

# **DELAWARE PLANS MANAGEMENT BOARD**

## **GOVERNANCE MANUAL**

*Adopted on June 8, 2021*

## TABLE OF CONTENTS

- I. THE PLANS MANAGEMENT BOARD**
  - A. History**
  - B. Statutory Duties; Fiduciary Obligations**
  - C. Code of Conduct**
  - D. Composition**
  - E. Chairperson**
  - F. Board Member Terms**
  - G. Removal**
  - H. Standing Committees**
  - I. Quorum; Voting; Proxies**
  - J. Regular and Special Meetings; Agendas**
- II. THE DEFERRED COMPENSATION PROGRAM**
  - A. The DC Program, Generally**
  - B. DC Plans - Overview**
    - 1. The 457(b) Plan*
    - 2. The 403(b) Plan*
    - 3. The Match Plan*
  - C. Investment Architecture**
- III. THE 529 COLLEGE INVESTMENT PROGRAM**
  - A. The College Program, Generally**
  - B. The 529 Plan - Overview**
  - C. Investment Architecture**
- IV. THE 529A ABLE PROGRAM**
  - A. The ABLE Program, Background**
  - B. The ABLE Plan - Overview**
  - C. Investment Architecture**

**V. THE OFFICE OF THE STATE TREASURER**

**A. Administrative Support**

**B. Procurement**

**C. Operational Functions**

**VI. PUBLIC MEETINGS AND PUBLIC RECORDS**

**A. Open Meetings - Freedom of Information Act**

1. *General Requirements*
2. *Executive Sessions*
3. *Notice and Agenda Requirements*
4. *Minutes*
5. *Legal Challenges*
6. *Parliamentary Procedure*

**B. Preservation of Records - Delaware Public Records Law**

1. *General Requirements*
2. *Official Custodian and Records Officer*
3. *General and Agency-Specific Retention Schedules*

**C. Open Records - Freedom of Information Act**

1. *"Public Records"*
2. *Exemptions*
3. *Facilitation of Access*
4. *FOIA Coordinator Duties*
5. *Responses to FOIA Requests*
6. *Fees*

**ATTACHMENTS (BOARD POLICIES AND PROCEDURES)**

**Attachment 1: Investment Policies**

*Tab A. Investment Policy Statement (DC Plans), adopted Sept. 5, 2018*

*Tab B. Investment Policy Statement (529 Plan), adopted Dec. 8, 2020*

*Tab C. Investment Policy Statement (National ABLE Alliance), adopted by the Alliance on Apr. 15, 2020*

- Attachment 2:** Allocation and Payment of Plan Expenses, adopted Sept. 5, 2018
- Attachment 3:** Documentation of Fiduciary Decisions, adopted June 4, 2019
- Attachment 4:** Proxy Voting Policy, adopted June 4, 2019
- Attachment 5:** Indemnification Procedures, adopted Sept. 4, 2019
- Attachment 6:** Reimbursement of Covered Members, adopted Sept. 4, 2019
- Attachment 7:** Budget Policy, adopted Dec. 10, 2019
- Attachment 8:** Audit Policy, adopted Dec. 10, 2019
- Attachment 9:** Training Policy, adopted June 2, 2020
- Attachment 10:** Communication Policy, Sept. 1, 2020
- Attachment 11:** Resignation Policy, adopted March 2, 2021
- Attachment 12:** Vendor Management - [To Come]
- Attachment 13:** Cybersecurity - [To Come]
- Attachment 14:** OST FOIA Policy - [To Come]

**APPENDICES**

- Appendix 1:** Memorandum from Treasurer Simpler, dated December 14, 2015
- Appendix 2:** Fiduciary Training Materials, dated September 2, 2020.
- Appendix 3:** Code of Conduct
- Appendix 4:** Code of Conduct Training Materials, dated June 8, 2021.
- Appendix 5:** Plans Management Board Resolution No. 2018-1
- Appendix 6:** Office of the State Treasury Procedure P104 - Screening for Conflicts in Procurement, adopted Mar. 9, 2021
- Appendix 7:** Plans Management Board Resolution No. 2021-1

## CHAPTER I THE PLANS MANAGEMENT BOARD

### A. History

The Delaware General Assembly created the Plans Management Board (the “**Board**”) in 2016 by enacting H.B. 358, codified at 29 *Del. C.* § 2722. The legislation vested in the Board responsibility for overseeing three different State-sponsored investment programs: (1) the State’s Deferred Compensation Program authorized under Chapter 60A of Title 29 of the Delaware Code (the “**DC Program**”); (2) the State’s College Investment Plan authorized by Subchapter XII, Chapter 34 of Title 14 of the Delaware Code (the “**College Program**”); and (3) the State’s Achieving a Better Life Experience Program authorized under Chapter 96A of Title 16 of the Delaware Code (the “**ABLE Program**”, and together with the DC Program and the College Program, the “**Programs**”).

Prior to the enactment of H.B. 358, all three Programs were overseen by different State entities. The Deferred Compensation Council (“**DCC**”) was created in 1975 and oversaw the DC Program from inception until June 2016. The Delaware College Investment Board (“**DCIB**”) oversaw the College Program since its creation in 1997 through June 2016. The Achieving a Better Life Experience Board (the “**ABLE Board**”) was established in June 2015 and charged with developing, implementing and maintaining the State’s ABLE Program. Prior to the enactment of H.B. 358, the ABLE Board had not met or taken action on the development of the ABLE Program. H.B. 358 abolished the DCC, DCIB and the ABLE Board and consolidated fiduciary oversight for all three Programs under one Board.

H.B. 358 also consolidated within the Office of the State Treasurer (“**OST**”) responsibility for providing administrative support to the Board and the Programs. Historically, OST provided support to the DCC and assisted with the administration of the DC Program.<sup>1</sup> Between 1998 and 2008, OST provided support to the DCIB and assisted with the administration of the College Program. In 2009, the administrative support functions for the College Program were transferred to the Delaware Department of Education.<sup>2</sup> As a result of the passage of H.B. 358, all three Programs are now supported by OST.

### B. Statutory Duties; Fiduciary Obligations

The Board’s overarching statutory mandate is to administer the State’s investment Programs in accordance with the purposes of the individual plans within those Programs. *See* 29 *Del. C.* § 2722(a). Primary duties include: (1) approving investment options consistent with applicable standards of care; (2) approving an annual budget for each plan that includes permitted uses of administrative fees collected from participants; and (3) performing annual audits of each plan utilizing an independent audit firm selected and overseen by the Auditor of Accounts. *See generally* 29 *Del. C.* § 2722(e).

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<sup>1</sup> *See* Memorandum from Treasurer Simpler, dated December 14, 2015, p. 1. A copy of this memorandum is affixed hereto as **Appendix 1**.

<sup>2</sup> *See id.*

The members<sup>3</sup> of the Board and its committees serve in a fiduciary capacity with respect to plan participants and beneficiaries and are expected to carry out their duties in accordance with the statutory standards of care set forth in 29 *Del. C.* § 2722(d) and other applicable federal and State laws and regulations. The Programs are not subject to the Employee Retirement Income Security Act of 1974 (“**ERISA**”), but the statutory standards of care imposed under Delaware law closely track ERISA standards, particularly with respect to the DC Program.

With respect to the DC Program, which involves retirement assets, Members of the Board and its committees have ERISA-like duties of loyalty that require them, among other things, to discharge their duties with respect to the DC Program plans solely in the interest of the participants and beneficiaries of each such plan, and for the exclusive purpose of providing Program benefits to participants and their beneficiaries, including defraying reasonable expenses of administering the Program. *See* 29 *Del. C.* § 2722(d)(1). Members have similar duties of loyalty with respect to the College and ABLE Programs, except that the Board is expressly authorized to use administrative fees collected from participants in those Programs to market the plans or fund such scholarship, match or promotional programs as the Board, in its discretion, may establish. *See* 29 *Del. C.* § 2722(d)(2).

With respect to all Programs, members must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of each Program. *See* 29 *Del. C.* §§ 2722(d)(1), (d)(2). This is similar to the “prudent expert” standard under ERISA.

Per the Board’s training policy, *see* **Attachment 9**, members must participate in periodic fiduciary training. The most recent training materials are attached hereto as **Appendix 2**.

