WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #1

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FILED

2004 MAR 16 P 3: 34

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §23-1-1a(j)(3), 23-2-9(b)&(m)

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 RULE BEING PROPOSED: 18

TITLE OF RULE BEING PROPOSED: Self Insurance Self Administration & Third Party Administrators

DATE OF PUBLIC HEARING: April 20, 2004 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia
*The comment period for this rule ends on April 20, 2004, at the close of this hearing.

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

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304
Fax #304-926-5372

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

Gregory A. Burton

Authorized Signature

58.60

WCC Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone: (304) 926-1710

March 16, 2004

The Honorable Joe Manchin III
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 18
"Self Insurance Self Administration & Third Party Administrators"

Dear Secretary Manchin:

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

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. Pursuant to that same bill, the Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 18 entitled, "Self Insurance Self Administration & Third Party Administrators," for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 18: Self Insurance, Self Administration & Third Party Administrators

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Avenue, S.E.

Charleston, WV 25301

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
1. ESTIMATED TOTAL COST	Unknown	0	Unknown	Unknown	Decrease
PERSONAL SERVICES	Unknown	0	Unknown	Unknown	Decrease
CURRENT EXPENSE	Unknown	0	Unknown	Unknown	Decrease
REPAIRS & ALTERNATIONS	0	0	0	0	0
ASSETS	0	0	0	0	0
OTHER	0	0	0	0	0
2. ESTIMATED TOTAL REVENUES	Unknown	0	Unknown	Unknown	Decrease

2. Explanation of above estimates:

It is expected that this rule will increase the Commission's personnel and other administrative expenses related to the auditing and review of self insured employers wage and claims records on an ongoing basis. Estimated annual costs, including possible contractual audits, resulting from the proposed rule cannot be reasonably determined and are shown as "unknown". In addition, implementation costs related to such items as data exchange processing and monitoring procedures may be significant. However, additional oversight and implementation costs should be offset by reductions in claims processing and adjudication costs related to the self insured claims. Although the initial implementation costs may exceed the claims processing savings on an annual basis, this rule is expected to result in an annual decrease in cost to the Commission over the long term.

Rule Title: Title 85 Series 18: Self Insurance, Self Administration & Third Party Administrators

3. Objectives of this rule:

This rule establishes additional policies and procedures of the Workers' Compensation Commission related to self insurance, self administration & third party administrators.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Although implementation costs may cause increased expenses in the next two years, the final impact of the rule should be an annual reduction in expenses.

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

It is expected that self insured employers and claimants will benefit from self administration. Improved oversight and control of claims information by the employers should help them to better service their own claims. This should result in accurate and timely processing of claims benefits for self insured claimants.

C. Economic Impact on Citizens/Public at Large.

This rule will not have a direct economic impact on the citizens of West Virginia.

Date: March 16 **,2004**

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

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2004 MAR 16 P 3: 34

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 18
Self-Insurance Self Administration &
Third Party Administrators

This rule repeals and replaces a portion of a rule of the former Workers' Compensation Division of the Bureau of Employment Programs entitled, 85 C.S.R 9 §13, "Risk Management."

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission was created, effective October 1, 2003, as a stand-alone agency of State government. Under that Bill, the Commission is required to revise each of its rules prior to July 1, 2006.

In addition, the provisions of S.B. 2013 made substantial changes to the provisions governing self-insurance. See W. Va. Code §23-2-9. In pertinent part, the new provisions provide:

W. Va. Code §23-2-9(b)(1):
"Notwithstanding any provision in this chapter to the contrary, self-insured employers shall, effective the first day of July, 2004, administer their own claims. The executive director shall, pursuant to rules promulgated by the board of managers, regulate the administration of claims by employers granted permission to self-insure their obligations under this chapter. Such rules shall be promulgated at least thirty days prior to the first day of July 2004. A self-insured employer shall comply with the rules promulgated by the board of managers governing the self-administration of its claims."

W. Va. Code §23-2-9(m):
"An employer may not hire any person or group to self-administer claims under this chapter as a third-party administrator unless the person or group has been determined to be qualified to be a third-party administrator by the commission pursuant to rules adopted by the board of Managers."

This exempt legislative rule establishes the requirements for self-insurance, the maintenance of self-insurance status, the self-administration of claims and the requirements for third party administrators under the workers' compensation system.

The rule was revised to comply with the Legislative directive.

Proposed for Public Comment
3-16-04

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION

SERIES 18
SELF INSURANCE, SELF ADMINISTRATION &
THIRD PARTY ADMINISTRATORS

§85-18-1. General.

1.1. Scope. --This exempt legislative rule provides for employers to administer and provide their own system of compensation to their injured employees. This rule applies to employers who previously received approval of their status as a self-insured employer and who are currently operating their own systems of compensation, former self-insured employers who may want to self-insure in the future, and employers who have not previously been granted self-insured status and who desire to apply for that privilege. Similarly, this rule applies to employers who desire to provide their own system of compensation with regard to coverage of catastrophic events. This rule applies to employers who desire to terminate their self-insurance coverage and return as regular subscribers to the Fund, or self-insured employers who wish to cease doing business. This rule applies to the responsibilities of self-insured employers with regard to their self-administration of workers' compensation claims filed by their employees. This rule also applies to the qualifications of third party administrators hired by self-insured employers to help process workers' compensation claims filed by the self-insured employer's injured workers.

1.2. Authority. -- W.Va. Code §§23-1-1a, 23-2-4, & 23-2-9. Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission 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.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal and replacement. -- This rule repeals and replaces section thirteen of 85 C.S.R. 9, entitled "Risk Management."

§85-18-2. Purpose of Rule.

The purpose of this rule is to provide for the administration of a system of self-insurance consistent with the specific provisions and purposes of W. Va. Code § 23-2-9.

§85-18-3. Definitions.

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

3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.

3.2. "Audited statements" mean the financial statements accompanied by an independent auditor's report which provide reasonable assurance about whether the audited employer has presented fairly the financial position, results of operations, and cash flows in conformity with generally accepted accounting principles. This assurance is derived through a systematic process, governed by generally accepted auditing standards, of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to determine whether (1) financial information is presented in accordance with established or stated criteria, (2) the entity has adhered to specific financial compliance requirements, if applicable, or (3) the entity's internal control structure over financial reporting and/or safeguarding assets is suitably designed and implemented to achieve the control objectives.

