STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Regulations: Workers' Compensation – Official Medical Fee Schedule: Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule

TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 9789.30 et seq.

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, 4603.5, 5307.1 and 5307.3 proposes to amend sections 9789.30, 9789.31, 9789.32, 9789.33, 9789.36, 9789.37, 9789.38, and adopt section 9789.39 in Article 5.3 of Subchapter 1, Chapter 4.5, Division 1, of title 8, California Code of Regulations, relating to the Official Medical Fee Schedule – Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule.

PROPOSED REGULATORY ACTION

The Division of Workers' Compensation, proposes to amend Article 5.3 of Subchapter 1, Chapter 4.5, Division 1, of Title 8, California Code of Regulations, by amending and adopting regulations commencing with section 9789.30:

1. **Amend section 9789.30 Definitions**
2. **Amend section 9789.31 Adoption of Standards**
3. **Amend section 9789.32 Applicability**
4. **Amend section 9789.33 Determination of Maximum Reasonable Fee**
5. **Amend section 9789.36 Update of Rules to Reflect Changes in the Medicare Payment System**
6. **Amend section 9789.37 DWC Form 15 Election for High Cost Outlier**
7. **Amend section 9789.38 Appendix X**
8. **Adopt section 9789.39 Federal Regulations and Federal Register Notices by Date of Service**

AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:

The Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule component of the Official Medical Fee Schedule "establish(es) or fix(es) rates, prices, or tariffs" within the meaning of Government Code section 11340.9(g) and is therefore not subject to Chapter 3.5 of the Administrative Procedure Act (commencing at Government Code section 11340) relating to administrative regulations and rulemaking.

This rulemaking proceeding to amend the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule is being conducted under the Administrative Director's rulemaking power under Labor Code sections 133, 4603.5, 5307.1 and 5307.3. This regulatory proceeding is subject to the procedural requirements of Labor Code sections 5307.1 and 5307.4.

This Notice and the accompanying Initial Statement of Reasons are being prepared to comply with the procedural requirements of Labor Code section 5307.4 and for the convenience of the regulated public to assist the regulated public in analyzing and commenting on this non-APA rulemaking proceeding.

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: **Tuesday, January 25, 2011**
Time: **10:00 a.m. to 5:00 p.m. or conclusion of business**
Place: **Elihu M. Harris State Building, Auditorium**
1515 Clay Street,
Oakland, CA 94612

In order to ensure unimpeded access for disabled individuals wishing to present comments and facilitate the accurate transcription of public comments, camera usage will be allowed in only one area of the hearing room. To provide everyone a chance to speak, public testimony will be limited to 10 minutes per speaker and should be specific to the proposed regulations. Testimony which would exceed 10 minutes may be submitted in writing.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require that, any persons who make oral comments at the hearings also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

ACCESSIBILITY

The State Office Buildings and Auditoriums are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable

accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Shavonda Early, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 p.m., on Tuesday, January 25, 2011.** The Department of Industrial Relations, Division of Workers' Compensation will consider only comments received at the Department of Industrial Relations, Division of Workers' Compensation by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov .

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than **5:00 p.m. on Tuesday, January 25, 2011**.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code sections 59, 133, 4603.4, 4603.5, and 5307.3.

Reference is to Labor Code sections 4600, 4603.2, 5307.1l and 5307.1.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. Labor Code section 4600 requires an employer to provide medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury. Under

existing law, payment for medical treatment shall be no more than the maximum amounts set by the Administrative Director in the Official Medical Fee Schedule or the amounts set pursuant to a contract. Labor Code Section 5307.1, as amended by Senate Bill 228 of 2003 (Chapter 639, Statutes of 2003, effective January 1, 2004), requires the Administrative Director to adopt and revise periodically an official medical fee schedule that establishes the reasonable maximum fees paid for all medical services rendered in workers' compensation cases.

