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WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Division of Workers' Compensation TITLE NUMBER: 85

CITE AUTHORITY W.Va. Code, §§ 23-1-13; 23-2-9; 23-3-1; 23-5-6; 23-4A-6

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 9

TITLE OF RULE BEING PROPOSED: Self-Insured Employers

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

Emily A. Spieler
Commissioner

WORKERS' COMPENSATION FUND
601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: (304) 348-0475

GASTON CAPERTON
GOVERNOR

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

January 9, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, W. Va. 25305

Dear Secretary Hechler:

RE: Filing of Proposed Legislative Rule, Title 85, Series 9; "Self-Insured Employers,"Division Of Workers' Compensation."

Pursuant to West Virginia Code, §5F-2-2(a)(12), please consider this letter to be my written approval for the filing of the above noted proposed legislative rule. This proposed rule has completed the public comment phase of promulgation and will now be submitted to the Legislature's Rule Making Review Committee.

With much appreciation for your assistance in this matter, I remain

Very truly yours,

Taunja Willis Miller
Secretary

TWM/jhk

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Self-Insured Employers

Type of Rule: X Legislative Interpretive Procedural

Agency: Division of Workers' Compensation
Address: Attn: John H. Kozak, Executive Secretary
601 Morris Street
Charleston. W.Va. 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	$0	$0	$0	$0	$0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2 Explanation of above estimates:

The procedures set forth in this rule will not have the effect of increasing or decreasing the agency's administrative budget.

3. Objectives of these rules:

To codify and ensure fairness in the operations of the Division of Workers' Compensation as to the self-insurance provisions of the state's workers' compensation laws. The rules presently in place do not adequately guard the solvency of the workers' compensation fund because of a lack of specificity regarding the security and bonding requirements for self-insured employers. This rule also provides for a hearings process so that employers who disagree with the agency's decisions can have a mechanism to appeal. The rule also provides for the responsibility of self-insured employers for certain awards made after

the employer became self-insured but the dates of injuries for which occurred before the self-insurance period began. The rules fixes the requirements for the data to be submitted by the applying employer. Also, the rule integrates the handling of self-insurers for both the regular compensation fund coverage and the surplus fund. Heretofore, the surplus fund was not explicitly provided for by rules.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The rule's impact on the division of workers' compensation will be to insure the solvency of the various funds administered by the commissioner.

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

Employers applying for self-insurance status will be required to post adequate and sufficient security and bonds in order to attain and maintain self-insurance status. Heretofore, it has not been the practice of the agency to require this even though the statute and prior rules require it. Such security and bonds will be more expensive for the employer community to obtain; however, the lack of such security or bonds in the past has passed this cost on to the division through failures of such security or bonds to cover a failed employer's obligations. The employers will also be required to pay for the services of the division's contracted for actuary. The rule expands the role of the actuary from almost nil in the past to full involvement with providing advice to the commissioner under the proposed rule. Each self-insured employer and each applying employer will bear the cost of the services provided by the actuary for that employer's account rather than spreading such costs over the entire employer community in the state.

C. Economic Impact on Citizens/Public at Large.

By allowing the division to operate on a more financially sound basis, the rule will aid the division in maintaining the solvency of the workers' compensation fund. This will insure that injured employees and their dependents will receive appropriate benefits while keeping the costs that are to be spread across all employers to a minimum.

Date: JANUARY 16, 1990

Emily A. Spieler, Commissioner

DATE: January 16, 1990.

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Division of Workers' Compensation

LEGISLATIVE RULE TITLE: Self-Insured Employers

1. Authorizing statute (s) citation:West Virginia Code, §§ 23-1-13; 23-2-9; 23-3-1; 23-5-6; & 23-4A-6.

2. a. Date filed in the State Register with Notice of Hearing:

   November 22, 1989.

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

   Copies of notice of filing and of the rule were distributed to representatives of the various business and trade groups that are regularly involved with or affected by the Division of Workers' Compensation.

   c. Date of hearing (s): January 5, 1990.

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

   Attached: Transcript and Comments Attached.

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

   January 16, 1990.

   f. Name and telephone number of agency person to contact for additional information:

   John H. Kozak, Executive Secretary, Division of Workers' Compensation, Post Office Box 3824, Charleston, West Virginia 25338.

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

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

   Not Applicable.

   b. Date of Hearing: Not Applicable.

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

Not Applicable.

d. Attach findings and determinations and reasons:

Attached Not Applicable.

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 9
SELF-INSURED EMPLOYERS

§85-9-1. General.

1.1. Scope. - This legislative rule applies to employers who either must subscribe to or who elect to subscribe to the Workers' Compensation Fund and who wish to elect to provide their own system of compensation. This rule applies to employers who previously received approval of their election and who are currently operating their own systems of compensation as well as employers who have not previously received such approval. Similarly, this rule applies to employers who wish to elect to provide their own system of compensation with regard to all or part of the surplus fund as well as those employers who previously received approval of such an election. The rule also applies to employers who wish to terminate either such election and to either return as a regular subscriber to part or all of the Fund or who wish to cease doing business.

1.2. Authority. - West Virginia Code, §23-1-13; §23-2-9; §23-3-1; §23-5-6; and §23-4A-6.

1.3. Filing Date. -

1.4. Effective Date. -

1.5. Repeal of Former Rules. - Upon approval by the Legislature and upon the final filing with the Office of the Secretary of State, this rule will replace the previously filed Emergency Rule titled "Self-Insurers Electing To Opt Into Or Out Of Surplus Fund," West Virginia Code of State Rules, §85-9-1 et seq. (1989). In addition, this rule repeals and replaces Section 4 of the legislative rule titled "Administration Of The Workers' Compensation Fund," West Virginia Code of State Rules, §85-1-1 et seq. (April 15, 1986). The provisions of section 8 of that latter rule are not affected by this rule and remain in force and effect. Finally, the provisions of the legislative rule titled "Hearing and Review Process Regarding The Performance of Self-Insured Employers," West Virginia Code of State Rules, §85-5-1 et seq. (May 23, 1985), are not affected by this rule.

1.6. Pursuant to West Virginia Code, §5F-2-2(b)(12), the Secretary of the Department of Health and Human Services has granted written consent to the promulgation of this rule.

§85-9-2. Definitions.

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

2.2. The term "the Act" means the workers' compensation laws of the State of West Virginia which are codified at chapter 23 of the Code of West Virginia of 1931, as amended.

2.3. The terms "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

2.4. The term "commissioner" means the West Virginia Workers' Compensation Commissioner as provided for by West Virginia Code, §23-1-1.

2.5. The term "compensation fund" means the fund created by West Virginia Code, §23-3-1, which includes the surplus fund.

2.6. The term "decision" means a written statement issued by the commissioner containing the commissioner's findings of facts and conclusions as to any issue presented to the commissioner under these rules. Any purported "decision" which is not in writing shall have no legal effect under this rule.

2.7. The term "employer" has the meaning ascribed to that term by West Virginia Code, §23-2-1.

2.8. The term "regular subscription" means that an employer is a subscriber to all parts of the compensation fund including the surplus fund.

2.9. The terms "self-insurer" and "self-insured employer" mean employers who have elected one or both of the options contained in West Virginia Code, §23-2-9, and who pay individually and directly, or from their own benefit fund or system of compensation, the compensation and other benefits provided to injured employees or their dependents under the Act.

2.10. The term "surplus fund" means that portion of the compensation fund created by West Virginia Code, §23-3-1, which is to be set aside to create and maintain coverage for the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for by the Act.

2.11. The phrase "this rule" means the instant legislative rule designated as W.Va. C.S.R., §85-9-1 et seq.

§85-9-3. Current Status Of Employers Not Affected.

3.1. 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.

3.2. Similarly, 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.

§85-9-4. Obtaining Self-Insurance Status.

4.1. Certain employers may elect to become self-insured with respect to all of the compensation fund or to the compensation fund but not including all or part of the surplus fund. In order for the employer's election to become effective, the employer must satisfy all of the requirements of the Act and of this rule. Failure to satisfy those requirements will prevent the employer from becoming a self-insured employer. A parent or other related company may self-insure the risks of an employer in lieu of the employer itself being self-insured if its parent or other related company can meet all of the applicable requirements of the Act and of this rule for itself and for the subject employer.

4.2. An employer wishing to elect to become a self-insured employer must first demonstrate that it is a member of one of the following categories.

a. The employer is of sufficient financial responsibility to ensure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as provided for by the Act and the various rules adopted by the commissioner, of the value at least equal to the compensation provided in the Act; or

b. The employer is of such financial responsibility as required by subsection 4.2.a and maintains its own benefit funds, or system of compensation to which its employees are not required or permitted to contribute; and

c. The employer furnishes bond or other security to insure that the payments described in subsection 4.2.a are made.

4.3. The employer shall demonstrate to the satisfaction of the commissioner that it meets the requirements of subsection 4.2 by supplying to the commissioner sufficient financial and other information about the employer from which the commissioner is then able to make findings of fact in support of the employer's contention and to conclude that the employer is a member of the categories described in subsection 4.2. The commissioner shall supply an application form to the employer which shall specify the information needed by the commissioner to make the aforesaid findings and conclusions. The employer

must supply all of the information requested plus such additional information as the employer may wish to have the commissioner consider on behalf of its application. If, as a result of his or her review of the completed application, the commissioner is of the opinion that further information is needed to properly make the required findings and conclusions, then the commissioner may require that the employer provide such further information to the commissioner. The commissioner may conduct an audit of all books, records, papers, and documents in the possession of the employer or under its control in order to verify the information provided by the employer or as will aid the commissioner in making the required findings and conclusions.

4.4. At a minimum, the application form shall require the employer to file financial statements including a sworn and notarized itemized statement of the assets and liabilities of the employer for the three years prior to the date of application. The employer shall also file copies of its federal tax returns for the three years immediately preceding the date of application if the employer has been in existence that long. If the employer does not file a separate tax return, then the employer shall file copies of the returns which include the employer. The employer shall also file a sworn statement indicating the type or kind of business or operation that the employer is engaged in or will become engaged in at the time of the effective date of its application.

4.5. At the time of filing of its application, the employer shall, with such application, make a written statement as to whether the employer elects to remain a subscriber to all or part of the surplus fund. If the employer elects to become self-insured for all or part of the surplus fund, then the employer shall specify the parts of the surplus fund to which it wishes to remain a subscriber and the parts of the surplus fund as to which it wishes to self-insure.

4.6. Any employer whose record upon the books of the commissioner for the ten years preceding the date of the employer's application shows, as determined by the Fund's actuary, a liability against the compensation fund incurred on account of injury to or death of any of its employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to compensate its injured employees and the dependents of its fatally injured employees until it has paid into the compensation fund the amount of such excess of liability over premiums paid, including its proper proportion of the liability incurred on account of explosions, catastrophes or second injuries occurring within the state and charged against such fund. An employer's "proper proportion" of the aforesaid liability shall be determined by comparing the amount of premiums paid by the employer to the specific portion of the

surplus fund in issue (eg., the second injury fund) and the total amount of dollars paid out of that fund on account of that employer's employees. The difference, if any, of premiums paid from dollars paid out shall be the employer's responsibility.

4.7. Any employer electing to become a self-insured employer, as to all or part of the compensation fund, shall give security or a bond in the form, of the type, and in the amount required by the commissioner. The amount of the security or bond shall be that amount determined by the commissioner's actuary to be adequate and sufficient to compel or secure to the employer's employees, or their dependents, payment of the compensation and expenses required by the Act, which compensation and expenses shall in no event be less than the compensation paid or furnished out of the state workers' compensation fund in similar cases to injured employees or the dependents of fatally injured employees whose employers contribute to such fund. If the employer wishes to post marketable securities in order to meet its obligation for security or bond, the self-insured employer must meet the following requirements:

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

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

c. The maturity date of the instrument shall not be more than ten years from the date the securities are posted with the Fund; and

d. The payment of both principal and interest shall be 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.

4.8. The security or bond given by the employer shall be of the occurrence type so that the security or bond shall be liable in the place of the employer should the employer be unable to meet its obligations for all injuries or deaths as may occur during the time period for which the security or bond is given for and shall remain so liable at the time the award, if any, is subsequently made and for the entire time period in which all benefits will be paid under such award including death benefits to surviving dependents. Nothing to the contrary contained in any writing associated with or part of the security or bond shall defeat this obligation. Every surety, guarantor, warrantor, or other such person or entity who purports to stand in the place of the self-insured employer for the payment of such benefits shall be deemed to have given such security or

bond in compliance with this subsection 4.8 and no statement or disclaimer in the security or bond shall negate this requirement. This subsection 4.8 shall be applicable to all security or bond given by an employer after the effective date of this rule including additional security or bond if an employer who is already a self-insurer (but not with regard to all or part of the surplus fund) becomes self-insured for all or the remaining part of the surplus fund. All security and bonds given prior to the effective date of this rule shall be construed in keeping with the law in effect prior to the effective date of this rule for purposes of this subsection.

4.9. The applying employer shall post security or a bond in an amount sufficient to meet all of its obligations, as specified in subsection 4.2.a of this rule, to its employees and their dependents during the first year of its achieving the status of self-insured with respect to the compensation fund or to the pertinent portion of the surplus fund 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 Commissioner shall require the employer to post an additional or supplemental bond or additional security to meet that obligation. Such additional or supplemental security or bond shall meet the requirements of subsections 4.7 and 4.8 of this rule. Failure on the part of the employer to so increase its bond or security shall result in the forfeiture by the employer of its rights to remain self-insured for any and all purposes under the Act and its self-insured status will be terminated. A determination of a requirement to post an additional or supplemental bond or additional security shall be made in accordance with the other provisions of this section 4 of this rule.

