WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

Do Not Mark In This Box

FILED

2004 OCT 19 P 3: 15

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code§§23-1-1a(j)(3), 23-2-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES____NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: *

TITLE OF RULE BEING AMENDED: * This proposed rule repeals and replaces 85CSR9, "Risk Management"

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 9

TITLE OF RULE BEING PROPOSED: "Risk Management"

DATE OF PUBLIC HEARING: November 19, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
**Comments will close at the end of the public hearing on this rule.

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T. J. Obrokta
Executive Offices
Workers' Compensation Commission
~~4700 MacCorkle Avenue, S.E.~~
Charleston, WV 25304
Fax # (304) 926-5372

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

$16.40

Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

October 19, 2004

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 9
"Risk Management"

Dear Secretary Manchin:

Please consider this letter to be my written approval for the filing of the above-noted proposed Rule.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission have approved the enclosed 85 C.S.R. 9 entitled, "Risk Management," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

G. A. Burton

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 9: Risk Management

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

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1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$0	Unknown	Unknown Decrease	Unknown Decrease	Unknown Decrease
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER:					
Benefit payments	0	Unknown	Unknown Decrease	Unknown Decrease	Unknown Decrease
Benefit related payments	0	Unknown	Unknown Decrease	Unknown Decrease	Unknown Decrease

2. Explanation of above estimates:

This rule provides general guidance to the Commission with regard to its general business operations, including employer premium audits, classifications, the ratemaking process which includes provisions for the prevention of abuse of experience modification factors, owner and officer coverage, adverse risk and various other matter. In addition, the rule allows payments of premium taxes to be required on a basis other than quarterly and requires that interest shall also accrue on penalties. No historical data is readily available to estimate any possible increases in revenue resulting from the implementation of the rules guidance related to ratemaking and receivables management.

Rule Title: Title 85 Series 9: Risk Management

3. Objectives of this rule:

This rule provides for the administration of a fair and equitable system for determining the risk associated with providing workers' compensation insurance coverage and pricing such coverage consistent with the general provisions and purposes of the applicable sections of the West Virginia Code.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule will contribute toward more efficient and thorough rate-making by the Workers' Compensation Commission, and will result in some savings in claims and claim related costs and should promote a more efficient and cost-effective workers' compensation insurance program.

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

It cannot be determined what economic impact this rule change will have on any political subdivisions, specific industries or specific groups of citizens.

C. Economic Impact on Citizens/Public at Large.

This proposed rule would not have a direct economic impact on the citizens of West Virginia.

Date: October 19, 2004

Signature of Agency Head or Authorized Representative

G. A. Burton

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 9

Senate Bill 2013, effective July 1, 2003, substantially changed the provisions of the Workers' Compensation Act [W. Va. Code §§23-1-1 et seq.]. The changes include: the creation of a new state agency, the West Virginia Workers' Compensation Commission; creation of a new governing board, the Board of Managers; and provisions that the agency be separated from the Bureau of Employment Programs. In addition, many statutes were changed and many requirements were imposed on the Commission. The requirements of the Senate Bill include the duty to revisit and revise the rules of the former Workers' Compensation Division of the Bureau of Employment Programs. This rule repeals and replaces the existing rule, provides many changes in the method and manner of administering the program, achieves many requirements of the new statutory provisions. Significant changes to the proposed rule:

1. Provides for terminology consistent with the current law;

2. Requires employers to maintain books and records for 10 years as opposed to 5 years to comply with the new statute of limitations in SB2013;

3. Provides for a penalties section for refusal to provide audit records or meet with the Commission's representatives;

4. Reiterates the employer's duty to update and maintain account information in accordance with the duty emphasized in SB2013;

5. Provides a more comprehensive definition of "independent contractor";

6. Creates a new section for denials of owner/officer coverage due to delinquencies or defaults consistent with the provisions of SB2013;

7. Clarifies the 90 day provision concerning employers coming into the State and the requirement of coverage and clarifies the provision of coverage while employees are temporarily outside the State;

8. Defines "Gross wages" at length;

9. Adds provisions to the determinations sections in order to facilitate certain programs required by SB2013;

10. Changes Emod eligibility from "full experience period" to experience in each coverage period of the experience period. The addition of this provision assists the Commission in implementing rules to prevent employers from avoiding their experience;

11. Provides for experience freezing. The addition of this provision assists the Commission in implementing rules to prevent employers from avoiding their experience;

12. Allows the Commission the opportunity to explore other methods of calculating Emods;

13. Provides details on what the Commission will provide to employers in a loss activity statement and provides the time frame for the provision of the report;

14. Eliminates group retrospective rating plans and individual retrospective rating plans as contained in this rule;

15. Changes the criteria for placement in the adverse risk plan and changes the plan so that so that any violation of listed criteria is sufficient for placement. The Board of Managers no longer has to approve individual placement in the adverse risk plan;

16. Notes the repeal of the self-insurance provisions now contained within 85 C.S.R.18;

17. Re-writes the receivables management provisions to allow collection of premiums at intervals greater than quarterly in accordance with SB2013;

18. Adds a new section concerning the provisions of W. Va. Code §23-2-16(a) [when a company creates a new company and wants their Emod.]. The additions mirror the Commission's current policy on this matter; and

20. Re-writes the penalties section in accordance with statutory changes in 1999.

TITLE 85
LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 9
RISK MANAGEMENT

§85-9-1. General.

1.1. Scope. This exempt legislative rule provides for the implementation of a system designed to underwrite the risk of providing for workers' compensation insurance, as administered by the workers' compensation commission, in accordance with the provisions of W. Va. Code §23-1-1, et seq.

1.2. Authority. W. Va. Code §§23-1-1a(j)(3) and 23-2-4. Pursuant to W. Va. Code §23-1-1a(j)(3), rules adopted by the board of managers are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal and replacement. This rule repeals and replaces 85 C.S.R. 9, entitled "Risk Management."

Effective July 1, 2004, the provisions of section 13 of this rule regarding self-insured employers were repealed and replaced by the implementation of the provisions of 85 C.S.R. 18, entitled "Self Insurance, Self-Administration & Third Party Administrators."

Effective December 6, 1999, this rule was amended at 4.7.a and 4.7.b concerning "misclassifications and reclassifications."

Effective February 6, 1997, this rule originally repealed and replaced 85 C.S.R. 9, entitled "Self-Insured Employers," which was filed on July 2, 1993, and became effective on July 2, 1993. In addition, this rule repealed and replaced sections two, three, four, five, six, seven, and eight of 85 C.S.R. 1, entitled "Administration of the Workers' Compensation Fund," which was filed on April 15, 1986, and became effective on July 1, 1986.

§85-9-2. Purpose of Rule.

The purpose of this rule is to provide for the administration of a fair and equitable system for determining the risk associated with providing workers' compensation insurance coverage and pricing such coverage consistent with the general provisions and purposes of W. Va. Code §23-1-1, et seq., and consistent with the specific provisions and purposes of W. Va. Code §23-2-4.

§85-9-3. Definitions.

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Assets" means probable future economic benefits obtained or controlled by an employer as a result of past transactions or events. These shall include, but not be limited to, good will, business assets, customers, clients, contracts, access to leases such as the right to sublease, assignment of contracts for the sale of products, operations, stock of goods or inventory, accounts receivable, equipment, or transfer of substantially all of its employees or such other assets which have the following three (3) characteristics:

(1) It embodies probable future benefit that involves a capacity, singly or in combination with other assets, to contribute directly or indirectly to future net cash inflows;

(2) A particular employer can obtain the benefit and control others access to it; and

(3) The transaction or other event giving rise to the employer's right to or control of the benefit has already occurred.

3.3. "Audited statements" means the financial statements accompanied by an independent auditor's report which provide reasonable assurance about whether the audited employer has presented fairly the financial position, results of operations, and cash flows in conformity with generally accepted accounting principles. This assurance is derived through a systematic process, governed by generally accepted auditing standards, of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to determine whether (1) financial information is presented in accordance with established or stated criteria, (2) the entity has adhered to specific financial compliance requirements, if applicable, or (3) the entity's internal control structure over financial reporting and/or safeguarding assets is suitably designed and implemented to achieve the control objectives.

3.4. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

3.5. "Classification" shall mean a categorization of employers for the purpose of assessing risk. Classifications are assigned in accordance with the guidelines approved by the board of managers.

3.6. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

3.7. "Commission" means the West Virginia Workers' Compensation Commission as provided for by W. Va. Code §23-1-1, et seq.

3.8. "Compensation fund" means the fund created by W. Va. Code §23-3-1.

3.9. "Coverage period" means the fiscal year (July 1 through June 30) during which an employer is provided workers' compensation coverage by the commission.

3.10. "Decision" means a written statement issued by the commission containing the commission's findings of facts and conclusions as to any issue presented to the commission under this rule. Such decisions shall include, but not be limited to, notices of delinquency and notices of default. Any purported "decision" which is not in writing shall have no legal effect under this rule.

3.11. "Default" means either or both of the following:

a. The failure by an employer which has not made a payment or filed a report due by it under the provisions of the Act and which has received a notice of delinquency but has further failed to make the payment or file the report within the time period specified by the notice. For the purposes of this definition, the employer may be a regular subscriber to the Fund or a self-insured employer with the Fund and either an employer required to subscribe to the Fund or an employer electing to subscribe to the Fund.

b. The omission or failure by an employer to subscribe to and pay premiums into the Fund and to comply with the requirements of the West Virginia Workers' Compensation Act at chapter 23 of the W. Va. Code, and the rules prescribed by the commission, as provided by the Code at §23-2-1(a), prior to the first date of employment of any employee of the employer and thereafter, shall cause default to occur immediately prior to the moment of employment of any employee upon the employer's omission or failure to subscribe or comply by that time. Default, as defined in this subsection, shall begin immediately, without notice as required by W. Va. Code §23-2-5, for delinquencies of subscribing employers, subject the employer to all the penalties prescribed by law, including interest on unpaid amounts, late reporting or payment penalty and other penalties and collection actions prescribed by Code and rules, including particularly the penalty prescribed by W. Va. Code at §23-2-8, that is, the default employer may be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, without the benefit of the common law defenses set forth in that section. This default may be cured through the employer's compliance with the Act and rules. If the default employer has not filed an application for coverage, the application must be filed. The provisions at W. Va. Code §23-2-5(f), are applicable to this default in providing for restoration of the benefits and protection of the Act, prospectively from the date of complete reporting and payment in full of the employer's delinquency and default liability or from the date of a complete filing of an application for reinstatement with adequate reinstatement deposit.

