

DISTRICT OF COLUMBIA HOUSING AUTHORITY**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Board of Commissioners of District of Columbia Housing Authority ("DCHA") hereby gives notice of the adoption on an emergency basis of a new chapter of Title 14 DCMR, "Chapter 83: Rent and Housing Assistance Payments." The chapter governs the Rent and Housing Assistance Payments to owners in the DCHA's Housing Choice Voucher Program.

The emergency adoption of these regulations will allow DCHA to move ahead with critical efficiency measures as well as critically needed provisions so that Housing Choice Voucher Program landlord requests for rent increases can be processed with increases capped at the Annual Adjustment Factor set by HUD and housing assistance payments be capped at 100% of fair market rents.

The Board of Commissioners of the DCHA also gives notice of intent to take final rulemaking action to adopt these amendments in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

The emergency rule took effect on date of adoption, May 11, 2005 and will expire on September 8, 2005, or upon publication of a Notice of Final Rulemaking in the Register, whichever occurs first.

Amendment: Chapter 83, Rent and Housing Assistance Payments, a new chapter in Title 14 of the DCMR, is to read as follows:

**CHAPTER 83
RENT AND HOUSING ASSISTANCE PAYMENTS**

8300 PAYMENT STANDARD AMOUNT

- 8300.1 Fair Market Rents. HUD publishes annually the fair market rents for each market area in the United States.
- (a) DCHA uses the fair market rent published by HUD annually for the Washington, D.C. Metropolitan Statistical Area.
 - (b) The Fair Market Rent (FMR) is set by HUD for the District at the 50th percentile rent to provide a broad range of housing opportunities throughout the District in order to assist in achieving deconcentration objectives.

8300.2 Payment Standard.

- (a) The Payment Standard is the percentage of the Fair Market Rents, as set by HUD, used to calculate the maximum housing assistance payments available at any given time.
- (b) Under HUD's rules, the Commission may set the Payment Standard for each size of unit at any level between 90 percent and 110 percent of the Fair Market Rent, or up to 120 percent as permitted under 8300.2(d) below.
- (c) Within the basic range for Payment Standards as specified in 8300.2(b) above, a separate payment standard may be set for a designated part of the FMR area or for a particular size of units.
- (d) The Payment Standard is 100% for all size units in all areas of the District of Columbia.

8300.3 Payment Standard Schedule. After publication by HUD of the Fair Market Rent, DCHA annually adopts, by rulemaking pursuant to the D.C. Administrative Procedure Act, D.C. Code § 2-501 et seq., the Payment Standard Schedule for the upcoming year. The Payment Standard Schedule shall apply to all housing assistance payment contracts entered into after the date of the adoption of any such regulation modifying the Payment Standard.

8300.4 HUD Discretion.

- (a) Payment Standard Schedules are subject to review by HUD and HUD, at its discretion, may modify payment standard amounts for any unit size on the DCHA Payment Standard Schedule.
- (b) Exception Payment Standards between 110 percent and 120 percent may be approved by the HUD Field Office for an exception area for all size units, or all units of particular sizes in an exception area.

8301 REASONABLE RENT TO OWNER

8301.1 Lease Approval. DCHA may not approve a lease unless it determines that the initial gross rent does not exceed the LESSER OF:

- (a) The reasonable rent as determined by DCHA in accordance with this Chapter; and

- (b) Forty percent (40%) of the participant's adjusted monthly income.

8301.2 When Determinations Required. DCHA is required to make a determination of rent reasonableness upon any of the following eventualities:

- (a) At initial lease up, or lease up upon transfer;
- (b) Before any increase in rent to Owner is approved;
- (c) If sixty (60) days or more before the contract anniversary date there is a 5% decrease in the published FMR for the unit size as compared to the previous FMR;
- (d) At the election of DCHA;
- (e) At the discretion of the US Department of Housing and Urban Development.

8301.3 Reasonable Rent Determination. The reasonable rent determination is undertaken on a case-by-case basis. At any time a rent determination is undertaken in accordance with 8301.2 above, the following process is used for determining whether the gross rent proposed to be charged by the Owner is reasonable.

- (a) DCHA when determining reasonable rent always considers items (i) through (ix) and may consider items (x) and (xi) at its option as follows:
 - (i) Square Feet
 - (ii) Number of Bedrooms
 - (iii) Maintenance Services provided by the lease
 - (iv) Location
 - (v) Unit Type
 - (vi) Quality
 - (vii) Date Built
 - (viii) Amenities included in the lease
 - (ix) Utilities if provided by Owner
 - (x) Number of Bathrooms
 - (xi) Other Services provided under the lease
- (b) DCHA maintains an automated database which includes data on comparable unassisted units for use by staff in making rent reasonableness determinations.
- (c) DCHA does not establish minimum base rent amounts.

- (e) DCHA shall use at least two comparable unassisted units for each rent determination with all comparables based on the rent that the unit would command if leased in the current market within the last twelve (12) months.
- (f) The data for other unassisted units may be gathered from newspapers, realtors, professional associations, inquiries of owners, market surveys, and other available sources.
- (g) The market areas for rent reasonableness are indicated by census tract, within the District of Columbia and the determination of reasonable rent is made by comparable rents on similar units within the same or nearby census tracts.

8301.4 Owner Information. The Owner is required to provide DCHA with information if requested on rents charged by the owner for other units owned by the Owner either at the same premises or elsewhere in the District of Columbia.

8301.5 Owner Certification. Acceptance of each monthly housing assistance payment is a certification by the Owner that the gross rent to the owner is not more than rent charged by the owner for comparable unassisted units in the premises for multi-unit premises, or in the same market area for single unit premises.

8302 HOUSING ASSISTANCE PAYMENTS FOR ASSISTED HOUSEHOLDS

8302.1 Applicable Payment Standard. The Payment Standard, except in the case of enhanced vouchers, for each Household is the LOWER of:

- (a) The payment standard for the household unit size and composition as set under Section 8300.2 above; OR
- (b) The payment standard amount for the size of the dwelling unit rented by the household.

8302.2 Amount of Monthly Housing Assistance Payment. DHCA shall pay a Monthly Housing Assistance Payment to the Owner on behalf of a participating Household that is equal to the payment standard for the Household as determined under 8302.1 above, minus the Total Tenant Payment notwithstanding the amount of the gross rent and the household's Family Share as determined under 8303 below.

8302.3 Decreases in Payment Standards During the HAP Contract. If the amount of the Payment Standard Schedule for the Unit Size decreases during the

term of a HAP contract, DCHA shall determine the Total Tenant Payment and Monthly Housing Assistance Payment for the household as follows:

- (a) At the second annual reexamination of the Household following the effective date of the decrease in the Payment Standard Schedule amount, DCHA shall redetermine the Total Tenant Payment as provided under 8302.1 above, using the lower Payment Standard.
- (b) DCHA shall determine whether the Monthly Housing Assistance Payment amount using the prior (higher) Payment Standard, or the monthly Housing assistance Payment amount using the decreased Payment Standard provides a lower or higher amount than the prior monthly Housing Assistance Amount (a higher amount being possible due to changes in household or unit size during the preceding examination period as required under 8302.5 below).
- (c) If the Monthly Housing Assistance Amount is increased before the implementation of the decrease, then the provisions governing increases in Section 8302.4 below shall apply.

