

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF HEALTH CARE QUALITY

Statutory Authority: 29 Delaware Code, Section 7903(9) (29 **Del.C.** §7903(9))
16 **DE Admin. Code** 3325

PROPOSED

PUBLIC NOTICE

3325 Financial Capability Reporting

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 29 of the Delaware Code, Section 7903(9), Delaware Health and Social Services (DHSS) / Division of Health Care Quality is proposing to amend Regulation 3325, Financial Capability Reporting, the Division's assessment of the financial capability of licensed providers revise the process for establishing capital availability for newly established facilities or facilities with a parent organization as well as to make some minor technical changes to other regulations.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Gabriela Kejner, Chief of Staff, Office of the Secretary, Main Admin Building, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4429 by Thursday, May 1, 2020, Yrene E. Waldron, of the Division of Health Care Quality, 3 Mill Road, Wilmington, DE 19806, (302) 421-7410 is the Division contact person.

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

SUMMARY OF PROPOSED CHANGES

The proposal amends Regulation 3325 at the following sections:

- 4.1.4 Surety Bond
- 4.1.5 Memorandum of Understanding
- 5.3.6 Capital availability
- 5.3.6.1 Capital availability form
- 5.3.6.1.1 Surety Bond designee
- 5.3.6.1.2 Memorandum of Understanding
- 14.1.6 Emergency financial support

Statutory Authority

29 **Del.C.** §7903(9), Powers, duties and functions of the Secretary

3325 Financial Capability Reporting

1.0 Authority

This regulation is promulgated and adopted pursuant to 29 **Del.C.** §7971(d).

2.0 Purpose and Scope

- 2.1 The purpose of this regulation is to detail the Department of Health and Social Services' (DHSS) authority to monitor the financial capability of licensed ~~long-term~~ long-term care (LTC) providers. It details the level of information that must be provided by the licensee, or potential licensee, under various circumstances. It also defines when and in what form the Department will require the submission of audited financial statements reporting the financial position and the results of operations of facilities by accountants.
- 2.2 Every facility (as defined in 16 **Del.C.** §1102(4)) licensed to provide care for more than three (3) residents shall be subject to this regulation, with the exception of state owned/operated facilities. Facilities licensed to provide care for 3 or fewer residents licensed as Family Care Homes shall only be required to submit documentation demonstrating financial capability as required by DHSS in Section 13.0 of these regulations.
- 2.3 This regulation shall not prohibit, preclude or in any way limit DHSS from ordering, conducting or performing examinations of facilities under the rules and regulations of the Delaware Department of Health and Social Services and the practices and procedures of its regulations.

3.0 Definitions

“**Accountant**” means a Certified Public Accountant or Public Accountant in good standing, as those terms are defined at 24 **Del.C.** §102.

An “**Affiliate**” of, or person “**Affiliated**” with, means a person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control of the facility specified.

“**Audited Financial Report**” means and includes those items specified in subsection 7.4 of this regulation.

“**Controlling Organization**” means an entity that has a majority ownership interest in the licensed facility.

“**DHSS**” means the Delaware Department of Health and Social Services.

“**Division**” means the DHSS Division of Health Care Quality (DHCQ).

“**Domicile**” means the location of the headquarters of the business.

“**Facility**” means a long term care facility as defined in 16 **Del.C.** §1102(4) which is licensed under 16 **Del.C.** §1103 to provide care and services to more than three (3) residents.

“**Family Care Home**” means a home as defined in 16 **Del.C.** §1102(4).

“**Financial Distress**” means a finding by the Department following the analysis of an audit, complaint or data indicating that the financial condition of the facility threatens the health or safety of a ~~resident(s)~~ resident of a facility.

“**Generally Accepted Accounting Principles (~~GAAP~~)**” or “**GAAP**” means those principles that are recognized as the standard framework of guidelines for financial accounting.

“**Local Financial Institution**” means a bank or other institution offering financial services with headquarters or branch offices in Delaware.

“**Material Adverse Change**” means a change in the financial position of the facility or the controlling organization that threatens the health or safety of a ~~resident(s)~~ resident of a facility.

“**Reasonable Profit**” means a net profit of 1-1.5 percent of Gross Receipts/Sales/Revenue.

