

DEPARTMENT OF HUMAN SERVICESPROPOSED RULEMAKING

The Director of the Department of Human Services (DHS), pursuant to authority set forth in Section (2)(f) of the Self-Sufficiency Promotion Amendment Act of 1998 (Act), effective April 20, 1999 (D.C. Law 12-241; D.C. Official Code § 4-202.05(b)) and Mayor's Order 99-65, dated April 26, 1999, hereby gives notice of intent to adopt the following amendments to Section 5813 of Chapter 58 of Title 29 of the District of Columbia Municipal Regulations (DCMR) (Temporary Assistance for Needy Families).

These proposed rules are required in order to allow DHS to provide incentive payments to eligible recipients of Temporary Assistance for Needy Families (TANF) benefits who obtain and retain unsubsidized employment through DHS, Income Maintenance Administration's (IMA's) Temporary Assistance for Needy Families Employment Program (TEP). The Act made extensive and significant changes to the District of Columbia (District) cash assistance program for the indigent, as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), approved August 22, 1996, Pub. L. No. 104-193, 110 Stat. 2105. PRWORA requires a large proportion of TANF recipients either to work or to participate in activities that will help them prepare for and retain employment.

In response to PRWORA, DHS/IMA initiated TEP to comply with federal requirements and help welfare recipients find jobs. Currently TEP relies on seven (7) contractors to provide job readiness training and job placement, and case management services to address barriers and structured job search assistance. TEP has successfully moved over seven thousand (7,000) recipients from welfare to work. Many recipients, however, still remain on welfare. Currently, there are approximately two thousand two hundred (2,200) single mothers who have received TANF for sixty (60) months since March 1997 (long-stayers). While these individuals have been referred to TEP, they have not successfully found and maintained employment.

DHS/IMA seeks to initiate a new demonstration program that provides intensive personal assistance and a supported work environment to help long-stayers overcome their persistent barriers and become self-sufficient. The supported work program will combine subsidized jobs, training, unsubsidized job placement and a continuum of support and mentoring for TANF recipients who have received TANF assistance for at least sixty (60) months and have not been able to successfully find and maintain employment.

These proposed rules will also enable the District to comply with the federal requirements to allow able-bodied adult TANF recipients to participate in work-related activities with the objective of securing and maintaining paid employment and ultimately self-sufficiency.

The rules will also allow DHS to provide an additional incentive to TEP participants who start working and retain their job. This incentive will provide meaningful assistance to TANF recipients as they move from welfare to work. It will also facilitate additional contact between the provider and the recipient after employment has commenced giving him or her additional opportunity to receive job retention services.

The Director also gives notice of the intent to take final rulemaking action to adopt the proposed rules not less than thirty (30) days from the date of the publication of this notice in the *D.C. Register*, or upon their approval by the Council of the District of Columbia, pursuant to Section (f)(2) of the Self-Sufficiency Promotion Amendment Act of 1998, whichever occurs last.

#### CHAPTER 58 TEMPORARY ASSISTANCE FOR NEEDY FAMILIES

Chapter 58 of Title 29 DCMR § 5813, Work Participation Allowance, is amended to read as follows:

#### 5813 WORK PARTICIPATION ALLOWANCE AND INCENTIVE PAYMENTS TO ELIGIBLE TANF RECIPIENTS

Chapter 58 of Title 29 DCMR is amended by adding §§ 5813.8 through 5813.14 to read as follows:

- 5813.8 The Director or his or her designee may provide a TANF recipient an incentive payment if he or she obtains and retains unsubsidized employment through the Department of Human Services', Temporary Assistance for Needy Families Employment Program (TEP) and all of the following occur:
- (a) If he or she is a current recipient of TANF at the time that he or she commences employment in a job for which he or she is seeking an incentive payment;
  - (b) The TANF recipient is paid not less than the applicable federal, District, state, county, or municipality wage rate;
  - (c) Has participated in TEP at some point within three (3) months of starting to work in an unsubsidized job; and
  - (d) Is a resident of the District of Columbia, as determined in accordance with § 503 of the District of Columbia Public Assistance Act of 1982, effective April 6, 1982 (D.C. Law 4-101; D.C Official Code § 4-205.03).
- 5813.9 An individual shall not be eligible to receive a TEP incentive payment if he or she has received an incentive payment from a TEP provider any time during the immediate twelve (12) month period prior to the commencement of his or her current employment.
- 5813.10 In order to be eligible to receive a TEP incentive payment, a TANF recipient shall be required to adhere to the following conditions:
- (a) Provide verification, in a manner approved by the Department of Human Services, that he or she has entered unsubsidized employment;

- (b) Submit it to the TEP provider not later than three (3) months after commencing his or her unsubsidized employment; and
- (c) Provide a copy of his or her pay stub, verifying the number of hours worked during the period for which he or she is requesting an incentive payment.

5813.11 A TANF recipient shall forfeit his or her right to receive an incentive payment if he or she fails to submit the required documents within three (3) months of the benchmark requested, which are set forth in subparagraph 5813.12 below.

5813.12 A TANF recipient shall be entitled to receive an incentive payment for unsubsidized employment, based on the duration of his or her employment under the following conditions:

- (a) Incentive Point 1: A TANF recipient shall be entitled to receive one hundred dollars (\$100) if he or she works in an unsubsidized job and is expected to work the minimum number of hours set forth in Section 5804.2 of this Chapter that is applicable to his or her family;
- (b) Incentive Point 2: A TANF recipient shall be entitled to receive two hundred dollars (\$200) if he or she works for one (1) month in an unsubsidized job for at least the average number of hours set forth in Section 5804.2 of this Chapter that is applicable to his or her family;
- (c) Incentive Point 3: A TANF recipient shall be entitled to receive three hundred dollars (\$300) if he or she works for three (3) months in an unsubsidized job for at least the average number of hours set forth in Section 5804.2 of this Chapter that is applicable to his or her family; and
- (d) Incentive Point 4: A TANF recipient shall be entitled to receive one hundred fifty dollars (\$150) if he or she works for six (6) months in an unsubsidized job for at least the average number of hours set forth in Section 5804.2 of this Chapter that is applicable to his or her family.

5813.13 The TEP incentive payments shall be provided in a timely manner.

5813.14 A TEP participant who believes that he or she qualifies for an incentive payment pursuant to subsection 5813.13 may appeal a denial of the incentive payment through the fair hearing process.

Comments on this proposed rulemaking may be made by filing written comments, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register* to Kate Jesberg, Administrator, Income Maintenance Administration, 645 H Street, N.W., Washington, D.C. 20002. Copies of these rules may be obtained by writing to the above address.

**DISTRICT OF COLUMBIA  
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING**

**NOTICE OF PROPOSED RULEMAKING**

The Commissioner of the Department of Insurance and Securities Regulation, pursuant to the authority set forth in Section 4 of the Department of Insurance and Securities Regulation Establishment Act of 1996, effective May 21, 1997 (D.C. Law 11-268; D.C. Official Code § 31-103(a)(1) (2001)) and Section 1205 of Part A of Title XII of the National Housing Act, approved August 1, 1968 (82 Stat. 569; D.C. Official Code § 31-5004(b)-(2001)), gives notice of his intent to adopt the following amendments to be included in Title 26 of the District of Columbia Municipal Regulation ("DCMR"), in not less than thirty (30) days from the date of publication of this notice in the D.C. Register. The purpose of the rulemaking is to amend the District of Columbia Insurance Placement Facility's Constitution and Plan of Operation so as to allow for the provision of homeowners insurance, among other things.

**TITLE 26, CHAPTER 13 (INSURANCE PLACEMENT FACILITIES), IS AMENDED TO READ AS FOLLOWS:**

**1300 GENERAL PROVISIONS**

- 1300.1 It is the purpose of this chapter to establish a constitution and provide for the administration of an industry placement facility pursuant to the provisions of D.C. Official Code § 31-5004(b) (2001) ("Statute").
- 1300.2 The Commissioner and his or her designee shall be responsible for performing the duties and responsibilities with respect to exercising the regulatory authority conferred by the Statute, through the Mayor, pursuant to D.C. Official Code § 31-103(a)(1) (2001).

**1301 NAME AND STYLE OF ORGANIZATION**

The name of this organization shall be District of Columbia Property Insurance Facility ("Facility"). The Facility shall be an unincorporated association.

**1302 OBJECTIVE**

The objective of the Facility shall be the formulation and administration of a program seeking the equitable apportionment of insurance among its Members in accordance with the provisions of the Statute and pursuant to the District of Columbia Property Insurance Facility's Plan of Operation ("Plan of Operation").

**1303 MEMBERSHIP**

- 1303.1 Every insurer licensed to write and engaged in writing in the District of Columbia, on a direct basis, Basic Property Insurance, as defined in the Plan of Operation, or

components of such insurance in multi-peril policies, shall be a Member of the District of Columbia Property Insurance Facility.

- 1303.2 Each Member shall participate, subject to a maximum as hereinafter provided, in the writings, expenses, profits and losses of the Facility in the proportion that such Member's Premiums Written during the preceding calendar year, on property located in the District of Columbia, bear to the aggregate of such Premiums Written by all Members of the Facility.
- 1303.3 The maximum liability of a Member on any single risk shall not exceed one and one-half percent (1 1/2%) of the Member's surplus to policyholders. The remaining Members shall assume liability in excess of such maximum and they shall share ratably the premiums applicable thereto.
- 1303.4 The Facility may procure, through assessment of all its Members, subject to reasonable minimum assessments, funds necessary to defray expenses required to operate.
- 1303.5 A Member, which has withdrawn from the District, has had its license revoked or has been placed in liquidation, shall remain liable for all obligations through the entire fiscal year of the District of Columbia Property Insurance Facility in which such withdrawal, license revocation or liquidation occurs. When a Member has been merged or consolidated into another insurer, the Member, or its successor in interest, shall remain liable for all obligations hereunder and shall continue to participate in the Facility, based upon the Premiums Written by it and by the other insurers with which it has been merged or consolidated.

**1304 OFFICE**

The principal office of the Facility shall be in the District of Columbia or at a location approved by the Commissioner.

**1305 BOARD OF DIRECTORS FOR THE FACILITY**

- 1305.1 The Facility shall be governed by a Board of Directors ("Board") composed of eleven (11) directors elected annually by cumulative vote of the Members of the Facility whose votes in such election shall be weighted in accordance with each Member's proportionate share of aggregate Premiums Written during the most recent calendar year for which data is available.
- 1305.2 Directors shall serve for a period of one (1) year or until their successors are elected.
- 1305.3 No more than one (1) Member in a group of insurers under the same management or ownership shall serve as a director on the Board at the same time.

