WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Bureau of Employment Programs Workers' Compensation Division TITLE NUMBER: 85

RULE TYPE: Exempt* Legislative

CITE AUTHORITY: 21A-2-6(1); 21A-2-6(14); 21A-3-7(b); 21A-3-7(c); 23-2-4; and 23-1-1

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 9

TITLE OF RULE BEING AMENDED: 85 C.S.R. 9, "Risk Management"

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: April 29, 1999 TIME: 10:00 a.m.

LOCATION OF PUBLIC HEARING: Charleston Civic Center
Room 206

*COMMENTS LIMITED TO: ORAL ____, WRITTEN ____, BOTH X

*** Comments are limited to the revised provisions in §4.7.**

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Randall B. Suter, Counsel
Legal Services Division
One Players Club Drive
Charleston, WV 25311
(304) 558-6100

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

William F. Vieweg, Commissioner

$17.70

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner

West Virginia Bureau of Employment Programs
• Job Service/Job Training Programs • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

March 22, 1999

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

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

Dear Secretary Hechler:

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

Pursuant to Enrolled Committee Substitute for House Bill 4030, Regular Session, 1994, the Department of Commerce, Labor and Environmental Resources was abolished. Pursuant to that same bill and to Executive Order No. 5-94 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Thank you very much for your assistance in this matter.

Very truly yours,

William F. Vieweg
Commissioner

WFV:RBS:kll

Legal Services Division
One Players Club Drive, Charleston, West Virginia 25311-1638 • http://www.state.wv.us/bep
Telephone 304/558-6100 • Facsimile 304/558-6101

Summary of Proposed Exempt Legislative Rule
Statement of Circumstances
Title 85, Series 9
Risk Management

The proposed changes to the "Risk Management" rule involve the treatment of employers who have been misclassified and have, as a result, overpaid or underpaid premiums.

Employers who have changed their business operations, who knew or should have known that the change in activity could result in improper classification, will be reclassified effective the date of the change in operations.

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 9: Risk Management

Type of Rule: __X__ Legislative Exempt ___Interpretive ___Procedural

Agency: Bureau of Employment Programs
Workers' Compensation Division

Address: 112 California Avenue
Charleston, WV 25305

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	Unknown	Unknown	Unknown	Unknown	Unknown
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: Premium Revenue	Unknown	Unknown	Unknown	Unknown	Unknown

2. Explanation of above estimates:

Implementation of this rule change may have an impact on the amount collected for underpayment of premiums and related penalties and interest. In the event of a misclassification of an employer that results in an underpayment of premium tax, the rule change no longer requires a repayment of the resulting outstanding liability by the employer, for a period of up to five years, unless fraud or willful intent to mislead the division is determined. In addition, the guidelines previously established for the handling of an overpayment by an employer, as a result of a misclassification, have been eliminated. Therefore the effect on the change in premium revenue, interest and penalties cannot be determined in light of what may have been collected or refunded without the changes in this rule.

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 specific provisions and purposes of the applicable W.Va. Code.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It cannot be determined if this rule change will have an economic impact on state government.

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.

It cannot be determined what the economic impact will be on the citizens or public at large.

Date: 3-22-99

Signature of Agency Head or Authorized Representative

William F. Vieweg
Commissioner, Bureau of Employment Programs

TITLE 85
LEGISLATIVE RULE
WORKERS' COMPENSATION DIVISION

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 division of the bureau of employment programs, in accordance with the provisions of W. Va. Code, §23-1-1, et seq.

1.2. Authority. -- W. Va. Code, §§21A-2-6(2); 21A-3-7(b) & -7(c); 23-1-1; 23-2-4; 23-2-9; and 23-2-18. Pursuant to W. Va. Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner 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. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. -- ~~January 7, 1997.~~

1.4. Effective Date. -- ~~February 6, 1997.~~

1.5. Repeal and replacement. -- This rule repeals and replaces 85 C.S.R. 9, entitled "Self-Insured Employers," which was filed on July 2, 1993, and became effective on July 2, 1993. This rule repeals and replaces 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 and 23-2-9.

§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 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. "Classification" shall mean a categorization of employers for the purpose of assessing risk. Classifications are assigned in accordance with the guidelines approved by the compensation programs performance council.

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

3.5. "Commissioner" means the commissioner of the bureau of employment programs pursuant to W. Va. Code §§21A-2-1 and 21A-2-12 & -13.

3.6. "Compensation fund" means the fund created by W. Va. Code, §23-3-1, which includes the surplus fund.

3.7. "Compensation programs performance council" means that body created within the bureau of employment programs under the provisions of W. Va. Code, §21A-3-1.

3.8. "Coverage period" means the period of time during which an employer is provided workers' compensation coverage by the division.

3.9. "Decision" means a written statement issued by the division containing the division's findings of facts and conclusions as to any issue presented to the division 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.

3.10. "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 division, 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, penalty premium rate 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, penalty premium rate, late reporting or payment penalty or other monetary penalties which may be imposed under law by the division 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. Furthermore, according to the exception set forth in the last sentence of W. Va. Code, §23-2-1(h), regarding coverage of sole proprietors, partners and corporate officers, notwithstanding the provision for a grace period from the imposition of certain other stated penalties, no sole proprietor, partner or corporate officer who may be lawfully elected out of mandatory coverage under subsections (g) and (h) of W. Va. Code, §23-2-1, may be afforded any benefits of coverage if injured within such thirty day grace period or thereafter until actual subscription occurs through application for coverage prior to the date of injury of such person.

3.11. "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 a claimant shall include, but not be limited to, those instances where:

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

B. 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 claimant returned to work or was released to return to work by the claimant's attending physician.

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

3.13. "Director" means the executive director of the workers' compensation division, who is appointed by the commissioner and who serves as the chief operating officer of the daily operations of the workers' compensation division, as contained in W. Va. Code, §23-1-4.

3.14. "Division" means the workers' compensation division within the bureau of employment programs as provided for by W. Va. Code, §§21A-1-4 and 23-1-1 et seq.

3.15. "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, caretakers, 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.

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

3.17. "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.

3.18. "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 division means that the employer is not delinquent or in default on its obligations to make reports or payments to the division.

3.20. "Incurred losses" are claims reserves consisting of 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 division 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.

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

B. 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:

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

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

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

D. Being a general partner in a partnership; or

E. 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 division to be a self-insurer, late reporting and payment penalties, interest, and penalty premium rate premium tax.

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 compensation programs performance council.

3.26. "Premium" and "premium tax" mean the amounts of money due from an employer to the Fund or division as a result of quarterly and other periodic assessments by the division 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 division. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit, penalty premium rate premium tax and interest, assessed to all employers; and also, that portion of self-insured premium tax assessed in arrears through benefit payorders to the employer for the employer's claimant employees, on behalf of and for the benefit of the Fund as provided by law, assessed in arrears in lieu of direct, advance premium tax payments to the division.

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 division.

3.29. "Remuneration" means "wages" as defined under the provisions of 26 U.S.C. 3121 of the Internal Revenue Code.

3.30. "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.

3.31. "Surplus fund" means that portion of the compensation fund created by W. Va. Code §23-3-1, which is to be set aside to create and maintain coverage for the catastrophe hazard, the second injury hazard, deficit reduction, and all losses not otherwise specifically provided for by the Act.

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

3.33. "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.

§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 five (5) 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 five (5) years in matters involving disputes with the division until such matter is determined to be resolved by the division.

4.2. Pursuant to W. Va. Code, §23-2-2(a), every employer shall furnish the division, upon request, all information required by the division 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 division, as premium taxes, premium tax deposits, interest, fees, penalties, or to carry out the various purposes of the Act.

4.2.a. Determinations. The commissioner and the compensation programs performance council 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 division. 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 division 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 division 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 division 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 division may direct that an agent or employee of the division 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 shall be considered as a placement criteria for placement in the assigned risk plan under the provisions of section twelve of this rule.

4.6. Classifications.

4.6.a. In general, only one risk classification is permitted per policy account. The division 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 division 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:

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

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

C. 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 division 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 commissioner and the compensation programs performance council 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 division.

4.7.a. If misclassification of the employer results in the underpayment of premium tax and is the result of ~~either,~~

~~A. Incomplete~~ incomplete, inadequate, untimely, or otherwise deficient disclosure by the employer, or

~~B. Is the result~~ of a change in the activities of the employer, without written notice to the division of such change, which the employer knew or should have known would ~~causes~~ cause the division to place or maintain the employer's account in an improper classification which results in the employer's payment of insufficient premiums, then the division 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 ~~required~~ for a period not to exceed the preceding five (5) fiscal years unless fraud or willful intent to mislead the division is determined.

~~4.7.b. If misclassification of the employer results in the overpayment of premiums by the employer, then the division 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 division shall refund the amount of the overpayment. Payment of refunds shall not exceed the period of the preceding five (5) fiscal 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 division 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.~~

~~If the employer has a security shortage, the division shall use the refund amount to purchase additional security or annuities to~~

~~reduce the undersecured employer's risk to the division. This provision does not apply to undersecured employers who have entered into an agreement with the division to obtain the proper level of security and are upholding such an agreement.~~

4.7.~~d~~b. When an employer's account is retroactively reclassified and it is determined that premium is due and owing to the division 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 division, 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 remuneration of those employees shall be included in the payroll reports to the division.

4.9. Either as an addition to or as part of the audit permitted under this rule, the division may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The commissioner, 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 division 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 division.

4.10. The request for information provided for by the Act, this rule or other rules of the division, 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 division 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 division will give the employer proper notice and reasonable time to gather the information necessary for the request for information, audit, or hearing.

4.11. When an employer has reported wages of an individual who is not an employee within the meaning of the statute and paid premium taxes thereon, such employer shall, upon proper request being made of the division, and sufficient evidence that the individual in question is not an employee, be entitled to a refund, if an overpayment exists after adjustment, of such premium taxes for a period not to exceed the preceding five (5) fiscal years unless claim liabilities under this employer exist for the individual.

§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.

5.2. Use of prescribed forms. Any employer subject to the act and required to subscribe and pay premium taxes to the division 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 division to subscribe for coverage. All information required by the form or forms must be supplied to the division in accordance

with the directions contained on the form or forms and the provisions of this rule.

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 division with a check for the required deposit, the employer shall be required to provide the division 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 division shall send notice to the employer of provisional coverage, including provisional classification. Once satisfied that all requirements have been met, the division 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 division'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, penalty premium rate, late reporting or payment penalty or other monetary penalties which may be imposed under law by the division. 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. Furthermore, according to the exception set forth in the last sentence of W. Va. Code, §23-2-1(h), regarding coverage of sole proprietors, partners and corporate officers, notwithstanding the provision for a grace period from the imposition of certain other stated penalties, no sole proprietor, partner or corporate officer who may be lawfully elected out of mandatory coverage under subsections (g) and (h) of W. Va. Code §23-2-1, may be afforded any benefits of coverage if injured within such thirty day grace period or thereafter until actual subscription occurs through application for coverage prior to the date of injury of such person.

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 and sworn to by the president alone or appropriate vice-president and secretary or assistant 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 division 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 division may assess the risks and costs of such injuries at any time for determinations made under the provisions of this rule.