3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W.Va. Code §23-1-1a.

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

3.5. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.6. "Decision" means a written statement issued by the commission containing the commission's findings of facts and conclusions as to any issue presented to the commission under this rule. Such decisions shall include, but not be limited to, notices of delinquency and notices of default. Any purported "decision" which is not in writing shall have no legal effect under this rule. "Decision" does not include a written statement in the form of e-mail.

3.7. "Default" for the purposes of a self-insured employer means the failure by a self-insured employer to make a payment or file a report due by it under the provisions of the Act or this rule and which has been notified of delinquency but has further failed to make the payment or file the report within the time period specified by the notice.

3.8. "Delinquent" means a self-insured employer has failed to timely pay premium taxes, to timely file a payroll report, to maintain an adequate premium deposit, to properly and timely pay workers' compensation benefits to their injured employees or to make any other payment due under the terms of this rule or the Act.

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

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

3.11. "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.

3.12. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.

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

3.14. "Injury" means compensable injuries or illnesses within the meaning of W. Va. Code §23-4-1 et seq.

3.15. "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 commission to be a self-insurer, and late reporting and payment penalties, and interest.

3.16. "Payroll" means the entire gross wages of all employees, not excluded under provisions of the Act or rules of the commission, or such other wage related exposure base as may be determined by the board of managers.

3.17. "Premium" and "premium tax" mean the amounts of money due from an employer to the fund or commission as a result of quarterly and other periodic assessments by the commission 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 commission. "Premium" and "premium tax" includes, but is not limited to, assessments of: premium tax, premium deposit and interest, assessed to all employers; and also, that portion of self-insured premium tax required to be paid by the employer for the benefit of the employer's claimant employees as required by law.

3.18. "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.

3.19. "Regular subscriber" and "subscriber" mean an employer who obtains coverage under any of the workers' compensation insurance plans offered by the commission.

3.20. "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.

3.21. "This rule" means this legislative rule designated as 85 C.S.R. 18, "Self Insurance, Self Administration & Third Party Administrators."

3.22. "Date stamp" means either a manual or an electronic date stamp.

3.23. "Claim correspondence" means the correspondence to which an employee is entitled due to a subsequent action or in anticipation of an action being taken.

3.24. "Rule" or "ruled" in the context of claims administration by a self-insured employer means the issuance of a written order to the claimant advising the claimant of actions undertaken or to be undertaken in the administration of a claim and advising the claimant of his or her rights to contest the ruling.

§85-18-4. Self Insurance Status.

4.1. Self insurance status. An employer may become self-insured with respect to the compensation fund and catastrophe coverage or to the compensation fund but not the catastrophe coverage, if the commission, with the approval of the board of managers, determines it meets the financial responsibility requirements and procedural requirements set forth in W. Va. Code §23-2-9, and in this rule.

4.2. 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 commission, with the approval of the board of managers, 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.

§85-18-5. Application for Self Insurance.

5.1. An employer may apply for self-insurance by filing with the commission an application for self-insurance in the form prescribed by the commission. If a parent is to guarantee the employer's compensation risk, the relationship between the employer and the parent must be documented on the application.

5.2. A disclosure of the employer's management and financial structures and the employer's audited financial statements for each of the three (3) fiscal years preceding the date of application must be attached to the application. If a parent business is to insure the employer's compensation risk, the parent's 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. The employer shall disclose to the commission all of the business entities acquired, bought, transferred or merged by or into the employer applicant. Failure to disclose without good cause, as determined in the sole discretion of the commission, this information at the time the application is filed with the commission may result in rejection of the application or termination of self-insurance status if the privilege of self-insurance has already been granted to the employer.

a. The employer's application and the required audited financial statements must be signed and sworn to by the president alone or vice-president and secretary or assistant secretary of the employer or parent if the employer or parent is a corporation or limited corporation; or, by all of the partners if the employer or parent is a partnership; or, by all of the general partners if the employer or parent is a limited partnership; or, by all the members if the employer or parent is a limited liability company; or, by the owner if the employer or parent is neither a corporation, limited corporation, partnership, limited liability company, nor limited partnership.

b. If the employer is a government agency, the criteria used to determine financial stability and guaranties may be modified to accommodate for governmental accounting and other issues related to a going concern. Any modifications allowed by the board of managers in these cases will take into consideration the risk to the commission.

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

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

The minimal application fee is $2,500.00. If it is determined that the cost of processing the application will exceed $2,500.00, the application fee may be modified by the commission. If the original application cannot be processed or is considered to be invalid, future applications by the same employer shall be subject to additional filing fees.

5.5. 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. If the application is approved by the board of managers, the self-insurance will be effective on the first day of the quarter, following the month in which the application was approved.

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 commission. Until self-insurance approval is granted, the new employer shall be considered to be in the guaranteed cost plan.

a. When an application for self-insurance is filed, the commission will review the application and inform the employer if there is a need for additional information, pursuant to subsection 5.3 of this rule. The employer must provide the commission with the additional information in order to complete the application process. The commission will complete an evaluation of the information. The commission will have a preliminary audit of the employer's account performed and issue to the employer a notice of the required remittance, which shall be paid within thirty (30) days of the notification or the application shall be considered to be null and void. The commission will have the payment amounts, defined under section 6 of this rule, calculated and advise the employer of their options. The employer must notify the commission of their preferred method of satisfying the payment amount within thirty (30) days of notification. Self-insurance status shall not be granted until the payment amount is satisfied in accordance with the selected method. Finally, the commission, with the approval of the board of managers, will render a decision approving or disapproving the application within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission.

b. Each approved applicant for self-insurance is required to secure its liability in accordance with the provisions of 85 C.S.R. 19, "Risk Pools," and this rule.

5.6. Employers applying for self-insurance must continue to make timely premium payments or other required payments for its workers' compensation risk until self-insurance status is approved by the board of managers and the status is effective. No employer shall be granted self-insured status retroactively, unless the application has not been approved within ninety (90) days from receipt of all full and complete information required by the commission, as determined in the sole discretion of the commission, and unless the self-insured status and the retroactive status is specifically approved by the board of managers.