8302.4 Increases in Payment Standards during the HAP Contract. If the amount on the Payment Standard Schedule for the Unit Size increases during the term of a HAP contract, then:

- (a) The increased Payment Standard shall be used as provided under 8302.1 above, to calculate the Monthly Housing Assistance Payment; and
- (b) The increase shall go in to effect as of the first annual reexamination on or after the effective date of the increase in the Payment Standard.

8302.5 Changes in Family Size and Moves. Notwithstanding the provisions in 8302.2 and 8302.3 above,

- (a) The Payment Standard in effect at the time there is any increase or decrease in household size during the HAP contract term shall be used to determine the Total Tenant Payment and monthly Housing Assistance Payment for the household beginning at the first annual reexamination following the change in household size;
- (b) If a family moves to a new unit, the Payment Standard in effect at the time of the move shall be used to determine the amount of the Total Tenant Payment and the monthly housing assistance

payment; and the new lease shall be approved in accordance with 8301.1 above.

303 FAMILY SHARE OF RENT

- 8303.1 Family Share of Payment. The family share of the gross rent stated in the lease is calculated by subtracting the amount of the monthly housing assistance payment from the gross rent. The family must pay the difference between the maximum housing assistance payment and the gross rent (if determined to be reasonable) due to the Owner.
- 8303.2 Limits on DCHA Payments. DCHA may not use housing assistance payments, or any other program funds, including administrative fee reserves, to pay any part of the family share.
- 8303.3 Maximum Family Share of Rent. DCHA may only approve a tenancy for a unit if:
- (a) For the initial occupancy period (usually one year), if the gross rent, as determined to be reasonable by DCHA, does not result in the maximum Family Share exceeding 40% of the household's adjusted monthly income;
 - (b) After initial occupancy, there is no limit (other than rent reasonableness determinations) on the gross rent and percent of adjusted monthly income that a participating household may elect to pay as the Family Share.
- 8303.4 Other Fees and Charges. Leases or separate agreements providing for additional fees and charges are subject to the following requirements:
- (a) Additional fees and charges will NOT be approved if:
 - (i) The cost of meals or supportive services is included in the rent to the Owner, with such costs being included in the calculation of reasonable rent;
 - (ii) Non-payment of such charges is grounds for termination of the lease;
 - (iii) Inclusion of any extra fees or charges are for items that are customarily included in rent in the District of Columbia;
 - (iv) Fees or charges are included for items provided at no additional cost to unsubsidized tenants in the premises.

- (b) DCHA is not liable for unpaid charges for any additional items whether set forth in the lease or covered by separate agreements;
- (c) If the tenant and owner have come to an agreement on the amount of charges for a specific item that is not prohibited under (a) above, and so long as those charges are reasonable and not a substitute for higher rent, they will be allowed. Costs for seasonal items can be spread out over 12 months.
- (d) Copies of all separate agreements must be provided to DCHA.

8303.5 Negotiating Rent. Negotiations over the gross rent to the Owner are conducted between the Owner and the Household. DCHA may assist the Household in the negotiations at the request of the Household.

8304 RENT INCREASES TO OWNER

8304.1 Written Request Required. Owners may request a rent increase no later than 90 days prior to any family annual reexamination date. The request must be in writing.

8304.2 Amount of Rent Adjustment. Rent to the Owner may be adjusted either up or down. Subject to compliance with 8304.1 above, the adjusted rent to an Owner who has submitted a written request shall be the LESSER of:

- (a) The current rent multiplied by the applicable annual adjustment factor published by HUD as in effect 60 days before the HAP anniversary date; OR
- (b) The reasonable rent as most recently determined (or redetermined) by DCHA; OR
- (c) The amount requested by the Owner.

8304.1 Prerequisites to a Rent Increase. The rent may not be increased on the family annual reexamination date unless:

- (a) The Owner has requested a specific increase amount at least 90 days before the family annual reexamination date; AND

- (b) The request is made in writing on DCHA provided forms for each unit for which an increase is being requested; and
- (c) In the preceding year, the Owner has complied with all requirements of the HAP contract, including compliance with the Housing Quality Standards.

8304.4 Timing of any Increases to Rent. Housing Assistance Payment increases, if approved by DCHA, shall be effective as of the first day of the first month commencing on or after the Participant's annual reexamination (anniversary) date;

All persons desiring to comment on the subject matter of this rulemaking should file comments in writing not later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with the Office of the General Counsel, DCHA, 1133 North Capitol Street, NE, Suite 210, Washington, DC 20002-7599. Copies of these rules may be obtained from DCHA at that same address.

D.C. OFFICE OF PERSONNEL**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000 and Mayor's Order 2005-73, dated May 5, 2005; and in accordance with Title II of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005, hereby gives notice of the adoption of the following emergency rules. The Act requires that criminal background checks be obtained for: (1) persons being considered for paid employment, or unsupervised voluntary services, with District government agencies that meet the definition of "covered child or youth services provider" in section 202 (3) of the Act; and (2) employees and unsupervised volunteers in District government agencies considered covered child or youth services providers. The Act also requires that traffic record checks be conducted for certain persons being considered for employment, compensated or voluntary, with District government agencies considered covered child or youth services providers; that employees and unsupervised volunteers submit to periodic criminal background checks; and that rules be issued to implement the provisions of the title. Therefore, to ensure the preservation of the welfare of the public in general, and to ensure the preservation of the welfare of children and youth in particular, action was taken on May 5, 2005 to supersede the Notice of Emergency and Proposed Rulemaking adopted on March 11, 2005 and published at 52 DCR 4067 (April 22, 2005), and adopt the following rules on an emergency basis effective May 5, 2005. These emergency rules implement the provisions of the Act by adding a new section 412 to Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations. These rules will remain in effect for up to one hundred twenty (120) days from May 5, 2005, unless earlier superseded by another rulemaking notice.

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000 and Mayor's Order 2005-73, dated May 5, 2005; and in accordance with Title II of the Act, hereby gives notice of the intent to adopt the following proposed rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. These proposed rules would implement the provisions of the Act by adding a new section 412 to Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations. Upon adoption, these rules would amend Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations, published at 32 DCR 75 (January 4, 1985) and amended at 33 DCR 4447 (July 25, 1986), 51 DCR 928 (January 23, 2004), and 51 DCR 11591 (December 24, 2004).