Except for physician services, all fees in the adopted schedule must be in accordance with the fee-related structure and rules of the relevant Medicare (administered by the Center for Medicare & Medicaid Services of the United States Department of Health and Human Services) and Medi-Cal payment systems. As set forth in Labor Code section 5307.1(c), the maximum facility fee for services performed in an ambulatory surgical center, or in a hospital outpatient department, may not exceed 120 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department. The inflation factor for hospital outpatient services is determined solely by the estimated adjustment in the hospital market basket for the 12 months beginning October 1 of the preceding calendar year. The Administrative Director may adopt different conversion factors, diagnostic related group weights, and other factors affecting payment amounts from those used in the Medicare payment system, provided estimated aggregate fees do not exceed 120 percent of the estimated aggregate fees paid for the same class of services in the Medicare Payment System.

Labor Section 5307.1 also provides that the Administrative Director shall adjust the hospital outpatient departments and ambulatory surgical centers fee schedule to conform to any relevant changes in the Medicare payment system by issuing an order, exempt from Labor Code sections 5307.3 and 5307.4 and the rulemaking provisions of the Administrative Procedure Act (Chapter 3.2 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), informing the public of the changes and their effective date.

Effective Jan. 1, 2004, the Administrative Director adopted the hospital outpatient departments and ambulatory surgical centers fee schedule (California Code of Regulations, title 8, sections 9789.30 et seq.), which is updated annually by Administrative Director Order.

The Administrative Director now proposes to amend sections 9789.30, 9789.31, 9789.32, 9789.33, 9789.36, 9789.37, and 9789.38, revise the multiplier for payment of facility fees for services performed in ambulatory surgical centers and proposes minor amendments to conform to the proposed change, update, or clarify sections of the hospital outpatient departments and ambulatory surgical centers fee schedule. The Administrative Director also proposes to adopt section 9789.39 which provides for the updates to the federal regulation and federal register references made in the hospital outpatient departments and ambulatory surgical centers fee schedule updates by Order of the Administrative Director, in order to conform to changes in the Medicare payment system as required by Labor Code section 5307.1.

The proposed regulations implement, interpret, and make specific sections 4600 and 5307.1 of the Labor Code as follows:

1. Section 9789.30 – Definitions

Subdivisions (a), (e), (f), (q), and (w) are amended to move references to the federal regulation and federal register made in the hospital outpatient departments and ambulatory surgical centers fee schedule updates by Order of the Administrative Director, to section 9789.39.

Subdivision (a) is also amended to revise the definition of "Adjusted Conversion Factor." Instead of setting forth a specific value for the formula to determine the adjusted conversion factor, the definition is set forth in terms, with reference made to where the values can be found, as follows:

"'Adjusted Conversion Factor' is determined as follows: unadjusted conversion factor x (1-labor-related share + (labor-related share x wage index)). For each update, the unadjusted conversion factor for the preceding period is adjusted by the rate of change in the market basket inflation factor. The market basket inflation factor and labor-related share are specified in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the unadjusted conversion factor, market basket inflation factor, and labor-related share by date of service." The year by year update references are deleted.

Subdivision (a) is also amended to state that for services rendered on or after February 15, 2006, the Federal Register adjusting the conversion factor for a rural Sole Community Hospital is "incorporated by reference and will be made available upon request to the Administrative Director."

Subdivision (c) amends the definition of "Ambulatory Surgical Center (ASC)" to modify a surgical clinic as one that is certified "to use anesthesia, except local anesthesia or peripheral nerve blocks, or both, in compliance with the community standard of practice, in doses that, when administered have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes."

Subdivision (e), which defines the "APC Payment Rate," is amended to state: "The APC payment rate is specified in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference to the APC payment rate by date of service." The year by year update references are deleted.

Subdivision (f), which defines the "APC Relative Weight," is amended to state: "The APC relative weight is specified in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference to the APC relative weight by date of service." The year by year update references are deleted.

Subdivision (p) adds a definition for "Labor-related Share" as "the portion of the payment rate that is attributable to labor and labor-related cost determined by CMS, pursuant to Section 1833(t)(2)(D) of the Social Security Act and as specified in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference that reference the labor-related share by date of service."