4.0 Requirements for the Submission of Financial Documents Upon Application for Renewal of a License.

4.1 With the exception of Family Care Homes, which are addressed in Section 13.0 of these regulations, all annual applications for renewal of a license shall be submitted at least thirty (30) calendar days prior to the expiration date of the license. The application must include a transmittal letter containing:

4.1.1 The type of ownership for the facility as well as senior, subordinate and affiliated organizations, i.e. proprietorship, partnership, corporation, Subchapter S Corporation or Limited Liability Company ~~and~~;

4.1.2 The place of incorporation/registration, including names and addresses for all persons/entities with a 5% or greater ownership;

4.1.3 Year-end financial ~~statement(s)~~ statement – balance sheet, income statement, and statement of cash flows for the facility (most recent year at year-end). If the year-end statement that is provided is three (3) or more months old when it is received by the Department a supplemental statement through the most recent month must be submitted. If the supplemental ~~statement(s)~~ statement is not prepared by independent accountants, it is to be attested to by the treasurer and a second officer;

4.1.4 Evidence of a surety bond in an amount equal to ~~or greater than the sum of the previous four (4) months of all expenses~~ 2 months expenses based on an average of the previous 12 months average expenses as indicated on the most recent year-end profit and loss ~~statement.~~ statement;

4.1.5 A copy of the Memorandum of Understanding executed by and between the principal and chief financial officer of the facility and the DHSS Cabinet Secretary, or their designee, agreeing and acknowledging any and all expenditures from this account will be at the call of and with the express written consent of DHSS or their designee, to provide for the emergency maintenance of the health services, housing and to protect the welfare of the residents. ~~residents;~~

4.1.6 A list of officers with addresses;

4.1.7 Organization charts with names and titles (personnel – facility and controlling organization);

4.1.8 Organization chart (corporate structure), delineating senior, subordinate and affiliated organizations, lines of authority/ownership, and domicile;

4.1.9 Facility address (domicile), all aliases and E.I.N. (employer identification number);

4.1.10 Information on the ownership of the real estate on which the facility is located including: name of the organization, address (domicile), E.I.N and principals with 5% or greater ownership;

- 4.1.11 Name, address (domicile, and E.I.N. of the management entity involved in the operation of the facility, if any;
- 4.1.12 ~~All items submitted separately must bear the A~~ signed certification statement for each item submitted separately: "I certify, under penalty of perjury, the attached statement is true, complete and correct"; and
- 4.1.13 Information on the controlling organization to include:
 - 4.1.13.1 The most recent year-end financial statements for the controlling organization;
 - 4.1.13.2 The most recent year-end personal financial statements of the proprietors or partners if the Controlling Organization is a proprietorship or partnership; and
 - 4.1.13.3 The most recent year-end personal financial statement for guarantors of a corporate transaction if the Controlling Organization is a proprietorship or partnership.
- 4.2 Any material adverse change to the facility's financial position must be reported to the Department by the facility in writing within five (5) business days of its occurrence or discovery.

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5.0 Requirements for the Submission of Financial Documents Upon Application for New Facility/Change of Ownership

- 5.1 All applications for a license for a new facility or for a change of ownership for an existing facility shall include with the application a transmittal letter to include all the items listed in subsection 4.1, except 4.1.3 and:
- 5.2 Transaction Documents to include:
 - 5.2.1 Sale/Purchase Agreement
 - 5.2.2 Closing Statement
 - 5.2.3 Notes (must include all terms and conditions, including but not limited to balance, payment amount, payment period, interest rate and mandated ratios)
 - 5.2.4 Mortgages (see 5.2.3)
 - 5.2.5 Leases (Complete)
 - 5.2.6 The above listed items must include all attachments, addendums, revisions and reference items.
- 5.3 Financial Documents to include:
 - 5.3.1 Projected statement of Revenue and Expenses for thirty-six (36) months;
 - 5.3.2 Projected statement of Revenue and Expenses converted to cash flow (for 36 months);
 - 5.3.3 Beginning Pro Forma Balance Sheet for the first three years of operation;
 - 5.3.4 Ending Pro Forma Balance Sheets for the first three years of operation;
 - 5.3.5 The documents shall be prepared in a month-by-month format for 36 months.
 - 5.3.6 Any newly established Facility without a parent, or any new or newly owned facility with a newly established parent without a financial history of at least thirty-six (36) months must provide evidence of capital availability in the name of the facility equal to ~~four (4) months~~ the last 2 months of the first year of anticipated facility expenses as ~~evidenced presented on the pro forma profit and loss statement to obtain a provisional license. Before an annual license is issued, the newly established Facility must provide evidence of a surety bond in an amount equal to 2 months actual expenses based on an average of a minimum of 6 months actual average expenses.~~
 - 5.3.6.1 The capital availability shall be in the form of ~~Cash or~~ a Surety Bond.
 - 5.3.6.1.1 ~~All cash and~~ surety bonds shall be in the name of the facility and the DHCQ and a copy of the bond must be provided to DHCQ before licensure is issued. The DHCQ Director or their designee shall have the authority to call the Surety Bond.
 - 5.3.6.1.2 Further, a Memorandum of Understanding will be executed by and between the principal and Chief Financial Officer of the facility and the Director of DHCQ or their designee agreeing and acknowledging any and all expenditures from this account will be at the call of and with the express written consent, direction and supervision of the DHCQ ~~for the emergency health, housing and welfare of the residents. Director or their designee, to provide for emergency health services, housing and to protect the welfare of the residents.~~
 - 5.3.6.1.3 ~~Said capital availability shall be maintained at a local financial institution for the first twenty-four (24) months of operation of the facility, and the facility will provide a copy of a letter from it to the local financial institution instructing it to notify DHSS immediately if the agreed upon balance is not maintained.~~
 - 5.3.7 Information on the controlling organization to include:

- 5.3.7.1 The most recent three (3) years of audited year-end financial statements for the controlling organization;
- 5.3.7.2 The most recent three (3) years of audited personal financial statements for the proprietors or partners if the Controlling Organization is a proprietorship or partnership;
- 5.3.7.3 The most recent three (3) years of audited personal financial statements for guarantors of a corporate transaction if the Controlling Organization is a proprietorship or partnership;
- 5.3.7.4 If the controlling organization is an affiliation of individuals each individual shall provide certified financial statements for the most recent three (3) years, or recent financial information acceptable to DHSS on which an analysis and judgement of financial strength and capability can be determined.
- 5.3.8 DHSS may accept draft transaction documents and unaudited financial statements pending the receipt of executed transaction documents and audited financial statements and reserves the right to require the submission of additional information upon initial review; and
- 5.3.9 Additional materials which will facilitate analysis are encouraged.
- 5.4 Effective upon the date of purchase or change of ownership the facility will provide monthly financial information to DHSS 30 days past the month reported. All in-house prepared financial information is to include the following certification signed by the Chief Financial Officer: "All financial information provided herewith is certified to be true and correct to the best of my knowledge and belief, under penalty of perjury." The information will include:
 - 5.4.1 Balance sheet;
 - 5.4.2 Profit/Loss statement;
 - 5.4.3 Statement of cash flow; and
 - 5.4.4 Current resident census.
- 5.5 Any material adverse change to the facility's cash flow or financial position must be reported to DHSS by the facility in writing within five (5) business days of its occurrence or discovery.

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6.0 Resident Trust Funds

- 6.1 Every facility that receives, holds or disburses funds belonging to the residents shall maintain and retain the below listed documentation. The documentation must be provided to DHSS upon request.
 - 6.1.1 Copy of the current Surety Bond covering Resident Trust Funds.
 - 6.1.2 Copies of appropriate account statements for the Fund (bank statements) for the most recent month.
 - 6.1.3 Copies of ledger account records for each resident having funds in the account corresponding to the most recent account statement.
 - 6.1.4 If reconciliations are performed, copies of the statement of reconciliation for the appropriate month.
 - 6.1.5 A record of all residents for whom the facility held funds discharged from the facility during the previous twelve (12) months. For each such discharged resident the facility shall document the following:
 - 6.1.5.1 Date of departure;
 - 6.1.5.2 Reason for departure;
 - 6.1.5.3 Resident balance in trust fund at date of departure;
 - 6.1.5.4 Date and disposition of resident funds.

7.0 Audited Financial Disclosure Requirement

- 7.1 When DHSS determines that financial conditions exist which threaten the health or safety of a ~~resident(s)~~ resident in a facility, DHSS may require the facility to submit certified in-house financial statements within 15 days of request and an audited financial report prepared by an accountant within 60 days. The foregoing time frames may be extended by DHSS upon written request.
- 7.2 Conditions which may prompt DHSS to require audited financial disclosure include but are not limited to:
 - 7.2.1 Substandard Quality of Care.
 - 7.2.2 A material adverse change to the facility's financial position.
 - 7.2.3 Facility/Equipment maintenance inadequacies.
 - 7.2.4 Repeated or frequent payroll interruptions or shortages.
 - 7.2.5 Confirmed delinquencies on invoices from suppliers or attendant court actions.
 - 7.2.6 Personnel shortages (understaffing and /or under-qualification of staff).

