WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

Form #6

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AGENCY: Insurance Commissioner TITLE NUMBER: 114

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 65

TITLE OF RULE BEING AMENDED: Self-Insurance Pools for Political Subdivisions

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) S.B. 177

SECTION 64-7-2(h), PASSED ON March 12, 2011

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: April 19, 2011.

Charles O. Lorensen
Cabinet Secretary
West Virginia Department of Revenue

TITLE 114
LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 65
SELF-INSURANCE POOLS FOR POLITICAL SUBDIVISIONS

Section

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FILED
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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TITLE 114
LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 65
SELF-INSURANCE POOLS FOR POLITICAL SUBDIVISIONS

§114-65-1. General.

1.1. Scope. -- This rule sets forth the procedural requirements for the creation and regulatory oversight of self-insurance pools created to insure workers' compensation and civil liability risks of political subdivisions.

1.2. Authority. -- This rule is promulgated pursuant to the authority granted by W. Va. Code §§29-12A-16(g) and 33-2-10.

1.3. Filing Date. -- April 19, 2011.

1.4. Effective Date. -- April 19, 2011.

§114-65-2. Definitions.

2.1. "Administrator" means the individual, partnership corporation or other entity authorized to serve as a representative of a pool and its members in carrying out the policies of the board of directors and managing the pool's activities.

2.2. "Board" means the board of directors of a pool.

2.3. "Commissioner" means the West Virginia Insurance Commissioner.

2.4. "Contribution" means the amount of payments required of each member in order to fund the pool's obligations under the plan.

2.5. "Civil Liability" means an obligation arising from claims for damages in civil actions for injury, death, or loss to persons or property allegedly cause by an act or omission of the political subdivision or any of its employees.

2.6. "Member" means a political subdivision which has entered into a member agreement and thereby becomes a pool member.

2.7. "Member agreement" means the written agreement executed between each member and the pool which sets forth the conditions of membership in the pool, the obligations, if any, of each member to the other members and the terms, coverages, limits, and deductibles of the plan.

2.8. "Plan" means the plan of self-insurance for coverage of civil liability and workers' compensation risks offered by the pool to its members as specifically designated in the member

agreement.

2.9. "Political subdivision" means any county commission, municipality and county board of education; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; any instrumentality supported in most part by municipalities; any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties cities or towns; a combined city-county health department created pursuant to article two, chapter sixteen of the West Virginia Code; public service districts; and other instrumentalities including, but not limited to, volunteer fire departments and emergency service organizations as recognized by an appropriate public body and authorized by law to perform a government function. "Political subdivision" does not include hospitals of a political subdivision and their employees.

2.10. "Pool" means a self-insurance program organized by two or more political subdivisions for the purpose of providing joint or cooperative action relating to their financial and administrative resources and providing risk management and coverage for civil liability, worker's compensation liability, or both, for pool members and their employees. Workers' compensation funds must be accounted for independently of any other funds of a pool.

2.11. "Workers' compensation risk" means an employer's liability for payment of benefits to injured workers and their dependents under the provisions of chapter twenty-three of the West Virginia Code.

§114-65-3. Establishment of Pools Authorized.

3.1. Regardless of whether a political subdivision secures a policy or policies of workers' compensation insurance or civil liability insurance, establishes and maintains a self-insurance program, or enters into an agreement for the joint administration of a self-insurance program, the political subdivision may, subject to approval by the Commissioner and pursuant to a written agreement and to the extent that it considers necessary, join with one or more political subdivisions to purchase group insurance or to establish and maintain a pool to provide coverage for its workers' compensation, civil liability risks, or both.

3.2. Two or more political subdivisions may establish and maintain a joint risk-management program, including but not limited to the employment of a risk manager or managers and consultants, for the purpose of preventing and reducing the risks covered by insurance, self-insurance, or a pool.

3.3. A pool is not an insurance company, its operation does not constitute the transaction of insurance, and it is not subject to the insurance laws of this State unless otherwise specifically stated herein.

§114-65-4. Criteria for Establishing and Maintaining Self-Insurance Pools.