### **C. Code of Conduct**

Members serve as “honorary state officials” within the meaning of the State Employees’, Officers’ and Officials’ Code of Conduct, 29 *Del. C.* §§ 5801-5810A (the “**Code of Conduct**”).<sup>4</sup> *See* 29 *Del. C.* § 5804(6). Members are subject to the Code of Conduct and are personally responsible for complying with its provisions. A copy of the Code of Conduct is attached hereto as **Appendix 3**.

The Code of Conduct prohibits certain conduct involving conflicts of interest, including participating in the review or disposition of a matter in which an honorary state official has a personal or private interest that may impair the person’s independence of judgment. *See* 29 *Del. C.* § 5805(a). Further, under the Code of Conduct, honorary state officials must pursue a course of conduct that will not raise suspicion among the public that such official is engaging in acts which are in violation of the public trust, or which could reflect unfavorably upon the State and its government. *See* 29 *Del. C.* § 5806(a).

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<sup>3</sup> For purposes of this Governance Manual, unless the context requires a different interpretation, the word “member” shall be inclusive of both Board and committee members, including any outside committee members and designees appointed by an ex officio Board member.

<sup>4</sup> Ex officio members also have disclosure obligations under 29 *Del. C.* §§ 5811-5816.

Violations of the Code of Conduct may be investigated by Counsel for the Public Integrity Commission (the “**PIC**”) and may be referred for disciplinary proceedings before the PIC. The PIC may, upon finding a violation, issue a written reprimand or issue a recommendation of removal. *See 29 Del. C. § 5810(d)*. Violations involving knowing or willful participation in certain prohibited conduct may be referred for criminal prosecution. *See 29 Del. C. § 5805(f)*.

Per the Board’s training policy, *see Attachment 9*, members must participate in periodic training on the Code of Conduct. The most recent training materials are attached hereto as **Appendix 4**.

A member, if in doubt about the propriety of a potential course of action, may seek an advisory opinion from the PIC or PIC Counsel as to the applicability of the Code of Conduct to any particular situation. *See 29 Del. C. § 5807(c)*. A member may also request from the PIC a waiver of a specific prohibition of the Code of Conduct if the literal application of such prohibition in a particular case is not necessary to achieve the purposes of the Code of Conduct or would result in an undue hardship, including an undue hardship on the Board. *See 29 Del. C. § 5807(a)*. Any person who acts in good faith reliance upon an advisory or waiver decision is not subject to discipline or other sanction under the Code of Conduct with respect to the matters covered by the decision, provided there was a full disclosure of all material facts. *See 29 Del. C. §§ 5807(a), (c)*.

Members of the Board and its committees should promptly report all actual or potential violations of the Code of Conduct of which the member becomes aware, whether such actual or potential violation resides with the member or with another individual. *See Resolution No. 2021-1 (the “2021 Resolution”), ¶ 1.<sup>5</sup>* Reports should be communicated to the Board Chairperson and/or the State Treasurer. *See id.* The Chairperson and/or the State Treasurer should promptly consult with the Board’s assigned Deputy Attorney General (“**DAG**”) concerning any such report and may discuss the matter with any individual to ascertain facts and confirm a member’s intention with respect to recusal or resignation. *See id.*

Any member may call for a discussion or vote relating to an actual or potential violation of the Code of Conduct. *See id.*

#### **D. Composition**

The Board has 11 members. The following five members serve ex officio, that is, by virtue of their position as elected or senior appointed officers of the State: the State Treasurer; the Secretary of Finance; the Director of the Office of Management and Budget; the Insurance Commissioner; and the Secretary of Education. Ex officio members are authorized by statute to appoint designees to serve in their stead and at their pleasure. *See 29 Del. C. § 2722(b)(1)*.

Two of the Board’s members are required to be State employees and are appointed by the Governor. *See 29 Del. C. § 2722(b)(2)*. One of the State employee members must be an education employee eligible to participate in the State’s supplemental retirement plan under § 403(b) of the Internal Revenue Code (“**IRC**”), also referred to as a tax-sheltered annuity plan. *See id.* State employee members are appointed based on their individual qualifications and may not serve

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<sup>5</sup> A copy of the 2021 Resolution is affixed hereto as **Attachment 7**.

through designee.

Membership also includes four public members, who are appointed by the Governor and qualified to serve based on their particular education or experience. *See 29 Del. C. § 2722(b)(3)*. Public members may not serve through designee. *See 2021 Resolution, ¶ 2*.

#### **E. Board Chairperson**

The Chairperson of the Board is appointed by, and serves at the pleasure of, the Governor. *See 29 Del. C. § 2722(c)(3)*. The Chairperson must be a public member. *See id.*

#### **F. Board Member Terms**

Ex officio members' terms are coincident with the terms of their respective offices. Ex officio members serve as soon and for as long as they hold the elective or appointive positions identified in *29 Del. C. § 2722(b)(1)*.

Appointed members – the two State employee members and four public members – serve terms of up to three years. *See 29 Del. C. § 2722(b)(3)*. Appointments must be staggered to ensure that no more than two appointed members' terms expire in any one calendar year. *See id.* Appointed members are eligible for reappointment. *See id.* There is no term limit for appointed members.

#### **G. Removal**

There is no mechanism for the removal of ex officio Board members.

Appointed Board members, by statute, serve at the pleasure of the Governor and may be removed only by the Governor. The Board, if approved by majority vote of current Board members, may submit to the Governor a written recommendation of removal for an appointed member. *See 2021 Resolution, ¶ 3*. Such recommendation must be based on cause, including violations of the Code of Conduct, failure to disclose conflicts of interest, or repeated failure to attend scheduled meetings. *See id.*

Committee members can be removed for any reason by majority vote of the current members of the Board. *See id.*

Designees can be removed at the discretion of the appointing official. The Board, by majority vote of its current members, may submit to the appointing official a written recommendation for removal of a designee, which recommendation shall be based on cause. *See id.*

#### **H. Standing Committees**

In February 2018, pursuant to Resolution No. 2018-1 (the “**2018 Resolution**”), the Board dissolved its existing Program-based committee structure and adopted a committee structure based on committee function. As memorialized in the 2018 Resolution, the Board created a standing Investment Committee and standing Audit and Governance Committee (collectively, the

“Committees”) and vested the Committees with authority to review and make recommendations to the Board with respect to certain matters. A copy of the 2018 Resolution is attached hereto as **Appendix 5**.

The Investment Committee is charged with reviewing and making recommendations to the Board with respect to all matters related to Program investment options and investment performance, as well as all other investment-related matters pertaining to the Programs as may be referred by the Board. The Audit and Governance Committee is charged with reviewing and making recommendations to the Board with respect to Plan audits, potential plan amendments, plan-related cybersecurity issues, and such other audit or governance matters pertaining to the Programs as may be referred by the Board.

Each Committee may have up to nine (9) members but must have at least four (4) members. 2021 Resolution, ¶ 5. Committee membership must include at least one (1) Board member and may include “outside” members who have relevant subject matter expertise. Committee members serve at the pleasure of the Board for such terms as the Board may decide, or until such member resigns or is removed.

Each Committee has a Chairperson who is appointed by, and who serves at the pleasure of, the Board for such term as the Board may decide, or until the Chairperson resigns or is removed. The Committees may elect (but to date have not elected) Vice Chairs to carry out Chairperson functions in the absence of a Chairperson. Vice Chairs serve at the pleasure of the Committee for such term as the Committee may decide, or until a Vice Chair resigns or is removed.

#### **I. Quorum; Voting; Proxies**

A majority of current members constitutes a quorum necessary to conduct a meeting of the Board or a Committee. *See 29 Del. C. §§ 2722(c)(2), 10002(g); 2021 Resolution, ¶ 5.*

Each member of the Board or a Committee, including an individual serving by designation, gets one vote with respect to any matter of public business. *See 29 Del. C. §§ 2722(c)(2).* The powers of the Board or a Committee may only be exercised by a majority vote of all members present. *See id.*

Members may not appear or vote by proxy, subject to the rights of ex officio members to appear and vote through designees. *See 2021 Resolution, ¶ 4.*

#### **J. Regular and Special Meetings; Agendas**

The Board is required to meet on a quarterly basis. *See 29 Del. C. §§ 2722(c)(4).* The State Treasurer and the Board Chairperson are authorized to call special meetings of the Board. *See id.* The Committees, per the 2018 Resolution, are required to attempt to meet at least four (4) times per year. Pursuant to the 2018 Resolution, the Board, a Committee Chairperson or the State Treasurer may call for a special Committee meeting.

