

DEPARTMENT OF HEALTH

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in section 104 of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 (“the Act”), effective October 5, 1985, (D.C. Law 6-42; D.C. Official Code § 2-1801.04) (2007 Repl.), section 4902 (b) of the Department of Health Functions Clarification Act of 2001 (Act), effective October 3, 2001 (D.C. Law 14-28; D.C. Official Code § 7-731(b)) (2008 Repl.), and Mayor’s Order 2004-46, dated March 22, 2004, hereby gives notice of his intent to amend Title 16, Chapter 36 of the District of Columbia Municipal Regulations (DCMR) to repeal the current massage establishment infractions in section 3625 and replace it with a new section 3625 schedule of fines for massage establishment and health spa facilities to correspond with the new Massage Establishment and Health Spa Facility Regulations which were published in the *D.C. Register* on October 9, 2009 at 56 DCR 7975.

This emergency rulemaking action is necessary to immediately protect the public health, safety, and welfare of hundreds of District residents and visitors by establishing a fine schedule for violations of health and safety regulations at massage and health spa facilities so that operators will immediately comply with current industry health and safety standards, and so that illegal operations may be readily identified.

This emergency rulemaking was adopted by the Director on November 10, 2009, and will become effective 30 days from the date this notice is published in the *D.C. Register*. The emergency rulemaking will expire within 120 days from the date of the adoption or upon publication of a Notice of Final Rulemaking in the *D.C. Register*, or whichever occurs first.

The Director also gives notice of his intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 36 of Title 16 DCMR (Civil Infractions Schedule of Fines) is amended to read as follows:

**3625 MESSAGE ESTABLISHMENT AND HEALTH SPA FACILITY
INFRACTIONS**

- 3625.1 Violation of the following provisions shall be a Class 1 infraction:
- (a) 25 DCMR D 1306.2 (1) – Operating a massage establishment or health spa facility without a required license in violation of 25 DCMR D 1200.1;
 - (b) 25 DCMR D 1200.1 – Operating a massage establishment or health spa facility with a suspended license;

- (c) 25 DCMR D 1306.2 (3) – Operating a massage establishment or health spa facility without a valid Certificate of Occupancy;
- (d) 25 DCMR D 1306.2 (4) – Operating a massage establishment or health spa facility for an illegal clandestine drug laboratory or related activities;
- (e) 25 DCMR D 1306.2 (5) – Operating a massage establishment or health spa facility for prostitution;
- (f) 25 DCMR D 1306.2 (6) – Failure of licensee to employ a massage therapist who is licensed in the District in violation of 25 DCMR D 200.1
- (g) 25 DCMR D 1306.2 (7) – Failure of licensee to employ a manager of a massage establishment or health spa facility who is on the premises during all hours of operation in violation of 25 DCMR D 200.2;
- (h) 25 DCMR D 1306.2 (8) – Failure of licensee to employ a massage therapist who is on the premises during all hours of operation in violation of 25 DCMR D 200.3;
- (i) 25 DCMR D 1306.2 (9) – Operating a massage establishment or health spa facility with six (6) or more critical violations that cannot be corrected on site during the course of the inspection;
- (j) 25 DCMR D 1306.2 (10) – Failing to allow access to DOH representatives during the massage establishment or health spa facility’s hours of operation and other reasonable times as determined by DOH in violation of 25 DCMR D 1300.4;
- (k) 25 DCMR D 1306.2 (11) – Hindering, obstructing, or in any way interfering with any inspector or authorized DOH personnel in the performance of his or her duty; or
- (l) 25 DCMR D 1306.3 – Operating in violation of any provision specified in 25 DCMR D 1700, 1701, or 1702.

