

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Insurance Commissioner TITLE NUMBER: 114

CITE AUTHORITY: W. Va. Code §§ 33-2-10, 33-6-8, 33-6-9, 33-25A-3(1),
33-25A-20, & 16-3C-2

AMENDMENT TO AN EXISTING RULE: YES NO

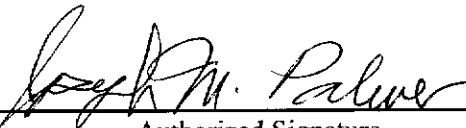
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 27

TITLE OF RULE BEING AMENDED: AIDS Regulations

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature
Acting Secretary of Tax & Revenue

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: AIDS Regulations
Title 114, Series 27

Type of Rule: XX Legislative ___ Interpretive ___ Procedural

Agency: Insurance Commissioner

Address: Post Office Box 50540
1124 Smith Street, Greenbrooke Building
Charleston, West Virginia 25305-0540

=====

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	Increase	Decrease	Current	Next	Thereafter
ESTIMATED TOTAL COST			None		
PERSONAL SERVICES			None		
CURRENT EXPENSE			None		
REPAIRS AND ALTERNATIONS			None		
EQUIPMENT			None		
OTHER			None		

2. Explanation of above estimates:

This rule will have no fiscal impact upon the Insurance Commissioner or State Government.

3. Objectives of these rules:

This rule broadens the types of HIV testing available for life and health insurance underwriting. It allows the use of newer tests approved by the United States Food and Drug Administration.

Rule Title: AIDS Regulations
Title 114, Series 27

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

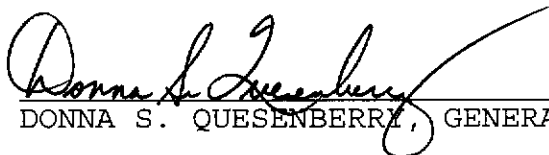
None

C. Economic Impact on Citizens/Public at Large.

None

Date: 9/1/00

Signature of Agency Head or Authorized Representative



DONNA S. QUEISENBERRY, GENERAL COUNSEL

Insurance Commissioner
Legislative Rule
Title 114, Series 27

AIDS REGULATIONS

TITLE 114, SERIES 27

BRIEF SUMMARY OF RULE

The Insurance Commissioner regulates life and accident insurance policies. There is much concern as to what information insurers may request and when and how insurers may require HIV testing of insurance applicants.

The existing rule has been in place since August, 1991, and was modified in May 1999. It sets out guidelines which insurers must follow in underwriting for HIV in regard to life and accident and sickness insurance policies. Inter alia, it prohibits questions relating to sexual preference or life-style, and limits HIV testing as to group insurance policies.

The current proposed amendments permit the use of urine test specimens in testing for HIV. The urine tests have been approved by the Food and Drug Administration, are highly accurate, are administered only by professionals, and are less intrusive than oral or blood tests. The testing protocols are the same as for oral fluid or blood.

Insurance Commissioner
Legislative Rule
Title 114, Series 27

AIDS REGULATIONS

TITLE 114, SERIES 27

STATEMENT OF CIRCUMSTANCES

Medical technology has advanced since the most recent revision of Series 27 in May, 1999. It is no longer necessary to draw blood to perform an accurate test for the presence of HIV. The U.S. Food and Drug Administration has approved the use of urine specimens for use in HIV testing. This is obviously a less intrusive method of obtaining a test specimen, as opposed to a blood draw.

The urine test's manufacturer has requested that Series 27 be amended to accommodate this new testing method. A number of other states have either already done so, or are in the process of permitting urine testing.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: SEPTEMBER 1, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: OFFICE OF THE INSURANCE COMMISSIONER
ATTN: Legal Division
1124 Smith Street
Post Office Box 50540
Charleston, West Virginia 25305-0540

LEGISLATIVE RULE TITLE: AIDS REGULATIONS
(TITLE 114, SERIES 27)

1. Authorizing statute(s) citation:

West Virginia Code §§ 33-2-10, 33-6-8, and 33-6-9,
33-25A-3(1), 33-25A-20, and 16-3C-2

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

July 21, 2000 - Comment Period

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) or Public Comment Period ended:

Comment period ended August 21, 2000.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

**e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)**

September 1, 2000

- f. **Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (Please type)**

Donna S. Quesenberry, General Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, WV 25305-0540
Phone: (304) 558-0401
Fax: (304) 558-1362
E-mail: quosed@wvnm.wvnet.edu

- g. **IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)**

Heidi L. Talmage, Associate Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, WV 25305-0540
Phone: (304) 558-0401
Fax: (304) 558-1362

3. **If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:**

- a. **Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.**

Not applicable

- b. **Date of hearing or comment period:**

Not applicable

- c. **On what date did you file in the State Register the findings and determinations required together with the reasons therefor?**

Not applicable

Insurance Commissioner
Title 114, Series 27

d. Attach findings and determinations and reasons:

Not applicable

Insurance Commissioner
Title 114, Series 27

Attachment for Question 2.d.