5.6. Evaluations. In reviewing an employer's application for coverage, the division 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.

6.1.a. Independent contractors. Services performed by an individual for wages are employment subject to this rule unless and until it is shown to the satisfaction of the division that such individual has been and will continue to be free from control or direction over the performance of such services, both under the contract of service and in fact.

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

6.2. Elections to not provide coverage. In accordance with the provisions of West Virginia Code §23-2-1(g), certain employers may elect not to provide coverage to certain individuals deemed employees within the meaning of the Act, as follows:

6.2.a. An employer, which is a subchapter S corporation under the Internal Revenue Code, of employees, who are officers of and stockholders in the subchapter S corporation;

6.2.b. An employer, which is a sole proprietorship, of an employee, who is the owner of the sole proprietorship;

6.2.c. An employer, which is a partnership, of employees, who are members of such partnership;

6.2.d. An employer, which is a corporation or association, of employees, who are corporate officers or members of the board of directors of the association or corporation. Such officers shall consist of:

A. A president, a vice president, a secretary, and a treasurer, each of whom shall be elected by a board of directors at such time and in such manner as prescribed by its bylaws, and

B. Such other officers and assistant officers as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws: Provided,

(a) Such other officers and assistant officers may not be elected out of coverage by an employer if such employee:

(A) Is engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by an officer and also having duties and work ordinarily performed by a worker, administrator, or employee who is not an officer;

(B) Is ordinarily engaged in performing the duties of a worker, an administrator, or an employee who is not an officer and receives pay therefore in the capacity of an employee; or

(C) Is engaged in an employment palpably separate and distinct from his or her official duties as an officer of the association or corporation; and

6.2.e. An employer, which is a limited liability company, as defined under the provisions of West Virginia Code §31-1A-1, et seq., of employees, who are managers and members of the limited liability company.

A. Such managers and members of the limited liability company may not be elected out of coverage by an employer if such employee:

(a) Is engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by a manager and also having duties and work ordinarily performed by a worker, administrator, or employee who is not a manager;

(b) Is ordinarily engaged in performing the duties of a worker, an administrator, or an employee who is not a manager and receives pay therefore in the capacity of an employee; or

(c) Is engaged in an employment palpably separate and distinct from his or her official duties as a manager of the limited liability company.

6.3. Manner of notification. In the event of an election under subsection 6.2 of this rule, the employer shall serve upon the division 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.

6.3.a. Elections not to be covered made under subsection 6.2 of this rule are effective for the next coverage period and each coverage period thereafter without subsequent election.

6.3.b. Elections not to be covered are valid only for the persons named in the written notice to the division. 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.

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

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

B. 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

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

D. Adding a person who has previously elected not to be covered under the provisions of subsection 6.2 of this rule if the division receives written notification sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the division sixty (60) days prior to the coverage period 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.

6.3.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.

6.4. If an employer has not subscribed to the compensation fund even though it is obligated to do so under the Act, then any partner, proprietor or corporate or executive officer shall not be covered by the Act and shall not receive the benefits of the Act.

6.5. Election to provide coverage. An employer may elect to provide coverage for employees who are exempt from the mandatory coverage provisions of W. Va. Code §§23-2-1 & -1a. An employer may elect coverage for its employees if it employs:

6.5.a. Employees engaged in domestic services; or

6.5.b. Five (5) or fewer full-time employees in agricultural service; or

6.5.c. Employees without the state except in cases of temporary employment without this state; or

6.5.d. Not more than three (3) employees and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter; or

6.5.e. Employees of a church; or

6.5.f. Employees engaged in organized professional sports activities, including trainers and jockeys engaged in thoroughbred horse racing; or

6.5.g. Employees of volunteer rescue squads or volunteer police auxiliary units organized under the auspices of a county commission, municipality, or other government entity or political subdivision; or, area or regional emergency medical services boards of directors in furtherance of the purposes of the emergency medical services act of W. Va. Code, §16-4C-1 et seq.: Provided, That should any of the employers described in 6.5.g. have paid employees, then to the extent of those paid employees the employer must subscribe to and pay premium taxes into the workers' compensation fund based upon the gross wages of the paid employees.

6.6. 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. Manner of notification. In the event of an election under subsection 6.5 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 division 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 division.

6.9. Extra-Territorial coverage.

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 remuneration 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 division 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 (90) days. 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.

6.10.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 division.

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.Members. A "member" as defined and provided by the West Virginia Limited Liability Company Act (W. Va. Code §31-1A-1 et seq.) is not an employee of an employer which is a limited liability company subject to the mandatory or elective provisions of the Act, unless that person is employed in the service of the limited liability company for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.14.Correspondence. All correspondence to the division 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 compensation programs

performance council may provide for a different exposure base consistent with the definition of remuneration or such other exposure base as it may determine.

7.1.a. Except as modified by the compensation programs performance council 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.

7.2. Determinations. The compensation programs performance council 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 compensation programs performance council 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 the calculation of the second injury assessment, 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 estimated future return on investment.

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 annual statement components and the time frames for distributing the annual statement.

7.2.n. Determine such other matters as the compensation programs performance council deems appropriate in the exercise of its ratemaking authority.

The division shall make the necessary expenditures to obtain technical assistance and statistical information or such other necessary information to assist the compensation programs performance council in the determinations to be made under this subsection.

7.3. Procedures for determinations. Determinations made by the compensation programs performance council under the provisions of subsection 7.2, shall be made in the following manner.

7.3.a. The compensation programs performance council 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 Compensation Programs Performance Council."

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 (EMF).

Exposure Units x Base Rate x EMF = 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 EMF 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 x EMF = Standard Premium Tax

200 x $5 x 1.25 = $1000

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

7.4.b.A. Eligibility. To be eligible for experience rating, an employer:

(1) Shall have had an account with the division for the full experience period.

(2) Shall have $1,500 in "expected losses" as defined under subparagraph 7.4.d.B.

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

7.4.d. Calculation of experience modification factor. The experience modification factor shall be calculated in accordance with the following formula.

$$M = (A/E) \times C + (1 - C) + (L \times C)$$

Where,

A is the actual reported loss;
E is the expected losses;
C is the credibility factor; and
L is the loss elimination ratio.

A. "A" or "actual reported losses" means paid losses plus case reserves incurred on a fiscal year basis.

B. "E" or "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).

C. "C" or "credibility" means the result calculated as a function of the expected losses over the previous three years.

D. "L" or "loss elimination ratio" means the calculation used to offset (on average) the impact of limiting the losses to the maximum single loss. In order to minimize the impact of infrequent high severity claims, a maximum at which claim occurrences are capped will be based on the following formula:

$$A(max) = S \times (E/C)$$

Where,

A(max) is the maximum single reported loss;

E is the expected loss;
C is the credibility factor; and
S is the swing factor.

E. "S" or "swing factor" is a cap on the increase of the experience modification factor resulting from a single occurrence. The swing factor may fluctuate by class and will be determined in accordance with subsection 7.2 and 7.3 of this rule.

7.4.e. 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 EMF = Standard Premium Tax

200 x $5 x 1.25 = $1250

7.5. Premium tax surcharges and credits. The division shall apply any applicable surcharge or credit to an employer's premium tax as determined under the provisions of this rule and in accordance with the following formula:

Exposure Units x Base Rate x EMF x (1 + Premium Tax Surcharge) or (1 + Premium Tax Credit) = Premium Tax

If employer B as described in section 7.4.e has a premium tax surcharge of +30%, employer B's premium tax is calculated as follows:

Exposure Units x Base Rate x EMF x (1 + Premium Tax Surcharge) = Premium Tax

200 x $5 x 1.25 x (1 + .30) = $1625

If employer B as described in section 7.4.e has a premium tax credit of -30%, employer B's premium tax is calculated as follows:

Exposure Units x Base Rate x EMF x (1 + Premium Tax Credit) = Premium Tax

200 x $5 x 1.25 x (1 + (-.30)) = $875

7.6. Annual statement. The division shall provide to each employer consistent with the determination under 7.2 and employer's statement detailing the activity in the employer's account for that coverage period. The employer's statement shall include, but not be limited to, the following:

7.6.a. The paid and incurred costs of the employer's claims that occurred during the experience periods underlying their rate calculation;

7.6.b. Individual experience modification factor determination information and the effect of such application of the experience modification factor on the premium tax; and

7.6.c. Amounts calculated to fund the deficit and provide for administrative costs of the division.

7.7. Notification. The division shall notify every employer whose premium tax is affected under the provisions of section seven (§85-9-7) of this rule. The division 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.

§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 division's evaluation is to assess the risk of the employer and determine the proper classification and premium tax for the employer. The division 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 division 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 division. As part of the evaluation, the division 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 division 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 division shall assign to each employer a base rate of premium tax or a merit rate of premium tax.

8.6. Ongoing authority. The division 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 division 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 division 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 division 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 division 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 division 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.

9.3.I. An employer requesting a deductible plan must have a tax liability rating of A or B.

9.4. Application.

9.4.a. An employer may apply for coverage under a deductible plan by filing with the division an application for the deductible plan in the form prescribed by the division. 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 division may require audited financial statements.

A. The employer's application and the required financial statements must be signed and sworn to by the president alone or the vice-president and secretary or assistant 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.

B. 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 division shall not be required to accept unaudited financial statements.

C. 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 division in these cases will take into consideration the risk to the division.

9.4.c. The employer may provide the division with any additional information deemed relevant to its financial stability. After reviewing the application and financial statements, the division 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 division a nonrefundable application processing fee at the time the application is filed. A fee schedule shall be determined by the division 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 45 days prior to the beginning of the coverage period. If the application and security are approved by the division, the coverage under the deductible plan will become effective on the first day of the coverage period.

A. When application for coverage under a deductible plan is filed, the division will review the application and inform the employer if there is a need for additional information. The employer must provide the division with the additional information in order to complete the application process. The division will render a decision approving or disapproving the application and defining the security requirements. The employer will have sixty (60) days from the date of notification to obtain adequate security as defined under the provisions of this section.

B. If the employer is unable to obtain adequate security, as defined by the division, within the sixty (60) day period, the application for coverage lapses. If the employer desires to reapply, the employer may 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 division and the status is effective.

9.5. Division'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 division 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 division 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 division.

9.5.d. The division 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 division. As part of the evaluation, the division 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 division according to the terms of the deductible plans. The division 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 division, 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 division 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 division to insure such risk. The division has the discretion to find that a particular type of security or bond is acceptable. Requirements for particular types of security or bonds are contained in the provisions of 13.6.c.A., - C. and are made applicable hereto.

9.6.d. Employers applying for coverage under a deductible plan must meet the security requirements defined by the division. 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 reserve loss experience and catastrophe reserve 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 division. At the time the application for continuation of the privilege is filed, or sooner as an individual case may require, the division shall review the employer's current financial status and security requirements. The division will notify the employer of the results of an annual review, if a review is performed.

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

A. If the division determines that an employer who obtains coverage under a deductible plan has insufficient security or bond, the division 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 division 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 ninety (90) days from the date of the division's order. The increased security or bond must meet the requirements set forth in subsection 9.6 of this rule.