4.10. At the time of filing its application, the employer shall pay to the commissioner a sufficient sum of money (at the time of the adoption of this rule, $2500.00) to pay for the commissioner's actuary and staff to conduct a review of the employer's account with the commissioner in order to make the determination under subsection 4.6 of this rule, to determine the proper amount of the security or bond to be given by the employer, and to make the determination under subsection 4.12 of this rule. The employer may request that any or all of such determinations be made prior to the time of the filing of its application, but such employer shall first pay the sum described above. In either event, the sum shall not be refundable to the employer. The commissioner shall increase or decrease the sum of money required by this subsection as the commissioner's expenses and costs change.

4.11. The amount of the security or bond required by the commissioner in order for the employer to become a self-insurer for all or part of the compensation fund or all or part of the

surplus fund shall be the sum actuarially determined by the commissioner's actuary. The actuary shall utilize generally accepted actuarial principles including, but not limited to, the applicant's own experience and net worth, and such additional factors as the actuary concludes are necessary to take into consideration. Until and unless the employer gives the required security prior to July 1 of the application year, the employer shall not attain self-insured status.

4.12. As part of its application for self-insured status, the employer shall be deemed to have agreed to pay to the commissioner a sufficient sum of money to cover the actuarially determined amount of its liability for the future costs of awards that are made by the commissioner following the effective date of its attaining self-insured status in respect to an injury or death which may have occurred prior to that effective date. Prior to the effective date of the employer attaining self-insured status, this amount shall either be paid in full or the employer shall enter into an agreement with the commissioner to make such payment over a period of time not to exceed three (3) years. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act.

4.13. Subsection 4.12 of this rule is not be applicable to those employers who are self-insurers at the effective date of this rule. However, for those employers the requirement of former section 4.2(b), 85 W.Va. C.S.R. 1 (1986), or the requirements of subsections 5.7 and 5.8 of the emergency predecessors to this rule, 85 W.Va. C.S.R. 8 [sic] and 85 W.Va. C.S.R. 9, shall continue and those employers shall remain liable for all awards made after the effective date of their self-insured status in respect to claims for an injury or death which may have occurred prior to that date. But, if such employers seek to expand their self-insurance status to other parts of the compensation fund (including other parts of the surplus fund), then such employer shall be subject to this subsection 4.13 in regards to the liability arising from the newly self-insured portion of the compensation fund.

4.14. Upon filing an application for self-insured status, an employer shall be deemed to have acknowledged its obligation to continue to make all other payments and all reports required by the Act or by the rules adopted by the commissioner which are applicable to self-insured employers. One such obligation requires each self-insured employer on or before the last day of the first month of each quarter, for the preceding quarter, to file with the commissioner a sworn statement of the total earnings of all of its employees subject to the Act for such preceding quarter, and to pay into the compensation fund a sum

sufficient to pay its proper proportion of the expenses of the administration of the Act and a sum sufficient to pay its proper portion of the expenses for claims for those employers who are delinquent in the payment of premiums, and a sum sufficient to pay its fair portion of the expenses of the disabled workers' relief fund, as may be determined by the commissioner.

4.15. If an employer applies for self-insured status with regard to the compensation fund but not including the surplus fund, then upon the approval of such application the employer shall attain the status of self-insurer for the compensation fund but not including the surplus fund as to which it shall remain a subscriber. In such a situation, the employer shall pay into the surplus fund upon the same basis and in the same percentages as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as is provided for with respect to payment of its proportion of expense of administration.

4.16. If an employer applies for self-insured status with regard to the compensation fund including all or part of the surplus fund, then subsection 4.15 of this rule shall be applicable to those portions of the surplus fund to which the employer remains a subscriber.

4.17. An employer wishing to elect to become a self-insured employer with respect to all or part of the compensation fund (including an employer who is already a self-insured employer for part of the compensation fund) shall be granted permission to become a self-insurer only as of the first day of July following the commissioner's approval of its application. In addition, the application asking for such permission must be received no later than December 31 of the year preceding said first day of July before the commissioner may grant his or her approval of the application. For example, in order to become a self-insured employer with respect to all or part of the compensation fund or in order to become a self-insurer to all or part of the surplus fund on July 1, 1991, the application must be received by the commissioner on or before December 31, 1990. This requirement applies to all employers who are initially electing to become a self-insurer and to employers who are already self-insured with respect to to part of the compensation fund, but who now wish to become self-insured with respect to all or part of the surplus fund; except that, an employer new to the State shall be permitted to file an application for self-insured status at any time during its first two years of operations.

4.18. By filing an application for self-insured status, the employer is deemed to have agreed to the provisions of this rule for maintaining its status as a self-insurer, for electing to relinquish its self-insured status, in whole or in part, and

for the termination of its doing business in the state or otherwise closing its account with the commissioner.

4.19. Any employer subject to the Act who has elected to carry its own risk and who has complied with the requirements of the Act and of this rule shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during the period that it is allowed by the commissioner to carry its own risk.

§85-9-5. Conditions For Maintaining Self-Insured Status.

5.1. Employers permitted by the commissioner to become self-insurers must comply with the Act, the various rules promulgated by the commissioner, and the orders of the commissioner. If at any time, an employer fails to comply or becomes in default with regard to the obligations of a self-insured employer or the requirements of the Act, of this rule of any other pertinent rule, or any order of the commissioner, such failure or default, shall be a sufficient basis for the commissioner's exercise of discretion to issue a decision which suspends or terminates the employer's status as a self-insurer. See, for example, the legislative rule titled "Hearing and Review Process Regarding The Performance Of Self-Insured Employers," 85 W.Va. C.S.R. 5 (May 23, 1985).

5.2. 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 meet all of the requirements for such status as well as the other requirements imposed by the Act, by this rule, and by other rules and regulations promulgated by the commissioner. The commissioner retains the discretion to issue a decision which permits an employer to correct within ninety (90) days any deficiency in lieu of revoking that employer's self-insured status. Unless such a correction decision is issued, the commissioner shall issue a decision which terminates the employer's self-insured status if it fails to satisfy the aforesaid requirements.

5.3. A self-insured employer with respect to all or part of the compensation fund shall be responsible for the direct payment of all pecuniary compensation due and owing under the Act to the employee or the employee's dependents and shall also be responsible for reimbursing the commissioner for all medical attention, funeral expenses, or other expenses paid by the commissioner on behalf of employees and their dependents. Pecuniary compensation payable by the employer and reimbursements from the employer shall be paid in the time periods specified in the Act, or in the various rules promulgated by the commissioner, or in accordance with the orders of the commissioner, or, in the absence of any of the

above, in a prompt and timely fashion. The employer's experience in so meeting its obligations shall be given consideration by the commissioner in determining whether to permit the employer to remain a self-insurer.

5.4. On at least an annual basis, but sooner if required by the commissioner, the employer shall file such reports as the commissioner may require in the form required by the commissioner concerning the number and type of claims made, the amount of benefits paid, and the timeliness of payments, all on an individual and aggregate basis.

5.5. On an annual basis or sooner as an individual case may require, the commissioner shall review the sufficiency and the commissioner's actuary shall review the amount of the bonds or securities provided by each self-insuring employer for its coverages with respect to all or part of the compensation fund. In the event that the commissioner then concludes that the securities or bonds are not adequate or sufficient for the purposes intended, the commissioner shall order the employer to increase or add to its securities or bonds by the amount needed to reach the adequate and sufficient level. The commissioner shall provide a reasonable amount of time for the employer to obtain such increased or added security or bond as is deemed just in each individual case; however, such period shall not exceed ninety (90) days from the date of the commissioner's order. Such increased or added security or bond shall be subject to all of the conditions of section 4 of this rule pertaining to security and bonds. Failure by the employer to furnish increased or additional bond in the required time shall result in the employer's immediate termination as a self-insurer. Upon such a termination, the employer shall be subject to the various provisions of section 6 concerning termination of self-insured status.

5.6. In the event that the employer's obligations under the Act can reasonably be expected to decrease, then the employer may petition the commissioner for permission to reduce the amount of its bond or security; however, such reduction shall not be made until after the commissioner approves the reduction. Upon a showing of credible evidence that the employer's obligations under the Act can reasonably be expected to decrease, the commissioner shall grant the petition to reduce the amount of bond or security for purposes of future injuries or deaths among the employer's employees. The determination of the amount of such reduction shall be within the discretion of the commissioner and shall be made in consideration of the factors outlined in section 4 of this rule. The commissioner shall obtain his or her actuary's opinion on the petition and shall rule upon each such petition within ninety (90) days of its receipt by the commissioner.

5.7. Self-insured employers may pay compensation benefits prior to receipt of the commissioner's pay order if, and only if:

a. The commissioner receives notice in writing from the employer within seven (7) days from the date of issuance of the first payment of benefits; and

b. Such notice is accompanied by a properly completed form or forms as designated by the commissioner unless such form or forms was submitted prior to the date of submission of the notice; and

c. Such notice is accompanied by a properly completed physician's report or a statement that a blank copy of the physician's report form has been sent by mail to the employee's treating physician with a request to file such form with the commissioner within seven (7) days from the date of issuance of the first payment unless such a report was submitted prior to the date of submission of the notice.

5.9. Every employer granted self-insured status must continue to meet all of the requirements for becoming self-insured under the Act, of this rule, and of any other pertinent rule promulgated by the commissioner in order to maintain its status as a self-insured employer. If, for example, the employer at any time ceases to meet the qualifications of subsection 4.2 of this rule, then the commissioner may exercise his or her discretion to revoke the employer's self-insured status or, alternately, allow the employer sufficient time (not to exceed ninety (90) days) to rectify its failure. In order to ascertain if the employer does continue to meet all of the requirements for becoming self-insured, the commissioner may conduct an audit of all books, records, papers, and documents in the possession of the employer or under its control in order to verify the information provided by the employer or as will aid the commissioner in making the required findings and conclusions.

5.9. In the event that security or bond previously given by the employer is unable to continue meeting the obligations imposed by section 4 of this rule, the self-insured employer shall substitute adequate and sufficient security or bond, under the terms imposed by section 4 of this rule, for all time periods originally intended to be covered by the failed security or bond. Such failed security or bond shall include, but not be 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. Whenever a substitution of security or bond is required, the employer shall be permitted a reasonable amount of time (not to exceed ninety (90) days) in which to obtain and file appropriate substitute security or

bonds. Failure to meet this obligation shall cause the employer's self-insured status to terminate.

§85-9-6. Terminating Self-Insured Status.

6.1. In the event that a self-insured employer wishes to continue doing business in the state but wishes to terminate, in whole or in part, its self-insured status with regard to all or part of the compensation fund, the employer may do so only after obtaining the agreement of the commissioner. The agreement with the commissioner shall be on such terms as are required by this rule and upon such additional terms as the commissioner finds to be reasonable under the circumstances in order to maintain the solvency of the compensation fund and in carrying out the commissioner's fiduciary duties to the compensation fund. The provisions of this section 6 are applicable to any employer wishing to terminate all or part of its self-insured status regardless of whether the employer became a self-insured employer before or after the effective date of this rule.

6.2. As part of the agreement with the commissioner, the employer shall be required to pay to the commissioner a sufficient sum of money to cover the actuarially determined amount of its liability for the future costs of awards made during its period of self-insured status and of awards that are made by the commissioner following the effective date of the termination of its self-insured status in respect to an injury or death which may have occurred prior to that effective date. This amount shall either be paid in full prior to the effective date of the employer's termination of its self-insured status or by the employer entering into an agreement with the commissioner to make such payment over a period of time not to exceed three (3) years. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act.

6.3. Upon making the payment or successfully completing the agreement required by subsection 6.2 of this rule, the employer shall be relieved of all future responsibility for the awards covered by the buy-out provided for by subsection 6.2. However, until the final payment pursuant to an agreement, the commissioner shall assume all such responsibility for so long as the employer abides by the agreement. In the event that the employer fails to abide by the agreement, the employer's obligation to make the required payments to the employee or the employee's dependents and to reimburse the commissioner shall resume. Further, the commissioner shall elect whether to apportion the employer's liability based upon the amount actually paid to the commissioner as opposed to the amount remaining to be paid under the agreement or, as an alternative,

the commissioner may find that the employer is in default of a payment for purposes of West Virginia Code, §23-2-5a.

6.4. If an employer's status as a self-insurer is terminated by the commissioner due to the failure of the employer to abide by and fulfill its obligations, such employer shall (unless a stay is obtained pending the exhaustion of administrative appeals including possible judicial appeals) make payment to the compensation fund in the same fashion as if it had elected to surrender its self-insurer status as provided for by subsection 6.2 of this rule except that such payment shall be due immediately upon the termination of the self-insured status and failure to make payment within thirty (30) calendar days of the effective date of the termination shall cause the employer to be in default for purposes of West Virginia Code, §23-2-5a. In lieu of the aforesaid payment, the employer may elect to post additional, sufficient bond or security within the thirty (30) day period to cover the amount due to the commissioner. The sufficiency of such bond or security must be satisfactory to the commissioner and meet the requirements of section 4 of this rule. In the event that the commissioner determines that good cause exists to believe that payment by the employer is unlikely or that posting of additional, sufficient bond or security is unlikely, the commissioner may demand that the employer make the required payment immediately and take collection actions as authorized by West Virginia Code, §23-2-5a, and the rules adopted by the commissioner thereunder.

