

COMMUNITY AFFAIRS

DIVISION OF CODES AND STANDARDS

Planned Real Estate Development Full Disclosure Act Regulations

Adopted Amendments: N.J.A.C. 5:26-1.3, 8.1, 8.2, and 8.4

Adopted New Rule: N.J.A.C. 5:26-8.8 through 8.14

Adopted Repeals: N.J.A.C. 5:20 and 5:26-8.3

Proposed: June 3, 2019, at 51 N.J.R. 795(a).

Adopted: January 6, 2020, by Lt. Governor Sheila Y. Oliver, Commissioner, Department of Community Affairs.

Filed: April 9, 2020, as R.2020 d.056, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 45:22A-21.

Effective Date: May 18, 2020.

Expiration Date: April 4, 2025.

Summary of Public Comments and Agency Responses:

Comments were received from: Shekeira Alexander, Portfolio Manager, RCP Management; Carri L. Alper, President, Target Property Management; Ed Anderson, Property Manager, Prime Management, Inc.; Anonymous Resident; Bald Eagle Village Condominium Association, Inc., Board of Trustees; Joe Balzamo, Chief Operating Officer, AR Management Company; Leonard Barber, President, Executive Property Management; Regina Belowski, President, Society Hill East II Condominium Association, Inc.; Joseph Bernstein, Board Member, Green Bay Harbor Condominium Association; Bonnie Bertan, President, Association Advisors NJ; Jean Bestafka;

Patricia Bielski, Treasurer, Board of Trustees, Pheasant Run of Barnegat; Diane Blanchard, Community Manager, RCP Management; Cindy Blank, Office Manager and Secretary to the Board, Leisure Village East Association; Board of Trustees, Leisure Village East Association, Inc.; Jackie Boker, Community Manager, RCP Management, Knob Hill Country Club Community Association; Chuck Boyle, Property Manager, RCP Management; Joanne Bradley, Executive Director, Kings Grant Open Space Association; Roslyn Brodsky, President, Concordia Homeowners Association, Inc.; Ralph Brownlee, Treasurer, Woods Landing Homeowner's Association; Sherryl Burman, President, Riviera at East Windsor Homeowners Association; Roy Campos; Barbara Cauceglia; Yvonne Cautillo; Janet Chavez; Jane Chepitch; Joseph Chorba, WilkinGuttenplan; Stacey Cole, Community Association Manager, Towne and Country Management; Jill Colella; Community Associations Institute Legislative Action Committee; Edward J. Connor, Treasurer, Marlton Lakes Civic Association; Senator Christopher J. Connors, Assemblyman Brian E. Rumpf, and Assemblywoman DiAnne C. Gove, of the 9th District Legislative Delegation; Crestwood Village Six Community Association, Inc., Board of Trustees; Marie Cutrona; Roni Dalesandro; Debra Daraklis; Stephen DeBaun; Joann DeMarco, Accounts Receivable Associate, Prime Management, Inc.; Evelyn Doherty; Coleen Doran, Community Manager, Towne & Country Management, Inc.; William Dougherty, Heritage Woods Homeowners Association; Erika Drennan, Community Association Manager, Towne and Country Management; Barbara Drummond, Community Manager, Prime Management, Inc.; Beth Duffy, Community Manager, FirstService Residential; John Dunkirk, Vice President, Parke Place Condominium Association; Audrey Eils, The Glens; Shelby A. Evans, GEM Property Management; John D. Fahey, President, Greenbriar II Homeowner's Association; Naomi Fisch, President, Somerset Park Condominium Association; Crystal L. Fitzpatrick, Director of

Financial Services, Prime Management, Inc.; William Foelsch, President, Wildflower Village Condominium Association; Four Seasons at Metedeconk Lakes, Board of Trustees; John Gagliard, Trustee, Four Seasons at Metedeconk Lakes; John Gallagher, Board Member, Village Grande at English Mill Egg Harbor Township; Jacqueline Geis; Bill Geronimo; Nina Globus; Richard Goldstein, President, Dayton Square Condominium IV Association; Ira Goodman, Executive House Condominium; Carolyn Green, Vice President, Board of Trustees, Society Hill East II; Ellen Griffiths; Ted Groesbeck; Dorthea Gwinn, Community Manager, Access Property Management; Debbie Haraburda for Debra L. Dodson, President, Canal Pointe Homeowners Association; Noel Hatzinikitas, Office Assistant, Lions Head Woods Condominium Association, Inc.; Gary Humber, President, Carriage Homes at Quailbrook Homeowners Association, Inc; Teresa Hogya, Community Manager, RCP Management; Eleanor Hunt, Board President, Fox Hills at Rockway Village Condominium Association; Louisa Huntington, President, Board of Trustees, Four Seasons of Upper Freehold; Michael Jenzano, President, Saint Regis Walk; Kevin Jorgensen, President, Middlesex Village Homeowners Association, Inc.; John Juliano, President, Park Place Garden Condominium Association; Dr. Robert Kahrman; Tejas Kadia, Reliance Property Management Group; Jennifer Karge; Gerald Krams, Resident, Four Seasons at Upper Freehold; Beth G. Kelly, Senior Property Manager, Preferred Community Management Services; Carl Kentzel; Albert Kobylarz, Trustee, Bald Eagle Village Condominium Association, Inc; Terry Kolb; Myron S. Kozak, President, MSK Professional Management, LLC; Michelina LaForgia; John Lawler, Board Member, Harmon Cove Towers I Condominium Association, Inc.; Allan Levy, Vice President, Board of Trustees, Pheasant Run of Barnegat; Rosie Long, Property Manager, RCP Management; John Lovelock, HOA President, Horizons at Woods Landing; Eileen Lukens, Community Manager, Realty Solutions LLC; Ronald MacKenzie;

Mitchell Malec, a retired former employee of the Department; Mark Maloney, Special Projects and Board Director, The Ponds at Clearbrook Association; Steve Mamakas, President, Highview Estate Home Owners Association; Janine Manganella, Community Association Manager, RCP Management; Glen A. Masullo, Owner, Preferred Community Management Services, Inc.; Cliff Maurer; Eileen McCarthy Born, New Jersey Coalition of Lake Associations (NJCOLA); Francis J. McGovern, Jr., Esquire; Lynn Meekins, Taylor Management Company; Lynn Meekins for Eleanor Hunt, Board President, Fox Hills at Rockaway Condominium Association, Inc.; Thomas Meister, Pheasant Run Condominium; Karen J. Mesler; Norma Meyer for Robert Mueller, President, Board of Directors, Blue Heron Pines Homeowner's Association; Richard Michelson, Board of Trustees, Pheasant Run of Barnegat; Mike Milano, Board Member, Wyckham Manor Homeowners Association; Todd Mitchell; Kathy Moore; Robert P. Morgan; Fikry Moustafa; Susan Mueller, Madison Place Condominium Association; Kristina Munson, Chief Operating Officer, RCP Management; Sandy Myers, Community manager, Cooks Bridge COA; New Jersey Builders Association; Michele Newman, Board Member, Ocean Club Condominium; Debbie Nicholson, Property manager, Society Hill at Bernards II Condo Association, Inc.; Christopher Nicosia, Vice President and Chief Operating Officer, Prime Management, Inc.; Jay Norman, President, Village Green Condominium Association; Patrick Notaroberto; Kenneth O'Connor; Cheryl Palent, Vice President, Renaissance at Raritan Valley Master Association; James Panzitta; Dan Paradis; Tony Paz; Ronald L. Perl, Esq., Hill Wallack, LLP; Michele Peters; Dennis Pietrattini; Andy Pignatelli, President, Board of Trustees, Pheasant Run of Barnegat; Pinnacle Real Estate Property Management; Richard Pucciarelli, Rambling Knolls Association; Mary Pyrros, Director of Property Management, Kent Builders Management, LLC; Marianne Raniolo-Flagg, Vice President, Montgomery Hills Homeowners Association, Inc.; Regency Club

Condominium Association; Michelle Ricardy, Assistant Vice President, Towne & Country Management; Karen Riggins; River Ridge Terrace Condominium Association; Adam Roberts; Rachel Rutman, Community Manager, FirstService Residential; Lawrence Sanders, President, Greenbriar Oceanaire Community Association; Maria Sappo, Community Association Manager, Towne & Country Management; Margaret Scott, Board Member, Cedar Village East Brunswick; Denise Schisano, Property Manager, Greenbriar II Homeowner's Association; Kim Schleider, President, Ridgeview Estates Homeowners Association; Linda Schoeppler, Secretary, Board of Trustees, Bald Eagle Village Condominium Association, Inc.; Fred Schulz; Wolfgang Schulz, Four Seasons at Upper Freehold; Stephen A. Shemonis; Mary Shute, Heritage Woods Homeowners Association; Lisa Smythe, President, The Case DiLusso Condominium Association, Inc.; Stuart M. Snyder, President, Warwick Board of Trustees; Janet Speziale; Roberta Stein, President, Trendmaker Homes at Quailbrook Condominium Association, Inc.; Renee Steinhagen, New Jersey Appleseed Public Interest Law Center of New Jersey; Greg Steinman, President, Mount Kemble Mews Condominium Association, Inc.; Mary Jo Stover for Steve Hazzard, President, Timber Glen Condominium Association; Mary Jo Stover for Paul Bodkin, President, Board of Trustees, The Fairways at Laguna Oaks Condominium Association; Cecilia Telling for Walter Wilkins, President, Board of Trustees, Village Grande at Little Mill Homeowner's Association; Larry Thomas, Chapter Executive Director, Community Association Institute (CAI); Alan R. Trachtenberg, Esq., In-House Counsel and Director of Risk Management, FirstService Residential; Walter Tucker; Ellen Vastola, Common Interest Community Resident; Ellen Vastola, President, Common Interest Homeowner's Coalition (CIHC); Mariaellen Valeris, Community Manager, RCP Management; Robert Weber, Board Member, St. Regis Walk Townhouse Community; Brian Weaver, Vice President, Wilkin

Management Group; Christopher J. West, General Manger, Northbridge Park Co-Op, Inc., RCP Management; Ann Marie Wiedemann; Anne Marie Wilcox; Cynthia Williams, Community Manager, Dilucia Management Corporation; Michelle Williams, General Manager, Clearbrook Community; Marjorie M. Wilson, President, Atlantic Realty Management, Inc.; Mark Winter, Former Trustee, Lexington Village Association; and Jean C. Wyer.

General Comments

1. COMMENT: Several commenters expressed support for this rulemaking. One commenter stated that this holds managers and board members to a higher standard and ensures transparency for association members. Another commenter stated that because owners are at the mercy of their association, fair elections are vital. One commenter pointed out that many associations already address most of these provisions in their bylaws and stated that these rules would mean that all boards are held to the same standards. One commenter pointed out that the provisions at N.J.A.C. 5:26-8.4 and 8.9 would guarantee that developers do not maintain unwarranted influence over executive boards, an issue the commenter stated has been prevalent in some associations for years.

RESPONSE: The Department of Community Affairs (Department) thanks the commenters for the support.

2. COMMENT: Several commenters expressed opposition to this rulemaking. The basis for opposition was the belief that these rules will discourage association members from volunteering for the executive boards and that the requirements are burdensome. The commenters believe that

the State is interfering with executive boards' rights to govern associations based on their specific needs.

RESPONSE: This rulemaking was necessitated by the passage of P.L. 2017, c. 106, (hereinafter the "Election Law"). The Election Law amended the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 to codify resident voting participation rights in common interest communities. In enacting the Election Law, the Legislature noted that in common interest associations, the governing entity has significant influence over residents' lives, and that it was "contrary to American democratic values for these communities to be governed by trustees who are not elected in a fair and open manner." The Legislature placed the election law in the Planned Real Estate Development Full Disclosure Act (PREDFDA) (N.J.S.A. 45:22A-21 et seq.), which the courts have recognized to be a consumer-oriented statute that is remedial in nature. *Tung v. Briant Park Homes, Inc.*, 287 N.J. Super. 232, 238 (App. Div. 1996). As such, the court declared that the Act must be interpreted expansively, and liberally construed to protect consumers residing in common interest communities. Those guiding principles were the framework for this rulemaking to implement the legislative mandate for fair and open elections.

The Department addresses these issues with significant relevant experience. It has been applying laws protecting homeowners in post-turnover situations for almost 25 years through the Association Regulation Unit (ARU). Thus, the Department enters this area of jurisdiction with a considerable background in understanding both the nature of the problems and adequate remedies.

3. COMMENT: CAI commented that the proposed regulations add complexity, burden, and expense for associations and their owners for the sake of a few poorly run associations. CAI

further argued that the regulations are likely to increase litigation over association elections and board meetings and place the sanctity of association elections above public elections. CAI stated that the administrative detailing of the process of board meetings will lead to unintentional violations of the rules. CAI expressed that although it supported the Election Law, the regulations over-manage association operations for little benefit.

RESPONSE: Formalizing the procedures necessary to ensure fair elections does not impose an undue burden when the legitimacy of the governing board's membership is involved; it is anticipated that many associations already hold fair elections. However, the Department has received a multitude of complaints showing that there are associations where fair elections are not held, thus necessitating uniform standards. Because the Department takes its obligation to ensure and enforce the rights of owners to fair elections seriously, it is obligated to issue orders and penalties, should that become necessary, to protect those rights. To allay any fears regarding enforcement, the Department intends to resort to penalties only as a result of direct refusal or failure to comply after notice of a violation and an opportunity to cure the violation or assure future compliance. All formal Department actions are subject to administrative appeal; no one is ever subject to paying a penalty without due process. Therefore, concern over the Department's potential response to unintentional rule violations is unwarranted, as the Department will offer ample opportunities to redress violations as they occur before resorting to punitive measures.

4. COMMENT: Many commenters, including the 9th District Legislative Delegation, simply seconded the comments submitted by CAI; CAI's comments are identified and summarized throughout this rulemaking under the appropriate subheadings. Many of these commenters, not

including any member of the Legislature, asked to be notified if the Department was to hold a public hearing.

RESPONSE: Each of CAI's comments are identified, summarized, and responded to throughout this notice of adoption in the order in which they correspond with the sections of the Planned Real Estate Full Disclosure Act Regulations, N.J.A.C. 5:26. As the Department received written comments from CAI, and a large number of comments received simply seconded CAI's comments, it was found that there was no need for a public hearing to receive testimony.

5. COMMENT: One commenter, who is a member of an executive board, expressed opposition to CAI's comments. The commenter found that the comments were problematic and intended to weaken the applicable laws. The commenter was also opposed to the form letters submitted to second CAI's comments and expressed support for CIHC's comments.

RESPONSE: The comments received from CAI and CIHC are identified, summarized, and responded to throughout this notice of adoption in the order in which they correspond with the sections of the rules.

6. COMMENT: New Jersey Appleseed (NJ) Public Interest Law Center, Common Interest Association Democracy Project, requested that the regulations be written as clearly and simply as possible with the least possible ambiguity. NJA stated that owners must know how their board is required to act, and boards must know that if they do not follow the regulations, they are violating the democratic mandates of PREDFDA.

RESPONSE: The Department kept these issues in mind when drafting the amendments and the rulemaking is clear. Once adopted, if there is confusion regarding certain provisions, the Department may issue guidance. In all cases, failure to comply with the rules is a violation.

7. COMMENT: One commenter submitted a series of complaints about the community in which the commenter lives. These complaints included the functioning of the executive board, renters in the community, and parking.

RESPONSE: These complaints are outside the scope of this rulemaking. Any unit owner who believes a board is in violation of any applicable laws and rules should direct complaints to the Association Regulation Unit of the Bureau of Homeowner Protection pursuant to the instructions provided online at <https://www.nj.gov/dca/divisions/codes/offices/ari.html>.

8. COMMENT: One commenter asked whether P.L. 2017, c. 106, and the PRED Regulations supersede the bylaws of the association regarding members in good standing and election procedures.

RESPONSE: Yes, statutes and adopted rules supersede the bylaws of the association.

9. COMMENT: One commenter requested that these regulations be voted on by the membership of every association in compliance with the association's governing documents. If the association approves the rules, then the executive board will amend the bylaws accordingly.

RESPONSE: Because the rules adopted by the Department supersede the bylaws of the association, these rules will be in effect for all associations upon publication of this notice of

adoption by the State. Associations will need to amend their association governing documents to comply with the law and the amendments.

10. COMMENT: One commenter questioned if these requirements were reconciled with P.L. 2017, c. 106. The commenter also asked how an association should deal with these new requirements.

RESPONSE: Yes, this rulemaking is a direct result of that act. The Department intends to issue guidance on its website at <https://www.nj.gov/dca/divisions/codes/offices/ari.html> to provide information about implementing the requirements established by this rulemaking.

11. COMMENT: One commenter recommended the Department review the provisions contained in the California “Davis-Stirling Act,” which is a body of law governing common interest developments.

RESPONSE: The Department reviewed regulations of other states as this rulemaking was drafted, but stayed consistent with the requirements established in the Election Law, which are appropriate for planned real estate developments in New Jersey.

12. COMMENT: One commenter noted that the adoption of these regulations could impact existing applications, public offering statements, contracts, and agreements, and asked if amendments to these documents would be required to be submitted to the Department with a fee for review and approval. The commenter asked what the economic impact of such amendments would be.

RESPONSE: For developments where the developer is in control of the executive board, any necessary amendments will need to be submitted to the Department; the amendment fee is currently \$250.00 and is paid by the developer. When the owners are in control of the executive board, amendments do not need to be filed with the Department unless the developer is still offering units in the ordinary course of business, in which case the developer must submit any amendments and pay the fee.

13. COMMENT: One commenter stated the understanding that these amendments implement P.L. 2017, c. 106. The commenter expressed his understanding that a State statute could not impede a pre-existing declaration. The commenter asked if this rulemaking is intended to impair contracts that were effective before the effective date of the Election Law. The commenter asked for the regulations to clarify that the amendments are applicable only to bylaws created after the effective date of the Act. The commenter summarized the PRED requirements that in the case of a conflict between the declaration and bylaws, the declaration controls; in the case of a conflict between the articles and the bylaws, the articles shall control; and in the case of a conflict between the statute and the bylaws, the statute shall control. The commenter again stated the understanding that because PRED-governing documents are a legal binding contract, legislative acts implemented after the acceptance of the provisions and before the effective date of the legislation are not enforceable. The commenter stated that the State Constitution prohibits states from passing laws that impair existing contract rights and asked for confirmation of such.