Default as defined in this rule is not affected or altered by the provisions of 5.5.a. of this rule providing for a grace period, for the first thirty (30) days from and including the date of employment of any employee; except that, if the employer files the application and deposit within thirty (30) days from the first date of employment, the employer may avoid the imposition of interest on payments unpaid when due, late reporting or payment penalty or other monetary penalties which may be imposed under law by the commission for the employer's omission or failure to file an application for coverage and premium deposit prior to the first date of employment of any employee. Therefore, the provisions of W. Va. Code §23-2-8, regarding civil liability for the injury or death of an employee, are not affected or altered by provision for such grace period.

3.12. "Delinquent" means an employer has failed to timely pay premium taxes, to timely file a payroll report, to maintain an adequate premium deposit, to honor proper pay orders or to make any other payment due under the terms of this rule or the Act.

a. Proper cause for failure to promptly honor a pay order to an injured worker shall include, but not be limited to, those instances where:

1. A self-insured employer fails to receive notice of a properly promulgated pay order, or

2. Those instances in which a pay order:

A. Has been promulgated in substantive error, or

B. Is on its face obviously in error as to the amount due, or

C. Orders the payment of temporary total disability benefits past the date on which the injured worker returned to work or was released to return to work by the claimant's attending physician.

3.13. "Dependent" has the meaning ascribed to that term by W. Va. Code §23-4-10(d).

3.14. "Domestic services" means services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not domestic services.

In general, services of a household nature in or about a private home include services performed by cooks, butlers, housekeepers, governesses, maids, valets, baby sitters, care-takers, handymen, gardeners, and chauffeurs of automobile for family use.

The term domestic services shall not include services of a household nature performed by an employee in or about the private home of a person when that employee is employed by someone other than a member of the household. For example, employees of maid services, temporary employment agencies, or other businesses do not provide domestic services under the provisions of this rule.

3.15. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.16. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

3.17. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

3.18. "Experience modification factor" means an actuarially determined multiplier which is applied to the premium tax base rate and used to determine the standard premium tax.

3.19. "Good standing" with the commission means that the employer is not delinquent or in default on its obligations to make reports or payments to the commission.

3.20. "Incurred losses" are claims reserves and compensation awards, medical payments, and claims expense payments.

3.21. "Injury" means compensable injuries or illnesses for which reported costs or incurred but not reported costs are incurred by the commission within the meaning W. Va. Code §23-4-1 et seq.

3.22. "Standard premium tax" means the base rate multiplied by the experience modification factor and the number of exposure units. Exposure units means the exposure base divided by the unit of exposure.

3.23. "Owned or controlled" and "owns or controls" means:

3.23.a.

1. Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or

2. Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an employer conducts its overall business operations.

3.23.b. The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant employer's operation is conducted:

1. Being an officer or director of an entity; or

2. Being the operator of a surface coal mining operation; or

3. Having the ability to commit the financial or real property assets or working resources of an entity; or

4. Being a general partner in a partnership; or

5. Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity.

3.24. "Payments" are obligations of the employer for the purposes of this rule including, but not limited to, the payment of premium taxes, the payment of premium deposits, the payment of any obligations due to be paid by an employer authorized by the commission to be a self-insurer, late reporting and payment penalties, and interest.

3.25. "Payroll" means the entire gross wages of all employees, not excluded under provisions of the Act or this rule, or such other wage related exposure base as may be determined by the board of managers

3.26. "Premium" and "premium tax" mean the amounts of money due from an employer to the Fund or commission as a result of quarterly and other periodic assessments by the commission under the provisions of the Act in order to establish, maintain, and replenish the Fund and to pay the expenses of administration of the Fund by the commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit and interest, assessed to all employers.

3.27. "Quarter" means the four calendar quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31 of each calendar year.

3.28. "Regular subscriber" and "subscriber" mean an employer who obtains coverage under any of the workers' compensation insurance plans offered by the commission.

3.29. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self insured status under the provisions of W. Va. Code §23-2-9.

3.30. "This rule" means the instant legislative rule designated as 85 C.S.R. 9, "Risk Management."

§85-9-4. Auditing; Classifications; and Inspections.

4.1. Preservation of records. Every employer subject to the workers' compensation law shall keep, preserve and maintain complete records showing in detail all expenditures for gross wages and the separation of such expenditures in the various classifications of the employer's business. The employer shall keep such additional information necessary to determine classification of the employer's activities as well as other information necessary for a risk assessment. Such records shall be preserved for not less than ten (10) years after the respective times of the transaction upon which the records are based. The employer shall retain all records for periods in excess of ten (10) years in matters involving disputes with the commission until such matter is determined to be resolved by the commission.

4.2. Pursuant to W. Va. Code §23-2-2(a), every employer shall furnish the commission, upon request, all information required by the commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the names and social security numbers of the employees, the gross wages paid to employees during a pertinent period, occupations of employees, classification information, other information necessary for risk assessment, and payments owed to the commission, as premium taxes, premium tax deposits, interest, fees, penalties, or to carry out the various purposes of the Act.

4.2.a. Determinations. The board of managers may make a determination, consistent with the provisions of 7.2 and 7.3 of this rule, to require a periodic listing of all such employees.

4.3. Inspections of records; failure to maintain records. All accounting records, books, records, papers and documents reflecting the amount and the classifications of the gross wage expenditures of an employer, as well as the nature of the business operation, shall be kept available for inspection at any reasonable time by the duly authorized representatives of the commission. If any employer fails to keep, preserve and maintain such records and other information as required under the provisions of this section, or fails to make such records and information available for inspection, the commission may determine the amount of premium tax due from the employer based upon such information as is available and such findings shall constitute prima facie evidence.

4.4. Auditing records; adjustments. The commission shall have the right at any reasonable time to audit any or all books, records, papers, documents, operations and payroll of an employer for the purpose of verifying the correctness of reports made by an employer or such other reports as may be required by State or federal law. The commission shall have the right to make adjustments as to risk assessments, including classifications, allocation of gross wage expenditures to classifications, amount of gross wage expenditures, premium tax rates and amount of premium tax.

4.5. In order to inspect the information specified by the Act and this rule, the commission may direct that an agent or employee of the commission audit the information referred to in this section during the regular business hours of the employer or at another reasonable time and place within the state of West Virginia and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed. Failure to cooperate with such an inspection may subject the employer to penalties as proscribed in this rule and the employer may be considered for placement in the adverse risk plan.

4.5.a. The commission shall make three attempts to establish an appointment for the completion of the audit with the employer or the employer's designated representative. Attempts shall include, but not be limited to: phone calls where contact with the employer or representative are made; by letter; or a physical visit to the employer or representative's address on record with the commission. If the commission fails to obtain an appointment after three attempts, a certified letter shall be sent to the employer requiring the employer to contact the commission's assigned auditor within fifteen (15) days from the date the letter is received to schedule the audit.

4.5.b. Failure by the employer or the employer's representative to accept the certified letter or to arrange an appointment may result in an initial penalty of up to $100. The commission shall provide the employer with notice of the assessment of the penalty by certified mail.

4.5.c. The commission, upon failure of the employer to respond to the initial certified letter, may issue a subpoena for the records to be presented to a location and on a date determined by the commission.

4.5.d. Failure of the employer to provide the records, as required by the subpoena may subject the employer to an additional penalty of up to $500 and consideration for placement in the adverse risk plan as provided for in section twelve of this rule. The commission expressly retains its rights to apply before a circuit judge and compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.

4.5.e. Any employer or representative who fails to keep an established appointment for the completion of an audit, without good cause, as determined by the commission, or who fails to make the required records available may subject the employer to a $500 penalty and placement in the adverse risk plan until such time as the employer presents the required records to the commission or its designated representative but in no event shall placement be for less than one quarter.

4.6. Classifications.

4.6.a. In general, only one risk classification is permitted per policy account. The commission shall assign to the employer the classification yielding the highest base rate consistent with the general business operations of the risk being assessed. In the event an employer changes its employment activities to result in a change in risk classification, the employer shall notify the commission in writing of such change within thirty (30) days of occurrence.

4.6.b. To qualify for more than one risk classification, the employer shall meet all of the following criteria:

1. The activities of the additional risk classification are conducted in a separate location;

2. The employee(s) are not customarily used interchangeably between the two locations; and

3. The activities of the additional risk classification are not in support of or incidental to the activities of the existing risk classification.

4.6.c. When the commission has assigned multiple classifications for an employer's operations, the employer shall keep an appropriate record showing a correct and verifiable segregation of gross wage expenditures into such classifications. If the employer has failed to keep such record, payroll shall be placed under the assigned classification having the highest rate and the employer shall be assessed the premium tax accordingly.

4.6.d. Determinations. The board of managers may make a determination, consistent with the provisions of subsection 7.2 of this rule and the procedures for determinations under subsection 7.3 of this rule, to provide for a system of classification other than that described by the provisions of paragraph 4.6.a.

4.7. Misclassifications and reclassifications. Except as provided below, employer classification changes shall be made and become effective upon the first day of the quarter immediately subsequent to the request for classification review, if such request for review is made by the employer, or upon the first day of the quarter immediately subsequent to the discovery of misclassification, if discovered by the workers' compensation commission.

4.7.a. If misclassification of the employer results in the underpayment of premium tax and is the result of incomplete, inadequate, untimely, or otherwise deficient disclosure by the employer, or of a change in the activities of the employer, without written notice to the commission of such change, which change the employer knew or should have known would cause the commission to place or maintain the employer's account in an improper classification which results in the employer's payment of insufficient premiums, then the commission shall make the class change retroactively to the first day of the quarter in which such change or deficient disclosure occurred and shall demand payment of the liability resulting from the underpayment of premiums and related penalties and interest. Payment of outstanding liabilities will be for a period not to exceed the preceding five (5) years unless fraud or willful intent to mislead the commission is determined.

4.7.b. If an employer makes a complete, adequate, timely and otherwise sufficient application, or when the employer has supplied written notice of its change in activities to the commission, and the commission has failed to act on such information, which results in the overpayment of premiums by the employer, then the commission shall make the class change retroactively to the first day of the quarter in which such change occurred. If an overpayment still exists after adjustment, the commission shall refund the amount of the overpayment. Payment of refunds shall not exceed the period of the preceding five (5) years.

