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# TO THE POINT™



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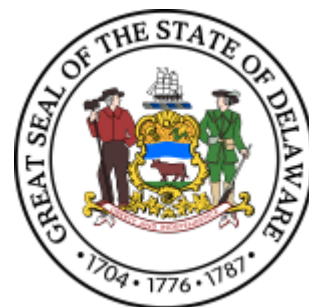
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## There's a New Way for Delaware Companies to Highlight their Sustainability Chops. Will it be Meaningful?

Guest Post By Lois Yurow – Fellow, G&A Institute

*Delaware companies that are focused on sustainability will soon have a new way to demonstrate their dedication.*

Effective October 1, any Delaware “entity”—a term that encompasses corporations, partnerships, limited liability companies, statutory trusts, and certain associations—may elect to apply for a so-called “certificate of adoption of transparency and sustainability standards.”



The newly enacted [Certification of Adoption of Transparency and Sustainability Standards Act](#) is designed to give Delaware companies a platform for signaling their “commitment to global sustainability.” Since this is the first statute of its kind in the United States, and Delaware is home to a disproportionate number of U.S. companies, it’s worth looking at how the Certification Act is intended to work.

## The Statute at a Glance

On its face, it looks like the Certification Act offers a formal seal of approval — a certificate from the Secretary of State to any entity that commits to publish an annual sustainability report. No big deal, right? But if you look deeper, it becomes clear that a certificate will represent both significant board-level involvement and greater corporate transparency.

## Let's Start with Key Terms

Several definitions in the Certification Act are substantive and intertwined. It will be easier to appreciate what it means to get a certificate if you first understand some terminology.

**Standards**—the “governing body” (such as the board of directors, general partner, or a “duly authorized and empowered committee”) of a “reporting entity” (one that has or wants a certificate) must adopt “principles, guidelines or standards” against which the entity will measure “the impacts of its activities on society and the environment.” Standards must be “based on or derived from third-party criteria.”

**Third-Party Criteria** are “principles, guidelines or standards developed and



maintained by” someone unaffiliated with the reporting entity — such as a government unit, an NGO, or an independent consultant—for the purpose of “measuring, managing or reporting the social and environmental impact of businesses or other entities.”

Presumably, the requirement that standards have some relationship to third-party criteria will improve the odds that companies will select credible standards that are tangible and objective. This requirement also may accelerate the movement toward uniform disclosure and reporting standards — such as those developed by GRI or SASB.

**Assessment Measures**—the governing body of a reporting entity must adopt “policies, procedures or practices” that will generate “objective factual information” about how well the entity is performing against the standards it adopted. (In other words, performance metrics.) This includes deciding whether to provide for “internal or external verification” of performance results.

**Standards Statement**—the first step to getting a certificate is filing a standards statement. The most important things a standards statement must do are:

- affirm that the entity’s governing body adopted resolutions that enumerate standards and assessment measures;
- affirm that the entity will use those assessment measures to evaluate the entity’s performance in relation to those standards;
- affirm that the entity will periodically revisit its standards and assessment measures and adjust them if the governing body thinks changes are appropriate;
- affirm that the entity will publish a report (described below) every year; and
- indicate where on the reporting entity’s principal website a visitor can (without paying a fee or providing any information) find a discussion of the entity’s “standards and assessment measures, the third-party criteria used . . . [and] the process by which such standards were identified, developed and approved,” as well as all of the entity’s reports.

**Report**—in order to maintain its certificate, a reporting entity will need to publish on its primary website comprehensive annual performance reports covering these topics:

- “the standards and assessment measures in effect” over the past year, “the third-party criteria and any other source used to develop [those] standards and assessment measures,” and how the entity identified, developed and approved its standards and assessment measures;
- the type of information described above regarding any standards or assessment measures the entity changed;
- how the reporting entity has endeavored to satisfy its standards and whether those efforts included any interaction with stakeholders;
- current “objective and factual information developed pursuant to the assessment measures” to gauge how the entity performed in relation to its standards;
- the governing body’s view of “whether the entity has been successful in meeting the standards”;
- if the entity was not successful, whether the governing body has ordered “additional efforts” to improve performance, and if not, why not;
- whether the entity retained an independent consultant to help measure, manage, or report on its performance, and if so, whom; and if “materially different,” how the entity intends measure, manage, and report its performance in the next annual reporting period.



