WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

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

RULE TYPE: *Exempt Legislative ; CITE AUTHORITY W.Va. Code, §§ 21A-2-6 (2); ~~21-A-3-7 (b) & -7 (e); 23-1-1;~~ 23-2-18; 23-2-4; 23-2-9

AMENDMENT TO AN EXISTING RULE: YES____ NO X **

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: ** The proposed rule repeals and replaces 85 C.S.R. 9 "Self-Insured Employers"

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 85 C.S.R. 9, "Underwriting"

TITLE OF RULE BEING PROPOSED: 85 C.S.R. 9, "Underwriting"

* Per W.Va. Code, §21A-3-7 (c), this rule is not subject to Legislative review.

DATE OF PUBLIC HEARING: May 2, 1996 TIME: 10:00 A.M.

LOCATION OF PUBLIC HEARING: Room 206, Civic Center
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL____, WRITTEN____, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Randall B. Suter, Counsel
Legal Services Division
Post Office Box 3922
Charleston, WV 25339-3922
(304) 926-5130

The last day for written comments is May 2, 1996, at 5:00 p.m.

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Andrew N. Richardson
Andrew N. Richardson
Commissioner

8.20

Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305-0112

Gaston Caperton
Governor
Andrew N. Richardson
Commissioner

April 1, 1996

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

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

Dear Secretary Hechler:

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

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

Thank you very much for your assistance in this matter.

Very truly yours,

Andrew N. Richardson
Commissioner

Summary of Proposed
Exempt Legislative Rule
"Underwriting"
Title 85, Series 9

This proposed exempt legislative rule provides for the implementation of a system designed to underwrite the risk of providing workers' compensation insurance, as administered by the Workers' Compensation Division of the Bureau of Employment Programs, in accordance with the provisions of West Virginia Code, §23-1-1, et seq.

The proposed rule is intended to provide a fair and equitable system for determining risk associated with providing workers' compensation insurance coverage and pricing such coverage.

The proposed rule provides for a system of ratemaking, including provisions to determine the exposure base, base rate schedule, experience modification factors, experience periods, credibility factors, actual limited losses, average losses, and incurred losses during an accident year.

The proposed rule contains criteria for an annual statement.

The proposed rule contains provisions allowing for a guaranteed cost plan of providing workers' compensation insurance.

The proposed rule provides for the identification of employers with substandard performance for assignment to the assigned risk plan. The proposed rule provides for increased base premium taxes for those employers assigned to the assigned risk plan.

The proposed rule provides for a system of self insurance.

The proposed rule provides for notice to employers and administrative protests and hearings.

The proposed rule repeals and replaces the current 85 C.S.R 9, "Self Insured Employers." The rule was substantially revised to include provisions relating to all insurance plans offered by the Workers' Compensation Division, methodologies for calculating premium tax rates, and base rate classifications.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: 85 C.S.R. 9, "Underwriting"
EXEMPT

Type of Rule: X Legislative ___Interpretive ___Procedural

Agency: Workers' Compensation Division, Bureau of Employment Programs

Address: Legal Services Division
P. O. Box 3922
Charleston, West Virginia 25339-3922

Contact Person: Randall B. Suter, Legal Services Division

Phone Number: (304) 926-5130

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$0	$0	$0	$0	$0
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

No immediate increase in personnel is necessary as the result of the promulgation of this rule. Certain increases will be necessary to implement the full underwriting program as contemplated by the division.

3. Objectives of these rules:

The purpose of this rule is to provide for the administration of a fair and equitable system for determining the risk associated with providing workers' compensation coverage and pricing such coverage consistent with the general provisions.

Rule Title: 85 C.S.R. 9, "Underwriting"

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The rule provides for a fairer and more equitable approach for pricing workers' compensation coverage. The sums collected as premium tax will be distributed more equitably and follow costs incurred.

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

Claims costs for employers will be fairly distributed to reflect costs incurred. Certain employers will pay greater premium tax and certain employers will pay less premium tax depending on the risk of insurance.

C. Economic Impact on Citizens/Public at Large.

Premium tax rates will be adjusted to reflect the risk of insurance. See above.

Date: April 1, 1996

Signature of Agency Head or Authorized Representative

Andrew N. Richardson

Andrew N. Richardson
Commissioner, Bureau of Employment Programs

TITLE 85
EXEMPT LEGISLATIVE RULES
BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION

SERIES 9
UNDERWRITING

§85-9-1. General.

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

1.2. Authority. -- West Virginia Code, §21A-2-6(2); §21A-3-7(b) & -7(c); §23-1-1; §23-2-4; 23-2-9; and §23-2-18. Pursuant to West Virginia Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise be required under West Virginia Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

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

§85-9-2. Purpose of rule.