Subdivision (p now q), amends the definition for "Market Basket Inflation Factor," to remove the specific reference to the 3.4% market basket increase in the August 1, 2003 Federal Register and instead to reference the Federal Register "notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference to the market basket inflation factor by date of service." The year by year update references are deleted.

Subdivision (r) adds a definition for "Outlier Threshold" to mean "the Medicare outlier threshold used in determining high cost outlier payments."

Former subdivision (q) is re-lettered as (s).

Subdivision (t) adds a definition for "Price adjustment" to mean "any and all price reductions, offsets, discounts, rebates, adjustments, and or refunds which accrue to or are factored into the final net cost to the hospital outpatient department or ambulatory surgical center."

Former subdivision (r) is re-lettered as (u).

Former subdivision (s) is re-lettered as (v).

Subdivision (t now w), amends the definition for "Wage Index" to remove the specific reference to the CMS' 2004 Hospital Outpatient Prospective Payment System and instead to reference the CMS' Hospital Outpatient Prospective Payment System Federal Register "and wage index values as specified in the Hospital Inpatient Prospective Payment Systems set forth in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference that contains description of the wage index and wage index values by date of service." The year by year update references are deleted.

Subdivision (u now x) is amended to clarify that the 120% Medicare multiplier required by Labor Code section 5307.1, or the 122% multiplier that includes an extra 2% reimbursement for high cost outlier cases applies to services rendered before March 1, 2011 in both hospital outpatient departments and ambulatory surgical centers. After March 1, 2011, the rate for hospital outpatient departments will be the same. For services rendered in ambulatory surgical centers on or after March 1, 2011, the workers' compensation multiplier will be 100% Medicare multiplier, or the 102% multiplier that includes an extra 2% reimbursement for high cost outlier cases.

2. Section 9789.31 Adoption of Standards

Subdivision (a), which incorporated by reference the 2004 CMS Hospital Outpatient Prospective Payment System (HOPPS), is amended to incorporate by reference certain addenda published in the Federal Register notices announcing revisions in the Medicare payment rates. The adopted payment system addenda by date of service is listed in Section 9789.39(b). The year by year update references are deleted.

Subdivision (b), which incorporated by reference certain tables published in the 2005 CMS Hospital Inpatient Prospective Payment Systems (IPPS), is amended to incorporate by reference certain tables published in the Federal Register notices announcing revisions in the Medicare payment rates. The adopted payment system tables by date of service is listed in Section 9789.39(b). The year by year update references are deleted.

Subdivision (c), which incorporated by reference the 2005 CMS Hospital Inpatient Prospective Payment Systems (IPPS) "Payment Impact File" published by CMS, is amended to incorporate by reference the "Payment Impact File" published by CMS "in effect for the year that includes the date of service." The year by year update references are deleted.

Subdivision (d), which incorporated by reference the American Medical Associations' Physician "Current Procedural Terminology," 2004 Edition, is amended to incorporate by reference the American Medical Associations' "Current Procedural Terminology," 4th Edition, annual revision in effect for the year that includes the date of service. The revised subdivision also provides the mailing address, the internet address and the phone number where copies may be purchased. The year by year update references are deleted.

Subdivision (e), which incorporated by reference CMS' 2004 Alphanumeric "Healthcare Common Procedure Coding System (HCPCS)," is amended to incorporate by reference the Alphanumeric "Healthcare Common Procedure Coding System (HCPCS)" annual revision in effect for the year that includes the date of service. The revised subdivision also provides the mailing address, the internet address and the phone number where copies may be purchased. The year by year update references are deleted.

3. Section 9789.32 Applicability

Subdivision (a) is revised to refer to the new section 9789.39.
The CPT codes 10040-69990, which define surgical procedures, are increased to include 10021 through 69990.

Subdivision (b) is revised to state: "Sections 9789.30 through 9789.39 apply to any hospital outpatient department as defined in Section 9789.30(n) and any ASC as defined in Section 9789.30(c)." The references to other outpatient departments and clinics are deleted.

Subdivision (e) has a syntax change, adding the words "referenced in," and changes the reference from Section 9789.31(a)(5) to Section 9789.31(a).