B. The employer's failure to obtain additional bond or security, as required by the division, 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 division shall issue a notice specifying the effective date of any such action or actions.

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

9.6.f. The division 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 commissioner and the compensation programs

performance council 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 division 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 division 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 division. 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 division 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 utilized by self-insured employers.

If the employer chooses a reimbursable deductible, the division 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 division.

If the employer chooses the form utilized by self-insured employers, the employer shall pay all costs of the claim or claims up to the deductible amount in the same manner and subject to the same administrative payment rules as a self-insured employer.

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 division and shall be accompanied by all application materials required under the provisions of subsection 9.4.

The employer must provide the application to the division at least forty-five (45) 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 division. 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 division may conduct an audit of all accounting records, books, records, papers, and documents of the employer.

9.8.b. The division 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 division. The division 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 division 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 division 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 division 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 division.

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 division.

§85-9-10. Group Retrospective Rating Plan.

10.1. Description. The division shall offer a plan for workers' compensation coverage to groups of employers. The premium tax for this plan will be determined and adjusted

periodically according to the group retrospective rating plan described herein.

10.2. Eligibility. In establishing a group for group rating purposes, the sponsoring group organization or individual employers in the group must satisfy all of the following requirements:

10.2.a. All of the employers within the group must be members of the sponsoring organization. The sponsoring organization must have been in existence for at least two years prior to the last date upon which the group's application for coverage is filed with the division.

10.2.b. The division shall require the organization to document its purpose by its charter, by-laws, or other evidence. The sponsoring organization shall have duly elected officers. So long as all of the other criteria of this rule are satisfied, a parent corporation may be a sponsoring organization and, if it qualifies under the criteria of this rule, a member of a group of its subsidiary corporations for group rating purposes.

10.2.c. The employers in the organization must be in the same classification. Classification group at the time of this rule's adoption refers to the 91 classification codes used to distinguish the different industries for the base rate calculations. The compensation programs performance council has the authority at any time to change the definition of classification group in accordance with the determination provisions of 7.2 of this rule. A sponsoring organization may sponsor more than one group.

10.2.d. The group of employers must consist of at least two individual risk members and the aggregate workers' compensation premiums of the members are, as determined by the division, expected to exceed $250,000 during the coverage period.

10.2.e. The formation and operation of the group program in the organization shall be required to provide a written plan for a safety and loss control program and claims handling for the employers in the group. The division shall require the group to document its plan or program for these purposes and have the plan

or program approved by the division. Groups reapplying annually for group coverage shall document and submit the results of prior programs.

10.2.f. Each employer seeking to enroll in a group for workers' compensation coverage must have active workers' compensation coverage according to the following standards:

A. Unless a dispute of the obligation has been lodged by the application deadline, the employer must be current on any and all payments, premiums, administrative costs, assessments, fines or monies otherwise due to any fund administered by the workers' compensation division, including amounts due for retrospective rating, at the time of the application deadline date;

B. Employers subject to a reinstatement agreement for payment of premiums or assessment obligations are eligible if an agreement has been reached with the division to resolve the issues relating to the reinstatement and if the employer is actively participating in such a reinstatement plan;

C. The employer cannot have cumulative delinquencies in excess of fifty-nine days within the eighteen months preceding the application deadline date for group rating;

D. The employer must have a tax liability rating of A or B as defined by section fourteen of this rule; and

E. The employer must be in an active status on the first day of the coverage period for group rating. An employer who becomes active and obtains coverage after the first day of the coverage period may not participate in group rating for that year.

10.2.g. All members of the group must have entered into a written agreement among themselves, which includes at least the following:

A. A statement setting forth their reasons for purchasing insurance under a group retrospective rating plan;

B. A statement attesting that all members have the same classification code;

C. A formula determining how any additional premium taxes due the division or any premium taxes returned by the division as a result of the operation of the group retrospective rating plan will be allocated to each member of the group;

D. An undertaking by each member to pay to the division its allocated share of any additional premium taxes and to allocate responsibility if any member fails to pay its allocated share when due, so that the group will pay, in full, any additional premium taxes owed the division; and

E. An undertaking to establish and maintain a safety committee of its members to assist all members in reducing the incidence of losses and controlling the severity of losses of the group_including documentation of compliance with the safety and loss control plan at the time of renewal. All documentation will be reviewed by the division's safety director for approval.

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10.3. Group status. Each employer who is a member of a group shall be jointly and severally liable for the workers' compensation obligations of other members of that group. No employer may apply for or be a member of more than one group for the purpose of obtaining workers' compensation coverage.

10.4. Representation for a group retrospective rating plan.

10.4.a. A group that has been established and has been accepted by the division for the purpose of a group retrospective rating plan shall have no more than one permanent authorized representative for representation of the group and the individual employers of the group before the division in any and all risk-related matters pertaining to participation in the workers' compensation fund.

10.4.b. The selection of an authorized representative must be made by submission of a completed form supplied by the division, and any change or termination of the authorized representative can

be made only by a subsequent submission of the form. Only an officer of the group may sign such a form.

10.4.c. Notwithstanding the provisions of 10.4.a of this rule, an individual risk in a group may retain the services of an attorney and /or other authorized representative for claims-related matters before the division, through submission of the appropriate authorization for representation in such individual claim files. The division will recognize only one authorized representative for notice and appeal purposes.

10.4.d. For an individual employer which has left a group, the individual employer may retain an authorized representative for both claims and risk matters.

10.5. Application.

10.5.a. An application for a group retrospective rating plan shall be made in a form provided by the division and shall be completed in its entirety with all documentation attached as required by the division. The absence of pertinent information will result in the application being rejected. The application shall be signed by an officer of the organization to which the members of the group belong, and each individual employer in the group shall be identified in the application and shall individually sign a form provided by the division indicating a desire to be a part of the group for rating purposes and an acknowledgment of the criteria and rules for the group retrospective rating plan, as well as an acknowledgment by each employer of its joint and several liability for the workers' compensation obligations of other members of the group. The division may request of individual employers or the group additional information necessary including, but not limited to financial statements, safety and loss control inspection reports and claims reports, for the division to rule upon the application for group coverage. Failure or refusal of the group to provide the requested information on the forms or computer formats provided by the division shall be sufficient grounds for the division to reject the application and refuse the group's participation in the group retrospective rating plan. Individual employers who are not included on both the final group roster and the individual

employer application by the application deadline will not be considered for the group plan for that coverage period. All rosters, computer formats or typewritten, must be submitted by the application deadline.

10.5.b. Completed applications for group coverage shall be filed one full quarter prior to the beginning of the coverage period.

10.5.c. An application for group rating is applicable to only one coverage period. The group must reapply each period for group coverage. Continuation of a plan for subsequent periods is subject to timely filing of an application on a periodic basis and the meeting of eligibility requirements each period. Timely filing, in this instance, means filing ninety (90) days prior to the end of a coverage period. An individual employer member of a continuing group who initially satisfied the homogeneous requirement of this rule shall be disqualified from participation in the continuing group for failure to continue to satisfy such requirement.

10.5.d. Once a group has applied for a group retrospective rating plan, the organization may not voluntarily terminate the application during the division's evaluation period. All changes to the original application must be filed on a division form provided for the application for the group retrospective rating plan and must be filed prior to the filing deadline. Any rescissions made must be completed in writing, signed by an officer of the organization to which the members of the group belong, and filed prior to the filing deadline. The group may make no changes in the application after the last day for filing the application. Any changes received by the division after the filing deadline will not be honored. The latest application form or rescission received by the division prior to the filing deadline will be used in determining the premium obligation.

10.5.e. In reviewing the group's application, if the division determines that individual employers in the group do not meet the eligibility requirements for group rating, the division will notify the individual employers and the group of this fact. Employers found to be ineligible will be given fourteen (14) days

to resolve all issues surrounding their ineligibility. If eligibility issues are unresolved, the group may continue in its application for group coverage without the disqualified employers, if the group still satisfies the minimum requirements for group rating as provided by this rule.

10.6. Calculation of group retrospective premium tax.

10.6.a. Standard premium shall be calculated for the members of the group. Standard premium for purposes of the group retrospective rating plan shall mean the aggregate premium tax of the group calculated according to the terms of the individual employers' applicable policies.

10.6.b. Adjustment of standard premiums on a loss sensitive basis. Standard premiums calculated in 10.6.a shall be adjusted on the basis of actual incurred losses and rating values.

10.6.c. The compensation programs performance council shall approve any rating schedule in accordance with the determinations provisions of section seven of this rule.

10.6.d. Retrospective premium calculation. The retrospective premium tax equals the sum of the premiums for the individual policies of the employers who are members of the group. Such premiums equal the sum of 10.6.d.E. and 10.6.d.F, below. Determine the following:

A. Incurred subject losses. In order to keep the expected total loss amount used in the premium computation within a predictable range, each loss used in computing the final adjusted premium is capped at an amount negotiated with the group's representative.

B. Incurred subject losses multiplied by the sum of those rating values shown on the schedule as applicable to incurred subject losses.

C. Standard premium multiplied by the sum of those rating values shown in the schedule as applicable to standard premium.

D. Other charges calculated according to rating values shown in the schedule or in other agreements between the individual group member and the division.

E.

(a) The sum of 10.6.d.A, -B, -C and -D above, divided by the value in 10.6.d.E.(b) below.

(b) One minus the sum of the assessment factors shown in the schedule.

F. Premiums identified as "Non-Subject," after adjustment to reflect the increase or decrease in the basis thereof from the basis as estimated at the policy's inception. Non-subject premium refers to exposures that are not subject to the experience or retrospective rating.

10.6.e.

A. Aggregate stop. If an aggregate stop amount is shown in the schedule, the division will not use more than such aggregate stop amount as the incurred subject losses in this formula for all policies to which this group rating plan applies, subject to 10.6.e.B.

B. If an aggregate stop limit is shown in the schedule, that is the maximum incurred subject loss the division will exclude from the formula for all policies which this group rating applies because of the application of 10.6.e.A.

10.7. Schedule of adjustments.

10.7.a. The division will calculate the first interim estimated premium eighteen (18) months after the plan's inception. The division will recalculate the interim estimate premium annually thereafter until all subject losses are settled or at an earlier time by agreement with the group when a final reconciliation and adjustment are computed.

10.7.b. Payment of additional premium to the division, or the return of premium to the group, resulting from the calculation or recalculation of the adjusted premium, shall be according to the agreement between the division and the group.

10.8. Cancellation.

10.8.a. If, without the division's written consent, any policy subject to the group rating plan is canceled, and if an aggregate stop amount calculated as a function of the standard premium is shown in the schedule, then the division will change the way the aggregate stop amount will be calculated, as follows:

A. The standard premiums used by the division as the basis of the aggregate stop amount will be the sum of the annualized standard premiums for all policies in effect at any time during the term (or the terms) to which this plan applies, according to the division's audit or the basis thereof.

10.8.b. If the division cancels any policy subject to group rating, the standard premium for the canceled policy will be the pro-rata share of the policy's annual standard premiums for the period of coverage, subject to adjustment on the basis of the division's audit or reasonable estimate of the actual premium basis during that period.