Board and Committee Chairpersons, with the assistance of OST staff, normally set and prepare agendas for public meetings. In the absence of a Chairperson, the State Treasurer may set

the agenda for any Board or Committee meeting. *See* 2021 Resolution, ¶ 6.

## **CHAPTER II THE DEFERRED COMPENSATION PROGRAM**

### **A. The DC Program, Generally**

The DC Program is authorized and governed by Chapter 60A of Title 29 of the Delaware Code. The DC Program is intended to create a vehicle through which State employees may, on a voluntary basis, provide for additional retirement income security. *See* 29 *Del. C.* § 6051. The DC Program is in addition to pension and other benefit programs provided by law for employees of the State. *See id.*

The DC Program encompasses three distinct plans: (1) the State’s deferred compensation plan under IRC § 457(b) (the “**457(b) Plan**”); (2) the State’s tax-sheltered annuity plan for certain education employees under IRC § 403(b) (the “**403(b) Plan**”); and (3) the State’s employer match plan under IRC § 401(a) (the “**Match Plan**,” and together with the 457 Plan and the 403(b) Plan, the “**DC Plans**”).

All three DC Plans are administered through an integrated platform offered by a single recordkeeper that serves as the DC Program manager (presently, Voya). The DC Program manager, or one or more affiliates or third-parties, serves as the trustee for 457(b) Plan and Match Plan assets and as the custodian of 403(b) Plan assets. Captrust Financial Advisors (“**Captrust**”), through a merger with Cammack Retirement Group, serves as the Board’s independent investment advisor and consultant and is a co-fiduciary with respect to the DC Plans.

### **B. DC Plans – Overview**

#### ***1. The 457(b) Plan***

The 457(b) Plan is a supplemental retirement plan available to all regular full-time or part-time employees of the State who are otherwise eligible for State employee benefits plans, but not including individuals hired on a temporary basis (*e.g.*, “casual/seasonal” employees) or consultants. The State does not make contributions to the 457(b) Plan.

Participants make contributions under salary reduction agreements, subject to annual contribution limits under federal law (presently, \$19,500). Participants who are 50 years of age or older are eligible to make additional elective deferrals or “catch-up” contributions up to the annual catch-up limit under federal law (presently, \$6,500). Additionally, in the three years prior to the year of retirement, a participant, in lieu of regular catch-up contributions, is eligible to make “special catch-up” contributions in amounts up to twice the normal annual limit (currently capped at \$39,000). Participants may designate all or a portion of their deferrals as pretax or after-tax (Roth) contributions. Participants may also “roll over” into the 457(b) Plan certain distributions from other eligible retirement plans.

Distributions are permitted after the occurrence of one of the following events: (a) severance from employment; (b) the first day of the calendar year in which the participant attains

age 59 ½; and (c) the participant demonstrates an unforeseeable emergency. Required minimum distributions commence at age 72 for most participants. Loans are not permitted.

Participants in the 457(b) Plan may invest only in:

- Savings accounts in federally insured banking institutions;
- U.S. government bonds or debt instruments;
- Life insurance and annuity contracts issued by companies subject to regulation by the Delaware Insurance Commissioner;
- Investment funds registered under the Investment Company Act of 1940; and
- Securities that are traded on the New York Stock Exchange, the NASDAQ Stock Market, or the American Stock Exchange (n/k/a NYSE American).

*See 29 Del. C. § 6057A.*

As of December 31, 2020, the 457(b) Plan held approximately \$841 million of assets. As of December 31, 2020, there were 10,048 participants actively contributing to 457(b) Plan accounts and 16,570 accounts with balances greater than \$0.

## **2. *The 403(b) Plan***

The 403(b) Plan is a supplemental retirement plan, also referred to as a tax-sheltered annuity plan, covering most part-time and full-time employees of the State's public schools and the Delaware Department of Education. The State does not make contributions to the 403(b) Plan.

Contributions are made pursuant to salary reduction agreements, subject to annual contribution limits under federal law (presently, \$19,500). Participants who are 50 years of age or older are eligible to make catch-up contributions up to the annual catch-up limit under federal law (presently, \$6,500). Participants may designate all or a portion of their deferrals as pretax or after-tax (Roth) contributions. Participants may also rollover into the 403(b) Plan certain distributions from other eligible retirement plans.

Distributions are generally not permitted until the occurrence of one of the following events: (a) severance from employment; (b) the participant attains age 59 ½; and (c) the participant requests and is entitled to a hardship withdrawal. Required minimum distributions commence at age 72 for most participants.

Prior to January 1, 2009, the 403(b) Plan permitted participants to take loans against their accounts. Loans are no longer permitted. Several impermissible loans made by legacy vendors after January 1, 2009 have been identified and have since been "grandfathered" through plan amendments.

Under federal law, participants in the 403(b) Plan may invest only in annuity contracts or mutual funds held in custodial accounts. For several decades, the tax-sheltered annuity program in this State was administered at the local district or school level and offered participants annuity products from more than 100 vendors. In 2009, in response to federal regulations, the State adopted a formal plan document and centralized oversight responsibility by vesting it in the DCC, the predecessor to the Board.<sup>6</sup> That same year, the DCC limited the investment options available to participants to certain annuity and mutual fund products offered by Voya and 13 other DCC-approved vendors (commonly referred to as “legacy vendors”).

In 2016, the Board, as successor to the DCC, selected Voya as the sole record keeper for ongoing 403(b) Plan contributions. A portion of the assets formerly held by the legacy vendors (primarily in group contracts) was liquidated and transferred to Voya for reinvestment in the new investment options offered by Voya. As of December 31, 2020, the legacy vendors, including Voya, presently hold approximately \$296.7 million of 403(b) Plan assets (primarily in the form of individual annuity contracts) outside of the Voya platform (commonly referred to as “legacy assets”). The Board has certain limited obligations with respect to the legacy assets. OST, at the direction of the Board, has been engaged in an ongoing campaign to consolidate the legacy assets with other 403(b) Plan assets.

The General Assembly has been supporting the 403(b) Plan with annual appropriations of \$75,000 because administrative expenses, primarily audit and legal fees, have exceeded the State administrative fees collected from 403(b) Plan assets managed through the Voya platform.

As of December 31, 2020, approximately \$195.5 million of 403(b) Plan assets were being managed on the Voya platform, with another \$296.7 million in legacy assets. As of December 31, 2020, there were 5,626 participants contributing to 403(b) Plan accounts on the Voya platform and 7,002 unique participants with accounts on that platform. In addition, as of December 31, 2020, there were 6,863 legacy accounts.

### **3. *The Match Plan***

The Match Plan is a defined contribution plan under IRS § 401(a). The Match Plan was established in 2001 and has been frozen since mid-2008. Employees of the State and employees of State-supported instrumentalities are eligible to participate after enrolling in the 457 Plan and making contributions to the 457(b) Plan for six months. The Match Plan is not available for temporary employees or consultants.

Under the Match Plan, subject to appropriations authorized by the General Assembly, the State contributes a certain amount per pay period to each participant who makes a deferral into the 457(b) Plan.<sup>7</sup> Between January 2001 and July 2008, the State contributed \$10 per pay period. In 2008, the General Assembly passed legislation, S.B. 300, which suspended contributions under

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<sup>6</sup> Participants with individual contracts issued by a vendor prior to January 2009, typically referred to as the “orphan” accounts, have been excluded from the 403(b) Plan in accordance with U.S. Department of Labor guidance.

<sup>7</sup> The Match Plan does not allow participant contributions other than rollover contributions from another plan qualified under IRS § 401(a).

the Match Plan. The State has not made contributions to the Match Plan since that time. It is unclear if or when the General Assembly will authorize contributions to resume.

Distributions are permitted after severance from employment, or when the participant reaches retirement age and in fact retires. In-service distributions presently are not permitted. Required minimum distributions commence at age 72 for most participants. Loans are not permitted.

The General Assembly has supported the Match Plan with appropriations because fees associated with annual audits and legal services have exceeded State administrative fees collected from Match Plan participants.

As of December 31, 2020, the Match Plan had approximately \$25.6 million of assets and 8,991 participants.

### **C. Investment Architecture**

The DC Program is voluntary, and participant directed. The DC Program is designed to afford participants with a sufficiently diverse set of investment options that encompass a variety of risk/reward characteristics to enable participants to adequately diversify their supplemental retirement portfolios.