3635.2 **Reserved**

3625.3 Violation of the following provisions shall be a Class 3 infraction:

- (a) 25 DCMR D 1306.2 (2) – Operating a massage establishment or health spa facility with an expired license in violation of 25 DCMR D 1200.1;
- (b) 25 DCMR D 1306.1(a) – Operating with extensive fire damage that affects the massage establishment or health spa facility’s ability to comply with these regulations;

- (c) 25 DCMR D 1306.1(b) – Operating with serious flood damage that affects the massage establishment or health spa facility’s ability to comply with these regulations;
- (d) 25 DCMR D 1306.1(c) – Operating with loss of electrical power to critical systems, including but not limited to lighting, heating, cooling, or ventilation controls for a period of two (2) or more hours;
- (e) 25 DCMR D 1306.1(d) – Operating with no hot water, or an unplanned water outage, or the water supply is cut off in its entirety for a period of one (1) or more hours in violation of 25 DCMR D 605, 606, and 702.1;
- (f) 25 DCMR D 1306.1(e) – Operating with inadequate water pressure to any part of the massage establishment or health spa facility;
- (g) 25 DCMR D 1306.1(f) – Operating with insufficient water capacity to any part of the massage establishment or health spa facility;
- (h) 25 DCMR D 1306.1(g) – The massage establishment or health spa facility’s use of a water supply that is not approved by the Department;
- (i) 25 DCMR D 1306.1(h) – Operating with a defect or condition that exists in the plumbing system supplying potable water that may result in the contamination of the water;
- (j) 25 DCMR D 1306.1(i) – Operating with a sewage backup or sewage that is not disposed of in an approved and sanitary manner;
- (k) 25 DCMR D 1306.1(j) – Operating with a cross-connection between the potable water and non-potable water distribution systems, including but not limited to landscape irrigation, air conditioning, heating, and/ or fire suppression system.
- (l) 25 DCMR D 1306.1(k) – Operating with a back siphonage event;
- (m) 25 DCMR D 1306.1(l) – Operating with toilet and/or handwashing facilities that are not properly installed;
- (n) 25 DCMR D 1306.1(m) – Operating with the presence of toxic or noxious gases, vapors, fumes, mists or particulates in concentrations immediately dangerous to life or health, or in concentrations sufficient to cause an environmental disease or public nuisance;
- (o) 25 DCMR D 1306.1(n) – Operating with the presence of any unapproved pesticide residues in the interior building areas of a massage establishment or health spa facility, in food storage or service areas contained within the massage

establishment or health spa facility, or in the presence of any food in the establishment; or in the presence of excessive restricted-use pesticide in any outdoor area of a massage establishment; or any evidence of the indiscriminate use of a pesticide or herbicide which may be injurious to the health of humans;

- (p) 25 DCMR D 1306.1(o) – Operating with the presence of any disease-causing organism in water exposed to the atmosphere which has caused or is likely to cause an environmental disease in the massage establishment or health spa facility;
- (q) 25 DCMR D 1306.1(p) – Operating with equipment that by condition, design, construction or use poses an immediate risk of entrapment, fall, puncture, pinch, crush, trip, or other cause of injury;
- (r) 25 DCMR D 1306.1(q) – Operating with environmental surfaces, including but not limited to equipment, furnishings, beds, mattresses, mats, massage tables, pillows, linens, robes, garments, chairs or other items within any room of a massage establishment or health spa facility that are stained with blood or bodily fluids, or soiled; or infested with vermin; or are in an otherwise unsanitary condition;
- (s) 25 DCMR D 1306.1(r) – Operating with any unmitigated biohazardous event that simultaneously involves more than one (1) customer, massage therapy room or a public area exceeding two hundred square feet (200 sq. ft.);
- (t) 25 DCMR D 1306.1(s) – Operating with gross insanitary occurrence or condition that may endanger public health including but not limited to an infestation of vermin;
- (u) 25 DCMR D 1306.1(t) – Operating with incorrect hot water temperatures that cannot be corrected during the course of the inspection in violation of section 702.1;
- (v) 25 DCMR D 1306.1(u) – Operating with the presence and use of any used bedding which has not been sterilized or disinfected in violation of D.C. Official Code § 8-502(4), including the presence or use of any used bedding discarded and then recovered from a dumpster, trash room, alleyway, landfill, dump, junkyard, or hospital; or
- (w) 25 DCMR D 1306.1(v) – Failing to minimize the presence of insects, rodents, or other pests on the premises in violation of section 821 (a) through (d).

3625.4 Violation of any provision of the District of Columbia Massage Establishment and Health Spa Facility Regulations (25 DCMR, Subtitle D) which is not cited elsewhere in this section shall be a Class 4 infraction.