6.5. In the event that a self-insured employer sells its assets or acquires additional assets of another business, then the appropriate provisions of section 8 of the legislative rule titled "Administration Of The Workers' Compensation Fund," 85 W.Va. C.S.R. 1 (1986), shall apply to the employers involved in the transaction.

6.6. Subscribing employers who were previously self-insured employers and who at the effective date of this rule were continuing to pay compensation and expenses for certain of its employees due to its previous status as a self-insurer may elect to buy-out their responsibility for those payments by making the payment specified by subsection 6.2 of this rule including entering into a agreement in which event the terms of subsection 6.3 shall also be applicable.

§85-9-7. Buy-outs Required By The Commissioner.

As regards any self-insured employer, whether the employer attained that status before or after the effective date of this rule, the commissioner may at any time and in any case that shall require the payment of compensation or benefits by such employer in periodical payments, and the nature of the case makes it possible to compute the present value of all future payments, the commissioner may, in his or her discretion, at any

time compute and permit or require to be paid into the compensation fund an amount of money equal to the present value of all unpaid compensation for which liability exists, in trust. In an appropriate case, the commissioner may permit an employer to enter into an agreement to make the required payment over a period of time not to exceed three (3) years. The agreement shall provide for the payment of interest on the principal which shall be calculated as provided for in West Virginia Code, §23-2-13, except that the rate of interest after being so determined shall not change during the life of the agreement; however, interest shall be compounded as specified in the Act. During the life of such an agreement, the commissioner shall pay any pertinent claims from the compensation fund. Upon the employer making such payment or upon the employer successfully achieving the completion of an agreement, the employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the commissioner. Failure by the employer to complete an agreement under which the commissioner has been making payments, in lieu of the employer, shall cause the employer to be in default of a payment due the commissioner for purposes of the West Virginia Code, §23-2-5a, and shall further cause the employer to forfeit its self-insured application and status, if any, and shall further cause the employer's security or bond to be responsible for any obligations of the employer which results from the failure within the ambit of the security or bond.

§85-9-8. Protests By Employers; Administrative Hearings.

8.1. An employer may protest any order or decision of the commissioner made under the provisions of West Virginia Code, §23-2-9, or of this rule. In order to preserve its right to protest, the employer must file a written petition stating the order or decision protested and the exact nature of the issue in controversy. Such written petition must be received by the commissioner within thirty (30) days of the date of the order or decision protested. This period may not be extended or waived.

8.2. Within fifteen (15) days of the commissioner's receipt of the written protest, the commissioner shall issue a notice of an administrative hearing upon the protest. The hearing shall be held within thirty (30) days after the receipt by the commissioner of the written protest unless such hearing be postponed by agreement of the parties or by the commissioner for good cause. Filing of the written protest shall not stay the order or decision protested unless the commissioner so orders. The commissioner may grant a stay provided that security or a bond is provided by the employer in a sufficient and adequate amount to protect the interests of the compensation fund in keeping with the fiduciary obligations of the commissioner.

8.3. All administrative hearings conducted pursuant to this rule will be held in accordance with the provisions of this section 8 of this rule. In any particular case, any special conditions which are set forth in the Act or in other rules promulgated by the commissioner and which are applicable to that case will be adhered to during administrative hearings in lieu of any contrary provision in this rule.

8.4. Unless waived by all the parties to the hearing and by the commissioner, all hearings shall be preceded by at least ten (10) days written notice. The notice shall be given either by personal delivery thereof to the person or to the entity to be notified or by depositing such notice in the certified United States mail, postage prepaid, return receipt requested, in an envelope addressed to such person or other entity at the last known address of such person or other entity. Proof of the giving of notice in either such manner may be made by the affidavit of any officer or assistant or employee of the commissioner, or by affidavit of any person over eighteen years of age, naming the person or other entity to which or to whom such notice was given and specifying the time, place and manner of the giving thereof. If certified mail is used, then a copy of the return receipt shall be attached to the proof of notice.

8.5. Notice of the hearing and service of any document or order shall be upon the parties of record except that any party who is represented by an attorney shall be deemed to have designated that attorney as the proper recipient of all such notices, documents, or orders and service upon that attorney will be the equivalent for all purposes as service upon the party. Notice shall be complete if the written notice is personally tendered to the intended recipient and is either accepted or refused by that recipient. Similarly, notice shall be complete if the written notice is sent by certified mail, return receipt requested, to the recipient and the return receipt shows that it was either accepted by a person at the last known address or was refused by a person at the last known address.

8.6. In any instance where any form of notice, including one arising under subsection 8.4 of this rule or one contained in any order or document, the time period will begin to elapse with the first day following the date of the notice, order, or document. This rule is applicable whether the notice is delivered personally or served by mail.

8.7. The subsection 8.4 notice shall contain the date, time, and place of the hearing and a short and plain statement of the matters asserted. If the commissioner is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by a party, a more definitive and detailed statement shall be furnished.

8.8. The hearing shall be held in the county selected by the commissioner.

8.9. At the hearing, an opportunity shall be afforded all parties to present evidence and argument with respect to the matters and issues involved. Any person interested in the proceeding, but not a party thereto, shall be permitted to testify as to the issues in controversy after first being placed under oath or affirmation. Any such interested person, who is not a party, shall not, however, be permitted to submit argument or to cross-examine other witnesses. Argument may be restricted to a presentation in written form. All of the testimony and evidence at the hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. The commissioner shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Upon request from any party to the hearing, all reported testimony and evidence at a hearing shall be transcribed, and a copy thereof furnished to the party at its expense. The commissioner shall have the responsibility for making arrangements for the transcription of the reported testimony and evidence and such transcription shall be accomplished with all dispatch.

8.10. Evidentiary depositions may be taken and read as in civil actions in the circuit court of this state.

8.11. Except to the extent required by statute or by this rule, all hearings under this rule will be conducted in accordance with the then current versions of the "Rules of Civil Procedure for Trial Courts of Record," "Trial Court Rules for Trial Courts of Record," and "Local Rules for Kanawha County Civil Courts" as those rules would apply to a trial court sitting without a jury.

8.12. All hearings shall be conducted in an impartial manner and shall be open to members of the public. The commissioner, the executive secretary, inspectors, and every hearing officer appointed by the commissioner shall have the power to administer oaths and affirmations, certify official acts, take depositions, rule upon offers of proof and receive relevant evidence, regulate the course of the hearing, hold conferences for the settlement or simplification of the issues by consent of the parties, dispose of procedural requests, motions, or similar matters, and take such other actions as are authorized by this rule.

8.13. During a hearing, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The then current "Rules

of Evidence" as applied in civil cases by a court sitting without a jury shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing officer shall be bound by the rules of privilege recognized by law. Objections to evidentiary offers shall be noted in the record, but exceptions to rulings by the hearing officer shall not be made. Any party to any hearing may vouch the record as to any excluded testimony or other evidence provided that the hearing officer may elect to require that the excluded testimony be submitted in written form following the hearing.

8.14. All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts or by incorporation by reference. In all cases, copies of orders, proceedings, or records in the office of the commissioner shall be equal to the original in evidence.

8.15. Every party as well as the commissioner shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

8.16. All witnesses who testify during a hearing shall first be subject to oath or affirmation and any testimony submitted by deposition shall show on the face thereof that the witness was so qualified.

8.17. The hearing officer may take notice of judicially cognizable facts. All parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

8.18. Upon motion in writing served by any party or by the Fund as notice may be served pursuant to subsection 3.2 of this rule and therein assigning error or omission in any part of any transcript of the proceedings had and testimony taken at any such hearing, the hearing officer shall settle all differences arising as to whether such transcript truly discloses what occurred at the hearing or shall direct that the transcript be corrected and revised in the respects designated by the hearing officer, so as to make it conform to the whole truth.

8.19. The commissioner, the executive secretary, inspectors, or a hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent

books, accounts, papers, records, documents, and testimony. All subpoenas and subpoenas duces tecum shall be issued in the name of the commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas duces tecum issued at the instance of the Fund shall be the responsibility of the commissioner. All requests by interested parties for subpoenas and subpoenas duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay service fees and fees for the attendance and travel of witnesses.

8.20. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail. But a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. If service is by mail, then the five (5) day notice period shall not begin to run until the date the subpoena or subpoena duces tecum is received by the person or entity subject thereto as shown by the date on the return receipt.

8.21. Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State. All such fees shall be paid by the Fund if the subpoena or subpoena duces tecum was issued, without the request of an interested party, at the instance of the Fund. All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued.

8.22. Upon motion made promptly and in any event before the time specified in a subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the circuit court in which the subpoena duces tecum was served, or the judge of either such court in vacation, may grant any relief with respect to such subpoena duces tecum which either such court, under the West Virginia Rules of Civil Procedure for Trial Courts of Record, could grant, and for any of the same reasons, with respect to a subpoena duces tecum issued from either such court.

8.23. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the commissioner, shall compel obedience by attachment proceedings for contempt of a subpoena

or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

8.24. The issuance of a subpoena duces tecum will be refused only in an instance when there is good reason to believe that the subpoena power is being abused. All subpoenas and subpoenas duces tecum will state on their face the name of the party who requested it.

8.25. Discovery shall be engaged in only with the consent of the hearing officer or, if a hearing officer has not yet been assigned, with the consent of the commissioner or the executive secretary. All discovery requests will be submitted to the appropriate official at the same time as the discovery request is served upon the other party. Discovery requests filed less than ten (10) days prior to a hearing shall not be approved unless the party to whom the discovery request is directed waives this requirement. If the official determines that the requested information is relevant and material to the issues to be heard and not unduly burdensome, the official will permit the discovery and set a reasonable time frame for the disclosure of the information. Determination of a reasonable time frame will be premised upon the nature and scope of the information requested and the date on which the hearing is scheduled. The official shall attempt to avoid continuing a previously scheduled hearing.

8.26. Every hearing officer appointed by the commissioner to conduct a hearing under this rule shall be an attorney licensed to practice law in this state.

8.27. The hearing officer is authorized to receive and rule upon any procedural matter arising before, during, or after a hearing. All final rulings on substantive matters shall be made by the commissioner.

8.28. The hearing officer shall continue a hearing upon motion of the commissioner. Requests for continuances by a party shall not be granted as a matter of course, but only upon a showing of good cause which cause shall be strictly construed against the requests.

8.29. At the conclusion of the submission of evidence, the parties shall be permitted to file proposed findings of fact, conclusions of law, and such legal briefs or memoranda as they wish. The parties shall be permitted seven (7) days to file such items which filings shall be concurrent. The parties shall be permitted three (3) days to respond to the filing of any other party. No further argument shall be permitted.

8.30. Thereafter, the hearing officer will prepare a report and recommendation which shall contain proposed findings of fact and conclusions of law as suggested by the hearing

officer for the commissioner's approval. The parties to the hearing shall then be permitted seven (7) days in which to file objections or comments upon the report and recommendation and three (3) more days to respond to each others' objections and comments. The hearing shall be deemed to be ended upon the commissioner's receipt of the objections and comments from all of the parties. Within thirty (30) days of the receipt of the parties objections and comments, the commissioner shall decide whether to accept the report and recommendation, to reject it, to modify it, or to remand the matter to the hearing officer for further proceedings or upon other instructions. The commissioner retains his or her right to review any and all proposed findings of facts against the record and to disagree therewith provided that the commissioner states the basis for the disagreement in his or her final order. The commissioner shall render either a final order or an interlocutory order as his or her decision may require in which the commissioner accepts in whole or in part the proposed findings of fact and conclusions of law submitted by the hearing officer and, to the extent that the commissioner rejects or modifies the report and recommendation of the hearing officer, the commissioner shall furnish his or her own findings of fact and conclusions of law.

8.31. At any time within thirty (30) days after the receipt of the parties' objections and comments, the commissioner may order a supplemental hearing upon due notice to the parties if the commissioner is of the opinion that the facts have not been adequately developed.

8.32. A copy of the final order or decision of the commissioner shall be served upon each party and the party's attorney of record, if any, either in person or by certified mail.

8.33. All appeals from the final order or decision of the commissioner shall be taken as provided by West Virginia Code, §23-5-1 et seq.

§85-9-9. Written Decisions; Public Access.

All decisions made pursuant to the provisions of this rule shall be in writing and shall be a matter of public record. Any purported decision not in writing shall be void and of no legal effect and any person or other entity relying upon such a purported decision shall do so at his or her or its own risk.

§85-9-10. Severability

If any provision of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of this rule which can be given affect without the invalid

provisions or application and to this end the provisions of this rule are declared to be severable.

TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 9
SELF-INSURED EMPLOYERS

WORKERS' COMPENSATION FUND
601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: (304) 348-0475

GASTON CAPERTON
GOVERNOR

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

Legislative Rule Making Review Committee

FROM: Emily A. Spieler
Commissioner

DATE: January 16, 1990

RE: Filing of Agency Approved, Proposed Legislative Rule, "Self-Insured Employers," Title 85, Series 9.

Appended hereto, please find the necessary documentation for the filing of the above noted rule. Please note that Taunja Willis Miller, Secretary, Department of Health and Human Resources has approved the filing of this rule and her letter of January 9, 1990, is included with this filing.

