WEST VIRGINIA
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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

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

CITE AUTHORITY WV Code §§ 23-2-9(i); 23-2C-2(p); 23-2C-2(q); 23-2C-5(c)(2); 23-2C-22 and 33-2-10(b)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X 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 ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS March 4, 2007

James Robert Alsop
Cabinet Secretary
West Virginia Department of Revenue

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), 23-2C-2(p), 23-2C-2(q), 23-2C-5(c)(2), 23-2C-22, and 33-2-10(b). Pursuant to W. Va. Code §23-2C-5(c)(2), rules adopted 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. "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) or file a report due by it under the provisions of the Act or this rule within the time period specified by a notice regarding such failure.

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

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

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

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

3.9. "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. "Subscriber" 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) 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 Pool established pursuant to W. Va. Code §§23-2-9(i) 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 claims 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.

§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 result in revocation of self-insurance status. 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 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. The employer shall file its petition for grace period with the Insurance Commissioner who will distribute the petition to the Industrial Council.

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

D. 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 §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 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 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).

8.1. Beginning January 1, 2006, Security Pool assessments to self-insured employers

shall be made as follows:

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

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

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

e. 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. 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 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. 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 5% of the preceding year's 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 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 Status or Becoming Inactive.

On or after July 1, 2004, any active self-insured employer who (i) becomes a subscriber or who, either voluntarily or involuntarily, becomes inactive and (ii) did not buy out its liability prior to December 31, 2005, shall leave all existing surety in place; 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 $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.

§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.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-19-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner of West Virginia to the stakeholder and public comments received in regard to the new Title 85 Rule, W. Va. Code St. R. § 85-19-1 et seq. ("Rule 19" - Self-Insurance Risk Pools), which was filed with the West Virginia Secretary of State for public comment on 11/6/06. This response is itemized by topic, and addresses all of the comments received by the public at the 12/7/06 Industrial Council meeting as well as other selected substantive written comments received by stakeholders.

Methodology for Assessments and Minimum Funding Level for Guaranty Pool

The most prevalent and significant comments received on this Rule pertain to the changes to the methodology for assessments and the minimum funding level for the self-insured employer guaranty risk pool ("Guaranty Pool"). The assessment methodology for the Guaranty Pool was changed, section 9.1., from five percent (5%) of all claims projected claim liabilities during the fiscal year to two percent (2%) of all indemnity payments made during the previous fiscal year. Additionally, the minimum funding level for the Guaranty Pool (referred to in the rule as the "adequate level of funding") was changed, in section 9.1., from thirty million dollars ($30,000,000) to ten million dollars ($10,000,000).

During the public hearing at the 12/7/06 Industrial Council meeting, as well as in several written comments received by the Insurance Commissioner, representatives of the insurance industry, labor and the workers' compensation attorney community expressed concern with the changes to the assessment methodology and minimum funding level for the Guaranty Pool. Specifically, the concern is that these changes were posing a potential risk to the economy and particularly the self-insured employer community in the case of a self-insured employer or self-insured employers defaulting upon their workers' compensation obligations.

These proposed changes are based on a determination by the Insurance Commissioner's staff that the assessment methodologies and minimum funding levels in the current version of Rule 19 were excessive based on the amount necessary to sufficiently fund the Guaranty Pool. Such determination was made after a careful, in-depth look at the self-insurance market, the potential risks related to the market and the provisions in law and rule which are in place to protect the market and claimants relying upon self-insured employer workers' compensation responsibilities. The Commissioner believes that the proposed amendments represent a balance between protecting claimants and the self-insured community, and promoting investment in our economy. Consequently, these changes to Rule 19 will remain, pending approval of the Industrial Council.

Revocation of Self-insured Employers for Failure to Post Adequate Security

During the public hearing on 12/7/2006, a representative of the self-insurance community expressed concern with the provisions of section 6.1.c. of the Rule (section 6.1.c. of the final draft) which permits the Insurance Commissioner to unilaterally revoke the status of a self-insured employer failing to provide proper security as required by Rule 19 without going through the process set forth in W. Va. Code of W. Va. CSR § 85-18-1 ("Rule 18" – Self Insurance, Self Administration and Third Party Administrators). Rule 18 requires certain notices and final approval of the Industrial Council before a self-insured employer can be revoked. The concern specifically is that revocation for failure to provide security should go through the same process as revocation for any other reason.

In response, the expedited revocation process in section 6.1.c. of the Rule is in place for situations in which a self-insured employer in deteriorating financial condition has failed to post adequate security, and therefore is posing an immediate and serious threat to the self-insured employer community and market. In such cases, the Commissioner reserves the right to revoke an employer without going through the longer process of revocation contained in Rule 18. While the potential to use this process is remote, it is necessary to have it in place in order to protect the market. Moreover, it should be pointed out that 6.1.c. also permits a self-insured employer to petition the Industrial Council for a single six (6) month grace period prior to being revoked for failure to post adequate security.

Additionally, an attorney commented that the provisions in 6.1.c. were conflicting because while the first part of 6.1.c. states that the Insurance Commissioner can unilaterally revoke a self-insured employer which fails to post adequate security, the latter portions provide an ability to petition the Industrial Council for a single six (6) month grace period. The Commissioner believes that the grace period provision does not conflict with the ability to unilaterally revoke self-insured in 6.1.c. Rather, it simply provides a self-insured employer on the verge of revocation the ability to be granted six (6) additional months to post the necessary security before begin revoked, at the discretion of the Industrial Council.

Finally, an attorney commented on the provision in 6.1.c. providing that the Industrial Council shall only consider a petition for a grace period in executive session. The concern is that such consideration should be done in public because of the public interest in the financial health of self-insured employers. While the Commissioner agrees that there is a public interest in the financial health of self-insured employers, the purpose of holding petitions for grace periods in executive session (as well as holding all self-insured related discussions before the Industrial Council in executive session) is to protect proprietary information pertaining to self-insured employers that is discussed during the meeting from being disclosed to the public. This is consistent with the provisions of our state's freedom of information and open meetings laws exempting proprietary information regarding a company. It should also be noted that while

discussions regarding self-insured matters are in executive session, the vote of the Industrial Council regarding any action to be taken is made in public session.

Obligations and Liabilities of Security and Guaranty Pools

An attorney commented that subsection 4.1. and 4.2. of the Rule is inconsistent with the law to the extent that it limited the Security and Guaranty risk pools to payments on behalf of bankrupt and default self-insured employers. Specifically, W. Va. Code § 23-2-9(i) provides that upon termination of the former Workers' Compensation Commission ("WCC"), the funds contained in the self-insured employer security risk pool ("Security Pool") shall be deposited in the Old fund. It is suggested that this language indicates that the legislature intended the funds and/or assets in the Security Pool could be used for Old fund liabilities as well. Additionally, without specific authority, it is suggested that funds in the Guaranty pool could also be used for liabilities other than those of bankrupt or default self-insured employers.

The Insurance Commissioner believes that this is an incorrect interpretation of the law. The intent of the legislature in the selected portion of 23-2-9(i) was simply to transfer any existing funds contained in the Security Pool at the time of the termination of the former Workers' Compensation Commission into the Old fund to pay any current liabilities of the pool. Then, the known liabilities are to be paid from the Old fund. Sections 4.1. and 4.2. of Rule 19 clarify that the funds and assets in the pools after the Workers' Compensation Commission terminated are to pay for the liabilities of bankrupt or default self-insured employers only. This is not in conflict with 23-2-9(i) of the Code. Specifically, W. Va. Code §§ 23-2C-2(q), which defines the Security Pool, specifically clarifies that the security risk pool assets are to only be used to pay the liabilities of default self-insured employers. There is not reason to believe the legislature had a different intent for the guaranty risk pool.

Moreover, sound policy dictates that the funds in the self-insured pools, which are funded solely through assessments and security from the self-insured community, only be used to pay liabilities of default self-insured employers. The legislature created separate funding mechanisms in the code for Old fund liabilities. Further, it should be noted that the self-insured community is already paying regular assessments to the Debt Reduction Fund pursuant to W. Va. Code § 23-2C-3(f). Finally, there is a separate fund, the West Virginia Uninsured Employers' Fund, that is used for purposes of paying the workers' compensation liabilities of uninsured employers.

Self-insured security for post 7/1/04 Liabilities

An attorney commented that section 6.3. of the Rule provides that the Insurance Commissioner cannot "require proof of the self-insured employer having secured payment ability sufficient to cover its anticipated claims expenses." The Insurance Commissioner does not know the exact meaning the term "self-insured employer having secured payment ability" the context of the above quote; however, to the extent it is being suggested that section 6.3.of the rule prevents the Commissioner from compelling the

self-insured to disclose financial data indicating that they have ability to meet their workers' compensation obligations, or to disclose evidence of necessary security, the Commissioner does not interpret the section to do so. The sole purpose of section 6.3. is to clarify that self-insured employers do not have to provide surety (i.e., security) for claims liabilities with dates of injury on or after July 1, 2004, as the Guaranty Pool covers post 7/1/2004 liabilities for defaulting self-insured employers.

The Insurance Commissioner has the ability under W. Va. Code § 23-2-9, this Rule and W. Va. Code St. R. § 85-18-1 et seq. to perform periodic thorough financial reviews of self-insured employers. Further, section 6.3.a. of this Rule gives the Commissioner the ability to require a self-insured employer with a deteriorating financial condition to post security for post 7/1/2004 liabilities as well. As such, the Commissioner has clear and broad abilities to monitor and implement security requirements on self-insured employers, and does not read section 6.3. of this Rule as in any way usurping such power.