RESPONSE: The commenter has taken the applicable laws out of context. The commenter is correct in the summary of PRED's requirements, but comes to the wrong conclusion; the Act and the rules adopted pursuant thereto supersede the bylaws of the association. Associations may

need to amend their bylaws to be in compliance with the Election Law and this rulemaking. There is nothing in the State Constitution preventing new laws or rules that impact association governing documents.

14. COMMENT: One commenter asked whether the Department is contemplating having the Office of Administrative Law (OAL) and administrative law judges presiding over and reviewing association elections. The commenter asked if the OAL is recruiting an association lawyer to serve as the judge on these issues. The commenter stated the belief that these regulations lay the groundwork for a comprehensive State takeover of association governance. Further, the commenter took issue with the Social Impact and Economic Impact statements in the notice of proposal. The commenter stated that the Social Impact did not state that the regulation will diminish the right to self-governance, empower contrarians, and discourage volunteers. The commenter stated that the Economic Impact statement was not correct because the complaints and penalties provision will necessitate significant State spending. The commenter asked “who will carry out the complaint process, the review, the relief determination, who will provide the report, who will undertake an investigation, who will levy and collect these new fines? Who will pay those at the OAL? What new taxes, fines, fees, or penalties will fund the new personnel and procedures?”

RESPONSE: The Department respectfully disagrees with the commenter’s characterization of the social impact. This rulemaking requires boards to operate in a transparent manner and ensures that all association members have a voice in their community. Fair election procedures have a positive impact on self-governance by assuring democratic decision making. The Social Impact statement does not say that the amendments diminish the right to self-governance,

empower contrarians, and discourage volunteers because such a statement would be inaccurate. The program will be administered by the Association Regulation Unit, which already exists in the Bureau of Homeowner Protection. The Bureau is charged with administration and enforcement of the Act; thus, OAL will not be responsible for oversight of elections. If the Bureau issues an Order, the appeal process may go through the Office of Administrative Law, which is an entity in, but not of, the Department of the Treasury, and operates under separate funds designated for that purpose within the overall State budget.

15. COMMENT: One commenter felt that all common interest community board members should be required to undertake basic training. The commenter stated the belief that executive board members do their best to govern common interest communities, but often defer to the perspective of property managers and attorneys. The commenter stated that the State should have oversight as to the content of and compliance with any training and added that the Common Interest Homeowner's Coalition would welcome the opportunity to train board members.

RESPONSE: The suggestion is beyond the scope of this rulemaking. The Department is not considering changes to require basic training at this time.

16. COMMENT: The New Jersey Coalition of Lake Associations (NJCOLA) submitted comments related to lake associations. NJCOLA stated that because lake associations were generally formed in the early 1900s and have a long history of operating under bylaws that have been tailored to meet the needs of the individual communities, more consideration should be given to the historic nature of these association's bylaws and discretion as to enforcement or applicability should be allowed.

NJCOLA stated that N.J.A.C. 5:26-8.2(a) may be inconsistent with the bylaws of a lake association that reserves to the membership certain authority to act, including authority to amend bylaws or sell association property.

NJCOLA stated that N.J.A.C. 5:26-8.8(e) may be inconsistent with bylaws of lake associations because many lake associations allow owners only one membership and vote, even if they own multiple properties. NJCOLA requested this section be amended to allow this practice to continue if authorized to do so in an association's bylaws.

NJCOLA stated that the provisions at N.J.A.C. 5:26-8.9(1)v would put an unreasonable burden on lake associations because most lake associations only invoice once a year, at which time association members receive notice that their account is in arrears and they have lost good standing. NJCOLA further stated that giving residents the right to contest the boards' determination would not apply to the members not in good standing for failure to pay dues and assessments, requiring an association to handle multiple demands of alternative dispute resolution (ADR) when ADR is not appropriate under the circumstances. NJCOLA recommended that as an alternative, the notice only be required when the "good standing" status has been suspended for reasons other than failure to pay dues.

RESPONSE: Nothing in this rulemaking or PREDFDA prevents bylaw amendments; in fact, this rulemaking develops a system through which bylaws are to be amended. PREDFDA and this rulemaking are intended for planned real estate developments. Voluntary associations, including lake associations, do not fall under the scope of this rulemaking; such organizations can continue to operate to meet the needs of the individual association. Any determination by an appropriate forum that a specific lake association qualifies as a PRED would mean that the

association falls under the scope of this rulemaking. In such instances, the association would have to modify its practices accordingly.

Definitions (N.J.A.C. 5:26-1.3)

17. COMMENT: One commenter requested that the Department add definitions of “amendments to the master deed/bylaws” and “bylaw resolutions.”

RESPONSE: The Department respectfully disagrees this change is necessary. These terms are common terms of art and do not need to be defined specifically within the rules.

18. COMMENT: Two commenters requested a definition of “common expense” be included in the regulations.

RESPONSE: This addition is outside the scope of this rulemaking and cannot be accommodated at this time; however, the Department agrees a definition of “common expense” would be helpful and will include this in a future amendment to N.J.A.C. 5:26.

19. COMMENT: NJA stated that the definition of “association” at N.J.A.C. 5:26-1.3 should specify the inclusion of any common interest association that is not only governed by PREDFDA, but may be organized or incorporated under other acts, such as the Condominium Act, N.J.S.A. 15A:1-1 et seq., or any other specific statute. NJA stated that for many years, some older common interest associations in New Jersey took the position that the 1993 representative democracy amendments to PREDFDA were not retroactive to associations

organized prior to the original enactment of PREDFDA in 1977. The New Jersey Supreme Court has held otherwise.

RESPONSE: The Department believes this is appropriately addressed within the rules because the definition of association references the 1993 amendments, which state that an association is an association for the management of common elements and facilities, organized pursuant to Section 1 of P.L. 1993, c. 30 (N.J.S.A. 45:22A-43). This section of PREDFDA states that the application of P.L.1993, c. 30 to the association of an existing planned real estate development is not limited by whether the developer has been subject to, or exempted from, the registration requirements of PREDFDA or the development's date of establishment.

20. COMMENT: CAI commented that the definition of "association" does not account for associations created prior to the Planned Real Estate Development Full Disclosure Act (PREDFDA) even though judicial decisions have held that amendments to the PREDFDA that concern operations of community associations were applicable to associations created prior to the enactment of PREDFDA. CAI requested the Department revise the definition of association accordingly.

RESPONSE: The Department respectfully disagrees that the definition of "association" must be amended. It is clear as written and was taken verbatim from PREDFDA at N.J.S.A. 45:22A-23n.

21. COMMENT: CAI commented that the definition of "association member" would not be consistent with pending bill S3661/A5043, which clarifies the sections of the Election Law. If the bill is signed, it would exempt certain owners of lots or units within voluntary associations from being considered an association member.

RESPONSE: The Department respectfully disagrees this change is necessary at this time. In the event the bill is signed into law, the Department will review the current definition to determine whether further amendments regarding association membership are necessary.

22. COMMENT: Two commenters requested the Department amend the definitions of “association member” and “voting eligible tenant” to remove references to the tenant’s right to vote. The commenters expressed the opinion that because tenants do not own their unit, they should not be allowed to vote.

RESPONSE: The Department cannot make this change; as stated in the Response to Comment 43, P.L. 2017, c. 106 established rights for voting eligible tenants, and the provisions regarding tenant eligibility further the intent of ensuring fair elections in associations.

23. COMMENT: One commenter had a number of questions pertaining to the definition of “bylaws” as the governing documents adopted for the administration and management of the property. The commenter stated that using the term “governing documents” may lead some to believe that declarations, covenants, and master deed documents would be considered bylaws. The commenter stated the belief that P.L. 2017, c. 106 applies only to bylaw amendments and not to the amendment of a master deed, declaration, or covenant. The commenter further expressed the understanding that the bylaws establish policies and procedures for the governing of an association including, but not limited to, election of directors, terms of office, powers and duties, and quorums. The commenter recommended the definition of “bylaws” be revised to reflect this.

RESPONSE: The Department respectfully disagrees that a change is needed. The examples provided by the commenter all fall within the current definition. Declarations, covenants, and master deeds are separate governing documents with multiple purposes, including the administration and management of the development; bylaws are a subset of governing documents. Further, “governing documents” is a term of art that is universally understood, and no amendment to include its definition is being considered at this time.

24. COMMENT: The New Jersey Builders Association (NJBA) stated that the term “governing documents” is broader and more inclusive than the term “bylaws,” which are the regulations of an association that deal with procedures and processes or operations of the association. NJBA requested the term bylaws be amended and the term governing documents be included as follows:

“Bylaws” means the governing regulations adopted under this chapter for the administration and management of the property.

“Governing documents” means the master deed, the declaration of covenants and restrictions, or other instrument of creation of a planned real estate development that is recorded in the recording office of the county where the planned real estate development is located, and shall include any bylaws authorized or adopted in accordance with the master deed, declaration of covenants and restrictions.

RESPONSE: The Department respectfully disagrees with the changes proposed by the commenter. The definition of bylaws is appropriate as proposed, because they are a governing document. Further, the term “governing document” is a term of art that is understood by those involved in this area.

25. COMMENT: NJBA stated that “condominium” is defined in the Condominium Act and proposed that the definition in these regulations be consistent with that definition:

“Condominium” means the form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in common elements appurtenant to each such unit.

RESPONSE: The Department notes that the only difference between this definition and the one proposed for adoption is that the rules say “units *or* improvements”; this difference was intentional. “Units of improvements” is a typo that has been in PREDFDA since its enactment, and this rulemaking change is intended to fix that typo in the Administrative Code.

26. COMMENT: CAI commented that the terms “master association” and “umbrella association” are used interchangeably by draftspersons of the governing documents creating common interest communities. CAI stated the belief that these terms are synonymous and suggested that two separate definitions were added for the avoidance of doubt and not to designate two different types of associations. CAI recommends that the Department make the definition of “umbrella association” applicable to master or umbrella associations.

RESPONSE: The Department agrees with the commenter. Upon adoption, the term “master association” is deleted, and “umbrella association” is changed to read “umbrella or master association.”

27. COMMENT: NJA noted that N.J.A.C. 5:26-1.3 contained distinct definitions for “master association” and “umbrella association.” NJA stated that in common parlance, a master

association is often considered a second-level umbrella association that handles matters affecting an entire development, in contrast to a first-level association that handles matters only affecting its particular portion of a neighborhood within the larger development. NJA further expressed that it was unaware of any statute defining these terms differently, and stated that if a distinction between master and umbrella associations is necessary, the definitions should include specific examples.

RESPONSE: As stated in the Response to Comment 26, the Department has deleted the definition of master association; the Department agrees that in practice, these terms are used interchangeably, and for clarity, the rules should reflect such.

28. COMMENT: NJBA suggested that separate definitions of master and umbrella associations are not warranted because the statute and regulations use these terms interchangeably, and recommended that the definition encompass master and umbrella associations, which have unit owners as members and those that have other associations as members. NJBA suggested the following definition:

“Master or umbrella association” means a type of association in a planned real estate development, whose members may either be other associations within that planned real estate development or unit owners within that planned real estate development and which is established for the governance, management, and oversight of specific areas or common facilities within that planned real estate development or to provide certain services within that planned real estate development for the benefit of the members of the master or umbrella association.

RESPONSE: As stated in the Response to Comments 26 and 27, the Department agrees that these terms are interchangeable; upon adoption, the terms have been consolidated in the definition of umbrella association.

29. COMMENT: NJBA stated the opinion that the definition of “voting eligible tenant” in the notice of proposal is not consistent with the definition of this term in PREDFDA. NJBA stated that if the prior standard practice of allowing tenants to vote is to be memorialized in writing, then such requirement should be included at proposed N.J.A.C. 5:26-8.8(d) and not in the definition. NJBA recommended the following language:

“Voting eligible tenants” means a tenant of a unit within a planned real estate development in which the governing documents of the development permit the tenant’s participation in the executive board election and either the development has allowed tenant participation in executive board elections as a standard practice prior to the effective date of P.L. 2017, c. 106 (N.J.S.A. 45:22A-1, et seq.), or the owner has affirmatively acknowledged the right of the tenant to vote through a provision of the written lease agreement or separate document. “Voting eligible tenants” shall not be construed to affect voting as an agent of the owner through a proxy or power of attorney.

RESPONSE: The Department respectfully disagrees with the commenter regarding the necessity of this amendment. The language recommended by NJBA still contains all of the information currently proposed. The Department recognizes there are multiple ways of writing one definition, but finds that the definition as currently written is clear.

Formation of the Association (N.J.A.C. 5:26-8.1)

30. COMMENT: One commenter pointed out that the notice of proposal states that an association may be formed as a for-profit or nonprofit corporation, unincorporated association, or any other form allowed by the law, and questioned whether these regulations conflict with the New Jersey Corporation Law, and which law controls.

RESPONSE: This language has been a part of the rule text since the inception of the PRED rules in 1978. The rulemaking merely shifts where the requirement was codified with no change in text. No conflicts have been brought to the Department's attention in the decades this rule has been in effect. In addition, common interest coalitions formed as a non-profit corporation are a very small subset of nonprofit corporations.

Association Powers and Responsibilities (N.J.A.C. 5:26-8.2)

31. COMMENT: CAI commented that the rule text, at N.J.A.C. 5:26-8.2, allows the executive board to act in all instances on behalf of the association. CAI stated the opinion that this leads to the conclusion that the board has the sole authority to act on behalf of the association and stated that in a number of instances, the board cannot act for the association without the consent of the members. CAI cited the provision in the Condominium Act that states "the actions of the association shall be governed by the bylaws" and stated its understanding that the requirements of this section are accurate only in connection with the constraints set forth in the Condominium Act.

RESPONSE: The Department notes that this section is not a change in rule text or requirement; it is merely a recodification from former N.J.A.C. 5:26-8.3 to 8.2. This language has existed since the inception of the PRED rules. This rule text, in conjunction with the specific requirements set forth in the Condominium Act, is sufficiently clear as written.

32. COMMENT: NJBA stated that an association can be created through the recording of a master deed for a condominium or a declaration of covenants and restrictions for a non-condominium development, and all associations must have bylaws to provide for the operation of the association. As a result, NJBA recommended that N.J.A.C. 5:26-8.2(a) be amended to read as follows:

Subject to the governing documents of the association, the association may do all that it is legally entitled to do under the laws applicable to its form of organization. The executive board of the association may act in all instances as provided in the governing documents on behalf of the association.

RESPONSE: The Department respectfully disagrees that this suggested rewording is necessary or beneficial. As proposed, the language cites all “instruments of creation” that may be used to form an association. This is another section where the proposed revision is a distinction in language without a difference in requirement, and the Department feels that the requirements are clear as written.

33. COMMENT: NJBA stated that every executive board member, whether appointed by the developer or elected by the owners, should have a fiduciary duty to the owners of units. As a result, NJBA requests the following language change to N.J.A.C. 5:26-8.2(e):

Members of the executive board shall be liable as fiduciaries to the unit owners for their acts or omissions.

RESPONSE: This language is recodified from former N.J.A.C. 5:26-8.3 without change.

Moreover, this language was taken verbatim from PREDFDA at N.J.S.A. 45:22A-45c. Because

this requirement reflects the Act, the Department declines to change the rule at this time. The Department notes that multiple court decisions, including *Thanasoulis v. Winston Tower 200 Association, Inc.* 214 *NJSuper* 408 (Appellate Division 1986) and *Siller v. Hartz Mountain Association*, 93 *NJ* 370, 382 *cert. den.* 464 *U.S.* 961 (New Jersey Superior Court 1983), found that an association's board had a fiduciary relationship to the unit owners comparable to the obligation that a board of directors of a corporation owes to its stockholders.

Administration and Control (N.J.A.C. 5:26-8.4)

34. COMMENT: NJA had a few comments concerning N.J.A.C. 5:26-8.4, Administration and control. NJA stated that this section is essential to clarifying that once a developer sells 75 percent of the units to be built in the planned real estate development, that developer retains one seat on the board only so long as it is selling the remaining 25 percent of the units in the regular course of business and suggested that N.J.A.C. 5:26-8.4(a) be amended from "retains at least one unit as a rental unit" to "retains one or more units as rental units" to make the prohibition clearer.

Further, NJA states that the Department should make clear whether it approves of a developer who retains a significant number of units for rent (or the developer's successor owner), retaining multiple board seats by submitting its employees or representatives as candidates for the board. NJA stated its position that the developer should be entitled to run for only one seat on the board, not multiple seats, which would allow the developer to continue to dominate the board through retention of any number of rental units, especially if the developer never sells 75 percent of the units built. NJA points out that this issue is addressed at N.J.A.C. 5:26-8.10(c), which states that a person or owning entity shall not hold more than one seat on the

executive board, and stated that the requirement should be included at N.J.A.C. 5:26-8.4 to avoid ambiguity.

RESPONSE: The Department respectfully disagrees with the suggested amendment to N.J.A.C. 5:26-8.4(a); the recommended language is no different in meaning from the current provision. The Department recognizes there are multiple ways to format a given requirement, but the section is clear as proposed.

The Department also disagrees that there is ambiguity regarding representation on the board. Pursuant to N.J.A.C. 5:26-8.10(c), an owning entity shall not hold more than one seat on the executive board. Thus, the developer could not have multiple employees serve on the board. N.J.A.C. 5:26-8.10 is the appropriate place for this requirement, because that section deals with representation on the board. This language is not needed at N.J.A.C. 5:26-8.4, which deals with administration and control of the executive board.

35. COMMENT: Regarding N.J.A.C. 5:26-8.4(a), CIHC asked what makes a developer the same as a member in good standing if the developer does not pay dues on the developer's unit at the same rate as other members pay dues on their units, but may be entitled to vote and run in an election if the developer does not hold a seat on the executive board. CIHC also questioned provisions at N.J.A.C. 5:26-8.8 and 8.9 regarding developer membership in the association and participation in elections. CIHC stated that the concern is that a developer who purchases undeveloped land or redevelops units within an existing association that had previously ceded control by its original developer but has not yet conveyed any of those new units to members should not be entitled to a number of new votes for those unsold or prospective units if they do not pay assessments to the new association. CIHC further stated that the developer does not

have an equal stake in the ongoing finances of the association because the developer wants to sell units and move on and does not contribute to the finances of the association as do other members. Lastly, CIHC notes that only owners current on their assessments are entitled to vote and run for an executive board position.