Also, please note that there was only one set of comments received on this rule. The West Virginia Self-Insurers Association, by its Executive Secretary, Henry C. Bowen, filed a set of comments dated January 4, 1990. Examination will reveal that the comments are in two parts. One part relates directly to this proposed rule and a memorandum of response is included. The other part, however, pertains to the filing of an emergency rule which dealt with a subpart of the substance of this rule. The two rules - the emergency and this proposed permanent - are very different in all respects - substantial and formalistic. In addition, the Division of Workers' Compensation allowed the emergency rule to expire and, hence, it is no longer effective. But, for the sake of clarity, the Association's comments to the emergency rule and the division's responses are included.

WORKERS' COMPENSATION FUND

Transcript of a Public Hearing held at 10:00 a.m. on Friday, January 5, 1990, in the Third Floor Conference Room, 601 Morris Street, Kanawha County, Charleston, West Virginia, pursuant to prior public notice duly given pursuant to Chapter 29A of the West Virginia Code, as amended, concerning Legislative Rules proposed by the Senior Administrator of the Division of Workers' Compensation, Department of Health & Human Resources of the State of West Virginia.

APPEARANCES: WILLIAM MITCHELL, Senior Counsel
Workers' Compensation Fund

Workers' Compensation Fund
Charleston, WV

MR. MITCHELL: This proceeding is being conducted for the purpose of receiving written public comment pertaining to a proposed Legislative rule filed in the State register on November 22, 1989, by the Senior Administrator of the Division of Workers' Compensation, Department of Health & Human Resources. The rules are designated Title 85, West Virginia Legislative Rule, Series IX, entitled Self Insured Employers. This meeting was convened at 10:00 a.m. on January 5, 1990. It is presently 10:10 a.m. and there has not been an appearance by any member of the public desiring to present written comment. Apparently those persons desiring to offer written comment have done so by mailing or delivering their comments to the offices of the Commissioner previously. This meeting is adjourned.

(HEARING ADJOURNED AT 10:10 a.m.)

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION FUND, to wit:

I, Susan L. Settle, Reporter for the Workers' Compensation Fund, do hereby certify that the foregoing is a correct record of the proceedings.

Given under my hand this the 5th day of January, 1990.

Susan L. Settle

Susan L. Settle, Reporter.

Workers' Compensation Fund
Charleston, WV

WORKERS' COMPENSATION FUND
601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
TELEPHONE: (304) 348-0475

GASTON CAPERTON
GOVERNOR

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

Legislative Rule Making Review Committee

FROM: Emily A. Spieler
Commissioner

DATE: January 16, 1990

RE: Responses to Comments and Explanation of Changes, Proposed Legislative Rule, "Self-Insured Employers," Title 85, Series 9.

Under cover letter dated January 4, 1990, the West Virginia Self-Insurers Association, by Henry C. Bowen, Executive Secretary, filed comments on this proposed legislative rule. This memorandum will respond to those comments and explain any changes made to the original draft of the proposed rule as a result of the comments. Please note that this memorandum will follow the numbering of the Association's comments for ease of reference.

1) The division disagrees with the Association's comment that subsection 2.9 is different from the definition of "self-insured employers" as stated in subsection 1.5(a), "Hearing and Review Process Regarding the Performance of Self-Insured Employers," 85 W. Va. C.S.R. 5 (1985). Both subsections refer to the same code language, West Virginia Code, § 23-2-9. Subsection 2.9 of the instant rule also states the substance of the statutory provision. The additional language does not change the meaning of the term as it is used in either rule. Rather, the language of subsection 2.9 merely saves the reader from having to refer to the statute in order to determine what relevance the statutory language has to the definition.

2) The Association next questions portions of subsection 4.1. First, it questions the use of the word "certain" in the first sentence of the section. Apparently the association fears that the use of the word somehow limits the number of employers who may elect to become self-insured; that is, limits employers who are qualified to become self-insured by imposing some additional criteria by its presence. This was not the intention of the use of the term "certain" in this context. The term is used in a limiting sense, but only to amplify the conditions that are stated in the next sentence. It does not add to those conditions. Rather, it alerts the reader to the fact that not all employers can become self-insured.

The Association also criticizes subsection 4.1 due to the presence of the third sentence which the Association states is redundant to the second sentence. The division does not agree that the third sentence fails to serve a useful purpose. The second sentence states that an employer electing to become self-insured must meet all of the requirements of the law and of the rule. The third sentence makes explicit the inference contained in the second sentence; that is, the failure on the part of the employer to meet the requirements will result in the employer failing to become self-insured. The division is of the opinion that the third sentence serves the useful purpose of making explicit what is inferred earlier.

3) As to subsection 4.2, the Association questions a portion of the language which details the types of benefits that the self-insured employer will have to be able to provide its employees and suggests other language. The division notes that the language referred to by the Association is statutory. Moreover, the language requested by the Association is already contained in the subsection and is also statutory.

4) The Association next turns to subsection 4.3 which details the type of information that an electing employer must supply to the division in order to become self-insured. The material specified consists of a variety of financial data and records. The Association suggests the addition of a sentence which would define all of the submitted data and records as being confidential and not subject to public inspection. The division rejects this amendment. The State's Freedom of Information Act, West Virginia Code, §29B-1-1 et seq., specifies the types of information which is subject to being withheld from the public. That statute can and will be applied to requests from the public for information collected under the instant rule. The division notes that section 9 of the instant rule states that all decisions by the division made under this rule must be in writing and that any decision not in writing is void. Section 9 then specifies that any decision under the rule shall be a matter of public record so that the public can readily ascertain that a written decision was indeed issued. The division believes

that the Association's confidentiality language would be contrary to the division's policy, as expressed in section 9, that matters handled by the division be done so in public and that the division is publicly accountable for its actions. Employers are not under any obligation to seek to become self-insured. An employer electing to do so is voluntarily entering into the review process set out by the rule and subjecting itself to a public review within the terms of the State's Freedom of Information Act.

5) The division will accept the Association's suggested insertion of the phrase "and notarized" in the requirement of subsection 4.4 that the employer submit a "sworn itemized statement."

6) The Association suggest the addition of a sentence to subsection 4.5 which would require the division to send back to the applying employer, within sixty days of the division's receipt of the application, an acknowledgement of the application and a restatement of what the employer has told the division it wishes with regard to self-insured status and the surplus fund. The division views such a requirement as being meaningless and serving no useful purpose. The Association's requirement would result in a mere parroting of the applying employer's application with no desired end in sight. If the employer is concerned about any confusion in the minds of the division's personnel, it will have ample opportunity to learn of that confusion and to correct it during the process required by the rule.

7) The Association objects to the requirement of subsection 4.6 for a determination of any liability to the division by the employer where the division has incurred a liability in excess of the amount of premiums paid to the division by the employer. The subsection limits the period for determining the excess to the last ten years. The language objected to by the Association is required by West Virginia Code, §23-2-9, and is set forth in the second full paragraph of that section. Hence, the Association's distress with subsection 4.6 is misplaced. The division notes that the statute is open ended with regard to the period to be examined while the rule sets forth a ten year time limit. The division inserted this provision as a matter of administrative grace which recognizes that, due to the effects of inflation, comparing present day dollars to dollars of more than ten years ago rapidly becomes meaningless. The Association's complaint that a reciprocal provision is not in the rule is ill founded. The purpose of the second paragraph in the statute is to protect the fiscal solvency of the workers' compensation fund. In effect, the language operates as a buyout of liability by the employer so that the fund will not be injured due to the absence of the employer and the presence of the liability. The division notes that the failure of past administrations to protect the fund when an employer voluntarily elects to withdraw from further participation currently causes the division much

difficulty in deciding which account - the employer's self-insured account or the employer's regular subscription account - should be charged with a given liability. The result has been the creation of a number of artificial rules of thumb of a very complicated nature. Active enforcement of the statutory language set forth in subsection 4.6 of the instant rule will go a long ways towards protecting the fiscal solvency of the fund. This will be especially true when the division gives credence to the last paragraph of West Virginia Code, §23-2-9, which is an additional buyout provision and which is implemented in section 7 of the instant rule.

The Association also objects to the word "explosions" being in subsection 4.6. The division notes that the word is quoted from West Virginia Code, §23-2-9, and is contained in the second full paragraph of that section.

8) As its last comment, the Association suggests the insertion of certain language into subsection 4.9. The division is agreeable to the insertion of the first part of the Association's language and that amendment will be made. However, the division rejects the additional language that would prohibit the division from charging a given self-insured employer with the costs of the division's actuary for determining whether that employer's bond or security is adequate. The division notes that the Association's language would have the effect of spreading across all of the State's employers the costs of making sure that the workers' compensation fund is protected from any unexpected liability due to the failure of a self-insured employer in meeting its obligations. The division notes that West Virginia Code, §23-2-5(g), requires that an employee who suffers a compensable injury be provided benefits even if the employer is delinquent or in default of a payment due under the Act. Failure of a self-insured employer to meet its payment obligations would constitute a default in a payment and require the fund to make the payments. In the absence of adequate security, the fund, and ultimately all of the other State employers, would bear this additional expense. The division is of the opinion that the costs associated with an employer's voluntary election to become self-insured should not be passed along to other employers. This includes the costs associated with protecting the fund itself from the failure of security or bond to meet an employer's obligations. Thus, the division rejects this portion of the Association's suggested language.

West Virginia Self-Insurer's Association
Comments to Proposed Legislative Rule
Title 85, Series 9, "Self-Insured Employers"

The West Virginia Self-Insurer's Association notes and appreciates the adoption, in part, of proposals offered by the Association to the Commissioner's Emergency Rule Title 85, Series 9; "Self-Insurers Electing to Opt Into or Out of Surplus Fund." To the extent that the proposed Legislative Rule Title 85, Series 9, "Self-Insured Employers" fails to incorporate fully the concerns addressed by the Association regarding the Emergency Rule, the Association reiterates the concerns expressed therein and offers the following additional proposals for the final Legislative rule.

1. Section 2.9.

With regard to definition of "self-insurer" and "self-insured employer" the Association recommends that the Commissioner amend the definitions to conform to Title 85, Series 5, section 1.5(a). The inclusion of two slightly different definitions for the same term invites confusion.

2. Section 4.1.

The Association questions the purpose of the term "certain" in the first sentence of this section. It is the understanding of the Association that any employer that can comply with the minimum requirements of the proposed rule and the Act may obtain self-insured status.

The Association questions the need for the third sentence of section 4.1: "Failure to satisfy those requirements will prevent the employer from becoming a self-insured employer." This sentence is redundant in light of the affirmative duty imposed by the

preceding sentence to "satisfy all of the requirements of the Act and of this rule" in order for an employer to become self-insured.

3. Section 4.2.

The phrase in subsection (a) following "fatally injured employees" appears to be unnecessary. In the interest of brevity, the Association suggests the following amendment: after the words "fatally injured employees," the excision of the remainder of the paragraph and the addition of the language "in a value at least equal to and in a manner consistent with the compensation provided in the Act."

4. Section 4.3.

The Association proposes the addition of the following sentence at the end of section 4.3: "All information provided to and reviewed by the Commissioner in accordance with this section and not otherwise available for public review shall be kept confidential by the Commissioner and his/her staff."

5. Section 4.4.

To the extent that this section is intended to require of an employer a "sworn itemized statement," the Association would suggest some guidance as to the nature of a statement that will qualify under the rule as a "sworn" statement. If the intent of the rule is to require a notarized statement, the Association suggests the insertion of the words "and notarized" following the word "sworn" on the second line of the section and anywhere else the same intent is expressed.

6. Section 4.5.

In order to eliminate the potential for denial of an

application for self-insured status for a part of the Surplus Fund when in fact self-insured status is sought for a different part of the Surplus Fund, the Association suggests an acknowledgement of the employer's application for self-insured status. At the end of section 4.5, the following language is recommended: "Within sixty days of the receipt of an application for self-insured status, the Commissioner shall, by letter to the employer, acknowledge the employer's application and the part of parts of the Surplus Fund to which the employer wishes to remain a subscriber and the part or parts of the Surplus Fund for which the employer wishes to self-insure."

7. Section 4.6.

The Association generally objects to the Fund's imposition of a charge equaling the difference between the amount of premiums paid and the amount of liability incurred for the ten-year period preceding the application for self-insurer status. The net effect of such a requirement is to place self-insured liability on an employer for the ten years preceding that employer's actual date of application for self-insured status. Such a tactic is unduly punitive towards those employer's wishing to self-insure that, for the ten years preceding the date of that application may have utilized significantly different defense strategies than they would have had they been self-insured.

Section 4.6 also fails to reward those employers for whom the actual liability incurred during those preceding ten years was in fact less than the premiums paid. In such cases, the Fund should assume an employer's liability after self-insured status has been

granted in an amount equal to the difference between the employer's premiums paid and the actual liability incurred.

The Association objects to the inclusion of the word "explosions" appearing five lines up from the bottom of the page in Section 4.6. The Workers' Compensation Act makes no specific reference to explosions within the definitions with regard to the Surplus Fund and, therefore, the use of the term in the proposed rule is inappropriate.

8. Section 4.9.

After the phrase "additional security to meet that obligation," the Association suggests the inclusion of the following language: "A determination of a requirement to post an additional or supplemental bond or additional security shall be made in accordance with the other rules and regulations of this section; except, the employer shall not be charged in accordance with section 4.10 for additional actuarial calculations necessary to arrive at a determination of whether an additional bond or security is necessary.

