SPONSOR: Rep. M. Smith & Sen. McDowell
Reps. Baumbach, Bentz, Bolden, Brady, Carson, Gray, Heffernan, Hudson, Jaques, J. Johnson, Q. Johnson, Keeley, Kenton, Longhurst, Mitchell, Mulrooney, Osienski, Paradee, Potter, Schwartzkopf, B. Short, D. Short, Spiegelman, Viola, Wilson, Yearick; Sens. Henry, Sokola, Walsh

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

# HOUSE BILL NO. 310

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO THE CERTIFICATION OF ADOPTION OF SUSTAINABILITY AND TRANSPARENCY STANDARDS BY DELAWARE ENTITIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subtitle II of Title 6 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows.

## CHAPTER 50D.

## CERTIFICATION OF ADOPTION OF SUSTAINABILITY AND TRANSPARENCY STANDARDS BY DELAWARE BUSINESS ENTITIES.

§ 5001D Definitions.

As used in this chapter only, the following terms shall have the following meanings:

(1) "Acknowledged" shall mean, with respect to any document or instrument required to be executed by an Authorized Person pursuant to this chapter, the Authorized Person executing such document or instrument has certified, under penalty of perjury, that the information set forth in such document or instrument is accurate and complete to the best of such Authorized Person's actual knowledge after due inquiry.

(2) "Application" shall mean a document, form or other instrument prepared and made available by the Secretary of State requiring the information and commitments set forth in § 5003D of this chapter.

(3) "Assessment Measures" shall mean, with respect to any Entity, the policies, procedures or practices adopted by such Entity to adduce objective factual information to assess the Entity's performance in meeting its Standards, including any procedures for internal or external verification of such information.

(4) "Authorized Person" means, with respect to any Entity, any person or entity who has been duly authorized in accordance with the Organizational Documents of the Entity and the laws of this State (whether statutory, common law or otherwise) under which the Entity is incorporated, formed or organized to execute such documents and instruments and make such acknowledgments as are required by this chapter.

(5) "Certificate of Adoption of Sustainability and Transparency Standards Reporting" shall mean a certificate, issued by the Secretary of State, attesting that a Reporting Entity has filed with the Secretary of State an Application pursuant to this chapter. Such certificate shall state on its face that the State of Delaware has not reviewed the contents or implementation of such Standards, nor verified any reports made with respect thereto.

(6) "Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of equity or other voting securities, by contract or otherwise.

(7) "Entity" means any (A) corporation (stock or nonstock), partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), limited liability company, or statutory trust validly existing under the applicable laws of this State, or (B) any association of the kind commonly known as a joint-stock association or joint-stock company, and any unincorporated association, trust or other enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein, the internal affairs of which are governed by the laws of this State and which has not otherwise been dissolved (whether voluntarily or by any order or decree of any court of competent jurisdiction) or otherwise terminated.

(8) "Governing Body" shall mean the board of directors or equivalent governing body, person or entity having the power to manage and direct the business and affairs of the Entity, and shall include any duly authorized and empowered committee of the board of directors or equivalent governing body.

(9) "Non-Reporting Entity" shall mean any person or entity (including any Entity) that is not a Reporting Entity.

(10) "Organizational Documents" shall mean the certificate of incorporation, bylaws, partnership agreement, limited liability company agreement, articles of association or other agreement, document or instrument containing the provisions by which an entity is formed or organized and by which its internal affairs are governed, in each case as amended, modified, supplemented and/or restated and in effect as of any date of determination.

(10) "Provider" shall mean, as to any Entity, any Third Party that is engaged to provide professional consulting services or advice to assist entities or enterprises in measuring, managing or reporting the impact of their business and operations on issues of social and environmental impact.