4.7.c. If the employer's account is otherwise in good standing, a refund of the applicable overpayment from 4.7.b shall be made to the employer through a credit to the employer's account. If the commission determines that the refund amount is materially greater than the employer's premium tax payment of the previous quarter, the employer's account shall be credited and a refund issued for the difference within 30 days of receipt of the employer's credited quarterly report.

4.7.d. When an employer's account is retroactively reclassified and it is determined that premium is due and owing to the commission as a result of the adjustment, the employer's account shall not be deemed to be in default or to be delinquent unless the employer fails to pay the premium owed within thirty days of notification or under terms not to exceed thirty-six months. If it is determined that the employer's account was improperly classified as a result of fraudulent or other unlawful actions on the part of the employer, then such employer's account shall be deemed to have been in default as of the date of the first improper premium payment or report. If the employer fails to make payment on the date specified or agreed to by the commission, then such account shall be deemed to have been in default since the first improper or inadequate premium payment or report.

4.8. Records of out-of-state employment. In instances of temporary employment of certain employees without the state, the entire gross wages of those employees shall be included in the payroll reports to the commission.

4.9. Either as an addition to or as part of the audit permitted under this rule, the commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The executive director, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounting records, accounts, papers, records, documents, and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with 85 C.S.R. 7, "Rules for Selected Hearings," and the commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the commission.

4.10. The request for information provided for by the Act, this rule or other rules of the commission, the audit provided for by this rule, or the hearing provided for by this rule may be conducted at any time when necessary to carry out the purposes of the Act including when the commission has good cause to believe that the employer may be delinquent. Such times may be before the issuance of a notice of delinquency, after the issuance of a notice of delinquency, before or after an employer has defaulted or has been terminated or before, during, or after the implementation of an attempt to collect or enforce upon the employer's delinquency or default or resulting from any risk management assessment. The commission will give the employer proper notice and reasonable time to gather the information necessary for the request for information, audit, or hearing.

§85-9-5. Employers.

5.1. Duty to register. Every employer subject to the Workers' Compensation Act (W. Va. Code §23-1-1 et seq.) is required to register and pay premium taxes into the Workers' Compensation Fund for the protection of its employees.

5.1.a. Each employer shall be assigned one policy number per federal employer identification number (FEIN).

5.1.b. An employer, who on the effective date of this rule has multiple policy numbers attributable to a single FEIN number, shall reapply for coverage under a single FEIN within thirty (30) days after the effective date of this rule. The change in the employer's policy will be effective on the beginning date (July 1) of the commission's next fiscal year following the effective date of this rule. The employer's operations will be classified in accordance with this rule. The employer's experience will be blended in determining the employer's experience factor.

5.2. Use of prescribed forms. Any employer subject to the act and required to subscribe and pay premium taxes to the commission for the protection of its employees, as provided in W. Va. Code §23-2-1 et seq., must use the form or forms designated by the commission to subscribe for coverage. All information required by the form or forms must be supplied to the commission in accordance with the directions contained on the form or forms and the provisions of this rule.

5.2.a. Every employer shall have a continuous and ongoing duty to maintain current information on the books of the commission about the employer's activities, risks and rates.

5.3. Foreign corporations; certificate of authority. Upon application for workers' compensation coverage and prior to work being performed in this state by any employee, a foreign corporation must provide a copy of its certificate of authority from the secretary of state of West Virginia.

5.4. Business registration certificate. Upon application for workers' compensation coverage, all applicants must provide a copy of the business registration certificate issued by the tax commissioner pursuant to W. Va. Code §11-1 et seq.

5.5. Application. When the duly executed application form or forms have been returned to the commission with a check for the required deposit, the employer shall be required to provide the commission with any additional or relevant information. The information requested may include, but is not limited to, audited financial statements, as well as any other information necessary to assess the risk being insured. Upon receipt of the application the commission shall send notice to the employer of provisional coverage, including provisional classification. Once satisfied that all requirements have been met, the commission shall promptly send the employer a notice of the acceptance of his application. The notice shall state the date of such acceptance, which shall be midnight following the day of receipt of all such forms and the satisfaction of all such requirements. The date of acceptance and beginning date of the employer's coverage shall be the same date.

5.5.a. An employer may be allowed a grace period from the commission's imposition of monetary penalties resulting from non-compliance with the Act for the first thirty (30) days from and including the date of employment of any employee. If the employer files an acceptable application for coverage and pays an adequate premium tax deposit within thirty (30) days from the first date of employment, the employer may avoid the imposition of interest on overdue payments, late reporting or payment penalty or other monetary penalties which may be imposed under law by the commission. However, the provisions of W. Va. Code §23-2-8, regarding civil liability for the injury or death of an employee, are not affected or altered by provision for such grace period.

Such an individual or individuals who exercise ownership and control of an employing entity shall fully disclose the identities of all other entities for which they have or continue to exercise ownership and control.

5.5.b. The employer's application and the required financial statements must be signed, notarized and sworn to by the president alone or treasurer and secretary of the employer, parent or other related business if the employer, parent, or related business is a corporation or limited corporation; or, by all of the partners if the employer, parent or related business is a partnership; or, by all of the general partners if the employer, parent or related business is a limited partnership; or, by all the members if the employer, parent, or related business is a limited liability company; or, by the owner if the employer, parent or related business is neither a corporation, limited corporation, partnership, limited liability company, nor limited partnership.

5.5.c. Any employer applying for coverage subsequent to the beginning of operations is required to notify or disclose to the commission any and all injuries, which have occurred prior to the date of such application, or provide an affirmative statement that no injuries have occurred. The commission may assess the risks and costs of such injuries at any time for determinations made under the provisions of this rule.

5.6. Exemption determination. An employer make application to the commission on forms supplied by the commission for a letter of exemption from coverage. The commission will review the application for exemption from coverage and make such determination as it deems proper. The commission shall charge each applicant for a letter of exemption from coverage a processing fee in the amount of twenty-five dollars ($25).

5.7. Evaluations. In reviewing an employer's application for coverage, the commission shall make such evaluations, assessments and determinations necessary to carry out the provisions of this rule and the Act.

§85-9-6. Employees Covered; Employers Required to Subscribe; Coverage Elections; Assignment.

6.1. General. An employer's subscription for workers' compensation coverage must cover all of its employees who are mandated coverage and benefits by law.

6.2. Independent contractors. Services performed by a worker for wages are employment subject to this rule unless and until it is shown to the satisfaction of the commission the worker is an independent contractor. In determining whether an independent contractor relationship or an employment relationship exists between the parties, the commission will examine information that provides evidence of the degree of control and the degree of independence exhibited by the parties.

Facts that provide evidence of the degree of control fall into three categories: behavioral control, financial control, and the type of relationship between the parties. As the degree of control rises, the more the facts indicate that an employee/employer relationship exists. The commission is provided with discretion to weigh out the degree of control. Neither all categories of the degree of control, nor each element of every category, is required to determine that an employment relationship exists.

All relationships between workers and businesses are required to be resolved in favor of an employment relationship when the precise nature of the relationship cannot be determined by a review of the facts providing evidence of the degree of control.

6.2.a. Behavioral control is whether the business has a right to direct and control how the worker does the task for which the worker is hired. Evidence of behavioral control includes whether the worker is subject to the business' instructions about when, where, and how to work. The key consideration is whether the business has retained the right to control the details of a workers' performance or instead has given up that right.

6.2.b. Financial control is whether the business has a right to control the business aspects of a worker's job.

6.2.c. In determining whether an independent contractor or employment situation exists, the commission should also examine facts that show the relationship between the parties.

6.3. Seasonal employers for purposes of W. Va. Code §23-2-5(a)(3), shall be determined by the commission on a case-by-case basis. Each employer requesting "seasonal employer" status shall demonstrate to the commission the seasonal nature of its employment over a two-year minimum period. The employer requesting "seasonal employer" status shall petition the commission sixty (60) days prior to the beginning of the coverage period for which such status is requested.

6.4. Elections to not provide coverage. Elections to not provide coverage to certain individuals, such as partners of a partnership, sole proprietors, members of limited liability companies or certain corporate officers, are governed by the provisions of W. Va. Code §23-2-1(g).

6.4.a. Certain corporate officers and all members of a corporation's board of directors may be elected out of coverage by an employer. A corporate officer or member of a corporate board of directors elected out of coverage by an employer shall not be entitled to the benefits of the Workers' Compensation Act as provided in chapter 23 of the West Virginia Code.

1. The election of officers of a corporation is limited to four officers (a president, a vice-president, a secretary, and a treasurer). The four officers must be elected or appointed by the corporation's board of directors as prescribed by the corporate bylaws. The employer is allowed to elect these four officers out of coverage even though their activities consist of work that is ordinarily performed by an officer and work that is ordinarily performed by a worker, an administrator or an employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other worker) is deemed to be working in a "dual capacity."

2. "Other officers" and "assistant officers" may only be elected out of coverage if they are engaged in activities exclusive to their function as a corporate officer. No other officer or assistant officer may be elected out of coverage if they are engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by an officer and also having duties and responsibilities for work ordinarily performed by a worker, administrator or employee who is not an officer.

3. Dual capacity is determined by the duties of the officer/employee. For an officer, other

than the four principal officers to be eligible to be elected out of coverage, that officer cannot have duties and perform work that also would ordinarily be done by a worker, administrator or employee who is not an officer. It is the employer's duty to show that work performed by "other officers or assistant officers" are not dual capacity activities and that the work could only be performed by an officer of a corporation. Examples of such showings are a vice president within a corporation (not the one vice president allowed to be elected out of coverage) that only attends board meetings and the assistant secretary whose only job is to affix the corporate seal to corporate papers.

4. Members of corporate boards of directors may be elected out of coverage by an employer, regardless of whether the member of the board of directors works in a dual capacity. It is the employer's duty to show that the individual elected out of coverage is, in fact, a member of the board of directors and is, in fact, vested with the authority to manage the affairs of the corporation as a member of the employer's board of directors. Members of corporate boards of directors who do not receive "gross wages" from the employer for their activities are not "employees" within the meaning of the Workers' Compensation Act and are not entitled to the benefits of the Act.

6.4.b. Certain members of a limited liability company may be elected out of coverage by an employer. "Limited liability companies" include those entities created pursuant to the "Uniform Limited Liability Company Act" of Chapter 31B of the Code of West Virginia. These entities consist of all forms of limited liability companies, including, but not limited to, manager-managed limited liability companies, member-managed limited liability companies, foreign limited liability companies and professional limited liability companies.