§85-18-6. Reconciliation and Settlement of Applicant's Account.

6.1. An audit of the employer's account will be performed using reconciled wage, premium and charge data and other sources that the commission deems relevant. This data shall be compiled on a fiscal year basis and it shall be considered to be an adequate source for use in determining any pre-audit liability. The commission shall not recommend for approval by the board of managers and shall not grant self-insured status under the Act to any employer whose record upon the books of the commission shows a liability against the compensation fund, incurred on account of injury to or death of any of its employees, in excess of premium taxes paid by such employer to the compensation fund, until it has paid into the compensation fund the amount of such excess liability, including excess liability incurred on account of catastrophes or second injuries. The employer must pay to the compensation fund the entire amount of the excess liability prior to the effective date of self-insurance. The excess liability must be satisfied within thirty (30) days of notification or the application for self-insurance will be considered to be null and void.

6.2. 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 commission will determine the amount of money that is sufficient to cover the applicant's liability for the future costs of the awards and medical expenses not previously used in calculating premium.

a. If the employer is 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 and within thirty (30) days of notification.

§85-18-7. Catastrophe Reserve Election.

7.1. The employer applying to self-insure its workers' compensation risk must at the time of application elect in writing to subscribe to catastrophic risk coverage or to self-insure the catastrophe risk pursuant to W. Va. Code §23-2-9(g).

a. If a self-insured employer elects not to self-insure its catastrophic injury risk, it shall pay premium taxes on the same basis and in the same percentages as subscribers to the general fund pay for catastrophic coverage.

b. If a self-insured employer elects to self-insure the catastrophe risk, then it must furnish a catastrophe security or bond, in an amount determined by the commission, with the approval of the board of managers, in addition to the security or bond furnished as a self-insurance requirement. The catastrophe security or bond shall be in an amount the commission 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.

7.2. A self-insured employer may elect to insure its catastrophic risk through a policy of excess insurance obtained through a private insurance carrier approved by the commission.

a. The self-insured employer shall provide a copy of the policy to the commission for approval.

b. The commission may give approval of the election if the insurer meets the financial strength requirements as applied to self-insured employers and entities that provide surety to self-insured employers.

c. If approved to insure catastrophic risk through a private insurance carrier, the self-insured employer shall notify the commission within fifteen (15) days of the occurrence of any change in the terms of the policy, including cancellation, by filing a copy of the policy with the change and providing a written explanation of the type of change.

7.3. The employer may request a change in its election as to catastrophic coverage. The request must be in writing and filed with the commission on or before June 1 of any given year, to be effective on July 1 of that year. The commission will issue a decision approving or disapproving the change in election.

§85-18-8. Commission's Review of the Application for Self-Insurance.

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

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

8.3. If an employer relies on the audited financial statements of its parent to be granted self-insured status, then the parent company shall provide a parental guaranty in a form acceptable to the commission. The required parental guaranty must be received and accepted by the commission before the application for self-insurance can be processed.

§85-18-9. Security and bond.

9.1. In accordance with the provisions of this rule and other rules of the commission, self-insured employers are required to secure certain obligations for payments. In such instances where security or bond is required by the commission, the security or bond shall be tendered to the commission in accordance with this section.

9.2. 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 commission has the discretion to find that a particular type of security or bond is acceptable or unacceptable.

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. The security or bond shall be deemed to define "occurrence" as including dates of injury prior to the effective date of self-insurance and coverage when the date of injury was prior to the effective date and the award date was after the effective date so that the liability provided in subsection 6.2. shall be secured by the security.

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. The surety company issuing the bond must meet and maintain the commission's financial strength requirements. The commission shall review the financial strength of the issuers of all of the surety provided by the self-insured employer in the course of the commission's annual review and recommendation to the board of managers.

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 commission; 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 the letter of credit forms approved by the commission 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 commission, 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 the issuance of the evergreen form of letter of credit, then the employer-applicant must obtain permission from the commission to use the letter of credit for with a non-renewal draw clause. The employer must also provide the form letter of Authority and Acknowledgment which authorizes the draw of the entire amount of the letter of credit in the event of cancellation of the letter of credit, although the self-insured employer is not then in default under the Act or the rules.

4. The bank issuing the letter of credit must meet and maintain the commission's financial strength requirements.

9.3. Employers who are required to meet the security requirements defined by the commission, as approved by the board of managers, shall post an amount to be adequate and sufficient to compel or secure payment of compensation and expenses to the employer's employees, or their dependents, as required by the Act, and shall not be less than one million dollars ($1,000,000). The amount of security required of a self-insured employer shall be based upon, but not be limited to, such criteria as the employer's financial strength including the employer's demonstrated loss experience. A demonstrated loss experience includes general workers' compensation loss experience, second injury loss experience and catastrophe loss experience.

The commission shall utilize a financial ratio summarization, based upon a comparison of the employer-applicant's solvency, efficiency and profitability ratios to a specific industry's ratios, as defined, for example, in the current Dunn & Bradstreet Industry Norms and Key Business Ratios, in evaluating an employer's financial strength and in making a recommendation to the board of managers as to an appropriate amount of security. Whenever possible, the commission shall make a comparison of ratios utilizing the employer's workers' compensation industry classification.

a. If the commission determines that a self-insured employer's securities or bonds are inadequate or insufficient, the commission shall notify the employer. Thereafter, with the approval of the board of managers, the commission 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 commission shall provide a reasonable amount of time for the employer to obtain the increased or added security or bond or develop a work out agreement and obtain the first installment payment; however, the period to secure additional security or period to develop a work out agreement and obtain the first installment payment shall not exceed ninety (90) days from the date of the commission's notification. The increased security or bond must meet the requirements set forth in this rule.

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

c. If the commission determines that a decreased adjustment is merited, the self-insured employer may file a written request with the commission for a downward adjustment of the self-insured employer's security requirements.

§85-18-10. Self-insured Employer's Modification of Business.

10.1. 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 claims liability, the self-insured employer must notify the commission of the modification of business, immediately. The notice of modification must include specific information as to the nature of the modification, including but not limited to a copy of the executed contract causing the modification, and the names of other employers and/or businesses affected by the modification.

a. If a reconciliation audit is performed as a result of a self-insured employer's failure to properly report business modifications, any liabilities found against the commission in excess of premiums paid will be due and owing upon notification. Failure to comply may result in the revocation of the self-insured employer's self-insured status.