- 1305.4 The Board shall have responsibility for the administration of the Facility and shall adopt and promulgate such rules as may be necessary to carry out the objective of the Facility subject to the powers of the Commissioner set forth in the Statute.
- 1305.5 The Board shall elect from its directors a Chairperson and a Vice Chairperson and shall appoint a Secretary.
- 1305.6 The Board shall make appropriate arrangements for the daily management of the affairs of the Facility.
- 1305.7 Regular and special meetings of the Board shall be held in the District, unless another place shall be designated by the Chairperson of the Board.
- 1305.8 The Board shall meet as often as may be required to perform the general duties of administration and shall meet upon the request of any two (2) directors or of any ten (10) Members.
- 1305.9 Notice of Board meetings shall be furnished by the Secretary.
- 1305.10 Six (6) directors shall constitute a quorum.
- 1305.11 Each director shall have one (1) vote. Any matter submitted shall be carried provided it is voted in the affirmative by a majority of the Board. Voting by proxy at meetings of the Board shall not be permitted.
- 1305.12 Any action required or permitted by law to be taken at a meeting may be taken without a meeting if the action is taken by unanimous consent of all directors entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the directors entitled to vote on the action, and delivered to the Secretary for inclusion in the minutes for filing with the corporate records. The action shall be deemed effective when the last director signs the consent, unless the consent specifies a different effective date.
- 1305.13 The Board or any committee of the Board may permit any or all directors or committee members to participate in a regular or special meeting by, or conduct the meeting through, the use of any means of communication by which all directors or committee members participating may simultaneously hear each other during the meeting. A director or committee member participating in a meeting by this means shall be deemed to be present in person at the meeting.
- 1305.14 The Chairperson, or in his or her absence the Vice Chairperson, shall preside at meetings of the Board and at annual or special meetings of the Members of the Facility. The Secretary, or a designee appointed by the Chairperson or Vice Chairperson, shall act as Secretary at such meetings.

- 1305.15 The Chairperson may appoint or the Board may elect such standing committees or temporary or special committees as may be deemed necessary for the transaction of the Board's business. The Chairperson and Vice Chairperson shall be ex-officio Members of all committees of the Board with the right to vote.
- 1305.16 The Board shall have the right, in person or through representatives, at all reasonable times, to audit and inspect the books and records of any Member of the Facility as to matters coming within the purview of the Constitution and the Plan of Operation.
- 1306 ANNUAL AND SPECIAL MEETINGS OF MEMBERS OF THE FACILITY**
- 1306.1 There shall be an annual meeting of Members, on a date fixed by the Board, for the election of directors and for such other business as may be necessary.
- 1306.2 Special meetings of the Members may be called by the Board on its own motion or upon the written request to the Board by any ten (10) Members, no two (2) of which shall be in the same group of insurers with respect to management or ownership.
- 1306.3 Written notice of the annual or any special meeting, stating the time and place and the matters to be considered, shall be given to all Members at least ten (10) days in advance of each meeting.
- 1306.4 Notice, in the case of a special meeting, shall be accompanied by the agenda for such meeting and such supporting data and information as may be assembled by the Board. No matter may be considered at any special meeting that has not been included in the agenda.
- 1306.5 At any annual or special meeting, Members representing at least fifty-one percent (51%), of the aggregate Premiums Written by Members of the Facility, based on the most recent available data, shall constitute a quorum. Members may be represented by proxy.
- 1306.6 Voting on matters requiring a vote by the Members, including amendment to the Constitution or termination of the Facility, shall be weighted in accordance with the Premiums Written by each Member as determined from the most recent available data.
- 1306.7 A proposal, other than for the election of directors, shall be considered adopted by the Members when approved by at least two-thirds (2/3) of the votes cast on the weighted basis described in subsection 1306.6.
- 1306.8 Any matter subject to vote by the Members may be proposed and voted upon by mail, facsimile or electronic communication, provided such procedure is authorized by a majority of the Board.

## 1307 INDEMNIFICATION

1307.1 The Facility shall indemnify:

(a) each director of the Board (or other board empowered to act in the capacity of a board of directors) and the representatives of any insurer Member of the Board, each Member of any other committee or any subcommittee of the Facility, and the estate, executor, administrator, personal representative, heirs, legatees and devisees of any such person made a party to a proceeding by reason of service in that capacity unless it is proved that:

- (1) The act or omission of such Member or person was material to the cause of action adjudicated in the proceeding; and (A) was committed in bad faith or (B) was the result of active and deliberate dishonesty;
- (2) Such Member or person actually received an improper personal benefit in money, property, or services; or
- (3) In the case of any criminal proceeding, such Member or person had reasonable cause to believe that the act or omission was unlawful.

(b) every Member of the Facility, both as a Member and by reason of such Member having one or more of its personal representatives or employees serving in any of the capacities or positions specified in paragraph (a) above, or as an officer or employee of the Facility, which has been made a party to a proceeding by reason of service in that capacity, unless it is proved that:

- (1) The act or omission of such Member or person was material to the cause of action adjudicated in the proceeding; and (A) was committed in bad faith or (B) was the result of active and deliberate dishonesty;
- (2) Such Member or person actually received an improper personal benefit in money, property, or services; or
- (3) In the case of any criminal proceeding, such Member or person had reasonable cause to believe that the act or omission was unlawful.

1307.2 Indemnification under subsection 1307.1 shall be against judgments, penalties, fines, settlements, and reasonable expenses actually incurred by the Member or

person in connection with the proceeding. However, if the proceeding was commenced by, on behalf of, or in the right of, the Facility, indemnification shall not be made in respect of any proceeding in which the Member or person shall have been adjudged to be liable to the Facility.

- 1307.3 The termination of any proceeding by judgment, order, or settlement does not create a presumption that the Member or person did not meet the requisite standard of conduct set forth in subsection 1307.1. The termination of any proceeding by conviction, or a plea of *nolo contendere* or its equivalent, or an entry of an order of probation prior to judgment, creates a rebuttable presumption that the Member or person did not meet that standard of conduct.
- 1307.4 The Facility may indemnify any officer or employee of the Facility, any consultant to, or independent contractor retained by the Facility, or the estate, executor, administrator, personal representative, heirs, legatees or devisees of such person made a party to a proceeding by reason of service in that capacity unless it is proved that:
- (a) The act or omission of such person was material to the cause of action adjudicated in the proceeding; and (i) was committed in bad faith or (ii) was the result of active and deliberate dishonesty;
  - (b) Such person actually received an improper personal benefit in money, property, or services; or
  - (c) In the case of any criminal proceeding, such person had reasonable cause to believe that the act or omission was unlawful.
- 1307.5 Indemnification under subsection 1307.4 may be against judgments, penalties, fines, settlement, and reasonable expenses actually incurred by the person in connection with the proceeding. However, if the proceeding was commenced by, on behalf of, or in the right of, the Facility, indemnification may not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the Facility.
- 1307.6 The termination of any proceeding by judgment, order or settlement does not create a presumption that the person did not meet the requisite standard of conduct set forth in subsection 1307.4. The termination of any proceeding by conviction, or a plea of *nolo contendere* or its equivalent, or an entry of an order of probation prior to judgment, creates a rebuttable presumption that the person did not meet that standard of conduct.
- 1307.7 A Member or person shall not be indemnified under of subsection 1307.1 or 1307.4 in respect of any proceeding charging improper personal benefit to the Member or person, whether or not involving action in the Member's or person's official capacity, in which the Member or person was adjudged to be liable on the basis that personal benefit was improperly received.

- 1307.8 A court of appropriate jurisdiction, upon application of a Member or person and such notice as the court shall require, may order indemnification in the following circumstances:
- (a) If it determines a Member or person is entitled to reimbursement under subsection 1307.1, the court shall order indemnification, in which case the Member or person shall be entitled to recover the expenses of securing such reimbursement; or
  - (b) If it determines that the Member or person is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the Member or person met the standards of conduct set forth in subsections 1307.1 or 1307.4, or has been adjudged liable under the circumstances described in subsection 1307.7, the court may order such indemnification as the court shall deem proper. However, indemnification with respect to any proceeding commenced by, on behalf of, or in the right of, the Facility, or in which liability shall have been adjudged in the circumstances described in subsection 1307.7, shall be limited to expenses.
- 1307.9 A court of appropriate jurisdiction may be the same court in which the proceeding involving the Member or person's liability took place.
- 1307.10 Indemnification under subsection 1307.1 shall not be made by the Facility unless authorized for a specific proceeding after a determination has been made that indemnification of the Member or person is required in the circumstances because the Member or person has met the standard of conduct set forth in subsection.
- 1307.11 Such determination under subsection 1307.10 shall be made:
- (a) By the Board by a majority vote of a quorum consisting of directors not, at the time, parties to the proceeding, or, if such a quorum cannot be obtained, then by a majority vote of a subcommittee of the Board consisting solely of two or more directors not, at the time, parties to such proceeding and who were duly designated to act in the matter by a majority vote of the full Board in which the designated directors who are parties may participate;
  - (b) By special legal counsel selected by the Board or a subcommittee of the Board by vote as set forth in subparagraph (a) hereof, or if the requisite quorum of the full Board cannot be obtained therefore and the subcommittee cannot be established, by a majority vote of the full Board in which directors who are parties may participate; or
  - (c) By the Members of the Facility.

- 1307.12 Indemnification under subsection 1307.4 may not be made by the Facility unless authorized for a specific proceeding after a determination has been made that indemnification of the person is permitted in the circumstances because the person has met the standard of conduct set forth in that subsection and that under the circumstances indemnification is in the best interests of the Facility.
- 1307.13 Such determination under subsection 1307.12 shall be made:
- (a) by the Board by a majority vote of a quorum consisting of directors not, at the time, parties to the proceeding, or, if such a quorum cannot be obtained, then by a majority vote of a subcommittee of the Board consisting solely of two or more directors not, at the time, parties to such proceeding and who were duly designated to act in the matter by a majority vote of the full Board in which the designated directors who are parties may participate; or
  - (b) by the Members of the Facility.
- 1307.14 Authorization of indemnification and determination as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is required or permitted. However, if special legal counsel makes a determination that indemnification is required, authorization of indemnification and determination as to reasonableness of expenses shall be made in the manner specified in paragraph 1307.13(b) for selection of such counsel.
- 1307.15 Reasonable expenses incurred by a Member or person, other than an officer or employee, who is a party to a proceeding shall be paid or reimbursed by the Facility, and in the case of an officer or employee, reasonable expenses incurred may be paid or reimbursed by the Facility in advance of the final disposition of the proceeding upon receipt by the Facility of:
- (a) A written affirmation by the Member or person of the Member's or person's good faith belief that the standard of conduct necessary for indemnification by the Facility as authorized by this section has been met; and
  - (b) A written undertaking by or on behalf of the Member or person to repay the amount if it shall ultimately be determined that the standard of conduct has not been met.
- 1307.16 The undertaking required by paragraph 1307.15(b) shall be an unlimited general obligation of the Member or person but, in the discretion of the Board, need not be secured and may be accepted without reference to financial ability to make the repayment.
- 1307.17 Payments under subsection 1307.15 shall be made as provided by contract or as specified in subsection 1307.8 or subsection 1307.10.