§85-9-11. Individual Retrospective Rating Plan.

11.1. Description.

11.1.a. The plan may be used upon election by the employer and acceptance by the division.

11.1.b. This plan adjusts the premium tax on the basis of losses incurred during the period of coverage. The intent is to charge a premium which reflects those losses. Within the principle of insurance, retrospective rating establishes the reasonable cost of workers' compensation coverage by using losses

incurred during the coverage period and adding the division's expenses and other applicable charges.

11.1.c. This plan provides an incentive to the employer to control and reduce losses because the retrospective premium will be the result of losses during the coverage period. To the extent that the employer controls losses there is a reward through lower premiums.

11.1.d. The retrospective premium for a coverage period is based on the incurred losses during that period. Premium under the plan is the direct result of such incurred losses because the plan reflects the cost of losses, subject to limitation, plus the division's expenses and other applicable charges.

11.1.e. Retrospective rating is superimposed upon the standard premium.

11.1.f. Table of expense ratios. As part of its determinations under the provisions of section seven of this rule, the compensation programs performance council may develop expense ratio tables to indicate the total amount of the division's administrative expenses and other applicable charges. The total amount for such charges is determined by multiplying the standard premium of the risk by the factor for that size premium in the Table of Expense Ratios.

11.2. During the course of the coverage period in which an employer subscribes to the retrospective rating plan, the employer shall pay premium taxes in the same manner and in the same amount required under the provisions of the guaranteed cost plan (section eight) and the provisions of the receivables management section (section fourteen).

11.3. Election. An employer who meets the eligibility requirements of 11.4 may apply for coverage under a retrospective rating plan.

11.4. Eligibility. Coverage under a retrospective rating plan is available to an employer if the estimated annual standard premium is at least $50,000.

11.5. Application.

11.5.a. An employer may apply for coverage under a retrospective rating plan by filing with the division an application for the retrospective rating plan in the form prescribed by the division. The application must be completed in its entirety. The absence of pertinent information will result in the application being rejected.

11.5.b. The employer applying for coverage under the retrospective rating plan shall pay to the division an application fee of $2,500.00 at the time the application is filed.

A. The employer's application and the required financial statements must be signed and sworn to by the president alone or the vice-president and secretary or assistant 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.

11.5.c. An employer who applies for coverage under the retrospective rating plan shall apply for coverage under this plan at least 45 days prior to the beginning of the coverage period. If the application is approved by the division, the coverage under the retrospective rating plan will become effective on the first day of the coverage period.

A. When an application for coverage under a retrospective rating plan is filed, the division will review the application and inform the employer if there is a need for additional information. The employer must provide the division with the additional information in order to complete the application process. The division will render a decision approving or disapproving the application.

11.5.d. Employers applying for coverage under a retrospective rating plan must continue to make timely premium payments or other required payments for its workers' compensation risk until the retrospective rating plan is approved by the division and the status is effective.

11.5.e. The division 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 division. As part of the evaluation, the division may require payment and classification audits, as well as loss prevention inspections, to more accurately assess risk and charge appropriate premium taxes.

11.6. Calculations.

11.6.a. The retrospective premium formula. The premium for a risk subject to this plan is determined by the following retrospective premium formula:

Retrospective premium tax =

1. Basic premium (reflecting maximum and minimum premium)

Plus

2. Converted Losses

This formula produces a retrospective premium which shall be subject to the minimum retrospective premium and the maximum retrospective premium.

11.6.b. Definitions used in the formula.

A. "Basic premium" means a portion of the standard premium. It is determined by multiplying the standard premium by a basic premium factor. Such factors shall be based on the table of expense ratios and the table of insurance charges.

The "Expense" portion of the basic premium is that allocation of the standard premium intended to pay for the administration of the division, the retirement of any deficit, and such other charges not related to direct claims costs.

The "Insurance charge" reflects the net expected converted losses for which the retrospective premium formula will not generate additional premiums as a result of the application of minimum and maximum premium factors (See 11.6.b.D. and 11.6.b.E.) or per-claim loss limitations (See 11.7.a.).

B. Converted losses are based on the incurred losses of the employer during the period of the policy or policies to which this plan is applied. A loss conversion factor is applied to such losses to produce the converted losses.

C. The loss conversion factor covers claim adjustment expenses and the cost of the division's loss related services.

D. The minimum retrospective premium is a percentage of the standard premium. It is the least amount of premium to be paid by the employer subject to this plan. The minimum retrospective premium factor is established by agreement between the employer and the division. The basic factor varies in accordance with the minimum premium so established. The basic factor represents provisions for non-loss expense and the "insurance charge" for specific and aggregate limits on an employer's claims liabilities entering the retrospective premium calculation.

E. The maximum retrospective premium is a percentage of the standard premium. It is the greatest amount of premium to be paid by the employer subject to this plan. It has the effect of placing a limit on the impact of incurred losses on the retrospective premium. The maximum retrospective premium factor is established by agreement between the employer and the division. The basic factor varies in accordance with the maximum premium so established.

11.7. Elective elements. The employer and the division may agree that either or both of the following additional elective

premium elements will be included in the retrospective premium formula:

1. Per-claim loss limitation;

2. Retrospective development premium.

11.7.a. Per-claim loss limitation. Use of this elective element is intended to avoid the possibility that high individual losses will have too great an impact on the retrospective premium. Election of a loss limitation places a limit on the amount of incurred loss arising out of any one claim, which will be included in the retrospective premium formula. The basic factor will vary in accordance with the per-claim limit so elected.

11.7.b. Retrospective development premium. The purpose of this elective-premium element is to stabilize premium adjustments for employers subject to this plan. Retrospective development premium anticipates future increases in loss costs. The retrospective development premium is included only in the first three adjustments of the retrospective premium and is not included in any later premium computations.

A. Retrospective development premium is computed as shown below:

Standard Premium x Retrospective Development Factor x Loss Conversion Factor

B. Retrospective development factors shall be determined by the compensation programs performance council in accordance with the provision of section seven of this rule.

11.7.c. Calculations of elective elements. The retrospective premium for an employer which has elected either or both of the additional elective premium elements is determined by the following formula:

Retrospective Premium Tax=

1. Basic Premium Tax (reflecting maximum and minimum premium, and per-claim loss limitation)

Plus

2. Converted Losses

Plus

3. Retrospective Development Premium

The retrospective premium shall not be less than the minimum retrospective premium nor more than the maximum retrospective premium.

11.8. Retrospective rating options. The parameters of each retrospective rating plan are subject to agreement between the employer and the division. These include the loss conversion factor, minimum premium factor, maximum premium factor, per-claim loss limitation, and retrospective development. The basic factor is determined in accordance with parameters so agreed upon.

In order to facilitate the use of retrospective rating, the division may issue (in tabular form) one or more "plans" based on the most commonly selected sets of parameters.

11.9. Cancellation.

11.9.a. Determination of premium upon cancellation.

A. Cancellation by the division, except for non-payment of premium.

B. Cancellation by the employer when retiring from business provided:

(a) All work covered by the policy has been completed, or

(b) All interest in any business covered by the policy has been sold.

C. If the reason for the cancellation is A or B above, retrospective premium for the canceled policy shall be computed as follows:

(a) Standard Premium: Determine the premium for the canceled policy on a pro-rata basis. The resulting premium shall be the Standard Premium.

11.9.b. Retrospective Premium: The retrospective premium for the canceled policy shall be determined by using the retrospective premium formula in this plan. Use the standard premium to establish the basic premium and, if applicable, any retrospective development premium for the formula.

11.9.c. Exception for non-payment of premium: If the cancellation by the division is because of non-payment of premium by the insured, the maximum retrospective premium shall be based on a standard premium which shall be the premium for the canceled policy extended pro-rata to an annual basis.

11.9.d. Cancellation by the employer, except when retiring from business for the reasons stated above.

A. Determine the retrospective premium as follows:

(a) The premium for the canceled policy is to be calculated on a short rate basis.

(b) Use the retrospective premium formula in this section of the plan to establish the retrospective premium as shown below:

(A) Basic premium and if applicable, excess loss premium and retrospective development premium shall be computed by using the short rate premium above as the standard premium.

(B) Minimum retrospective premium shall be the short rate premium.

(C) Maximum retrospective premium shall be based on a standard premium which shall be calculated by using the actual payroll for the period the policy was in effect, extending that payroll pro-rata to an annual basis and then multiplying such extended payroll by the authorized rates and experience rating modification.

11.10. Computations.

11.10.a. First computation of retrospective premium. As soon as practicable after data has been prepared in accordance with this section (losses will be valued six months after the close of the coverage period), the first retrospective premium computation shall be made by the division. The division shall notify the employer and return premium if the retrospective premium is less than premium previously paid. The employer shall pay any premium greater than premium previously paid.

If the employer and division agree, the first computation of the retrospective premium shall be the final adjustment of premium under this plan. In the absence of such an agreement, additional retrospective premium computations shall be made by the division in accordance with 11.10.b.

11.10.b. Retrospective premium adjustment after first computation.

A. If the first or any other retrospective premium computation is not final, a subsequent computation and adjustment of premium subject to this plan shall be made by the division. Losses will be valued twelve (12) months after the date of valuation used in the previous computation. The procedure for such later computations shall be the same as 11.10.a, except that premium calculations shall be based upon the latest data available. If the employer and division agree, the latest computation shall be the final retrospective premium. Unless such an agreement has been made, the division shall continue to make such additional retrospective premium computations at intervals of 12 months.

B. If a subsequent computation of retrospective premium results in no change from the previous computation, the division shall notify the employer that there is no change in the premium payment and that subsequent computations of retrospective premium will be made in accordance with 11.10.c.

11.10.c. Final computation of retrospective premium.

A. Subsequent computations of retrospective premium shall be issued by the division in accordance with 11.10.b. above until both the division and employer agree that the latest computation shall be the final retrospective premium under this plan.

B. When the employer and division have agreed to the final retrospective premium calculation, a revision of that premium adjustment is not permitted except for clerical error.

§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 division and improve their performance. A further purpose is to provide an insurance plan for those employers with an elevated risk and whose inclusion with other employers results in an unacceptable sharing of risk by those other employers.

12.2. Identification. The division 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 with the approval of the compensation programs performance council after review and evaluation of placement criteria to determine whether a specific employer has substandard performance levels.

12.3. Placement criteria. The division shall review and evaluate the following placement criteria in its determination of

whether to recommend to the compensation programs performance council that 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 division;

(3) Whether the employer has refused to provide access to its premises and/or provide information requested by the division;

(4) Whether the employer is in default;

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

(6) Whether the employer has failed to make a proper payment or payments to a medical provider or the claimant, as required by the applicable provisions of the West Virginia Code or rules promulgated thereto;

(7) Whether the employer is not in compliance with this rule;

(8) Whether the employer has been proven to be out of compliance with any federal or state safety laws and regulations directly affecting employee safety or health; and

(9) Whether an individual or individuals, who exercise ownership and control over an employer assigned or previously assigned to the adverse risk plan, exercise ownership or control over a new or existing employer.