Financial Review of Self-insured Employers

An attorney suggested that the last sentence of section 6.3.a. of this Rule should be deleted because it prevents the Insurance Commissioner from retaining discretion on determination of whether a self-insured employer is in deteriorating financial condition for the purposes of being required to obtain additional security for their post 7/1/2004 liabilities. The Insurance Commissioner disagrees with this interpretation. The sentence in question states that in reviewing a self-insured employer's financial condition, the Commissioner will use objective benchmarks pursuant to Rule 18. In turn, Rule 18 provides numerous benchmarks that must be met by self-insured employers in order to obtain and maintain self-insured status. Additionally, it permits the Commissioner to create, maintain, and change, as deemed appropriate, a "financial model" to be used for the analysis of a self-insured employer's financial condition. (See specifically section 18.3. of Rule 18). Thus, while there are objective benchmarks that must be met by all self-insured employers regarding financial soundness, the Insurance Commissioner ultimately has discretion to determine the *design of the financial model* that is used to measure a company's overall financial strength. As such, section 6.3.a. of this Rule does not prevent the Commissioner from retaining discretion regarding the determination of whether a self-insured employer is in deteriorating financial condition.

Consideration of and Employers' Claims When Assessing for Security Pool

An attorney commented that section 8.1.c. of this Rule, one of several subsections that addresses potential assessments of self-insured employers for the Security Pool, does not adequately take into account the "number and severity of injuries by each employer's employees, or of the allocation being based upon the projected direct costs of its claims" when calculating the amount of assessments. The Insurance Commissioner disagrees with this statement. To the contrary, section 8.1.c. specifically references "claims reserves" in addition to financial strength as the criteria to be used for allocating assessments among the self-insured employers. In considering claims reserves, this

means the Insurance Commissioner would, if Security Pool assessments needed to be made, take into account the "number and severity of injuries by each employer's employees, or of the allocation being based upon the projected direct costs of its claims", as such information would be included as part of a self-insured employer's claims reserves.

Minimal Assessments for Guaranty Fund for New Self-insured Employers

An attorney commented that section 9.1.b. of the rule requires that that new self-insured employers after 7/1/2004 pay an assessment methodology that is different that the assessment methodology of other self-insured employers (specifically, five percent (5%) of the previous years' workers' compensation premium, or $5000, whichever is greater). Additionally, 9.1.b. does not cease the assessments of such new self-insured employers until they have paid assessments as provided for three (3) years, even if the minimum funding level for the pool has been reached. The comment stated that self-insured employers should not be treated differently in regard to assessments. While the Insurance Commissioner agrees with the general proposition that self-insured employers should be treated equally in regard to assessments (i.e. assessed on the same methodology), the Commissioner believes that having a different methodology for new self-insured employers for the first three years is acceptable. First, new self-insured employers have no self-insured claims data upon which to base an assessment as other self-insured employers do, so the rule instead uses the previous years' premiums for workers' compensation insurance. Second, section 9.1.b. was drafted with the intent of compelling new self-insured employers to pay a "buy-in" to the Guaranty Pool for three years before beginning to make assessments as other self-insured employers do. This is an appropriate policy when considering fairness and equity to the self-insured employers that have been paying assessments for years.

Changing Minimum Pool Amounts and Assessment Methodologies

An attorney suggested that subsection 9.3. of the Rule, pertaining to the Insurance Commissioner's ability to change the minimum funding amount and the assessment methodologies for the Guaranty Pool should be changed to not require the Insurance Commissioner to propose such changes by Rule and, as such, have the changes approved by the Industrial Council. Rather, it is suggested that the Insurance Commissioner be able to change the minimum pool amounts and the methodologies without going through the rule making process. Moreover, it is suggested that the Commissioner should be permitted to be able to resume the assessment process without going through the rule-making process.

Regarding the requirement that the Commissioner go through the rule making process to change the minimum pool amount and assessment methodologies for the Guaranty Pool, the Insurance Commissioner believes that these changes should go through the Rule making process. These items are very significant in that they directly affect the self-insured community's finances, and making such changes would be a material change to the Guaranty Fund. Consequently, while the Insurance Commissioner

makes the proposal for changes to the Guaranty Pool structure, it seems appropriate for the Industrial Council to provide the final approval. Moreover, the law requires such approval by the Industrial Council pursuant to W. Va. Code § 23-2-5.

Regarding the Insurance Commissioner being able to resume assessments for the Guaranty Pool when it falls below the minimum funding level, the Insurance Commissioner disagrees that section 9.3. of the Rule requires the Commissioner to go through the rule making process and the Industrial Council before resuming assessments. Specifically, section 9.2. gives the Commissioner the ability to "suspend" the assessments when the pool funding reaches an adequate level. This provision, in turn, clearly includes the ability to *resume* assessments when the pool funding has fallen to an inadequate level once again.

Finally, a representative of the insurance industry commented that it should be clarified in section 9.3. that changes in assessment methodologies or minimum funding levels are limited to funding from self-insured employers. The language in 9.3. only serves the purpose of explaining the procedure for changing the assessment methodologies minimum funding levels for the Guaranty Pool, and does not indicate that any other parties other than self-insured employers are liable for pool funding. Moreover, the overall structure of Rule 19 clarifies that assessments and funding for the Guaranty Pool is the responsibility of the self-insured community. Consequently, the Insurance Commissioner does not believe that a change in 9.3. of the Rule is necessary.

Brickstreet INSURANCE
Office of General Counsel

December 1, 2006

VIA E-MAIL ADDRESS - ryan.sims@wvinsurance.gov
Ryan Sims, Esq.
WV Insurance Commission
1124 Smith Street, Greenbrooke Building
Room 413
Charleston, WV 25301

RE: Rule 19 Comments Submitted by BrickStreet Mutual Insurance Company

Dear Ryan:

Please accept the following as BrickStreet Mutual Insurance Company's comments on the proposed changes to Rule 19. BrickStreet greatly appreciates the efforts of the Office of Insurance Commissioner ("OIC") to update existing rules to accommodate the privatization of our State's workers' compensation system. However, as you know, we have some concerns regarding the Rule 19 proposal and outline them as follows:

I. Introduction

From 1913 until December 31, 2005, the State of West Virginia was a so-called "monopolistic" workers' compensation jurisdiction. That is, the sole provider of workers' compensation insurance during this 92 year period was the State of West Virginia. The State of West Virginia, through various agencies and ultimately through the West Virginia Workers' Compensation Commission ("WVWCC"), insured all workers' compensation risks. As of 2005, West Virginia was one (1) of only five (5) states that operated a state-run monopolistic workers' compensation system. This all changed when Governor Manchin and the Legislature enacted historic SB 1004. This landmark legislation ended the State of West Virginia's involvement as a writer of workers' compensation insurance and transferred that risk to the private insurance market.

Prior to SB 1004, the only alternative to purchasing workers' compensation insurance from the State of West Virginia was for an employer to self-insure its risks. This self-insurance option was first made available in the 1970's. The right of an employer to self-insure its workers' compensation risk has always been at

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the discretion of the State agency that regulates workers' compensation. Prior to 2006, such regulation was provided by the WVWCC. Beginning in 2006, the Office of the Insurance Commissioner has been the regulator that determines what companies may self-insure their risks.

II. Self-Insurance

The self-insurance market in West Virginia is currently occupied by about 120 employers, out of the approximate 36,000 employers in the State. However, the self-insurance market has traditionally represented about 20% of the State's payroll. This obviously demonstrates that only the State's larger employers have been permitted to self-insure.

As noted, the self-insurance market has always been regulated by the State of West Virginia. Generally, prior to 2003, self-insured employers were required to meet certain financial tests and were required to "secure" their future claim obligations. Such future claims could have included numerous permanent total disability ("PTD") awards which a self-insured employer was obligated to pay over the next 30+ years (i.e. until the PTD recipient and his/her dependent spouse dies). An overly simplified example of this situation would involve a self-insured employer that had three (3) PTD's on its books. In order to properly "secure" this financial obligation and make sure that the necessary money would be available to pay benefits for years to come, this self-insured employer would have obtained approximately $1,500,000 of surety (e.g., bonds or pledged lines of credit) since each PTD is valued at about $500,000. Evidence of this surety would have been filed with the WVWCC.

Unfortunately, prior to 1995, the WVWCC failed to insist on adequate security from the self-insured employer community. As a result, certain self-insured employers became grossly under-secured. To address this lack of security, the Legislature passed legislation currently found at West Virginia Code Section 23-2-9(f) that allowed the WVWCC to create "security pools" that could be used to secure the under-funded liabilities of the self-insured community. **Remarkably**, for the next 8 years, the WVWCC failed to implement this tool that had been given to it by the Legislature to secure the grossly under-funded liabilities of the self-insured community.

III. Rule 19 and Weirton

When Gregory A. Burton was appointed head of the WVWCC and was charged with fixing the workers' compensation system once and for all, he and his team immediately recognized the under-funded time-bomb that existed in the self-insurance community. For instance, it was quickly noted that in one (1) instance a single self-insured employer (Weirton Steel) represented approximately a **$70 Million Dollar** unfunded liability. In short, if Weirton Steel went bankrupt, then $70,000,000 worth of injured workers' claims would go unpaid by the self-insured employer over the course of several years and would be the responsibility of the other self-insured employers. This was because Weirton had never been required to provide sufficient security for its claims obligations. Unfortunately, the recognition of this risk was a foreshadowing of dire things to come.