1. Limited liability companies that may elect not to include as an "employee" for purposes of workers' compensation coverage a total of not more than four (4) persons. Each of the persons elected out of coverage by the employer is required to be acting in the capacity of a manager, officer or member of the limited liability company.

6.5. Manner of notification. In the event of an election under W. Va. Code § 23-2-1(g) and subsection 6.4 of this rule, the employer shall serve upon the commission written notice naming the positions not to be covered and the names and social security numbers of the persons occupying those positions, and shall not include such "employee's" gross wages for premium purposes in future payroll reports. Such partner, member/manager, proprietor or corporate or executive officer shall not be deemed an employee within the meaning of the Act after such notice has been served.

6.5.a. Elections not to be covered made under subsection 6.4 of this rule are effective for the next coverage period and each coverage period thereafter without subsequent election.

6.5.b. Elections not to be covered are valid only for the persons named in the written notice to the commission. Such an election is not valid for any person who may later hold the same position, office or title until an amendment to the election is made in accordance with this rule.

6.5.c. Amendments to an election may be made only for the purpose of:

1. Changing the named person for any office or position previously reported on the election; or

2. Making an election for persons who were not previously employed as a sole proprietor, partner, officer, or member of the board of directors on the date the election was made; or

3. Making an election upon application to become a subscriber to workers' compensation coverage; or

4. Adding a person who has previously elected not to be covered under the provisions of subsection 6.4 of this rule if the commission receives written notification sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the commission sixty (60) days prior to the coverage period (fiscal year July 1 through June 30) in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that coverage period. The written notification shall clearly identify the coverage period in which coverage is sought to begin.

6.5.d. Amendments to the annual election may not be made in circumstances where a named employee has only changed corporate offices during the course of a coverage period.

6.6. Owners and officers; Coverage denials when the employer is delinquent or in default.

6.6.a. Employers who fail to subscribe for workers' compensation coverage shall not be afforded coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage be afforded to any "employee" for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.

6.6.b. Employers who are delinquent, absent administrative error, or in default of their workers' compensation obligations shall not be afforded workers' compensation coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage be afforded to any "employee" for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.

1. Coverage for the "employees" specified in this provision shall not be afforded if the employer is delinquent or in default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default or delinquency status, the "employee" nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.

2. In those cases where the employer is in good standing at the time of the injury and the "employee's" injury is therefore covered, but the employer then becomes delinquent or in default, then coverage shall terminate for the "employees" specified in this policy for the time period of the delinquency or default. No indemnity or medical benefits shall be paid for lost wages or medical treatment provided during this period of default or delinquency.

3. In those cases where the employer appears to be in good standing at the time of the injury and the employer appears to have workers' compensation coverage, but the employer then becomes delinquent or goes into default retroactively (for example, as a result of underreporting payroll for a time period) so as to include the date of injury, then coverage shall not be afforded for the "employee" and this exclusion will continue for the life of that injury.

A. Provided: If the total delinquency or default is less than two hundred dollars ($200.00) of premium tax, then the commission will afford the employer an opportunity to cure its retroactive delinquency status by the issuance of a thirty (30) day notice to cure to the employer. If the employer cures its default or delinquency in accordance with this provision, the "employee" will be covered for the injury that occurred during the period of default or delinquency and benefits will be payable for that injury.

4. Benefits paid during periods of delinquency or default for "employees" denied coverage under

this provision shall be considered overpayments.

5. When coverage for an injury is denied to an "employee" as a result of the employer's delinquency or default, the injured "employee" may only contest the commission's order through the provisions of 85 C.S.R. 7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.

6.7. Election to provide coverage. Certain employers, who are exempt from the mandatory coverage provisions of W. Va. Code §§23-2-1 & -1a, may elect to subscribe for coverage for its employees. An employer may elect coverage for its employees if it meets the requirements of W. Va. Code §23-2-1(b).

6.7.a. Employees who are the subject of a default employer's voluntary election to provide them the benefits afforded by subscription to the compensation fund shall have such protection terminated at the time of their employer's default.

6.7.b. Manner of notification. In the event of an election under subsection 6.7 of this rule, the employer shall report and include such employee's gross wages for premium tax purposes in required payroll reports.

6.8. Election by foreign businesses. Foreign employers whose employment in this state is to be for a definite or limited period less than ninety (90) days may choose to subscribe and pay into the workers' compensation fund the premium taxes provided under the Act.

6.8.a. Such an employer shall make application for coverage in the manner provided by this rule and the Act.

6.8.b. Such an employer shall furnish a statement to the commission under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll and any other information which may be required by the commission.

6.9. Employment activities within and outside state borders; reporting.

6.9.a. The entire gross wages of employees, whose contracts of hire have been consummated within the borders of West Virginia, whose employment involves activities both within and without the borders of West Virginia, and where the supervising office of the employer is located in West Virginia, shall be included in the payroll report.

6.9.b. The gross wages of employees of other than West Virginia employers, who have entered into a contract of employment outside of West Virginia to perform transitory services in interstate commerce only, both within and outside the boundaries of West Virginia, shall not be included in the payroll report.

6.9.c. The workers' compensation commission respects the extra-territorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while performing work in the state of West Virginia for a temporary period not to exceed ninety working (90) days in any three hundred sixty-five day period.

1. Employees whose contracts of hire are consummated at a job site in West Virginia or employees who have been hired to work specifically in West Virginia must be protected for workers'

compensation insurance under the West Virginia workers' compensation fund.

6.9.d. Where there is a conflict with respect to the application of the workers' compensation law, the provisions of W. Va. Code §23-2-1c, apply. The employer requesting coverage under such provisions shall supply the names and social security numbers of each employee sought to be covered under such provisions.

6.9.e. Workers' compensation coverage for temporary or transitory employment activities outside the State of West Virginia extends only to the time limit as defined and determined by the requirements of coverage of such other state or other jurisdiction.

6.10. Clergy. Whenever there are churches in a circuit which employ one individual clergyman and the payments to such clergyman from such churches constitute his or her full salary, such circuit or group of churches may elect to be considered a single employer for the purpose of premium payment and reporting to the commission.

6.11. Limited partner. A "limited partner" as defined and provided by the Uniform Limited Partnership Act (W. Va. Code §47-9-1 et seq.) is not an employee of an employer which is a limited partnership subject to the mandatory or elective provisions of the Act, unless that person is employed in the service of the limited partnership for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.12. Investors. A person who is solely an investor and who does not participate in the direction, administration, or control of a business or venture and its activities or investments is not an employee of an employer subject to the mandatory or elective provisions of the Act, unless that person is employed in the service of the business or venture for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.13. Correspondence. All correspondence to the commission from an employer or its representative related to an employer's workers' compensation account, premiums, or coverage issues shall contain the employer's policy number as well as the employer's federal employer identification number.

§85-9-7. Ratemaking.

7.1. Exposure base. Premium taxes shall be based on the total gross wages paid or payable to employees covered by the Act. In accordance with the provisions of 7.2, the board of managers may provide for a different exposure base as it may determine.

7.1.a. Except as modified by the board of managers under the provisions of 7.2, "gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services. The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."

"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation distributions of ordinary income from trade or business activities (do not report losses), draws taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third party sick pay, and disability pay.

7.2. Determinations. The board of managers shall have the authority to make the following determination or determinations at any time and from time to time in accordance with the procedures set out in subsection 7.3 of this rule. Such determinations shall be consistent with the duty of the board of managers to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a solvent workers' compensation fund and the reduction of any deficit that may exist in such fund and in keeping with their fiduciary obligation to the fund.

7.2.a. Classify into classes the employers subject to the Act.

7.2.b. Restructure classes and create or eliminate classes.

7.2.c. Prepare a premium tax rate schedule which shall specify the base rate for each classification.

7.2.d. Adjust the premium tax rate schedule in whole or in part.

7.2.e. Determine the expected loss rate to be used in calculating expected losses which are used to derive the experience modification factor.

7.2.f. Determine the method for limiting losses in the experience modification factor formula or determine that all losses be used in the experience modification factor formula.

7.2.g. Determine the methodology of calculating the experience modification factor and the credibility assigned to the employer's loss exposure.

7.2.h. Employ various methodologies, such as accident year losses in the calculation of base rates and experience modification factors.

7.2.i. Using claims costs incurred (both awarded and incurred but not reported) as the basis, determine the methodology for assessment of administrative costs, the methodology to assess deficit reduction costs, and such other costs pertinent to the determination of required revenues.

7.2.j. Determine a rating plan for adverse risk employers.

7.2.k. Determine the commission's discount rate.

7.2.l. Determine the amount of premium tax which is assessed to reduce any deficit that may exist in the workers' compensation fund.

7.2.m. Determine the methodology of apportioning assessments, related to the maintenance and reduction of the deficit, between regular subscribers and self-insured employers.

7.2.n. Determine the methodology used to calculate the various components of the premium tax liability of self-insured employers.

7.2.o. Determine the parameters of a program for employers who have not incurred a compensable injury for one year or more and who maintain an employee safety committee or similar organization and make periodic safety inspections of the workplace, under which the commission may grant discounts on premium rates;

7.2.p. Determine the parameters of a program for employers who successfully complete a loss prevention program, including the establishment of a drug-free workplace, as prescribed by the commission's safety and loss control office, under which the commission may grant discounts on premium rates;

7.2.q. Determine such other matters as the board of managers deems appropriate in the exercise of its ratemaking authority.

The commission shall make the necessary expenditures to obtain technical assistance and statistical information or such other necessary information to assist the board of managers in the determinations to be made under this subsection.

7.3. Procedures for determinations. Determinations made by the board of managers under the provisions of subsection 7.2, shall be made in the following manner.

7.3.a. The board of managers shall make any determination or determinations at a public meeting or meetings held in accordance with the provisions of 85 C.S.R.14, "Procedural Rules for the Workers' Compensation Board of Managers."

7.3.b. Such determinations shall be filed with the office of the secretary of state for publication in the state register pursuant to the provisions of W.Va. Code §29A-2-1 et seq.

7.3.c. Such determinations shall be filed with the office of the secretary of state at least thirty (30) days prior to the first day of the quarter in which the determination or determinations become effective.

