

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 § 2007(2) and (3) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.07(2) and (3)) (2001), hereby gives notice of the intent to adopt the following rules in no less than thirty (30) days from the publication of this notice in the *D.C. Register*. Section 2007(2) of the CMPA provides that the Mayor shall establish an employee health services program that shall provide for pre-employment and other physical examinations, including fitness-for-duty examinations. Accordingly, these rules would amend Chapter 20 of the *D.C. Personnel Regulations*, Health, to add a new § 2049 containing the requirements for pre-employment and other physical examinations, and general medical qualifications requirements. Additionally, these rules would update the provisions of § 2050, Employee Assistance Program, established pursuant to § 2007(3) of the CMPA; and add a definitions section to the chapter. Upon adoption, these rules would amend Chapter 20 of the *D.C. Personnel Regulations*, Health, published at 40 DCR 7649 (November 5, 1993).

CHAPTER 20

HEALTH

A new § 2049 is added to read as follows:

2049 PRE-EMPLOYMENT AND OTHER PHYSICAL EXAMINATIONS AND GENERAL MEDICAL QUALIFICATIONS REQUIREMENTS

- 2049.1 The provisions of this section establish the requirements for pre-employment and other physical examinations, including fitness-for-duty examinations; and general medical qualifications requirements, pursuant to § 2007(2) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.07(2)) (2001), with adherence to the provisions of the Americans with Disabilities Act of 1990, approved July 26, 1990 (P.L. 101-336; 42 U.S.C. § 12101 *et seq.*), as amended; other federal or District laws or regulations; and equal employment opportunity considerations.
- 2049.2 Each person selected for appointment shall be physically and mentally capable of safe and satisfactory performance of the essential functions of the position for which he or she was selected.

- 2049.3 Medical determinations shall be made by physicians or practitioners, and determinations regarding job requirements and performance shall be made by supervisors and managers.
- 2049.4 To the extent inconsistent with any applicable law or regulation, the provisions of this section shall not apply to:
- (a) Police officers in the Metropolitan Police Department;
 - (b) Firefighters in the Fire and Emergency Medical Services Department; and
 - (c) Employees on disability compensation system pursuant to §§ 2301 through 2347 of the CMPA (D.C. Official Code § 1-623.01 *et seq.* (2001 & 2003 Supp.)).
- 2049.5 Personnel authorities may establish physical and mental qualifications requirements that are necessary to perform a specific job or classes of jobs, such as certain jobs in transportation, public works, or security jobs. Any physical and mental qualifications requirements established by the personnel authority pursuant to this subsection shall:
- (a) Be related to the duties and responsibilities of the specific job or classes of jobs, and consistent with business necessity.
 - (b) Be designed to ensure consideration of persons having the minimum physical ability necessary to perform the duties of the job efficiently without posing a significant risk of substantial harm to his or her health or safety, or that of others.
 - (c) List disqualifying medical conditions only in cases in which job duties require special physical capacities to safely and satisfactorily perform the duties assigned to the job.
 - (d) Be waived by the personnel authority when a determination is made that the appointee or employee is a "qualified individual with a disability," as that term is defined in § 2099.
- 2049.6 The personnel authority may require an individual who has applied for or occupies a position with established physical or mental standards or requirements for selection or retention, or established occupational or environmental standards that require medical surveillance, to report for a medical examination or evaluation as follows:
- (a) Prior to appointment or selection (including reemployment on the basis of full or partial recovery from a medical condition);
 - (b) On a regularly recurring, periodic basis; or

(c) Whenever there is a direct question about an employee's continued capacity to meet the established physical or mental standards or requirements of the position, or conditions of employment.

- 2049.7 As appropriate in the case of positions with physical or mental qualifications requirements pursuant to § 2049.5, a personnel authority may deny an applicant examination, deny an eligible appointment, or, instruct or allow the employing agency to remove an appointee, by reason of physical or mental unfitness for the position for which he or she has applied, or to which he or she has been appointed.
- 2049.8 In addition to a medical examination required pursuant to § 2049.5, an employing agency may require a medical examination because of an employee's conduct or performance on the job. Such an examination shall be ordered only upon approval by the personnel authority of a written request from the agency.
- 2049.9 A personnel authority or employing agency may offer a medical examination when an employee has made a request for medical reasons for a change in duty status, assignments, or working conditions, or any other benefit or special treatment (including reemployment on the basis of full or partial recovery from a medical condition), and the employing agency, after it has received and reviewed the employee's medical documentation, determines that it cannot grant, support, or act further on the request without verification of the clinical findings and current clinical status.
- 2049.10 If an employee wishes his or her employing agency to consider any medical condition that may contribute to his or her unacceptable performance on the job, he or she shall furnish medical documentation, as that term is defined in § 2099, of the condition. After its review of the medical documentation supplied by the employee, the employing agency may, at its discretion, offer a medical examination in accordance with this section.
- 2049.11 The medical examination process shall consist of the following:
- (a) When a personnel authority or agency orders or offers a medical examination under this section, it shall inform the applicant or employee in writing of its reasons for ordering or offering the examination, and the consequences of failure to cooperate.
 - (b) The personnel authority or agency shall designate the examining physician, but shall offer an employee or former employee an opportunity to submit medical documentation from his or her personal physician or practitioner which the agency shall review and consider, or to propose a physician or practitioner of his or her choice.
 - (c) The personnel authority or agency shall provide the examining physician or practitioner with a copy of any approved medical evaluation protocol, any

applicable medical qualifications and requirements for the position, or a detailed description of the duties of the position, including physical demands and environmental factors.