The purpose of this rule is to provide for the administration of a fair and equitable system for determining the risk associated with providing workers' compensation insurance coverage and pricing such coverage consistent with the general provisions and purposes of W. Va. Code, §23-1-1, et seq., and consistent with the specific provisions and purposes of W. Va. Code, §23-2-4 and §23-2-9.

§85-9-3. Definitions.

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

3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at chapter twenty-three of the Code of West Virginia.

3.2. "Classification" shall mean the description of an employer's operation.

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

3.4. "Commissioner" means the commissioner of the bureau of employment programs pursuant to West Virginia Code, §21A-2-1, and West Virginia Code, §21A-2-12 & -13.

3.5. "Compensation fund" means the fund created by West Virginia Code, §23-3-1, which includes the surplus fund.

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

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

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

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

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

Default as defined in this rule is not affected or altered by the provisions of any rule which may be issued by the division providing for a grace period, for the first thirty (30) days from and including the date of employment of any employee; except that, if the employer files the application and deposit within thirty (30) days from the first date of employment, the employer may avoid the imposition of interest on payments unpaid when due, penalty premium rate, late reporting or payment penalty or other monetary penalties which may be imposed under law by the division for the employer's omission or failure to file an application for

coverage and premium deposit prior to the first date of employment of any employee. Therefore, the provisions of W. Va. Code, §23-2-8, regarding civil liability for the injury or death of an employee, are not affected or altered by provision for such grace period. Furthermore, according to the exception set forth in the last sentence of W. Va. Code, §23-2-1(h), regarding coverage of sole proprietors, partners and corporate officers, notwithstanding the provision for a grace period from the imposition of certain other stated penalties, no sole proprietor, partner or corporate officer who may be lawfully elected out of mandatory coverage under subsections (g) and (h) of W. Va. Code, §23-2-1, may be afforded any benefits of coverage if injured within such thirty day grace period or thereafter until actual subscription occurs through application for coverage prior to the date of injury of such person.

3.9. "Delinquent" means an employer has failed to timely pay premium taxes, to timely file a payroll report, or to maintain an adequate premium deposit. A delinquent employer shall not be considered to be in good standing.

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

3.11. "Employee" has the meaning ascribed to that term by West Virginia Code, 23-2-1 and 23-2-1a.

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

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

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

3.15. "Incurred losses" are compensation awards, medical payments, and reserves.

3.16. "Injury" means compensable injuries or illnesses for which costs are incurred by the division within the meaning W. Va. Code, 23-4-1 et seq.

3.17. "Merit rated premium tax" means the base rate multiplied by the experience modification factor and the number of classification exposures.

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

3.18.a.A. Being a permittee of a surface coal mining operation (as defined under W. Va. Code, §22-3-1 et seq.); or

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

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

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

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

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

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

D. Being a general partner in a partnership; or

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

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

3.20. "Payroll" means the entire gross wages of all employees, not excluded under provisions of the Act or this rule.

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

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

3.23. "Regular subscriber" and "subscriber" mean an employer who is a subscriber to all parts of the compensation fund including the surplus fund.

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

3.25. "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, deficit reduction, and all losses not otherwise specifically provided for by the Act.

3.26. "This rule" means the instant legislative rule designated as 85 C.S.R. 9, "Underwriting."

§85-9-4. Ratemaking

4.1. Exposure base. Premium taxes shall be based on a prescribed percentage of the entire gross wages of all employees from which net payroll is calculated and paid during the preceding quarter. Gross wages includes, but is not limited to, all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services.

4.2. Base rate schedule. At such times as the commissioner and the compensation programs performance council elects to readjust the base rates for the various industrial classifications, the commissioner and the compensation programs performance council shall file a schedule of the readjusted base rates for each industrial class with the office of the secretary of state for publication in the state register pursuant to W. Va. Code §29A-2-1 et seq. The schedule shall be filed at least thirty days prior to the date for which the adjustment of rates is to be applicable.

4.3. Base rates.

4.3.a. Eligibility. All employers who are not eligible for merit rated premium tax shall be subject to a base rate schedule unless otherwise determined under the provisions of this rule.

4.3.b. Computation of base rate premium taxes. The premium tax assessed to each employer subject to the base rate shall be calculated by multiplying the number of classification exposures by the specific base rate for the employer's class or group.

For example, Employer A has $20,000 of payroll. Employer A's base premium tax rate is $5 per $100 of payroll. Employer A's classification exposures are calculated:

Total Payroll ÷ Payroll Unit = Classification Exposures
$20,000 ÷ $100 = 200 Classification Exposures

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

Classification Exposures x Base Rate = Premium Tax
200 x $5 = $1000

4.4 Merit rated premium tax. The workers' compensation division recognizes the existence of variability among the employers within each premium tax class or group. The division shall determine merit rated premium taxes for eligible employers by utilizing experience modification factors calculated in accordance with the following methodology and principles.