CHAPTER 4

ORGANIZATION FOR PERSONNEL MANAGEMENT

A new section 412 is added to read as follows:

412 CRIMINAL BACKGROUND CHECK AND TRAFFIC RECORD CHECK REQUIREMENTS – DISTRICT GOVERNMENT AGENCIES CONSIDERED COVERED CHILD OR YOUTH SERVICES PROVIDERS

- 412.1 Pursuant to Title II of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005, and as specified in this section, the Mayor and other personnel authorities shall be required to conduct criminal background checks and traffic record checks to investigate certain employees, volunteers, and persons being considered for employment with District government agencies that are “covered child or youth services providers,” as that term is defined in section 202 (3) of the Act and section 499 of this chapter.
- 412.2 Pursuant to section 211 (1) of the Act, District government agencies considered covered child or youth services providers shall begin conducting criminal background checks within forty-five (45) days of the publication in the D.C. Register of the notice of final rulemaking implementing the criminal background check requirements of the Act. The requirement for the criminal background checks shall apply not only to new appointees to paid and voluntary positions covered under the Act, but also to employees occupying positions covered under the Act. Such employees will be subjected to an initial criminal background check within the timeframe specified in this subsection and, subsequent to that, to periodic checks as specified in section 412.3 of this section.
- 412.3 Pursuant to section 203 (g) of the Act, each employee or volunteer described in section 412.11 (c) and (d) of this section occupying a covered position shall be required to submit to periodic criminal background checks while employed by, or volunteering at, a District government agency considered a covered child or youth services provider. The provisions for periodic criminal background checks are specified in sections 412.36 through 412.38 of this section.
- 412.4 The following subordinate agencies shall be considered covered child or youth services providers subject to the criminal background check and traffic record check provisions of the Act. The standard for determining that an agency is subject to the Act is that as part of its mission, the agency, as a whole or certain components thereof, provides the types of direct services to children or youth, or for the benefit of children or youth, encompassed in the duties and responsibilities listed in section 412.13 of this section:

- (a) Department of Human Services;
- (b) Department of Health;
- (c) Department of Parks and Recreation;
- (d) Fire and Emergency Medical Services Department;
- (e) Metropolitan Police Department;
- (f) State Education Office within the Executive Office of the Mayor;
- (g) Department of Youth Rehabilitation Services;
- (h) Department of Mental Health; and
- (i) Child and Family Services Agency.

412.5 A District government agency designated by the Mayor or independent personnel authority as a child or youth services provider subject to the Act, may challenge such a designation and the requirement to comply with the Act, by submitting a challenge of the designation, in writing, to the appropriate personnel authority, within five (5) days of the publication in the D.C. Register of the notice of final rulemaking implementing the criminal background check requirements of the Act. The submission shall include information and documentation deemed appropriate by the agency to challenge the designation. The personnel authority will evaluate the information and documentation submitted by the agency and respond in writing within five (5) days of the receipt of the agency's challenge.

412.6 Pursuant to section 204 (b)(2) of the Act, traffic record checks shall be conducted on employees and supervised and unsupervised volunteers of District government agencies considered covered child or youth services providers who are, or on appointees who would be, required to drive motor vehicles to transport children or youth in the course of performing their duties. Traffic record checks shall be obtained from the traffic records maintained by the D.C. Department of Motor Vehicles.

412.7 Pursuant to section 205 (a) and (b) of the Act, criminal background checks will be conducted in accordance with Federal Bureau of Investigations (FBI) policies and procedures and in a FBI-approved environment, by means of fingerprint and National Criminal Information Center checks.

412.8 Agencies subordinate to the Mayor that are subject to the Act, and independent District government agencies that are subject to the Act, shall cover the costs

for criminal background checks and traffic record checks required under the Act.

- 412.9 The Director, D.C. Office of Personnel, shall enter into a Memorandum of Understanding (MOU) with the Chief, Metropolitan Police Department (MPD) stating that the MPD will conduct the criminal background checks under the Act, including fingerprinting, and develop internal operating procedures to conduct the checks, for agencies under the personnel authority of the Mayor.
- 412.10 Personnel authorities shall be responsible for conducting traffic record checks pursuant to the Act, and for developing internal operating procedures for conducting the checks.
- 412.11 Except as specified in section 412.12 of this section, criminal background checks pursuant to this section will be required for the following persons:
- (a) Each person being considered for paid employment with a District government agency considered a covered child or youth services provider, in a position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities;
 - (b) Each person being considered for voluntary service in a District government agency considered a covered child or youth services provider, in an unsupervised position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities;
 - (c) Each paid employee of a District government agency considered a covered child or youth services provider, who occupies a position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities; and
 - (d) Each volunteer in a District government agency considered a covered child or youth services provider in an unsupervised position with duties and responsibilities as described in section 412.13 of this section or similar duties and responsibilities.
- 412.12 Criminal background checks are not required for the following persons:
- (a) A person being considered for compensated or voluntary employment with a District government agency considered a covered child or youth services provider that will not bring the person in direct contact with children or youth;
 - (b) A volunteer in a District government agency considered a covered child or youth services provider who has only supervised contact with children or

youth; however, if applicable, such person will be required to submit to a traffic record check pursuant to section 204 (b)(2) of the Act; and

- (c) A person being considered for compensated or voluntary employment with a District government agency considered a covered child or youth services provider who has an active federal security clearance.

412.13 Upon consulting with the head of a District government agency considered a covered child or youth services provider, the appropriate personnel authority shall identify and determine which positions in the agency shall be covered under the Act. In identifying the covered positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to, at least one (1) of the following duties and responsibilities:

- (a) Childcare duties;
- (b) Recreational activities;
- (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
- (d) Educational activities;
- (e) Individual counseling;
- (f) Group counseling;
- (g) Assessment, case management and support services;
- (h) Psychiatric and psychological assessment services;
- (i) Developmental, speech, and language evaluation services;
- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;

- (o) Mentoring services;
- (p) Youth care services;
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;
- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving; or
- (t) Driving a motor vehicle to transport children or youth.

412.14 The following standards shall be applied in identifying positions, compensated or not, which shall be subject to the criminal background check requirement or the traffic record check requirement under the Act:

- (a) The underlying guiding standard to be applied in identifying positions that shall be subject to the criminal background check requirement and traffic record check requirement shall be one of reasonableness, coupled with the standards outlined in section 412.14 (b) through (k) of this section, as applicable.
- (b) A determination that a position is covered under the Act and subject to the criminal background check requirement shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in section 412.13 of this section or similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
- (c) The single fact that a position is located in a District government agency considered a covered child or youth services provider does not automatically make the position or its incumbent subject to the criminal background check requirement or the traffic record check requirement of the Act.
- (d) Strictly tangential, casual, or occasional contact with children or youth does not automatically make an employee or volunteer subject to the criminal background check requirement or traffic record check requirement of the Act.

- (e) Administrative, clerical, or technical support positions within the immediate office of the head of a District government agency considered a covered child or youth services provider as well as within other components, units, or divisions of the agency that provide non-operational support services shall not be subject to the criminal background check requirement unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in section 412.13 of this section, or similar duties and responsibilities related to the direct provision of services to children or youth, and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely. Such positions may include, but are not limited to the head of the agency, special assistants, administrative officers, staff assistants, and secretaries.
- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a covered position shall be subject to an initial criminal background check upon the personnel action being effected and to periodic criminal background checks while detailed, temporarily promoted, or temporarily reassigned.
- (g) A volunteer whose assignment changes from non-covered duties and responsibilities to covered duties and responsibilities shall be subject to an initial criminal background check upon being moved to the covered assignment and to periodic criminal background checks while in the covered assignment.
- (h) A determination that a position is subject to the traffic record check requirement under the Act shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties requires that any incumbent of the position drive a motor vehicle to transport children or youth in the course of performing his or her duties.
- (i) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a position that will require him or her to drive a motor vehicle to transport children or youth in the course of performing the duties of the detail, temporary promotion, or temporary reassignment shall be subject to an initial traffic record check upon the personnel action being effected.
- (j) A volunteer whose assignment changes from non-covered duties and responsibilities to duties and responsibilities that will require him or her to drive a motor vehicle to transport children or youth in the course of performing the duties of the voluntary assignment shall be subject to an

initial traffic record check requirement upon being moved to the covered assignment.