4. Section 9789.33 Determination of Maximum Reasonable Fee

Subdivision (a) is revised to state "In accordance with Section 9789.30(x), an extra 2% reimbursement," instead of "The 1.22 factor."

Subdivision (a)(1): The CPT codes 10040-69990, which define surgical procedures, are increased to include 10021 through 69990 in three places.

Subdivision (a)(1) is also amended to revise the method of determining the maximum allowable payment for outpatient facility fees for hospital emergency room services or for surgical services performed at a hospital outpatient department or at an ambulatory surgical center. The term "adjusted conversion factor" is substituted into the formula, and instead of setting forth a specific value for the formula to determine the payment, the definition is set forth in terms, with reference made to where the values can be found, as follows:

"APC relative weight x adjusted conversion factor x applicable workers' compensation multiplier. See Section 9789.39(b) for the APC relative weight by date of service. See Section 9789.30(x) for the applicable workers' compensation multiplier by date of service".

The year by year update references are deleted.

Subdivision (a)(1)(A) is amended to revise the method of determining the maximum payment rate for ASCs and non-listed hospitals. Instead of setting forth a specific value for the formula to determine the payment, the definition is set forth in terms, with reference made to where the values can be found, as follows:
"APC relative weight x adjusted conversion factor x applicable workers' compensation multiplier pursuant to Section 9789.30(x)"

Subdivision (a)(1)(B) is amended to include the following language:
"For services rendered on or after February 15, 2006, table B in Section 9789.35 contains an 'adjusted conversion factor' which incorporates the standard conversion factor, wage index, rural SCH adjustment factor, and inflation factor, as described in CMS' 2006 Hospital Outpatient Prospective Payment System final rule of November 10, 2005, published in the Federal Register (CMS-1501-FC, 70 FR 68516), at page 68556."

Additionally, the words "outpatient departments" are added after the phrase "The maximum payment rate for the listed hospitals" as clarification. The number "1.22" in the formula to determine the payment rate for the listed hospital~~s~~ outpatient departments is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (a)(2): The number "1.22" in the formula for procedure codes for drugs and biologicals with status code indicator "G" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (a)(3): The formula for procedure codes for devices with status code indicator "H" is revised to state. "Documented paid cost, plus an additional 10% of the hospital outpatient department's or ASC's documented paid cost, net of immediate and anticipated price adjustments based upon the hospital outpatient department's or ASC's prior calendar year's usage for comparable devices, not to exceed a maximum of $ 250.00, plus any sales tax and/or shipping and handling charges actually paid."

Subdivision (a)(4): The number "1.22" in the formula for procedure codes for drugs and biologicals with status code indicator "K" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x).

Subdivision (a)(5): The number "1.22" in the formula for procedure codes for blood and blood products with status code indicator "R" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x).

Subdivision (a)(6): The formula for procedure codes for brachytherapy services with status code indicator "U" is revised to state. "Documented paid cost, plus an additional 10% of the hospital outpatient department's or ASC's documented paid cost, net of immediate and anticipated price adjustments based upon the hospital outpatient department's or ASC's prior calendar year's usage for comparable devices, not to exceed a maximum of $ 250.00, plus any sales tax and/or shipping and handling charges actually paid."

For services rendered on or after April 15, 2010, the number "1.22" in the formula for procedure codes for brachytherapy services with status code indicator "U" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (b)(1)(A): The CPT codes 10040-69990, which define surgical procedures, are increased to include 10021 through 69990 in three places.
The standard payment formula is revised to state:

"APC relative weight x adjusted conversion factor x applicable workers' compensation multiplier. See Section 9789.39(b) for the APC relative weight by date of service. See Section 9789.30(x) for the applicable workers' compensation multiplier by date of service."

The following sentence was deleted: "For services rendered on or after July 15, 2005, use: (APC relative weight x unadjusted conversion factor) x (.40 + .60 x applicable wage index) x 1.20"

For services rendered on or after February 15, 2006, by rural SCH hospitals, the formula was revised to state, "use: APC relative weight x adjusted conversion factor x 1.071 x applicable workers' compensation multiplier. See Section 9789.39(b) for the APC relative weight by date of service. See Section 9789.30(x) for the applicable workers' compensation multiplier by date of service."