RESPONSE: The Department notes that the developer does pay its proportionate cost of association operations before the owners control the executive board. Additionally, in accordance with PREDFDA, the developer is guaranteed a seat on the executive board and retains the seat only while selling in the ordinary course of business. With regards to the scenario depicted by the commenter, a developer who fails to pay assessments to the association would not retain their right to vote; a failure to pay means they would no longer be in good standing, and good standing is a precondition for voting for both owners and developers.

36. COMMENT: CAI notes that the proposed regulations state, “a developer who has stopped selling units in the regular course of business shall not be entitled to an automatic seat on the board.” CAI pointed out that the Condominium Act uses the term “ordinary course of business,” and stated the opinion that because there is no commonly understood definition of either phrase, it is impossible to enforce. CAI recommends the phrase “regular course of business” be defined in a concrete manner that would use an objective standard for the time between sale of the last unit in the project at the current time and suggested if the time exceeds one year, then the developer has ceased to sell units in the regular course of business.

RESPONSE: This is outside the scope of this rulemaking; however, the Department agrees there would be value in defining “regular course of business,” and will include this in a future amendment to N.J.A.C. 5:26.

37. COMMENT: NJBA stated that the proposed regulation at N.J.A.C. 5:26-8.4(b) contradicts the existing PREDFDA regulation which states, “the developer may retain one member of the executive board so long as there are any units remaining unsold in the regular course of business.” NJBA stated that “the proposed revisions would serve to undermine an important right currently provided by the law of the developer to maintain representation on the executive board during the development of a project when that project has either taken longer than anticipated to develop or has stalled for various market-related reasons and adversely impact the entire development. The developer’s limited representation on the executive board following its turnover of control to the owners, as required by both PREDFDA and the Condominium Act, does not pose an opportunity for the developer to exert undue influence over the decisions of the executive board nor limit the right of the owner elected executive board members from controlling the decisions made by the association. In addition, the proposed revisions do not take into account that the leasing of one or more units by a developer can stabilize a stalled project and generate potential buyers.” NJBA recommended the following language:

“Notwithstanding (a)1, 2, and 3 above, and so long as control of the executive board has been turned over to the owners, other than the developer, the developer may retain one member of the executive board so long as there are any units remaining unsold in the regular course of business, subject to the following:

i. For those developments intended to be comprised of 100 or fewer units at full buildout, the developer-appointed member shall resign from the executive board no later than two years following the date of turnover of control of the executive board to the unit owners; and

ii. For those developments intended to be comprised of 101 or 250 units at full buildout, the developer-appointed member shall resign from the executive board no later than five years following the date of turnover of control of the executive board to the unit owners; and

iii. For those developments intended to be comprised of more than 250 units, the developer-appointed member shall resign from the executive board no later than eight years following the date of turnover of control to the executive board to the unit owners.”

RESPONSE: The recommended language would be a substantive change to the rules, is outside the scope of this rulemaking, and cannot be done upon adoption. The Department agrees that clearly defining ordinary course of business would be a valuable amendment to the rules and will propose the change in a future rulemaking. The Department also notes that this section applies to associations of all sizes.

38. COMMENT: NJBA expressed that N.J.A.C. 5:26-8.4(f), regarding copies of the annual audit, should not be limited to only during the period of the developer control, and suggested the following revision:

Copies of the annual audit of association funds, whether prepared during the period of developer control or after control of the association is transferred to the owners of units, shall be available onsite for inspection and reproduction by owners and/or their authorized representatives.

RESPONSE: The recommended language would be a substantive change to the rules and cannot be done upon adoption. The Department agrees that this would be a valuable amendment to the

rules and will propose the change in a future rulemaking. Currently, there is no requirement that unit owner-controlled boards prepare audits.

Membership in the Association (N.J.A.C. 5:26-8.8)

39. COMMENT: CAI stated that N.J.A.C. 5:26-8.8(a), which provides that each owner is an association member upon acceptance of the deed, does not take into account pending bill S3661/A5043 and recommended the section be amended accordingly.

RESPONSE: As stated in the Response to Comment 21, the Department declines to make any amendments based on a pending bill. Pending bill S3661/A5043 addresses lake associations; this requirement only applies to associations that have been determined to be planned real estate developments within the scope of N.J.A.C. 5:26.

40. COMMENT: NJA stated that N.J.A.C. 5:26-8.8(b), which provides that a developer shall have one membership in the association for each unit registered pursuant to this chapter, should be limited to the developer of an independent common interest association and not include the developer of units added to an existing common interest association that has already transitioned to residential control. NJA stated that a developer of units whose owners will be entitled to membership in an established homeowners association should not be entitled to membership in that association prior to conveying such units to individual owners. NJA suggested that securing one seat on the board, otherwise controlled by residents, may be more appropriate than controlling a significant block of votes that would give that developer total control of the association that has already transitioned to unit-owner control.

RESPONSE: The scenario presented by the commenter is not possible; if the association has already transitioned, the developer is only entitled to one seat on the board even if the developer chooses to add more units after transition in accordance with N.J.S.A. 45:22A-47(a)3.

41. COMMENT: CAI expressed concern regarding N.J.A.C. 5:26-8.8(c)1. This section states that an association member is in good standing when the member is current in the payment of any charges lawfully assessed or in compliance with a judgement for such expenses. CAI acknowledged that these provisions come directly from P.L. 2017, c. 106, but stated that the regulations do not allow an executive board to grant owners with *de minimis* outstanding fees the ability to participate in an election. CAI stated that this could lead to the inability to meet the quorum requirements in an association's bylaws. Because some associations set the quorum at 50 percent of all members, CAI expressed that this rule makes it difficult to meet those requirements and conduct an annual meeting. CAI recommends an amendment to permit the board to permit those owners with small outstanding balances, of \$25.00 or less to be able to participate in the annual meeting.

RESPONSE: As noted by CAI, the provisions for good standing come directly from P.L. 2017, c. 106. Therefore, the Department is unable to make a change.

42. COMMENT: At N.J.A.C. 5:26-8.8(c), CIHC questioned whether it was necessary to make the condition of voting dependent upon good standing. The commenter mentioned the right to vote in State and Federal elections is not dependent upon paying taxes and other fees and questioned whether common interest community owners pay for their right to vote or if it is their democratic right to vote regardless of money owed to an association.

RESPONSE: The right for members in good standing to vote is established in the Election Law at N.J.S.A. 45:22A-23r. For common interest communities, election practices need not always parallel voting in a large-scale election.

43. COMMENT: Three commenters objected to tenants voting in association elections. One commenter stated that owners make the financial commitments to purchase homes in these communities and, thus, have a long-term interest in the condition and character of the community. The commenter expressed the opinion that renters' voices are heard through their landlords and have no place in voting for community association boards.

RESPONSE: The provision for tenant-eligibility comes directly from the Election Law and fits the intent of the Act by ensuring fair election practices for those living in common interest communities. In addition, because tenants can only vote with the consent of the owner and in place of the owner, the rules still give the owner the ultimate say. If the owner does not consent to a tenant voting in his or her place, then the owner's vote will be eligible, so long as they are in good standing. Furthermore, bylaws of the association must permit tenant voting for such practice to be allowed.

Executive Board Elections (N.J.A.C. 5:26-8.9)

44. COMMENT: CIHC stated that the regulations need to set standards regarding how elections are to be conducted in a "fair and open manner."

RESPONSE: N.J.A.C. 5:26-8.9, Elections, fully covers this matter. Associations in compliance with this section would be conducting fair and open elections.

45. COMMENT: Two commenters requested that the Department specify that once a vote is cast, it cannot be changed.

RESPONSE: This matter is more appropriately handled by the governing documents of the association. However, the Department will be monitoring the effects of this rulemaking over time, and if there are issues pertaining to this matter that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

46. COMMENT: Three commenters recommended adding language to state, “any candidate running for board elections shall not be prohibited, limited, impeded, or restricted in their efforts to solicit votes in person, by mail, by email, or by phone, by anyone – the Board, Management, Association Lawyers, or other Unit Owners.”

RESPONSE: This recommendation is outside the scope of this rulemaking; the Department does not regulate campaigning. The Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

47. COMMENT: One commenter requested an amendment to state that no board member can support any candidate, including themselves, on any association document, newsletter, or association letterhead, and cannot use their title as a trustee on any election literature.

RESPONSE: This change cannot be made upon adoption. The Department does see value in this provision and will propose a change to require this in a future amendment to the PRED Regulations at N.J.A.C. 5:26.

48. COMMENT: One commenter recommended that at least 33 percent of the membership must vote in any election. The commenter stated that it is impossible to get 51 percent of the membership to vote, especially in larger associations.

RESPONSE: This matter is more appropriately established by the governing documents of each individual association.

49. COMMENT: Three commenters recommended adding language to state, “Should a quorum as defined in the bylaws not be met, all votes shall be frozen as cast and a notice sent to the community that additional time has been granted for casting their votes. Candidates will be given the number of votes they received at the election meeting and the number needed for quorum to be reached. If quorum is not reached within the additional time given, the candidates with the most votes will fill the Board vacancies.”

RESPONSE: This matter is more appropriately handled by the governing documents of the association. The Department does not regulate how associations address lack of quorum at a meeting or election. However, the Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

50. COMMENT: One commenter requested that the rules specify that no board member can serve more than three terms in office, no board member can serve as president for more than two consecutive years, and boards without election terms specified in the bylaws should be limited to three years.

RESPONSE: In accordance with N.J.A.C. 5:26-8.9(b)2, associations shall set the term of an executive board member for a maximum of four years. The other limits recommended by the commenter cannot be added upon adoption, and the Department believes these limits are more appropriately determined by the governing documents of the association.

51. COMMENT: NJA had a few questions regarding N.J.A.C. 5:26-8.9, Executive board elections. NJA noted that N.J.A.C. 5:26-8.9(b)3 establishes a procedure that homeowners should follow in the event that their association has not held an election in compliance with its bylaws and noted the use of the word “may” when directing that a petition signed by a minimum of 25 percent of the association members be submitted to any board member to compel an election. NJA questioned whether the Department intends this to be a prerequisite before any group of homeowners may proceed to the Chancery Division of the Superior Court to compel an election.

NJA also raised this issue regarding N.J.A.C. 5:26-8.9(c), which provides the options when an association has no board members and the association members fail to act on petition or by majority. NJA stated that if an association has no board members, then unit owners are unable to organize and submit a petition as set forth at N.J.A.C. 5:26-8.9(b)3. In addition, NJA questioned what is meant by “act by majority.” Lastly, NJA stated the opinion that requiring unit owners to give notice to all owners prior to submitting a petition to court is an onerous burden. NJA asked whether the Department understands these regulations to set up a requirement that would take away the jurisdiction of the Chancery Division if a group of homeowners went directly to court to compel compliance with its bylaws without first notifying all unit owners; NJA also asked whether this procedure is only required to be followed if the group of unit

owners that goes to court desires that its expenses be a common expense to be reimbursed by the association.

NJA stated that these ambiguities must be clarified, otherwise, these regulations will create more problems for unit owners faced with noncompliant boards than the current procedure of going to court to compel an election.

Lastly, NJA expressed understanding that N.J.A.C. 5:26-8.9(d)3 comes directly from the Election Law, but noted that read in isolation, the provision makes it sound as if the use of proxies and absentee ballots is discretionary. NJA believed this to be in conflict with N.J.A.C. 5:26-8.9(g), which forbids associations from prohibiting proxy holders from voting for any candidate; NJA stated that this requirement suggests that proxies, and, therefore, absentee ballots, are mandatory. NJA further posited that proxy ballots and absentee ballots should be required in the regulations “as it is in the statutory law” to ensure maximum participation of unit owners in elections. NJA recommended that N.J.A.C. 5:26-8.9(g) be rewritten to make it clear that both proxies and absentee ballots are required to be in compliance with PREDFDA.

RESPONSE: The term “may” was used because the Department does not intend to require association members to petition board members to compel an election; it is an option for members who wish to do so. Because this is an optional remedy, the Department does not see this as a prerequisite to proceeding to the Chancery Division of the Superior Court.

The rule text at N.J.A.C. 5:26-8.9(c) was taken from the requirements established in the Election Law at N.J.S.A. 45:22A-45 and is intended to establish an optional procedure to address situations in which there is no executive board. Notifying all owners is a necessity in these instances because, as stated in the text, “any association member or group, at common expense ... may petition a court with jurisdiction ...” Because this matter involves the use of common

expense, it is imperative that all owners know how their money is being used. Acting by a majority means 51 percent of the membership must vote to act on a matter.

These requirements reflect those established by the Election Law and provide options to association members in certain situations; members still maintain the right to petition a court of competent jurisdiction without giving other members notice, at the acting member's expense, not at the common expense of the association.

Lastly, the Election Law does not mandate the use of proxies or absentee ballots. Throughout PREDFDA and this rulemaking, the use of proxies is always established in an association's bylaws; the statute and this rulemaking do mandate that if proxies are allowed, absentee ballots must also be allowed. As such, the Department respectfully disagrees that there is a conflict between N.J.A.C. 5:26-8.9(d)3 and (g); N.J.A.C. 5:26-8.9(d) establishes the rules for how proxies and absentee ballots are to be used. Proxies and absentee ballots not used in accordance with this subsection would be a violation of the rules, and by extension, of PREDFDA. Further explanation is not needed within the rules. All rules must be followed; failure to comply is a violation. The language at N.J.A.C. 5:26-8.9(g) is to ensure that no one voting in the board election (which *may* include association "members ..., proxy holders, individuals acting pursuant to a valid power of attorney, or voting eligible tenants") is prohibited from voting for any candidate. The purpose of this requirement is not to require proxies; it is to ensure that proxy holders are not restricted in voting for any candidate.

52. COMMENT: One commenter asked if cumulative voting is allowed during elections in which two or more positions on the executive board are to be filled.

RESPONSE: This matter may be established and addressed in the governing documents of the association.

53. COMMENT: CAI recommended that at N.J.A.C. 5:26-8.9(e), regarding allocation of votes, the term “governing documents” should be used, as opposed to “bylaws.” This is because allocation of votes based on value or size would more likely be found in the declaration or master deed than the bylaws. CAI also recommended a definition for “governing documents” be included in the regulations and include the master deed, declaration, bylaws, and certificate of incorporation.

RESPONSE: Upon adoption, the Department has replaced the term “bylaws” with the term “governing documents” at N.J.A.C. 5:26-8.9(e). However, the Department respectfully disagrees that a definition of “governing documents” is necessary. “Governing documents” is a term of art that is universally understood, and no amendment to include its definition is being considered at this time. This term has been understood since the inception of PREDFDA.

54. COMMENT: CIHC had a few questions regarding the provision at N.J.A.C. 5:26-8.9(e). CIHC questioned whether the equal basis clause applies to the one or equal number of votes or to the proportional votes? CIHC stated that the current equal number of votes provision permits an association to allocate a fixed number of votes to each unit regardless of size or value and noted that this regulation appears to force a form or proportionate voting where none is intended. CIHC stated that the “one or more” provision was intended to allow one association to continue its prior policy of granting two votes per unit to permit a split vote regardless of the unit size or value. CIHC stated that a lot of time was spent to ensure that associations “are not influenced by

commercial interests, and it would be a huge slap in the face if DCA were to negate any part of our efforts.”

RESPONSE: This section comes from the Election Law at N.J.S.A. 45:22A-45.2c(9), which states, “An association shall not provide for an allocation of votes other than one vote for each unit or such larger number of equal votes per unit ... except ... where the bylaws or other governing document provide for the voting interest to be proportional to a unit’s value or size.” As reflected in the rules, the requirement is that all units be assigned one vote or an equal number of votes per unit. This would allow a single vote per unit or two votes per unit throughout an entire development. The rule further states that the bylaws of the association may allow for voting proportional to a unit’s size or value, so long as the allocation is consistent such that all owners of units of the same size or value shall have the same number of votes and ensures that representatives of commercial units do not constitute a majority of the executive board.

55. COMMENT: One commenter expressed concern about the Summary statement for N.J.A.C. 5:26-8.9(e), regarding allocation of votes. The statement included an example of allocating votes proportional to a unit’s size or value. The commenter expressed the opinion that the example provided “established and implied that is justifiable that members living in a unit of 925 square feet may be entitled to one vote and members living in a 1010 square foot unit may be entitled to two votes within the bylaws. This does not appear to be ‘proportional’ and the Department needs to clarify or rescind this example even though it is not included as part of the proposed regulations.” The commenter stated the opinion that the owners of larger units would have an unfair advantage. The commenter further pointed out that the act and proposed rulemaking state

that a unit's value can be used to establish proportional voting and asked a series of questions regarding how a unit's value is determined, including whether the value remains indefinitely once determined; whether it needs to be updated through amendment; whether it means just the price or if other factors can impact value. The commenter stated that allowing the number of votes to be manipulated by bylaws based on size or value gives larger units disproportionate power to determine the outcome of elections. The commenter recommended the Department discuss this with State legislators.

RESPONSE: The Election Law specifically allows for allocation of votes by size or value. Furthermore, the Department notes that value is determined by the fair market value at the time of sale of a unit; in over 40 years of administering PREDFDA, the agency has not heard of any voting situations similar to the one presented by the commenter. Generally, when voting is based on size, the typical allocation is based on either wide square footage groupings, exact percentage voting proportional to the square footage, or by the number of bedrooms. The Department respectfully notes that changes cannot be made to the example provided within the Summary statement of the notice of proposal, per the commenter's recommendations, as the notice of proposal Summary statements is final upon publication of the notice of proposal.

56. COMMENT: CAI expressed concern with the requirements at N.J.A.C. 5:26-8.9(f), which states that associations shall not prohibit, limit, impede, or restrict participation by residents of low- or moderate-income housing units in executive board elections. CAI stated that this section should be amended to include that these residents must be in good standing. CAI expressed the opinion that, as currently written, if an association revokes the voting rights of an affordable

housing unit owner for lack of good standing, it may be found to have restricted the owner's right to vote.

RESPONSE: The Department respectfully disagrees that this change is necessary and with the commenter's interpretation of the section. In accordance with N.J.A.C. 5:26-8.8(c), good standing is a prerequisite for voting. The intent of N.J.A.C. 5:26-8.9(f) is to ensure that no members who own low- or moderate-income housing units are prevented from participating because of the size or cost of the unit they own. N.J.A.C. 5:26-8.9(f) has nothing to do with whether members who own low- or moderate-income units are in good standing, because any member owning any size unit who is not in good standing is not allowed to vote, including low- and moderate-income members.