In 2003, when Mr. Burton discovered that the security pool authority given to the WVWCC in 1995 had never been implemented, he directed his staff to work with the self-insured community and other interested parties to use the security pool authority to fashion a remedy to the under-secured self insured claim obligations. Rule 19 was the result of these efforts. The rule was drafted with input from the self insured community, was subject to public comment and a public hearing, and was passed unanimously by the WVWCC Board of Managers.

The cornerstone of Rule 19 is a balance between ensuring proper self-insured security for past and future claims obligations. The first part of this balance is provided by requiring self-insured employers to provide contributions to a Security Pool which provides security for previously incurred (i.e., past) claims liabilities, which security is called upon in the event of a self-insured employer's default. The second component of the balance is provided by requiring (in response to the self-insured community's insistence that security was extremely difficult to obtain), contributions to a Guaranty Pool to cover claims liabilities that would be incurred in the future (i.e., future losses) which contributions would be called upon in the case of bankruptcy or default by self-insured employers. It was agreed that the Guaranty Pool would be funded to a level of $30,000,000 through an initial 2 year assessment on paid indemnity and then, effective July 1, 2006, through an assessment of 5% of expected losses.

At about the time Rule 19 was passed, the worst fears were realized when Weirton Steel went bankrupt, and left the self-insured community liable for about $70,000,000 of future claim liabilities.

IV. Legislative bailout

At the time of the Weirton Steel bankruptcy, the Security Pool established to secure past claims liabilities like those of Weirton Steel had not had enough time to become properly funded. Consequently, shortly after the collapse and default of Weirton Steel, the Legislature appropriated $9,000,000 to the Security Pool (all of Weirton's claims predated the cut-off for the Guaranty Pool). This was an unprecedented commitment of state general revenue funds to aid the self insured community.

Sometime after Weirton Steel went bankrupt and defaulted on its workers' compensation obligations, another self-insured employer (Horizon Natural Resources) also filed for bankruptcy. Because Horizon was also partially under-secured for its self-insured liability, its bankruptcy caused even more liability to attach to the Security Pool.

Additionally, given the dates of some of the Horizon claims, liability also attached to the Guarantee Pool.

Nearly all the obligation of the self-insured community for the Weirton and Horizon debt was ultimately rolled into the Old Fund and cleared from the self insured's books. This was a $70,000,000+ forgiveness for the self insured community.

V. Current attempts to amend Rule 19

Notwithstanding the Legislature's bailout of the self insured community by contributing $9,000,000 to the Guaranty Pool and then placing the entire Weirton debt into the Old Fund and securing an alternative funding mechanism for it, the self insured community is still not satisfied. Now, the self-insured community is asking this Industrial Council to amend Rule 19 by 1) reducing the funding limit for the Guaranty Pool from $30,000,000 to $10,000,000; 2) changing the assessment methodology that should have gone into place on July 1, 2006; and 3) creating ambiguity as to whether only self-insured employers can be assessed for defaulting self-insured employer liabilities.

BrickStreet opposes these changes. First, the self-insured community participated in the drafting of Rule 19 and did not object to the language it now wants changed. Second, as the foregoing hopefully illustrates, it has been a long

struggle to get the self insured community adequately securitized and to otherwise adequately protect the citizens of West Virginia from having to bail out the self-insured community again sometime in the future. BrickStreet does not believe it would be wise for this Industrial Council to undo these efforts and expose the citizens of West Virginia and their tax dollars to another potential bail out of a bankrupt self-insured.

Thank you for permitting BrickStreet to comment on this matter and we are happy to respond to any inquiry you may have on this or any other issue.

Very truly yours,

/s/

T. J. Obrokta, Jr., Esq.
General Counsel

cc: Charles E. Bayless
Bill Dean
Walter C. Pellish
Dan Marshall
Richard Slater
Sarah Minear
Senator Brooks McCabe
Senator Sarah Minear
Speaker Robert S. Kiss
Delegate Kevin J. Craig

Georgia Cisco

From: Jennifer Meeks [jennifermeeks@wvdhhr.org]
Sent: Friday, October 27, 2006 2:07 PM
To: Ryan Sims
Subject: Draft comments to Rule 19

Attachments: WordPerfect 6.1

Comments to
roposed Rule 19.w..

I do not know when the comment period for this proposed rule ends, as it was not contained in the e-mail or on the agenda for the last Industrial Council meeting. However, given that the next Council meeting is the end of next week, I though I should send some draft comments.

The attached comments are my own, as they have not been through official DHHR review for approval to submit them formally as agency comments. I recognize that other interpretations may be given, different than those I have expressed in comments to 85-19-4.1, and I would be happy to discuss the comments with you, should you wish to do so.

Thank you for your consideration.

Jennifer J. Meeks
State Capitol Complex
Building 3, Room 201
Charleston, WV 25305
(304)558-6989

DRAFT Comments to Proposed Rule 19:
Self Insurance Risk Pools

85-19-3: In the introductory language, the word "and" in the second line should be replaced with a comma, to correct the statement stylistically. Also, for consistency and ease of reference, the terms found in section three should be arranged in alphabetical order.

85-19-3.1: It may be preferable, for clarity, to also list the other Code sections which address workers' compensation law in this State.

85-19-4.1: The statute provides that "the funds contained in the security pool shall be deposited into the old fund . . ." (W. Va. Code 23-2-9(i) (2005).) The proposal contained in this rule indicates the funds have not been and will not be deposited in the old fund, and that they cannot be used to address old fund claims generally. The proposal is in direct conflict with this statutory provision. While the self-insured employer community may prefer that the funds it had paid into the security pool be used only for claims payments to employees of self-insureds who have gone bankrupt or defaulted, the statute is not so restrictive. Indeed, it mandates the commingling of former security pool funds with other old fund monies, to address payment of all claims with date of injury or last exposure prior to July 1, 2005. The statutory provision begins with the workers' compensation commission's authority to create "a perpetual self-insurance security risk pool" used to "secure the payment of obligations of self-insured employers." However, "Effective upon termination of the commission, . . . the funds contained in the security pool **shall** be deposited in the old fund" without restricting use to obligations of self-insured employers. The legislature is elsewhere quite specific in restricting the use of funds, which indicates that here such restricted use was not intended. The insurance commissioner does not have discretionary authority under the statutory language to continue to segregate the security pool funds. An alternative interpretation would dictate that the old security pool funds which existed prior to July 1, 2005 must go into the "old fund" for general use, and newer premium taxes going into the security pool may be designated as going into the Insurance Commissioner's "Self-Insured Employer Guaranty Risk Pool" for payment of claims of incompetent self-insured employers, going forward. The difference is important, because the statute specifically states that "[t]he Old Fund and assets therein shall remain property of the state and shall not novate or otherwise transfer to the company."

85-19-4.2: The restricted use of Guaranty Pool monies is not necessary. The Insurance Commissioner may not recognize that she is unduly restricting her use of state funds.

85-19-6.1.b: This section uses the phrase "time frames as specified by the rules" as the deadline by which a security increase plan must be fulfilled. The term "time frames" has a very specific meaning in workers' compensation litigation before the Office of Judges. As an existing term of art in workers' compensation, a different phrase should probably be used in this regulation, to avoid confusion. Also, there is no citation to the "rules of the Insurance Commissioner" referenced here. Please include the citation.

85-19-6.1.c: This provision seems at odds with the following subsections. It states the Insurance Commissioner need not notify the Industrial Council of impending revocation of self-insured status, nor obtain the approval of the Industrial Council. However, the following provisions allow an employer to petition the Industrial Council for a six-month grace period. In addition, some explanation should be given before the regulation is finalized, as to why the petition should be considered in executive session. The petition is voted upon in an open meeting. It would be consistent to have consideration in a public meeting, as well. There is a public interest in the health of self-insureds, as injured citizens may be put at risk and State monies expended in their care upon default of self-insureds (notwithstanding the various pools). Lessons may be learned from prior experiences with bankrupt self-insureds.

85-19-6.3.: This provision appears to state that the Insurance Commissioner cannot require proof of the self-insured employer having secured payment ability sufficient to cover its anticipated claims expenses. It would seem that the Insurance Commissioner should require the same proof of security for liability as has always been required.

85-19-6.3.a: The last sentence of this provision should be deleted, in order for the Insurance Commissioner to retain discretion over how deteriorating financial condition may be determined. Alternatively, the citation to "the rule governing self-administration of self-insurance" should be given, and specifically citation to the particular provisions of that rule incorporated here. The incorporation raises such questions as: Is the referenced rule currently active? What are the current requirements or benchmarks in that rule? Are those benchmarks exhaustive, and are they sufficiently predictive of deteriorating condition? It is better to put the benchmarks in this rule, than to reference another rule.

85-19-8.1.c: It appears that the word "as" may have been unintentionally omitted. The allocation is "based upon the self-insured employer's claims reserves and financial strength, [as] a fair and equitable portion of the projected claims payment." There should be some inclusion of consideration of the number and severity of injuries by each employer's employees, or of the allocation being based upon the projected direct costs of its claims.

85-19-9.1.a: Only 2% of actual payments seems inadequate to quickly get this fund financially secure. Raising that percentage should be considered, particularly since newly self-insured employers are required to pay 5% (in 9.1.b). Also, given the language struck through in the example, the last sentence should calculate 2% of $1,000,000, or $20,000. Alternatively, the language struck through should be reinstated, and included in the text of the rule.

