

TREASURY — GENERAL

(a)

DIVISION OF PENSIONS AND BENEFITS

ALTERNATE BENEFIT PROGRAM

Proposed Readoption with Amendments: N.J.A.C. 17:7

Proposed New Rules: N.J.A.C. 17:7-8.11 and 22.1 through 22.6

Proposed Recodifications: N.J.A.C. 17:7-22.4 and 22.7 as 18.4 and 8.8, Respectively

Authorized By: Florence J Sheppard, Acting Director, Division of Pensions and Benefits.

Authority: N.J.S.A. 18A:66-192.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-038.

Submit comments by June 6, 2014, to:

Susanne Culliton
Administrative Practice Officer
Division of Pensions and Benefits
PO Box 295
Trenton, NJ 08625-0295

The agency proposal follows:

Summary

The Division of Pensions and Benefits (Division) is responsible for promulgating and reviewing the administrative rules for the Alternate Benefit Program (ABP) codified at N.J.A.C. 17:7. When the Division becomes aware of a court decision or change in the law that could affect the ABP, the administrative rules are reviewed and, if changes are mandated, steps are taken to propose revisions to those rules, so that they conform to the new statute or court decision. Additionally, the rules are periodically reviewed by the Division to ascertain whether current rules are necessary, cost efficient, reflect current procedures of the Division, and maintain qualified plan status in compliance with Federal IRS regulations. Finally, when the rules under N.J.A.C. 17:7 are due to expire, they must be repromulgated.

Accordingly, the Director of the Division proposes to readopt the existing rules within N.J.A.C. 17:7, which expire on March 8, 2014, with the following amendments, recodifications, and new rules. As the notice of readoption was filed with the Office of Administrative Law prior to March 8, 2014, the expiration date is extended 180 days to September 4, 2014, pursuant to N.J.S.A. 52:14B-5.1.c(2). The rules proposed for readoption with amendments, recodifications, and new rules reflect the requirements for administration, enrollment, contributions, distribution, termination, and transfers within N.J.S.A. 18A:66-167 through 192.

The ABP is a defined contribution retirement program for eligible employees of the public institutions of higher education in New Jersey. In addition to the distribution of retirement benefits, the ABP provides members with life insurance and disability coverage. Under the ABP, members direct their own retirement accounts and may accumulate contribution balances with any employer who participates in the ABP. Authorized ABP carriers offer a variety of investment choices and distribution methods to ABP members. Vested members are permitted to allocate and transfer employer and employee contributions to authorized investment carriers.

A member of the ABP becomes eligible to commence distributions at any age upon termination of employment or retirement. Members may receive benefits in the form of an annuity or cash distribution. Annuity benefits will be calculated by the investment carrier(s) based upon the account accumulation, life expectancy, and the distribution option selected. Cash distributions to members under the age of 55 are limited to their employee contributions and accumulations. The remaining employer contributions and earnings are available for distribution upon attaining age 55. Once vested members start collecting benefits from their ABP

account, members are considered retired and are not eligible to enroll in any New Jersey State-administered retirement system; nor are they eligible to reenroll in the ABP.

Members, retirees, and survivors of members and retirees rely on the efficient operation of the ABP to administer their accounts and to provide the information they need regarding their accounts. They rely on the presence and predictability of rules that guide the administration of their accounts. The protections and guarantees that these rules afford members and retirees mandate their continued existence.

Following is a discussion of the amendments and new rules proposed:

Subchapter 1. General Provisions

Subchapter 1 restates the provisions of the Alternate Benefit Program established in statute. It includes information about the Program's establishment, the ABP as an exclusive benefit, and the five plans that make up the ABP, including the ABP Retirement Plan, the ACTS Program, the Group Life Insurance Plan, the Group Long-Term Disability Benefit Plan, and the closed ABP Pre-1995 Annuity Contracts Plan.

The Division of Pensions and Benefits proposes to amend N.J.A.C. 17:7-1.7 by removing the reference to the public institution of higher education formerly known as the "University of Medicine and Dentistry of New Jersey" ("UMDNJ"), while adding references to both Rowan University and University Hospital. These changes are required because the adoption of P.L. 2012, c. 45, has brought about the transfer of the Newark-based UMDNJ's schools and UMDNJ's Robert Wood Johnson Medical School in New Brunswick to Rutgers, the State University of New Jersey, as of July 1, 2013, as well as the transfer of the UMDNJ's School of Osteopathic Medicine to Rowan University. In addition, P.L. 2012, c. 45, has called for the creation of the Newark-based teaching hospital now known as "University Hospital." These amendments bring N.J.A.C. 17:7-1.7 up to date with the changes brought about by P.L. 2012, c. 45.

Subchapter 2. Definitions

Subchapter 2 provides definitions for terms that are used regularly in ABP rules, including but not limited to "account," "base salary," "designated service provider," "distribution," and "investment option."

The Division proposes to amend N.J.A.C. 17:7-7.2 by including three additional forms of extra compensation that employers are not permitted to incorporate as part of a member's "base salary." Specifically, vehicle allowances or reimbursements, housing allowances or reimbursements, and relocation allowances or reimbursements are considered forms of extra compensation, so employers may not include these amounts as part of an ABP member's "base salary."

The Division also proposes to modify the definitions of "employer," "non-academic employee," "part-time," and the "University of Medicine and Dentistry" of New Jersey (UMDNJ), while also adding new definitions for "Rowan University" and "University Hospital." Again, these changes are required because the adoption of P.L. 2012, c. 45, has brought about the transfer of the Newark-based UMDNJ's schools and UMDNJ's Robert Wood Johnson Medical School in New Brunswick to Rutgers, the State University of New Jersey, the transfer of the UMDNJ's School of Osteopathic Medicine to Rowan University, and the creation of University Hospital, a Newark-based teaching hospital, as of July 1, 2013. For this reason, it is necessary to delete references to the public institution of higher education formerly known as the "University of Medicine and Dentistry of New Jersey" from the definitions of "employer," "non-academic employee," and "part-time," while also including in these definitions the public institution of higher education known as "Rowan University," as well as the Newark-based teaching hospital created under P.L. 2012, c. 45, known as "University Hospital." In addition, the Division proposes to add "Rowan University" and "University Hospital" as new definitions in N.J.A.C. 17:7-2.1.