10.2. If the self-insured employer has acquired a new operation or business as a separate legal entity, and desires to self-insure that separate entity, then it must file an application for self-insurance on behalf of the separate entity. If the self-insured employer has acquired a new operation or business or has merged with another business the self- insured employer must notify the commission of the acquisition or merger as soon as practicable, but no less than one (1) day prior to the date of closing, then it must file an application for self-insurance on behalf of its new or additional business and must request that the new or additional business be merged into its existing self-insured account. The application to self-insure the new operation or business shall be processed in accordance with the Act and the commission's rules governing self-insurance.

10.3. Under subsections 10.1. and 10.2. of this rule, the commission will review the employer's security and bond requirements and make, if necessary, an appropriate recommendation to the board of managers for an adjustment to the security requirements.

10.4. If the modification of business requires processing that includes any type of an actuarial analysis, a $2,500.00 processing fee shall be accessed.

10.5. If the modification causes a self-insured employer to no longer qualify for the privilege of self-insured status, the commission, with the approval of the board of managers, shall have the authority to terminate the status in accordance with the provisions of section 18 of this rule. Settlement of estimated liability at the time of revocation shall be determined in accordance with the provisions of this rule.

§85-18-11. Voluntary Termination of Self-Insured Status.

11.1. If a self-insured employer decides to continue doing business in the state of West Virginia, but terminate its self-insured status, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of all such liability, including the costs of the administration of that liability, in which case the future costs of the liability shall be paid from the compensation fund. The employer must pay a fee of $2,500.00 for the liability calculation. The employer shall provide written notice to the commission thirty (30) days prior to the termination of its status.

a. When the employer decides to terminate its self- insured status, the commission shall determine actuarially the amount of money that is sufficient to cover the future costs of the liability.

b. The commission shall not permit the employer to terminate the self-insured status and subscribe to another plan until it pays the actual estimate, or maintains security or bond in an amount sufficient to cover the estimated future cost of the liability. The commission must approve the employer's election for the payment of the estimated future cost of liability. No self-insured employer will be allowed to remain self-insured once it elects and satisfies the buy out of its open and contingent claims liabilities.

1. If the employer elects or is required by the commission 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 commission enter into a repayment agreement. The commission 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.

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.

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

11.2. A self-insured employer must provide the commission with written notice thirty (30) days prior to termination if it ceases doing business in the state of West Virginia and intends to terminate its self-insurance status. If a self-insured employer so terminates its business, the employer remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status, unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability shall be paid from the compensation fund. When the employer decides to terminate its self-insured status, the commission shall estimate the amount of money that is sufficient to cover the future costs of the liability. The employer shall pay a fee of $2,500.00 for the liability calculation.

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 commission for the amount of 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 and other rules of the commission.

a. If the employer elects or is required by the commission to pay the actual amount estimated to cover the cost of future liability, the employer must pay this amount prior to the termination and within forty-five (45) days of the date of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission 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.

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.

11.3. 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 commission of the sale or transfer as soon as practicable, but no less than one (1) day prior to the date of closing. The self-insured employer so terminating its self-insured status remains liable for all accrued and contingent liabilities transferred to the self-insured account on the effective date of self-insurance, and remains liable for all accrued and contingent liabilities resulting from injuries or diseases incurred by its employees during the period of self-insurance and prior to termination of the self-insured status unless the employer pays into the compensation fund an amount sufficient to cover the estimated cost of the liability, in which case the future costs of the liability will be paid from the compensation fund. When the employer decides to terminate its self-insured status, the employer shall request the commission to estimate the amount of money that is sufficient to cover the future costs of the liability defined in this section. The employer shall pay a fee of $2,500.00 for the liability calculation.

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 commission must approve the employer's election for the payment of the estimated future cost of liability.

a. If the employer elects 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 and within forty-five (45) days of the commission's notification, unless the employer and the commission enter into a repayment agreement. The commission has the authority to determine whether entering into a particular repayment agreement will meet the fiduciary responsibility of 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 agreeing to the specific terms of the repayment.

Additionally, the agreement shall provide for the payment of interest on the principal, which the commission 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 or pay the full amount of the future liability as specified in 11.2 or enter into a repayment agreement with the commission 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 and other rules of the commission.

11.4. Self-insured employers who become regular subscribers on or after July 1, 2004, and who do not buy out their liability shall continue to pay any applicable Security or Guaranty Pool assessments imposed by the rules of the commission.

11.5. 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 commission, the employer may request the commission give effect to the agreement, so long as, in its opinion, the agreement meets the fiduciary requirements of the commission. The commission will issue a written decision on whether it will give effect to the agreement. The commission is under no obligation to give effect to such an agreement.

a. If a completed copy of the contract of sale is filed with the commission and the commission gives effect to the agreement, and if the agreement provides that the buyer or person acquiring the business assumes the liability defined and 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 or, alternatively, the buyer or person acquiring the self-insured employer's business must, with the board of managers' 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 commission 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 commission and/or if the commission does not give effect to the agreement, the commission 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 section.

§85-18-12. Present Value Payment of Unpaid but Awarded Claims Liabilities.

12.1. At any time, the commission, in its discretion, with the approval of the board of managers, may permit any self-insured employer to pay into the Fund an amount of money equal to the present value, as determined by the commission, of all unpaid but awarded claims liabilities for which the employer is liable.

12.2. Upon approval of the board of managers and by making the present value payment of unpaid but awarded claims liabilities with one lump sum, 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.

12.3. In order to utilize this section, the employer is required to relinquish its self-insurance status.

§85-18-13. Subscribing Employers Buy-Out of Liability Previously Incurred as a Self-Insured Employer.

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 section 11 of this rule.

§85-18-14. Current Status of Employers Not Affected.

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

14.2. 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.

§85-18-15. Self-Administration of Claims.

15.1. Effective July 1, 2004, all self-insured employers shall administer their own claims. An injured worker, who is an employee of a self-insured employer, is entitled to all of the same benefits, as those afforded to injured workers whose claims are administered by the workers' compensation commission. These same benefits include the proper and timely payment of medical bills and compensation.

a. The commission shall make the allocation decision concerning occupational disease claims. Each claim shall be administered as directed by the commission.

b. The self-insured employer shall report all allocated occupational disease claims to the commission within five (5) days of the claimant's report of injury or disease.

