

## Enactment of Department of Economic and Community Development Rule 300

### **BASIS STATEMENT (5 M.R.S. § 8052(5)):**

The basis for the proposed rule is to establish rules for the Dirigo Business Incentives Program created by PL 2023, c. 412, Part J. The rule provides additional detail to definitions of eligible sectors and qualified business activity and specifies the process of applying for a letter of certification in order to clarify definitions and process for participants and agency staff.

### **DISCUSSION OF COMMENTS RECEIVED AND RATIONALE FOR ADOPTING OR FAILING TO ADOPT SUGGESTED CHANGES (5 M.R.S. § 8052(5)):**

The Maine Department of Economic and Community Development opened the public comment period for this rule on January 24, 2024. Written comments were accepted through February 23, 2024. This document summarizes the comments that were received during the comment period, the Department's responses, and a list of changes to the final rule.

#### **Commenters**

1. Melissa LaCasse, CEO, Tanbark Molded Fiber Products
2. Emily Donaldson, Director of Business Development, Springworks Farm
3. Sandra Yang, Senior Associate, Site Selection and Incentives Advisory
4. Dana Doran, Executive Director, Professional Logging Contractors of the Northeast
5. Leo Waterston, Program Director, FocusMaine
6. Malinda Gagnon, CEO, Uprise Partners
7. Linda Caprara, Vice President of Advocacy, Maine State Chamber of Commerce
8. Peter DelGreco, President & CEO, Maine & Co.

#### **Commenter 1:**

1. Commenter 1 expressed concern that section 2(2)(C)(c) implied that businesses previously certified for the Pine Tree Development Zone program were not eligible to apply for the Dirigo Business Incentives Program. They requested that section 2(2)(C)(c) be updated to read, "Is not certified under the Pine Tree Development Zone or Employment Tax Increment Financing programs unless the business has withdrawn from such programs prior to the date the business property is placed in service."

Response: The Department will update the identified language to clarify that prior participants in the Pine Tree Development Zone and Employment Tax Increment Financing programs are eligible to participate in the Dirigo Business Incentives Program as long as they are no longer certified at the time of application. Under 36 M.R.S. §§ 5219-AAA(3)(C), a business cannot be certified for Dirigo if they are still certified under PTDZ or ETIF.

### **Commenter 2:**

1. Commenter 2 asked if equipment purchased and assembled on-site would qualify if it is used in an eligible sector. This question was prompted by the sentence in section 1(3) of the rule that states, “In general, on-site construction and assembly of an asset is considered part of the construction industry and is not an eligible sector, while the off-site production of an asset may be considered manufacturing and is an eligible sector.”

Response: Property, including equipment, assembled on-site for use in a qualified business activity can be considered eligible business property. The distinction is that the assembly of property itself is not an eligible sector that can be the basis for a qualified business activity; the property must then be used for a qualified business activity, such as in agriculture, and it is the certified agriculture business that may receive associated credits, not the construction company.

### **Commenter 3:**

1. Commenter 3 expressed concern that a facility constructed by a developer and then leased to an operating company that is in an eligible sector would not be considered capital investment eligible for a credit. Because construction is not an eligible sector, the developer is not eligible for the credit, and because lease payments are not considered capital investment, the operating company in the eligible sector cannot claim a credit for those payments, resulting in no benefits for the facility investment. The commenter stated that, “Unless lease payments become a qualified business expenditure, it will be hard for long-distance freight companies to derive any benefit from the program the way it’s written right now.”

Response: The Department may not amend statutory definitions, including those of “eligible business property”, “eligible capital investment”, or “eligible sector”, via rulemaking. Lease payments do not meet the definition of “eligible capital investment” in statute, as the taxpayer would not be purchasing the property in question.

### **Commenter 4:**

1. Commenter 4 asked for additional clarity on what trainings will be considered meeting the definition of a “qualified employee training program”. Specifically, they asked if a training provided by a trade association or on-the-job training provided by an employer would be eligible.

Response: The Department intends to release additional guidance on programs that may constitute a qualified employee training program. The Department did not further define or list eligible programs in this rule in the interest of maintaining responsiveness as training offerings change. At the time of writing, trade association training or on-the-job training may be covered by participation in programs such as the Workforce Development Compact or Eastern Maine Development Corporation’s formal on-the-job training programming.

2. Commenter 4 asked: “with respect to timber harvesting and trucking operations, does a capital investment which qualifies as a business activity include the trade or replacement of equipment or does the equipment need to be in addition to what is already owned?”

Response: The program statute does not require capital investment to be additional property to be eligible. Replacement property may be eligible as well. This rule does not alter that eligibility.