- 1307.18 The indemnification and advancement of expenses provided or authorized by this section shall not be deemed exclusive of any other rights, including, but not limited to, indemnification, any right to which the Member or person may be entitled under this chapter, any resolution of the Members or the Board or any contract or other agreement, both as to actions in an official capacity and as to actions in another capacity while holding such position.
- 1307.19 This chapter does not limit the Facility's power to pay or reimburse expenses incurred by a Member or person in connection with an appearance as a witness in a proceeding at a time when the Member or person has not been made a named defendant or respondent in the proceeding.
- 1307.20 The Facility may purchase and maintain insurance on behalf of any entity or person who is or was a Member, a director, a representative of any director of the Board, a member of any other committee or any subcommittee of the Facility, and the estate, executor, administrator, personal representative, heirs, legatee and devisees of any such person, or an officer or employee of the Facility and the estate, executor, administrator, personal representative, heirs, legatees or devisees of such officer or employee, or which (or who), while a Member, director of the Board, representative of a director of the Board, member of any other committee or any subcommittee, officer or employee of the Facility, is or was serving at the request of the Facility as a director, officer, partner, trustee, employee, or agent of a foreign or domestic corporation, partnership, joint venture, trust, other enterprises, or employee benefit plan, against any liability asserted against and incurred by such entity or person in any such capacity or arising out of such entity's or person's position, whether or not the Facility would have the power to indemnify against liability under the provisions of this chapter.
- 1307.21 The Facility may provide similar protection to that referenced in subsection 1307.20, including a trust fund, letter of credit, or surety bond, not inconsistent with this chapter.
- 1307.22 Any insurance or similar protection provided by the Facility may be procured through a Member or other affiliate of the Facility.
- 1307.23 The indemnification provided by this chapter shall be secondary to any benefits which the Member or person may be entitled to receive from any applicable insurance policy providing Directors and Officers, Errors and Omissions or other applicable insurance coverage, which has been procured by the Facility or for which the Facility has paid the premium.
- 1307.24 The indemnification provided by this chapter shall be primary over any indemnification provided by a Member or a director of the Board at his or its own expense. The indemnification provided for in this chapter shall be deemed to be an expense of the Facility to which all of the Members of the Facility shall contribute in the proportion that such Member participates according to law in writings, expenses, and losses of the Facility.

1307.25 In this section, the following terms shall have the meanings ascribed:

“Member” means any entity that is or was an insurer member of the Facility or a director of the Board of Directors of the Facility.

“Expenses” includes, but not limited to, attorney’s fees.

“Official capacity” means the following:

- (i) The role of a Member of the Facility, when used with respect to a Member;
- (ii) The position of director of the Board of Directors of the Facility, when used with respect to a director of the Board of Directors; and
- (iii) The elective or appointive office in the Facility held by the officer, or the employment relationship undertaken by the employee on behalf of the Facility, when used with respect to an entity or person other than a Member of the Facility or a director of the Board of Directors.

“Party” includes a person who was, is, or may be made, a named defendant or respondent in a proceeding.

“Proceeding” means any threatened, pending or completed action or suit, whether civil, criminal, administrative, or investigative.

## 1308 INSOLVENCY

1308.1 If any Member fails, by reason of insolvency to pay its proportion of any expense or of any loss incurred by the Facility, the unpaid loss or the remaining Members shall pay expense, each contribution in the manner provided for distribution of expenses and losses under the Constitution, deleting thereby the proportion of the defaulting Member.

1308.2 The Facility shall be subrogated to the rights of the remaining Members in any liquidation proceeding and shall have full authority on their behalf to exercise their rights in any action or proceeding.

1308.3 In the event of insolvency of a Member, any reinsurance assumed by the Facility with respect to policies issued by such Member pursuant to the previous Plan of Operation shall be payable as follows:

- (a) On the basis of the liability of the Member without diminution;
- (b) Directly to the Member; or

(c) To its liquidator, receiver or statutory successor.

- 1308.4 An exception to subsection 1308.3 shall apply when the Facility, with the consent of the insured under the reinsured policy, as evidenced by endorsement, has assumed the policy obligations of the Member as direct obligations of the Facility to the payees under the policy and as a substitute for the obligations of the Member to the payees.
- 1308.5 The liquidator, receiver or statutory successor of the Member shall give written notice to the Facility of the pendency of a claim against the Member on the policy reinsured within a reasonable time after the claim is filed in the insolvency proceeding.
- 1308.6 During the pendency of a claim, the Facility may investigate the claim and, at its own expense, in the proceeding where the claim is to be adjudicated, interpose any defense or defenses that it may deem available to the Member or its liquidator, receiver or statutory successor.
- 1308.7 The expense incurred by the Facility shall be chargeable subject to court approval against the insolvent Member as part of the expense of liquidation to the extent of a proportionate share of the benefit that may accrue to the Member solely as a result of the defense undertaken by the Facility.

### **1309 AMENDMENTS**

The Facility's Constitution may be amended by the Members subject to the powers of the Commissioner as set forth in the Statute.

### **1310 PLAN OF OPERATION**

- 1310.1 The revised Plan of Operation, which was approved by the Commissioner and deemed effective as of April 1, 2004, replaces the prior Plan of Operation that had been effective as of October 1, 1972, as amended, provides that the Plan of Operation shall remain effective to complete all unfinished business in progress and until such time as all liability has ceased, claims are settled and final settlement has been made with respect to insurance written pursuant to the Plan of Operation.
- 1310.2 The Facility is authorized to issue policies or certificates of insurance on risks in a form where each Member of the Facility shall be a direct insurer hereunder in such proportion as its Premiums Written bear to the total Premiums Written of all Members.
- 1310.3 Liability of each Member shall be several, each of itself, and not joint, and no Member shall be liable under any such policy or certificate for the liability of any other Member, except as otherwise provided in this chapter.

- 1310.4 Members of the Facility shall be deemed to have authorized the manager of the Facility to act as attorney-in fact for all Members to execute policies on behalf of the Member companies.
- 1310.5 Any policy or certificate of insurance issued pursuant to this section shall be executed on behalf of the participating Members by any attorney-in-fact appointed.
- 1310.6 The attorney-in-fact shall pay, on behalf of such Members, premium and other taxes related to Facility business on terms and conditions agreeable to the taxing authority involved.
- 1310.7 In the event of death, resignation or incapacity of said attorney-in-fact to act, the Board shall nominate a successor.
- 1310.8 No policy or certificate of insurance shall be affected or invalidated by any change of the attorney-in-fact who, at the time the policy or certificate of insurance was issued, shall have duly acted pursuant to the powers vested in him or her.

### **1311 INSPECTIONS AND REPORTS**

- 1311.1 Any property owner is entitled to an inspection by the Facility of property that is eligible for Basic Property Insurance or Homeowners Insurance and, if unable to obtain such insurance in the normal market, may apply to the Facility for such inspection.
- 1311.2 The application shall include a request for inspection and the original inspection or attempt to inspect shall be made at no cost to the applicant. If the inspector is unable to complete an inspection of the property due to the fault of the owner, the applicant or their designated responsible representative, the Facility shall require the applicant to pay, in advance, the reasonable cost of any subsequent inspection efforts. The Board of Directors shall set the fee for the reasonable cost of any subsequent inspection efforts.
- 1311.3 The inspector must be provided full access to the property for which the inspection is sought, but the presence of the owner of a building may not be required when a tenant is seeking insurance.
- 1311.4 An Inspection Report shall be made for each property inspected and shall be sent to the Facility. The report shall cover pertinent structural and occupancy features, as well as the general condition of the building and surrounding structures. Representative photographs of the property shall be taken during the inspection.
- 1311.5 Once an eligible risk has been inspected and found insurable, it shall be re-inspected only:

- (a) Upon request of the property owner;
- (b) Upon a limited basis for statistical purposes as determined by the Board;
- (c) Upon a change in type of occupancy;
- (d) Upon a schedule of not more than once every three (3) years as determined by the Board; or
- (e) Upon information or well founded belief of the Manager of the Facility that the occupancy hazards or physical condition of the property have substantially changed since the last inspection.

## 1312 PROCEDURE AFTER INSPECTION

- 1312.1 In order to achieve maximum uniformity in the definition and application of reasonable underwriting standards, the Board of Directors shall specify criteria that are contained in the Rules of the Plan of Operation, which shall be used by the Facility in determining insurability.
- 1312.2 A risk shall not be declined for reason of neighborhood or area location or Environmental Hazard beyond the control of the Property Owner.
- 1312.3 The Facility shall advise the licensed insurance producer or applicant that:
- (a) The risk is acceptable and the policy will be issued upon receipt of the full required amount of the premium;
  - (b) The risk is not acceptable, but will be acceptable if improvements, noted on the Report of Declination, are made by the applicant and confirmed by reinspection or other means; or
  - (c) The risk is not acceptable for the reason stated in the Report of Declination.
- 1312.4 If the inspection of the property reveals that there are one or more substandard conditions, condition charges may be imposed in conformity with the substandard rating plan approved by the Commissioner. Whenever improvements are specified, they shall be set forth in such a way that the applicant will know what must be done to achieve insurability at standard rates: (a) with an approved condition charge, or (b) without any condition charge. If an approved condition charge is applicable, coverage shall be provided immediately at the approved higher rate during the period in which any improvements are being made. If improvements are completed and are verified by the Facility through inspection or other means, the premium shall be pro-rated and adjusted to the proper level. Coverage bound and approved and cancelled prior to policy issuance shall be pro-

rated, with applicable condition charges, for purposes of earned premium calculations.

- 1312.5 In the event a risk is declined because it fails to meet reasonable underwriting standards, or if the applicant is notified that coverage will be written if stated improvements are made, the Facility shall send copies of the Inspection Report and the Report of Declination to the Property Owner along with an explanation of the Facility's action and the procedures for appealing that action.
- 1312.6 Forms listing all condition charges applied by the Facility will be furnished with the Approval Notice.

### **1313 PLACEMENT OF INSURANCE**

- 1313.1 Premiums are payable by licensed insurance producers on a net basis to the Facility by means and in a form acceptable to the Facility. The Facility must have on file a copy of the producer's current license issued by the Department of Insurance, Securities and Banking of the District of Columbia. Premium financing arrangements will be honored by the Facility.
- 1313.2 All others seeking insurance are required to pay gross premium by means and in a form acceptable to the Facility.
- 1313.3 Payment may be made in person or by mail, but cash shall not be sent through the mail.
- 1313.4 Payment shall be received by the Facility before coverage can become effective.
- 1313.5 Dishonored first payments will void the policy. Other dishonored payments will cause the policy to be cancelled on a pro-rata equity basis.
- 1313.6 Customers may elect an installment payment plan developed by the Facility and approved by the Commissioner. Commissions shall be paid only on payments received, excluding installment payment fees.

### **1314 IMMEDIATE BINDING**

Eligible risks shall be subject to immediate binding in accordance with procedures adopted by the Board in the Rules of the Plan of Operation.

### **1315 STANDARD POLICY COVERAGE**

- 1315.1 All policies issued shall be for Basic Property Insurance or Homeowners Insurance on standard policy forms and shall be issued for a term of one (1) year. Policies may be continued on a year-to-year basis only upon the annual submission of a properly completed continuation application, receipt of the proper premium and approval by the Facility.

- 1315.2 Deductibles, percentage participation clauses, and other underwriting devices may be employed to meet special problems of insurability, subject to approval of the Commissioner.
- 1315.3 The Facility shall, subject to the provisions of the Plan of Operation, write insurance up to the reasonable insurable value of the property, subject to a maximum of one million five hundred thousand dollars (\$1,500,000) on all interests at one location. The Board may set sub-limits on certain lines of insurance subject to approval of the Commissioner.
- 1315.4 After the issuance of a policy, the following procedure shall be followed to effect any change by endorsement:
- (a) The request for change must be in writing;
  - (b) The endorsement shall be prepared by the Facility;
  - (c) The request for endorsement shall be implemented by proper adjustment of premium;
  - (d) The endorsement shall be signed by the attorney-in-fact of the Facility; and
  - (e) The original of the endorsement shall be sent to the named insured or licensed producer.