- (d) The personnel authority or agency may order a psychiatric examination (including a psychological assessment) only when the result of a current general medical examination which the agency or personnel authority has the authority to order under this section indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others.
- (e) All medical specialty examinations ordered or offered under this section shall be conducted by a medical specialist.
- (f) The employee shall pay for any medical examination conducted by a physician or practitioner he or she selected, regardless of whether the medical qualifications examination is ordered or offered by the agency or scheduled on the employee's own initiative.
- (g) An agency may authorize, under conditions prescribed by the agency, an agency-required pre-employment medical qualifications examination of an applicant to be conducted by a physician or practitioner designated by the applicant, in which case the applicant shall pay for the examination.
- (h) Each agency shall receive and maintain all medical documentation and records of examinations obtained under this section in accordance with the provisions of Chapter 31 of these regulations.
- (i) The report of an examination conducted under this section shall be made available to the applicant or employee under the provisions of Chapter 31 of these regulations.

2049.12 If, based on the review of the medical documentation, in consultation with a physician or practitioner, the personnel authority determines that an employee is temporarily disabled from performing his or her duties, the personnel authority may authorize one (1) or more of the following actions, as appropriate:

- (a) Detail;
- (b) Sick leave;
- (c) Advanced sick leave;
- (d) Leave without pay; or
- (e) Any other feasible assistance in returning the employee to full performance capacity.

- 2049.13 If, based on the review of the medical documentation, in consultation with a physician or practitioner, the personnel authority determines that the disability is permanent, the personnel authority shall do the following:
- (a) Determine whether reasonable accommodation can be made that would enable the employee to perform the essential functions of the position;
 - (b) In the event of a negative determination under § 2049.13(a), determine if there is another position available for which the employee qualifies and in which he or she can perform satisfactorily and safely, with or without reasonable accommodation;
 - (c) In the event of a negative determination under § 2049.13(b), explore with the employee, or his or her representative, the eligibility requirements and the advisability of filing for disability retirement or social security disability, as appropriate, and apply or assist in applying therefore; or
 - (d) In the event that the individual does not qualify for or does not apply for disability retirement or social security disability, or, if his or her application has been disapproved, the personnel authority may initiate action to terminate the employee.
- 2049.14 If, based on the review of the medical documentation, the personnel authority determines that the employee is fit, and the employee continues to be deficient in either conduct or performance, the personnel authority may take administrative action against the employee. Any action taken against a Career Service employee covered under Chapter 16 of these regulations shall be taken under the provisions therein.
- 2049.15 This section shall not apply to any situation where an employee, due to a problem or condition that adversely affects his or her overall work performance, and with his or her supervisor's approval, is engaged in a voluntary program of medical assistance through a personal physician or practitioner, the Employee Assistance Program under § 2050, or any other recognized and qualified party. In these situations, a medical examination may be offered at the employee's request, and shall be ordered only if the employee continues to perform unsatisfactorily, or poses a significant risk of substantial harm to his or her health or safety, or that of others.

Section 2050 is amended to read as follows:

2050 EMPLOYEE ASSISTANCE PROGRAM

- 2050.1 In accordance with § 2007(3) of the CMPA (D.C. Official Code § 1-620.07(3)) (2001), it shall be the policy of the District government to provide an Employee Assistance Program (EAP) designed to address personal problems that employees may encounter which may adversely affect their overall work performance or conduct on the job.

- 2050.2 The Director of Personnel shall administer an EAP pursuant to Mayor's Order 91-62, dated May 1, 1991.
- 2050.3 The provisions of a collective bargaining agreement shall take precedence over the provisions of this section, to the extent that there is a difference or conflict.
- 2050.4 The EAP shall provide counseling and related services to employees who are experiencing problems, including, but not limited to, the following problems or issues which may adversely affect work performance or conduct on the job:
- (a) Family and marital problems;
 - (b) Financial difficulties;
 - (c) Emotional or mental illness; and
 - (d) Substance abuse problems.
- 2050.5 Records and information on referral to, or participation in, the EAP, shall be maintained in confidence as provided in Chapter 31 of these regulations and any other applicable federal and District of Columbia laws and regulations.
- 2050.6 An employee who is experiencing problems that adversely affect his or her work performance or conduct on the job shall be encouraged to voluntarily seek assistance to resolve the problems.
- 2050.7 Supervisors and managers should, in appropriate cases, consider referring to the EAP employees who are experiencing problems which adversely affect their overall work performance or conduct on the job before taking administrative action against employees.
- 2050.8 Participation in the EAP shall not preclude the taking of a disciplinary action under Chapter 16 of these regulations, if applicable, or any other appropriate administrative action, in situations where such action is deemed appropriate. The EAP shall not be used in lieu of disciplinary actions, or any other appropriate administrative action.
- 2050.9 Any employee, other than a temporary employee or a Career Service employee serving a probationary period under Chapter 8 of these regulations shall be eligible to receive services through the EAP.
- 2050.10 The EAP shall consist of assessment, counseling, and referral services.
- 2050.11 Involvement in the EAP shall be on the basis of self-referral or agency referral.
- 2050.12 Up to two (2) hours of administrative leave may be granted to an employee to attend his or her initial EAP appointment.