15.2. Transitional Notifications.

a. Upon the effective date of this rule, each self-insured employer shall within five (5) working days notify, in writing, the following persons, entities or adjudicatory bodies involved in active claims matters that that the self-insured employer is self-administering its claims.

1. Claimants;
2. Claimant representatives;
3. All parties to the claim;
4. All adjudicatory bodies that are currently proceeding in the claim; and
5. Vendors who are rendering services in the claim.

b. Upon the effective date of this rule, each self-insured employer shall within five (5) days notify its employees that it is self-administering its claims. This notice must be posted at each of the employer's places of business within the State.

c. The self-insured employer is required to state in each notice, whether the notice is individually written or posted, that the self-insured employer, and not the commission, is the primary contact for submitting invoices, claims inquiries, legal notices, medical reports and other communications concerning the claim.

15.3. Claims Contact. The self-insured employer shall maintain with the commission a current name, address and telephone number of the contact person responsible for administering payments on behalf of the injured employees.

15.4. Claims Reports. The self-insured employer shall report claims information to the commission as follows:

a. Within five (5) days of notification of a covered injury, the self-insured employer shall post basic information regarding the injury with the commission in a format prescribed by the Commission.

b. The commission shall assign a claim number to the claim.

c. The self-insured employer shall update claims information for each claim on at least a quarterly basis in a form and format prescribed by the commission. The commission may determine the appropriate time to update the claims information on an individual self-insured employer basis. If any employer fails to maintain such records and other information as required under the provisions of this section, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

15.5. Claims Actions.

a. Initial Rulings; Injury and occupational disease claims. Those claims based upon injuries and non-allocable occupational diseases that are filed with the self-insured employer, upon properly executed, prescribed forms created under the provisions of W. Va. Code §23-4-1a, shall be ruled upon within fifteen (15) working days from the date of receipt by the self-insured employer.

b. Medical Authorizations.

1. Medical Treatment. The self-insured employer shall rule upon requests for authorization of medical treatment within fifteen (15) working days from the date of receipt by the self-insured employer.

2. Appliances, Devices, and Supplies. The self-insured employer shall rule upon requests for authorization for the purchase of prosthetic or other appliances, devices or

medical supplies within fifteen (15) working days from the date of receipt by the self-insured employer.

c. Disability Benefits.

1. Awards of temporary total disability benefits. Written medical reports submitted upon properly executed, prescribed forms and providing proper and sufficient evidence that claimants are entitled to awards of temporary total disability benefits shall be acted upon by issuance of orders granting awards of benefits within fifteen (15) days from the date of receipt by the self-insured employer or the date of issuance of a compensability ruling in the claim. Payment pursuant to such awards shall be issued in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

2. Cessation of temporary total disability. Written medical or other information providing proper and sufficient evidence that claimants have ceased to be temporarily and totally disabled or have returned to work shall be acted upon by issuance of notices advising the parties that benefit payments shall be suspended pending final disposition. The self-insured employer shall issue such notices within five (5) working days from the date of receipt of incoming correspondence.

3. Notice of closing claim. After the thirty (30) day notice period provided in suspension notices has expired and review of claims reveals that sufficient medical evidence to support a further award of temporary total disability benefits has not been received, the self-insured employer shall issue an order within ten (10) working days from the end of the aforesaid notice period advising the parties that the claims have been closed upon a temporary total disability basis. Failure to issue the order in a timely fashion under this provision does not act as a bar to the issuance of the order by the self-insured employer.

4. The self-insured employer shall make referrals of claimants to physicians for independent medical examinations and evaluations as required by West Virginia Code within twenty (20) days of the end of the one hundred twenty (120) day period of temporary total disability. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

5. The self-insured employer shall make referrals of claimants to physicians for examinations and evaluations in response to requests by or on behalf of claimants for consideration of permanent disability awards in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt of such requests. The self-insured employer shall make the referral from a list of independent medical evaluators qualified by the commission to perform independent medical evaluations.

6. Self-insured employers are required to use and pay for the services of the occupational pneumoconiosis board (W. Va. Code § 23-4-8a) in appropriate cases arising under the Workers' Compensation Act.

d. Permanent disability rulings.

1. The self-insured employer shall act upon permanent disability evaluation reports received from physicians to whom claimants have been referred by the self-insured in claims based upon injuries and occupational diseases other than occupational pneumoconiosis within fifteen (15) working days from the date of receipt.

2. Payment pursuant to awards of permanent disability benefits shall be issued and delivered within fifteen (15) days from the date of the award in accordance with the provisions of West Virginia Code article four, chapter twenty-three.

3. Self-insured employers are required to use and pay for the services of the interdisciplinary examining board (W. Va. Code § 23-4-6(j)) in appropriate cases arising under the Workers' Compensation Act.

e. Petitions for reopening.

1. The self-insured employer shall rule upon petitions for reopening of claims upon a temporary total disability basis within thirty (30) days from the date of receipt.

2. The self-insured employer shall rule upon petitions for reopening of claims upon a permanent disability basis within thirty (30) days from the date of receipt.

f. Applications for modification of awards. Modification of awards initiated by self-insured employers shall be noticed to the claimant. The claimant shall have ten (10) working days to respond to application, which shall clearly and fully state the self-insured employer's reasons for pursuing a modification. The claimant shall also be apprised of the time period to respond to the self-insured employer's notice. Thereafter, the self-insured employer is required to issue a ruling within ten (10) working days after the date of the expiration of the time period for the claimant's response.

g. Vocational Rehabilitation; Training proposals. The self-insured employer shall rule upon Individualized Written Rehabilitation Programs received from vocational rehabilitation providers within twenty (20) working days from the date of receipt.

h. Invoices.

1. Health care vendors. The self-insured employer shall rule upon and pay invoices for payment or reimbursement of health care vendor services or health care supplies submitted upon properly executed prescribed forms within thirty (30) days from the date of receipt.