4.1. Before a pool may begin to offer civil liability coverage to members, the following must be filed with the Commissioner:

4.1.a. A copy of a financial plan which must set forth:

4.1.a.1. The insurance coverages to be offered by the pool, applicable deductible levels, and the maximum level of claims to be self-insured against;

4.1.a.2. The pool's proposed rates, which should not be excessive, inadequate or unfairly discriminatory taking into account all underwriting, exposure and claims history when pricing any current or prospective pool members. A pool's rates are not subject to prior approval by the Commissioner , however appropriate regulatory action may be taken if he or she determines that the rates are not in compliance with this rule;

4.1.a.3. The amount of cash reserves as are necessary, in the exercise of sound and prudent actuarial judgment, to cover potential pool members and employee liability, expense, loss, and damage, which cash reserves may be funded by the issuance of certificates of participation by the pool and its members and reinsurance; and

4.1.a.4. The amount of aggregate excess insurance or reinsurance coverage to be purchased in the event that the pool's resources are exhausted in a given fiscal period;

4.1.b. A copy of a plan of management which describes the governing authority of
the pool, which must be a board of directors, and provides the following with regard to the board:

4.1.b.1. The manner in which member contributions to the pool will be determined;

4.1.b.2. The methods for maintaining reserves, levying and collecting assessments for deficiencies, the financing of cash reserves and reinsurance, and disposing of surplus;

4.1.b.3. The basis upon which new members may be admitted to, and existing
members may leave or have membership terminated by the pool;

4.1.b.4. The identification of funds and reserves by exposure areas;

4.1.b.5. The manner in which the pool will be administered in the event of termination or insolvency; and

4.1.b.6. Any other provisions that may be considered by the members or the
Commissioner to be necessary or desirable for the operation of the pool;

4.1.c. A copy of the articles of incorporation;

4.1.d. A copy of the bylaws of the proposed pool;

4.1.e. A copy of the form or forms to be used for the member agreement, which must set forth at a minimum the rights, privileges and obligations of the member and the terms, coverages, limits and deductibles of the plan;

4.1.f. A copy of the proposed policy form or forms, which are not subject to prior approval by the Commissioner;

4.1.g. Designation of the initial or interim supervisory board, at least a majority of which must be pool members, and the administrator, together with pertinent biographical information for each member of the board and for the administrator or the principal officers of the corporation serving as administrator;

4.1.h. The address within West Virginia where the books and records of the pool will be maintained at all times;

4.1.i. A confirmation of a fidelity bond covering the administrator and its employees in an amount sufficient to protect the pool against the misappropriation or misuse of any monies or securities;

4.1.j. A projection of administrative expenses for the first year of operation in a dollar amount and as a percentage of the estimated annual contributions;

4.1.k. Proof of payment of contributions by members into a depository account of an amount between $250,000 and $500,000 that, in the Commissioner's discretion, constitutes sufficient capital; and

4.1.*l*. A composite listing of the estimated annual gross contributions which may, in addition to cash contributions, be made up of proceeds from the sale of certificates of participation in the premium stream of the pool, to be developed by each organizing member of the pool individually and in the aggregate for the pool. Contributions must be based on reasonable assumptions and certified by an actuary as to the sufficiency of the contributions.

4.1.m. The authorization given in paragraph 3, subdivision a and paragraph 2, subdivision b of this subsection and in subdivision l of this subsection to issue certificates of participation as a means of providing capital for the pool, establishing adequate reserves and purchasing reinsurance is limited to those political subdivisions that are authorized to issue public debt pursuant to other applicable law.

4.2. A pool's application for authorization to offer workers' compensation coverage is subject to the requirements of W. Va. Code §23-2-9(a)(2) and W. Va. Code St. R. §85-18-5 except that:

4.2.a. In lieu of the requirement in §5.2 of such rule that an applicant submit

financial statements for the last 3 years, the pool shall be required to fully secure all of its projected claims liabilities in a form of surety approved by the Commissioner, and shall continue to fully secure its projected liabilities on an ongoing basis until such time that the pool is able to produce 3 years of audited financial statements which do meet the Commissioner's financial condition benchmarks.

4.2.b. Instead of the application being subject to approval by the Industrial Council in accordance with §5.5.a of such rule, the Commissioner is responsible for approving or disapproving the application.