(11) "Report" shall mean a report with respect to a Reporting Period for a Reporting Entity containing the following:

a. a summary of the Standards and Assessment Measures in effect during the applicable Reporting Period, which summary shall include the Third Party Criteria and any other source used to develop the Entity's Standards and Assessment Measures and the process by which they were identified, developed and approved by the Entity;

b. a summary of the actions or activities by which the Entity has sought to meet the Standards during the applicable reporting period, including engagement with and disclosure to stakeholders, if any;

c. objective and factual information with respect to meeting the Standards Assessment Measures, Reporting Period, and an assessment by the Governing Body whether the Entity has been successful in meeting the Standards, and in the case of any failure to meet such Standards, a summary of any additional efforts the Governing Body has determined the Entity will undertake to improve its performance in respect thereof, or its determination not to undertake such additional efforts;

d. (i) the identity of any Provider assisting the Entity in measuring, managing or reporting the impact of the Entity's business and operations in light of its Standards; or (ii) a statement that the Entity has not engaged the services of any Provider for such purposes;

e. a summary of any changes to the Standards, Assessment Measures or Reporting Period duration the process by which such changes were identified, developed and approved by the Entity, and the Third Party Criteria used to develop any changes to the Standards;

f. a summary of the actions or activities planned for the next succeeding Reporting Period with respect to measuring, managing and reporting with respect to the Standards if such actions and activities are materially different from those described for the applicable Reporting Period; and

g. a copy of any report or assessment relating to environmental and social impact submitted to, or any certification received by, any Provider (to the extent not included in the information required by the immediately preceding clauses a. through f.).

Notwithstanding the foregoing, no Entity shall be required to include in any Report any information that such Entity determines in good faith is subject to an attorney-client or other applicable privilege or would result in the disclosure of trade secrets or other competitively sensitive information.

(12) "Reporting Entity" shall mean an Entity that has been issued a Certificate of Adoption of Sustainability and Transparency Standards and that has not become and continued to be a Non-Reporting Entity pursuant to Section 5004D of this subtitle.

(13) "Reporting Period" shall mean one of a series of equal time periods of not greater than two years, the initial such period to begin not less than one year following, or more than a time equal to the duration of a single Reporting Period plus ninety days preceding, the filing of the Application, and subsequent Reporting Periods to begin on the day following the last date of the prior Reporting Period.

(14) "Standards" shall mean, with respect to an Entity, the principles, guidelines or standards adopted by the Entity to assess and report the impacts of its activities on society and the environment, which principles, guidelines or standards shall be based on or derived from Third Party Criteria.

(15) "Third Party" means, with respect to any Entity, any person or entity other than any person or entity that controls, is controlled by or under common control with such Entity, including any governmental or non-governmental organization, that provides services or tools with respect to measuring, managing or reporting the social and environmental impact of businesses or other enterprises.

(16) "Third Party Criteria" shall mean any principles, guidelines or standards developed and maintained by a Third Party (including a Provider) that are used to assist businesses or other enterprises in measuring, managing or reporting the social and environmental impact of businesses or other entities.

§ 5002D Certificate of Adoption of Sustainability and Transparency Standards.

(1) The Secretary of State shall issue a Certificate of Adoption of Sustainability and Transparency Standards to any Entity if the Secretary of State shall have determined that the following conditions have been satisfied:

a. such Entity shall have executed and acknowledged, and delivered to the Secretary of State, an Application; and

b. such Entity shall have paid all fees and costs assessed by the Secretary of State.

(2) A Certificate of Adoption of Sustainability and Transparency Standards shall be valid from the date and time it is issued by the Secretary of State until the first date on which an Entity becomes a Non-Reporting Entity.

(3) Each Reporting Entity shall, for all purposes of the laws of this State, be authorized and permitted to disclose, publicly or privately, that it is a Reporting Entity.

§ 5003D Application for Certificate of Adoption of Sustainability and Transparency Standards.

The Application shall be in such form as the Secretary of State shall in its sole discretion prescribe and shall require that an Authorized Person on behalf of the Entity:

(1) Acknowledge that the Governing Body of the Entity has adopted resolutions setting forth the Entity's Standards Assessment Measures;

(2) Set forth such Standards and Assessment Measures, and identify the Third Party Criteria used to develop the Standards and the process by which such Standards were identified, developed and approved by the Entity;

(3) Acknowledge that the Entity has agreed to acknowledge and deliver to the Secretary of State, within 30 days after a request therefor by the Secretary of State, its most recent Report; and

(4) Acknowledge that the Entity has committed, for each Reporting Period to:

a. use the Assessment Measures to assess the Entity's performance in meeting its Standards;

b. review and assess its Standards and Assessment Metrics, and make such changes thereto as the Governing Body in good faith determines are necessary or advisable in furtherance of meeting the Entity's Standards;

c. prepare and make available to the public at no cost (by posting on the principal website maintained by or on behalf of the Entity within ninety days after the end of the Reporting Period) a copy of its Report; provided, however, that if a website is not maintained by or on behalf of the Entity, the Entity shall publicly post the Report on the internet in a means that is readily discoverable and available without cost to any person requesting it; and

d. identify the duration of the Reporting Period, and the date on which the initial Reporting Period begins.

