WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

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

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §§23-2-9(e), 23-2C-2(p), 23-2C-2(q), 23-2C-22, 33-2-10(b) and 33-2-21(a)

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 19

TITLE OF RULE BEING AMENDED: Self Insurance Risk Pools

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

TITLE OF RULE BEING PROPOSED: ________

DATE OF PUBLIC HEARING: Thursday, September 11, 2008 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING: Offices of the WV Insurance Commissioner
1124 Smith Street – 4th Floor – Room 400
Charleston, WV 25301

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: Thursday, Sept. 11, 2008 TIME: 3:00 PM

WRITTEN COMMENTS MAY BE MAILED TO:

Ryan Sims, Associate Counsel
Offices of the Insurance Commissioner
P.O. Box 50540
Charleston, WV 25305-0540
Ryan.Sims@wvinsurance.gov

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

Insurance Commission
Exempt Legislative Rule
Title 85, Series 19

SELF INSURANCE RISK POOLS

TITLE 85, SERIES 19

BRIEF SUMMARY OF RULE

Title 85, Series 19 ("Rule 19," "Self-insurance risk pools") sets forth standards, clarification, guidelines and procedures regarding the two pools which cover potential default of self-insured employers - the self-insurance guaranty risk pool and the self-insurance security risk pool. The last version of this rule was proposed by the Insurance Commissioner and approved by the Industrial Council with an effective date of March 4, 2007.

This rule is being updated with necessary technical and stylistic cleanup. Additionally, several substantive changes are being made. The substantive changes being made to this rule are as follows:

- Definition of "default" in subsection 3.2. amended to include failure to maintain adequate security;
- Subsection 5.3. amended to clarify that employers who have completely bought out their liability are not subject to pool participation; and
- Subdivision 6.1.b. amended to clarify that the Offices of the Insurance Commissioner does not have authority to unilaterally revoke a self-insured employer who has not posted adequate surety.

Insurance Commission
Exempt Legislative Rule
Title 85, Series 19

SELF INSURANCE RISK POOLS

TITLE 85, SERIES 19

STATEMENT OF CIRCUMSTANCES

Pursuant to W. Va. Code §§23-2-9(e), 23-2C-2(p) and 23-2C-2(q), there are two pools which provide coverage for the potential default of self-insured employers. These are the self-insured employer guaranty risk pool ("guaranty pool") and the self-insured employer security risk pool ("security pool"). The security pool covers claims with dates of injury prior to July 1, 2004, while the guaranty pool covers claims with dates of injury on or after July 1, 2004. Title 85, Series 19 ("Rule 19," "Self Insurance Risk Pools"), which was last amended by the Offices of the Insurance Commissioner and approved by the Industrial Council with an effective date of March 4, 2007, sets forth standards, clarification, guidelines and procedures regarding these two pools.

It has become apparent to the Insurance Commissioner that there is a need for certain stylistic, technical and substantive amendments to this rule. Specifically, there is a need to make Rule 19 consistent with recent amendments to Rule 18 also pertaining to self-insured employers. The substantive amendments in the instant draft are more specifically referenced in the "Brief Summary" for this rule.

This amended rule is being promulgated to implement the above referenced changes necessary to Rule 19.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Self Insurance Risk Pools (Title 85, Series 19)

Type of Rule: X Exempt Legislative ___ Interpretive ___ Procedural

Agency: Insurance Commission

Address: Post Office Box 50540

1124 Smith Street, Greenbrooke Building

Charleston, West Virginia 25305-0540

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

Fiscal Note Summary

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

The rule will have no additional fiscal impact upon state government.

Fiscal Note Detail

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

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

Rule Title: Self Insurance Risk Pools (Title 85, Series 19)

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

N/A

MEMORANDUM

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

Date: ______________________

Signature of Agency Head or Authorized Representative

____

Ryan Sims, Associate Counsel

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

SERIES 19
SELF INSURANCE RISK POOLS

Section

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

SERIES 19
SELF INSURANCE RISK POOLS

§85-19-1. General.

1.1. Scope. -- This exempt legislative rule provides for the creation of risk pools for the benefit of self-insured employers to secure the payment of obligations of self-insured employers.

