WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §23-2C-5(c)(2); 23-2C-22; 33-2-10(b) & 33-2-20(a)

AMENDMENT TO AN EXISTING RULE: YES ______ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: ______

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

TITLE OF RULE BEING PROPOSED: Workers' Compensation Uninsured Employers' Fund

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DATE OF PUBLIC HEARING: Thursday, July 20, 2006 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING: Charleston Civic Center

200 Civic Center Dr. – Room 207-209

Charleston, West Virginia

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

NOTE: Comment period for written Comments will end on July 20, 2006 at 3:00 PM.

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

Ryan Sims, Associate Counsel
WV Insurance Commission
P.O. Box 50540
Charleston, WV 25305-0540

The Department request 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

John C. Musgrave
Acting Secretary of Tax and Revenue

Insurance Commission
Exempt Legislative Rule
Title 85, Series 9

COMPROMISE & SETTLEMENT OF WORKERS' COMPENSATION ISSUES

TITLE 85, SERIES 9

BRIEF SUMMARY OF RULE

This new rule sets forth procedures and processes for the administration of the Workers' Compensation Uninsured Employers' Fund. The Uninsured Employers' Fund was created in Senate Bill 1004, First Special Session, 2005, and is to be administered by the insurance commissioner. Specifically, see W. Va. Code §§ 23-2C-2(o); 23-2C-7(a); and 23-2C-8. The purpose of the Uninsured Employers' Fund is to pay the claims of employees who are injured while working for illegally operating uninsured West Virginia employers. This rule discusses various processes and procedures to be implemented in the administration of the Uninsured Employers' Fund. The procedures and processes addressed in this rule include application of a claim to the fund; the assignment of subrogation rights by claimants under the fund; the liability of uninsured employers to reimburse the fund and the methods for determining this liability; and the methods for determining assessments to West Virginia Employers from the fund.

Insurance Commission
Exempt Legislative Rule
Title 85, Series 9

WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

TITLE 85, SERIES 9

STATEMENT OF CIRCUMSTANCES

Pursuant to Senate Bill 1004, First Special Session, 2005, workers' compensation in West Virginia was changed from a state run, monopolistic system to a private market system. As part of this Bill, the Workers' Compensation Uninsured Employers' Fund was created, and is to be administered by the insurance commissioner. Specifically, see W. Va. Code §§ 23-2C-2(o); 23-2C-7(a) and 23-2C-8. The purpose of the Uninsured Employers' Fund is to pay the claims of employees who are injured while working for illegally operating uninsured West Virginia employers. The legislature mandated that the workers' compensation rules of W. Va. Code St. R. Title 85 be amended as necessary to reflect this transition. See W. Va. Code § 23-2-10. The insurance commissioner believes that in order to efficiently administer the Uninsured Employers' Fund, a rule needs to be promulgated to clarify the procedure and processes that govern the Uninsured Employers' Fund.

This new rule is being promulgated to implement the above referenced code provisions.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Workers' Compensation Uninsured Employers' Fund (Title 85, Series 9)

Type of Rule: X Exempt Legislative ____Interpretive ____Procedural

Agency: Insurance Commission

Address: Post Office Box 50540

1124 Smith Street, Greenbrooke Building

Charleston, West Virginia 25305-0540

Phone Number: (304) 558-0401 Email: Ryan.Sims@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This proposed new rule addresses procedures and processes to be used in the administration of the Uninsured Employers' Fund, a Fund created by W. Va. Code §§ 23-2C-2(o); 23-2C-7(a) and 23-2C-8. The Insurance Commissioner currently has staff in place to administer the Uninsured Employers' Fund, and has been administering the fund, in cooperation with its designated third-party administrator for the Fund. This Rule will merely provide more clarification for the Insurance Commissioner's staff in regard to the Fund's administration. Therefore, the changes in this rule should not significantly impact the budget of the Insurance Commissioner.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	Unknown	Unknown	Unknown
Personal Services	0	0	0
Current Expenses	Unknown	Unknown	Unknown
Repairs & Alterations	N/A	N/A	N/A
Assets	N/A	N/A	N/A
Equipment	N/A	N/A	N/A
Other	Unknown	Unknown	Unknown
2. Estimated Total Revenues	N/A	N/A	N/A

3. Explanation of above estimates (including long-range effect):
Please include any increase or decrease in fees in your estimated total revenues.