4.3. Any subsequent revisions to documents filed with the Commissioner pursuant to subsection 4.1 of this section must also be filed with the Commissioner.

4.4. Every member of a group self-insurance pool shall execute a member agreement which shall set forth the rights, privileges and obligations of the member, and the terms, coverages, limits, and deductibles of the Plan. Member agreements must, at a minimum, disclose the following:

4.4.a. The coverages provided;

4.4 b. The period of the coverage;

4.4.c. The amount of any deductible per claim and in the aggregate;

4.4.d. The maximum amount of coverage to be borne by the pool;

4.4.e. The contribution amount and dates payment are due for the member;

4.4.f. The basis upon which each member's contribution is determined and under what circumstances additional assessments of the members may be made, including the possibility that assessments may continue after the member's membership in the pool has been discontinued;

4.4.g. The circumstances under which a member's participation in the pool may be terminated, including for non payment of contributions or assessments, and a plan to be followed in the event the pool is dissolved;

4.4.h. A description of the excess coverage for the pool as to its coverage per occurrence, coverage per occurrence per person, if appropriate, and in the aggregate;

4.4.i. The pool's obligations to provide a defense for the member in the event of a claim; and

4.4.j. With respect to civil liability coverage, a prominent disclosure notice that must be signed by a duly authorized officer of the member, which must use the following or substantially similar language:

"The pool is not protected by any West Virginia insurance guaranty association against default due to insolvency. In the event of insolvency, members and persons filing claims against members may be unable to collect any amount owed to them by the pool regardless of the terms of this member agreement. In the event that the pool is in a deficit position, a member may be liable for any and all unpaid claims against the member."

4.4.k. With respect to workers' compensation coverage, a member agreement under which each member agrees to assume and discharge, jointly and severally, any liability under West Virginia workers' compensation laws of any and all employers party to the agreement and which provides that, in addition to the rights of the pool, in the event of failure of the pool to enforce such rights after reasonable notice to the pool, the Commissioner shall have the right independently to enforce on behalf of the pool the joint and several liability of its members under West Virginia workers' compensation laws and the liability of members for any unpaid contributions and assessments;

4.5. The costs of funding the pool may be allocated among the funds or accounts of the pool members on the basis of their relative exposure and loss experience. A pool member is not liable for any amount in excess of amounts payable pursuant to terms of the member agreement for participation in the pool.

4.6. The board must act diligently to limit the pool's exposure on any loss on any one risk or hazard.

4.7. The board's responsibilities include, but are not limited to, retaining control of all monies collected and directing the disbursement of such monies; levying upon the members additional assessments in proportionate amounts when needed to supplement the pool's surplus and to assure payment of its obligations; actively collecting delinquent accounts resulting from past due contributions of members and taking appropriate action to declare a delinquent member ineligible for coverage from the pool until such time as the delinquency and cost of collection have been fully recovered; and adopting its own rules and procedures as it considers necessary for the efficient and actuarially sound operation of the pool, provided the rules and procedures are consistent with this rule.

§114-65-5. Authorization of Pools.

5.1. After review of the documents and information described in section four of this rule, the Commissioner may notify the pool that its operation is authorized if he or she determines that the pool meets the criteria set forth in this rule. Authorization to operate a pool shall remain in effect until terminated at the request of the board or revoked by the Commissioner.

5.2. The Commissioner is authorized to monitor as he or she considers necessary the financial solvency of pools, which may include reviewing the pool's rates, to ensure that the pool's liabilities for claims, present and contingent, and other expenses are at no time greater than its assets. If a pool is found by the Commissioner to be in a deficit condition the pool must file a financial plan acceptable to the Commissioner to correct the deficit condition. The Commissioner may examine the affairs, transactions, accounts, records, and assets of the pool as

often as it deems necessary and may take appropriate regulatory action whenever in his or her judgment a pool is insolvent or otherwise financially impaired, which may include the withdrawal of the authorization to operate the pool.

5.3. Information regarding the portion of reserves of a pool established to satisfy a specific claim or cause of action is confidential and is not subject to discovery.

5.4.