## 1316 CANCELLATIONS

- 1316.1 Grounds for Cancellation shall be:
- (a) Non-payment of premium;
  - (b) Evidence of incendiarism;
  - (c) Cause which would have been grounds for non-acceptance of the risk at the time of acceptance;
  - (d) Cause arising subsequent to the inspection, which would have been grounds for non-acceptance of the risk under the Plan of Operation, had such cause existed at the time of inspection; or
  - (e) Two (2) unsuccessful attempts to inspect the property.
- 1316.2 Except for non-payment of premium, or evidence of incendiarism, or a cause, which would have been grounds for non-acceptance of the risk at the time of inspection, or a misrepresentation of fact, thirty (30) days notice of cancellation,

together with a statement of the reasons therefore, shall be sent to the insured. A statement explaining that the insured has a right of appeal shall accompany all notices.

**1317 RIGHT OF APPEAL**

1317.1 Any applicant for insurance, any person insured pursuant to the Plan of Operation or any affected insurer may appeal to the Board within fifteen (15) days after any ruling, action or decision of the Facility. The Board or an appeals committee designated by the Board shall hear and determine such appeal within fifteen (15) days after the same is filed. Such determination may be appealed to the Commissioner within ninety (90) days as provided in the Statute.

1317.2 Orders of the Commissioner shall be subject to judicial review as provided in the Statute.

**1318 COMMISSIONS**

1318.1 Commissions to the licensed producers, designated by the Property Owner or the insured, shall be twelve percent 12% until the Board determines a different amount and that amount is approved by the Commissioner.

1318.2 If a policy is canceled, or if an endorsement is issued which requires a premium to be returned to the insured, the unearned premium, net of any commission, will be sent to the licensed producer. The producer shall add to that return the commission on that unearned premium and refund the total amount to the insured.

1318.3 Notwithstanding the provisions of subsection 1318.2, if a policy is canceled, or if an endorsement is issued which requires a premium to be returned to the insured, and a licensed premium finance company has paid the insured's premium pursuant to a premium finance agreement of which the Facility has been notified, the unearned premium, net of any commission, will be sent directly to the licensed premium finance company. The producer shall be solely responsible for the return to the licensed premium finance company of the commission on that unearned premium.

**1319 STATISTICS AND REPORTS**

1319.1 All business written pursuant to the Plan of Operation shall be coded separately in order that the experience of the business may be viewed separately from the experience on general business.

1319.2 The Facility shall furnish to all Members, to the Commissioner and to other entities as required by statute or regulation, a written report at such intervals and containing such information as may be required.

**1320 CANCELLATION OR NON-RENEWAL OF ELIGIBLE RISKS**

1320.1 Each Member Company agrees that on cancellations and non-renewals that it initiates on risks eligible for insurance under the Plan of Operation (except in cases of non-payment of premium, or evidence of incendiarism), it will:

- (a) Furnish the policyholder thirty (30) days advance written notice in order to allow time for the application for coverage to be made and a policy to be written under the provisions of the Plan of Operation; and
- (b) Furnish the policyholder notice of the availability and location of the Facility.

**1320 CONTINUING EDUCATION**

The Facility shall undertake a continuing education program to assure that this program receives adequate public attention.

**1321 MODIFICATION**

The Plan of Operation may be amended by the Board in any manner not inconsistent with the Constitution of the Facility, subject to disapproval by the Commissioner in whole or in part in accordance with the provisions of the Statute.

**1399 DEFINITIONS**

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

"Commissioner" means the Commissioner of Insurance, Securities and Banking of the District of Columbia or his designated agent.

"Basic Property Insurance" means insurance against direct loss to property caused by perils as defined and limited in the standard fire policy and extended coverage endorsement, including builder's risk coverage and vandalism and malicious mischief endorsements thereon and other insurance as the Commissioner has designated or may designate in accordance with the authority vested in him by the Statute.

"Environmental Hazard" means any hazardous condition that might give rise to loss under an insurance contract, but which is beyond the control of the Property Owner.

"Facility" means the District of Columbia Property Insurance Facility.

"Homeowner's Insurance" means insurance for residential property that provides a combination of coverages, including fire, extended coverage, vandalism and

malicious mischief, burglary, theft, and personal liability. The term shall include a policy of insurance that is limited to basic market value, repair cost, or actual cash value contracts for owner-occupants of one-to-four-family dwellings as approved by the Commissioner.

“Licensed Insurance Producer” means an insurance producer required to be licensed in the District of Columbia to sell, solicit, or negotiate insurance.

“Manager” means the principal administrative officer of the District of Columbia Property Insurance Facility appointed by the Board of Directors.

“Member Company” or “Member” means a participant in the District of Columbia Property Insurance Facility.

“Plan of Operation” means the District of Columbia Property Insurance Facility’s Plan of Operation.

“Premiums Written” means gross direct premiums charged with respect to property in the District of Columbia on all policies of Basic Property Insurance, Homeowners Insurance and the Basic Property Insurance premium components of all multi-peril policies, less all premiums and dividends returned, paid or credited to policyholders or the unused or unabsorbed portions of premium deposits.

“Property Owner” means any person having an insurable interest in real, personal, or mixed real and personal property.

Persons desiring to comment on the proposed rulemaking may submit their 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 addressed to Leslie Johnson, Hearing Officer, Department of Insurance, Securities and Banking, 810 First Street, N.E., Room 701, Washington, DC 20002. Copies of the proposed rules may be obtained from the Department at the above address.

## EXECUTIVE OFFICE OF THE MAYOR

NOTICE OF PROPOSED RULEMAKING

The Mayor of the District of Columbia, pursuant to the authority set forth in the Freedom of Information Act of 1976, effective March 25, 1977 (D.C. Law 1-96, D.C. Official Code §§ 2-531 *et seq.* (2001)), hereby gives notice of the intent to adopt the following amendments to Chapter 4 of Title 1 DCMR in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The amendments update the existing rules and clarify the appeal process. Upon adoption, these rules will amend Chapter 4 of the D.C. Freedom of Information Regulations, published at 23 DCR 3744 (1977), amended at 24 DCR 6211 (January 27, 1978), 44 DCR 2316 (April 18, 1997), 44 DCR 2984 (May 16, 1997), and 23 DCR 9668 (June 3, 1977).

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments in writing not later than thirty days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with the Executive Office of the Mayor, Office of the Secretary at 1350 Pennsylvania Ave, Suite 419, Washington, D.C. 20004. Copies of the proposed amendments may be obtained from the Executive Office of the Mayor, Office of the Secretary at the address stated above.

## CHAPTER 4

## FREEDOM OF INFORMATION

Title 1, Chapter 4 is amended to read as follows:

**400 PURPOSE AND APPLICATION**

- 400.1 This chapter contains the rules and procedures to be followed by all agencies, offices, and departments (hereinafter "agency") of the District of Columbia Government which are subject to the administrative control of the Mayor in implementing the Freedom of Information Act, D.C. Law 1-96, 23 DCR 3744 (1977) (hereinafter "the Act") and all persons (hereinafter "requesters") requesting records pursuant to the Act.
- 400.2 For the purpose of this chapter, "agency" includes the Executive Office of the Mayor.
- 400.3 Employees may continue to furnish to the public, informally and without compliance with these procedures, information and records, which they customarily furnish in the regular performance of their duties.
- 400.4 The policy of the District of Columbia Government is one of full and responsible disclosure of its identifiable records consistent with the provisions of D.C. Law 1-

96. All records not exempt from disclosure shall be made available. Moreover, records exempt from mandatory disclosure shall be made available as a matter of discretion when disclosure is not prohibited by law or is not against the public interest.

#### **401 AGENCY RESPONSIBILITY**

401.1 The ultimate responsibility for responding to requests for records of an agency is vested in the agency head.

401.2 Each agency head shall designate an individual as the Freedom of Information Officer of the agency and may delegate to that individual the authority to grant and deny requests and to respond to appeals pursuant to §§ 412.5 and 412.6 of this chapter.

401.3 Each agency shall post the name, title, address, telephone number, fax number, and e-mail address of its designated Freedom of Information Officer on its web page.

401.4 All Freedom of Information Officers shall attend the meetings and training sessions, as scheduled and conducted by the Freedom of Information Act Committee established by Mayor's Order 2001-30, entitled "Establishment-Freedom of Information Act (FOIA) Committee," dated February 27, 2001.

401.5 All agency employees who maintain records shall assist the designated Freedom of Information Officer, as appropriate, with the identification and search of responsive records.

#### **402 REQUESTS FOR RECORDS**

402.1 A request for a record of an agency may be made orally or in writing and shall be directed to the particular agency.

402.2 Although oral requests may be honored, a requester may be asked to submit in writing a request for records.

402.3 A written request may be mailed, faxed or e-mailed to the agency Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer. The outside of the envelope or the subject line of the fax or e-mail shall state: "Freedom of Information Act Request" or "FOIA Request". In addition, a request shall include a daytime telephone number, e-mail address or mailing address for the requester.

402.4 A request shall reasonably describe the desired record(s). Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied.

402.5 Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.

403-404 **RESERVED**

405 **TIME LIMITATIONS**

405.1 Within the time prescribed by applicable law following the receipt of a request, the agency shall determine whether to grant or to deny the request and shall dispatch its determination to the requester, unless an extension is made pursuant to §§ 405.2 and 405.3 of this section.

405.2 In unusual circumstances as specified in § 405.3, the agency may extend the time for initial determination on a request up to the time prescribed by applicable law.

405.3 An extension shall be made by written notice to the requester, which shall set forth the reason or reasons for the extension. As used in this section "unusual circumstances" means, but only to the extent necessary to the proper processing of the request, either of the following:

- (a) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (b) The need for consultation with another agency having a substantial interest in the determination of the request or among two (2) or more components of the agency having substantial subject matter interest therein.

405.4 If no determination has been dispatched at the end of the period prescribed by law or the extension thereof, the requester may deem his or her request denied, and exercise a right of appeal in accordance with § 412.

405.5 When no determination can be dispatched within the applicable time limit, the agency shall nevertheless continue to process the request. On expiration of the time limit, the agency shall inform the requester of the following:

- (a) The reason for the delay;
- (b) The date on which a determination may be expected; and

- (c) The right to treat the delay as a denial and of the appeal rights provided by the Act and this chapter.

The agency may ask the requester to forego appeal until a determination is made.

405.6 For purposes of this chapter, a request is deemed received when the designated Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, receives the request submitted in compliance with the Act and this chapter. When the Freedom of Information Officer, pursuant to § 402.5, contacts the requester for additional information, then the request is deemed received when the Freedom of Information Officer receives the additional information.

#### 406 EXEMPTIONS

406.1 No requested record shall be withheld from inspection or copying unless both of the following criteria apply:

- (a) It comes within one of the classes of records exempted by the D.C. Law 1-96; and
- (b) There is need in the public interest to withhold it.