- 7.2.7 Delinquent tax payments.
- 7.2.8 Bankruptcy, reorganization or closure.
- 7.3 Audits may initially be transmitted to DHSS by electronic means. The electronic submission must be followed by an original, bound, signed audit, prepared by an accountant.
- 7.4 Contents of an Audited Financial Report:
 - 7.4.1 The audited financial report shall indicate the current financial position of the facility and the results of its operations, cash flows and changes in capital. The report shall conform to GAAP practices. It shall include:
 - 7.4.1.1 Report of accountant;
 - 7.4.1.2 Balance sheet reporting assets, liabilities, and capital;
 - 7.4.1.3 Statement of operations;
 - 7.4.1.4 Statement of cash flows;
 - 7.4.1.5 Statement of changes in capital; and
 - 7.4.1.6 Notes to financial statements. These notes shall be those required by GAAP.

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8.0 Qualifications of Accountants

In order for DHSS to recognize a person or firm as a qualified accountant, the person or firm must be in good standing with the Delaware Board of Accountancy.

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9.0 Consolidated Financial Statements

- 9.1 A facility may make written application to DHSS for approval to file consolidated financial statements in lieu of separate annual financial statements if the facility is part of a group. Consolidated statements must meet the following requirements:
 - 9.1.1 Amounts shown on the consolidated audited financial report shall be shown on the worksheet;
 - 9.1.2 Amounts for each separately licensed facility subject to this section shall be stated separately;
 - 9.1.3 Non-facility operations may be shown on the worksheet on a consolidated or individual basis;
 - 9.1.4 Explanations of consolidating and eliminating entries shall be included;
 - 9.1.5 A reconciliation of any differences between the amounts shown in the individual facility columns of the worksheet and comparable amounts shown on the annual statements of the facilities shall be included;
 - 9.1.6 Notes on each facility included in a consolidated financial statement will be included with the notes of the consolidation with each separate facility clearly identified; and
 - 9.1.7 Any statements completed in excess of 30 days after the closing of the audited period will be accompanied by an in-house prepared financial statement for each separately licensed facility. The period covered by the in-house statement will be from the audit end-date through the most recent facility monthly statement. The statement will be dated and certified as correct by the signature of the Chief Financial Officer.

10.0 Scope of Audit and Report By Accountant

Financial statements furnished pursuant to subsection 7.4 shall be examined by the accountant. The audit of the facility's financial statements shall be conducted in accordance with generally accepted auditing standards. The accountant should obtain an understanding of internal control sufficient to plan the audit.

11.0 Notification of Adverse Financial Condition

- 11.1 A facility that is required to furnish an annual audited financial report shall require the accountant to report, in writing, within five (5) business days to the board of directors or its audit committee any determination by the accountant that the facility has materially misstated its financial condition to DHSS. A facility that receives a report pursuant to this paragraph shall forward a copy of the report to DHSS within five (5) business days of receipt of the report accompanied by any amended or corrected audit generated as a result of the misstatement.
- 11.2 No accountant shall be liable in any manner to any person for any statement made in connection with the above paragraph if the statement is made in good faith in compliance with Section 10.0.
- 11.3 If the accountant, subsequent to the date of the audited financial report filed pursuant to this regulation, becomes aware of facts that might have affected his or her report, DHSS notes the obligation of the accountant to take such action as prescribed by the Delaware Board of Accountancy.

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12.0 Conduct of Facility in Connection with the Preparation of Required Reports and Documents

- 12.1 No director or officer of a facility shall, directly or indirectly:
- 12.1.1 Make or cause to be made a materially false or misleading statement to an accountant in connection with any audit, review or communication required under this regulation; or
 - 12.1.2 Fail to accurately report any material fact or information to the accountant in connection with any audit or review required under this regulation; or
 - 12.1.3 Directly or indirectly coerce, manipulate, mislead or fraudulently influence any accountant engaged in the performance of an audit pursuant to this regulation that results in the submission of materially misleading financial statements.