12.4. The division shall 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 is engaged in a unique employment category such that there is no suitable classification for purposes of determining the employer's experience modification factor;

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

12.4.d. 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 compensation programs performance council shall 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.

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 compensation programs performance council 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 division 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 division, 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 division 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 recommending to the compensation programs performance council that an employer be included in the adverse risk plan, the division shall:

A. Notify the employer regarding the forthcoming recommendation;

B. Provide to the employer the reasons for recommending assignment to the adverse risk plan;

C. Provide to the employer thirty (30) days for written response to the division's reasons for recommending assignment to the adverse risk plan;

D. Provide a copy of any such employer response to the compensation programs performance council when the division recommends including an employer in the adverse risk plan.

12.8.b. After the compensation programs performance council has determined that an employer be assigned to the adverse risk plan, the division shall:

A. 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. Self Insurance.

13.1. Self insurance status. An employer may become self-insured with respect to the compensation fund and the catastrophe reserve of the surplus fund or to the compensation fund but not the catastrophe reserve of the surplus fund, if the division, with the approval of the compensation programs performance council,

determines it meets the financial responsibility requirements and procedural requirements set forth in W. Va. Code, §23-2-9, and in this rule.

An employer owned by or related to another business may have its compensation risks self-insured by the parent or related business in lieu of the employer itself being self-insured, if the relationship between the employer and parent or related business is adequately documented, as determined by the division, and if the parent or related business can satisfy the requirements of the Act and this rule for both itself and for the subject employer.

Any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall give security or bond in the form, of the type, and in the amount required by the division, with the approval of the compensation programs performance council, pursuant to the Act and this rule. Additionally, any employer granted the privilege of self-insurance, as to all or part of the compensation fund, shall abide by the requirements for maintaining, modifying, or terminating the self-insured status, as set forth in the Act and this rule.

13.2. Application.

13.2.a. An employer may apply for self-insurance by filing with the division an application for self-insurance in the form prescribed by the division. If a parent or related business is to insure the employer's compensation risk, the relationship between the employer and the parent or related business must be documented on the application.

13.2.b. A disclosure of the employer's management and financial structures, notice of the type of surety the employer intends to obtain to secure the self-insurance risk, and the employer's audited financial statements for each of the three (3) fiscal years preceding the date of application must be attached to the application. If a parent or related business is to insure the employer's compensation risk, the parent's or related business' disclosure of management and financial structures, and its audited financial statements for the three years preceding the date of application must also be attached to the application.

A. The employer's application and the required audited financial statements must be signed and sworn to by the president alone or vice-president and secretary or assistant 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.

B. If the employer is a government agency, the criteria used to determine financial stability, guaranties, and security may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed by the compensation programs performance council in these cases will take into consideration the risk to the division.

13.2.c. The employer may provide the division with any additional information deemed relevant to its financial stability. After reviewing the application and audited financial statements, the division may request additional information from the employer, parent, or related business relevant to the employer, parent, or related business's financial stability, and the applicant must provide the requested information.

13.2.d. The employer applying for self-insurance shall pay to the division a non-refundable application processing fee at the time each application is filed.

The application fee is $2,500.00, but may be modified by the division.

13.2.e. An employer who is a subscriber to all or part of the West Virginia Workers' Compensation Fund may apply at anytime to self-insure all or part of its workers' compensation risk, as set forth in subsection 13.4 of this rule. If the application and the

security are approved by the compensation programs performance council, the self-insurance will be effective on the first day of the quarter, following the month in which the application was approved, but only if the security is effective on that date.

An employer new to the state of West Virginia, who has never subscribed to the compensation fund, may apply for self-insurance at the time it registers with the division. Until self-insurance approval is granted, the new employer shall be considered to be in the guaranteed cost plan.

A. When an application for self-insurance is filed, the division will review the application and inform the employer if there is a need for additional information, pursuant to paragraph 13.2.c of this rule. The employer must provide the division with the additional information in order to complete the application process. The division will complete an evaluation of the information and the employer's surety choice. The division will have a preliminary audit of the employer's account performed and issue to the employer a notice of the required remittance, which shall be paid prior to further processing of the application. The division will have the "buy-out" amounts, defined under subsection 13.3. of this rule, calculated and advise the employer of their options. Finally, the division, with the approval of the compensation programs performance council, will render a decision approving or disapproving the application and defining the security requirements. The employer will then have sixty (60) days from the date of notification to obtain adequate security, as defined by the division, with the approval of the compensation programs performance council, under subsection 13.6 of this rule. Self insurance status shall not be granted until adequate security is effective.

B. If the employer is unable to obtain adequate security, as defined by the division with the approval of the compensation programs performance council, within the sixty (60) day period, the employer may file a written request with the division for an extension of the deadline, but the request must be filed prior to the expiration of the original deadline. The division may grant a sixty (60) day extension if the employer has established good cause for the extension. If an extension is granted, the employer

must obtain adequate security, as defined by the division with the approval of the compensation programs performance council, under subsection 13.6 of this rule, within the extension period, to be effective on the first day of the quarter after approval.

13.2.f. Employers applying for self-insurance must continue to make timely premium payments or other required payments for its workers' compensation risk until self-insurance status is approved by the compensation programs performance council and the status is effective.

13.3. Reconciliation and settlement of applicant's account.

13.3.a. The compensation programs performance council shall not grant self-insured status under the Act to any employer whose record upon the books of the division shows a liability against the compensation fund, incurred on account of injury to or death of any of its employees, in excess of premium taxes paid by such employer to the compensation fund, until it has paid into the compensation fund the amount of such excess liability, including excess liability incurred on account of explosions, catastrophes or second injuries occurring within the state and charged against the surplus fund. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance, unless the division and the employer enter into a repayment agreement.

The division has the authority to determine whether entering into a particular repayment agreement will meet the division's fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years. Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

13.3.b. An employer is responsible for the future costs of awards and medical benefits granted after the effective date of

self-insurance to its employees for injuries or deaths that occurred in any period during which it subscribed to the compensation fund. At the time of an employer's application for self-insured status, the division will determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses not previously used in calculating premium.

An employer's self-insured status will not be effective until the employer posts security or bond in an amount sufficient to cover the future liability, or pays the actual amount. The division must approve the employer's election.

A. The division must approve of the form, type, and amount of the security or bond before the employer will be permitted to post security or bond to cover the cost of future liability.

(a) If the security or bond is approved by the division, the division will transfer all of the employer's open and closed claims from the employer's existing account to the self-insured account. The employer shall agree to reimburse the compensation fund for any payments made in these claims on behalf of the employer after the effective date of self-insurance except where an award was granted prior to the effective date of self-insurance.

(b) If a self-insured employer's employee is granted a permanent total disability award pursuant to W. Va. Code §23-3-1, and the "second injury" was incurred by the employee during a period of time in which the employer was a subscriber to the compensation fund or the Second Injury Reserve of the surplus fund, then only the cost of the permanent partial disability award associated with the "second injury" will be charged to the self-insured account and all other costs associated with that permanent partial disability award which are incurred after the date of the second injury life award will be charged to the compensation fund.

B. If the employer elects or is required by the division to pay the amount estimated to cover the cost of future liability, this amount shall be paid prior to the effective date of self-insurance. The employer must pay to the division the entire

amount of the excess liability prior to the effective date of self-insurance, unless the division and the employer enter into a repayment agreement.

The division has the authority to determine whether entering into a particular repayment agreement will meet the fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years. Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

13.3.c. If an employer-applicant can establish that as of the effective date of self-insurance, its record upon the books of the division shows that the premium taxes it paid to the compensation fund exceed the liabilities incurred by the compensation fund on account of injury to or death of any of its employees, then the division and the compensation programs performance council shall consider the amount of excess premium taxes in assessing the employer's demonstrated loss experience for the purpose of determining whether security in excess of the one million dollar minimum shall be required, pursuant to subsection 13.6. of this rule. This paragraph does not entitle the employer to an actual monetary credit or refund. The amount of security required to be pledged in lieu of a buy-out of the employer's prior claims liabilities shall not be reduced by the amount of any excess premiums.

13.4. Elections by employers applying for self-insurance.

13.4.a. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to the catastrophe reserve of the surplus fund or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(d), and elect in writing to make direct payment of health care provider and medical invoices or to have the division make payment of the invoices.

A. If a self-insured employer elects to subscribe to the catastrophe reserve of the surplus fund, it shall pay premium taxes into the surplus fund on the same basis and in the same percentages as subscribers to the general fund pay for coverage under the catastrophe reserve of the surplus fund. The employer shall pay the premium tax in accordance with the provisions of section fourteen of this rule.

B. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the division, with the approval of the compensation programs performance council, in addition to the security or bond furnished as a general self-insurance requirement. The catastrophe security or bond shall be in an amount the division considers adequate and sufficient to compel or secure payment of all compensation and expenses to the employer's employees and the employees' dependents for catastrophe-related injuries or deaths.

C. The employer must satisfy the following requirements in order to make direct payment of health care provider and medical invoices:

(a) The employer must designate in writing to the division a person responsible for payment of the bills and must provide the division with the address and telephone number of the responsible person.

(b) The employer must retain a claimant file, a copy of each invoice, and a record of any action taken with respect to the invoice. Such records may be retained in an electronic format as approved by the division. This information must be accessible to the division during normal working hours. If the employer stops doing business in West Virginia, or elects or is required to cease making direct payment of health care provider and medical invoices, then the employer must deliver this information to the division.

(c) The health care provider must use the invoices prescribed by the division in billing the employer. The employer must pay all invoices within thirty (30) days of receipt.

(d) The employer may request the division's assistance in resolving an invoice dispute. The request must be made in writing and include a complete medical and medical invoice history of the relevant claim.

(e) The employer shall forward medical invoices in claims with allocated employer charges to the division for processing. The division will then issue a payorder and/or check, as is appropriate.

(f) The employer shall forward medical invoices related to Occupational Pneumoconiosis Board evaluations to the division for processing. The division will then issue a payorder and/or check, as is appropriate.

(g) Employers must collect all overpayments and duplicate payments directly from the health care provider. When the employer collects such overpayments and duplicate payments from a health care provider, then the employer shall notify the division of such collections in the manner prescribed by the division.

(h) The employer must provide all medical invoices that it believes are to be paid from one of the division's internal accounts to the division for processing. The employer must file a written explanation of the charge with the invoice.

(i) At the end of each calendar year, the employer must provide an IRS Form 1099 to health care providers to whom payment was made during the calendar year.

(j) Prior to July 31 of each year, the employer must provide the division with an annual report of total medical payments made during the previous fiscal year. The report must be in a format acceptable to the division.

D. If the employer fails to meet any statutory or regulatory requirements pertaining to the payment of health care provider or medical invoices, the division may revoke the privilege of making direct payments. The division will issue to the employer an intent to revoke and the employer is afforded an opportunity for hearing before the privilege is revoked. The employer will have thirty (30) days after receiving the revocation notice to request a hearing and/or provide the division with evidence of a just cause for failure to meet the requirements.

If the employer is issued a revocation notice more than two times, even if the infractions have been corrected and just-cause shown, the division may review the employer's entire record and make a determination as to whether the employer shall be allowed to continue the privilege of making direct payments.