406.2 The classes of records authorized to be exempted from disclosure shall be those records which concern matters that are of the following nature:

- (a) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;
- (b) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
- (c) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of those records would do the following:
  - (1) Interfere with enforcement proceedings;
  - (2) Deprive a person of a right to a fair trial or an impartial adjudication;
  - (3) Constitute an unwarranted invasion of personal privacy;

- (4) Disclose the identity of a confidential source and, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;
  - (5) Disclose investigative techniques and procedures not generally known outside the government; or
  - (6) Endanger the life or physical safety of law enforcement personnel;
- (d) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
  - (e) Test questions and answers to be used in future license, employment, or academic examinations, but not previously administered examinations or answers to questions thereon;
  - (f) Information specifically exempted from disclosure by statute (other than this section), provided that the statute does one of the following:
    - (1) Requires that the matters be withheld from the public in a manner as to leave no discretion on the issue; or
    - (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;
  - (g) Information specifically authorized by Federal law under criteria established by a Presidential Executive Order to be kept secret in the interest of national defense or foreign policy which is in fact properly classified pursuant to that Executive Order;
  - (h) Information exempted from disclosure by D.C. Official Code § 28-4505 (2001);
  - (i) Information disclosed pursuant to D.C. Official Code § 5-417 (2001);
  - (j) Any specific response plan, including any District of Columbia response plan, as that term is defined in D.C. Official Code § 7-2301(1A) (2001), and any specific vulnerability assessment, either of which is intended to prevent or to mitigate an act of terrorism, as that term is defined in D.C. Official Code § 22-3152(1) (2001);

(k) Information exempt from disclosure by § 47-2851.06 (2001); and

(l) Any further exemption from disclosure that may be provided by applicable law.

406.3 Any reasonably segregable portion of a record shall be provided to any person requesting the record after deletion of those portions, which are exempt under this section.

#### 407 RESPONSES TO REQUESTS

407.1 When a requested record has been identified and is available, the agency shall notify the requester where and when the record will be made available for inspection or copies will be made available. The notification shall also advise the requester of any applicable fees.

407.2 A response denying a written request for a record shall be in writing and shall include the following information:

(a) The identity of each person responsible for the denial, if different from that of the person signing the letter of denial;

(b) A reference to the specific exemption or exemptions authorizing the withholding of the record with a brief explanation how each exemption applies to the record withheld. Where more than one record has been requested and is being withheld, the foregoing information shall be provided for each record or portion of a record withheld; and

(c) A statement of the appeal rights provided by the Act and this chapter.

407.3 If a requested record cannot be located from the information supplied or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

#### 408 FEES

408.1 Charges for services rendered in response to information requests shall be as follows (not to exceed a maximum search fee per request as may be imposed by applicable law):

(a) Searching for records, \$4.00 per quarter hour, after 1st hour, by clerical personnel (DS 1 through 8);

(a-1) Searching for records, \$7.00 per quarter hour after the 1<sup>st</sup> hour, by professional personnel (DS 9 through 13);

- (b) Searching for records, \$10.00 per quarter hour after the 1<sup>st</sup> hour, by supervisory personnel (DS 14 and above);
- (c) Copies made by photocopy machines....\$ .25 per page;
- (d) Charges for the initial review of documents, as permitted by applicable law, shall be assessed at the rate provided in subsections (a), (a-1), and (b) above.

- 408.2 When a response to a request requires services or materials for which no fee has been established, the direct cost of the services or materials to the government may be charged, but only if the requester has been notified of the cost before it is incurred.
- 408.3 Where an extensive number of documents is identified and collected in response to a request and the requester has not indicated in advance his or her willingness to pay fees as high as are anticipated for copies of the documents, the agency shall inform the requester that the documents are available for inspection and for subsequent copying at the established rate.
- 408.4 A charge of one dollar (\$ 1) shall be made for each certification of true copies of agency records.
- 408.5 Search costs, not to exceed any dollar limitation prescribed by the Act for each request, may be imposed even if the requested record cannot be located. No fees shall be charged for examination and review by an agency to determine whether a record is subject to disclosure.
- 408.6 To the extent permitted by applicable law, an agency shall require that fees as prescribed by these rules shall be paid in full prior to issuance of requested copies.
- 408.7 Remittances shall be in the form either of a personal check or bank draft on a bank in the United States, or a postal money order. Remittance shall be made payable to the order of the D.C. Treasurer and mailed or otherwise delivered to the Freedom of Information Officer, or the head of the agency in the absence of a designated Freedom of Information Officer.
- 408.8 A receipt for fees paid shall be given only upon request. No refund shall be made for services rendered.
- 408.9 An agency may waive all or part of any fee when it is deemed to be either in the agency's interest or in the interest of the public.
- 408.10 A requester seeking a waiver or reduction of fees shall provide a statement in his or her request letter explaining how the requested records will be used to benefit the general public.

408.11 The price for the publication *Indices: A Statistical Index to the District of Columbia* shall not exceed sixty dollars (\$ 60), to be paid by check made payable to the "D.C. Treasurer."

409-411 **RESERVED**

412 **REVIEW OF DENIALS**

412.1 When a request for records has been denied in whole or in part by an agency, the requester may appeal the denial to the Mayor or may seek immediate judicial review of the denial in the D.C. Superior Court.

412.2 Unless the Mayor otherwise directs, the Secretary shall act on behalf of the Mayor on all appeals under this section, except that in the case of an initial denial by the Secretary, the Mayor or the designee thereof shall act on the appeal. If the Mayor directs that a person other than the Secretary act on the Mayor's behalf on appeals under this section, references in this chapter to the "Secretary" shall be deemed to refer instead to the person designated by the Mayor.

412.3 An appeal to the Mayor shall be in writing. The appeal letter shall include "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as marked on the outside of the envelope. The appeal shall be mailed to:

Mayor's Correspondence Unit  
FOIA Appeal  
1350 Pennsylvania Ave, NW  
Suite 221  
Washington, D.C. 20004

The requester shall forward a copy of the appeal to the Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, of the agency whose denial is the subject of the appeal.

412.4 An appeal to the Mayor shall be in writing and shall include:

- (a) Statement of the circumstances, reasons or arguments advanced in support of disclosure;
- (b) Copy of the original request, if any;
- (c) Copy of any written denial issued under § 407.2; and
- (d) Daytime telephone number, email address or mailing address for the requester.

- 412.5 Within five (5) days (excluding Saturdays, Sundays, or legal public holidays) of receipt of its copy of the FOIA appeal the agency shall file a response with the Secretary. The response shall include the following documents:
- (a) The agency's justification for its decision not to grant review of records as requested, to the extent not provided in the agency's letter of denial to the requester;
  - (b) Any additional documentation as may be necessary and appropriate to justify the agency's decision, such as a *Vaughn* index of documents withheld, an affidavit or declaration of a knowledgeable official or employee testifying to the decision to withhold documents, or such other similar proof as the circumstances may warrant; and
  - (c) A copy of the public record or records in dispute on the appeal; provided, that if the public record or records are voluminous, the agency may provide a representative sample; and provided further, that if the public record contains personal, sensitive, or confidential information, the public body may redact such information from the copy furnished the Secretary in a manner that makes clear that the agency has made redactions.
- 412.6 An agency may request additional time to file documentation required by § 412.5 by filing a written or e-mailed request to the Secretary with a copy to the requester. The request for additional time must be filed within five (5) days (excluding Saturdays, Sundays, and legal public holidays) of receipt of the appeal. The Secretary will respond to the request for additional time with a copy to the requester. An agency that does not file the information required by § 412.5 within the time provided herein or such further time as the Secretary may provide in response to written or e-mail request shall be deemed to have waived its right to respond to the appeal.
- 412.7 A written determination with respect to an appeal shall be made within ten (10) days (excluding Saturdays, Sundays and legal public holidays) of the filing of the appeal.
- 412.8 If the records, or any segregable part thereof, are found to have been improperly withheld, the Secretary shall order the agency to make them available. If the agency continues to withhold the records, the requester may seek enforcement of the order in the Superior Court.
- 412.9 A denial in whole or in part of a request on appeal shall set forth the exemption relied upon, a brief explanation consistent with the purpose of the exemption of how the exemption applies to the records withheld, and the reasons for asserting it. The denial shall also inform the requester of the right of judicial review.

412.10 If no determination has been dispatched at the end of the ten-day period, the requester may deem his or her appeal denied, and exercise his or her right to judicial review of the denial.

**413 RECORDS MAINTAINED BY AGENCIES**

413.1 Each agency shall make and maintain records pertaining to each request for information, including copies of correspondence. The record(s) shall be filed by individual request.

413.2 Each agency shall maintain a file, open to the public, which shall contain copies of all letters of denial.

413.3 Where the release of the identity of the requester or other identifying details related to the request would constitute a clearly unwarranted invasion of personal privacy, the agency shall delete identifying details from the copies of the documents maintained in the public files.

413.4 Each agency shall also maintain records permitting annual reporting of the following information:

- (a) Total number of requests made to the agency;
- (b) The number of requests granted and denied, in whole or in part;
- (c) The number of times each exemption was invoked as the basis for non-disclosure;
- (d) The names and titles or positions of each person responsible for the denial of records and the number of instances each person was involved in a denial; and
- (e) The amount of fees collected, and the amount of fees for duplication and search waived by the agency.

413.5 On or before the 31st day of December of each year, each agency shall compile and submit to the Secretary its report covering the fiscal year concluded the preceding September 30<sup>th</sup> pursuant to the provisions of this section and on other matters relating to agency compliance with the terms of the Act.

413.6 With respect to appeals pursuant to § 412, the Secretary shall maintain records reflecting the number of appeals taken, the results of the appeals, and the number of times each exemption was invoked as the basis for non-disclosure.

**414 RESERVED**

415            **OVERSIGHT**

415.1            On or before the 1st day of February of each year, the Secretary shall compile and submit to the Council of the District of Columbia, on behalf of the Mayor, a report covering the disclosure activities of each agency and of the Executive as a whole during the preceding fiscal year.

416-417        **RESERVED**

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

The Interim 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 IV of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-604.01 *et seq.*) (2001), hereby gives notice of the intent to adopt the following rules in not less than thirty (30) days from publication of this notice in the *D.C. Register*. These rules would amend Chapter 4 of the *D.C. Personnel Regulations*, Organization for Personnel Management, to add provisions on suitability to the chapter. Specifically, the following new sections are being added: § 402, Suitability Policy; § 403, General Provisions on Suitability; § 404, Applicability – Suitability; § 405, Suitability Checks and Background Investigations; 406, Background Investigations for Information Technology Systems Personnel in Subordinate Agencies; § 407, Suitability Actions Against Employees Initiated by Personnel Authorities; and § 408, Suitability Records. In addition, § 401, Variations, is renumbered as 400 and amended, § 400, Appointment Affidavit, is renumbered as 401 and amended; and § 499 is amended to add definitions for the terms “background investigation,” “independent agency,” “material,” “subordinate agency,” and “suitability.” While a Notice of Proposed Rulemaking was published at 51 DCR 8354 (August 27, 2004), a comment was received from the Fire and Emergency Medical Services Department indicating that Chapter 8 of the *D.C. Personnel Regulations*, Career Service, contains provisions on suitability for candidates to uniformed positions in the department, and that, consequently, these individuals should be excluded from the provisions in this chapter. Based on this comment, a substantive change is being made to section 404.1 (a) of this chapter to provide that the suitability provisions in Chapter 8 of the *D.C. Personnel Regulations* shall cover candidates for uniformed positions in the Fire and Emergency Medical Services and Metropolitan Police Departments. Upon adoption, these rules will amend Chapter 4 of the *D.C. Personnel Regulations*, Organization for Personnel Management, published at 32 DCR 75 (January 4, 1985) and amended at 33 DCR 4447 (July 25, 1986), and 51 DCR 928 (January 23, 2004).