4.4.a. Eligibility. To be eligible for a merit rated premium tax, an employer:
(1) Shall have had an account with the division for the full experience period.
(2) Shall have $1,500 in "average losses" as defined under subparagraph 4.4.d.C.

4.4.b. Accident year. The amount charged against the employer's account during an annual period shall be for costs incurred for injuries or fatalities occurring in that annual period.

4.4.c. Experience period. The experience period used to determine the experience modification factor for the fiscal year ending June 30, 1997, shall be the fiscal years ending June 30, 1993, June 30, 1994, and June 30, 1995.

4.4.d. Calculation of experience modification factor. The experience modification factor

shall be calculated in accordance with the following formula.

$$M = Z \times K/X + (1-Z)$$

Where,

M is the experience modification factor;

Z is the credibility factor;

K is the employer's actual limited losses during the experience period; and

X is the average losses adjusted for the loss limit.

A. "Z" or "credibility factor" means an actuarially determined factor that varies by loss limit and industry group which represents the predictability of the employer's future costs given its past losses. The credibility factor is determined using statistical methods and the division's past experience. The credibility may be adjusted so that the maximum cost of any single claim is 15% of the base rate.

B. "K" or "actual limited losses" means the actual claim incurred losses limited to the loss limitation value. The loss limitation value is 10% of average losses before adjustment for the loss limit. The division may utilize a reserve for each claim in the experience period, which is an estimate of future benefit payments to be made on that claim. The experience modification factor will not be recalculated if the reserve for a claim does not happen to be the actual future cost of that claim.

C. "X" or "average losses" means the employer's payroll by year times the average reported loss rate by year for the class times a loss limitation ratio. The average loss rate for the class is the average cost of claims during the experience period, per unit payroll, for all employers in that given class.

4.4.e. Computation of merit rated premium taxes. The premium tax assessed to each merit rated employer shall be calculated by determining the total base premium tax in accordance with the methodology outlined in subsection 4.3 and multiplying the total base premium tax by the experience modification factor (EMF).

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

Total Payroll	÷	Payroll Unit	=	Classification Exposures
$20,000	÷	$100	=	200

Classification Exposures	x	Base Rate	x	EMF	=	Premium Tax
200	x	$5	x	1.25	=	$1250

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

Classification x Base x EMF x (1+ premium tax surcharge) or (1+ premium tax credit) = Premium Tax
Exposures Rate

If employer B as described in section 4.4.e. has a premium tax surcharge of + 30%, employer B's premium tax is calculated as follows:

Classification Exposures	x Base Rate	x EMF	x (1+ premium tax) Surcharge	=	premium tax
200	x $5	X 1.25	X 1.30	=	$1625

If employer B as described in section 4.4.e has a premium tax credit of -30%, employer B's premium tax is calculated as follows:

Classification Exposures	x Base Rate	x EMF	x (1+ premium tax) Credit	=	premium tax
200	x $5	X 1.25	X .70	=	$875

4.6. Self-insurer second injury experience modification factors. The division shall determine merit rated premium tax modification factors for employers who are subscribers to the self-insurer second injury fund.

4.6.a. Eligibility. To be eligible for a merit rated premium tax, the employer shall have been self-insured for the full experience period.

4.6.b. Experience period. The experience period used to determine the experience modification factor for the fiscal year ending June 30, 1997, shall be the calendar years of 1993, 1994 and 1995.

4.6.c. Calculation for experience modification factor. The experience modification factor shall be calculated in accordance with the following formula.

$$M = (K + 1{,}000{,}000) / (X + 1{,}000{,}000)$$

Where,

M is the experience modification factor;

K is the employer's actual second injury charges during the experience period; and

X is the average losses for the experience period.

A. The employer's average losses shall be calculated as an average loss ratio times the employer's base rate premium.

B. The average loss ratio shall be determined as the ratio of actual second injury charges to the base rate premium for second injury subscribers.

C. Average loss ratios shall be calculated for three industry groups:

(a) Coal;

(b) Glass, metal and chemical manufacturing, construction and trucking; and

(c) All other.

D. The employer's base rate premium shall be the employer's payroll, by class, times the base rate.

4.7. Annual statement. The division shall provide to each employer an employer's statement detailing the activity in the employer's account for that coverage period. The employer's statement shall include, but not be limited to, the following:

4.7.a. The name of each of the employer's employees for whom costs were paid during the calendar year and the amount of such costs paid during the period covered by the employer's statement;

4.7.b. Amounts calculated to fund the deficit and provide for administrative costs of the division.

4.8. Notification. The division shall notify every employer whose premium tax is affected under the provisions of section four of this rule. The division shall provide such notice, in accordance with the provisions of section ten of this rule, to each affected employer at least thirty (30) days prior to the period for which the rate change is applicable.