- (k) Except as specified in section 412.12 of this section, any position subject to the traffic record check requirement shall also be subject to the criminal background check requirement.
- 412.15 District government agencies considered covered child or youth services providers may submit information and documentation to the appropriate personnel authority to challenge the designation of a position as subject to a criminal background check or traffic record check. The personnel authority shall evaluate any information and documentation submitted by an agency, and promptly determine whether the original designation shall stand or be changed.
- 412.16 Vacancy announcements for positions identified and designated as requiring a criminal background check or traffic record check, or both, shall include statements informing each applicant that:
- (a) The position for which he or she is applying has been identified and designated as requiring a criminal background check or traffic record check, or both;
 - (b) If tentatively selected for the position, a criminal background check or traffic record check, or both, as appropriate, will be conducted; and
 - (c) The employing agency may offer employment to the appointee to the position contingent upon receipt of a satisfactory criminal background check or traffic record check, or both.
- 412.17 In the case of non-competitive recruitment for a position requiring a criminal background check or traffic record check, or both, the appropriate personnel authority shall inform the person being considered for employment, in writing, of the requirements specified in section 412.16 of this section.
- 412.18 The Director, D.C. Office of Personnel (or his or her designee), shall publish the list of positions in agencies under the personnel authority of the Mayor that are subject to a criminal background check or traffic record check, or both, in the District Personnel Manual (or any other procedural manual developed). The list shall be published on an annual basis.
- 412.19 An appointee to a compensated position with a District government agency considered a covered child or youth services provider may be offered employment contingent upon receipt of a satisfactory criminal background check or traffic record check, or both, and begin working in a supervised setting, prior to receiving the results of the checks, and prior to the employing agency making a determination that the appointee meets the requirements of

the Act. Upon making a determination to allow the appointee to begin working prior to receiving the results of the check or checks, the employing agency shall so inform the appropriate personnel authority.

- 412.20 An appointee to an unsupervised volunteer position with a District government agency considered a covered child or youth services provider will not be allowed to begin volunteering in an unsupervised setting until the results of the criminal background check or traffic record check, or both, are received and a determination is made that the appointee meets the requirements of the Act.
- 412.21 Prior to a criminal background check being conducted, the appropriate personnel authority will inform each appointee, employee, or unsupervised volunteer subject to the check of the location of the office where the check will be conducted, when to report for fingerprinting, and provide each appointee, employee, or unsupervised volunteer with a form or forms to be utilized for the following purposes:
- (a) To authorize the MPD or other entity, as appropriate, to conduct the criminal background check and confirm that the appointee, employee, or unsupervised volunteer has been informed that the employing agency is authorized to conduct a criminal background check;
 - (b) To affirm that the appointee, employee, or unsupervised volunteer has not been convicted of a crime, has not pleaded nolo contendere, is not on probation before judgment or placement of a case upon a stet docket, and has not been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the following offenses or their equivalent in another state or territory:
 - (1) Murder, attempted murder, manslaughter or arson;
 - (2) Assault, battery, assault and battery, assault with a dangerous weapon, mayhem, or threats to do bodily harm;
 - (3) Burglary;
 - (4) Robbery;
 - (5) Kidnapping;
 - (6) Theft, fraud, forgery, extortion, or blackmail;
 - (7) Illegal use or possession of a firearm;
 - (8) Trespass or injury to property;

- (9) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse;
 - (10) Child abuse or cruelty to children; or
 - (11) Unlawful distribution or possession of, or possession with intent to distribute, a controlled substance;
- (c) To acknowledge in writing that the appointee, employee, or unsupervised volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
 - (d) To acknowledge that the employing agency may choose to deny the appointee employment or an unsupervised volunteer position, or to terminate an employee or volunteer, based on the outcome of the criminal background check;
 - (e) To provide any additional identification that is required, such as name, social security number, date of birth, and gender; and
 - (f) To inform the appointee or employee that a false statement on the form or forms may subject them to criminal penalties.
- 412.22 Upon receiving and completing the form or forms specified in section 412.21 of this section, the appointee or employee shall report to the designated location to be fingerprinted.
- 412.23 Upon completing each criminal background check, the designated MPD representative, or the representative for any other entity conducting the check, shall forward the check to the appropriate employing agency. The employing agency shall forward a copy of the check to the personnel authority upon completing the review and determination process pursuant to sections 412.24 through 412.32 of this section.
- 412.24 District government agencies shall consider a variety of factors in determining an appointee's suitability for employment based on a criminal background check conducted pursuant to this section, but shall not consider arrest records unless they are related to crimes against children or youth. Possession of one (1) or more of the following criminal background characteristics may make the appointee ineligible for employment or unsupervised voluntary service:
- (a) A felony conviction; or

- (b) A serious misdemeanor conviction.
- 412.25 Except as provided in section 412.26 of this section, the following variables shall be closely considered and evaluated on a case-by-case basis to determine if an appointee subject to a criminal background check shall be ineligible for paid employment or unsupervised voluntary service:
- (a) The recency of any conviction;
 - (b) The age of the appointee at the time of any conviction;
 - (c) Any false statements made by the appointee concerning the form or forms described in section 412.21 of this section, or the uncovering of any intentional false statements of material fact or deception or fraud in applying for employment, compensated or not, that would provide a basis for disqualification; and
 - (d) The absence or presence of rehabilitation or efforts toward rehabilitation.
- 412.26 Notwithstanding the factors and variables specified in sections 412.24 and 412.25 of this section, a criminal background check reflecting a conviction or convictions for crimes against children or youth shall result in the disqualification of the appointee subject to the check.
- 412.27 Records of traffic infractions shall be judged on an individual basis for appointees whose duties would include driving a motor vehicle to transport children or youth as described in the Act. A pattern of disregard for existing traffic regulations, particularly where there has been a conviction for driving under the influence of intoxicants or drugs, may make the appointee ineligible for employment or voluntary service, if the appointee could be required to drive a motor vehicle to transport children or youth in the course of performing his or her duties.
- 412.28 Based on the outcome of the criminal background check, each employing agency shall determine whether a final offer of appointment should be made or denied or, when the appointee to a compensated position was allowed to begin working in a supervised setting prior to receiving the results of the check, if he or she will be retained or employment will be terminated.
- 412.29 If the determination is to deny the final offer of appointment or terminate employment, the employing agency shall do all of the following:
- (a) Send the appointee a written notification of the determination. The written notification shall inform the appointee of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and

completeness of the report, in writing, within ten (10) days of receiving the written notification; and

(b) Send the personnel authority a copy of the written notification.