85-19-9.1.b: The percentage of assessment should be the same as the percentages elsewhere in this rule, for consistency and to avoid discriminatory treatment. In order to maximize financial security, it should probably be 5% for every self-insured employer. Why is this assessment (for those becoming self-insured on or after July 1, 2004) not subject to suspension, if the Insurance Commissioner determines the Guaranty Pool contains excessive funds? All "older" self-insureds would have their payments suspended, and the funds would presumably be unnecessary.

85-19-9.3: The word "propose" should be changed to "impose the same or," in order to preserve

the Insurance Commissioner's discretion to re-start the assessments, when the funds get below the required level of funding. There should not be a long, involved process. The resumption of collecting monies from self-insured employers should be automatic, particularly if the collection methodology is the same as is currently embodied in these rules. There should not be a new rule-making process required. Alternatively, there should be a requirement that the Insurance Commissioner amend this rule PRIOR to suspending payments under section 9.2. The process should be identical, whether the status of collections change to require or to omit the payments.

West Virginia Insurance Federation

West Virginia Insurance Federation
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December 7, 2006

BY HAND-DELIVERY
Timothy Murphy
Associate Counsel
Office of the WV Insurance Commissioner
1124 Smith Street
Charleston, WV 25301

RE: Comments to Proposed Administrative Rule
Title 85, Series 19
Self-Insurance Risk Pools

Dear Mr. Murphy:

These comments to the proposed amendments to 85 CSR 19 relating to Self Insurance Risk Pools are submitted on behalf of the West Virginia Insurance Federation ("WVIF"), the state trade association for property and casualty insurance companies doing business in West Virginia. Many of the WVIF's member companies currently write workers' compensation insurance in other states and have been monitoring closely the development of administrative rules by the Industrial Council and the Office of the Insurance Commissioner in order to assess whether West Virginia's workers' compensation market will be sufficiently secure, stable, and fair to private insurance companies to enable them to enter the private workers' compensation market in 2008.

As such, WVIF has three concerns that directly affect these considerations:

1. **Proposed Rule 9.2.** Currently, "[t]he 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." Proposed Rule 9.2, however, states that "ten million dollars ($10,000,000.00) is deemed to be an adequate level of funding to maintain the solvency of the Guaranty Pool." This is a reduction by sixty-six percent (66%).

The WVIF questions whether this will ensure the necessary stability of the self-insured employer community and the private workers' compensation system generally. Specifically, the WVIF is concerned that a single bankruptcy by a self-insured employer would devastate the fund, especially given that Weirton Steel's bankruptcy left approximately seventy million dollars ($70,000,000.00) in unfunded liability. The WVIF believes this reduction is overly aggressive and could create undue risk and instability in the Guaranty Pool.

2. **Revisions to Rule 9.1.** Section 9.1(a) and (b) currently provide that "[t]he self-insured employer would be assessed two percent (2%) of eight hundred thousand dollars ($800,000.00)" and that "[b]eginning 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, whichever is greater." (Underlining added.) The Proposed Rule

would delete the five percent assessment – which should have taken effect earlier this year – and, instead, maintain the two percent (2%) assessment.

The WVIF's concern, again, hinges upon its belief that this number is inadequate to ensure the continued financial stability of the Guaranty Pool and believes this reduction Pool is too aggressive.

3. **Proposed Section 9.3.** This Proposed Section permits the Insurance Commissioner to develop different methodologies for imposing assessments to maintain the solvency of the Pool, as follows:

> 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 his rule.

Although it should be clear that Rule 19 applies only to self-insured employers, the WVIF believes that Proposed Section 9.3 could be interpreted creatively to permit assessments of entities other than the intended self-insured employers. As a result, the WVIF suggests revising this Proposed Section to clarify that the Commissioner could assess only those self-insured employers participating in the Pool, as follows:

> The Insurance Commissioner shall propose different assessment methodologies and/or a different level of minimum funding of the Pool <u>by self-insured employers</u> whenever he or she determines that such a change or changes are necessary to maintain the solvency of the Pool; . . .

While the WVIF appreciates the interests of the self-insured employer community, the WVIF respectfully requests that those interests be balanced with the necessity of ensuring that the regulatory workers' compensation environment be attractive and conducive to competition by private carriers. The WVIF believes that the proposed revisions create some risk to private workers' compensation carriers, which ultimately and unintentionally could undermine the attractiveness of the private market in 2008.

Thank you for your consideration. Naturally, if you have any questions or need additional information of any kind, please feel free to contact me.

Very truly yours,

Jill C. Bentz

cc: The Honorable Jane L. Cline (by hand-delivery)
Mary Jane Pickens (by hand-delivery)
Ryan Sims (by hand-delivery)

PUBLIC HEARING

DECEMBER 7, 2006

WEST VIRGINIA INSURANCE COMMISSION
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

SELF-INSURANCE RISK POOLS
TITLE 85, SERIES 19

Transcript of the Public Hearing held on Thursday, December 7, 2006, at 3:00 p.m., Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia, related to the proposed Title 85, Series 19, Self-Insurance Risk Pools for the Workers' Compensation Industrial Council.

Industrial Council Members Present:

Bill Dean, Chairman
Dan A. Marshall
Walter C. Pellish (via telephone)
Rick Slater
Bill Kenny

MR. SIMS: Good afternoon members of the Industrial Council. We're here today for the public hearing portion of the amended version of Rule 19, which we presented to you during the, I believe it was the October meeting for initial filing. We have, in fact, filed the initial version of Rule 19. It's been out for public comment for about a month and it completes today with the public hearing. We've received two written comments on the current amendment to Rule 19.

Rule 19, of course, addresses the Self Insurance Security and Guaranty Risk Pools and how they

are managed, including the assessment methodologies. Of course, the substantive changes made to the rule surround the methodology for the assessments for the guaranty -- self-insured guaranty fund, which is the fund in place for payment of any obligations that self-insured employers, for whatever reason, cannot make or would not be able to make on or after July 1, 2004. And, again, the substantive changes deal with assessment methodologies.

And we're here today to provide the public an opportunity to comment on this amended rule and provide you an opportunity to listen to anybody that wants to comment on it.

CHAIRMAN DEAN: And there is one gentleman that would like to comment, Henry Bowen.

MR. BOWEN: Good afternoon, Mr. Dean and members of the Council. I'm Henry Bowen. I'm Executive Secretary of the West Virginia Self Insurers' Association and I have elected to ask for this opportunity of making public comments about the proposed changes to Rule 19.

This rule is found, of course, in Title 85, Series 19. It's commonly referred to as Rule 19, dealing with the self-insurance risk pools. It's one of two rules

in the Workers' Compensation system that apply exclusively to employers that are authorized to self-insure their Workers' Compensation liabilities in West Virginia.

The rule as written was initially promulgated by the Workers' Compensation Board of Managers in 2004 to implement required changes of Senate Bill 2013. It was adopted by the legislature and became effective on July 1, 2003.

Among those changes were mandatory self-administration for self-insurers, and that's reflected in the self-administration rule, Rule 18, and codification of the rules that had been previously adopted that dealt with the issue of self-insurance security.

Even though the rule speaks in terms of two pools, if you think in terms of the security pool, that is how all self-insured obligations are secured for liabilities with dates of injuries prior to July 1, 2004. That pool, if you will, contains primarily commercial surety instruments, letters of credit, bonds that had been issued for the benefit of the state of West Virginia to secure those self-insured liabilities. Parental guarantees are also a form of security that might be in

the security pool.

Cash payments that were made by the West Virginia Legislature in recognition of a significant unfunded liability at Weirton Steel and other cash that may have been transferred to it with respect to other failures for which the security was pooled.

The Guaranty Pool is the second of the two risk pools and it covers liabilities with dates of injuries on or after July 1, 2004. When that rule was initially promulgated, the Guaranty Pool was supposed to reflect a cash alternative pool to commercial surety instruments. If you I'm sure recall, after 911 the national market for certain types of surety instruments tightened considerably and already for years in West Virginia certain types of self-insured industries had difficulty cost effectively purchasing commercial products.

So the association made a recommendation to the Workers' Compensation Commission that a cash alternative pool similar to that utilized in the State of Ohio, one of the remaining monopoly states, be authorized as part of the general way to allow this combined pooling

of assets to secure self-insurance liabilities.

But historically self-insurance liabilities prior to the 2003 legislation were shared liabilities within all employers in Workers' Compensation. They were not joint and several. They were not segregated.

As a policy determination, former Workers' Compensation Board of Managers made a determination that it preferred self-insured liabilities to be exclusively the obligations of self-insured employers and that body segregated self-insurers and their liabilities from other losses in the insured community that were mandatory subscribers to the Workers' Compensation system.

The legislature then retroactively codified that as part of Senate Bill 213. The concept had already been developed at Workers' Compensation at the old division, which became in October 2003 the Workers' Compensation Commission, but it was quite clear at that point we had a segregated liability.

Not one employer that is insured in West Virginia or its carriers can be legally turned to to pay a dollar of self-insurance liability.

Now, with respect to the rule as it was adopted, please remember that when it was adopted in 2004 it was one year prior to the authorization where our systems become privatized, and that is critical because at the time of the adoption of Rule 19 and some of the decisions that were made at that time, the old Workers' Compensation Commission had the statutory responsibility to administer the Workers' Compensation system for all employers and to regulate over all employers, including self-insurance, all benefits, all required documentation that had to be filed and so forth. So the rule was drafted by individuals who were a part of that state regulatory agency.