The DC Program includes a multi-tiered investment architecture providing participants with three overarching types or “tiers” of investment options:

#### ***Tier 1 – Default Options***

Tier 1 includes a family of target date retirement funds that have been selected as the DC Program’s default investment options. Retirement date funds have the primary objective of providing asset allocation strategies for participants using a methodology that allows for a gradual reallocation (commonly referred to as a “glide path”) of assets to more conservative strategies as the participant approaches the fund’s stated retirement date. Tier 1 is designed to allow participants to choose the time horizon that suits their specific financial goals by selecting the anticipated retirement year in the fund’s name.

#### ***Tier 2 – Core Options***

Tier 2 consists of “core” investment options of actively and passively managed funds selected from among the major asset classes, as well as a group annuity product offered by Voya. Participants who are comfortable selecting and allocating contributions among core investment options may do so. Participants also have the option of having their core investments selected and managed professionally by a third-party investment advisor (presently, Morningstar), subject to the payment of additional fees to the investment advisor and/or DC Program manager.

#### ***Tier 3 – Brokerage Window***

Tier 3 offers a self-directed brokerage account option (presently offered through TD Ameritrade) that provides participants with the opportunity to allocate their contributions to

investments not otherwise offered in the investment array. Participants in the 457 Plan and the Match Plan can invest in a broad array of individual stocks and bonds, exchange traded funds and mutual funds. Participants in the 403(b) Plan are limited to investing in mutual funds through the brokerage window. Tier 3 is designed for participants who desire a more expansive universe of investment options, and who have the time and ability to build their own portfolios. Each participant who selects the brokerage account option is assessed an annual fee by the DC Program manager and will incur fees imposed by the brokerage firm.

## CHAPTER III THE 529 COLLEGE INVESTMENT PROGRAM

### A. The College Program, Generally

The College Program is intended to create a vehicle through which residents of Delaware and other states may save for qualified education expenses on a tax-favored basis by contributing to accounts authorized under IRC § 529. The College Program consists of a single college investment plan<sup>8</sup> authorized and governed by IRC § 529 and Subchapter XII, Chapter 34 of Title 14 of the Delaware Code (the “**529 Plan**”).<sup>9</sup>

The College Program presently is made available through an online platform offered by Fidelity Investments. Various Fidelity entities administer the College Program, serve as the sole recordkeeper for the 529 Plan and manage the Fidelity mutual funds that serve as investment options for 529 Plan participants. Captrust serves as the Board’s independent investment advisor and consultant and is a co-fiduciary with respect to the 529 Plan.

### B. The 529 Plan - Overview

The Plan provides an opportunity for participants to take an active role in saving for education through a tax-advantaged vehicle. The 529 Plan has a maximum contribution limit of \$350,000 per account. Under current law, contributions to 529 Plan accounts are not deductible and do not provide any tax credit or deduction under federal or state law.

The 529 Plan is participant-directed. Consistent with federal and state law, participants may only move money among investment portfolios within an existing account twice during a calendar year, or when the account owner changes the beneficiary of the account to another family member of the original beneficiary. *See* 26 U.S.C. § 529(b)(4); 14 *Del. C.* § 3489(e). Account owners may change the allocation of future contributions at any time.

Account assets can be withdrawn without taxation on growth if used to satisfy tuition and other qualified expenses at most colleges and universities. In addition, up to \$10,000 of an account’s assets may be used each year to pay for tuition expenses at public, private, and religious elementary and secondary educational institutions. Finally, subject to a lifetime limit of \$10,000, account assets may be withdrawn and used to pay the principal or interest on a qualified education loan of the designated beneficiary or a sibling of the designated beneficiary.

The assets are held collectively in a trust that contains several investment portfolios. Board members serve as trustees under the trust document. Money held in the trust is used to purchase units of one or more of the trust’s investment portfolios. Trust units are held in brokerage accounts and are municipal securities subject to regulation by the Municipal Securities Rulemaking Board. Units are not registered with the Securities and Exchange Commission (or any state securities commission).

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<sup>8</sup> Unlike the DC Plans, the 529 Plan does not have a formal “plan” document.

<sup>9</sup> The State has not adopted a prepaid tuition plan authorized under IRC § 529.

As of December 31, 2020, the 529 Plan had approximately \$728.3 million of assets and 22,346 accounts with balances greater than \$0.

### **C. Investment Architecture**

The 529 Plan offers participants an array of professionally managed Fidelity investment options to enable diversification across a range of risk levels, asset classes, and investment strategies in order to accommodate the participants' varying needs and risk tolerances. Participants have the option of selecting an age-based strategy, or they may create a custom strategy consistent with their particular investment goals. Participants following a custom strategy could choose to invest with an age-based option, a static allocation option, one or more individual fund options, or any combination of the forgoing. Participants also have the option of a bank deposit portfolio.

#### ***Age-Based Options***

The 529 Plan's investment array presently includes multiple aged-based options tied to a beneficiary's year of birth. Age-based options are "fund of funds" investment portfolios with "glide path" strategies that reallocate assets to more conservative fund investments as the beneficiary approaches college enrollment age. Participants may select investment portfolios invested in actively managed funds, passively managed index funds, or a blend of actively managed and index funds.

#### ***Static Allocation Options***

The investment array presently includes six "static" allocation options – meaning that the target asset class allocations do not change over time. Each static investment portfolio is a "fund of funds" that invests in either actively or passively managed funds. Participants have three allocation options - aggressive growth, moderate growth, and conservative.

#### ***Individual Fund Options***

The investment array presently includes five investment portfolios that are each invested in a single underlying index-based fund or an actively managed money market fund. The individual fund options allow participants to construct diversified portfolios and investment styles matching their risk tolerances, asset class preferences, time horizons, and expected returns. Options presently include two U.S. equity funds, one non-U.S. equity fund, one investment-grade debt fund, and one short-term debt (money market) fund.

#### ***Bank Deposit Option***

The 529 Plan currently offers a bank deposit option. This portfolio is composed exclusively of deposits in an FDIC-insured interest-bearing omnibus negotiable order of withdrawal (or NOW) deposit account.

## CHAPTER IV THE 529A ABLE PROGRAM

### A. The ABLE Program, Background

The ABLE Program is a vehicle that allows individuals with blindness or other qualifying disabilities to save for a broad range of disability-related expenses on a tax-advantaged basis while preserving eligibility for benefits from Social Security, Medicaid and other federal programs. The ABLE Program consists of a single plan<sup>10</sup> authorized and governed by IRC § 529A and Chapter 96A of Title 16 of the Delaware Code (the “**ABLE Plan**”).

Shortly after its creation, the Board created a task force to study available options for implementing the ABLE Program and make recommendations to the Board. The task force, chaired by the State Treasurer, considered multiple possible paths, including having a stand-alone Delaware plan, joining the “National ABLE Alliance,” an Illinois-led, multi-state consortium, and contracting with another “host” state. The task force, after a series of public meetings, ultimately recommended the consortium option. The Board, at a meeting held on October 24, 2017, discussed the task force’s recommendation, considered the pros and cons of the various options, and voted to join the National Able Alliance (“**Alliance**”). During the remainder of 2017 and through the first half of 2018, the operational elements for the State’s ABLE Program were finalized. The ABLE Plan was launched through the Alliance in June 2018.

The Alliance is a coalition of states that has partnered to share a uniform program and program manager, while maintaining member states’ independence and ability to provide high quality plans that meet the needs of their particular constituents. The Alliance offers a set of common program elements, services and costs to each member’s plan. As of April 30, 2021, there are 18 members of the Alliance - 17 member states and Washington, D.C.

In connection with joining the consortium, Delaware entered into the ABLE Interstate Agreement (the “**Interstate Agreement**”) with the other Alliance members. Pursuant to the Interstate Agreement, the members created the ABLE Consortium Advisory Committee, which consists of a representative from each member jurisdiction, to make recommendations to the members with respect to the implementation and maintenance of the consortium program, including the selection of a lead or “facilitator” state, the fair apportionment of shared expenses, and procurement-related issues. Each member’s representative gets one vote.

Under the Interstate Agreement, the facilitating state, Illinois, is responsible for conducting procurement processes for the selection of a program manager to provide investment and recordkeeping services and entering into an “umbrella contract” with the successful bidder on terms and conditions approved by majority vote of the Committee. The facilitating state has authority to engage, at its expense, a consultant to advise on the procurement of a program manager.<sup>11</sup> As contemplated in the Interstate Agreement, the members (other than the facilitating state), including Delaware, have negotiated and entered into “implementing agreements” to

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<sup>10</sup> As with the 529 Plan, the ABLE Plan does not have a formal “plan” document.