Subdivision (b)(1)(B): The number "1.20" in the formula for procedure codes for drugs and biologicals with status code indicator "G" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x).

Subdivision (b)(1)(C): The formula for procedure codes for devices with status code indicator "H" is revised to state. "Documented paid cost, plus an additional 10% of the hospital outpatient department's or ASC's documented paid cost, net of immediate and anticipated price adjustments based upon the hospital outpatient department's or ASC's prior calendar year's usage for comparable devices, not to exceed a maximum of $ 250.00, plus any sales tax and/or shipping and handling charges actually paid."

Subdivision (b)(1)(D): The number "1.20" in the formula for procedure codes for drugs and biologicals with status code indicator "K" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (b)(1)(E): The number "1.20" in the formula for procedure codes for blood and blood products with status code indicator "R" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (b)(1)(F): For services rendered on or after March 1, 2009, the formula for procedure codes for brachytherapy services with status code indicator "U" is revised to state. "Documented paid cost, plus an additional 10% of the hospital outpatient department's or ASC's documented paid cost, net of immediate and anticipated price adjustments based upon the hospital outpatient department's or ASC's prior calendar year's usage for comparable devices, not to exceed a maximum of $ 250.00, plus any sales tax and/or shipping and handling charges actually paid."

Also in this subdivision, for services rendered on or after April 15, 2010, the number "1.20" in the formula for procedure codes for brachytherapy services with status code indicator "U" is replaced with the phrase "applicable workers' compensation multiplier pursuant to Section 9789.30(x)."

Subdivision (b)(2) is revised by adding the following sentence: "For services rendered on or after July 15, 2005, the outlier threshold is specified in the Federal Register notices announcing revisions in the Medicare payment rates. See Section 9789.39(b) for the Federal Register reference that defines the outlier threshold by date of service." The year by year update references are deleted.

Subdivisions (c)(1), (c)(5) and (c)(6) are revised to update the DWC Medical Unit address to : P.O. Box 71010, Oakland, CA 94612.

Subdivision (c)(6) is revised to reflect the correct webpage link for the Division of Workers' Compensation: http://www.dir.ca.gov/dwc/dwc_home_page.htm

5. Section 9789.36 – Update of Rules to Reflect Changes in the Medicare Payment System

This section is amended to add reference to the proposed section 9789.39 to the hospital outpatient departments and ambulatory surgical centers fee schedule section of the Official Medical Fee Schedule. In addition, the effective date for annual updates to the hospital outpatient departments and ambulatory surgical centers fee schedule is changed from January 1 to March 1 of each year, to provide for a more realistic effective date given the constraints of when the Medicare publishes the final rule and providing adequate notice (30-days) to affected parties.

The section is also revised to reflect the correct webpage link for the Division of Workers' Compensation: http://www.dir.ca.gov/dwc/dwc_home_page.htm

6. Section 9789.37 Election for High Cost Outlier

Number 7 on the form is revised to update the DWC Medical Unit address to: P.O. Box 71010, Oakland, CA 94612. The revision date is also changed to state "03/01/2011."

7. Section 9789.38 Appendix X

The following sentence is added to this section: "See Section 9789.39(a), for the Code of Federal Regulations reference for effective date, revisions, and amendments by date of service."
The year by year update references are deleted.

8. Proposed section 9789.39. Federal Regulations, Federal Register Notices by Date of Discharge.

This section is added to provide for the updates to the federal regulation and federal register references made in the hospital outpatient departments and ambulatory surgical centers fee schedule updates by order of the Administrative Director, in order to conform to changes in the Medicare payment system as required by Labor Code Section 5307.1.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

- Adoption of these regulations will not: (1) create or eliminate jobs within the State of California, (2) create new businesses or eliminate existing businesses within the State of California, or (3) affect the expansion of businesses currently doing business in California.

- Effect on Housing Costs: None.