7.4. Computation of standard premium tax. The premium tax assessed to each employer shall be calculated by multiplying the number of exposure units, the specific base rate for the employer's class, and the experience modification factor (Emod).

Exposure Units x Base Rate x Emod = Standard Premium Tax

An employer meeting the criteria in subsection 7.4.b shall be experienced rated. An employer who is not eligible for experience rating shall have an Emod of one and shall be referred to as a base rated employer.

7.4.a. Computation of standard premium tax; base rated employer.

Example, Employer A has $20,000 of payroll. Employer A's class rate is $5 per $100 of payroll.

Employers A's exposure units are calculated:

Total Payroll ÷ Payroll Unit = Exposure Units
$20,000 ÷ $100 = 200 Exposure Units

Employer A's premium tax assessed at the base rate is calculated:

Exposure Units x Base Rate = Standard Premium Tax

200 x $5 x 1.00 = $1000

7.4.b. Computation of standard premium tax; experienced rated employer. The workers' compensation commission recognizes the existence of variability among the employers within each premium tax class. The commission shall determine standard premium taxes for eligible employers by utilizing experience modification factors calculated in accordance with the following methodology and principles.

1. Eligibility. To be eligible for experience rating, an employer:

A. Shall have had an account with the commission during each coverage period of the experience period. For example, if the determined experience period is a certain three (3) fiscal years, an employer who has an account with the commission during any part of each fiscal year is eligible for experience rating.

B. Shall have $1,500 in "expected losses". "Expected losses" means the result generated by transferring the selected incurred loss development factor into an implied percentage of reported losses and applying it to the expected ultimate losses (loss cost multiplied by exposure).

2. Experience freezing.

A. An employer, who has loss experience and who has not qualified to be experience rated because it has insufficient experience under 7.4.b.1.A, maintains that portion of its experience through any period of inactivity.

For example, an employer with loss experience in each of two fiscal years becomes inactive for two years. Upon resuming employment activities, the employer shall be assigned the experience of the two fiscal years in which it was active. The period of inactivity is not used in the calculation of any future experience rating.

B. An employer, who is experience rated, maintains that loss experience through any period of inactivity.

For example, an employer with an experience rating is inactive for two years. Upon resuming activities, the employer is assigned the experience that resulted in the experience rating. The period of inactivity is not used in the calculation of this or any future experience rating.

7.4.c. Experience period. The experience period used to determine experience modification factors shall be an experience period deemed appropriate by the board of managers to capture the necessary claims information. This period may vary between classifications dependent on the risk and nature of the business.

7.4.d. Computation of standard premium taxes.

Example, Employer B has $20,000 of payroll. Employer B's class rate is $5 per $100 of payroll. Employer B's experience modification factor is 1.25. Employer B's standard premium tax is calculated as follows:

Total Payroll ÷ Payroll Unit = Exposure Units
$20,000 ÷ $100 =200

Exposure Units x Base Rate x Emod = Standard Premium Tax

200 x $5 x 1.25 = $1250

7.5. Employee loss activity statement. The commission shall provide to each employer that has claims losses an employer's loss activity statement detailing the activity in the employer's account on a quarterly basis. The employer's statement shall include, but not be limited to, the following:

7.5.a. The injured worker's claim number, name, date of injury, body part injured and nature and cause of injury; and

7.5.b. The paid, reserved and incurred amounts for medical and indemnity benefits for each claim.

7.6. Notification. The commission shall notify every employer whose premium tax is affected under the provisions of section seven (§85-9-7) of this rule. The commission shall provide such notice, in accordance with the provisions of section sixteen (§85-9-16) of this rule, to each affected employer at least thirty (30) days prior to the period for which the rate change is applicable. Except that, for all employers who begin operations between the time that rate determinations are filed with the office of the secretary of state and the effective date of the determinations, the filing of the rate determinations shall constitute sufficient notice of base rate changes.

§85-9-8. Guaranteed Cost Plan.

8.1. Description. Employers who subscribe to the guaranteed cost plan are afforded coverage as required by the Act. Coverage includes insurance for all covered losses for a calculated premium tax. Such premium tax includes contributions for the retirement of any deficit and the costs of administration of the Fund.

8.2. Eligibility. All employers shall be eligible for and assigned to the guaranteed cost plan with the exception of employers who qualify for and are granted an alternative plan under the provisions of this rule.

8.3. Evaluation. The purpose of the commission's evaluation is to assess the risk of the employer and determine the proper classification and premium tax for the employer. The commission shall review and evaluate each application received as part of the registration and application process under the provisions of section five of this rule. The commission shall review such forms to evaluate the accuracy and completeness of information, correctness of classification information, payroll reports and deposits, and such other materials deemed necessary by the commission. As part of the evaluation, the commission may require payroll and classification audits, as well as loss prevention inspections, to more accurately assess risk and charge appropriate premium taxes.

8.4. Classification of employer operations. The commission shall classify every employer according to the risk of their operations and in accordance with the classification schedule determined under the provisions of section seven of this rule.

8.5. Assignment of premium rates. Under the applicable provisions of this rule, the commission shall assign to each employer a base rate of premium tax or a merit rate of premium tax.

8.6. Ongoing authority. The commission shall maintain the authority to review and reevaluate all information and actions related to the employer's guaranteed cost plan from time to time and at any time as the commission determines.

8.7. Compliance. An employer who subscribes or is assigned to the guaranteed cost program shall comply with all applicable provisions of this rule. An employer failing to provide information necessary to the assessment of risk within the time frame requested by the commission may be assigned to the adverse risk plan. Should such assignment be made, no refunds will be made upon subsequent provision of the information.

§85-9-9. Deductibles.

9.1. Description. The deductible plan requires employers to pay the costs of a claim or claims up to a specified limit in return for receiving a discount on premium tax liability. The deductible plan is a loss sensitive plan which shows immediate results to an employer and places emphasis on safety and accident prevention in the workplace.

9.2. Election. If the commission determines an employer meets the financial responsibility requirements and procedural requirements set forth in this rule, an employer may elect coverage under a deductible plan.

9.3. Eligibility. Coverage under a deductible plan is available to employers who request such coverage and satisfy all of the following eligibility requirements.

9.3.a. The employer must be in good standing as defined by this rule.

9.3.b. The employer must meet such standards of financial strength and stability to show evidence of its ability to cover all costs of the deductible plan.

9.3.c. The employer must fulfill requests of the commission for required security.

9.3.d. The employer must not have been in default during the three years prior to the application for coverage under a deductible plan.

9.3.e. The employer cannot have entered into a reinstatement agreement for payment of premium taxes due the commission for the five rating years preceding the beginning date of the deductible policy year.

9.3.f. The employer must be in active status on the first day of the policy year.

9.3.g. The employer must have a minimum of three year's experience.

9.3.h. The employer must be in compliance with all other elements of the workers' compensation Act.

9.4. Application.

9.4.a. An employer may apply for coverage under a deductible plan by filing with the commission an application for the deductible plan in the form prescribed by the commission. The application must be completed in its entirety, including but not limited to the selection of a deductible amount. The absence of pertinent information will result in the application being rejected.

9.4.b. A disclosure of the employer's management and financial structures, notice of the type of security the employer intends to obtain to secure the deductible plan risk, and the employer's financial statements for the three (3) fiscal years preceding the date of application must be attached to the application. The commission may require audited financial statements.

1. The employer's application and the required financial statements must be signed and sworn to by the president alone or treasurer and secretary of the employer, parent or related business if the employer, parent or related business is a corporation or limited corporation; or, by all of the partners if the employer, parent or related business is a partnership; or, by all of the general partners if the employer is a limited partnership; or, by all the members if the employer, parent, or related business is a limited liability company; or, by the owner if the employer is neither a corporation, limited corporation, partnership, limited liability company, nor limited partnership.

2. If an employer does not have audited financial statements for the three years preceding the date of application, the employer must submit a financial statement prepared by an outside accounting firm which addresses each of the three fiscal years immediately preceding the date of application or the period for which the employer has existed, whichever is a shorter period. The commission shall not be required to accept unaudited financial statements.

3. In the case where the applicant is a government employer, the criteria used to determine financial stability, guarantees, and security may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed by the commission in these cases will take into consideration the risk to the commission.

9.4.c. The employer may provide the commission with any additional information deemed relevant to its financial stability. After reviewing the application and financial statements, the commission may request additional information from the employer relevant to the employer's financial stability. The applicant must provide the requested information.

9.4.d. The employer applying for coverage under the deductible plan shall pay to the commission a nonrefundable application processing fee at the time the application is filed. A fee schedule shall be determined by the commission according to the terms of the deductible.

9.4.e. An employer who applies for coverage under the deductible plan shall apply for coverage under this plan at least sixty (60) days prior to the beginning of the quarter for which the employer desires the deductible plan to be effective. If the application and security are approved by the commission, the coverage under the deductible plan will become effective on the first day of the coverage period.

1. When application for coverage under a deductible plan is filed, the commission will review the application and inform the employer if there is a need for additional information. The employer must provide the commission with the additional information in order to complete the application process. The commission will render a decision approving or disapproving the application and defining the security requirements. The employer is required to have adequate security, as defined under the provisions of this section, in place prior to the effective date of the deductible plan.

2. If the employer is unable to obtain adequate security, as defined by the commission, within the sixty (60) day period, the application for coverage lapses. If the employer desires to reapply, the employer shall be required to begin the application process again and pay the nonrefundable application processing fee.

9.4.f. Employers applying for coverage under a deductible plan must continue to make timely premium payments under its current plan or other required payments for its workers' compensation risk until the deductible plan is approved by the commission and the status is effective.

9.5. Commission's review of the application for coverage under a deductible plan.

9.5.a. In reviewing the employer's application for coverage under a deductible plan, the commission shall assess the risk being insured, including the employer's ability to meet its obligations under the Act.

9.5.b. In assessing the employer's application, the commission shall review and evaluate the financial statements filed with the application, the employer's workers' compensation loss experience, and other information.

9.5.c. If an employer relies on the audited financial statements of its parents to be granted coverage under a deductible plan, then the parent company shall provide a parental guaranty in a form acceptable to the commission.

9.5.d. The commission shall review each application to evaluate the accuracy and completeness of information, correctness of classification information, payroll reports and deposits, and such other materials deemed necessary by the commission. As part of the evaluation, the commission may require payment and classification audits, as well as loss prevention inspections, to more accurately assess risk and charge appropriate premium taxes.