<sup>11</sup> Illinois engaged Marquette Associates as a consultant to assist with its duties as the facilitating member.

directly engage the services of the program manager. The implementing agreements are coterminous with the umbrella agreement, unless earlier terminated by a member state. A member state may only withdraw from the Interstate Agreement upon termination of its respective implementing agreement.

Delaware's ABLE Program, as with other state's programs, presently is made available through an online platform offered by the selected program manager, Ascensus College Savings Recordkeeping Services, LLC ("Ascensus").<sup>12</sup> BlackRock, Schwab, and Vanguard provide most of the underlying mutual funds and/or ETFs available through the program's investment options. The Captrust consulting engagement covers ABLE-related services, but those services must be specifically requested by the Board or a Committee and are separately billed on an hourly basis.

## **B. The ABLE Plan – Overview**

An ABLE account may be established for an individual with a disability who is the designated beneficiary and owner of the account. *See* 29 *Del. C.* § 9605A(a). A designated beneficiary may have only one ABLE account. *See* 26 U.S.C. § 529A(b)(1)(B); 29 *Del. C.* § 9606A(a). Any person may make a contribution to an account once it is opened. *See* 29 *Del. C.* § 9605A(b).<sup>13</sup>

Under IRC § 529A, there is an annual contribution limit of \$15,000 per account (from all sources), subject to certain exceptions for designated beneficiaries who are employed.<sup>14</sup> Total account balance limits vary by state. Delaware has limited ABLE Plan account balances to the maximum amount allowed to be contributed to a 529 Plan account - \$350,000. *See* 29 *Del. C.* § 9606A(c). Under current law, subject to the limited "savers credit" exception, contributions to ABLE Plan accounts are not deductible and do not provide any federal or state tax credit or deduction.<sup>15</sup>

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<sup>12</sup> The umbrella agreement with Ascensus expires December 7, 2021 but may be extended by the members for up to five years with the mutual consent of the program manager. Illinois presently is conducting a procurement process and may select and engage a new program manager prior to the expiration date.

<sup>13</sup> Delaware does not have an estate tax or gift tax. Certain transactions related to an ABLE Plan account may be subject to federal gift and generation-skipping taxes. Under federal law, in each calendar year, an individual other than the account owner may contribute up to the gift tax limit – currently \$15,000 – to the account without the contribution being considered a taxable gift. In addition, a transfer of an account to a person who is not a member of the family will subject the account owner to federal gift and generation-skipping transfer taxes.

<sup>14</sup> An account owner who is employed and who is not contributing to a defined contribution plan, an annuity contract or an eligible deferred compensation plan may contribute the lesser of the account owner's compensation for the year or the amount equal to the poverty line for a one-person household for the prior year. *See* 26 U.S.C. § 529A(b)(2)(B)(ii).

<sup>15</sup> As a result of the Tax Cuts and Jobs Act of 2017, certain designated beneficiaries (*i.e.*, individuals who are 18 years of age or older, who are not a dependent or a full-time student, and who meet the income requirements) may be eligible to claim a nonrefundable "saver's credit" for a percentage of their contributions.

The ABLE Plan is participant-directed. Consistent with federal and state law, participants may only move money among investment portfolios within an existing account twice during a calendar year, or upon a change in account owner to an eligible individual who is a member of the family. *See* 26 U.S.C. § 529A(b)(4); 16 *Del. C.* § 9606A(d). Account owners may change the allocation of future contributions at any time.

Account assets can be withdrawn without taxation of growth if used to satisfy qualified disability expenses. There is no federal or state income tax on qualified withdrawals. Upon the death of an ABLE Plan beneficiary, funds remaining in an ABLE Plan account can be used by the decedent's estate to pay for outstanding qualified disability expenses, including funeral and burial costs. Funds remaining subsequent to these payments will be transferred to the decedent's estate and may be subject to "clawback" under applicable Medicaid laws and regulations. *See* 26 U.S.C. § 529A(f). Delaware prohibits State agencies from seeking to recoup certain Medicaid funds spent on behalf of a deceased beneficiary. *See* 16 *Del. C.* § 9607A(c). Notwithstanding that law, Delaware's Division of Medicaid and Medical Assistance may be obligated under federal law - namely, Section 1917(b)(1) of the Social Security Act - to recoup Medicaid funds spent on behalf of a deceased beneficiary over the age of 55, or Medicaid funds expended for certain beneficiaries in nursing facilities, intermediate care facilities, or similar institutions.

The assets of each member state are held collectively in that certain Ascensus ABLE Consortium Trust. Ascensus serves as the administrator of the trust and uses contributions to purchase units of one or more of the trust's investment portfolios in accordance with the directions of the participants. The assets of each member plan participating in the Alliance are held and accounted for in a separate series of the trust. No other series has any claim on the assets held in a member plan's series. Trust units are municipal securities subject to regulation by the Municipal Securities Rulemaking Board. Units are not registered with the Securities and Exchange Commission (or any state securities commission).

The State is entitled to collect certain administrative fees under the ABLE Plan. Due to the small size of the ABLE Plan, the State has collected less than \$100 of administrative fees since the plan went live in June 2018. To date, legal and auditing expenses for the ABLE Plan have been minimal. Other administrative expenses likewise have been minimal, primarily because OST has been providing staffing for ABLE Plan oversight from its general fund budget.

As of December 31, 2020, the ABLE Plan had approximately \$1.2 million of assets and 115 accounts with balances greater than \$0. The Alliance as a whole had approximately \$142.9 million of assets and 17,700 accounts with balances greater than \$0.

### **C. Investment Architecture**

The ABLE Plan offers account owners six professionally managed investment options to enable diversification across a range of risk levels. Account owners also have the option of a checking account.

#### ***Target Risk Options***

The investment array presently includes six investment portfolios that are invested in

varying degrees in nine underlying index-based stock and bond funds and ETFs, with two conservative options also invested in a high yield savings account. The Target Risk Options allow participants to construct diversified portfolios and investment styles matching their risk tolerances and asset allocation preferences.

The Aggressive Option seeks to provide long-term capital appreciation with very low-income potential and allocates approximately 90% of its assets to stocks and 10% to investment-grade bonds. The Moderately Aggressive Option seeks to provide long-term capital appreciation with low income potential and allocates approximately 75% of its assets to stocks and 25% to bonds. The Growth Option seeks to provide capital appreciation and low current income and allocates approximately 60% of its assets to stocks and 40% to bonds. The Moderate Option seeks to provide capital appreciation and moderate current income and allocates approximately 45% of its assets to stocks and 55% to bonds. The Moderately Conservative Option seeks to provide moderate current income, low capital appreciation and moderate capital preservation and allocates approximately 30% of its assets to stocks, 45% to bonds and 25% to cash. The Conservative Option seeks to provide substantial capital preservation, limited current income and very low capital appreciation and allocates approximately 10% of its assets to stocks, 30% to bonds and 60% to cash.

### *Checking Option*

The Checking Option is designed to meet the needs of account owners looking for capital preservation and who require a transactional account. The Checking Option invests 100% of its assets in FDIC-insured checking accounts held at Fifth Third Bank. Account owners who invest in the Checking Option are able to write checks or use a debit card to pay for qualified disability expenses.

## **CHAPTER V THE OFFICE OF THE STATE TREASURER**

OST serves as the administrative support agency for the Board and its Committees and handles all aspects of procurement for Board-related matters. OST also performs certain operational functions for the Plans.

### **A. Administrative Support**

OST staff members perform numerous administrative tasks in support of the Board and its Committees, including:

- Assisting with the orientation and onboarding of new members;
- Maintaining public-facing webpages for the Board and Plan-related documents and information;
- Preparing draft agendas for, and coordinating and hosting, public Board and Committee meetings;
- Preparing Board and Committee meeting minutes;
- Responding to requests for public records directed to the Board or a committee, or their respective members, including lodging objections when necessary and identifying, producing and redacting responsive documents;
- Coordinating and hosting member educational training;
- Working with the DAG and, when necessary, outside tax counsel and the Board's consultant to identify and address Plan-related legal or operational issues;
- Serving as the liaison between the Board and the Auditor of Accounts in connection with the selection of external auditors; and
- Working with the DAG and, when necessary, outside tax counsel to prepare draft Plan amendments.