5.4.a. A civil liability pool may voluntarily dissolve after presentation to and approval by the Commissioner of a plan of dissolution. The plan must provide for the payment of all incurred losses and expenses of the fund and its members, including all incurred but not reported losses, as certified by an actuary, to the extent of the pool's assets. No assets of the pool may be used for any other purpose until payment of all such losses and expenses is provided for. Subject to approval of the Commissioner, a pool may merge with another pool if the resulting pool assumes in full all obligations of the merging pools.

5.4.b. Upon approval from the Commissioner, a workers' compensation pool may voluntarily dissolve. The pool and its members shall remain forever jointly and severally liable for all injuries and exposures, whether known, unknown, or contingent, occurring during the period in which the pool was in existence. Prior to dissolving, a pool shall post bond or security in a form acceptable to the Commissioner and in an amount sufficient to cover all past, present and future liabilities, whether known, unknown or contingent, resulting from the period in which the pool was self-insured, and provide adequate assurances for the continued administration of claims and payment of assessments, surcharges as required by chapter twenty-three of the West Virginia code and the rules promulgated thereunder. The pool shall further meet all other reasonable terms and conditions for dissolution as required by the Commissioner.

5.5. No member of a workers' compensation pool may be terminated unless at least 30 days written notice has been given to the member and the Commissioner: *Provided*, That the pool shall remain liable for all claims applicable to the period during which an employer was a member of an association, including the period of 30 days or more required for termination of membership.

5.6. If the Commissioner determines that a pool is not in compliance with this rule or with any applicable statute, rule or order of the Commissioner, he or she must notify the board by certified or registered mail in writing with a description of the non-compliance and a date by which the non-compliance must be corrected or by which a plan for correcting the non-compliance must be filed. If the non-compliance is thereafter not corrected, the Commissioner may, after notice and a hearing, withdraw the authorization of approval of the pool or assess a monetary penalty, or both.

§114-65-6. Investments.

The board may invest funds in any type of investments authorized by W. Va. Code §33-8-1 *et seq.*

§114-65-7. Responsibilities of Board of Directors.

7.1. The board shall be responsible for holding and managing the assets of and directing the affairs of the pool and shall be elected in the manner prescribed by the pool's governing instruments. At least a majority of the board must be members of the pool, but a board member shall not be an owner, officer or employee of any service agent, its parent or any of its affiliated companies, under contract with the pool.

7.2. The board shall fix contributions to the pool and supervise the finances of the pool and the pool's operations to the extent necessary to assure conformity with law, this rule, the member agreement, and the pool's governing instruments.

7.3. The board shall take all necessary precautions to safeguard the assets of the pool, including, but not limited to, the following:

7.3.a. Doing all acts necessary to assure that each member continues to be able to fulfill the obligations of membership; and also reporting promptly to the Commissioner any grounds or change in circumstances which may affect the pool's ability to meet its obligations such as withdrawal of a member;

7.3.b. Designating an administrator to administer the affairs of the pool, to carry out the policies established by the board and to provide day to day management of the pool. The administrator shall furnish a fidelity bond in an amount sufficient to protect the pool against the misappropriation or misuse of any monies or securities. Evidence of the bond shall be filed with the Commissioner, said bond being one of the conditions required for approval of the pool. The administrator shall not be an owner, officer or employee of any service agent, its parent or any of its affiliated companies, any of which are under contract with the pool;

7.3.c. Retaining control of all monies collected for the pool and the disbursement of such monies by the pool. All assets of the pool shall remain in the custody of the board or the authorized administrator. However, a claims fund for payment of claims due and other related expenses may be established for the use of any authorized service agent;

7.3.d. Actively collecting delinquent accounts resulting from any past due contributions by members. Any member of a pool who fails to make the required contributions after due notice may be terminated from the pool until this past due account, including cost of collection, has been paid or adequately provided for: *Provided*, That prior to being terminated, the Commissioner must approve the termination by ensuring that the member being terminated has either obtained West Virginia workers' compensation coverage for its employees or is no longer operating its business: *Provided, further*, That the pool remains liable for all compensable injuries, exposures and deaths of member's employees occurring prior to the termination of the member; and

7.3.e. Assuring that, for workers' compensation pools, payroll verifications of all members of the pool are completed within 180 days after the close of a plan year and requiring that efforts are made to collect any additional amounts due within 30 days of the completion of

each audit.

