

INDEMNIFICATION PROCEDURES

*The State of Delaware Deferred Compensation Plans
Under IRC §§ 457(b), 403(b) and 401(a)*

*The State of Delaware College Investment Plan under
IRC § 529*

The State of Delaware ABLE Plan under IRC § 529A

Approved on September 4, 2019

By the Delaware Plans Management Board

I. THE PLANS MANAGEMENT BOARD AND ITS COMMITTEES

The Plans Management Board (the “Board”) oversees and administers the State’s deferred compensation program authorized under chapter 60A of title 29 of the Delaware Code (the “DC Program”).¹ The DC Program encompasses three distinct deferred compensation plans authorized under the Internal Revenue Code (“IRC”): (a) the State’s deferred compensation plan under IRC § 457(b); (b) the State’s tax-sheltered annuity plan for certain education employees under IRC § 403(b); and (c) the State’s employer match plan under IRC § 401(a). The Board also oversees and administers the State’s college investment plan under IRC § 529, authorized by subchapter XII, chapter 34 of title 14 of the Delaware Code, and the State’s “Achieving a Better Life Experience Program,” authorized by chapter 96A of title 16 of the Delaware Code (the “Plans”).

In February 2018, as memorialized in Resolution No. 2018-1 (the “Resolution”), the Board dissolved its existing Plan-based committee structure and adopted a new committee structure based on committee function. Pursuant to the Resolution, the Board created a standing “Investment Committee” and vested it with authority to review and make recommendations to the Board with respect to all matters related to Plan investment options and Plan investment performance, as well as all other investment-related matters pertaining to the Plans as may be referred by the Board. The Board created a second standing committee - the “Audit and Governance Committee” - and vested it with initial responsibility for all audits-related matters, potential Plan amendments, Plan-related cybersecurity issues, and such other audit or governance matters pertaining to the Plans as may be referred by the Board.

II. OFFICE OF THE STATE TREASURER

The Office of the State Treasurer (“OST”) provides administrative support to the Board and its committees.

III. SCOPE AND DISCLAIMER

Under Delaware law, the members of the Board and its committees (collectively, “Members”) have certain protections from personal liability and may be entitled to representation and indemnification in connection with legal proceedings arising from a Member’s participation on the Board or a committee. This document contains the procedures for Members who seek representation by or indemnification from the State in connection with legal proceedings.

This document contains general descriptions of Members’ immunities and litigation-related rights under Delaware law. The descriptions are for convenience purposes only. They are not intended as, nor may they reasonably be relied upon as, legal advice, and are not binding on or otherwise enforceable against the State. A Member’s failure to comply with these procedures may affect the Member’s ability to be represented by the State and may result in a forfeiture or limitation of any right the Member may have to seek indemnification. Members with questions concerning their individual rights under these procedures or applicable law are encouraged to consult with their own counsel.

¹ See 29 Del. C. § 2722.

IV. QUALIFIED IMMUNITY AND EXCULPATION

Civil Matters

Under Delaware law, Members have protection from personal liability in civil matters. First, Members are entitled to qualified immunity in civil tort proceedings as long as the statutory requirements for such immunity are satisfied.² Second, Members are protected from monetary judgments by a broad exculpation provision that, on its face, insulates Members from personal liability for “any act or omission” made during the Member’s tenure, as well as “any loss” incurred by a plan participant.³

Criminal Matters

Members do not have qualified immunity in criminal matters. Nor are they insulated from personal liability for fines, penalties or restitution that may be imposed in connection with a criminal matter.

Obligation to Participate

The foregoing protections do not insulate Members from being threatened with, or named as defendants in, legal proceedings. Nor do they excuse Members from their obligations to participate in litigation, whether civil or criminal. A Member who is made a party to a legal proceeding may be required to remain in the case until that Member’s immunity, exculpation and other rights are finally resolved. Whether or not named as a defendant, a Member may be required to submit to depositions, serve as a witness at trial, or otherwise assist with Board-related litigation. Members who are threatened with, or named as defendants in, legal proceedings may have rights to representation and indemnification by the State.