- 2050.13 The services of the EAP shall be provided through contracted health care service provider(s).
- 2050.14 The cost of the initial assessment, counseling, and referral session with the EAP contractor shall be paid in full by the District government, to the extent that the session is not covered by the employee's health insurance carrier.
- 2050.15 Unless a separate program is established pursuant to the provisions of § 2050.19, participation in the EAP rather than another employee assistance program in the District government by agencies under the personnel authority of the Mayor shall be mandatory.
- 2050.16 The Director, D.C. Office of Personnel, shall establish the rates for participation in the EAP.
- 2050.17 The Director, D.C. Office of Personnel, may enter into a written agreement with other personnel authorities to provide EAP services.
- 2050.18 Each subordinate agency and independent personnel authority that participates in the EAP administered by the D.C. Office of Personnel shall designate an EAP coordinator.
- 2050.19 The Director, D.C. Office of Personnel, may authorize the establishment of other employee assistance programs in the District government, and each such program shall be consistent with the provisions of this section.

A new § 2099 is added to read as follows:

2099 DEFINITIONS

- 2099.1 For the purposes of this chapter, the following terms shall have the meaning ascribed:

Essential functions of the position – the fundamental job duties of the position that an individual with a disability holds or desires. A job function may be considered essential for any of several reasons, including but not limited to the following: the function may be essential because the reason the position exists is to perform that function; because of the limited number of employees available among whom the performance of that job function can be distributed; or the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Medical condition – a health impairment that results from injury or disease or any other physical or mental impairment that may affect an individual's capacity to safely and satisfactorily perform his or her assigned duties. A "physical or mental impairment" is: (1) a physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one (1) or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as

mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Medical documentation or documentation of a medical condition – a statement from a licensed physician or other appropriate practitioner which provides one (1) or more of the following kinds of information:

- (a) The history of the specific medical condition(s), including references to findings from previous examinations, treatment, and responses to treatment;
- (b) Clinical findings from the most recent medical evaluation, including any of the following that have been obtained:
 - (1) Findings of physical examination;
 - (2) Results of laboratory tests including drug and alcohol screening, X-rays, echocardiograms, and other special evaluations or diagnostic procedures; and
 - (3) In the case of psychiatric disease evaluation of psychological assessment, the findings of a mental status examination and the results of psychological tests, if appropriate;
- (c) Assessment of the current clinical status and plans for future treatment;
- (d) Diagnosis;
- (e) An estimate of the expected date of full or partial recovery;
- (f) An explanation of the impact of the medical condition on the individual's capacity to carry out his or her assigned duties;
- (g) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well stabilized;
- (h) Narrative explanation of the medical basis for any conclusion that duty restrictions or accommodations are or are not warranted and, if they are, an explanation of their therapeutic or risk-avoiding value; or
- (i) Narrative explanation of the medical basis for any conclusion that indicates the likelihood that the individual is, or is not, expected to suffer injury or harm with or without accommodation, by carrying out the tasks or duties of a position for which he or she is assigned or qualified.

Medical specialist – a physician who is board-certified in a medical specialty.

Physician – A licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this chapter.

Practitioner – A person providing health services who is not a medical doctor, but who is certified by a national organization and licensed by a State to provide the service in question.

Qualified individual with a disability – an individual with a disability who satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

Reasonable accommodation – modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. Reasonable accommodation may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. All of the above is contingent upon the needs of the agency. A "covered entity" is an employer, employment agency, labor organization, or joint labor management committee.

Review of medical documentation – assessment of medical documentation by, or in coordination with, a physician to ensure that the following criteria are met:

- (a) The diagnosis or clinical impression is justified in accordance with established diagnostic criteria; and
- (b) The conclusions and recommendations are consistent with generally accepted medical principles and practice.

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

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Chief Administrative Law Judge of the Office of Administrative Hearings (OAH), pursuant to the authority set forth in Section 8 of the Office of Administrative Hearings Establishment Act of 2001 (the "Act") (D.C. Law 14-76; D.C. Official Code § 2-1831.05(b)(7)), gives notice of his intent to adopt, on an emergency basis, the following amendment to Chapter 28 to Title 1 of the District of Columbia Municipal Regulations (DCMR). These emergency rules prescribe the rules of practice and procedure in matters before OAH. Adoption of these rules on an emergency basis will ensure that there will be published amended rules of practice and procedure in effect for OAH at the time it is scheduled to expand its jurisdiction pursuant to Section 6 of the Act on October 1, 2004. Therefore, adoption of these rules on an emergency basis is necessary to protect public health, safety and welfare. These emergency rules were adopted on September 23, 2004, and became effective on that date.

