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: Physician Fee Schedule

TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 9789.12.1 et seq.

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code sections 59, 133, 4603.5, 5307.1 and 5307.3 proposes to amend sections 9789.12.1, 9789.12.2, 9789.12.6, 9789.12.8, 9789.12.12, 9789.13.2, 9789.16.1, 9789.16.7, 9789.18.1, 9789.18.2, 9789.18.3, 9789.18.11, and 9789.19; and adopt new section 9789.19.1, in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, of title 8, California Code of Regulations, relating to the Official Medical Fee Schedule – Physician Fee Schedule.

PROPOSED REGULATORY ACTION

The Division of Workers' Compensation proposes to modify existing regulations and adopt a new regulation, related to the physician and non-physician practitioner fee schedule by amending Article 5.3 of Chapter 4.5, Subchapter 1, Division 1, of Title 8, California Code of Regulations. The following regulations are proposed for amendment or adoption:

Section 9789.12.1	Physician Fee Schedule: Official Medical Fee Schedule for Physician and Non-Physician Practitioner Services – For Services Rendered On or After January 1, 2014 [amend]
Section 9789.12.2	Calculation of the Maximum Reasonable Fee - Services Other than Anesthesia [amend]
Section 9789.12.6	Health Professional Shortage Area Bonus Payment: Primary Care; Mental Health [amend]
Section 9789.12.8	Status Codes [amend]
Section 9789.12.12	Consultation Services Coding – use of visit codes [amend]
Section 9789.13.2	Physician-Administered Drugs, Biologicals, Vaccines, Blood Products [amend]
Section 9789.16.1	Surgery – Global Fee [amend]
Section 9789.16.7	Surgery – Co-surgeons and Team Surgeons [amend]
Section 9789.18.1	Payment for Anesthesia Services - General Payment Rule [amend]
Section 9789.18.2	Anesthesia - Personally Performed Rate [amend]
Section 9789.18.3	Anesthesia - Medically Directed Rate [amend]
Section 9789.18.11	Anesthesia Claims Modifiers [amend]
Section 9789.19	Update Table [amend]

Section 9789.19.1 Table A [adopt]

AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:

The Physician 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 Physician 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 Section 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, oral or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: **April 17, 2018**
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. 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 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 April 17, 2018.** The Division of Workers' Compensation will consider only comments received at the Division 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 April 17, 2018**.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in him by Labor Code sections 59, 133, 4603.5, 5307.1, and 5307.3.

Reference is to Labor Code sections 4600, 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 Directive in the Official Medical Fee Schedule (OMFS) or the amounts set pursuant to a contract. (Labor Code sections 5307.1, 5307.11.)

In September of 2012, the California legislature passed Senate Bill 863 (Statutes of 2012, Chapter 363), a sweeping reform bill that, among other things, amended Labor Code section 5307.1. The new provisions of the statute direct the Administrative Director to "adopt and review periodically an official medical fee schedule based on the resource-based relative value scale for physician services and non-physician practitioner services."

In June of 2013 the Acting Administrative Director commenced a rulemaking action to adopt a new physician fee schedule based upon the Resource Based Relative Value Scale (RBRVS). After considering public comments received during a public hearing and two written comment periods, the Acting Administrative Director adopted regulations to establish a new physician fee schedule based upon the RBRVS. The regulations were filed with the Secretary of State for publication in the California Code of Regulations on September 24, 2013. The regulations became effective for services rendered on or after January 1, 2014. As part of the physician fee schedule regulations, the Acting Administrative Director adopted an average statewide geographic adjustment factor in lieu of Medicare's locality-specific geographic adjustment factors.

Objective and Anticipated Benefits of the Proposed Regulation:

The objective of the rulemaking action is to amend the fee schedule for physician and non-physician practitioner services to eliminate use of the average statewide geographic adjustment factor, and adopt the use of Medicare's MSA-based locality-specific geographic adjustment factors, known as the Geographic Practice Cost Indices (GPCIs). The amendments also make minor clarifying revisions to the regulations.

The Protecting Access to Medicare Act of 2014 (PAMA 2014) required Medicare to create locality definitions for California to be based on the Metropolitan Statistical Area (MSA) delineations as defined by the Office of Management and Budget (OMB) for services furnished on or after January 1, 2017. The change to California's locality structure increased the number of localities from 9 under the former locality structure to 27 under the MSA-based locality structure. Using the new Medicare MSA-based locality structure instead of an average statewide geographic adjustment factor will improve payment accuracy for services rendered by physician and non-physician practitioners within California. Increasing payment accuracy for medical services according to geographic areas should improve access, especially in the higher cost areas. The statewide economic impact is nominal. With the 2018 update, the

impact includes a -0.1 percent reduction in the statewide GAF, and a 0.4 percent increase in the statewide GAF in 2022, when the new locality structure is fully transitioned.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Administrative Director has determined that this proposed regulation is not inconsistent or incompatible with existing regulations.

