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(1), -6(2) & -6(14); 21A-3-7(b) & -7(c); 23-2-9(f); and 23-1-1.

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: 9A

TITLE OF RULE BEING PROPOSED: Self-Insurance Security Risk Pool

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DATE OF PUBLIC HEARING: June 1, 1999

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
One Players Club Drive
Charleston, West Virginia 25311
(304) 558-6100

* The comment period ends at close of business June 1, 1999, 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

L. Eugene Dickinson
L. Eugene Dickinson, General Counsel
Bureau of Employment Programs

$3.60

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner

West Virginia Bureau of Employment Programs

• Job Service/Job Training Programs • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

April 29, 1999

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

Re: Proposed Exempt Legislative Rule
Title 85, Series 9A
"Self-Insurance Security Risk Pool"

Dear Secretary Hechler:

As authorized by the Commissioner and as approved by the Compensation Programs Performance Council, please consider this letter to be the 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,

L. Eugene Dickinson

L. Eugene Dickinson, General Counsel
Bureau of Employment Programs

LED:RBS:kll

Legal Services Division
One Player's Club Drive, Charleston, West Virginia 25311-1638 • http://www.state.wv.us/bep
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SUMMARY OF PROPOSED EXEMPT LEGISLATIVE RULE

Statement of Circumstances
Title 85, Series 9A
Self-Insurance Security Risk Pool

This rule implements the provisions of W. Va. Code §23-2-9(f), regarding the creation, implementation and administration of a self-insurance security risk pool designed to serve the needs of employees, employers and the workers' compensation fund by providing additional security for self-insured employers.

The rule authorizes the creation of a self-insurance security risk pool to secure the payment of any part or all of the obligations incurred by self-insured employers from any occurrence which arises from insolvency, bankruptcy or inadequacy of security posted with the Workers' Compensation Division.

The rule authorizes the Division to assess each member self-insured employer in proportion according to the employer's portion of the unsecured obligation and liability to secure an adequate risk pool. Any self-insured employer which is inadequately secured shall be required to secure membership in the security risk pool.

All self-insured employers are required to become members of the self-insurance security pool and membership is a condition of self-insurance.

Assessments to self-insured employers will be of two types:

1. Charges to all self-insured employers to build a perpetual self-insurance security risk pool through annual assessments; and

2. Charges to self-insured employers who are not fully secured.

Notice of not less than thirty (30) days will be given to each assessed employer.

The rule allows the Division, with the approval of the Compensation Programs Performance Council, to accept any other self-insurance security risk pool, including private insurer pools.

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85CSR Series 9A: Self-Insured Security Risk Pool

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Bureau of Employment Programs
Workers' Compensation Division

Address: 112 California Avenue

Charleston, WV 25305

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1. **Effect of Proposed Rule**

	Annual		**Fiscal Year**		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
1. ESTIMATED TOTAL COST	$5,000,000	Unknown	$5,000,000	Unknown	Unknown
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	$5,000,000	Unknown	$5,000,000	Unknown	Unknown
2. ESTIMATED TOTAL REVENUES	$15,000,000	Unknown	$15,000,000	Unknown	Unknown

2. **Explanation of above estimates:**

Above estimates are based on the assumption that the rule becomes effective July 1, 1999. Implementation of this rule will add approximately $15,000,000 of additional administrative assessments to self-insured accounts for the fiscal year beginning 7/1/99. It will also result in additional expense of approximately $5,000,000 for the fiscal year beginning 7/1/99, to purchase supplemental insurance coverage. Because this rule establishes additional assessments and expenses in subsequent years based on liabilities which are actuarially determined at the end of each year, no estimates can be reasonably determined beyond the first year.

3. **Objectives of this rule:**

To create a self-insurance security risk pool of funds in accordance with West Virginia Code, Chapter 23, Article 2, Section 9(f), to cover a portion of the actuarial estimate of claims liabilities owed by all self-insured accounts in excess of the amounts covered by bonding and securities of these self-insured accounts currently held by the Division.