57. COMMENT: At N.J.A.C. 5:26-8.9(g), one commenter requested that the first sentence include that the association shall not prohibit "limit, impede, or restrict" members in good standing ... from voting for any candidate in an executive board election.

RESPONSE: Upon adoption, the Department has included "limit, impede, or restrict ..." at N.J.A.C. 5:26-8.9(g) for consistency with other sections of the rule.

58. COMMENT: NJCOLA recommended that N.J.A.C. 5:26-8.9(g) be amended to clarify that it is permissible for the bylaws of an association to provide that association members may nominate and vote for only some members of the executive board based on a distribution allocating those with proportionality to the number, value, or size of the units located in certain geographical areas within the development.

RESPONSE: N.J.A.C. 5:26-8.9(g) is intended to ensure that voters are not prohibited from voting for specific candidates. The requirement cited by the commenter is addressed in the section governing representation, specifically N.J.A.C. 5:26-8.10(a).

59. COMMENT: Two commenters requested that the rules specify who may have access to the physically secured ballots.

RESPONSE: This would constitute a substantive change that cannot be made upon adoption. In addition, the Department currently believes this can be sufficiently addressed in the governing documents of the association. The Department will be monitoring the effects of this adoption over time, and if there are issues that were not foreseen at the time of this rulemaking, further rulemaking will be undertaken to remedy these problems.

60. COMMENT: At N.J.A.C. 5:26-8.9(h)1, CIHC recommended that the following language be added: “the key or access or opening of the secured depository shall be performed by an impartial unit owner or other disinterested, qualified party, and where possible, in the presence of a second person/witness.”

RESPONSE: N.J.A.C. 5:26-8.9(h)1 already requires that the depository for physical ballots be secure. The Department believes this sufficiently ensures ballots are protected; however, the Department will monitor the effects of this rule upon its promulgation and will undertake further rulemaking if additional protection is found to be necessary.

61. COMMENT: Two commenters recommended that ballot tallying should be done by unit owners who are not, or have not been, members of the board and non-unit owners such as

members of the management company. The commenters further stated that the association's lawyers should be prohibited from participating in tallying.

RESPONSE: The provisions at N.J.A.C. 5:26-8.9(h) address ballot tallying; because the section requires that ballots be counted in public and available for inspection by association members, the rulemaking as written sufficiently addresses any concerns regarding who is tallying.

62. COMMENT: Two commenters asked how the ballots can remain anonymous if they are available to any association member for review.

RESPONSE: Associations will need to implement a system that maintains anonymity. As an example, associations may use double envelopes so no identifying information is included on the ballot.

63. COMMENT: One commenter fully supported the need for ballot tallying to be public and for ballots to be cast in a secure manner. The commenter pointed out that a double-envelope system could easily be utilized by associations and stated that while elections and secure balloting may cause some inconvenience to implement at first, the current environment of corporate disruption is more inconvenient. The commenter further stated that good standing provisions need to be followed by all associations. The commenter then provided anecdotal evidence about appointments occurring for his association's executive board.

RESPONSE: The Department thanks the commenter and agrees that methods for anonymous balloting are relatively simple to integrate and ensure fair elections. The Department notes that upon adoption of this rulemaking, board members must adhere to the good standing provisions at

N.J.A.C. 5:26-8.8(c) and cannot accept positions through appointment, except as provided at N.J.A.C. 5:26-8.11.

64. COMMENT: CIHC commented that while some common interest communities may balk at how to achieve an anonymous election, anonymity can easily be attained by using the double envelope method of voting used by unions and many other organizations. CIHC further cited 29 CFR 452.97, which explains how a double envelope method is used.

RESPONSE: The Department agrees that a double envelope system is a simple solution for anonymous balloting.

65. COMMENT: NJCOLA recommended that N.J.A.C. 5:26-8.9(h)3 be amended to state that absentee ballots do not have to be cast in an anonymous matter since these ballots are typically signed.

RESPONSE: The Department respectfully disagrees that this amendment is necessary. There are ways to confirm an absentee ballot is verified and still maintain anonymity (see the Responses to Comments 63 and 64). Additionally, PREDFDA and this rulemaking are intended for planned real estate developments. Voluntary associations, including lake associations, do not fall under the scope of this rulemaking; such organizations can continue to operate to meet the needs of the individual association.

66. COMMENT: CAI expressed a number of concerns with provisions requiring that ballots are cast anonymously, that ballot tallying occur publicly, and that ballots be open to inspection by members. Several commenters submitted copies of these concerns.

CAI stated that nothing in the Election Law requires tallying of ballots in public or that ballots be cast in an anonymous manner.

CAI stated that the tallying is often an event that is undertaken while the annual meeting is being held and expressed that the activities that occur during the public meeting would divert the focus of the inspectors of the election who would be counting in a noisy venue, as well as distracting the membership away from the meeting proceedings. CAI suggested that inspectors would be subject to interference by the candidates or supporters during public ballot tallying.

CAI noted that the regulations allow for electronic balloting and stated that the nature of electronic balloting means that an online system receives the votes and reports the results in writing; thus, electronic systems cannot accommodate being tallied in public, and tallying is merely a product of the computer program.

CAI stated that some community associations have systems by which the voting commences through the use of proxies or absentee ballots before the annual meeting, continues by in-person balloting at the time of the meeting, and allows ballots to be cast for a few days following the meeting. Only then are the ballots tallied, and none of the membership would be present at that time.

CAI stated that for very large associations, tallying takes place over several days because of the burden of tallying such a large number, typically over thousands of units. In very large associations, public tallying would be impractical.

CAI stated that it is not unusual for an association to be unable to obtain a quorum of the membership by the first scheduled date of the election meeting. In those cases, the election meeting is adjourned to a future date, but the proxies, absentee ballots, and in-person ballots received at the time continue to be valid. When quorum is reached, the ballots are tallied at the

adjourned date of the annual meeting, but those who originally attended typically do not come again because their vote has been cast.

CAI stated that the corporate nature of associations does not lend itself to public tallying and stated that most public elections where the results are recorded by voting machines are reported without a public tallying.

CAI stated that maintaining anonymity is impractical when considering the use of proxy ballots and absentee ballots, because the association must confirm the ballots are from a person who is in good standing and who is an owner.

CAI noted that if a member contests the determination that they are not in good standing on the day of the annual meeting, their ballot will be set aside and considered provisional. If the results of the voting indicate that the casting of all provisional ballots might affect the outcome of the election, the issue over whether those ballots were properly excluded is determined, and valid ballots will be counted. CAI expressed the opinion that this cannot occur where ballots are anonymous.

CAI noted that where voting is weighted, the inspectors must have a way to determine which unit the vote is associated with, otherwise, the correct weighting cannot be determined.

CAI noted that absentee ballots must contain the name of the person submitting it, otherwise, its validity cannot be determined.

CAI recommended that the Department reconsider these two rules and stated that there were other ways to accomplish the statutory intent in these rules, including having the inspectors of the election swear an oath of confidentiality. CAI also requested that the Department create a provision prohibiting board members from having access to the voted ballots, proxies, and absentee ballots, and require boards to retain all ballots for 30 days. CAI also recommended the

regulations state that if the tally demonstrates that the successful candidate with the lowest vote total is less than five percent ahead of the unsuccessful candidate with the highest vote total, the unsuccessful candidate can request a recount to be performed by alternative inspectors.

Finally, CAI questioned if the Department had the statutory authority to adopt these regulations.

RESPONSE: Pursuant to N.J.S.A. 45:22A-35, the Department is authorized to adopt rules to further the intent of the Act. The methods established at N.J.A.C. 5:26-8.9(h) further the intent of the Act by ensuring elections occur in a “fair and open manner,” which is the stated intent of the Election Law at N.J.S.A. 45:22A-45.1d. The Department recognizes that existing systems for counting ballots will need to be updated upon adoption of this rulemaking.

The association does not have to tally the ballots during the annual meeting if doing so would cause undue interference and distraction. A separate public time can be established by the association for the tallying of ballots.

CAI is correct in stating that electronic systems cannot accommodate being tallied in public and that tallying is a product of the computer program. Because electronic systems show the tally, this does not conflict with any of the requirements applicable to physical ballots.

The Department does not see a problem with balloting that occurs over multiple days, with ballots being tallied after all votes are received. The Department notes that the requirement at N.J.A.C. 5:26-8.9(h)2 requires ballot tallying to occur publicly and for the ballots to be open to inspection. As long as the tallying is public, that is, open to attendance by membership for observation, it does not matter if the membership is actually present or not.

The Department respectfully disagrees that this requirement would be burdensome for large associations. CAI notes that tallying takes place over several days for such associations; this rule merely requires those tallying sessions be public.

Additionally, absentee ballots, proxies, and in-person ballots received prior to quorum being reached can be held and counted publicly with other returned ballots once a quorum is present. The Department notes again that it does not matter if “those who originally attended” come again; the requirement is simply that the tallying be public. Members who want to attend are free to do so, but there is no requirement that specific members attend the tallying.

The Legislature found that “because of the significant influence community associations have over the lives of their residents, and because community associations are creatures of State law, it is unfair and runs contrary to American democratic values for these communities to be governed by trustees who are not elected in a fair and open matter” (N.J.S.A. 45:22A-45.1d). The “corporate nature” of associations is the reason public tallying is vital to ensuring fair and open elections.

Associations will have to implement procedures that maintain anonymity. The Department respectfully disagrees that this would be impractical in regard to proxies and absentee ballots, because a double envelope system, or any similar system, could be easily implemented. Double envelopes would also ensure provisional ballots are taken into consideration and anonymity is maintained at the time of tallying, allow associations to check the validity of the vote, and the inner envelope or the ballot could contain information regarding the weight of the vote. Additionally, the weighted ballots will be given by the association only to those entitled to the specific weighting. A person casting a weighted vote whose outer envelope shows is not in good standing will have the enclosed ballot rejected.

The Department respectfully disagrees that this rule should be reconsidered. CAI recommended language regarding recounts; this language is outside the scope of this rulemaking and would be more appropriately addressed in the governing documents of the association. Lastly, as stated above, the Department has authority under N.J.S.A. 45:22A-35 to “adopt ... regulations as are reasonably necessary for the enforcement and provisions of this Act.” The Election Law is a part of PREDFDA; thus, the Department has rulemaking authority to ensure the intent of the Election Law is met.

67. COMMENT: NJA recommended that N.J.A.C. 5:26-8.9(j) be further qualified in order to “guarantee that the master or umbrella association does not become an oligarchy concerning the first-level, constituent homeowners association.” NJA recommended the following language:

Where the executive board of a planned homeowners association is authorized pursuant to its governing documents to appoint a representative of that association or board to the executive board of a master or umbrella association, the name of that representative should be submitted to membership for majority approval, even if that representative is already an elected member of the association’s executive board. If the nominated representative is a board member, such representative shall serve on the executive board of the umbrella or master association no longer than the term to which that representative was most recently elected to the association’s board. If not a board member, the representative should serve on the board of the master or umbrella association for a term no longer than four years.

Each constituent homeowners association should be represented on the executive board of the umbrella or master association by a number of representatives that is

reasonably proportionate to the number of units in each constituent planned development compared to the total number of units in all constituent planned developments whose common elements and facilities are being managed by the executive board of the umbrella or master association.

RESPONSE: This matter is more appropriately addressed in the governing documents of the association. The Department does not perceive this to be a problem based on the lack of complaints received regarding umbrella associations. However, the Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

68. COMMENT: CAI recommended an amendment to N.J.A.C. 5:26-8.9(j), regarding the method by which elections occur in master or umbrella associations. CAI noted that it is often the master association's governing documents that require that the president of a sub-association serve on the master board or that the sub-association board elect a representative to the master board. CAI stated its opinion that, as written, the regulations limit the authority for the appointment of a master association board member to the sub-associations governing documents when those are typically not the documents that establish that procedure. CAI suggested that the rule be modified to permit the requirement for election to the master board be pursuant to the independent associations' governing documents or the governing documents of the master association.

RESPONSE: The Department respectfully disagrees a change is needed. This section reflects the Election Law at N.J.S.A. 45:22A-45.24f(2). The actual format of the election or

appointment, where applicable, to the master or umbrella association would be pursuant to the association's governing documents.

69. COMMENT: Two commenters requested that the requirement that all ballots be cast anonymously be clarified to state that all voters must be verified to be in good standing before the ballots are sent so those voters who are not in good standing do not receive ballots.

RESPONSE: The Department refers the commenters to N.J.A.C. 5:26-8.9(k)4 and (l)1, which set the standards for notification for associations with fewer than 50 units and greater than 50 units, respectively. Both of these sections require that members be notified of their standing within the timeframe for notification of an election. In addition, N.J.A.C. 5:26-8.9(h), regarding counting of ballots, states that "the association shall verify the eligibility of the voters and count the ballots." This further ensures that if any ballots were cast by members not in good standing, they would not be counted.

70. COMMENT: One commenter recommended that if the election is just for a seat on the board, only the term, and not the office, needs to be included on the ballot.

RESPONSE: The Department refers the commenter to N.J.A.C. 5:26-8.9(l)1iv(5), which states "when an election is for a specific board position, the ballot shall indicate what office and term each candidate is seeking." If it is not for a specific position, this provision would not apply. N.J.A.C. 5:26-8.9(l)1iv(2) always requires the names of all persons nominated to be included on the ballot.

71. COMMENT: One commenter recommended that all ballots should be laid out vertically on the page and in alphabetical order by last name.

RESPONSE: N.J.A.C. 5:26-8.9(1)iv(2) requires ballots to list candidates in alphabetical order by last name. The page layout is more appropriately addressed in the governing documents of the association.

72. COMMENT: Several commenters stated the opinion that allowing write-in candidates is contrary to the intent and purpose of the Election Law and the proposed regulations. The commenters believe write-in votes discourage transparency during association meetings because all candidates should be required to present themselves and their qualifications to the members of the association.

RESPONSE: Including write-in candidates is in keeping with general democratic principles and practices; thus, this provision furthers the intent of the Election Law to ensure “unit owners living in community associations should have the right to ... freely elect ... the executive boards that govern communities” (N.J.S.A. 45:22A-45.1f).

73. COMMENT: CAI expressed concern regarding N.J.A.C. 5:26-8.9(1)iv, which mandates that the election meeting notice contain a copy of the ballot. CAI stated that associations typically include the proxy and absentee ballots in the election meeting notice and stated that including a copy of the in-person ballot would be confusing to association members and could cause returns of the wrong document. CAI pointed out that the Election Law only requires the absentee ballots and proxies in the meeting notice and expressed the opinion that there was an inconsistency within the Act; CAI cites a section of the law that states “any proxies used by an association

must contain a prominent notice that use of the proxy is voluntary on the part of the granting owner ... and that absentee ballots are available. An association may not use proxies for an executive board member election without also making absentee ballots available.” CAI recommended the Department clarify its rulemaking and correct the inconsistency in the Act through the regulations.

RESPONSE: The Department respectfully disagrees that this provision is inconsistent with the Election Law; requiring the ballot be provided ensures open and fair elections in associations. In addition, because each document would be clearly labeled, it should not be difficult for association members to differentiate among proxies, absentee ballots, and a sample of the in-person ballot. Unless otherwise stated (see the Response to Comment 76), the ballot is merely a sample, just as voters receive sample ballots in advance of general elections.

74. COMMENT: CAI commented that the Election Law mandates that an association make absentee ballots available to owners, whether or not the association’s bylaws permit their use, at N.J.S.A. 45:22A-45.2(a) and 45.2(c)5. CAI noted that there is very little difference between a proxy ballot and an absentee ballot other than the fact that the proxy ballot gives another person the ability to cast an owner’s completed ballot. CAI further noted that proxy ballots can lead to difficulties if the proxy holder is not in attendance at the meeting and stated that in many instances the absentee ballot is preferable since it does not require any person’s presence at the election meeting.

In a similar vein, NJCOLA stated that there is an inconsistency regarding proxies between N.J.S.A. 45:22A-46d(2)(d) and 45.2(c)5. The former section states that meeting notices must include a proxy if permitted by the association, and the latter states that proxy and absentee

ballots be included in the written notice of the election unless prohibited by the bylaws.

NJCOLA recommended that these sections “be brought into compliance in order to clarify that proxies are not required unless authorized by the bylaws.”

RESPONSE: The citations provided by CAI do not state that associations must provide absentee ballots regardless of whether their bylaws allow for their use. N.J.S.A. 45:22A-45.2(a) states, “An association may not use proxies for an executive board member election without also making absentee ballots available,” which is identical in meaning to the proposed rules at N.J.A.C. 5:26-8.9(l)1iv(1); N.J.S.A. 45:22A-45.2(c)5 states “this notice shall include a proxy ballot and an absentee ballot, unless prohibited by the bylaws.” The Election Law does not require the use of either proxies or absentee ballots, but it does treat proxies and absentee ballots differently. Bylaws can allow absentee ballots, without allowing proxies. However, if proxies are allowed, then absentee ballots also must be used. This is reflected in the Department’s proposed rules at N.J.A.C. 5:26-8.9(l)1iv(1) and 8.13(f)4, which state that “[I]f the bylaws permit, the notice of the meeting shall include an absentee ballot ... If the bylaws provide for a proxy ballot, an absentee ballot shall also be included.”

With regard to NJCOLA’s comments, the Department respectfully disagrees that there is a conflict between the cited sections in the Election Law; both sections require proxies and absentee ballots be included in meeting notices when the association allows their use. In addition, the former citation applies to elections to the board; the latter applies to bylaw amendments. Because these are separate processes within an association, different requirements would not create a conflict within the rules.

75. COMMENT: CAI was opposed to the rule text at N.J.A.C. 5:26-8.9(l)1iv(2), which requires that when an election is for a specific board position, the ballot shall indicate what office and term each candidate is seeking. CAI stated that the Election Law does not require a candidate to declare which term of office a candidate is seeking. CAI then gave a hypothetical example where there could be positions with different term lengths with no one running for the shorter term and stated that because no one would fill the shorter term, the executive board would then need to make an appointment. CAI recommends the Department revise this rule to employ a common procedure utilized by associations wherein the elected candidate receiving the greatest number of votes fills the longer term and the elected candidate receiving a lesser number of votes fills the shorter term.

RESPONSE: The intent of the Election Law is to ensure elections to the Executive Board are open and fair – and telling members what position they are voting upon is fundamental. Nonetheless, for situations where there is no one to fill the shorter term, the bylaws of the association could include the procedure mentioned by CAI to fill those spots using candidates without needing to appoint someone to the board.