- 412.30 In challenging the results of a criminal background check report, the appointee may present information and documentation to clarify any errors in the report resulting from mistakes in identity, and any mitigating circumstances that may exist concerning the report.
- 412.31 Upon receiving a challenge to a criminal background check report, the appropriate employing agency shall promptly make a determination on the case and inform the appointee of the decision, in writing, with a copy to the personnel authority.
- 412.32 If the determination is that a final offer of appointment should be made to an appointee who did not begin working prior to the employing agency receiving the results of the check, the employing agency shall promptly notify the personnel authority.
- 412.33 Upon receiving the employing agency's determination that a final offer of appointment should be made to an appointee, the appropriate personnel authority shall promptly issue a final offer letter to the appointee. If the determination is to terminate employment, the personnel authority will process the action to terminate the employment within ten (10) days of receiving the employing agency's determination.
- 412.34 An appointee under this section who intentionally provides false information that is material to the application in the course of applying for a position shall be subject to prosecution pursuant to section 404 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405) (2001).
- 412.35 A volunteer in an unsupervised position may use the same successful criminal background check conducted on him or her for a period of two (2) years when applying for multiple unsupervised volunteer positions, if the volunteer provides a signed affirmation that he or she has not been convicted of a crime, has not pleaded nolo contendere, is not on probation before judgment or placement of a case upon a stet docket, and has not been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in section 412.21 (b)(1) through (11) of this section, or their equivalent in any other state or territory, since the date of the most recent check.

- 412.36 Periodic criminal background checks for current employees and unsupervised volunteers shall be conducted when:
- (a) Derogatory information about the employee or unsupervised volunteer, of a nature that will impact the employee's or unsupervised volunteer's suitability to continue performing the duties of the covered position, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority; or
 - (b) Information about a criminal offense committed by the employee or unsupervised volunteer, such as the criminal offenses listed in section 412.21 of this section, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority.
- 412.37 An employee who fails a periodic criminal background check may be subject to administrative action up to and including removal. In determining the type of administrative action to be taken, the employing agency shall consider the factors and variables in sections 412.24 and 412.25 of this section as well as any other similar factors and variables, except that a criminal background check reflecting a conviction or convictions for crimes against children or youth shall result in removal. In addition to, or in the place of administrative action, and at the employing agency's discretion, an employee who fails a periodic check may be reassigned to a non-covered position, except that this option shall not be available for an employee whose criminal background check reflects a conviction or convictions for crimes against children or youth.
- 412.38 An unsupervised volunteer who fails a periodic criminal background check may be terminated or moved to another volunteer assignment that does not include the provision of direct services to children or youth. In determining the type of action to be taken, the employing agency shall consider the factors and variables in sections 412.24 and 412.25 of this section as well as any other similar factors and variables, except that a criminal background check reflecting a conviction or convictions for crimes against children or youth shall result in the termination of the voluntary services.
- 412.39 In the case of an agency that violates any of the provisions of the Act, the Mayor (or his or her designee) or independent personnel authority may take administrative action, or direct that administrative action be taken, against the agency head or other agency official who violated the particular provision or provisions of the Act.
- 412.40 Criminal background check records obtained under this section shall be confidential and shall be for the exclusive purpose of making employment-

related determinations under this section. The records shall not be released or otherwise disclosed to any person, except when:

- (a) Required as one component of an application for employment with a District government agency considered a covered child or youth services provider;
- (b) Requested by the personnel authority during an official inspection or investigation;
- (c) Ordered by a court;
- (d) Authorized by the written consent of the person being investigated; or
- (e) Utilized for an administrative action in a personnel proceeding, including but not limited to, disciplinary actions under Chapter 16 of these regulations.

412.41 An individual who discloses confidential information in violation of any of the provisions in section 412.40 of this section shall be guilty of a criminal offense and, upon conviction, shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one hundred eighty (180) days, or both.

412.42 Each personnel authority with agencies considered covered child or youth services providers shall prepare compliance reports every six (6) months beginning on the date that these regulations are effective. Each report shall be submitted to the Mayor and shall include:

- (a) The number of criminal background checks and traffic record checks conducted for appointees, the number of appointees who were hired upon completion of the check, and the number rejected; and
- (b) The number of periodic criminal background checks conducted for employees and unsupervised volunteers, and any administrative action initiated or taken upon completion of the periodic checks.

412.43 Agencies covered under the Act shall submit, to the Mayor, a list of positions subject to the criminal background check requirement on an annual basis by December 1st of every year.

Section 499 is amended to add the following definitions:

499 DEFINITIONS

499.1 When used in this chapter, the following terms have the meaning ascribed:

Applicant – for the purposes of section 412 of this chapter, a person who has filed a resume or written or electronic (web-based) application for employment with a District government agency considered a covered child or youth services provider; or a person who has made an affirmative effort through written application, resume or a verbal request, to serve in an unsupervised volunteer position with a District government agency considered a covered child or youth services provider.

Appointee – for the purposes of section 412 of this chapter, a person who has been made a tentative job offer to a covered position, compensated or voluntary, subject to the satisfactory completion of a criminal background check or traffic record check, or both.

Children – for the purposes of section 412 of this chapter, persons twelve (12) years of age and under.

Covered assignment – for the purposes of section 412 of this chapter, tasks of a volunteer with a District government agency considered a covered child or youth services provider, which require the volunteer to provide direct services that affect the health, safety, and welfare of children or youth, including but not limited to the duties and responsibilities listed in section 412.13 (a) through (t) of this chapter.

Covered child or youth services provider – for the purposes of section 412 of this chapter, any District government agency, or a component of a District government agency such as an office, unit or division, including the agencies listed in section 412.4 of this chapter, that provides direct services that affect the health, safety, and welfare of children or youth, including individual and group counseling, therapy, case management, supervision, or mentoring. These services are provided either directly or for the benefit of children or youth.

Covered duties and responsibilities – for the purposes of section 412 of this chapter, duties and responsibilities of a volunteer in a District government agency considered a covered child or youth services provider, that require the volunteer to provide direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to the duties and responsibilities listed in section 412.13 of this chapter.

Covered position – for the purposes of section 412 of this chapter, a position, compensated or voluntary, in a District government agency considered a covered child or youth services provider, with duties and responsibilities that would require the employee or volunteer to provide direct services that affect the health, safety, and welfare of children or youth or services for the benefit of children or youth, including but not limited to the duties and responsibilities listed in section 412.13 of this chapter.

Criminal background check – the investigation of a person's criminal history through the record systems of the FBI or MPD.

Days – calendar days, unless otherwise indicated.

Independent agency – any board or commission of the District of Columbia government not subject to the administrative control of the Mayor.

Material – a statement that is capable of influencing, or has a natural tendency to affect, an official decision.

Non-covered duties and responsibilities – for the purposes of section 412 of this chapter, duties and responsibilities of a volunteer in a District government agency considered a covered child or youth services provider, of such a nature that would not require that the volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Non-covered position – for the purposes of section 412 of this chapter, a position, compensated or voluntary, in a District government agency considered a child or youth services provider, with duties and responsibilities of such a nature that would not require that the employee or volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Person being considered for employment – for the purposes of section 412 of this chapter, a person who has been made a tentative offer of employment, compensated or voluntary, to a covered position, subject to the satisfactory completion of a criminal background check or a traffic record check, or both.

Volunteer – for the purposes of section 412 of this chapter, any person who performs work without any monetary or other financial compensation, in a covered position, for a District government agency considered a child or youth services provider.

Youth – for the purposes of section 412 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.

Comments on these proposed regulations should be submitted, in writing, to Ms. Lisa R. Marin, SPHR, Director of Personnel, 441 4th Street, N.W., Suite 300 South, Washington, D.C. 20001, within thirty (30) days of the date of the publication of this notice. Additional copies of these proposed rules are available from the above address.