Rule Title: Title 85CSR Series 9A: Self-Insured Security Risk Pool

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

It is expected that this rule will contribute toward reducing that portion of the actuarially determined claims liability of self-insured accounts that exceeds their existing bonding and securities held by the Division to help pay such liabilities, in the event of default or bankruptcy by self-insured account(s), thereby reducing the state's exposure to additional liabilities for these claims.

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

It is expected that self-insured accounts will incur additional administrative assessments to cover the funding needed to establish this self-insured security risk pool including the purchase of supplemental insurance coverage in accordance with West Virginia Code, Chapter 23, Article 2, Section 9(f), in order to reduce this unsecured liability.

C. Economic Impact on Citizens/Public at Large.

It is expected that the collection of the additional assessment from self-insureds to create the risk pool funds and purchase the supplemental insurance will allow for payment of all self-insured claims when incurred, in the event of default, and eliminate the need to pay these claims using other sources of funds.

Date: April 29, 1999

Signature of Agency Head or Authorized Representative

L. Eugene Dickinson

L. Eugene Dickinson
General Counsel, Bureau of Employment Programs

TITLE 85
LEGISLATIVE RULE
WORKERS' COMPENSATION DIVISION

SERIES 9A
SELF-INSURANCE SECURITY RISK POOL

§85-9A-1. General.

1.1. Scope. -- This rule implements the provisions of *W. Va. Code* §23-2-9(f), regarding the implementation and administration of a self-insurance security risk pool designed to serve the needs of employees, employers and the workers' compensation fund by providing additional security for self-insured employers.

1.2. Authority. -- *W. Va. Code* §§21A-2-6(1), -6(2) & -6(14); 21A-3-7(b) & -7(c); 23-2-9(f); and 23-1-1. Pursuant to *W. Va. Code*, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner are not subject to legislative approval as would otherwise by required under *W. Va. Code*, §29A-3-1 *et seq.* Public notice requirements of that chapter and article, however, must be followed. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.

1.3. Filing Date. --

1.4. Effective Date. --

§85-9A-2. Purpose of Rule.

2.1. The purpose of this rule is to create and establish and to authorize the workers' compensation division to implement and administer, under the authority of the compensation programs performance council and the provisions of the West Virginia workers' compensation act and this temporary rule and a permanent rule to be promulgated within one hundred eighty days of the effective date, a perpetual self-insurance security risk pool of funds, sureties, securities, insurance or reinsurance provided by private insurance carriers or other states' programs, and other property, of both real and personal properties, to secure the payment of any part or all of the obligations incurred by employers under the self-insurance provisions of the Act and its rules.

2.2. This rule is promulgated to provide immediate and adequate authority to the council and to the division to create, establish, implement and administer the provisions and purposes of law provided at chapter twenty-three, article two, section nine, subsection (f) of the *West Virginia Code*, to ensure without delay caused by the preparation of a more thorough rule, that the substantial and imperative financial interests and security of employers, employees and the workers' compensation fund be protected from any occurrence of insolvency and inadequacy of security that may be found without provision. Immediately upon the approval and filing of this rule, the council and division will commence the preparation and promulgation of amendments to this rule which will enlarge this rule to provide clarity, detail and more thorough provisions to carry out the purposes of the Act and this rule and will file and give notice of public hearing and comment period within one hundred eighty days of the effective date of this rule; however, this temporary rule shall not expire and shall remain in force and effect as a permanent rule until amended.

§85-9A-3. Definitions.

3.1. As used in this rule, the following terms, words, and phrases have the meanings stated below unless in any instance where such term, word or phrase is employed the context clearly indicates that another meaning is intended or must be intended as a matter of law.

3.2. "Workers' Compensation Act" or "Act" means the workers' compensation laws of the state of West Virginia which are codified at *W. Va. Code*, §23-1-1, *et seq*.

3.3. "*West Virginia Code*" means the *West Virginia Code* of 1931, as amended.