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M E M O R A N D U M

TO: The Honorable Ken Hechler
Secretary of State

Legislative Rule Making Committee

FROM: Emily A. Spieler
Commissioner

DATE: October 10, 1989

RE: Response To Comments To Emergency Rule: "Self-Insurers Electing To Opt Into Or Out Of Surplus Fund, 85 CSR 9.

A public hearing was held on this rule at 9:30 a.m. on August 14, 1989, at the offices of the Workers' Compensation Fund. Two persons attended the public hearing one of whom represented Mr. Henry C. Bowen, Esquire, who filed written comments on the rules on behalf of the West Virginia Self-Insurers Association. The other person did not file comments. It is the purpose of this memorandum to respond to the written comments. In the text below, the comment will first be restated followed by the Fund's response.

1. The first comment is as follows:

§ 4.2

This section fails to define specifically when an employer's approved application to self-insure with respect to all or part of the Surplus Fund would become effective. The section allows the employer to withdraw its letter of intent to self-insure by October 31, 1989, even after the Commissioner's approval. The section, however, fails to indicate when, for purposes of § 5.7 self-insured status liability, an approved application would become effective. The revocable intent language of § 4.2 seems to suggest that an approved application to self-insure would not become effective until October 31, 1989. The language of §

5.7, however, could be read to impose self-insured status liability upon the Commissioner's approval of the application.

The uncertainty in the actual effective date of an application to self-insure with respect to the Surplus Fund could lead to unnecessary confusion. An employer may elect to self-insure at some time before October 31, 1989 and subsequently suffer a catastrophe. Under the language of § 4.2 and § 5.7, the employer may or may not then be allowed prior to October 31, 1989 to withdraw its letter of intent in order to avoid self-insured liability.

It is recommended that the following language be inserted after the last sentence in § 4.2. "The effective date of the approval of an application for self-insured status under this section shall be the date following the final day of the revocation period."

The Fund agrees that the section does not specify an effective date. The reason for this is that agency practice prior to the promulgation of this rule was to permit requests for self-insured status with respect to all or part of the surplus fund to be made at any time. Such requests were then processed and permission to become self-insured was granted on an ad hoc basis. The purpose of section 4.2 of the rule was to permit a window of opportunity for employers to have one last chance to avail themselves of this prior practice. After June 30, 1989, employers would be placed on a schedule for the filing of such requests. Thus, the Fund rejects the suggested addition to section 4.2 as being narrower than the intended scope of sections 4.1 and 4.2. Instead, the Fund has added to the end of section 4.2 two sentences which clarify the Fund's intention that a request for self-insured status in relation to all or part of the surplus fund may become effective on an individual basis for each requesting employer as determined by the facts and circumstances applicable to each such employer's own case. In addition, the Fund has amended section 4.2 by adding a new section which permits the Commissioner to extend the October 31, 1989, deadline in case of administrative delays by the Fund.

2. The second comment is as follows:

§ 5.3

This section effectively vitiates the discretion of the Commissioner to set bond or security amounts that are based on highly subjective and inexact factors. It is essential that the Commissioner retain the option to set an amount that may reflect more accurately than could "generally accepted actuarial principles," the past record and prospective security of individual self-insurers. The current language may also

result in a denial of important due process rights of employers opting out of the surplus fund by failing to grant an opportunity to be heard on the Commissioner's bond determination.

We strongly urge that the last sentence of § 5.3 be stricken and the section amended to conclude as follows: "The Commissioner shall consider, but need not be bound by, any additional information submitted by the employer on the amount of the bond or security necessary. If, upon the basis of any additional information submitted by the employer, the Commissioner determines that the bond or security that should be posted is an amount less than that determined by the Fund's actuary, the Commissioner may order the employer to post the lesser figure as a bond or security but shall offer the reasons therefore in writing."

The amended section would better serve the ends of a fair and equitable self-insuring election scheme. It would afford electing employers necessary due process considerations by offering them the opportunity to be heard on the amount of bond or security required. The proposed amendment also recognized the inexact nature and fallibility of actuarial science and affords the Commissioner the discretion to consider factors not within the purview of actuarial principles.

The Fund rejects this suggested change. The intention behind section 5.3 was to limit the discretion of the Commissioner so that this discretion was not exercised in an arbitrary and capricious manner as has been the case too often in the past. For example, it has been the practice of prior commissioners to allow the filing of security in the amount of $1 million for the general Fund and in the amount of $500 thousand for the surplus fund. This appears to have been a general rule which was applied without regard to the actual magnitude of the expected claims for any individual employer.

It is the Fund's position that all of the comment's suggested factors, as well as all others, can still be considered. The employer's past record as a self-insurer in relation to the general Fund will be considered as part of the Fund's overall evaluation of the request. Further, the language of the statute indicates an intention that the security to be given is to be in an amount determined on an actuarial basis. Security or bond shall be "in such additional amount as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any catastrophe or second injury that might thereafter ensue." West Virginia Code, §23-2-9. Such an amount can only be determined by the use of actuarial principles.

The comment also states a concern over the opportunity of the employer to be heard on the amount of security and raises a due process issue. Such a concern in misplaced. Section 7.3 (previously section 7.4) of the rule states that an employer may "protest any decision made by the Commissioner under this rule...." An administrative hearing is then provided for by the rule.

3. The third comment is as follows:

§ 5.5

To the extent that the Commissioner must act upon a petition to reduce the amount of an employer's bond or security, it is suggested that this section define an appropriate standard for review. Again, the definition of an applicable standard for review on this issue is an essential safeguard to the due process rights of self-insuring employers.

We suggest that the following language be inserted after the sentence that ends "approves the reduction" on line 5: "Upon a showing of credible evidence that the employer's obligation under the Act can reasonably be expected to decrease, the Commissioner shall grant the petition to reduce the amount of bond or security. The determination of the amount of such a reduction shall be within the discretion of the Commissioner and shall be made in consideration of the factors outlined in § 5.3 above."

The Fund will add the language suggested to Section 5.5. However, the Fund notes that the new language includes a reflection back to section 5.3 which, as explained in the response to the second comment above, has not been amended in the manner requested by the commentator.

4. The fourth comment is as follows:

§§ 5.7 and 5.8.1

These sections would create hardship and uncertainty among employers choosing to opt out of the Surplus Fund. In effect, § 5.7 makes the relinquishment of vested and purchased rights a precondition to opting out of the Surplus Fund. The resolution of the claim, an event outside the control of both the claimant and the employer, is an unsatisfactory point from which to assess the liability of a self-insuring employer. Rather, the employer should be entitled to the benefits of its subscription for any injuries occurring during that time and should be allowed to start self-insurance coverage with a clean slate.

The present language of § 5.7 would have a chilling effect on an important option for many employers. Large employers likely to opt out of the Surplus Fund may have too many claims in litigation to risk loosing its coverage in favor of whatever gain could be realized by self insuring. Smaller employers that would otherwise be able to cover the costs of self-insuring may risk significant depletion of self-insurance monies from the claims that arose under their subscriptions. Section 5.7 appears to be an attempt to bolster the solvency of the Surplus Fund at the expense of a small number of large employers.

It is difficult to understand, let alone reconcile, the provisions of § 5.7 with those of § 5.8.1. The combined effect of the two is a double penalty for employers that either opt out of the Surplus Fund or opt into it. While employers that opt out of the Surplus Fund are denied their already purchased coverage for awards made after the option, those that opt in are not relieved of their obligations for injuries incurred while still self-insured. The logical reconciliation of these sections requires that the phrase, "on all awards made" in line number 2 of § 5.7 be replaced with, "for all injuries incurred." Such an amendment would properly charge self-insured Surplus Fund employers only for those injuries incurred when they did not also have the benefit of their subscription.

The Fund rejects the suggested changes. It is the Fund's position that the opportunity to become a self-insurer is the result of benevolent act of the Legislature and is not a matter of right. Further, the exercise of that option by an employer should not result in an additional financial burden to the Fund which would then have to be borne by the remaining subscribing employers. The commentator's suggested changes would result in shifting the expense of prior injuries to the rest of the employer community and away from the newly self-insured employer.

The Fund is amending section 5.7 to allow an employer the option of buying out its future liability to the surplus fund. By electing to pay the actuarially determined buy out amount, the employer will be free of liability for any injuries to its employees which occurred prior to the effective date of self-insured status. Such liability will remain with the Fund and will not be shifted to other employers because of the receipt of the buy out payment.

The other point raised by the comment concerns section 5.8.1 which has been redesignated as section 5.8.a. This section is intended to prevent an employer (whose employees incur a number of injuries which potentially could invoke the second injury provisions of West Virginia Code, §23-3-1) from abandoning its self-insured status and, by returning to subscriber status in relation to the

surplus fund's second injury account, transfer its liability for such injuries to the surplus fund and, thus, the rest of the employer community. The effect of the section is to keep the responsibility for such injuries with the employer unless the employer chooses to buy out its liability by paying an actuarially determined amount to the surplus fund as provided for in section 5.8.b (previously designated as section 5.8.2). Upon payment of that amount, the employer would return to subscriber status with regard to the surplus fund and the liability for the second injury claims would be transferred to the Fund.

5. The fifth comment is as follows:

§5.8.2

The concern expressed in our comment to § 5.3 is also at issue in this section. It is strongly urged that the Commissioner be permitted discretion in the determination of the "total present value" addressed in this section on the basis that there can be no exact actuarial science applied in reaching a figure for total present value. We would again suggest that the employer be permitted to submit relevant information and calculations of total present value and that the Commissioner be vested with the discretion to decide an appropriate figure.

We suggest that § 5.8 be amended by striking the language following "subsection 5.8.1 above" and inserting "as determined by the Commissioner based on information provided by the actuary retained by the Fund, information submitted by the employer and any other reliable sources available to the Commissioner; except, the determination of the total present value shall be exclusively within the discretion of Commissioner and no one report, investigation or source of information shall be considered to be determinative or binding."

The Fund rejects the suggested changes. The commentator's suggested changes to section 5.3 have been dealt with above and are similarly rejected here. However, the Fund has rewritten section 5.8.b (previously designated as section 5.8.2) in order to make clearer that the principles stated in section 5.3 are applicable to section 5.8.b.

6. The sixth comment is as follows:

§ 6.1

This section is of questionable relevance to the stated purpose of the Emergency Rule. To the extent that the section will

remain in the permanent rule, we offer the following suggested change from line 6 after the words "Commissioner or" by inserting the words "upon appropriate notice to the Commissioner," and by striking the words "in the absence thereof," and further, by striking all of the sentence following the word "subscription" on line 12.

The comment is rejected. The purpose of section 6.1 is to make clear that employers who are self-insurers in relation to all or part of the surplus fund are under the same obligations with regard to the payment of benefits as are self-insured employers with regard to the general fund. The section notes that the employer's ability to make timely payments is a factor in deciding whether to permit the employer to obtain self-insured status in relation to the surplus fund and in order to determine whether the employer should be allowed to maintain that status.

7. The seventh comment is as follows:

§ 6.2

This section will require from employers cumulative information already available to the Commissioner. Self-insurers presently must file numerous reports to the Commissioner that receive no particular review or use in the end. The stated goals of the Emergency Rule are not served by the requirement for excessively cumulative and unnecessary information from self-insurers. We recommend the excision of this section from the final rule.

The comment is rejected. The information heretofore requested from self-insured employers forms the basis for a number of statistical reports contained in the Fund's annual report. Persons other than those in the employer community have an interest in these reports which interest cannot be ignored simply because it is not shared by the self-insured employer. Since the Fund has permitted certain self-insured employers to process their own employees' medical bills, the annual reports on this information is the only way for the Fund to ascertain the total amounts paid for the various types of injuries and conditions suffered by those employees.

8. The eighth comment is as follows:

§85-8-7 Continuance Of Self-Insured Status; Termination

This entire section appears to be ill-suited to the stated ends of the Emergency Rule. For the most part, the other sections

of the Emergency Rule set forth the substantive provisions necessary for the administration of the Surplus Fund self-insurers' option; Section 7 outlines remedial measures and procedural provisions already provided for by other sections of the Act and rules of the Commissioner. In addition to the cumulative nature of the entire section, the procedures outlined pose serious threats to the due process rights of those employers that elect to opt out of the Surplus Fund. We strongly urge that the entire section be stricken from the permanent rule.

§ 7.1

To the extent that this section remains, we suggest the insertion of the word "substantially" after the phrase "continues to meet" on line 3. The wording as it exists creates a significant risk to employers that may negligently fail to comply with the provisions of the Act. In such cases, due process demands that the Commissioner be afforded discretion to allow the employer to remedy what may be merely a negligible or technical violation.

The introductory portion of this comment questions the relevance of all of section 7 of this rule to the remainder of the rule. Section 1.1 of this rule notes that it is intended to apply to the movement of employers into as out of self-insured status with regard to the surplus fund. Section 7 deals with the failure of an employer to maintain its status as a self-insurer and the consequent possibility that the employer might have its status taken away from it. As such the section is relevant to the scope of this rule. The title of section 7 has been amended to include a reference to an employer's right to protest any decision of the Commissioner and to have a hearing thereon.

The comment raises the concern that an employer be permitted to remedy a deficiency prior to having its self-insured status revoked. The Fund has no problem with this goal and, indeed, intended that section 7.1 would be implemented with such a remedy being available. The commentator's suggestion of adding the word "substantially" to the section is rejected. The employer must continue to meet all of the criteria for self-insured status. However, the Fund has amended section 7.1 so as to specifically allow the remedy sought by the commentator.