D.C. OFFICE OF PERSONNEL

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000, and in accordance with Title I of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005, hereby gives notice of the adoption of the following emergency rules. The Act amended the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*) (2001), to add a new Subtitle XX-C, Mandatory Drug and Alcohol Testing Program for Certain Employees Who Serve Children. The Act requires that the following individuals be tested by the District government for drug and alcohol use: (1) an applicant for employment in a safety-sensitive position with the District government; (2) a District government employee in a safety-sensitive position who has had a reasonable suspicion referral; (3) a post-accident District government employee in a safety-sensitive position; and (4) a District government employee who is required to drive a motor vehicle to transport children or youth in the course of performing his or her official duties, whenever a supervisor has probable cause or a police officer arrests such employee for a violation of the law and has reasonable grounds to believe such employee to have been operating or in physical control of a motor vehicle within the District of Columbia while that employee's breath contains .08 percent or more, by weight, of alcohol, or while under the influence of an intoxicating liquor or any drug or combination thereof, or while that employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor. District government employees who work in safety-sensitive positions shall be subject to random testing. The Act also requires that rules be issued to implement its provisions. Therefore, to ensure the preservation of the welfare of the public in general, and to ensure the preservation of the welfare of children or youth in particular, action was taken on April 28, 2005 to supersede the Notice of Emergency and Proposed Rulemaking adopted on March 11, 2005 and published at 52 DCR 3433 (April 1, 2005), and adopt the following rules on an emergency basis effective on May 2, 2005. These emergency rules add new sections 3901 through 3910 and 3999 to Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, for the purpose of implementing the provisions of the Act. The rules also modify section 3900 of the chapter, Drivers of Commercial Motor Vehicles. These rules will remain in effect for up to one hundred twenty (120) days from May 2, 2005, unless earlier superseded by another rulemaking notice.

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000, and in accordance with Title I of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005, hereby gives notice of the intent to adopt the following proposed rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The Act requires that rules be issued to implement its provisions. Accordingly, these proposed rules would add new sections 3901 through 3910 and 3999 to Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, for the purpose of implementing the provisions of the Act. These proposed rules would also modify section 3900 of the chapter, Drivers of Commercial Motor Vehicles. Upon

adoption, these rules will amend Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, published at 47 DCR 7931 (September 29, 2000).

CHAPTER 39

TESTING FOR THE PRESENCE OF CONTROLLED SUBSTANCES AND ALCOHOL

Section 3900 is amended to read as follows:

3900 DRIVERS OF COMMERCIAL MOTOR VEHICLES

- 3900.1 Pursuant to section 2011 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.11) (2001), the federal regulations issued pursuant to 49 U.S.C. § 31306 (currently, 49 C.F.R. Parts 382-385) shall apply to individuals who are employed, or who are candidates for employment, as drivers of commercial motor vehicles.
- 3900.2 The provisions of section 3900.1 of this section, and the regulations incorporated by reference therein, shall apply to agencies under the personnel authority of the Mayor and other personnel authorities, and to individuals who are employed by or who are candidates for employment in those agencies and personnel authorities as drivers of commercial motor vehicles.

New sections 3901 through 3910 and 3999 are added to read as follows:

3901 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – GENERAL

- 3901.1 Pursuant to Title XX-C of the CMPA, as amended by Title I of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Congressional Review Amendment Act of 2004 (Act), effective April 13, 2005, and as a means of ensuring the health and safety of children and youth, a Mandatory Drug and Alcohol Testing Program for Safety-Sensitive Positions (Program) has been established within the District government. The purpose of the Program is to test appointees to and employees in safety-sensitive positions for illegal drug and alcohol use.
- 3901.2 Implementation of the Act and drug and alcohol testing shall commence as soon as practicable after May 2, 2005.
- 3901.3 Each personnel authority with safety-sensitive positions pursuant to the Act shall contract with a professional testing vendor or vendors to conduct testing under the

Program, including random testing. The vendor or vendors shall ensure quality control, chain-of-custody for samples, reliable collection and testing procedures, and any other safeguards needed to guarantee accurate and fair testing, in accordance with the procedures in 49 C.F.R. Part 40, and District government procedures.

- 3901.4 The vendor or vendors selected to conduct the testing shall be certified by the United States Department of Health and Human Services (HHS) to perform job-related drug and alcohol forensic testing.
- 3901.5 The Director, D.C. Office of Personnel (or his or her designee), shall develop operating policies and procedures for the Program for agencies subordinate to the Mayor that are subject to the Act. Such operating policies and procedures shall include, but not be limited to, the following:
- (a) The process by which the database for drug and alcohol testing for employees in safety-sensitive positions in subordinate agencies will be established, maintained, and updated;
 - (b) The process by which subordinate agencies will be informed of the results of each test, including random tests; and
 - (c) The process for reasonable suspicion referrals.
- 3901.6 The provisions of the Program are specified in sections 3902 through 3910 of this chapter.

3902 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – APPLICABILITY

- 3902.1 The following subordinate agencies shall be covered under the Program, on the basis that each one of these agencies, as a whole or certain components thereof, has safety-sensitive positions:
- (a) Department of Human Services;
 - (b) Department of Health;
 - (c) Department of Parks and Recreation;
 - (d) Fire and Emergency Medical Services Department;
 - (e) Metropolitan Police Department;
 - (f) State Education Office of the Executive Office of the Mayor;
 - (g) Department of Youth Rehabilitation Services;

- (h) Department of Mental Health; and
 - (i) Child and Family Services Agency.
- 3902.2 Pursuant to sections 2032 (a) and 2033 of the CMPA, the following appointees and District government employees shall be subject to drug and alcohol testing:
- (a) An appointee to a safety-sensitive position with a District government agency;
 - (b) A District government employee in safety-sensitive position who has a reasonable suspicion referral;
 - (c) A post-accident District government employee in a safety-sensitive position, as soon as reasonably possible after the accident; and
 - (d) A District government employee who is required to drive a motor vehicle to transport children or youth in the course of performing his or her official duties, whenever a supervisor has probable cause, or a police officer arrests such employee for a violation of the law, and has reasonable grounds to believe such employee to have been operating or in physical control of a motor vehicle within the District of Columbia while that employee's breath contains .08 percent or more, by weight, of alcohol, or while under the influence of an intoxicating liquor or any drug or combination thereof, or while that employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor;
- 3902.3 Pursuant to section 2032 (b) of the CMPA and in addition to any testing under the conditions described in section 3902.2 of this section, a District government employee in a safety-sensitive position will be subject to random testing, unless the employing agency has additional requirements for drug and alcohol testing of its employees, in which case the stricter testing requirements will apply.
- 3903 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – STANDARDS FOR THE IDENTIFICATION OF POSITIONS SUBJECT TO DRUG AND ALCOHOL TESTING UNDER THE ACT**
- 3903.1 Upon consulting with the head of a District government agency with safety-sensitive positions, the appropriate personnel authority shall identify and determine which positions in the agency shall be designated safety-sensitive positions subject to mandatory drug and alcohol testing under the Program. In identifying the safety-sensitive positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of services that affect the health, safety, and welfare of children or youth, including direct care and custody of

children or youth, including but not limited to at least one (1) of the following duties and responsibilities:

- (a) Childcare duties;
- (b) Recreational activities;
- (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
- (d) Educational activities;
- (e) Individual counseling;
- (f) Group counseling;
- (g) Assessment, case management and support services;
- (h) Psychiatric and psychological assessment services;
- (i) Developmental, speech, and language evaluation services;
- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;
- (o) Mentoring services;
- (p) Youth care services;
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;
- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving; or
- (t) Driving a motor vehicle to transport children or youth.