3.4. "Workers' compensation fund" or "fund" means the fund created by *W. Va. Code*, §23-2-1, which includes the surplus fund.

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

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

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

3.8. "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.

3.9. "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.

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

3.11. "This rule" means the instant rule designated as 85 C.S.R. 9A, "Self-insurance security risk pool."

§85-9-4. Inclusion and Applicability of Other Rules and Law.

4.1. To the extent necessary to define or to carry out the purposes of the act or this rule promulgated thereunder, the provisions of the workers' compensation act or other laws and rules, including, but not limited to, those providing for self-insurance and for procedures, processes and applicable provisions related to bankruptcy, insolvency, default, collection and application of securities and payments of moneys and revocation of self-insured status, shall be included in this rule by this statement of inclusion as if fully set out herein.

4.2. To the extent any provision which may be obtained through the above authority of inclusion is already provided and set out within this rule, then that provision set out herein shall be exclusive, unless another provision is not in conflict and aids in the determination of the proper interpretation or action under this rule and law.

§85-9A-5. Self-Insurance Security Risk Pool.

5.1. The compensation programs performance council hereby creates and establishes a security risk pool solely to secure and to protect self-insured employers and their employees, and the workers' compensation fund, from any occurrence which arises from insolvency, bankruptcy or inadequacy of security posted with the division or elsewhere under the requirements of chapter twenty-three, article two, section nine of the *Code* and rules; and, authorizes the workers' compensation division to implement and administer this self-insurance security risk pool under the authority of the council and in accordance with the provisions of this rule and the Act.

5.2. To properly create, establish, fund and build this risk pool to serve the needs of employers and their employees and the workers' compensation fund by providing adequate security, the division is authorized to assess each member self-insured employer in proportion according to each employer's portion of the unsecured obligation and liability. The council authorizes the division to use any assessments, premium tax assessments and revenues and appropriations as may be needed or made available to the division to fund and secure an adequate risk pool and to increase or decrease its value as needs dictate or are decided under the provisions of rule and law.

5.3. Any self-insured employer may participate and become a member of the security risk pool, although the applicant may be fully secured under the provisions of the Act at the time of application. Any self-insured employer which is inadequately secured shall be required to secure membership in the security risk pool if authorized alternative methods of full security are not secured.

5.4. All moneys in the security risk pool shall be held in trust and shall not be money or property of the participants or members. The division shall be authorized to keep and invest the moneys of the pool in the same manner as provided by law for investments of the moneys of the workers' compensation fund. All returns on investments shall be retained and reinvested by the pool. The expenses of administration of the pool, its investments and its obligations shall be paid from the moneys of the pool.

§85-9A-6. Actuarial Determinations.

6.1. For the purpose of determining an employer's security requirements and determining the employer's proportionate share of the unsecured obligation and liability or to assess any employer or employers according to some other method, the division shall utilize a qualified actuary to make such determinations.

6.2. Objections to determinations made by the division's qualified actuary shall be limited in scope to the issue of whether the actuary's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

§85-9A-7. Membership.

7.1. All individual self-insured employers, either currently self insured or hereinafter permitted the privilege of election to become self insured, are required to become members of the self-insurance security pool and membership therein is a condition of self insurance under the provisions of the act. If any self-insured employer fails to maintain membership in good standing in the pool and pay assessments or premiums as levied from time to time by the division, the compensation programs performance council shall revoke immediately the employer's status as a self-insured employer pursuant to the provisions of this rule and the provisions of 85 C.S.R. 9, Rules, workers' compensation division.