### **B. Procurement**

OST handles all aspects of procurement for the Board. OST staff members, typically director-level employees, oversee and perform all procurement-related functions for Plan-related matters. OST staff members prepare and post requests for proposals and solicit bids from entities desiring to provide consulting, recordkeeping and other services to the Board or a Plan and work with the DAG to ensure compliance with the State's Procurement Code, 29 *Del. C.* Ch. 69, and other applicable laws and regulations. OST staff members frequently sit on proposal evaluation

teams and directly participate in the scoring of prospective vendors. To enhance or acquire subject matter expertise, OST may solicit other individuals, including consultants or other State employees, to participate on evaluation teams.

Evaluation teams, in turn, make recommendations based on scoring results, which recommendations are typically made to a Committee and documented in a written memorandum. The Board is ultimately responsible for approving any award to the successful vendor or vendors.

OST, working with the DAG, handles the negotiation of contracts with Board-approved vendors. Traditionally, the State Treasurer, acting on behalf of the State, and with the authority of the Board, executes all Plan-related contracts.

OST has adopted a written policy to screen for and address conflicts of interest in procurement, including all Board-related procurement processes. A copy of that policy is attached hereto as **Appendix 6**.

### **C. Operational Functions**

OST performs various operational functions for the Plans. OST staff members serve as the public-facing representatives of the State, as the sponsor of the Plans, and the Board. Plan participants may contact OST with Plan-related questions or concerns, including complaints concerning a Plan vendor or a Plan feature or investment option.

OST also serves as the “Administrator” under the DC Plans and, in that capacity, performs various operational functions for those Plans. For example, OST employees process death claims and trustee-to-trustee transfers (out of or into a Plan) and approve written requests to make special catch-up contributions and contributions of eligible sick and vacation pay resulting from severance or retirement.

## CHAPTER VI PUBLIC MEETINGS AND PUBLIC RECORDS

The Board is a “public body” within the meaning of the State’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), and an “agency” within the meaning of the Delaware Public Records Law, 29 *Del. C.* Ch. 5 (the “DPRL”). So are its Committees. The Board and its Committees and their respective members are subject to FOIA and the DPRL and are thus required to (a) hold and memorialize public meetings in accordance with FOIA, (b) preserve and dispose of public records in accordance with the DPRL, and (c) timely respond to FOIA requests and make available for inspection or produce copies of public records.

### A. Open Meetings - FOIA

#### 1. General Requirements

The Board and its Committees must conduct all business in public, except certain discussions that are permitted to take place in executive session (closed to the public) as part of a properly noticed public meeting. FOIA does not permit straw polling or otherwise permit a public body to discuss and reach consensus on matters of public business outside of the context of a public meeting. *Op. Att’y Gen.* 05-IB29, 2005 WL 3991287, at \*5 (Oct. 13, 2005). Members may appear and vote at public meetings in person, or through the use of teleconferencing or videoconferencing. *See* 29 *Del. C.* § 2722(e)(8). All votes must take place in open session, including any vote on whether the public body should convene in executive session. *See* 29 *Del. C.* § 10004(c).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the member of any public body for the purpose of discussing or taking action on public business.” *See* 29 *Del. C.* § 10002(g).<sup>16</sup> Importantly, a public body may reach a “constructive” quorum (and thus be conducting a private “meeting” in violation of FOIA) through serial telephone, email or other electronic communications that allow members of a public body to exchange opinions and thoughts about a matter of public business. *See Op. Att’y Gen.* 17-IB09, 2017 WL 2345247, at \*5 (2017). The Board has adopted a communications policy that expressly addresses, among other things, communications between Board or Committee members outside of public meetings. *See* Communication Policy, **Attachment 10**.

With the exception of the foregoing requirements, as well as those listed below dealing with executive sessions and notice/agenda and minutes requirements, FOIA generally does not govern how public bodies conduct public meetings. Public bodies are free to adopt such rules of parliamentary procedure as are appropriate to facilitate the business of the group through an orderly, democratic process. The Board has adopted informal rules of parliamentary procedure that are listed below in Section A.6.

#### 2. Executive Sessions

The Board or a Committee may call for an executive session to discuss (but not vote on)

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<sup>16</sup> “Public business” is broadly defined as “any matter over which the public body has supervision, control, jurisdiction, or advisory power.” *See* 29 *Del. C.* § 10002(j).

certain subject matters outside of public view, including:

- Pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body;
- The contents of documents that are excluded from the definition of “public record” (discussed below);
- Personnel matters in which the names, competency and abilities of individual employees are discussed, unless the employee requests that such a meeting be open; and
- Investment strategy or negotiations concerning the investment of money belonging to the Plans.<sup>17</sup>

*See 29 Del. C. §§ 2722(c)(5), 10004(b).* In the event of a challenge, public bodies have the burden of proof to justify going into executive session for a purpose authorized by statute. *See Op. Att’y Gen. 05-IB29, 2005 WL 3991287, at \*4 (Oct. 13, 2005).*

### 3. *Notice and Agenda Requirements*

Under FOIA, most public meetings require at least seven days’ advance notice. *See 29 Del. C. § 10004(e)(2).* There are exceptions for emergency meetings that are necessary for the immediate preservation of the public peace, health or safety. *See 29 Del. C. § 10004(e)(1).* FOIA also recognizes exceptions to the seven-day rule for special or rescheduled meetings, which may be conducted on as little as 24 hours’ notice as long as the public notice of the special or rescheduled meeting explains why the public body could not provide seven days’ notice. *See 29 Del. C. § 10004(e)(3).*

Notices must be timely and conspicuously posted at the public body’s primary office (*i.e.*, OST’s Dover office) and on the State’s public meeting calendar. *See 29 Del. C. § 10004(e)(2).* Each notice must include the date, time and place of the meeting and indicate whether the meeting will be conducted by videoconferencing. *See id.* The notice must include the agenda for the meeting, if the agenda is known at the time of posting. *See 29 Del. C. § 10004(e)(2).*

Each agenda must include “a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor.” *29 Del. C. § 10002(a).* The “general statement” of each “major issue” (or agenda item) must not be so broad or vague that it fails to draw the public’s attention to the fact that a specific important subject will be discussed or the subject of a vote. For example, an agenda should not list “discuss and vote on contract” as an agenda item if the public body intends to discuss and vote on whether to award a major contract that may be of interest to a member of the general public. The disclosures required for executive sessions need not be as detailed. Public bodies are required to disclose in their agendas only that they intend to convene in executive session to discuss a matter that, by statute, may be discussed in closed session. The

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<sup>17</sup> The Board and its Committees, for transparency reasons, historically have not invoked the exemption for investment strategy/negotiations.

disclosure should include the general type of matter and the specific statute involved – *e.g.*, “Personnel matters covered by 29 *Del. C.* § 10004(b)(9).”

FOIA permits agendas to be added or amended in certain limited circumstances. First, if the agenda is not known when the initial notice is required to be posted, the agenda may be added to the notice at least six hours in advance of the meeting. *See* 29 *Del. C.* § 10004(e)(5). The revised notice/agenda must include a brief description of the reasons for the delay in posting the agenda. *See id.*

Second, under FOIA determinations issued by the Delaware Department of Justice (“**DDOJ**”), a public body is permitted to amend a timely posted agenda if: (1) the public body posts an amended agenda describing adequately the new items at least six hours in advance of the meeting; (2) the public body includes in the amended agenda a brief statement describing the reasons for the delay in providing notice of each new agenda item; and (3) the amended agenda includes a statement that each new matter of public business came up unexpectedly after the initial posting and required immediate attention (*i.e.*, that the matter could not be delayed to a meeting held on seven days’ notice). *See Op. Att’y Gen.* 17-IB15, 2017 WL 3426253, at \*6 (July 7, 2017). The DDOJ has warned against repeated or routine amending of agendas after the initial posting. *See id.* at \*5.

Finally, the agenda may be changed during a public meeting to include new agenda items, including a new executive session, as long as the circumstances giving rise to the need for agenda modification arose after the commencement of the meeting. *See* 29 *Del. C.* § 10004(e)(2).