76. COMMENT: NJCOLA recommended that N.J.A.C. 5:26-8.9(l)1iv be amended to state that the meeting notice requires a copy of a *specimen* ballot. NJCOLA further stated that the rule should permit an association to allow for specific instructions regarding obtaining an absentee ballot prior to the election to maintain control of the duplication of use of absentee ballots and the submittal of a ballot during the general election.

RESPONSE: The Department respectfully disagrees that these changes are necessary. The rules specify that this is a copy of the ballot. Associations may, in their bylaws, choose to accept the

copy ballot as a valid vote unless stated otherwise in the bylaws and may determine the method by which the owner must obtain an absentee ballot. The rule was written in this way to allow for flexibility, where appropriate.

77. COMMENT: CAI objected to the proposed regulations at N.J.A.C 5:26-8.9(l)1v, which establishes timeframes for notifying residents of whether they are in good standing and allows residents to rectify their standing up until five business days prior to the election date. CAI believes this rule contradicts the Nonprofit Corporations Act because that law permits bylaws to set a record date or where no date is set, it empowers the board to fix a record date subject to timing limitations. CAI noted that many associations have a record date set forth in their bylaws that is more than five days – and typically 30 days – before the election meeting. CAI stated that because there is no provision in PREDFDA that calls for an association’s record date to be five days before the meeting, an administrative rule cannot require that the terms of an association’s bylaws be disregarded, especially when the rule contradicts other laws.

CAI further stated that the rule could be a violation of the Fair Debt Collection Practices Act. CAI provided the example that the law prohibits a debt collector from contacting a debtor when the debtor has refused, in writing, to pay the debt or wishes the debt collector to cease further communication. CAI stated that because this rule mandates communication, it is contrary to the Fair Debt Collection Practices Act. In addition, CAI stated that the requirement to notify the debtor that they have the right to Alternative Dispute Resolution is inappropriate in situations where judgements have previously been entered against the delinquent owner. At that point, the owner is no longer entitled to Alternative Dispute Resolution.

CAI added that good standing also applies to a qualifying candidate for the governing board, and stated that the qualification of candidates must be determined at the time the nomination is received. CAI noted that it would be unreasonable for an association to send an annual meeting notice with a ballot that contains the name of a candidate who is not in good standing on the basis that the candidate has the ability to cure his or her standing until five days before the election.

RESPONSE: The Department respectfully disagrees that there is a conflict with the Nonprofit Corporations Act, which is applicable to many nonprofits outside the scope of this chapter. The record dates established by associations for payment are distinct from the timeframes established by the Department. The 30-day timeframe was established in the Election Law, and the Department's rulemaking established five business days as an appropriate timeframe for rectifying standing within that context. Nothing in PREDFDA prevents the Department from establishing appropriate timeframes.

The Department further disagrees that there is a conflict with the Debt Collection Act. N.J.A.C. 5:26-8.9(1)1v would only require associations to notify members of their standing and allow them to rectify their standing. This rule does not require members to rectify their standing. This is a notice of eligibility for an election and is not an attempt to collect a debt. Further, N.J.A.C. 5:26-8.8(c)2 states that an association member shall be considered to be in good standing with respect to eligibility to vote in executive board elections, vote to amend bylaws, and nominate or be a candidate for a position on the executive board when the association member: "2. Is in compliance with a judgement for common expenses, late fees, interest on unpaid assessments, legal fees, or other charges lawfully assessed." Thus, this provision does not interfere with situations where a judgement has been entered against an owner.

The provision allowing members to rectify their standing within five business days before an election is for voting purposes.

Representation (N.J.A.C. 5:26-8.10)

78. COMMENT: NJBA stated that the limitation set forth at N.J.A.C. 5:26-8.10(a) would create inflexible standards that fail to account for shifting project requirements or market conditions.

As an example, NJBA stated that where a mixed-use project consists of a majority of commercial units with minimal residential units, prohibiting commercial units from constituting a majority of the board would create an unreasonable scenario where the smaller residential use controls the entire project. NJBA further stated that the limitation on board members per owner should never apply to the developer and recommended the following changes to N.J.A.C. 5:26-8.10:

(a) The association bylaws may provide for representation on the executive board for owners with different types of units, and in such event, such owners shall be afforded the right to nominate members of the executive board to ensure representation of their unit types on the board.

(b) Unless the executive board members are serving as representatives of the developer, not more than one resident from a single unit shall serve on the executive board simultaneously with another resident of the same unit.

(c) Other than the developer, a person or owning entity shall not hold more than one seat on the executive board.

RESPONSE: The Department respectfully disagrees with the recommended deletion of N.J.A.C. 5:26-8.10(a)1, 2, and 3. These qualifiers are necessary to ensure boards include fair and

appropriate representation, and (a)1 merely clarifies the meaning of “different unit types.” The Department also finds that the hypothetical example provided by NJBA where there are more commercial than residential units in a planned real estate development is unlikely; thus, it is appropriate to ensure commercial units do not constitute a majority on the board.

Further, NJBA’s recommended language at N.J.A.C. 5:26-8.10(b) would delete the modifying “during the period prior to surrender of control to the owners,” thus allowing two residents from a single unit to serve on the board if representing the developer at any time. This is another hypothetical example that is an unlikely scenario because, generally, those serving on the executive board as a representative of the developer are not residing in the development.

Lastly, the Department disagrees with adding “other than the developer” at N.J.A.C. 5:26-8.10(c). This section is imperative to ensure that the developer does not have undue control over the daily lives of owners within the planned real estate development.

79. COMMENT: NJA noted that N.J.A.C 5:26-8.10(a) states that an association’s bylaws may provide for representation on the executive board for owners with different types of units and noted that the term “may” implies discretion. NJA further notes that N.J.A.C. 5:26-8.10(a)2 appears to require that the bylaws shall reserve a seat or seats on the executive board for election by owners of affordable units. NJA stated its assumption that the Department meant the proposed rule to apply to inclusionary developments with COAH units, not to low-cost housing that is generally considered to be affordable and recommended the Department define the term “affordable unit”; NJA also recommended the Department clarify the regulations to state that representation of different unit types is discretionary except when COAH units constitute a minority in that particular association, and, in such case, reservation of a reasonably

proportionate number of seats is required. NJA cited that the New Jersey Supreme Court's holding in *Brandon Farms Property Owners Association v. Brandon Farms Condo. Ass'n.*, 180 NJ 361 (2004), would require a seat to be reserved on the master or umbrella association for a COAH unit owner if all of the COAH units had been placed in their own condominium association separate from the market rate units existing in the greater common interest community, which are also governed by the umbrella association.

RESPONSE: NJA's reading of this section is correct; the amendments set forth a recommendation, not a mandate. The rule text already states that bylaws may provide for representation of different types of units, except that associations must reserve a seat or seats on the executive board for "affordable units," which term is used in accordance with the New Jersey Fair Housing Act, N.J.S.A. 52:27D-304; for clarity, the Department has made a change upon adoption to state that affordable units are "in accordance with the Fair Housing Act." In addition, the Department does not require specific representation on an umbrella association executive board. This is more appropriately decided in the governing documents of the associations.

80. COMMENT: One commenter expressed support for this proposed section and wished to make a statement advocating for the right to protect minority shareholders in condominiums, both residential and commercial. The commenter then expressed concern with the loopholes that developers or majority share owners use to discriminate against minority share owners, but did not provide any examples of loopholes.

RESPONSE: The Department thanks the commenter for the expression of support; allowing minority shareholders a voice on the executive board was one of the main priorities of this rulemaking and is established at N.J.A.C. 5:26-8.10(a)1. The Department would also like to note

that the Condominium Act, N.J.S.A. 46:8B-1 et seq., still applies to commercial units within developments. The Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

81. COMMENT: CAI expressed opposition to N.J.A.C. 5:26-8.10(a)2, which states that when affordable units represent a minority of units in the development, the bylaws of the association shall reserve a seat or seats on the board for election by owners of affordable units. Several commenters echoed this opposition. CAI stated that nothing in the Election Law or any other laws suggests that association bylaws must reserve a position for affordable housing owners and cited the provision of PREDFDA granting the Department rulemaking authority, noting that the regulations adopted by the Department must further a PREDFDA provision. CAI commented that the provisions of the Act mentioned by PREDFDA were those extant in 1977. CAI also noted that the Legislature did not authorize the Department to adopt regulations regarding association operations and implied that any rules impacting association operations are not necessarily within the Department's rulemaking authority. CAI further noted that the Legislature is entitled to limit an agency's rulemaking authority, and where it sets limitations on that authority, those limitations must be observed.

CAI stated that the adoption of this provision would create hostility between the market owners who are not permitted to run for the seat on the board reserved for the affordable unit owner while the affordable unit owners are entitled to run for that seat and others on the executive board. Other commenters seconded this belief, and some characterized it as "reverse discrimination" against market rate unit owners. CAI stated that it supports bylaws that preserve

a seat for affordable owners, but does not support administrative rules that isolates the right of owners to select board members based on economic status.

RESPONSE: The Department notes that the section provided by CAI explicitly states, “the agency shall adopt ... rules and regulations as are reasonably necessary for the enforcement of the provisions of this act ... The rules may provide for, but are not limited to ... provisions for operating procedures; and other such rules and regulations as are necessary and proper to effectuate the purposes of this act, and taking into account and providing for, the broad range of development plan and devises, management mechanisms, and methods of ownership permitted under the provisions of this Act.” The Department also notes that there are longstanding provisions applicable to association operations at N.J.A.C. 5:26-8. It is incorrect to interpret PREDFDA as prohibiting the Department from adopting rules pertaining to association operations.

The rulemaking furthers the Election Law Act at N.J.S.A. 45:22A-45.2f(1)c, which gave associations the option of reserving seats for owners of affordable units. Furthering that Election Law provision is in the interest of democratic elections and fair representation on the executive board and necessary to ensure owners of affordable units have a seat on the executive board.

N.J.S.A. 45:22A-24 states that the Act shall be administered by the Department, meaning that when there is a change to the Act, the Department is charged with implementing and enforcing such change. Though the Department recognizes the Legislature’s authority to limit rulemaking authority, the Legislature did not limit the Department’s rulemaking authority in the passing of the Election Law. The adoption of this provision aligns with the Department’s authority to make rules that take into account and provide for the methods of ownership permitted under the provisions of PREDFDA.

Regarding concerns that market rate unit owners will feel that this is unfair, this rule would give unit owners who represent a minority of the development a voice in executive board elections.

82. COMMENT: NJA recommended that N.J.A.C. 5:26-8.10(c) be amended to make explicit that the prohibition against one owner holding more than one seat on the executive board applies to the developer, along with the developer's employees and other agents, who never sells more than 75 percent of the units and retains a significant number of rental units.

RESPONSE: The Department respectfully disagrees that such an amendment is necessary; N.J.A.C. 5:26-8.10(c) already states, "a person or owning entity shall not hold more than one seat on the executive board." A plain reading of this section shows that the developer or the developer's employees or agents would be considered a person or owning entity. Pursuant to N.J.A.C. 5:26-8.4, a developer selling in the regular course of business always maintains a seat on the executive board. A developer who has stopped selling units in the regular course of business is not entitled to a seat on the executive board.

Appointments, Removals, and Executive Board Vacancies (N.J.A.C. 5:26-8.11)

83. COMMENT: One commenter requested a provision that executive boards establish a permanent finance committee.

RESPONSE: This change cannot be made upon adoption. While the Department recognizes the benefits of a permanent finance committee, this matter is more appropriately addressed by the governing documents of the association.

84. COMMENT: Two commenters recommended language be added to N.J.A.C. 5:26-8.11(b) allowing association members to remove a board member for good cause directly impacting the member's ability to serve.

RESPONSE: N.J.A.C. 5:26-8.11(b) is specific to the executive board removing one of its members. Association members who wish to remove a board member may do so in accordance with N.J.A.C. 5:26-8.11(d).

85. COMMENT: NJCOLA was opposed to the language at N.J.A.C. 5:26-8.11(b)1 and stated that its interpretation of this section was that it requires that the Alternative Dispute Resolution provider act as an arbitrator rather than a mediator in the ADR process. NJCOLA further stated that there is no requirement in PREDFDA that ADR requires the provider to come to a resolution of any matter and added that many ADR policies are based on mediation rather than arbitration principles. NJCOLA stated that a board member's violation of a confidentiality agreement should make the board member subject to suspension or removal in accordance with the bylaws without the requirement for ADR.

RESPONSE: ADR provides for either mediation or arbitration. The ADR provision cited at N.J.A.C. 5:26-8.11(b) would be non-binding, and either party may challenge the conclusion. The Department respectfully disagrees with the suggestion that a board member may be removed without ADR. It is important that board members have access to due process.

86. COMMENT: One commenter suggested that any board member who violates the bylaws or covenants of the association should be automatically removed from the board by a person who has submitted evidence or a trustee with sufficient evidence.

RESPONSE: The Department respectfully disagrees with this suggestion. It is important that board members have access to ADR and due process.

87. COMMENT: One commenter recommended adding a provision that any board member who votes on any association matter from which there is personal gain must resign from the board.

RESPONSE: As stated in the Response to Comment 86, the Department respectfully disagrees with this suggestion. It is important that board members have access to ADR and due process.

88. COMMENT: One commenter recommended that language be added to establish that “unit owners eligible for appointments will be those who previously ran for board positions and received votes as part of the annual election, starting with the most recent election and working backwards. They will be appointed according to the number of votes they received, highest to the lowest.”

RESPONSE: The requested change cannot be made upon adoption. This suggestion would be more appropriately addressed in the bylaws of the association. The Department will monitor the effects of this rulemaking upon adoption, and if this matter is found to be an issue, the Department will revise the election rules to account for this.

89. COMMENT: One commenter suggested that when a board member is removed, dies, or resigns, a special election must be held based upon special election guidelines.

RESPONSE: N.J.A.C. 5:26-8.11(c)3 allows for appointment in these situations but requires that any executive board position that has been filled by an appointee for these circumstances shall be subject to election within a year following such appointment.

90. COMMENT: NJCOLA stated that for the purpose of continuity, when board members are appointed pursuant to N.J.A.C. 5:26-8.11(c)3, particularly officers, the board should be permitted to continue the appointment for the unexpired term if allowed in the bylaws.

RESPONSE: The Department respectfully disagrees. Ensuring appointed members are subject to an election ensures that all board members are elected democratically; this prevents a possible long-term appointment that undermines the democratic process.

91. COMMENT: Two commenters recommended adding language to state that no association member and no existing or new executive board member can be appointed and that any appointment is a violation and a fine will be levied. Commenters state that appointments are against the intent of the Election Law. Commenters further stated that residents want change and relief from corrupt executive boards; they suggested that, as written, the same board members will continue to serve indefinitely.

RESPONSE: The Election Law states at N.J.S.A. 45:22A-45.2f(3) and 45.2f(3)(a), “except with regard to a planned real estate development containing fewer than 50 units ... an association shall not allow a person to take an executive board position through appointment, provided that nothing herein shall prevent the executive board members of an association from filling a vacancy in the executive board created by resignation, death, failure to maintain any reasonable qualification, including maintaining good standing, to be an executive board member.” This

language is repeated in the rules at N.J.A.C. 5:26-8.11(c). Both the law and the rules limit appointments, except for specific instances where it is appropriate for appointments to be made. The rule does protect members of the association by requiring that any executive board position that has been filled by an appointee be subject to election within a year following such appointment.

92. COMMENT: Two commenters suggested that any board member who resigns and any member who does not run for a position on the executive board should not be eligible for appointment.

RESPONSE: The Department respectfully disagrees with this recommendation. This matter is more appropriately addressed in the governing documents of the association.

93. COMMENT: One commenter recommended adding a provision that any board member who resigns cannot be eligible for appointment.

RESPONSE: The Department respectfully disagrees with the suggestion. This would not be an issue; not only is it unlikely that a resigned board member would want to accept an appointment, any board position that has been filled by an appointee is subject to election within a year of the appointment.

94. COMMENT: NJBA stated that unit owners should not have the ability to remove the developer and suggested the following revision to N.J.A.C. 5:26-8.11(d):

Association members may initiate removal of a board member who was elected by the unit owners by submitting to the board a petition signed by 51 percent of association members for removal of that board member.

RESPONSE: The developer's right to serve on the executive board is statutory; because this will be a clarification without a change in current requirements, the Department agrees with the recommended revision and has changed this section upon adoption to include "who was elected by the unit owners."

95. COMMENT: Two commenters requested that the threshold for removal of a board member be brought down to 25 percent.

RESPONSE: This change cannot be made upon adoption. The reason the Department set the threshold to petition for a special election to remove a board member at 51 percent was to ensure that a majority of association members are aware of the allegation and concur on the importance of having open, formal discussion of its significance and the associated facts. However, the Department will monitor the effects of this rulemaking upon adoption. If the majority established by rule has led to impracticalities in removing a board member, the Department will revise the election rules accordingly.

96. COMMENT: CAI questioned the intent of N.J.A.C. 5:26-8.11(d), which allows association members to initiate the removal of a board member by submitting a petition signed by 51 percent of association members. Several commenters repeated this concern. CAI noted that this rule only provides for the initiation of the removal process and not the actual removal. CAI further stated that most association bylaws contain provisions relating to the method by which

association members may initiate the removal of board members and that the majority of those bylaws require far less than 51 percent of the members to call for a meeting for a vote to remove a board member. CAI was concerned with the requirements in the section that require a vote to be held within 60 days of receipt of the petition and suggested the Department's intent was to permit a board member to be removed simply through the petition process. CAI noted that this would violate the terms of most bylaws, which give the board member whose removal is sought an opportunity to speak to the membership prior to the final vote on the issue of his or her removal. CAI also cited case law that provides that where removal of an existing board member is "with cause," the board member is entitled to rebut the claim of cause. CAI stated that this rule would further violate bylaw terms that authorize the board to choose a replacement for a removed board member and again implied that the Department does not have the statutory authority to create a policy concerning the method by which board members of a private entity may be removed.