Now, with respect to the cleanup, very little cleanup has taken place on Rule 19 in 2005. It simply reflected the recognition of the 2005 legislation and the conversion of the system to a privatized system, which became in effect on January 1, 2006.

Now, the rule had in it a funding mechanism which was extremely important to the Guaranty Fund and a legal obligation which was equally as important to the regulator of the self-insured community. First and

foremost, by June 30, 2006 all self-insurers had to be fully secured for all liabilities, and that meant in the security portion of it, if there had been an unsecured self-insurer identified in 2004 as being unsecured, that self-insured employer, working with the former Commission and currently with the Insurance Commission, had to establish a plan that was implemented to bring that self-insurer to a full security for all obligations with dates of injuries prior to July 1, 2004.

Subsequently, after that rule was adopted the Commission, in one of -- I think one of its real success stories for the former administration of the Workers' Compensation Commission, closed the gap, the rule was implemented and the self-insured community which had members that for years had been unsecured was, in fact, brought up to full security.

Please recall that the most significant division that the legislature then made was its determination that on a going forward basis the self-insured community remain solely responsible for self-insured default, although the regulator has statutory authority to seek legislative assistance if its necessary.

So even though the initial rule was being discussed at the time of the failure of Weirton Steel Corporation, had it not been for the intervention of the legislature, the self-insured community would have solely been responsible for paying that unfunded liability, but fortunately, the legislature saw that that was not fair and equitable and they intervened.

Now, as part of the funding of the initial Guaranty Fund, discussions that took place in 2004 identified a level of security for the cash pool that was felt to be required because of the estimated liabilities that self-insured carries. Those estimated liabilities did not factor in any of the significant reforms that were adopted by the legislature in 2003.

As we have all come to realize, all employer liabilities since the 2003 legislation and its enactment have seen a dramatic decrease in the cost of providing benefits for injuries in West Virginia. Not only are claims down in the entire system, but the cost of those claims are down as well.

So as a consequence, we went to the Insurance Commissioner and urged her to reconsider the

current language and the current requirement that beginning in fiscal year 2007, last July 1, that the funding in the current rule requires funding at a level of 5 percent of the estimated liabilities with the corpus still targeted to be $30 million.

Now, there are two reasons we feel that the proposal that the Commissioner agreed to is fair and reasonable.

First and foremost is the impact of the 2003 legislation and the subsequent decisions that are commonly referred to as the Wampler decisions in 2004 where the Supreme Court upheld the retroactive application of the 2003 reforms to orders entered on or after July 1, 2003.

That was key not only to the old Workers' Compensation Commission and eliminated approximately a billion dollars of liability that the Workers' Compensation system would have had to absorb had the Supreme Court not allowed the legislature to apply the 2003 reforms in the manner in which they were ultimately applied.

Secondly, the Insurance Commissioner,

exercising her discretion as the regulator -- the transferred regulation of self-insurance went to her on January 1 -- her self-insurance unit continues to administer both Rule 18 and Rule 19, and even though I might personally disagree with their decision, their policy and practice has been to apply a financial test to self-insurers as part of the annual review of the financial capability of the self-insurer that's required under the West Virginia law in Chapter 23, Article 2, Section 9 of the law, and that requires the annual review of the self-insurer. And as part of that review, the Insurance Commission applies a financial test that's proprietary to it to the financial information supplied by the self-insurer. And if it determines that the financial test score is not what it believes is sufficient, then it is requiring additional commercial surety or security to be posted by that self-insurer to meet its prospective Guaranty Pool obligations.

So if you'll follow and allow me to suggest an easy chart or graph.

We have security obligations that are real security instruments covering dates of injuries July 1,

2004 -- before that date -- excuse me -- June 30, 2004 and before. July 1, 2004 and after that date we have a pool of cash and you also have security instruments.

Now, what's the difference? Security is siloed security. The surety instruments that are commercially obtainable are for the benefit of the Insurance Commission but they're only issued to protect against default from the individual self-insurer that purchases it.

The cash pool, if you will, is a joint and several cash pool. It is not siloed. And if the agency needs the money to pay for self-insured defaults, those obligations can be met by taking the pool proceeds, and if they are determined to be inadequate, the Insurance Commission has clear regulatory and statutory authorization to assess self-insurers for that. And, again, it's a stand-alone self-insured obligation absent any legislative intervention or alternative payments.

So the proposed rule would lower the corpus to $10 million. And the reason we feel that it is completely adequate, the $10 million, because the financially weak self-insurers are the only ones that pose

probability of default and they are fully secured with security fund surety, they are fully secured by surety obligations being paid in addition -- or posted in addition to Guaranty Fund payments. In effect, they're paying twice for that prospective security. If a financially healthy self-insurer poses no risk, it is allowed to contribute cash into the fund.

Now, if you recall, as I remarked a moment ago, the 2003 legislation dramatically altered the self-insured liabilities, as they altered the liabilities of the entire Workers' Compensation system. That law has been affirmed in Court and unless the legislature changes it on a going forward basis, we have no reason to anticipate that we will find ourselves in a situation where that small number of West Virginia employers, approximately 120, including five cities, will find themselves dramatically unsecured, imposing a risk to one another.

So we have siloed security instruments that are commercially issued available to cover certain discreet employers who purchase them. We have a cash pool that's available whenever the agency needs it and we have

other security posted.

So is the $30 million necessary now? In our view, it is not. Now, we understand and quite honestly I understand why as a matter of public policy it would be a concern. We all want BrickStreet to be successful. We don't consider, the self-insured community, a small number of authorized self-insurers certainly don't feel that are in competition with BrickStreet.

As a matter of public policy, you know, if you retain the security corpus of the Guaranty Fund at a high level that's unnecessary, it just drives up cost of doing business in West Virginia.

And the Office of the Insurance Commissioner was good enough to meet with our association and its representatives and disclose to us what we feared all along, was that if the current rule were implemented, it would require an increase this fiscal year of approximately $10 million into the pool.

Now, if there was a public policy justification for saddling these self-insurers with an additional $10 million, then you'll make that determination, but I submit to you there is no

justification for it, nor is accepting the Insurance Commission's reasoned approach to keeping a pool corpus at a maintained level that would be perfectly adequate should cause no angst for anyone. There is absolutely no reason for unnecessary fearfulness that the self-insured community, which is our state's largest employers, five cities, our largest retailers, our largest hospitals, our largest utilities, they're obviously not all going to fail at one time. In fact, some of them cannot possibly fail just because of the nature of their very organizations. I doubt seriously anybody would expect American Electric Power or any of those other utilities to have a catastrophic failure.

So in summary, there are a number of other technical issues that we have concerns about that we would invite you to assess. Again, the rule was written at a time when the state had every interest in maintaining firm regulatory control.

Self-insurance is now just one of several products that are available for employers to meet their statutory obligations. The majority of those obligations will be met through the purchase of commercial insurance

for Workers' Compensation. Some employers will continue to look at this as an opportunity to direct pay benefits and avoid certain obligations and costs and will look and see that self-insuring is financially worth the risk of handling that.

And all that we're asking in the regulatory oversight is that it be fair and equitable, that the pools that have been established be funded but be funded in a fair and equitable way. We respectfully suggest that this proposed rule meets those concerns and we hope when the rule is ultimately presented to you, that you will act affirmatively to implement those provisions of it.

The last thing that I would like to suggest is more in the nature of cleanup. The Insurance Commission doesn't have a great deal of experience in dealing with the issue of Workers' Compensation default, but the statutory default scheme has always had a bifurcated component to it. An employer, if it fails to do something, like file a report, becomes delinquent first, then the agency was required to give notice of delinquency. And if the notice of delinquency did not lead to a cure of that delinquency, then employer default

had resulted.

That's how it happened when the state was not the regulator of the Workers' Compensation system. If you didn't file a report, you were in trouble, and if you didn't cure that report, you could then get the loss of your employer immunity.

Default is a term of art. It has significance legally. It means you have no exclusive remedy. It means you have no immunity from suit, civil immunity.

This rule still has in it a reference to a default mechanism that if a self-insurer is not fully secured, then it is in default.

We would simply ask that you consider having this section rewritten. Rule 18 has an involuntary revocation proceeding, under 85-18, Section 19 of that rule. We suggest that the Insurance Commission doesn't need a separate default revocation proceeding for self-insurance risk pools. It would make sense just to use the one in Rule 18.

This does have a automatic default with the authority in the rule of giving you all an opportunity

to serve as an appellate body. I don't know if that's something you're interested in or not, but it's a carryover provision from the old rule. It's a carryover provision from the Workers' Compensation Commission. It's a carryover provision from the prior compensation program's Performance Council.

In terms of that council and its role in oversight of the Commission, you all are in a totally different role than that body was, and the Insurance Commission isn't the Workers' Compensation Commission, and this is only one of multiple insurance disciplines they have to administer.

We would urge that you consider looking at that section dealing with your opportunity to grant a stay and an automatic revocation and simply agree that it should be deleted and references made to the other rule and so we could have consistent -- You have two ways of dealing with that. You can revoke a self-insurer if they abuse the privilege of self-insuring or you can simply not renew them.

The agency has plenty of regulatory sticks available if it chooses to club a self-insurer for

noncompliance with the law.