The West Virginia Insurance Commissioner received only one comment to the proposed amendments to the rule. Mr. Harvey Pogoriler, Assistant General Counsel for The Northwestern Mutual Life Insurance Company, indicated that the title of the consent form in Appendix A is not consistent with a reference to the form just above the signature line. (copy attached)

Response: Although the suggestion does not address the agency's proposed changes to the rule, the reference at the end of the form will be changed to facilitate consistency. The final two paragraphs will now read as follows:

I have read and I understand this Notice and Consent for Blood, Urine or Oral Fluid Testing Which May Include AIDS Virus (HIV) Antibody/Antigen Testing. I voluntarily consent to give a urine or oral fluid specimen and/or to the withdrawal of blood from me, the testing of that urine and/or blood or oral fluid, and the disclosure of the test results as described.

I understand that I have the right to request and receive a copy of this authorization. A photocopy of this form will be as valid as the original.

From: harveypogoriler@northwesternmutual.com <harveypogoriler@northwesternmutual.com>
To: talmageh@wvnm.wvnet.edu <talmageh@wvnm.wvnet.edu>
Cc: BethByrne@acli.com <BethByrne@acli.com>; michaelyoungman@northwesternmutual.com <michaelyoungman@northwesternmutual.com>
Date: Friday, August 18, 2000 6:01 PM
Subject: Proposed change in AIDS regulation, Title 114, Series 27

The proposed changes in the AIDS regulation were circulated here at Northwestern Mutual, and the only comment made for me to pass on to you--and it's really minor--is that there is a slight discrepancy in the name of the consent form (Appendix A to the regulation). The name of the form has the wording ". . . MAY INCLUDE AIDS VIRUS (HIV) ANTIBODY/ANTIGEN TESTING," whereas the reference to the name of the form as it appears in the second to the last paragraph above the signature lines has the wording ". . . May Include HIV Antibody/Antigen Testing."

Harvey Pogoriler
Assistant General Counsel
The Northwestern Mutual Life Insurance Company
Milwaukee WI
414-665-7347

114CSR27
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 27

AIDS REGULATIONS

- 114-27-1. General.
- 114-27-2. Applicability.
- 114-27-3. Definitions.
- 114-27-4. Medical/Lifestyle Applications Questions and Underwriting Guidelines.
- 114-27-5. Testing.
- 114-27-6. Notice and Consent Form.
- 114-27-7. Separability.

114CSR27
WEST VIRGINIA LEGISLATIVE RULE
INSURANCE COMMISSIONER

Series 27

AIDS REGULATIONS

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Section 1. General.

1.1. Scope - This legislative rule establishes standards for AIDS-related underwriting questions and AIDS testing in connection with applications for life or health insurance policies.

1.2. Authority - West Virginia Code §§ 33-2-10 and 16-3C-2(j).

1.3. Filing Date - ~~May 6, 1999~~

1.4. Effective Date - ~~May 6, 1999~~

Section 2. Applicability.

2.1. Insurers - All insurers who deliver or issue for delivery in this state any policies for life or accident and sickness insurance are subject to this regulation.

2.2. Service Corporations - All health service corporations who deliver or issue for delivery in this state any subscriber's contracts for health insurance are subject to this regulation.

2.3. Health Care Corporations - All health care corporations who issue to enrollees in this state evidence of health insurance coverage are subject to this regulation.

2.4. Fraternal Benefit Societies:

a. All fraternal benefit societies who deliver or issue for delivery life insurance benefit certificates in this state are subject to this regulation.

b. All domestic, foreign, or alien societies who issue any certificate or other evidence of any contract of accident or sickness insurance in this state are subject to this regulation.

2.5. Health Maintenance Organizations - All health maintenance organizations who deliver or offer for delivery in this state any evidence of coverage are subject to this regulation.

Section 3. Definitions.