2. Travel expenses; wages. The self-insured employer shall rule upon and pay invoices for reimbursement of travel expenses and wages submitted upon properly executed, prescribed forms within thirty (30) days from the date of receipt.

i. Payments to claimants.

1. Self-insured employers shall make the initial temporary total disability payments to claimants in lost-time claims that are ruled compensable within fifteen (15) days of its ruling.

2. Self-insured employers shall make continuous bi-weekly temporary total disability payments to claimants for the extent of their temporary total disability as defined by the provisions of article four, chapter twenty-three of the West Virginia Code and the rules of the commission.

j. Orders. The self-insured employer shall comply with all orders of the office of judges and the board of review and all mandates of the West Virginia Supreme Court within fifteen (15) working days from the date of receipt, unless sooner required to act under the terms of the order or mandate.

15.6. Maintenance of Claim Records. For all actions taken on or after July 1, 2004, the self-insured employer is required to maintain a detailed claim record, either in an electronic or paper format, for each claim. The claim record shall include, but not be limited to:

a. The completed report of injury as prescribed in the forms of the commission;

b. Wage calculations used to determine claimant benefits;

c. Dates that the claimant ceased work and returned to work as a result of the compensable injury;

d. Health care invoices;

e. Medical and vocational reports and summaries of psychiatric reports, if so restricted by the psychiatrist;

f. Motions, applications, and claim correspondence;

g. Rulings issued by the self-insured employer, including denial of benefit rulings; and

h. Rulings issued by all adjudicatory bodies involved with the claim, including the office of judges, the board of review and the West Virginia Supreme Court of Appeals.

15.7. Date stamp; Claims records. The self-insured employer is required to date stamp each report of injury, health care invoice, medical and vocational report, motion, application, claim correspondence, ruling issued by the self-insured employer and ruling issued by adjudicatory bodies on the date received or sent, as applicable.

15.8. Claims Records. The self-insured employer is required to maintain claim files for the benefit of the workers' compensation commission in the event of the self-insured employer's termination of business, termination of self-insured status, default or buy-out of claims liability.

a. The self-insured employer shall provide all claims records within five (5) working days for active claims and within thirty (30) working days for non-active claims after notification by the commission. The self-insured employer may retain copies for their records.

15.9. Requests for Claims Records by Injured Workers or Their Representatives. The self-insured employer shall provide a copy of the claim record to the claimant or his authorized representative within ten (10) working days of the date the written request is received by the self-insured employer. The initial copy of the record will be provided at no cost by depositing the claims records, postage prepaid in the United States mail. Subsequent copies will be provided at a reasonable charge.

15.10. Settlements. The self-insured employer and the claimant may negotiate a final settlement of any and all issues in a claim with the approval of the office of judges in accordance with the provisions of West Virginia Code §23-5-7. The commission is not required to be a party to the settlement.

15.11. Recoveries of overpayments.

a. The self-insured employer is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the self-insured employer's self-administration of its claims.

1. The self-insured employer is required to document each recovery of overpayment from its claimants.

2. In circumstances when the self-insured employer collects an overpayment previously made by the fund, the self-insured employer shall remit the collected amount to the commission within thirty (30) days of recovery.

b. The commission is responsible for collecting all overpayments to claimants, whether made by the self-insured employer or by the fund, in the commission's administration of its claims.

1. In circumstances when the commission collects an overpayment previously made by a self-insured employer, the commission shall remit the collected amount to the self-insured employer within thirty (30) days of recovery.

c. The self-insured employer may seek recovery of vendor overpayment made by the self-insured employer directly from the service provider.

§85-18-16. Payroll Reports and Premium Taxes.

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

16.2. 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 commission a sworn statement of the total gross wages and earnings of all of its employees subject to the Act for the preceding quarter.

16.3. 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 as portions of its self-insured premium tax or surcharge, as applicable:

a. A sum sufficient to pay the employer's proper portion of the expense of the administration of the Act;

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

c. A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund;

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

e. A sum as determined by the commission to be sufficient to pay the employer's portion of rates, surcharges or deficit management and deficit reduction assessments;

f. A sum as determined by the commission to pay the employer's portion of self-insured catastrophic injury benefits, and second injury payments on all self-insured second injury claims other than second injury claims for those employers self-insured for second injury. Any employer previously self-insured for second injury benefits shall continue to be responsible for payment of those benefits; and

g. Risk pool assessments as may be required by the rules of the commission (85 C.S.R. 19, entitled "Risk Pools").

§85-18-17. Auditing, Monitoring and Inspections; Record Keeping.

17.1. Preservation of records. Every self-insured employer shall keep, preserve and maintain complete records showing in detail all expenditures for gross wages and the separation of such expenditures in the various classifications of the employer's business. The employer shall keep such additional information necessary to determine classification of the employer's activities as well as other information necessary for a risk assessment. Such records shall be preserved for not less than ten (10) years after the respective times of the transaction upon which the records are based. The employer shall retain all records for periods in excess of ten (10) years in matters involving possible fraud or failure to report or disputes with the commission until the commission or appropriate administrative, judicial or appellate body finally resolves the matter and the time for appeal has been exhausted.

17.2. Pursuant to W. Va. Code §23-2-2(a), each self-insured employer shall furnish the commission, upon request, all information required by the commission to ascertain or verify the number of employees employed by the employer during a pertinent period, the names and social security numbers of the employees, the gross wages paid to employees during a pertinent period, occupations of employees, classification information, other information necessary for risk assessment, and payments owed to the commission, as premium taxes, premium tax deposits, interest, fees, penalties, or to carry out the various purposes of the Act.

17.3. Preservation of claims records. Every self-insured employer is required to keep, preserve and maintain all claims records.

17.4. Inspections of records; failure to maintain records.

a. All accounting records, books, records, papers and documents reflecting the amount and the classifications of the gross wage expenditures of an employer, as well as the nature of the business operation, shall be kept available for inspection at any reasonable time by the duly authorized representatives of the commission.

b. The self-insured employer shall keep all claims records available for inspection at any reasonable time by the duly authorized representatives of the commission. The commission shall review claims records of the employer on an annual basis or more frequently as the commission determines in its sole discretion to be necessary.

c. If any employer fails to keep, preserve and maintain such records and other information as required under the provisions of this section, or fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.5. Auditing records; adjustments. The commission shall have the right at any reasonable time to audit any or all books, records, papers, documents, operations and payroll of an employer for the purpose of verifying the correctness of reports made by an employer or such other reports as may be required by the commission or by State or federal law. The commission shall have the right to make adjustments, including adjustments to the amount of gross wage expenditures, premium tax rates and amount of premium tax.