#### 4. Minutes

FOIA requires public bodies to maintain minutes of all meetings, including executive sessions. *See* 29 *Del. C.* § 10004(f). Minutes must include a record of those members present and an accurate record, by individual member, of each vote taken and action agreed upon. *See id.*; *see also Op. Att’y Gen.* 16-IB21, 2016 WL 6247574, at \*3 (Oct. 19, 2016) (“[T]he Board violated 29 *Del. C.* § 10004(f) by failing to maintain minutes that accurately reflected the votes taken and actions agreed upon at the April 4<sup>th</sup> meeting.”). Aside from these minimal requirements, FOIA does not expressly prescribe the type or level of detail required in the minutes of a public meeting. *See Op. Att’y Gen.* 12-IIB12, 2012 WL 6858970, at \*7 (2012) (“While we agree the Board probably should have included a reference to the Presentation in the February 8<sup>th</sup> Minutes, FOIA did not obligate the Board to do so.”).

The Board historically has included more detail in its open session minutes that is required under FOIA and has adopted a written policy that expressly requires that all fiduciary decisions be adequately summarized and documented in minutes. *See* Documentation of Fiduciary Decisions, **Attachment 3**

Under FOIA, the Board and its Committees are required to post draft minutes of their open meetings to the public meeting calendar within 20 working days after the conclusion of each meeting. *See* 29 *Del. C.* § 10004(f). Prior to being posted, draft minutes may be distributed to members who were present at the meeting. *See id.* Draft minutes may continue to be revised and corrected up until final minutes are approved at an open meeting. *See id.* The Board has required

that OST prepare and circulate draft minutes, including executive session minutes, no later than seven calendar days after the date of each Board or Committee meeting. *See* 2021 Resolution, ¶ 7. OST is required by FOIA to post final approved minutes of open meetings to the public meeting calendar within five working days of final approval. *See id.*

The Board, consistent with agency practices across State government, prepares separate minutes for any discussion held in executive session. The Board, to comply with DDOJ guidance, requires an exacting level of detail for minutes of its executive sessions. *See Att’y Gen. Op.* 03-IB16 (July 14, 2003) (noting that, to meet its burden of proof, a public body normally will have to prepare minutes of executive session that are sufficiently detailed to allow the DDOJ to determine exactly what the public body discussed outside of public view). Under FOIA, minutes of executive session need not be posed publicly and may be withheld from public disclosure so long as such disclosure would defeat the lawful purpose of the executive session, but no longer. *See id.*

### 5. *Legal Challenges*

Actions taken at a meeting in violation of FOIA’s open meetings provisions may be challenged in, and may be voided by, the Court of Chancery. *See 29 Del. C. § 10005(a)*. A Delaware citizen must file suit within 60 days of the citizen’s learning of action taken in violation of FOIA. *See id.* No such action may be filed more than six months after the date of the action. *See id.*

A Delaware citizen also has the right to petition the DDOJ to determine whether a violation of FOIA has occurred or is about to occur – *e.g.*, whether minutes were timely posted to the public meeting calendar. *See 29 Del. C. § 10005(e)*. The DDOJ is required to render a written determination within 20 days of receiving the petition. *See id.* The petitioner or public body may appeal the determination on the record to Superior Court. *See id.*

### 6. *Parliamentary Procedure*

As noted, subject to the forgoing rules, FOIA does not govern how public bodies conduct public meetings. The Board has adopted general rules to facilitate the business of the Board and its Committees through an orderly, democratic process. The Board, due to its small size and typically non-controversial nature of its public business, has not adopted Robert’s Rules of Order as a formal system of parliamentary procedure and has opted instead to conduct business through an informal process guided by a few basic precepts:

- The presiding officer (normally the Chairperson) should ensure that a quorum is present and, if so, call the meeting to order at the set time.
- The presiding officer should adhere to the agenda as posted but has discretion to address agenda items out of order to maintain the flow of the meeting and ensure efficient use of time. During a meeting, any change to the agenda involving the addition of an action item – *i.e.*, a topic that will be the subject of discussion or vote – requires a majority vote of present members.

- The presiding officer should introduce each agenda item and open the floor for discussion if warranted. Every matter presented for discussion or vote should be discussed fully, with every member, including the presiding officer, having an opportunity to question or speak on any matter of public business.
- At the conclusion of any discussion requiring a vote on a matter of public business, the presiding officer may call for a motion or make a motion with respect to such matter. The presiding officer normally should call for a motion to be seconded before putting the matter to a vote.
- Members of the public, if present, should be given an opportunity to speak at the end of each meeting and must be treated with fairness and respect.
- At the conclusion of the agenda, the presiding officer should inquire as to whether there is any further business, absent which, the presiding officer may adjourn the meeting (without a vote).

See 2021 Resolution, ¶ 8.

## **B. Preservation of Records - DPRL**

The General Assembly has, through the DPRL, attempted to provide for the systematic management and preservation of historically valuable materials and ensure that the public has access to vital information to promote the efficient and economical operation of government. See 29 Del. C. § 501(a).

### *1. General Requirements*

The DPRL governs the creation, preservation and management of public records and serves as the backbone of FOIA's open records provisions, 29 Del. C. § 10003.<sup>18</sup> The definition of a "public record" under the DPRL is very broad and covers all physical and electronic documents "made, used, produced, composed, drafted or otherwise compiled or collected or received" by any officer or employee of a public body "in connection with the transaction of public business, or in any way related to public purposes." See 29 Del. C. § 502(8). This definition, like its counterpart under FOIA, is broad enough to include work-related emails, text messages and instant messages. With the exception of personal notes, Board and committee members should assume that all documents they receive or create in their official capacities are "public records" for purposes of the DPRL.<sup>19</sup>

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<sup>18</sup> Absent the documentation and record retention and preservation requirements of DPRL, FOIA would not provide a meaningful mechanism for Delaware citizens to review public records and hold the State's public bodies, officials and employees accountable.

<sup>19</sup> The DDOJ has consistently determined, albeit within the context of FOIA, that the personal notes of public officials do not constitute public records under FOIA provided that they are created for

The DPRL requires all public officials to:

- Adequately document the transaction of public business and the services and programs for which they are responsible;
- Retain and adequately protect all public records in their custody; and
- Cooperate with Delaware Public Archives (“**Archives**”) and records officers in the establishment and maintenance of an active and continuous program for the economical and efficient management of public records.

*See 29 Del. C. § 504(a).*

The DPRL expressly prohibits public officials from destroying, selling or otherwise disposing of any public record in such person’s care or custody, or under such person’s control, without the consent of Archives, the official repository for the archival records of this State. *See 29 Del. C. § 504(b).* A failure to adhere to DPRL requirements could result in criminal prosecution for an unclassified misdemeanor, conviction for which may result in a fine of up to \$500, or imprisonment of up to 3 months, or both. *See 29 Del. C. § 526.*

## 2. *Official Custodian and Records Officer*

Under the DPRL, the chief administrative officer charged by law with the responsibility of maintaining offices having public records is the official custodian of such public records. *See 29 Del. C. § 520.* OST, as the administrative arm of the Board, maintains offices for Board-related matters, including the management of the Board’s public records. The State Treasurer is the official custodian of all Board-related records.

The DPRL requires every State agency to designate a records officer to serve as a liaison with Archives for the purpose of implementing and overseeing a records retention program. *See 29 Del. C. § 521(a).* The Board has designated OST’s Chief Operating Officer (“**COO**”) as the Board’s records officer. *See 2021 Resolution, ¶ 9.* The COO is tasked with ensuring that all Board-related documents are retained and either archived or destroyed in accordance with Archive-approved retention schedules, discussed below.

## 3. *General and Agency-Specific Retention Schedules*

Archives has promulgated general retention schedules applicable to all State agencies, including OST and the Board, that list types of records commonly generated by agencies. There are presently four general retention schedules covering accounting and finance records (including procurement-related documents and contracts), administrative records (including agendas, minutes, meeting handouts), electronic records (email correspondence), and personnel records. The general retention schedules set the applicable retention period for each type of record, mandate

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the convenience of an individual, and, are not circulated or maintained in the public body’s files. *See, e.g., Op. Att’y Gen. 17-IB66, 2017 WL 6948885, at \*2-\*3 (Dec. 29, 2017).*

the permanent archiving of certain vital records, and, permit the destruction of non-critical records that have been retained for the applicable retention period prescribed by Archives. The Board requires OST to comply with the general retention schedules applicable to Board-related activities. *See* 2021 Resolution, ¶ 10.

OST has an agency-specific retention schedule that has been approved by Archives. OST's agency-specific retention schedule covers records that OST generates when performing operational functions for the Plans. The Board requires OST to comply with its agency-specific retention schedules for Plan-related records. *See id.*

The retention periods reflected in the general and agency-specific retention schedules are minimum periods only and do not override applicable federal and state laws, or litigation-related orders, rules or obligations. Accordingly, agency records may need to be retained beyond the applicable retention periods.