All persons wishing to comment on the proposed rules should submit written comments no later than thirty (30) days after publication of this notice in the *D.C. Register*, to the Department of Health, Office of the General Counsel, 825 North Capitol Street, N.E., Room 4122, Washington, D.C. 20002. Copies of the proposed rules may be obtained, at cost, at the same address during the hours of 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

DEPARTMENT OF INSURANCE, SECURITIES, AND BANKING

NOTICE OF EMERGENCY RULEMAKING

The Commissioner of the Department of Insurance, Securities, and Banking, pursuant to the authority set forth in section 4 of the Department of Insurance, 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 21 of the Hospital and Medical Services Corporation Regulatory Act of 1996, effective April 9, 1997 (D.C. Law 11-245; D.C. Official Code § 31-3520 (2001), and section 2(j) of the Medical Insurance Empowerment Amendment Act of 2008 (MIEAA), effective March 25, 2009 (D.C. Law 17-0369, 56 DCR 1346; D.C. Official Code § 31-3524), hereby gives notice of her intent to adopt, by emergency rulemaking, a new Chapter 46, Title 26 (Insurance), of the District of Columbia Municipal Regulations, effective November 8, 2009. The emergency rules will expire 120 days after their effective date, or upon publication in the *D.C. Register* of a Notice of Final Rulemaking, whichever occurs first. This emergency action is necessary to maintain the procedures and processes for the Commissioner to determine excess and unreasonably large surplus pursuant to the MIEAA during the review of the Notice of Final Rulemaking. The new chapter will set forth procedures for the review of the surplus of hospital and medical services corporations and to determine whether the surplus is excessive or unreasonably large.

A new Chapter 46 (Procedures for the Determination of Excess Surplus), Title 26 (Insurance), of the District of Columbia Municipal Regulations, is established to read as follows:

CHAPTER 46 PROCEDURES FOR THE DETERMINATION OF EXCESS SURPLUS**4600 APPLICABILITY**

4600.1 These rules apply to any domestic hospital and medical services corporations issued a certificate of authority pursuant to section 6 of the Act.

4601 FILING REQUIREMENTS AND PUBLIC NOTIFICATION

4601.1 All domestic companies licensed under this chapter shall file a financial report with the Commissioner which details the company's surplus and examines whether the company's surplus is considered excessive under the Act. The financial report shall detail the appropriate level of surplus necessary for the company to meet the National Association of Insurance Commissioners' Risk Based Capital Requirements for health insurers pursuant to the Health Organizations RBC Amendment Act of 2002, effective June 18, 2003 (D.C.

Law 14-312; D.C. Official Code § 31-3851.01 *et seq.* (2008 Supp.)); and the Blue Cross/Blue Shield Association capital requirements.

- 4601.2 The report required by section 4601.1 shall be filed with the Commissioner for his review by June 1st of each year, except that the report with the Commissioner by July 24, 2009.
- 4601.3 All filings are required to be submitted electronically in a format prescribed by the Commissioner.
- 4601.4 In determining whether the surplus is excessive, the Commissioner shall consider the National Association of Insurance Commissioners' Risk Based Capital Requirements for health insurers pursuant to the Health Organizations RBC Amendment Act of 2002, effective June 18, 2003 (D.C. Law 14-312; D.C. Official Code §§ 31-3851.01 *et seq.* (2008 Supp.)); and the Blue Cross/Blue Shield Association capital requirements.
- 4601.5 If the preliminary analysis of the Commissioner determines that the company's surplus is excessive, a public hearing shall be scheduled in accordance with section 4602 to determine whether the company's surplus is excessive and unreasonably large, and the company shall provide a report to the Commissioner, at least fifteen (15) days prior to the date of the public hearing, a report with the following information:
- (a) The company's actuarially determined risk exposures; and
 - (b) The company's expected and unanticipated contingencies.
- 4601.6 The Commissioner shall post on the Department's website, all public documentation used in determining whether a company's surplus is excessive and unreasonably large, and whether surplus is adequate to cover the anticipated and unanticipated losses of the company.
- 4601.7 The Commissioner shall provide a determination of the amount of surplus attributable to the District of Columbia.
- 4601.8 In determining whether a company's surplus attributable to the District is unreasonably large, the Commissioner may include provisions for actuarially determined risk exposures as well as the expected and unanticipated contingencies of the company. The anticipated cost of the corporation's contribution to the open enrollment program required by section 15 of the Act should be included in the surplus determination.