3.1. Code - means the West Virginia Code.

- 3.2. Commissioner - means the Insurance Commissioner of the State of West Virginia.
- 3.3. Acquired Immunodeficiency Syndrome (AIDS) - means the acquired immunodeficiency syndrome as may be from time to time defined by the Centers for Disease Control of the United States Public Health Service.
- 3.4. AIDS Related Complex (ARC) - means a syndrome in which the individual displays many of the same symptoms of AIDS, including the presence of the HIV antibody.
- 3.5. Human Immunodeficiency Virus (HIV) - means the virus responsible for the potential development of the Acquired Immunodeficiency Syndrome (AIDS).
- 3.6. Oral mucosal transudate or OMT means a serous fluid that comes from transudation at the gingival crevice and across oral mucosal surfaces, as distinguished from whole saliva, and which is collected by a method approved by the FDA for OMT testing for HIV.
- 3.7. Enzyme Linked Immunosorbent Assay (ELISA) - means a test which has been licensed by the FDA and is used to determine the existence of the HIV antibody ~~in the blood or in OMT~~.
- 3.8. Insurer - includes all entities providing life or accident and sickness coverage.
- 3.9. Western Blot - means a test which has been licensed by the FDA and is used to determine the existence of the HIV antibody ~~in the blood or in OMT~~.
- 3.10. Health Care Professional or Health Care Provider - means any physician, nurse, ~~physicians~~ physician's assistant, or any other person providing medical, dental, nursing or other health care services of any kind.
- 3.11. FDA means the United States Food and Drug Administration.

Section 4. Medical/Lifestyle Applications Questions and Underwriting Guidelines.

- 4.1. General Propositions:
- a. No inquiry in an application for health accident and sickness or life insurance coverage, or in an investigation conducted by an insurer or an insurance support organization on its behalf in connection with an application for such coverage shall be directed toward determining the proposed insured's sexual orientation.

b. Sexual orientation may not be used in the underwriting process or in the determination of insurability.

c. Insurance support organizations shall be directed by insurers not to investigate, directly or indirectly, the sexual orientation of an a proposed insured or beneficiary.

4.2. Medical/Lifestyle Applications Questions and Underwriting Standards.

a. No question shall be used which is designed to establish the sexual orientation of the proposed insured.

b. Questions relating to the proposed insured having or having been diagnosed as having AIDS or ARC are permissible if they are factual and designed to establish the existence of the condition.

For Example: Insurers should not ask "do you believe you may have . . .?", but rather "do you know or have reasons to know . . .?"

c. Questions inquiring as to whether the proposed insured has ever tested positive for the presence of the HIV virus or HIV virus antibodies are permissible; however, questions inquiring as to whether the proposed insured has ever been tested for the presence of the HIV virus or HIV antibodies are prohibited.

d. Questions relating to medical and other factual matters intending to reveal the possible existence of a medical condition are permissible if they are not used as a proxy to establish the sexual orientation of the proposed insured, and the proposed insured has been given an opportunity to provide an explanation for any affirmative answers given in the application.

For Example: "Have you had chronic cough, significant weight loss, chronic fatigue, diarrhea, enlarged glands, . . .?" would be permissible. These questions must relate to a definite time period immediately preceding the application and must be specific. The proposed insured shall be given the opportunity to explain the described symptoms.

e. Questions relating to the proposed insured's having or having been advised to seek treatment by a medical doctor, health nurse or other medical professional for a sexually transmitted disease are permissible.

f. Neither the marital status, the "living arrangements," the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of a proposed insured may be used to establish, or aid in establishing, the proposed

insured's sexual orientation.

g. For purposes of rating a proposed insured for health and life insurance, an insurer may impose territorial rates, but only if the rates are based on sound actuarial principles and are related to actual or reasonably anticipated experience.

For Example: If a particular territory demonstrates a general propensity for high risk, an insurer may impose a rate higher for that territory than for similar risks located in other territories.

h. No questions shall seek to determine if the proposed insured has demonstrated AIDS-related concerns or has sought AIDS-related counseling.

i. No adverse underwriting decision shall be made because medical records or a report from an insurance support organization show(s) that the proposed insured has demonstrated AIDS-related concerns or has sought counseling. This subsection does not apply to a proposed insured seeking treatment and/or diagnosis.

Section 5. Testing.

5.1. AIDS-related testing in connection with the application for group life or accident and sickness insurance is prohibited; provided that an insurer may conduct such testing in relation to the application for group life and accident and sickness insurance when the insurance applied for is individually underwritten and evidence of insurability is required by the insurer because the proposed insured is either a late entrant, is applying for supplemental group life coverage, or is applying for small group insurance where the group consists of less than twenty-five members.

5.2. Whenever a proposed insured is requested to take an AIDS-related test in connection with an application for insurance, the use of such a test must be revealed to the proposed insured and his or her written, informed consent obtained.

