

Form #1

OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

John C. Musgrave
Acting Cabinet Secretary
West Virginia Department of Revenue

\$5.00

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

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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 §§~~23-1-1a~~, 23-2-4, 23-2-9(i), ~~23-2C-5(c)(2)~~, ~~23-2C-22~~, and ~~33-2-10(b)~~. Pursuant to ~~West Virginia~~ W. Va. Code §~~23-1-1a(j)(3)~~ ~~23-2C-5(c)(2)~~, rules adopted by the ~~Board of Managers and the Commission~~ Industrial Council are not subject to legislative approval as would otherwise be required under ~~West Virginia~~ W. Va. Code §~~29A-3-1 et seq.~~ §§~~29A-3-9~~ through ~~29A-3-16~~, inclusive. Public notice requirements of that chapter and article, however, must be followed. ~~Upon termination of the Commission, regulatory enforcement of this exempt legislative rule shall transfer to the Insurance Commissioner. W. Va. Code §§23-2-9(i) and 23-2C-22.~~

1.3. Filing Date. -- ~~June 29, 2005.~~

1.4. Effective Date. -- ~~August 1, 2005.~~

§85-19-2. Purpose of Rule.

This rule provides for the ~~creation~~ 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. ~~"Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~ "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.

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

~~3.4. 3.3. "Commission" means the former Workers' Compensation Commission created pursuant to the provisions of W. Va. Code §23-1-1.~~

~~3.5. 3.4. "Default" for the purposes of a self-insured employer 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) 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 a notice regarding such failure.~~

~~3.6. "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.~~

~~3.7. 3.5. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.~~

~~3.8. 3.6. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.~~

~~3.9. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W. Va. Code §23-1-1b.~~

~~3.10. "Injury" means compensable injuries or illnesses within the meaning of W. Va. Code §23-4-1 et seq.~~

~~3.11. "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, interest.~~

~~3.12. "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,~~

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~~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.~~

3-13. ~~3.7.~~ "Regular subscriber" and "subscriber" mean "Subscriber" means an employer who obtains coverage under any of the workers' compensation insurance plans offered by ~~the commission~~ an insurer licensed by the Insurance Commissioner to provide such coverage in this State.

3-14. ~~3.8.~~ "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status by the Insurance Commissioner under the provisions of W. Va. Code §23-2-9.

3-15. ~~"This rule" means this legislative rule designated as 85CSR19, "Self Insurance Risk Pools."~~

3-16. ~~3.9.~~ "Insurance Commissioner" means the insurance commissioner of West Virginia as provided in W. Va. Code §33-2-1.

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

~~4.1. The Commission shall establish two pools of funds to cover claims payments of default and bankrupt self-insured employers.~~

~~4.2. 4.1. The Commission~~ Insurance Commissioner shall establish a maintain the Security Pool established pursuant to W. Va. Code §23-2-9(i) (2005). The Security Pool shall pay claims to make payments for bankrupt and default self-insured employers for claims with dates of injury prior to July 1, 2004.

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

b. ~~The Commission~~ 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 Commission~~ Insurance Commissioner shall establish a maintain the Guaranty Pool established pursuant to W. Va. Code §23-2-9(i) (2005). The Guaranty Pool shall pay claims to make payments for bankrupt and default self-insured employers for claims with dates of injury on or after July 1, 2004.

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

b. The ~~Commission~~ 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 claims shall participate in the Security Pool.

~~a. Inactive self-insured employers having active claims who decline to participate shall extinguish their liability through a buyout as calculated by the Commission.~~

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, ~~may~~ shall be required to participate in the Guaranty Pool under the provisions of section ~~ten~~ 10 of this rule.

§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 ~~on or~~ prior to ~~June 30~~ 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. All employers who are not fully secured for their claims liabilities as of the effective date of this rule are required to fully secure their claims liabilities and maintain and increase that security as necessary.