4602 PUBLIC HEARINGS

- 4602.1 The Commissioner shall publish a public notice of hearing in the *D.C. Register* setting forth the hearing date for the surplus determination, including applicable briefing schedule as determined by the Commissioner. The public notice shall be published no later than forty-five (45) days prior to the hearing. A copy of the public notice shall be served on any corporation subject to the public hearing by U.S. mail no less than forty-five (45) days prior to the hearing.
- 4602.2 The corporation and members of the public may submit a written report for consideration by the Commissioner no later than fifteen (15) days prior to the hearing date. The corporation's report shall not exceed 50 pages in length and interested persons' reports should not exceed fifteen (15) pages. The Commissioner shall publish any report submitted pursuant to this section on the Department's website no later than two (2) days after receipt of a report.
- 4602.3 The hearing shall be conducted in accordance with the following requirements:
- (a) The hearing shall be transcribed at the cost of the corporation;
 - (b) The corporation may make an oral presentation.
 - (c) At the discretion of the Commissioner, interested members of the public may make oral presentations.
 - (d) The Commissioner may directly, or through independent experts, question witnesses presented by the corporation or any interested person making a presentation.
 - (e) The corporation should be allowed to make a final statement prior to the conclusion of the hearing. The final statement should not exceed thirty (30) minutes.
- 4602.4 The record in the hearing shall remain open for seven (7) days to allow the corporation or interested persons to file rebuttal statements, not to exceed eight (8) pages, clarifying any issue or responding to questions raised at the hearing.
- 4602.5 Following the hearing, the Commissioner shall make a final determination regarding the corporation's surplus after review of all relevant submissions and with the assistance of experts, if necessary. The cost of any experts used by the Commissioner shall be borne by the corporation.

- 4602.6 The final determination shall be issued in writing and shall be accompanied by findings of fact and conclusions of law.
- 4602.7 The transcript of a Public Hearing shall be posted for public inspection on the Department's website as soon as practicable.
- 4603 DETERMINATION OF EXCESSIVE AND UNREASONABLY LARGE SURPLUS**
- 4603.1 If the Commissioner make a final determination that a corporation's surplus which is attributable to the District is excessive and unreasonably large, the Commissioner shall order the corporation to submit a plan for dedication of the excess to community health reinvestment for approval.
- 4603.2 The Commissioner shall approve the plan if it is fair and equitable as determined by the Commissioner.
- 4603.3 Should the corporation fail to submit a plan as ordered or fails to execute within a reasonable time period a plan approved by the Commissioner, the Commissioner shall deny all premium rate increases for subscriber policies written in the District until the company complies with the order or the Commissioner may issue any other order as necessary to enforce the purposes of the Act.
- 4603.4 The Commissioner shall verify compliance with its approved plan with the use of experts and other professionals, the cost of which shall be borne by the corporation.
- 4699 DEFINITIONS**
- 4699.1 **"Act"** – shall mean the Hospital and Medical Services Corporation Regulatory Act of 1996, effective April 9, 1997 (D.C. Law 11-245; D.C. Official Code § 31-3501 *et seq.* (2001)).
- 4699.2 **"Attributable to the District"**- shall mean the process used by the Commissioner to allocate the portion of the surplus of a hospital and medical services corporation that is derived from the company's operations in the District of Columbia based on the following factors:
- (a) The number of policies by geographic area;
 - (b) The number of health care providers under contract with the company by geographic area; and
 - (c) Any other factor that the Commissioner deems to be relevant based on the record of a public hearing held pursuant to section 4602.

- 4699.3 “**Department**” – District of Columbia Department of Insurance, Securities and Banking.
- 4699.4 “**Unreasonably large surplus**” – shall mean a surplus of a corporation that is greater than the sum of the following:
- (a) The appropriate NAIC risk-based capital level requirements determined by the Commissioner and the Blue Cross/Blue Shield Association capital requirements based on the company’s surplus from the immediately preceding year; and
 - (b) The amount of surplus needed by the corporation to meet its expected and unanticipated contingencies.

Persons desiring to comment on these proposed rules should submit comments in writing to Ms. Leslie E. Johnson, Hearing Officer, Department of Insurance, Securities and Banking, 810 First Street, NE, Suite 701, Washington, DC 20002. Comments must be received no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the proposed rules may be obtained from the Department at the address above and will be published on the website at www.disb.gov