As described in the summary above, the costs associated with this rule will be the costs of paying a hearing examiner to review the settlement, any relevant evidence presented in conjunction with the request for review, and possibly hold hearings on the settlement if requested by the involved parties. Additionally, the hearing examiner will have to prepare findings of fact and conclusions of law and a recommended decision. Generally, the insurance commissioner will designate an administrative law judge (ALJ) working for the Office of Judges (OOJ - a unit within the OIC), as the hearing examiner. Therefore, the costs associated with this rule will be the cost of paying the OOJ to staff the above described work. Also, in some situations the OIC may appoint a hearing examiner not working for the OOJ, and in this case, the OIC would pay the hearing examiner on a contract basis for the above described work. There is no historical data available to estimate the number of requests for review of settlement that will be received. Therefore, the fiscal costs of this rule amendment cannot be estimated at this time. However, this review will be undertaken within the existing resources of the Offices of the Insurance Commissioner.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

As described above, this rule will have some fiscal impact, as related to the cost of paying hearing examiners to review settlements and related evidence, and in some cases hold hearings, and to prepare findings of fact and conclusions of law and recommended decisions. However, this cost cannot be estimated at this time as there is no historical date available in regard to how many requests for review of settlement will be filed. The review will be undertaken within the existing resources of the Offices of the Insurance Commissioner.

Date: June 19, 2006

Signature of Agency Head or Authorized Representative

Jane L. Cline / MJP

Jane L. Cline, Insurance Commissioner

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 9
WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

§85-9-1. General.

1.1. Scope. -- These rules shall govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); and 33-2-20(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the Industrial Council and the Insurance Commissioner as related to workers' compensation under chapter twenty-three of the West Virginia Code are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. --

1.4. Effective Date. --

§85-9-2. Purpose.

The purpose of this rule is to establish a procedure and process to govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

§85-9-3. Definitions.

As used in this exempt legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Commissioner" means the Insurance Commissioner of West Virginia as provided in W. Va. Code §23-2-1, or any designated third-party administrator of the Insurance Commissioner.

3.2. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.

3.3. "Private carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.4. "Fund" is the Workers' Compensation Uninsured Employers' Fund, as defined and established in W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

§85-9-4. Application for Benefits from the Fund.

4.1. If an individual believes that he or she may be entitled to benefits under the Fund, then he or she shall complete an application for benefits from the Fund on a form created by the Commissioner. The Commissioner reserves the right to change the Fund application from time to time as deemed necessary. Completion of the application for benefits is an absolute prerequisite for any entitlement to benefits from the Fund.

4.2. Upon receipt of an application for benefits, the Commissioner shall send a letter to the employer named in the application which notifies the employer that one of its employees has made a claim against the Fund.

4.3. Within five (5) business days of receiving an application for benefits, the Commissioner shall determine whether the claimant's employer named in the application was insured on the date of injury or date of last exposure. If the Commissioner needs additional time to make this determination, the Commissioner shall be granted up to an additional thirty (30) calendar days to make the determination. The Commissioner shall also send a letter to the claimant, copied to the employer, informing them that the determination cannot be made within five (5) business days, the reason(s) why it cannot be made and that the decision will be made within the next thirty (30) calendar days.

a. If the Commissioner determines that the employer named in the application was insured on the date of injury or date of last exposure, the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that coverage for the claim through the Fund is therefore denied.

b. If the Commissioner determines that the employer named in the application was not insured on the date of injury or date of last exposure, the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that the claim will be accepted into the Fund: *Provided*, That the letter accepting the claim is not a compensability ruling, but rather is only an initial determination that the claim is chargeable to the Fund, if in fact the claimant is ultimately found by the claims adjuster to be otherwise entitled to benefits under the law. The Commissioner shall then forward the claim to its designated third-party administrator for further administration of the claim consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

4.4. If, after rendering a decision as described in subdivisions a and b, subsection 4.3 of this section, the Commissioner receives evidence to indicate that the decision was erroneous, the Commissioner reserves the right to enter a corrective determination remedying the previous erroneous determination.

4.5. Any decision rendered by the Commissioner under subdivision a or b of subsection 4.3 or subsection 4.4 of this section may be contested by an aggrieved party only through the provisions of 85CSR7, "Rules for Selected Hearings," *Provided*, That the sole issue that may be argued by any party contesting any such decision is whether the claimant's employer, as stated in the application, was insured on the date of injury or date of last exposure.

§85-9-5. Irrevocable Assignment of Subrogation Rights.

5.1. Pursuant to W. Va. Code §23-2C-8(b)(1)(C), as a condition of receiving benefits from the Fund, a claimant under the Fund irrevocably assigns all of his or her rights to recover money from a collateral source for the occurrence or exposure which resulted in the claimants' injury, including, but not limited to: (a) any benefits from other existing insurance policies, such as a later discovered workers' compensation policy providing coverage, or a disability insurance policy; and (b) any funds resulting from a settlement or jury verdict stemming from a cause of action under statutory or common law against a third-party who has liability for the occurrence or exposure which resulted in the claimant's occupational injury or disease. The subrogation language contained in the application for benefits from the Fund, which is signed by the claimant, is deemed to constitute the irrevocable assignment from the claimant to the Commissioner of a right to be subrogated to the rights of the claimant as contemplated by this subsection and W. Va. Code §23-2C-8(b)(1)(C).