The ~~Commission~~ Insurance Commissioner shall establish the terms and conditions of a security increase plan for each employer.

The security increase plan is required to be completed such that the employer is fully secured on or before June 30, 2006.

Employers whose unsecured liabilities increase less than one million dollars shall not be eligible for a security increase plan and shall provide the full amount of security

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within the time frames as specified by the rules of the ~~Commission~~ Insurance Commissioner.

c. The failure by an employer to fully secure and maintain security on their claims liabilities in accordance with this rule shall result in revocation of self-insurance status. The ~~Commission~~ 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 ~~Board of Managers~~ Industrial Council. The provisions of other rules of the ~~Commission~~ Insurance Commissioner requiring the ~~Commission~~ Insurance Commissioner to present the revocation recommendation to the ~~Board of Managers~~ Industrial Council and for the ~~Board of Managers~~ 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 revocation of self-insured status for failure to fully secure or maintain security on their claims liability may file a petition with the ~~Board of Managers~~ Industrial Council to be granted a six (6) month grace period to obtain security.

A. The employer shall file its petition for grace period with the ~~Executive Director of the Workers' Compensation Commission~~ Insurance Commissioner who will distribute the petition to the ~~Board of Managers~~ Industrial Council.

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

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

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

~~6.2. New self-insured employers who were previously regular subscribers must secure their liability up through June 30, 2004 or must pay the Commission an amount equal to the liability amount attributable to periods through June 30, 2004, including incurred but not reported liabilities. The requirements of Section 6.2 shall sunset upon termination of the Commission and shall not be applicable to any regular subscriber that applies for self insured status upon termination of the Commission.~~

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~~6.3.~~ 6.2. The ~~Commission~~ Insurance Commissioner shall perform an annual surety review based upon the ~~Commission's~~ 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 ~~Commission's~~ actuary Insurance Commissioner.

~~6.4.~~ 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 on or after July 1, 2004.

a. The ~~Commission~~ 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 ~~Commission~~ Insurance Commissioner. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in the rule governing self-administration of self-insurance.

§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 W. Va. Code §23-2-9(i);

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

e. 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 Executive Director and the Board of Managers, and upon termination of the commission,~~ the Insurance Commissioner and the Industrial Council shall identify and pursue such alternative funding as shall be deemed necessary.

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

8.1. Beginning January 1, 2005 ~~2006~~, Security Pool assessments to self-insured employers shall be made as follows:

a. The ~~Commission~~ Insurance Commissioner shall determine the projected claims payments to be made in the fiscal year, ~~with the first projection based upon the period July 1, 2004 through June 30, 2005.~~

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

c. The ~~Commission~~ 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 payment.

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

e. Notification. The ~~Commission~~ 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 ~~Commission~~ 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. Payments required under this provision shall be pro-rated and made on a quarterly basis.

§85-19-9. Guaranty Pool Funding.

9.1. Beginning ~~the calendar quarter immediately following the effective date of this rule~~ July 1, 2006, and in order to fund the Guaranty Pool, the ~~Commission~~ 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 ~~initial~~ annual assessment shall be equal to 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 \$5,000, whichever is greater. ~~The initial annual assessment shall be imposed for each of Fiscal Years 2005 and 2006.~~ For example, a self-insured employer has paid one million dollars (\$1,000,000.00)

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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. Beginning with Fiscal Year 2007 (July 1, 2006 through June 30, 2007), annual assessments shall be based on five percent of the projected claims liabilities of the self-insured employer for the fiscal year in which the charge is made or \$5,000.00, whichever is greater~~

~~c. Payments made under this subsection shall be pro-rated and made on a quarterly basis.~~

9.2. b. Employers Any employer who become becomes self-insured after the establishment of the Guaranty Pool on or after July 1, 2004, will be assessed an amount equal to 5% of the preceding year's base-rated premium, or a minimum of \$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 within such 3-year period: Thereafter, assessments shall be made as needed 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.