The Division also proposes to modify the definition of the "University of Medicine and Dentistry" by including July 1, 2013, as the date of its merger with Rutgers and Rowan, since as of that date, the University of Medicine and Dentistry ceased to exist as an institution of higher education under that name. Furthermore, since an independent "University Hospital" has been created under P.L. 2012, c. 45, which presently does not have statutory designation as an institution of higher

education, ABP members employed by the UMDNJ on June 30, 2013, who became employees of University Hospital on July 1, 2013, as part of UMDNJ's merger will be permitted to retain their membership in the ABP, as P.L. 2012, c. 45, was not intended to negatively impact their status in the ABP. However, no other University Hospital employees will be permitted to enroll in the ABP.

Finally, the definition of "distribution" is amended to include group life insurance benefits paid out under the Group Life Insurance Plan component of the ABP.

Subchapter 3. Pension Provider Selection Board

In Subchapter 3, the composition of the Pension Provider Selection Board is delineated. In addition, the pension provider selection process and the pension provider performance review process is outlined. No changes are proposed to this subchapter.

Subchapter 4. Participation in the Alternate Benefit Program

Subchapter 4 outlines eligibility requirements for participation in the ABP. It includes information about who carries the responsibility for determining ABP eligibility and about transfers from other programs into the ABP.

The Division proposes to amend N.J.A.C. 17:7-4.1, Mandatory participation in the Alternate Benefit Program, to eliminate the reference to the institution of higher education formerly known as "the University of Medicine and Dentistry," while at the same time including a reference to Rowan University, since the University of Medicine and Dentistry's schools merged with Rutgers and Rowan on July 1, 2013, under P.L. 2012, c. 45. In addition, the Division proposes to simplify the language of N.J.A.C. 17:7-4.1(a) to make the subsection more understandable and less confusing.

Additionally, the Division proposes to clarify eligibility requirements for adjunct faculty and part-time instructors by including additional rules for this employee group. Specifically, adjunct faculty and part-time instructors are to be regarded as 10-month employees who shall earn six months of service credit for teaching a minimum of one three-credit course during the fall or spring semester of the academic calendar.

Moreover, in accordance with special provisions included in P.L. 2012, c. 45, the Division proposes to amend the list of employee groups that are eligible for membership in the ABP. In particular, ABP membership eligibility is to include all ABP members employed by the University of Medicine and Dentistry of New Jersey on June 30, 2013, who became employees of University Hospital on July 1, 2013, under P.L. 2012, c. 45, as P.L. 2012, c. 45, was not intended to exclude from the ABP those ABP members employed by UMDNJ who were transferred to University Hospital on July 1, 2013. In addition, employees of University Hospital hired on or after July 1, 2013, who were not employed by the University of Medicine and Dentistry of New Jersey on June 30, 2013, shall not be eligible for ABP membership, as University Hospital has not been designated as an institution of higher education by statute. Likewise, any University Hospital employee who maintained ABP membership eligibility as a result of his or her employment with UMDNJ will not retain ABP membership eligibility at University Hospital if he or she terminates employment at University Hospital for any reason.

Finally, the Division of Pensions and Benefits proposes to amend N.J.A.C. 17:7-4.2, Ineligibility, in order to identify two additional employee groups that are ineligible for ABP membership. Under new paragraph (a)10, the Division proposes that non-U.S. citizens employed outside the United States shall be deemed ineligible for ABP membership; and under new paragraph (a)11, the Division proposes that U.S. citizens employed outside the United States, where compensation paid is not subject to tax under the Federal Insurance Contributions Act (FICA), shall be deemed ineligible for ABP membership.

Subchapter 5. Contributions to the ABP Retirement Plan

In Subchapter 5, the process of enrolling members in the ABP Retirement Plan is outlined. Subchapter 5 specifies the employee and employer contributions to be made, based on a member's base salary.

The Division proposes to amend N.J.A.C. 17:7-5.2, Employee contribution; pick up in ABP Retirement Plan, and 5.3, Employer contributions, to eliminate the reference to the institution of higher education formerly known as "the University of Medicine and Dentistry,"

while at the same time including a new reference to Rowan University, since the University of Medicine and Dentistry's schools merged with Rutgers and Rowan on July 1, 2013, under P.L. 2012, c. 45. In addition, a reference to University Hospital will be added, the Newark-based teaching hospital created under P.L. 2012, c. 45, as University Hospital is now responsible for making ABP employee contributions for those ABP members employed by the University of Medicine and Dentistry of New Jersey on June 30, 2013, who became employees of University Hospital on July 1, 2013, under P.L. 2012, c. 45. However, since University Hospital is not an institution of higher education, no other University Hospital employees will be permitted to participate in the ABP or have employee contributions deducted from their salary.

Subchapter 6. Vesting and Forfeiture – ABP Retirement Plan Only

The main purpose of Subchapter 6 is to provide vesting schedules for the ABP Retirement Plan, including the one-year delay of vesting during a member's first year of employment. Subchapter 6 also outlines how forfeitures are to be executed in cases of dishonorable service. No changes are proposed to this subchapter.

Subchapter 7. QDRO Procedures

Subchapter 7 outlines when and how a Plan Administrator of the ABP Retirement Plan or ACTS is to enforce a domestic relations order as a QDRO. Required notices to participants and alternate payees regarding distributions are specified, as well as how investments are to be directed during a domestic relations matter. No changes are proposed to this subchapter.

Subchapter 8. Distributions and Minimum Distribution Requirements— ABP Retirement Plan

Subchapter 8 outlines the distribution requirements to be met when a member severs his or her ABP employment through retirement or disability. It also includes information about minimum distribution, corrective distributions, default retirement distributions, and repurchases.

The Division of Pensions and Benefits proposes to recodify N.J.A.C. 17:7-22.7, Election to receive cash distribution, as N.J.A.C. 17:7-8.8, with no change in text, as this rule applies to ABP distributions upon retirement. In addition, the Division proposes new N.J.A.C. 17:7-8.11, Transition to retirement programs. N.J.A.C. 17:7-8.11 outlines the specific procedures and eligibility requirements for the transition to retirement programs that are now permitted as a result of P.L. 2013, c. 120, the "Transition to Retirement Programs" (TTRP) Act, which was signed into law by Governor Christie on August 9, 2013. Under N.J.A.C. 17:7-8.11, ABP members employed at institutions of higher education are permitted to continue to teach on a limited basis and collect a salary, while also receiving ABP distributions during a period of transition to retirement. The Division proposes to limit the period of time allowed for an ABP member's transition to retirement under a TTRP to one year or less, to prevent ABP members from continuing a retirement transition for an indefinite time period. TTRPs provide an exception to N.J.A.C. 17:7-8.1, which otherwise prohibits distributions to ABP members who are actively employed. In addition, the Division proposes to limit TTRP participation to ABP members with a minimum of 10 years of service who have attained the age of 55, the age of at which all forms of distribution become available to eligible ABP members, including employee contributions and accumulations, and employer contributions and earnings. These three provisions, specifying a 10-year minimum ABP service requirement and a minimum age requirement of 55 for TTRP eligibility, as well as a one-year limit allowed for TTRP participation, were all stipulations contained in TTRP contracts negotiated in anticipation of the recently-passed TTRP legislation.