3903.2 The following standards shall be applied in designating a position as safety-sensitive:

- (a) The underlying guiding standard to be applied in identifying safety-sensitive positions shall be one of reasonableness, coupled with the standards outlined in section 3903.2 (b) through (f) of this section, as applicable.
- (b) A determination that a position is a safety-sensitive position shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in section 3903.1 of this section or any similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
- (c) The single fact that a position is located in a District government agency with safety-sensitive positions pursuant to the Act does not automatically make its incumbent subject to testing under the Program.
- (d) Strictly tangential, casual, or occasional contact with children or youth does not automatically make the position safety-sensitive or its incumbent subject to testing under the Program.
- (e) Administrative, clerical, or technical support positions and staff within the immediate office of the head of a District government agency with safety-sensitive positions as well as within other components, units, or divisions of the agency that provide non-operational support services will not be subject to testing under the Program unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in section 3903.1 of this section or similar duties and responsibilities and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely. Such positions may include, but are not limited to the head of the agency, special assistants, administrative officers, staff assistants, and secretaries.
- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a nonsafety-sensitive position to a safety-sensitive position shall be tested upon the personnel action being effected and, as applicable, shall be subject to testing under the Program while on temporary assignment.

3904 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – NOTIFICATION REQUIREMENTS

3904.1 Pursuant to section 2035 (a) of the CMPA, the Mayor and other personnel authorities with safety-sensitive positions shall issue a drug and alcohol testing policy, including a notice required under section 2032 (d) of the CMPA, at least thirty (30) days in advance of implementing the Program.

- 3904.2 The drug and alcohol testing policy shall inform employees in safety-sensitive positions of all of the following:
- (a) Which employees will be tested;
 - (b) Circumstances under which an employee will be tested;
 - (c) The methodology to be used for testing; and
 - (d) The consequences of a positive test result.
- 3904.3 Each employee occupying a safety-sensitive position shall sign an acknowledgment that he or she received a copy of the drug and alcohol testing policy and notice, and has been informed of the requirements for alcohol and drug testing. The original acknowledgment form shall be filed by the agency in a place designated for that purpose and a copy shall be provided to the appropriate personnel authority.
- 3904.4 Upon acknowledging receipt of the advance written notice, each employee occupying a safety-sensitive position shall be given one (1) opportunity to seek treatment if he or she acknowledges a drug or alcohol problem. An employee who so acknowledges a drug or alcohol problem shall undergo and complete a counseling and rehabilitation program, and shall not be subject to administrative action while completing the counseling and rehabilitation program; however, the employing agency shall immediately detail the employee to a nonsafety-sensitive position while he or she completes the counseling and rehabilitation program.
- 3904.5 Position vacancy announcements for positions identified and designated as safety-sensitive shall include a statement informing each applicant that:
- (a) The position for which he or she is applying has been identified and designated as a safety-sensitive position subject to mandatory drug and alcohol testing;
 - (b) If tentatively selected for the safety-sensitive position, he or she will be required to submit to testing for illegal drug use prior to appointment, and that appointment to the position will be contingent upon a negative drug test result;
 - (c) If selected to the safety-sensitive position before the drug test result is received, and contingent upon a negative drug test result, he or she may begin working in a position that is not a safety-sensitive position prior to receiving the result; and
 - (d) Once hired into a safety-sensitive position, he or she shall be subject to mandatory random drug or alcohol testing.
- 3904.6 In the case of non-competitive recruitment for a safety-sensitive position, the appropriate personnel authority shall inform the person being considered for

employment of the mandatory testing requirements described in section 3904.4 of this section.

- 3904.7 The position description for each position designated as safety-sensitive shall include a statement of such designation and a statement indicating that incumbents of the position shall be subject to testing for drug and alcohol use.
- 3904.8 The Director, D.C. Office of Personnel (or his or her designee), shall publish the list of safety-sensitive positions in agencies under the personnel authority of the Mayor, in the District Personnel Manual (or any other procedural manual developed). The list shall be updated periodically, as needed.

3905 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS -- TESTING

- 3905.1 Appointees and District government employees as described in sections 3902.2 and 3902.3 of this chapter shall be tested for drug and alcohol use as specified in this section and section 3906 of this chapter.
- 3905.2 A final offer of appointment to a covered position shall not be made until after the results of any test conducted are received and it is determined that the test result is negative; however, a selectee may begin working in a position that is not a safety-sensitive position prior to receiving the results.
- 3905.3 Pursuant to section 2032 (b) of the CMPA, and except for a District government employee described in section 3905.4 of this section and section 3908 of this chapter, a District government employee in a safety-sensitive position shall be subject to random testing.
- 3905.4 Pursuant to section 2033 of the CMPA, an employee in a safety-sensitive position who operates a motor vehicle in the performance of his or her duties shall be tested whenever a supervisor has probable cause, or a police officer arrests the employee for a violation of the law, and has reasonable grounds to believe such employee to have been operating or was in physical control of a motor vehicle within the District of Columbia while the employee's breath contains .08 percent or more, by weight, of alcohol, or while under the influence of an intoxicating liquor or any drug or combination thereof, or while the employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor.
- 3905.5 An employee who acknowledges a drug or alcohol problem as specified in section 3904.4 of this chapter and who completes a counseling and rehabilitation program for illegal drug use or alcohol abuse shall be tested before being allowed to return to the safety-sensitive position he or she occupied before completion of such a program. After returning to the safety-sensitive position, the employee shall be subject to testing as specified in sections 3905.3 and 3905.4 of this section, and section 3908 of this chapter, as applicable.

- 3906 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – TESTING METHODOLOGY**
- 3906.1 Testing for illegal drug use shall be conducted by collecting a urine sample from the individual being tested.
- 3906.2 Testing for alcohol use shall be conducted utilizing an evidentiary breath-testing device or EBT, commonly referred to as a “breathalyzer.”
- 3906.3 The vendor or vendors selected to conduct the testing shall, at a location designated by each personnel authority with safety-sensitive positions for such purposes, conduct the breathalyzer test for alcohol use; or collect urine specimens on site for drug testing.
- 3906.4 In the case of drug testing, the vendor shall split each sample and perform enzyme-multiplied-immunossay technique (EMIT) testing on one (1) sample and store the split of that sample. A positive EMIT test shall be confirmed by the vendor, using the gas chromatography/mass spectrometry (GCMS) methodology.
- 3906.5 Prior to testing for illegal drugs, a physician shall sit down with the appointee or employee being tested, as applicable, and ask what medications he or she might have been taking, to rule out any false positives in the drug screening results.
- 3906.6 The appropriate personnel authority shall notify, in writing, any appointee or employee in a safety-sensitive position found to have a confirmed positive urinalysis test result. The appointee or employee may then authorize that the stored sample be sent to another HHS-certified laboratory of his or her choice, at his or her expense, for a confirmation, using the GCMS testing method.
- 3906.7 Probable cause or reasonable suspicion and post-accident employee testing shall follow the same procedures set forth in this section. In the case of a reasonable suspicion referral, as confirmed by a second supervisor, or a post-accident employee, a supervisor shall escort the employee to the vendor’s test site for specimen collection or a breathalyzer.
- 3906.8 In the event that a covered employee may require medical care following an accident, medical care shall not be delayed for the purpose of testing.
- 3906.9 A breathalyzer test shall be deemed positive if the vendor determines that one (1) milliliter of the employee’s breath (consisting of substantially alveolar air) contains .38 micrograms or more of alcohol.