~~Assessments to fund the Guaranty Pool shall continue until the Guaranty Pool is fully funded. The Guaranty Pool shall be considered fully funded when it contains the sum of thirty million dollars (\$30,000,000.00) or five percent (5%) of the total claims liability of all self-insured employers, whichever is greater.~~

~~b. If assessments cease because the Guaranty Pool is fully funded and thereafter the funding level for the Guaranty Pool drops below the required amount, the assessments shall resume in the same manner and amounts as required by 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.

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9.3. ~~In the event that actual claims defaults exceed the amounts of defaulted claims reserves recognized in the most recent audited financial statement of the Commission, the Board of Managers shall determine the methodology to assess additional amounts to self insured employers to fund the Guaranty Pool. 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 Regular-Subscriber Status or Becoming Inactive.

~~Active~~ On or after July 1, 2004, any active self-insured ~~employers~~ employer who ~~become regular subscribers (i) becomes a subscriber or inactive who, either voluntarily or involuntarily on or after July 1, 2004, becomes inactive and (ii) who do did not buy out their its liability prior to December 31, 2005, shall leave all existing surety in place; and such an employer shall also be assessed the Security Pool and Guaranty Pool assessments for a period of up to ten (10) years from the termination of self-insured status with Security Pool assessments beginning January 1, 2005: In *Provided*, That in these circumstances, Guaranty Pool assessments for each year shall be based upon in the amount of five percent (5%) of the prior year's indemnity payments or \$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 Commission Insurance Commissioner.~~

§85-19-11. Transfer to the Insurance Commissioner.

~~Upon termination of the Commission, regulatory enforcement of this exempt legislative rule shall transfer to the insurance commissioner to be administered in a manner otherwise consistent with chapter twenty-three of the West Virginia Code. W. Va. Code §§23-2-9(i) and 23-2C-22. Upon termination of the Commission, functions of the Board of Managers with regard to matters related to the maintenance of self insured status are transferred to the Insurance Commissioner and the Industrial Council, created under the provisions of W. Va. Code §23-2C-5.~~

§85-19-12 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

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application and to this end the provisions of these rules are declared to be severable.

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BRIEF SUMMARY OF RULE

Beginning with the first quarter of fiscal year 2007, the assessment methodology for self-insured employers to fund the Guaranty Pool was to change from 2% of the previous year's indemnity payments to 5% of projected claims liabilities for the year in which the assessment is made; the amendment to the rule is intended to continue the 2% assessment methodology. Assessments are suspended whenever the pool is "fully funded," which the current rule sets at \$30,000,000 and which the amendment would set at \$10,000,000. The higher assessment rate that is imposed for three years on employers who become self insured after July 1, 2004 is not suspended if the Pool becomes fully funded during that 3-year period.

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STATEMENT OF CIRCUMSTANCES

In this rule, which among other things sets the methodology for assessing self-insured employers and former self insured employers to fund the Guaranty Pool used to pay claims of defaulting and bankrupt self-insured employers, the basic assessment rate established in 2005 - 2% of the employer's indemnity payments for the previous year - was to increase in fiscal year 2007 to a higher rate - 5% of an employer's projected claim liabilities. Initial studies determined that the Pool would be "fully funded" at a level of \$30,000,000 and that the assessment levels would enable the Pool to attain this level in 4-5 years. The Insurance Commissioner has determined, however, that \$10,000,000 is a sufficient amount for the Pool's solvency and that this level can be attained in 4-5 years under the current (2%) assessment methodology.

APPENDIX B
FISCAL NOTE FOR PROPOSED RULES

Rule Title: Self Insurance Risk Pools

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: Timothy.Murphy@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	None	None	None
Personal Services	None	None	None
Current Expenses	None	None	None
Repairs & Alterations	None	None	None
Assets	None	None	None
Equipment	None	None	None
Other	None	None	None
2. Estimated Total Revenues	None	None	None

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

Jane L. Cline, Insurance Commissioner