Finally, the Division proposes to amend N.J.A.C. 17:7-8.1(b)3, the provision that covers a member's termination of membership in the ABP Retirement Plan at retirement. The proposed amendment will allow eligible ABP members choosing to participate in a TTRP at their employing location to receive ABP distributions prior to their complete severance from employment, under the TTRP.

Subchapter 9. Rollovers and Transfers – ABP Retirement Plan

In Subchapter 9, the types of rollover distributions of retirement plan funds that are allowable are outlined. In addition, Subchapter 9 stipulates

that the acceptance of rollover distributions into the ABP Retirement Plan and ACTS is permitted. No changes are proposed to this subchapter.

Subchapter 10. Plan Administration – ABP Program

The authority given the plan administrator to control and manage the operation of the ABP Program is set forth in Subchapter 10, including tasks like determining whether an employee is eligible for membership or determining when severance from employment should occur, as well as whether a valid beneficiary designation has been submitted. Subchapter 10 also includes information about designated service provider responsibilities and plan administrator responsibilities. No changes are proposed to this subchapter.

Subchapter 11. General Provisions – ABP Program

The general provisions of the ABP are provided in Subchapter 11. Subchapter 11 includes information like the engagement of audits by a plan administrator, how expenses incurred by a plan administrator are to be covered, the role of the ABP certifying officer, Internal Revenue Service approval for the retirement plan, and the resolution of mistaken contributions made to the ABP or ACTS by members. No changes are proposed to this subchapter.

Subchapter 12. New Jersey Additional Contributions Tax-Sheltered Program (ACTS)

Subchapter 12 governs the administration of the ACTS program, one of the five plans that comprise the ABP. It includes information about the voluntary contributions to ACTS that ABP members may make, as well as the vesting schedule within ACTS.

The Division proposes to amend N.J.A.C. 17:7-12.1, Employee voluntary contributions to ACTS, to eliminate the reference to the Board of Trustees of the institution of higher education formerly known as “the University of Medicine and Dentistry,” while at the same time including a new reference to the Board of Trustees of Rowan University, since the University of Medicine and Dentistry’s schools were merged with Rutgers and Rowan on July 1, 2013, under P.L. 2012, c. 45.

Subchapter 13. Investments and Investment Direction – ABP Retirement Plan and ACTS

Subchapter 13 covers the general area of investments. The subchapter specifies the procedures that members must follow to direct their ABP and ACTS investments, as well as the limits placed on the frequency of directing investments. It also stipulates that the designated service provider must accept every proper investment direction received from an ABP member. No changes are proposed to this subchapter.

Subchapter 14. Loans – ABP Retirement Plan, ACTS, and Closed Plan

Subchapter 14 specifies that loans are permitted and sets forth how loans are to be administered. Information like loan amounts, interest, and repayment terms are stipulated. No changes are proposed to this subchapter.

Subchapter 15. Accounts – ABP Retirement Plan and ACTS

Subchapter 15 specifies account statement or confirmation information that is to be furnished by the plan administrator, as well as account balance information. No changes are proposed to this subchapter.

Subchapter 16. Administration of Distributions – ABP Retirement Plan and ACTS

Subchapter 16 specifies how distributions to members or their beneficiaries are to be paid. The subchapter includes information about the valuation of payments, payment delays, and distributions to proper recipients and minor beneficiaries. No changes are proposed to this subchapter.

Subchapter 17. Alternate Benefit Program Groups Life Insurance Plan

Subchapter 17 specifies how the non-contributory group life insurance benefit is payable to ABP members. Member eligibility rules are also set out, as well as how the life insurance premiums are funded. No changes are proposed to this subchapter.

Subchapter 18. Alternate Benefit Program Group Long-term Disability Benefit Plan

Subchapter 18 governs the administration of the ABP Group Long-Term Disability Benefit Plan, one of the five plans that comprise the ABP. It includes a definition of total disability, the amount of benefit that a member may receive, and information about the Disability Premium Fund.

The Division proposes to recodify existing N.J.A.C. 17:7-22.4, Base monthly salary for disability benefits, as N.J.A.C. 17:7-18.4, with no change in text, as this rule applies to group long-term disability benefits.

Subchapter 19. Amendment

Subchapter 19 specifies that the New Jersey Legislature has the right to amend the Program at any time, in accordance with the New Jersey Constitution and N.J.A.C. 17:7-19.2. The State Treasurer also has the right to amend the Program in accordance with the enabling statute, including the terms of any plan and the group life insurance premium funds. No changes are proposed to this subchapter.

Subchapter 20. Construction

The provision of Subchapter 20 govern the construction and interpretation of the Program. The Program is constructed to be a qualified plan and the ABP Retirement Plan is to conform to applicable Federal statutes and is to be consistent with investment law. No changes are proposed to this subchapter.

Subchapter 21. Claims and Appeal Procedures

Subchapter 21 provides instructions about how to appeal decisions made by the Division regarding the ABP, and the claims procedures that may or may not follow.

The Division proposes to amend N.J.A.C. 17:7-21.1, Appeal from Division decisions, to provide more specific procedural information for ABP members wishing to appeal a decision by the Division related to their ABP membership. Specifically, the appeal process is being amended to include a 45-day timeframe for Director replies to all appeals, and it also now specifies that such replies shall be in writing. In addition, specific instructions for granting an administrative hearing for contested case hearings are also proposed.