With these definitions under our belt, the statute is pretty straightforward.

## Putting It All Together

Any Delaware entity in good standing will be able to apply to the Secretary of State for a certificate of adoption of transparency and sustainability standards by delivering a standards statement and paying the prescribed fees (\$200 to file and \$50 for the certificate).

All the certificate will do is attest that the named entity filed a standards statement. The Secretary of State will not even confirm that the entity actually implemented the standards and assessment measures it purports to have adopted. Certificates are renewable every year, also with an application and a fee.

It looks so easy—until you return to the definition of “standards statement.” The seemingly simple application process belies the two rigorous obligations at the core of the statute: board-level involvement and complete transparency around standards, metrics, and results.

Again, the standards statement must affirm that the decision to adopt particular standards and assessment measures was made by formal action at the entity’s highest levels. The standards statement also must promise that the entity will issue an annual report. The prescribed content of that report—standards, metrics, results, and the governing body’s reaction to it all—suggests this will not be a simple undertaking.

### *So why would a company bother getting a certificate (and paying fees, and assuming a disclosure obligation)?*

Every company is at liberty now, certificate or no certificate, to voluntarily issue a sustainability report. Indeed, [85% of the Fortune 500 published a sustainability report in 2017](#). No doubt those reports represent a genuine commitment on the part of the issuing companies. Still, it pays to consider *who* chooses *what* a given company reports on: what goals it adopts, what metrics it uses to gauge progress, who measures that progress, and what specific information will be shared. With voluntary reporting, companies have almost infinite flexibility.

Under the Certification Act, reporting entities will need to disclose “objective and factual” performance results, and each entity’s governing body will be required to specifically address those results, offering its view of whether they represent success. By imposing these rules, the statute responds to the ever lingering concern that at least some sustainability reports are as much about marketing as they are about real change. The public in general, and investors in particular, may find the Certification Act’s data-heavy reports more valuable.

## Liability Concerns

Any company thinking about assuming the obligations of a reporting entity will want to consider whether there are any risks. The Certification Act explicitly eliminates two.





**First**, there is no audit or merit review required. The statute expressly does not prescribe particular sustainability standards. Moreover, every certificate will state that the Secretary of State does not verify standards statements or annual performance reports.

**Second**, no one will have a cause of action against a Delaware entity because of anything the entity does (such as choosing particular standards and assessment measures) or fails to do (such as falling short of a standard, or refusing to become a reporting entity at all).

Reporting entities may suffer reputational harm if their goals are unrealistically ambitious or easy, or if their disclosure seems inadequate, but these risks are largely controllable. In addition, the standards statement, the annual performance report, and every application to renew a certificate must be “acknowledged.” That means an “authorized person” of the reporting entity must “certif[y], under penalty of perjury, that the information [provided] is accurate and complete to the best of such authorized person’s actual knowledge after due inquiry.” This too presents a largely controllable potential risk.

## Conclusion

A few Delaware companies reportedly are mulling whether they want to be the pioneer reporting entities. Many organizations already have the requisite governance and data-gathering processes in place, so applying for a certificate would be a relatively uncomplicated—and possibly logical—next step. For those companies that have not fully implemented sustainability practices and reporting protocols, the Certification Act may serve as another nudge.

**Guest Commentator Lois Yurow** is founder and president of [Investor Communications Services, LLC](#), where she specializes in converting complex legal, business, and financial documents into plain English. *Mutual Fund Regulation and Compliance Handbook*, a book she co-authored and updates annually, is published by Thomson West. Lois writes and speaks frequently about plain English, disclosure, and other securities law matters. Before forming Investor Communications Services, Lois practiced corporate and securities law, first in Chicago and then in New Jersey. Email: [lois@securitieseditor.com](mailto:lois@securitieseditor.com)



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