9. The ninth comment is as follows:

§ 7.2

This section, like the one above, wrests all discretion over potentially subjective factors from the Commissioner and constitutes a denial of due process. The section again makes

no provisions for insignificant or merely technical violations. Additionally, it is frighteningly possible that a clerical mistake by the Commissioner or an inadvertent failure to give notice to a violating self-insurer would necessitate the revocation of self-insured status from an innocent employer. Such circumstances may only be remedied in the discretion of the Commissioner. This section fails to recognize that need for discretion.

We vehemently urge the amendment of this section in the following ways: by striking the first phrase "In the event" and inserting in its place the words "If it is determined;" by inserting in the first line the words "materially or substantially" after the words "fails to meet;" by striking the words "will" and "shall" as they respectively appear in the fourth and sixth lines of the section and inserting in their place the word "may."

The Fund has elected to delete section 7.2. The reason for this is that the section was written with the intention of integrating this rule with another rule which was being written concerning delinquent and defaulted employers. Since that latter rule has been filed without the provisions to which section 7.2 of this rule was supposed to relate, there no longer is a need for this section.

10. The tenth comment is as follows:

§ 7.3

This subsection would appear to be the only necessary provision in the entire section to ensure that the ends of the Emergency Rule are recognized.

The Fund disagrees that section 7.3 (now section 7.2) is the only part of section 7 that is necessary. However, the Fund does agree that section 7.2 is necessary.

11. The eleventh comment is as follows:

§ 7.5

This section in its present form appears to be unnecessarily punitive and provides significant potential for abuse. To the extent that such a procedural provision is proper under the stated purpose of the Emergency Rule, the following amendments are requested: after the words "terminated shall," the insertion of the phrase "after having exhausted its administrative appeals;" after the words "of this rule" the insertion of a "." and the excision of the remainder of that

sentence. The need for the remainder of the paragraph is questionable since an employer against which action has been taken under the section would already have provided a bond or security sufficient to satisfy its obligations. The remainder of the paragraph unfairly vests with the Commissioner that discretion the Emergency Rule refused to grant in § 5.3.

The Fund rejects this comment. Section 7.5 states the actions that must be taken following the enforced movement of an employer from self-insured status in relation to all or part of the surplus fund back to subscriber status. In order to protect the solvency of the Fund, it is necessary to provide for the resulting liability of the Fund for the payment of claims which would have been the responsibility of the employer except for its return to subscriber status. The Fund is amending section 7.5 to note that an employer may obtain a stay of the requirement to immediately pay into the Fund the required amount of money pending the exhaustion of administrative remedies, including appeals. A corresponding amendment has also been made to section 7.3 (previously section 7.4).

12. The twelfth comment is as follows:

§ 85-11-8 Collection Actions Against Self-Insured Employers

This section is another unnecessarily cumulative provision and appears not to be germane to the stated purposes of the Emergency Rule. If it remains in the permanent rule, we offer the following additions: after the words "shall pertain to" the insertion of the words "a finding of;" in the following sentence, after the words "timely fashion or" the insertion of the words "a finding of."

The Fund has elected to rewrite section 8. As with former section 7.2, the Fund intended this section 8 to be congruent with another rule that was then being drafted. However, that other rule was changed in such a manner that section 8 no longer interrelates to it. The commentator's suggestion that determinations be tied to findings is appropriate and have been taken into account in the revision of section 8.

Finally, this rule has been designated as series 9 instead of series 8. This change has occurred due to the fact that a prior series 8 has been found to exist on another subject and it is not the intention of this rule to replace that other series.

WEST VIRGINIA SELF-INSURERS ASSOCIATION

COMMENTS TO PROPOSED EMERGENCY RULE

§§ 85-8-1-9

"Self-Insurers Electing To Opt Into Or Out Of Surplus Fund"

§ 85-8-4 Election With Regard To The Surplus Fund

1. § 4.2

This section fails to define specifically when an employer's approved application to self-insure with respect to all or part of the Surplus Fund would become effective. The section allows the employer to withdraw its letter of intent to self-insure by October 31, 1989, even after the Commissioner's approval. The section, however, fails to indicate when, for purposes of § 5.7 self-insured status liability, an approved application would become effective. The revocable intent language of § 4.2 seems to suggest that an approved application to self-insure would not become effective until October 31, 1989. The language of § 5.7, however, could be read to impose self-insured status liability upon the Commissioner's approval of the application.

The uncertainty in the actual effective date of an application to self-insure with respect to the Surplus Fund could lead to unnecessary confusion. An employer may elect to self-insure at some time before October 31, 1989 and subsequently suffer a catastrophe. Under the language of § 4.2 and § 5.7, the employer may or may not then be allowed prior to October 31, 1989 to withdraw its letter of intent in order to avoid self-insured liability.

It is recommended that the following language be inserted after the last sentence in § 4.2. "The effective date of the approval of an application for self-insured status under this section shall be the date following the final day of the revocation period."

§ 85-8-5 Standards For Approval Of Applications

2. § 5.3

This section effectively vitiates the discretion of the Commissioner to set bond or security amounts that are based on highly subjective and inexact factors. It is essential that the Commissioner retain the option to set an amount that may reflect more accurately than could "generally accepted actuarial

principles," the past record and prospective security of individual self-insurers. The current language may also result in a denial of important due process rights of employers opting out of the surplus fund by failing to grant an opportunity to be heard on the Commissioner's bond determination.

We strongly urge that the last sentence of § 5.3 be stricken and the section amended to conclude as follows: "The Commissioner shall consider, but need not be bound by, any additional information submitted by the employer on the amount of the bond or security necessary. If, upon the basis of any additional information submitted by the employer, the Commissioner determines that the bond or security that should be posted is an amount less than that determined by the Fund's actuary, the Commissioner may order the employer to post the lesser figure as a bond or security but shall offer the reasons therefore in writing."

The amended section would better serve the ends of a fair and equitable self-insuring election scheme. It would afford electing employers necessary due process considerations by offering them the opportunity to be heard on the amount of bond or security required. The proposed amendment also recognizes the inexact nature and fallibility of actuarial science and affords the Commissioner the discretion to consider factors not within the purview of actuarial principles.

3. § 5.5

To the extent that the Commissioner must act upon a petition to reduce the amount of an employer's bond or security, it is suggested that this section define an appropriate standard for review. Again, the definition of an applicable standard for review on this issue is an essential safeguard to the due process rights of self-insuring employers.

We suggest that the following language be inserted after the sentence that ends "approves the reduction" on line 5: "Upon a showing of credible evidence that the employer's obligations under the Act can reasonably be expected to decrease, the Commissioner shall grant the petition to reduce the amount of bond or security. The determination of the amount of such a reduction shall be within the discretion of the Commissioner and shall be made in consideration of the factors outlined in § 5.3 above."

4. §§ 5.7 and 5.8.1

These sections would create hardship and uncertainty among employers choosing to opt out of the Surplus Fund. In effect, § 5.7 makes the relinquishment of vested and purchased rights a precondition to opting out of the Surplus Fund. The resolution of the claim, an event outside the control of both the claimant and the employer, is an unsatisfactory point from which to assess the

liability of a self-insuring employer. Rather, the employer should be entitled to the benefits of its subscription for any injuries occurring during that time and should be allowed to start self-insurance coverage with a clean slate.

The present language of § 5.7 would have a chilling effect on an important option for many employers. Large employers likely to opt out of the Surplus Fund may have too many claims in litigation to risk loosing its coverage in favor of whatever gain could be realized by self-insuring. Smaller employers that would otherwise be able to cover the costs of self-insuring may risk significant depletion of self-insurance monies from claims that arose under their subscriptions. Section 5.7 appears to be an attempt to bolster the solvency of the Surplus Fund at the expense of a small number of large employers.

It is difficult to understand, let alone reconcile, the provisions of § 5.7 with those of S 5.8.1. The combined effect of the two is a double penalty for employers that either opt out of the Surplus Fund or opt into it. While employers that opt out of the Surplus Fund are denied their already purchased coverage for awards made after the option, those that opt in are not relieved of their obligations for injuries incurred while still self-injured. The logical reconciliation of these sections requires that the phrase, "on all awards made" in line number 2 of § 5.7 be replaced with, "for all injuries incurred." Such an amendment would properly charge self-insured Surplus Fund employers only for those injuries incurred when they did not also have the benefit of their subscription.

5. § 5.8.2

The concern expressed in our comment to § 5.3 is also at issue in this section. It is strongly urged that the Commissioner be permitted discretion in the determination of the "total present value" addressed in this section on the basis that there can be no exact actuarial science applied in reaching a figure for total present value. We would again suggest that the employer be permitted to submit relevant information and calculations of total present value and that the Commissioner be vested with the discretion to decide an appropriate figure.

We suggest that § 5.8 be amended by striking the language following "subsection 5.8.1 above" and inserting "as determined by the Commissioner based on information provided by the actuary retained by the Fund, information submitted by the employer and any other reliable sources available to the Commissioner; except, the determination of the total present value shall be exclusively within the discretion of Commissioner and no one report, investigation or source of information shall be considered to be determinative or binding."

§ 85-8-6 Payment Of Compensation Benefits

6. § 6.1

This section is of questionable relevance to the stated purpose of the Emergency Rule. To the extent that the section will remain in the permanent rule, we offer the following suggested change from line 6 after the words "Commissioner or" by inserting the words "upon appropriate notice to the Commissioner," and by striking the words "in the absence thereof," and further, by striking all of the sentence following the word "subscription" on line 12.

7. § 6.2

This section will require from employers cumulative information already available to the Commissioner. Self-insurers presently must file numerous reports to the Commissioner that receive no particular review or use in the end. The stated goals of the Emergency Rule are not served by the requirement for excessively cumulative and unnecessary information from self-insurers. We recommend the excision of this section from the final rule.

§ 85-8-7 Continuance Of Self-Insured Status; Termination

This entire section appears to be ill-suited to the stated ends of the Emergency Rule. For the most part, the other sections of the Emergency Rule set forth the substantive provisions necessary for the administration of the Surplus Fund self-insurers' option; Section 7 outlines remedial measures and procedural provisions already provided for by other sections of the Act and rules of the Commissioner. In addition to the cumulative nature of the entire section, the procedures outlined pose serious threats to the due process rights of those employers that elect to opt out of the Surplus Fund. We strongly urge that the entire section be stricken from the permanent rule.

8. § 7.1

To the extent that this section remains, we suggest the insertion of the word "substantially" after the phrase "continues to meet" on line 3. The wording as it exists creates a significant risk to employers that may negligently fail to comply with the provisions of the Act. In such cases, due process demands that the Commissioner be afforded discretion to allow the employer to remedy what may be merely a negligible or technical violation.

9. § 7.2

This section, like the one above, wrests all discretion over potentially subjective factors from the Commissioner and constitutes a denial of due process. The section again makes no

provision for insignificant or merely technical violations. Additionally, it is frighteningly possible that a clerical mistake by the Commissioner or an inadvertent failure to give notice to a violating self-insurer would necessitate the revocation of self-insured status from an innocent employer. Such circumstances may only be remedied in the discretion of the Commissioner. This section fails to recognize that need for discretion.

We vehemently urge the amendment of this section in the following ways: by striking the first phrase "In the event" and inserting in its place the words "If it is determined;" by inserting in the first line the words "materially or substantially" after the words "fails to meet;" by striking the words "will" and "shall" as they respectively appear in the fourth and sixth lines of the section and inserting in their place the word "may."

10. § 7.3

This subsection would appear to be the only necessary provision in the entire section to ensure that the ends of the Emergency Rule are recognized.

11. § 7.5

This section in its present form appears to be unnecessarily punitive and provides significant potential for abuse. To the extent that such a procedural provision is proper under the stated purpose of the Emergency Rule, the following amendments are requested: after the words "terminated shall," the insertion of the phrase "after having exhausted its administrative appeals;" after the words "of this rule" the insertion of a "." and the excision of the remainder of that sentence. The need for the remainder of the paragraph is questionable since an employer against which action has been taken under the section would already have provided a bond or security sufficient to satisfy its obligations. The remainder of the paragraph unfairly vests with the Commissioner that discretion the Emergency Rule refused to grant in § 5.3.

§ 85-11-8 Collection Actions Against Self-Insured Employers

12. This section is another unnecessarily cumulative provision and appears not to be germane to the stated purposes of the Emergency Rule. If it remains in the permanent rule, we offer the following additions: after the words "shall pertain to" the insertion of the words "a finding of;" in the following sentence, after the words "timely fashion or" the insertion of the words "a finding of."

Conclusion

The Emergency Rule provides necessary guidance in an area where the

potential for confusion is great. Unfortunately, the Emergency Rule also provides unnecessary confusion in areas already clearly directed by other provisions of the Act, rules and regulations. The amendments offered will protect the interests and rights of all those affected without diminishing the effectiveness or diluting the purposes of the permanent rule.

WORKERS' COMPENSATION FUND

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JOHN H. KOZAK
EXECUTIVE SECRETARY

ATTENDANCE SHEET

NAME	REPRESENTING	ADDRESS
Mark A. Tarr	Robinson & McElwee (WVUSIA)	United Center
Barbara Robinson	McDonough Caperton	1 Players Club Dr.

EMERGENCY RULE
TITLE 85
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
DIVISION OF WORKERS' COMPENSATION

SERIES 9
Self-Insurers Electing To Opt Into Or Out Of Surplus Fund

§85-9-1. General.