Subchapter 22. Insurance, Death Benefits and Retirement

Finally, the Division proposes to amend the heading of N.J.A.C. 17:7-22, Insurance, death benefits and retirement to Beneficiary–Group Life Insurance Plan Only, in order to bring rules governing beneficiary designations for ABP group life insurance in line with practices currently followed by the Division. The Division proposes new N.J.A.C. 17:7-22.1 through 22.6 in order to provide participants with specific direction for designating beneficiaries for their ABP group life insurance benefits. N.J.A.C. 17:7-22.1, Beneficiary designation, and 22.2, Construction of beneficiary designation, shall provide information about using the proper form, supplying the correct beneficiary information, and the process of changing a beneficiary designation, when necessary. N.J.A.C. 17:7-22.3, Beneficiary must be alive when the distribution becomes payable, shall specify how a distribution is to be paid out to surviving beneficiaries, if a designated beneficiary is not living when an ABP member’s death occurs, while N.J.A.C. 17:7-22.4, Marriage or status has no effect, specifies that an ABP member’s family relationship to an individual has no effect on whether that person can be designated as a beneficiary. N.J.A.C. 17:7-22.5, Lack of beneficiary designation, provides information about how a member’s distribution shall be paid if no formal beneficiary designation has been made by a member. Finally, N.J.A.C. 17:7-22.6, A slayer cannot be a beneficiary, states that a named beneficiary who feloniously and intentionally kills a participant or another beneficiary is no longer a beneficiary after committing such an act and is not entitled to any distribution or any other right under the Program or any Plan under the ABP Program.

The Division proposes to recodify existing N.J.A.C. 17:7-22.1 as 22.7 and amend and restructure the section to remove references to retirements, since retirements are now covered in Subchapter 8.

Subchapter 23. Transfers

Subchapter 23 specifies how transfers of a member's account balance are to be effected, as well as in what cases interest is to be added. No changes are proposed to this subchapter.

As the Division has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption with amendments, recodifications, and new rules benefit ABP members, retirees, and survivors of members and retirees. Members, retirees, and survivors of members and retirees rely on the efficient operation of the ABP to provide them with a monthly distribution in retirement, proper crediting of contributions and earnings, death benefits, and information regarding their individual accounts. Rules that amend eligibility requirements for ABP membership and clarify current practices regarding proper beneficiary designations result in greater efficiency in the administration of the ABP.

More specifically, allowing ABP members who transferred to University Hospital from UMDNJ on July 1, 2013, under P.L. 2012, c. 45, to retain their ABP membership is an exception to the stipulation that ABP members be employed at institutions of education. This exception is included because P.L. 2012, c. 45, was not intended to exclude from the ABP those ABP members employed by UMDNJ who were transferred to University Hospital on July 1, 2013. This change will have a positive social impact on this group of University Hospital employees. However, since University Hospital is not deemed an institution of education by statute, no other University Hospital employees will be permitted to participate in the ABP or have employee contributions deducted from their salary.

The modifications to the eligibility requirements for adjunct faculty members clarify the enrollment criteria and crediting of service for adjunct faculty members, which will have a positive social impact for this employee group and for the employers who carry the responsibility of enrolling members and making contributions to member accounts. In Subchapter 8, the proposed amendments governing the TTRP now permitted under P.L. 2013, c. 120, state retirement transitions that are allowed at institutions of higher education, although they may have a negative social impact in that ABP members are being allowed to return to public employment without a wait period, an action that is prohibited for other New Jersey public employees.

In Subchapter 2, the additional forms of extra compensation that are now being excluded from base salary, including vehicle allowance or reimbursement, housing allowance or reimbursement, and relocation allowance or reimbursement, may also have a noticeable negative social impact on ABP members, as it will reduce contributions made to their pension accounts.

In Subchapter 4, additional ineligibility factors, such as the exclusion from ABP membership of non-US citizens employed outside the United States and US citizens employed outside the United States, where compensation is not subject to tax under the FICA, could have a negative social impact on faculty members employed at overseas branches of New Jersey public universities.

The changes to the procedures for designating beneficiaries in Subchapter 22 will also have a positive social impact because the changes clarify and facilitate the distribution of member account balances in the event of a member's death.

Members, retirees, and survivors of members and retirees rely upon the presence and predictability of the rules that guide the administration of their benefits and the stability of the ABP. The protections and guarantees that these rules afford members, retirees, and survivors of members and retirees mandate their continued existence.

Economic Impact

The rules proposed for readoption with amendments, recodifications, and new rules will not impose any adverse economic effects on the public. On the contrary, they will maintain the ABP's status as a qualified plan under existing IRS regulations and will improve the efficient administration of the ABP. The rules proposed for readoption with amendments, recodifications, and new rules do not impose any additional recordkeeping or other requirements, and will serve to preserve and

improve the efficient administration and operation of the ABP. Since the process of designating beneficiaries for group life insurance is made clearer and eligibility requirements for ABP membership are brought in line with existing Division practice under the proposed new rules, greater efficiency in the administration of the ABP will result. In addition, the amendments required, as a result of the enactment of P.L. 2012, c. 45, and P.L. 2013, c. 120, will also keep the ABP rules up to date with current law.

In addition, the new TTRP rules at Subchapter 8 allow public colleges and universities to retain the services of qualified and experienced professors, who will be permitted to continue teaching for up to one year at a reduced load (50 percent or less). They also allow faculty members who are TTRP participants to continue to earn a salary for up to a year. Furthermore, N.J.A.C. 17:7-22.7 may have a favorable economic impact by removing a reporting requirement for employers, as this change removes from employers the responsibility of notifying the Division when a member's death occurs.

Finally, participation in the ABP is an economic benefit to its members, as it provides a means of securing a retirement income for faculty members and administrators at institutions of higher education in the State of New Jersey.

Federal Standards Statement

The rules proposed for readoption with amendments, recodifications, and new rules meet, but do not exceed, the applicable Federal standards, that is, 26 U.S.C. § 403(b). There are no other Federal standards applicable to the subject matter of this chapter, therefore a Federal standards analysis is not required.

Jobs Impact

The operation of the rules proposed for readoption with amendments, recodifications, and new rules will not result in the generation or loss of jobs. The Division invites any interested parties to submit any data or studies concerning the jobs impact of the rules proposed for readoption with amendments, recodifications, and new rules with their written comments.

Agriculture Industry Impact

The rules proposed for readoption with amendments, recodifications, and new rules will not have any impact on the agriculture industry.

Regulatory Flexibility Statement

The rules of the ABP affect ABP members and retirees and survivors of ABP members and retirees. Thus, the rules proposed for readoption with amendments, recodifications, and new rules do not impose any reporting, recordkeeping, or other compliance requirements upon small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Therefore, a regulatory flexibility analysis is not required.