13.0 Facilities With Three or Fewer Residents/Family Care Homes

- 13.1 Facilities licensed to house 3 or fewer residents are private family residences. As such, they have no corporate structure or accounting procedures by which the Division is able to assess their financial capability.
- 13.2 An annual application for renewal of a license shall be submitted at least thirty (30) calendar days prior to the expiration date of the current license.
- 13.3 The financial capability of Family Care Homes will be measured by an analysis of the license-holder's credit worthiness through credit checks at the discretion of DHSS. These will be conducted by a nationally recognized credit check agency at the time of license renewal, inception or at the discretion of DHSS.
- 13.3.1 To facilitate this process it will be necessary for every license-holder to submit identification information including full name, address, date of birth and Social Security Identification number annually on their application for a license or license renewal.

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14.0 Enforcement and Oversight Authority

- 14.1 DHSS is authorized to impose the below listed actions to monitor the financial capability of a facility it has determined to be in financial distress. Noncompliance with any imposed action may result in the imposition of civil penalties or other remedies for compliance as authorized by 16 **Del.C.**, Chapter 11, Subchapter I.
- 14.1.1 Monthly submission within thirty (30) calendar days of the end of the month of monthly financial information from the facility to include:
- 14.1.1.1 Balance Sheet, Profit and Loss Statement, Statement of Cash Flows, Census Information; and
 - 14.1.1.2 Certification by the Chief Financial or Corporate Officer with the following statement: "All financial information provided herein is certified to be true and correct to the best of my knowledge and belief, under penalty of perjury."
- 14.1.2 Submission of monthly certifications from the facility that all required licenses, taxes and insurances are paid-to-date, are current and in effect.
- 14.1.3 Attendance of facility and corporate staff at periodic meetings with DHSS to discuss past performance and expectations for future performance, to include:
- Facility Administrator
 - Regional/Corporate CFO/Controller
 - Regional Administrator
- 14.1.4 Requirement of a written plan from the facility indicating how it will return to profitability.
- 14.1.5 Reclassification of the facility license from annual to provisional status.
- 14.1.6 Requirement that the Controlling Organization (if any) of the facility provide a written assurance to DHSS that the Controlling Organization will step in to provide financial support to ensure that the residents continue to receive quality care. The written assurance is to include text as provided by DHSS. In an emergency, to the extent ongoing expenses exceed bond monies available, the Controlling Organization will be responsible to provide the financial support necessary to subject facility to ensure residents continue to receive quality care.
- 14.1.7 Query courts of local jurisdiction for pending or past legal actions or judgments against the facility by suppliers ~~and/or~~ and government agencies
- 14.1.8 Notification to The Centers for Medicare and Medicaid Services of the facility's financial difficulty (federally certified facilities).
- 14.1.9 The issuance of an emergency order temporarily transferring the management of the facility to another qualified entity in cases where the physical health or safety of a ~~resident(s)~~ resident is in imminent risk.

- 14.1.9.1 The terms and conditions of the emergency order including costs of implementation are to be determined by DHSS. The terms and conditions of the emergency order are effective until DHSS conducts an administrative hearing to determine the facility management's ongoing licensure status, which hearing must be conducted within 60 days from the date of the issuance of the order unless the facility requests a continuance of the hearing date. At the conclusion of the hearing DHSS will make a final determination regarding the costs of implementation of such management and the facility's ongoing licensure status.
- 14.1.9.2 Any costs associated with the actions taken in subsection 14.1.9.1 will be paid via the reserve fund established under subsection 5.3.5.
- 14.1.10 Require written notification from the facility, to each individual resident and, if known, a family member or legal representative that the financial capability of the facility is under review by DHSS. The notification must be written in a language and manner that is easily understood by the individual resident ~~and/or~~ and individual resident's representative.
 - 14.1.10.1 Provide a copy of the notice to the DHSS; the State Long Term Care Ombudsman; managed care organization (MCO), as appropriate; any DHSS agency involved in the resident placement in the facility, including Adult Protective Services; and the protection and advocacy agency as defined in 16 **Del.C.** §1102 if the resident is an individual with a developmental disability or mental illness.

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15.0 Confidentiality of Facility Financial Records

- 15.1 DHSS shall maintain the financial documents submitted by facilities in a secure and confidential manner.
- 15.2 DHSS will consider financial documents submitted pursuant to these regulations as exempt from public disclosure consistent with 29 **Del.C.** §10002(l)(2) and 16 **Del.C.** §1104(e).

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16.0 Severability Provision

If any section or portion of a section of this regulation or its applicability to any person or circumstance is held invalid by a court, the remainder of the regulation or the applicability of the provision to other persons or circumstances shall not be affected.

19 DE Reg. 52 (07/01/15)

23 DE Reg. 45 (07/01/19)

23 DE Reg. 814 (04/01/20) (Prop.)