5.3. The proposed insured should demonstrate an understanding that the test is being performed, of the nature of the test, of the persons to whom the results of that test may be disclosed, of the purpose for which test results may be used, of any limitations on the accuracy and meaning of the test results, and of any foreseeable risks and benefits resulting from the test.

5.4. The person requesting the test, and not the individual or individual's health care provider, must underwrite the cost of the test.

Insurance Commissioner
Legislative Rule
Title 114, Series 27

5.5. The individual undergoing the test has a choice to receive the test result directly or to designate in writing, prior to the administration of the test, any other person, such as a health care professional or clergyman, who may receive the results.

5.6. The testing must be performed by an individual who is properly trained in the administration of the test; holds an appropriate medical license, if state or federal law requires licensure in order to perform the testing procedure; and is properly supervised in accordance with state and federal law and FDA approval requirements.

5.7. The insurer and its agents shall not release or disclose either that a HIV test has been conducted or the test results to any other party except under the following limited circumstances:

a. Negative test results only may be disclosed to a reinsurer where either:

1. The reinsurer is to reinsure a portion of the risk on a facultative basis;

or

2. The reinsurer is to reinsure a portion of a block of business on a treaty basis and where the release of HIV test information is disclosed by the ceding insurer only to the extent that the reinsurer is permitted to perform limited underwriting audits of the ceding ~~insurers~~ insurer's underwriting files to verify that proper HIV underwriting has occurred.

b. Positive test results only may be disclosed to the Medical Information Bureau (MIB) provided that such information release is limited to a coded report identified only as a nonspecific abnormal blood, urine or oral fluid test code.

c. To the extent necessary to allow them to properly perform the functions for which their services were contracted by the insurer, an insurer may disclose HIV test information to certain contractors of the insurer such as audit firms, third party underwriters and claims adjusting firms. No person receiving HIV test information shall transmit information further, and each person shall maintain strict confidentiality.

d. To the extent that they are otherwise entitled to access to the ~~insurers~~ insurer's files, government agencies may be permitted access to files containing HIV test information: Provided that confidentiality is maintained and the HIV test information is not shared with other persons.

5.8. Upon written request by the individual undergoing the test the insurer must provide within 30 days, a written list of all persons or entities to whom test information has been released or caused to be released by the insurer.

5.9. The testing is required to be administered on a nondiscriminatory basis for all individuals in the same underwriting class. No proposed insured may be denied coverage or rated a substandard risk on the basis of HIV testing unless acceptable testing protocol is followed, ~~The insurer may at its option use a urine HIV test as an initial screening device; provided that if such urine test yields a negative result no further HIV testing may be required of the proposed insured. If the urine test yields a positive result for the presence of HIV antibodies then HIV blood or OMT testing may be required by the insurer. The proposed insured may not be denied insurance coverage or rated a substandard risk on the basis of a positive urine HIV test alone including the use of FDA-licensed tests.~~ The following is the acceptable ~~blood or OMT~~ HIV testing protocol for use in this state ~~and an insured may not be denied coverage on the basis of AIDS-related testing unless:~~

- a. An initial enzyme linked immunosorbent assay (ELISA) ~~blood or OMT~~ test is administered to the proposed insured, and it indicates the presence of HIV antibodies ~~in the blood or OMT~~; and
- b. A second ELISA ~~blood or OMT~~ test is administered and it indicates the presence of HIV antibodies ~~in the blood or OMT~~; and
- c. A Western Blot ~~blood or OMT~~ test is conducted and it confirms the results of the two ELISA tests.

5.10. If any of the test results in the ELISA-ELISA-Western Blot series produce a negative result, the testing ceases and the proposed insured cannot be denied coverage based on AIDS-related testing.

For Example: If the initial ELISA test yields a negative result, the testing ceases. If the initial ELISA test yields a positive result and the subsequent ELISA test yields a negative result, the testing ceases. If both ELISA tests yield a positive result and the Western Blot test yields a negative result, for purposes of insurability, the results are negative.

5.11. News of a positive test result could result in serious emotional trauma to the proposed insured. For this reason, it is recommended that the insurer recommend to the proposed insured that positive results be communicated to the proposed insured face to face by a qualified health care professional who could provide AIDS counseling.

Section 6. Notice and Consent Form.

6.1. A notice and consent form must be executed by each proposed insured before AIDS-related testing is performed as to such proposed insured on behalf of any insurer.

Insurance Commissioner
Legislative Rule
Title 114, Series 27

6.2. The notice and consent form required by subsection 6.1 shall be as is set out in Appendix A attached hereto unless an alternative form is approved by the commissioner in writing.

Section 7. Separability.