RESPONSE: As stated at N.J.A.C. 5:26-8.11(d), association members may initiate the removal of a board member by petition. The Department respectfully disagrees that this could be interpreted to mean that a board member would be removed simply through the petition process. The submission of the petition requires a special election within 60 days, not the automatic removal of a board member. Nothing in this section prevents a board member from having the opportunity to be heard by the membership prior to the final vote of the special election. In addition, the Department notes that rules adopted by the Department supersede bylaws adopted by the association. As noted in the Response to Comment 95, the Department set the threshold to petition for the removal of a board member at 51 percent to ensure widespread awareness and consideration of the allegation against the board member among association members. The

Department will monitor the effects of this rule upon adoption, and if the 51 percent threshold has led to impracticalities in removing a board member, the Department will revise the election rules accordingly. Lastly, as stated above, the Department has authority at N.J.S.A. 45:22A-35 to “adopt ... regulations as are reasonably necessary for the enforcement and provisions of this Act.”

97. COMMENT: One commenter did not see a statutory basis to allow for the removal of a board member.

RESPONSE: The Department respectfully disagrees. Although there is no specific provision governing the removal of a board member in the Election Law, the central purpose of the law is to effect fair elections. Recall and removal are integral components of fair elections and governance, and the intent of the Election Law was to adhere to “American democratic values” in association elections.

98. COMMENT: NJA stated the opinion that the requirements of N.J.A.C. 5:26-8.11(d), to initiate the removal of a board member, is burdensome. NJA stated that the 51 percent threshold imposes an unnecessarily high burden simply to petition for a special election that is essentially equivalent to a recall election of municipally elected officers. NJA stated that a 15 percent requirement to initiate a removal election is more appropriate and would adequately protect board members from frivolous petitions because, ultimately, they cannot be removed unless 51 percent of unit owners vote them out. NJA stated that requiring owners to organize 51 percent owners merely to put removal on a special ballot is a sure way to maintain the status quo even if the actions of a board member warrant removal.

RESPONSE: The Department respectfully disagrees that the number set for removal of a board member is burdensome. Given that some commenters believe that members should not be allowed to remove board members, and some commenters believe that board members should immediately be removed if they violate these rules, the number set by the Department is an appropriate middle ground. However, the Department will be monitoring the effect of this rulemaking over time, and if the number established in this section is burdensome once in effect, a further rulemaking will be undertaken to address this problem.

Open Meetings (N.J.A.C. 5:26-8.12 – inserting and updating former N.J.A.C. 5:20)

99. COMMENT: One commenter highlighted parts of the proposed regulation with which its association is not currently aligned. According to the commenter, the association’s website is not accessible by every resident, no notices are posted online, and no notices are provided regarding meetings, bill statements, or any other activities. In addition, the association rarely provides minutes, refuses to give minutes until they have been approved at the next meeting, which is often three months later, and cancellation notices never state a reason for cancellation.

RESPONSE: These complaints are outside the scope of this rulemaking. Any unit owner who believes a board is in violation of any applicable laws or rules should direct complaints to the Association Regulation Unit of the Bureau of Homeowner Protection (Bureau) pursuant to the instructions provided online at <https://www.nj.gov/dca/divisions/codes/offices/ari.html>.

100. COMMENT: One commenter recommended that any expenditure by the board exceeding \$50,000 must be voted on and approved by the membership with a 33 percent approval.

RESPONSE: Matters such as these are more appropriately addressed by the individual associations in their bylaws.

101. COMMENT: One commenter suggested that any changes in usage and structural changes that impact any association buildings usage must be voted on and approved by the membership of the association. The commenter stated that many clubs can be impacted by board changes that the membership does not support.

RESPONSE: Matters such as these are more appropriately addressed by the individual associations in their bylaws. The members of the association have the power to elect or remove executive board members and to amend the bylaws.

102. COMMENT: One commenter recommended that all legal confidential matters of the board be defined in the bylaws. The commenter felt that members of the board should not have to sign a confidentiality agreement, but must adhere to the bylaws. The commenter further recommended that all responsibilities of the board president are to be specified in the bylaws and defined by the Department, rather than the president of the board or his or her attorney.

RESPONSE: The Department cannot require executive boards to list all legal confidential matters in the bylaws of the association. In addition, the responsibilities of the board president are more appropriately handled in the governing documents of the association, rather than dictated by the Department. The Department will continue to monitor this rulemaking upon adoption and may undertake further review of the election rules should there be new issues that need to be addressed.

103. COMMENT: NJA stated that the requirements at N.J.A.C. 5:26-8.12 do not go as far as the requirements under the Senator Byron M. Baer Open Public Meetings Law, N.J.S.A. 10:4-1 et seq., which state that any meeting where there is a quorum of municipal council members must be open to the public, because when a quorum is present, a binding vote may occur “even if it is not called binding at the time of the closed door voting.” NJA stated that association boards have often abused PREDFDA’s working sessions exception to open board meetings; real discussions and decisions are made in working sessions, then, the public meeting is held and the vote is taken with little discussion or opportunity for unit owners to understand what was decided or comment. NJA stated that although N.J.A.C. 5:26-8.12(a)2 now requires the association board to provide a brief explanation for the basis and cost entailed in a matter that is the subject of a binding vote, it is not clear that such requirement will create the transparency needed to promote genuine participation by owners in the affairs of the community. NJA urged the Department to adopt regulations stating that any meeting at which there is a quorum of executive board members present must be open to attendance by unit owners; this way, working sessions will be limited to a subset of board members, and the board will always vote on all matters for the first time at an open meeting.

RESPONSE: Executive boards of associations are not bound by the Senator Byron M. Baer Open Public Meetings Act and may have working sessions, as well as closed meetings pursuant to N.J.A.C. 5:26-8.12(e). The Department refers the commenter to N.J.A.C. 5:26-8.12(a), which requires that any meeting at which a binding vote is to be taken shall be open to attendance by all association members and voting eligible tenants. Any binding vote taken in a non-open meeting is a violation of Chapter 26, and members of the association could file a complaint with the Bureau.

104. COMMENT: Two commenters requested that associations should be required to adopt a policy for comments by the association members. The commenters stated that many projects are approved without any comment from the association members.

RESPONSE: This change cannot be made upon adoption. The Department refers the commenters to N.J.A.C. 5:26-8.12(a)3, which allows boards to adopt a policy for comments by association members and voting eligible tenants during meetings. This situation is appropriately handled in the governing documents of an association.

105. COMMENT: One commenter suggested that the policies adopted by associations for comments from association members during meetings be no less than five minutes for each association member.

RESPONSE: It is up to the governing documents of the association how the policy for comments by association members is administered.

106. COMMENT: NJBA stated that in accordance with existing law, N.J.S.A. 45:22A-46, conference or working sessions of the board at which no binding votes are to be taken are not subject to open meeting requirements and suggested the following revision to N.J.A.C. 5:26-8.12(a):

The bylaws of the association shall include a requirement that meetings of the executive board where a binding vote of the executive board is to be taken (but excluding conference or working sessions at which no binding votes are to be taken) shall be open to attendance by all association members and voting eligible tenants, as applicable.

RESPONSE: The Department respectfully disagrees that the parenthetical language requested by NJBA is necessary. The section already states that meetings where a binding vote is to be taken shall be open; this implicitly means that meetings where no binding vote is to be taken (that is, working sessions) do not need to be open. Further, this rule also allows for closed meetings at N.J.A.C. 5:26-8.12(e), which establishes the requirements for when the executive board may exclude attendance of association members and voting eligible tenants at meetings and specifies that no binding votes may be taken during such meetings.

107. COMMENT: NJBA stated that if the bylaws set conditions for what constitutes a binding vote of the executive board, those conditions should be very clear, easy to follow, and indisputable. NJBA stated the opinion that requiring a brief explanation of the basis for and cost entailed in a matter prior to votes of the executive board leaves the board in a precarious position to be challenged as to the validity of every decision they make. NJBA stated that there is a potential for numerous challenges of decisions made by developer-controlled executive boards, followed by a breach of fiduciary claims made by homeowner-controlled executive boards post transaction. NJBA recommended the following language at N.J.A.C. 5:26-8.12(a)2: “The board shall provide an agenda in accordance with N.J.A.C. 5:26-8.12(c)3ii.”

RESPONSE: The Department respectfully disagrees with the commenter. It is routine for boards to explain their position and justify their actions during an open meeting. This section codifies a common practice among associations.

108. COMMENT: One commenter suggested requiring boards to hold at least 10 monthly open meetings a year.

RESPONSE: The Department respectfully disagrees with the commenter. Matters such as this are more appropriately addressed by the individual associations in their bylaws.

109. COMMENT: One commenter suggested that any board member who misses a combination of four meetings must resign from the board because missing board members impact the decision process of the association. The commenter also suggested that the board not hold more than two executive sessions in a month and may only hold a special meeting if an emergency arises.

RESPONSE: Attendance policies are more appropriately handled in the governing documents of the association. In addition, the Department respectfully disagrees with the suggestion that boards not hold more than two executive sessions a month. This imposes an unnecessary restraint on the board.

110. COMMENT: One commenter suggested that at the annual meeting, the membership under new business can make motions and seconds giving direction to the board for changes to the covenants, offering new services, and any other meaningful and legal suggestion for the good of the association; within 30 days of the annual meeting, a ballot will be printed and mailed to the membership for a vote on all items seconded at the annual meeting.

RESPONSE: The format of a meeting is more appropriately handled in the governing documents of the association. If an executive board wishes to hold a meeting in this way, nothing in the Election Law prohibits them from doing so. The Department also notes that members of the association always have the right to vote to change bylaws.

111. COMMENT: CAI took issue with the provisions at N.J.A.C. 5:26-8.12(b) that require that within seven days following the annual association meeting, the association shall post and maintain posted throughout the year an open meeting schedule. Several commenters echoed these concerns. CAI noted that many boards do not hold a board meeting within seven days of the annual meeting and suggests that the requirements for posting an annual meeting schedule be revised to “within seven days of the first open board meeting following the annual meeting.” In addition, at N.J.A.C. 5:26-8.12(b)3, when there is a change to the schedule, it must be made at least seven days prior to the scheduled date and posted and maintained in the same manner as the original schedule. CAI stated that there are instances where this rule will not be able to be observed and provided an example; if it is learned two days before a meeting that a quorum of the board would not be available due to an illness, vacation, or required business trip, the board will not be able to conduct a meeting and the seven-day requirement will not be met. CAI suggested that this section be amended to follow the rules for cancellation of a meeting at N.J.A.C. 5:26-8.12(h) or allow a lesser time period for good cause shown. CAI further noted that if the board is unable to meet due to a lack of quorum, it will not be possible to state in the posted notice when the meeting will be held, and if there is no pressing business before the board, the meeting may be cancelled with no alternative date.

RESPONSE: The Department would like to note that a second meeting is not necessary in order to post a schedule. In addition, an executive board may cancel the meeting pursuant to N.J.A.C. 5:26-8.12(h); this would allow for short-notice cancellations or postponements in the scenarios presented above. The provision at N.J.A.C. 5:26-8.12(b)3 would apply when the board learns in advance that the date of the meeting needs to be changed.

112. COMMENT: NJBA stated that the board may have to act in an expedited manner on some matters and seven days notice may not be practical. NJBA stated that clarification is needed to ensure that the open meeting schedule only requires a listing of regularly scheduled meetings and not special meetings and recommended the following language at N.J.A.C. 5:26-8.12(b)2 and 3:

2. The open meeting schedule shall contain the time, date, and locations of such regularly scheduled meetings. The bylaws shall provide a process for the board to call special meetings as deemed necessary.

3. Except for special meetings, any changes to the posted open meeting schedule shall be made at least seven days prior to the scheduled date and posted and maintained in the same manner as the original schedule.

RESPONSE: The Department disagrees that this change is necessary; special meetings are addressed in this rulemaking at N.J.A.C. 5:26-8.12(g).

113. COMMENT: NJCOLA stated that N.J.A.C. 5:26-8.12(b)3 should be amended to allow for the postponement of an open meeting within the seven-day period if the meeting is cancelled for weather-related reasons or lack of quorum.

RESPONSE: The Department refers the commenter to N.J.A.C. 5:26-8.12(h), which contains the provisions for cancelling or rescheduling a meeting.

114. COMMENT: One commenter asked where electronic means is defined and what electronic means would include.

RESPONSE: There is no definition for electronic means in this chapter because the term is self-explanatory and would include a number of items, including emails, text messages, or other

methods of transmission that can reasonably be expected to reach a substantial majority of association members.

115. COMMENT: CAI noted that the requirement to include agenda items in the notice no longer includes the phrase “to the extent known,” as the requirements at N.J.A.C. 5:20-1.2(b) included. CAI requested the Department maintain this language since without it, there is ambiguity regarding whether an agenda item that was not included on the notice can be acted on by the board. CAI pointed out that associations often have matters arise suddenly that require board action and stated that flexibility is necessary for the reasonably efficient operation of the association.

116. COMMENT: NJCOLA stated that N.J.A.C. 5:26-8.12(c)3 should be amended to indicate that nothing in this section shall prevent an adjustment to the agenda when determined necessary by the board.

RESPONSE TO COMMENTS 115 AND 116: The Department agrees that deleting this phrase has created ambiguity and, upon adoption, the phrase has been reinserted into the section. In reviewing this rulemaking, the Department removed this phrase because it seemed that it would always be interpreted that items not included on the agenda can still be acted on. Because the phrase ensures flexibility during meetings, it is being added back into the section.

117. COMMENT: NJBA recommended that to address the concern about providing information on the items that the board are to vote on at the meeting, the agenda for such meeting should be descriptive and recommended the following language at N.J.A.C. 5:26-8.12(c)3ii:

ii. Agenda items, which shall include items for discussion, items for action and a brief description of and purpose for the action to be taken, and reoccurring items, such as passage of a budget.

RESPONSE: The Department disagrees with this change. In the Response to Comment 108, the Department maintained that discussing the reason for, and cost entailed in, an agenda item is appropriate during an open meeting. In addition, the Department fails to see how including this information on the agenda would prevent concerns related to challenging executive board decisions noted by NJBA in Comment 108.

118. COMMENT: NJBA stated that since the technology is readily available, and in order to encourage participation of board members, the rules should allow board members to participate in board matters via electronic means and recommended the following change to N.J.A.C. 5:26-8.12(d):

Every elected board member shall be provided equal opportunity to participate in any meeting of board members, which may include participation by electronic means (telephonic, skype, or other communication systems) where such member may hear and be heard on all business matters.

RESPONSE: The Department respectfully disagrees that this change is necessary. As written, this rulemaking does not preclude electronic participation in meetings; it would be up to individual associations and included within their governing documents whether or not they want to allow electronic participation. The Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

119. COMMENT: CAI was opposed to the amendments at N.J.A.C. 5:26-8.12(d), which state that every elected board member shall be provided an equal opportunity to participate in any meeting of board members. CAI stated that this provision undermines the role of the meeting chair, who is charged with moving an agenda item forward and focusing the board on important business before it. CAI further expressed the belief that the provision is unlikely to serve the purpose for which it was proposed and stated that if a motion is proposed and approved by four out of five board members, the four affirmative votes will say “aye,” while the opposing voter usually wishes to express reasons for his or her vote. CAI stated this rule would permit the chair to deny the nay voter that opportunity on the basis that “equal opportunity” means an opportunity to state only “aye” or “nay.” CAI stated that this rule would require the chair to keep track of the time of participation by each board member to determine how much time each board member should be given since the opportunity must be equal; this would mean that chairs running the meeting would not have the ability to end repetitive comments or comments that are not germane to the issue being discussed. CAI also suggested that this rulemaking would interfere with association bylaws governing board conduct. Executive boards have few sanctions available to enforce these rules, often denying a board member attorney-client privileged communications to protect the legal interests of the association. CAI stated that the “equal opportunity to participate” language would provide a violating board member with the ability to avoid a sanction for misconduct.

CAI suggested changes to this section that would state that every board member will be given the opportunity to reasonably participate in the meeting subject to the chair’s reasonable limits on time, relevance, and repetitiveness, and where a board has adopted rules related to the

conduct of board members, it may deny a board member the opportunity to participate in executive session where the subject matter of the four exceptions to the open meeting requirements may be discussed and that board member has previously breached reasonable confidentiality requirements of board rules, provided that no board member may be prohibited from participating in a meeting of the board open to the members.

RESPONSE: The Department respectfully disagrees with the commenter's interpretation of this section. This provision does not undermine the chair of the executive board, because the chair is still in charge of the meeting. Moreover, the Department disagrees that this section would suppress opposing voters from expressing their thoughts; equal opportunity to participate means that all voters have the opportunity to attend the meeting and to express the reason for their votes. If only the opposing voter speaks, or if only supporting voters speak, that does not mean anyone's voice has been suppressed. As long as there is an option to participate and speak, this section will be met; whether a board member chooses to use such opportunity is voluntary. This section also does not require the chair of the board, or any executive board member, to keep track by the minute. Equal opportunity is broadly applicable and may be defined in the governing documents; executive boards cannot silence or bar specific board members from attending while allowing others to attend and speak. Further, the Department disagrees that this rule could be interpreted to allow sanctions for misconduct, because participation still must comply with applicable governing documents.

120. COMMENT: One commenter suggested an amendment to state that all votes of the board of trustees must be held in an open session and that no votes are to be taken in an executive session.

RESPONSE: The Department refers the commenter to N.J.A.C. 5:26-8.12(e)2, which states, “a vote taken at a closed meeting shall not be binding. If the matter requires a binding vote, it shall be taken at a subsequent open meeting in a manner that does not disclose any confidences.”

121. COMMENT: CAI took issue with the proposed text at N.J.A.C. 5:26-8.12(e)2, which states that a vote taken at a closed meeting shall not be binding, and states that if the matter requires a binding vote, it shall be taken at a subsequent open meeting in a manner that does not disclose any confidences. Several other commenters agreed, expressing concern that this provision would disclose confidences to association members during meetings. CAI believed this rule is contrary to the statutory provisions contained in the Condominium Act and PREDFA and cited the section of the statute, stating “All meeting of the governing board, except conference of working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners ... except that the governing board may exclude or restrict attendance at those meetings, or portions of meetings, dealing with ...” and enumerates the four topics contained within the statutes and at N.J.A.C. 5:26-8.12(e)1. CAI expressed the understanding that the statutes provide that where the board will be taking binding votes, there must be notice of the meeting and it must be open to attendance by all unit owners, but the language expressly excepts from both of those requirements board meetings that “deal with” the four enumerated topics.