9.6. Security and bond.

9.6.a. A security schedule shall be determined by the commission according to the terms of the deductible plans. The commission may direct that this amount be increased or decreased in the future.

9.6.b. The employer shall post security or bond in an amount sufficient to meet all of its obligations to the commission, subject to the provisions of subsection 9.6.f and as defined by the Act and this rule, during the coverage period of the deductible plan. At any time that good cause exists to believe that the bond or security is no longer sufficient to meet the employer's reasonable foreseeable obligations, the commission shall require the employer to post additional or supplemental security or bond to meet these obligations.

9.6.c. There are several acceptable types of security and bond including, but not limited to, occurrence type security or bond, marketable securities, letters of credit and premiums assessed by the commission to insure such risk. The commission has the discretion to find that a particular type of security or bond is acceptable. Requirements for particular types of security or bonds acceptable to the commission are contained in the provisions 85 C.S.R. 18, entitled "Self Insurance, Self Administration & Third Party Administrators," and are expressly made applicable hereto.

9.6.d. Employers applying for coverage under a deductible plan must meet the security requirements defined by the commission. The amount of security required by an employer seeking coverage under a deductible plan shall be based upon, but not be limited to, such criteria as the employer's financial strength including excess liability insurance and the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury loss experience and catastrophe loss experience.

9.6.e. Each employer who obtains coverage under a deductible plan shall annually file a renewal application to continue the privilege of insurance under a deductible plan. Such an application shall be filed in accordance with the provisions of this rule in subsection 9.4 in the form supplied by the commission. At the time the application for continuation of the privilege is filed, or sooner as an individual case may require, the commission shall review the employer's current financial status and security requirements. The commission will notify the employer of the results of an annual review, if a review is performed.

If the commission determines that the security requires adjustment in light of the employer's current financial status, the commission may adjust the security requirements. The commission shall utilize the review procedure set forth in this section to make the security requirement determination.

1. If the commission determines that an employer who obtains coverage under a deductible plan has insufficient security or bond, the commission shall enter an order directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity behind the security or bond is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

The commission shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond; however, the period shall not exceed sixty (60) days from the date of the commission's order. The increased security or bond must meet the requirements set forth in subsection 9.6 of this rule.

2. The employer's failure to obtain additional bond or security, as required by the commission, may result in a revocation of the privilege of obtaining coverage under a deductible plan and termination of the employer's deductible plan, the reassignment of the employer to another workers' compensation insurance plan, and/or the imposition of additional premiums to insure against such risk. The commission shall issue a notice specifying the effective date of any such action or actions.

3. If the commission has not already determined that a decreased adjustment is merited, an employer may file a written petition with the commission for a downward adjustment of its security requirements for purposes of coverage under a deductible plan. The commission may request additional information from the employer, as it considers necessary. The commission shall render a written decision on the petition within ninety (90) days of receipt of the petition, and if it is granted, the commission shall set forth the terms for the new security requirements in the written decision.

9.6.f. The commission may develop a sliding scale to determine the amount of security required to obtain coverage under a deductible plan.

9.7. Initial computation.

9.7.a. In accordance with the provisions of subsections 7.2 and 7.3, the board of managers shall make the following determinations regarding deductible plans:

1. The composition of employer hazard groups;

2. The number of employer hazard groups;

3. The premium range categories;

4. The premium tax discount for each classification; and

5. The size of the deductible.

9.7.b. The determinations shall be reduced to a table or tables to assist in the calculation of premium tax.

9.7.c. The premium tax amount payable by an employer subscribing to the deductible plan shall be a function of the table or tables in 9.7.b and the employer's standard premium tax.

9.7.d. Form of deductibles.

A. All deductible contracts entered between the commission and employers, where the per claim deductible amount is less than twenty thousand dollars ($20,000), shall be in the form of reimbursable deductibles. The commission shall pay all costs of the claim or claims and seek reimbursement from the employer by the issuance of a pay order payable to the commission. All incurred costs shall be utilized to determine the employer's experience modification factor notwithstanding the employer's payment of deductible amounts.

B. All deductible contracts entered between the commission and employers, where the per claim deductible amount is $20,000 or greater, shall be, at the option of the employer, either in the form of a reimbursable deductible or in the form of direct payments to the injured worker or provider.

If the employer chooses a reimbursable deductible, the commission shall pay all costs of the claim or claims and seek reimbursement from the employer by the issuance of a pay order payable to the commission.

If the employer chooses the form of direct payment to the injured worker or provider, the employer shall pay all costs of the claim or claims up to the deductible amount.

All incurred costs shall be utilized to determine the employer's experience modification factor notwithstanding the employer's payment of deductible amounts.

9.8. Maintaining deductible plan status.

9.8.a. Each employer who obtains coverage under a deductible plan shall annually file a renewal application to continue the privilege of obtaining coverage under a deductible plan. The renewal application shall be in a form prescribed by the commission and shall be accompanied by all application materials required under the provisions of subsection 9.4.

The employer must provide the application to the commission at least sixty (60) days prior to the expiration of the coverage period. The employer status as a subscriber to a deductible plan shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing and continues to satisfy the other requirements imposed by the Act, this rule, any other pertinent rule, and any order of the commission. If necessary, in order to ascertain whether the employer has met and can continue to meet all of the requirements and obligations for maintaining deductible plan status, the commission may conduct an audit of all accounting records, books, records, papers, and documents of the employer.

9.8.b. The commission may suspend or terminate an employer's deductible plan status if the employer fails at any time to comply with the requirements of the Act, this rule, any other pertinent rule, or any order of the commission. The commission shall provide the employer with written notice of the lack of compliance and give the employer 30 days to respond. Lack of resolution within this thirty (30) day period will result in suspension or termination. Suspension or termination shall take effect thirty (30) days after the date of notice where the matter has not been resolved.

9.9. Transfers and terminations. Transfers of business assets as well as successor business obligations are provided for in W. Va. Code §§23-2-14, 23-2-15 and section seventeen of this rule.

9.9.a. An employer may not voluntarily terminate a deductible plan during the coverage period.

9.9.b. The commission will review the employer's security and bond requirements and make an appropriate adjustment to the requirements, as set forth in this rule.

9.9.c. Depending on the nature of the modification of business, the commission may require the employer to pay a fee. The fee is assessed to offset the cost incurred to perform any reviews, including actuarial reviews, to determine any new or additional exposure which the modification may cause.

9.9.d. If the modification causes an employer to no longer qualify for the privilege of obtaining coverage under a deductible plan, the commission shall have the authority to revoke the deductible plan status due to changes arising from the modification of business. Settlement of estimated liability at the time of revocation shall be determined by the commission.

9.10. Administrative reports and fees.

9.10.a. An employer who obtains coverage under a deductible plan acknowledges its obligations to continue to make all payments and make all reports required by the Act or by the rules adopted by the commission.

§85-9-10. Reserved.

§85-9-11. Reserved.

§85-9-12. Adverse Risk Plan.

12.1. Description. The adverse risk plan identifies employers with substandard performance levels and imposes additional premium taxes on employers assigned to this plan. The purpose of the adverse risk plan is to encourage employers, by means of the imposition of a higher rate of premium tax, to adhere to the Act and the rules of the commission and improve their performance.

12.2. Identification. The commission shall have the authority to identify and assign certain employers excluding self-insured employers to the adverse risk plan. Such assignment shall only take place after review and evaluation of placement criteria to determine whether a specific employer has substandard performance levels.

12.3. Placement criteria. The commission shall review and evaluate the following placement criteria in its determination of whether an employer be included in the adverse risk plan:

(1) Whether the employer's actual losses exceed the employer's expected losses by a factor determined in accordance with the provisions of subsection 7.2.;

(2) Whether the employer has knowingly underreported its payroll information or wage information required by the commission;

(3) Whether the employer has refused to provide access to its premises and/or provide information requested by the commission, including but not limited to, the provision of information concerning premium payments, classifications, leasing contracts and complete descriptions of business operations;

(4) Whether the employer is in default for two quarters during any twenty-four (24) month period;

(5) Whether the employer is delinquent in filing and/or paying required premium taxes more than two times in any calendar year; and

(6) Whether the employer is not in compliance with this rule.

12.4. The commission may consider additional factors in its determination of whether the employer meets the placement criteria of 12.3(1). Such factors shall include:

12.4.a. Whether the employer has been properly classified for purposes of determining the employer's expected losses;

12.4.b. Whether the employer experienced an anomalous circumstance so as to adversely affect the employer's actual losses; and

12.4.c. Whether the employer is participating in a program developed under the provisions of W. Va. Code §23-2B-1 et seq.

12.5. Evaluation of criteria. The commission may consider the criteria of subsection 12.3 and 12.4, taken as a whole, in its determination of whether to assign an employer to the adverse risk plan: Provided that, any violation of provisions 12.3(1) through 12.3(6) is sufficient to place the employer into the adverse risk plan without consideration of the other factors.

12.6. Effect of assignment to the adverse risk plan. Placement in the adverse risk plan shall result in an increase in the amount of premium tax paid by the employer so assigned. The amount of increase of premium tax shall be determined in accordance with a schedule of adverse risk charges developed by the board of managers under the provisions of subsection 7.2. The increase in premium taxes shall include all payment periods during which the employer is assigned to the adverse risk plan. The amount of increase in premium tax shall be over and above any other assessment of charges under the provisions of the Act.

12.7. Length of assignment. When an employer has been placed in the adverse risk plan, such assignment shall be for a period, to be determined by the commission considering the number and severity of violations, not to exceed one year. Each employer assigned to the adverse risk plan shall develop a remediation plan, acceptable to the commission, which addresses the correction of the placement criteria under subsection 12.3 for which the employer was deficient. The remediation plan from the employer shall be due within thirty (30) days following the date of assignment to the adverse risk plan. Such period may be extended for an appropriate period by the commission if the employer does not correct its actions or falls within any placement criteria developed under subsection 12.3.

12.8. Notification.

12.8.a. Prior to placing an employer in the adverse risk plan, the commission shall:

1. Notify the employer regarding the forthcoming assignment;

2. Provide to the employer the reasons for the forthcoming assignment to the adverse risk plan; and

3. Provide to the employer thirty (30) days for written response to the commission's reasons for assignment to the adverse risk plan.

12.8.b. If an employer is assigned to the adverse risk plan, the commission shall:

1. By its order, notify the employer of the reasons for assignment to the adverse risk plan, the length of the initial assignment to the plan, the additional percentage of premium tax or such other sums due, and the due date of such payment.