1.2. Authority. -- W. Va. Code §§23-2-9~~(i)~~(e), 23-2C-2(p), 23-2C-2(q),~~23-2C-5(c)(2)~~, 23-2C-22, ~~and~~ 33-2-10(b), and 33-2-21(a). Pursuant to W. Va. Code §23-2C-5(c)(2), workers' compensation rules ~~adopted~~ proposed by the Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §§29A-3-9 through 29A-3-16, inclusive. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- ~~February 2, 2007~~.

1.4. Effective Date. -- ~~March 4, 2007~~.

§85-19-2. Purpose of Rule.

This rule provides for the continued maintenance and funding of two risk pools ~~previously created by the former Workers' Compensation Commission~~ to secure the obligations of self-insured employers.

§85-19-3. 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 primarily codified at W. Va. Code §23-1-1 et seq.~~

3.~~2~~1. "Default" means the failure by a self-insured employer to make a payment (including but not limited to payment of a claim, regulatory surcharge, debt reduction assessment or guaranty pool assessment), maintain adequate surety, or file a report due by it under the provisions of ~~the Act or this rule~~ chapter twenty-three of the West Virginia Code or the rules promulgated thereunder within the time period specified by a notice regarding such failure.

3.~~3~~2. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.~~4~~3. "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.~~5~~4. "Guaranty Pool", as the term is used in this ~~Rule~~ rule means the Self-insured employer guaranty risk pool as established by W. Va. Code §§23-2-9~~(i)~~(e) and 23-2C-2(p) ~~(2005)~~.

3.~~6~~5. "Industrial Council" means the Industrial Council created within the office of the Insurance Commissioner pursuant to ~~the provisions of~~ W. Va. Code §23-2C-5.

3.~~7~~6. "~~Insurance~~ Commissioner" means the insurance commissioner of West Virginia ~~as provided in W. Va. Code §33-2-1~~.

3.~~8~~7. "Security Pool", as the term is used in this ~~Rule~~ rule means the Self-insured employer security risk pool as established by W. Va. Code §§23-2-9~~(i)~~(e) and 23-2C-2(q) ~~(2005)~~.

3.~~9~~8. "Self-insurer" and "self-insured employer" mean employers who have been granted self-insured status ~~by the Insurance Commissioner~~ under the provisions of W. Va. Code §23-2-9.

3.~~10~~9. ~~"Subscriber"~~ "Insured Employer" means an employer who obtains coverage under any of the workers' compensation insurance plans offered by an insurer licensed by the ~~Insurance~~ Commissioner to provide such coverage in this State.

§85-19-4. Self Insurance Pools; Establishment; Application of Funds.

4.1. The ~~Insurance~~ Commissioner shall maintain the Self-insured Employer Security Pool established pursuant to W. Va. Code §§23-2-9~~(i)~~(e) and 23-2C-2(q) ~~(2005)~~ to make payments for bankrupt and default self-insured employers for claims with dates of injury prior to July 1, 2004.

a. The ~~Insurance~~ Commissioner shall segregate all contributions to the Security Pool, including all investment income earned from Security Pool proceeds.

b. The ~~Insurance~~ Commissioner shall not expend proceeds from the Security Pool corpus or its earnings for any other purposes than for obligations of the security pool.

4.2. The ~~Insurance~~ Commissioner shall maintain the Self-insured Employer Guaranty Risk Pool established pursuant to W. Va. Code §§23-2-9~~(i)~~(e) and 23-2C-2(p) ~~(2005)~~ to make payments for bankrupt and default self-insured employers for claims with dates of injury on or after July 1, 2004.

a. The ~~Insurance~~ Commissioner shall segregate all contributions to the Guaranty Pool, including all investment income earned from Guaranty Pool proceeds.

b. The ~~Insurance~~ Commissioner shall not expend proceeds from the Guaranty Pool corpus or its earnings for any other purposes than for obligations of the Guaranty Pool.

§85-19-5. Participation.

5.1. All ~~active~~ self-insured employers ~~and all inactive self insured employers having active~~, whether active or inactive, which have any claims arising during the period of self-insurance and which are open or subject to being re-opened shall participate in the Security Pool.

5.2. All active self-insured employers shall participate in the Guaranty Pool. Active self-insured employers that become inactive on or after July 1, 2004, shall be required to participate in the Guaranty Pool under the provisions of section 10. of this rule.

5.3. Former self-insured employers who have voluntarily bought out their liability prior to December 31, 2005, or have entered into an agreement for an involuntary buy out are not required to participate in either the security or guaranty pools.

§85-19-6. Surety Requirements.