- The Division of Workers' Compensation is aware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The proposed regulations will most significantly affect ambulatory surgical centers, workers' compensation insurers, self-insured employers and workers' compensation third party administrators.

  The Medicare fee related payment structure is based on the averaging concept, so that in some cases the ambulatory surgical center may be paid less than cost and in other cases the ambulatory surgery center may be paid more than cost. But, on the average, the allowance should be reasonable.

  Because the fee is being reduced from a 120% multiplier to 100% multiplier of the Medicare outpatient hospital departments fee schedule, or a 102% multiplier that includes an extra 2% reimbursement for high cost outlier cases, the ambulatory surgical centers will be receiving less than they are currently receiving. Preliminary analyses show ambulatory surgical centers costs are 66 to 71% of hospital outpatient department costs. Starting in 2008, Medicare pays ambulatory surgical centers 67% of hospital outpatient department rates for most procedures. (See slides 24 and 25 of Barbara O. Wynn's Presentation to CHSWC, Oakland, October 22, 2009.) It is anticipated that the annual savings to the workers' compensation system will be approximately $31 million dollars.

  Workers' compensation insurers, self-insured employers and workers' compensation third party administrators, will benefit with a reduced payment for procedures performed in ambulatory surgical centers.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulation will affect small business. Small business employers will have reduced costs due to the reduced facility fees for services rendered in ambulatory surgical centers. Ambulatory surgical centers will be affected as the maximum allowed fees will be reduced from 120% to 100% of the Medicare hospital outpatient departments fee schedule.

FISCAL IMPACTS

- **Costs or savings to state agencies:** These regulations affect the State Compensation Insurance Fund (SCIF), which is the largest workers' compensation insurer in the state. In 2009, SCIF had 18.6% of the workers' compensation market share (*2009 California Property and Casualty Market Share Report*, CA Dept. of Insurance, http://www.insurance.ca.gov/0400-news/0200-studies-reports/0100-market-share/2009/index.cfm. Reducing the cost of procedures performed in ambulatory surgical fee centers will reduce the cost to SCIF by a little under $6 million.

- Costs/savings in federal funding to the State: None.

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, are not a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46. The potential costs imposed on all public agency employers and payors by these proposed regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.

- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed regulations do apply to a local agency or school district in its capacity as an employer required to provide workers' compensation benefits to injured workers.

- Other nondiscretionary costs/savings imposed upon local agencies: None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Pursuant to Government Code section 11346.45, the text of draft proposed regulations was made available for pre-regulatory public comment through the Division's Internet message board (the DWC Forum.) Additionally, a pre-rulemaking stakeholder's meeting was held to receive input on the development of the regulations.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below. However, documents subject to copyright may be inspected but not copied.

As of the date of this notice, the rulemaking file consists of the notice; the initial statement of reasons; the proposed text of the regulations (underline and strikeout version and clean version); the documents incorporated by reference; and the Form 399, Economic and Fiscal Impact Statement. Also included are studies and documents relied upon in drafting the proposed regulations and Form 399, Economic and Fiscal Impact Statement.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov. To access them, click on the link for the Division of Workers' Compensation homepage, then click on the ''Participate in Rulemaking'' link and scroll down the list of rulemaking proceedings to find the current Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule rulemaking link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 1515 Clay Street, 18th Floor, Oakland, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603

San Francisco, CA 94142
E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

BACKUP CONTACT PERSON / CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Minerva Krohn, Industrial Relations Counsel IV or
Jarvia Shu, Industrial Relations Counsel III
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
E-mail: (mkrohn@dir.ca.gov; jshu@dir.ca.gov)

The telephone number of the backup contact persons is (510) 286-7100.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website: www.dir.ca.gov , then click on the link for the Division of Workers' Compensation homepage, then click on the ''Participate in Rulemaking'' link and scroll down the list of rulemaking proceedings to find the current Outpatient Hospital Departments and Ambulatory Surgical Centers Fee Schedule rulemaking link.

AUTOMATIC MAILING

A copy of this Notice will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations as amended and adopted will appear in title 8, California Code of Regulations, commencing with section 9789.30.