5.2. Pursuant to the irrevocable assignment of subrogation rights as contemplated in subsection 5.1 of this section and W. Va. Code §23-2C-8(b)(1)(C), the Commissioner shall have discretion to pursue subrogation directly from any collateral source with liability, by contacting the collateral source and demanding the funds for which the source is liable, and bringing a civil action in the name of the claimant against the liable source if necessary; or seeking subrogation from the claimant of any funds the claimant has successfully recovered from any collateral source; or any combination thereof: *Provided*, That the Commissioner shall only be permitted to seek collateral source funding as described in this section up to the amount of benefits paid from the Fund, including all medical and indemnity benefits.

§85-9-6. Employer Liability.

6.1. Pursuant to W. Va. Code §23-2C-8, an employer of claimant(s) who receive benefits from the Fund will be held liable to the Fund for all expenditures from the Fund on behalf of their injured employee(s), including, but not limited to:

a. All benefits, including all medical and indemnity payments, made from the Fund;

b. All claims administration costs related to the administration of claim(s) against the Fund;

c. All attorney fees related to defense of claim(s) made against the Fund; and

d. Interest on the above expenditures, as calculated under W. Va. Code §23-2C-8(b)(4)(8).

6.2. An employer shall remain on the Commission Default List or Private Carrier Default List, whichever is applicable, as defined in 85CSR11, until it pays all of its liability to the Fund, enters into a full and final settlement with the Commissioner for its liability to the Fund or enters into a repayment agreement with the Commissioner for its liability to the Fund. As such, the employer will be subject to all of the sanctions associated with being on the Default List, including, but not limited to:

a. Not being permitted to obtain or renew mandatory workers' compensation coverage;

b. Having a posting placed on the employer's front door informing its employees that the employer is uninsured and therefore may be sued by its employees for work related injuries;

c. A penalty of up to $10,000, pursuant to W. Va. Code §23-2C-8(b)(10); and

d. Being subject to an action in the Circuit Court of Kanawha County to enjoin the employer from continuing business operations.

6.3. If an employer incurs liability to the Fund after being removed from the Commission Default List or Private Carrier Default List, whichever is applicable, and the employer fails to remit payment for such liability to the Fund on a timely basis, as described in subsection 7.1 of this rule, the employer will be placed on the Default List until the liability is fully paid or otherwise resolved pursuant to section 7 of this rule.

§85-9-7. Methods for Determining and Collecting Employer Liabilities Owed to the Fund.

The Commissioner shall have discretion, on a case-by-case basis, based on what is considered to be in the best interests of the Fund, to utilize one or more of the following methods to determine and collect amounts owed to the Fund:

7.1. As benefit payments are made from the Fund, issue pay orders to liable employers ordering them to reimburse the fund, within a specific and reasonable amount of time, as selected by the Commissioner, for the amounts described in subsection 6.1 of this rule;

7.2. Enter into repayment agreements with employers to reimburse the Fund for the amounts described in subsection 6.1 of this rule, and then enter pay orders to employers as described in subsection 7.1 of this section;

7.3. Using generally accepted accounting and actuarial principles, reduce the estimated amount of a claim or claim(s) against the Fund, including all the amounts described in subsection 5.1 of this rule, to a present value reserve for the claim, and then deem the responsible employer to be liable for this amount. The Commissioner may then pursue this amount as a judgment against the employer, including filing a civil action in Circuit Court against the employer, seeking a judgment lien against the employer, and all other accepted methods of collection as set forth in article two, chapter twenty-three of the West Virginia Code and 85CSR11.

7.4. The Commissioner shall have discretion, if it is found to be in the best interests of the Fund, to enter into a full and final settlement with an employer for its liability to the Fund. Further, if it is found to be in the best interests of the Fund, the Commissioner shall have discretion to waive amounts owed to the Fund as part of a repayment agreement or a full and final settlement with the employer.

§85-9-8. Methods for Determining Assessments for the Fund.

8.1. If at any time the Commissioner determines, based on generally accepted accounting and actuarial principles, despite the collection of, or projected collection of, amounts owed to the Fund, that: (1) the Fund has incurred a deficit balance; or (2) it appears imminent that it will incur a deficit balance, then, in order to maintain the solvency of the Fund, the Commissioner may, pursuant to W. Va. Code §23-2C-8(a)(3), impose assessments against either private carriers, self-insured employers, or both, in the following manner:

a. Monthly or quarterly assessments against workers' compensation private carriers that reflect the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual expenditures for claims: Provided, this assessment may be collected by each private carrier from its policy holders in the form of a policy surcharge, and private carriers will have no liability for the amounts of this assessment which are not paid by employers defaulting on their premium payments;

b. Monthly or quarterly assessments against self-insured employers that result in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims.

8.2. Prior to imposing the assessments described in this section, the Commissioner shall provide at least thirty (30) days notice to the entities being assessed. Notice shall be provided by posting the intended assessment dates and amounts on the Commissioner's web site, and also through other means considered appropriate by the Commissioner.

§85-9-9. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.