§85-9-5. Guaranteed cost plan.

5.1. General. Certain matters involving employers who subscribe to the guaranteed cost plan are covered under the general provisions of chapter twenty-three of the West Virginia Code, the provisions of W. Va. Code, §23-2-1 et seq., the provisions of 85 C.S.R.1, entitled "Administration of the Workers' Compensation Fund," and other rules of the division. Such matters include, but are not limited to, applications, guidelines for reports and remittances, coverage and coverage elections, audits and payroll adjustments, transfers of business assets and successor business obligations.

5.2. Description. Employers who subscribe to the guaranteed cost plan are afforded full workers' compensation coverage. Coverage includes payment for all covered losses for a calculated premium tax amount which includes contributions for the retirement of any deficit and the costs of administration of the Fund. Covered losses shall include those matters forward which disbursements are made under the provisions of W. Va. Code §23-4-1.

5.3. Eligibility. All employers, except self-insurers, shall be eligible for and assigned to the guaranteed cost plan.

5.4.. Evaluation. The purpose of the division's evaluation is to assess the risk of the employer and determine the proper classification and premium tax for the employer. The division shall review and evaluate each application received as part of the registration and application process. The division shall review such forms to evaluate the accuracy and completeness of information, correctness of classification information, payroll reports and deposits, and such other materials deemed necessary by the division. As part of the evaluation, the

division may require payroll and classification audits, as well as loss prevention inspections, to more accurately assess risk and charge appropriate premium taxes.

5.5. Classification of employer operations. The division shall classify every employer applicant according to the nature of their operations and in accordance with the classification of employment schedule determined under the provisions of this rule.

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

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

5.8. Compliance. An employer who subscribes or is assigned to the guaranteed cost program shall comply with all applicable provisions of this rule.

§85-9-6. Deductibles.

[**Reserved**]

§85-9-7. Group rating.

[**Reserved**]

§85-9-8. Assigned risk plan.

8.1. Description. The assigned risk plan identifies employers with substandard performance levels and imposes additional premium taxes on employers assigned to this plan. The purpose of the assigned risk plan is to encourage employers, by means of the imposition of a higher rate of premium tax, to adhere to the Act and the rules of the division and improve their performance. A further purpose is to provide an insurance plan for those employers with an elevated risk and whose inclusion with other employers in the same classification results in an unacceptable sharing of risk by those other employers.

8.2. Identification. The division shall have the authority to identify and assign certain employers including self-insured employers to the assigned risk plan. Such assignment shall only take place with the approval of the compensation programs performance council after review and evaluation of placement criteria to determine whether a specific employer has substandard performance levels.

8.3. Placement criteria. The division shall review and evaluate all or some of the following placement criteria in its determination of whether to include an employer in the assigned risk plan:

(1) Whether the employer's experience modification factor, with relation to its premium size, is considered excessive, as defined by the commissioner and the compensation programs performance council under the applicable provision of this rule;

(2) Whether the employer has knowingly under-reported its payroll information or wage information required by the division;

(3) Whether the employer has refused to cooperate with any inspection, audit or program administered by the division;

(4) Whether the employer is in default;

(5) Whether the employer has failed to maintain the proper level of premium tax deposit;

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

(7) When applicable, whether the employer has failed to post the amount of surety required by the division;

(8) Whether the employer has failed to pay a medical provider or the claimant in accordance with the applicable provisions of the West Virginia Code or rules promulgated thereto;

(9) Whether the employer is not in compliance with any other rules or programs of the division;

(10) Whether the employer has not complied with any applicable federal or state safety laws or regulations;

(11) Whether an employer, that has opened an account with the division within the last three years, has demonstrated sufficient managerial experience and expertise in the area of safety training, supervision, and accident prevention;

(12) The management history of the employer; and

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

8.4. The division shall consider additional factors in its determination of whether the employer meets the placement criteria of 8.3.(1). Such factors shall include:

A. Whether the employer has been properly classified for purposes of determining the employer's experience modification factor;

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

C. Whether the employer experienced a catastrophic loss or other anomalous circumstance so as to adversely affect the employer's experience modification factor; and

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

8.5. Evaluation of criteria. The division shall consider the criteria of subsection 8.3, taken as a whole, in its determination of whether to assign an employer to the assigned risk plan.

8.6. Effect of assignment to the assigned risk plan. Placement in the assigned risk plan shall result in an increase in the amount of premium tax paid by the employer so assigned. The amount of increase of the employer's base rate shall be 30%. The increase in premium taxes shall include all payment periods during which the employer is assigned to the assigned risk plan. The amount of increase in premium tax shall be over and above any other assessment of charges under the provisions of the Act.