CAI expressed the opinion that this rule appears to graft the terms of the Senator Byron M. Baer Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.), applicable to public bodies, onto the language in the Condominium Act and PREDFDA. CAI cited the language in the Senator Byron M. Baer Open Public Meetings Act that “a public body may exclude the public only from

that portion of a meeting at which the public body discusses any ...” and stated the understanding that the public body can retire to a non-public session exclusively for discussion. CAI argued that the phrase “deal with” in the Condominium Act and PREDFDA is much broader than the “discussion” language in the Senator Byron M. Baer Open Public Meetings Act and argued that it must be assumed that this permits the board to do more than discuss a matter. CAI again implied that the Department does not have the statutory authority to make this change without a change to the underlying statutes and urged the Department to remove this provision.

RESPONSE: The Department notes that the section cited by the commenter, N.J.S.A. 46:8B-13, explicitly states that no binding votes are to be taken in conference or working sessions. This is repeated at N.J.A.C. 5:26-8.12(a), which was taken directly from the former N.J.A.C. 5:20-1.1(a). The Department respectfully disagrees with the interpretation that the phrase “deals with” in the Condominium Act inherently includes voting because a separate and inapplicable law uses the phrase “discuss.” Because the Act explicitly states no binding votes are to be taken, interpreting the phrase “deals with” to include binding votes would create a conflict within the Act. Additionally, authority for this rulemaking is granted to the Department pursuant to N.J.S.A. 46:8B-13.1. The Department notes that in accordance with N.J.A.C. 5:26-8.12(e)2, if a matter requires a binding vote, the vote must be taken at a subsequent open meeting in a manner that does not disclose any confidences. This is in keeping with the understanding regarding matters that cannot be disclosed during an open meeting and avoids the concerns expressed by commenters that private information would be disclosed to association members during a meeting.

122. COMMENT: NJCOLA expressed the opinion that N.J.A.C. 5:26-8.12(f) conflicts with Robert's Rules of Order, which state that minutes do not become minutes until they have been approved. NJCOLA stated that the association should not be required to produce draft minutes, and this section should require minutes become available to members only after approved by the board at the next open meeting.

RESPONSE: The Department notes that meetings of the executive board are not bound by Robert's Rules of Order. The Department found that allowing draft minutes to be provided to the membership is appropriate for planned real estate developments; to allow boards to not make minutes available until after approval with no established timeframe would leave association members uninformed about the topics discussed and matters acted upon at a meeting. The Board has the right to make clear that the minutes are drafts, which are subject to correction by the Board at the meeting at which they are presented for adoption.

123. COMMENT: One commenter stated that "timely manner" needs to be defined and suggested that it be defined as "ten business days after the open meeting or election meeting."

RESPONSE: What constitutes "timely manner" may vary among different associations. This is more appropriately defined in the governing documents of the association. However, the Department notes that N.J.A.C. 5:26-8.12(f)5 does require that the minutes be made available before the next meeting.

124. COMMENT: One commenter suggested that all minutes must be maintained in hard copy for at least five years. The commenter also suggested that all minutes be available online and in hard copy in the association library for members to review.

RESPONSE: This change cannot be made upon adoption. Currently, record maintenance and retention are established in the governing documents of the association. Minutes should be maintained the same as all other association records. Should retention of minutes become an issue, the Department may undertake further review of Chapter 26.

125. COMMENT: CAI opposed the amendments at N.J.A.C. 5:26-8.12(f)6, which requires that when a meeting is recorded electronically, a written record shall still be taken, and association members shall have access to both the electronic and written records. CAI stated that PREDFDA contains no reference to electronic recordings or access to them and took issue with the Department's notice of proposal Summary, item 34, which stated that these provisions were included in the former N.J.A.C. 5:20, proposed for repeal. CAI argued that while some associations use a recording to facilitate the preparation of meeting minutes, associations typically erase the recording after the approval of the minutes and argued that the electronic recording is not minutes and there is no valid basis upon which the Department may require that they be retained. CAI recommended this section be updated to state "association members shall have access to the electronic recording if retained by the association."

RESPONSE: The Department notes that PREDFDA does not contain reference to electronic recordings of meetings because it was enacted in the 1970s; its absence in the Act does not mean that maintaining electronic recordings is prohibited. Item 34 in the Summary statement referred broadly to the requirements for minutes, which were included at N.J.A.C. 5:20, and further explained that the section was updating the text formerly in that section. These amendments were made to account for modern technology, as well as to what information must be included in the minutes. The Department respectfully disagrees with the determination that an electronic

recording cannot be considered as part of the minutes for the meeting; when an association chooses to record the meeting electronically, the recording serves as the basis for the minutes. Further, because it is an electronic record, the Department does not see this requirement as burdensome. If the recording exists, there should be no reason the association cannot maintain it instead of deleting it once the minutes are drafted.

Amendments to the Bylaws (N.J.A.C. 5:26-8.13)

126. COMMENT: One commenter recommended the Department add language regarding how association members can submit “resolutions to the bylaws” for board consideration.

127. COMMENT: Two commenters recommended that further language be added regarding “resolutions to the bylaws,” stating that “resolutions made by the board are to be submitted to the association members at least ten business days for solicitation for comment before or at the open meeting at which the board will vote on the resolution.”

RESPONSE TO COMMENTS 126 AND 127: This change cannot be made upon adoption. This matter is more appropriately addressed in the governing documents of the association. As a technical matter, there are no resolutions to bylaws; however, there are resolutions to make amendments to the bylaws. These rules establish the requirements for amending bylaws. If association members want the executive board to make a change to the bylaws, they may petition the board to do so. The Department notes that providing copies of drafted amendments to the bylaws 14 days prior to the meeting is already required; see N.J.A.C. 5:26-8.13(f)1.

128. COMMENT: One commenter stated that in California, bylaw amendments in planned real estate developments do not need to be recorded to be effective. The commenter states that at

N.J.A.C. 5:26-8.13, it is required that the bylaws be recorded with the county Clerk's Office in a timely manner. The commenter asked what is considered "timely." The commenter described a hypothetical scenario where members do not want the bylaw amendment to go into effect until another issue is addressed and asked if the bylaw amendment can be postponed from being recorded and still be considered to be submitted in a timely manner. The commenter asked why bylaws need to be recorded to be in effect.

RESPONSE: The Department follows the laws established in the State of New Jersey. The bylaws need to be recorded to be in effect because it ensures that the amendments have been finalized and that the membership of the association is informed of the changes. The Department does agree that "timely manner" may cause confusion; this term has been deleted from N.J.A.C. 5:26-8.13(b), but can be defined by the association in its governing documents. This will not allow associations to avoid filing because, as stated, the bylaws are not enforceable until they are filed, and the Department expects that associations will file documents in a reasonable timeframe as a matter of practice. Enforcing bylaws that have not been filed with the county would be a violation of this chapter.

129. COMMENT: CAI was opposed to the amendment at N.J.A.C. 5:26-8.13(b), which states that no amendments to the bylaws shall be effective until they are recorded in the same county Clerk's Office as the existing bylaws. CAI noted that cooperatives that are not subject to the "Co-Op Recording Act" (N.J.S.A. 46:8D-1 et seq.) should be exempt from the requirement to record the bylaws. CAI noted that it would make more sense to require those cooperatives to provide the buyer with a full set of all validly adopted bylaws and any amendments at the time of closing. CAI opined that the proposed regulation is contrary to the statute and that the governing

document recording requirements in the Condominium Act, PREDFDA, and the Co-Op Recording Act do not apply to cooperatives that predate the Co-Op Recording Act; such cooperatives are subject to the Corporations Act.

RESPONSE: The Department respectfully disagrees. The bylaws need to be recorded to be in effect to ensure that the amendments have been finalized and that the membership of the association has been informed of the changes and that the public at large, especially any prospective purchaser, is able to access the most up-to-date information about the association. The requirement is not burdensome in light of the benefit to owners and potential purchasers to have public access to the bylaws of an association. Providing a validly adopted set of bylaws at the time of closing would only provide unit owners with the bylaws in effect at the time of closing.

130. COMMENT: NJBA stated that it is unduly burdensome and costly to impose a requirement on existing communities that previously did not have an obligation to record their bylaws to now record their bylaws. NJBA noted that associations cannot legally record a document against real property without the owner and any lien holder specifically signing the recording instrument, and it is impractical to expect associations to gather all necessary signatures. NJBA recommended the following language at N.J.A.C. 5:26-8.13(b):

(b) No amendments to the bylaws shall be effective until they are recorded in the same county Clerk's Office as the existing bylaws.

1. The amendments to the bylaws shall be recorded in the same county Clerk's Office in a timely manner.

2. The association shall maintain a record of the filing, which shall be available to any owner, or designee, upon receipt.

RESPONSE: The Department respectfully disagrees with the commenter. Unlike documents that create planned real estate developments, bylaws are not legally reported against real property; they relate to the governance of the property. In addition, there is no need for owners to sign amendments to the bylaws. When the executive board and the members of the association pass an amendment to the bylaws, the amended bylaws are filed, and the amendment is enforceable.

131. COMMENT: One commenter suggested that any association document previously filed with the county that has subsequent updates must be filed with the county. Additionally, the commenter suggested that all covenants and bylaws be filed with the county.

RESPONSE: Bylaws are required to be filed with the county at N.J.A.C. 5:26-8.13; amendments to the master deed and declaration of covenants and restrictions are already required to be filed with the county.

132. COMMENT: One commenter recommended the Department clarify the provisions at N.J.A.C. 5:26-8.13(c) to read, "If the association has in its bylaws those amendments must obtain a 2/3 majority, that wording is no longer valid. Instead only a majority of unit owners (51 percent) will be needed for an amendment to be passed."

RESPONSE: The Department expects that the section is clear as written and should not cause confusion. The Department will monitor the effects of this rulemaking upon adoption, and if this provision is found to be confusing, the Department will revise the rule to clarify.

133. COMMENT: One commenter stated that the executive board of their association is proposing to amend their bylaws to require a quorum of 2/3 of the votes cast by households in good standing; the commenter was wondering if the regulations would allow such a change and if that quorum level is allowed.

RESPONSE: In accordance with N.J.A.C. 5:26-8.13(c), “if the bylaws provide for an amendment by more than a two-thirds majority, the association members may amend the bylaws by a vote of the majority of the total authorized votes in the association.” Thus, if there is a greater than 2/3 requirement for a vote, it reverts to 51 percent vote.

134. COMMENT: One commenter points out that N.J.A.C. 5:26-8.13(c) reflects the Election Law by stating that if the bylaws require an amendment by a majority vote exceeding a 2/3 majority, the members may amend the bylaws by an affirmative vote of a majority of the total authorized voters in the association. The commenter stated the opinion that this appears to be usurping legal contracts with no justification and questioned what the justification for this requirement is. The commenter questioned how this provision is fair, considering developments that have higher than 66 percent quorums will be reduced to greater than 50 percent, while developments between 51 and 65 percent will not be reduced. The commenter stated that the Department should have commented on the legislation to address the perceived lopsidedness. The commenter then provides a number of hypothetical votes in associations of different sizes to express the opinion that this rule is inequitable and stated that if the Act required changing the majority votes to not exceed a 2/3 majority, the requirement would be more equitable. The commenter then asked if existing bylaws requiring 66 percent approval can be amended to

require 70 percent approval without being subject to the requirement in this subsection. The commenter further questioned if bylaws reduced to greater than 50 percent can be increased to 66 percent or more by an approved bylaw amendment. The commenter suggests the “Department needs to discuss this matter with legislation makers.”

RESPONSE: Both the Election Law and this chapter contain this requirement because it is recognized that 66 percent is an unrealistic number for many associations. N.J.S.A. 45:22A-46d(2) and N.J.A.C. 5:26-8.13(c) supersede the bylaws and allow the membership to make amendments by a vote of the majority of the total authorized votes in the association.

135. COMMENT: CAI was concerned about N.J.A.C. 5:26-8.13(d), which states that the majority shall be determined based on association membership in good standing at the time of the vote. CAI endorsed the concept that the majority vote should be based on membership in good standing, but expressed that the relevant date is the record date and not the date of the meeting. CAI stated that otherwise, those not qualified as of the record date, but who became qualified thereafter, would enlarge the number against which the majority vote would be calculated, but would not be able to vote. This would make it more difficult to obtain the required majority vote.

RESPONSE: The Department respectfully disagrees with this interpretation of the section. The Department recognizes that number of voters needed to reach quorum would be a “floating” figure that will change based on how many members are in good standing. The figure will be final five days before the vote, and anyone qualified to vote by that date will be able to do so. No change to this section is being considered at this time.

136. COMMENT: CAI expressed the same concerns it had at Comment 66, this time regarding anonymous votes at N.J.A.C. 5:26-8.13(f)4.

RESPONSE: Pursuant to N.J.S.A. 45:22A-35, the Department is authorized to adopt rules to further the intent of the Act. The methods established at N.J.A.C. 5:26-8.9(h) further the intent of the Act by ensuring elections occur in a “fair and open manner,” which is the stated intent of the Election Law at N.J.S.A. 45:22A-45.1d. The Department recognizes that existing systems for counting ballots will need to be updated upon adoption of this rulemaking.

The association does not have to tally the ballots during the annual meeting if doing so would cause undue interference and distraction. A separate public time can be established by the association for the tallying of ballots.

CAI is correct in stating that electronic systems cannot accommodate being tallied in public and that tallying is a product of the computer program. Because electronic systems show the tally, this does not conflict with any of the requirements applicable to physical ballots.

The Department does not see a problem with balloting that occurs over multiple days with ballots being tallied after all votes are received. The Department notes that the requirement at N.J.A.C. 5:26-8.9(h)2 requires ballot tallying to occur publicly and for the ballots to be open to inspection. As long as the tallying is public, that is, open to attendance by membership for observation, it does not matter if the membership is actually present or not.

The Department respectfully disagrees that this requirement would be burdensome for large associations. CAI notes that tallying takes place over several days for such associations; this rule merely requires those tallying sessions be public.

Additionally, absentee ballots, proxies, and in-person ballots received prior to quorum being reached can be held and counted publicly with other returned ballots once a quorum is

present. The Department notes again that it does not matter if “those who originally attended” come again; the requirement is simply that the tallying be public. Members who want to attend are free to do so, but there is no requirement that specific members attend the tallying.

The Legislature found that “because of the significant influence community associations have over the lives of their residents, and because community associations are creatures of State law, it is unfair and runs contrary to American democratic values for these communities to be governed by trustees who are not elected in a fair and open matter” (N.J.S.A. 45:22A-45.1d). The “corporate nature” of associations is the reason public tallying is vital to ensuring fair and open elections.

Associations will have to implement procedures that maintain anonymity. The Department respectfully disagrees that this would be impractical in regard to proxies and absentee ballots, because a double envelope system, or any similar system, could be easily implemented. Double envelopes would also ensure provisional ballots are taken into consideration and anonymity is maintained at the time of tallying, allow associations to check the validity of the vote, and the inner envelope or the ballot could contain information regarding the weight of the vote. Additionally, the weighted ballots will be given by the association only to those entitled to the specific weighting. A person casting a weighted vote whose outer envelope shows is not in good standing will have the enclosed ballot rejected.

The Department respectfully disagrees that this rule should be reconsidered. CAI recommended language regarding recounts; this language is outside the scope of this rulemaking and would be more appropriately addressed in the governing documents of the association. Lastly, as stated above, the Department has authority under N.J.S.A. 45:22A-35 to “adopt ... regulations as are reasonably necessary for the enforcement and provisions of this Act.” The

Election Law is a part of PREDFDA; thus, the Department has rulemaking authority to ensure the intent of the Election Law is met.

137. COMMENT: CAI questioned the intent of the provisions at N.J.A.C. 5:26-8.13(g) for adjourning a meeting if an insufficient number of ballots are received. CAI stated that it was unclear why the Department considered this “a palliative to some ill not apparent,” and stated that there were instances where a 30-day adjournment would not be sought where there is urgency to make amendments to the bylaws. CAI stated the opinion that there is no advantage to the required 30-day adjournment and that the regulation micromanages the procedures of the association without a corresponding public benefit. CAI further noted that the regulation requires bylaws provide a percentage required to determine the period of adjournment and stated that most bylaws contain a provision stating that an action of the membership is deemed approved upon the affirmative vote of a majority of those persons present or by proxy at a meeting. Finally, CAI stated that it would assist associations if the rule instead stated that those present by absentee ballot could also count towards the required quorum.

RESPONSE: As CAI stated throughout its comments, it was involved in the drafting of the legislation and strongly supported its requirements. The 30-day adjournment period comes directly from P.L. 2017, c. 106 (at N.J.S.A. 45:22A-46d(2)(e)). The broad language cited above would be considered to cover the requirement that bylaws address the percentage of voters required to determine the period of adjournment; associations could also establish in their governing documents that those present by absentee ballot count towards the required quorum. This is supported by N.J.A.C. 5:26-8.13(g), which specifically cites ballots and proxies in reference to quorum.

138. COMMENT: Three commenters requested clarification on why 51 percent of the membership is needed to approve an amendment, but only 10 percent are needed to reject an amendment.

139. COMMENT: One commenter questioned the intent of N.J.A.C. 5:26-8.13(h), which establishes that an amendment is considered defeated when 10 percent of the association members in good standing vote to reject the amendment within 30 days of the mailing. The commenter asked what the justification for the 10 percent threshold is aside from being established by the Election Law. The commenter provided hypothetical scenarios for the application of this section. The commenter interpreted this to require that if an amendment is defeated by 10 percent of the members, it needs to be presented to the members and voted on by the members and receive a majority to pass. The commenter cites the California Corporations Code requirements allowing bylaws to be adopted except under certain situations and asked if this provision was intended to give the board power to amend the bylaws in certain situations so that the unnecessary cost and time of going through the voting process would be eliminated.

RESPONSE TO COMMENTS 138 AND 139: The Department notes N.J.A.C. 5:26-8.13(h) states, “an amendment ... shall be considered defeated if ... a ballot to reject the amendment was included and at least 10 percent of the association members in good standing voted to reject the amendment within 30 days of the mailing.” This establishes a circumstance and sets an amount of time where the 10 percent rejection applies. If the association does not include a ballot to reject the amendment, then the amendment will be discussed and voted on at an open meeting. If

the association does include a ballot to reject the amendment and 10 percent of the association members in good standing do not vote to reject the amendment, the amendment passes. This gives the association members power to reject amendments created by the executive board so that unnecessary cost and time of undertaking the voting process would be eliminated. The 51 percent majority vote applies to amendments to the bylaws brought forth by the association members. Pursuant to N.J.A.C. 5:26-8.13(j), executive boards can amend the bylaws without a vote to the extent necessary to render the bylaws consistent with State, Federal, or local law.