Housing Affordability Impact Analysis

The rules proposed for readoption with amendments and new rules will have no impact on affordable housing in New Jersey nor will they evoke a change in the average costs associated with housing because the rules pertain to administration of the ABP for members, retirees, and survivors of members and retirees.

Smart Growth Development Impact Analysis

The rules proposed for readoption with amendments and new rules will not have any impact on the achievement of smart growth nor will they evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan because the rules pertain to administration of the ABP for members, retirees, and survivors of members and retirees.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 17:7.

Full text of the proposed amendments, recodifications, and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL PROVISIONS

17:7-1.7 No additional benefits— ABP Retirement Plan only
 No additional retirement, death, or other benefit under the ABP Retirement Plan shall be payable by the State; [the University of Medicine and Dentistry;] Rutgers, the State University; the New Jersey Institute of Technology; **Rowan University; University Hospital;** State colleges and universities; county colleges; or the Division of Pensions and Benefits. Benefits shall be payable to participants and their beneficiaries only by the pension providers under the terms of the contracts with such pension providers.

SUBCHAPTER 2. DEFINITIONS

17:7-2.1 Definitions
 Whenever used in the Program or with respect to an applicable Plan, each of the following terms has the meaning stated below. To the extent that any term is not defined in this subchapter or otherwise by this chapter, such term has the meaning given by N.J.S.A. 18A:66-169 or by the Internal Revenue Code.

“Base salary” means a participant’s regular base or contractual salary. Base salary includes employee contributions as well as salary reduction contributions and other amounts excluded from gross income with respect to such base salary under, without limitation, IRC §§ 125, 132(f)(4), 402(e)(3), 402(h)(1)(b), 403(b), 414(h)(2), or 457(b). Payments related to guaranteed faculty practice moneys shall be included in such base salary up to the extent provided by N.J.S.A. 43:3C-9.1 et seq. The employee’s and employer’s contributions shall be computed on earned and paid base salary. Base salary excludes bonus, overtime, or other forms of extra compensation, such as:

- 1.-5. (No change.)
- 6. Any unscheduled individual adjustment made in the final year to place the member at the maximum salary level within his or her salary range; [and]
- 7. Any pay for services rendered during the summer vacation period by a participant who is required to work only 10 months of the year[.];
- 8. Vehicle allowance or reimbursement;**
- 9. Housing allowance or reimbursement; and**
- 10. Relocation allowance or reimbursement.**

“Distribution” means, as appropriate in the context, any kind of distribution or the particular kind of distribution provided by the ABP Retirement Plan, **Group Life Insurance Plan,** or ACTS.

“Employer” means [the University of Medicine and Dentistry;] county colleges; Rutgers, the State University; **Rowan University; University Hospital;** and the State colleges, that pays the base salary of a participant for services rendered by the participant. Except as described in this definition, each employer with eligible employees shall be a participating employer with respect to the ABP for the benefit of its eligible employees as described in N.J.A.C. 17:7-4 and not excluded thereunder, and shall not be required to take affirmative action to adopt the ABP for its eligible employees or to enter into any contractual arrangement regarding its obligations to contribute to the plan, except as may be required by the Plan Administrator. Notwithstanding the foregoing, the Plan Administrator may determine that an employer is not eligible to maintain the ABP for its employees if the Plan Administrator reasonably concludes that the employer is not an employer that can maintain a “governmental plan” within the meaning of § 414(d) of the Federal Internal Revenue Code or Section 3(32) of the Employees Retirement Income Security Act, as amended. The Plan Administrator’s determination in this regard shall be final and conclusive.

“Non-academic employee” is one who does not occupy a faculty or other teaching position with academic rank or other equivalent title whose primary employment is not directly related to teaching, research, and/or other aspects of the educational programs of the county college. Adjunct faculty members and part-time instructors of the faculty of [the University of Medicine and Dentistry of New Jersey;] Rutgers, the State

University; the New Jersey Institute of Technology; **Rowan University;** the State; and county colleges are excluded from this definition.

“Part-time” means an appointment where the employee receives a salary or wages for a period of less than 50 percent of the normal work week. This definition shall apply to teaching and administrative staff members, and to employees serving in a dual capacity where the appointment includes teaching, as well as administrative duties. However, adjunct faculty members and part-time instructors of the faculty of [the University of Medicine and Dentistry of New Jersey;] Rutgers, the State University; the New Jersey Institute of Technology; **Rowan University;** the State; and county colleges shall be excluded from this definition.

“**Rowan University**” means the public research university described in Chapter 64M of Title 18A of the New Jersey Statutes.

“**University Hospital**” means the principal teaching hospital of the New Jersey Medical School, New Jersey Dental School, and any other medical education programs located in Newark, pursuant to the terms of P.L. 2012, c. 45. **ABP membership eligibility at this employing location applies only to those individuals employed by the former University of Medicine and Dentistry of New Jersey on June 30, 2013, who became employees of University Hospital on July 1, 2013, under special provisions of P.L. 2012, c. 45. All other employees of University Hospital are not eligible to participate in the ABP.**

“University of Medicine and Dentistry” or “**UMDNJ**” means the University of Medicine and Dentistry of New Jersey established pursuant to the terms of section 3 of P.L. 1970, c. 102 (N.J.S.A. 18A:64G-3). **Operations of the UMDNJ were merged with or transferred to Rutgers, the State University, Rowan University, or University Hospital on July 1, 2013, pursuant to the terms of P.L. 2012, c. 45.**

SUBCHAPTER 4. PARTICIPATION IN THE ALTERNATE BENEFIT PROGRAM

17:7-4.1 Mandatory participation in the Alternate Benefit Program
 (a) The following [persons] **employees** shall be eligible and shall immediately enroll in the Alternate Benefit Program[, provided they are eligible employees of an employer]:

1. All full-time officers and all full-time members of the faculty of [the University of Medicine and Dentistry of New Jersey;] Rutgers, the State University; the New Jersey Institute of Technology; **Rowan University;** the State universities and colleges; the county colleges; and all regularly appointed teaching and administrative staff members in applicable positions, as determined by the Director of the Division[.];