**CHAPTER 4****ORGANIZATION FOR PERSONNEL MANAGEMENT**

*Section 401 is renumbered as 400 and amended to read as follows; § 400 is renumbered as 401 and amended to read as follows; and new §§ 402 through 408 are added to read as follows:*

**400 VARIATIONS**

- 400.1 The Director, D.C. Office of Personnel, is authorized to grant variations from the letter of the D.C. personnel regulations issued under the authority of the Mayor pursuant to section 404 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

§ 1-604.04) (2001) whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulations.

- 400.2 The Director, D.C. Office of Personnel, shall be authorized to grant a variation as specified in section 400.1 of this section if:
- (a) Such a variation is within the spirit of the regulations;
  - (b) The efficiency of the District government is being protected and promoted; and
  - (c) The integrity of the Career, Legal, Excepted, Management Supervisory, or Executive Services, as applicable, is being protected and promoted.
- 400.3 Whenever a variation is granted, the Director, D.C. Office of Personnel, shall publish in the District Personnel Manual (or any other procedural manual or manuals developed) an issuance showing the following:
- (a) The particular practical difficulty or hardship involved;
  - (b) The variation being permitted, the difference from the requirements of the regulations, and to whom it applies;
  - (c) The specific circumstances which protect or promote the efficiency of the District government and the integrity of a particular Service or Services; and
  - (d) The steps that will be taken to limit the application of the variation only to the duration of the conditions that gave rise to it.
- 400.4 Like variations shall be granted whenever like conditions exist.
- 401 APPOINTMENT AFFIDAVIT**
- 401.1 Each personnel authority shall designate in writing a person or persons authorized to administer the oath of office to each employee of an agency.
- 401.2 As provided in section 408 of the CMPA (D.C. Official Code § 1-604.08) (2001), each covered employee of an agency shall swear or affirm to the following oath of office: "I, (employee's name), do solemnly swear (or affirm) that I will faithfully execute the laws of the United States of America and of the District of Columbia, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States, and will faithfully discharge the duties of the office on which I am about to enter."
- 401.3 As part of the oath of office, each employee shall execute the following:

- (a) An affidavit stating: "I have not, nor has anyone acting in my behalf, given, transferred, promised, or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment;" and
  - (b) An affidavit on the "Declaration of Appointee Form," stating: "The answers in the Declaration of Appointee are true and correct and I have read and understand the information thereon."
- 401.4 The appointee, on the "Declaration of Appointee Form," shall be required to provide information concerning the following:
  - (a) Application for or receipt of an annuity under any District government civilian retirement system, or other compensation based upon District government service; and
  - (b) Certification of notification of the prohibition to strike pursuant to section 1705 of the CMPA (D.C. Official Code § 1-617.05) (2001).
- 401.5 The provision in section 401.3 (a) of this section shall not be applicable to elected officials and members of boards and commissions.
- 401.6 Any individual initially appointed to the District government and any individual reappointed after a break in service of one (1) or more days shall take the oath of office and execute the appointment affidavit as soon as administratively practicable, but not later than thirty (30) days after the effective date of his or her appointment.
- 401.7 Any individual who refuses to swear or affirm to the oath of office as provided in sections 401.2 or 401.6 of this section shall not be appointed or shall have his or her appointment terminated.
- 401.8 The appointment of an employee may become effective before the oath of office (oath) is executed although the employee has no right to continued employment until the oath is executed. The oath, when executed, shall refer to the date of entrance on duty so as to entitle the employee to pay from that date.
- 401.9 An individual who is retroactively restored to duty without a break in service shall not be required to execute a new appointment affidavit.
- 401.10 In the administration of the oath of office (oath), the following shall apply:
  - (a) The oath may be administered on an individual or group basis;
  - (b) The person administering the oath shall read the oath aloud to the appointee(s);
  - (c) The appointee(s) taking the oath shall stand, raise his or her right hand, and repeat the oath aloud, except as provided in section 401.11 of this section and with

regard to any physical handicap the appointee(s) may have that may necessitate reasonable accommodation;

- (d) The appointee(s), after taking the oath and in the presence of the person administering the oath, shall sign the appointment affidavit; and
  - (e) The person administering the oath, upon signature by the appointee(s), shall sign the appointment affidavit.
- 401.11 When a group of appointees is taking the oath of office (oath), the person administering the oath may ask the appointees to swear or affirm to the oath by saying "yes" after the oath is read aloud to them.
- 401.12 The oath of office should be administered, if practicable, before the flags of the United States and District of Columbia.
- 401.13 The appointment affidavit shall be filed as a permanent record in each employee's official personnel folder and a copy filed with the employing agency.

## **402 SUITABILITY POLICY**

- 402.1 It shall be the policy of the District government to consider persons for employment who are suitable in efficiency, character, conduct and reputation; and to conduct suitability investigations as specified in this chapter for the purpose of ascertaining the fitness of applicants for employment as to their character, knowledge, and ability to perform the duties of the position sought.
- 402.2 Appointees and employees to Information Technology Systems positions must be particularly suitable in character, conduct and reputation because they have access to systems that house financial, proprietary, or sensitive personal data. Any misconduct, illegal action, or inaction on their part could directly compromise the security of the District government. For those reasons, these individuals shall be subject to suitability investigations as specified in section 406 of this chapter.
- 402.3 Each personnel authority shall determine, as part of suitability investigations described in this chapter, whether a person being considered for employment is or has been involved in any act that constitutes a reasonable basis for concluding that the person would not faithfully discharge the duties of the position for which he or she is being considered.
- 402.4 No person who advocates the overthrow of the governments of the United States, the District of Columbia, or both by unconstitutional means shall be considered suitable for employment in the District government.

**403 GENERAL PROVISIONS ON SUITABILITY**

- 403.1 The provisions of suitability or background check programs negotiated between the District government and a labor organization, if any, shall take precedence over the provisions of this chapter for employees in a bargaining unit represented by a labor organization, to the extent that there is a difference.
- 403.2 In securing information about individuals as part of pre-employment inquiries or background investigations under this chapter, each individual shall be afforded the necessary rights and protections.
- 403.3 When taking administrative action against an employee under this chapter, personnel authorities shall ensure that the affected employee is afforded due process, and fair and equitable treatment.
- 403.4 Except as otherwise specified in this chapter, pre-employment inquiries and background investigations shall be conducted after the person being considered for employment has a conditional job offer, but before actual employment commences. For the purposes of this chapter, any job offer made under these circumstances is conditional and non-binding on the appropriate personnel authority.
- 403.5 The Mayor may delegate his or her personnel authority, in whole or in part, to subordinate agency heads to conduct suitability investigations and take suitability action against employees as described in this chapter.

**404 SUITABILITY: APPLICABILITY**

- 404.1 The provisions of sections 404 through 408 of this chapter shall apply to persons being considered for employment and employees occupying positions in the:
- (a) Career Service under the authority of section 801 of the CMPA (D.C. Official Code § 1-608.01) (2001), except for candidates for uniformed positions in the Fire and Emergency Medical Services Department and Metropolitan Police Department, who shall be covered by the suitability provisions in Chapter 8 of these regulations;
  - (b) Legal Service under the authority of sections 851 through 862 of the CMPA (D.C. Official Code § 1-608.51 through 1-608.62) (2001);
  - (c) Excepted Service under the authority of sections 901 through 908 of the CMPA (D.C. Official Code §§ 1-609.01 through 1-609.08) (2001); and
  - (d) Management Supervisory Service under the authority of sections 951 through 958 of the CMPA (D.C. Official Code §§ 1-609.51 through 1-609.58) (2001).

404.2 Persons being considered for employment in the Executive Service under the authority of sections 1051 through 1063 of the CMPA (D.C. Official Code §§ 1-610.51 through 1-610.63) (2001) shall be subject to pre-employment inquiries and background investigations as prescribed by the Director, D.C. Office of Personnel, or in the case of the Director of Personnel him or herself, as prescribed by the Mayor.

#### 405 SUITABILITY CHECKS AND BACKGROUND INVESTIGATIONS

405.1 Each personnel authority shall establish the suitability for employment of an appointee by conducting investigations as described in sections 405.2, 405.3 of this section, and section 406 of this chapter, as applicable.

405.2 Each personnel authority shall conduct pre-employment inquiries as follows:

- (a) Every appointment to a position in one of the Services listed in section 404.1 shall be subject to completion of at least three (3) reference checks to ascertain character, reputation, relevant traits and characteristics, and other relevant personal qualities, and whether the reference would recommend the appointee for the position for which he or she is being considered;
- (b) Prior employment checks to verify:
  - (1) Dates of employment;
  - (2) Salary or other compensation received;
  - (3) Titles held and nature of duties performed;
  - (4) Reasons for leaving employment; and
  - (5) Performance.
- (c) Possession of a college degree shall be verified if the education was substituted for experience in qualifying the person for the position;
- (d) Possession of a professional or other type of license shall be verified if it is a prerequisite for employment;
- (e) Possession of a college degree from an accredited school and in the appropriate professional field shall be verified, including semester hours or other measures of credit completed, periods of attendance, type of degree and date conferred, if the degree is required as a job-related qualification standard such as is the case in the professional engineering field;
- (f) Miscellaneous checks such as professional standing and other inquiries may also be conducted, if considered necessary by the personnel authority, and in addition to the pre-employment inquiries required under section 405.2 (a) through (e) of this section; and

- (g) The minimum number of reference checks specified in section 405.2 (a) of this section shall be made with an appointee's or selectee's former employer, except that personal references may be utilized instead of, or in addition to, checks with former employers as deemed necessary by the personnel authority.
- 405.3 Based on the duties of the position, or if required by law or regulation, each personnel authority shall determine which positions, in addition to being subject to pre-employment inquiries pursuant to section 405.2 of this section, shall be subject to background investigations, and mandatory criminal background checks. The vacancy announcements for such positions, and for positions described in section 406 of this chapter, shall include a statement informing applicants of the background investigation requirement. The Director, D.C. Office of Personnel (or his or her designee), shall publish in the District Personnel Manual (or any other procedural manual or manuals developed) positions in subordinate agencies subject to background investigations pursuant to this subsection, section 406 of this chapter, or any other law or regulation, as applicable.
- 405.4 Except for a mandatory criminal background check required by law or regulation, a background investigation pursuant to section 405.3 of this section shall be conducted in accordance with the following:
- (a) Before conducting the investigation, the personnel authority shall determine the degree of sensitivity of the position being filled in order to determine the scope of the investigation. Based on that determination, the investigation may cover, in addition to the requirements in section 405.2 (a) through (g) of this section, the following:
- (1) Additional reference checks;
  - (2) Employment history for a specific number of past years;
  - (3) Highest education completed or last school attended beyond high school;
  - (4) A credit check that adheres to the notification and consent requirements of the Fair Credit Reporting Act, approved October 26, 1970 (P.L. 91-508; 15 U.S.C. § 1681) and any other applicable law or regulation;
  - (5) A traffic record check; or
  - (6) A newspaper/magazine/media search on the appointee.
- (b) In conducting the background investigation, a personnel authority shall attempt to verify any derogatory information by seeking it from more than one (1) source, asking former employers and other sources for permission to name them as the source and, as needed, obtaining a written release from the subject.
- 405.5 Unless otherwise provided by law or regulation, in filling a position subject to background investigation, the investigation need not be conducted if the prior position

that the person held was subject to one, and the nature of the personnel action for the new appointment is one (1) of the following:

- (a) Promotion;
- (b) Demotion;
- (c) Reassignment; or
- (d) Appointment, or conversion to an appointment made by a District government agency of an employee of that agency who has been serving continuously with that agency for at least one (1) year in one (1) or more positions under an appointment subject to investigation.