8.6.a. Placement in the assigned risk plan shall result in removal of the employer's experience from its previous classification for purposes of calculating the base rate and experience modification factors for the remaining members of the class.

8.6.b. Changes to the base rate and experience modification factors for the remaining

members of the class occasioned by the placement of a member of the class in the assigned risk plan shall result in a retrospective credit to each employer so affected. Such credit shall be applied by the division to the following annual period.

8.7. Length of assignment. When an employer has been placed in the assigned risk plan in the exercise of the division's discretion under the provisions of subsection 8.5., such assignment shall be for a period, to be determined by the division considering the number and severity of violations, not to exceed one year. Such period may be extended for an appropriate period by the division if the employer does not correct its actions or falls within any placement criteria developed under subsection 8.3.

8.8. Notification. Each employer assigned to the assigned risk plan shall be notified by the division at least thirty (30) days prior to assignment. Such notification shall include the reasons for assignment to the plan, the length of initial assignment to the plan, the additional percentage of premium tax or such other sums due, and the due date of such payment.

§85-9-9. Self insurance.

9.1. Election. An employer may elect to become self-insured with respect to the compensation fund and the catastrophe reserve of the surplus fund or to the compensation fund but not the catastrophe reserve of the surplus fund, if the division determines it meets the financial responsibility requirements and procedural requirements set forth in W. Va. Code, §23-2-9, and in this rule.

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

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

9.2. Application.

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

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

A. The employer's application and the required financial statements must be signed

and sworn to by the president or vice-president and secretary or assistant secretary of the employer, parent or other related business if the employer, parent, or related business is a corporation or limited corporation; or, by all of the partners if the employer, parent or related business is a partnership; or, by all of the general partners if the employer, parent or related business is a limited partnership; or, by the owner if the employer, parent or related business is neither a corporation, limited corporation, partnership, nor limited partnership.

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

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

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

9.2.d. The employer applying for self-insurance shall pay to the division an application fee of $2,500.00 at the time the application is filed, to be deposited in the general revenue account of the Workers' Compensation Fund. The fee is assessed to offset the cost incurred by the division when the division requests the workers' compensation staff and/or actuary to review the employer's account, and the financial statements and other information submitted by the employer in conjunction with the application. The division will utilize the reviews in making a decision on the application, pursuant to section subsection 9.5 of this rule, and in setting appropriate security and bond requirements, pursuant to section subsection 9.6 of this rule.

The application fee is subject to modification by the division.

9.2.e. An employer who is a subscriber to all or part of the West Virginia Workers' Compensation Fund may apply at anytime to self-insure all or part of its workers' compensation risk, as set forth in subsection 9.4 of this rule. If the application and the security are approved by the compensation programs performance council, the self-insurance will be effective on the first day of the quarter, following the month in which the application was approved, but only if the security is effective on that date.

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

A. When an application for self-insurance is filed, the division will review the application and inform the employer-applicant if there is a need for additional financial information, pursuant to paragraph 9.2.c of this rule. The employer-applicant must provide the division with the additional information in order to complete the application process. The division will complete an evaluation of the financial statements and the employer-applicant's surety choice. The division will have a preliminary audit of the employer- applicant's account performed and issue to the employer-applicant a notice of the required remittance, which shall be paid prior to further processing of the application. The division will have the "buy-out" amounts,

defined under subsection 9.3. of this rule, calculated and advise the employer of their options. Finally, the division will render a decision approving or disapproving the application and defining the security requirements. The employer-applicant will then have thirty (30) days from the date of notification to obtain adequate security, as defined by the division under section subsection 9.6 of this rule.

B. If the employer-applicant is unable to obtain adequate security, as defined by the division, within the thirty (30) day period, the employer-applicant may file a written request with the division for an extension of the deadline, but the request must be filed prior to the expiration of the original deadline. The division may grant a sixty (60) day extension if the employer-applicant has established good cause for the extension. If an extension is granted, the employer-applicant must obtain adequate security, as defined by the division under subsection 9.6 of this rule, within the extension period, to be effective on the first day of the quarter after approval.

9.2.f. Employers applying for self-insurance must continue to make timely payments for quarterly premiums as a regular subscriber to the compensation fund until the self-insurance status is approved by the compensation programs performance council and the status is effective.

9.3. Reconciliation and settlement of applicant's account.

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

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

9.3.b. An employer is responsible for the future costs of awards and medical benefits granted after the effective date of self-insurance to its employees for injuries or deaths that occurred in any period during which it subscribed to the compensation fund. At the time of an employer's application for self-insured status, the division may determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses. The division may utilize an actuary for calculating the amount.

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

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

(a) If the security or bond is approved by the division, the division will

transfer all of the employer's open and closed claims from the regular subscriber account to the self-insured account. The employer shall agree to reimburse the compensation fund for any payments made in these claims on behalf of the employer after the effective date of self-insurance except where an award was granted prior to the effective date of self-insurance.