13.4.b. The employer may request a change in its election as to the catastrophe reserve or direct payment of medical and health care provider invoices. The request must be in writing and filed with the division on or by June 1 of any given year, to be effective on July 1 of that year.

The division will issue a decision approving or disapproving the change in election. If the change in status is approved, the new status will be effective on the first day of the first quarter following the request for a change in status.

13.5. Division's review of the application for self-insurance.

13.5.a. In reviewing an employer's application for self-insurance, the division must assess the employer's ability to demonstrate that its financial strength is sufficient to meet its obligations under the Act.

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

13.5.c. If an employer relies on the audited financial statements of its parent to be granted self-insured status, then the parent company shall provide a parental guaranty in a form acceptable to the division.

13.6. Security and bond.

13.6.a. The minimum amount of security or bond required to become a self-insurer for all or part of the compensation fund is one million dollars ($1,000,000). The one million dollar ($1,000,000) minimum is in addition to any security that may be required as a result of the employer not buying out their prior claims liability or any security that may be required due to the employer self insuring their catastrophe risk. The division, with the approval of the compensation programs performance council, may direct that this amount be increased or decreased in the future.

13.6.b. The employer-applicant shall post security or bond in an amount sufficient to meet all of its obligations to its employees and their dependents, as defined by the Act and this rule, during the first year of self-insurance and for the reasonably foreseeable period thereafter. At anytime that good cause exists to believe that the bond or security is no longer sufficient to meet the employer's reasonably foreseeable obligations, the division, with the approval of the compensation programs performance council, shall require the employer to post additional or supplemental security or bond to meet these obligations. (See subsection 13.8 of this rule, Maintaining self-insured status).

13.6.c. There are several acceptable types of security and bond including, but not limited to, occurrence type security or bond, marketable securities, and letters of credit. The division has the discretion to find that a particular type of security or bond is acceptable.

A. If the self-insured employer obtains an occurrence-type security or bond, then the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is

effective, and the security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents.

Nothing to the contrary contained in any writing associated with or included as a part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other person or entity who purports to stand in the place of the self-insured employer for the payment of benefits shall be considered to have given the security or bond in compliance with this subsection, and no statement or disclaimer in the security or bond shall negate this requirement.

B. If the self-insured employer wishes to post marketable securities to meet its obligation for security or bond, the securities must satisfy the following requirements:

1. The securities must be fixed term debt instruments with a fixed and determinable principal amount;

2. The issuer of the securities must be a governmental entity or governmental agency or corporation of this state, or any other state, or the United States;

3. The maturity date of the instrument cannot be more than ten years from the date the securities are posted with the division; and,

4. The payment of both principal and interest are denominated and payable in United States dollars with the interest payable at fixed periodic payment dates and at a fixed rate of the principal amount of the indebtedness.

C. If the self-insured employer wishes to post a letter of credit to meet its obligation for security or bond, the letter of credit must satisfy the following requirements:

1. The letter of credit must be issued by a bank operating in the United States;

2. The letter of credit must utilize language approved by the division and in accordance with this rule; and

3. Before it will be considered security for self-insured risks, the letter of credit must contain an "evergreen" clause as specified by the division, which holds the issuer responsible for the employer-applicant's liability resulting from all injuries incurred by or deaths of the employer's employees prior to the expiration of the letter of credit. In the event that the employer-applicant is unable to obtain an evergreen clause, then the employer-applicant must obtain permission from the division to use a letter of credit with a nonrenewal draw clause.

13.6.d. Employers applying for self-insurance must meet the security requirements defined by the division, as approved by the compensation programs performance council, in an amount to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one million dollars ($1,000,000). The amount of security required of a self-insured employer 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 reserve loss experience and catastrophe reserve loss experience.

The division shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios, in evaluating an employer's financial strength and in making a recommendation to the compensation programs performance council as to an appropriate amount of security, not to be less than one million dollars ($1,000,000). Whenever possible, the division shall make a comparison of ratios utilizing the employer's workers' compensation industry classification.

13.6.e. Upon notice from the division, each self-insured employer shall file an application annually to continue the self-insurance privilege, as set forth in subsection 13.8 of this rule. At the time the application for continuation of the privilege is filed, or sooner as an individual case may require, the division shall review the self-insured employer's current financial status and security requirements. The division will notify the employer of the results of an annual review, if a review is performed.

If the division determines that the security requires adjustment in light of the employer's current financial status, the division shall recommend to the compensation programs performance council that the security requirements be adjusted. Prior to such action, the division shall notify the employer of the forthcoming recommendation to the compensation programs performance council and the reasons for the recommendation. The employer shall be provided thirty (30) days for written response to the division. The division shall provide a copy of any such employer response to the compensation programs performance council if the division recommends that the employer's security be adjusted.

A. If the division determines that a self-insured employer's securities or bonds are inadequate or insufficient, the division, with the approval of the compensation programs performance council, 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 division shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond or develop a work out agreement and obtain the first installment payment; however, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment shall not exceed ninety (90) days from the

date of the division's order. The increased security or bond must meet the requirements set forth in paragraph 13.6.b of this rule.

B. A self-insured employer's failure to obtain additional bond or security, as required by the division's order, may result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status, and/or the imposition of a graduated premium tax pursuant to 13.8.d. The division shall issue a notice specifying the effective date of any such action or actions.

C. If the division has not already determined that a decreased adjustment is merited, the self-insured employer may file a written petition with the division for a downward adjustment of its security requirements for purposes of future injuries or deaths incurred by its employees. The security cannot be adjusted to an amount less than one million dollars ($1,000,000). The petition must include the employer's audited financial statements for the three years preceding the date of the petition. The division may request additional information from the employer, as it considers necessary. The division shall render a written recommendation to the compensation programs performance council on the petition within ninety (90) days of receipt of the petition, and if the petition is granted by the compensation programs performance council, the division shall set forth the terms for the new security requirements in the written decision.

13.6.f. After the effective date of this rule, this section of the rule is applicable to all security or bond given by an employer to meet any security requirement under the Act or this rule. All securities and bonds given prior to the effective date of this rule shall be construed to be in keeping with the law in effect prior to the effective date of this rule.

13.6.g. In accordance with the provisions of subsection 7.2, the division, with the approval of the compensation programs performance council, shall develop a sliding scale based upon the employer's financial circumstances, to determine the amount of security required to become a self-insured.

13.7. Second injury reserve of the surplus fund.

13.7.a. All self-insured employers must subscribe to the second injury reserve of the surplus fund, with the exception of the self-insured employers who elected prior to the second day of February, one thousand nine hundred ninety-five, not to subscribe to the second injury reserve and who have continued not to subscribe to the reserve from that date, without interruption, and with the exception of the self-insured employers who elected prior to the second day of February, one thousand nine hundred ninety-five, to subscribe to the second injury reserve of the surplus fund, but elected not to subscribe to the reserve for the calendar year of one thousand nine hundred ninety-five and who have continued such election from that date, without interruption.

13.7.b. To determine the self-insured employer's second injury reserve premium or contribution, the division shall establish industrial groups or classes to reflect common risks related to the payment of second injury life awards from the second injury reserve of the surplus fund and the division may modify the groups or classes from time to time, as necessary to meet the fiduciary needs of the second injury reserve of the surplus fund, pursuant to W. Va. Code §23-2-9. Additionally, by the first day of July in any given year, the division shall actuarially establish the projected funding cost for losses to be incurred by the second injury reserve of the surplus fund during the prospective year for each industrial group or class.

A. The division shall assign base premium tax rates to each industrial class to reflect the second injury life award experience rating of the class. The division may modify the assigned rate yearly on the first day of July, or at any time the modification may be necessary, provided that a schedule of the readjusted rates are filed with the office of the Secretary of State for publication in the State Register, pursuant to W. Va. Code §29A-2-1 et seq., at least thirty (30) days prior to the first day of the quarter to which the adjustment of rates is applicable.

B. The individual self-insured employer's base rate shall be modified by the division to reflect the ratio of the individual

employer's record of second injury life awards to the average cost of second injury life awards for all employers in the particular industrial group or class. To calculate the ratio, the division shall utilize a period not to exceed three years preceding the year in which the rate is to be effective.

C. The division shall notify every self-insured employer subscribing to the second injury reserve of the surplus fund of any rate modification and the effective date of the modification. The division shall furnish each self-insured employer subscribing to the second injury reserve of the surplus fund, yearly or more often if requested by the employer, a statement giving the name of each of the employer's employees who were granted a second injury life award or related benefits during the period covered by the statement.

13.7.c. The division, with the approval of the compensation programs performance council, may require any employer who is permitted to self-insure the second injury life award risk pursuant to W. Va. Code §23-2-9, to furnish an additional security as defined by subsection 13.6 of this rule. The second injury security or bond must be in an amount determined by the division, with the approval of the compensation programs performance council, and must satisfy the requirements set forth in subsection 13.6 of this rule. Provided, pursuant to W. Va. Code §23-2-9(e), any self insured employer who was, prior to the second day of February, one thousand nine hundred ninety-five, permitted to self insure its second injury risk, may elect to continue to self-insure its second injury risk for so long as it meets the requirements of Chapter twenty-three of the West Virginia Code, including the security and bond requirements of W. Va. Code, §23-2-9(a), and subsection 13.6 of this rule.

13.8. Maintaining self-insured status.

13.8.a. Upon notice of the division, each self-insurer shall file annually an application to continue the self-insurance privilege. The renewal application shall be in the form prescribed by the division and shall be accompanied by a current audited financial statement.

The employer's status as a self-insured employer with respect to all or part of the compensation fund shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing, as set forth in subsection 13.5 of this rule, and continues to satisfy the other requirements imposed by the Act, this rule and any other pertinent rule, and any order of the division. If necessary in order to ascertain whether the employer has met and can continue to meet all of the self-insurance requirements and obligations, the division may conduct an audit of all accounting records, books, records, papers, operations and documents deemed relevant by the division in the possession or control of the employer.

13.8.b. A self-insured employer with respect to all or part of the compensation fund is responsible for the direct payment of all pecuniary compensation due and owing under the Act to employees or employees' dependents; is responsible for the direct payment of health care provider and medical invoices pursuant to subsection 13.4 of this rule, if the employer elected to make such direct payment; and is responsible for reimbursing the division for all medical, funeral, or other expenses paid by the division on behalf of its employees and their dependents.

The employer shall pay pecuniary compensation payable by the employer and reimbursements due from the employer within the time periods specified by the Act, the various rules promulgated by the compensation programs performance council, and the orders of the division; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion. Further, the division's payorders for temporary total disability benefits must be paid within ten (10) days of receipt, payorders for permanent partial disability benefits must be paid within fifteen (15) days of receipt, and payorders for medical bills must be paid within thirty (30) days of receipt. The employer's experience in meeting these obligations shall be considered by the compensation programs performance council in determining whether to permit the employer to remain a self-insurer.

13.8.c. The compensation programs performance council may direct the division to suspend or terminate an employer's self-

insurance status if the employer fails at any time to comply with the requirements of the Act, this rule or any other pertinent rule, or any order of the division; or, otherwise defaults on a self-insurance obligation. The division shall provide the employer with written notice of the suspension or termination.