7.4. Neither the board nor the administrator shall use any of the monies collected for any purpose unrelated to securing the members' liability or other rights and obligations under the member agreement and any administrative or other necessary expenses of the pool, and the board may not borrow any monies from the pool or in the name of the pool without advising the Commissioner of the nature and purpose of the loan and obtaining the Commissioner' s approval.

7.5. The board may dispose of any surplus as provided in section 12 of this rule.

7.6. The board shall assure that the office of the administrator of the pool and all pertinent records necessary to verify the accuracy and completeness of all reports submitted to the Commissioner are maintained within West Virginia.

7.7. The board may adopt its own operating procedures and protocols as it deems necessary for the operation of the pool provided these rules and procedures are not inconsistent with this rule.

7.8. The board may designate a service agent or agents.

§114-65-8. Additional Requirements for Workers' Compensation Pools.

8.1. To the extent not inconsistent with this rule, each workers' compensation pool is subject to the requirements of *West Virginia Code* §§33-2-21 and 33-2-22 and *West Virginia Code* Chapter Twenty-Three and the rules promulgated thereunder, including but not limited to the payment of surcharges pursuant to *West Virginia Code* §§23-2C-3(f)(2) and 23-2C-3(f)(3)(B) and *West Virginia Code* St. R. Section 85-6-1 *et seq.;* the record retention requirements of *West Virginia Code* St. R. Section 85-18-13; and the data requirements of *West Virginia Code* St. R. Section 85-2-1 *et. seq.*: *Provided,* That such a pool is subject to *West Virginia Code* St. R. Section 85-18-1 *et seq.*; as if the pool was a single self-insured employer: *Provided*, however, That no provision of Chapter Twenty-Three of this code or any rule promulgated thereunder requiring participation in the self-insured guarantee risk pool and the self-insured security risk pool, or providing for industrial council approval of self-insured status, termination of self-insured status or approval of security, shall apply.

§114-65-9. Filing of Reports; Examination by Commissioner.

9.1. Every pool authorized by the Commissioner must file with the Commissioner and distribute to pool members within 180 days following the pool's fiscal year end an audited statement of its financial condition and business for the most recently completed fiscal year; such statement must be signed on behalf of the pool by two duly authorized officers or a duly authorized officer and the administrator.

9.2. The financial statement must be audited by an independent certified public accountant and verified by the signature and oath of the pool's authorized representative. If a pool fails to file the audited financial statement required by this section, the Commissioner may

have the audit performed. If the audit is performed by the Commissioner's staff, it will be at the expense of the pool and all working papers will be confidential and not open for public inspection until the audit is final.

9.3. The audited financial statement shall contain a report in detail of the pool's assets, outstanding liabilities, including the amount of claims paid to date and current reserves for losses, revenues and disbursements during the year, the investments of the pool's assets and all other information that the Commissioner deems necessary to secure a full and accurate knowledge of the financial affairs and condition of the pool. The working papers of the certified public accountant and other records pertaining to the preparation of the audited financial statements may be reviewed by the Commissioner.

9.4. In addition to the annual audited financial statement, the Commissioner may require any pool to file additional financial information, including interim financial reports and additional reports, exhibits or statements considered necessary to secure complete information concerning the condition, solvency, experience, transactions or affairs of the pool. The Commissioner shall establish reasonable deadlines for filing these additional reports, exhibits or statements and may require verification as the Commissioner shall designate.

9.5. The pool must retain and have available for examination by the Commissioner all executed copies of the application of each political subdivision for membership in the pool and a certified copy of each political subdivision's resolution authorizing membership in the pool.

§114-65-10. Reserves.

10.1. Every pool shall calculate the amount reasonably determined to be sufficient to provide for the payment of every loss or claim whether reported or unreported and whether arising on or prior to the date of any annual or other statement, and it shall maintain a reserve liability in an amount estimated in the aggregate to provide for the payment of all such losses or claims and any expenses related thereto.