V. REPRESENTATION IN LEGAL PROCEEDINGS

Representation by the Delaware Department of Justice or Special Counsel in Civil Matters

A Member who is named as a defendant in a civil matter arising by reason of such Member’s participation on the Board or a committee normally will be represented by the Delaware

² See 29 *Del. C.* § 2722(f)(2) and 10 *Del. C.* § 4001. Members’ rights with respect to qualified immunity derive from 29 *Del. C.* § 2722(f)(2) and 10 *Del. C.* § 4001. Generally speaking, unless federal or other State laws provide otherwise, Members are insulated from suit and money damage awards in tort actions if:

- (1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, or any other official duty involving the exercise of discretion on the part of the Member;
- (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and
- (3) The act or omission complained of was done without gross or wanton negligence.

See 10 *Del. C.* § 4001.

³ 29 *Del. C.* § 2722(f)(2). Delaware courts have not had occasion to interpret or apply the exculpation language in § 2722(f)(2).

Department of Justice (“DDOJ”).⁴ In the event the DDOJ is unable to represent the Member, whether because of a conflict or otherwise, the DDOJ may consider the appointment of special counsel, with expenses borne by the State.⁵ Any such appointment, and the terms and conditions of the engagement, must be approved by the Attorney General and the Governor, in their discretion, and are subject to the terms and conditions of the DDOJ’s Outside Counsel Billing Policy (the “Billing Policy”), a copy of which is affixed hereto.⁶

A Member who is named as a defendant in a civil matter must first (a) promptly after learning of the matter, discuss with the Board’s assigned Deputy Attorney General (the “DAG”) the DDOJ’s role in representing the Member, and (b) promptly provide the DAG with such information as the DAG may reasonably request to enable the DDOJ to assess conflicts of interest and otherwise determine whether the DDOJ will represent the Member in the matter. A Member who thereafter desires to request the appointment of special counsel must (y) promptly after receiving notice that the DDOJ is unable to represent the Member, provide the DAG with a written request for such appointment, and (z) promptly provide the DAG with such information as the DAG may reasonably request to enable the Attorney General and the Governor to assess whether the Member is entitled to special counsel.

Representation by Court-Appointed Attorney in Criminal and Civil Matters

A Member who is named as a defendant in a criminal or civil matter arising by such Member’s participation on the Board or a committee may petition the court with jurisdiction over the matter to appoint an attorney to represent the Member’s interests, with expenses borne by the State.⁷ If the petition has merit, the Court will first consider whether to appoint a DAG from the DDOJ.⁸ If the court determines that the DDOJ is unable to represent the Member, whether because of a conflict or otherwise, the court may appoint a non-DDOJ attorney to represent the Member’s interests.⁹ In criminal matters, the court will appoint an attorney from the Office of Defense Services. In civil matters, the court may appoint an attorney licensed in this State.¹⁰

Representation by Private Attorney in Criminal and Civil Matters

A Member who is named as a defendant in a criminal matter may select a private attorney of their choosing. In civil matters, the DDOJ has a statutory duty to represent public officials sued in their

⁴ See 29 Del. C. §§ 2504(3) (providing that DDOJ has the duty, power and authority to represent public officials sued in their official capacities, except where the State has a conflicting interest), 2507 (prohibiting employment of non-DDOJ attorneys by State officials except for special counsel approved by the Attorney General and the Governor).

⁵ See 29 Del. C. § 2507.

⁶ See *id.*

⁷ See 10 Del. C. § 3925.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

official capacities, except where the State has a conflicting interest.¹¹ In the event of a conflict, the DDOJ may seek to appoint special counsel for the Member. Absent representation by the DDOJ or special counsel, the Member may select a private attorney of their choosing to represent his or her interest in a civil matter. Payment for private attorneys' fees shall be borne by the Member unless (a) the Member was not entitled to representation by the State, either by the DDOJ directly or through the appointment of special counsel, and (b) the Member is entitled to indemnification for attorneys' fees under applicable law.