The Administrative Director now proposes to amend the fee schedule for physician and non-physician practitioner services. The proposed regulations implement, interpret, and make specific Labor Code section 5307.1 as follows:

Section 9789.12.1 Physician Fee Schedule: Official Medical Fee Schedule for Physician and Non-Physician Practitioner Services – For Services Rendered On or After January 1, 2014: sets forth the scope and applicability of the Physician Fee Schedule. The proposed amendment adds section 9789.19.1 to the regulation sections that comprise the Official Medical Fee Schedule for physician and non-physician practitioners.

Section 9789.12.2 Calculation of the Maximum Reasonable Fee - Services Other than Anesthesia: sets forth the formulas for calculating the maximum fee for physician and nonphysician practitioner services other than anesthesia. One formula is for physician services rendered in a "facility" and one formula is for physician services rendered in a "nonfacility." The proposed amendment provides the payment formulas for services rendered on or after January 1, 2019, which incorporate the work, practice expense, and malpractice expense MSA-based locality GPCIs in lieu of the work, practice expense, and malpractice expense average statewide geographic adjustment factors. GPCI values by locality for the county where the service is rendered would be referenced by date of service in section 9789.19.

Section 9789.12.6 Health Professional Shortage Area Bonus Payment: Primary Care; Mental Health: adopts the Medicare Geographic Health Professional Shortage Area (HPSA) 10% bonus payment for services provided in an area designated by the US Dept. of Health & Human Services Health Resources and Services Administration as a primary care geographic health professional shortage area or a geographic mental health shortage area. The proposed amendment clarifies the "shortage area" pertains to a shortage of providers for the entire population within a defined geographic area, as opposed to a specific population group or facility. The section heading is amended to clarify this section pertains to "geographic" health professional shortage area bonus payments. The word "Geographic" is added, as necessary, throughout section 9789.12.6, to clarify the shortage area pertains to the geographic shortage area.

Section 9789.12.8 Status Codes: adopts the Status Codes that are used in the National Physician Fee Schedule Relative Value File, but sets forth modified definitions of the status codes where needed for use in the workers' compensation context. The proposed amendment clarifies that status code "C" means, "[i]f payable, these codes will be paid using the RVUs listed in the Centers for Medicare and Medicaid Services (CMS') National Physician Fee Schedule Relative Value File, or if no RVUs are assigned, then "By Report," generally following review of documentation such as an operative report."

Section 9789.12.12 Consultation Services Coding – use of visit codes: requires use of CPT evaluation and management "visit codes" and prolonged service codes, if warranted under CPT guidelines, rather

than CPT "consultation codes" for physician consultations in outpatient settings. This section requires use of hospital care codes or nursing facility care codes, as appropriate, for physician consultations performed in inpatient and nursing facility settings. This section specifies that consultation reports are bundled into the underlying evaluation and management visit code and are not separately payable, except when the consultation report is requested by the Workers' Compensation Appeals Board or the Administrative Director, or when requested by a Qualified Medical Evaluator or Agreed Medical Evaluator in the context of a medical-legal evaluation. The proposed amendment to subdivision (b) of this section would clarify consultation reports would be bundled into the underlying evaluation and management visit "or hospital care code."

Section 9789.13.2 Physician-Administered Drugs, Biologicals, Vaccines, Blood Products: specifies how physician-administered drugs, biologicals, vaccines, and blood products are paid. In particular, subdivision (b) specifies the RBRVS fee schedule shall be used to determine the maximum reimbursement for the drug administration fee. The proposed amendment replaces "RBRVS" with "physician."

Section 9789.16.1 Surgery – Global Fee: sets forth the definition of the global surgical package, indicates how surgical procedures with a global period are identified in the National Physician Fee Schedule Relative Value File, and sets forth the components included and those not included in the global surgical package. The proposed amendment to subdivision (a)(1)(C), replaces "column U" with "Global Days column" in order to provide greater clarity.

Section 9789.16.7 Surgery – Co-surgeons and Team Surgeons: sets forth the billing and payment rules for surgeries involving co-surgeons and team surgeons. The section includes direction on the use of modifiers and identifies relevant indicators in the Co-Surgeon and Team Surgeon columns of the National Physician Fee Schedule Relative Value File. The proposed amendment to subdivision (b)(1) adds clarifying language that, "[i]f the surgery is billed with a "-62" modifier and the Co-Surgeons column contains an indicator of "0," payment for co-surgeons is not allowed."

Section 9789.18.1 Payment for Anesthesia Services - General Payment Rule: sets forth the basic calculation of the fee schedule amount for physician anesthesia services: allowable base units and time units multiplied by the anesthesia conversion factor. The section specifies that Medicare's Anesthesia Base Units by CPT Code file are used to determine the base units. The proposed amendment provides the payment formulas for anesthesia services rendered on or after January 1, 2019, which incorporate the work, practice expense, and malpractice expense MSA-based locality GPCIs in lieu of the average statewide anesthesia geographic adjustment factor. Reference to GPCI values by locality would be updated by date of service in section 9789.19. Proposed adoption of section 9789.19.1, Table A would provide the anesthesia conversion factor adjusted by the anesthesia shares and GPCIs by locality, by date of service. The proposed amendment would also reformat the section to provide greater clarity and readability.