§85-9-13. Reserved.

§85-9-14. Monthly, Quarterly and Annual Reporting and Payment Requirements.

14.1. Receivables management. The workers' compensation commission shall administer all aspects of receivables management. Receivables management includes, but is not limited to, collection activities, minimizing the risk of uncollectibles, resolution of specific collection issues to meet the overall financial objectives of the commission, and the establishment and enforcement of collection procedures and processes to assist in the creation of a more financially viable workers' compensation system.

14.2. The commission has the authority to set payment terms and reporting frequencies for all employers. Payment terms and reporting frequencies are set in the sole discretion of the commission.

14.3. Payment terms. Standard payment terms (quarterly payments), as set out in the provisions of W. Va. Code §23-2-5, and elsewhere in this rule, are applicable to all employers with the following exceptions.

14.3.a. Annual payment terms. Employers receiving guaranteed cost coverage with estimated annual premium taxes of $500 or less may, at the discretion of the commission, pay expected premium taxes on an annual basis at the beginning of each coverage period by filing an estimated premium tax report along with the payment for the expected annual premium tax. Such employers must have had workers' compensation coverage with the commission for a period in excess of three years to qualify for these payment terms. The commission may require such employers to pay under these terms.

1. Such employers are required to file at the end of the coverage period, a report reconciling estimated premium taxes with actual required premium taxes in the form prescribed by the commission.

2. Underpayment of estimated premium taxes by 25% or greater may result in the application of interest and penalties.

14.3.b. Monthly payment terms. Employers who meet the following criteria shall be required to file premium payroll reports and pay premium taxes on a monthly basis:

1. Employers who become default on or after the effective date of this rule; or

2. Employers who become delinquent more than one time within any two-year rolling period on or after the effective date of this rule; or

3. Employers who belong to any industry or classification when the commission determines that

all members of that industry or classification should report on a monthly basis.

14.3.c. Failure. Failure of an employer to timely pay premium taxes or other payments, to timely file a payroll report, to timely file a premium tax deposit form, or to maintain an adequate premium tax deposit under this section, shall cause the employer's account to become delinquent. The commission shall notify the employer, in writing, immediately upon its delinquency. Failure of an employer to timely make payments under the provisions of this rule shall result in the imposition of interest beginning with the due date of the payment.

1. The notification shall demand the filing of the delinquent payroll report, payment of delinquent premium taxes, the penalty for late reporting or payment of premium taxes or premium deposit, interest and an amount sufficient to maintain the premium deposit. Such demand shall require the employer to cure its delinquency within thirty (30) days.

2. The failure by an employer to cure its delinquency within the stated time period as provided by the notice shall cause the employer's account to go into default.

14.4. Electronic funds transfer. The commission, at its discretion, may require the electronic transfer of funds for the payment or refund of premium tax deposits. Such transfers may be initiated by the commission or the employer through instructions to the employer's financial institution to debit or credit the employer's account. "Electronic Funds Transfer" means any transfer of funds processed by the commission that is initiated through a terminal, telephone, computer, or magnetic tape for the purpose of instructing or authorizing a financial institution to debit or credit an account.

14.5. Forms. The commission will provide premium tax deposit forms to employers. Employers shall include a properly completed coupon with each deposit.

14.5.a. In the case of a return period, monthly, quarterly or annual, an employer must complete the premium tax deposit form so that it designates the proper return period for which the deposit relates

14.6. Notification. All notices regarding changes in payment terms shall be given in accordance with the provisions of section sixteen of this rule.

§85-9-15. Reports of Gross Wages; Remittances; Requests for Refunds.

15.1. Reports of all information necessary to determine the employer's exposure base under the provision of section seven shall be made in the form or forms required by the commission in compliance with the instructions given thereon.

15.2. Guidelines for reporting. The following guidelines shall be followed as appropriate:

15.2.a. Employers conducting operations in more than one classification shall segregate gross wages by each classification.

15.2.b. If the employer had no employees during a quarter the employer shall report zero wages and shall be assessed the minimum premium tax as prescribed by W. Va. Code §23-2-5.

15.2.c. Theoretical gross wages shall be reported for members of any volunteer fire department, other emergency service organizations authorized under emergency services law (§§ 15-5-1 et seq.) or any other volunteer organization authorized to elect coverage under the provisions of W. Va. Code §23-2-1(b)(7), by multiplying the "whole man hours" worked or served in that capacity by the State minimum wage.

15.2.d. Employers who regularly employ migrant laborers shall report gross wages for premium tax purposes in the same manner as reported in connection with a claim for benefits, taking into account the entire gross wage as defined herein.

15.2.e. Gross wages paid to employees while engaged in training programs must be reported and premium taxes must be paid thereon unless a valid contract exists which requires that said employees be covered by another employer.

15.2.f. Churches. If coverage is elected, total gross wages must be reported for all paid employees including the clergy.

15.2.g. Gross wage apportionment. Any individual or individuals who exercise ownership and control over a business entity shall report their gross wages as equally apportioned over the four quarters of the fiscal year (July 1 through June 30) in which such distribution of wages occurs.

For example, an individual who exercises ownership and control over a business entity receives a one-time payment of gross wages on June 15 in the amount of $28,000. The gross wages will be equally apportioned over the current quarter and the three previous quarters, as follows: first quarter, $7,000; second quarter, $7,000; third quarter, $7,000; fourth quarter, $7,000.

1. Failure to accurately report quarterly estimated wages for any such individual shall result in employer default, assessment of late payment fees, interest, and such penalties as provided by law.

15.3. Remittances.

15.3.a. All remittances shall be made payable to the order of "Workers' Compensation Commission" and shall be mailed with the payroll and premium tax report to the address provided by the commission.

15.3.b. Each report or payment mailed to the commission must be submitted in a separate envelope. Any such report of payment shall be deemed to be received on the date the envelope transmitting it is postmarked by the United States postal service.

15.3.c. Terminations. When an employer fails to provide written notification to the commission that coverage is to be terminated, the commission will assess the minimum premium tax per quarter through the quarter in which the notice is received, with the following limitation:

1. An employer, who fails to notify the commission that coverage is terminated who does not, in fact, have employees and does not conduct business operations, shall be assessed the minimum premium tax per quarter up to a limit of eight (8) quarters.

15.3.d. Payment allocations. The commission shall maintain the authority to allocate payments, including but not limited to, premium tax payments, late reporting and payment penalties, interest, and other premium tax surcharges to the employer's longest outstanding amounts owed to the commission.

15.4. Refunds.

15.4.a. In circumstances where an individual or individuals exercise ownership and control over a business entity that has made application for a refund of premium deposit, as a result of termination of business, or for a refund as a result of misclassification, reclassification or any other reason and such individual or individuals exercise ownership and control over another business entity that is delinquent or in default, or has entered into a current reinstatement agreement with the commission, as defined by the provisions of W. Va Code §23-2-5, then the refund shall be denied under the provisions of this rule. The commission shall apply such refund amount to the outstanding liabilities of the delinquent or default employer.

15.4.b. Upon an employer's application for refund of the premium tax deposit, the commission shall determine whether a gain or loss has occurred in relation to the employer's account. The commission shall determine the following factors: total premium taxes paid, excluding the costs of the administration of the workers' compensation act, deficit maintenance and reduction charges or any other assessments or surcharges, and the cost of known claims reserved. If the total premium taxes paid are less than the costs of known claims reserved, the commission shall deny the request for refund and apply the deposit or applicable portion thereof against the employer's account. If the total claims paid and the costs of claims reserved are less than total premium taxes paid, then the deposit shall be returned to the employer.

15.4.c. The commission shall notify in writing each employer denied a refund under the provisions of this rule.

1. Such notification shall include the reasons for denial as well as the name of the business entity to which account the refund amount has been applied.

15.4.d. Any such application for refund shall include a complete listing of all operations or businesses over which the employer or the employer's owners or officers exercise ownership and control. Such application shall be in a form or forms supplied by the commission.

15.4.e. If an employer is indebted to the workers' compensation commission or any other state agency and that obligation or obligations is later absolved through bankruptcy or insolvency proceedings, the commission shall apply the deposit to the indebtedness.

§85-9-16. Name and Address of Employer; Legal Notice; Fee for Employer Records and Publications.

16.1. General. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the commission for giving any notice required by the statute or by this rule, unless a formal request for a change of name or address is made by the employer as hereinafter provided.

16.2. Change of name or address. Any employer changing the name or the address of the business must promptly notify the commission, in writing, and request that the name or address be changed on the commission's records. Every employer required to register with the Office of the Secretary of State shall provide evidence of any name change from that office.

16.2.a. In case of the appointment of a receivership, the full name of the receivership shall be reported.

16.2.b. If the employer wishes to have certain notices and correspondence directed to a subsidiary, a branch office or agent, the employer must notify the commission in writing of the name and address of said subsidiary, branch office or representative and specify the circumstances under which said notice is to be given. It will be the responsibility of the representative to notify the commission when such representation ceases and to provide a current address to which the employer's notices and correspondence are to be sent.

16.3. Effect of failure to request change of name or address. In the absence of a request for a change of name or address by the employer, any notice given by the commission to the employer at the address and in the name shown on the commission's records shall constitute constructive notice to the employer of any action taken.

16.4. Legal notice to attorney or agent. In any matter arising under this rule in which the commission is required to give notice to a party, if a party is represented by an attorney or other representative, then notice to the attorney or other representative shall be sufficient notice to the party so represented.

16.5. Fee for employer records and publications. The commission may charge a reasonable fee for copies of any employer records and general publications.

§85-9-17. Sale, Transfer, Absorption or Merger of Business; Assignment of Premium Rates.

Transfers of business assets as well as successor business obligations are provided for in W. Va. Code, §§23-2-14 and 23-2-15.

17.1. Obligations of selling employer. If any employer shall sell or otherwise transfer substantially all of the employer's assets, so as to give up substantially all of the employer's capacity and ability to continue in the business in which the employer has previously engaged, or if any employer shall sell or otherwise transfer a portion of the employer's assets so as to affect the employer's capacity to do business, then:

17.1.a. Such employer's premium taxes, premium deposits, interest, and other payments owed to the commission shall be due and owing upon execution of the agreement of sale or other transfer;

17.1.b. Any repayment or reinstatement agreement entered into by the selling employer with the commission pursuant to W. Va. Code §23-2-5, shall terminate upon execution of the agreement of sale or transfer and all amounts owed to the commission shall become due;

17.1.c. The commission shall continue to have a lien against the remaining property of such employer as well as the sold or transferred assets; and

17.1.d. Such employer shall remain liable for all amounts due to the commission until such amounts are fully paid. When a successor employer succeeds to the selling employer's liability, the selling employer remains jointly and severally liable for such obligations.