All we're asking is a scheme so that self-insured employers will be treated the same way as insurance companies that fail to do something that's in compliance or required by West Virginia law as well. I mean, we've simply got to move away from this mentality that we have a monopoly Workers' Compensation system run by a state agency and that we're going to accept out of their responsibility self-insurance and come to the recognition that we're on our way to a full open market privatized Workers' Compensation system and there's no real regulatory justification for treating 112 employers or 120 employers one way and treating the insurance industry in another way.

Thank you very much for the opportunity. I'd be happy to answer any questions if there are any.

CHAIRMAN DEAN: Do you have any questions?

MR. MARSHALL: Mr. Pellish, do you have a question or anything?

MR. PELLISH: No. No questions. It was a good comment.

CHAIRMAN DEAN: Mr. Slater, do you have any

questions?

MR. SLATER: No.

CHAIRMAN DEAN: Would anybody else like to speak on Title 85, Series 19?

MR. WHITE: Thank you, Mr. Chairman. Steve White with the ACT Foundation. I'll be very brief.

I don't claim to be an expert on self-insurance, but there's one area I'd just like to focus here on. And Mr. Bowen spent some time on it, but the guaranty pool going from $30 million to $10 million troubles me.

I'll give you two words why, "Weirton Steel." Maybe I should add another phrase, "$70 million."

When Weirton Steel defaulted it was the taxpayers who ended up paying the $70 million because there was enough guaranty in place.

Well, I think with more of a track record, Mr. Bowen's comment would be very appropriate. I just don't think we've got the track record yet. I don't think we've -- I don't have the comfort level in place of the mechanisms to protect the public from defaults that might occur in the self-insured industry.

I'd be happy to share with you historically some of the defaults that we faced beyond Weirton Steel, which are quite significant. So my suggestion would be to restore the $30 million guaranty pool, review it at a later date when we're all more comfortable with lowering it that amount.

Thank you very much.

CHAIRMAN DEAN: Would anybody else like to speak?

MS. BENSE: Hi. My name is Jill Bense and I am president of the West Virginia Insurance Federation. The West Virginia Insurance Federation is the trade association for property and casualty insurance companies doing business in West Virginia. And in that role I represent member companies who are really, in my view, uniquely situated as companies who currently write Workers' Compensation outside of West Virginia and who are looking at the development of our private Workers' Compensation system to see whether or not it's a sufficiently attractive market, meaning, will it be stable, will it be secure, will it be fair to insurance companies who are thinking about coming into West Virginia

and writing Workers' Compensation.

So when we talk about privatizing the Workers' Compensation market in 2008, I represent the companies who would permit it to be fully privatized. And these companies have been watching closely and monitoring this Council's activities as you all have considered the regulatory framework under which the companies would write Workers' Compensation.

So this has been the first rule where our -- the Federation's member companies have said, "Whoa, stop, hold on. We're very interested in what these self-insurance risk pools" -- "the regulations relating to this issue, what the implications of that would be on the private writers of Workers' Comp.

And we really -- we did file written comments earlier this afternoon, so at some point I'm certain that you would be privy to those, but just to really highlight a few of our concerns, and I'll echo what Mr. White just said, too, which is the $30 million -- the reduction in the $30 million to the $10 million is very concerning for companies. We also -- in fact, I indicated in the written comments on behalf of the Federation

earlier today that it is concerning. We think it's premature and at this point overly aggressive.

Weirton Steel, you know, I'll say that, too. I mean, Weirton Steel was a $70 million bankruptcy that forced the state to turn to the private business community to fund that liability. That's very concerning.

From our perspective, too, again, the private insurance market perspective, you know, we're taking essentially $20 million out of the written premium that's available, and we want, as an industry, for there to be premium dollars to write. We want I think as West Virginians to say to companies who are looking at West Virginia in the Workers' Comp market, you know, "Come here, write Workers' Comp, we will make this an attractive and competitive market."

That benefits them, of course, but importantly, I think Mr. Bowen said earlier for the self-insured employer community, you know, this is a cost of doing business. Well, arguably, Workers' Compensation insurance is a cost of doing business for every single business in this state. Insurance is a cost of doing business for every business doing business in this state.

We want it to be a competitive, thriving market. Why? So companies can compete against each other for competitive rate, and that benefits all of our businesses and, in turn, in my view, we, as West Virginians.

Along those same lines, there's a proposed revision to Rule 9.1 and Mr. Bowen touched on it as well. Currently, the self-insured employer would be assessed two percent of $800,000.00, and beginning fiscal year 2007, which actually should have started July 1 of 2006 and I don't think it did, which that is a past date requirement, but annual assessments shall be based on five percent and there's a proposal to strike that and maintain it at the two percent level.

Again, the Insurance Federation's concern is the same as it is with the reduction in the 30 to $10 million level to maintain the fund. And specifically, at this point we just think it's overly aggressive and it's concerning to us that the fund would in some way, in any way be insecure, unstable in some way.

We also, in the written comments, provided a suggestion for just really a technical cleanup. There is

a proposed section 9.3 that permits the Insurance Commissioner to develop different methodologies for assessing -- for imposing assessments to fund the pool whenever he or she deems it necessary. And while I think it's probably very clear that that assessment would only be, obviously, on the self-insured employer community, I think past practice tells us in dealing with some of these liabilities that oftentimes there has been a turning to the private community to help fund these liabilities, and we would suggest a clarification of that, and I actually, in the written comments, suggested such language.

So I'll rest on my written comments and be more than happy to answer any questions.

CHAIRMAN DEAN: Any questions, Mr. Marshall?

MR. MARSHALL: No, Mr. Chairman.

CHAIRMAN DEAN: Mr. Pellish, do you have any questions?

MR. PELLISH: No questions.

CHAIRMAN DEAN: Mr. Slater?

MR. SLATER: I do have questions, I'm just not sure they're directed to Jill. I'd like to -- If

we're going to Jill, I have no questions for her.

CHAIRMAN DEAN: No questions. Thank you.

MS. BENSE: Thank you.

MR. SLATER: I was going to ask Bill. Bill's gone. Ryan, can you address the Insurance Commission's view on all this and how we kind of got to -- well, there's all kind of questions. Let me just start with that one first.

MR. SIMS: I guess what I'll say is -- I can't tell if this is picking me up -- but really, you know, I think from a legal perspective, we've drafted the rule as we were directed to by agency leadership. It was the belief of the agency leadership that this methodology for the assessment amount -- the amount needed to be placed in the Guaranty Fund at this time called for the methodology that's reflected in this amended rule, which is reducing the percentage and looking towards the indemnity payments rather than the previous language or the language of the current rule, which anticipates all liabilities for the year and, as well, reducing the target amount from $30 million to $10 million.

As far as why, I think those are financial

actuarial and other related issues that I'm really not qualified to tell you. I would maybe defer to Melinda Kiss on that or perhaps even Joyce Shepherd to maybe fill you in a little bit more on that. But to be honest with you, I didn't -- I wasn't -- It's really a policy call, I guess is what I'm trying to tell you, based on financial and, you know, those type of related issues. And, again, I don't feel like I'm the one maybe to address that.

MS. KISS: Good afternoon. I can tell you some of the things, but I'm going to make an apology. I'm deep in the throes of preparing not one but two sets of financial statements, the final ever for the Workers' Compensation Commission and the first ever for the offices of the Insurance Commission. And I actually haven't seen other people for about a month.

So I'm going to try to back up and recall where we were when we came in here in October with our original proposal of Rule 19.

Exactly, I guess to go to the immediate comment on the 10 to the 30, I think Mr. Kenny is back and he can discuss that.

What I can tell you is, you know, basically,

what we were trying to come up with was, and when we presented this rule we said, "We have to do some technical cleanup and we have been working with the self-insureds and the question becomes, do we truly need to make this assessment at this point?" Going back to Mr. Bowen's point, there is one source of revenue for the guaranty pool, and that is the self-insured community.

Certainly deferring to Ms. Bense, if it's at all ambiguous, there is one source of revenue. So in working with them, the policy decision is do we need to take this money out this rapidly. And the main problem from the actuarial perspective, the main problem with the current Rule 19 doesn't deal with two percent versus five percent and it doesn't deal with 10 million versus 30 million. What is not workable in the current rule is five percent of the projected aggregate liabilities of the self-insured community, because if we kept the current version of Rule 19 in place and did not make some alteration or accommodation, we would achieve that $30 million funding level within a two-year period. That goes from -- I guess we've been assessing since 2004. We have about $2 million, 2.8. Okay. We have 2.8 and that's what

we have assessed thus far at two percent of indemnity.

The other thing, and I think the one thing to keep in mind and that is markedly different and I think that's where we need to focus and where this Council may want to focus is what's different now, you know. You've heard some comments about Weirton and how you got there. If Weirton had had proper security in place, we would not have been -- the self-insured community at large would not have been on the hook and certainly the legislature would not have been asked to try to help them come up with what was necessary.

Every time we come up here and you all will recall in very recent history we faced a difficult decision and some criticism for enforcing that all self-insured employers, if they fail the financial test, be required to post prospective. The Insurance Commissioner had stood firm in that they will post prospective and be indemnified. And I'm as surprised as anyone who has had to work with self-insurance for a long that they're all fully collateralized.

So I think the questions you have to ask are -- you know, I'm holding security for those people that,

based on financial review, we believe are not as strong as we would like them to be, so we've already made them give us security out there that we're holding for the use and benefit of that pool, so we don't even have to assess the self-insured community.

The question is do we want to just assess the self-insured community somewhat arbitrarily, as a matter of course, to get money that we may or may not need or do we wait until we actually have a problem and then we're going to assess them. So it's your all's call. It is very much a policy call.