140. COMMENT: NJBA stated that N.J.A.C. 5:26-8.13(h) is drafted in a manner that “seems to imply that any amendment to the bylaws is considered defeated when the association board provides notice to the association members of the proposed amendment with a ballot to reject the amendment and at least ten percent of the members in good standing vote to reject the amendment. There is a reference in this section to ‘amendments proposed by the associations board’, which is presumably meant to limit this requirement to amendments proposed by the executive board pursuant to N.J.S.A. 45:22A-45d(5) ... Moreover, this provision seems to imply that executive board amendments that are necessary to comply with State, Federal or local law are subject to ability of the members to reject the amendment if at least 10 percent of the members in good standing vote to reject the amendment ...”

“N.J.A.C. 5:26-8.13(j), which also deals with executive board amendments, is separated by N.J.A.C. 5:26-8.13(i), which is unrelated and seems repetitive of the recording requirements in N.J.A.C. 5:26-8.13(b). Combining N.J.A.C. 5:26-8.13(h) and (j) would make these provisions more understandable. In addition, N.J.A.C. 5:26-8.13(j) purports to limit the rights of an executive board to amend the bylaws without a vote of the association members only to the

extend necessary to render the bylaws consistent with State, Federal, or local law. N.J.S.A. 45:22A-46d(5)(b) clearly provides that an executive board can amend the bylaws for any purpose, so long as at least 10 percent of the members of the association in good standing to not vote to reject it.” NJBA suggested that the proposed regulations deviated from the statute and recommended the following language:

(h) An executive board shall not amend the bylaws of an association without a vote of the association members as required by the bylaws or without a vote of the association members pursuant to N.J.A.C. 5:26-8.13(c) through (g), if applicable, except an executive board may amend the bylaws under the following circumstances:

1. To the extent necessary to render the bylaws consistent with State, Federal, or local law. An amendment of the bylaws by the executive board to comply with State, Federal, or local laws shall not be required to comply with subsection 2 below; or

2. After providing notice to all association members of the proposed amendment, which notice shall include a ballot to reject the proposed amendment and a notice that the amendment will fail only if at least 10 percent of the association members in good standing vote to reject the amendment. An amendment proposed by the executive board shall be considered defeated if at least 10 percent of the association members in good standing voted to reject the amendment within 30 days of the mailing. If less than 20 percent of the association members in good standing voted to reject the amendment within 30 days of the mailing, the amendment shall be considered approved.

RESPONSE: The Department respectfully disagrees with the concerns and changes. N.J.A.C. 5:26-8.13(h) is not an implication; it is a requirement. The requirement mirrors the Election Law at N.J.S.A. 45:22A-46d(5)(b). The Department disagrees that this section implies that

amendments to comply with State, Federal, or local laws are subject to rejection; this section clearly states at N.J.A.C. 5:26-8.13(j) that an executive board can amend the bylaws without a vote to the extent necessary to render the bylaws consistent with State, Federal, or local law. Because these amendments are not up for vote, there would be no notice requirement allowing a 10 percent rejection. The Election Act specifically requires that amendments not solely related to making the bylaws consistent with State, Federal, or local law be voted on at N.J.S.A. 45:22A46d(5), “an executive board shall not amend the bylaws of an association without a vote of the association members open to all association members.” In addition, all of the requirements at N.J.A.C. 5:26-8.13 deal with executive board amendments, not only subsections (h) and (j).

Complaints and Penalties (N.J.A.C. 5:26-8.14)

141. COMMENT: One commenter stated the opinion that violations must be handled in the Attorney General’s Office because that office has the lawyers and the expertise to prosecute violators in court.

RESPONSE: Pursuant to N.J.S.A. 45:22A-24, the Department is charged with administering the Act; this includes violations and enforcement. As stated in the Response to Comment 2, the Bureau of Homeowner Protection currently administers other programs related to owners’ rights. However, it is possible that some cases may be referred to the Attorney General’s Office depending on the nature and severity of the violation, as well as the legal remedies sought by the Department.

142. COMMENT: One commenter expressed the belief that politicians have oversight, whereas condominium boards have no effective oversight or regulations that are enforceable. The commenter pointed out that the proposed regulations are “littered with loopholes that will be exploited by HOA boards.” The commenter did not specify what these loopholes were. The commenter further stated that without defined consequences and sufficient penalties, nothing will compel associations to comply with the law.

RESPONSE: The Association Regulation Unit in the Bureau of Homeowner Protection will be responsible for oversight of common interest community boards regarding this chapter. The Department finds that this chapter provides clear, thorough rules for fair elections in common interest communities while still allowing for flexibility in self-governance among executive boards.

143. COMMENT: One commenter suggested that the definition of alternative dispute resolution be revised. The commenter stated that ADR should not be run by any board members, friends, relatives, coworkers, or neighbors of board members, association lawyers, property management companies, or their employees. The commenter also stated that ADR should only be used as a last resort.

144. COMMENT: One commenter stated that only binding arbitration is acceptable.

RESPONSE TO COMMENTS 143 AND 144: Concerns regarding alternative dispute resolution are outside the scope of this rulemaking. Changes to the definition are not being considered at this time.

145. COMMENT: Two commenters recommended that non-election complaints should be treated in the same way as election complaints regarding time limits. One of those commenters recommended the Department include a timeframe in the regulations that it will contact the complainant within five business days of receipt as to the action taken in regard to the complaint.

RESPONSE: The Department may undertake a future rule review to codify its policies for non-election complaints in a future rulemaking should it determine such rulemaking to be necessary. The Department is not setting a timeframe for response to any complaints, because each one will be factually different and will involve different levels of review of supporting documentation.

146. COMMENT: One commenter asked whether there are other areas for which unit owners can submit complaints to the Department, including budget matters and alternative dispute resolution and suggested the Department revise the Summary statement based on the comments received.

RESPONSE: There are other areas handled by the Bureau's Association Regulation Unit; these areas are addressed online at <https://www.nj.gov/dca/divisions/codes/offices/ari.html>. As stated in the Response to Comment 148, the Department intends to codify the procedures for these complaints in a future rulemaking. When an association is still controlled by the developer, complaints should be submitted pursuant to N.J.A.C. 5:26-11.2. Finally, the Summary statement is final upon publication and cannot be changed.

147. COMMENT: One commenter expressed the opinion that a time frame should be provided to the complainant.

RESPONSE: The Department is not setting a timeframe for response to any complaints, because each one will be factually different and will involve different levels of review of supporting documentation.

148. COMMENT: One commenter asked who is considered a court of competent jurisdiction to petition to if a member believes an executive board has violated the rules.

RESPONSE: “Court of competent jurisdiction” is a term of art commonly understood as any court that has jurisdiction to hear a complaint; these complaints would be a matter for action in accordance with court rules including the New Jersey Rules of Court and the Federal Rules of Civil Procedure.

149. COMMENT: One commenter recommended that the penalties and fines should be listed on the Department’s website. The commenter also suggested that the penalties and fines must be given by the Department for any board member, lawyer, or anyone employed by the property management company who violates the rules. The commenter stated that alternative dispute resolution does not work in these scenarios and should be a last resort.

RESPONSE: PREDFDA and the rules at N.J.A.C. 5:26-8.14 and 11 clearly define the Bureau of Homeowner Protection’s enforcement authority. Copies of the Act and the rules are available on the Division’s website for review at

https://www.nj.gov/dca/divisions/codes/codreg/admin_codes_statutes.html.

150. COMMENT: One commenter requested clarification on what the cash amounts of the fines are and what other penalties can be enacted. The commenter suggested that fines must be substantial and total \$500.00-\$1,000 a week.

RESPONSE: The Department notes that the purpose of these rules is to gain compliance. If a monetary penalty is determined to be necessary to gain compliance, the amount of the fine will depend on the seriousness of the violation.

151. COMMENT: One commenter stated that in addition to the penalties and fines at N.J.A.C. 5:26-8.14, professional penalties should be enacted, including lawyers being brought before the BAR and termination of licensure for management companies that have advised the executive board to violate the regulations. The commenter also stated that fines and penalties should be levied against the individuals, management companies, and association lawyers who violate the regulations and noted that levying the fines against the association would mean that penalties are assessed against those the executive board is supposed to serve.

RESPONSE: The penalties referenced by the commenter are outside the Department's jurisdiction. The Department notes that individuals have other avenues available beyond this chapter; for example, N.J.A.C. 5:26-8.14(d) serves as a reminder that unit owners may petition a court of competent jurisdiction if they believe that the association is acting contrary to this chapter or any applicable law. The Department further notes that penalty actions on attorneys are the jurisdiction of the New Jersey Supreme Court.

152. COMMENT: One commenter recommended that board members found to be in violation should have to resign and should be prevented from holding office again. The commenter also

suggested that new elections should be required in communities where the board was found to have violated the regulations and that such elections be overseen by the Department.

RESPONSE: The Department respectfully disagrees with these suggestions. Board members who are found to be in violation, but who come into compliance with the rules, should not be prevented from holding office again. In addition, should the Department order a new election be held in compliance with the rules, there is no reason for the Department to oversee that election. Doing so would intrude on the function of the association. The enforcement actions available to the Department should discourage willful, repeated violations of the chapter. Who serves on the board is a matter for the membership of the association to decide during the executive board elections.

153. COMMENT: One commenter requested that a list of board members, property management companies, and condominium association lawyers who violate the regulations should be posted on a “New Jersey offender list” with a description of the violation and penalty enacted. The commenter also suggested the list of descriptions of penalties and amount of fines should be posted on a “State violation list.” The commenter requested that the name of the Department and contact information of where to report a violation should be posted on a “New Jersey Condominium Violator Website.”

RESPONSE: This is beyond the scope of this rulemaking. Though the Department intends to include information on its website regarding the content and application of this rulemaking, the Department respectfully disagrees with including the specifics requested by the commenter.

154. COMMENT: One commenter stated that penalties should be noted and include the board and any management companies or lawyers who knowingly took part in any violation. The commenter suggested that if monetary penalties are given, money should come from personal accounts and not association funds.

155. COMMENT: CIHC commented that N.J.A.C. 5:26-8.14 should specifically state that the person or persons directly responsible for the violation of the regulations shall be held accountable for a penalty. This would make a board member personally liable for knowingly violating the regulations. CIHC commented that the monetary penalty should not be paid using association funds. Further, CIHC commented that the penalty should be of a monetary nature or community service hours witnessed by an impartial party,

RESPONSE TO COMMENTS 154 AND 155: The ability to issue penalties and levy and collect fines is necessary for the enforcement of the Act and this chapter. The Department will take into account what method of enforcement is necessary as the result of particular violations, including corrections for future elections, ordering a new election be held, or monetary penalties for egregious violations. The Department does not enforce its rules by requiring community service.

156. COMMENT: CAI made a number of comments concerning the penalty provisions at N.J.A.C. 5:26-8.14. Multiple commenters echoed its concerns. CAI noted that when PREDFDA was first adopted, it was limited to the issue of developer registration and authorized the Department to impose fines in connection with violations of the Act. CAI further noted that subsequent amendments to the Act did not specifically state that the requirements were subject to the fines established by the Act and stated that no fining authority was added to P.L. 2017, c.

106.

CAI stated its opinion that there is no statutory authority for the Department to impose fines or other penalties on associations or members of the board and that these regulations conflate the provisions applicable to developers and those involved in the operation of campground facilities with those involved in the operation of associations. CAI stated that board members and associations “should not be subject to fines, which under applicable law may range from \$50 to \$5,000.” CAI urged the Department to remove this provision.

RESPONSE: The Department notes that N.J.S.A. 45:22A-24 states that the Act shall be administered by the Department, meaning that when there is a change to the Act, the Department is charged with implementing and enforcing such change. Further, N.J.S.A. 45:22A-38 states “any person who violates any provision of this act or a rule adopted under it ... shall be fined ...” and allows the Commissioner to levy and collect penalties. Because the Election Law is part of PREDFDA and the rules are adopted under PREDFDA, the Department does have the statutory authority to levy and collect penalties. Although penalties are commonly used to obtain compliance with the law, the Bureau has been judicious in imposing penalties because it seeks voluntary compliance. However, if an association refuses to comply with the law, penalties may be necessary. Multiple commenters stated that a fine of thousands of dollars would be impractical for accidental violations or simple mistakes; the Department agrees. Fines are not the only available avenue of enforcement available to the Department.

157. COMMENT: One commenter stated that without effective regulation and penalties, owners in common interest communities need to spend thousands of dollars to take their association’s executive boards to court. The commenter stated that effective penalties are needed to motivate the executive boards to comply with their bylaws and the Election Law. The

commenter stated that having the Department levy and collect fines is a necessity for associations to follow laws. The commenter stated that without sufficient consequences, owners will continue to be victimized by illegal actions. The commenter further expressed support for a schedule of fines, exponentially increasing for repeat offenses, as well as the Department having the authority to permanently remove board members and call on the community for special elections to replace violators. The commenter stated that without these penalties, the Election Law and the proposed regulations will be ineffective.

RESPONSE: The Department agrees that the ability to issue penalties and levy and collect fines is necessary for the enforcement of the Act and this chapter. The Department will take into account what method of enforcement is necessary as the result of particular violations, including corrections for future elections, ordering a new election be held, or monetary penalties for egregious violations.

158. COMMENT: NJBA argued that the imposition of monetary penalties set forth at N.J.A.C. 5:26-8.14(e) against associations is not supported by the applicable statutory provisions under PREDFDA, which provisions contemplate the imposition of monetary penalties against the applicants or developers subject to the registration requirements of N.J.S.A. 45:22A-21, and owners and proprietary lessees in proprietary campground facilities (N.J.S.A. 52:22A-51). NJBA further argued that the provisions are unduly burdensome for the associations that are non-profit organizations, as well as the members of the associations who will be forced to collectively pay for said penalties and would have a chilling effect on the ability of associations to solicit volunteers to run for the non-paying executive board positions. NJBA suggested that the Department instead seek compliance of associations only through the mechanisms of cease and

desist orders, injunctive relief/appointment of a receiver, and/or administrative law hearings, as contemplated by N.J.S.A. 45:22A-33 and 35(b). NJBA recommended the following language:

The Department may issue penalties as set forth at N.J.A.C. 5:26-11 against associations as follows:

1. For associations that are controlled by unit owners other than the developer, the Department may take actions as set forth in N.J.S.A. 45:22A-33 and 35(b) against the executive boards of noncompliance associations.

2. In addition to the penalties listed above, for associations that are controlled by the developer, which are non-compliant and not subject to a settlement agreement with the Department to address said compliance issues, the Department may issue a revocation of registration pursuant to N.J.A.C. 5:26-2.11.

RESPONSE: The Department respectfully disagrees that there is no statutory basis for penalties. The Bureau is charged with administration of the Act pursuant to N.J.S.A. 45:22A-24. N.J.S.A. 45:22A-38 states “any person who violates any provision of this act or of a rule adopted under it or an any person who in an application for registration filed for registration makes any untrue statement of material fact or omits to state a material fact shall be fined.” This section purposely mentions registration violations or any other provision of the law or Act; anything within the Election Law is a part of the Act. As stated in the Response to Comment 157, penalties are not the sole avenue of enforcement available to the Department. They will be imposed only for egregious violations of this chapter. The purpose of this section is to list the enforcement options available to the Department, so that Code users do not have to refer to the statute to find this information. Penalties have been an available means of enforcement for the Bureau for almost 25 years with no effect on those desiring to serve on an executive board.

Federal Standards Statement

No Federal standards analysis is required for the adopted amendments because the amendments and new rules are not being adopted in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

Full text of the adoption follows (additions to the proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

SUBCHAPTER 1. GENERAL PROVISIONS

5:26-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

...

[“Master association” means a type of association in a development that is made up of representatives from other associations developed and established to cover specific areas within that development.]

...

“Umbrella ***or master*** association” means a type of association that is made up of representatives across multiple associations established for the governance, management, and oversight of the common elements and facilities of multiple developments.

...

5:26-8.4 Administration and control

(a)-(b) (No change from proposal.)

[(a)] *(c)* (No change in text.)

[(b)] *(d)* Notwithstanding *[(a)1]* *(c)1*, 2*,* 3 above, the developer may retain one member of the executive board so long as there are any units remaining unsold in the regular course of business.

Recodify existing (c)-(h) as (e)-(j) (No change in text.)

5:26-8.9 Executive board elections

(a) – (d) (No change from proposal.)

(e) Each unit shall be allocated either one vote or an equal number of votes per unit, unless the *[bylaws]* ***governing documents*** of the association allow for voting proportional to a unit's value or size. These allocations shall be consistent such that all owners of units of the same value or size shall have the same number of votes.

(f) (No change from proposal.)

(g) The association shall not prohibit*, **limit, impede, or restrict*** members in good standing, proxy holders, individuals acting pursuant to a valid power of attorney, or voting eligible tenants, as applicable, from voting for any candidate in an executive board election.

1.-2. (No change from proposal.)

(h)-(l) (No change from proposal.)

5:26-8.10 Representation

(a) The association bylaws may provide for representation on the executive board for owners with different unit types. Such owners shall be afforded the right to nominate members of the executive board to ensure representation of their unit types on the board.

1. (No change from proposal.)

2. When affordable units*, **in accordance with the New Jersey Fair Housing Act, N.J.S.A. 52:27D-304,*** represent a minority of units in the development, the bylaws shall reserve a seat or seats on the executive board for election by owners of affordable units.

3. (No change from proposal.)

(b)-(c) (No change from proposal.)

5:26-8.11 Appointments, removals, and executive board vacancies

(a) – (c) (No change from proposal.)

(d) Association members may initiate removal of a board member ***who was elected by the unit owners*** by submitting to the board a petition signed by 51 percent of association members for removal of that board member.

1. – 2. (No change from proposal.)

(e) (No change from proposal.)

5:26-8.12 Open meetings

(a) – (b) (No change from proposal.)

(c) In addition to the posted open meeting schedule, adequate notice of at least seven days prior to any such meeting shall be given to all association members and voting eligible tenants, as applicable.

1. – 2. (No change from proposal.)

3. The notice shall include the following details:

i. (No change from proposal.)

ii. Agenda items ***to the extent known***, which shall include items for discussion, items for action, and reoccurring items, such as passage of a budget.

4. (No change from proposal.)

(d) – (h) (No change from proposal.)