§ 5004D Reporting Entity Status: Renewal Application.

(1) A Reporting Entity shall cease to be a Reporting Entity ninety days following the end of any Reporting Period, if the Reporting Entity shall have failed to submit a Renewal Application to the Secretary of State in accordance with this chapter. The Renewal Application shall be in such form as the Secretary of State shall in its sole discretion prescribe and shall require an Authorized Person on behalf of the Entity to:

a. summarize any changes to its Standards, Assessment Measures or Reporting Period duration, which summary shall include the process by which such changes were identified, developed and approved by the Entity and the Third Party Criteria used to develop any changes to the Standards; and

b. provide an internet link to the Report for the most recent Reporting Period and a copy of such Report.

(2) Any Reporting Entity that (i) fails to acknowledge and deliver its Report to the Secretary of State, or (ii) knowingly and intentionally fails to make available its Report to the public, in each case as contemplated by § 5003D of this chapter, shall thereupon automatically become a Non-Reporting Entity, without the need for further action by the Secretary of State.

(3) No Renewal Application shall be filed if more than one year has elapsed following the end of a Reporting Period without a Renewal Application having been filed providing an internet link with respect to the Report for such Period.

§ 5005D Limitation of Liability.

Neither the failure by an Entity to satisfy any of its Standards, nor the selection of specific Assessment Measures, nor any other action taken by or on behalf of the Entity pursuant to this chapter or any omission to take any action required by this chapter to seek, obtain or maintain status as a Reporting Entity, shall, in and of itself, create any right of action on the part of any person or entity or otherwise give rise to any claim for breach of any fiduciary or similar duty owed to any person or entity.

§ 5006D Short Title.

This chapter shall be known and may be identified and referred to as the "Certification of Adoption of Sustainability and Transparency Standards Act".

Section 2. This Act takes effect on July 1, 2018.

## SYNOPSIS

The Certification of Adoption of Sustainability and Transparency Standards Act (the "Act") establishes a voluntary disclosure regime to foster dialogue around sustainability and responsibility among participating Delaware business entities and their various stakeholders. Because issues relating to sustainability and responsibility are fact-specific and fact-intensive and may vary greatly depending on, among other things, the size of the entity, the nature of its business and operations, and the industry in which it operates, the Act does not prescribe specific standards, measures of performance or criteria for evaluating performance. Rather, consistent with the enabling approach of Delaware business laws generally, the Act requires the governing body of each entity seeking certification under the Act to adopt principles, guidelines and standards to guide its business activities in a sustainable and responsible manner, as well as metrics for assessing whether it has met its objectives.

Although Section 5003D of the Act grants the Secretary of State of the State of Delaware (the "Secretary of State") the authority and discretion to provide the form of application for certification under the Act, the Act does not contemplate that State officers will make qualitative judgments regarding the standards or metrics that an entity adopts. The Act also does not contemplate or require that State officers determine qualitatively whether an entity has been operated in a sustainable and responsible manner. The Secretary of State's certification is focused on information acknowledged by an authorized representative of the entity regarding its adoption of procedures to operate sustainably and responsibly and its commitment to disclose, at least annually, such procedures. To that end, Section 5003D of the Act requires an entity applying for certification under the Act to make disclosures regarding the sustainability and responsibility standards it has adopted, the metrics it uses to evaluate whether it has met those standards, and its performance in meeting those standards.

The Act is entirely voluntary. The decision whether to seek certification is in the sole discretion of each entity. The Act imposes no obligations on any Delaware entities that have not elected certification. (Of course, any person or entity that misrepresents an entity's certified status may be subject to civil or criminal fines or penalties.) The Act does not impose fines or penalties on entities that elect not to seek certification, nor does it impose penalties or fines on entities that, having become certified, fail to satisfy their own performance standards. Moreover, the Act specifies that fiduciary liability shall not be imposed as a result of, among other things, the decision whether or not to seek certification or the failure to meet specific sustainability and responsibility standards.