1.1. Scope - This emergency legislative rule provides for the movement by employers electing to opt out of the Workers' Compensation Fund's surplus fund or to opt into that surplus fund. The rule is adopted on an emergency basis in order to prevent a substantial harm to the public interest. Heretofore, the Workers' Compensation Fund has not had a rule regulating the options of self-insuring employers regarding movement into and out of surplus fund coverage. The Fund has had a rule regulating movement into and out of the general fund, but it has not been applied to the surplus fund. This lack of a rule makes impossible the carrying out of the commissioner's duty to accurately set rates for the surplus fund at the lowest possible rates of premiums consistent with the maintenance of a solvent surplus fund. This is because the unpredictable movement of employers into and out of the surplus fund renders rate calculation equally unpredictable. Given the compensation fund's current extreme financial difficulty, it is essential that accurate rates be fixed in order to achieve solvency for the surplus fund and to comply with the statutory directive imposed upon the commissioner.

1.2. Authority - West Virginia Code, §23-2-9, and §23-3-1.

1.3. Filing Date - November 22, 1989.

1.4. Effective Date - November 22, 1989.

1.5. Notice - This emergency rule is issued with the expectation that a permanent rule will be promulgated and that that permanent rule will affect the entire area of self-insurance under the Act. During the development of that permanent rule, the commissioner expects to revaluate all of the policy issues affecting self-insurance and to implement such changes and additions to policy as that revaluation may indicate are necessary. Hence, this emergency rule shall not be relied upon as stating what the policy shall or will be following the promulgation of the permanent rule by the commissioner and its approval by the Legislature.

§85-9-2. Definitions.

2.1. As used in this emergency legislative rule, the following terms, words, and phrases have the meanings stated below unless in any instance where such term, word, or phrase is

employed the context clearly indicates that another meaning in intended.

2.2. The term "Act" means the workers' compensation laws of the State of West Virginia which are codified at chapter 23 of the Code of West Virginia of 1931, as amended.

2.3. The terms "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.

2.4. The term "commissioner" means the West Virginia Workers' Compensation Commissioner as provided for by West Virginia Code, §23-1-1.

2.5. The term "compensation fund" means the fund created by West Virginia Code, §23-3-1, which includes the surplus fund.

2.6. The term "employer" has the meaning ascribed to that term by West Virginia Code, §23-2-1.

2.7. The term "regular subscription" means an employer's relationship to the main portion of the compensation fund but not including the surplus fund.

2.8. The terms "self-insurer" and "self-insured employer" mean employers who have elected one or both of the options contained in West Virginia Code, §23-2-9, and who pay individually and directly, or from a benefit fund or system of compensation, the compensation and other benefits provided to injured employees or their dependents under the Act.

2.9. The term "surplus fund" means that portion of the compensation fund created by West Virginia Code, §23-3-1, which is to be set aside to create and maintain coverage for the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for by the Act.

2.10. The phrase "this rule" means the instant emergency legislative rule designated in the caption hereof as W.Va. C.S.R., §85-9-1 et seq.

§85-9-3. Prior Rule Not Affected.

3.1. By legislative rule effective July 1, 1986, the commissioner specified that employers which elect to self-insure under the provisions of West Virginia Code, §23-2-9, with regard to their regular subscription under the Act are to file an application in order to do so. See W.Va. C.S.R., §85-1-4. The application must also indicate whether or not the employer further elects to become a self-insured employer in regard to all or part of the surplus fund. See W.Va. C.S.R., §85-1-4.5.

3.2. Nothing in this rule is intended to affect the substantive right of an employer to elect to become a self-insurer under W.Va. C.S.R., §85-1-4.5.

3.3. However, any employer hereafter electing to become a self-insured employer with respect to all or part of the surplus fund must comply with this rule as to the conditions for becoming a self-insurer and with the provisions of any permanent rule which supersedes or supplements this rule. Such an employer also includes one who is initially electing to become self-insured with respect to its regular subscription and who is electing to become self-insured to all or part of the surplus fund as well.

§85-9-4. Election With Regard To The Surplus Fund.

4.1. Until June 30, 1989, any employer who has previously elected to be a self-insured employer with regard to its regular subscription under the Act but who has also not elected to be a self-insured employer with respect to all or part of the surplus fund may elect to do so by filing a written letter of intent with the commissioner which must be received by the commissioner on or before June 30, 1989.

4.2. An employer so filing will then be reviewed for approval to change its status to self-insured with respect to all or part of the surplus fund without undue delay upon the terms stated below. An employer may withdraw the letter of intent at any time even after approval by the commissioner, except as follows. The employer must elect either to be a self-insurer or to withdraw the letter of intent by December 31, 1989. Once withdrawn, the letter of intent is void and may not be resurrected. The effective date of the employer's change to self-insured status will be determined by the employer and the commissioner in each individual case as warranted by the facts and circumstances in each such case. Such factors as the availability of adequate security, determination of the amount of funds needed by an employer to buy out its liability, the availability to the employer of such funds, and others shall be considered.

4.3. Any self-insured employer who has not previously elected to be a self-insured employer with regard to all or part of the surplus fund and which wishes to so elect after June 30, 1989, shall file a written request to so change its status. The written request shall be in the form specified by the commissioner and shall contain the information provided for below.

4.4. An employer making the election under subsection 4.3 of this rule who meets the conditions specified below will be granted permission to become a self-insured employer only as of the first day of July following the commissioner's approval of

its application for such permission; however, such application must be received no later than December 31 of the year preceding the pertinent first day of July. As an example, any application received after June 30, 1989, will not be eligible for approval and implementation until July 1, 1990, provided the application is received on or before December 31, 1989; similarly, an application received between January 1, 1990, and December 31, 1990, will be eligible for implementation on July 1, 1991. An employer applying for self-insured status for its regular subscription as well as for all or part of the surplus fund must comply with W. Va. C.S.R., §85-1-4.2(d), as to the timing of the entire application.

4.5. An employer which has made the election under subsection 4.3 of this rule and which has been approved by the commissioner to become a self-insured employer with respect to all or part of the surplus fund, shall exercise the election on or before October 1, 1990, or by the first day of October for each year thereafter.

§85-9-5. Standards For Approval of Applications.

5.1. No application for self-insured status with regard to all or part of the surplus fund will be approved unless the employer complies with all of the provisions of the Act, of the other various rules promulgated by the commissioner, and of this rule unless it is expressly stated otherwise in a specific subsection.

5.2. The applying employer must either meet or continue to meet all of the requirements for self-insured status as to its regular subscription under the Act. An employer which previously became a self-insured employer for purposes of its regular subscription but not as to the surplus fund shall not be permitted to become self-insured with respect to the surplus fund if it is not in good standing with regard to all of its obligations under the Act.

5.3. Prior to becoming self-insured for all or any part of the surplus fund, the employer shall post a bond or give security. The bond or security shall be in the form, type, and amount as required by the commissioner. The amount required by the commissioner shall be the sum actuarially determined by the Fund's actuary. The actuary shall utilize generally accepted actuarial principles including, but not limited to, the applicant's own experience and net worth, and such additional factors as the actuary concludes are necessary to take into consideration.

5.4. On an annual basis or sooner as an individual case may require, the commissioner shall review the sufficiency and the Fund's actuary shall review the amount of the bond or security

provided by each self-insuring employer for its coverage with respect to all or part of the surplus fund.

5.5. In the event that the employer's obligations under the Act can reasonably be expected to decrease, then the employer may petition the commissioner for permission to reduce the amount of its bond or security; however, such reduction shall not be made until after the commissioner approves the reduction. Upon a showing of credible evidence that the employer's obligations under the Act can reasonably be expected to decrease, the commissioner shall grant the petition to reduce the amount of bond or security. The amount of such reduction shall be actuarially determined by the Fund's actuary and shall be made in consideration of the factors outlined in subsection 5.3 above. The commissioner shall rule upon each such petition within ninety (90) days of its receipt by the commissioner.

5.6. The employer shall acknowledge its obligation to continue to make all other payments required under the Act, to file all reports due under the Act or required by rule, and to make timely payment of all benefits properly due to employees.

5.7. As a condition of approval, the employer shall agree either to assume liability on all awards made after the effective date of the approval of the application for self-insured status in respect to claims for an injury or death which may have occurred prior to that date or the employer shall pay into the surplus fund prior to the effective date of the approval of the employer's request for self-insured status the amount of money equal to the total present value of all of the claims for which the Fund would have been responsible if the employer had not become self-insured. The amount required by the commissioner shall be the sum actuarially determined by the Fund's actuary. The actuary shall utilize generally accepted actuarial principles and such additional factors as the actuary concludes are necessary to take into consideration.

5.8. As a condition of approval, the employer shall agree that, if its application is approved, then the employer may subsequently surrender its self-insured status with regard to all or part of the surplus fund only by electing one of the two following alternatives for disposal of claims or awards for injuries or deaths occurring during the period of its self-insured status:

5.8.a. The employer shall retain responsibility for the payment of all claims with dates of injury before the effective date of the employer's return to non-self-insurer status with regard to the surplus fund even if a final award has not been made for a particular claim prior to that effective date; that is, in effect the employer will remain self-insured for those claims; except that, in a situation where in a particular case a

date of injury occurs while the employer is a subscriber to the pertinent portion of the surplus fund and then the employer becomes self-insured for that pertinent portion of the surplus fund and then subsequently returns to the status of subscriber to that pertinent portion of the surplus fund and then the date of award occurs for that injury subsequent to that employer's return to subscriber status for that portion of the surplus fund, in that instance responsibility for payments for that award will be determined as if the employer had not had the intervening period of self-insured status; it is expressly noted that this exception is only applicable during the existence of this rule and that during the promulgation of the permanent rule this issue will be reviewed; or

5.8.b. The employer shall pay into the surplus fund prior to the effective date of the approval of the employer's return to regular subscriber status the amount of money equal to the total present value of all the claims for which it would be responsible under subsection 5.8.a. Such amount shall be determined through the use of generally accepted actuarial principles and such other factors as are deemed pertinent by the Fund's actuary.

5.9. By filing an application for self-insured status with regard to all or part of the surplus fund, the employer is deemed to acknowledge that if the application is approved it will be responsible for all charges assignable to its account that would otherwise be the responsibility of the surplus fund. For example, any award to an employee for a second injury shall be the responsibility of the employer who shall compensate the employee or employees in the same manner as if the disability of the employee had resulted from a single injury while in the employ of the employer.

5.10. By filing an application for self-insured status with regard to the surplus fund, the employer is deemed to acknowledge that it remains subject to all other pertinent rules and regulations.

§85-9-6. Payment Of Compensation Benefits.

6.1. A self-insured employer with respect to all or part of the surplus fund shall be responsible for the direct payment of all benefits due and owing under the Act to the employee or the employee's dependents. Benefits payable by the employer shall be paid in the time periods specified in the Act or in the various rules promulgated by the commissioner or, in the absence thereof, in a prompt and timely fashion. The ability of an employer to process, review, and ultimately pay for services rendered to an employee, benefits due an employee's dependents, and invoices therefor shall be determined upon the same basis as for self-insured employers with respect to their regular subscription. The employer's experience in meeting its

obligations in a prompt and timely fashion shall be given considerable weight by the commissioner in determining whether to permit the employer to remain a self-insurer.

6.2. The employer shall file reports with the commissioner in the form required by the commissioner concerning the number and type of invoices presented and the amount of benefits paid, all on an individual and aggregate basis.

§85-9-7. Continuance Of Self-Insured Status; Termination; Right to Protest and Hearing.

7.1. The employer's status as a self-insured employer with respect to all or part of the surplus fund shall continue on a year-to-year basis so long as the employer continues to meet all of the requirements for such status as well as the other requirements imposed by the Act, by this rule, and by other rules and regulations promulgated by the commissioner. The commissioner retains the discretion to permit an employer to correct any deficiency in lieu of revoking that employer's self-insured status.

7.2. The legislative rule titled "Hearing And Review Process Regarding The Performance of Self-Insured Employers" and designated as W.Va. C.S.R., §85-5-1 et seq. (1985), shall be applicable to self-insured employers under this rule to the same extent as that rule applies to employers which have elected to be self-insurers with respect to their regular subscriptions.

7.3. Any employer which wishes to protest any decision made by the commissioner under this rule (including those decisions made by the commissioner upon the advice of the Fund's actuary) may do so by filing a petition which sets forth with particularity the decision complained of, the facts pertaining to the employer's position, and the reasons in support thereof. The employer shall then be entitled to a hearing upon that petition as provided for by general law or by procedural rule promulgated by the commissioner. An employer may file a petition requesting that the commissioner stay the immediate enforcement of a protested order against the employer. The commissioner may grant that request for a stay and, in an appropriate case, may condition the stay upon the employer filing a sufficient bond to cover any obligations of the employer that appear to be a risk so as to result in final payment by the Fund. In addition, in any particular case where the commissioner finds good cause to believe that an employer may have violated the Act or any rule pertaining to self-insurance status, then the commissioner may institute a show cause proceeding against that employer by filing a petition setting forth the nature of the offense and a summary of the facts in support thereof. A hearing shall then be held as provided for by general law or by procedural rule promulgated by the commissioner. Upon convening a show cause hearing, the

initial burden of going forward with the evidence shall be upon the Fund to present the basis for the good cause finding. Thereafter, the burden of going forward with the evidence switches to the employer.