The Chief Administrative Law Judge also gives notice of his intent to take final rulemaking action to adopt these rules as an amendment to Chapter 28 of Title 1 DCMR in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register* in accordance with § 6(a) of the District of Columbia Administrative Procedures Act, D.C. Official Code § 2-505(a).

These emergency rules will expire on January 20, 2005, 120 days after their adoption, or upon publication of a notice of final rulemaking in the *D.C. Register*, whichever occurs first.

Section 2805.5 of 1 DCMR Chapter 28 is added as follows:

2805.5 Notwithstanding the provisions of Section 2811.5 of these Rules, when a case is commenced by filing a request for a hearing with this administrative court, the time limit for filing such a request permitted under applicable law, other than these Rules, shall control. In the case of a time limit established by a District of Columbia agency rule, other than these Rules, the agency rule shall apply if in effect prior to October 1, 2004.

Section 2805.6 of 1 DCMR Chapter 28 is added as follows:

2805.6 Where authorized by Section 6(h) of the Act, a governing board, commission or other deliberative body may, upon the timely receipt of a request for hearing, authorize this administrative court to hold a hearing and issue a final decision in a matter, provided that such authorization is made in writing and, along with a copy of the request for hearing, is filed with this administrative court no later than forty (40) days from the first date such entity or its designee initiates the proposed disciplinary or other action. A failure to timely file such authorization shall be deemed an election by the governing board, commission or body to exercise its right to retain jurisdiction pursuant to Section 6(h) of the Act.

Section 2805.7 of 1 DCMR Chapter 28 is added as follows:

2805.7 Any request for a hearing under this Rule appealing a proposed tax assessment shall be filed with this administrative court, and a service copy of the request for hearing served upon the agency issuing the proposed tax assessment, in order for the case to be commenced before this administrative court. The request for hearing filed with this administrative court shall be accompanied by a copy of the proposed tax assessment.

Section 2805.8 of 1 DCMR Chapter 28 is added as follows:

2805.8 Any request for a hearing under this Rule appealing a determination regarding unemployment compensation shall be filed with this administrative court in order for the case to be commenced before this administrative court. Any agency accepting claims for unemployment compensation and each party to the matter shall file a copy of the claims examiner's decision with this administrative court no later than three (3)

business days from the transmittal date of the hearing request to the agency and parties by this administrative court.

Section 2811.1 of 1 DCMR Chapter 28 is amended to read as follows:

2811.1 Except as specified in Section 2805.5 of these Rules, this Rule applies to all periods of time prescribed or allowed by these Rules, by order of this administrative court, or by any applicable law.

Section 2811.6 of 1 DCMR Chapter 28 is amended to read as follows:

2811.6 Whenever these Rules or an order of this administrative court require or allow an act to be done at or within a specified time, this administrative court, for good cause shown, may order the period enlarged or reduced if a request is made before expiration of the period, or, if the period has expired, may enlarge it if the failure to act was the result of excusable neglect; however this Section does not authorize the reduction or enlargement of any period prescribed by law, or any period provided under Rules 2805, 2829, 2832, 2833 or 2835 of this Chapter.

Section 2823.1 of 1 DCMR Chapter 28 is amended to read as follows:

2823.1 In addition to the right to seek a subpoena under Rule 2822, in every case in which an evidentiary hearing has been ordered, each party shall disclose, by filing with this administrative court and serving upon each other party, the documentary exhibits it wishes to offer at the hearing or otherwise seeks to have considered by the presiding Administrative Law Judge. Unless otherwise ordered, such disclosure shall be made at least ten (10) calendar days before the date on which the evidentiary hearing is scheduled, except that, in unemployment compensation cases, such disclosure shall be made at least three (3) business days before the date on which the evidentiary hearing is scheduled. This Section does not limit the right of any party to obtain information as permitted by other applicable law. This disclosure obligation contained in this Section shall not be deemed to be discovery for purposes of these Rules.

Section 2840.1 of 1 DCMR Chapter 28 is amended to read as follows:

2840.1 Unless a federal law or regulation or District of Columbia statute requires that a particular federal or District of Columbia procedure be observed, these Rules and any final or interlocutory order of this administrative court shall take precedence and supersede in the event of a conflict with other authority on any issue involving or relating to procedures of this administrative court. All procedural authorities promulgated by any agency relating to adjudicated cases filed with this administrative court pursuant to Section 6 of the Act are hereby superseded. In determining whether an issue involves or relates to procedures of this administrative court, the presiding Administrative Law Judge shall follow the doctrine set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and related case law. These Rules shall be deemed to involve or relate to procedures of this administrative court unless otherwise found in an order issued under the authority of Section 2840.2 or on judicial review of a decision of this administrative court.

Section 2840.19 of 1 DCMR Chapter 28 is added as follows:

2840.19 If no applicable District of Columbia law or agency rule, other than these Rules, provides a time period within which to appeal an agency action or decision consistent with Rule 2805, such appeal must be filed within thirty (30) days of the agency's transmitting its decision to the party filing a request for a hearing under Rule 2805.