3907 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – POSITIVE DRUG AND ALCOHOL TESTS

3907.1 The following shall be grounds for termination of employment, provided that the notification requirements in section 3904 of this chapter have been met:

- (a) A confirmed positive drug test result;
- (b) A positive breathalyzer test;
- (c) Refusal to submit to a drug test or breathalyzer; or
- (d) In the case of an employee who acknowledged a drug and alcohol problem as specified in section 3904.4 of this chapter, failure to complete the counseling and rehabilitation program, or a confirmed positive drug test result for the test conducted upon completion of the counseling and rehabilitation program pursuant to section 3905.5 of this chapter.

3907.2 The appropriate personnel authority shall decline to make a final offer of employment to a safety-sensitive position to an appointee if he or she:

- (a) Refuses to take the required drug test; or
- (b) Has a confirmed positive drug test result.

3907.3 A person described in section 3907.2 of this section shall not reapply for appointment to a safety-sensitive position with the District government for a period of one (1) year from the date of his or her refusal to take the required drug test or the date of the confirmed positive test result, as applicable.

3907.4 A District government employee who is terminated for any of the events described in section 3907.1 of this section shall be denied subsequent appointment to a safety-sensitive position with the District government for a period of one (1) year from the date of any of these events.

3908 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – REASONABLE SUSPICION REFERRALS

3908.1 The immediate supervisor or manager of an employee occupying a safety-sensitive position shall make a reasonable suspicion referral for testing of an employee in a safety-sensitive position when there is a reasonable suspicion that the employee is under the influence of illegal drugs or alcohol to the extent that the employee is too impaired to perform his or her duties.

3908.2 Prior to contacting the appropriate personnel authority to make a referral under this section, the supervisor or manager shall:

- (a) Have probable cause or reasonable suspicion that the employee is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired;
- (b) Gather all information and facts to support this suspicion; and
- (c) Receive a second opinion from another supervisor or manager.

3908.3 A reasonable suspicion referral may be based on direct observation of illegal drug use or possession, physical symptoms of being under the influence of illegal drugs, or intoxicated by alcohol, a pattern of erratic behavior, work performance indicators of drug or alcohol abuse, as well as any other reliable indicators.

3908.4 Testing resulting from a reasonable suspicion referral shall be conducted as specified in sections 3905 and 3906 of this chapter.

3909 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – REQUIRED TRAINING

3909.1 Agencies with safety-sensitive positions shall be responsible for providing training in drug abuse detection and recognition; documentation; intervention; and any other appropriate topics, for supervisors and managers in agencies with covered employees.

3910 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – RECORD KEEPING AND CONFIDENTIALITY

3910.1 All matters relating to test results and applicants for employment and covered employees involved shall be confidential. All records relating to alcohol and drug testing shall be kept by the appropriate personnel authority in a place apart from employment applications or employees' official personnel folders.

3910.2 The results of a random test shall not be turned over to any law enforcement agency without the subject's written consent.

3999 DEFINITIONS

3999.1 When used in this chapter, the following terms shall have the meaning ascribed:

Alcohol – for the purposes of sections 3901 through 3910 of this chapter, the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols in methyl and isopropyl alcohol, no matter how it is packaged or in what form the alcohol is stored, utilized or found.

Applicant – for the purposes of sections 3901 through 3910 of this chapter, a person who has filed a resume or written application for District government employment in a safety-sensitive position.

Appointee – for the purposes of sections 3901 through 3910 of this chapter, a person who has been made a tentative offer of appointment with the District government in a safety-sensitive position.

Breathalyzer/Evidential Breath Testing Device (EBT) – for the purposes of sections 3901 through 3910 of this chapter, method for measuring the level of alcohol present in an individual.

Children – for the purposes of sections 3901 through 3910 of this chapter, persons twelve (12) years of age and under.

Days – calendar days, unless otherwise specified.

Drugs – for the purposes of sections 3901 through 3910 of this chapter, illegal drugs for which tests are required under 49 C.F.R. part 40, such as marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates; but not authorized prescription medications.

Enzyme-Multiplied-Immunoassay Technique (EMIT) – for the purposes of sections 3901 through 3910 of this chapter, initial method that is used to test for drugs in urine samples.

Gas chromatography mass spectrometry (GCMS) methodology – for the purposes of sections 3901 through 3910 of this chapter, the only authorized confirmation-testing method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.

Personnel authority – a person or entity with the authority to administer all or part of a personnel management program as provided in Title IV of the CMPA (D.C. Official Code § 1-604.01 *et seq.*) (2001).

Post-accident employee – for the purposes of sections 3901 through 3910 of this chapter, a District government employee in a safety-sensitive position who, while on duty, is involved in a vehicular or other type of accident resulting in personal injury or property damage, or both, in which the cause of the accident could reasonably be believed to have been the result, in whole or in part, from the use of drugs or alcohol on part of the employee.

Probable cause – for the purposes of sections 3901 through 3910 of this chapter, a reasonable belief by a supervisor that an employee in a safety-sensitive position is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired.

Random testing – for the purposes of sections 3901 through 3910 of this chapter, drug or alcohol testing conducted on a District government employee in a safety-sensitive position at an unspecified time for purposes of determining whether the employee has used drugs or alcohol and, as a result, is unable to satisfactorily perform his or her employment duties.

Reasonable suspicion – for the purposes of sections 3901 through 3910 of this chapter, a reasonable belief by a supervisor that an employee in a safety-sensitive position is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired.

Reasonable suspicion referral – for the purposes of sections 3901 through 3910 of this chapter, referral of an employee in a safety-sensitive position for testing by the District government for drug or alcohol use.

Safety sensitive position – for the purposes of sections 3901 through 3910 of this chapter, a position with duties and responsibilities that require the incumbent to provide services that affect the health, safety, and welfare of children or youth, including direct care and custody of children or youth, including but not limited to the duties and responsibilities listed in section 3903.1 (a) through (t) of this chapter.

Subordinate agency – any agency under the direct administrative control of the Mayor, including, but not limited to, the agencies listed in section 301 (q) of the CMPA (D.C. Official Code § 1-603.01 (17)) (2001).

Youth – for the purposes of sections 3901 through 3910 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.

Comments on these proposed regulations should be submitted, in writing, to Ms. Lisa R. Marin, SPHR, Director, D.C. Office of Personnel, 441 4th Street, NW, Suite 300 South, Washington, D.C. 20001, within thirty (30) days of the date of the publication of this notice. Additional copies of these proposed rules are available from the above address.