail [Christopherm.klein@state.de.us](mailto:Christopherm.klein@state.de.us). Any written submission in response to this notice and the relevant proposed regulations must be received by the Department of Safety and Homeland Security no later than 4:30 p.m. (EST) on December 31, 2018. A copy of this regulation may be viewed online at the Registrar of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml).

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**DIVISION OF STATE POLICE****5500 BAIL ENFORCEMENT AGENTS****PUBLIC NOTICE**

Notice is hereby given that the Board of Examiners of Bail Enforcement Agents, in accordance with 24 **Del.C.** Ch. 55 proposes to amend the following adopted rule in 24 **DE Admin. Code** 5500 Bail Enforcement Agents: Rule 2.0 Badges, Patches, and Advertisements. If you wish to view the complete Rule, contact Ms. Ashley Hughes at (302) 672-5337. Any persons wishing to present views may submit them in writing, by December 31, 2018, to

Delaware State Police, Professional Licensing Section, P.O. Box 430, Dover, DE 19903. The Board will hold its quarterly meeting Thursday, February 14, 2019, 10:00am, at the Tatnall Building, 150 Martin Luther King, Jr. Boulevard South, Room 112, Dover, DE.

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

**102 Procedures Governing the Creation and Existence of an Interim Bank**

The State Bank Commissioner proposes to amend Regulation 102 - Procedures Governing the Creation and Existence of an Interim Bank. The proposed amendments to the Regulation would add an additional permissible purpose for the formation of an interim bank and, a technical amendment, which removes a reference to the former Regulation number. This proposed amendment is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Other Regulations issued by the State Bank Commissioner are not affected by this proposed amendment. The State Bank Commissioner is issuing this proposed amended Regulation in accordance with Title 5 of the Delaware Code. This Notice is issued pursuant to the requirements of Title 29 of the Delaware Code, Chapter 11, Subchapter III, Chapter 101, Subchapter II, and Chapter 104, Sections 10404A(b)(1) and 10404B(b)(1).

A copy of the proposed amended Regulation is being published in the December 1, 2018 edition of the Delaware *Register of Regulations*. Copies are also on file in the Office of the State Bank Commissioner, 43 South DuPont Highway, Edgehill Shopping Center, Dover, DE 19901 and are available for inspection during regular office hours. Copies are available upon request.

Interested parties may offer comments on the proposed amended Regulation or submit written suggestions, data, briefs or other materials to the Office of the State Bank Commissioner at the above address as to whether the proposed amended Regulation should be adopted, rejected or modified. Pursuant to 29 **Del.C.** §10118(a), public comments must be received on or before January 3, 2019. Written materials submitted will be available for inspection at the above address.

On or after January 3, 2019, following review of the public comment, the State Bank Commissioner will determine whether to adopt the proposed amended Regulation, or make additional changes because of the public comments received.

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**DEPARTMENT OF TRANSPORTATION**  
**DIVISION OF TRANSPORTATION SOLUTIONS**  
**PUBLIC NOTICE**

**2408 Performance-Based Contractor Evaluation Procedures**

Senate Bill 208 of the 149th General Assembly made changes to 29 **Del.C.** §6962 relating to public works contracting requiring the Delaware Department of Transportation (DelDOT) to implement a performance-based rating system for contractors that is defined in regulations. To fulfill this requirement, the Department, through its Division of Transportation Solutions, seeks to promulgate a new regulation entitled Performance-Based Contractor Evaluation Procedures.

DelDOT will take written comments on this proposed Section 2408 of Title 2, Delaware Administrative Code, from December 1, 2018 through December 31, 2018. The public may submit their comments to:

Robert McCleary, Chief Engineer, Division of Transportation Solutions  
([Robert.McCleary@state.de.us](mailto:Robert.McCleary@state.de.us)) or in writing to his attention,  
Chief Engineer  
Delaware Department of Transportation  
P.O. Box 778  
Dover, DE 19903

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