10.2. Each pool shall maintain reserves equal to the unearned portion of the gross contribution or assessment, if any, on unexpired or unterminated risks.

10.3. Reserves for coverages based on life expectancy shall be computed according to tables of mortality and rates of interest prescribed in Section 415 of the Internal Revenue Code.

10.4. Every pool may receive credit for insurance or reinsurance recoverable from an insurance company licensed to transact such insurance in West Virginia or any state of the United States or the District of Columbia and meeting the standards of solvency at least equal to those required in West Virginia. A pool may receive credit for insurance or reinsurance with any other insurer to the extent that funds are withheld as security for the payment of obligations thereunder if such funds are held subject to withdrawal by and are under the control of the pool. Such funds may include letters of credit subject to the approval of the Commissioner. Credit may be received for insurance or reinsurance recoverable on the basis of an agreement entered into with individual unincorporated underwriters having a trusteed surplus of at least

$100,000,000.

10.5. Credit may be received for insurance or reinsurance when the contract is:

10.5.a. Not cancellable or terminable for any reason except upon not less than 60 days written notice sent by registered or certified mail to (i) the pool and (ii) the Commissioner;

10.5.b. Automatically renewable at the expiration of the policy period except upon 60 days written notice sent by registered or certified mail to (i) the pool, and (ii) the Commissioner.

10.6. No more than one pool, which shall be defined as the named insured, shall be covered by any contract or policy of excess liability insurance. Any contract of insurance or reinsurance shall be payable by the assuming insurer on the basis of the liability of the pool under the contract or contracts assumed without diminution because of the insolvency of the pool.

10.7. Copies of the complete contracts or policies of insurance or reinsurance, with all endorsements thereto entered into by the pool for the benefit of the pool, shall be filed with the Commissioner.

10.8. No pool shall expose itself to any loss on any one risk or hazard in an amount exceeding 10% of the aggregate annual contribution, unless authorized by the Commissioner.

§114-65-11. Additional Contribution Requirements for Workers' Compensation Pools.

11.1. For the purpose of funding a workers' compensation pool, the members shall make contributions to the pool based on annual payrolls for all employees of each member using rates as adopted by the board and approved by the Commissioner. The rates to be used are those in effect as of the inception of each pool's fiscal year. A plan that allows for consideration of past experience in developing a factor to be applied to a member's contribution may be used provided this plan has been approved by the Commissioner.

11.2. Each workers' compensation pool shall file with the Commissioner the basis for establishing the annual contributions of its members; such contributions must be based on reasonable assumptions and certified by an actuary or other person satisfactory to the Commissioner as to the sufficiency of such contributions.

11.3. The total amount of each member's annual contribution to the workers' compensation pool shall be certified by the board to the governing body of each member at least one month prior to the beginning of the next fiscal year, if practical.

11.4. Each workers' compensation pool may impose upon its members and former members an additional assessment whenever needed to supplement the pool's surplus to assure payment of its obligations.

11.4.a. The workers' compensation pool may assess each participating member an additional proportionate amount, as provided in the pool's member agreement or as provided in the pool's plan filed with the Commissioner to correct a deficit condition.

11.4.b. The board shall submit to the Commissioner a report of the causes of the pool's insufficiency, the assessments necessary to replenish it and the steps taken to prevent a recurrence of such circumstances.

§114-65-12. Distribution of Surplus Funds.

12.1. Any surplus accumulated within a pool's fiscal year, as determined from the annual audited financial statement, may be declared refundable by the board. No distribution of the surplus funds shall be made earlier than twenty-four months following the end of the pool's fiscal year for which a surplus was declared. Such distribution shall not be made until certified by an actuary and the plan has been filed with and approved by the Commissioner.

12.2. Surplus accumulated within a pool's fiscal year shall be used exclusively for the benefit of those members belonging to the pool during that year. The accounting for each pool's fiscal year shall be separate for each year: *Provided*, That the Commissioner may require, and shall permit upon application of the pool, that 5.0%, or such greater amount as the board may elect, of a pool's surplus accumulated within a fiscal year be allocated to a restricted surplus account at the end of that year: *Provided, however*, That the restricted surplus is, subject to the approval of the Commissioner, to be used at the direction of the pool's board.