The definition of "Filed" in 1 DCMR 2899 is amended to read as follows:

"Filed" means, unless otherwise specified, when the document is actually received by the Clerk of Court. Notwithstanding the foregoing definition, a document filed pursuant to Rule 2805 may relate back for purposes of timeliness if expressly authorized by an OAH form approved by the Chief Administrative Law Judge pursuant to Section 8(a)(7) of the Act and if the filing party uses such form.

Comments on these proposed regulations should be submitted, in writing, to Mr. Tracy J. BeMent, Chief Administrative Officer, Office of Administrative Hearings, 825 North Capitol Street, N.E., Suite 4150, Washington, D.C. 20002, within thirty (30) days of the date of publication of this notice in the D.C. Register. Copies of these proposed regulations are available without charge from the above address.

**OFFICE OF THE DEPUTY MAYOR FOR PLANNING AND ECONOMIC
DEVELOPMENT**

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Deputy Mayor for Planning and Economic Development, pursuant to the authority set forth in sections 5 and 14 of the Retail Incentive Second Congressional Review Emergency Act of 2004 (Act), effective July 19, 2004 (D.C. Act 15-482), and any succeeding similar legislation, and Mayor's Order 2004-146 August 26, 2004, hereby gives notice of the adoption on an emergency basis of the following rules to be included in Title 10 of the District of Columbia Municipal Regulation ("DCMR"). The purpose of the new chapter is to set forth the rules of operation for the Downtown Retail Priority Area under the Act.

This emergency action is necessary for the immediate preservation of the public welfare, which will be achieved by the expeditious introduction to the financial marketplace of the existing tax increment financing projects during a financially advantageous period.

This rulemaking was adopted on an emergency basis on August 30, 2004, and became immediately effective on that date.

The Deputy Mayor for Planning and Economic Development also gives notice of intent to take final rulemaking action to adopt the proposed rulemaking in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

The emergency rule will expire on December 28, 2004, or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first.

TITLE 10 DCMR is amended by adding a new Chapter 61 as follows:

**CHAPTER 61 RULES OF OPERATION FOR THE DOWNTOWN RETAIL PRIORITY
AREA****6100 Public Purpose of the Retail Incentive Second Congressional Review Emergency
Act of 2004**

6100.1 The Retail Incentive Second Congressional Review Emergency Act of 2004 (Act), and any succeeding similar legislation, is intended to provide a means to: (1) encourage commercial development in the District of Columbia; (2) expand the District's tax base through the use of tax increment financing; and (3) provide economic assistance to encourage development of retail facilities in District of Columbia Retail Priority Areas.

6100.2 Retail Priority Areas include the Downtown Retail Priority Area (as defined in the Act) and any other areas or areas in the District of Columbia designated by the Mayor and approved by the Council.

6100.3 The Act provides that the Mayor is also to designate the areas known as Columbia Heights, Georgia Avenue, Minnesota/Benning, Shaw, and the H Street, NE Corridor as Retail Priority Areas.

6101 Eligible Retail Development Projects

6101.1 Under the Act, a Retail Development Project is defined as the establishment of a business engaged in direct onsite sales to consumers. With respect to the Downtown Retail Priority Area, Retail Development Projects are limited to businesses that engage in sales of home furnishings, apparel, and general merchandise goods to specialized customers. Under the Act, liquor stores, nightclubs, hotels, restaurants, banks, pharmacies, phone stores and service retail outlets are businesses that do not qualify for inclusion in the Downtown Retail Priority Area.

6101.2 Pursuant to the Act, bonds issued by the District of Columbia to provide financing for Retail Development Projects may be secured by available sales tax revenues (tax increment revenues) as well as the pledge of other assets of the District of Columbia and are to be used to fund the retail development costs of Retail Development Projects. The aggregate principal amount of bonds that may be issued in the Downtown Retail Priority Area is \$30 million.

6101.3 A Retail Development Project that has already received proceeds of bonds through another Tax Increment Financing (TIF) program, either directly or as part of a larger development project, is not eligible to be designated a TIF Area under the Act. Bonds shall not be issued with respect to any TIF Area until the TIF Area is open for business to the general public.

6102 Application of Rules of Operation

6102.1 The Rules of Operation shall be applied uniformly within the Downtown Retail Priority Area as defined in the Act.

6102.2 The Mayor shall have the authority to suspend and re-institute, from time to time, the designation of TIF Areas in response to market conditions.

6103 Downtown Retail Committee

6103.1 The Mayor has created the Downtown Retail Committee for the Downtown Retail Priority Area for the purpose of evaluating and recommending to the Mayor proposed Retail Development Projects for the Downtown Retail Priority Area as well as the allocable portion of Bond proceeds for each Retail Development Project.

6103.2 The Downtown Retail Committee shall consist of not less than 3 nor more than 15 members. The Downtown Retail Committee shall be comprised of the Mayor, retail brokers and property owners in the Downtown Retail Priority Area and such other persons as the Mayor shall designate. The Mayor shall appoint the members of the

Downtown Retail Committee and may designate the Chairperson and Vice Chairperson of the Committee.