Does that help at all?

MR. SLATER: Yes, some.

MS. KISS: Do I get to sit down?

CHAIRMAN DEAN: Yes. Thank you.

MR. SLATER: Bill, we started with you and you weren't here. And Ryan took a shot and then Ms. Kiss took a shot and now we're going to get back to you.

The 30 million to the 10 million, certain this wasn't an arbitrary figure that was arrived at. I'm sure the Insurance Commission and the self-insurance community went through some pretty strong analyticals and

actuarial computations to get there.

Can you elaborate on how the proposed rule has been -- has went from 30 million to 10 million since the initial adoption, I guess?

MR. KENNY: The 30 million was not our number, that was what was in the old -- in the legislation prior to us getting involved. So we really looked at the 30 million and looked at the adequacy and what we felt we needed. Thirty million is a huge amount of money, a huge chunk from what's in there now. I think Melinda told you there was a little over $2 million in that fund now. So that's a very large increase.

And when we looked at the securitization requirements now where all companies essentially have to be a hundred percent secured, we could not rationalize in our mind why we would need such a large sum of money in a pool. So we felt there was no real reason to assess such a hardship number as 30 million.

So the $10 million is the number that we have looked at that we think is actuarially sound and secure enough to secure that pool, given the fact that all self-insureds now have to be a hundred percent

collateralized and that was not the case in Weirton and that's what really caused that issue.

So as long as we require the securitization on an individual basis, one could argue there's no need for a pool at all. We would argue that we should have some amount in the pool and 10 million would be sufficient.

MS. KISS: Mr. Kenny, Angie reminds me where 10 million comes from. Ten million is more than adequate to meet one year's cash payout even in the event of the default of our largest self-insured employer, meaning you'd have plenty of time to come in here and pass the assessment and get everybody assessed if they need to be.

So that's why we wanted to make certain we had cash on hand so that the state could exercise its responsibilities, which is to immediately step in in the event of self-insured default and make sure the claimants get paid and that everybody gets everything that is supposed to be coming to them. And then you all would have to pass -- you know, get the assessments worked out and that gives you enough cash.

The $30 million, I couldn't remember because

I was over at Comp when they came up with $30 million. Where did that come from? And it took me quite a while and I finally remembered and found it came from a financial model that was built over there, and basically what it was keying off of was a routine accounting recognition and actual booking of potential self-insured loss, just like you will do a bad debt allowance. You would just look at the aggregate liabilities of self-insureds and routinely book them to the actual financials.

We are in the throes of working with our auditors. We will not be doing that as a matter of course. It isn't appropriate to do so. FASB 5 -- and I can really bore you all now -- but it tells you the criteria for recognizing losses on your financial statements and clearly it's got to be profitable. You can't really say that. So we will not be doing that as a matter of course on our financials. So that's where that 30 originally comes from. Thank you.

MR. SLATER: Back to 9.1(b), what was alluded to by several, that the five percent is currently in place and was effective July 1st of '06 but isn't being adhered to, is that a factual statement? Does anyone

know? 9.1(b). Where we talk about beginning fiscal year 2007 --

MS. KISS: Oh, no, no.

MR. SLATER: It's in the law but it's not being followed; is that what you're saying?

MS. KISS: As a general rule.

MR. SLATER: And does anyone know why it's not being followed?

MS. KISS: I guess I can offer I guess my take on that. In looking at that and trying to get ready for the rule change, we did a variety of calculations. The issue with the five percent, everybody can do five percent but on how are you going to assess and how are you going to calculate the liability, many things have also changed since the original passage of Rule 19 and one of those things is self-administration for self-insured employers.

When Rule 19 and 18 were originally written, the Workers' Compensation Division, slash, Commission was the administrator of self-insured claims. Heretofore they had perfect data for indemnity claims. Some self-insured self-administered their medical already. But if self-

insured was hanged and indemnity claimed, they received a pay order from the state telling it exactly how much to pay and who had to pay it. So we had within our computer system the data surrounding all indemnity benefits.

With self-administration, we no longer have that. The state didn't -- Workers' Comp didn't even before the split where the Insurance Commission is regulating self-insured and BrickStreet is selling insurance. What we do have is a transmission data called EDI. And I will let Angie -- I'm just dying to get her up anyway -- talk at length about EDI.

But there are significant differences in that and exactly the information you have by which to calculate reserves. I went through a rather extensive gyration of how you could calculate or approximate the liabilities in the future because you have to approximate future cost using NCCI loss columns and all that, and it is complex. We would have to capture NCCI payroll data in order to do that from all self-insureds by their employee classification. That's another switch to them. That's not information that we have asked for administratively and it is somewhat complex and it requires a lot of

change.

And I have got all this together and presented it to Mr. Kenny and the Commissioner like that. It's complex. And it is, and it was on very short notice. In reality, we don't have the data. I do not have within my shop right now the data to accurately predict exactly what it is we should be charging them.

So to do that five percent, we decided that the cleaner thing and more reliable and more consistent thing should still be based on indemnity. Whether that percentage ends up being two or five or some other percentage, I think is at the discretion of this Council, and I'll let other people weigh in on that. But to us, from the administrative, the accounting, the actuarial perspective in getting payments, we have those, we can get those. They're easier to audit. They're easier to verify because they're all in the system.

MR. SLATER: I guess with setting this up for overall competition January 1st of 2008, I'd be interested to hear from any member that's out there, if there are any, from any of the insurance companies, private, that would be interested in entertaining that

January 1st entrance date as to their feelings. I know we heard from Ms. Bense. If there are any separate companies that would like to speak, now would be a good time.

Okay. Hearing none, seeing none.

Well, I guess I'll just theorize here for a moment. It seems to me this whole thing is a bit scattered, and I don't see a great basis here of analysis or I guess proof to me thus far -- and maybe I just haven't read all the right stuff -- but to take something from 30 million down to 10 million this close to the process seems to be a bit much to me. I'm not sure 10 million is the number, but I'm also not sure it's not 15 million or 20 million.

So maybe there's some happy medium in all of this. It further troubles me that we have a law and we have rules that have been effectuated and in place and we have members of the self-insurance community apparently not following that. That also pains me as a member of this Council that for some reason we have things not being followed and that just doesn't quite seem right to me.

So for all those reasons, I am still in a

bit of a lurch on that stuff and I've yet to be proven by anyone that 10 million is a good number or 30 million is a good number. I mean, the fact that we have BrickStreet opposing this when they really stand to lose the most with all the other competition coming into the market here on some of this stuff. I mean, they're not really opposing other competition as they come in. And this is going to kind of affect everyone here.

So again, Mr. Chairman, I am going to turn it back over to you with any additional questions or comments, but at this point I don't feel comfortable with this rule and, again, still open public comment period and I could be persuaded, but at this point I'm not.

CHAIRMAN DEAN: Mr. Pellish, do you have any comments you'd like to make?

MR. PELLISH: I guess I am comfortable with the change, and if I understand the procedures that have been established and what we are now asking the self-insured, the vigorous process that we put them through and the insistence that we've placed upon them to make sure that they are capable of fulfilling requirements make me comfortable that the $30 million can be brought down. So

I think I'm comfortable with the Commissioner's proposed changes.

CHAIRMAN DEAN: Very good. Mr. Marshall, do you have anything?

MR. MARSHALL: Let me put this -- in the form of your question, the surety that we require of a self-insured is really based, is it not, on your financial analysis, with particular emphasis on the financial strength at the time of the applicant? In other words, the company that's investment grade is going to have a lesser surety requirement than a company of lesser financial strength. Is that correct?

MS. KISS: The surety requirements for the guaranty pool are only -- there is only a surety requirement if they've not passed our financial tests.

MR. MARSHALL: Okay. So given that, there's no other way to take into account a situation where a company's financial condition substantially deteriorates, let's say to the point of bankruptcy, other than the surety or the guaranty fund? And we've seen in recent years an awfully rapid deterioration in companies' financial conditions.

So it seems to me prudent that we would have a very strong fund here. And looking to Mr. Slater's comments, I don't know whether the right number is 10 million or 30 million or somewhere in between, but at this point in time, I'm just not comfortable with it and I'd like to see some more data and some more analysis that would give us -- give me and perhaps the other members some comfort that we're not going to be confronted in the future with adverse affects of some large company that looks real healthy now, as Weirton Steel did at one time, deteriorating rapidly and leaving us holding the bag, basically.

MR. BOWEN: May I comment, sir? First of all, Mr. Slater made a comment that self-insurers are not compliant with the law. That is inaccurate. The Insurance Commission has not implemented the new provisions. That is their regulatory decision. We continue to pay everything we're asked to pay.

Secondly, Mr. Marshall, Weirton Steel was never financially capable of meeting its obligations. Government allowed it to self-insure. Governor Rockefeller specifically allowed it to be an employee

ESOP. It was always unsecured. It was known to government for fourteen years. It was dramatically unsecured, and if anybody has heard anything today, the legislature in 2003 made it very clear that the Insurance Federation, that BrickStreet, Liberty Mutual, Travelers St. Paul and all of their insurers don't pay a dollar if there's a self-insured default.

Now, if we have multiple defaults and we can't meet them through the surety obligations, the cash pool, then I suggest our state is in big trouble anyway, but I think you're misunderstanding the whole thing.