7.4. Any employer whose status as a self-insurer for all or part of the surplus fund is terminated shall (unless a stay is obtained pending the exhaustion of administrative appeals including possible judicial appeals) make payment to the surplus fund in the same fashion as if it had elected to surrender its self-insurer status as provided for by subsection 5.8.b of this rule except that such payment shall be due immediately upon the termination of the self-insured status and failure to make payment within thirty (30) calendar days of the effective date of the termination shall cause the employer to be in default for purposes of section 8 of this rule. In lieu of the aforesaid payment, the employer may elect to post additional, sufficient bond or security within the thirty (30) day period to cover the amount due to the Fund. The sufficiency of such bond or security must be satisfactory to the commissioner and meet the requirements of subsection 5.3 of this rule. In the event that the commissioner determines that good cause exists to believe that payment by the employer is unlikely or that posting of additional, sufficient bond or security is unlikely, the commissioner may demand that the employer make the required payment immediately and take collection actions.

§85-9-8. Collection Actions Against Self-Insured Employer.

Notwithstanding any other provision of this rule, either as an addition to or in place of any remedy provided by the Act, other rules promulgated by the commissioner, or by this rule, the commissioner may institute one or more collection actions against a self-insured employer. Such collection actions shall pertain to a finding that the employer has failed to make any payment due to the Fund in a prompt or timely fashion. As an example of such payments, the amounts of money determined to constitute a buy out of liability by an employer being forced back into subscriber status with respect to all or part of the surplus fund pursuant to section shall constitute a payment due to the Fund. All such collection actions will be controlled by the Act as provided for in section 5a of article 2, chapter 23, West Virginia Code, and by any pertinent rule promulgated by the commissioner.

§85-9-9. Severability.

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

WWSIA

WEST VIRGINIA SELF-INSURERS ASSOCIATION

P.O. BOX 1573 CHARLESTON, WEST VIRGINIA 25326

August 14, 1989

Workers' Compensation Fund
601 Morris Street
Charleston, West Virginia 25301

ATTN: John H. Kozak,
Executive Secretary

Dear Mr. Kozak:

Attached are comments drafted on behalf of the West Virginia Self-Insurers Association regarding the Proposed Emergency Rule entitled "Self-Insurers Electing To Opt Into Or Out of Surplus Fund." The permanent rule will have a significant impact on members of the Association. We believe that our comments and proposed amendments would help to further the Commissioner's stated purpose in the enactment of the Emergency Rule.

If you have any questions regarding our comments or the position of the Association, please feel free to contact me.

Very truly yours,

Henry G. Bowen

HCB/c

Enclosure

WEST VIRGINIA SELF-INSURERS ASSOCIATION

COMMENTS TO PROPOSED EMERGENCY RULE

§§ 85-8-1-9

"Self-Insurers Electing To Opt Into Or Out Of Surplus Fund"

§ 85-8-4 Election With Regard To The Surplus Fund

1. § 4.2

This section fails to define specifically when an employer's approved application to self-insure with respect to all or part of the Surplus Fund would become effective. The section allows the employer to withdraw its letter of intent to self-insure by October 31, 1989, even after the Commissioner's approval. The section, however, fails to indicate when, for purposes of § 5.7 self-insured status liability, an approved application would become effective. The revocable intent language of § 4.2 seems to suggest that an approved application to self-insure would not become effective until October 31, 1989. The language of § 5.7, however, could be read to impose self-insured status liability upon the Commissioner's approval of the application.

The uncertainty in the actual effective date of an application to self-insure with respect to the Surplus Fund could lead to unnecessary confusion. An employer may elect to self-insure at some time before October 31, 1989 and subsequently suffer a catastrophe. Under the language of § 4.2 and § 5.7, the employer may or may not then be allowed prior to October 31, 1989 to withdraw its letter of intent in order to avoid self-insured liability.

It is recommended that the following language be inserted after the last sentence in § 4.2. "The effective date of the approval of an application for self-insured status under this section shall be the date following the final day of the revocation period."

§ 85-8-5. Standards For Approval Of Applications

2. § 5.3

This section effectively vitiates the discretion of the Commissioner to set bond or security amounts that are based on highly subjective and inexact factors. It is essential that the Commissioner retain the option to set an amount that may reflect more accurately than could "generally accepted actuarial

principles," the past record and prospective security of individual self-insurers. The current language may also result in a denial of important due process rights of employers opting out of the surplus fund by failing to grant an opportunity to be heard on the Commissioner's bond determination.

We strongly urge that the last sentence of § 5.3 be stricken and the section amended to conclude as follows: "The Commissioner shall consider, but need not be bound by, any additional information submitted by the employer on the amount of the bond or security necessary. If, upon the basis of any additional information submitted by the employer, the Commissioner determines that the bond or security that should be posted is an amount less than that determined by the Fund's actuary, the Commissioner may order the employer to post the lesser figure as a bond or security but shall offer the reasons therefore in writing."

The amended section would better serve the ends of a fair and equitable self-insuring election scheme. It would afford electing employers necessary due process considerations by offering them the opportunity to be heard on the amount of bond or security required. The proposed amendment also recognizes the inexact nature and fallibility of actuarial science and affords the Commissioner the discretion to consider factors not within the purview of actuarial principles.

3. § 5.5

To the extent that the Commissioner must act upon a petition to reduce the amount of an employer's bond or security, it is suggested that this section define an appropriate standard for review. Again, the definition of an applicable standard for review on this issue is an essential safeguard to the due process rights of self-insuring employers.

We suggest that the following language be inserted after the sentence that ends "approves the reduction" on line 5: "Upon a showing of credible evidence that the employer's obligations under the Act can reasonably be expected to decrease, the Commissioner shall grant the petition to reduce the amount of bond or security. The determination of the amount of such a reduction shall be within the discretion of the Commissioner and shall be made in consideration of the factors outlined in § 5.3 above."

4. §§ 5.7 and 5.8.1

These sections would create hardship and uncertainty among employers choosing to opt out of the Surplus Fund. In effect, § 5.7 makes the relinquishment of vested and purchased rights a precondition to opting out of the Surplus Fund. The resolution of the claim, an event outside the control of both the claimant and the employer, is an unsatisfactory point from which to assess the

liability of a self-insuring employer. Rather, the employer should be entitled to the benefits of its subscription for any injuries occurring during that time and should be allowed to start self-insurance coverage with a clean slate.

The present language of § 5.7 would have a chilling effect on an important option for many employers. Large employers likely to opt out of the Surplus Fund may have too many claims in litigation to risk loosing its coverage in favor of whatever gain could be realized by self-insuring. Smaller employers that would otherwise be able to cover the costs of self-insuring may risk significant depletion of self-insurance monies from claims that arose under their subscriptions. Section 5.7 appears to be an attempt to bolster the solvency of the Surplus Fund at the expense of a small number of large employers.

It is difficult to understand, let alone reconcile, the provisions of § 5.7 with those of S 5.8.1. The combined effect of the two is a double penalty for employers that either opt out of the Surplus Fund or opt into it. While employers that opt out of the Surplus Fund are denied their already purchased coverage for awards made after the option, those that opt in are not relieved of their obligations for injuries incurred while still self-injured. The logical reconciliation of these sections requires that the phrase, "on all awards made" in line number 2 of § 5.7 be replaced with, "for all injuries incurred." Such an amendment would properly charge self-insured Surplus Fund employers only for those injuries incurred when they did not also have the benefit of their subscription.

5. § 5.8.2

The concern expressed in our comment to § 5.3 is also at issue in this section. It is strongly urged that the Commissioner be permitted discretion in the determination of the "total present value" addressed in this section on the basis that there can be no exact actuarial science applied in reaching a figure for total present value. We would again suggest that the employer be permitted to submit relevant information and calculations of total present value and that the Commissioner be vested with the discretion to decide an appropriate figure.

We suggest that § 5.8 be amended by striking the language following "subsection 5.8.1 above" and inserting "as determined by the Commissioner based on information provided by the actuary retained by the Fund, information submitted by the employer and any other reliable sources available to the Commissioner; except, the determination of the total present value shall be exclusively within the discretion of Commissioner and no one report, investigation or source of information shall be considered to be determinative or binding."

§ 85-8-6 Payment Of Compensation Benefits

6. § 6.1

This section is of questionable relevance to the stated purpose of the Emergency Rule. To the extent that the section will remain in the permanent rule, we offer the following suggested change from line 6 after the words "Commissioner or" by inserting the words "upon appropriate notice to the Commissioner," and by striking the words "in the absence thereof," and further, by striking all of the sentence following the word "subscription" on line 12.

7. § 6.2

This section will require from employers cumulative information already available to the Commissioner. Self-insurers presently must file numerous reports to the Commissioner that receive no particular review or use in the end. The stated goals of the Emergency Rule are not served by the requirement for excessively cumulative and unnecessary information from self-insurers. We recommend the excision of this section from the final rule.

§ 85-8-7 Continuance Of Self-Insured Status; Termination

This entire section appears to be ill-suited to the stated ends of the Emergency Rule. For the most part, the other sections of the Emergency Rule set forth the substantive provisions necessary for the administration of the Surplus Fund self-insurers' option; Section 7 outlines remedial measures and procedural provisions already provided for by other sections of the Act and rules of the Commissioner. In addition to the cumulative nature of the entire section, the procedures outlined pose serious threats to the due process rights of those employers that elect to opt out of the Surplus Fund. We strongly urge that the entire section be stricken from the permanent rule.

8. § 7.1

To the extent that this section remains, we suggest the insertion of the word "substantially" after the phrase "continues to meet" on line 3. The wording as it exists creates a significant risk to employers that may negligently fail to comply with the provisions of the Act. In such cases, due process demands that the Commissioner be afforded discretion to allow the employer to remedy what may be merely a negligible or technical violation.

9. § 7.2

This section, like the one above, wrests all discretion over potentially subjective factors from the Commissioner and constitutes a denial of due process. The section again makes no

provision for insignificant or merely technical violations. Additionally, it is frighteningly possible that a clerical mistake by the Commissioner or an inadvertent failure to give notice to a violating self-insurer would necessitate the revocation of self-insured status from an innocent employer. Such circumstances may only be remedied in the discretion of the Commissioner. This section fails to recognize that need for discretion.

We vehemently urge the amendment of this section in the following ways: by striking the first phrase "In the event" and inserting in its place the words "If it is determined;" by inserting in the first line the words "materially or substantially" after the words "fails to meet;" by striking the words "will" and "shall" as they respectively appear in the fourth and sixth lines of the section and inserting in their place the word "may."

10. § 7.3

This subsection would appear to be the only necessary provision in the entire section to ensure that the ends of the Emergency Rule are recognized.

11. § 7.5

This section in its present form appears to be unnecessarily punitive and provides significant potential for abuse. To the extent that such a procedural provision is proper under the stated purpose of the Emergency Rule, the following amendments are requested: after the words "terminated shall," the insertion of the phrase "after having exhausted its administrative appeals;" after the words "of this rule" the insertion of a "." and the excision of the remainder of that sentence. The need for the remainder of the paragraph is questionable since an employer against which action has been taken under the section would already have provided a bond or security sufficient to satisfy its obligations. The remainder of the paragraph unfairly vests with the Commissioner that discretion the Emergency Rule refused to grant in § 5.3.

§ 85-11-8 Collection Actions Against Self-Insured Employers

12. This section is another unnecessarily cumulative provision and appears not to be germane to the stated purposes of the Emergency Rule. If it remains in the permanent rule, we offer the following additions: after the words "shall pertain to" the insertion of the words "a finding of;" in the following sentence, after the words "timely fashion or" the insertion of the words "a finding of."

Conclusion

The Emergency Rule provides necessary guidance in an area where the

potential for confusion is great. Unfortunately, the Emergency Rule also provides unnecessary confusion in areas already clearly directed by other provisions of the Act, rules and regulations. The amendments offered will protect the interests and rights of all those affected without diminishing the effectiveness or diluting the purposes of the permanent rule.

MR. KOZAK: This is a public hearing on the emergency rule for self-insurers electing to opt into or out of the surplus fund. Those rules were filed on June 15, 1989, and at that time a public hearing was scheduled on the rules pursuant to the West Virginia Administrative Procedures Act for 9:30 a.m. on Monday, August 14, 1989, in the Fund's offices.

Prior to the convening of this hearing, we had two individuals show up, one representing Mr. Henry C. Bowen, who filed written statements on comments on the rules on behalf of the West Virginia Self-Insurers Association and one representative of McDonough-Caperton, who arrived for the purpose of observing the hearings but not to file written comments.

It is now 9:35 a.m., and there being no other members of the public present who wish to comment on the rules, I declare the public hearing on the emergency rule closed.

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION FUND, to wit:

I, Grace Day, Reporter for the Workers' Compensation Fund, do hereby certify that the foregoing is a correct record of the proceedings.

Given under my hand this the 14th day of August, 1989.

Grace Day

Grace Day, Reporter.

Workers' Compensation Fund
Charleston, WV

WORKERS' COMPENSATION FUND

601 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
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GASTON CAPERTON
GOVERNOR

EMILY A. SPIELER
COMMISSIONER

JOHN H. KOZAK
EXECUTIVE SECRETARY

ATTENDANCE SHEET

NAME	REPRESENTING	ADDRESS
Mark A. Tarr	Robinson & McElwee (WVUSIA)	United Center
Babette Johnson	McDonough Capleton	1 Players Club Dr.