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

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

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

9.3.c. If an employer-applicant can establish that as of the effective date of self-insurance, its record upon the books of the division shows that the premium taxes it paid to the compensation fund exceed the liabilities incurred by the compensation fund on account of injury to or death of any of its employees, then the division shall consider the amount of excess premium taxes in assessing the employer-applicant's demonstrated loss experience for the purpose of determining whether security in excess of the one million dollar minimum shall be required, pursuant to subsection 9.6. of this rule. This paragraph does not entitle the employer-applicant to an actual monetary credit or refund. The amount of security required to be pledged in lieu of a buy-out of the employer's prior claims liabilities shall not be reduced by the amount of any excess premiums.

9.3.d. The division will attempt to obtain the actuarial figures on a buy-out of liability in a timely fashion. The employer will not be penalized by a delay in a decision on the self-insurance application because the division is unable to obtain the actuarial figures in a timely fashion.

9.3.e. The division will not interpret in a capricious or arbitrary manner the provisions requiring the employer to buy out liability.

9.4. Elections by employers applying for self-insurance.

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

A. If a self-insured employer elects to subscribe to the catastrophe reserve of the

surplus fund, it shall pay premium taxes into the surplus fund on the same basis and in the same percentages as subscribers to the general fund pay for coverage under the catastrophe reserve of the surplus fund. The employer shall pay the premium tax on or before the last day of the first month of each quarter.

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

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

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

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

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

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

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

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

(g) Employers must collect all overpayments and duplicate payments directly from the health care provider.

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

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

(j) Prior to July 31 of each year, the employer must provide the

division with an annual report of total medical payments made during the previous fiscal year. The report must be in a format acceptable to the division.

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

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

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

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

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

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

9.5.b. In assessing the employer-applicant's financial standing, the division shall review and evaluate the financial statements filed with the application, the employer- applicant's workers' compensation loss experience, and other information obtained during the application process. The evaluation may be performed by the division's staff and/or actuary. The evaluation may include, but shall not be limited to, reference to a version of the current financial ratios found in the Dun & Bradstreet Industry Norms and Key Business Ratios.

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

9.6. Security and bond.

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

9.6.b. The employer-applicant shall post security or bond in an amount sufficient to meet all of its obligations to its employees and their dependents, as defined by the Act and this rule, during the first year of self-insurance and for the reasonably foreseeable period thereafter. At anytime that good cause exists to believe that the bond or security is no longer sufficient to meet the employer's reasonably foreseeable

obligations, the division shall require the employer to post additional or supplemental security or bond to meet these obligations. (See subsection 9.8 of this rule, Maintaining self- insured status).

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

A. If the self-insured employer obtains an occurrence-type security or bond, then the security or bond is liable in the place of the employer should the employer be unable to meet its obligations for any or all injuries or deaths that may occur during the time period for which the security or bond is effective, and the security or bond remains liable at the time any awards for the injuries or deaths are subsequently made and for the entire time period in which benefits will be paid under the awards, including death benefits to surviving dependents.

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

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

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

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

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

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

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

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

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

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

with a nonrenewal draw clause.

9.6.d. Employers applying for self-insurance must meet the security requirements defined by the division. The amount of security or bond required from a self-insured employer shall be that amount determined by the division or its actuary to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one million dollars ($1,000,000). The amount of security required of a self-insured employer shall be based upon, but not be limited to, such criteria as the employer's financial strength including excess liability insurance and the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury reserve loss experience and catastrophe reserve loss experience.

The division shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios referenced in subsection 9.5 of this rule, in evaluating an employer's financial strength and in making a determination as to an appropriate amount of security, not to be less than one million dollars ($1,000,000). Whenever possible, the division shall make a comparison of ratios utilizing the employer-applicant's workers' compensation industry classification.

9.6.e. Upon notice from the division, each self-insured employer shall file an application annually to continue the self- insurance privilege, as set forth in subsection 9.8 of this rule. At the time the application for continuation of the privilege is filed, or sooner as an individual case may require, the division or its actuary shall review the self-insured employer's current financial status and security requirements. The division will notify the employer of the results of an annual review, if a review is performed.

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

A. If the division determines that a self- insured employer's securities or bonds are inadequate or insufficient, the division shall enter an order directing the employer to increase its securities or bonds by the amount needed to reach the adequate and sufficient level for all time periods originally intended to be covered by the inadequate or insufficient security or bond. An inadequate or failed security or bond includes, but is not limited to instances where the entity behind the security or bond is no longer a viable entity or, for whatever reason, can no longer meet its obligations.