The 2005 legislation dramatically increased the taxes on insured companies and the coal industry and others to pay for the unfunded liability that's in the old fund. And arbitrarily saying 30 million makes you feel better means that that's going to be twenty some million dollars more to do business in West Virginia that people are saying, "Why do we have to do it?" Please don't make a decision based on Weirton Steel because that's been addressed legislatively. You've got plenty of good public policy things to balance. And if you choose to keep the current rule, that's fine, but if you change simply

because of concern of another Weirton, it can't happen.

The Insurance Commissioner reviews everybody annually. They're on top of it. This agency will not allow a Weirton Steel to occur again. It cannot legally happen unless something false or criminally occurs. I mean, it just can't happen and it's extremely expensive.

MR. SLATER: Mr. Dean, would you ask Mr. Bowen if he's going to address the Council if he could come to the podium?

MR. BOWEN: I'm sorry.

CHAIRMAN DEAN: Anything else? And if you do have anything else, please come to the podium.

MR. BOWEN: No. I'm done. Thank you.

MR. MARSHALL: I would just respond to Mr. Bowen that Weirton Steel aside, we've seen some pretty large companies in the last five years go down the tubes very rapidly, and I'm thinking Enron and MCI, or whatever it was called before that. And I don't know that -- I'm not married or committed to $30 million, but I am not sure at this point that $10 million is the right number and I think this Council needs to be very careful in its contemplation of what it's going to do with this rule.

MR. SIMS: I was just coming up to -- as a point of clarification, just because it's been discussed on the record, the Insurance Commission hasn't been following the law, I think that's completely inaccurate.

First of all, I'll back what Mr. Bowen said. The self-insured community, as far as I know, has been compliant with everything we've told them to pay. What the rule requires is on an annual basis for them to pay the current methodology. If, in fact, this Industrial Council does not believe this rule is proper, we will enforce the current methodologies as they are stated in the rule. I don't believe that the Insurance Commission has not followed the law, so to speak and I just wanted to get that clear on the record.

Secondly, I think our decision was a policy decision. We have no clear emergency rule making provisions, but we came to the decision that -- and this is my general understanding -- that the current assessment methodologies imposed an undue hardship on the self-insured community and would be contrary to the business interests of this state. As it's been noted, some of the largest employers in the community are self -- in the state are

self-insured employers; thus, we believe this is the closest thing we can get to an emergency rule making whereas we believe we would change the methodology to reflect something more reasonable based on the work that our self-insured department has done that would impose more reasonable assessments and more reasonable funding levels of the Guaranty Fund.

And again I'll reiterate, we intend to absolutely follow this rule as it reads now if we don't get this amendment, and the self-insured community will be fully assessed pursuant to the current methodology if this Council chooses not to make a change or some other type of change to the methodology as it's currently stated in the rule. And I just wanted to clear that for the record. We haven't, in my opinion, at all not followed the law.

MR. SLATER: Let me -- For the record, I wasn't accusing anyone of not following the law. I had asked the question pursuant to 9.1(b), that this was to go in place I guess from the initial adoption July 1st, 2006 and I asked the query if this had been followed effective July 1st to the current, and all the answers were, no, it wasn't being followed. So I just used that as my --

MR. SIMS: And, again, I think we're on the same page. As a point of clarification, the idea of agency leadership was to try to get this rule through on expedited basis. We have to take three meetings to get any rule through. We don't have an emergency provision. If we had an emergency rule making provision, we probably would have at least considered using it, but I think the idea was, if this comes through, we'll do the new methodology; if it doesn't go through, the self-insured community will deal with that with the methodology that is currently under the rule. If there's no changes, they'll have to, you know, pay up everything they had owed from the time this new methodology went into place.

MR. MARSHALL: Query, Ryan, while you're up there. If the existing methodology is in place for this year, would this Council have the authority for subsequent years to adjust it?

MR. SIMS: Well, I think there's always ability of this Council to, well, working with the Insurance Commission --

MR. MARSHALL: I mean, we can change it, can we not? We can let it stand as it is and amend it for

subsequent years, can we not, from the standpoint of our powers?

MR. SIMS: One of many options.

MR. KENNY: Would you be referring to increasing or decreasing the size of the pool?

MR. MARSHALL: The proposal that's before us, which would change it from the 30 million to the 10 million and the, I guess, five percent to two percent.

MR. SIMS: Well, a couple of changes were made, you know, moving from 30 million as the target to consider --

MR. MARSHALL: Right.

MR. SIMS: -- the pool funded fully to 10 million and then the other changes the actual methodology. Currently it contemplates a percentage of the total claims liabilities. The previous methodology in effect until the recent change was five percent of the indemnity payments, and I think Ms. Kiss --

MR. MARSHALL: What you alluded to, Melinda, a while ago, right?

MS. KISS: One thing I think we need to keep in mind, that $30 million is not a ceiling, it's a floor.

And if you've got a current copy of rule, I'll defer to Mr. Sims to read that, it's $30 million or five percent of the aggregate liabilities, whichever is greater. I can assure you that five percent of the aggregate liabilities is going to be much greater than 30 million. That is -- The way it's currently written is five percent of the aggregate liabilities of all self-insureds, even extremely solvent ones. There is no regard in the current provision in the rule to do any -- to look at any other financial reviews or to assess the financial viability and any potential risk from that community. It's just a flat out five percent.

So what you're actually saying is if we get a large -- a lot of large, really solvent, really healthy employers in here, in the self-insured community, the pool keeps going up. Is there any greater risk? No.

So I think irregardless of what happens, it's going to have to be rethought and maybe fine-tuned. And I tend to agree there are always compromises to be sought, but I would not have certainly worked as much as I had or neither would any of the other staff if we thought the current rule was a workable version. As is, it's going to have to be adjusted somewhat.

MR. SLATER: And I guess that would be the hope at least of this Commission member, that with the very divergent sides of this, then I would like to see all these groups kind of come together and come up with some workable compromise that serves certainly the interest of everyone here. And that's kind of easy to say, but, again, I guess I'm still kind of at this point of, there's a big discrepancy there and I can't really -- and I'm just kind of a dumb accountant and I can't really quite get my arms around it very much and I'm just usually not someone that just kind of will vote to do something without understanding it. And maybe I just don't understand it, but no one has been able to get me from 30 to 10 and no one can get me from 30 to 29 or 30 to 28 and I need to get there. And I don't know. I'll leave it up to the other members of the Commission to respond to that.

So I think all this is workable and it can be worked out. Ryan, I would ask you, I mean, can we -- do we have the mechanism to allow for additional time for discussions of compromise amongst the groups and the Insurance Commission?

MR. SIMS: Absolutely.

CHAIRMAN DEAN: Sir, do you have a comment?

MR. OBROKTA: Thank you. My name is T.J. Obrokta. I'm the general counsel at BrickStreet. I was not going to make any remarks today but I thought I'd just share a couple of points with the Industrial Council that you may find to be of interest or you may find to be relevant as you consider these suggested changes to Rule 19.

I've heard some discussion today regarding security and prospective security. I just wanted to offer up one point that you may find to be of interest. As someone who lived through the drafting of Rule 19 and someone who lived through Weirton, I'll share this with you.

Weirton did have about $70 million of liability on the books that ultimately got transferred to the state. They also had $10 million of security. Their security was with a company called Frontier. Frontier went bankrupt before we could collect on that security. So I would suggest that security is not the sole solution to this problem.

The second thing I would suggest is that, as

I understand Mr. Bowen's comments, he says that basically everything changed in 2003 and we put the Workers' Comp -- all the employers in the state that buy insurance, at that point through the state, now buy it from BrickStreet, if we put them in one bucket and we put the self-insured companies in another bucket, what he said was neither would be responsible for the other's debts. That's essentially what he's saying. If that's the case, why in 2004 did that bucket of self-insureds go to the legislature and secure $9 million to help them with their debts, why in 2005 did we take the Weirton obligations and the Horizon bankrupt companies and role it into the old fund and we're now paying those debts out of the old fund? Who pays for the old fund? Mostly all the other companies in this state, law firms, accounting firms, et cetera, who pay ten percent more on their premiums to fund the old fund.

So to suggest that there's not a single payer who is going to be responsible for future self-insured obligations simply does not bear out. It's not a past practice of the self-insured community. Whenever there's a problem, they either go to the legislature or cut another agreement that will enable them to locate funds other than

their own to secure their debts.

So I would just ask you to consider those two points as you deliberate on this rule. Thank you.

CHAIRMAN DEAN: Any further comments?

MR. PELLISH: Yeah, I'd like to make a comment and respond to something that Rick said and I think that other people have said as well. I don't want us to get trapped into the focusing on the $30 million as being a valid number. I'm not sure it is or ever was. So going from 30 to 10 sounds like a monumental change. The real question is what is necessary to go into a fund so that we are comfortable. Maybe the 10 million is not enough. Maybe it needs to be 12 or 15. I don't know. I think that's a valid question, but I don't think we should focus on the 30 because I'm not sure how real that is.

And the other comment I would make, again, is that we spend a lot of time, in the sense of an awful lot of work when we review anyone who is applying to be self-insured and the tests that we're applying to these folks are extremely rigorous, and I think are tremendous studies in terms what the abilities of the company are to self-insure themselves. So I think we're taking some

excellent preventative measures to never allowing a Weirton to happen again. And I forget who pointed it out before, but Weirton was never fully funded, and I'm only hazarding a guess here because I wasn't around before, but I'm not sure that we ever put the kind of test to Weirton that we're putting toward self-insureds as they attempt to become or continue to be self-insured under the present system.