7.2. Assessments or premiums to self-insured employers under this rule shall be of two types:

a. Assessments or premiums charged to establish, amortize and build a perpetual self-insurance security risk pool through a reasonable period of annual assessments and contributions from any authorized source and which shall be charged to all self-insured employers in accordance with the provisions and methods provided or authorized by subsection 5.2. of this rule: Provided that each member employer's assessments or premiums shall be in proportion according to each member employer's portion of the entire security obligation and liability of all self-insured employers, both active and inactive, for which benefit obligation and liability reserves are or have been established by the fund.

b. Assessments or premiums charged to maintain the self-insured employer's individual security in part or in whole, at the security obligation value required by the Act and rules as a condition and requirement of the obtainment and maintenance of self-insured status: Provided, that these assessments or premiums shall be charged only to self-insured member employers which are not fully secured by any of the methods approved under the provisions of Rules, 85 C.S.R. 9, Risk Management, for self-insured employers; or, to any self-insured member employer who is adequately secured under those provisions but which applies for permission to transfer its obligation, in part or in whole, to the security pool for security coverage under the requirements and provisions of the Act and rules.

7.3. Any and all self-insured employers who have not provided approved adequate security as previously required by the Act and rules prior to the effective date of this rule shall be and are required hereinafter to obtain from this security pool that amount of security needed to be adequately secured and, shall, thereinafter pay both type a. and type b. assessments or premiums for those purposes.

7.4. Any fully-secured member employer may elect at any time to apply for security coverage under the provisions of this rule through the security pool and, upon approval by the division, thereinafter be subject to coverage and assessments or premiums therefore by the division.

7.5. A member who ceases to be a self insurer shall continue to be responsible and liable for any and all assessments or premiums made or charged pursuant to this rule, as long as the member employer's liability for workers' compensation injury or death claims' benefits exists for claims which were incurred by the employer as a self-insured employer and unless and until the liability has been paid under the provisions of the Act and rules.

§85-9A-8. Notice and Payment of Assessment or Premiums.

Each member self-insured employer shall be given not less than thirty (30) days' notice to the last address of record at the division of the amount or amounts and types of assessment or premiums charged under this rule and the date that the assessment or premium is due and payable. The fund may levy penalties and interest as may be provided by law or rule for other late payments: Provided, that any failure to pay timely any assessment or premium charged under this rule may cause revocation of self-insurance status proceedings to be commenced immediately as otherwise provided by law and rule and, if such assessment or premium charge and penalty and interest remains unpaid for more than sixty days after it shall have become due, the division may commence and maintain actions at law under the provisions of chapter twenty-three, article two, Section five-a, *W. Va. Code*, of the amounts due and unpaid; and, reasonable attorneys' fees and the costs of the actions.

§85-9A-9. Default, Insolvency and Bankruptcy and the Payment of Claims of the Fund.

9.1. Upon the default of any member self-insured employer to pay the fund's orders or claims against it made under the provisions of the workers' compensation act whether due to insolvency, bankruptcy or otherwise occurring, the division shall reimburse or pay the fund from the self-insurance security pool for all payments made on behalf of or due from such member if any amount of such liability is not provided for payment or reimbursement and coverage under any security provided by the self-insured employer under the provisions of the act and rules at 85 C.S.R. 9, Risk Management, workers' compensation division: Provided, that the provisions set for in chapter twenty-three, article two, section nine of the act, for treatment of premiums as taxes in advance and taxes in arrears are applicable to assessments and premiums charged and reimbursed and paid under this rule.

9.2. It shall not be necessary that any claim be made or paid in any insolvency or bankruptcy proceeding prior to or as a qualifying condition or conditions to reimbursement or payment under this rule of terms of any self-insured security.

§85-9A-10. Other Self-Insurance Security, Risk Pools.

The division, with the approval of the council, may adopt, accept, include or otherwise use as deemed fit any other self-insurance security risk pool, even one provided by a self-insurance association or other private insurer, if in its sole discretion, it desires to use the pool and if it finds that the purposes of this rule and the act are met and it conforms with the law of this rule, the act and the *West Virginia Code*.

§85-9A-11. Implementation, Administrative Protests and Hearings, Information and Severability.

To the extent relevant and applicable, the provisions of Rules, 85 C.S.R. 9, Risk Management, set out therein at section nineteen, Implementation; section twenty, Administrative Protests and Hearings; section twenty-one, Information; and section twenty-two, Severability, are made a part of this rule, as though they were each fully set forth and included in their entirety herein.