17.6. In order to inspect, audit or review the information specified by the Act and this rule including, but not limited to payroll and claims records, the commission may direct that an agent or employee of the commission audit the information referred to in this section during the regular business hours of the employer or at another reasonable time and place within the state of West Virginia and the employer shall permit the audit to occur and shall cooperate with the auditors so that the audit may be successfully completed. Failure to cooperate with such an inspection may be considered sufficient to revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

17.7. Either as an addition to or as part of the audit permitted under this rule, the commission may convene an administrative hearing or conduct a deposition for the purpose of receiving the information in testimonial or evidentiary form. The executive director, his or her designee, an inspector or a designated hearing officer may issue subpoenas and compel the attendance of witnesses and the production of pertinent books, accounting records, accounts, papers, records, documents, and testimony at any such hearing or deposition. Any such administrative hearing or deposition shall be convened and conducted in accordance with 85 C.S.R. 7, "Rules for Selected Hearings," and the commission shall have the right to have any employer or officer, agent, or employee of any employer examined under oath or affirmation. A deposition may be held pursuant to this subsection even if a hearing regarding the employer has not been previously noticed or requested; but, in that event, adequate notice of the deposition shall be given to all interested parties known to the commission.

17.8. The request for information provided for by the Act, this rule or other rules of the commission, the audit provided for by this rule, or the hearing provided for by this rule may be conducted at any time when necessary to carry out the purposes of the Act.

17.9. Noncompliance Penalties. Penalties may be assessed to self-insured employers who fail to comply with the statutes and rules governing workers' compensation benefits and self-administration. The penalty amount will be based upon the employer's overall compliance as determined by the commission's review of the employer's records.

a. The penalty assessed shall be in the sole discretion of the commission, not to exceed $5,000 per review, and shall be based on an employer's compliance with the following: (1) claims action, rulings, and payment; (2) claims support activities; and (3) administrative functions. Subsequent violations may result in a multiple of the initial fine up to and including revocation of self-insured status.

b. The self-insured employer's overall compliance with the applicable statutes and rules may be determined by the commission's review of the employer's claims and the activities taken within a prescribed time period as determined in the discretion of the commission.

c. In addition to penalties provided for in 17.9.a, the employer may be assessed penalties in an amount determined in the sole discretion of the commission, not to exceed $500 per occurrence, for administrative non-compliance, such as:

1. Failure to submit claims data transmissions in a timely and acceptable format;

2. Refusal to allow inspection of records for commission review purposes;

3. Failure to submit audited financial statements timely for annual review purposes;

4. When the employer elects to employ or contract with a third party administrator to administer its claims, the failure to utilize a third party administrator qualified by the commission; and

5. Failure to timely and fully respond to the commission's requests in regard to items 17.9.c.1 through 17.9.c.4, may result in penalties provided for in 17.9.a.

d. The assessment and payment of penalties under this section shall not prevent the commission from making recommendations to the board of managers concerning the employer's self-insurance status.

§85-18-18. Maintaining Self-Insured Status; Annual Review.

18.1. 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 section 8 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 commission.

18.2. Annual review. The commission will perform a comprehensive claims, financial, compliance and security review of each self-insured employer on an annual basis. The commission may conduct an audit of all claims records, accounting records, books, records, papers, operations and documents deemed relevant by the commission in the possession or control of the employer.

a. The commission shall notify each self-insured employer of their annual review.

b. Upon notice of the commission, each self-insurer shall file or make available for inspection, whichever method as may be specified by the commission, documents and information requested to perform an annual review on the self-insured employer. If any employer fails to make such records and information available for inspection, the commission may revoke the employer's self-insurance status or, in the commission's discretion, impose penalties on the self-insured employer.

c. The commission shall notify the employer of the results of the annual review.

18.3. Financial review. In the performance of its annual financial and security review, the commission shall determine whether the self-insured employer continues to demonstrate sufficient financial capability to remain self-insured.. All the following benchmarks must be met in order to demonstrate a financial position that is not deteriorating.

a. The most recent three years of audited financial statements must be analyzed through the most current commission financial review model.

1. A score of medium to high must be met in the financial strength category.

2. A company cannot post net operating losses more than two years in a row.

3. The current ratio should not decline two years in a row and be at least one to one or should not decline 40% from one financial review to the next.

4. The total liabilities to total assets should not increase two years in a row or increase over 40% from one financial review to the next.

b. In addition to meeting all of the preceding benchmarks, one of the following three benchmarks must be met to demonstrate a financial condition that is not deteriorating:

1. Cash flow from operating activities should be greater than net income.

2. Total stockholders' equity should not decline two years in a row or decline over 40% from one financial review to the next.

3. An employer must have at least three (3) of the six (6) profitability and solvency ratios fall within the industry median as reported by Dun & Bradstreet or other company as specified by the commission. The six ratios are:

A. Profit margin;

B. Rate of return on assets;

C. Return on net worth;

D. Current ratio;

E. Current liabilities to net worth; and

F. Total liabilities to net worth.

18.4. The commission reserves the right to review or audit, at any time, a self-insured employer's compliance with the requirements of the Act or the rules of the commission.

18.5. Security Responsibility. The self-insured employer is responsible for maintaining adequate security for its claims liability for catastrophic coverage, for claims with dates of injury prior to July 1, 2004, and in instances of a deteriorating financial condition for claims liability for dates of injury on or after July 1, 2004, as provided by this and other rules of the commission.

18.6. Claims Responsibility. 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; and is responsible for reimbursing the commission for any payments made by the commission that should have been paid by the self-insured employer.

a. The self-insured 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 board of managers, and the orders of all adjudicatory bodies; or, in the absence of any of the above, employer shall pay the compensation and reimbursements in a prompt and timely fashion.