2. Adjunct faculty members and part-time instructors of the faculty of [the University of Medicine and Dentistry of New Jersey;] Rutgers, the State University; the New Jersey Institute of Technology; **Rowan University;** the State universities and colleges; and the county colleges[.], **who teach a minimum of one three-credit hour course for a full fall or spring semester.**

i. **Adjunct faculty and part-time instructors will be considered 10-month employees.**

ii. **Salary is reportable and service will be accrued for teaching only during the spring and fall semesters.**

iii. **Six months of service credit will be earned for teaching a minimum of one three-credit hour course for the full semester.**

iv. **Additional teaching responsibilities over the minimum under this paragraph during the spring or fall semester will be pensionable based on the salary earned during each full semester.**

v. **Teaching assignments outside of the spring or fall semester or below the minimum will not accrue ABP service credit and related salary is not pensionable; and**

3. **Under special provisions contained in P.L. 2012, c. 45, all ABP members employed by the former University of Medicine and Dentistry of New Jersey on June 30, 2013, who are employees of University Hospital on July 1, 2013.**

i. **An employee who terminates employment with University Hospital for any reason and subsequently becomes reemployed by**

University Hospital will not be permitted to resume participation in the ABP.

ii. No employee of University Hospital hired on or after July 1, 2013, except those former employees of the University of Medicine and Dentistry of New Jersey who were employed by University Hospital on July 1, 2013, shall be eligible to participate in the ABP.

17:7-4.2 Ineligibility

(a) Employees meeting the following criteria shall not be eligible to participate in the ABP:

1.-7. (No change.)

8. Members of the Teachers' Pension and Annuity Fund, the Public Employees' Retirement System, the Police and Firemen's Retirement System, or the Group Annuity Plan, who did not elect to transfer to the Alternate Benefit Program in accordance with the provisions of Chapter 64C or 65 of Title 18A of the New Jersey Statutes, P.L. 1967, c. 278 (N.J.S.A. 18A:66-130 et seq.), or P.L. 1967, c. 281 (N.J.S.A. 18A:66-142 et seq.), or P.L. 1968, c. 181 (N.J.S.A. 18A:66-154 et seq.); [and]

9. Any eligible employee who has been enrolled in the Alternate Benefit Program for at least one year who is promoted or transferred to a part-time position within the institution will not be eligible for continued participation in the Alternate Benefit Program on the basis of that employment, unless they are covered by N.J.A.C. 17:7-4.1(a)2[.];

10. Non-U.S. citizens employed outside the United States; and

11. U.S. citizens employed outside the United States, where compensation paid is not subject to tax under the Federal Insurance Contributions Act (FICA).

(b) (No change.)

SUBCHAPTER 5. CONTRIBUTIONS TO THE ABP RETIREMENT PLAN

17:7-5.2 Employee contribution; pick-up in ABP Retirement Plan

(a) Employee contributions will be made as follows:

1. [The University of Medicine and Dentistry of New Jersey;] Rutgers, the State University; [and] the New Jersey Institute of Technology; **University Hospital; and Rowan University** shall reduce the compensation of each participant in the ABP Retirement Plan and pay over to the insurers or mutual fund companies for the benefit of the participant an employee contribution for the retirement annuity contract or contracts equal to five percent of the participant's base salary. The intervals for payroll shall be determined by the respective school governing bodies.

2. (No change.)

(b) (No change.)

17:7-5.3 Employer contributions

(a) The employer contribution(s) will be made as follows:

1. Based on a certification to the Division by [the University of Medicine and Dentistry of New Jersey;] Rutgers, the State University; **Rowan University; University Hospital;** and the New Jersey Institute of Technology of the number and base salary of participants, the Division shall authorize the State to make payment of the employer contributions to the ABP Retirement Plan at a rate equal to eight percent of the participant's base salary, except the amount of the contribution shall not exceed eight percent of the maximum salary for department officers established pursuant to section 1 of P.L. 1974, c. 55 (N.J.S.A. 52:14-15.107), which moneys shall be paid to the pension providers for the benefit of each participant.

2.-4. (No change.)

(b)-(c) (No change.)

SUBCHAPTER 8. DISTRIBUTIONS AND MINIMUM DISTRIBUTION REQUIREMENTS—ABP RETIREMENT PLAN

17:7-8.1 Distribution and repurchase

(a) (No change.)

(b) In the event a participant in the ABP Retirement Plan terminates his or her employment for reasons other than retirement or disability and requests cash out of his or her annuity or annuities after the participant's

55th birthday, such [cash out] **cash-out** amounts shall be allowed provided it meets the conditions under which the insurer or mutual fund company will repurchase annuities automatically.

1.-2. (No change.)

3. Membership or participation in the Retirement Plan shall terminate and the individual shall be considered retired once he or she has elected to receive a cash distribution of the value of his or her accounts in a direct payout as a cash distribution, a rollover, or an annuity (or a combination of these distributions). Any such distribution shall only occur upon severance from employment, **unless the individual is a participant in a transition to retirement program that meets the requirements of N.J.A.C. 17:7-8.11.**

17:7-[22.7]8.8 (No change in text.)

Recodify existing N.J.A.C. 17:7-8.8 and 8.9 as **8.9 and 8.10** (No change in text.)

17:7-8.11 Transition to retirement programs

(a) Members will be permitted to file for retirement from the ABP and receive benefits under the ABP if the member participates in a transition to retirement program (TTRP) adopted by the employer that meets the following minimum requirements:

1. Members must meet the eligibility requirements for transition to retirement programs provided below:

i. Members must be full-time tenured faculty who are at least 55 years of age;

ii. Members must have served a minimum of 10 years at a college or university;

iii. Members who wish to participate in the program must submit the request to retire under the terms of the TTRP to their employer no later than April 1 of the calendar year preceding the academic year in which they wish to participate in the program;

2. Members who meet all of the requirements of the TTRP and are approved by their employer shall be permitted to participate for one year only.

3. Program minimum requirements must include:

i. Participating faculty must officially retire from the college or university and then seek re-employment under the terms of this section;

ii. As retirees, participating faculty have no claims of tenure or other rights and/or obligations of a tenured member of the faculty;

iii. In no event shall the total assignment exceed 50 percent of a full-time faculty load; and

iv. Participating faculty shall receive compensation proportional to the assignment approved by the college or university which shall not exceed 50 percent of their final year's salary.

(b) ABP employers shall provide to the Division an annual listing of all ABP members at their location who are participants of their TTRP.