Section 9789.18.2 Anesthesia - Personally Performed Rate: sets forth the method for determining payment for anesthesia reimbursement at the "personally performed" rate and the circumstances that warrant that rate. The section states that the anesthesia calculation will recognize the base unit for the anesthesia code and one time unit per 15 minutes of anesthesia time when the personally performed rate is applicable. The proposed amendment would clarify the anesthesia fee calculation will recognize the base unit for the anesthesia code and time units as calculated in accordance with section 9789.18.8.

Section 9789.18.3 Anesthesia - Medically Directed Rate: sets forth the reimbursement for anesthesia where the physician's service is medical direction of the anesthesia: 50% of the allowance for the service performed by the physician alone. The section sets forth the criteria for a physician's service to constitute "medical direction" and specifies documentation necessary to establish payment at the medically directed rate. The proposed amendment to subdivision (a) clarifies that "qualified individuals" means "all of whom could be CRNAs, AAs, interns, residents, or combinations of these individuals." The proposed amendment to subdivision (a)(3) clarifies, "Personally participates in the most demanding procedures in the anesthesia plan, including, '*if applicable*,' induction and emergence."

Section 9789.18.11 Anesthesia Claims Modifiers: requires physicians to report the appropriate anesthesia modifier to denote whether the service was personally performed, medically directed, or medically supervised in addition to any applicable CPT modifier. The proposed amendment clarifies that modifier QS – requires providers to report actual anesthesia time "and payment modifier" on the claim. The proposed amendment to modifier QY – replaces "certified registered nurse" with "qualified non-physician" in order to conform to Medicare payment rules.

Section 9789.19 Update Table: sets forth a table of documents incorporated by reference that are used in physician billing and payment. The table specifies the document name and provides a link to access the document. For several entries the updated data itself is included in the table, such as the conversion factors, California Specific Codes, and List of CPT Codes that Shall Not Be Used. The proposed amendments to section 9789.19 include the following:

- Subdivisions (a) through (e), first column, labeled "Document/Data": For the row currently labeled as, "Health Professional Shortage Area zip code data files," add the word "Geographic" before "Health Professional Shortage Area zip code data files." For the row currently labeled as, "Health Resources and Services Administration: HPSA shortage area query," add the word "Geographic" after "Health Resources and Services Administration:."

Document/Data
Geographic Health Professional Shortage Area zip code data files
Health Resources and Services Administration: Geographic HPSA shortage area query (By State & County) (By Address)

- Add subdivision (f) for services rendered on or after January 1, 2019. Place-holder information is added to select columns and rows of subdivision (f). When CMS publishes the 2019 Physician Fee Schedule final rule, relevant information will be adopted and inserted through future updates by Administrative Director order. The proposed amendment will adopt and incorporate by reference the following: 1. Add a new row which references the GPCI by locality (other than anesthesia services) file and county-to-locality crosswalk file; 2. Add a new row which references GPCI by locality and anesthesia shares (anesthesia) file and county-to-locality

crosswalk file; and 3. Add all files in the 2019 CMS Medicare National Physician Fee Schedule Relative Value File, except the Anesthesia – Anes file.

Section 9789.19.1. Table A: This section is proposed to be adopted to provide a table of anesthesia conversion factors adjusted by GPCI locality and anesthesia shares.

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. Claims administrators will incur one-time up-front costs to modify its medical bill payment system to accommodate the Medicare MSA-based GPCI locality structure. The adoption of the new Medicare MSA-based GPCI locality structure, however, is anticipated to increase payment accuracy and better align OMFS allowances with Medicare rates and private payer payments for services rendered by physicians and non-physician practitioners within California.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations will affect small business, primarily medical providers. One-time up-front costs may be incurred by providers to modify their billing system to accommodate the Medicare MSA-based GPCI locality structure, however, there will be offsetting long-term benefits due to improved payment accuracy and better alignment of OMFS allowances with Medicare rates and private payer payments for services rendered by physicians and non-physician practitioners within California. The impacts to providers will vary depending on the locality where services are rendered.

FISCAL IMPACTS

- Costs or savings to state agencies: The state will experience the same costs and savings as other employers.

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

- Local Mandate: None. The proposed amendments to the 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 amendments, 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 amendments 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 amendments, 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.

- Other nondiscretionary costs/savings imposed upon local agencies: None. To the extent that local agencies and school districts are self-insured employers who must reimburse physicians or other providers for medical treatment for industrially injured employees, they will be subject to the same cost impacts as all other employers in the state. These impacts are discussed in more detail elsewhere in this Notice.

CONSIDERATION OF ALTERNATIVES

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.

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 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; and the documents incorporated by reference.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at:
http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html

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

Inquiries concerning this proposed action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed amendments to the regulation, 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

In the event the contact person is unavailable, inquiries should be directed to the following backup contact person:

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

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

FORMAT OF REGULATORY TEXT

Text proposed to be added is displayed in underscore type.
Text proposed to be deleted is displayed in strikeout type.
Plain text is the current codified language effective 3/15/2018.

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:
http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html

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 adopted will appear in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, title 8, California Code of Regulations commencing with section 9789.12.1.