The division shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond; however, the period shall not exceed ninety (90) days from the date of the division's order. The increased security or bond must meet the requirements set forth in paragraph 9.6.b of this rule.

B. A self-insured employer's failure to obtain additional bond or security, as required by the division, may result in a revocation of the privilege of self-insurance and termination of the employer's self-insured status. The division shall issue a notice specifying the effective date of termination of self-insured status.

C. If the division has not already determined that a decreased adjustment is merited, the self-insured employer may file a written petition with the division for a downward adjustment of its security requirements for purposes of future injuries or deaths incurred by its employees. The security cannot be adjusted to an amount less than one million dollars ($1,000,000.). The petition must include the employer's audited financial statements for the three years preceding the date of the petition. The division may request

additional information from the employer, as it considers necessary. The division shall render a written decision on the petition within ninety (90) days of receipt of the petition, and if it is granted, the division shall set forth the terms for the new security requirements in the written decision.

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

9.6.g. The division may, with the approval of the compensation programs performance council, develop a sliding scale based upon the employer's financial circumstances, to determine the amount of security required to become a self-insured.

9.7. Second injury reserve of the surplus fund.

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

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

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

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

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

9.7.c. The division may require any employer who is permitted to self-insure the second injury life award risk pursuant to W. Va. Code §23-2-9, to furnish an additional security as defined by subsection 9.6 of this rule. The second injury security or bond must be approved by the division and must satisfy the requirements set forth in this section. Provided, pursuant to W. Va. Code §23-2-9(e), any self insured employer who was, prior to the second day of February, one thousand nine hundred ninety-five, permitted to self insure its second injury risk, may elect to continue to self-insure its second injury risk for so long as it meets the requirements of Chapter twenty-three of the West Virginia Code, including the security and bond requirements of W. Va. Code, §23-2-9(a), and subsection 9.6 of this rule.

9.8. Maintaining self-insured status.

9.8.a. Upon notice of the division, each self-insurer shall file annually an application to continue the self-insurance privilege. The renewal application shall be on a form prescribed by the division and shall be accompanied by a current audited financial statement and a renewal processing fee of one hundred dollars ($100).

The employer's status as a self-insured employer with respect to all or part of the compensation fund shall continue on a year-to-year basis so long as the employer continues to maintain the requisite financial standing, as set forth in subsection 9.5 of this rule, and continues to satisfy the other requirements imposed by the Act, this rule and any other pertinent rule, and any order of the division. If necessary in order to ascertain whether the employer has met and can continue to meet all of the self-insurance requirements and obligations, the division may conduct an audit of all books, records, papers, and documents in the possession or control of the employer.

9.8.b. A self-insured employer with respect to all or part of the compensation fund is responsible for the direct payment of all pecuniary compensation due and owing under the Act to employees or employees' dependents; is responsible for the direct payment of health care provider and medical invoices pursuant to subsection 9.4 of this rule, if the employer elected to make such direct payment; and is responsible for reimbursing the division for all medical, funeral, or other expenses paid by the division on behalf of its employees and their dependents.

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

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

The division may exercise his or her discretion to permit an employer to correct a failure to comply or a default within ninety (90) days of receiving notice of the deficiency, in lieu of revoking that employer's self-insured status.

9.8.d. Notwithstanding section 9.6.b of this rule, in cases where the employer is permitted to remain self-insured, even though their security is less than the amount required, as determined by the division, the compensation programs performance council may approve a graduated premium tax surcharge. This increased premium tax applies to any self-insured employer who fails to maintain adequate security. The additional revenue generated by this premium tax surcharge may be used to establish a pool of funds that will be available to pay self-insured claims that result from any exposure created by a failed self-insured employer.

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

9.9.a. In the event a self-insured employer reorganizes its business, assumes additional liability, acquires new assets or operations, buys an additional business, merges with another business, or otherwise changes its operation in any manner which impacts on its workers' compensation liability, the self-insured employer must notify the division of the modification of business, immediately. The notice of modification must include specific information as to the nature of the modification and the names of other employers and/or businesses affected by the modification.

9.9.b. If the self-insured employer has acquired a new operation or business or has merged with another business, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The division has the discretion to require that the application to self-insure the new operation or business be processed in accordance with the Act and the division's rules governing self- insurance, including, but not limited to subsection 9.1, Self-Insurance; subsection 9.5, Division's review of the application for self-insurance; and, subsection 9.6, security and bond.

9.9.c. Under paragraphs 9.9.a and 9.9.b, of this rule, the division or its actuary will review the employer's security and bond requirements and make an appropriate adjustment to the requirements, as set forth in subsection 9.6 of this rule.

9.9.d. Depending on the nature of the modification of business, the division may require the self-insured employer to pay a fee of $2,500. The fee is assessed to offset the cost incurred to perform any reviews, including actuarial reviews, to determine any new or additional exposure which the modification may cause.