- 6103.3 Members of the Downtown Retail Committee may not participate in connection with the evaluation of a Retail Development Project in which they may have any direct or indirect interest.
- 6103.4 Each Downtown Retail Committee member serves at the pleasure of the Mayor and the Mayor may replace any member at any time for any reason.
- 6103.5 The duties of the Downtown Retail Committee are to:
- (a) Apply the rating system (Rating System) provided in Appendix 2 for proposed Retail Development Projects; review and revise the Rating System from time to time as necessary to respond to market conditions;
 - (b) Compute Bond allocation (Bond Allocation Amount) based on a numeric formula (Bond Allocation Formula) for each Retail Development Project and adjust the Bond Allocation Formula, as necessary or appropriate, to maximize the use of Bond proceeds to achieve the purposes of the Act;
 - (c) Recommend Retail Development Projects to the Mayor for designation as TIF Areas in the Downtown Retail Priority Area; and
 - (d) Take such other actions as the Mayor may consider necessary or appropriate to facilitate the selection and funding of TIF Areas in the Downtown Retail Priority Area .
- 6103.6 A simple majority shall constitute a quorum for any meeting or for purposes of any vote. All recommendations to the Mayor with respect to any Retail Development Project shall be by a two-thirds vote of the Downtown Retail Committee.
- 6103.7 All meetings shall take place in person or by teleconference.
- 6103.8 Voting may be evidenced in person during a meeting or orally during a teleconference. No member may vote on any issue that was considered at any meeting that such member did not attend.
- 6103.9 The Chairperson or Vice Chairperson of the Downtown Retail Committee or their designee shall provide prior written notice to each member at least three (3) business days prior to any meeting of the Downtown Retail Committee. Such notice may be provided by e-mail, telecopy (provided the sender receives confirmation that such notice was received), hand delivery, or by United States first-class, certified mail, postage prepaid. Notice shall be deemed received: (1) on the date the e-mail or telecopy is transmitted (provided the sender has electronic or telegraphic evidence of successful transmission); on the date of hand delivery (with a signed receipt); or two (2) business days following receipt of proof of service by United States first class certified mail.
- 6104 Rating System for Ranking Retail Development Projects for Downtown Retail Priority Area**

- 6104.1 Owners of proposed Retail Development Projects within a specified Retail Priority Area shall complete a Retail Development Project Application (Application) (see Appendix 1).
- 6104.2 The Application shall include all exhibits and attachments specified in the Application to the extent applicable to the Retail Development Project
- 6104.3 All Applications are to be submitted to the Office of the Deputy Mayor for Planning and Economic Development (DMPED) by hand delivery (with signed receipt of delivery), by overnight mail with a signed receipt, or by United States first class, certified mail, postage prepaid.
- 6104.4 Neither DMPED nor the Downtown Retail Committee has any obligation to review or consider for approval any Application that is not complete.
- 6104.5 DMPED will review each Application and provide to the Downtown Retail Committee a preliminary scoring of such Application, based on the Rating System (see Appendix 2), and indicate a recommended Bond Allocation Amount for each Retail Development Project.
- (a) Following its scoring of the Application, DMPED will forward the Application, together with DMPED's preliminary recommendation for each Retail Development Project, including the score received and the recommended Bond Allocation Amount, and any comments, concerns or further recommendations with respect to such Retail Development Project, to the Downtown Retail Committee.
- (b) The Application will be scored in conformance with the Rating Chart as provided in Appendix 2. The Rating Chart is based on the following objective criteria:
- (1) Likelihood of Bond repayment based on projected Tax Increment Revenues from the Retail Development Project;
 - (2) Uniqueness of the retailer(s) (i.e. type of product, anticipated demand, likelihood of success based on market or feasibility study, experience and public recognition of "brand name" or product(s)) that will be in the Retail Redevelopment Project;
 - (3) The market position of each retailer and whether each retailer is first in its market to locate in the Downtown Retail Priority Area;
 - (4) Likelihood that each retailer will attract other retailers to locate nearby (i.e. confidence of other retailers in success and stability of the retailer(s), "draw" factor of the retailer(s), hours and days of operation);
 - (5) Extent to which each retailer will promote the Downtown Retail Priority Area in its advertising (each retailer to submit a marketing plan for first two years of operation, including prototype of marketing materials (print and radio/TV), types of window displays, etc.);

- (6) Vertical integration of retailer(s) (the portion of the product mix that is sold under the retailer's brand);
- (7) Intention of each retailer in a given Retail Development Project to locate on more than one level of the building in which it is located;
- (8) Extent to which each retailer's storefront is expressive (quality of architecture, "draw" of signage and display windows, extent to which store appearance enhances and upgrades the area);
- (9) The location of the ownership of the retailer, i.e. whether the retailer is a District-owned business;
- (10) Square footage of retail space; and
- (11) Whether the retailer(s) in the Downtown Retail Priority Area [is/are] one of multiple retailers that co-locate in the Downtown Retail Priority Area (i.e. is retailer part of a group of retailers that is willing to locate in the Downtown Retail Priority Area).