17.2. Obligations of successor employer. If an employer acquires by sale or such other transfer or assumes all or substantially all of a predecessor employer's assets, then:

17.2.a. Liens for payments owed to the commission for premium taxes, premium deposits, interest, and other payments owed to the commission by the predecessor employer shall be extended to the successor employer;

17.2.b. Liens held by the commission against the predecessor employer's property shall be extended to all assets of the successor employer;

17.2.c. Liens extended to the successor employer by operation of the West Virginia Code or this section are enforceable pursuant to West Virginia Code §23-2-5a;

17.2.d. Unless all amounts owed by the predecessor employer are paid prior to or at the sale or other transfer, prior defaults by a predecessor employer shall accrue to the successor employer for purposes of determining whether the successor employer is in default; and

17.2.e. The successor employer shall assume all liabilities, charges and contingent liabilities of the predecessor employer and shall be subject to modifications to premium rates as contained in subsection 17.3.

17.3. Premium tax rates; sale of business or assets. If an employer acquires by sale or such other transfer or assumes all or substantially all of a predecessor employer's assets, then:

17.3.a. If the new employer does not already have an experience modification factor for that same class, the new employer shall assume the predecessor employer's experience modification factor for the payment of premium taxes until sufficient time has elapsed for the new employer's experience record to be combined with the experience record of the predecessor employer so as to calculate the new employer's own experience modification factor.

17.3.b. If the new employer has an experience modification factor for that same class, the new employer shall be assigned a new rate computed on the basis of the new employer's and the predecessor employer's combined experience record. The new rate will become effective on the first day of the coverage period following the sale or other transfer.

17.3.c. If the new employer is a self-insurer and is conducting business in the same class of the business or assets purchased, then the self-insurer must make application to the commission and post such additional bond as may be required pursuant to the commission's rules governing self-insurance.

17.3.d. If the predecessor employer is a self-insurer, then, if the new employer does not already have an experience modification factor, the new employer shall be assigned the base rate for that class, or if the new employer already has an experience modification factor for that same class, the new employer shall continue under that experience modification factor.

17.4. In the event of sale or other transfer of assets not covered by the above provisions, the commission will make such ruling in the case as is proper, following the principles and policies set forth in this rule.

17.5. Agreements on assumption of charges.

If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the commission, the employer may request the commission give effect to the agreement. The commission may give affect to the agreement, if, in the commission's sole discretion, the agreement meets the fiduciary requirements of the Fund. The commission will issue a written decision on whether it will give effect to the agreement. The commission is under no obligation to give effect to such an agreement, but shall do so if it is reasonable and meets the fiduciary requirements of the fund.

17.6. Certificate of good standing to transfer a business or business assets. If an employer subject to this section pays to the commission, prior to the execution of an agreement of sale or other transfer, a sum sufficient to retire all of the indebtedness that the employer would owe at the time of the execution, then the commission shall issue such a certificate to the employer that the employer's account is in good standing and that the assets may be sold or otherwise transferred without the attachment of the commission's lien.

17.6.a. In the event the employer would not owe any sum to the commission on the date of execution of the agreement, then a certificate of verification of good standing, as previously described, shall be issued to the employer.

17.6.b. For clarification purposes, a "certificate of coverage" which may be issued by the commission to verify that an employer has workers' compensation coverage shall not be an acceptable substitute for a "certificate of good standing to transfer a business or business assets."

17.7. Presumption. The sale or other transfer of an employer's assets shall be presumed to be a transfer of all or substantially all of the assets if the transfer affects the employer's capacity to do business. The presumption may be overcome through the administrative protest procedure outlined in this rule (§85-9-20) and other rules of the commission.

a. The sale or transfer of an employer's assets, determined by the commission to be a succession, shall result in the transfer of the predecessor's deposit to the account of the successor, unless the predecessor provides proof of entitlement to the deposit.

17.8. Construction. The provisions of this section are expressly intended to impose upon such successor employers the duty of obtaining from the commission or predecessor employer, prior to the date of such acquisition, a valid "certificate of good standing to transfer a business or business assets" to verify that the predecessor employer is in good standing prior to sale or other transfer.

17.9. Corporate employers; assignment of premium rates. Pursuant to W. Va. Code §23-2-16(a), a new corporate employer may make application to the commission that the commission assign to it the same rate of payment of premiums as that assigned to a pre-existing corporate employer. Application for assignment shall be on such forms and shall require such information as prescribed by the commission.

17.9.a. As part of the application process, privately held preexisting and new corporate employers are required to provide a copy of each one's schedule of stockholders as listed on its federal tax return. In addition, the applicant shall provide a listing of all other employers related to the preexisting employer or to the new employer, which are:

1. Managed by the same, or substantially the same, management personnel;

2. Have a common ownership by at least forty percent of each corporation's shareholders; and

3. Is the same classification for rating purposes.

17.9.b. The commission, in its discretion, may grant the request if the following conditions have been met.

1. The new corporate employer and the previously existing corporate employer are managed by the same, or substantially the same, management personnel;

2. The new corporate employer and the previously existing corporate employer have a common ownership by at least forty percent of each corporation's shareholders;

3. The new corporate employer and the previously existing corporate employer are in the same class or group as determined by the commission;

4. The pre-existing corporate employer's account is in good standing with the commission; and

5. The commission determines that granting the request is in keeping with the executive director's fiduciary obligations to the workers' compensation fund.

17.9.c. Period of assignment of rate. In keeping with the executive director's fiduciary obligation to the workers' compensation fund, the new corporate employer and the pre-existing corporate employer must maintain the five required conditions to continue to be granted the pre-existing corporate employer's same rate of payment of premiums. Thus, the granting of an assignment will last no longer than one fiscal year.

17.9.d. Review. At any time and at least prior to the expiration of the fiscal year, the commission will review each account to ensure that the five required conditions are being met and, if so, may, at the discretion of the commission, grant an additional assignment of the pre-existing corporate employer's experience modified rate.

1. If the pre-existing corporate employer's experience modified rate changes as a result of its experience, the new corporate employer's rate will change in a like fashion.

2. If the new corporate employer and the pre-existing corporate employer do not meet the five required conditions, then the assignment of the pre-existing corporate employer's experience modified rate shall cease.

3. The commission will also examine the amount of payroll and the claims history of both the new corporate employer and the pre-existing corporate employer to determine whether the rate assignment should continue. The assignment of the pre-existing corporate employer's experience modified rate shall cease if the commission determines that the trended claims experience of the new corporate employer is greater than the assigned modified premium rate. The assignment of the pre-existing corporate employer's experience modified rate shall cease if the commission determines that significant changes have been made to the payroll of the pre-existing corporate employer. The determination of whether the change in payroll is significant is in the sole discretion of the commission.

4. The assignment of the pre-existing corporate employer's experience modified rate shall cease when the new corporate employer has sufficient experience for the Commission to calculate the new corporate employer's own experience modified rate.

17.9.e. "Pre-existing corporate employer" for purposes of this section refers to an employer that existed prior to the creation of the new corporate employer and is not to be construed as an employer that is no longer in existence.

17.9.f. "Same rate of payment of premiums" for purposes of this section refers to the employer's experience modified rate.

§85-9-18. Late Penalties For Filing and Reporting.

18.1. Late penalties. In accordance with and as further described by the provisions of W. Va. Code §23-2-5(b), each employer who shall fail to timely file any payroll report or timely make any payment due under this rule, or both, for any payment period commencing on and after the first day of July, one thousand nine hundred and ninety-five, shall pay a late reporting or payment penalty of the greater of fifty dollars ($50) or a sum obtained by multiplying the premium tax due with the report by the penalty rate applicable to that quarter.

18.2. Interest shall accrue and be charged on all payments, delinquent premium tax payments, penalties and premium deposit shortfall, all of which or whichever may be applicable, pursuant to W. Va. Code §23-2-13.

§85-9-19. Implementation.

The commission shall administer and implement this rule to minimize the workers' compensation fund deficit and encourage the prevention of work related injuries. In accordance with this objective, the commission is imbued with the authority to implement the provisions of this rule in the sequence and in such a manner as the commission sees fit.

§85-9-20. Administrative Protests and Hearings.

20.1. Protest. An employer may contest any order or decision made under the provisions of this rule by filing a request for reconsideration with the commission in accordance with the provisions of 85 C.S.R. 7, "Rules for Selected Hearings," and W. Va. Code §23-2-17.

20.2. Any subsequent administrative hearing proceedings shall be in accordance with 85 C.S.R. 7 "Rules for Selected Hearings."

§85-9-21. Information.

21.1. A request to inspect or copy any public record of the commission shall be made directly to the executive director of the workers' compensation commission under the provisions of West Virginia Code §23-1-4.

21.2. All requests for information must state with reasonable specificity the information sought. The director, upon demand for records made under this rule, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:

21.2.a. Furnish copies of the requested information;

21.2.b. Advise the person making the request of the time and place at which the person may inspect and copy the materials; or

21.2.c. Deny the request stating in writing the reasons for such denial. Such a denial shall indicate that the responsibility of the commission to produce the requested records or documents is at an end, and shall afford the person requesting them the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court of Kanawha County.

21.3. The commission may release, pursuant to a proper request, the following information:

21.3.a. The base premium tax rate for a specific employer;

21.3.b. Whether or not a specific employer has obtained coverage under the provisions of this chapter;

21.3.c. Whether or not a specific employer is in good standing or is delinquent or in default according to the commission's records and the time periods thereof; and

21.3.d. If a specific employer is delinquent or in default, what the payments due the commission are and what the components of that payment are including the time periods affected.

21.4. Without an appropriate release or waiver, the commission may release or communicate publicly only that information which it may release under the provision of subsection 21.3 and W. Va. Code §23-1-4.

21.5. The commission may charge fees reasonably calculated to reimburse the commission for its actual cost in making reproductions of such records, including reimbursement for costs of computer programming where applicable.

§85-9-22. Severability.

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not effect the provisions or the applications of these rules which can be given affect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.