9.9.e. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the division shall have the authority to revoke the self-insured status due to changes arising from the modification of business. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this section.

9.10. Voluntary termination of self-insured status.

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

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

utilize its actuary for calculating the estimate. The employer must pay a $2,500.00 fee for the service.

B. The division shall not permit the employer to terminate the self-insured status and subscribe to the Fund until it pays the actual estimate, or maintains security or bond in an amount sufficient to cover the estimated future cost of the liability. The division must approve the employer's election for the payment of the estimated future cost of liability.

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

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

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

9.10.b. A self-insured employer must provide the division with written notice of termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status, stop reporting wages, stop paying administrative costs, and stop paying premium taxes to the Surplus Fund. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from the compensation fund. When the employer decides to terminate its self-insured status, the division shall estimate the amount of money that is sufficient to cover the future costs of the liability. The division may utilize its actuary for calculating the estimate. The employer must pay a $2,500.00 fee for the service.

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

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

Additionally, the agreement shall provide for the payment of interest on the principal which the

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

9.10.c. If a self-insured employer terminates its self-insured status because it ceases doing business in the state of West Virginia as the result of a sale or transfer of all or part of its business, the self-insured employer must notify the division of the sale or transfer within thirty (30) days after the date of closing. The self- insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self- insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the division to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. The division may utilize its actuary for calculating the estimate. The employer must pay a $2,500.00 fee for the service.

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

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

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

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

9.10.d. If a contract of sale or transfer includes an agreement as to the parties' assumption of charges and contingent liabilities incurred by the self-insured seller prior to the effective date of the sale or transfer, and if a complete copy of the contract is filed with the division, the division will give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the Fund. The division will issue a written decision on whether it will give effect to the agreement.

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

insurance. In the event of a security or bond being posted by the buyer to cover the seller's liabilities, or if the buyer pays the actual estimate of the seller's liability, then the division will release the employer's like security or bond previously posted by the employer-seller.

B. If a complete copy of the contract of sale is not filed with the division and/or if the division does not give effect to the agreement, the division will hold the self-insured seller liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to the effective date of the sale or transfer, unless the employer pays into the fund an amount sufficient to cover the estimated cost of all such liability, as set forth in this subsection.

9.10.e. The division will attempt to obtain the actuarial figures on a buy-out of liability in a timely fashion. The employer will not be prevented from terminating its self-insured status or from subscribing to the Fund because of an untimely delay in obtaining the buy-out figures.

9.10.f. The division will not interpret in a capricious or arbitrary manner the provisions requiring the employer to buy out liability.

9.11. Present value payment of unpaid compensation.

9.11.a. At any time, the division, in its discretion, may permit or require any self-insured employer to pay into the Fund an amount of money equal to the present value of all unpaid compensation awarded in a claim and for which the employer is liable, in trust.

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

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

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

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

9.12.a. Employers who were previously self-insured employers and who on the effective date of this rule were continuing to pay compensation and expenses for certain of their employees due to their previous status as self-insured employers may elect to buy out their responsibility for those payments related to the prior self-insured status, pursuant to the provisions set forth in paragraph 9.10.b of this rule.

9.13. Administrative reports and fees.

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

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

9.13.c. On or before the last day of the first month of each quarter, for the preceding quarter, each self-insured employer shall pay into the compensation fund a sum sufficient to cover its proper portion of the expenses related to the administration of the Act.

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

B. If a self-insured employer does not subscribe to the second injury reserve of the surplus fund, pursuant to W. Va. Code §23-2- 9(e), the sum sufficient to pay its proper portion of the expenses related to the administration of the second injury reserve of the surplus fund is determined by applying a percentage to the second injury reserve base rate that has been assigned to the self-insured employer's second injury reserve industrial class.

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

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

9.14. Current status of employers not affected.

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

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

§85-9-10. Name and address of employer; legal notice; fee for employer records and publications.

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

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

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

10.2.b. If the employer wishes to have certain notices and correspondence directed to a subsidiary, a branch office or agent, the employer must notify the division in writing of the name and address of

said subsidiary, branch office or representative and specify the circumstances under which said notice is to be given. It will be the responsibility of the representative to notify the division when such representation ceases and to provide a current address to which the employer's notices and correspondence are to be sent.

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

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

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

§85-9-11. Implementation

11.1. The commissioner and the compensation programs performance council have reserved certain sections of this rule to provide additional insurance plans as the same become available. This reservation in no way limits the ability of the commissioner and the compensation programs performance council to develop additional insurance plans.

§85-9-12. Administrative protests and hearings.

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

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

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

12.4. Subsequent administrative hearing proceedings shall be in accordance with 85 C.S.R. 7 " Rules for Selected Hearings."

§85-9-13. Severability

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