VI. INDEMNIFICATION BY THE STATE

General Requirements - Civil and Criminal Matters

Under Delaware law, the State may be obligated to indemnify a Member who is a party to, or who is threatened to be made a party to, any civil or criminal proceeding arising by reason of the Member's participation on the Board or a committee.¹² In civil matters, the State's indemnification obligations cover any expenses, judgments, fines and amounts paid in settlement (collectively, "Expenses") if (a) such Expenses were actually and reasonably incurred by the Member in connection with such action, suit or proceeding, and (b) the Member acted in good faith and in a manner that the Member reasonably believed to be in the best interest of the State.¹³ In criminal matters, the State has an obligation to indemnify members for Expenses only if (y) the requirements in the preceding sentence are satisfied, and (z) the Member had no reasonable cause to believe that the Member's conduct was unlawful.¹⁴

Private Attorneys' Fees - Civil and Criminal Matters

In civil and criminal matters, assuming other applicable requirements are met, the State's indemnification obligations with respect to Expenses may include private attorneys' fees, provided that the Attorney General has determined that the Member was not entitled to representation by the State, either by the DDOJ directly or through special counsel.¹⁵ Attorney's fees and pass-through expenses shall be subject to review for reasonableness under the Billing Policy.

Payment of Current Expenses in Civil Matters

In civil matters only, assuming other applicable requirements are met, Members are entitled to payment of incurred Expenses, including private attorneys' fees if otherwise authorized, prior to final disposition of the matter but only if such prepayment is expressly authorized and approved in advance by a majority of current Board members and the Governor.¹⁶ Payments authorized prior to final disposition of the matter remain subject to disgorgement based on facts that are developed during the course of the civil matter.

¹¹ See 29 Del. C. §§ 2504(3), 2507.

¹² See 29 Del. C. § 2722(f)(2).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

Indemnification Procedures - Civil and Criminal Matters

A Member who seeks payment for covered Expenses, including payment of private attorneys’ fees prior to final disposition, shall submit a written request for indemnification (“Request”) to OST. The Request shall include information and documentation sufficient to enable the Board to determine whether the Member is entitled to indemnification. OST shall preliminarily review each such Request to ensure compliance with the foregoing requirement and may request that the Member submit additional information and documentation in support of the Request.

OST shall schedule an adequately supported Request for consideration by the Board at the first available quarterly meeting, unless the State Treasurer or the Chairperson of the Board calls for a special meeting to consider the Request. At any such meeting, assuming a quorum is present, the Board shall first determine whether conflicts or other concerns limit the Board’s ability to take official action with respect to the Request.¹⁷ In the event the Board is unable to act, the Board shall submit the Request and all supporting documentation to the Office of the Governor for action.

In the event the Board is able to act on a Request, a majority of current Members shall, by majority vote, determine whether and to what extent the Member is entitled to indemnification. OST shall promptly memorialize the decision and any supporting rationale in writing (the “Decision”) and provide the Decision and the Request (including all supporting documentation) to the Office of the Governor for action.

VII. MISCELLANEOUS PROVISIONS

These procedures shall be binding on Members and shall remain in effect until amended by the Board. The Board shall have full and complete discretion as to the interpretation of this document and its application to a specific situation. Nothing contained herein shall provide to any participant, beneficiary or any other party the right to enforce the terms of this Policy.

Adopted by the Delaware Plans Management Board this 4th day of September 2019, as evidenced by the signature of the Board Chair, as attested below.

[_____], Chair

ATTEST:

Colleen Davis, State Treasurer

¹⁷ A Member’s vote with respect to a particular Request is subject the State’s code of conduct applicable to honorary officials. *See generally* Chapter 58, Title 29 of the Delaware Code.