- 6104.6 Upon receipt by the Downtown Retail Committee from DMPED of an Application and the recommendations of DMPED, the Downtown Retail Committee shall review the Application and the recommendations of DMPED and shall vote whether to recommend (i) the Retail Development Project in the Downtown Retail Priority Area for designation as a TIF Area and (ii) a Bond Allocation Amount with respect to such Retail Development Project to the Mayor. The Downtown Retail Committee shall have the right to accept, reject or revise any or all of the recommendations of DMPED.
- 6104.7 The Downtown Retail Committee may request technical assistance from DMPED at any time for any reason, including but not limited to, the evaluation of any Application or any proposed revision of the Rating System or the Bond Allocation Formula.
- 6104.8 The Downtown Retail Committee may revise the Rating System at any time, and from time to time by a two-thirds vote, but may not revise the Rating System for any Application that has been submitted to DMPED.

6105 Bond Allocation Formula

The Bond Allocation Formula (based upon the Rating Chart) for determining aggregate principal amounts of Bonds to be allocated to a Retail Development Project, if approved as a TIF Area, is as follows:

Grand Total (reflected on the Rating Chart) X \$2.55 X total square feet
of Retail Development Project.

6106 Mayor's Approval and Certification

- 6106.1 Upon receipt of the recommendation of the Downtown Retail Committee with respect to a Retail Development Project, the Mayor may approve and certify the rating of the Retail Development Project, the designation of the Retail Development Project as a TIF

Area, the issuance of Bonds in an amount equal to the Bond Allocation Amount and such other matters as the Mayor considers necessary or appropriate to achieve the goals and objectives of the Downtown Retail Priority Area.

- 6106.2 Upon receipt of the Mayor's approval and certification, the Downtown Retail Committee shall direct DMPED to send a written approval letter ("Approval Letter") to the Owner (Owner) of the proposed Retail Development Project indicating that such Retail Development Project has been approved by the Mayor and stating the reserved Bond Allocation Amount that the Owner shall receive, subject to the Owner meeting all program criteria and all requirements necessary for issuance of the Bonds as set forth in the Development Agreement.
- 6106.3 DMPED shall facilitate and manage the financing process with the Owner, including negotiating the Development Agreement and any other related documents.
- 6106.4 In connection with the issuance of the bonds, the Owner shall enter into a Development Agreement with the District, such Development Agreement to be satisfactory to the Mayor, and consistent with the requirements of the Act and any other applicable laws of the District of Columbia. Such Development Agreement shall also include, among other things, the terms and conditions relative to the issuance of the Bonds.

Appendix 1 - Retail Development Project Application

Retail Incentive Second Congressional Review Emergency Act of 2004 (and Similar Succeeding Legislation)

Application for Tax Increment Financing

Pursuant to the Retail Incentive Second Congressional Review Emergency Act of 2004 (and Similar Succeeding Legislation) (Retail TIF Act), the undersigned Applicant hereby applies to the District of Columbia for tax increment financing for a Retail Development Project in the Downtown Retail Priority Area. This Application shall be submitted to the Office of the Deputy Mayor for Planning and Economic Development ("DMPED").

Applicant: [name of applicant], a [form of legal entity] organized under the laws of _____, and owner of the Building (as described in the Application). A copy of the Deed providing evidence of ownership is attached as Exhibit A.

Tenant: [legal tenant name], doing business as [tenant], a [legal entity], organized under the laws of _____. The 20xx Annual Report of [parent company name] its parent company, if applicable, is attached as Exhibit B.

Building: The [building name], [building address] Street, N.W., Washington, D.C., located on the Land.

Land: Lot [xxx] in Square [yyy], as shown on Exhibit C.

Retail Development Project: The leasing of [xx,xxx] rentable square feet of space in the Building to [tenant] pursuant to the [tenant] Lease, and the build-out of such space for the retail sale by [tenant] of [describe goods sold]. [Description of the timeline of proposed tenant build-out.]

[Tenant] Lease: Applicant and [legal tenant name] have executed a Lease dated [lease execution date], pursuant to which [legal tenant name] is leasing the TIF Area. A copy of the Lease is attached as Exhibit D.

TIF Area: The space occupied by [tenant] in the Building, as shown on Exhibit E. The space consists of [xx,xxx] square feet of rentable area on the [floor number(s)] floor(s) of the Building.

Retail Development

Costs: The estimated costs to be incurred in connection with the Retail Development Project and the plans and specifications for the build-out of the tenant space are included in Exhibit F.

Projected Sales: A projection of [tenant's] sales at the TIF Area including projected sales taxes, is attached as Exhibit G.

Certificate of Occupancy: The Applicant expects that the District of Columbia will issue a Certificate of Occupancy to [tenant] to operate the TIF Area for retail use on [projected date]. The Applicant expects the [tenant] to open for business on [date]. A copy of the Certificate of Occupancy will be required to be delivered pursuant to the Development Agreement prior to the issuance of the TIF Note or Bonds.