SUBCHAPTER 12. NEW JERSEY ADDITIONAL CONTRIBUTIONS TAX-SHELTERED PROGRAM (ACTS)

17:7-12.1 Employee voluntary contributions to ACTS

(a) State and participating institutions are authorized to enter into agreements with ACTS participants for voluntary salary reductions of compensation to the maximum limitations set forth in IRC § 415(c) and the regulations thereunder, in order to purchase from the selected pension providers retirement or annuity contracts that are tax deferred under IRC § 403(b). The [Board of Trustees of the University of Medicine and Dentistry of New Jersey; the] Board of Governors of Rutgers, the State University; the Board of Trustees of the New Jersey Institute of Technology; **the Board of Trustees of Rowan University;** and the boards of trustees of State and county colleges, are hereby authorized to enter into an agreement with each employee participating in the ABP whereby the employee agrees to take a reduction in salary with respect to amounts earned after the effective date of such agreement in return for the agreement of the respective institution to use a corresponding amount to purchase an annuity for such employee, so as to obtain the benefits

afforded under IRC § 403(b). Any such agreement shall specify the amount of such reduction, the effective date thereof, and shall be legally binding and irrevocable with respect to amounts earned while the agreement is in effect; provided, however, that such agreement may be terminated after it has been in effect for a period of not less than one year upon notice in writing by either party, and provided further that not more than one such agreement shall be entered into during any taxable year of the employee. For the purposes of this section, any investment option and annuity or other contract offered by the DSP that meets the requirements of IRC § 403(b), may be utilized. The amount of the reduction in salary under any agreement entered into between the institutions and any employee pursuant to this section shall not exceed the limitations set forth in IRC §§ 415(c) and 403(b).

(b)-(c) (No change.)

17:7-[22.4]18.4 (No change in text.)

Recodify existing N.J.A.C. 17:7-18.4, 18.5, 18.6, and 18.7 as **17:7-18.5, 18.6, 18.7, and 18.8** (No change in text.)

SUBCHAPTER 21. CLAIMS AND APPEAL PROCEDURES

17:7-21.1 Appeal from Division decisions

(a) An Alternate Benefit Program participant may appeal a preliminary administrative determination from the Division by **submitting a written statement** to the Director of the Division **within 45 days after the date of written notice of the determination**. The Director of the Division shall reply to an appeal **within 45 days** with [an] a written administrative determination.

(b) An Alternate Benefit Program Retirement Plan participant may appeal the initial administrative determination of the Director of the Division, **in writing**, within 45 days from the date of the Director’s determination. If no such written statement is received within the 45-day period, then the Director’s initial administrative determination shall be considered a final administrative determination.

(c) (No change.)

(d) **The Division shall determine whether to grant an administrative hearing based upon the standards for a contested case hearing set forth in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.**

1. Administrative hearings shall be conducted by the Office of Administrative Law pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.A.C. 1:1.

2. If the granted appeal involves solely a question of law, the Division may retain the matter and issue a final determination, which shall include detailed findings of fact and conclusions of law based upon the documents, submissions, and legal arguments of the parties. The Division’s final determination may be appealed to the Superior Court, Appellate Division.

3. If the granted appeal involves questions of fact, the Division shall submit the matter to the Office of Administrative Law.

SUBCHAPTER 22. [INSURANCE, DEATH BENEFITS AND RETIREMENT] **BENEFICIARY – GROUP LIFE INSURANCE PLAN ONLY**

17:7-22.1 Beneficiary designation

(a) **The designation of a beneficiary by a participant or retiree shall be made in writing on the applicable form to the Division and filed with the Division. The participant or retiree may, from time to time and without the consent of his or her designee, change the beneficiary by filing a written notice of the change on the applicable form. The new designation will be effective on the date the applicable form, in proper form, is received by the Division, and any prior applicable form shall thereupon become void.**

(b) **If more than one beneficiary is designated and in such designation the participant or retiree has failed to specify their respective interests, the beneficiaries shall share equally.**

(c) **Any amounts due for which there is no beneficiary at the death of a participant or retiree, shall be payable to the estate of such participant or retiree.**

(d) **With respect to any death benefits payable on the basis of the individual retirement annuity contract or contracts, all settlement options will be made available to the participant, retiree, or beneficiary, as are allowed by the insurer or insurers.**

(e) **The provisions of this section shall be construed separately with respect to each of the death benefits for which a beneficiary is designated by the participant or retiree.**

17:7-22.2 Construction of beneficiary designation

(a) **A beneficiary designation will be construed according to the following provisions:**

1. Any statement in a beneficiary designation referring to a beneficiary’s relationship to the participant is for convenience or information only, and has no effect in the construction or interpretation of the beneficiary designation.

2. A beneficiary designation will be construed to dispose of all of the remaining benefits under the Group Life Insurance Plan and will not be accepted otherwise. However, if a beneficiary designation specifies shares that total less than 100 percent of the benefit as the result of a beneficiary predeceasing the member, the Plan Administrator will adjust the shares pro rata, so that the shares equal 100 percent.

3. Except as otherwise provided by the Group Life Insurance Plan, a beneficiary designation that uses a term or phrase that would have significance in construing or interpreting a conveyance or disposition of a decedent’s estate will, except as otherwise specified by the participant, be construed or interpreted according to the Uniform Probate Code (without regard to the participant’s domicile at the time he or she made the beneficiary designation or at the time of his or her death). Likewise, if a beneficiary designation remains ambiguous after applying all provisions and construction rules stated by the Group Life Insurance Plan, but would be resolved by applying the rules of construction and interpretation of the Uniform Probate Code for construing a beneficiary designation or conveyance, such rules will apply to the beneficiary designation, except as otherwise provided by the Group Life Insurance Plan. Notwithstanding anything in this subsection, the Plan Administrator will not give effect to any Uniform Probate Code provision concerning the effect of divorce or marital separation. Also, the Plan Administrator will not give effect to any Uniform Probate Code provision or any construction or interpretation principle that would require the Plan Administrator to consider information not in the Group Life Insurance Plan records.

17:7-22.3 Beneficiary must be alive when the distribution becomes payable

Notwithstanding any beneficiary designation or any law to the contrary, a person will not be a beneficiary unless he or she is living or it exists when the distribution otherwise would become payable. Further, a person that would receive a distribution as a trustee or other fiduciary will not be a beneficiary unless the person that the trustee or fiduciary serves is living or exists when the distribution would become payable. Any right of a beneficiary is strictly personal to that beneficiary and lapses on his or her death. Any undistributed benefit that would have been distributable to a person had he or she lived is not distributable to that person’s legatees or heirs. On a beneficiary’s death, any undistributed benefit attributable to that beneficiary becomes distributable to the remaining primary beneficiaries or beneficiary if any, or if none, to the remaining contingent beneficiaries or beneficiary, in each case to be distributable in equal shares to all living beneficiaries of the applicable primary or contingent beneficiary class.