6.1. All employers who participate in the Security Pool are required to fully secure their claims liabilities for all claims with dates of injury prior to July 1, 2004.

a. All employers who are fully secured for their claims liabilities as of the effective date of this rule shall maintain and increase their security as necessary to remain fully secured for their claims liabilities.

b. The failure by an employer to fully secure and maintain security on their claims liabilities in accordance with this rule ~~shall~~ may result in revocation of self-insurance status pursuant to the provisions of W. Va. Code St. R. §85-18-1 et seq. ~~The Insurance Commissioner is authorized by this rule to provide notice of the revocation to the self-insured employer without any action or approval by the Industrial Council. The provisions of other rules of the Insurance Commissioner requiring the Insurance Commissioner to present the revocation recommendation to the Industrial Council and for the Industrial Council to approve the revocation are expressly made inapplicable to revocation of self-insurance under this section.~~

~~1.~~ An employer who receives a notification of a recommendation by the Commissioner of revocation of self-insured status for failure to fully secure or maintain security on their claims liability may file a petition with the Industrial Council to be granted a six (6) month grace period to obtain security.

~~A~~1. The employer shall file its petition for grace period with the ~~Insurance~~ Commissioner who will distribute the petition to the Industrial Council.

~~B~~2. The Industrial Council shall consider the petition for grace period at such time as is convenient to the Industrial Council. The Industrial Council shall consider the petition in an executive session. The Industrial Council may consider the written petition only or request the employer, the ~~Insurance~~ Commissioner or both to make an oral presentation. The Industrial Council shall make any decision regarding the petition for grace period in an open meeting.

~~C~~3. The Industrial Council shall only grant a petition for grace period upon a unanimous vote of the Industrial Council.

~~D~~4. An employer may only be granted one grace period.

6.2. The ~~Insurance~~ Commissioner shall perform an annual surety review based upon the ~~Insurance~~ Commissioner's actuarial calculations to determine the required surety level for periods prior to July 1, 2004.

~~a.~~ Existing surety using old bond language will be credited to the employer at the estimated actual value of the bond as determined by the ~~Insurance~~ Commissioner.

6.3. Self insured employers shall not be required to provide surety, other than through Guaranty Pool assessments, for liabilities attributable to claims with dates of injury or last exposure on or after July 1, 2004.

~~a.~~ The ~~Insurance~~ Commissioner may require additional surety for claims with dates of injury on or after July 1, 2004, if it is determined that an employer's financial condition has deteriorated compared to the previous year's financial analysis by the ~~Insurance~~ Commissioner. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in W. Va. ~~CSR~~ Code St. R. §85-18-1 et seq.

§85-19-7. Security Pool Funding.

7.1. The Security Pool shall be funded by the following sources:

a. Proceeds received from the draw-down on surety documents in the event of a self-insured employer's default;

b. All graduated premium tax payments made by participating self-insured employers for periods through the quarter ending June 30, 2004;

c. Assessments to fund the Security Pool ~~generated under the provisions of~~ pursuant to W. Va. Code §23-2-9~~(i)~~(e); and

~~d. Beginning July 1, 2006, proceeds received from assessments pursuant to W. Va. Code §23-2-9(e)(2); and~~

~~e~~d. Proceeds received from any alternative funds identified and made available through legislative enactment.

7.2. Should the proceeds identified in subsection 7.1. of this section be inadequate to fully satisfy the obligations of the Security Pool, the ~~Insurance~~ Commissioner and the Industrial Council shall identify and pursue such alternative funding as shall be deemed necessary.

§85-19-8. Security Pool Assessments Pursuant to W. Va. Code §23-2-9~~(i)~~(e).

~~8.1.~~ Beginning January 1, 2006, Security Pool assessments to self-insured employers shall be made as follows:

~~a~~8.1. The ~~Insurance~~ Commissioner shall determine the projected claims payments to be made in the fiscal year.

~~b~~8.2. The ~~Insurance~~ Commissioner shall determine the amount necessary to fund the Security Pool through assessments.

~~c~~8.3. The ~~Insurance~~ Commissioner shall determine the methodology employed to allocate to each self-insured employer, based upon the self-insured employer's claims reserves and financial strength, a fair and equitable portion of the projected claims payments.

~~d~~8.4. In accordance with the methodology employed, the ~~Insurance~~ Commissioner shall determine the amount of each Security Pool assessment.