Requested TIF Amount: The Requested TIF amount of \$[Requested TIF amount].

TIF Note/Bond Structure: The Applicant proposes that the District of Columbia issue a TIF Bond or Note [describe proposed terms and provisions of TIF Note or Bond].

LSDBE Participation: The Applicant has affirmed its agreement with respect to LSDBEs in the Development Agreement between the Applicant and the District. The Development Agreement is attached as Exhibit H.

First Source Commitment: The Applicant will, and will require that, its tenant also execute a First Source Agreement, the forms of which are attached to the Development Agreement.

Non-Discrimination and EEO: Attached as Exhibit I is Applicant's Non-Discrimination Certification. Attached as Exhibit J is Applicant's Equal Employment Opportunity Policy Statement. Attached as Exhibit K is Applicant's Assurance of Compliance with Equal Employment Opportunity Requirements.

Tax Certification Affidavit: Attached as Exhibit L is the Applicant's Tax Certification Affidavit.

No Other

Incentives: The Applicant has not received from the District of Columbia any other funds (including without limitation proceeds of bonds through any other program of tax increment financing) for development of this Retail Development Project.

Sources and Uses: Attached as Exhibit M is a statement of sources and uses for the Building, showing (i) the total estimated costs of the Building (including the Retail Development Costs for this Retail Development Project), and (ii) the sources of funds (including debt, equity and TIF) anticipated to pay these costs including copies of lender commitments, if applicable.

Certification of Application: A certification of this Application for Tax Increment Financing is attached as Exhibit N.

Applicant has executed this Application for Tax Increment Financing as of _____, 2004.

[Applicant's legal name]

By: [_____]

List of Exhibits:

A	Deed
B	[Parent company] 20xx Annual Report
C	Plat of Land
D	Copy of Lease
E	Diagram of TIF Area
F	Retail Development Costs and Plans and Specifications
G	Projected Sales Taxes
H	Development Agreement
I	Non-Discrimination Certification
J	Equal Employment Policy Statement
K	Assurance of Compliance with Equal Employment Opportunity Requirements
L	Tax Certification Affidavit
M	Sources and Uses
N	Certification of Application

Appendix 2 – Rating System

Downtown Retail Incentive Program
Rating Matrix

The Office of the Deputy Mayor for Planning & Economic Development will use this matrix to inform its recommended TIF award to the Downtown Retail Committee. The rating factors are explained in the Downtown Retail Incentive Act published Rules of Operation. The Committee may amend the rating matrix from time to time to maximize the public policy impact of the Downtown Retail Incentive Act.

Retailer _____ Phone _____ E-mail _____
Property Owner _____ Phone _____ E-mail _____

TIF Award Feasibility Analysis			
Rate = LIBOR + Spread	5.78%	Bond allocation formula	\$2.55
LIBOR (six month)	1.28%	Projected sales per s.f.	\$ 500
Spread (in basis points)	450	Square Feet	7001
Amortization (in years)	5	Sales tax rate	5.75%
Debt coverage ratio	1.25		\$99.67

RATING FACTOR	RATING SCALE				RATING
1 Uniqueness factor Number of stores in region =	Unique	2nd in	<5 in	>5 in	
	9	7	4	0	<input type="text" value="4"/>
2 Collateral Leasing Benefit (exclusive of #4) <small>(Depends on # of co-tenants anticipated to follow this retailer)</small>	> 1 store	1 store	0 Stores		<input type="text" value="4"/>
	8	4	0		
3 Sales per square foot and factor Sales per sf \$ 200 \$ 250 \$ 300 \$ 400 \$ 500 \$ 700 Factor 1 2 3 4 5 6					<input type="text" value="5"/>
4 Dominates category or 1st in market	Yes	No			<input type="text" value="0"/>
	5	0			
4a Fulfills clustering goal	5	(must be part of a 3+ store deal)			<input type="text" value="0"/>
4b Minimum 10 points needed to be eligible for TIF incentives. If <10, stop here.					Subtotal <input type="text" value="13"/>
5 Advertises in region <small>(\$ of advertising / square feet of store)</small>	> \$10	> \$5	\$0		<input type="text" value="3"/>
	7	3	0		
6 Vertically integrated retailer <small>(percentage of goods carried under the retailers label)</small>	>50%	<50%	<25%		<input type="text" value="2"/>
	4	2	0		
7 Highly expressive retail façade	Yes	No			<input type="text" value="2"/>
	2	0			
8 Second floor occupied (75% of 1st)	1	0			<input type="text" value="1"/>
9 DC owned business	2	0			<input type="text" value="2"/>
10 Square footage of retail store (Anchor ability) Square feet 0 7000 20000 40000 Factor 0 1 2 3					<input type="text" value="1"/>
					<input type="text" value="24"/>
				Grand Total	<input type="text" value="24"/>
If subtotal on line 4b is > = 10, then multiply grand total by bond allocation formula.				TIF/s.f.	<input type="text" value="\$ 61.20"/>

MAXIMUM ALLOWABLE TIF INCENTIVE