17:7-22.4 Marriage or status has no effect

Notwithstanding any law to the contrary, a marriage, civil union, domestic partnership, or a divorce, dissolution, annulment, revocation, or other end of a marriage, civil union, or domestic partnership, or any other creation, interruption, or end of a spouse

or other family relationship has no effect concerning whether a person is (or is not) a beneficiary.

17:7-22.5 Lack of beneficiary designation

(a) If a participant failed to designate a beneficiary (including a failure because the participant's beneficiary designation is invalid or ineffective) or no beneficiary designated by the participant is living or exists when the distribution otherwise would become payable, then the participant's estate is the beneficiary to the extent of the failure or invalid or ineffective designation. For the purposes of this subsection, the Plan Administrator may rely on an appropriate court order or the personal representative's written statement as to the identity (including name, address, and taxpayer identifying number under IRC § 6109) of and shares allocable to the persons entitled to such estate.

(b) Invalid designations include any document that contains:

1. Provisions that have been crossed out;
2. Provisions that have been whited out;
3. Provisions completed in pencil;
4. Provisions that list the same individual(s) as both the primary and contingent beneficiary;
5. Provisions that use nicknames; the beneficiary's legal name must be provided;
6. Provisions that use general terms, like "my children" or "my grandchildren"; the specific name of each individual beneficiary must be listed;
7. In cases where a participant provides a distribution using specific percentages, provisions that do not add up to 100 percent; and
8. In cases where the participant provides a distribution using specific fractions, provisions that do not add up to one.

17:7-22.6 A slayer cannot be a beneficiary

A named beneficiary who feloniously and intentionally kills the participant or another beneficiary is not a beneficiary and is not entitled to any distribution or any other right under the Program or any Plan under the ABP Program; and any benefit is paid as though the killer had predeceased the participant or beneficiary.

17:7-[22.1]22.7 Death [or retirement] of participant; notice

(a) Upon receiving notification of the death [or retirement] of a participant, [the employing institution shall notify] the Division [of Pensions and Benefits.

(b) The Division shall process the necessary forms related to such death [or retirement] and notify the insurer providing life insurance coverage.

17:7-[22.2]22.8 Assignments; group life insurance

(a) (No change.)

(b) Any such assignment, whether made before or after June 28, 1973, the effective date of this [rule] section, shall entitle the insurer to deal with the assignee as the owner of all rights and benefits conferred on the insured under the group life policy in accordance with the terms of the assignment.

17:7-[22.3]22.9 (No change in text.)

(Agency Note: N.J.A.C. 17:7-22.4 is proposed for recodification as N.J.A.C. 17:7-18.4.)

Recodify existing N.J.A.C. 17:7-22.5 and 22.6 as **22.10** and **22.11** (No change in text.)

(Agency Note: N.J.A.C. 17:7-22.7 is proposed for recodification as N.J.A.C. 17:7-8.8.)

TREASURY — TAXATION

(a)

DIVISION OF TAXATION

General Policies and Procedures Penalties and Interest Civil Fraud

Proposed New Rule: N.J.A.C. 18:2-2.9

Authorized By: Michael Bryan, Director, Division of Taxation.

Authority: N.J.S.A. 54:49-9.1 and 54:50-1.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-041.

Submit comments by June 6, 2014, to:

Mitchell C. Smith
Administration Practice Officer
Division of Taxation
P.O. Box 269
Trenton, NJ 08695-0269
Email: Tax.RuleMakingComments@treas.state.nj.us

The agency proposal follows:

Summary

The proposed new rule incorporates the civil fraud penalty provided for by N.J.S.A. 54:49-9.1 into the rules concerning penalties and interest found at N.J.A.C. 18:2-2. N.J.S.A. 54:49-9.1 states: "If any part of an assessment is due to civil fraud, there shall be added to the tax an amount equal to 50% of the assessment. This amount shall be in lieu of any other additions to the tax imposed by R.S. 54:49-4 and R.S. 54:49-9." The proposed rule provides that the civil fraud penalty will be 50 percent of the entire assessment. Pursuant to N.J.S.A. 54:49-6.b, there is no statute of limitations for assessments in the case of false or fraudulent returns.

Circumstantial evidence of fraud may include elements of common law fraud as described in *Jewish Center of Sussex County v. Whale*, 86 N.J. 619 (1981); *New Jersey Economic Authority v. Pavonia Restaurant, Inc.*, 319 N.J. Super. 435 (App. Div. 1998); *Genie & Company v. Comptroller of the Treasury*, 668 A.2d 1013 (Md. Ct. Spec. App. 1995); *Bradford v. Comm'r*, 796 F. 2d 303 (9th Cir. 1986); *Stolzhus v. United States*, 398 F.2d 1002, 1004 (3rd Cir. 1968), cert. denied 393 U.S. 1020, (1969); *Banco Popular N. Am. v. Gandi*, 184 N.J. 161 (2005). The indicia of fraud listed in the proposed rule are consistent with Federal case law and the Internal Revenue Service manual on civil fraud.

Proposed N.J.A.C. 18:2-2.9(a) reflects the statutory authority for assessing the civil fraud penalty. N.J.S.A. 54:49-9.1 imposes a penalty for civil fraud equal to 50 percent of the assessment. This penalty shall be in lieu of any other additions to the tax imposed by N.J.S.A. 54:49-4 and 54:49-9. This subsection explains that 50 percent of the assessment means 50 percent of the portion of the assessment that relates to tax only, exclusive of amnesty penalty and/or interest, including any portion of the tax assessment that is not due to civil fraud. An example is provided.

Proposed N.J.A.C. 18:2-2.9(b) provides that, in general, civil fraud is characterized by a taxpayer's intent to evade or avoid the payment of taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes.

Proposed N.J.A.C. 18:2-2.9(c) provides that if the Division of Taxation determines that a taxpayer filed a false or fraudulent return with the intent to evade tax or failed to file a return at all, the Division of Taxation may assess tax at any time.

Proposed N.J.A.C. 18:2-2.9(d) provides that the Division of Taxation may impose the penalty provided for in subsection (a) where there is clear and convincing evidence of the taxpayer's intent as required in subsection (b). Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness.

Proposed N.J.A.C. 18:2-2.9(e) lists indicia of fraud that the Division of Taxation may consider to determine whether any part of an assessment is due to civil fraud.