3. Commenter 4 asked: “Does a new application need to be filed every time a piece of equipment is purchased?”

Response: No, a Letter of Certification, once issued, will be valid for five years and cover associated qualified business activity for that period.

4. Commenter 4 asked: “Regarding new equipment, can the business train an existing employee or are they required to hire a new employee to take advantage of the tax credit for training?”

Response: Qualified employee training may include both new and/or existing employees. Training may be independent of eligible capital investment.

5. Commenter 4 expressed concern that temporary seasonal layoffs in certain industries means the eligibility requirement stated in section 2(2)(C)(e), that a business must not have undergone a layoff within the past two tax years, could prevent otherwise eligible businesses from participating in the program.

Response: “Layoff” is defined in the Dirigo Business Incentives Program statute as: “a reduction in workforce at a qualified business with 20 or more persons employed during any one of the preceding 4 quarters that results in an employment loss for at least 2 consecutive months within the same tax year of at least 20% of the qualified business's employees in this State. ‘Layoff’ does not mean a reduction in workforce due to a catastrophic event.” The requirement that a business may not be certified for the program if it “has undergone a layoff within the past 2 tax years” is in statute and cannot be adjusted by rule. The Department added a reference to the statutory definition of “layoff” into the rule for clarification.

#### **Commenter 5:**

1. Commenter 5 expressed support for the program and appreciation that pharmaceutical and medicine manufacturing, medical device manufacturing, medical equipment and supplies manufacturing, and testing laboratories are covered by the eligible sector definition.

#### **Commenter 6:**

1. Commenter 6 stated that they would appreciate Information Technology, Cybersecurity, and Software Engineering services being included in the program.

Response: The stated industries are covered by included NAICS codes 5132 and 5415.

### **Commenter 7:**

1. Commenter 7 stated that the language in section 2(2)(C)(e), that a business must not have undergone a layoff within the past two tax years, may prevent the participation of businesses that are shutting down a portion of their business that is no longer profitable in order to invest in new technology for the business to grow.

Response: The requirement that a business may not be certified for the program if it “has undergone a layoff within the past 2 tax years” is in statute and cannot be adjusted by rule. “Layoff” is defined in the Dirigo Business Incentives Program statute as: “a reduction in workforce at a qualified business with 20 or more persons employed during any one of the preceding 4 quarters that results in an employment loss for at least 2 consecutive months within the same tax year of at least 20% of the qualified business's employees in this State. ‘Layoff’ does not mean a reduction in workforce due to a catastrophic event.” If a business meets that definition of layoff in the course of pivoting their business operations to a new focus, they would not be eligible for participation in the program by statute. The Department added a reference to the statutory definition of “layoff” into the rule for clarification.

### **Commenter 8:**

1. Commenter 8 expressed that the application process should consider that many variables can change between the time that a business makes plans for a capital expenditure to the time that they actually carry out the expenditure. The commenter stated, “Asking for that information too early in the process can create inaccurate expectations for both the State and the company applying to the programs.”

Response: The Department agrees that specific investment and training numbers are likely to change between the time a business applies for certification and the time that they perform the investment or training. It will be important to communicate that program benefits are based on actual performance and not projected activity. However, it is necessary for the Department to request this information at the time of application to ensure that the applying business will meet the statutory requirements of what constitutes eligible capital investment and qualified employee training.

2. Commenter 8 expressed that the definition of “layoff” as used as part of the eligibility criteria in section 2(2)(C)(e) will be important to the success of the program, as there are many scenarios in which a business may reduce its employment.

Response: “Layoff” is defined in the Dirigo Business Incentives Program statute as: “a reduction in workforce at a qualified business with 20 or more persons employed during any one of the preceding 4 quarters that results in an employment loss for at least 2 consecutive months within the same tax year of at least 20% of the qualified business's employees in this State. ‘Layoff’ does not mean a reduction in workforce due to a catastrophic event.” The Department added a reference to the statutory definition of “layoff” into the rule for clarification.

3. Commenter 8 suggested that “county” be added to “municipality” in section 2(2)(A)(b) as an option for a business indicating where their project will occur if they do not yet have a specific address selected.

Response: The Department agrees with this suggestion and has adjusted the rule accordingly.

#### **List of Changes to the Final Rule**

1. The Department added the phrase “or county” to 2(2)(A)(b).
2. The Department added the word “currently” to section 2(2)(C)(c) and (d)
3. The Department added the phrase “as defined in 36 M.R.S. §§ 5219-AAA(1)(I)” to section 2(2)(C)(e) to clarify the source of the definition of the word “layoff”.