13.8.d. Notwithstanding section 13.6.b of this rule, in cases where the employer is permitted to remain self-insured, even though their security is less than the amount required, as determined by the division, with the approval of the compensation programs performance council, the compensation programs performance council may approve a graduated premium tax to insure against the additional risk. This increased premium tax applies to any self-insured employer who fails to maintain adequate security.

13.9. Self-insured employer's modification of business.

13.9.a. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which impacts on its workers' compensation liability, the self-insured employer must notify the division of the modification of business, immediately. The notice of modification must include specific information as to the nature of the modification, including but not limited to a copy of the executed contract causing the modification, and the names of other employers and/or businesses affected by the modification.

13.9.b. If the self-insured employer has acquired a new operation or business or has merged with another business, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The application to self-insure the new operation or business shall be processed in accordance with the Act and the division's rules governing self-insurance.

13.9.c. Under paragraphs 13.9.a and 13.9.b, of this rule, the division will review the employer's security and bond requirements

and make an appropriate recommendation to the compensation programs performance council for an adjustment to the security requirements, as set forth in subsection 13.6 of this rule.

13.9.d. Depending on the nature of the modification of business, the division may require the self-insured employer to pay the application processing fee of $2,500.

13.9.e. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the division, with the approval of the compensation programs performance council, shall have the authority to suspend or terminate in accordance with the provisions of 13.8.c. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of section thirteen of this rule.

13.10. Voluntary termination of self-insured status.

13.10.a. If a self-insured employer decides to continue doing business in the state of West Virginia, but terminate its self-insured status, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of all such liability, in which case the future costs of the liability shall be paid from the compensation fund. The employer shall provide written notice to the division thirty (30) days prior to the termination of its status.

A. When the employer decides to terminate its self-insured status, the division shall estimate the amount of money that is sufficient to cover the future costs of the liability.

B. The division shall not permit the employer to terminate the self-insured status and subscribe to another plan until it pays the actual estimate, or maintains security or bond in an

amount sufficient to cover the estimated future cost of the liability. The division must approve the employer's election for the payment of the estimated future cost of liability.

(a) If the employer elects or is required by the division to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance unless the employer and the division enter into a repayment agreement. The division has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three (3) years.

Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

(b) If the employer elects to cover the future costs of the liability with a security or bond, it must obtain the division's approval of the election and the division's approval of the form, type, and amount of the security or bond.

13.10.b. A self-insured employer must provide the division with written notice thirty (30) days prior to termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from

the compensation fund. When the employer decides to terminate its self-insured status, the division shall estimate the amount of money that is sufficient to cover the future costs of the liability. If the division incurs costs beyond those normally required for a buyout calculation, the employer must pay a fee equal to the greater of $5,000.00 or the costs actually incurred.

Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full amount of the future liability, or enter into a repayment agreement with the division for the amount of the future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance, as defined by this rule.

A. If the employer elects or is required by the division to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination unless the employer and the division enter into a repayment agreement. The division has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three years.

Additionally, the agreement shall provide for the payment of interest on the principal which the division shall calculate on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate remains the same for the life of the agreement.

13.10.c. If a self-insured employer terminates its self-insured status because it ceases doing business in the state of West Virginia as the result of a sale or transfer of all or part of its business, the self- insured employer must notify the division of the sale or transfer thirty (30) days prior to the date of closing. The self-insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self-insured account on the

effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the division to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. If the division incurs costs beyond those normally required for a buyout calculation, the employer must pay a fee equal to the greater of $5,000.00 or the costs actually incurred.

The employer shall pay the actual estimate, or post security or bond in an amount sufficient to cover the estimated future cost of the liability. The division must approve the employer's election for the payment of the estimated future cost of liability.

A. If the employer elects or is required by the division to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination of self-insurance unless the employer and the division enter into a repayment agreement. The division has the authority to determine whether entering into a particular repayment agreement will meet its fiduciary responsibility to the compensation fund and shall consider the employer's financial stability, as reflected by its financial statements and other information of record, in making the determination and in agreeing to specific terms of repayment. The repayment term shall not exceed three (3) years.

Additionally, the agreement shall provide for the payment of interest on the principal which the division shall calculate on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate remains the same for the life of the agreement.

B. Upon terminating self-insurance, the employer may elect to continue making payment of benefits, pay the full amount of the

future liability, or enter into a repayment agreement with the division for the amount of the future liability. If the employer retains full liability or enters into a repayment agreement, the employer must maintain the security for self-insurance, as defined by this rule. The division may impose a graduated premium tax to insure against such risk.

13.10.d. If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the self-insured seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the division, the employer may request the division give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the Fund. The division will issue a written decision on whether it will give effect to the agreement. The division is under no obligation to give effect to such an agreement.

A. If a completed copy of the contract of sale is filed with the division and the division gives effect to the agreement, and if the agreement provides that the buyer or person acquiring the business assumes the liability defined in referenced in this subsection, the buyer or person acquiring the business must pay the actual estimate of all the self-insured seller's accrued and contingent liability, as calculated pursuant to that section. Alternatively, the buyer or person acquiring the self-insured employer's business may, with the compensation programs performance council's approval, post security or bond in an amount actuarially determined to be sufficient to cover the assumed liabilities. The security or bond must cover the seller's entire period of self-insurance. In the event of a security or bond being posted by the buyer to cover the seller's liabilities, or if the buyer pays the actual estimate of the seller's liability, then the division will release the employer's like security or bond previously posted by the employer-seller.

B. If a complete copy of the contract of sale is not filed with the division and/or if the division does not give effect to the agreement, the division will hold the self-insured seller liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period

of self-insurance and prior to the effective date of the sale or transfer, unless the employer pays into the fund an amount sufficient to cover the estimated cost of all such liability, as set forth in this subsection.

13.11. Present value payment of unpaid but awarded claims liabilities.

13.11.a. At any time, the division, in its discretion, with the approval of the compensation programs performance council, may permit any self-insured employer to pay into the Fund an amount of money equal to the present value, as determined by the division, of all unpaid but awarded claims liabilities for which the employer is liable.

13.11.b. The self-insured employer and the division may enter an agreement to allow the employer to make the present value payment of unpaid but awarded claims liabilities over a period of time, if the division determines that entering into an agreement is in keeping with its fiduciary responsibility to the Fund. The payment term shall not exceed three (3) years.

Additionally, the agreement shall provide for the payment of interest on the principal which shall be calculated on the effective date of the agreement, pursuant to W. Va. Code §23-2-13. The interest rate shall remain the same for the life of the agreement.

13.11.c. Upon making the present value payment of unpaid but awarded claims liabilities with one lump sum or with the last installment of the payment agreement, the self-insured employer is discharged from any further liability for the unpaid compensation and all future costs associated with the unpaid compensation shall be paid from the Fund.

13.12. Subscribing employers buy-out of liability previously incurred as a self-insured employer.

13.12.a. Employers who were previously self-insured employers and who on the effective date of this rule were continuing to pay compensation and expenses for certain of their

employees due to their previous status as self-insured employers may elect to buy out their responsibility for those payments related to the prior self-insured status, pursuant to the provisions set forth in paragraph 13.10.b of this rule.

13.13. Administrative reports and fees.

13.13.a. Upon filing an application for self-insured status, an employer acknowledges its obligation to continue to make all payments and file all reports required by the Act or by the rules adopted by the division.

13.13.b. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall file with the division a sworn statement of the total earnings of all of its employees subject to the Act for the preceding quarter.

13.13.c. On or before the last day of the first month of each quarter or such other period as may be determined under section fourteen, for the preceding quarter, each self-insured employer shall pay into the compensation fund a sum sufficient to cover its proper portion of the expenses related to the administration of the Act.

A. The sum sufficient to pay a self-insured employer's proper portion of the expenses related to the administration of the Act is determined by applying a percentage to the base rate that has been assigned to the self-insured employer's industrial class.

B. The sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund.

C. The sum sufficient to pay the employer's proper portion of the expense of claims for those employers who are in default in the payment of premium taxes or other obligations.

D. The sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing sums.

13.14. Current status of employers not affected.

13.14.a. Employers who at the time of the effective date of this rule are self-insured employers as regards to all or part of the compensation fund shall not lose that status due to the mere promulgation of this rule.

13.14.b. Employers who at the time of the effective date of this rule are subscribers to all of the compensation fund shall not become self-insured due to the mere promulgation of this rule.

§85-9-14. Tax Liability Policy Guidelines For Receivables Management.

14.1. Definitions. As used in this section, 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.

14.1.a. "Direct Deposit Authorization Form" means a form developed by the division that is used to request that funds be direct-deposited into an account at a financial institution.

14.1.b. "Direct Withdrawal Authorization Form" means a form developed by the division that is used to transfer funds from an employer's account into the division's account.

14.1.c. "Electronic Data Interchange Payment" means a computer-to-computer transmission of a payment and related information in a standard format.

14.1.d. "Electronic Funds Transfer" means any transfer of funds processed by the division 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.

14.1.e. "NACHA" means the National Automated Clearing House Association, which is the national association that establishes the rules and procedures governing the exchange of commercial

Automated Clearing House payments by depository financial institutions.

14.1.f. "Non-banking days" means local banking holidays, Saturdays, Sundays and legal holidays. The division shall have the discretion to make exceptions for late deposits due to extreme weather conditions such as floods, blizzards, fire, etc. Except as specified by the division, the employer must request this exception in writing.

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

14.3. Evaluations. The division has the authority to set tax liability limits, payment terms, and reporting frequencies for all employers. Such tax liability limits, payment terms and reporting frequencies shall be set only after an evaluation of information to determine the risk of insuring a specific employer or group of employers.

14.4. Development of credit information. Credit information on any employer may be developed and evaluated by the division.

14.4.a. Credit information sources may include, but will not be limited to:

(1) The application for coverage;

(2) Secured creditors and types of collateral;

(3) Guarantors of employer debt;

(4) Determinations of whether the employer, owners, or officers have ever filed bankruptcy and, if so, what type of bankruptcy and when was the bankruptcy filed;

(5) The provider of other types of insurance coverage;

(6) The employer's most recent interim and prior year annual financial statements;

(7) Detailed listings or summaries of assets, property and equipment, liabilities or equity;

(8) Supplier and/or bank references;

(9) Credit reporting agencies;

(10) Federal, state or local government agencies; and

(11) Audits conducted by those on behalf of the division.

14.4.b. Upon proper notification, the employer shall be required to provide detailed credit information. Failure to provide such information will result in the employer's classification at the most adverse (C) tax liability rating.

14.5. Tax liability rating. Each employer or group of employers may be assigned a tax liability rating by the division. The tax liability rating will correspond with the following credit descriptions.

TABLE 85-9-A.

Credit Description	*Tax Liability Rating*
Low risk of bad debt losses	A
Moderate-average risk of bad debt losses	B
High risk of bad debt losses	C

14.5.a. The assignment of a tax liability rating shall be based upon credit information that reflects upon the employer's willingness to pay, as evidenced by payment history in all aspects of its operation, the employer's ability to pay, as evidenced by its financial position, and other factors. Such other factors may include, but are not limited to:

(1) The type of business entity;

(2) The type of industry in which the employer is engaged;

(3) The number of years the employer has been engaged in business;

(4) The prior management history of the employer; and

(5) The prior payment history and other experience with the division.