405.6 Upon completing the pre-employment inquiry pursuant to section 405.2 of this section or background investigation pursuant to section 405.3 of this section, the personnel authority shall inform the agency of the results of the inquiry or investigation. Based on the results, a personnel authority may make a determination that an appointee is not suitable for employment, and may thereby:

- (a) Deny him or her examination for, or appointment to, the position for which the person had been considered; or
- (b) Instruct the employing agency to terminate the person from District government service in the case of a person who began employment with the District government before the pre-employment inquiry pursuant to section 405.2 of this section or background investigation pursuant to section 405.3 of this section was completed.

405.7 Before taking action against an appointee for suitability disqualification, at the discretion of the personnel authority, the person may be given an opportunity to explain the derogatory information, in writing, within fifteen (15) days of being notified thereof, to allow the appointee to provide information that would explain any discrepancies, omissions, or misinformation, or mitigating circumstances that may exist which are unknown to the personnel authority.

405.8 The reasons which may be used in making a determination of disqualification of an appointee due to unsuitability may include, but shall not be limited to the following:

- (a) Delinquency or misconduct in prior employment;
- (b) Criminal, dishonest, or other conduct of a nature that causes discredit to the District government;
- (c) An intentional false statement of any material fact or deception or fraud in the examination or appointment;
- (d) Illegal use of drugs; or

(e) Any other legal disqualification for appointment.

405.9 In making its determination of disqualification of an appointee due to unsuitability, the personnel authority shall consider the following additional factors, to the extent that these factors are deemed pertinent to the individual case:

- (a) The kind of position for which the person is being considered or in which the person is employed, including its sensitivity;
- (b) The nature and seriousness of the conduct, occurrence or information;
- (c) The circumstances surrounding the conduct or occurrence;
- (d) The recency of the conduct or information;
- (e) The age of the appointee at the time of the conduct or occurrence;
- (f) Contributing social or environmental conditions;
- (g) The absence or presence of rehabilitation or efforts toward rehabilitation; or
- (h) In the case of criminal conduct, its relevance or relationship to the duties of the position.

405.10 Unless otherwise provided pursuant to law, regulation, or this chapter, an appointment to a position subject to background investigation pursuant to section 405.3 of this section shall be subject to investigation for one (1) year from the date of appointment to continue the personnel authority's jurisdiction to investigate the qualifications and suitability of the person after appointment, if needed, and to authorize the personnel authority to require termination when it finds that the employee is not suitable for District government employment, or to take any of the other actions specified in section 407 of this chapter, as applicable.

405.11 Unless otherwise provided pursuant to law or regulation, when an appointee is disqualified for any of the reasons listed in section 405.8 of this section, or for other reasons not listed, the personnel authority, at its discretion, may continue to rely on that determination with regard to subsequent applications for employment to a position in one of the Services listed in section 404.1 of this chapter, for a period of not more than three (3) years from the date of determination of disqualification, after which a new background investigation shall be required.

405.12 Upon expiration of the three-year (3-year) period under section 405.11 of this section, a new background investigation shall be conducted and a re-determination made before the person may be appointed to any position in one of the Services listed in section 404.1 of this chapter.

**406 BACKGROUND INVESTIGATIONS FOR INFORMATION TECHNOLOGY SYSTEMS PERSONNEL IN SUBORDINATE AGENCIES**

- 406.1 Background investigations shall be conducted for employees and persons being considered for employment in positions associated with the design, use, or operation of District government automated information technology systems.
- 406.2 Notwithstanding any other provision in this chapter, Mayor's Order 2003-136, dated September 25, 2003, delegated personnel authority to subordinate agency heads to conduct background investigations for persons being considered for employment in information technology (IT) systems positions in their agencies. The background investigations for IT personnel shall be conducted as specified in this section.
- 406.3 The Director, D.C. Office of Personnel (or his or her designee), shall develop procedures to set forth the policies, standards, and criteria for background investigations pursuant to this section, and publish the procedures in the District Personnel manual (or any other procedural manual or manuals developed).
- 406.4 As specified in the procedures developed by the Director, D.C. Office of Personnel, each subordinate agency head (or his or her designee) shall be required to inform the D.C. Office of Personnel of the results of background investigations conducted pursuant to this section.
- 406.5 An employee for whom a background investigation pursuant to this section was conducted shall not be subject to further background investigation after the effective date of the appointment, except when:
- (a) Derogatory information about the employee, of a nature that may impact the employee's suitability to continue performing the duties of the position, is disclosed to the employing agency or personnel authority by credible source(s); or
  - (b) As a result of a promotion, reassignment, or other position change, the employee moves to a position with higher security requirements, as determined by the employing agency.
- 406.6 Notwithstanding the provisions of section 406.2 of this chapter, the Director, D.C. Office of Personnel (or his or her designee), shall conduct background investigations for cases described in section 406.5 (a) of this section.

**407 SUITABILITY ACTIONS INITIATED BY PERSONNEL AUTHORITIES AGAINST EMPLOYEES**

- 407.1 Personnel authorities may take a suitability action against a District government employee pursuant to this section.
- 407.2 When the personnel authority makes a determination that an employee was involved in a material, intentional false statement or deception or fraud in his or her examination or appointment, the personnel authority shall:

- (a) Require that the employing agency remove the employee from District government service;
  - (b) Require that the employing agency remove the employee from District government service; and cancel any reinstatement eligibility obtained as a result of a false statement, deception or fraud in the examination or appointment process, as applicable; or
  - (c) In addition to the actions specified in section 407.2 (b) of this section, deny the employee examination for and appointment to, a position in the agency for a period of not more than three (3) years from the date of the determination of unsuitability.
- 407.3 In the event that a determination is made that the suitability violation does not rise to the standard of a material, intentional false statement or deception or fraud in examination or appointment described in section 407.2 of this section, the personnel authority may require that the employing agency take an administrative action against the employee that is less than removal.
- 407.4 The appropriate personnel authority shall determine the specific duration of any period of debarment imposed under section 407.2 (c) of this section.
- 407.5 Subordinate agencies shall refer any case of a material, intentional false statement or deception or fraud in examination or appointment to the Director, D.C. Office of Personnel (or his or her designee), for determination. The Director, D.C. Office of Personnel (or his or her designee), may also initiate a suitability action against an employee pursuant to this section based on information obtained independently by the D.C. Office of Personnel from the employing agency.
- 407.6 The appropriate personnel authority shall ensure that any suitability action taken against an employee pursuant to this section is based on information or documentation that is accurate, timely, relevant, and complete; and that before any action is taken, the subject employee is provided an opportunity to respond to the charge of material, intentional false statement or deception or fraud in examination or appointment.
- 407.7 Before taking any of the actions listed in sections 407.2 and 407.3 of this section, the employee shall be given an opportunity to explain the derogatory information, in writing, within fifteen (15) days of being notified thereof, to allow the appointee to provide information that would explain any discrepancies, omissions, or misinformation, or mitigating circumstances that may exist which are unknown to the personnel authority.
- 407.8 The Mayor (or his or her designee) shall take suitability disqualification action against a subordinate agency head when a determination has been made that the subordinate agency head was involved in a material, intentional false statement or deception or fraud in examination or appointment; or in any other, lesser examination or appointment violation.

**408 SUITABILITY RECORDS**

408.1 Records and files created and maintained pursuant to sections 405 through 407 of this chapter shall be subject to the following:

- (a) Information related to suitability investigations and suitability actions shall be kept in strict confidence in accordance with this section and with Chapter 31 of these regulations;
- (b) Sources of information shall not be disclosed except as specifically authorized in this chapter and in Chapter 31 of these regulations;
- (c) Reports of investigations conducted by a personnel authority shall not be disclosed to the person investigated, nor may the information be discussed with him or her in a manner that would reveal or permit him or her to deduce the source of the information;
- (d) The restrictions contained in section 408.1 (c) of this section shall not apply to the following:
  - (1) Information of public record; and
  - (2) Information from District government personnel records which could be obtained on request by the subject employee under the provisions of Chapter 31 of these regulations; and
- (e) Other sources of information in reports of investigation may be disclosed to the subject of the investigation only if the personnel authority obtains the information independently, such as by interviewing the subject, or by obtaining permission, in writing, from the sources named to use the information and to identify the source.

408.2 A subordinate agency head (or his or her designee) delegated personnel authority pursuant to sections 403.5 or 406 of this chapter, shall provide the Director, D.C. Office of Personnel (or his or her designee), information to document the results of each suitability investigation conducted by the subordinate agency. Unless otherwise specified, the information shall be provided prior to the effective date of appointment of a selectee or appointee.

*Section 499 is amended to add definitions for the terms "background investigation," "material," "subordinate agency," and "suitability:"*

**499 DEFINITIONS**

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

**Agency** – any unit of the District of Columbia government, excluding the courts, required by law, by the Mayor of the District of Columbia, or by the Council of the District of Columbia to administer any law, rule, or any regulation adopted under authority of law. The term "agency" shall also include any unit of the District of Columbia government created by the reorganization

of one (1) or more of the units of an agency and any unit of the District of Columbia government created or organized by the Council of the District of Columbia as an agency.

**Background investigation** – thorough inquiry into the past and present conduct and behavior of an applicant to determine his or her suitability for appointment.

**Days** – calendar days, unless otherwise specified.

**Employee** – an individual who performs a service for the District government and who receives compensation for the performance of such service.

**Personnel authority** – an individual 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).

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

**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).

**Suitability** – the quality or state of being acceptable for District government employment with respect to the character, reputation, and fitness of the person under consideration.

Comments on these proposed regulations should be submitted, in writing, to Ms. Lisa R. Marin, Acting Director of Personnel, 441 4<sup>th</sup> Street, N.W., Suite 300S, Washington, D.C. 20001, within thirty (30) days of the date of publication in the *D.C. Register*. Additional copies of these proposed regulations are available from the above address.

## DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION

## NOTICE OF PROPOSED RULEMAKING

The Director of the District of Columbia Department of Transportation, pursuant to the authority of section 3(b) of Department of Transportation Establishment Act of 2002, effective May 21, 2002 (D.C. Law 14-137; D.C. Official Code § 50-921.02(b)); the Urban Forest Preservation Act of 2002, effective June 12, 2003 (D.C. Law 14-309; D.C. Official Code § 8-651.01 *et seq.*) ("the Act"); Mayor's Order 2003-11, January 16, 2003, and Mayor's Order 2003-173, December 1, 2003), hereby gives notice of the intent to amend the Public Space and Safety Regulations (24 DCMR) by adding a new Chapter 37, Special Trees. This chapter implements the Act, which established an urban forest preservation program requiring a Special Tree Removal Permit prior to the removal of a tree with a circumference of 55 inches or more. These proposed regulations do not address whether and how monies deposited in the Tree Fund established pursuant to section 107 of the Act (D.C. Official Code § 8-651.07) will be used to provide income contingent subsidies to assist District residents with the removal costs of hazardous trees, as is authorized in subsection (b). The Department will continue to analyze this issue and the sufficiency of revenues that are dedicated to the fund to determine whether such a program would be financially sustainable.