7.1. If any provision of this regulation or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the regulation and the application thereof to other persons or circumstances shall not be affected thereby.

APPENDIX A

Examiner	_____	Insured	_____
Address	_____	Address	_____
	_____		_____

**NOTICE AND CONSENT FOR BLOOD, URINE, OR ORAL FLUID TESTING
WHICH MAY INCLUDE AIDS VIRUS (HIV) ANTIBODY/ANTIGEN TESTING**

To determine your insurability, the insurer named above (the Insurer) has requested that you provide a sample of your blood, urine, or oral fluids for testing and analysis. All tests will be performed by a licensed laboratory.

Tests may be performed to determine the presence of antibodies or antigens to the Human Immunodeficiency Virus (HIV), also known as the AIDS Virus. The HIV antibody test that we perform is actually a series of tests done by a medically accepted procedure. The HIV antigen test directly identifies AIDS viral particles. This series of tests is extremely reliable. Other tests which may be performed include determinations of blood cholesterol and related lipids (fats) and screening for liver or kidney disorders, diabetes, and immune disorders.

All test results will be treated confidentially. They will be reported by the laboratory to the Insurer. When necessary for business reasons in connection with insurance you have or have applied for with the Insurer, the Insurer may disclose test results to others such as its reinsurers, employees, or contractors. If the Insurer is a member of the Medical Information Bureau (MIB, Inc.), and if the test results for HIV antibodies/antigens are other than normal, the Insurer will report to the MIB, Inc. a generic code which signifies only a non-specific ~~blood, or oral fluid~~ test abnormality. If your HIV test is normal, no report will be made about it to the MIB, Inc. Other test results may be reported to the MIB, Inc. in a more specific manner. The organizations described in this paragraph may maintain the test results in a file or data bank. There will be no other disclosure of test results or even that the tests have been done except as may be required or permitted by law or as authorized by you. If you desire, you have the right to request a complete list of the parties to whom the insurer has released test information.

APPENDIX A

You should also be aware that the person who performs the blood, urine or oral fluid testing is subject to West Virginia Code §§ 16-3C-3 and 16-3C-4 which ~~authorizes~~ authorize that they may disclose test results to certain limited individuals under certain limited circumstances [these relate primarily to (1) persons you authorize to see the test results, (2) health care providers who may come into contact with you or specimens obtained from you, (3) the United States centers for disease control, (4) a court order to release the results, and (5) identified sex partners and persons sharing needles.] These persons are required by West Virginia Code §§ 16-3C-3 and 16-3C-4 to keep test information confidential.

You may direct that test results be disclosed directly to you or if you prefer to your personal physician or other health care professional. It is strongly suggested that you designate a physician or health care professional to receive your test results so that they may properly explain the results to you.

If your HIV test results are normal, no routine notification will be sent to you. If the HIV test results are other than normal, the Insurer will contact you. The Insurer may also contact you if there are other abnormal test results which, in the Insurer's opinion, are significant. If you have not already indicated one, the Insurer may ask you at that time for the name of a physician or other health care provider to whom you may authorize disclosure and with whom you may wish to discuss the results.

Positive HIV antibody/antigen test results do not mean that you have AIDS, but that you are at significantly increased risk of developing AIDS or AIDS-related conditions. Federal authorities say that persons who are HIV antibody/antigen positive should be considered infected with the AIDS virus and capable of infecting others.

Positive HIV antibody or antigen test results or other significant blood abnormalities will adversely affect your application for insurance. This means that your application may be declined, that an increased premium may be charged, or that other policy changes may be necessary.



STATE OF WEST VIRGINIA
Offices of the Insurance Commissioner

Legal Division

CECIL H. UNDERWOOD
Governor

HANLEY C. CLARK
Insurance Commissioner

September 1, 2000

HAND DELIVERED

Ms. Judy Cooper, Director
Administrative Law Division
Office of Secretary of State
State Capitol
Charleston, West Virginia 25305

Dear Ms. Cooper:

Enclosed please find for filing one (1) copy of the following:

- 1) Notice of Agency Approval of a Proposed Rule and Consent of Acting Secretary of Tax and Revenue;
- 2) Fiscal Note for Proposed Rule;
- 3) Brief Summary of Rule;
- 4) Statement of Circumstances;
- 5) Legislative Rule-Making Review Committee Questionnaire;
- 6) Agency approved proposed rule entitled "AIDS Regulations" (Title 114, Series 27).

Please contact me if further information is required.

Sincerely,

A handwritten signature in cursive script that reads "Donna S. Quesenberry".

Donna S. Quesenberry
General Counsel

DSQ/jz
Enclosures