18.7. If the commission determines that the security requires adjustment in light of the self-insured employer's current financial status or liability, the commission shall recommend to the board of managers that the security requirements be adjusted. Prior to such action, the commission shall notify the employer of the forthcoming recommendation to the board of managers and the reasons for the recommendation. The employer shall be provided thirty (30) days for written response to the commission. The commission shall provide a copy of any such employer response to the board of managers if the commission recommends that the employer's security be adjusted.

18.8. The commission shall report directly to the board of managers any acts of non-compliance by the self-insured employer. The board of managers may direct the commission to 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 commission; or, otherwise defaults on a self-insurance obligation. The commission shall provide the employer with written notice of the termination.

§85-18-19. Involuntary revocation of self-insurance status.

19.1. Notification.

a. Prior to recommending to the board of managers that the self-insured employer's status of self-insurance be revoked, the commission shall:

1. Notify the self-insured employer regarding the forthcoming recommendation;

2. Provide to the employer the reasons for recommending revocation of self-insured status;

3. Provide to the employer fifteen (15) days for written response to the commission's reasons for recommending revocation of self-insurance status;

4. Inform the self-insured employer that failure to respond in writing to the notification shall result in the commission's recommendation to the board of managers that the self-insured employer's status of self-insurance be revoked; and

5. The notification to the self-insured shall be in writing and sent to the self-insured employer by certified United States mail, return receipt requested.

19.2. Presentation before the Board of Managers.

a. After the commission's review of the response from the self-insured employer or the expiration of the time for response, the commission may proceed to recommend to the board of managers that the employer's status of self-insurance be revoked.

b. The commission shall provide a copy of any such employer response to the board of managers when the commission recommends that the employer's status of self-insurance be revoked.

c. The commission shall make its recommendation to the board of managers at a meeting of the board. The recommendation may be provided to the board during an executive session of a meeting.

d. The employer shall be notified of the date, time and location of the meeting of the board of managers wherein the commission will make its recommendation. The employer may be present during the presentation of the commission's recommendation. The employer may address the board regarding the recommendation and for such time as may be appropriate in the discretion of the chair.

19.3. Approval of the Board of Managers.

a. After the commission presents its recommendation to the board of managers, the board shall determine whether to approve the commission's recommendation.

b. All decisions of the board of managers regarding the commission's recommendation shall be made in an open meeting of the board.

19.4. Revocation.

a. If the board of managers approves the commission's recommendations to revoke the employer's self-insurance status, the commission shall, by its order, notify the employer of the revocation of the status of self-insurance and the reasons for the revocation.

b. Upon revocation of the privilege of self-insurance, the employer shall remain 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 termination of self-insured status.

c. The commission shall order the employer to pay into the compensation fund an amount sufficient to cover the estimated cost of all such liability or, in the alternative and in the commission's sole discretion, secure the liabilities in a manner consistent with other provisions of this rule.

§85-18-20. Name and Address of Employer; Legal Notice; Publications; Employer Correspondence.

20.1. General. Except as hereinafter provided, the name and address given by the employer on the application for coverage shall be used by the commission 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.

a. Self-insured employers are required to provide the name, telephone number, fax number and e-mail address of its designated primary contact person responsible for workers' compensation matters.

20.2. Change of name or address. Any employer changing the name or the address of the business must promptly notify the commission, in writing, and request that the name or address be changed on the commission'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.

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

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 commission 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 commission when such representation ceases and to provide a current address to which the employer's notices and correspondence are to be sent.

20.3. 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 commission to the employer at the address and in the name shown on the commission's records shall constitute constructive notice to the employer of any action taken.

20.4. Legal notice to attorney or agent. In any matter arising under this rule in which the commission 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. "Other representative" shall include the employer's third party representative, if the employer is so represented.

20.5. Correspondence. All correspondence to the commission from an employer or its representative related to an employer's workers' compensation account, premiums, or coverage issues shall contain the employer's policy number as well as the employer's federal employer identification number.

§85-18-21. Third Party Administrators.

21.1. Self-insured employers may hire third party administrators to administer claims if the third party administrator meets certain qualifications.

21.2. Qualifications. In order to qualify to administer claims for a self-insured employer, a third party administrator is required to meet the same financial tests as required of third-party administrators governed by the State insurance commissioner pursuant to the provisions of article forty-six, chapter thirty-three of the West Virginia Code [W. Va. Code §§ 33-46-1 et seq.].

21.3. Each third party administrator, administering claims on behalf of a self-insured employer, shall within five (5) days from the effective date of this rule provide a list of self-insured employers for whom the third party administrator administers claims. The third party administrator shall notify the commission within twenty-four (24) hours of entering into or terminating a third party administrator contract with a self-insured employer.

21.4. Each third party administrator shall re-apply bi-annually on forms provided by the commission to qualify as a third party administrator for the purpose of administering workers' compensation claims.

21.5. The commission shall notify third party administrators who no longer qualify to administer workers' compensation claims.

§85-18-22. Administrative Protests and Hearings.

Any self-insured employer who wishes to contest a decision made by the commission, under the provisions of chapter twenty-three, article two of the Code, may do so under the provisions of W. Va. Code, §23-2-17. The rule implementing that section requires the filing of a formal request for reconsideration, and following reconsideration, a petition within thirty days of the self insured employer's receipt of notice of the disputed decision or action or reconsidered decision or, in the absence of such receipt, within sixty days of the date of the commission's making such disputed decision or taking such disputed action or making such reconsideration decision. (See 85 C.S.R. 7, "Rules for Selected Hearings." However, as a mandatory prerequisite to hearing a petition after a reconsideration decision, the employer must deposit with the commission the sum of any amounts in dispute or which arise from, may be calculated from or which are involved in the disputed decision; unless the employer has a financial inability to pay a part or all of the required deposit and then if so, except to the extent the same is proven by, at least, a competent written declaration of need for exception in an amount which is accompanied by three years of financial records to that extent and effect, pays that portion of the required deposit as has been thereafter approved by the commission. Furthermore, any amount due and unpaid by the employer, other than and except for any amount in dispute as defined above under petition and paid in deposit or not paid in deposit due to proved financial hardship, shall be charged to the employer's policy account and, if not paid timely, shall be delinquent and, if still not paid timely after notice given under the provisions of Section 23-2-5 of the W. Va. Code, shall be and cause default under the provisions of section 23-2-8 of the Code.

§85-18-23. Severability.

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