14.5.b. Tax liability rating reevaluations shall be performed when payment activity or a change in the employer's circumstances indicate such a review is merited. Within its discretion, the division may reevaluate the employer's tax liability rating at any time.

14.5.c. Delinquency or default by an employer will result in a downgrade of tax liability ratings or loss of payment plan options or loss of rating plan status or any combination thereof.

14.6. Assignment of tax liability limits. Each employer or group of employers will be assigned a tax liability limit by the division. The tax liability limit will correspond with the following tax liability ratings.

TABLE 85-9-B.

Employer Tax Liability Rating	*Tax Liability Limit Not to Exceed*
A	$100,000
B	$50,000
C	$5,000

14.6.a. The tax liability rating shall be established using the criteria set forth in subsection 14.5.

14.6.b. The tax liability limit set forth in Table 85-9-B is the maximum amount of bad debt risk that the division may accept from specific employers in the appropriate category. The compensation programs performance council may amend the tax liability table in accordance with the provisions of 7.2 and 7.3 of this rule.

14.6.c. Each employer's tax liability limit will be based upon their individual tax liability rating and expected level of premium for the coverage period.

14.6.d. Payment terms shall be applied to individual employers so that the employer does not exceed preestablished tax liability limits.

14.7. Payment terms. Standard payment terms, 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.

14.7.a. Employers receiving guaranteed cost coverage with estimated annual premium taxes of $500 or less may, at the discretion of the division, 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 division for a period in

excess of three years to qualify for these payment terms. The division may require such employers to pay under these terms.

A. 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 division.

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

14.7.b. In accordance with the provisions of subsection 14.6.d. of this rule, employers who fall within the applicable tax liability limits of Table 85-9-B shall be required to pay premium taxes on a frequency less than quarterly so that the employer does not exceed preestablished tax liability limits.

A. Payment terms shall be set forth for each employer.

14.7.c. Deposit rules. On an annual basis, the division shall determine whether an employer is a quarterly depositor, monthly depositor, bi-weekly depositor, or a weekly depositor. In determining the depositor category, the division shall consider the employer's tax liability rating and the aggregate amount of premium taxes expected to be reported during the forthcoming twelve-month coverage period not to be less than the premium taxes reporting during a "look-back" period. The look-back period is the twelve-month period ending the preceding June 30th.

A. Quarterly rule. The division shall determine an employer to be a quarterly depositor if the accrued premium tax liability is $50,000 or less and the employer's tax liability rating is A or B. Quarterly deposits are required by the 30th day of the month following the end of the quarter. If the due date falls on a non-banking day, the deposit will be timely if made on the next banking day.

B. Monthly rule. The division shall determine an employer to be a monthly depositor if the accrued premium tax liability exceeds $50,000 and the employer's tax liability rating is A or B. Monthly deposits are required by the 15th day of the following

month. If the due date falls on a non-banking day, the deposit will be timely if made on the next banking day.

C. Bi-weekly rule. The division shall determine an employer to be a bi-weekly depositor if the accrued premium tax liability is $50,000 or less and the employer's tax liability rating is C. For those with paydays on Wednesday, Thursday and/or Friday, deposits are required by the following Wednesday. When the payday falls on Saturday, Sunday, Monday and/or Tuesday, deposits are required by the following Friday.

D. Weekly rule. The division shall determine an employer to be a weekly depositor if the accrued premium tax liability exceeds $50,000 and the employer's tax liability rating is C. For those with paydays on Wednesday, Thursday and/or Friday, deposits are required by the following Wednesday. When the payday falls on Saturday, Sunday, Monday and/or Tuesday, deposits are required by the following Friday.

Bi-weekly and weekly depositors shall have at least three banking days following the close of a weekly or bi-weekly period to make a deposit. If a bank holiday falls on any one of those three days, the employer will have an additional banking day to make the deposit.

E. Accelerated deposits. Employers who have accumulated $100,000 or more in premium taxes on any day within a deposit period, either quarterly, monthly, bi-weekly, or weekly, shall make accelerated deposits. These employers are required to deposit the premium taxes by the close of the next banking day.

F. Safe harbor rule. Except as provided under the provisions of 14.7.a.B, the deposit obligation will be satisfied if the difference between the amount of tax that should have been deposited less the amount of tax actually deposited (shortfall) does not exceed the greater of $100 or 2% of the amount required to be deposited. However, the under-deposit must be deposited by a specified "make-up" date. The make-up date for monthly depositors is the due date for the quarterly return. The make-up date for weekly or bi-weekly depositors and those required to make accelerated deposits is the first Wednesday or Friday (whichever

is earlier), falling on or after the 15th day of the month in which the deposit was due. Deposit shortfalls will be subject to the application of interest and penalties in accordance with the Act and section eighteen of this rule.

14.7.d. Self-insured employers. Receivables for payments made by the division on behalf of a self-insured employer or any other employer, where applicable, are due to the division within thirty (30) days of the date of billing.

14.7.e. 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 division 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.

A. 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, the interest penalty and an amount sufficient to maintain the premium deposit. Such demand shall require the employer to cure its delinquency within a stated time period.

14.8. Electronic funds transfer. The division, 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 division or the employer through instructions to the employer's financial institution to debit or credit the employer's account.

The division anticipates the phase-in of electronic transfer of funds over a period of several years and intends to establish multiple methods from which to choose, flexible enough to fit the varying needs and technological capabilities of employers.

14.8.a. Electronic transfers of funds will not change the due date of premium taxes and will be processed through the Automated Clearing House (ACH).

14.9. Deposit forms. The division will provide premium tax deposit forms to employers. Employers shall include a properly completed coupon with each deposit.

14.9.a. In the case of a return period, either quarterly or annual, ending during a weekly or bi-weekly period, an employer must complete the premium tax deposit form so that it designates the proper return period for which the deposit relates. If the return period ends during a weekly or bi-weekly period in which an employer has two or more payment dates, two or more deposit obligations may exist and separate premium tax deposit forms would be required.

14.9.b. The last return for any employer who either goes out of business or otherwise ceases to pay wages must be marked "Final Return." An employer who has only temporarily ceased to pay covered gross wages, including an employer engaged in seasonal activities, must continue to file returns.

14.10. Notification. All notices regarding changes in tax liability ratings or payment terms shall be given in accordance with the provisions of section sixteen of this rule.

14.11. Discretion. The division will implement the assignment of tax liability ratings, tax liability limits and payment terms at its discretion on an individual employer basis depending on the circumstances of the employer and in keeping with the financial obligation of the division to the workers' compensation fund.

§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 division 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.

A. 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 Division - Bureau of Employment Programs" and shall be mailed with the payroll and premium tax report to the address provided by the division.

15.3.b. Each report or payment mailed to the division 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 division that coverage is to be terminated, the division will assess the minimum premium tax per quarter through the quarter in which the notice is received.

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

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 division, as defined by the provisions of West Virginia Code, §23-2-5, then the refund shall be denied under the provisions of this rule. The division 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 division shall determine whether a gain or loss has occurred in relation to the employer's account. The division shall determine the following factors: total premium taxes paid and the cost of known claims reserved. If the total premium taxes paid are less than the costs of known claims reserved, the division 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 division shall notify in writing each employer denied a refund under the provisions of this rule.

A. 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 division.

§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 division 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 division, in writing, and request that the name or address be changed on the division'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 division 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 division 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 division to the employer at the address and in the name shown on the division'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 division 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 division may charge a reasonable fee for copies of any employer records and general publications.

§85-9-17. Sale, Transfer, Absorption or Merger of Business.

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, penalty premium rate and other payments owed to the division 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 division 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 division shall become due;

17.1.c. The division 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 division 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 division for premium taxes, premium deposits, interest, penalty premium rate and other

payments owed to the division by the predecessor employer shall be extended to the successor employer;

17.2.b. Liens held by the division 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 whether the successor employer is subject to the penalty premium rate provisions of West Virginia Code, §23-2-5(f); 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 division and post such additional bond as may be required pursuant to section thirteen of this rule.

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 division 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 division, the employer may request the division give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the Fund. The division will issue a written decision on whether it will give effect to the agreement. The division 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 division, 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 division 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 division's lien.

17.6.a. In the event the employer would not owe any sum to the division 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 division 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 upon petition or petition and administrative hearing in accordance with the provisions of W. Va. Code, §23-2-15.

17.8. Construction. The provisions of this section are expressly intended to impose upon such successor employers the duty of obtaining from the division 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.

§85-9-18. Late Penalties For Filing and Reporting; Penalty Premium Rate.

18.1. Late penalties. In accordance with 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 ten percent (10%) of the payment due, but not to exceed five hundred dollars ($500), with such report. Such

late penalty shall be paid at the earliest of thirty (30) days from date of notification or the date when the next report and payment are due. If such late penalty is not paid when due, the same may be charged to and collected by the division from the employer's premium deposit account or otherwise as provided for by law.

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

18.2. Penalty premium rate. In accordance with the provisions of W. Va. Code, §23-2-5(f), whenever a penalty premium rate is imposed on an employer and such employer fails to timely pay such penalty premium rate, then such amount shall be subject to late penalties for filing and reporting and interest accrued which shall be in accordance with W. Va. Code, §23-2-13.

§85-9-19. Implementation.

19.1. The division 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 division is imbued with the authority to implement the provisions of this rule in the sequence and time frames required and in such a manner as the division, with the agreement of the compensation programs performance council, sees fit. The implementation of this rule is contingent upon the capacity of the division to properly administer the same and upon whether such is financially viable given the fiduciary obligations of the compensation programs performance council and the division. It is the intent of this rule, although it is not a requirement of this rule, that it be implemented in its entirety on or before July 1, 1998.

19.2. The division with the agreement of the compensation programs performance council, shall have the authority to manage its capacity to implement the provisions of this rule by requesting, selecting, acquiring, directing and controlling the

financial and human resources, along with the processes and technology, necessary to implement this risk management system.

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

20.1. Protest. An employer may protest any order or decision made under the provisions of this rule.

20.2. Petition. In order to preserve its right to protest, the employer must file a written petition with the division, stating the order or decision protested and the exact nature of the issue in controversy. In the written petition, the employer must designate a person or entity to receive official notices related to the protest and the employer must provide the address of the person or entity. The written petition must be received by the division within thirty (30) days after the employer receives notice of the objectionable order or decision or within sixty (60) days of the date of the objectionable order or decision, regardless of notice. This period may not be extended or waived.

20.3. Acknowledgment. Within thirty (30) days after receiving the written protest, the division shall issue a notice acknowledging the protest and providing an opportunity for hearing.

20.4. 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 division shall be made directly to the director of the workers' compensation division 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 director and the division 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 division 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 division'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 division are and what the components of that payment are including the time periods affected.

21.4. Without an appropriate release or waiver, the division 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 division may charge fees reasonably calculated to reimburse the division 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.