### **C. Open Records - FOIA**

The General Assembly has, through FOIA's open records provisions, provided a comprehensive process through which Delaware citizens may access documents and information maintained by public bodies, subject to certain exemptions. FOIA requires public bodies to take certain actions to facilitate access to public records, including the appointment of a FOIA coordinator, prescribes a deadline for public bodies to respond, and sets the types and amounts of fees that may be charged in connection with a FOIA request.

#### *1. "Public Records"*

All records meeting the definition of a "public record" are accessible by Delaware citizens. *See 29 Del. C. § 10003(a)*. The definition of "public record" under FOIA is very broad and includes all information contained in or on physical documents (*i.e.*, paper), as well as information stored in electronic format (such as Word, Excel, etc.) or databases, "relating in any way to public business, or in any way of public interest, or in any way related to public purposes." *See 29 Del. C. § 10002(l)*. Thus, FOIA's concept of a "public record" covers, at least initially, almost every conceivable type of physical or electronic record that may be created, maintained or possessed by a public body.

#### *2. Exemptions*

FOIA contains a list of various types of documents and information that are excluded from the definition of a "public record" and thus need not be produced in response to a FOIA request. For example, FOIA exempts:

- Personnel files, the disclosure of which would constitute an invasion of personal privacy, under FOIA or under any State or federal law as it relates to personal privacy, *see 29 Del. C. § 10002(l)(1)*;
- Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature, *see 29*

*Del. C. § 10002(1)(2);*

- Records specifically exempted from public disclosure by statute (*e.g.*, documents relating to Plan-related investment strategy or negotiations per 29 *Del. C. § 2722(c)(5)*), or common law (*e.g.*, attorney-client privilege), *see 29 Del. C. § 10002(1)(6)*;
- Records pertaining to pending or potential litigation; *see 29 Del. C. § 10002(1)(9)*;
- Records of discussions held in executive session if public disclosure would defeat the lawful purpose for the executive session, *see 29 Del. C. §§ 10002(1)(10), 10004(f)*;
- IT infrastructure details, source code, network schematics, vulnerability reports, and any other information that, if disclosed, could jeopardize the security or integrity of an IT system maintained by a public body, *see 29 Del. C. § 10002(1)(17)a.7.*

The Board, acting through its designated FOIA coordinator (discussed below), and with the assistance of its DAG, determines whether and to what extent a particular record may be withheld or redacted under an applicable exemption. To make that determination, the Board may need to consult with another public body, or perhaps even a private person or entity, that submitted information to OST or the Board on a “confidential,” “private,” or “privileged” basis. The Board bears ultimate responsibility for determining whether and to what extent an exemption applies.

### 3. *Facilitation of Access*

To facilitate the public’s access to documents, FOIA requires that all public bodies:

- Develop a web portal<sup>20</sup> for receiving FOIA requests utilizing the standard request form promulgated by the DDOJ, *see 29 Del. C. § 10003(c)*;
- Provide a mailing address for receiving FOIA requests through the U.S. mail, *see 29 Del. C. § 10003(e)*;
- Promulgate a policy for addressing FOIA requests,<sup>21</sup> *see 29 Del. C.*

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<sup>20</sup> The Board’s official webpage contains a “FOIA Requests” hyperlink that takes requestors to OST’s official webpage and permits individuals to submit FOIA requests for public records of the Board.

<sup>21</sup> OST is in the process of formally adopting a written policy governing FOIA requests seeking access to or copies of the Board’s public records, which policy has been or will be approved by majority vote of the current members of the Board prior to publication in accordance with the State’s Administrative Procedures Act, 29 Del. C. Ch. 101 (the “APA”). The Board has required

§ 10003(b);

- Provide reasonable assistance to the public in identifying and locating “public records,” *see 29 Del. C. § 10003(d)(1)*; and
- Designate a FOIA coordinator<sup>22</sup> to serve as the point of contact for FOIA requests and coordinate the public body’s responses thereto, *see 29 Del. C. § 10003(g)(1)*.

Under the express provisions of FOIA, public bodies are required to provide citizens with reasonable access to public records and reasonable facilities for copying them. *See id.* Historically, “access” required a public body to track down physical copies of responsive documents and make them available for inspection and copying at an office maintained by the public body. With most documents now maintained in electronic format, “access” now generally requires that responsive documents be located and sent to the requesting party via email or placed on a thumb drive or CD ROM and mailed to the requesting party. Under DDOJ guidance, if a citizen requests electronic copies of public records, a public body *must* produce the records in electronic format (if the records exist in that format). *See DDOJ FOIA Coordinator Manual* (2019 ed.), p. 18.

#### 4. FOIA Coordinator Duties

The FOIA coordinator is required to “make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records.” *29 Del. C. § 10003(g)(2)*. The FOIA coordinator is also required to “work to foster cooperation between the public body and the requesting party.” *Id.* In addition, the FOIA coordinator is required to maintain a document tracking all FOIA requests. For each FOIA request, the log must include certain information, including the requesting party’s contact information, the date the public body received the request, the public body’s response deadline, the date of the public body’s response (including the reasons for any extension), whether documents were made available, the amount of copying and/or administrative fees assessed, and the date of final disposition. *See 29 Del. C. § 10003(g)(3)*.

#### 5. Responses to FOIA Requests

Public bodies are required to respond to FOIA requests “as soon as possible,” but no later than 15 business days after they are received. *29 Del. C. § 10003(h)(1)*. Public bodies may respond to a FOIA request by either providing access to the requested records, denying access to the records or parts of them (redaction), or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or seek records that are in storage or archived. *See id.* If access cannot be provided within 15 business days, the public body’s response must cite a reason why more time is needed and provide a good faith estimate of how much additional time is

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OST to comply with the policy when officially promulgated in accordance with the APA and approved by the Board. *See 2021 Resolution, ¶ 11.*

<sup>22</sup> The Board had designated OST’s FOIA coordinator to serve as the FOIA coordinator for the Board and its Committees. *See 2021 Resolution, ¶ 12.*

required to fulfill the request. *See id.* If a public body denies a request, in whole or in part, the public body's response must indicate the reason or reasons for the denial – *e.g.*, the public body does not possess or control the requested documents, or the requested documents are, in whole or in part, subject to an exemption that permits withholding or redaction. *See 29 Del. C. § 10003(h)(2).*

These duties are typically delegated and handled by a public body's FOIA coordinator.<sup>23</sup>

## 6. Fees

FOIA permits public bodies to charge certain fees for locating and copying responsive documents in response to a FOIA request. *See generally 29 Del. C. § 10003(m).*

In instances where paper records are requested and provided to the requesting party, the public body may charge copying fees of \$0.10 per page (\$0.20 for double-sided), except that the first 20 pages are free. *See 29 Del. C. § 10003(m)(1).* Additional fees may be charged for color or oversized copies. *See id.* Charges for copying records maintained in electronic format will be calculated by the material costs involved in generating the copies (including DVD, CD, or other electronic storage costs) and permissible administrative costs (discussed below). *See 29 Del. C. § 10003(m)(4).*

Public bodies also may charge reasonable administrative fees for requests requiring more than one hour of staff time to process. *See 29 Del. C. § 10003(m)(2).* Public bodies must make every effort to ensure that administrative fees are minimized. *See id.* Charges for administrative fees may include staff time associated with processing FOIA requests, including time spent identifying records and generating computer records (electronic or printouts). *See id.* Administrative fees must be billed at the current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service. *See id.* Public bodies may not charge for the public body's legal review of whether any portion of the requested records is exempt from FOIA. *See id.*

Prior to fulfilling any request that would require a requesting party to incur administrative fees, public bodies must provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records. *See id.* Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request. *See id.* The public body may require advance payment of all or any portion of the fees as a condition to providing responsive documents. *See 29 Del. C. § 10003(m)(5).*

A public body may, through an officially adopted FOIA policy, waive otherwise applicable administrative fees. *See 29 Del. C. § 10003(m)(2).* Any such waiver policy must apply equally to a particular class of persons (*i.e.*, nonprofit organizations). *See id.*

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<sup>23</sup> The Board has delegated to the FOIA coordinator responsibility for providing access to public records and timely written responses to FOIA requests. The FOIA coordinator has been directed to work with the Board's DAG to identify and redact or withhold any confidential information or documents.