~~e~~8.5. Notification. The ~~Insurance~~ Commissioner shall notify every employer who is assessed under this provision the amount of the assessment and the methodology employed to determine the assessment. The ~~Insurance~~ Commissioner shall provide notice to each affected employer at least thirty (30) days prior to the period for which the assessment is applicable.

~~f~~8.6. Payments required under this provision shall be pro-rated and made on a quarterly basis.

§85-19-9. Guaranty Pool Funding.

9.1. Beginning July 1, 2006, and in order to fund the Guaranty Pool, the ~~Insurance~~ Commissioner shall, except with respect to those self-insured employers and former self-insured employers required to make payments in accordance with subdivision b. of this subsection and section 10. of this rule, respectively, assess self-insured employers, as follows:

a. The annual assessment shall be equal to two percent (2%) of the self-insured employer's preceding fiscal year's annual claims indemnity payments [excluding payments to settle claims on a full and final basis] or a minimum of five thousand dollars ($5,000), whichever is greater. For example, a self-insured employer has paid one million dollars ($1,000,000.00) in indemnity payments in the preceding fiscal year. Of the one million dollars ($1,000,000.00), two hundred thousand dollars ($200,000.00) has been paid to settle claims on a full and final basis. The self-insured employer would be assessed two percent (2%) of eight hundred thousand dollars ($800,000.00), which yields sixteen thousand dollars ($16,000.00) as an assessment to the self-insured employer; and

b. Any employer who becomes self-insured on or after July 1, 2004, will be assessed an amount equal to five percent (5%) of the preceding year's premium, or a minimum of five thousand dollars ($5,000), whichever is greater, for a period of 3 years, beginning with the quarter in which self-insured status was made effective and regardless of whether such employer becomes ~~a subscriber~~ an insured employer within such 3-year period: Thereafter, assessments shall be made in accordance with the same methodology utilized for other self-insured employers, as set forth in subdivision a. of this subsection. An employer's liability for the assessments imposed pursuant to this subsection is not subject to suspension under subsection 9.2. of this section.

c. Payments made under this section and section 10. of this rule shall be pro-rated and made on a quarterly basis.

9.2. Whenever it is determined by the ~~Insurance~~ Commissioner that the Guaranty Pool contains more than the sum necessary to maintain the solvency of the Pool, the ~~Insurance~~ Commissioner shall suspend the obligation of self-insured employers to pay the assessment under subdivision a., subsection 9.1. of this section and of any former self-insured employer to pay the assessment under section 10. of this rule: *Provided*, That as of July 1, 2006, ten million dollars ($10,000,000) is deemed to be an adequate level of funding to maintain the solvency of the Guaranty Pool.

9.3. The ~~Insurance~~ Commissioner shall propose different assessment methodologies and/or a different level of minimum funding of the Pool whenever he or she determines that such a change or changes are necessary to maintain the solvency of the Pool: *Provided*, That any changes to the assessment methodologies, as prescribed in subdivision a. and/or b., subsection 9.1. of this section, or to the level of funding deemed necessary to maintain solvency of the Pool, as prescribed in subsection 9.2. of this section, shall be made by amendment to this rule.

§85-19-10. Converting to ~~Subscriber~~ Insured Employer Status or Becoming Inactive.

On or after July 1, 2004, any active self-insured employer who: (i) becomes ~~a subscriber~~ an insured employer or who, either voluntarily or involuntarily, ~~becomes inactive~~ has its self-insured status terminated; and (ii) did not enter into a voluntary buy out for its liability prior to December 31, 2005, or enter into an agreement for an involuntary buy out, shall ~~leave all existing~~ maintain surety ~~in place~~ in an amount sufficient to cover its liabilities during its period of self-insurance consistent with this rule and W. Va. Code St. R. §85-18-1 et seq.; any such ~~an~~ employer shall also be assessed Security Pool and Guaranty Pool assessments for a period of ten (10) years from the termination of self-insured status: *Provided*, That in these circumstances, Guaranty Pool assessments for each year shall be in the amount of five percent (5%) of the prior year's indemnity payments or five thousand dollars ($5,000.00), whichever is greater; *Provided, further*, That such assessments are subject to suspension as provided in subsection 9.2. of this rule. This provision is not to be construed as excusing any obligation of a terminated self-insured employer imposed by ~~the Act or by other rules of the Insurance Commissioner~~ chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

~~§85-19-11. 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.~~