Although the next available chapter in Title 24 would have been chapter 35, the Department wishes to reserve chapters 35 and 36 in the event that additional excavation related rules are needed. Final rulemaking action to adopt these amendments shall be taken in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*, but not until the Council adopts a resolution approving these rules as required by section 103(b) of the Act (D.C. Official Code § 8-651.03(b)).

Proposed regulations were published in a Notice of Proposed Rulemaking in the *D.C. Register* (51 DCR 1446) on February 6, 2004. In response to comments received, the regulations were revised to: (1) deem a Special Tree unprotected from removal if the Urban Forestry Administration fails to determine otherwise within 40 days after a permit application is received; (2) increase the length of time for which removal permits are valid; (3) clarify the guidelines for tree replacement; (4) add, correct, and clarify definitions; and (5) correct typographical, grammatical, and numbering errors.

The revised proposed regulations were published again in a Notice of Proposed Rulemaking in the *D.C. Register* (51 DCR 4555) on April 30, 2004. In response to comments received, the regulations have been further revised to: (1) allow a person or non-governmental entity to remove a hazardous tree without a Special Tree Removal Permit if the tree poses imminent harm or danger to people or property; and (2) expand locations where replacement trees may be planted.

The following amendments are proposed:

TITLE 24, DCMR, Public Space and Safety, is amended by adding a new Chapter 37 to read as follows:

**Chapter 37 SPECIAL TREES**

**3700 SPECIAL TREE REMOVAL PERMIT**

3700.1 Except as provided in §§ 3700.2 and 3705.1, no person or non-governmental entity shall remove a Special Tree without a Special Tree Removal Permit issued by the Urban Forestry Administration, as provided in the Act.

3700.2 Where the removal of a Hazardous Tree is necessary to avoid imminent harm or danger to persons or property, a person or non-governmental entity may remove a Hazardous Tree without a Special Tree Removal Permit; provided, the person or non-governmental entity shall submit to the Urban Forestry Administration, within fifteen (15) business days after removal of the Hazardous Tree, a permit application for a Special Tree Removal Permit together with a certification by an International Society of Arboriculture certified arborist that the tree was a Hazardous Tree.

**3701 PERMIT APPLICATION PROCEDURES FOR A SPECIAL TREE REMOVAL PERMIT**

3701.1 A permit application for a Special Tree Removal Permit shall be signed by the owner of the property on which the Special Tree is located and submitted to the Urban Forestry Administration on a form provided by the Urban Forestry Administration. The permit application shall be submitted at least fifteen (15) business days prior to the day that tree removal is desired.

3701.2 In addition to such other information as the Urban Forestry Administration may request, the permit application shall state the address of the property on which the Special Tree is located.

3701.3 If Special Tree removal is sought, in whole or in part, based upon a promise to plant replacement trees pursuant to § 3701.7(b), and the replacement trees will not be planted on the property where the Special Tree is located, the permit application shall contain the following:

- (a) The address of the property where the replacement trees will be planted;
- (b) A statement, signed by the owner of the property on which the replacement trees will be planted, on behalf of the present owners and all future owners of the property, that upon issuance of the Special Tree Removal Permit, the owner shall:

- (1) Plant and maintain, or permit the permittee to plant and maintain, the replacement trees in accordance with §§ 3702.2(a) – (e);
- (2) Allow an inspector of the Urban Forestry Administration reasonable access to the property for twelve (12) months following the planting of the replacement trees in accordance with § 3702.2(h);
- (3) Comply with all other applicable requirements of this chapter and the terms of the Special Tree Removal Permit, including, but not limited to, § 3702.2(f); and
- (4) Be subject to the imposition of fines, penalties, and fees for any violation of §§ 3701.3(b)(1)-(3).

3701.4 As part of the Special Tree Removal Permit application, the applicant shall agree to permit an arborist from the Urban Forestry Administration to inspect the proposed Special Tree removal site. The inspection shall occur during the Urban Forestry Administration's normal business hours and prior to issuance of a Special Tree Removal Permit.

3701.5 If an International Society of Arboriculture certified arborist or an Urban Forestry Administration arborist determines that the Special Tree to be removed is a Hazardous Tree or is a tree that has been identified pursuant to § 3701.9 as appropriate for removal, a Special Tree Removal Permit shall be issued. A Special Tree Removal Permit issued pursuant to this subsection shall not be suspended or revoked based upon a third party's allegation that the arborist certification was in error.

3701.6 If the applicant elects on the permit application to have an Urban Forestry Administration arborist make the determination set forth in § 3701.5 and the arborist fails to make a determination within forty (40) days after the permit application is submitted, a Special Tree Removal Permit shall be issued.

3701.7 If an International Society of Arboriculture certified arborist or an Urban Forestry Administration arborist determines that the tree to be removed is not a Hazardous Tree and is not a tree that has been identified in § 3701.9, or if the applicant stipulates as to both on the permit application, no Special Tree Removal Permit shall be issued until the applicant:

- (a) Pays into the Tree Fund a tree replacement fee equivalent to thirty-five dollars (\$35) per inch of circumference of each Special Tree that is to be removed;
- (b) Avers on the Special Tree Removal Permit application to plant, on private property located within the District, as identified on the permit application,

and in accordance with §§ 3702.2(a)-(e), a quantity of saplings whose aggregated circumference equals or exceeds the circumference of the Special Tree(s) to be removed; or

- (c) A combination of (a) and (b) so as to account for the circumference of the tree(s) removed.

3701.8 The authority to remove a Special Tree as granted by a Special Tree Removal Permit shall be valid for one hundred eighty (180) calendar days after permit issuance.

3701.9 Tree species appropriate for removal are:

- (a) *Ailanthus altissima* (common name-Ailanthus);
- (b) *Morus species* (common name-Mulberry); and
- (c) *Acer platanoides* (common name-Norway maple).

## 3702 PERMIT CONDITIONS FOR TREE REPLACEMENT

3702.1 The provisions of this section shall apply to any Special Tree Removal Permit issued, in whole or in part, upon the promise of the applicant for the Special Tree Removal Permit to plant replacement trees pursuant to § 3701.7(b).

3702.2 In addition to any other conditions imposed by the Urban Forestry Administration, the following conditions shall apply and be stated on the Special Tree Removal Permit:

- (a) Replacement trees, when planted, shall have a minimum caliper size of two (2) inches;
- (b) The replacement trees shall be properly planted according to the International Society of Arboriculture standards that are in effect at the time of planting;
- (c) The replacement trees shall be planted only during the planting season (October 15 to May 1), except that planting must be completed no later than seven (7) months after the Special Tree is removed, unless construction activity makes tree replacement infeasible, in which case planting shall be completed no later than seven (7) months after construction is finished;
- (d) Replacement trees shall not be of a species listed in § 3701.9;

- (e) For a twelve (12) month period after planting, the replacement trees shall be watered, mulched, and, when appropriate, removed from any tree protection stakes and guy wires;
- (f) A non-hazardous replacement tree shall not be cut down, girdled, broken, or destroyed unless the replacement tree has grown into a Special Tree, and then only if a Special Tree Removal Permit has been issued.
- (g) Not later than thirty (30) days after the replacement trees are planted, the permittee shall mail or hand deliver to the Urban Forestry Administration a certification, signed by the permittee, attesting to the successful planting of the replacement trees; and
- (h) An inspector of the Urban Forestry Administration shall be granted reasonable access to the property where replacement trees are planted for twelve (12) months following planting.

3702.3 If the replacement trees are not planted on the same property where the Special Tree is located:

- (a) The Special Tree Removal Permit shall include the information and statement provided by the permit application pursuant to § 3701.3(b); and
- (b) The permittee shall record the Special Tree Removal Permit in the land records of the District of Columbia against the property on which the replacement trees are to be planted and mail or hand deliver confirmation of the recorded Special Tree Removal Permit to the Urban Forestry Administration no later than thirty (30) days after the Special Tree Removal Permit is issued, except that this requirement shall not apply where the property is owned by or under the jurisdiction of the District of Columbia.

**3703 ENFORCEMENT AND ADJUDICATION**

3703.1 Notices of Infractions for violations of the Act, this chapter, or any condition of a Special Tree Removal Permit shall be issued, answered, and adjudicated pursuant to the Department of Consumer and Regulatory Affairs Civil Infraction Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code § 2-1801.06 *et seq.*) and the provisions of Chapter 31 of Title 16 of the District of Columbia Municipal Regulations.

**3704 SCHEDULE OF FINES**

3704.1 Any person or non-governmental entity that violates any provision of the Act, this chapter, or any condition of a Special Tree Removal Permit shall be subject to a

civil infraction fine of one hundred dollars (\$100) per inch of circumference of the tree or trees in question.

**3705 PUBLIC UTILITIES**

3705.1 Public utility companies regulated by the Public Service Commission may remove Special Trees in connection with utility construction, line maintenance, and emergency work within the District's right-of-way without a Special Tree Removal Permit. Such companies shall comply with the notice requirement set forth in section 105(b) of the Act (D.C. Official Code § 8-651.05(b)) and shall comply with ANSI(a)(300) standards.

**3799 DEFINITIONS**

3799.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed below:

**Act** – the Urban Forest Preservation Act of 2002, effective June 12, 2003 (D.C. Law 14-309; D.C. Official Code § 8-651.01 *et seq.*).

**ANSI(a)(300) standards** - the American National Standards Institute, Inc. American National Standard Specifications for Standards for Tree Care Operations; Tree, Shrub, and Other Woody Plant Maintenance - Standard Practices

**Caliper** – the diameter (width) of the trunk of a tree when measured at a height of six inches (6 in.) above the ground/soil.

**Circumference** – the linear distance around the trunk of a tree when measured at a height of four and one-half feet (4½ ft.) above the ground.

**District's right-of-way** – all the publicly owned property between the property line on a street, park, or other public property as such property lines are shown on the records of the District, and includes any roadway, tree space, sidewalk, or parking between such property lines.

**Hazardous Tree** – a Special Tree that should be removed because it is:

- (a) Structurally defective, diseased, dying, or dead;
- (b) Posing a high risk of failure or fracture with the potential to cause injury to people or damage to property; or
- (c) Causing damage to property or structures that cannot be mitigated in any manner other than removal of the tree.

**Permittee** – a person or non-governmental entity issued a Special Tree Removal Permit by the Urban Forestry Administration.

**Person or non-governmental entity** - any individual, corporation, firm, agency, association, organization, or utility company.

**Private property** – real property, including real property owned or under the jurisdiction of the District of Columbia and real property that is to be developed pursuant to an approved campus plan, planned unit development, or a historic preservation review. This term does not include the District's right-of-way.

**Remove** - cutting down, topping, girdling, breaking, or destroying a Special Tree.

**Replacement tree** – A tree planted pursuant to § 3701.7(b).

**Special Tree** – a tree within the District of Columbia that has a minimum circumference of fifty-five inches (55 in.).

**Tree Fund** – the fund established under section 107 of the Urban Forest Preservation Act of 2002, effective June 12, 2003 (D.C. Law 14-309; D.C. Official Code § 8-651.07).

All persons interested in commenting on the subject matter in this proposed rulemaking action may file comments in writing, not later than thirty (30) days after the publication of this notice in the *D.C. Register*, with Ainsley Caldwell, Urban Forestry Administration, Department of Transportation, 4901 Shepherd Parkway, SW, Washington, D.C. 20032. Copies of this proposal are available, at cost, by writing to the above address.